"FRIEND TO THE MARTYR, A FRIEND TO THE WOMAN OF SHAME": THINKING ABOUT THE LAW, SHAME AND HUMILIATION*

BY: PROFESSOR MICHAEL L. PERLIN** & NAOMI M. WEINSTEIN, ESQ.***

ABSTRACT

This Article considers the intersection between law, humiliation and shame, and how the law has the capacity to allow for, encourage, or (in some cases) remediate humiliation, or humiliating or shaming behavior. The need for new attention to be paid to this question has increased exponentially as society begins to also take international human rights mandates more seriously, especially—although certainly not exclusively—in the context of the recently-ratified United Nations Convention on the Rights of Persons with Disabilities, a convention that calls for "respect for inherent dignity," and characterizes "discrimination against any person on the basis of disability [as] a violation of the inherent dignity and worth of the human person . . . ."

Humiliation and shaming contravene basic fundamental human rights and raise important constitutional questions implicating the due process and equal protection clauses. Humiliation and shaming practices

---

* An excerpt from this paper was presented at the Human Dignity & Humiliation Studies

** Director of the International Mental Disability Law Reform Project and the Online Mental Disability Law Program; Professor, New York Law School. J.D. 1969, Columbia Law School; A.B. 1966, Rutgers University.

*** Senior Attorney, Mental Hygiene Legal Service, Appellate Division, First Judicial Department, New York. J.D. 2010, New York Law School; B.A. 2006, Tufts University.

include "scarlet letter"-like criminal sanctions, police stop-and-frisk practices, the treatment of persons with mental disabilities in the justice system, and the use of sex offender registries. Humiliation and shame are detrimental in ways that lead to recidivism, inhibit rehabilitation, discourage treatment, and injure victims. They also directly contravene the guiding principles of therapeutic jurisprudence, especially in the context of its relationship to the importance of dignity in the law, and potentially violate international human rights law principles as well.

This Article explores how humiliation and shaming harm all participants in the legal system and the law itself. It urges that the techniques be banned, and that this ban will enhance dignity for the entire legal system and society as a whole. First, the Article considers the meaning of shame and humiliation. Then, it briefly discusses principles of therapeutic jurisprudence and its relationship to the significance of dignity, and considers recent developments in international human rights law, both of which are valuable interpretive tools in this conversation. Next, it looks at how the United States Supreme Court has considered these concepts in recent cases. Following this, it studies several relevant areas of law and policy from the perspective of how overt shaming is employed: scarlet letter punishments, use of the police power, treatment of institutionalized persons with mental disabilities and elders, and sex offender registry law. Then, using a therapeutic jurisprudence filter and drawing on international human rights law principles, it examines why these shaming tactics are contrary to bedrock principles of the legal system: the mandates to honor dignity, to minimize recidivism, and to enhance rehabilitation.

TABLE OF CONTENTS

I. INTRODUCTION

Thirty years ago, Professor Robert Cover famously wrote that the "principle by which legal meaning proliferates in all communities never exists in isolation from violence."[1] Scholars have spent the past three decades plumbing the depths of what Cover wrote, and applying it to a vast range of legal topics.[2] Cover's theories on law and violence have greatly influenced legal academia.[3]

In one of Cover's most important articles, he briefly discussed the relationship between shame and violence, noting: "[t]here are societies in

---

[1] Robert M. Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).

[2] *See, e.g.*, Jamal Greene, *On the Origins of Originalism*, 88 Tex. L. Rev. 1, 74 n.516 (2009) (discussing Cover's Nomos and Narrative while investigating originalism); Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 404 (1991) (discussing Cover's Nomos and Narrative and its application to the law); Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 433 n.102 (2011) (discussing Cover's Nomos and Narrative while investigating the power of language).

[3] *See, e.g.*, Daniel Ross Goodman, *Towards a Moral Values Paradigm in False-Speech Adjudication*, 55 S. TEX. L. REV. 71, 74–75 (2013) ("In his important and influential essay *Nomos and Narrative*, Robert Cover memorably distinguished the creative and constrictive interpretations of the Supreme Court as 'jurisgenerative' and 'jurispathic."); Nomi M. Stolzenberg, *Un-Covering the Tradition of Jewish "Dissimilation": Frankfurter, Bickel, and Cover on Judicial Review*, 3 S. CAL. INTERDISC. L.J. 809, 812 (1994) (noting the influence of Cover's *Nomos and Narrative*); Beverly Horsburgh, *Recent Development, Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171, 213 (1995) (noting that Cover is a "highly influential scholar").

which contrition or shame control defendants' behavior to a greater extent than does violence. Such societies require and have received their own distinctive form of analysis."[4] This Article's authors believe that, on many levels, our society has become one in which shame—along with violence—is used as a modality to control defendants' (and other litigants') behavior. This Article thus seeks to address the intersection between law, humiliation and shame, and how the law has the capacity to allow for, encourage, or (in some cases) remediate humiliating or shaming behavior.[5] This intersection is a collateral issue that has not been the topic of nearly as much attention as has the intersection between law and violence, but is one that must be examined if the dignitarian values that the law optimally expresses are to be taken seriously.[6] This issue's need for new attention has increased exponentially as society begins to also take international human rights mandates more seriously, especially in the context of the recently ratified United Nations Convention on the Rights of Persons with Disabilities ("CRPD").[7] That convention calls for "respect for inherent dignity,"[8] and characterizes "discrimination against any person on the basis of disability [as] a violation of the inherent dignity and

---

[4] Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1607 (1986).

[5] *See generally* SHAME: INTERPERSONAL BEHAVIOR, PSYCHOPATHOLOGY, AND CULTURE (Paul Gilbert & Bernice Andrews eds., 1998) (discussing the concept of shame). *See also* Toni M. Massaro, *The Meaning of Shame: Implications for Legal Reform*, 3 PYSCHOL. PUB. POL'Y & L. 645, 648 (1997) (discussing the role of shame in legal reforms); Walter J. Torres & Raymond M. Bergner, *Humiliation: Its Nature and Consequences*, 38 J. AM. ACAD. PSYCHIATRY & L. 195, 199 (2010) (analyzing the structure of humiliation).

[6] MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW 100–06 (2013) (discussing dignity in the law and criminal justice system); Michael Perlin, *"There Are No Trials Inside the Gates of Eden": Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, *in* COERCIVE CARE: LAW AND POLICY 193, 217 (Bernadette McSherry & Ian Freckleton, eds., 2013) [hereinafter Perlin, *Gates of Eden*] (discussing how dignity plays a role in mental health law); Michael L. Perlin, *Understanding the Intersection Between International Human Rights and Mental Disability Law: The Role of Dignity*, *in* THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES 191, 194 (Bruce Arrigo & Heather Bersot, eds., 2014) [hereinafter Perlin, *The Role of Dignity*] (discussing the role of dignity in law); Michael L. Perlin, *"Dignity Was the First to Leave": Godinez v. Moran, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61 (1996) [hereinafter Perlin, *Dignity Was the First to Leave*] (discussing how dignity is a prerequisite for a constitutionally fair trial); Michael L. Perlin, *"The Judge, He Cast His Robe Aside": Mental Health Courts, Dignity and Due Process,* 3 J. MENTAL HEALTH L. & POL'Y J. 1, 20–21 (2013) [hereinafter Perlin, *Cast His Robe*] (discussing the role of dignity in the law).

[7] G.A. Res. 61/611, U.N. GAOR, 61st Sess., Supp. No. 49, U.N. Doc. A/61/611 (Dec. 6, 2006) [hereinafter CRPD].

[8] *Id*. at 4.

worth of the human person."[9]

Humiliation and shaming contravene basic fundamental human rights and raise important constitutional questions implicating the due process and equal protection clauses.[10] Humiliation and shaming practices include "scarlet letter" criminal sanctions,[11] police stop-and-frisk practices,[12] the treatment of persons with mental disabilities in the justice system,[13] and the use of sex offender registries.[14] Moreover, humiliation and shame are detrimental in ways that lead to recidivism,[15] inhibit rehabilitation,[16] discourage treatment,[17] and injure victims.[18] These practices also directly contravene the guiding principles of therapeutic jurisprudence ("TJ"), especially in the context of its relationship to the importance of dignity in the law,[19] and potentially violate international human rights law principles.[20]

In recent years, scholars and activists from multiple disciplines have begun to devote themselves to the study of humiliation and how it robs the legal system and society of dignity. [21] The Human Dignity and Humiliation Studies Network explicitly underscores this in its mandate: "We wish to stimulate systemic change, globally and locally, to open space for dignity and mutual respect and esteem to take root and grow, thus ending humiliating practices and breaking cycles of humiliation

---

[9] *Id*. at 2. See also Raymond Lang, *The United Nations Convention on the Rights and Dignities for Persons with Disabilities: A Panacea for Ending Disability Discrimination?*, 3 ALTER: EUR. J. DISABILITY RES. 266, 273 (2009) (discussing how dignity is the first "fundamental axiom" upon which the convention is premised).

[10] *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[11] *See infra* Part IV.A.

[12] *See infra* Part IV.B.

[13] *See infra* Part IV.E.

[14] *See infra* text accompanying notes 252–312.

[15] *See infra* text accompanying notes 269–93.

[16] *See infra* text accompanying notes 280–90.

[17] *See infra* text accompanying notes 308–11.

[18] *See infra* text accompanying note 326.

[19] *See infra* Part V.

[20] *See infra* Part III.

[21] *See, e.g.*, *Welcome to Human Dignity and Humiliation Studies*, HUMAN DIGNITY AND HUMILIATION STUDIES (2014), http://www.humiliationstudies.org/ (last visited Sep. 4, 2014) ("We are a global transdisciplinary network and fellowship of concerned academics and practitioners. We wish to stimulate systemic change, globally and locally, to open space for dignity, for mutual respect and esteem to take root and grow, thus ending humiliating practices and breaking cycles of humiliation throughout the world.").

throughout the world."[22]

This Article's title comes in part from Bob Dylan's 1983 song "Jokerman."[23] In the most elaborate discussion of the song's meaning, the critic Michael Gray points out that it "insist[s] that 'evil' is not 'out there,' 'among the others,' but is inside us all, and that all progress, individual and social, must be built upon coming to terms with this literally inescapable, fundamental truth."[24] Some verses after the "friend to the woman of shame" line, Dylan sang, "False-hearted judges dying in the webs that they spin, only a matter of time 'til the night comes stepping in."[25] Shaming litigants—the men and women of shame—is often the work of such "false-hearted judges," and the result of these shaming and humiliating tactics is often a reflection of the evil that is, in Gray's words, "inside us all."[26] We believe that these words are crucial to understanding the legal issues discussed here.

This Article explores how humiliation and shaming are bad for all participants in the legal system and the law itself. It urges that humiliating and shaming techniques be banned in order to enhance dignity for society and the legal system. In Section I, the Article considers the meanings of shame and humiliation. Then, it briefly discusses principles of TJ, its relationship to the significance of dignity, and recent developments in international human rights law in Section II. Section III discusses international human rights law and the CRPD. Next, the Article considers how the United States Supreme Court has evaluated these concepts in recent cases in Section IV. Next, the Article examines several relevant areas of law and policy from the perspective of how overt shaming is employed through scarlet letter punishments, use of the police power, treatment of institutionalized persons with mental disabilities, treatment of elders, and sex offender registry laws. Then, using a TJ filter and drawing on international human rights law principles, Section V considers why these shaming tactics are contrary to bedrock principles of the legal system, including the mandates to honor dignity, minimize recidivism, and enhance rehabilitation. Section VI concludes.

---

[22] *Id.*

[23] BOB DYLAN, Jokerman, on INFIDELS (Columbia Records 1983).

[24] MICHAEL GRAY, THE DYLAN ENCYCLOPEDIA 364 (2008).

[25] Dylan, *supra* note 23.

[26] *See* GRAY, *supra* note 24, at 362 (reflecting Dylan's focus on shame, and how evil can be internalized as well as externalized).

