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Three Worlds Collide: A Novel Approach to the Law, Literature, and Psychology of Shame

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THREE WORLDS COLLIDE: A NOVEL APPROACH TO THE LAW, LITERATURE, AND PSYCHOLOGY OF SHAME

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INTRODUCTION

What is a shame sanction? Surprisingly, the sixth edition of *Black's Law Dictionary*¹ does not tell us. Since 1990, however, something has happened in the legal world because shaming now appears in both the 1996 pocket edition² and the 1999 seventh edition of *Black's Law Dictionary*.³ The Pocket Edition defines a shame sanction as “a criminal

1. See BLACK'S LAW DICTIONARY (6th ed. 1990) [hereinafter BLACK's 6th ed.].

2. See BLACK'S LAW DICTIONARY (pocket ed. 1996) [hereinafter BLACK's pocket ed.].

3. See BLACK'S LAW DICTIONARY (7th ed. 1999) [hereinafter BLACK's 7th ed.].

sanction that stigmatizes or shames the convicted offender.”⁴ Notably though, the definition appears under the term “SCARLET LETTER PUNISHMENT”⁵ as the predominant⁶ legal term. What?!! Is shaming real, or is it fiction? Was Hawthorne a lawyer?⁷ How ironic that the legal “real” world would adopt a fictional literary title as its primary legal term for shaming. How interesting those terms within the definition such as “shame” and “stigmatize” have specific, powerful connotations in the psychological world. Why would the legal world choose to adopt a fictional term for shaming rather than, perhaps more appropriately, a psychological one?

In the seventh edition of *Black's Law Dictionary*, the definition was refined and placed under the heading of “shame sanction.”⁸ It defines a shame sanction as a “criminal sanction designed to stigmatize or disgrace a convicted offender, and often to alert the public about the offender’s conviction.”⁹ This edition also offers insight into the application of the term: “A shame sanction usu[ally] publicly associates the offender with the crime that he or she committed. An example is being required to post a sign in one’s yard stating, ‘Convicted Child Molester Lives Here.’”¹⁰ What has happened in the last nine years that precipitated *Black's* to change its definitional approach?

4. BLACK’S pocket ed., *supra* note 2, at 563; see also John Braithwaite, *Reintegrative Shaming, Republicanism, and Policy*, in *CRIME AND PUBLIC POLICY: PUTTING THEORY TO WORK* 191 (Hugh D. Barlow ed., 1995) (defining shaming as “all [the] social processes of expressing disapproval that have the intention or effect of involving remorse in the person being shamed and/or condemnation by others who become aware of the shaming.”). This definition will be expanded upon *infra* Part I.B.

5. BLACK’S pocket ed., *supra* note 2, at 563. The term “Scarlet Letter” comes from Nathaniel Hawthorne’s 1850 novel *The Scarlet Letter*, the story of an adulteress who, as punishment, had to wear a large, red letter “A” emblazoned on her dress for the rest of her life. See generally NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Bantan Books 1986) (1850).

6. BLACK’S pocket ed., *supra* note 2, at XI, XIII (explaining the dictionary’s system of cross-referencing legal terms and indicating in section 8(b) that a small cap typeface refers to the predominant form when a legal term may be phrased or spelled in more than one way. For example: FALSE SWEARING: PERJURY). The term “shaming sentence” also appears in the dictionary, but merely cross-references the reader to the predominant listing. See *id.*

7. While not a lawyer, Nathaniel Hawthorne was a literary contemporary and friend of Ralph Waldo Emerson and Henry David Thoreau among other writers of the day. Hawthorne’s preoccupation with the effects of Puritanism on New England is evidenced in some of the short stories appearing in his *Twice-Told Tales*, notably “The Minister’s Black Veil” and “Dr. Heidegger’s Experiment,” as well as appearing in his renowned *The Scarlet Letter*.

8. See BLACK’S 7th ed., *supra* note 3, at 1346. *Black's* attempts to mirror the predominant form of usage in the legal profession. Where this is unclear, *Black's* editor will search Westlaw to ascertain the most frequent usage of a term. Telephone Interview with David Schultz, Associate Editor, *Black's Law Dictionary* (Oct. 26, 1998). *Black's* changed this definition after receiving various inquiries from authors, including this one.

9. *Id.* at 1342.

10. *Id.* The seventh edition now distinguishes definitional information from encyclopedic information. See *id.* at X (“Bullets now appear within definitions to help

Indeed, something has happened in the legal world since the 1990 publication of *Black's* sixth edition. Since that time, there has been a virtual explosion in the popular press,¹¹ in the courtrooms across America,¹² and in the scholarly world of law review articles¹³ discussing the recent resurrection of shaming. Legal commentators,¹⁴ media laypeople,¹⁵ and judges¹⁶ alike have entered the fray in what has become a bona-fide scholarly debate on the appropriateness of shame sanctions in the criminal law.

This Comment illuminates the shaming issue from a "law in literature"¹⁷ standpoint since, through literature, contextualization and empathy can be best understood.¹⁸ "Literature is instructive to lawyers and scholars because it leads away from a view of law as formal, mechanized rule-making, and leads instead toward all the possibilities, probabilities, ambiguities and doubts that life possesses."¹⁹

differentiate definitional information (before the bullet) from encyclopedic information (after the bullet).") This is "after the bullet" information.

11. See Jan Hoffman, *Judges Swing Whip of Public Shame: Penalties of Humiliation Grow More Common, But Effectiveness Unclear*, AUSTIN AM.-STATESMAN, Jan. 26, 1997, at H5; Nicole Koch, *Unconventional Punishment Putting Criminals to Shame*, DALLAS MORNING NEWS, June 18, 1998, at A6; Haya El Nasser, *Paying for Crime with Shame*, USA TODAY, June 25, 1996, at A1; Ted Poe, *Public Humiliation is Effective Deterrent*, DALLAS MORNING NEWS, Apr. 11, 1997, at A31; *Public Shame finds Favor as Punishment Method*, DALLAS MORNING NEWS, July 13, 1997, at A30; George F. Will, *The Sting of Shame*, WASH. POST, Feb. 1, 1996, at A21.

12. See *Lindsay v. State*, 606 So. 2d 652 (Fla. Dist. Ct. App. 1992); *Goldschmitt v. State*, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986); *Ballenger v. State*, 436 S.E.2d 793 (Ga. Ct. App. 1993); *People v. Meyer*, 680 N.E.2d 315 (Ill. 1997); *People v. Lettrelough*, 655 N.E.2d 146 (N.Y. 1995); *State v. Burdin*, 924 S.W.2d 82 (Tenn. 1996).

13. See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998); Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Douglas Litowitz, *The Trouble with 'Scarlet Letter' Punishment*, 81 JUDICATURE 52 (1997); Toni M. Massaro, *The Meanings of Shame Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645 (1997) [hereinafter *The Meanings*]; Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991) [hereinafter *Shame*]; Henry J. Reske, *Scarlet Letter Sentences*, 82 A.B.A. J. 16 (1996); Scott E. Sanders, *Scarlet Letters, Bilboes and Cable TV: Are Shame Punishments Cruel and Outdated or are they a Viable Option for American Jurisprudence?*, 37 WASHBURN L.J. 359 (1998); James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998).

