

Chapter 10

Back to the Pillory?

Young drug dealers, caught for the first time peddling, should be sent home with their heads shaved and without their pants instead of being jailed, was a suggestion I cautiously floated. My liberal friends rolled their eyes and stared at me with open dismay. When I tried to explain that if the same youngsters are jailed they are likely to graduate more hardened criminals than when they entered the stockades, that rehabilitation in prisons is practically unknown, and young people are often abused in jails, one of my friends stated that the next thing I would suggest would be to mark people with scarlet letters. The others changed the subject.

A few weeks after this dinner conversation, a tragedy brought the merit of shaming back into public and scholarly discussion. I was a member of a panel of lawyers and academics who were asked by National Public Radio to discuss the rape and murder of a 7-year-old girl in a women's bathroom in a Las Vegas casino (NPR 1998). The media attention this time was not focused on the father, who left his child roaming the casino at 3:30 a.m., or on the rapist-assassin Jeremy Strohmeyer, but on a friend of the murderer named David Cash (Booth 2001). He accompanied Strohmeyer to the lady's room but did nothing to try to stop the savaging of Sherrice Iverson or to inform the police after the act.

In reaction, outraged Representative Nicholas Lampson drafted a Good Samaritan Act, which imposes severe punishments on those who do not stop a sexual crime against a child when they could do so at little risk to themselves, or who do not report such offenses to public authorities. UCLA law professor Peter Aranella, who joined the NPR conversation, argued that the punishment was too severe and suggested instead that a shorter jail sentence should suffice. Elizabeth Semil from the National Association of Criminal Defense Lawyers, also on the panel, was even more critical of the Good Samaritan draft act. She pointed out: "...Punitive legislation, criminal legislation, isn't the proper response." She also wondered out loud "whether making it criminal to fail to act is good public policy. In other words, is it

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going to assist in solving the problem? And my response to that is: absolutely not” (NPR 1998). A typical letter to the editor of the *Sacramento Bee* opined, “I realize this is a popular issue, but the consequences of a law of this nature are terrifying ... Americans would be required to function as part of the government apparatus ... Maybe you know someone who takes cash in their business, but doesn’t necessarily tell the IRS. You may go to jail for not turning that person in” (Sacramento Bee 1998). A commentator in Bergen, New Jersey’s *Record* holds forth, “As much as I’d like to encourage compassion and community, I think it’s too late to legislate such morality” (Sjoerdsma 1997).

I, too, wondered if Americans should and could be turned into a nation of police informers, a role often despised not merely by their fellow citizens but even by the police themselves. And yet there is a strong sense that Mr. Cash behaved poorly (or worse) and others must do better. One looks for ways Good Samaritans may be fostered but in some less punitive way, ideally one that entails no jail terms.

I suggested shaming. Instead of jailing future Cashes, the law should require that the names of *bad* Samaritans be posted on a website and in advertisements (paid for by the offenders) in key newspapers. Such posting would remove any remaining ambiguities concerning what society expects from people who can help others when there is no serious risk to their well-being. And those with a weak conscience or civic sense will be nudged to do that which is right by fearing that their names will be added to the list of bad Samaritans, their friends and families will chide them, and their neighbors will snicker (NPR 1998).¹

While there are no statistics on the matter, judges seem recently to be trying shaming more often than a decade or two ago, as a middle course between jailing offenders and allowing them to walk off scot free. Those convicted of driving under the influence of alcohol in Fort Bend County, Texas, must place “DUI” bumper stickers on their cars (Kahan 1996). A child molester in Port St. Lucie, Florida was ordered by a judge to mark his property with a sign warning away children. The same judge ordered a woman convicted of purchasing drugs in front of her children to place a notice in the local newspaper detailing her offense (Hoffman 1997, p. A1). Stephen K. Germershausen was ordered to place a 4 × 6 in. ad in his local Rhode Island newspaper, accompanied by his photo, reading, “I am Stephen Germershausen, I am 29 years old ... I was convicted of child molestation ... If you are a child molester, get professional help immediately, or you may find your picture and name in the paper...” (Massaro 1991). A Tennessee judge sentenced a convicted defendant to confess his crime of aiding in the sale of a stolen vehicle before a church congregation (Massaro 1991). Syracuse puts embarrassing signs in front of buildings owned by slum lords, and Des Moines publishes their names in newspapers (Belluck 1998, pp. A4–A5).