II. WHAT IS SHAME?

Shame is a difficult concept to understand. "Shame is bordered by embarrassment, humiliation, and mortification, in porous ways that are difficult to predict or contain,"[27] and it is "one of the most important, painful and intensive of all emotions."[28] Although each person reacts differently to shame,[29] there is uncontested uniformity among "the self-shattering pain that shame can produce in an individual," even when the "experience may vary widely among individuals."[30] "Shame is considered to be more painful than guilt because one's core self—not simply one's behavior—is at stake."[31] Typically, scholars note how sexual abuse can cause such reactions,[32] but the range of behaviors is far wider, including, but certainly not limited to, college hazing,[33] societal response to transgendered individuals,[34] and online invasions of privacy.[35] According to Professor Martha Nussbaum, when "shame is a large part of their problem . . . expos[ing] that person to humiliation may often shatter the all-too-fragile defenses of the person's ego. The result might be utter collapse."[36]

Like shame, humiliation can be difficult to abstractly

---

[27] Massaro, *supra* note 5, at 655.

[28] Robert Svensson et al., *Moral Emotions and Offending: Do Feelings of Anticipated Shame and Guilt Mediate the Effect of Socializing on Offending?,* 10 EUR. J. CRIMINOLOGY 2, 3 (2012).

[29] Massaro, *supra* note 5, at 656.

[30] *Id.* at 661.

[31] June Price Tangney et al., *Moral Emotions and Moral Behavior*, 58 ANN. REV. PSYCHOLOGY 345, 349 (2007).

[32] *See* Jennifer Ann Drobac, *Wake Up and Smell the Starbucks Coffee: How* Doe v. Starbucks *Confirms the End of "The Age of Consent" in California and Perhaps Beyond*, 33 B.C. J.L. & SOC. JUST. 1, 13 (2013) (discussing how the American Academy of Child & Adolescent Psychiatry has explained that children and adolescent victims "commonly conceal the perpetrator's offenses based on feelings of shame, fear, humiliation, and vulnerability"); Claudio Negrao II et al., *Shame, Humiliation, and Childhood Sexual Abuse: Distinct Contributions and Emotional Coherence*, 10 CHILD MALTREATMENT 350, 351 (2005) (discussing shame among childhood sexual abuse survivors).

[33] Claire Wright, *Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN'S L.J. 457, 556–57 (2013).

[34] *See* Amy D. Ronner, *Let's Get the "Trans" and "Sex" Out of It and Free Us All*, 16 WOMEN'S J. GENDER RACE & JUST. 859, 908 n.326 (quoting Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 295 (1999) (discussing shame in the lack of choice for gender identification)).

[35] Jacqueline D. Lipton, *Mapping Online Privacy*, 104 NW. U. L. REV. 477, 504 (2010).

[36] Michael Lee Dynes & Henry Edward Whitmer, *The Scarlet Letter of the Law: A Place for Shaming Punishments in Arizona*, 6 PHOENIX L. REV. 513, 524 (2013) (quoting Martha C. Nussbaum, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 236 (2004)).

conceptualize. Broadly, humiliation has been defined as "the rejection of human beings as human, that is, treating people as if they were not human beings but merely things, tools, animals, subhumans, or inferior humans."[37] Humiliation can also reflect "a loss of control over one's identity,"[38] or "being denied a certain status in communion with others."[39]Because of humiliation's damaging effects, "[a] civilized society is one whose members do not humiliate one another."[40] Certainly, apology may have a role in remediating shame and humiliation. In his book, *On Apology,* Aaron Lazare notes:

> Apologies have the power to heal humiliations and grudges, remove the desire for vengeance, and generate forgiveness on the part of the offended parties. For the offender, they can diminish the fear of retaliation and relieve the guilt and shame that can grip the mind with a persistence and tenacity that are hard to ignore.[41]

The use of humiliation techniques, whether done in overt or passive ways, violates rights to due process, privacy, and freedom from cruel and unusual punishment.[42] By marginalizing the rights of those who are shamed and humiliated, such individuals are treated as less than human.[43]

Indeed, the entire legal process has the capacity to shame. Luther Munford, a practicing attorney, highlighted the inherent potential in the legal process for humiliation and shame:

> As one researcher has written, 'few psychotherapists or litigants are truly prepared for the forces of aggression that are released and sanctioned by our judicial system.' Litigation presents the ultimate psychological threat because it puts each party's integrity at issue. A person who is sued fears a judgment that will bankrupt him. Even if that does not happen, he may

---

[37] Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 487 n.266 (1997) (quoting Avishai Margalit, THE DECENT SOCIETY 1 (1996)).

[38] Claire Wright, *Censoring the Censors in the WTO: Reconciling the Communitarian and Human Rights Theories of International Law*, 3 J. INT'L MEDIA & ENT. L. 17, 102 n.534 (2010) (citing JACK KATZ, SEDUCTION OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL 24 (1988)).

[39] Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 CORNELL INT'L L.J. 675, 691 n.120 (2008) (citing Axel Honneth, THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS 131–39 (Joel Anderson trans., 1995)).

[40] Margalit, *supra* note 37, at 1.

[41] Aaron Lazare, ON APOLOGY 1 (2004); *cf.* Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT'L L. 433, 441 (2006) (noting that apologies can be used for negative means as "stronger states have coerced apologies from weaker states or peoples as expressions of dominance or means of humiliation").

[42] *See* Bernstein, *supra* note 37, at 489–90 (discussing the damaging nature of humiliation).

[43] *Id.*

> not be able to get a loan or change jobs while the lawsuit is pending. A suit against a professional assaults his professional competence or even morality. On the other hand, a person who sues fears the rejection and humiliation that accompany a courtroom defeat.[44]

Subsequently, Munford noted that litigation "keeps the injury alive and present" in such a way that "discussion of personal matters in public testimony may shame [the litigant]," leading to greater negative consequences.[45]

In the next sections, this Article considers both TJ and international human rights as potential tools for remediating some of the issues discussed above.

III. THERAPEUTIC JURISPRUDENCE AND THE SIGNIFICANCE OF DIGNITY

Humiliation in the law utterly contradicts the aims of TJ and undermines the role of dignity. TJ is one of the most important legal theoretical developments of the past two decades.[46] Having been developed in cases involving mental disability, TJ presents a new model for assessing the impact of case law and legislation by recognizing that, as a therapeutic agent, the law that can have therapeutic or antitherapeutic consequences.[47] The ultimate aim of TJ is to determine whether legal

---

[44] Luther T. Munford, *The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare*, 12 HARV. NEGOT. L. REV. 377, 387 (2007) (quoting, Larry H. Strasburger, *The Litigant-Patient: Mental Health Consequences of Civil Litigation,* 27 J. AM. ACAD. PSYCHIATRY & L. 203, 203 (1999)).

[45] Munford, *supra* note 44, at 388.

[46] *See, e.g.*, MICHAEL PERLIN, 1-2 MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2D-3 at 534–41 (2d ed. 1999) (discussing therapeutic jurisprudence's role in law and mental health law as well as its growth); David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, *in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 157, 170 (David B. Wexler & Bruce J. Winick eds., 1996) (investigating therapeutic jurisprudence and its role in the law); DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 4 (1990) (discussing the importance of therapeutic jurisprudence and its role in the law); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 6–11 (2005) (discussing therapeutic jurisprudence's role in the law and mental health); David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 L. & HUM. BEHAV. 27, 32–33 (1992) (discussing the role of therapeutic jurisprudence in the law and how Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 18 (2008) (discussing the growth of therapeutic jurisprudence).

[47] Michael L. Perlin, *"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 912 (2009); *see also* Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, DISP. & DILEMMAS IN HEALTH L. 91, 97–106 (Ian Freckelton & Kerry Peterson

rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[48] There is an inherent tension in this inquiry, but David Wexler has clearly identified how it must be resolved: the law's use of "mental health information to improve therapeutic functioning [cannot impinge] upon justice concerns."[49]

TJ "asks us to look at law as it actually impacts people's lives"[50] and "focuses on the law's influence on emotional life and psychological well-being."[51] It suggests that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness."[52]

In recent years, scholars have considered a vast range of topics through a TJ lens, including many aspects of mental disability law, domestic relations law, criminal law, employment law, gay rights law, and tort law.[53] As Ian Freckelton has noted, "[TJ] is a tool for gaining a new

---

eds., 2006) (discussing a transnational perspective).

[48] *See* Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 585–86 (2008) (discussing the importance of balancing therapeutic jurisprudence with individual liberties); Michael L. Perlin, *"Baby, Look Inside Your Mirror": The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589, 591 (2008) (discussing how therapeutic jurisprudence "[m]ight be a redemptive tool in effort to combat sanism, as a means of 'strip[ping] bare the law's sanist façade"); Michael L. Perlin, *"You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 692, 719 (2003) (discussing the role of therapeutic jurisprudence in clinical teaching to ensure due process); *Bernard P. Perlmutter, George's Story: Voice and Transformation through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 599 n.111 (2005) (discussing how both client and lawyer must fully understand each other's roles).

[49] David B. Wexler, *Therapeutic Jurisprudence and the Changing Conceptions of Legal Scholarship*, *in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 597, 601 (David B. Wexler & Bruce J. Winick eds., 1996); *see also* David Wexler, *Applying the Law Therapeutically*, *in* APPLIED & PREVENTIVE PSYCHOL. 179, 180–83 (1996) (suggesting that *Tarasoff*'s obligations for health professionals, if appropriately handled, could promote therapeutic functioning while still protecting patients' privacy).

[50] Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

[51] David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Dennis P. Stolle et al., eds., 2000) [hereinafter PRACTICING THERAPEUTIC JURISPRUDENCE].

[52] Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, *in* INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton, eds., 2003).

[53] Michael L. Perlin, *"Things Have Changed": Looking at Non-institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 537 (2002–03).

and distinctive perspective utilizing socio-psychological insights into the law and its applications."[54] It is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.[55] In its aim to use the law to empower individuals, enhance rights, and promote well-being, TJ has been described as "a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasises psychological wellness over adversarial triumphalism."[56] That is, TJ supports the ethics of care.[57]

One of the central principles of TJ is a commitment to dignity.[58] Professor Carol Sanger suggests that dignity means that people "'possess an intrinsic worth that should be recognized and respected,' and that they should not be subjected to treatment by the state that is inconsistent with their intrinsic worth."[59] The right to dignity is memorialized in many state

---

[54] Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 576 (2008).

[55] Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 51, at 365.

[56] Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001); *see also* Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 341–42 (Marjorie A. Silver ed., 2007) ("If [judges, lawyers, police officers, expert witnesses testifying in court, and government officials at every level] know that their actions either can impose psychological harm or facilitate emotional wellbeing, they should strive to minimize the anti-therapeutic consequences of their conduct and maximize its therapeutic potential."); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–06 (2006) (discussing how lawyers can lessen the burden on their clients through ethical considerations).

[57] *See, e.g.*, Gregory Baker, *Do You Hear the Knocking at the Door? A "Therapeutic" Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006) ("Therapeutic jurisprudence is a client-centered approach. This bedrock principle suggests that the lawyer assist clients in making informed decisions by engaging the client and exploring all possible alternatives."); Brookbanks, *supra* note 56, at 334 ("The emphasis of the ethics of care is thus upon traits valued in *intimate* personal relationships including such things as sympathy, compassion, fidelity, discernment, and love."); David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007) ("The addition of a [therapeutic jurisprudence] lens . . . will encourage criminal lawyers to practice explicitly and systematically with an 'ethic of care' and 'psychological sensitivity.'"); Winick & Wexler, *supra* note 56, at 605–07 ("Lawyers applying a therapeutic jurisprudence approach thus explicitly practice law with an ethic of care.").

[58] Winick, *supra* note 52, at 161.

[59] Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 415 (2009) (quoting Gerald Neuman, *Human Dignity in*

constitutions, human rights documents, judicial opinions, and constitutions of other nations.[60] The legal process upholds human dignity by allowing litigants, including criminal defendants, to tell their own stories.[61] A notion of individual dignity:

> generally articulated through concepts of autonomy, respect, equality, and freedom from undue government interference, was at the heart of a jurisprudential and moral outlook that resulted in the reform, not only of criminal procedure, but of the various institutions more or less directly linked with the criminal justice system, including juvenile courts, prisons, and mental institutions.[62]

Fair process norms such as the right to counsel "operate as substantive and procedural restraints on state power to ensure that the individual suspect is treated with dignity and respect." [63] Dignity concepts are expansive; a Canadian Supreme Court case has declared that disenfranchisement of incarcerated persons violated their dignity interests.[64]

Professor Amy Ronner uses the "three Vs" (voice, validation, and voluntariness) when explaining how dignity for litigants is attained.[65] She has stated:

> What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation.