14. See sources cited *supra* note 13.

15. See sources cited *supra* note 11.

16. See Poe, *supra* note 11, at A31.

17. See ROBERT L. HAYMAN, JR. & NANCY LEVIT, JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES 266 (1994) (describing three identified schools of law and literature as "law in literature," "law as literature," and "storytelling"). The study of law *in* literature "look[s] at representations of laws, lawyers or legal systems in fiction for a number of purposes." *Id.*

18. See *id.* at 268.

19. *Id.* at 267. In an especially poetic quotation on the benefit of literature to the law, Justice Felix Frankfurter stated:

No one can be a truly competent lawyer unless he is a cultivated man
The best way to prepare for the law is to come to the study of the law as a well-read person. Thus alone can one acquire the capacity to use the English

More specifically, through analyzing the conditions that existed in Hawthorne's Salem at the close of the Seventeenth century, and contrasting them with conditions in America at the beginning of the Twenty-first century, this Comment exposes the flaws inherent in a modern scarlet letter sentence. Part I addresses the legal world of shame, using illustrative examples from *The Scarlet Letter*. First, Part I traces the movement from theocracy to democracy to show why shaming historically declined as a form of punishment. Second, the shaming definition is expanded focusing on two divergent schools of thought on what constitutes an effective shaming. Third, the modern and postmodern viability of shame punishment is questioned. Part I concludes by developing a shame profile and addressing specific concerns that arise as a result of legal shaming.

Part II addresses the psychological world of shame by examining the dangers of delving into the depths of the human psyche. Additionally, Part II questions the role of the judiciary in the psychological realm, and examines the distinction between shame and guilt.

Part III addresses Hester Prynne's shaming in *The Scarlet Letter* and analogizes the psychological effects of shame upon Hester Prynne,²⁰ her daughter Pearl, and Reverend Dimmesdale to the modern psychological literature of shame, demonstrating that the literary world can inform the legal world that modern shaming is troublesome and inappropriate. This Comment concludes with the suggestion that shaming, although potentially effective, is a politically motivated, media-driven tactic that avoids confronting the very real psychological and social consequences inherent in a modern scarlet letter sentence.

I. THE LEGAL WORLD OF SHAME

A. *From Theocracy to Democracy*

Salem - circa 1642

[T]here was very much the same solemnity of demeanor on the part of the spectators; as befitted a people amongst whom religion and law were almost identical, and in whose character both were so thoroughly interfused, that the mildest and the severest acts of public discipline were alike made venerable and awful. Meagre, indeed, and cold was the sympathy that a transgressor might look for from

language on paper and in speech and with the habits of clear cultivation of the imaginative faculties by reading poetry, seeing great paintings . . . and listening to great music. Stock your mind with the deposit of much good reading, and widen and deepen your feelings by experiencing vicariously as much as possible the wonderful mysteries of the universe, and forget all about your future career.

Letter from Felix Frankfurter, Associate Justice, U.S. Supreme Court, to M. Paul Clausen, Jr. (May 1954), *reprinted in* THE WORLD OF LAW: THE LAW AS LITERATURE 725 (Ephraim London ed., 1960).

20. Hawthorne's heroine fated to wear the "Scarlet Letter" of shame. *See generally* HAWTHORNE, *supra* note 5.

such by-standers, at the scaffold. On the other hand, a penalty, which in our days, would infer a degree of mocking infamy and ridicule, might then be invested with almost as stern a dignity as the punishment of death itself.²¹

Seventeenth century Salem marked a time in American history when the leading clergymen were the dominant authority, law and religion truly were one. This was a theocracy that regarded social status as the highest good.²² Moreover, a person's social status was pre-determined and understood to be part of a Divine plan for the "preservation and good of the whole."²³ Thus, a deprivation of social status became the preferred method of punishment in this hierarchical society.²⁴ Shame sanctions were a particular form of punishment reserved for those of low-status that involved a public display of humiliation such as pillories or stocks, usually on a scaffold located in the center of the community.²⁵ The Puritans placed a "special emphasis on the doctrine of original depravity," derived from the tenets of John Calvin, such that no person could earn redemption in the performance of good deeds since good deeds in themselves were a predestined gift from God.²⁶ Therefore, the Puritans did not justify their punishments by today's traditional justifications (deterrence, rehabilitation, incapacitation, and retribution) but, rather, placed people on display simply to exhibit their true, sinful nature for all to see.

"There can be no outrage, methinks, against our common nature,—whatever be the delinquencies of the individual,—no outrage more flagrant than to forbid the culprit to hide his face for shame"²⁷

With the movement from theocracy to democracy, the idea of a Divine social hierarchy became antithetical to a system where "all men are created equal."²⁸ The new America valued liberty as its highest good.²⁹ As a result, by the end of the eighteenth and the beginning of the nineteenth century, the preferred method of punishment shifted from the deprivation of status, to the deprivation of liberty in accordance with society's emphasis on liberty as the highest good.³⁰ Theories of punishment evolved from public, participatory, status-

21. *Id.* at 47.

22. See Whitman, *supra* note 13, at 1070-71.

23. John Winthrop, *A Model of Christian Charity*, in *THE AMERICAN TRADITION IN LITERATURE* 34-35 (Barbara Perkins and George Perkins eds., 9th ed. 1999) ("God Almighty in his most holy and wise providence, hath so disposed of the Condition of mankind, as in all times some must be rich, some poor, some high and eminent in power and dignity; others mean and in subjection.").

24. See Whitman, *supra* note 13, at 1071.

25. See *id.* at 1070.

26. Winthrop, *supra* note 23, at 5.

27. Hawthorne, *supra* note 5, at 53.

28. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

29. See Whitman, *supra* note 13, at 1071.

30. See *id.*; see generally MICHEL FOUCAULT, *DISCIPLINE & PUNISH, THE BIRTH OF THE PRISON* (Alan Sheridan trans., Pantheon Books 1977) (1975).

degrading spectacles, to private, state-imposed deprivations of liberty.³¹ Society witnessed the "birth of the prison."³² So, if our modern society no longer possesses "nicely articulated status distinctions,"³³ why are judges imposing status-reducing, publicly-humiliating shame sanctions? One commentator has suggested that shaming is a powerful deterrent for certain limited categories of status-seekers.³⁴ Another has suggested that modern shaming is just plain mean-spirited and that society is venting its frustration with crime on certain vulnerable categories of offenders.³⁵ Additionally, another emphasizes that shame sanctions are a viable economic alternative to imprisonment and, at the same time, satisfies the public's need to express condemnation.³⁶

B. *The Elements of a Modern Shaming*

"Come along, Madam Hester, and show your scarlet letter in the market-place!"³⁷

Notwithstanding the scant definition supplied by *Black's*, a shaming is in theory "all [the] social processes of expressing disapproval that have the intention or effect of involving remorse in the person being shamed *and/or* condemnation by others who become aware of the shaming."³⁸ This definition encompasses two divergent schools of thought on what constitutes an effective shaming. One school uses shaming as a means to an end, with the desired end being an elicited emotional response from the offender. This school can be referred to as the liberal view of shaming.³⁹ The second school focuses its attention on the act of shaming itself without regard to its effect upon the offender. This school can be described as the utilitarian viewpoint.⁴⁰

31. See FOUCAULT, *supra* note 30.

32. *Id.*

33. Whitman, *supra* note 13, at 1071.

34. See *id.* at 1064. Professor Whitman ultimately concludes that shame sanctions, although effective, are not proper. He views public shaming as an improper delegation of the state's authority into the hands of the lay public. See *id.* at 1092.

35. See Litowitz, *supra* note 13, at 57 ("Although shaming is rationalized as a return to traditional values, its real motivation is simply to vent frustration. Shaming rituals are as close to a good old-fashioned whipping a contemporary society will allow.").

36. See Kahan, *supra* note 13, at 630.

37. HAWTHORNE, *supra* note 5, at 52.

38. Braithwaite, *supra* note 4, at 191 (emphasis added).

39. There exists in the law an on-going tension between liberalism and utilitarianism that is replicated in the shaming controversy. Liberalism focuses on the rights of an individual, whereas utilitarianism focuses on the net good. See *id.* This author has attached the labels of liberalism and utilitarianism to the shaming definition posed by Braithwaite because of the applicable emphasis on the respective two-part definition.

