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TRENDING NOW: THE USE OF SOCIAL MEDIA WEBSITES IN PUBLIC SHAMING PUNISHMENTS

Lauren M. Goldman*

I. INTRODUCTION

Imagine logging into your Facebook account and the first thing you see is a picture of someone you know. Maybe it is a friend from high school or college, perhaps a colleague, a family member, or an acquaintance you have not spoken to for years. This picture is odd because it is unlike a typical Facebook picture of a friend's wedding or a colleague's birthday party: it is that person's mug shot. Alongside the mug shot, the caption reads: "I am a thief. This is my punishment."

At first blush, this scenario seems completely outlandish. However, shaming punishments are alive and well in today's society and are often imposed upon convicts as part of their probation conditions. Courts have yet to take these shaming punishments to the realm of online social media, but such punishments have included other forms of public display¹ and have also infiltrated print media.² In today's technologically driven world, it is possible that the next step for the judiciary would be to incorporate the realm of online social media into its public shaming punishments.

Recently, the Ninth Circuit validated public shaming punishments in *United States v. Gementera*.³ In *Gementera*, the court upheld the district court's probation condition, which required a twenty-four-year-old convicted mail thief to stand outside of a postal office for eight hours and wear a sandwich board that read: "I

* Georgetown University Law Center, J.D. 2014. I would like to thank the ACLR staff for their suggestions and guidance throughout the process of editing this Note. © 2014, Lauren Goldman.

1. See, e.g., *People v. McDowell*, 130 Cal. Rptr. 839, 842–43 (Cal. Ct. App. 1976) (observing that a probation condition requiring a thief to wear tap shoes anytime he leaves the house is not constitutionally unreasonable merely because the condition is out of the ordinary); *Goldschmitt v. State*, 490 So. 2d 123, 124–25 (Fla. Dist. Ct. App. 1986) (concluding display of a bumper sticker that read "CONVICTED D.U.I.—RESTRICTED LICENSE" as part of defendant's punishment "is not necessarily offensive to the Constitution"); *Ballenger v. State*, 436 S.E.2d 793, 795 (Ga. Ct. App. 1993) (upholding a probation condition requiring the defendant to wear a fluorescent pink bracelet reading "D.U.I. CONVICT"); Ron Word, *Better Than Jail Time? Some Judges Try Unusual Sentences*, L.A. TIMES (Nov. 4, 2007), <http://articles.latimes.com/2007/nov/04/news/adna-sentences4> (describing judicial sentences that include requiring offenders to wear signs articulating their crimes).

2. See *United States v. Clark*, 918 F.2d 843, 845, 848 (9th Cir. 1990) (concluding that a condition of probation for the defendant, a police officer convicted of perjury, to publish an apology in a local newspaper was not an abuse of discretion); *Lindsay v. State*, 606 So. 2d 652, 653–54, 658 (Fla. Dist. Ct. App. 1992) (upholding probation condition requiring probationer to place an advertisement in a local newspaper that consisted of the probationer's mug shot, name, and the caption "DUI—Convicted"); see also Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, N.Y. TIMES (Jan. 16, 1997), <http://www.nytimes.com/1997/01/16/us/crime-and-punishment-shame-gains-popularity.html> ("Convicted shoplifters must take out advertisements in their local newspapers, running their photographs and announcing their crimes.").

3. 379 F.3d 596 (9th Cir. 2004).

stole mail. This is my punishment.”⁴ Although humiliating, the Ninth Circuit observed that criminal conviction is inherently humiliating.⁵ Subsequently, the court of appeals concluded that the district court judge, Judge Vaughn Walker, imposed the condition for the legitimate statutory purposes of rehabilitation, deterrence, and protection of the public, and that the condition was reasonably related to the purpose of rehabilitation.⁶

One month after standing outside the postal office with the sandwich board, Gementera stole mail for the second time.⁷ Gementera was again in front of Judge Walker, who expressed frustration that his original sentence had not “put [Gementera] on the right track.”⁸ This result raises an important question: what type of punishment *would* have put Gementera on the right track? As the Ninth Circuit noted in its decision affirming Judge Walker’s signboard requirement, “much uncertainty exists as to how rehabilitation is best accomplished,” and recidivism rates are unfortunately extremely high, regardless of the type of punishment.⁹

Some commentators argue that although public shaming sanctions were once effective, they are no longer useful because modern societal conditions do not foster an environment in which such punishments thrive.¹⁰ Others argue that shaming sanctions are inherently cruel and socially unacceptable.¹¹ Nonetheless, courts continue to implement public shaming sanctions and the legal community has been unable to agree upon a common objection to them.¹²

As public shaming sanctions continue to be issued, one begins to wonder where they will go next. Over time, these sanctions have evolved from the placement of offenders in stocks, which restrained the offender’s hands and feet between wooden boards,¹³ to the positioning of the previously described offender in front of a post office wearing a signboard.¹⁴ Further, some courts have taken these punishments to print media, requiring offenders to have their names and mug shots

4. *Id.* at 598.

5. *Id.* at 605.

6. *Id.* at 607.

7. Pam Smith, *Scarlet Letter Sentence Doesn’t Work*, 130 RECORDER 12, 12 (2006).

8. *Id.*

9. *Gementera*, 379 F.3d at 604. The court observed that “two-thirds of the 640,000 state and federal inmates who will be released in 2004 will return to prison within a few years.” *Id.* (citing *The Price of Prisons*, N.Y. TIMES (June 26, 2004), <http://www.nytimes.com/2004/06/26/opinion/the-price-of-prisons.html>; BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002) (finding a 67.5% recidivism rate within three years of release among study population of 300,000 prisoners released in 1994)).

10. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1922–24 (1991).

11. See Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1382–84 (1989); see also Massaro, *supra* note 10, at 1942; James Q. Whitman, *What is Wrong With Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1057 (1998).

12. See Whitman, *supra* note 11, at 1057.

13. ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 5 (1992).

14. See *United States v. Gementera*, 379 F.3d 596, 598 (9th Cir. 2004).

publicized.¹⁵ Although Gementera became a repeat offender, it is unclear what caused this result. Gementera may have stolen mail again because his punishment included an inherently ineffective shaming punishment. On the other hand, perhaps that *particular type* of shaming punishment simply did not work. The judiciary has already shown vast creativity in sentencing, and it may be time to continue innovating.¹⁶

Believing that public shaming punishments generally have the ability to positively affect their children's behavior, parents have utilized public shaming punishments in much the same way as courts have.¹⁷ Some parents have even taken to their children's social media profiles to punish their children because they believe that using social media as a means to punish might be effective in today's culture.¹⁸ If parents are using this method of punishment, it may be time for the courts to take note. Gementera was twenty-four years old at the time he committed his crime, and had been a past offender since the age of eighteen.¹⁹ People in this age group frequently use social media websites, such as Facebook.²⁰ What if Judge Walker's sentence had required Gementera to post his mug shot on his Facebook page accompanied by the caption, "I stole mail. This is my punishment"? This Note proposes that this type of shaming sanction might be an effective addition to the menu of public shaming punishments the judiciary already offers.²¹

15. See *supra* note 2.

16. Innovation may come from within the court system, or even from local law enforcement. See *Gementera*, 379 F.3d at 610 (noting that "in comparison with the reality of the modern prison, we simply have no reason to conclude that the sanction . . . exceeds the bounds of 'civilized standards' or other 'evolving standards of decency that mark the progress of a maturing society'"); Philip Caulfield, *Huntington Beach, Calif., Plagued by Drunk Drivers, Considers Posting DUI Mugshots on Facebook*, DAILY NEWS (Jan. 18, 2011, 9:22 AM), <http://www.nydailynews.com/news/national/huntington-beach-calif-plagued-drunk-drivers-considers-posting-dui-mug-shots-facebook-article-1.152163> (describing police department's consideration of shaming arrested, not convicted, drunk drivers by posting their mug shots on Facebook); Wes Venteicher, *Suburban Police Department to Tweet Names of DUI Suspects*, CHI. TRIB. (Dec. 10, 2013), http://articles.chicagotribune.com/2013-12-10/news/chi-drunk-driving-tweets-riverside-20131210_1_impaired-drivers-names-drunk-driving-arrests (discussing choice of police department to start tweeting information of anyone arrested of drunk driving).

17. See *infra* Section V.B.

18. See *infra* Section V.B.

19. *Gementera*, 379 F.3d at 598.

20. See David Cohen, *AllFacebook Stats Adds Data by Country*, ALLFACEBOOK (May 14, 2012, 11:50 AM), http://allfacebook.com/allfacebook-stats-by-country_b88679 (noting in a table that there are approximately eighteen million male Facebook users between the ages of eighteen and twenty-four).

21. This Note's discussion and analysis assume that the particular offender actually has an online social media presence. An argument can be made that public shaming sanctions involving the use of social media will be ineffective because such punishments will have no use in relation to certain criminals, particularly those who are poor and have no Internet access. However, at most, this consideration just advances the argument that the judiciary should be *selective* in imposing such sanctions. See *infra* Section VI. Further, it seems unlikely that all potential offenders in a class of criminals, including drunk drivers, embezzlers, thieves, or rapists, would escape the reach of this sort of shaming sanction. As a particular illustration of the pervasiveness of social media as of 2014, approximately 1.35 billion people use Facebook each month. *Newsroom*, FACEBOOK, <http://newsroom.fb.com/Key-Facts> (last updated Sep. 30, 2014). Additionally, as of 2012, approximately 173 million people subscribed to Facebook in North America. *Facebook Users in the World: Facebook Usage and Facebook Growth*

Section II of this Note lays the foundation of shaming punishments in America, giving an overview of their history and development. Section III discusses the Ninth Circuit's recent decision in *Gementera*, in which the court upheld a modern-day public shaming punishment, as well as other select cases that have upheld public shaming punishments that involve print media. Section IV outlines the current scholarly debate surrounding the use of public shaming punishments. Section V gives an overview of the presence of social media and Internet usage in today's society, discusses a new trend among parents in which parents have begun to utilize social media to punish their children, and evaluates public shaming punishments via social media websites from the vantage point of various criminal law theories. Finally, Section VI advocates for the inclusion of online social media public shaming punishments into the judiciary's already expansive list of sentencing options, but with some limitations and guidelines.

II. THE HISTORY OF PUBLIC SHAMING PUNISHMENTS

A. *Public Shaming Punishments in Colonial America*

The Scarlet Letter illustrates the classic public shaming punishment, where the protagonist Hester Prynne must wear a scarlet letter "A" on her chest to represent her adulterous behavior.²² In early America, shaming punishments were among the most popular methods of criminal sanctioning.²³ Vivid images of public punishments involving the stocks come to mind whereby the offender's hands and feet were restrained between wooden boards.²⁴ Sentences often included the requirement that the offender display a sign or write a letter announcing his wrongful behavior.²⁵ Flogging and branding were also used, but were considered more severe forms of public shaming punishments because they involved an element of physical pain.²⁶ The use of pillories, which were similar to the stocks except that the offender's head was also constrained,²⁷ seemingly developed to punish those criminals whose offenses did not warrant a harsh physical component. Arguably then, the only conceivable characteristic of punishment in the use of the pillory

Statistics by World Geographic Regions, INTERNET WORLD STATS, <http://www.internetworldstats.com/facebook.htm> (last visited Dec. 22, 2014). These numbers have been on the rise each year, even in developing nations. *Id.*

22. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Bill Blauvelt, ed., Townsend Press, 2007) (1850).

23. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 38 (1993) (noting that shaming punishments were used with great frequency in colonial America).

24. HIRSCH, *supra* note 13, at 5; Whitman, *supra* note 11, at 1060–61 (1998) (noting that flogging and using the pillory and stocks were regarded as shaming sanctions in the seventeenth and eighteenth centuries).

25. See Massaro, *supra* note 10, at 1913–14 (outlining common techniques to publicly shame offender).

26. FRIEDMAN, *supra* note 23, at 40 (observing that branding was used to mark an offender to the public); HIRSCH, *supra* note 13, at 5 (noting the use of branding to warn the community of a person's criminal propensities); Brilliant, *supra* note 11, at 1361 (describing the use of branding and flogging in American colonies); Massaro, *supra* note 10, at 1913 (discussing how branding and maiming effectively cast the offender out of the community).