---

the United States Constitution, *in* ZUR AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM SPIROS SIMITIS 249, 249–50 n.21 (Dieter Simon & Manfred Weiss eds., 2000)).

[60] Perlin, *The Role of Dignity*, *supra* note 6, at 195.

[61] *See* David Luban, Lecture, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 837 (2005) ("Human Dignity consists in having one's own story to tell"); *see also* Katherine Kruse, *The Human Dignity of Clients*, 93 CORNELL L. REV. 1343, 1353 (2008) (affirming Luban's "own story" aspect of human dignity).

[62] Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism,* 65 OHIO ST. L.J. 1479, 1569 n.463 (2004).

[63] Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 200 (1983).

[64] Perlin, *Cast his Robe*, *supra* note 6, at 21 (citing Sauvé v. Canada, [2002] 3 S.C.R. 519, para. 35 (Can.)); *see also* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 464 (2010) (noting how the Canadian Supreme Court struck down Canada's law permitting prisoner disenfranchisement).

[65] Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008); *see also* Diesfeld & Freckelton, *supra* note 47, at 99–106 (illustrating the importance of "voice" and noting that a patient-centered hearing and communicative improvements could enhance a detained persons' well-being).

> When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.[66]

Judicial and legislative policies should be changed to reflect the aims of TJ so that, for example, the law can reduce the humiliation felt by persons with mental disabilities and the elderly, or address whether sex offender residency restrictions should be abolished. The authentic impacts of these scarlet letter punishments are discussed below.

IV. INTERNATIONAL HUMAN RIGHTS LAW[67]

The state of the law as it relates to persons with disabilities must be radically reconsidered in light of the ratification of the United Nations' Convention on the Rights of Persons with Disabilities.[68] The CRPD is "regarded as having finally empowered the 'world's largest minority' to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection."[69] This convention is the most revolutionary international

---

[66] Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002); *see also* AMY D. RONNER, LAW, LITERATURE, AND THERAPEUTIC JURISPRUDENCE 23 (2010) (reviewing the "three Vs").

[67] *See* Michael L. Perlin & Meredith Rose Schriver, *"You That Hide Behind Walls": The Relationship between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients*, *in* TORTURE AND ILL-TREATMENT IN HEALTH-CARE SETTINGS: A COMPILATION (Ctr. for Human Rights and Humanitarian Law, American Univ. Washington Coll. of Law ed., 2013) (discussing the relationship between therapeutic jurisprudence and international human rights law).

[68] *See generally* MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD (2011) (discussing the CRPD and its implications).

[69] Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 4 (2008); *see also* Statements Made on the Adoption of the UN Convention on the Rights of Persons with Disabilities by Ambassador Don Mackay, Chair of the Ad-hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, UNITED NATIONS (Dec. 13, 2006), http://www.un.org/disabilities/default.asp?id=155 (noting the statements made by multiple United Nations member states upon adoption of the CRPD); Statements Made on the Rights of Persons with Disabilities at the U.N.

human rights document ever created that applies to persons with disabilities,[70] and "furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most aspects of life."[71] It firmly endorses a social model of disability and reconceptualizes mental health rights as disability rights—a clear and direct repudiation of the medical model that has traditionally directed mental disability law.[72] "The Convention . . . sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities."[73] It provides a framework for ensuring that mental health laws "fully recognize the rights of those with mental illness."[74] There is no question that it has "ushered in

---

Convention on the Rights of Persons with Disabilities by U.N. High Commissioner for Human Rights Louise Arbour, UNITED NATIONS (Dec. 5, 2006), http://www.un.org/esa/socdev/enable/rights/ahc8hrcmsg.htm (noting that it is crucial to protect those with disabilities and that the adoption of the CRPD by an ad hoc committee as a "momentous occasion").

[70] *See* PERLIN, *supra* note 46, § 1-2, at 3–21 (discussing the importance and revolutionary nature of the CRPD); Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, *in* MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 80, 85 (Michael Dudley et al., eds., 2012) (labeling the CRPD as the "most significant development in the recognition of the human rights of persons with mental disabilities"); Michael L. Perlin, *"A Change Is Gonna Come": The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 N. ILL. U. L. REV. 483, 492–93 (2009) [hereinafter Perlin, *A Change Is Gonna Come*] (noting how the CRPD allows those with disabilities to participate equally in national and international affairs).

[71] Perlin, *A Change is Gonna Come*, *supra* note 70, at 490.

[72] *See* Phillip Fennel, *Human Rights, Bioethics, and Mental Disorder*, 27 MED. & L. 95, 107 (2008) ("Traditional responses to mental ill-health have been based on social segregation and separate treatment. . . . Contemporary approaches [including the CRPD] draw on the philosophies of social inclusion and non-stigmatization developed by the disability rights movement."); Michael L. Perlin, *"Abandoned Love": The Impact of Wyatt v. Stickney On The Intersection Between International Human Rights And Domestic Mental Disability Law*, 35 L. & PSYCHOL. REV. 121, 138–39 (2011) ("The 'wide scope' and 'holistic' CRPD furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most aspects of life.").

[73] Janet E. Lord & Michael A. Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT'L L. J. 249, 256 (2009); *see also* Ronald McCallum, The United Nations Convention on the Rights of Persons with Disabilities: Some Reflection (Mar. 3, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1563883 (noting that the convention is broad in its scope, as it includes economic and cultural equality as opposed to simply focusing on political equality).

[74] Michael L. Perlin, *"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN. ST. L. REV. 1159, 1174 n.67 (2013) [hereinafter Perlin, *Guardians*] (quoting Bernadette McSherry, *International Trends in Mental Health Laws: Introduction*, 26 LAW IN CONTEXT 1, 8 (2008)).

a new era of disability rights policy."[75]

The convention describes disability as a condition arising from "interaction with various barriers [that] may hinder [a person's] full and effective participation in society on an equal basis with others," instead of a person's inherent limitations,[76] and extends existing human rights to take into account the specific rights experiences of persons with disabilities.[77] The CRPD calls for "respect for inherent dignity" and "non-discrimination."[78] Subsequent articles within the CRPD declare "freedom from torture or cruel, inhuman or degrading treatment or punishment, . . . freedom from exploitation, violence and abuse,"[79] and a right to protection of the "integrity of the person."[80]

The CRPD is unique because it is the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities; it not only clarifies that States should not discriminate against persons with disabilities, but also establishes the many steps that States must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society.[81]

---

[75] Paul Harpur, *Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change*, 45 VAL. U. L. REV. 1271, 1295 (2011).

[76] CRPD, *supra* note 7, at 4.

[77] Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494, 515 (2008).

[78] CRPD, *supra* note 7, at 5.

[79] *Id.* at 12.

[80] *Id.* at 13.

[81] *See* Bryan Y. Lee, *The U.N. Convention on the Rights of Persons with Disabilities and its Impact Upon Involuntary Civil Commitment of Individuals with Developmental Disabilities*, 44 COLUM. J. L. & SOC. PROBS. 393, 413–30 (2011) (discussing the changes that ratifying states need to make in their domestic involuntary civil commitment laws to comply with CRPD mandates); *see also* Kathryn D. DeMarco, *Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and Its Impact on The Use of Supermax Solitary Confinement*, 66 U. MIAMI L. REV. 523, 544–50 (2011) (discussing the application of the CRPD to solitary confinement in correctional institutions); István Hoffman & György Könczei, *Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code*, 33 LOY. L.A. INT'L & COMP. L. REV. 143, 163–66 (2010) (discussing the application of the CRPD to capacity issues); Perlin, *Gates of Eden*, *supra* note 6, at 193-97 (discussing the application of the CRPD to mental health court systems); Perlin, *Guardians*, *supra* note 74, at 1176–83 (discussing the application of the CRPD to guardianship law); Michael L. Perlin, *"Yonder Stands Your Orphan with His Gun": The International Human Rights Implications of Juvenile Punishment Schemes*, 46 TEX. TECH L. REV. 301, 329–36 (2013) (discussing the application of the CRPD to juvenile punishment schemes).

V. HUMILIATING AND SHAMING SANCTIONS

The law shames and humiliates in many ways, sometimes purposively and sometime inadvertently. In this section, this Article explores in detail some of those shaming and humiliating modalities. In each instance, questions must be raised: do these tactics and schemes subordinate or privilege dignity? Are they consonant with therapeutic jurisprudential principals? Do they potentially violate international human rights law?

A. SUPREME COURT DECISIONS DISCUSSING HUMILIATION AND SHAME

The Supreme Court has recognized that legislative enactments can result in humiliating consequences, and has underscored dignity's important role in the law.[82] In several landmark decisions, the Court has struck down both criminal and civil statutes that humiliate and shame.[83] With these cases, the Court has acknowledged the importance of the role of dignity.

In *Lawrence v. Texas*, the Court struck down a Texas statute that criminalized certain intimate voluntary sexual conduct engaged in by two persons of the same sex.[84] Specifically, the Court found:

> The stigma this criminal statute imposes, more-over, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. . . . We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in

---

[82] *See* Jones v. Barnes, 463 U.S. 745, 759 (1983) (Brennan, J., dissenting) (stating that one of the critical functions of counsel in the trial process is to "protect the dignity and autonomy of a person on trial"); *see also, e.g.*, Philip Halpern, *Government Intrusion into the Attorney-Client Relationship: An Interest Analysis of Rights and Remedies*, 32 BUFF. L. REV. 127, 172 (1983) ("The right to counsel embraces two separate interests: reliable and fair determinations in criminal proceedings, and treatment of defendants with dignity and respect regardless of the effect on the outcome of criminal proceedings.").

[83] This is not to say that this line of decisions is unanimous. *See, e.g.*, Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 132 S. Ct. 1510, 1523 (2012) (holding that suspicionless strip searches of detainees being admitted to the general jail population did not violate the Fourth or Fourteenth Amendments); Julian Simcock, *Florence, Atwater, and the Erosion of Fourth Amendment Protections for Arrestees*, 65 Stan. L. Rev. 599, 602 (2013) (detailing how decisions such as Florence may heighten the potential risk of abuse by prison officials).

[84] Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

> question the convicted person would come within the registration laws of at least four States were he or she to be subject to their jurisdiction. . . . This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.[85]

Elsewhere, the Court has specifically recognized the shame that can result when dignity is not present. In *Indiana v. Edwards*, the Court held that "a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel."[86] The Court stated that "to the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling."[87]

---

[85] *Id.* at 575–76 (citing to state laws in Idaho, Louisiana, Mississippi, and South Carolina). *See infra* text accompanying notes 294–97 (considering the discussion of shame and humiliation in the Sex Offender Registration and Notification Act ("SORNA") case of Smith v. Doe, 538 U.S. 84, 86 (2002)). Remarkably, the Eleventh Circuit Court of Appeals chose to ignore those aspects of *Lawrence* that deal with shame and dignity in its decision upholding an Alabama statute banning the sale of sexual devices of the sort typically used by women. Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1250 (11th Cir. 2004). In its opinion, the court declined to "extrapolate from *Lawrence* and its dicta a right to sexual privacy triggering strict scrutiny" and rejected the dissent's argument that public morality is no longer a rational basis for legislation. *Id.* at 1238. In writing about this case, Professors Waldman and Herald have pointed out that the Court was aware of the disproportionate harm to women, since the court's rationale assumed that the sale of sex products used by males would go undisturbed. Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285, 305 (2005). The professors have also emphasized that the law stigmatizes private sexual conduct. *Id*. "The court's main point seems to be that this would all be easier if women would keep quiet and be happy with the few 'body massagers' that they are able to procure." *Id*. See Alana Chazan, *Good Vibrations: Liberating Sexuality from the Commercial Regulation of Sexual Devices*, 18 TEX. J. WOMEN & L. 263, 295 (2009), for a discussion on how the sexual device cases "effectively criminalize or pathologizes all women who use sexual devices."

