CAN SHAME BE THERAPEUTIC?

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I. INTRODUCTION

“I never wonder to see men wicked, but I often wonder to see them not ashamed.”

— Jonathan Swift

“Shame was an emotion he had abandoned years earlier. Addicts know no shame. You disgrace yourself so many times you become immune to it.”

— John Grisham

“How can the intensity of this shame be understood by those who have never experienced it? How can they understand the strength of the motivations produced by the desire to escape from it?”

— Didier Eribon

The American judicial system abandoned the use of shame as a criminal punishment around the beginning of the 19th century. The rise of the penal system and the young nation’s growth saw the use of stocks and public humiliation decline. However, as flaws in the penal system have become evident and crime rates fail to significantly change, the shaming of criminals has been taken off the shelf, dusted off, and put back to use as punishment options.

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a1  J.D. Candidate 2013, Phoenix School of Law. Tremendous thanks to my wife and Professor Michael Jones. Without their support and understanding, this would not have been possible.

1 JONATHAN SWIFT, THOUGHTS ON VARIOUS SUBJECTS (1706).


5 See id.
This paper will look at the use of shame as punishment through a therapeutic jurisprudence comparative lens. Therapeutic jurisprudence is the "study of the role of the law as a therapeutic agent." The focus of therapeutic jurisprudence is to look below the surface of the legal system with attention placed on human factors such as emotional and psychological well-being. Therapeutic jurisprudence looks at all facets of the law, all persons involved, and the effects of the legal system. Studies focus on the “therapeutic and antitherapeutic consequences of the law.” Law from a therapeutic jurisprudence perspective can be broken down into legal rules, procedures, and actors. One goal of therapeutic jurisprudence is in deeply study of these sections of law for way to improve the mental and psychological well-being of the persons involved.

The rise of therapeutic jurisprudence and the return of shame as a punishment frame the question: Is shame therapeutic? This paper will look at shame’s historical use, its modern use, judicial trends, reasoning for and against, data on its effectiveness, and possible areas where shame would be most effective.

II. HISTORICAL USE OF SHAMING PUNISHMENTS

Shame was a prominent part of punishment of non-capital offenses in 16th to early 19th century America and Europe. Punishments for these offenses were made a public display. To maximize the shame, these punishments would take place at the busiest times of day to ensure

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7 See DAVID B. WEXLER, Therapeutic Jurisprudence: An Overview, LAW.ARIZONA.EDU, Dec.15, 2012, archived at http://www.webcitation.org/6CxZg9N6d
8 Id.
9 See id.
10 See id.
12 See Sanders, supra note 4, at 563.
the largest amount people witnessed the punishment.\textsuperscript{13} Depending on the offense, the convicted could be confined to public stocks or pillories or made to wear signs or letters proclaiming the misdeed.\textsuperscript{14} Ducking chairs were used for women who spoke out of turn or insulted their husbands or prominent community men. The women would be tied to a chair on one end of a type of seesaw and paraded around town and/or “ducked” in to a nearby body of water.\textsuperscript{15} For offenses deemed serious enough, offenders would be branded with the letter of their crime, forever marked as a criminal in their community.\textsuperscript{16} Upon seeing, say the letter “T”, one could identify the branded as a thief.\textsuperscript{17} Other serious offenses resulted in public beatings or whippings.\textsuperscript{18} Given the community nature of the early colonies and smaller villages in Europe, the beatings were not the worst part of the punishment.\textsuperscript{19} “The sting of the lash and the contortions of the stocks were surely no balm, but even worse for community members were the piercing stares of neighbors who witnessed their disgrace and with whom they would continue to live and work.”\textsuperscript{20} Early punishment by shame seemed to focus on deterring the viewing public from committing a similar offense. In these small, connected communities, the shame of one’s criminal act was ever present well after the punishment.\textsuperscript{21}

During the late 18th century, authorities used shame less frequently for criminal punishing. Two common reasons involved the changing populations and rise of personal liberty

\textsuperscript{14} See Sanders, \textit{supra} note 4, at 363.
\textsuperscript{15} See Sanders, \textit{supra} note 4, at 364.
\textsuperscript{16} See id.
\textsuperscript{17} See id.
\textsuperscript{18} See Sanders, \textit{supra} note 4, at 363.
\textsuperscript{19} See id.
\textsuperscript{20} Id.
found in new governments.\textsuperscript{22} Shaming punishments were effective in small, close-knit communities where people the offender lived with and depended on for survival offender would view their crime.\textsuperscript{23} As populations migrated to large urban centers, the effectiveness of shaming found in small communities was lost. As a known, dependent member of a group, one could not hide their shame and faced possible banishment.\textsuperscript{24} However, in a large city, one was not dependent on the collective for their livelihood and could blend in with the masses or completely avoid them, providing cover for their criminal acts.\textsuperscript{25} Additionally, increased transportation methods afforded, criminals the option to leave the community for a new home and life without shame.\textsuperscript{26} If a criminal is no longer dependent on those viewing their punishment, the embarrassment through the publicity of the act is lost and not an effective shaming method.