27. HIRSCH, *supra* note 13, at 5.

was for the purpose of public display, and thus humiliation.²⁸ In colonial America, these types of punishments were extremely common and the public usually participated in their administration.²⁹

Scholars offer various theories as to why shaming sanctions were so popular during this time period. One theory rests on the fact that most American societies were small, close-knit communities in which people knew each other very well.³⁰ Any sort of public display emanating from a criminal's offense was utterly humiliating to offenders who knew the majority of the watchful crowd.³¹ Consequently, community members would be aware of the offender's crime, spread this information to others, and criminals would thus feel the sting of shame.³² Fear of public exposure and community disapproval made public shaming punishments extremely effective because it deterred crime and controlled deviant behavior.³³ However, these punishments were only successful because of "the community's familiarity with the offender and his recognized membership to the community";³⁴

28. HARRY ELMER BARNES, *THE STORY OF PUNISHMENT: A RECORD OF MAN'S INHUMANITY TO MAN* 62–63 (2d ed. 1972) ("When the pillory was employed in a simple fashion and not accompanied by any other mode of punishment, its operation was chiefly psychological, and it was designed to bring about the feeling of humiliation naturally attendant upon the infliction of public disgrace."); see 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, 363 (1998) ("While the physical abuse was severe, the accompanying shame was often the most painful ingredient of the punishment.").

29. Dan M. Kahan, *What Do Alternative Sanctions Mean*, 63 U. CHI. L. REV. 591, 611 (1996); see HIRSCH, *supra* note 13, at 5 (noting that public shaming was performed before the assembled community on market or lecture days).

30. See MICHAEL STEPHEN HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA 1767-1878*, at 100–01 (1980); Aaron S. Book, Note, *Shame on You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653, 658 (1999) (noting that the first shame sanctions responded to the closeness of communities); see also Massaro, *supra* note 10, at 1916 (explaining that the offender needs to be part of a group for shaming to be effective).

31. HIRSCH, *supra* note 13, at 34 ("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."); see also Massaro, *supra* note 10, at 1902, 1916.

32. Deni Smith Garcia, *Three Worlds Collide: A Novel Approach to the Law, Literature, and Psychology of Shame*, 6 TEX. WESLEYAN L. REV. 105, 111 (1999) (noting that an offender must be a member of a group whose members know of the shaming and that the group must actually shun the offender); Massaro, *supra* note 10, at 1902 (describing the necessity of offender communicating shame to the group, the group's actual knowledge of the act, and group withdrawal and how important community perception and disapproval were to offenders); see HIRSCH, *supra* note 13, at 34 (observing that offenders felt shame when they knew and respected their onlookers).

33. See Phaedra Athena O'Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783, 805 (1998) (noting the large fear of "losing face" among community members); see also Sanders, *supra* note 28, at 361 ("In colonial America, shame punishments led to shunning by the community, a high price to pay in New England's close-knit communities."); Leslie Cannold, *Power of Shame Rules Our Actions*, THE AGE (Jan. 11, 2014), <http://www.theage.com.au/comment/power-of-shame-rules-our-actions-20140110-30mc7.html> (explaining that shaming is an effective form of social control because individuals care about what others think).

34. Barbara Clare Morton, Note, *Bringing Skeletons Out of the Closet and into the Light—"Scarlet Letter" Sentencing Can Meet the Goals of Probation in Modern America Because It Deprives Offenders of Privacy*, 35 SUFFOLK U. L. REV. 97, 103 (2001); see HIRSCH, *supra* note 13, at 34 (arguing that the communal character of colonial American towns fostered an environment in which public shaming was effective).

if a wrongdoer did not have a connection with the community, public shaming sanctions would most likely not affect that criminal's behavior.³⁵

A related explanation for the success of shaming punishments in early America stems from the limited mobility during this time period.³⁶ Most residents of small communities were life-long members who rarely contemplated moving elsewhere.³⁷ Thus, small communities that rarely diversified their membership perpetuated the ability for shaming punishments to have a powerful effect. Additionally, because imprisonment was expensive in the colonial period just as it is today, public shaming sanctions presented a cheaper form of punishment.³⁸ Therefore, public shaming punishments were preferable because they were inexpensive to administer and effective within immobile communities.

Finally, the presence of religion in colonial America played a large role in the effectiveness of shaming sanctions.³⁹ Community members were often "stern moralists" because of their strict religious beliefs.⁴⁰ Religious virtues infiltrated society and created "a clear manner in which citizens were expected to behave."⁴¹ "Law and religion were so deeply intertwined that colonists even shaped their laws around their religious precepts, equating crime with sin."⁴² If one was publicly shamed, it meant that he not only broke the written law but also the law of a higher power. Thus, a society in which the entire community held strong negative beliefs about criminal behavior created an environment in which shaming sanctions were extremely effective.

The combination of close-knit communities, lack of mobility among such communities, the cost-effectiveness of public shaming punishment, and the prevailing religious discipline of the time fostered an environment in which shaming punishments flourished. However, by the nineteenth century, public shaming sanctions had fallen out of favor.

35. HINDUS, *supra* note 30, at 100–01 (describing the reasons why public shaming punishments fell out of use in Massachusetts in the early nineteenth century but continued in South Carolina, "a relatively stable rural state where face-to-face contact remained important and where honor was accorded great protection"); HIRSCH, *supra* note 13, at 40 (arguing that public shaming failed when the offender lacked community ties); Massaro, *supra* note 10, at 1903 (noting that shaming loses its sting if the audience ignores the public spectacle).

36. Morton, *supra* note 34, at 103; *see* HIRSCH, *supra* note 13, at 32 (noting the limited mobility in early colonial America).

37. Morton, *supra* note 34, at 103; *see* HIRSCH, *supra* note 13, at 32–33 (noting the existence of life-long residents in many towns that experienced little turnover in population).

38. *See* HIRSCH, *supra* note 13, at 8.

39. Morton, *supra* note 34, at 103; *see* Sanders, *supra* note 28, at 361–62 (asserting that religion played a "heavy role in the colonial philosophy of punishment").

40. Morton, *supra* note 34, at 103.

41. *Id.* at 104.

42. *Id.* at 103.

B. *The Rise of the Penitentiary*

By the nineteenth century, the widespread use of public shaming sanctions was replaced by another form of punishment: incarceration. Social, cultural, and political changes have been credited with the virtual elimination of public shaming punishments.⁴³ Public shaming punishments became less effective due to the industrialization of society, which led to the elimination of the close-knit communities that were a staple of the colonial era.⁴⁴ This time period saw unprecedented population growth as well as increased mobility.⁴⁵ The small communities of the past were replaced by larger and more urban communities where anonymity was much more common.⁴⁶ Thus, the threat of being displayed in the pillory would be much less daunting when passersby were people with whom offenders were unacquainted.⁴⁷ “[I]n a society of strangers, the bare deprivation of status no longer resonated as a symbol of the community’s moral disapproval.”⁴⁸ The breakdown of the community “weakened the sensation of suffering that had accompanied public spectacles.”⁴⁹ As impersonal communities became the new norm, society no longer fostered an environment in which shaming penalties could be successful.⁵⁰

Additionally, public shaming punishments became the target for reform as American society continued to democratize after the Revolutionary War.⁵¹ When such punishments were in use during the colonial period, they reflected a sense of hierarchy: sovereigns disciplined their subordinates with such tactics and this

43. See e.g., HINDUS, *supra* note 30, at 100 (arguing that the abolition of shaming punishments reflected changes in culture and the social structure of society); HIRSCH, *supra* note 13, at 38 (asserting that social changes impeded the effectiveness of public shaming punishments); Kahan, *supra* note 29, at 611–12 (discussing the democratization of American society as a change that “unleashed a passion for equality that impelled Americans to root out all perceived vestiges of social hierarchy from within their basic institutions and laws”); Douglas Litowitz, *The Trouble with ‘Scarlet Letter’ Punishments: Subjecting Criminals to Public Shaming Rituals as a Sentencing Alternative Will Not Work.*, 81 JUDICATURE 52, 54 (1997) (observing that public shaming punishments declined because of the newly “impersonal, secular, and industrial” American society).

44. KERMIT L. HALL ET AL., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* 243 (2d ed. 1996) (“Industrialization, urbanization, territorial growth, and immigration transformed nineteenth-century American society.”); Sanders, *supra* note 28, at 365 (asserting that the breaking up of close-knit communities contributed to the decline of shaming punishments); Morton, *supra* note 34, at 105 (noting the “metamorphosis of American communities from small, intimate, and tight-knit to urban, sprawling, and anonymous”).

45. Morton, *supra* note 34, at 105–06; see HIRSCH, *supra* note 13, at 35 (noting the large population boom and increased mobility that was characteristic of Massachusetts in the eighteenth century).

46. Morton, *supra* note 34, at 105–06.

47. See HINDUS, *supra* note 30, at 100; HIRSCH, *supra* note 13, at 38.

48. Kahan, *supra* note 29, at 611.

49. Morton, *supra* note 34, at 106; see HIRSCH, *supra* note 13, at 38 (noting that criminal anonymity weakened the effectiveness of public shaming punishments).

50. Morton, *supra* note 34, at 106; see O’Hara Kelly, *supra* note 33, at 806 (noting the demise of shaming punishments as a result of changing society).

51. See Kahan, *supra* note 29, at 611–12; Morton, *supra* note 34, at 107 (“The United States’ independence from Britain and its accompanying reformation of penal ideology also contributed to the disuse of shaming penalties.”).

included the government's punishment of lowly criminals.⁵² The American Revolution had sparked a new passion for equality within society,⁵³ and certain public shaming punishments that had been an instrument of private tyranny, such as whipping, were now viewed as "unrepublican" and offensive to a citizen's dignity.⁵⁴ As a result, public shaming punishments became unacceptable because they expressed notions of hierarchy in a society now characterized by egalitarian values.⁵⁵

The development of this "new" society facilitated the need for a different form of punishment that would reflect its new values. As American society rejected the hierarchical structure it had just broken away from, Americans began to develop a growing sense of individual liberty.⁵⁶ Consequently, "the threat of liberty deprivation seemed a natural replacement for the threat of status deprivation formerly associated" with public shaming punishments.⁵⁷ Liberty deprivation as a mode of discipline seemed well-suited to an egalitarian society in which "imprisonment expressed what citizens of a republic shared—their liberty."⁵⁸ One of the main reasons behind the development of long-term prison sentences as a form of punishment was the belief that it was an appropriate method of expressing moral condemnation in the current time period.⁵⁹ Prison was perceived to underscore social equality in the same way that public shaming punishments were perceived to underscore social status. Even though incarceration was used during the colonial period, albeit extremely rarely,⁶⁰ it became the preferred means of punishment to deter and control deviant behavior by the middle of the nineteenth century.⁶¹

The historical evolution of shaming punishments above suggests that imprisonment became the dominant form of punishment because of the necessity for a new method of punishment that would effectively control conduct in the face of altered

52. See Kahan, *supra* note 29, at 612.

53. *Id.* at 611.

54. FRIEDMAN, *supra* note 23, at 74 (describing how whipping had been used as a form of social control within schools, prisons, families, the navy, and on southern plantations).

55. Kahan, *supra* note 29, at 612; see MYRA C. GLENN, *CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA* 56 (1984) ("Although convicts were certainly not free men, prison reformers believed that the latter's discipline should reflect the republican principles of the nation as much as possible.").

56. See Kahan, *supra* note 29, at 613.

57. *Id.* at 613; see HIRSCH, *supra* note 13, at 75–76 (comparing the penitentiary to slavery).

58. Kahan, *supra* note 29, at 613; see GLENN, *supra* note 55, at 56 ("[R]eformers believed that liberty from external constraints was the essence of freedom in a republic.").

59. Kahan, *supra* note 29, at 612–13 (noting that the rise of the penitentiary was also the product of the ideal of rehabilitation).

60. See *e.g.*, FRIEDMAN, *supra* note 23, at 77 ("[J]ail was essentially a place to hold people for trial who could not make bail, and for debtors who could not pay debts."); HIRSCH, *supra* note 13, at 8; Morton, *supra* note 34, at 107–08 n.78.

61. Kahan, *supra* note 29, at 612; Morton, *supra* note 34, at 108.

social conditions.⁶² In other words, shaming punishments *themselves* were not innately ineffective; rather, they were unsuccessful due to changes in society.⁶³ As an illustration, public shaming sanctions continued to be used within small communities, such as prisons themselves, because they remained effective in those types of environments.⁶⁴ Therefore, there is still a possibility that shaming punishments can be successful under appropriate circumstances in modern society.