[86] Indiana v. Edwards, 554 U.S. 164, 176 (2008) (citing McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984) (finding a pro se defendant's Sixth Amendment right to conduct his own defense was not violated by unsolicited participation of standby counsel)). *Edwards* modified the holding of *Godinez v. Moran*, that had mandated a unitary competency standard in all aspects of the criminal trial process, including trial, guilty pleas and counsel waivers. Godinez v. Moran, 509 U.S. 389 (1993). *See also*, PERLIN, *supra* note 46, § 8B-3.1c(1), at 44–51 (2d ed. 1999) ("Although the Court took pains to assert that *Godinez v. Moran* 'does not answer' the question posed in *Edwards* (although it 'bears certain similarities' to it), at the least, *Edwards* carves out an important exception to that decision.").

[87] *Edwards*, 554 U.S. at 176. *See* PERLIN, *supra* note 46, at 48 (discussing how the Supreme Court's focus on dignity and the perceptions of justice are, perhaps, its first implicit endorsement of important principles of therapeutic jurisprudence in a criminal procedure context). *See supra* text accompanying notes 46–66 (discussing of therapeutic jurisprudence in

The Court has also recognized that age can play a role in the humiliation experienced. *Safford Unified School District #1 v. Redding* involved a strip search of a thirteen-year-old female by her school's Assistant Principal.[88] The Court found that the student's expectation of privacy is "inherent in her account of it as embarrassing, frightening, and humiliating" and that the reasonableness of her expectation of privacy is indicated by "consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."[89]

Most recently, in *United States v. Windsor*,[90] in striking down portions of the Defense of Marriage Act ("DOMA"), the court recognized the humiliating consequences resulting from DOMA and the importance of the role of dignity,[91] stating:

> DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the

---

general).

[88] Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 366 (2009).

[89] *Id.* at 366, 375; *see also* Steven F. Shatz, Molly Donovan & Jeanne Hong, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 11 (1991) (discussing how evidence from psychologists supports the assumption that any search of a school age child or adolescent has a greater impact because the development of a sense of privacy is critical to a child's maturation).

[90] United States v. Windsor, 133 S. Ct. 2675 (2013).

[91] *Id.* at 2694.

children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.[92]

B. SHAME AND HUMILIATION IN SPECIFIC LEGAL CONTEXTS

1. "Scarlet Letter" Punishments

Shaming penalties, also known as scarlet letter punishments, have recently arisen in the criminal justice system[93] as an alternative sanction that allegedly is economically sound while satisfying "the community's desire to punish and condemn crime."[94] Scarlet letter punishments are sanctions that "shine a spotlight on offenders in order to warn others of antisocial activity and of the miscreants perpetrating the deeds."[95] The concept of "shaming punishments" has "leaped from the nineteenth century fiction of Nathaniel Hawthorne[96] into the twentieth century courtroom."[97] Public humiliation is predicated on the belief that it will deter individuals from committing antisocial acts.[98] Some judges who use

---

[92] *Id.*; *see also* Colin Starger, *A Visual Guide to United States v. Windsor: Doctrinal Origins of Justice Kennedy's Majority Opinion*, 108 NW. U. L. REV. COLLOQUY 130 (2013) (describing the relationship between the opinions in Windsor and Lawrence).

[93] These punishments may be the product of either legislation or judicial decision.

[94] Massaro, *supra* note 5, at 688. This Article's position needs to be explicit. This sort of "shaming sanction" is completely unmoored from and totally unrelated to the sort of shaming sanctions discussed by John Braithwaite in his writings about "reintegrative shaming theory," in which he writes about the consequences of shaming after an offense is committed. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 55 (1989); Cesar J. Rebellon et al., *Anticipated Shaming and Criminal Offending*, 38 J. CRIM. JUST. 988, 989 (2010).

[95] Brian Netter, *Avoiding the Shameful Backlash: Social Repercussions for the Increased Use of Alternative Sanctions*, 96 J. CRIM. L. & CRIMINOLOGY 187, 188 (2005).

[96] NATHANIEL HAWTHORNE, THE SCARLET LETTER (1850). *See generally* Sandi Varnado, *Avatars, Scarlet "A"s, and Adultery in the Technological Age*, 55 ARIZ. L. REV. 371 (2013) (discussing contemporaneous considerations of adultery in a scarlet letter context).

[97] Scott 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, 359 (1998) (quoting Julia C. Martinez, *Judges Using 'Shame Punishment' More to Emphasize Message*, FLA. TIMES-UNION, Feb. 16, 1997, at n.1); *see also* ELIZABETH STROUT, THE BURGESS BOYS 35–36 (2013) ("Bob's mind went to his grandmother, who used to tell stories of their English ancestors arriving ten generations earlier. . . . One day, his grandmother told him how thieves would be made to walk through the town. She said if a man stole a fish he had to walk around town holding the fish, calling out, 'I stole the fish and I am sorry!' While the town crier followed, beating a drum."); Luke Coyne, *Can Shame Be Therapeutic?*, 7 ARIZ. SUMMIT L. REV. 539, 541–543 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214413 (demonstrating the use of shaming punishments in the American criminal justice system throughout the sixteenth to early nineteenth century).

[98] *See, e.g.*, Dale Lezon, *Judge Uses Signs to Change* Behavior, HOUS. CHRONICLE (June 3,

shaming sanctions in the sentencing of criminals state explicitly that these sanctions work to deter future criminal behavior because they involve public humiliation,[99] an approach that apparently meets with the support and approval of both a significant portion of the public[100] as well as some scholars.[101]

The range of humiliation sanctions is robust:

> (1) A warning sign placed on the front door of a child molester's home following his release from jail, reading "No children under the age of [eighteen] allowed on these premises by court order."[102]
>
> (2) A witness who committed perjury in court being ordered to wear a sign in front of the courthouse which read: "I lied in court. Tell the truth or walk with me."[103]
>
> (3) A convicted thief being ordered to place an ad at least four inches in height and bearing the felon's photograph in the newspaper following his release from prison reading: "I am a convicted thief."[104]
>
> (4) Convicted drunk drivers being ordered "to wear pink hats during their performance of community service projects or to affix bumper stickers to their vehicles warning others of their crime."[105]
>
> (5) Prison inmates who expose themselves in the presence of female guards being forced to wear pink uniforms.[106]
>
> (6) A burglary victim being allowed to take something of like value out

---

2002), *available at* http://www.chron.com/news/houston-texas/article/Judge-uses-signs-to-change-behavior-2069028.php (noting how Judge Poe commented that humiliation can "change behavior").

[99] *See* Sanders, *supra* note 97; Barbara Clare Morton, *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, 120–21 (2001) ("Public apologies, sign wearing, bumper stickers, or fluorescent bracelets also can serve to rehabilitate and deter offenders.").

[100] Robert Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1335 (2000).

[101] Aaron S. Book, *Shame on You*, 40 WM. & MARY L. REV. 653, 680–81 (1999); *see, e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 635 (1996) (arguing that shaming sanctions reinforce public norms against criminality).

[102] Sanders, *supra* note 97, at 359–70.

[103] *Id.*

[104] *Id.* (citing *Fort Pierce Judge Tries Humiliating Defendants*, FLA. TODAY, Dec. 6, 1996, at 5B).

[105] *Id.* (citing *Fort Pierce Judge Tries Humiliating Defendants*, FLA. TODAY, Dec. 6, 1996, at 5B).

[106] *Id.* (citing Courtney G. Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1535 (1996)).

of the burglar's home.[107]

(7) A convicted purse snatcher being forced to wear tap shoes while out in public.[108]

Other examples include forcing shoplifters to parade in front of the stores they have victimized, carrying signs that announce their offenses or forcing DUI offenders to affix bumper stickers to their cars that read "I am a convicted drunk driver."[109] There are many, many more similar examples, including a trial judge in one sex offender case who said, about persons who molest children, "It is my feeling that we should probably dye them green."[110]

Some scholars argue that the reemergence of shaming penalties is due to society's growing belief that prison terms, fines, and parole are not rehabilitating criminals.[111] But in almost every instance, the humiliating measures are punitive in design and scope.[112]

Judicially-imposed shaming penalties fall into four categories: "stigmatizing publicity, literal stigmatization, self-debasement, and demands for public expressions of contrition."[113] Stigmatizing publicity sanctions are those that publicize criminal status, like publishing names of convicted sex offenders on the web or in a newspaper.[114] Literal stigmatization involves sanctions that effectively attach a label on the offender, like wearing a sign or affixing a bumper sticker to a car,[115] while "[s]elf-debasement penalties involve ceremonies or rituals that publicly disgrace the offender."[116] Public expression-of-contrition penalties force offenders to apologize for their offenses.[117]

---

[107] Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 736 (1998).

[108] Sanders, *supra* note 97, at 359–70 (citing Kirsten R. Bredlie, *Keeping Children Out of Double Jeopardy: An Assessment of Punishment and Megan's Law in* Doe v. Poritz, 81 MINN. L. REV. 501, 512 n.77 (1996)).

[109] Massaro, *supra* note 5, at 689.

[110] Leonore Tavill, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty Is Today's Probation Condition*, 36 CLEVE. ST. L. REV. 613, 644 n. 193 (1988).

[111] Morton, *supra* note 99, at 98.

[112] *See* Misner, *supra* note 100, at 1364–65 (noting how humiliating sentences are "additional punishment").

[113] Kahan, *supra* note 101, at 631.

[114] *Id.* at 631–32.

[116] *Id.* at 632.

[116] *Id.* at 633.

[117] *Id.* at 634; *see also* W. Reed Leverton, *The Case for Best Practice Standards in Restorative Justice Processes*, 31 AM. J. TRIAL ADVOC. 501, 506 (2008) (discussing how apologies can be "benign, yet humiliating"); *supra* text accompanying note 41.

Many cases involving shaming sanctions are never appealed.[118] Those that are appealed often result in appellate courts upholding the use of such scarlet letter punishments. In *Ballenger v. State*, for instance, the Georgia Court of Appeals, upheld a shaming condition requiring the offender to wear a fluorescent pink plastic bracelet imprinted with the words "D.U.I. CONVICT."[119] The court rejected the offender's arguments that wearing the bracelet violated his equal protection rights and constituted cruel and unusual punishment.[120] The court stated that "being jurists rather than psychologists, we cannot say that the stigmatizing effect of wearing the bracelet may not have a rehabilitative, deterrent effect on Ballenger."[121]

Likewise, in *State v. Bateman,* the Court of Appeals of Oregon upheld a probation requirement that required the offender to post signs reading "dangerous sex offender" on his residence and on any vehicle that he was operating.[122] In *Goldschmitt v. State*, the District Court of Appeal of Florida upheld a probation requirement that a driver affix a bumper sticker to his automobile reading "CONVICTED D.U.I. – RESTRICTED LICENSE."[123] The court held that the shaming condition did not violate the First Amendment or Eighth Amendment.[124] Specifically, that court stated that they were "unable to state as a matter of law that Goldschmitt's bumper sticker is sufficiently humiliating to trigger constitutional objections."[125]

United States v. Gementera is perhaps the most important appellate decision regarding scarlet letter punishments.[126] The Ninth Circuit Court of

---

[118] It should be noted that such punishments have been rejected by some courts. *See* Coyne, *supra* note, at 97 (discussing decisions in State v. Schad, 206 P.3d 22 (Kan. App. 2009), State v. Muhammad, 43 P.3d 318 (Mont. 2002), and People v. Meyer, 680 N.E.2d 315 (Ill. 1997), all ruling that the use of shaming signs violated sentencing statutes for not meeting the goals of rehabilitation and protection of the public).

[119] Ballenger v. State, 436 S.E.2d 793, 794–95 (Ga. Ct. App. 1993).

[120] *Id.*

[121] *Id.*

[122] State v. Bateman, 771 P.2d 314, 316 (Or. Ct. App. 1989).

[123] Goldschmitt v. State, 490 So. 2d 123, 124–25 (Fla. Dist. Ct. App. 1986).

[124] *Id.* at 126.