The second common reason involves the changing political landscapes of the time. The revolutions in Europe and America brought about a more enlightened view of liberty and personal equality, including equal punishments.\textsuperscript{27} Changing views on public punishment led to rising public resistance of the practice.\textsuperscript{28} As dependence on community waned, the idea of personal liberty began to flourish.\textsuperscript{29} Accordingly, shaming lost effectiveness while personal liberties became a prized and effective target of punishment.\textsuperscript{30}

The enlightenment that sparked governmental change also led to the creation of the penal system.\textsuperscript{31} Revolutions provided an opportunity for change in the legal system and opened the

\textsuperscript{22} See id. at 502.
\textsuperscript{23} See id. at 501.
\textsuperscript{24} See id. at 502.
\textsuperscript{25} See id.
\textsuperscript{26} See id.
\textsuperscript{27} See id.
\textsuperscript{29} See Zeil, supra note 21, at 501.
\textsuperscript{30} See id. at 502.
\textsuperscript{31} See Kahan, supra note 11, at 612.
door for new methods of punishment by the government.\textsuperscript{32} Seen as “more suited to the genius of a republic,” prisons were “superior to corporal punishment as a means of expressing appropriate moral condemnation.”\textsuperscript{33} Rehabilitation, rather than corporal punishment, of offenders was the goal of the new system.\textsuperscript{34} This system of punishment operates into modern day, but as its flaws and overuse become increasingly evident, more and more legislatures and judges look to revisit shaming as an alternative.\textsuperscript{35}

III. MODERN AMERICAN JUDICIAL USE OF SHAMING

Several courts are now using various creative ways to punish criminals with little or no jail time by conditioning probation or reduced jail time upon completion of a shaming sanction. Professor Dan Kahan has defined four categories of shame punishments: stigmatizing publicity, literal stigmatization, self-debasement, and contrition.\textsuperscript{36}

Stigmatizing publicity is the publication of an individual’s conviction to the entire community.\textsuperscript{37} Typical examples are local newspaper ads, paid for by the criminal, with their picture and the committed crime listed.\textsuperscript{38} Other means of publication include the use of community access channels and billboards\textsuperscript{39} to display pictures of men found guilty of soliciting prostitutes\textsuperscript{40} or websites to display pictures of deadbeat parents.\textsuperscript{41}

\textsuperscript{32} See Morton, supra note 13, at 107.
\textsuperscript{33} Id.
\textsuperscript{34} See Sanders, supra note 4, at 367.
\textsuperscript{35} See Massaro, supra note 28, at 1884.
\textsuperscript{36} See Kahan, supra note 11, at 631.
\textsuperscript{37} See id. at 631-632.
\textsuperscript{38} See Sanders, supra note 4, at 368.
\textsuperscript{39} See Kahan, supra note 11, at 632.
\textsuperscript{41} See Sanders, supra note 4, at 370.
Literal stigmatization is the marking of the criminal or their property with their crime.\textsuperscript{42} Typical punishments use sandwich boards or clothing stating the offender’s violation such as “DUI Convict” or “I Write Bad Checks.”\textsuperscript{43} States will mark vehicles of drunk drivers with bumper stickers or special license plates.\textsuperscript{44} Convicted sex offenders can have signs posted on their homes declaring their offenses.\textsuperscript{45}

Self-debasement is the modern version of the colonial stocks.\textsuperscript{46} One version is the public apology or admittance of ones crimes, typically occurring in front of the courthouse.\textsuperscript{47} Another is labeling the offender during performance of another part of the sentence, such as a shirt stating “DUI Offender” while performing community service.\textsuperscript{48}

Other forms of self-debasement follow the retribution theory of punishment. Creative judges have sentenced offenders to punishments tailored to the offenses. One judge ordered burglars to allow their victims to take something of like value from the burglars’ homes.\textsuperscript{49} Another ordered an offender, who caused his victim to lose an eye, to wear an eye patch whenever awake.\textsuperscript{50} A New York judge sentenced a slumlord to house arrest – in one of his own slums.\textsuperscript{51} Some scholars have argued these punishments do not always require the audience element typically needed to shame the offender. Rather than shame the offender, these punishments morally educate them to the consequences of their crime.

\textsuperscript{42} See Kahan, supra note 11, at 632.
\textsuperscript{43} See id. at 633.
\textsuperscript{44} See id.
\textsuperscript{45} See Massaro, supra note 28, at 1888.
\textsuperscript{46} See Kahan, supra note 11, at 634.
\textsuperscript{47} See Garvey, supra note 40, at 736.
\textsuperscript{48} See Massaro, supra note 28, at 1887.
\textsuperscript{49} See Garvey, supra note 40, at 736.
\textsuperscript{50} See id.
\textsuperscript{51} See id.
The final category offered by Kahan is contrition and has two versions. In the first, the offender publicly admits their crime and, regardless of sincerity, apologizes. Examples include offender’s placing of ads in the local paper confessing to their crime, or confessing their offense to an entire church congregation. The second version is the “apology ritual.” Often used where there is a close family or social connection between the offender and victim, these apologies must be sincere to the victim. Some involve physical signs of remorse such as apologizing on their hands and knees while others use reparations like helping to repair the damage they created.

IV. JUDICIAL USE AND REVIEW

A. State Use of Shaming

In light of prison overcrowding and repeat offenders, many judges turn to alternative sentencing, especially shaming. The conditions widely range and are often very creative. Numerous shoplifting offenders have worn sandwich boards stating their crime in front of the store from which they stole. Several jurisdictions use special license plates or bumper stickers stating the driver’s previous drunk driving conviction. A Texas drunk driver now has a picture of the fatal wreck he caused hanging in his living room. The photo of drunk driving victim, in his coffin, will forever be in a Pennsylvania offender’s wallet. A Florida man will spend

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52 See Kahan, supra note 11 at 169.
53 See Massaro, supra note 28 at 1898.
54 See Kahan, supra note 11 at 171.
55 See THE DOCTOR PHIL SHOW, Episode 3819, DRPHIL.COM, archived at http://www.webcitation.org/6CxlhjnC
57 See OHIO REV. CODE ANN. § 4503.231; See also Jon Nordheimer, In-House Dispute: Drunken-Driver Bumper Sticker, N.Y. TIMES, June 6, 1985, at A22; See also Scarlet Bumper: Humiliating Drunk Drivers, TIME, June 17, 1985, at 52.
58 See Texas Judge Orders Convicted Drunk Driver to Public Humiliation, FOXNEWS.COM (April 21, 2012), archived at http://www.webcitation.org/6CxoP6tAr
Thanksgiving and Christmas Day in jail after driving recklessly and killing a teenager on Thanksgiving. And in Ohio, Judge Cicconetti sentenced a woman to spend one night in the woods where she abandoned thirty-five kittens with no supplies, only the clothes on her back.