40. See *id.*

1. The Liberal View

The liberal stance encompasses the first half of the shaming definition "that has the intention or effect of involving remorse in the person being shamed."⁴¹ Proponents of this viewpoint tend to justify shaming punishments on a specific deterrence theory or a rehabilitative theory.⁴² Specific deterrence has the effect of reducing the rate of recidivism in the offender by making the shaming punishment so distasteful that the offender would not repeat the deviant behavior.⁴³ A rehabilitationist would require that the shame sanction cause the offender to feel shame, realize that the deviant behavior is morally wrong, and self-internalize the wrongful act as unthinkable, and therefore, not repeat the wrongful behavior.⁴⁴ The liberal view proposes that shame sanctions are most effective when five conditions are met:⁴⁵ 1) the offender must be a member of an identifiable group;⁴⁶ 2) the member's social standing must be threatened;⁴⁷ 3) the group must know of the shaming and actually shun the offender;⁴⁸ 4) the shamed person must fear the shunning;⁴⁹ and 5) there must be a means of "reintegrating" the shamed person back into the group.⁵⁰

2. The Utilitarian View

The utilitarian viewpoint is encompassed in the second part of the shaming definition emphasizing social condemnation.⁵¹ Proponents of this view tend to emphasize the punishment theories of general deterrence and retributivism.⁵² With general deterrence, the stigmatic nature of the shaming would be so threatening to the offender's status in

41. *Id.*

42. See generally Garvey, *supra* note 13.

43. One offender who was ordered to spend 600 hours of community service shoveling manure from the city of Houston's police department stables, when asked if he would steal again, stated "never in this life." Kahan, *supra* note 13, at 591; see Reske, *supra* note 13, at 17. Another offender, who was ordered to carry a sign in front of a store he stole from that read "I stole from Fiesta. Don't steal or this could be you" stated, "I'm never doing anything against the law again; this right here has straightened me up for good. No more bad guy." Koch, *supra* note 11, at A6.

44. See Braithwaite, *supra* note 4, at 192. "[S]haming accomplishes moral education about the wrongfulness of crime . . ." *Id.*

45. See *Shame*, *supra* note 13, at 1883.

46. See *id.*

47. See *id.*

48. See *id.*

49. See *id.*

50. See *id.* The fifth element of reintegration is not always necessary: See Braithwaite, *supra* note 4, at 193 (partitioning shaming into two types-reintegrative and stigmatizing). "Stigmatization is disrespectful shaming, whereas reintegrative shaming communicates respect for the person as well as disapproval of that person's deed." *Id.* at 194.

51. See Braithwaite, *supra* note 4, at 191 ("Shaming . . . means all social processes of expressing disapproval that have the intention or effect of involving . . . condemnation by others who become aware of the shaming.").

52. See Kahan, *supra* note 13, at 636.

the community that a potential offender would refrain from acting in a deviant manner for fear of public exposure. The retributivist simply desires public exposure as a payback for a wrongful act. Under the utilitarian view, successful shamings or "status degradation ceremonies"⁵³ involve three elements:⁵⁴ 1) the shaming must be "imposed by [the] agent invested with the moral authority of the community,"⁵⁵ 2) the shaming must "denounce the wrongdoer and his conduct as contrary to shared moral norms,"⁵⁶ and 3) the shaming must "ritualistically separate the wrongdoer from those who subscribe to such norms."⁵⁷ Notably, and here is the major difference between the liberal and utilitarian views, "[i]t is not a condition of a successful degradation ceremony that it induce any particular belief or emotion on the part of the offender . . . it is enough that the affliction convey disapproval in terms that its members understand."⁵⁸ Nor does this model require any reintegration of the ritualistically separated member.⁵⁹ Ironically, the utilitarians, who otherwise traditionally emphasize means/ends analyses, with shaming, are concerned only with the act of shaming itself. Instead of using shaming as a means to an end, here, shaming, or public condemnation, is the end.

C. *Is Shaming Modernly Viable?*

Whether subscribing to the liberal view or utilitarian view of shaming, both views maintain the common elements of public denunciation and shunning. Both viewpoints also require some semblance of community. To address adequately the modern viability of scarlet letter sentencing, our notion of community must be addressed. If the pure community of seventeenth century New England no longer exists, in what manner is shaming justified and in what way are we as a society meeting the community requirement of shaming?

1. The Argument from Modernity⁶⁰

The requirements of public denunciation and shunning, common in both the liberal and utilitarian viewpoints, become problematic in a

53. *Id.* at 636 (citing Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 422-23 (1956)).

54. *See id.*

55. *Id.* This element could tend to be problematic in itself since it is arguably disconcerting for some to consider the state as the moral authority of the community. *See also* Garvey, *supra* note 13, at 774. ("A liberal state should not concern itself with the moral development of its citizens Repentance is within the jurisdiction of the church, where it rightly belongs.")

56. Kahan, *supra* note 13, at 636.

57. *Id.*

58. *Id.* at 636-37.

59. *See id.*

60. *See* Whitman, *supra* note 13, at 1063. "The argument from modernity" essentially states that "in a modern, anonymous, urban society, shame sanctions cannot possibly work." *Id.*

modern world. We no longer live in a society that subscribes to a homogenous moral dogma. Some commentators have suggested that we are longing for a return to a nostalgic world that no longer exists.⁶¹ In today's secular world of gated communities, who cares if Hester slept with the minister? Indeed, punishment as spectacle, popular in the close-knit communities of the seventeenth century, declined in large part because of the "[i]ndustrialization, immigration, urbanization, [and] westward expansion"⁶² of modern America. "Communities have been besieged by an enormous range of forces. Increasing mobility, ethnic and cultural diversity, the breakdown of the family, and the dominant ideological emphasis on individualism all contribute to an absence of strong feelings of community and mutual obligation in modern America."⁶³ The decline of the traditional community, particularly in comparison with the tight-knit, morally cohesive communities of the seventeenth century, works against the idea of an effective shaming.⁶⁴ Nevertheless, the reality remains that shaming is enjoying a modern resurgence, and shaming is in fact effective upon certain limited categories of wrongdoers.⁶⁵ With the rise of modern technological advances, new communities exist that, although not resembling the Puritanic communities of the seventeenth century, nevertheless foster a sense of social cohesion.⁶⁶ For example, with the pervasiveness of the television media, we live in a virtual "global village" and events occurring across the world simultaneously occur in our living rooms. The Internet as well allows instant communication from all points of the world creating virtual communities of all sorts of varying interests and likes. However, the existence of a "virtual" village does not adequately meet the requirement of a local community needed to

61. See Braithwaite, *supra* note 4, at 199-200 ("Many versions of communitarianism and community policing amount to a utopian yearning for lost geographical community that is not to be found in the contemporary metropolis.").

62. Brian J. Telpner, *Constructing Safe Communities: Megan's Laws and the Purposes of Punishment*, 85 GEO. L.J. 2039, 2045 (1997).

63. *Id.* at 2068. See generally Seth Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 105 (1991) ("A society like ours, which is rich in a variety of social roles and overlapping communities, provides the forum for realization of an ideal that allows the citizen to choose the self she wishes to develop from among the plurality of identities offered." (citing DIANA T. MEYERS, SELF, SOCIETY, AND PERSONAL CHOICE 95 (1989) ("Though people cannot choose directly to change their constitutive characteristics, they can choose to place themselves in situations and to act in ways designed to bring about such changes."))).

64. See FOUCAULT, *supra* note 30, at 216 ("In a society in which the principle elements are no longer the community and public life, but, on the one hand, private individuals and, on the other, the state, relations can be regulated only in a form that is the exact reverse of the spectacle.").

65. See Whitman, *supra* note 13, at 1064 (discussing the failure of the argument from modernity specifically because shaming is being used and is at least anecdotally effective on three particularly vulnerable class-conscious categories of offenders—sexual/morals offenders, business/white collar offenders, and first/minor offenders).

66. See *id.*

condemn an offender.⁶⁷ For example, a shame sentence requiring a drunk driver to post a bumper sticker on his car stating "I'm a drunk driver" cannot be seen by a cyber-community, and therefore, minimizes the effectiveness of the sanction.