[125] *Id.* (noting that the court's only concern was the potential humiliation suffered by someone other than the defendant, insofar as the defendant's vehicle might be owned or operated by others).

[126] United States v. Gementera, 379 F.3d 596 (9th Cir. 2004); *see* Preston H. Neel, Comment, *Punishment or Not: The Effect of United States v. Gementera's Shame Condition on the Ever-changing Concept of Supervised Release Conditions*, 31 AM. J. TRIAL ADVOC. 153 (2007) (summarizing *Gementera*).

Appeals upheld a supervised release condition that required a convicted mail thief to spend a day wearing a signboard that stated "I stole mail. This is my punishment."[127] The court held this punishment was reasonably related to the legitimate statutory objective of rehabilitation.[128] Moreover, it rejected that the shaming sanction violated the Eighth Amendment.[129] Arguing for form over substance, the Ninth Circuit loosely connected supervised release conditions that shamed with the inherent qualities found in all criminal punishments, stating they "nearly always cause shame and embarrassment."[130] It emphasized that:

> [A]ny condition must be 'reasonably related' to 'the nature and circumstances of the offense and the history and characteristics of the defendant.' Moreover, it must be both 'reasonably related' to and 'involve no greater deprivation of liberty than is reasonably necessary' to 'afford adequate deterrence to criminal conduct,' protect the public from further crimes of the defendant,' and 'provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.' . . . The 'reasonable relation' test is necessarily a 'very flexible standard,' and that such flexibility is necessary because of 'our uncertainty about how rehabilitation is accomplished, [as reflected in the] vigorous, multifaceted, scholarly debate on shaming sanctions' efficacy, desirability, and underlying rationales [as it] continues within the academy.[131]

Some legal scholars argue that scarlet letter punishments generally help establish and reinforce social norms because they "effectively and cheaply communicate opprobrium for criminal behavior and thereby increase the social, emotional, and other costs of [the behavior they condemn]."[132] Yet these arguments fail to take into account that the alleged deterrent effects of shaming sanctions are doubtful in modern settings, especially in urban areas,[133] and in situations where the potential

---

[127] *Gementera*, 379 F.3d at 598.

[128] *Id,* at 607.

[129] *Id.* at 610.

[130] *Id.* at 605. It should be noted that the court did not address the defendant's First, Fifth, or Fourteenth Amendment claims.

[131] *Id.* at 600, 603, 605.

[132] Massaro, *supra* note 5, at 689.

[133] *Gementera*, 379 F.3d at 694. There has also been scant consideration in the case law of how different the nation was in the eighteenth and nineteenth centuries when sanctioning humiliation was greatly effective, compared to today, where there are dramatically different cultural conditions, such as larger cities, a much greater likelihood of anonymity, and greater value placed on privacy rights); *see, e.g.*, Morton, *supra* note 99, at 109 (citing Toni Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1922 (1991) (noting how shaming

offenders are not "members of an identifiable group, such as a close-knit religious or ethnic community."[134] The alleged deterrence effects justification is further weakened because the government is unable to assess public reaction to these punishments.[135]

An increase in the use of shaming sanctions could decrease any deterrent effect from their use as social norms adapt to this punishment and accept them as typical.[136] For example, "if there is a convict with a sandwich board on every street corner, then the potential criminal would conclude that the stigma was less burdensome."[137] Moreover, in a society that values privacy and independence, rather than community and dependence, the effectiveness of shaming is reduced.[138] In fact, there is very little empirical evidence showing that shaming sanctions improve society.[139] Importantly, there have been no comprehensive studies to their effectiveness,[140] and there is no empirical work available through which the practical impact of such sanctions can be tested.[141] Professor Kahan, the leading academic supporter of such judicial interventions, believes it is "too early to determine the success of shame punishments."[142] Professor Stephen Garvey concluded, "No one knows for certain [about the effectiveness of judicial intervention]."[143]

The lack of valid and reliable research (or even systemic empirical inquiry) must be considered in light of the judicial narcissism reflected in the statements of some of the judges who are the strongest proponents of shaming sanctions. An Ohio judge has stated (on the "Dr. Phil" television

---

sanctions have failed in modern times)); Morton, *supra* note 99, at 109 ("[S]carlet letter sentences successfully control and deter criminal conduct only under very limited, and currently nonexistent, societal conditions.").

[134] Massaro, *supra* note 133, at 1883.

[135] Paul Ziel, *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, 508 (2005).

[136] Netter, *supra* note 95, at 190; Morton, supra note 99, at 121–22.

[137] Netter, *supra* note 95, at 198–99.

[138] Morton, *supra* note 99, at 121.

[139] Netter, *supra* note 95, at 215.

[140] Sanders, *supra* note 197, at 378.

[141] Massaro, *supra* note 133, at 1918.

[142] Sanders, *supra* note 97, at 359–60 (quoting June Arney, *Shame and Punishment: Our Forebears Put Scoundrels in Stocks, or Branded Them With the "Scarlet Letter." Now, 300 Years Later, "Shame" Sentences Are Back in Vogue*, VIRGINIAN-PILOT LEDGER-STAR, Mar. 2, 1997, at J1); Kahan, *supra* note 101, at 638 (arguing that shaming sanctions reinforce public norms against criminality).

[143] Garvey, *supra* note 107, at 753.

show), "I've been a judge for almost 14 years, and the most effective punishments are those that fit the crime. They teach the offenders a lesson they'll never forget. My court is a people's court."[144] A Texas judge—named Poe—labels these sanctions as "Poe-etic punishments" (in some cases, ordering the use of sandwich boards advertising the offender's crime), explaining that "[O]ur founders knew that the judgment of a friend, a neighbor, or family member held far greater significance than that of the jailer or judge."[145] Such proponents of shaming are "sure" that their sanctions reduce recidivism based on their "ordinary common sense"[146] and limited personal knowledge, but infrequently rely on valid statistical literature to support their position.[147]

Shaming sanctions may be psychologically debilitating, as one commenter who is a director of a mental health program for juveniles, has argued in criticizing this approach:[148]

> All of our mental health programs end up having more and more people come in with trauma at the hands of humiliation. When you do this creative type of justice, the problem is that it's just going to make the behavior show up in different ways. So, [the judge] may never see that person again, but mental health programs will see that person, other judges may see that person or, unfortunately, the morgue may see that person.[149]

---

[144] Coyne, *supra* note 97, at 552 (quoting *Dr. Phil Show: Wrongful Punishment* (CBS television broadcast Aug. 10, 2007)).

[145] *Id.* at 546 (quoting Sanders, *supra* note 98, at 366–67).

[146] *See* Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & CIV. RTS. L. REV. 1, 38 (2013) (footnotes omitted) (discussing how inappropriate factors cloud judicial decision making in sex offender cases).

[147] *See* Coyne, *supra* note 97, at 561 "The judges issuing shaming sanctions produce most evidence of its effectiveness. In Sarasota County, Florida, Judge Titus initiated a DUI bumper sticker penalty in 1985. He claims that since the program began DUI arrests dropped one-third in the county. Judge Titus believes fear of public knowledge of the offense led to the reduction. Judge Cicconetti has said only two offenders who received his shaming sanctions have reoffended. Another famous issuer of shaming sanctions, Judge Poe, stated, "I have no stats, but people I've imposed this type of sentence on haven't been back through the system." While the anecdotal evidence is promising, independent studies are needed to assess the effectiveness of shaming sanctions." *Id*.

[148] *Id.*

[149] *Id.* at 557 (internal citations omitted). The judge in question—Michael Cicconetti—hands down sentences that he has characterized as "provocative enough so it gets everybody's attention and deters other people from doing the same thing." Tracey Read, *Most Influential: Judge Cicconetti's Alternative Sentences Leave Impression (With Video)*, THE NEWS-HERALD (Dec. 31, 2012, 12:00 AM), http://www.news-herald.com/general-news/20121231/most-influential-judge-michael-cicconettis-alternative-sentences-leave-impression-with-video.

In addition, proponents of shaming sanctions fail to recognize that shaming sanctions can be more harmful than prison because it conveys the message that offenders subject to shaming sanctions are less than human, and deserve our individual and collective contempt.[150] "Sending this kind of message, even about criminal offenders, is, and should be, jarring in a political order that makes equality a cultural baseline."[151] It is hard to imagine how shaming penalties that are crude and degrading will foster respect for the law.[152] It is more likely that they are frequently counterproductive; philosopher Jeremy Waldron has noted that the predictable response to humiliation is for its target to "lash out at the humiliator" via a combination of anger and fear.[153]

Humiliation is also contradictory to the aims of TJ and restorative justice,[154] as it robs the process of dignity, and ultimately demeans the victims of the initial criminal activity.[155] A commentator has characterized them as "particularly poor tools of rehabilitation and specific deterrence."[156] James Whitman has argued that the chief evil of public humiliation sanctions is not their effect on an offender but their effect on a society of onlookers whose punitive sensibilities will be inflamed by publicly sanctioned shaming.[157] Finally, a law and economics analysis of such sanctions concludes that shaming penalties are self-destructive.[158]

---

[150] Massaro, *supra* note 5, at 699.

[151] *Id.* at 700.

[152] Ziel, *supra* note 135, at 510.

[153] Jeremy Waldron, *On Humiliation*, 93 MICH. L. REV. 1787, 1801 (1995).

[154] *See, e.g.*, Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOLOGY 334, 335–36 (2006) (providing a brief description of restorative justice); PERLIN, *supra* note 6, at 79; Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 607–11 (2006) (describing therapeutic jurisprudence).

[155] *C.f.* Perlin, *Dignity Was the First to Leave*, *supra* note 6 (arguing that allowing seriously mentally disabled defendants to represent themselves in criminal trials is demeaning to the victims of the underlying crimes); *see also* Massaro, *supra* note 133, at 1943 (discussing how state-enforced shaming "authorizes public officials to search for and destroy or damage an offender's dignity").

[156] Persons, *supra* note 106, at 1547.

[157] James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1068–75 (1998).

[158] Alon Harel & Alon Klement, *The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization*, 36 J. LEGAL STUD. 355, 374 (2007); *see also* Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113, 132 (2008) ("In [shaming] cases the suffering inflicted on the criminal is merely a price reflecting the inferior quality of the goods or services rather than a genuinely punitive measure."); Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on*

There has been recent academic interest in this topic from a wide range of perspectives. Barbara Morton[159] examined the issue through the prism of heightened expectations of privacy, and found that this expectation served as a "powerful deterrent and rehabilitative mechanism attendant in [the use of such sanctions]."[160] Robert Misner, on the other hand, made a plea for the incorporation of mercy into any sentencing system.[161] Stephanos Bibas and Richard Bierschbach called on us to consider (and expand) the role of apology and remorse in the criminal justice system.[162] Sharon Lamb looked at the need to consider parenting techniques and moral development in aiding the law, "as a collective expression of cultural values," to employ "moral standards to balance its condemnatory function."[163]

The use of shaming sanctions frequently lessens the likelihood that the offender will be reintegrated into society because these sanctions may lead to ostracism, leading to offenders suffering degradation indefinitely and losing social status. Such sanctions would put them in peril of losing employment.[164] Further, the victim is forced to relive the offense and confront the offender, even though there is no evidence that there is a rehabilitative effect for offenders who come face-to-face with their victims.[165] Scarlet letter punishments may also lead them to commit more crimes if they are permanently marked and unable to rejoin society.[166] These punishments also affect third parties, such as children or spouses of the recipient of the punishment.[167]

Megan's Laws, 42 HARV. J. ON LEGIS. 355, 371 (2005) (discussing how there is limited empirical data evaluating this issue).

[159] Ultimately, this Article disagrees with Morton's final position.

[160] Morton, *supra* note 99, at 100.

[161] Misner, *supra* note 100, at 1308–13.

[162] Stephanos Bibas & Richard Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 112–19 (2004).

[163] Sharon Lamb, *The Psychology of Condemnation: Underlying Emotions and Their Symbolic Expression in Condemning and Shaming*, 68 BROOK. L. REV. 929, 931 (2003).

[164] Massaro, *supra* note 5, at 695.