III. PUBLIC SHAMING PUNISHMENTS IN TODAY'S SOCIETY

Although incarceration has become the main method of punishing criminals, the judiciary has been extremely creative in utilizing public shaming sanctions as part of the criminal justice system. Dan Kahan, a leading scholar in the field of criminal law, groups these types of sanctions into four classes: stigmatizing publicity, literal stigmatization, self-debasement, and contrition.⁶⁵ These categories include punishments with characteristics such as the following: publishing offenders' names in newspapers,⁶⁶ having an offender wear a t-shirt announcing his or her crime or having the offender attach a sign with the same message to his property such as his car,⁶⁷ publicly disgracing the offender through a ceremony or ritual such as having the offender stand in a public place with a sign describing his offense,⁶⁸ and requiring the offender to apologize for their crimes.⁶⁹

State courts have started using such punishments with greater frequency; however, the trend of using shaming sanctions is not as apparent in federal courts.⁷⁰ As mentioned above, shaming conditions vary tremendously in the way in which they communicate information about an offender's crime to the public. One form of a public shaming punishment is to have the offender's own person

62. See HIRSCH, *supra* note 13, at 114–15 (noting that a “necessity for change” drove punishment reform); Morton, *supra* note 34, at 108.

63. See Morton, *supra* note 34, at 108 (“[T]he altered face of society and sudden burst of uncontrolled crime mandated the transition, not the innate failure of shaming.”).

64. HIRSCH, *supra* note 13, at 46 (recognizing that by statute, violations of prison discipline were punishable with public shaming punishments); Morton, *supra* note 34, at 108–09 (observing that “[l]aws permitted prison authorities to force inmates to display signs or don dunce caps while standing on platforms for all other inmates to see” and that “such penalties remained a viable and effective means of punishment”).

65. Kahan, *supra* note 29, at 631.

66. *Id.* at 632; see *infra* Section III.B.

67. Kahan, *supra* note 29, at 632; see *Goldschmitt v. State*, 490 So. 2d 123, 124 (Fla. Dist. Ct. App. 1986) (upholding requirement that a convicted drunk driver place a bumper stick on his car that read “CONVICTED D.U.I.—RESTRICTED LICENSE”); *State v. Bateman*, 771 P.2d 314, 316, 322 (Or. Ct. App. 1989) (reviewing imposition of probation condition on a convicted child molester that he place signs on both sides of his car and on the door of his residence stating “Dangerous Sex Offender—No Children Allowed”).

68. Kahan, *supra* note 29, at 633; see *infra* Section III.A.

69. Kahan, *supra* note 29, at 634.

70. Jonathan Turley, *Shame on You*, WASH. POST (Sept. 18, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/17/AR2005091700064.html> (“What distinguishes the *Gementera* case is that it was a federal judge who imposed the shaming punishment. Federal judges have long been viewed as insulated from this trend—until now.”).

become the vehicle for disseminating information about his or her crime to the public.⁷¹ Alternatively, some public shaming sanctions include print media, leading to a more widely disseminated public display of one's crime.⁷² The following Parts discuss examples of the judiciary's use of public shaming sanctions in modern society.

A. Upholding the Signboard Requirement in *United States v. Gementera*

In *United States v. Gementera*, the Ninth Circuit recently upheld a probation condition requiring Shawn Gementera to wear a signboard for eight hours that stated "I stole mail. This is my punishment."⁷³ Gementera plead guilty to mail theft after a police officer observed Gementera pilfering letters from several mailboxes in San Francisco in May of 2001.⁷⁴ Although only twenty-four years old at the time of this offense, Gementera had many previous encounters with law enforcement, and the district court was concerned that his crimes were escalating in severity.⁷⁵ Because there is "little federal authority on sentences that include shaming components,"⁷⁶ *Gementera* was a "groundbreaking federal case."⁷⁷

1. The District Court's Sentence

In 2003, Judge Vaughn Walker of the United States District Court for the Northern District of California sentenced Gementera to two months of incarceration and three years of supervised release.⁷⁸ As part of the supervised release, Gementera was required to (1) observe postal patrons visiting the "lost or missing mail" window; (2) "write letters of apology to any identifiable victims of his crime;" (3) "deliver lectures at a local school;" and (4) perform one day of eight total hours "of community service during which time he shall either (i) wear a two-sided sandwich board-style sign or (ii) carry a large two-sided sign stating, 'I stole mail; this is my punishment,' in front of a San Francisco postal facility identified by the probation officer."⁷⁹ Although Gementera challenged the sandwich board requirement by filing a motion to correct the sentence under the Federal Rules of Criminal Procedure, Judge Walker denied his motion and told

71. See *United States v. Gementera*, 379 F.3d 596, 598 (9th Cir. 2004) (signboard); see *infra* Section III.A.

72. See *Lindsay v. State*, 606 So. 2d 652, 654 (Fla. Dist. Ct. App. 1992); see *infra* Section III.B.

73. *Gementera*, 379 F.3d at 598.

74. *Id.*

75. *Id.* at 598 & n.1.

76. *Id.* at 611 (Hawkins, J., dissenting).

77. Paul Ziel, Note, *Eighteenth Century Public Humiliation Penalties in Twenty-First Century America: The "Shameful" Return of "Scarlet Letter" Punishments in U.S. v. Gementera*, 19 *BYU J. PUB. L.* 499, 506 (2005).

78. *Gementera*, 379 F.3d at 598.

79. *Id.* at 599. Originally, Judge Walker sentenced Gementera to 100 hours of community service, which included the signboard requirement. *Id.* at 598. Gementera filed a motion to remove the sandwich board provision, but Judge Walker denied his motion and imposed the four-part special condition instead. *Id.* at 598-99.

Gementera that he needed “to be reminded in a very graphic way of exactly what the crime [he] committed means to society.”⁸⁰

2. *The Appeal to the Ninth Circuit*

Gementera appealed Judge Walker’s denial of his motion to remove the signboard requirement, but the Ninth Circuit upheld the district court’s sentence.⁸¹ Gementera first argued that the eight-hour sandwich board condition violated the Federal Sentencing Reform Act.⁸² Judges are granted broad discretion in determining conditions of supervised release and may impose any condition they consider to be appropriate.⁸³ However, such discretion is limited, as the condition must be “reasonably related to”⁸⁴ “the nature and circumstances of the offense and the history and characteristics of the defendant.”⁸⁵ Further, the condition must be “reasonably related to”⁸⁶ and involve “no greater deprivation of liberty than is reasonably necessary”⁸⁷ to “afford adequate deterrence to criminal conduct,”⁸⁸ “protect the public from further crimes of the defendant,”⁸⁹ and rehabilitate the defendant by providing him with “educational or vocational training, medical care, or other correctional treatment.”⁹⁰ In order to decide whether or not the district court abused its discretion under the United States Sentencing Guidelines, the Ninth Circuit performed a two-part test, determining (1) “whether the sentencing judge imposed the conditions for permissible purposes,” and (2) “whether the conditions [were] reasonably related to the purposes.”⁹¹

First, Gementera argued that the signboard condition was “imposed for the impermissible purpose of humiliation.”⁹² However, the court disagreed. The court instead pointed out that Judge Walker had emphasized that he was not subjecting Gementera to humiliation for humiliation’s sake.⁹³ Rather, Judge Walker articulated:

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

80. *Id.* at 598–99 & n.2.

81. *Id.* at 610.

82. *Id.* at 599–600; *see* 18 U.S.C. § 3583(d) (2012).

83. *Gementera*, 379 F.3d at 600; *see* 18 U.S.C. § 3583(d) (2012).

84. § 3583(d)(1).

85. 18 U.S.C. § 3553(a)(1).

86. § 3583(d)(1).

87. § 3583(d)(2).

88. § 3553(a)(2)(B).

89. § 3553(a)(2)(C).

90. § 3553(a)(2)(D); *see* *United States v. Gementera*, 579 F.3d 596, 600 (9th Cir. 2004).

91. *Gementera*, 579 F.3d at 601 (quoting *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988)) (internal quotation marks omitted).

92. *Id.* at 601.

93. *Id.* at 601–02.

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.⁹⁴

Moreover, Judge Walker expressed that by exposing Gementera to the public in this manner, the public would be protected by becoming aware of Gementera's criminal nature, and it would deter others from committing similar crimes.⁹⁵ The Ninth Circuit held that the district's court rationale aligned with permissible statutory objectives, specifically the goal of rehabilitation, and to a lesser extent, general deterrence and protection of the public.⁹⁶

After the court held that the signboard requirement was imposed for legitimate statutory purposes, Gementera argued that the signboard condition was not "reasonably related" to the goal of rehabilitation under the second prong of the court's test.⁹⁷ Although the Ninth Circuit acknowledged the uncertainty regarding how rehabilitation is best accomplished,⁹⁸ it ultimately concluded that criminal penalties "nearly always cause shame and embarrassment" and this does not automatically render them objectionable.⁹⁹ Further, because the signboard requirement was coupled with more socially useful provisions, including lecturing at a high school and writing apologies, the court observed that the condition might be understood "to promote the offender's social reintegration" rather than to encourage his disintegration.¹⁰⁰ The court then concluded that public acknowledgement of Gementera's offense, whereby Gementera had to come face-to-face with people who use the postal service, was reasonably related to the goal of rehabilitation.¹⁰¹ After evaluating the sandwich board requirement with the other supervised release conditions, the court upheld Judge Walker's sentence.¹⁰²

94. *Id.* at 602.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 603.

99. *Id.* at 605.

100. *Id.* at 606.

101. *See id.* at 604 ("[P]ublic acknowledgement of one's offense . . . was necessary to his rehabilitation.").

102. *Id.* at 607. The court did note that this holding was limited to the facts of this case. *Id.* However, the court stated "a per se rule that the mandatory public airing of one's offense can *never* assist an offender to reassume his duty of obedience to the law would impose a narrow penological orthodoxy not contemplated by the Guidelines' express approval of 'any other condition [the district court] considers to be appropriate.'" *Id.* (quoting 18 U.S.C. § 3583(d) (2000)). Further, because the court found the condition was reasonably related to the goal of rehabilitation, it did not discuss the relationship the conditions had to the goals of deterrence or protection of the public. *Id.* at 607 n.16. Additionally, Gementera challenged the signboard condition as a violation of the Eighth Amendment but the court held that there was no such violation. *Id.* at 607, 610.

B. Upholding Public Shaming Punishments That Include Print Media

Public shaming punishments that require offenders to publish announcements of their crimes have also been upheld in state and federal court. These punishments have been justified as means to deter the defendant from future criminal conduct, to rehabilitate the defendant, and to protect the public. In Illinois, Circuit Court Judge Jeffrey Ford requires first-time drunk driving offenders who admit their guilt to publicly apologize by placing ads in their local newspapers, with their photos included.¹⁰³ Judge Ford believes that a public admission of guilt will be a more successful deterrent in comparison to an admission of guilt in the courtroom because the courtroom allows the offender to remain anonymous and unaccountable.¹⁰⁴

Judge Farmer expressed a similar opinion when upholding a probation condition in *Lindsay v. State*.¹⁰⁵ In *Lindsay*, the defendant was charged with driving under the influence of alcohol after he ran into the rear of a patrol car.¹⁰⁶ As part of the defendant's probation condition, the lower court required the convicted offender to publish an advertisement in the local newspaper that consisted of the defendant's mug shot, name, and the caption "DUI—Convicted."¹⁰⁷ The court of appeals found authority for such a condition in a Florida statute that allows the judiciary to impose terms of probation it considers to be proper.¹⁰⁸

Although the defendant challenged the probation condition as one that served no penological goals, the court held that the probation condition had a rehabilitative purpose and was logically connected to the criminal conduct.¹⁰⁹ The defendant also argued that the condition was arbitrary and capricious in that it failed to treat like offenders similarly.¹¹⁰ Noting that there is always some uncertainty for defendants in sentencing and that those who receive incarceration as punishment are treated *more harshly* than those who just receive probation, the court rejected the defendant's argument and upheld the probation condition.¹¹¹

Additionally, in *United States v. Clark*, the Ninth Circuit upheld a probation condition that required two policemen, who had been convicted of perjury, to

103. Joseph R. Tybor, *Unusually Creative Judges Now Believe Some Punishments Can Fit*, CHI. TRIB. (July 3, 1988), http://articles.chicagotribune.com/1988-07-03/news/8801120882_1_unusual-sentences-beverly-hills-neurosurgeon-judges.