Far from being widely hailed as a more humane and just way of punishing offenders and deterring others, judicial shaming has raised waves of criticism that

¹The larger sociological issues of shaming and juvenile crime, and the need for alternative punishments and the use of *social* instead of legal controls, are explored throughout Etzioni 2003.

put to shame my friends' reaction to my proposals. Nadine Strossen, president of the American Civil Liberties Union (ACLU) was rather gentle: "I'm very skeptical when criminologists and sociologists say that the best way to rehabilitate someone is to isolate him and put some sort of scarlet letter on him. We need to integrate criminals back into our community"(CQ Researcher 1997, p. 252). The ACLU's Mark Kappelhoff states that "Gratuitous humiliation of the individual serves no societal purpose at all ... and there's been no research to suggest it's been effective in reducing crime" (Allen-Mills 1997). Judge Politan, U.S. District Court (N.J.), wrote similarly that:

[S]ocieties have often used branding or close equivalents thereto as means of making certain persons or groups of persons easily identifiable and thus, easily ostracized or set apart ... A clear example of such branding, justified by a social purpose wrongfully deemed acceptable by the populace, was the requirement in Nazi Germany that Jews wear the Star of David on their sleeve so that they might easily be identified ... This Court must determine whether Megan's Law and its attendant notification provisions amount to a branding of registrants with a 'Mark of Cain' or a 'Scarlet Letter,' thus rendering them subject to perpetual public animus (American Civil Liberties Union 1996).

Law professor Evan Cherminsky is also concerned about shaming, claiming, "The real measure of how civilized we are is the way we choose to punish people. It's not civilized to tell somebody 'you're going to sit in the stocks and we're going to throw stones at you'" (American Civil Liberties Union 1996).² Carl F. Horowitz, Washington correspondent for *Investor's Business Daily*, attacks shaming, which he writes includes public hanging, beheading of drug dealers, blacklisting, and boycotts (Horowitz 1997, p. 71).

When I faced similar challenges from a class I teach at The George Washington University, I suggested an examination of shaming suffers if one labels all punitive measures one disapproves of and seeks to shun as shaming. True or pure shaming entails only *symbolic acts* that communicate censure, ranging from relatively gentle acts such as according a student a C+ or sending a disruptive kid to stand in the classroom's corner, to such severe measures as marking the cars of convicted repeat drunk-drivers with glow-in-the-dark "DUI" bumper stickers. Shaming differs sharply from many other modes of punishment—public flogging, Singapore style, for instance—in that the latter inflict bodily harm, rather than being limited to psychic discomfort. While shaming has some untoward consequences of its own, it is relatively light punishment, especially if one takes into account that most other penalties shame in addition to inflicting their designated hurt.

I also stressed that shaming is morally appropriate or justified only when those being shamed are acting out of free will. To the extent that people act in ways that the law or prevailing mores consider inappropriate, but cannot help themselves from doing so (such as when those with mental illnesses defecate in the streets or scream

²See also: ACLU 1999 ("Notification laws will not prevent sex offenders from committing crimes, the ACLU said but rather will victimize rehabilitated ex-offenders and their families. Those in stable environments have the highest likelihood of staying out of trouble. Attacking the family unit by publicizing this information will only make ex-offenders more likely to reoffend."); McAlinden 2007, pp. 42–46.

their head off at 3 a.m.), chiding them is highly inappropriate. They are to be helped, removed if need be, but hardly shamed.

When I tried to advance similar arguments on NPR, Ms. Semil would not have any of it; she instead would rely on education, celebrating those who conduct themselves as Good Samaritans rather than punishing those who do not:

Instead of thinking about ways in which we can shame people, let's think about ways in which we can honor or hold up examples of the many heroes that we read about every week who risk their lives to save others; in other words, teaching by positive example children and adults that, indeed, this kind of behavior is rewarded and respected and admired (NPR 1998).

Such suggestions show that one's assessment of shaming is highly colored by one's assumption of human nature. Ms. Semil belongs to the sanguine camp that believes that people can be convinced to conduct themselves in a virtuous manner solely by means of praise, approbations, and words of encouragement, or by drawing on non-judgmental responses, allowing the goodness of people to unfold. For those who share this view, shaming is not merely cruel but also unnecessary punishment; indeed, punishment in general is anti-social. Many of those who hold this view of human nature tend also to believe that people are good by nature; if they misbehave—either the demands imposed on them are unjust or their behavior reflects distorting forces which they neither caused nor are able to control (for instance, that they were abused by their own parents).