2. The Argument from Postmodernity⁶⁸

Would it be ludicrous to suggest that crime creates communities? A theory of criminal punishment known as "denunciation theory"⁶⁹ suggests that punishment *creates* social cohesion by bringing together law-abiding society to condemn collectively what it will not tolerate as socially unacceptable behavior.⁷⁰ The denunciation theory has been described as a cross between retributivism and utilitarianism.⁷¹ Like retributivism, the denunciation theory looks backward to the offender's wrongful act, and like utilitarianism, denunciation theory looks forward to the ultimate benefit to society that public condemnation creates.⁷² Public denunciation "strengthens and reinforces shared communal values."⁷³ Shaming then serves as a public rallying-point to reaffirm to the community and to the offender that it will not tolerate a given type of behavior by offering a visible example of the unpleasant consequences that could happen to a member of a given community. "[A]t a time when many do not know the names of their neighbors, most still share a baseline of common moral instincts By holding the offender up for social condemnation, [shaming] enable[s] communities to define themselves around a shared ideal."⁷⁴

D. The Shame Profile

Modern public shaming has traditionally been applied to three psychologically vulnerable categories of offenders-sexual and morals of-

67. But see Department of Revenue Services, *Delinquent Taxpayer List: Top 100 Delinquent Taxpayer Accounts* (visited Nov. 11, 1999) <<http://www.state.ct.us/drs/delinq/top100.html>> (posting by the state of Connecticut of delinquent taxpayers' names on the Internet and apparently reporting increased collection rates).

68. See J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1996 (1992) ("Postmodernism is often associated with what is new, innovative, and on the cutting edge of cultural development.").

69. See Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 331 n.133 (1990) (crediting Emile Durkheim as having first advanced the denunciation theory of punishment). See generally E. DURKHEIM, *ON THE DIVISION OF LABOR IN SOCIETY* 108-09 (G. Simpson trans., 1933).

70. See Telpner, *supra* note 62, at 2066 (citing DURKHEIM, *supra* note 69, at 108-09).

71. See *id.*

72. See *id.*

73. Telpner, *supra* note 62, at 2066.

74. *Id.* at 2068 (specifically discussing community notification of sex-offenders, popularly known as "Megan's Laws.").

fenders,⁷⁵ first and minor offenders,⁷⁶ and commercial and business offenders.⁷⁷ In order for shaming to be effective,⁷⁸ the person being shamed, or deterred, must fear a loss of reputation or status within his or her community.⁷⁹ Shame finds a natural role in the realm of sexual and morals offenses since “[s]hame, particularly in a Christian or post-Christian society, always shadows us in our sexual activities.”⁸⁰ For first and minor offenders such as shoplifters and drunk drivers, a shame sanction sends a powerful message from the court that they are “flirting with a deep, and deeply undesirable, status change,”⁸¹ and that they are dangerously close to “outcast status.”⁸² Businesses rely on reputation for their continued viability;⁸³ any threat to a company’s image through the imposition of public shaming exposure could have serious repercussions, easily outlasting a given sanction.⁸⁴ Companies invest great sums of money building their public image, which has a value in itself for both small businesses and large corporations.⁸⁵ Conversely, a negative public image can have serious repercussions, financially, politically, and socially.⁸⁶ Therefore, persons who have no

75. See generally Poe, *supra* note 11, at A31 (ordering child molesters to place warning signs on their front doors reading ‘No children under the age of 18 allowed on these premises by court order.’). “Such public warnings may prevent the type of anonymity that child molesters need in order to have access to children.” *Id.*

76. See Whitman, *supra* note 13, at 1064.

77. See *id.*; see also Braithwaite, *supra* note 4, at 196 (stating that shaming is effective on “offender types who have enjoyed a historic immunity from public disapproval of their crimes” such as white-collar criminals, violent, domestic offenders, and drunk drivers). Braithwaite credits women’s movements for creating social movements that “target” historically accepted “patriarchal collusion.” See *id.* at 197. For example, white collar criminals have been forgiven for their crimes due to their power and prestige in their communities. See *id.* Also, historically the values of privacy and liberty have given men the prerogatives to engage in violence in their own homes. See *id.* at 196. “Patriarchal collusion” also is seen in tavern drinking where drunken driving results. See *id.*

78. When the sanctioning judge is concerned with general deterrence instead of specific deterrence, the offender’s ties to a specific community would seemingly not matter.

79. See *Shame*, *supra* note 13, at 1883.

80. Whitman, *supra* note 13, at 1065.

81. *Id.* at 1068.

82. *Id.*

83. See *All Things Considered* (National Public Radio broadcast, May 22, 1997) (interviewing Lewis Colten, Building Commissioner of Framingham, Massachusetts who posted fifty-three big red plywood boards and banners on vacant and neglected buildings that were being turned into drug houses. The boards contained the name and phone number of the landlord. As a result, all fifty-three buildings were cleaned up. Stated Mr. Colten, “[S]ome of these owners were banks And I can tell you, banks don’t like to have their names advertised like that.”).

84. One need only consider the television news expose regarding Food Lion’s mishandling of its meat market that permanently stigmatized the grocery chain. Anecdotal evidence demonstrates a causal link between the news report and the subsequent closure of many of Food Lion’s stores.

85. See Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 368-69 (1996).

86. See *id.* at 369.

status, or who do not fear a loss of reputation, cannot be effectively shamed.⁸⁷ These classes have been identified as follows: the very rich, since their status is given as a result of their wealth; the very poor, since they virtually have no status to lose; and persons who have no ties to a group.⁸⁸ Since shame has been defined as a lowering of self-worth or self-esteem,⁸⁹ offenders who lack self-esteem in the first place are essentially incapable of being effectively shamed.⁹⁰ These broad categories of shame-ables naturally lead to the creation of a shame profile.

Given the limitations on a modern shaming's applicability, the shame profile comprises generally law-abiding, middle-class, status-seekers, who are members of a specific community of shared values, who value their reputations for either personal or professional purposes.⁹¹ Although a shame identity may predict some measure of effectiveness in these limited circumstances, it does not follow that shaming is necessarily appropriate.⁹²

E. *Problems with Legal Shaming*

Once a shame profile is identified, what are the potential problems that might tend to make a shaming inappropriate? Although potentially effective, shaming punishments nevertheless create problematic side issues that deserve consideration in the totality of deciding whether to impose a public shaming. Among other things, judges imposing a shame sanction should consider the disparate effects of individualized sentencing that an offender-specific sanction creates. Judges should consider too the tangential effect of a shaming on third parties. Also important is the potential emotional response from the individual being shamed, as well as the potential public reaction. Last,

87. See *Shame*, *supra* note 13, at 1933-34.

88. See *id.*

89. See generally HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 59-63 (1976).

90. See Litowitz, *supra* note 13, at 57 ("It is true that a strong sense of shame prevents a person from committing a crime, but shame is a fall from grace, and a person who lacks self-esteem in the first place cannot fall very far.").

91. See *Shame*, *supra* note 13, at 1934 ("Middle-class offenders thus may seem to be 'ideal' targets for shaming sanctions. They are the people most likely to worry about public appearances, to be vulnerable to moralistic or judgmental social groups, to defer to authority, and to be relatively conventional in attitudes toward 'law and order'.")

92. It is doubtful that our society would approve cutting off a shoplifter's hand even if it were proven to reduce theft. Corporal punishment is another area where effectiveness does not equate with appropriateness. For an extremely interesting and provocative argument in support of corporal punishment, which involves a significant degree of shaming, see Whitney S. Wiedeman, *Don't Spare the Rod: A Proposed Return to Public, Corporal Punishment of Convicts*, 23 AM. J. CRIM. L. 651 (1996) (discussing the constitutionality of corporal punishment, nevertheless acknowledging societal barriers to overcome before actually becoming a viable punishment).

judges should consider the consequences of the stigma that could attach to an offender as a result of a shaming.