104. *Id.*

105. 606 So. 2d 652 (Fla. Dist. Ct. App. 1992).

106. *Id.* at 653.

107. *Id.*

108. *Id.* at 654–55 (quoting FLA. STAT. § 948.03(2) (1991)).

109. *Id.* at 656–57. The defendant also made a constitutionally based argument, which was swiftly rejected by the court. *Id.* at 657 (“[E]ven constitutional rights can be abridged by conditions of probation if the conditions are reasonably related to the probationer’s past or future criminality or to the rehabilitative purpose of probation.” (internal quotation marks omitted)).

110. *Id.* at 657–58.

111. *Id.* at 658.

publish apologies in a local newspaper and in the police department's newsletter.¹¹² The court utilized the same two-part test as the *Gementera* court, determining (1) whether the sentencing judge imposed the probation condition for permissible purposes, and (2) whether the condition was reasonably related to those purposes.¹¹³ Finding that the sentencing judge imposed the probation condition for the purpose of rehabilitation, the court concluded that the condition was reasonably related to that penological goal because a "public apology may serve a rehabilitative purpose."¹¹⁴

As shown, the judiciary has upheld a wide variety of public shaming punishments. However, there is a vast difference in scholarly opinion about the effectiveness of such punishments.

IV. REACTIONS TO PUBLIC SHAMING PUNISHMENTS IN THE MODERN WORLD

Scholars continue to debate the effectiveness and moral implications of public shaming punishments. The following Parts give a brief overview of the arguments in favor and against public shaming punishments.

A. Arguments in Favor of Public Shaming Punishments

1. Public Shaming Punishments Are Cost-Effective

Proponents of public shaming punishments argue that these punishments allow the state to reduce the costs of punishing offenders. One reason for the rebirth of public shaming punishments is because they are less expensive than imprisonment.¹¹⁵ In 2012, the state and local prison system in the United States contained more than 1.3 million inmates, resulting in budget issues for many states.¹¹⁶ A forty-state survey in 2010 found that the total per-inmate cost averaged \$31,286 per year.¹¹⁷ Although incarceration may be necessary to protect the public from violent offenders, over half of the American prison population consists of non-violent offenders who may be sufficiently deterred by other forms of punishment.¹¹⁸ There would be significant financial consequences for state and federal

112. 918 F.2d 843, 845, 847 (9th Cir. 1990).

113. *Id.* at 848; see *United States v. Gementera*, 379 F.3d 596, 601 (9th Cir. 2004).

114. *Clark*, 918 F.2d at 848.

115. Kahan, *supra* note 29, at 635; Litowitz, *supra* note 43, at 52, 54.

116. Matt Berman, *Can Public Shaming Be Good Criminal Punishment?*, NAT'L J. (Sept. 9, 2013), <http://www.nationaljournal.com/domesticpolicy/can-public-shaming-be-good-criminal-punishment-20130909>; see John Anderson, *Public Shaming is an Effective Alternative to Prison*, DAILY AZTEC (Jan. 23, 2011), <http://www.thedailyaztec.com/2088/opinion/public-shaming-is-an-effective-alternative-to-prison/> ("The U.S. has the most prisoners per-capita of any country in the world.").

117. CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INSTITUTE OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9 (2012), available at http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prison_updated_version_072512.pdf.

118. See *Shaming Punishments—Contemporary Impetus: The Search for an Expressively Appropriate Alternative Sanction*, available at <http://law.jrank.org/pages/2117/Shaming-Punishments-Contemporary-impetus-search->

prison systems if the number of inmates guilty of non-violent crimes, such as drunk driving, perjury, drug distribution, and fraud, was reduced.¹¹⁹

Recently, a judge mentioned that the only difference between public shaming sanctions and prison “is that taxpayers aren’t paying for it.”¹²⁰ If punishment can be achieved through both incarceration and public shaming, the more expensive method should not necessarily be favored.¹²¹ Although not much data exists on the cost of public shaming sanctions, the cost of publishing one’s picture in the newspaper or making a sign and wearing it for eight hours certainly is much less than \$31,286 a year per person. Economic scholars have argued that courts “should resort to imprisonment only when cheaper sanctions cannot deter offenders.”¹²² Seen as one of the “most low-tech deterrent[s],” shaming punishments accomplish the goal of cost efficiency.¹²³ Thus, some proponents of public shaming sanctions base their support on the economic consequences of such punishments.

2. *Public Shaming Prevents Indoctrination into a Criminal Culture*

Many commentators prefer public shaming punishments because they believe that incarceration is more likely to lead to increased recidivism. Recidivism of incarcerated individuals is very common—as of 2011, sixty-seven percent of released offenders were re-arrested within three years.¹²⁴ In other words, low-level criminals are likely to be repeat offenders once they enter the prison system. “Prison fosters an atmosphere of fear and criminal camaraderie more than one of rehabilitation, which is one reason we see staggering gang affiliation figures in prisons.”¹²⁵ Many people complain about offenders who serve short sentences during which they have the “opportunity to learn advanced criminal skills.”¹²⁶ Keeping offenders out of prison could prevent them from becoming part of a

an-expressively-appropriate-alternative-sanction.html (last visited Dec. 26, 2014) (noting that violent offenders make up less than half of American prison population, and arguing for alternative sanctions).

119. Kahan, *supra* note 29, at 635 & nn. 173, 177–78; Berman, *supra* note 116.

120. Christina Gallagher, *Shaming Sentences Aim to Cut Costs*, TRIBLIVE (May 11, 2013, 9:00 PM), <http://triblive.com/news/alleggheny/3983712-74/judge-state-court>.

121. See Kahan, *supra* note 29, at 630 (“[A] society is certainly better off if it can substitute a cheaper pairing of sensibilities and institutions for a costly pairing.”); see also Berman, *supra* note 116 (noting that public shaming punishments “could actually work to not only cut down on low-level crime, but to help slash ballooning state and local budgets as well”).

122. Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2189 (2003). A similar argument has been made for other forms of punishment that are less expensive than incarceration. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 193 (1968) (advocating for the use of fines “whenever feasible” because “institutionalization use[s] up social resources” while fines do not) (emphasis omitted).

123. See Richard Lacayo, *Considering the Alternatives: Crowded Prisons Spark Less Confining Punishments*, TIME, Feb. 2, 1987, at 60–61 (noting that while shaming punishments reduce costs, they do not necessarily reduce crime).

124. Anderson, *supra* note 116.

125. *Id.*

126. Hoffman, *supra* note 2.

criminal culture that is pervasive within the prison system.¹²⁷ Thus, public shaming punishments may serve as a means to keep low-level criminals out of the prison system and to prevent them from becoming repeat offenders.

3. *Public Shaming Punishments Express Appropriate Moral Condemnation*

Others argue that public shaming punishments express appropriate moral condemnation. This is particularly true in comparison to other alternative penalties such as community service or fines, which may be imposed for questionable and ambiguous reasons.¹²⁸ The public expects punishments to express moral condemnation, and the political acceptability of a punishment reflects this expressive power.¹²⁹ Because Americans value their liberty, taking it away from them through imprisonment unmistakably reflects American society's acceptance of imprisonment as a proper expression of condemnation of criminal wrongdoing.¹³⁰ Shaming penalties, unlike fines and community service, also express appropriate moral condemnation.¹³¹ Like liberty, society also values social status in that humans care deeply about what other people think about them.¹³² By dishonoring the offender, "shaming penalties supply an unambiguous and dramatic sign of the wrongdoer's disgrace."¹³³

Even if the offender does not care about social status, the assertion that public shaming appropriately condemns offenders means that it actually does not matter if the offender actually *feels* shame. "[J]ust as some offenders do not view imprisonment as vitiating the respect of their peers," some offenders will not feel the shame that others will feel elicited from shaming punishments.¹³⁴ However, such a realization "does not diminish the resonance of either shaming penalties or imprisonment as symbols of the community's moral disapproval. If anything, the perception that the offender is not shamed by what is commonly understood to be shameful would reinforce onlookers' conclusion that he is depraved and worthy of

127. See Anderson, *supra* note 116 (noting that criminal culture is pervasive in prisons).

128. Kahan, *supra* note 29, at 635; see *Shaming Punishments—Contemporary Impetus: The Search for an Expressively Appropriate Alternative Sanction*, *supra* note 118 ("[W]hen fines are used as a substitute for imprisonment, they sometimes suggest that society is assigning a price to the regulated behavior . . . [which] is inconsistent with moral condemnation . . .").

129. *Shaming Punishments—Contemporary Impetus: The Search for an Expressively Appropriate Alternative Sanction*, *supra* note 118.

130. *Id.*

131. See David R. Karp, *The Judicial and Judicious Use of Shame Penalties*, CRIME & DELINQUENCY 277, 278–79 (1998) ("Shame penalties, unlike other alternative sanctions, are justified by their intent to convey the same moral condemnation as incarceration. They are meant to satisfy the retributive impulse. The symbolic power, however, does not come from the denial of liberty but . . . from the reduction of social status.").

132. Cannold, *supra* note 33.

133. *Shaming Punishments—Contemporary Impetus: The Search for an Expressively Appropriate Alternative Sanction*, *supra* note 118.

134. Kahan, *supra* note 29, at 636.

condemnation.”¹³⁵ Additionally, shaming penalties often have a spillover effect, stigmatizing the offender’s friends and families who tend to value their reputations.¹³⁶ Even if shaming penalties fail to induce shame on the particular offender, they can serve as a general deterrent to the entire public by reinforcing the community’s norms.¹³⁷ Thus, public shaming sanctions may be an effective alternative to imprisonment because they express appropriate moral condemnation.

4. *Public Shaming Punishments Accurately Reflect Society’s Values*

Other commentators argue that public shaming punishments are appropriate because they deprive individuals of what they value most: their privacy. Although the rise of egalitarianism after the Revolutionary War was one reason why public shaming punishments lost their favor, society’s values have continued to evolve. In modern society, people still value their personal liberty; however, liberty is not necessarily limited to notions of equality and freedom. Today, individual liberty encompasses one’s personal privacy, which has become one of society’s most coveted values, as evidenced by the vast array of constitutional questions heard by courts and recognized by legislatures in the recent past.¹³⁸

Barbara Morton, one commentator on the subject, argues that the value that modern society places upon privacy is one reason why shaming punishments *would* work today.¹³⁹ Making a spectacle of one’s punishment in public seems to be an invasion of privacy because many feel that when someone commits a crime, it is a private matter between the criminal, the victim, and the criminal justice system.¹⁴⁰ Just as a damaged reputation in the community was enough to deter criminal conduct in colonial times, the loss of personal privacy and inability to control the distribution of personal information is enough to deter such conduct today.¹⁴¹ Given the elaborate array of existing privacy laws, “it seems probable that many would perceive intrusions into one’s personal life . . . as sufficiently repelling to deter behavior leading to such a penalty.”¹⁴² Because they deprive individuals of their privacy, which is highly valued in today’s society, public shaming punishments could be supported as an appropriate form of punishment.

135. *Id.* at 636.

136. *Id.* at 643 n.215; see Hoffman, *supra* note 2 (describing how a punishment requiring an offender to post a sign outside of his house, which called attention to his violent felony, led to great family resentment and caused the offender’s wife to move out).

137. Kahan, *supra* note 29, at 643; Note, *supra* note 122, at 2191.

138. Morton, *supra* note 34, at 122–23.

139. *Id.*

140. Litowitz, *supra* note 43, at 54.

141. Morton, *supra* note 34, at 122.

142. *Id.* at 123.

B. Critiques of Public Shaming Punishments

1. Public Shaming Punishments Fail Because of a Lack Of Necessary Societal Conditions

Some commentators believe that shaming punishments can only be successful under limited conditions, which are not present in today's society.¹⁴³ Toni Massaro, a scholar in the field, asserts that the social climate today does not resemble that of the close-knit communities of the colonial period; rather, it reflects the social conditions that were present when shaming conditions fell out of favor in the nineteenth century as previously discussed.¹⁴⁴ Society is largely impersonal in nature and people now live in sizeable and diverse communities.¹⁴⁵ This lack of face-to-face interaction with one's neighbors leads to ineffective shaming punishments because shame itself is an emotion only felt by an offender in the presence of those who know him.¹⁴⁶ Because of the anonymity of modern society, characterized by people who are "neurotically wrapped up in their own worlds and concerned with their own lives,"¹⁴⁷ public shaming sanctions lose their thrust.