I file with those who hold that a world of only positive reinforcements, while in theory very commendable, is not within human reach, and that hence a society must—however reluctantly—also employ some forms of punishment. Granted, we should first determine if the social demands are fair and reasonable, and to what extent we can rely upon positive inducements in given situations. But, at the end of the day, some form of disincentive—hopefully sparing and mostly of the gentle kind—cannot be avoided. Or, as Judge Ted Poe, a strong proponent of shaming penalties, puts it, "...a little shame goes a long way. Some folks say everyone should have high self-esteem, but that's not the real world. Sometimes people should feel bad" (Massaro 1991, pp. 1880, 1883).

An often overlooked feature of shaming, I should add, is that it is deeply democratic. Shaming reflects the community's values, and hence cannot be imposed by the authorities per se against a people. Thus, if being sent to the principal's office is a badge of honor in a person's peer culture, no shaming will occur in that situation. A yellow star, imposed to mark and shame Jews in Nazi Germany, is worn as a matter of pride in Israel. Thus, people are better protected from shaming that reflects values that are not shared by the community than from other forms of punishment, punishment that can be imposed by authorities without the specific consent of those who are governed.

Critics are quick to turn the communitarian tables on those who seek to use community to shame offenders by pointing out that communitarians have shown that communities are waning. Legal scholar Toni M. Massaro argues in the *Michigan Law Review* (1991, p. 1921) that shaming will be cogent and productive only if five conditions coexist.

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 decisionmaker'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.

But, Massaro adds, the “cultural conditions of effective shaming seem weakly present, at best, in many contemporary American cities.” While granting that it is unfair to say that “Americans have no commonly shared instincts about crime or about shame,” Massaro believes that “American subculturism, or cultural pluralism, is pronounced enough to make broad conclusions about our moral coherence suspect, and thus to undermine the likely effectiveness of widespread government attempts to shame offenders, absent significant decentralization of criminal law authority and the delivery of formal norm enforcement power to the local subcultures” (Massaro 1991, p. 1923; see also Markel 2007, p. 1385).

Massaro and others who draw on communitarians' arguments do not take into account that while communities clearly are much weaker now than they were in, for instance, colonial days, they are not powerless, especially in smaller towns and in what have been called urban villages, numerous ethnic concentrations in big cities that form rather strong communities—Chinatown in New York City, for instance. Otherwise shaming would be no punishment at all. People are, however, very reluctant—ashamed—to drive around with a DUI marker on their car or to take ads in their town newspaper that contain their picture, apologizing for their offenses. Indeed, an accountant, who was sentenced to stand in his neighborhood with a sign “I embezzled funds” seemed deeply distraught when interviewed, and mused that he might have been better off if he had instead accepted a jail sentence.

Hardly indifference. A woman convicted of welfare fraud in Eau Claire, Wisconsin preferred to be jailed than wear a sign admitting, “I stole food from poor people.” In arguing about these matters with liberal criminologists, I picked up a useful distinction between two kinds of shaming, one that isolates and is to be avoided, and one that reintegrates offenders into communities and is to be preferred. Liberal criminologists worry that once a person is shamed, he will be cut off from his community and withdraw into himself or worse, into a criminal subculture, and hence will be unlikely to be rehabilitated. Instead, criminologists suggest dealing with crimes in a way that restores people to good standing in their communities. The measures they favor include face-to-face meetings of the offenders and the victims, “facilitated” by community members; the offenders making amends (for instance, rebuilding a fence their car demolished); and closure, a ritual of reconciliation and forgiveness, all of which restore the offender to full membership in the community. David Karp (1998, p. 292), a criminologist, adds, “These efforts may be through

social services or local economic efforts to change the social conditions of the offender's neighborhood."

Reintegrative shaming may well be the best shaming there is, although the jury is out on whether it can be made to work, especially for offenders who are members of different communities than their victims, such as gang members. In effect, any kind of shaming will work only if it is couched in the reference terms of the community of the offenders—or if these terms can be changed as shaming occurs.