1. Individualized Sentencing

Shame sanctions are inherently individualized; judges are essentially left to their own creativity when imposing a shaming penalty.⁹³ The individualized nature of legal shaming works as a double-edged sword. On one hand, shame sentences need to be particularized to the individual defendant to maximize their effectiveness. On the other hand, having individualized sentencing opens the door to unequal treatment between similarly situated defendants.⁹⁴ Judges imposing shame sanctions on middle-class offenders run the risk of being accused of disproportionate sentencing by the lower class since the alternative to a shame sanction is usually imprisonment or fines.⁹⁵ Similarly, a relatively wealthy defendant, who might not otherwise be deterred by a shame sanction, might appear to get off easily by having to pay a fine, whereas a relatively poor defendant would have to endure a potentially stigmatic shame penalty. Judges who do not want to confront the issue of disparate treatment among different socio-economic defendants may want to avoid shame sanctions since shaming requires individualized treatment to be effective.

2. Tangential Victims

Pearl was a born outcast of the infantile world—Pearl felt the [scorn], and requited it with the bitterest hatred that can be supposed to rankle in a childish bosom.⁹⁶

The singularity lay in the hostile feelings with which the child regarded all these offspring of her own heart and mind. She never created a friend, but seemed always to be sowing broadcast the dragon's teeth, whence sprung a harvest of armed enemies, against whom she rushed to battle. It was inexpressibly sad—then what depth of sorrow to a mother, who felt in her own heart the cause!—to

93. See Garvey, *supra* note 13, at 783; see also Gonzalez, *supra* note 11, at 29 (quoting Texas Attorney General Dan Morales as stating that Texas law authorizes “any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant.”).

94. See Garvey, *supra* note 13, at 783 (“[T]he more individualized sentencing becomes, i.e., the more room that exists for judges to take account of the particular facts and circumstances of an offender and an offense, the more room exists for the exercise of bias and prejudice.”).

95. See *Developments in the Law—Alternative Punishments: Resistance and Inroads*, 111 HARV. L. REV. 1967, 1981 (1998) (illustrating the problem of judicial discretion in imposing alternative sanction B. “[S]uch unequal administration might perniciously suggest that members of the lower class either feel no shame or have less ‘social capital’ to lose than more wealthy, middle-class offenders.”).

96. HAWTHORNE, *supra* note 5, at 99-101.

observe, in one so young, this constant recognition of an adverse world⁹⁷

Another problem arises when, in the imposition of a shame sanction,⁹⁸ other victims are created.⁹⁹ Dick Kurtenbach, executive director of the ACLU's Western Missouri office, stated, "Kids are ridiculed; marriages are probably going to be broken up. The question is, is the kind of deterrent value [judges] are trying to gain worth the damage done to people innocent of this crime? I cannot imagine it is worth it. There are some very substantial costs."¹⁰⁰ While there always may be some shame involved in any form of punishment, shaming is particularly stigmatic to innocent third-party relations given the public nature of a shaming. Indeed, public exposure is a primary deterrent factor of shame sentencing. However, here we are discussing the effects on innocent third parties, not the defendant. Other forms of punishment, such as imprisonment or fines, while public record, generally are more anonymous to the peer circles of third party relations.

3. Soldier-Martyr Syndrome

She was patient,—a martyr, indeed¹⁰¹

[G]iving up her individuality, she would become the general symbol at which the preacher and moralist might point, and in which they might vivify and embody their images of woman's frailty and sinful passion. Thus the young and pure would be taught to look at her, with the scarlet letter flaming on her breast¹⁰²

97. *Id.* at 101.

98. This situation arises when a sex offender is required to post a sign in front of his house with children also living in the house; or when a local television station or newspaper publishes the names, addresses, and pictures of prostitute solicitors who are married with families; or when a DWI offender is required to post a bumper sticker on a family vehicle.

99. See *Public Shame Finds Favor as Punishment Method: Critic Questions Whether Deterrent Value is Worth Other Costs Incurred*, DALLAS MORNING NEWS, July 13, 1997, at A30 (quoting Dick Kurtenbach, executive director of the ACLU's Western Missouri office). But see Gonzalez, *supra* note 11, at 29 (quoting Texas State District Judge Sharen Wilson of Tarrant County, "[A] sign is appropriate for sex offenders who are still living in homes with children. . . . [P]arents of other children have a right to know if their child is visiting a home where a sex offender resides. . . . [T]he sign is not there to humiliate, but to warn others.").

100. *Public Shame Finds Favor as Punishment Method*, *supra* note 99, at A30. In Pittsfield, Illinois, as a condition of probation, a judge ordered Glenn Meyer to post a sign at the end of his driveway stating: "Warning, A violent felon lives here. Travel at your own risk." Hoffman, *supra* note 11, at H5. Meyer's wife moved out. See *id.* See generally Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055 (1996) (cautioning policymakers that the imposition of a shame sanction as a means for instilling a social norm through law can be counterproductive).

101. HAWTHORNE, *supra* note 5, at 90.

102. *Id.* at 84.

Another problem is that crime can be a "badge of honor" for some.¹⁰³ For example, defendants have shown up in court "proudly wearing their prison number on a T-shirt."¹⁰⁴ Indeed, moral condemnation through the imposition of a shame sanction could backfire if the person being shamed does not accept the legitimacy of the punishment resulting in a "downward cycle of violence."¹⁰⁵ This detrimental reaction from the individual being shamed tends to undermine the effectiveness of a shame sanction. Compounding the negative aspect of the soldier-martyr syndrome is the unpredictability at the outset of how a defendant will react once a shame sanction is imposed. Judges cannot predict in any given scenario what the reactions will be.

Related to the reaction of the individual being shamed is the reaction of the public, as well as the offender's peers, who are witnessing the shaming. Instead of the public reacting by condemning the offender, they might instead perceive the offender as a martyr. This unpredictable reaction underlies a major drawback to public shaming, namely the sheer unpredictability surrounding shaming from every participant in the shaming process—the public, the offender, and related third-parties.

4. Stigmatization

In all her intercourse with society, however, there was nothing that made her feel as if she belonged to it. Every gesture, every word, and even the silence of those with whom she came in contact, implied, and often expressed, that she was banished¹⁰⁶

[There] was that SCARLET LETTER, so fantastically embroidered and illuminated upon her bosom. It had the effect of a spell, taking her out of the ordinary relations with humanity, and enclosing her in a sphere by herself.¹⁰⁷

Children . . . would scamper off with a strange, contagious fear.¹⁰⁸

Shaming can be divided into two types—stigmatizing and reintegrating.¹⁰⁹ Stigmatization can have the counter-productive effect of pushing an offender to the fringe of society.¹¹⁰ Ideally, a shame sanction should be one that reintegrates an offender back into the commu-

103. See Nasser, *supra* note 11, at A1 (citing Detroit criminal court Judge Robert Evans).

104. *Id.* (quoting Judge Evans).

105. See Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 347 (1984) ("[C]riminals . . . would view themselves as soldiers who bear the risk of punishment as an occupational hazard. Worse yet, when the risk became a reality, they and their peers would perceive themselves as martyrs fighting an unjust social order.").

106. HAWTHORNE, *supra* note 5, at 89.

107. *Id.* at 58.

108. *Id.* at 86.