Moreover, Massaro emphasizes that America's cultural heterogeneity results in "significant subcultural disagreements . . . regarding what punishments are embarrassing,"¹⁴⁸ a feature of society that did not exist in the religiously centered communities of the colonial period. Without societal consistency, there cannot be one audience that condemns the offender and public shaming sanctions will be ineffective.

2. Public Shaming Punishments Are Inhumane

Some commentators allege that public shaming conditions are not acceptable because they lack an element of humanity. "The humaneness of a penalty depends on a host of factors, including whether it is proportional to the crime, is administered in an even-handed manner across offenders, and is not exceptionally degrading or cruel."¹⁴⁹ In terms of proportionality, the difficulty seems to arise in quantifying the punishment. Most conventional punishments include measurable

143. Massaro, *supra* note 10, at 1916, 1922–24 (observing that the conditions that lead to successful shaming punishments are currently absent in American society).

144. *Id.* at 1916, 1922–24; *see supra* Section II.B (describing reasons for the declined effectiveness of public shaming).

145. *See* Massaro, *supra* note 10, at 1922 (noting that population increases and geographical expansion have "eroded" the cultural conditions necessary for effective public shaming).

146. Whitman, *supra* note 11, at 1063.

147. Morton, *supra* note 34, at 122.

148. Massaro, *supra* note 10, at 1923.

149. *Id.* at 1936.

factors, such as the hours of community service performed, the number of dollars fined, or the months spent in prison.¹⁵⁰ In those contexts, it is easier for judges to comprehend “whether the dosage of the penalty is increasing, regardless of the offender’s personality or social circumstances.”¹⁵¹ It is not as simple to quantify an offender’s level of embarrassment or social standing.¹⁵² Further, within the various types of punishments themselves, it is difficult to express reasons for why one sanction is more or less harsh than others.¹⁵³

Judges also have a wide range of discretion when it comes to imposing creative shaming sanctions, which could lead to abuse or unequal application.¹⁵⁴ Massaro observes that judges do not appear to sentence offenders based on any sort of “shame schedule[,]” but seem to do so randomly.¹⁵⁵ He further notes that because it seems nearly impossible that any sort of sentencing schedule could anticipate the entire range of individual factors that may determine the impact of a shaming sanction on an offender, equality may be even harder to achieve in the realm of shaming punishments.¹⁵⁶ Because shaming sanctions do not appear to be the “product of reflective, individualized estimations of an offender’s sense of

150. *Id.* at 1937.

151. *Id.*

152. *Id.*

153. *Id.* at 1939 (arguing that holding a sign in public for one week seems worse than a one-day sentence, but that this contention turns on the offender’s deprivation of liberty rather than on the potential to be shamed).

154. *See id.* at 1940 (asserting that judges given great discretion may deliver inequitable punishments).

155. *Id.*; *see also* Mark Spatz, *Shame’s Revival: An Unconstitutional Regression*, 4 J. CON. L., 827, 847 (2002) (observing that shaming sanctions violate notions of even-handed punishments when judges arbitrarily pick an actor and subject him to punishments that others are not at risk of receiving).

156. Massaro, *supra* note 10, at 1940–41. Massaro asserts that even though the adoption of mandatory sentencing guidelines could reduce the risk of unequal application of shaming sanctions, such mandatory sentencing would likely compromise equality elsewhere in the criminal justice system. *Id.* at 1940. He continues:

[T]he legislature could insist that every person who steals \$200 worth of goods be compelled to stand for one hour in the town square with a sign that reads “I am a thief.” This would satisfy one rather static definition of equality. The only factor relevant to the punishment decision would be whether the same offense had been committed. But if one offender stole \$200 worth of groceries for her family, and the other stole a \$200 stereo, then a different sense of equality would be offended. Similarly, if one offender, who had never before stolen anything in her life and enjoyed widespread public respect, were facing her first criminal charge, whereas the other had a string of prior property offenses and had a reputation as a thief, then the hour in the square for the first would not be the same as the hour in the square for the second. One could, of course, simply define equality as “same offense—same sign.” But to do so would compromise other important meanings of equality.

Id. at 1940–41.

Although this example is compelling, it seems rather extreme. The criminal justice system may have mandatory *minimum* sentences, but they can be adjusted for whether or not the person is a first-time offender or repeat offender. However, it is likely true that minimum sentences do impose a sort of strict liability that appears to create some inherent unfairness in certain circumstances, such as in the above example.

shame,”¹⁵⁷ some critics contend that such punishments are not administered in an even-handed manner.

Further, some argue that public shaming sanctions are so degrading that they amount to cruel and unusual punishment under the Eighth Amendment. Although shaming sanctions lead to some of the same end results as incarceration, such as an offender’s loss of dignity, critics contend that public shaming punishments are not an acceptable means to this end.¹⁵⁸ Based on the inherently degrading notion of public shaming, the argument persists that such punishments violate the United States Constitution.¹⁵⁹ Many reformers advocate for the elimination of public shaming punishments due to their “barbaric” and uncivilized nature.¹⁶⁰ Although the Supreme Court has not held that public shaming punishments violate the Eighth Amendment, many still argue that the method by which the government wishes to deprive offenders of their dignity is simply unacceptable.

3. *Public Shaming Punishments Violate Egalitarian Values*

Related to the idea of loss of dignity, some commentators believe shaming punishments are not politically acceptable in today’s egalitarian society. After the American Revolution, the principles of respect and dignity formed the heart of the newly formed republic.¹⁶¹ Beginning in the mid-eighteenth century, reformers criticized public shaming sanctions as punishments that symbolically lower the offender’s standing within the social hierarchy¹⁶² because they conveyed the message “that offenders are the natural or social inferiors of those who discipline them.”¹⁶³ Status distinctions are therefore embedded within punishments themselves.¹⁶⁴ For example, one of the most famous differences in punishments was that members of the nobility were beheaded while commoners were hanged.¹⁶⁵ To Americans with egalitarian views, public shaming punishments, such as flogging, reflect the same objectionable forms of social stratification.¹⁶⁶ This social stratification emanates from public shaming punishment’s long history, as well from their

157. *Id.* at 1941–42 (“We do not know, for example, why the Rhode Island judge ordered Stephen Germershausen, but not other sex offenders, to place an ad in the newspaper for his offense. Nothing in the reported account of his sentence suggests that the judge selected Germershausen for this sentence because he was unusually likely to respond to this type of sentence, or because he deserved it more than other offenders.”).

158. *See id.* at 1942.

159. However, the Supreme Court has not held that such punishments violate the Constitution. *See supra* note 114 and Section III.A.2.

160. Whitman, *supra* note 11, at 1073–75.

161. *See* Karp, *supra* note 131, at 285–86 (describing the importance of preserving personal dignity in an egalitarian society).

162. Whitman, *supra* note 11, at 1069–70.

163. Kahan, *supra* note 29, at 17.

164. Whitman, *supra* note 11, at 1070.

165. *Id.*

166. Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions?*, 84 *TEX. L. REV.* 2075, 2093–94 (2006); Whitman, *supra* note 11, at 1070.

aesthetics, which tend to conjure up images of social hierarchy such as from the example of beheadings versus hangings described above.¹⁶⁷

Shaming sanctions confront egalitarians with punishments that are “assaultive of their preferred vision of the good society.”¹⁶⁸ Overall, the imposition of a shaming punishment upon an offender sends the message that the offender is of low status. Many commentators therefore believe that shaming sanctions have no place in a society that values liberty and equality.

4. *Public Shaming Punishments Improperly Incite the Public*

One commentator has criticized the use of public shaming punishments from the perspective of the punishment’s direct impact on the *public* and seemingly indirect impact on the *offender*.¹⁶⁹ James Q. Whitman, a Professor at Yale Law School, asserts that these “humiliation sanctions” are a sort of “lynch justice” that involve “an ugly, and politically dangerous, complicity between the state and the crowd.”¹⁷⁰ Although shaming sanctions have the potential to be effective, Whitman contends that once the government puts an offender on public display, it cannot control the reaction of the crowd.¹⁷¹ Even though such a reaction could include literal rioting,¹⁷² the real issue lies in the lack of control the state has over *any* sort of abuse the public will aim at an offender in private.¹⁷³ Whitman asserts that this lack of control illustrates the real problem with public shaming sanctions: “[t]hey involve a dangerous willingness, on the part of the government, to delegate part of its enforcement power to a fickle and uncontrolled general populace.”¹⁷⁴ Such an environment subjects the offender to unpredictable responses to shame sanctions, which is a violation of the offender’s “transactional dignity”: “a deeply rooted norm of our society that persons should never be forced to deal with wild or unpredictable partners” and that persons have “the right to know what kind of deal one has struck, and on what terms.”¹⁷⁵ By allowing the public to have some sort of influence over the offender’s treatment, the offender is robbed of his transactional dignity.¹⁷⁶

Whitman posits that even though prisons are not ideal, they are at least controllable environments managed by the State, whereby offenders are assured their sense of transactional justice.¹⁷⁷ Placement within a prison allows the

167. Kahan, *supra* note 166, at 2087–88.

168. *Id.* at 2090.

169. Whitman, *supra* note 11, at 1055, 1059.

170. *Id.* at 1059.

171. *Id.* at 1088.

172. *Id.* at 1059.

173. *Id.* at 1088.

174. *Id.* at 1088.

175. *Id.* at 1090.

176. *Id.*

177. *Id.* at 1091.

offender to know what he is getting into, without the threat of the unknown looming, because the State maintains the power.¹⁷⁸ This observation led Whitman to conclude that courts must not switch to a system of public shaming because there is no existing apparatus that allows the government to retain full control over the enforcement of the offender's punishment.¹⁷⁹ Because shaming punishments may improperly attribute partial control of the offender's punishment to the public, at least one scholar has argued that they should not be implemented.¹⁸⁰

5. *The Uncertain Psychological Effects of Public Shaming Punishments*

Some critics argue that public shaming sanctions are inherently unacceptable because of their uncertain psychological effects upon offenders. This argument draws a line between guilt and shame: the former is the acknowledgment of making a mistake, whereas the latter is the feeling that the offender himself *is* the mistake.¹⁸¹ Although crime should be stigmatized, the criminal should not.¹⁸²

Assuming that an offender will feel shame, "how that person reacts to his emotion is completely unpredictable."¹⁸³ A person may feel terribly and want to become a better person, or the punishment may be counterproductive and the offender may respond with rage and continue his wrongful behavior.¹⁸⁴ Illinois appellate court judge, Justice Carl Lund, has struck down public shaming sanctions on the basis that courts cannot determine the psychological effects of such punishments and "an adverse effect upon the defendant would certainly be

178. *See id.* at 1092 ("[A] prison sentence, by its nature, announces the government's ultimate refusal to abandon the power to punish.").

179. *Id.* at 1091.

180. Although Whitman raises a unique argument, it is worth noting that the argument may go too far in two respects. First, Whitman's argument appears to directly contradict one of the most prevalent arguments against public shaming sanctions: that such punishments are ineffective because of a lack of a homogeneous, close-knit society that will shame the offender. If society is too anonymous for an offender to feel shame because his audience will not know him, how can we expect the public to react in the manner posited by Whitman? It seems likely that the only reason the public would act in such a way would be if the members of the public were a cohesive group that all knew the offender, which many critics of public shaming sanctions believe does not exist today. Second, the unfortunate reality of prison conditions demonstrates why an offender is not necessarily guaranteed "transactional dignity" after being incarcerated instead of publicly shamed. The Supreme Court has described the unpredictable nature of what occurs to an offender once he enters the prison system: exposure to filth, homosexual rape, brutal beatings, and indifference by prison officials with regard to the prisoner's health and safety. *See United States v. Bailey*, 444 U.S. 394, 420–21 (1980) (Blackmun, J., dissenting). This tragic description of an inmate's potential reality seems just as likely to deprive the offender of his "transactional dignity" as does a public shaming sanction. Although the government may have the appearance of control when it incarcerates an offender, the public, albeit a public contained within the prison itself, still has the power to take the offender's punishment into its own hands.