Judge Cicconetti is one of several judges making a name for themselves by issuing alternative punishments. "I've been a judge for almost 14 years, and the most effective punishments are those that fit the crime, Judge Cicconetti says. They teach the offenders a lesson they'll never forget." His other alternative punishments include throwing a picnic for students who were forced to miss a field trip after the offenders vandalized the students’ buses and an animal cruelty offender sentenced to visit schools as "Safety Pup."

Some judges, like Florida Circuit Judge Schack, favor the public advertisement of the offenders’ crimes. Judge Schack’s typical sanctions require offenders to advertise their crimes in a local newspaper or posting warning signs on the homes of sexual offenders. One woman was sentenced to place an ad in the newspaper detailing the events when she purchased drugs in front of her children.

Perhaps the most popular advocate of these alternative sanctions is Judge Poe of Houston, Texas. His self-titled “Poe-etic” punishments have included sandwich boards stating the offender’s crime and the placement of an 8x10 photograph of a family placed in the jail cell of the drunk driver who killed them. Judge Poe stated, “[O]ur founders knew that the judgment of

59 See Garvey, supra note 40, at 787.
60 See THE DOCTOR PHIL SHOW, Supra note 57.
61 See id.
62 See Sanders, supra note 4, at 368.
63 See Chuck Colson, Poe-etic Justice, BREAKPOINT.ORG (December 26, 1997 9:42 AM), archived at http://www.webcitation.org/6Cxo0CQ1e
64 See Sanders, supra note 4, at 366, 367.
a friend, a neighbor, or family member held far greater significance than that of the jailer or judge.”

Some state legislatures are also following this trend by codifying judicial discretion to impose shameful alternative sanctions. In California a judge may issue

[O]ther reasonable conditions, as [the sentencing judge] may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . .

Ohio state legislators authorized unique license plates for DUI offenders and California allows judges the power to label DUI offenders while they perform public service.

Appellate courts, like the states, have taken differing views on the use of shaming as a punishment. The California Court of Appeals did not find cruel or unusual punishment in a probation condition mandating a convicted purse-snatcher wear tap shoes whenever in public, so as to no longer be able to sneak up on his victims. “Merely because a condition is out of the ordinary does not make it constitutionally unreasonable. One of the advantages of probation as an alternative to confinement is that its terms can be tailored by the court to fit the individual defendant.” The California Court of Appeals however, later limited the use of shaming sanctions.

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65 Id.
67 CAL. PENAL CODE § 1203.1(j)
68 See OHIO REV. CODE ANN. § 4503.231
69 See Massaro, supra note 28 at 1887.
70 People v. McDowell, 130 Cal. Rptr. 839, 843 (Ct. App. 1976).
71 Id.
Other appellate courts have upheld newspaper ads\textsuperscript{73} and bumper stickers for DUI convictions.\textsuperscript{74} One Florida appellate court stated,

> Deciding that the primary purpose of probation is rehabilitation is not the same thing as making probation free from any punitive effect. Rehabilitation and punishment are not mutually exclusive ideas. They can co-exist in any single, particular consequence of a conviction without robbing one another of effect. In fact, it is difficult to imagine any condition of probation that does not have some punitive aspect to it.\textsuperscript{75}

The state appellate courts are not alone in these views.

B. Federal Courts Use of Shaming

Federal courts of appeal also hold this reasoning. One court held, “The deterrent effect of punishment is heightened if it inflicts disgrace and contumely in a dramatic and spectacular manner. The arsenal of the sentencing judge should contain more than the traditional weapons of fine and imprisonment \textit{simpliciter}.”\textsuperscript{76} In reviewing the marking of DUI offenders’ clothes while performing community service, the U.S. Supreme Court stated this penalty was “less embarrassing and less onerous than six months in jail.”\textsuperscript{77}

The only federal case to use a shame condition is \textit{U.S. v. Gementera}.\textsuperscript{78} Convicted of mail theft, Gementera received a sentenced to two months jail and three years of supervised release.\textsuperscript{79} The supervised release was conditioned upon Gementera wearing or holding a large sign stating, “I stole mail; this is my punishment,” in front of a post office.\textsuperscript{80} The court explained:

\textsuperscript{74} See Goldschmitt v. State, 490 So. 2d 123 (Fla Dist. Ct. App. 1986).
\textsuperscript{75} Lindsay, 606 So. 2d at 656.
\textsuperscript{76} United States v. William Anderson Co., Inc., 698 F.2d 911, 913 (8th Cir.1983)
\textsuperscript{77} Blanton v. City of North Las Vegas, Nev. 489 U.S. 538, 544 (1989)
\textsuperscript{78} See 379 F.3d 596 (9th Cir. 2004).
\textsuperscript{79} See id. at 598.
\textsuperscript{80} Id. at 599.
While humiliation may well be—indeed likely will be—a feature of defendant's experience in standing before a post office with such a sign, the humiliation or shame he experiences should serve the salutary purpose of bringing defendant in close touch with the real significance of the crime he has acknowledged committing. Such an experience should have a specific rehabilitative effect on defendant that could not be accomplished by other means, certainly not by a more extended term of imprisonment.81

The Ninth Circuit Court of Appeals applied language from the federal Sentencing Reform Act.82 The act's guidelines require sentencing conditions: (1) be reasonably related to the offense and defendant; (2) involve no greater deprivation of liberty than is reasonably necessary; and (3) are consistent with Sentencing Commission policy statements.83 The court held the condition was imposed “for the stated and legitimate statutory purpose of rehabilitation and, to a lesser extent, for general deterrence and for the protection of the public.”84 In comparing a lengthy prison sentence, the court stated the shaming condition “would better promote this defendant's rehabilitation and amendment of life . . . .”85 The court further stated, “[I]n comparison with the reality of the modern prison, we simply have no reason to conclude that the sanction before us exceeds the bounds of “civilized standards” or other “evolving standards of decency that mark the progress of a maturing society.”86 While the federal courts have joined states allowing shaming conditions, other states prohibit their use.