Our history offers some lessons on the working of shaming, mainly what happens to a good thing when it is driven too far, much too far. Most importantly, history teaches us the significance of the particular context. In colonial America shaming was very common, not merely one tool of punishment among others but a major one. Indeed, historians report it often worked so well, no prisons were deemed necessary in some colonies, for instance, in South Carolina. (Reference is only to white folks; slaves were savagely treated.)

One reason shaming was so powerful is that it took place in communities that were much smaller, tightly knit, and moralistic than any known to us today on these shores. Historian Lawrence M. Friedman (1994, pp. 36–37) describes them as "little worlds on their own, cut off from each other..." and "...small-town life [was] at its most communal—inbred and extremely gossipy." Another historian, Roger Thompson, writes about Massachusetts that its communities were "well stocked with moral monitors who did not miss much in the goldfish-bowl existence of daily life" (Friedman 1994, p. 37). Single people who moved into colonies were required to board with someone, so that the community could better keep an eye on them.

In contrast, today many Americans are members of two or more communities (for instance, at work and where they reside) and psychologically can shift much of their ego involvement from a community that unduly chastens them to another. While it was not practical for most individuals to escape from one community to another during colonial times, today the average American moves about once every 5 years, and in the process chooses to which community he or she is willing to subject himself. Moreover, privacy at home is much greater, and the moral agenda of most communities is almost incomparably shorter.

In short, the colonial era shows us how little we now seek to shame about and how limited our ability to shame actually is. (Amy Gutmann, a liberal philosopher and former professor at Princeton University, once quipped that "communitarians seek Salem without witches," which the communitarians took as a scorching criticism. As I see it, we communitarians should, shamelessly, plead guilty as charged. We do favor communities in which moral mores are upheld without witch hunts, and maintain that in our kind of society this is possible.)

The purest form of shaming was 'admonition.' Law professor Adam Hirsch (1982, pp. 1179, 1224) described it as follows:

Faced with a community member who had committed a serious offense, the magistrates or clergymen would lecture him privately to elicit his repentance and a resolution to reform. The offender would then be brought into open court for formal admonition by the magistrate, a public confession of wrongdoing, and a pronouncement of sentence, wholly or partially suspended to symbolize the community's forgiveness.

“The aim was not just to punish, but to teach a lesson, so that the sinful sheep would want to be back to the flock,” writes Friedman (1994, p. 37).

The emphasis on reintegrative justice should appeal to the progressive criminologists who seek to restore it, although for others it may evoke the image of a Soviet or Chinese trial. Having witnessed one of these, what offended me most was not the shaming per se but the kind of matters people were shamed for, having conceived a second child and listened to the BBC.

While pure (merely symbolic) shaming was employed in the colonial era and long thereafter, often it was mixed with other forms of punishment such as fines, whipping, and worse.

Stocks and pillories combined holding people up for public ridicule, with confining their movements, exposing them to the elements, and at least a measure of physical discomfort.

Friedman describes another common shaming measure, which was to make the culprit (a thief) wear for 6 months a “Roman T, not less than four inches long and one inch wide, of a scarlet colour, on the outside of the outermost garment, upon the back, between the shoulders, so that all times to be fully exposed to view, for a badge of his or her crime.” A robber had to wear a scarlet R; and a forger, a scarlet F “at least six inches long and two inches wide” (Friedman 1994, p. 75).

But, unlike the DUI signs today, wearing of these insignia was preceded by a public whipping in a considerable number of cases.

All said and done it is easy to see why shaming as practiced in earlier periods or in other kinds of societies has left it in ill-repute. We best think about shaming in terms of how different our much more liberal and tolerant society may adapt it to our needs rather than be swayed by an anachronistic image.

Most important, one must not evaluate any social policy in itself but must compare it to others. The existing criminal justice system jails millions of people, about half of them for non-violent crimes mainly dealing in controlled substances. Offenders are incarcerated for ever longer periods, in harsher conditions, with fewer opportunities for parole. Still, the system rehabilitates very few, and the recidivism rate is very high, all while imposing high charges on the taxpayers. A year in jail costs the public about the same as a year at one of our nation’s most costly colleges (see Schmitt et al. 2010). Ergo, society is keen to find some new, more effective, more humane, and less costly modes of deterrence. Whether it works, and for which kinds of offenders, we are about to find out, that is, if our well-meaning progressive friends will allow us to proceed.

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