181. Garcia, *supra* note 32, at 122–23; Julie Deardorff, *Shame Returns as Punishment: Judges Turn to Public Humiliation for Some Criminals, but Critics Contend Such Sentences Can Be Psychologically Damaging*, CHI. TRIB. (Apr. 12, 2000), http://articles.chicagotribune.com/2000-04-12/news/0004120235_1_unusual-punishment-humiliation-sentencing.

182. *See Deardorff, supra* note 181.

183. Garcia, *supra* note 32, at 122.

184. *Id.* at 122.

inconsistent” with penological goals.¹⁸⁵ Critics contend that it is dangerous for judges to enter this realm of psychotherapy,¹⁸⁶ and that public shaming punishments are too uncertain in their psychological effects upon offenders to be supported.

V. THE USE OF SOCIAL MEDIA WEBSITES IN PUBLIC SHAMING PUNISHMENTS: WILL IT WORK?

Although there is a great scholarly debate surrounding the effectiveness of public shaming sanctions,¹⁸⁷ even critics concede that these punishments are consistent with criminal punishment theories such as deterrence, rehabilitation, and incapacitation.¹⁸⁸ With the ever-increasing usage of the Internet and social media websites, public shaming sanctions that utilize some aspect of these frequently visited mediums can also be justified under the general principles of criminal law. This Section gives an overview of the prominence of social media in our society today. Next, it describes a parenting disciplinary trend that includes parents publicly shaming their children and utilizing social media to do it. Finally, it analyzes the potential effectiveness of public shaming punishments, specifically those utilizing social media, from a theoretical perspective, addressing some of the more common criticisms of public shaming sanctions generally.

A. *Internet Usage and Online Social Media Presence in Today’s Society*

As the Internet has developed, social media websites have grown in popularity amongst every age group. The most recent census that studied American Internet usage found that, as of July 2011, more Americans were connected to the Internet than ever before.¹⁸⁹ Although 71.7% of U.S. households reported accessing the Internet,¹⁹⁰ there were various discrepancies among ethnic groups.¹⁹¹ While 76.2% of non-Hispanic white households and 82.7% of Asian households had Internet access, Hispanic and Black households had Internet access at rates of

185. Deardorff, *supra* note 181; *see also* *People v. Meyer*, 680 N.E.2d 315, 320 (Ill. 1997) (holding that a public shaming punishment was inappropriate because the “sign may have unpredictable or unintended consequences” and even “an adverse effect on innocent individuals” who associate with the defendant).

186. *See* Garcia, *supra* note 32, at 122; Karp, *supra* note 131, at 283–84 (describing how as a result of stigmatization, an offender could exile himself from the community, reject dominant normative standards, and become a repeat offender).

187. *See supra* Section IV.

188. Whitman, *supra* note 11, at 1062; *see* Massaro, *supra* note 10, at 1890–1900 (discussing how shame sanctions are justified on multiple theories of punishment).

189. THOM FILE, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: POPULATION CHARACTERISTICS 12 (2013), available at <http://www.census.gov/prod/2013pubs/p20-569.pdf>.

190. Based on more recent statistics, but not a census report, approximately 87.7% of the North American population uses the Internet. *Internet Usage Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last visited Dec. 27, 2014).

191. THOM FILE, U.S. CENSUS BUREAU, *supra* note 189, at 2.

58.3% and 56.9%, respectively.¹⁹² Internet access was also positively correlated with income and education; however, even for the lowest bracket of paid individuals making under \$25,000 a year, Internet access was still found at a rate of approximately fifty percent.¹⁹³

Of those who use the Internet in the U.S., sixty-seven percent use Facebook.¹⁹⁴ Strikingly, there is very little variation in online social media usage across income levels *if the person has access to the Internet* in the first place.¹⁹⁵ For example, sixty-eight percent of people who have access to the Internet and make under \$30,000 a year are on Facebook, compared to sixty-nine percent of those who have access to the Internet and make between \$50,000 and \$75,000 a year.¹⁹⁶

Although age was once a defining characteristic among those who used social media websites, discrepancies in age have started to fade. Pew Research Center's Internet and American Life Project has been studying online adult social networking sites since 2005 and has seen substantial growth in online adult social media presence. Currently, seventy-two percent of online adults use social networking sites, an increase from only eight percent in 2005.¹⁹⁷ Even those ages sixty-five and older have more than tripled their social media presence in the last four years, from thirteen percent to forty-three percent.¹⁹⁸ The dominating demographic on social networking sites continues to be those who are younger: eight-three percent of U.S. Internet users between ages eighteen and twenty-nine are Facebook users,¹⁹⁹ and there does not appear to be much divergence between genders in this demographic.²⁰⁰

Thus, as the Internet has become more widely used in households across the nation, so too has the use of various social media platforms. In particular, the growth of Facebook users has been astronomical. As various generations continue to learn and use the Internet and social media websites, people have put those mediums to various uses.

B. Parents Take to Social Media Websites to Punish Their Children

Just as the criminal justice system has developed various punishments for differing levels of criminals, many parents have done the same. Recently, parents

192. *Id.*

193. *Id.* at 5–6.

194. Cooper Smith, *7 Statistics About Facebook Users Reveal Why It's Such a Powerful Marketing Platform*, BUS. INSIDER (Nov. 16, 2013, 8:00 AM), <http://www.businessinsider.com/a-primer-on-facebook-demographics-2013-10>.

195. *Id.* at tbl.

196. *Id.* The same pattern is found for users of Twitter and Instagram. *Id.*

197. JOANNA BRENNER & AARON SMITH, PEW RESEARCH CENTER, *72% OF ONLINE ADULTS ARE SOCIAL NETWORKING SITE USERS 2* (2013), http://pewinternet.org//media/Files/Reports/2013/PIP_Social_networking_sites_update_PDF.pdf.

198. *Id.* at 4.

199. Smith, *supra* note 194.

200. Cohen, *supra* note 20.

have started to utilize public shaming punishments in the same way that courts do.²⁰¹ For example, one California mother recently required her eleven-year-old daughter to stand on a street corner holding a sign that read, “I was disrespecting my parents by twerking at a school dance.”²⁰² In justifying this form of punishment, the mother expressed that she wanted her daughter to realize “that she can’t do that.”²⁰³ Similarly, one mother in Indiana took to public shaming punishments because she did not feel like anyone was taking her fourteen-year old son’s crimes seriously.²⁰⁴ Although the court system punished her son with a fine and community service, his mother did not feel that those punishments would effectively rehabilitate or deter her son after she had already participated in “positive reinforcement,” “negative reinforcement,” “mommy-and-me days,” and called the police on her own son.²⁰⁵ Thus, she required her son to stand on the side of the road in front of his house wearing a sign around his neck that read, “I lie, I steal, I sell drugs.”²⁰⁶

Some parents have even taken their children’s punishments to the realm of social media. In Ohio, one mother, Denise Abbott, chose to punish her daughter for speaking disrespectfully to her in front of her friends.²⁰⁷ After changing her daughter’s Facebook profile picture to a picture of her daughter with a red “X” over her mouth, Abbott placed a message next to the picture saying, “I do not know how to keep [my mouth] shut. I am no longer allowed on Facebook or my phone. *Please ask why.*”²⁰⁸ Abbott required her daughter to answer every inquiry as to why she was being punished, believing that this sort of punishment would actually have some sort of positive effect on her daughter.²⁰⁹ She thought that she could more effectively reach her daughter by adapting her “parenting skills with the

201. See, e.g., Lisa Belkin, *Humiliating Children in Public: A New Parenting Trend?*, HUFFINGTON POST (Apr. 18, 2012, 5:22 PM), http://www.huffingtonpost.com/lisa-belkin/humiliating-children-to-teach-them_b_1435315.html (describing numerous instances of parents requiring their children to stand on street corners with signs that describe their crimes).

202. James Nye, *That Will Teach You to Twerk! Mom Shames Daughter, 11, Into Walking the Streets With Sign for Imitating Miley Cyrus at School Dance*, MAILONLINE (Sept. 11, 2013, 6:11 AM), <http://www.dailymail.co.uk/news/article-2417212/California-girl-Jamie-Hena-11-publicly-punished-mother-Frances-twerking-school-dance.html>.

203. *Id.* Similarly, in Memphis, a thirteen-year old girl stole her mother’s debit card in order to reactivate her cell phone that had already been disabled as a form of punishment. *Teen Forced to Hold ‘I Steal From My Family’ Sign on Street Corner as Punishment (VIDEO)*, HUFFINGTON POST (Feb. 15, 2012, 1:15 PM), http://www.huffingtonpost.com/2012/02/15/teen-forced-to-hold-i-steal-from-my-family-sign_n_1278946.html. The girl’s mother then had her daughter stand on the street corner carrying a sign that read, “I steal from my family.” *Id.*

204. Christina Ng, *Indiana Mom Forces Son to Wear ‘I Lie, I Steal’ Sign*, ABCNEWS (Jan. 12, 2012, 4:07 PM), <http://abcnews.go.com/blogs/headlines/2012/01/indiana-mom-forces-son-to-wear-i-lie-i-steal-sign/>.

205. *Id.*

206. *Id.*

207. Amber Doty, *Ohio Mom Uses Facebook to Punish Teen: Is Humiliation an Appropriate Method of Discipline?*, BABBLE (Apr. 29, 2012), <http://www.babble.com/mom/ohio-mom-uses-facebook-to-punish-teen-is-humiliation-an-appropriate-method-of-discipline/>.

208. *Id.* (emphasis added).

209. *Id.*

times.”²¹⁰ Just as parental disciplinary styles seem to be evolving, perhaps judicial punishments should do the same.²¹¹

Even though many cringe at the description of the punishments above, the children involved sometimes believed the punishments were reasonable and appropriate for what they had done. For example, Abbott’s daughter agreed with her mother’s method of discipline and claimed to understand why her mother reacted the way she did.²¹² Additionally, Miasha Williams expressed similar understanding for her mother’s choice of punishment after she was suspended from school for bullying.²¹³ Although Williams did not want to hold a sign that exposed her as a bully, she “[thought it was] the right punishment.”²¹⁴

Some commentators have supported such punishments on the rationale that “so much else in life is lived out loud and in public” that it logically follows “that [this] method of discipline . . . [seems] fitting in a modern age.”²¹⁵ Further, some support these punishments because they believe that parents know their children much better than anyone else does.²¹⁶ However, others criticize them as ineffective disciplinary tools that send the wrong message to children.²¹⁷

Despite the obvious debate surrounding the use of public shaming punishments upon children by their parents, which this Note does not seek to evaluate, the use of such punishments by courts upon convicted criminals may prove to be quite different. At least from a theoretical perspective, such punishments can be supported.

C. Online Social Media Public Shaming Punishments from a Theoretical Perspective

Public shaming sanctions utilizing online social media websites can be justified based on deterrence and rehabilitation theories, as well as incapacitation theory.

210. *Id.*

211. This Note does not seek to evaluate the use of such public shaming punishments on children by their parents. It is merely making an observation that such punishments are used in the lives of private citizens and that this could lend support to their usage in the criminal justice system as well.

212. Doty, *supra* note 207.

213. *Here’s Your Sign: Teen Gets Public Punishment*, NBCNews (May 17, 2007, 10:25 PM), http://www.nbcnews.com/id/18729564/ns/us_news-life/t/heres-your-sign-teen-gets-public-punishment/.

214. *Id.*

215. Belkin, *supra* note 201.

216. *Here’s Your Sign: Teen Gets Public Punishment*, *supra* note 213.

217. Belkin, *supra* note 201; *see also Is Public Shaming Fair to Kids?*, WTOG, <http://www.wtog.com/story/19305159/is-public-humiliation-fair-punishment-for-kids> (last visited Dec. 27, 2014) (noting a clinic psychologist would feel sympathy for a parent’s frustration but believes “there ought to be a law against this sort of thing”). This Note does not seek to explore the various arguments surrounding such punishments and their psychological impact on children.