C. State Opposition to Shaming

Not all courts are willing to sanction the use of shaming sanctions.87 Tennessee’s Supreme Court removed a condition requiring a sex offender to place a four-by-eight foot sign at

81 Id. at 602.
83 See Gementeera, 379 F.3d at 600.
84 Id. at 602.
85 Id. at 607.
86 Id. at 610.
his home reading: "Warning, all children. Wayne Burdin is an admitted and convicted child molester. Parents beware." The court stated the condition was a “breathtaking departure from conventional principles of probation.” Several state courts have struck down shaming sanctions as unrelated to rehabilitation.

The relation of the condition to rehabilitation is a common complaint. California’s Court of Appeals declined to extend the McDowell ruling in People v. Hackler. Hackler was ordered to wear a t-shirt stating, “I am on felony probation for theft” whenever in public. Unlike Hackler’s shirt, McDowell’s tap shoe condition did not label him as a purse-snatcher. Rather, the court felt the punishment would “brand Hackler and expose him to public ridicule and humiliation, rather than to facilitate his rehabilitation.”

The Kansas court of appeals, along with the Montana, and Illinois Supreme Courts, also ruled against the use of signs designed to shame the offender. These courts ruled the use of shaming signs violated sentencing statutes for not meeting the goals of rehabilitation and protection of the public. Erwin Chemerinsky, a law professor and constitutional scholar at the University of Southern California in Los Angeles, follows the reasoning of these courts. “If legislatures want to allow shame sentencing, there should be a statutory authorization for it.”

The lack of clear guidelines allows judges to interpret sentencing statutes. Chemerinsky noted,

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88 See State v. Burdin, 924 S.W.2d 82 (Teen. 1996).
89 Id. at 86.
90 See Hackler, 13 Cal.App.4th at 1058.
91 See id. at 1052.
92 See id. at 1059.
93 Id. at 1058.
95 State v. Muhammad, 309 Mont. 1 (2002).
97 See id.
98 See Kelly McMurry, For Shame: Paying for Crime Without Serving Time, but with a Dose of Humility, TRIAL, May 1, 1997 archived at http://www.webcitation.org/6CxtPXJCE
99 Id.
"That is one reason why there have not been clear standards from appellate courts on whether shame sentences are allowed."¹⁰⁰ Without appellate court rulings, the door will still be open for judges to issue shaming sanctions.

V. BENEFITS OF SHAMING SANCTIONS

Proponents of shaming sanctions state the sanctions do fit into statutory rehabilitation requirements as well as deterrence and incapacitation theories of punishment. When compared to traditional punishments, including prison, proponents argue shaming sanctions offer a more effective alternative.

A. Incapacitation

Shaming sanctions will likely only work for certain offenders. For many violent offenses, incarceration may be the only option.¹⁰¹ However, for non-violent crimes, proponents of shaming sanctions argue shame is more effective and cheaper than jail for incapacitating some offenders. Judge Cicconetti, a proponent and issuer of shaming sanctions, says jail is ineffective for younger offenders.¹⁰² "It becomes a status symbol, but let that same young impressionable individual be humiliated a little bit, boy, his friends are not going to be high-fiving him."¹⁰³ While a majority of offenses require jail time, others may not. Toni M. Massaro, a Professor of Law at the University of Arizona and opponent of shaming sanctions, reasons shame can have a similar incapacity effect as jail.¹⁰⁴

People might, for example, refuse a convicted embezzler a position that gives her access to funds. A known child molester may be denied contact with children.

¹⁰⁰ Id.
¹⁰¹ See Kahan, supra note 11 at 605.
¹⁰² See THE DOCTOR PHIL SHOW, Supra note 57.
¹⁰³ Id.
¹⁰⁴ See Massaro, supra note 28 at 1900.
And a convicted drunk driver may be refused alcohol or a job that involves use of a vehicle. As such, the shaming sanctions may have a disabling effect on the offenders, and thus may claim to serve incapacitation-type ends.\textsuperscript{105}

If shaming sanctions can have a similar ability as prison to prevent repeat offenses, their use becomes more appealing given the cost of incarceration.

Another draw to shaming sanctions over prison sentences is the higher cost involved in housing an inmate versus a shame sanction. In 2001, the average annual operating cost per State inmate was $22,650.\textsuperscript{106} California’s cost to incarcerate an inmate was roughly $47,000 per year in 2008.\textsuperscript{107} In New Jersey, it is cheaper to send a student to Princeton University than to house that same person in jail.\textsuperscript{108} In comparison, shaming sanctions require a fraction of the costs of incarceration or nothing at all in jurisdictions requiring the offender to pay administration costs. The cost incurred for a shaming sanction is usually limited to administration fees and a bumper sticker, t-shirt, or personnel to supervise a public act. Considering the effectiveness of some shaming sanctions in preventing repeat offenses, proponents have a strong argument for the availability of their use. When weighing the substantially higher cost of jail, the argument for the use of these sanctions only increases.