109. See Braithwaite, *supra* note 4, at 193.

110. See *id.*

nity.¹¹¹ However, with the modern “lock ‘em up and throw away the key” political atmosphere, reintegrative shaming is not a popular or politically profitable enterprise.¹¹² Referencing Tocqueville, sociologist John Braithwaite writes, “America [has] an unusually active citizenry on matters of crime control and an unusually stigmatizing one.”¹¹³

There is also the concern that, for juvenile criminals who have suffered abuse and humiliation in their lives, additional humiliation through a shame sanction “may reinforce the very root of the behavior.”¹¹⁴ Similarly, a business whose reputation is ruined might be forced to close its doors. For instance, a butcher shop was ordered to post an ad in the local newspaper stating it had “sold meat that consisted ‘in whole or in part of filthy, putrid and contaminated substances’ and was ‘unfit for human food.’”¹¹⁵ This type of sanction could potentially ruin a business affecting the livelihoods of not only the owners of a business but the employees as well. This economic harshness may or may not be desired; nevertheless, a judge must consider these factors when deciding whether to impose a shame sanction.

II. THE PSYCHOLOGICAL WORLD OF SHAME

A. *The Shame Continuum*

It is in the psychological world where the term shame and its derivative components take on specific emotional meaning. Terms such as *shame*, *shaming*, and *stigmatize*, that are loosely thrown around in the legal world, represent powerful effects on an individual’s psyche. The emotion of shame and the act of shaming involve many different con-

111. *See id.* (“All cultures are complex mixes of reintegrative and stigmatizing shaming practices. But to the extent that reintegrative shaming is more dominant than stigmatization in a culture, the culture will have less crime.”).

112. *See id.*

113. *Id.* at 202-03 (“Tocqueville concludes that the outcome of participatory justice against these ‘enemies of the human race’ was a tyranny of the majority.” (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 96 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1835))).

When a man or a party suffers an injustice in the United States, to whom can he turn? To public opinion? That is what forms the majority. To the legislative body? It represents the majority and obeys it blindly. To the executive power? It is appointed by the majority and serves as its passive instrument. To the police? They are nothing but the majority under arms. To the jury? The jury is the majority vested with the right to pronounce judgement; even the judges in certain states are elected by the majority.

Id. at 252.

114. Nasser, *supra* note 11, at A1 (quoting Jenni Gainsborough with the ACLU National Prison Project).

115. Julia C. Martinez, *Judges Using ‘Shame Punishment’ More to Emphasize a Message*, FLA. TIMES-UNION, Feb. 16, 1997, at F1.

texts that vary immensely with each individual.¹¹⁶ Judges who delve into the depths of the individual psyche of a person by imposing a shame sanction may or may not achieve the desired result. Shame, the emotion, actually falls along a continuum of emotions ranging from embarrassment on one end to mortification on the other.¹¹⁷ The implication of this continuum is that an individual who is subjected to a shame sanction might not fall within the desired range along the continuum, ideally shame. Instead, the shamed person might simply feel embarrassed. "Embarrassment is less intense, and less enduring than shame"¹¹⁸ which does not go far enough in fulfilling the retributive or deterrent purposes of punishment. The punishment would fail from a retributive standpoint because that person may not get what he or she deserves. Similarly, the expressive dimension of punishment will not be met either because the public would feel that merely embarrassing a person for a criminal act does not adequately condemn that person's conduct. From a deterrence standpoint, whether it is specific or general, embarrassment does not sufficiently cause the individual being punished to internalize his or her actions as being morally wrong. Therefore, a punishment that merely embarrasses most likely will not result in specific deterrence. From a general deterrence angle, an embarrassing sanction, and not more, will not deter. "I have thought of death," said she,— "have wished for it,—would even have prayed for it, were it fit that such as I should pray for anything."¹¹⁹

The opposite extreme from mere embarrassment is mortification.¹²⁰ Here, a person might be so mortified by his penalty that he would actually kill himself rather than live knowing he had to endure the fateful penalty. A judge cannot know if a certain sanction will result in embarrassment, shame or mortification; the line is unclear and person-specific.¹²¹

B. Judges as Psychotherapists?

The theory behind a shame sanction is for that person to feel shame. A person who feels shame ideally will internalize his wrongful conduct as being morally wrong, and therefore refrain from acting that way again.¹²² The act of shaming also involves an exterior dimen-

116. See *The Meanings*, *supra* note 13, at 645 ("[S]eparation of these terms is crucial to meaningful discussions about whether Americans have 'lost' their sense of shame.").

117. See *id.* at 668 ("[O]ne cannot predict which permutation will be elicited in a given scenario.").

118. *Id.*

119. HAWTHORNE, *supra* note 5, at 78.

120. See *The Meanings*, *supra* note 13, at 670 ("Mortification is shame at its most devastatingly extreme.").

121. See *id.* at 669.

122. See Braithwaite, *supra* note 4, at 192.

sion that requires public condemnation.¹²³ Shaming, then, relies upon two psychological uncertainties.¹²⁴ The first is a public that is willing to condemn or censure a person's conduct. The second is the desired private internalization of the offender's conduct as being shameful, therefore wrong.

Assuming a person might actually end up feeling the targeted shame, how that person reacts to his emotion is completely unpredictable. In theory, the person would feel bad, realize his conduct is morally wrong, and would want to become a better person by not acting that way again. However, that person may feel bad, realize his conduct is morally wrong, and then react with rage. "Psychological studies show that feelings of shame may induce destructive behavior, whereas feelings of guilt—which are focused on a specific failure, rather than on the entire self—may encourage just the opposite."¹²⁵ A person with no self-esteem cannot be shamed since, by definition, shame is a lowering of self-worth, or self-esteem. Since criminals generally do not have high levels of self-esteem, it follows that subjecting them to a shame sanction will not result in the desired internalization of conduct as being morally wrong. Similarly, a child molester or a wife-beater might realize his conduct is wrong and feel shame, but nevertheless continue his wrongful behavior. Judges, then, are faced with several difficulties. First, will the imposed sanction cause a person to feel shame? Second, if shame results, will the person internalize his actions as being morally wrong? Third, once internalized, will the person react by refraining from acting that way again? "For judges to get in the realm of psychotherapy in which they're not trained is dangerous."¹²⁶ This uncertainty further undermines the appropriateness of scarlet letter sentencing.

C. *Shame versus Guilt*

1. The Psychological World

Contrast the emotion of shame with the emotion of guilt. Where a person's shame can be described as a "failure to achieve an ideal,"¹²⁷

123. See *id.* at 191 (defining shaming as "all social processes of expressing disapproval that have the intention or effect of involving remorse in the person being shamed and/or condemnation by others who become aware of the shaming.").

124. Shaming also involves legal uncertainties as well. See *supra* Part II.A.; notes 93-115 and accompanying text.

125. *Developments In The Law—Alternatives to Punishment*, 111 HARV. L. REV. 1863, 1958 (1998).

126. Nasser, *supra* note 11, at A1 (quoting Jenni Gainsborough with the ACLU National Prison Project); see also *The Meanings*, *supra* note 13, at 692 ("[T]he complex and variable nature of shame suggests that customized, localized shame sanctions may be necessary . . . yet the limitations on a judge's ability to make accurate estimations about an offender's ego ideal . . . make such fine-tuning impractical.").

127. See MORRIS, *supra* note 90, at 61 ("The critical concept associated with shame is failure, shortcoming . . .").

with guilt, the emphasis is on the act, not the person. For example, a parent might tell a child that hitting is a bad thing to do and that it is wrong to hit others. This is the establishment of a rule. If the child then hits, she has broken the no-hitting rule. One could say that the child is *guilty* of breaking the rule. The child has crossed the threshold between right and wrong. Therefore, guilt can be described as a "threshold morality"¹²⁸ where a minimal demand is imposed requiring a person not to cross the line. This standard can be visualized as appearing horizontal, much like stepping over a line drawn on the ground.

On the other hand, a parent might tell a child that "good girls don't hit." This establishes an ideal "good girl" standard. If the child then hits, she is failing to live up to the ideal and is therefore moving downward toward being a "bad girl," the child feels like less of a person. This approach creates a "shame morality"¹²⁹ that results in a feeling of failure or shame in the child by not living up to the "good girl" ideal. Contrast the horizontal threshold concept of guilt with the vertical nature of shame, which can be described as a scaled concept.¹³⁰ With shame, one can be pictured as having to continually strive upward to achieve an ideal; conversely, one can be pictured as moving downward along the scale when exhibiting wrongful behavior. How does this relate to the criminal law? This is where the psychological world . . .