[165] *Compare* Massaro, *supra* note 133, at 1895 (discussing how shaming sanctions are beneficial to the victim), *with* Coyne, *supra* note 97, at 25–26 (arguing that there is no empirical evidence supporting that shaming sanctions are beneficial to the victims of the offense). *See also* Raffaele Rodogno, *Shame and Guilt in Restorative Justice*, 14 PSYCHOL. PUB. POL'Y & L. 142, 146 (2008) (discussing how the shame-rage spiral within the restorative justice context is created when the victim feels shame and anger in response to the offense against him and the offender reacts defensively rather than acknowledging the victim's hurt feelings).

[166] Coyne, *supra* note 97, at 561.

[167] Goldschmitt v. State, 490 So. 2d 123, 126 n.5 (Fla. Dist. Ct. App. 1986) ("[W]e were concerned . . . that innocent persons might be punished by the bumper

This research affirms that scarlet letter punishments are harmful and punitive in nature, outweighing any potential benefit. In light of these arguments, such humiliating practices must end.

C. HOW COERCIVE POLICE AUTHORITY SHAMES BY INTRUDING ON DIGNITY

In her recent magisterial opinion, holding the New York City Police Department's stop-and-frisk policies unconstitutional,[168] Judge Shira Scheindlin focused on the issue of humiliation:

> The Supreme Court has recognized that 'the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security.' In light of the very active and public debate on the issues addressed in this Opinion—and the passionate positions taken by both sides—it is important to recognize the human toll of unconstitutional stops. While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police. This alienation cannot be good for the police, the community, or its leaders. Fostering trust and confidence between the police and the community would be an improvement for everyone.[169]

Importantly, Judge Scheindlin approvingly cited a Ninth Circuit decision focusing on how such stops "are *humiliating*, damaging to the detainees' self-esteem, and reinforce the reality that racism and intolerance are for many African-Americans a regular part of their daily lives."[170]

---

sticker . . . however . . . the 'CONVICTED-D.U.I.' message [becomes] obscured when persons other than the probationer are using the vehicle . . . .").

[168] Floyd v. City of New York, 959 F. Supp. 2d 540, 658 (S.D.N.Y. 2013), appeal dismissed (Sept. 25, 2013). The Floyd decision has since been stayed, see *Ligon v. City of New York*, 538 F. App'x 101 (2d Cir. 2013), but subsequent to the stay, the City's motion to vacate was denied. Ligon v. City of New York, 736 F.3d 231 (2nd Cir. 2013). *See generally*, Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings,* 19 MICH. J. RACE & L. 199 (2014) (discussing the development of stop-and-frisk jurisprudence).

[169] Floyd, 959 F. Supp. 2d at 556 (internal citations omitted).

[170] *Id.* at 602–03 (emphasis added) (citing Washington v. Lambert, 98 F.3d 1181, 1188 (9th Cir.

Professor Jeffrey Fagan has recently spoken about about the indignities of "order maintenance policing," and how this sort of policing intrudes on the dignity of citizens by "proactive interdict[ion] and temporar[y] detain[ing of] citizens whose behavior is deemed sufficiently suspicious for police to conclude that 'crime is afoot.'"[171] In this speech, Fagan discussed the indignity of the unreasonable searches, and explained how such searches "accord with the common understanding of humiliation, in particular humiliations that involve intrusions on highly private spheres: intrusion in bodily functions, such as urine tests; searches of the person, especially strip searches; and searches of personal belongings that are perceived as private, such as purse or carry-on luggage."[172] He calls for a "jurisprudence of respect,"[173] arguing that "the systematic and cumulative denial of recognition—respect from the state—has stigmatizing effects that can lead to a deprivation on top of a breach with the moral bases of the law."[174] Perhaps decisions like that of Judge Scheindlin in *Floyd* will lead to a new reconceptualization of the impacts of current policies.

D. TREATMENT OF PERSONS WITH MENTAL DISABILITIES AND ELDERS

In light of the recently ratified CRPD,[175] it follows that persons with mental disabilities should be afforded greater protection from being humiliated and shamed. This section will address the importance of the CRPD in this context, then explore five areas that highlight the passive and overt use of humiliation and shame subjected to persons with mental disabilities and the elderly: the institutionalization of persons with mental illness, involuntary outpatient treatment, gun control, treatment of

---

1996)); *see also* Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM. URB. L.J. 621, 623–25 (1993) (discussing the discrimination African-Americans encounter); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 679–80 (1994) ("Put in the simplest terms, the criminal justice system treats African-Americans and Hispanic Americans differently than it does whites."); Tracey Maclin, *Black and Blue Encounters—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250–57 (1991) ("[African-American] men know they are liable to be stopped at anytime, and that when they question the authority of the police, the response from the cops is often swift and violent.").

[171] Jeffrey Fagan, *Indignities of Order Maintenance Policing*, at 3, *available at* http://www.law.arizona.edu/Events/Soll_Lectures/Soll_lecture_2013.cfm.

[172] *Id.* at 7.

[173] *Id.* at 21.

[174] *Id.* at 23.

[175] *See supra* text accompanying notes 67–81.

institutionalized elderly persons, and guardianships. Although these areas appear to be varied in scope, they share underlying issues involving the overt and passive uses of shame.

E. INSTITUTIONALIZATION

The rights of persons with mental disabilities have been systematically violated in virtually all societies.[176] Persons with disabilities face degradation, stigmatization, and discrimination.[177] Disproportionally, persons with mental disabilities are involuntarily committed to institutions, and deprived of their freedom, dignity, and basic human rights.[178] Persons with mental disabilities are relegated to psychiatric institutions that often isolate such persons and subject them to deplorable conditions that threaten their health and, in some cases, their lives.[179]

In the United States, persons with mental disabilities are still frequently housed in institutions that shock the conscience and humiliate the persons incarcerated there.[180] Court decisions and statutes have legalized forced isolation of persons with mental illness through personal protections orders, denial of evaluations, inpatient treatment, assisted outpatient treatment, and inadequate treatment in jails and prisons.[181] Isolation leads to feelings of shame for persons living with mental disabilities.[182] Thus, poor treatment might discourage treatment and

---

[176] Aaron Dhir, *Human Rights Treaty Drafting Through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 41 STAN. J. INT'L L. 181, 203 (2005);

[177] Perlin & Szeli, *supra* note 70, at 87.

[178] *See* PERLIN, *supra* note 46, § 2A-3, at 14 (discussing the problematic nature of involuntary commitments of individuals with mental disabilities).

[179] Lance Gable et al., *Mental Health and Due Process in the Americas: Protecting Human Rights of Persons Involuntarily Admitted and Detained in Psychiatric Institutions*, 18 PAN AM. J. PUBLIC HEALTH 365, 366 (2005).

[180] *See* PERLIN *supra* note 46, Ch. 3A, at 3–154.

[181] Hon. David A. Hoort, *Mental Illness and the Courts*, 91 MICH. B. J. 28, 31 (2012); *see also* MICHAEL L. PERLIN & HENRY A. DLUGACZ, MENTAL HEALTH ISSUES IN JAILS AND PRISONS: CASES AND MATERIALS (2008) (discussing issues in jails and prisons).

[182] Stigmatic isolation occurs when an individual's desire to manage shame leads him to follow strategies such as withdrawal and secrecy. *See, e.g.*, W. David Bell, *The Civil Case at the Heart of Criminal Procedure:* In Re Winship*, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 146 (2011) (citing Terri A. Winnick & Mark Bodkin, *Anticipated Stigma and Stigma Management Among Those to be Labeled "Ex-Con,"* 29 DEVIANT BEHAV. 295, 299–300 (2008)) (discussing how stigmatization can lead to isolation); *see also* Sherry Young, *Getting to Yes: The Case against Banning Consensual Relationships in Higher Education*, 4 AM. U. J. GENDER & L. 269, 286 (1996) (discussing the relationship between shame and psychiatric hospitalization).

encourage persons living with mental illness to keep their illness a secret.[183]

Olmstead v. L.C. ex rel. Zimring sought to enforce the right to community integration for persons with mental disabilities.[184] The Supreme Court held that the Americans with Disabilities Act ("ADA") requires States to provide community-based treatment, and that unjustified isolation is discrimination based on disability,[185] noting that the ADA "specifically identifies unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination.'"[186] The CRPD also guarantees the right for persons with disabilities to live in the community.[187] Nevertheless, approximately 40,000 Americans continue to reside in psychiatric hospitals.[188]

---

[183] *See* Maria Squera, *The Competing Doctrines of Privacy and Free Speech Take Center Stage after Princess Diana's Death*, 15 N.Y.L. SCH. J. HUM. RTS. 205, 219–20 (1998) (citing Martin London, *Greater Legal Restrictions on the Paparazzi? Yes*, N.Y. L.J., Sept. 22, 1997, at 2) (noting how patients may want to keep their admission to hospitals a secret).

[184] Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 581 (1999).

[185] *Id.* at 597.

[186] *Id.* at 583 (citing Americans With Disabilities Act, 42 U.S.C. §§ 12101(a)(2), 12101(a)(5) (2012) [hereinafter ADA].

[187] CRPD, *supra* note 7, at 15. President Obama signed the CRPD three years ago. *See* Michelle Diament, *Obama Urges Senate to Ratify Disability Treaty* (May 18, 2012), *available at* http://www.disabilityscoop.Com/2012/05/18/Obama-Urges-Senate-Treaty/15654/. However, the Senate failed to ratify on December 4, 2012 because of a lack of a "super majority" of votes. *Senate Fails to Ratify the Convention on the Rights of Persons with Disabilities (CRPD)*, THE AM. ASS'N OF PEOPLE WITH DISABILITIES (Dec. 4, 2012), http://www.aapd.com/resources/press-room/aapd-praises-selection-of-1-1-1-1-1-1-1.html. Another hearing may take place before the end of calendar year 2014. *The Convention on the Rights of People with Disabilities (CRPD)* U.S. INT'L COUNCIL ON DISABILITIES, http://www.disabilitytreaty.org/crpd. Although the United States has not ratified the CRPD, "a state's obligations under it are controlled by the Vienna Convention of the Law of Treaties[,] which requires signatories 'to refrain from acts which would defeat [the Disability Convention's] object and purpose."' Henry A. Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 331, 362–63 (2011) (discussing *In re* Mark C.H., 906 N.Y.S.2d 419, 433 (N.Y. Sur. Ct. 2010) (finding that guardianship appointments must be subject to requirements of periodic reporting and review)). *See* Perlin, *Guardians, supra* note 74, at 1178–79 (noting that *In re* Mark C.H. relied upon the CRPD). The CRPD *has* been relied upon by domestic state courts both before and after the failed ratification vote. *See e.g.*, In re Guardianship of Dameris L., 956 N.Y.S.2d 848, 853 (N.Y. Sur. Ct. 2012); *In re* Mark C.H, N.Y.S.2d at 433–34. *See generally*, Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93 (2012) (featuring an author who was the trial judge in *Dameris L.* and M*ark C.H.* cases).

[188] US CENSUS BUREAU, TABLE PCT20: GROUP QUARTERS POPULATION BY GROUP QUARTERS TYPE, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_ 10_SF1_PCT20&prodType=table (showing that 42,035 people reside in "[m]ental (psychiatric) hospitals and psychiatric units in other hospitals").

Institutional settings for people with mental disabilities are not just limited to psychiatric hospitals—many are also housed in adult homes.[189] Moving people with disabilities from state mental hospitals to privately owned board and care homes has been described as "transintitutionalization,"[190] which can be defined as "the transfer of a population from one institutional system to another as an inadvertent consequence of policies intended to deinstitutionalize the target population."[191] These adult homes can be as isolative as inpatient units and invoke similar feelings of shame for people who are forced to live there.[192]

There have been litigation efforts to abate the negative outcomes of this transinstitutionalization. By way of example, in *Disability Advocates, Inc. v. Patterson,* a federal district court found that such "adult homes" were institutions that impeded residents' community integration.[193] The court further found that New York state homes had "denied thousands of individuals with mental illness in New York City the opportunity to receive services in the most integrated setting appropriate to their needs," and that these actions constituted discrimination in violation of Title II of the ADA.[194] Although that decision was subsequently vacated on standing grounds by the Second Circuit in an opinion that never touched on the substance of the lower court's findings,[195] the state of New York nevertheless subsequently signed a consent agreement which provides funding for the development of 1050 supported housing units in Kings and Queens counties, a development of a Community Transition Unit to facilitate transitioning individuals with serious mental illness from transitional adult homes to the community, and an independent reviewer to ensure compliance.[196] Also, in *Brooklyn Center for Independence of the*

---

[189] Kevin M. Cremin, *Challenges to Institutionalization: The Definition of "Institution" and the Future of* Olmstead *Litigation,* 17 TEX. J. ON C.L. & C.R. 143, 151–52 (2012).