B. Deterrence

Proponents of shaming sanctions argue their use has the same or better deterring effects as conventional punishments. No longer in close-knit colonial settlements, deterrence through shame has shifted from fear of separation from the community to a loss of privacy and the ability

\textsuperscript{105} \textit{Id.}


\textsuperscript{107} See \textit{CALIFORNIA LEGISLATIVE ANALYST’S OFFICE, How Much Does it Cost to Incarcerate an Inmate 2008-2009}, archived at http://www.webcitation.org/6CxuLz4Ng

to hide one’s shameful act from witnesses to the shaming sanction. “Given the elaborate
enactment of privacy laws, and well-established, unambiguous constitutional protection against
privacy invasions, it seems probable that many would perceive intrusions into one’s personal life,
and resulting inability to control the distribution of private information, as sufficiently repelling
to deter behavior leading to such a penalty.”

Take the instance of a “john” contemplating the solicitation of a prostitute. The
possibility of a stranger’s knowledge of his crime would not be much of a deterrent. However,
the experience of looking those strangers in the eye - as each man, woman, and child passed the
offender and read the sign detailing his crime – would have significant effect on the offender.
The experience would be greatly magnified were the “john’s” family, co-workers, church, or
Boy Scout troop made aware of his crime. The publication of these shaming sanctions can
serve as a deterrent to a potential offender (specific deterrence) and the public (general
deterrence) as a reminder of possible punishments for these crimes.

Shaming sanctions do not have to be broadcast to have a deterring effect on previous
offenders. Judge Poe imposed a shaming sanction on a child custody offender to shovel horse
manure from the local police department stables for twenty hours a month, every month for the
duration of his ten-year probation. The offender stated, “That’s a lot of horse manure. It’s
definitely a deterrent. I don’t want to go back and do something like that again.”

Shaming sanctions have also been promoted as a harder hitting punishment and deterrent
than fining an offender. Fines can have negative public reaction if they are too high or low.
Punishing a murderer with a high fine, in lieu of jail, makes the public feel like one can “buy their way” out of jail.\textsuperscript{114} Conversely, a low fine for a polluter is merely viewed as the “cost of business” and not a meaningful punishment when the offender still makes a profit – and stays out of jail.\textsuperscript{115} Additionally, victims of these crimes are left to feel like their worth is denigrated when sentences are trivial.\textsuperscript{116} In these aspects, fines do not serve as a significant sanction and therefore do not offer significant deterrence.

Perhaps one of the strongest arguments offered against traditional punishments is their lack of effectiveness in deterring certain offenses. A study coordinated by the Institute for Legal and Policy Studies, Center for State Policy and Leadership found incarceration alone was ineffective in deterring repeat DUI offenses.\textsuperscript{117} Rather, offenders need to be evaluated for alcohol related problems and sanctions tailored accordingly.\textsuperscript{118} Additionally, judges need to issue those sanctions over an extended period.\textsuperscript{119} One of the report’s authors, William White, reasons long-term prison sentences remove the fear, and therefore deterrence, of incarceration. This view of DUI sanctions is echoed by studies of other offenses involving addiction.

By definition, an addict’s main motivation is to achieve the next high and continue to feed the addiction. It is illogical to believe an addict will weigh the low probability of arrest versus the desire to get high continually.\textsuperscript{120} Jail cannot be a deterrent if the offender does not contemplate going to jail. Incarceration does not appear to be an effective deterrent even after an offender has served a jail sentence. A 1998 study found two-thirds of drug users returned to their

\textsuperscript{114} See Kahan, supra note 11, at 622.
\textsuperscript{115} See id.
\textsuperscript{116} See id.
\textsuperscript{118} See id.
\textsuperscript{119} See id. (referring to State v. Gebeck, 2000 WL 35796934 memo).
addiction within three months of release.\footnote{See id, at 12.} In questioning heroin users who quit their addiction, one study reported not one adult user (and only 13\% of juvenile users) cited fear of punishment as a reason they quit.\footnote{See id.} Without a deterring factor in incarceration, jail sentences offer a retributive punishment but do little, if anything, to prevent recurring criminal drug use.

C. Rehabilitation

While critics of shaming sanctions may disagree, judges who use these sanctions claim their purpose is to rehabilitate the offender. Judge Cicconetti stated,

> I've been a judge for almost 14 years, and the most effective punishments are those that fit the crime. They teach the offenders a lesson they'll never forget. My court is a people's court. Every day, I see 40, 50, 60 people. Every day brings a new adventure. When I first went on the bench, I saw people who would commit one offense. They might be fine for a couple of months, but [then they'd] come back again, and they would repeat and repeat and repeat. There had to be a better way.\footnote{See \textit{THE DOCTOR PHIL SHOW}, \textit{Supra} note 57.}

There is reason to believe an offender will suffer enough from the shame of the sanction to be scared enough to refrain from future offenses.\footnote{See Massaro, \textit{supra} note 28, at 1894.} However, some critics argue these sanctions do not have that effect in our modern world.

To effectively rehabilitate, shaming sanctions generally only work when applied to offenders who care what others think of them. Some have theorized the population growth and resulting anonymity defeats the rehabilitative effects of shaming sanctions since the offender would not care about strangers viewing their punishment.\footnote{See Sanders, \textit{supra} note 4, at 365.} However, even though an offender’s sanction might not be viewed by those close to them, the glare from a stranger can be equally
embarrassing. Anyone who’s ever had the dream of showing up to school dressed only in their underwear knows the embarrassment of being exposed to the public. It is reasonable to believe that after being publicly embarrassed, certain offenders will consider their actions and the community’s reaction to those actions, resulting in a change of the offender’s future behavior.