1. *Deterrence and Rehabilitation Theories*

Although distinct principles, deterrence and rehabilitation are interrelated, particularly in the analysis of public shaming sanctions. The main contention of deterrence theory is to prevent future crimes, either by the same wrongdoer (specific deterrence) or by others (general deterrence).²¹⁸ Although there is no definitive empirical evidence that online public shaming punishments will deter future criminal conduct, they should do so.²¹⁹ First, criminal penalties deter by raising the cost of criminal behavior in that “[p]otential offenders refrain from committing crimes when the threat of unpleasant consequences offsets the expected gains from breaking the law.”²²⁰ Shaming penalties can lead to loss of respect, societal rejection, and a diminishment in self-esteem.²²¹ Because such penalties morally condemn offenders, they unambiguously mark the offender’s behavior as contrary to community moral norms and send a clear signal to potential offenders that these are not approved types of behaviors.²²² Such condemnation also highlights the disgrace associated with law-breaking, which reinforces society’s preference for compliance with the law.²²³ Furthermore, even if an offender is not shamed by the infliction of a public shaming sanction, the punishment can serve as a general deterrent to the public as a whole by reinforcing the community’s norms.²²⁴

Rehabilitation theory refers to when the government punishes offenders in order “to change their norm-violating ways” by giving them opportunities to reflect on what they have done so as to “actually change the defendant’s attitude as well as her behavior.”²²⁵ Whether or not a particular punishment has successfully rehabilitated someone is difficult to assess.²²⁶ However, one commentator laid out examples for how shaming sanctions could be justified under rehabilitation theory:

If, for example, a particular offender were sufficiently pained by wearing a sign that announced her status as a convicted felon, then she might be “scared

218. Massaro, *supra* note 10, at 1895–96.

219. Upon the implementation of Megan’s Law, which requires convicted sex offenders to register in a publicly accessible database, rape and sexual assaults decreased more than fifty-six percent between 1993 and 2004. Anderson, *supra* note 116. Further, the Washington State Institute for Public Policy conducted a study and found that there was a seventy percent reduction rate in felony sex recidivism following the implementation of the sex offender registry. *Id.* Although the registry seeks to inform the public about dangerous sex offenders in the community, it seems to also be a very effective deterrent. This one example demonstrates that shame has some role in at least deterring offenders convicted of sex crimes, and gives us reason to infer that public shaming punishments have the potential for success in other areas of the law.

220. Kahan, *supra* note 29, at 638.

221. *Id.*

222. *Id.* at 639.

223. *Id.*

224. *Id.* at 636; Note, *supra* note 122, at 2191.

225. Massaro, *supra* note 10, at 1893–94.

226. *Id.* at 1894.

straight,” and refrain from committing that offense in the future. More obviously, if an offender is compelled to apologize to, or interact with victims, then she might become sensitized to the human consequences of criminal acts. The experience might cause her to realize more fully her responsibility to others and thus to avoid conduct that could imperil them.²²⁷

Thus, if being forced to take responsibility for his actions effectively rehabilitates an offender, he will likely also be specifically deterred from committing the crime again as well.²²⁸

Although commentators have argued that shaming sanctions will have no deterrent effect in today’s modern society because of the lack of close-knit community characteristics,²²⁹ there is certainly a possibility that this argument does not apply to the communities people create on the Internet because “as conditions change the opportunities for shame ebb and flow.”²³⁰ Critics retort that many who observe the offender on public display “fail to link [the punishment’s] imposition to the offender’s identity because they have no preconceived idea of who the offender is.”²³¹ They further contend that although newspaper ads and dissemination of information over the Internet may reach some of the offender’s community, it likely will not reach the offender’s *entire community*.²³²

However, much of this discussion turns on how “community” is defined.²³³ If the purpose of shaming sanctions is to deter and rehabilitate the offender by making him come to terms with his crime in the face of societal disapproval, then

227. *Id.* at 1895. *But see id.* at 1926–27 (describing how rehabilitative theory does not support public shaming under modern societal conditions).

228. *See* Pat Wingert, *The Return of Shame*, NEWSWEEK (Feb. 6, 1995, 7:00 PM), <http://www.newsweek.com/return-shame-185216> (describing a dramatic reduction in the recidivism rate of juvenile offenders required to participate in apology rituals).

229. *See* Massaro, *supra* note 10, at 1916, 1921; Whitman, *supra* note 11, at 1064–68 (observing that the argument from modernity does not seem very convincing because of the specific contexts in which shaming sanctions are typically used); Note, *supra* note 122, at 2196.

230. Kahan, *supra* note 29, at 642; *see* HIRSCH, *supra* note 13, at 46 (observing that even though society at large discarded public sanctions, they were still utilized by the penitentiary because the prison “was itself a ‘little community’ still isolated enough for the old formulas to remain effective”).

231. Note, *supra* note 122, at 2196.

232. *Id.* at 2196.

233. *See* Kahan, *supra* note 29, at 642 (“The breakdown of pervasive community ties at the outset of the industrial revolution may have vitiated the stake that many individuals had in social status; but the proliferation of new civic and professional communities—combined with the advent of new technologies for disseminating information—has at least partially restored it for many others.”). Kahan offers an effective example:

Consider, for example, a corporate executive who is deciding whether to bribe a public official or to dump toxic wastes. He might not care that much what an auto mechanic in a remote part of town will think of him if he is caught and word of his offense broadcast to the community at large. But he probably cares a lot about what his family, his colleagues, his firm’s customers, his neighbors, and even the members of his health club think. The prospect of being disgraced in their eyes thus continues to furnish a strong incentive—psychological, economic, and otherwise—to avoid criminality.

Id. at 643.

the offender's community should revolve around only the people who know him.²³⁴ Thus, the failed aspect of a shaming sanction to not reach the "entire community" is likely not applicable in the context of an offender who is forced to expose his criminal tendencies to those who clearly *know* him.²³⁵ Individuals usually belong to multiple communities,²³⁶ and in today's modern age, most belong to some sort of social community that is harbored over the Internet.²³⁷ The person himself creates this community by picking and choosing with whom to associate.²³⁸ An offender's "entire community" can be characterized as the one *he himself creates* via online social media. Thus, a shaming sanction directed toward this self-created online community could actually reach the particular offender's "entire community."

If an offender is forced to reveal his criminal ways to *this* community, then the argument that public shaming will not be effective in modern society due to population increases, geographical expansion, and the lack of societal interdependency seems to disappear. It appears that an offender's community via online social media platforms contains the cultural conditions that existed during the colonial period, which fostered an environment in which public shaming thrived.²³⁹ Further, the Internet has a "permanence problem" in that once information about an offender is posted online, it is likely never going to go away.²⁴⁰ This permanency further defeats the argument that public shaming via online social media would not reach an offender's "entire community." Even if everyone in an

234. See Massaro, *supra* note 10, at 1902 ("The audience to a shaming must include people who are important to the offender, or she will not be 'ashamed.'").

235. Although the Internet *may* not be effective in reaching an "entire community," such as every person an offender has ever been connected with, it likely could be effective in reaching an offender's close-knit social community, which seems to be the community that is most receptive to an offender's public shaming punishment.

236. Note, *supra* note 122, at 2196–97; see Sanford Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1463–68 (1986).

237. See Garcia, *supra* note 32, at 113 ("With the rise of modern technological advances, new communities exist that . . . foster a sense of social cohesion. 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.").

238. See Anderson, *supra* note 116 (describing how in 2011, the average Facebook user had 130 friends and was connected to eighty groups, communities, and events, which included schools, employers, religious organizations, clubs, relatives, and local neighborhood organizations).

239. See *supra* Section II.A (discussing social conditions in the colonial period). It is possible that this online community may not have shared values, creating differences of opinion between subcultures that could influence the effectiveness of public shaming sanctions via social media. See Massaro, *supra* note 10, at 1923 (observing that although the majority of Americans agree that certain acts, such as murder, are crimes, significant subcultural disagreements often exist regarding what punishments are embarrassing). This Note does not attempt to analyze the specific members within an offender's potential online community and thus the inherent differences between those members' cultural viewpoints. However, there is an argument to be made that an offender's online community could be so eclectic that public shaming sanctions may lose some of their deterrent or rehabilitative effect due to the erosion of the cultural conditions that foster the effectiveness of public shaming sanctions.

240. Cole Stryker, *The Problem With Public Shaming*, THE NATION (Apr. 24, 2013), <http://www.thenation.com/article/174039/problem-public-shaming#>.

offender's community did not see his posted mug shot today, those people could certainly see it in the future or look it up if they desired.²⁴¹

Although critics may argue that this "permanence problem" is indeed troubling in the sense that it could lead to a punishment that is not proportional to the offender's crime, it is important to note that this problem already exists for many forms of public shaming punishments that have been upheld by the courts. For example, for public shaming punishments that require offenders to publish mug shots or apologies in newspapers,²⁴² those advertisements can be found not only in printed copies but also now on numerous electronic databases as well as on the newspaper's own website. Thus, the "permanence problem" may be amplified in the online public shaming context, but it may not be a sufficient argument to cut against the implementation of such punishments. By requiring offenders to publicize their criminal ways to their self-created online communities, online social media shaming punishments will likely have a deterrent effect.

Further, online social media shaming punishments will probably have a rehabilitative effect as well. Essential to rehabilitation is guilt and the removal of the offender "from [his] comfort zone and forcing [him] to interact with those [he has] harmed."²⁴³ Such a process "creates an atmosphere that inspires contrition," which should inspire offenders to become remorseful and to have a desire to change so that the offender can be reintroduced into society.²⁴⁴ Even the courts recognize that "it is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault."²⁴⁵ As demonstrated by Denise Abbott's use of Facebook to shame her daughter, which required her daughter to actively respond to inquiries about her punishment, this is just one tactic that could be implemented to effectuate a rehabilitative purpose. The fact that Abbott's daughter recognized her wrongdoing and believed her punishment was appropriate further illustrates the potential for online social media public shaming punishments to effectively rehabilitate offenders.

What this discussion demonstrates is that the criminal justice system may just need to shift its focus to "inspiring reconciliation between the offender and the offended."²⁴⁶ As demonstrated by the Ninth Circuit's creative punishment in *Gementera*, which required a mail thief to write letters of apology to his victims in

241. Because the criminal justice system seeks to punish offenders for the crime committed, and such punishments typically have a start and an end date, there is the potential that the offender's punishment could carry into the future, past the date of the offender's probation period. Although this Note does not seek to propose a remedy to this potential problem, one suggestion rests on the cooperation of social media websites with criminal law enforcement agents. Perhaps some sort of technological innovation exists whereby an offender's posting of a mug shot or apology could be removed in the future when his punishment has officially terminated.

242. See, e.g., *United States v. Clark*, 918 F.2d 843, 845 (9th Cir. 1990); *Lindsay v. State*, 606 So. 2d 652, 653-54 (Fla. Dist. Ct. App. 1992).

243. Anderson, *supra* note 116.

244. *Id.*

245. *Gollaher v. United States*, 419 F.2d 520, 530 (9th Cir. 1969).

246. Anderson, *supra* note 116.

addition to standing outside the postal office with a signboard,²⁴⁷ the court can impose conditions in a way that truly effectuates a rehabilitative purpose. It is possible for public shaming punishments, even via online social media, to attach some sort of extra rehabilitative component so as to change an offender's perspective and hopefully alter his future behavior.²⁴⁸

2. Incapacitation Theory: Protecting the Public

Public shaming punishments that incorporate social media websites likely are supported by incapacitation theory as well. Incapacitation theory suggests that a punishment should protect the public from the offender, either by physically removing the offender from society, or somehow disabling him from committing future crimes.²⁴⁹ Certain forms of public shaming may be a form of incapacitation in that they can protect the public by making future acts more difficult for the offender to perform.²⁵⁰ For example, requiring an offender to make a public apology or publicizing the offender's identity in the newspaper may alert members of the community about the person's criminal past so that they may choose not to associate themselves with that person, or to provide any services to the offender that may actually aid the offender in committing another crime.²⁵¹ Overall, having more knowledge about offenders protects the public; armed with that information, the public can take appropriate steps to avoid contact with the offender.

Society's desire to protect the public from criminals supports the use of public shaming punishments. Inherent in a public shaming punishment is the notion that such a punishment *is public*. Thus, any sort of punishment that alerts citizens to potential danger will have support under incapacitation theory. This rationale seems to also include shaming punishments that involve online social media. Moreover, the effectiveness of incapacitation does not seem to rely on whether or not the audience is familiar with the offender; however, one can imagine that the impact could be much greater upon the public if the public became aware of a friend's criminal conduct through a posted picture on Facebook. Thus, online social media public shaming would also find support under an incapacitation theory.

It is important to note that incapacitation theory may more strongly support the use of online social media public shaming sanctions as punishment for certain crimes over others. For example, if a corporate CEO is found guilty of embezzlement, an online social media shaming sanction may very well protect the public from re-hiring him or trusting him with funds. However, if a person is convicted of

247. *United States v. Gementera*, 379 F.3d 596, 599 (9th Cir. 2004).