[190] *Id.* at 156.

[191] Lois Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 805 (1988).

[192] *See* Bryan A. Liang, *Elder Abuse Detection in Nursing Facilities: Using Paid Clinical Competence to Address the Nation's* Shame, 39 J. HEALTH L. 527, 548 (2006) (discussing the shame nursing homes cause).

[193] Disability Advocates, Inc. v. Paterson, 653 F. Supp. 2d 184, 198 (E.D.N.Y. 2009), *vacated*, Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012).

[194] *Id.* at 188.

[195] Brooklyn Ctr. for Independence of the Disabled v. Bloomberg, 290 F.R.D. 409 (S.D.N.Y. 2012).

[196] United States v. New York, Nos. 13–CV–4165 (NGG) (MDG), 13–CV–4166 (NGG) (MDG), 2014 WL 1028982, at *12 (E.D.N.Y. March 17, 2014).

Disabled v. Bloomberg,[197] a federal court certified a class action of over 900,000 individuals against the mayor and city of New York, alleging that the city's emergency and disaster planning failed to address the needs of persons with disabilities, in violation of the Rehabilitation Act, Title II of the ADA, and state human rights law.[198]

Persons with mental disabilities continue to be housed in institutions that are humiliating and induce feelings of shame despite litigation efforts and the mandate of Title II of the ADA.[199] However, full integration of persons with mental disabilities into society in a way that enhances dignity and reduces shame is required both under federal and state law[200] and international human rights law.[201]

F. OUTPATIENT TREATMENT

Persons with mental disabilities are also subject to involuntary outpatient treatment. This statutory mechanism that can be as humiliating and shameful as inpatient hospital treatment, taking away the autonomy of patients and residents by not giving them choices in their treatment and living conditions.[202] In New York, this process of outpatient treatment is popularly known as *Kendra's Law*, or Assisted Outpatient Treatment ("AOT").[203] In New York, the law is used mainly in cases involving persons with multiple hospitalizations.[204] Persons are subject to AOT laws in New York if they are over the age of eighteen, suffering from a mental illness, deemed unlikely to survive in the community without supervision, have a history of noncompliance with treatment, and have been

---

[197] Brooklyn Ctr. for Independence of the Disabled, 290 F.R.D. at 417–21.

[198] *Id.* at 412.

[199] 42 U.S.C. § 12101(b) (2012).

[200] *Id. See e.g.*, *Introduction to state laws—Protections compared to the Americans with Disabilities Act*, *in* 1 GUIDE TO EMPLOYEE MEDICAL LEAVE § 6:1 (2014) (discussing how state laws may be broader and further reaching than federal laws in this context); *In re* Harry M., 468 N.Y.S.2d 359, 364 (N.Y. App. Div. 1983) (noting that treatment must be "essential" to justify commitment); *In re* Guardianship of Dameris L. 956 N.Y.S.2d 848, 853–54 (N.Y. Sur. Ct. 2012) (noting that guardianship can only be required when it is the least restrictive alternative).

[201] CRPD, *supra* note 7.

[202] Rae E. Unzicker, *From Privileges to Rights*, 17 T.M. COOLEY L. REV. 171, 172–74 (2000).

[203] *See* N.Y. MENTAL HYG. LAW § 9.60 (2012) (defining AOTs); Michael L. Perlin, *Therapeutic Jurisprudence and Outpatient Commitment: Kendra's Law as Case Study*, 9 PSYCHOL. PUB. POL'Y & L. 183, 194–95 (2003) (discussing Kendra's Law).

[204] Henry A. Dlugacz, *Involuntary Outpatient Commitment: Some Thoughts on Promoting a Meaningful Dialogue Between Mental Health Advocates and Lawmakers*, 53 N.Y. L. SCH. L. REV. 79, 95–96 (2008).

hospitalized at least twice in the prior thirty-six months or have been accused of an act of serious violent behavior toward self or others in the prior forty-eight months.[205] AOT is similar to involuntary inpatient treatment in that it forces a person to take certain medication, to live in a particular place, and in some cases, attend certain outpatient clinics.[206]

In theory, AOTs enable a person with mental illness to live in the community by providing a case manager, psychiatrist, or residential facilities or day treatment programs.[207] Offenders, however, may feel coerced due to the judicial decree that they must comply with a prescribed course of treatment or be "forcibly brought to an emergency room and held in the hospital for seventy-two hours without the option of leaving."[208] Of course, the mere fact that a patient is classified as "voluntary" does not mean that the process is necessarily free from coercion.[209] AOTs also disproportionately coerce racial minorities into involuntary treatment and forced drugging.[210] The court process can be humiliating because it shames people who are hospitalized twice or more in three years; such shaming in and of itself can discourage treatment and "inspire distrust of the therapist, resentment, and lack of genuine

---

[205] N. Y. MENTAL HYG. LAW §9.60(c).

[206] *Id.*; *see also* Rivers v. Katz, 495 N.E.2d 337, 344 (N.Y. 1986) (holding that an involuntarily committed patient in a psychiatric hospital could not be medicated over his or her objection, unless the hospital proved by clear and convincing evidence that the person suffers from a mental illness, lacks capacity to make a reasoned decision, and that the proposed treatment was the least restrictive alternative and in the patient's best interests). The *Rivers v. Katz* decision does not extend to AOTs in New York. *See* In re K.L., 806 N.E.2d 480 (N.Y. 2004) (holding that the threshold question as to capacity to make medical decisions was not required for an AOT).

[207] N.Y. MENTAL HYG. LAW § 9.60(a)(1).

[208] Dlugacz, *supra* note 204, at 88; *see also* KATEY THOM ET AL., BALANCING INDIVIDUAL RIGHTS WITH PUBLIC POLICY: THE DECISION-MAKING OF THE MENTAL HEALTH REVIEW TRIBUNAL 15 (2014) (citing, Terry Carney & David Tait, *Mental Health Tribunals—Rights, Protection, or Treatment? Lessons From the ARC Linkage Grant Study?*, 18 PSYCHIATRY PSYCHOL. & L. 137, 145 (2011) (discussing how judicial hearings engender feelings of powerlessness in persons with mental disabilities)).

[209] Coercion is also often present in the allegedly voluntary civil commitment process as well. *See* PERLIN, *supra* note 46, §§ 2C-7.2–7.2a, at 281–91 (discussing voluntary commitments); Susan C. Reed & Dan A. Lewis, *The Negotiation of* Voluntary *Admission in Chicago's State Mental Hospitals*, 18 J. PSYCHIATRY & L. 137, 148 (1990) (noting that the most common method for a therapist to obtain consent is through "persuasion and coercion"). *See generally* Birgit Volmm, Coercive Measures in Psychiatry, Reactions by Patients and Staff (Oct. 28, 2013).

[210] Dlugacz, *supra* note 204, at 82 (citing N.Y. LAWYERS FOR PUB. INTEREST, IMPLEMENTATION OF "KENDRA'S LAW" IS SEVERELY BIASED 11 (2005), available at http://www.prisonpolicy.org/scans/Kendras_Law_04-07-05.pdf).

cooperation."[211] Further, mandating a person, who would not otherwise be subject to forced medication, to take that medication against their will devalues the person being served.[212] A judge, rather than ordering assisted community treatment and "risk" having a patient potentially commit a criminal act, will order more preventive commitments.[213] This sort of rationalization feeds the misconception that persons with mental illness are inherently more dangerous than others.[214]

Persons with mental illness can conversely face involuntary confinement because they do not meet eligibility requirements for AOTs. *Mental Disability Law Clinic v. Hogan*,[215] a class action lawsuit that challenged the institutional aspect of AOTs, was brought on behalf of individuals who face involuntary confinement because they do not meet eligibility requirements for AOTs.[216] The plaintiffs alleged that "by failing to authorize outpatient services to individuals who do not satisfy the criteria for [AOTs]" the statute resulted in "unnecessarily segregating mentally ill individuals."[217] Although the case was ultimately dismissed, the plaintiffs' arguments raise important questions as to whether AOTs are truly the least restrictive alternative or whether persons with mental illnesses should be offered similar outpatient services regardless of having an AOT, and whether AOTs should continue only on a strictly voluntary basis.[218]

G. GUN CONTROL ISSUES

The response of the public, the press and the legislatures to recent mass killings has been to assume a causal relationship between mental

---

[211] Bruce J. Winick, *Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 PSYCHOL. PUB. POL'Y & L. 107, 120 (2003). A recent study in England found that community treatment orders—similar to AOTs—are no better and no more prevention readmission to a psychiatric hospital care than do other legal measures that allow patients short periods of leave from psychiatric hospitals. *See* Tom Burns et al., *Community Treatment Orders for Patients with Psychosis (OCTET): A Randomised Controlled Trial*, 381 LANCET 1627, 1631 (2013) (discussing how there is no support to justify the significant curtailment of patients' personal liberties).

[212] Perlin, *supra* note 203, at 191.

[213] Winick, *supra* note 211, at 109.

[214] Dlugacz, *supra* note 204, at 89; Winick, *supra* note 212, at 107.

[215] Mental Disability Law Clinic v. Hogan, No. CV-06-6320 (CPS)(JO), 2008 WL 4104460 (E.D.N.Y. Aug. 29, 2008).

[216] *Id.*

[217] *Id.* at *15.

[218] *See id.* (noting how involuntary hospitalizations are more restrictive than outpatient care).

illness and homicidal acts of violence.[219] This flawed "ordinary common sense"[220] persists notwithstanding the availability of valid and reliable research that tells us diagnosis of a major mental disorder—especially a diagnosis of schizophrenia—was associated with a *lower* rate of violence than a diagnosis of a personality or adjustment disorder along with a co-occurring diagnosis of substance abuse.[221]

The New York Secure Ammunitions and Firearms Enforcement ("SAFE") Act is a recent example of such reactionary legislation that humiliates persons with mental disabilities.[222] Under a vague standard of "likely to engage in conduct that would result in serious harm to self or others,"[223] the SAFE Act requires designated mental health professionals to report such persons to the Division of Criminal Justice Services ("DCJS"), regardless of whether they are seeking treatment voluntarily or involuntarily.[224] Not only does the SAFE Act apply to persons applying for new licenses, but it also applies to licenses already issued.[225] Thus, if a person with a mental disability legally owns a licensed gun, that person is required to turn in the gun to law enforcement authorities.[226] Moreover, the names of the persons are entered in a database kept indefinitely by the DCJS.[227]

The potential unintended consequences from such legislation, including damage to the therapeutic relationship between the patient and provider and violations of a patient's right to privacy, have yet to be

---

[219] Michael L. Perlin, *On "Sanism"*, 46 SMU L. REV. 373, 388–89 (1992).

[220] *See* Cucolo & Perlin, *supra* note 146, at 38 (citing Michael L. Perlin, *"She Breaks Just Like a Little Girl": Neonaticide, The Insanity Defense, and the Irrelevance of Ordinary Common Sense*, 10 WM. & MARY J. WOMEN & L. 1, 8 (2003)) ("[Ordinary common sense] is self-referential and non-reflective ('I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is.'")).

[221] *The MacArthur Violence Risk Assessment Study*, MACARTHUR RESEARCH NETWORK ON MENTAL HEALTH AND THE LAW (available at http://www.macarthur.virginia.edu/risk.html (last accessed, Nov. 1, 2013). "(1) Delusions. The presence of delusions—or the type of delusions or the content of delusions—was not associated with violence. A generally "suspicious" attitude toward others was related to later violence. (2) Hallucinations. Neither hallucinations in general, nor "command" hallucinations per se, elevated the risk of violence. If voices specifically commanded a violent act, however, the likelihood of violence was increased." *Id.*

[222] The bill passed the New York State Senate on January 14, 2013, and the governor of New York waived the legally required three day waiting period; it was passed by the State Assembly and signed by the governor on January 15, 2013. S.B. 2230, 2013–2014 Reg. Sess. (N.Y. 2014).