Shaming sanctions do appear to have a rehabilitative effect for offenders who come face to face with their victims and thereby sensitized by the “human consequences” of their offense.\textsuperscript{126} By seeing the damage their actions caused in person, some offenders may realize how their actions have negatively affected others and change their behavior to prevent future harm.\textsuperscript{127} This direct realization of consequences of one’s actions is similar to parts of Alcoholics Anonymous’ (AA) twelve steps to recovery.\textsuperscript{128} In AA, one must admit to others the exact nature of their wrong(s), be willing to admit their wrongs, and make amends to those they have harmed.\textsuperscript{129}

Rehabilitation of an offender is inherently hard to prove. Without a glimpse into the thoughts of an offender, one can never truly know if a shaming sanction has changed their mindset or prevented future behavior. It may be difficult to truly judge one’s rehabilitation, but it appears shaming sanctions have the potential to positively affect some offenders and their future choices.

D. Benefits to the Victims

Many of the shaming sanctions are imposed with the victims in mind. Typical shaming sanctions for shoplifting offenders include wearing a signs detailing their offense in front of the

\textsuperscript{126} See Massaro, supra note 28, at 1895.
\textsuperscript{127} See id.
\textsuperscript{128} See ALCOHOLICS ANONYMOUS, GENERAL SERVICE OFFICE, A.A. FACT FILE, archived at http://www.webcitation.org/6CxvwmPV6
\textsuperscript{129} See id.
place of business where they shoplifted. These sanctions offer the businesses another deterrent for potential future shoplifters.

In Missouri, a driver attempting to get home quickly killed a woman and her unborn twins.\textsuperscript{130} In addition to other sanctions, the judge sentenced Sharon Foster to spend the next six years’ worth of holidays in prison for three to five days.\textsuperscript{131} The victim’s husband stated he wished Foster’s sentence was longer but was pleased she will have to spend holidays in jail.\textsuperscript{132} “I hope she gets the feeling when she’s in there on Mother’s Day and Christmases, away from her family. But it’s not just the holidays for us. It’s every day.”\textsuperscript{133} Many shaming sanctions for these types of offenses involve the offender spending time in jail on important days like holidays and the victim’s birthday. In these cases, the victim’s family knows that not only are they suffering on the holidays, but the offender is suffering as well. Additionally, the offender is reminded regularly of the loss their action caused.

Some shaming sanctions are imposed after consultation with the victim’s family. A prosecutor in Texas requested probation conditions for an Intoxication Manslaughter offender after working the victim’s family.\textsuperscript{134} To maintain his probation, the offender will pay their victim’s funeral expenses; wear a bracelet with their victim’s name; and spend holidays, as well

\begin{footnotesize}
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\item See Joel Currier, \textit{Driver in Fatal Crash to Spend Holidays in Jail}, SAINT LOUIS POST-DISPATCH, May 16, 2012, archived at http://www.webcitation.org/6CxwM0PfH
\item See id.
\item See id.
\item Id.
\item See Melody McDonald, \textit{Fort Worth Driver in Deadly DWI Crash Must Spend His Victim's Birthdays in Jail}, STAR-TELEGRAM, Apr. 30, 2011, archived at http://www.webcitation.org/6Cy0TX5Hz
\end{enumerate}
\end{footnotesize}
as their victim’s birthday, and date of death, in jail.\textsuperscript{135} After speaking with the victim’s family, the prosecutor stated, “[T]his is what they wanted to do. This was done with their approval.”\textsuperscript{136}

The situation was similar for a nanny convicted of hitting a child with a belt.\textsuperscript{137} The judge gave the nanny articles on the consequences of child abuse and required her to read and discuss them in the courtroom with the victim’s mother and others present.\textsuperscript{138} The mother, affected enough by the events, agreed to forego a jail sentence for the nanny.\textsuperscript{139} Part of therapeutic jurisprudence is the inclusion of the victim and family in court proceedings, including sentencing. By conferring with those most affected by the offender’s actions, they can have a part in the proceedings rather than being mere bystanders.

VI. NEGATIVE EFFECTS OF SHAMING SANCTIONS

While shaming sanctions are touted for their benefits, they have also been criticized by some as ineffective and by others as too excessive. Additionally, some critics of argue certain requirements and conditions are needed for shaming sanctions. Finally, some argue reintergrative processes need to be added to shaming sanctions.

A. Ineffective Shaming Sanctions

Perhaps the most argued position against shaming sanctions is they simply do not work. For some offenders, the cost of “social embarrassment” is preferable to the cost of jail time.\textsuperscript{140}

\textsuperscript{135} See id.
\textsuperscript{136} Id.
\textsuperscript{137} See Woman Ordered to Spend Night in Woods for Abandoning Kittens, ABCNEWS.COM, Nov. 23, 2005, archived at http://www.webcitation.org/6Cy0pEQsY
\textsuperscript{138} See id.
\textsuperscript{139} See id.
\textsuperscript{140} See Massaro, supra note 28 at 1888 (“One man who opted for the public apology in lieu of a prison sentence stated that the cost of the social embarrassment paled when compared to the cost of six months in prison.”).
Shaming sanctions are also effectively limited for offenders who do not value their reputation. These offenders may care nothing about the social cost of a shaming sanction since they care nothing about what society thinks of them. This is especially true where an offender has the means to relocate and leave the society that viewed him negatively.