2. The Collision with the Legal World

In what context is it appropriate to impose a guilt morality? Similarly, where is a shame morality more appropriate? The criminal law should be concerned with guilt and not with shame. "Psychologist June Price Tangney has found that people who feel guilt adopt a more constructive attitude and are more willing to modify their behavior than people who feel shame."¹³¹ Legal scholar Herbert Morris writes:

[G]uilt finds a natural role within the law. It is a concept which even when employed in extralegal contexts, clearly has legal overtones. The law is concerned primarily with maintaining a certain balanced distribution of freedom and does this by ordering relationships among individuals through rules that set up a system of reciprocal rights and duties. There are a number of implications . . . that provide useful leads in [understanding guilt's role within the law]. First, in law our major concern is the maintenance of a minimum

128. *See id.*

129. *See id.*

130. *See id.* ("The critical concept associated with shame is failure, shortcoming, not violation. With guilt one has either done wrong or not; it is not a concept admitting of degrees of realization.")

131. *Developments in The Law—Alternatives to Punishment*, *supra* note 125, at 1958-59 (citing June Price Tangney et al., *Relation of Shame and Guilt to Constructive Versus Destructive Responses to Anger Across the Lifespan*, 70 J. PERSONALITY & SOC. PSYCHOL. 797, 806 (1996)).

level. Second, the concern is that conduct, relating to values sought to be protected, reach a minimum . . . [Third] there is an absence of concern with motives, with purity of heart, grandeur of soul. Diminishing harm to others is the predominant goal.¹³²

A shame morality, on the other hand, is most appropriate in a loving home where unconditional acceptance exists and moral development is vested with the authority figures in the home.¹³³ In a family disciplinary setting, the shamed person most likely is forgiven and is able to return to a normal relationship within the family unit. This reintegration protects the offending family member from the undesirable stigmatic effects of shame that can otherwise ensue from a shaming punishment. Without a reintegrative mechanism built into a legal shame sanction, criminals essentially are left hanging to deal with the unpredictable reactions of the general public, their community peers, and their own emotions.

III. CAN THE LITERARY WORLD INFORM THE LEGAL WORLD?

Besides lending the legal world a catchy term for shame punishment, how can *The Scarlet Letter*, a work of fiction, illuminate the current controversy of shame? Hawthorne's work, as well as most great works of literature, involves a timeless quality that enables a person to gain valuable insight into the human condition. It is noteworthy that a work of literature, written in 1850, about events occurring in 1642, can be instructive to readers in 1999 and beyond. (Three worlds meet?). Studying Hawthorne's novel with respect to the shaming issue clearly bifurcates the distinction between community, then and now. Similarly, studying Hawthorne's novel also enlightens the constancy of the human psyche and the immutable nature of shame, the emotion. In other words, times change, but people do not.

A. Hester's Shaming

"Mistress Prynne shall be set where man, woman, and child may have a fair sight of her brave apparel, from this time till an hour past meridian. . . ."¹³⁴

Mistress Prynne's shame sanction required her to stand before the town upon the scaffold for an afternoon, and from that time forward, wear a scarlet letter 'A' upon her dress for the rest of her life. Hawthorne himself seems critical of the oppressive, judgmental Puritanic community that assembled to witness Hester's shaming. The Puritanic code of law is described in negative, unflattering tones. Hawthorne writes, "[L]ike a black shadow emerging into sunshine, the grim and grisly presence of the town-beadle, with a sword by his side, and his

132. MORRIS, *supra* note 89, at 63.

133. See HAWTHORNE, *supra* note 5, at 51-52.

134. *Id.* at 49.

staff of office in his hand. This personage prefigured and represented in his aspect the whole dismal severity of the Puritanic code of law."¹³⁵ Hawthorne describes an observer of Hester's shaming as "the ugliest as well as the most pitiless of these self-constituted judges."¹³⁶ Moreover, his portrayal of the Puritan women, "wedging their not unsubstantial persons"¹³⁷ into the public ways in order to partake of the penal infliction about to take place, clearly contrasts with his opening portrayal of Hester Prynne, who is described as a young woman with "natural dignity and force of character."¹³⁸ It is clear that Hawthorne sympathizes with his heroine. Despite his bias in favor of Hester, it is equally clear that, from a legal vantage point, Hawthorne has a marked disdain for the idea of public spectacle, even in the Puritanic community that reeks of judgmental, holier-than-thou hypocrisy. Furthermore, while Hawthorne is critical of the Puritanic system of law and its people, he nevertheless acknowledges the solemnity and gravity of the shaming occasion in Salem circa 1642. Hawthorne suggests that by 1850, lacking the solemnity of the occasion, our society had grown corrupt enough to heartlessly ridicule and jest a shaming exhibition.¹³⁹ Therefore, while inappropriate in 1642 and 1850, a shaming is even more inappropriate now. Indeed, Foucault, in 1975, wrote that "[i]n a society in which the principle elements are no longer the community and public life, but on the one hand, private individuals and, on the other, the state, relations can be regulated *only in a form that is the exact reverse of the spectacle*."¹⁴⁰

135. *Id.* at 56.

136. *Id.* at 47.

137. *Id.* at 54.

138. *See id.* at 56. Throughout the novel, Hawthorne elaborates upon Hester's beauty. For example, Hawthorne writes:

The young woman was tall, with a figure of perfect elegance on a large scale. She had dark and abundant hair, so glossy that it threw off the sunshine with a gleam, and a face which, besides being beautiful from regularity of feature and richness of complexion, had the impressiveness belonging to a marked brow and deep black eyes. She was lady-like, too, after the manner of the feminine gentility of those days; characterized by a certain state and dignity, rather than by the delicate, evanescent, and indescribable grace, which is now recognized as its indication.

Id. at 50.

139. Hawthorne contrasts 1642 society with society in his time in the following passage:

The scene was not without a mixture of awe, such as must always invest the spectacle of guilt and shame in a fellow-creature, before society shall have grown corrupt enough to smile, instead of shuddering, at it. The witnesses of Hester Prynne's disgrace had not yet passed beyond their simplicity. They were stern enough to look upon her . . . sentence, without a murmur at its severity, but had none of the heartlessness of another social state, which would find only a theme for jest in an exhibition like the present.

Id. at 53.

140. FOUCAULT, *supra* note 30, at 216 (emphasis added). This chapter of Foucault, entitled "Panopticism," discusses a system of power modeled after Jeremy Bentham's panoptic schema structured so that one central eye oversees the subjected many.

If we apply the elements of a modern liberal shaming¹⁴¹ to Hester's scarlet letter sentence, we can easily expose the differences, then and now, that make a modern shaming problematic. First, Hester was a member of an identifiable group—that of a tightly-knit, interdependent Puritan community—arguably lacking in today's modern society. Second, Hester's social standing in the community was threatened. Modernly, this element most likely would be met since shaming, for the most part, is employed on the limited categories of status seekers discussed in Part I where some sense of community exists; but, there are so many communities within communities that, even if shunned by one group, a modern offender simply might turn to another group.¹⁴² Third, Hester's community clearly knew of the shaming; in fact, the whole townspeople gathered at the scaffold located in the center of town to witness the spectacle. It is doubtful that in today's hectic, commuter world people would congregate to witness someone's public shaming—particularly people who matter to the offender. Even a bumper sticker posted on an offender's car would probably get a mere glance at best on the open roads of our modern-day transit systems. Central gathering places are a thing of the past, and even in small communities with quaint downtown courthouses, people rarely congregate. The fourth element requires that the offender fear the shunning.¹⁴³ Even in *The Scarlet Letter*, Hester did not fear her public shunning. In fact, Hester proudly and “haughtily” bore her sentence.¹⁴⁴ A shame sentence is too indeterminate in nature to predict who will fear being shunned and who will simply feel resentment toward those who shun, just as Hester did. Fifth, only after many years was Hester somewhat reintegrated into the community, and even then, she was so stigmatized by that time that she never, in actuality, became an accepted part of the community. At her death, in accordance with her punishment, Hester's tombstone did not have her name on it but read instead, “On a field sable, the letter A, gules.”¹⁴⁵

If we apply the elements of a modern utilitarian shaming¹⁴⁶ to Hester's shaming, we can further illustrate the modern inappropriateness

People are induced into subjection by the impression that their actions are always seen and known by the centrally located authority. This system of power is seen in many different contexts, for example, in religion, the omniscient God; in education, the teacher positioned at the head of the class able to see all the students; and in government, “big brother.” Even Santa Claus, who sees you when you're sleeping and knows when you're awake, serves to induce children to be on their best behaviors. Shaming seemingly violates this scheme since, instead of one viewing many, with shaming, many are viewing one. *See id.*

141. *See supra* notes 42-50 and accompanying text.