248. See discussion *infra* Section VI for a more detailed account of the future of public shaming sanctions and social media.

249. Massaro, *supra* note 10, at 1899.

250. *Id.* at 1889–1900.

251. *Id.* at 1900.

burglary, an online social media shaming punishment may make people more aware of potential danger, but the burglar will still be free to roam the streets and steal again. Therefore, online social media shaming sanctions are likely supported under incapacitation theory but may be more effective in certain contexts than others. The last part of this Note further discusses the future of online social media shaming sanctions and the potential need for sentencing guidelines regarding their usage.

VI. THE FUTURE OF THE USE OF SOCIAL MEDIA WEBSITES IN PUBLIC SHAMING PUNISHMENTS

Public shaming sanctions that utilize social media websites are likely supported by criminal law theories. Further, such punishments have already been used by parents and seem to be effective in some instances. The question remains whether or not the judiciary should take the next step in expanding its already creative public shaming punishments to include punishments that utilize social media websites.

Noting the apparent inconsistency in sentencing that shaming punishments lead to, Professor Jonathan Turley has asserted that “judges are not chosen to serve as parents trying to set consequences for wayward children. Law demands not just consequences for wrongdoing, but consistent consequences. Otherwise citizens are left wondering whether they will receive a standard punishment or one improvised to suit a judge’s whim.”²⁵² The use of such customized punishments could undermine the criminal justice system’s desire to make criminal sentencing more uniform.²⁵³ Professor Turley asserts the legislature should be responsible for defining the ranges of permissible punishment.²⁵⁴

If the judiciary wishes to utilize online social media public shaming punishments, the public may indeed be better served if they are accompanied by legislative guidelines. The following parts do not provide a detailed statutory guideline, but rather a simplistic overview of some of the more important considerations legislatures should take into account.²⁵⁵ Statutory guidelines should seek to address two main criticisms of these types of public shaming punishments: (A) that judicial discretion in this area will create inconsistent sentencing, and (B) that these types of punishments merely humiliate offenders and serve no rehabilitative purpose.

252. Turley, *supra* note 70.

253. *Id.*

254. *Id.*

255. For another perspective outlining how the judicial system should implement public shaming sanctions, see Book, *supra* note 30, at 681–86.

A. *Statutory Guidelines to Avoid Sentencing Inconsistency*

Even though the threat of sentencing inconsistency is present whenever judges have sentencing discretion, statutory guidelines could decrease the possibility of large discrepancies in sentencing when judges wish to utilize online social media public shaming punishments. As previously discussed, many people in the United States use social media; however, not all criminals will be able to be punished with an online social media public shaming punishment because they may not even have access to the Internet, let alone have an online social media presence. Therefore, a sentencing guideline that requires judges to thoroughly investigate whether this type of public shaming punishment would be effective upon a particular offender should be encouraged.

In 1984, Congress passed the Sentencing Reform Act, which established the federal sentencing commission.²⁵⁶ The U.S. Sentencing Commission was responsible for writing mandatory guidelines that judges had to follow when sentencing convicted criminals who had committed the same crimes.²⁵⁷ However, in 2005, the Supreme Court ruled that United States Sentencing Guidelines were unconstitutional in the landmark case *United States v. Booker*.²⁵⁸ Following *Booker*, the Guidelines became advisory, rather than mandatory.²⁵⁹ This holding caused many people to worry that defendants would be treated unfairly as judges gained greater discretion in sentencing.²⁶⁰ However, the *Booker* Court limited judicial discretion by requiring judges to “consult those Guidelines and take them into account when sentencing.”²⁶¹

Even though the Guidelines are no longer mandatory, many judges continue to sentence defendants within the sentencing ranges provided by the Guidelines.²⁶² In 2012, the United States Sentencing Commission released a report stating that the Guidelines “have remained the essential starting point for all federal sentences and have continued to influence sentences significantly.”²⁶³ Between December 2007 and October 2011, 80.7% of sentences fell within the Guideline ranges or fell below those ranges pursuant to a government motion.²⁶⁴ Thus, even though the

256. Mosi Secret, *Wide Sentencing Disparity Found Among U.S. Judges*, N.Y. TIMES (Mar. 5, 2012), <http://www.nytimes.com/2012/03/06/nyregion/wide-sentencing-disparity-found-among-us-judges.html>.

257. *Id.*

258. 543 U.S. 220, 245 (2005).

259. *See id.*

260. Secret, *supra* note 256.

261. *Booker*, 543 U.S. at 264.

262. Ken LaMance, *How Federal Sentencing Guidelines Have Recently Changed*, LEGALMATCH, <http://www.legalmatch.com/law-library/article/how-federal-sentencing-guidelines-have-recently-changed.html> (last modified Jan. 27, 2012); Secret, *supra* note 256.

263. UNITED STATES SENTENCING COMMISSION, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 60 (2012), available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf.

264. *Id.* at 5, 60.

Guidelines are no longer mandatory, they continue to be extremely influential in a judge's decision-making process. As such, they stand to be a useful tool in formulating more consistent public shaming punishments.

In formulating online public shaming punishments, judges should not be able to impose punishments that require offenders to go out of their way to acquire computers or certain programs over the Internet in order to carry out their sentences. Judges should only implement public shaming conditions utilizing social media websites if the Government can prove that the offender already has access to the Internet and has an online social media presence. As discussed above, such a punishment will likely only be successful if the offender has created his own online community. Thus, judges should be required to evaluate the criminal and determine whether this type of punishment is appropriate for him or her. A guideline that codifies this requirement would help alleviate inconsistencies in sentencing because offenders would know in advance what type of punishment they could potentially receive. For example, an offender who is poor and does not have access to a computer would not be worried that this type of punishment could be enforced upon him. On the other hand, a more high profile or wealthy offender who has a large online social media presence would understand that committing a crime puts him at risk for such a punishment.

Further, the legislature should consider implementing a table of penalties outlining the offenses that could lead to the implementation of an online social media public shaming punishment. This implementation would again put potential offenders on notice of potential punishments. The table could also include the various types of online social media public shaming punishments that are available for the judiciary to use. This Note has only mentioned the use of an offender's Facebook through the posting of the offender's mug shot with a caption; however the legislature would be free to add other forms of punishments using other social media websites. For example, the judiciary could require an offender to "tweet" an apology to his followers on Twitter. However, if the Facebook punishment were the only one available, this would greatly limit sentencing inconsistencies between eligible offenders because only one punishment could be utilized amongst them. Thus, a sentencing guideline incorporating a table of penalties with types of online punishments and outlining necessary offender characteristics would serve to reduce sentencing inconsistencies in the context of online social media public shaming punishments.

B. Statutory Guidelines to Avoid Punishments Solely for the Sake of Humiliation

In implementing public shaming sanctions via social media websites, sentencing guidelines that require such punishments to include reintegrative elements would eliminate the impression that the punishment was solely being used to humiliate the offender. Studies suggest that the effectiveness of shaming sanctions depends somewhat on whether a culture shames reintegratively, meaning that the

community seeks to redeem the offender after the shaming has occurred and to reaccept that person into society.²⁶⁵ The main difference between shaming that is reintegrative and shaming that is disintegrative is that disintegrative shaming seeks to stigmatize the offender in order to create a class of outcasts, while reintegrative shaming pays more attention to de-labeling the offender as a gesture of reacceptance and forgiveness.²⁶⁶ One example where such reintegrative shaming occurs is within a family where the child does not become a criminal but rather knows that even after his punishment, his family will continue to love him.²⁶⁷ It is hypothesized that “families are the most effective agents of social control” because of their use of this “continuum of love.”²⁶⁸ Thus, public shaming punishments that contain more reintegrative elements could have the effect of greater social control over criminals.

Although one commentator suggests that today’s individualistic modern culture does not foster an environment of reintegration because communities do not have rituals to reclaim the offender,²⁶⁹ it is not impossible to at least try to *create* such an environment. As another commentator more optimistically discusses, there is a possibility of devising shaming ceremonies that are reintegrative, rather than disintegrative.²⁷⁰ For example, the rehabilitative subculture of Alcoholics Anonymous serves such a purpose in society “where those who perform remarkable feats of rehabilitation are held up as role models” and “where ceremonies to decertify deviance are widely understood and readily accessible.”²⁷¹

It certainly appears to be possible to formulate public shaming sanctions that foster a more reintegrative approach rather than a disintegrative one. As already seen in *Gementera*, Judge Walker created a probation condition that included a public shaming element as well as requirements for the offender to give lectures at schools and write letters to his victims.²⁷² This sort of combination of public shaming with reintegrative social elements appears to walk the line between a sanction that clearly seeks to condemn and ostracize the offender, with one that desires to redeem the offender and reclaim him back into society. Further, a reintegrative approach is possible when utilizing social media websites to publicly shame an offender. As demonstrated by Denise Abbott when she used her daughter’s Facebook to shame her daughter, she also required her daughter to answer inquiries about what she had done wrong and to explain herself to anyone

265. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 55 (1989); Massaro, *supra* note 10, at 1924.

266. BRAITHWAITE, *supra* note 265, at 55.

267. *Id.* at 56 (discussing the “family model”).

268. *Id.*

269. Massaro, *supra* note 10, at 1924 (“The earmarks of reintegrative shame cultures include social cohesiveness, a strong family system, high communitarianism, and social control mechanisms that aim to control by reintegration into the cohesive networks, rather than by formal restraint.”).

270. BRAITHWAITE, *supra* note 265, at 163.

271. *Id.*

272. *United States v. Gementera*, 379 F.3d 596, 599 (9th Cir. 2004).

who asked.²⁷³ This requirement forced her daughter to reflect on her actions, one of the first steps in rehabilitating an offender. Additionally, by requiring her daughter to make contact with those who knew her and were inquiring about her wrongdoing, her daughter was, in a way, being reaccepted amongst her peers. While it may be unrealistic to believe that the probation system could emulate this exact form of punishment as a probation condition, it can be argued that the mere act of requiring the offender to post his picture and an explanation of his crime online would itself be rehabilitative and open the door for his reintegration into society.

With the wide discretion that judges currently have in formulating punishments, there seems to be a place in the judicial system for reintegrative public shaming punishments that utilize social media websites. However, if the judiciary wishes to incorporate online social media public shaming sanctions into its existing punishment options, state legislatures and/or Congress should implement guidelines for such use.

VII. CONCLUSION

With the already widespread usage of public shaming punishments by judges, one wonders what form these punishments will take as society continues to change and develop. Such punishments have already transformed from ones of public display in the pillories, to wearing signboards describing an offender's crimes, to publishing the offender's mug shot with a description of his or her crimes in a newspaper. Although today's society is individualistic and private, causing some commentators to express malcontent with the usage of public shaming sanctions, these same qualities of today's society could prove to be reasons why shaming sanctions *can* work. However, such shaming sanctions must be altered from their current form in order to meet the new conditions of today's modern society. In particular, the inclusion of online social media websites in public shaming sanctions may prove to be an effective form of punishment that takes into account the societal conditions that exist today. Because people create their own communities via the Internet, public shaming sanctions that utilize an offender's online presence could be particularly effective. Such punishments are likely supported by various criminal law theories, as well as the theories that proponents of public shaming sanctions in general have advocated.

With that said, due to the unknown psychological consequences of public shaming sanctions, as well as the discretion that judges have in implementing such punishments, it may be wise for the legislature to implement sentencing guidelines around the usage of public shaming sanctions that incorporate social media websites. Guidelines would help alleviate the concerns surrounding inconsistency in punishment, and also aid judges in determining if such sanctions are appropriate

273. See Doty, *supra* note 207.

for certain offenders. Such guidelines should also require judges to include reintegrative probation conditions along with any public shaming sanction so as to make sure that such sanctions are not implemented solely for the sake of humiliation.

With the ever-changing technology of today's modern world, the judiciary could be ready to start expanding its already existing menu of shaming sanctions to include those that utilize social media websites. Although the passage of time may reveal an answer as to the effectiveness of public shaming sanctions, so far, time has not produced one. Perhaps the only thing left to do is to allow public shaming sanctions to evolve with the times, rather than count them out completely. This evolution could lead to the implementation of public shaming punishments that utilize social media websites. However, the use of such punishments should be carefully studied, and those who study it should guide the judiciary and legislature. After critically analyzing the effectiveness of these new punishments, the legal community may finally have its answer.

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