An offender’s social value can become meaningless when the offender can simply move and create a fresh social value in a new location. Such was the case in State v. Rosenberger where the offender was convicted of forgery but “argued that his ‘shame and disgrace’ in being convicted was sufficient punishment.” The judge rejected this argument stating

[The defendant] had minimal roots anywhere and lived in Bound Brook for only two years prior to this offense. After being fired by AT&T he moved to California and quickly obtained a new and equally lucrative position. There is no evidence that he is now shunned socially, financially or otherwise. He still earns as much as he did at AT&T and it is probable that his new neighbors are totally unaware of his criminal conduct. So where is the shame? With whom has he been disgraced? How has he been punished? It is apparent that he simply moved his employment and residence 3,000 miles and continued his same life style without so much as a hitch.

To carry weight as a punishment, the offender needs to depend heavily on their social group “for social, economic, or political support, or cannot leave the group easily.” Where an offender has the mobility to escape the social group’s negative views, shame can lose its stigma and therefore its effectiveness.

141 See Dan M. Kahan, What’s Really Wrong with Shaming Sanctions, 84 Tex. L. Rev. 2075, 2079 (2006) (Remarking on his critics claiming “shaming punishments couldn't be expected to deter, for example, because most offenders don't value their reputations enough to be influenced by the threat of humiliation.”).
143 Massaro, supra note 28 at 1934-35.
144 207 N.J. Super. at 356-58, 504 A.2d at 164.
146 See Massaro, supra note 28 at1935.
Shaming sanctions can also lose effectiveness as a deterrent if overused.\(^{147}\) When the public is bombarded by something repeatedly we can lose sensitivity and interest. As shaming critic Toni Massaro states

First, if the penalty were to become a common sanction, it may produce a shaming overload, which could reduce public interest in these displays and thereby lessen the deterrence impact. This decline in public interest could prove expensive to monitor. At least three million people pass through the state and federal corrections systems each year. Approximately two thirds of the offenders who are under correctional supervision are on probation or parole, and thus have been returned to the community. If only one half of this two thirds was sentenced to shame sanctions, this still might involve one million shamings per year for the government to publish and for the public to consume.\(^{148}\)

The public may become more and more disinterested in shaming events as shaming sanctions become more and more commonplace. One shoplifter performing a shaming sanction in front of a Wal-Mart might draw public attention. However, if a shaming sanction is taking place every time you shop at Wal-Mart, you might become desensitized to the display, if you notice it at all. Without public participation in the shaming sanction, the desired effect of the sanction is lost.

B. Shaming Sanctions are too Excessive

Another popular argument against shaming sanctions is the belief that they are too excessive. Rather than reform the offender, critics feel these punishments create more harm. Judge Cicconetti's well-publicized use of shaming sanctions has brought much of that criticism on him. Carole McKindley-Alvarez, the divisional director of the San Francisco Youth Mental

\(^{147}\) See id. at 1930.  
\(^{148}\) Id. at 1930-1931.
Health Program stated the Judge’s sanctions degrade, abuse, and cause more harm than good for the offender.\footnote{See THE DOCTOR PHIL SHOW, Supra note 57.}

All of our mental health programs end up having more and more people come in with trauma at the hands of humiliation. When you do this creative type of justice, the problem is that it’s just going to make the behavior show up in different ways. So, Judge Cicconetti may never see that person again, but mental health programs will see that person, other judges may see that person or, unfortunately, the morgue may see that person.\footnote{Id.}

These comments echo a common worry of shaming sanction critics. What if the offender loses status in their community to the point where they no longer regard themselves as a part of society?\footnote{See Sanders, supra note 4, at 365-366.}

In England and colonial America, offenders could be branded with a letter for their offense.\footnote{See Thomas J. Scheff, Community Conferences: Shame and Anger in Therapeutic Jurisprudence, 67 Rev. Juridica U.P.R. 97, 104 (1998).} This permanent marking of an individual would lead to an increase in crime. Since the offender could not rejoin society, they would be forced to join other criminals rejected by society.\footnote{Id.}

There is a fear that these modern shaming sanctions will have the same unintended consequences as branding. It is logical to presume that once an offender has lost all of their social status, they would have nothing to lose were they to offend again. If society casts the offender away, they will no longer be bound by society’s rules and expectations.
C. Conditions Needed for Effective Shaming

Critics of shaming sanctions argue those sanctions are not effective as currently applied. One critic, Toni Massaro, argues there are five conditions needed for effective shaming sanctions.\textsuperscript{153}

First, the potential offenders must be members of an identifiable group, such as a close-knit religious or ethnic community. Second, the legal sanctions must actually compromise potential offenders’ group social standing. That is, the affected group must concur with the legal decision maker’s estimation of what is, or should be, humiliating to group members. Third, the shaming must be communicated to the group and the group must withdraw from the offender - shun her - physically, emotionally, financially, or otherwise. Fourth, the shamed person must fear withdrawal by the group. Finally, the shamed person must be afforded some means of regaining community esteem, unless the misdeed is so grave that the offender must be permanently exiled or demoted.\textsuperscript{154}

Massaro argues the current society in the United States lacks the close-knit, interdependence needed for effective shaming.\textsuperscript{155} Additionally, our criminal justice system lacks any mode of reintegration for offenders given shaming sanctions.\textsuperscript{156} Without these elements, she concludes shaming sanctions will merely be a spectacle devoid of any community or deterrent benefit.\textsuperscript{157}

D. Shaming Sanctions Lack Reintegrative Elements

Restorative justice focuses on creating positive effects from the actions of our judicial system. Accordingly, some restorative justice advocates favor reintergrative shaming sanctions over those that stigmatize.\textsuperscript{158} John Braithwaite, an author of several works on shaming, argues for shame where society issues disapproval on the offender without rejecting the offender as a

\textsuperscript{153} See Massaro, supra note 28 at 1883.
\textsuperscript{154} Id.
\textsuperscript{155} See id. at 1884.
\textsuperscript{156} See id.
\textsuperscript{157} See id.
member of society. Braithwaite argues for “enough shaming to bring home the seriousness of the offense, but not so much as to humiliate and harden.” His thought is similar to those offered above in that an offender stigmatized excessively will withdraw from society and no longer be bound by its rules. Braithwaite, along with other restorative justice advocates, argues for community conferences as a way to incorporate reintegration with shaming sanctions.