142. *See Kreimer, supra* note 63.

143. *See Shame, supra* note 13, at 1883.

144. *See Hawthorne, supra* note 5, at 57.

145. *See id.* at 280 (meaning “on a black background, the red letter A”).

146. *See Kahan, supra* note 13, at 636; *see also supra* text accompanying notes 55-58.

of shame sanctions. First, while Hester's scarlet letter sentence was imposed by the elders of the church, the moral authority of her community, modern penal sanctions are imposed by the state—most definitely not the moral authority of our "community." Even though the modern crimes being punished by shame sanctions involve a significant degree of morality, or immorality that is,¹⁴⁷ it is not commonly accepted, nor believed, that the state should characterize its punishment in terms of moral development.¹⁴⁸ "A liberal state should not concern itself with the moral development of its citizens. When the state punishes, it should stay away from the 'inner citadels of the soul' Repentance is within the jurisdiction of the church, where it rightly belongs."¹⁴⁹ Second, Hester's conduct of adultery was contrary to the shared moral norms of her community despite the fact that Hester believed her absent husband was dead, and, in her mind, she committed no sin. Today, the crimes being punished with shame sanctions, although coinciding perhaps with majoritarian moral norms, are not contingent upon morality, but are legislated as being contrary to a disciplined society. Third, Hester's scarlet letter sentence not only ritualistically, but literally, separated her from those who subscribed to the norms of the community. This stigmatization is precisely what is wrong with an effective utilitarian shaming, particularly with respect to first and minor offenders and tangential victims of sexual and moral offenders. It is overly harsh to stigmatize, shun, and permanently push to the fringes of society a shoplifter, for example, or the innocent daughter of a sex offender.

B. *The Psychological Effects of Shame on the Characters in The Scarlet Letter*

1. Hester Prynne

Hester Prynne was a proud person who, when imposed with her scarlet letter sentence, never felt sincerely guilty or shamed over what she had done. Hawthorne writes,

[W]ith a burning blush, and yet a haughty smile, and a glance that would not be abashed, [Hester] looked around at her townspeople and neighbors. On the breast of her gown, in fine red cloth, surrounded with an elaborate embroidery and fantastic flourishes of gold-thread, appeared the letter A. It was so artistically done, and with so much fertility and gorgeous luxuriance of fancy . . . [that it was] beyond what was allowed by the sumptuary regulations of the colony.¹⁵⁰

147. For example, prostitution johns, drunk drivers, shoplifters, and wife-beaters.

148. See Garvey, *supra* note 13, at 774.

149. *Id.* ("The state might not rest until the 'heretic' has been 'converted'.").

150. HAWTHORNE, *supra* note 5, at 57.

Here, instead of reacting with shame, Hester reacted with proud defiance by elaborately emphasizing her scarlet letter. Her behavior coincides with the soldier-martyr syndrome discussed in Part I.¹⁵¹ Similarly, the lack of shame that Hester felt coincides with the imperfect imposition of shame discussed in Part II, where the targeted objective of shame never materialized.¹⁵²

2. Pearl

Pearl, the innocent, illegitimate, daughter of Hester, similarly serves as a literary example of the inappropriateness of shaming. Pearl was never accepted within her community. Hawthorne writes, "[T]he little Puritans, being of the most intolerant brood that ever lived, had got a vague idea of something outlandish, unearthly, or at variance with ordinary fashions, in the mother and child; and therefore scorned them in their hearts, and not unfrequently reviled them with their tongues."¹⁵³ Here, Pearl, who was innocent of any wrongdoing, is punished tangentially alongside her mother. This tangential stigmatization coincides with Part I's discussion of the unconscionable consequence a shame sanction can have on third parties.¹⁵⁴ One might argue that Pearl was better off not becoming part of the stifling Puritanic way of life.¹⁵⁵ However, the point remains that Pearl was completely shunned from her community, for better or worse.

3. Arthur Dimmesdale

Reverend Arthur Dimmesdale is Hester's partner in crime who was incapable of confessing his adulterous affair. The eloquent Reverend Dimmesdale is the only character in *The Scarlet Letter* where the emotion of shame had any effect. Dimmesdale literally died as a result of his shame. The notable irony of Dimmesdale's shame though, is that his shame was private and not publicly imposed. Throughout the novel, Dimmesdale's identity as the illicit father of Pearl was kept secret. He did not have to suffer the stigmatic shunning from the community that Hester suffered. In fact, Dimmesdale was revered as a powerful moral leader. The disparate treatment between the ill-fated lovers works powerfully throughout the novel and emphasizes the sheer hypocrisy inherent in public shame sentencing. Where Hester was publicly shamed and felt no shame, Dimmesdale was not publicly shamed but felt tremendous shame.

151. See *supra* notes 103-105 and accompanying text.

152. See *supra* notes 118-120 and accompanying text.

153. HAWTHORNE, *supra* note 5, at 99-100.

154. See *supra* notes 98-102 and accompanying text.

155. Indeed, Pearl eventually inherited money from Roger Chillingworth, Hester's husband and tormentor of Arthur Dimmesdale, moved to Europe, married well, and led a fruitful life of wealth and happiness. See HAWTHORNE, *supra* note 5, at 277.

Dimmesdale also felt guilt in addition to feeling shame. Throughout the novel, he felt overwhelming guilt knowing that Hester was being publicly punished while he was not. Dimmesdale's shame, on the other hand, was not a result of his act of adultery but rather his personal inability to confess openly to the town his shared guilt. His shame manifested itself as a true scarlet letter 'A' upon his chest, over his heart, and literally killed him.¹⁵⁶ This act corresponds to the psychological effect of mortification discussed in Part II,¹⁵⁷ further demonstrating the uncertain consequences of shame acting upon the person.

CONCLUSION

The Scarlet Letter teaches us that public, participatory shame sanctions are wrong for the clichéd reason that "times change, but people do not." Shaming is problematic in today's modern world. Legally, our society has moved beyond the idea of the state as a moral authority. Psychologically, the emotion of shame is too individualized to control. Socially, our communities are not as cohesive as a proper shaming requires. Judges are employing shame sanctions as a politically popular, media-driven attempt to answer the public's growing frustration with crime without giving regard to the detrimental effects of shame on the offender or the detrimental side-effects of shame on third parties. The reason the law prefers a literary term for shaming over a psychological one, plays upon the public's romantic notion of a return to an era that does not exist and a denial of the very real psychological implications of shame.

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156. Arthur Dimmesdale died on the scaffold in the center of town having just given a magnificent sermon. Before he died, he finally acknowledged his sin of adultery and publicly confessed before the town; he then collapsed and died as a result of his festering shame. See HAWTHORNE, *supra* note 5, at 273.

157. See *supra* notes 121-123 and accompanying text.