The community conference is one reintergrative means offered for shaming sanctions. Several countries use the conferences instead of traditional court proceedings. African cultures use “justice under a tree” where the community dispenses justice. In New Zealand, over half of all juvenile offenders have been dealt with in these conferences. By doing so New Zealand saves millions of dollars every year and recidivism rates have dropped. Australia uses these conferences for both juvenile and adult offenders. These conferences bring the accused, the victim, their relatives, and community participants together to discuss the offense.

Braithwaite states

For conferences to be maximally effective, two separate movements of shame should occur. First, all shame must be removed from the victim. The humiliation of degradation, betrayal and violation that has been inflicted on the victim can be relieved. This step is a key element in the victim's future well-being; it is the shame component, the feeling that the victim has that if only she had acted differently, the crime wouldn't have occurred or would have been less painful, that leads to the most intense and protracted suffering. The usual handling of crimes through courts and imprisonment does very little to relieve the victim of her suffering. Perhaps this is the main reason that many victims and much of the

160 Suzanne M. Retzinger & Thomas J. Scheff, Shame and Shaming in Restorative Justice, 2000, archived at http://www.webcitation.org/6Cy26yA5q
161 See id.
162 See id.
163 See Allison Quattrocchi, Justice Under A Tree the Inspiration Behind A South Africa Court Building, 46 Ariz. Att'y 16, 19 (Jan. 2010).
164 See id.
165 See id.
166 See Harcourt, supra note 161, at 628.
voting public want to visit excessive punishment on offenders, to make them suffer as their victims suffer.\textsuperscript{167}

The goal in these conferences is for the offender to accept the shame from the victim.\textsuperscript{168} This, Braithwaite feels, is the first step towards the offender’s rehabilitation.\textsuperscript{169} Like other restorative justice methods, shaming sanctions may be more effective when the offender and victim are made emotionally and psychologically complete afterwards.

E. Need for judicial training

Perhaps the most important aspect of shaming sanctions is identifying which offenders will be effectively affected by the sanction. Toni Massaro focuses on the criminal subculture and status position of the offender in that subculture.\textsuperscript{170} A judge or sentencing panel must be aware of the offender’s subculture and circumstances in order to issue a sanction that will punish by harming the offender’s status.\textsuperscript{171} Accordingly, a judge needs to be familiar with those subcultures and the effects shaming sanctions will have on the offender.

As Massaro points out, most judges, while having experience on the bench, do not have actual experience in the subculture.\textsuperscript{172} Each subculture has its own definitions of shame and as such, judges need knowledge of those subcultures to issue effective sanctions.\textsuperscript{173} By individualizing the offender, a judge can tailor the sanction to be effective without stigmatizing.

\begin{itemize}
\item \textsuperscript{167} Retzinger & Scheff , supra note 162.
\item \textsuperscript{168} See id.
\item \textsuperscript{169} See id.
\item \textsuperscript{170} See Massaro, supra note 28, at 1923.
\item \textsuperscript{171} See id.
\item \textsuperscript{172} See Massaro, supra note 28, at 1924.
\item \textsuperscript{173} See id.
\end{itemize}
As Judge Cicconetti stated, a judge sometimes has to be a psychologist, priest, rabbi, minister, drill sergeant, or parent.174

VII. ARE SHAMING SANCTIONS EFFECTIVE?

Judging the effectiveness of shaming sanctions is difficult due to the lack of many studies. In one very limited study, 97 percent of sex offenders did not repeat their offense.175 The judges issuing shaming sanctions produce most evidence of its effectiveness. In Sarasota County, Florida, Judge Titus initiated a DUI bumper sticker penalty in 1985.176 He claims that since the program began DUI arrests dropped one-third in the county.177 Judge Titus believes fear of public knowledge of the offense led to the reduction.178 Judge Cicconetti has said only two offenders who received his shaming sanctions have reoffended.179 Another famous issuer of shaming sanctions, Judge Poe, stated, "I have no stats, but people I've imposed this type of sentence on haven't been back through the system."180 While the anecdotal evidence is promising, independent studies are needed to assess the effectiveness of shaming sanctions.

VII. CONCLUSION

Given the rising prison population causing overcrowding and government spending on incarceration, the need for other punishment alternatives is apparent. Critics may say shaming sanctions will harm some offenders, but prison sentences carry the same, if not greater risk, of

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174 See THE DOCTOR PHIL SHOW, Supra note 57.
176 See Massaro, supra note 28, at 1887.
177 See id.
178 See Sanders, supra note 4, at 381-382.
179 See ABCNEWS, supra note 139.
180 See Sanders, supra note 4, at 382.
harming the offender. The stigma of a prison sentence lasts far longer than a limited shaming sanction.

No one form of punishment is appropriate for all offenders. Where prison is appropriate for violent or repeat offenders, shaming sanctions may be a better option for middle class, first time, drug, alcohol, or youth offenders. Judges will need the necessary education to identify which offenders will benefit from these sanctions.

The therapeutic jurisprudence goal of improving the emotional and psychological well-being of those involved in the judicial process can be aided by shaming sanctions. Through careful, non-stigmatizing sanctions, an offender can see the victims they have affected and how their actions have harmed those victims. The shame these victims feel can be taken on by the offender and both sides can move forward. Additionally, victims are not relegated to the sidelines of the judicial process, but rather a part of the punishment decision making. Given these benefits, it appears that shame can indeed be therapeutic.