[223] N.Y. MENTAL HYG. LAW § 9.46 (2014).

[224] S.B. 2230, 2013–2014 Reg. Sess.

[225] *Id.*

[226] *Id.*

[227] *Id.* What is to be done with the database has yet to be seen.

addressed in the legal literature.[228] A person seeking mental health treatment has an expectation of privacy and confidentiality of their medical treatment.[229] In the past, according to the *Tarasoff* decision, a psychiatrist only would report a patient to the authorities or the potential victim when "disclosure [was] essential to avert danger to others."[230] But, the SAFE Act makes the threshold for disclosure much lower when reporting the patient's information to the DCJS.[231] Further, it adds to the misconception that persons with mental disabilities are inherently more dangerous by assuming that taking away access to guns from persons potentially suffering from a mental illness will end mass violence.[232]

H. ISSUES INVOLVING ELDERS WITH COGNITIVE DEFICITS

The humiliation that persons with disabilities experience as a result of their treatment is also shared by the elderly. Currently there are about 1,832,000 people living in skilled nursing facilities in the United States.[233]

---

[228] *But see*, Jeffrey Swanson, *Mental Illness and New Gun Law Reforms: The Promise and Peril of Crisis-Driven Policy*, 309.12 JAMA 1233, 1233–34 (2013) (critiquing SAFE for problems of over-identification, having a chilling effect on individuals who might otherwise have sought treatment, and invasion of privacy).

[229] Health Insurance Portability Accountability Act (HIPAA) of 1996, 42 U.S.C. § 1320d-9 (2012). There are other exceptions to confidentiality, including a patient's decision to put his mental state in issue in civil litigation, conflicts with police power statutes (such as those criminalizing child abuse) and inquiries into such public welfare matters as an individual's competency to operate a motor vehicle). *See* PERLIN, *supra* note 46, § 7A-5, at 333–34 ("Psychiatrists, other mental health professionals, governmental officials, and mental health centers have both a legal and ethical obligation to maintain secrecy in matters involving the professional-parent relationship.").

[230] Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 347 (Cal. 1976). *Tarasoff* is not universally accepted by all state courts. *See* PERLIN, *supra* note 46, § 7C-2.4h, at 479–81 ("Several jurisdictions have declined to follow the California Supreme Court and impose a *Tarasoff* duty to warn."). *See also Mental Health Professionals' Duty to Protect/Warn*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx (providing a state-by-state guide to recognition of *Tarasoff*) (last visited Dec. 23, 2013).

[231] S.B. 2230, 2013–2014 Reg. Sess (N.Y. 2014).

[232] Jana R. McCreary, *"Mentally Defective" Language in the Gun Control Act*, 45 CONN. L. REV 813, 842 (2013) (discussing the Federal Gun Control Act of 1968 and arguing that determining who is irresponsible and dangerous has been done irresponsibly).

[233] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 60 (2012), available at http://www.census.gov/compendia/statab/2012/tables/12s0073.pdf. In 2004, 1,492,200 people were in nursing homes. CENTERS FOR DISEASE CONTROL AND PREVENTION, 2004 NATIONAL NURSING HOME SURVEY 7, *available at* http://www.cdc.gov/nchs/data/nnhsd/Estimates/nnhs/Estimates_PaymentSource_Tables.pdf. In the US Census Bureau 2000, 4,059,039 people were living in institutions total (not distinguished between psychiatric hospitals and nursing homes). U.S. CENSUS BUREAU, TABLE 1: TOTAL POPULATION IN HOUSEHOLDS AND GROUP QUARTERS

This vulnerable population can be subject to abuse and neglect while housed in nursing homes.[234] In a situation that parallels the problems involving deinsitutitonalization of the mentally ill from psychiatric hospitals, many elderly people are kept in nursing homes despite the availability of residences in the community in which where they could live with the support of community-based services.[235]

I. GUARDIANSHIPS

Guardianships may also be humiliating to any person subject to them.[236] In many nations, entry of a guardianship order is the "civil death" of the person affected.[237] It is so characterized:

> because a person subjected to the measure is not only fully stripped of their legal capacity in all matters related to their finance and property, but is also deprived of, or severely restricted in, many other fundamental rights, [including] the right to vote, the right to consent or refuse medical treatment (including forced psychiatric treatment), freedom of association and the right to marry and have a family.[238]

Guardianships also can take away all the rights of allegedly incapacitated persons, and can take away their dignity by stripping such persons of any ability to make decisions for themselves.[239] Under the

---

BY SEX AND SELECTED AGE GROUPS FOR THE UNITED STATES, *available at* http://www.census.gov/population/www/cen2000/briefs/phc-t7/tables/ grpqtr01.pdf.

[234] *See, e.g.*, Iain Johnson, *Gay and Gray: The Need for Federal Regulation of Assisted Living Facilities and the Inclusion of LGBT Individuals*, 16 J. GENDER RACE & JUST. 293, 298 (2013) (citing Patrick A. Bruce, The Ascendancy of Assisted Living: The Case for Federal Regulation, 14 ELDER L.J. 61, 69 (2006)) (reporting on a study specifically finding an "unprecedented number" of reports of abuse of elderly residents within nursing homes, and noting further that only forty percent of nursing homes met the minimum standards required by federal law).

[235] Jennifer Matta, *Informed Choice: Expanding Housing Options in an Aging Society*, 48 WAYNE L. REV. 1503, 1522–23 (2003).

[236] *See* Perlin, *Guardians*, *supra* note 74, at 1161–62 (noting how guardianships severely curtail individual rights).

[237] Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT'L. L. & COM. 563, 569 (2007); *see also* Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?*, 34 SYRACUSE J. INT'L. L. & COM. 429, 445 (2007) (explaining "civil death").

[238] Oliver Lewis, *New Project on Reforming Guardianship in Russia*, MENTAL DISABILITY ADVOC. CTR. (Aug. 11, 2009), http://www.mdac.info/en/content/new-project-reforming-guardianship-russia.

[239] *See* Perlin, *Guardians*, *supra* note 74, at 1168–70 (noting how guardianships can be abused); *see also* CHINESE HUM. RTS. DEFENDERS, THE DARKEST CORNERS: ABUSES OF INVOLUNTARY PSYCHIATRIC COMMITMENT IN CHINA 12 (2012), *available at* http://www.chrdnet.com/wp-content/uploads/2012/08/ CRPD_report_FINAL-edited2.pdf ("Once individuals have been

CRPD, substituted decision making should be abolished altogether.[240] Article 12 of the CRPD guarantees that persons with disabilities have the right to recognition everywhere before the law.[241] The International Disability Alliance, a network of global and regional organizations of persons with disabilities, argues that the following must be abolished:

> (1) plenary guardianship;
>
> (2) unlimited time frames for exercise of guardianship;
>
> (3) the legal status of guardianship as permitting any person to override the decisions of another;
>
> (4) any individual guardianship arrangement upon a person's request to be released from it;
>
> (5) any substituted decision-making mechanism that overrides a person's own will, whether it is concerned with a single decision or a long-term arrangement; and
>
> (6) any other substituted decision-making mechanisms, unless the person does not object, and there is a concomitant requirement to establish supports in a person's life so they can eventually exercise full legal capacity.[242]

The CRPD requires the following actions to ensure equal recognition before the law:

> (1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
>
> (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
>
> (3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
>
> (4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of

---

brought to psychiatric hospitals in China, hospital authorities and staff respond only to the wishes and requests of those who authorized the commitment, not to the committed.").

[240] CRPD, *supra* note 7, at 6; *see also* INTERNATIONAL DISABILITY ALLIANCE, PRINCIPLES FOR IMPLEMENTATION OF CRPD ARTICLE 12 3–4, *available at* http://www.internationaldisabilityalliance.org/sites/disalliance.e-presentaciones.net/files/public/files/Article_12_Principles_Final.doc, (last accessed Nov. 23, 2013).

[241] CRPD, *supra* note 7, at 10–11.

[242] PRINCIPLES FOR IMPLEMENTATION OF CRPD ARTICLE 12, *supra* note 240, at 3–4.

> conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
>
> (5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.[243]

At the least, as Professor Arlene Kanter noted: "Instead of parentalistic guardianship laws, which substitute a guardian's decision for the decision of the individual, the CRPD's supported-decision making model recognizes first, that all people have the right to make decisions and choices about their own lives."[244]

Guardianships are also seen as a violation of a mandate of the ADA to provide services in the most integrated and least restrictive manner.[245] "Like institutionalization, guardianship entails the loss of civic participation" and create a legal construct that parallels the isolation of institutional confinement.[246] "When the state appoints a guardian and restricts an individual from making his or her own decisions, the individual loses crucial opportunities for interacting with others."[247] Further, "there is evidence that guardianship often leads to institutionalization."[248]

The fact that guardianships can lead to institutionalization only increases the chances of humiliation.[249] Moreover, the court guardianship-determination process itself can be humiliating as medical and personal history are aired in public testimony.[250] Instead of substituted decision

---

[243] CRPD, *supra* note 7, at 10–11.

[244] Arlene Kanter, *The United Nations Convention on the Rights of Persons With Disabilities and Its Implications for the Rights of Elderly People under International Law*, 25 GA. ST. U. L. REV. 527, 563 (2009); Perlin, *Guardians*, *supra* note 74, at 1176–79.

[245] Cremin, *supra* note 189, at 179 (quoting Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV 157, 193 (2010)).

[246] *Id.*

[247] *Id.* (quoting Salzman, *supra* note 245, at 194).

[248] *Id.*

[249] *See supra* text accompanying notes 236–39.

[250] *See* PERLIN, *supra* note 46, § 2C-4.4, at 322–28 (discussing issues related to public civil

making, assistance to persons in need of help with their day-to-day living should be done in conjunction with their wishes and to afford them the greatest amount of independence possible. Guardianship hearings should be closed to anyone not directly involved in the case. Further, even private medical testimony, which can be embarrassing to the person subject to the guardianship, should be minimized in order to reduce potential feelings of shame and humiliation.

J. SEX OFFENDER RESIDENCY RESTRICTIONS

1. Introduction

Sex offenders are arguably the most despised members of our society and face the harshest condemnation.[251] Regularly reviled as "monsters" by district attorneys in jury summations,[252] by judges at sentencings,[253] by elected representatives at legislative hearings,[254] and by the media,[255] the

commitment hearings).

[251] *See* Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner's Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 513–15 (2007) (discussing the problems faced by sex offenders); Bruce J. Winick, *Sex Offender Law in the 1990's: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 505 (1998) (discussing how individuals who commit sex offenses against children are probably the most hated group in our society).

[252] We have yet to find an appellate reversal of a case in which this inflammatory language was used. *See, e.g.*, Comer v. Schriro, 463 F.3d 934, 960 (9th Cir. 2006), *cert. denied*, 550 U.S. 966 (2007) (upholding a decision even when a defendant had been referred to as a "monster" and "filth" at trial); Kellogg v. Skon, 176 F.3d 447, 452 (8th Cir. 1999) (upholding a decision even when a defendant had been referred to a "monster and "sexual deviant" at trial); State v. Henry, 102 So. 3d 1016, 1025 (La. Ct. App. 2012) (upholding a decision even when a defendant had been referred to as a "monster" and "sexual predator" at trial); People v. Bonner, No. 10–09–00120–CR, 2010 WL 3503858, at *11 (Tex. Crim. App. Sept. 8, 2010) (upholding a decision even when a defendant had been referred to as a "child predator of the highest order" at trial).

253 *See* People v. Ball, No. 295851, 2011 WL 1086557, at *3 (Mich. Ct. App. Mar. 24, 2011) (upholding a decision even when a defendant had been referred to as a "monster" and "coward" by the trial judge).

[254] *See, e.g.*, Timothy Wind, *The Quandary of Megan's Law: When the Child Sex Offender Is a Child*, 37 J. MARSHALL L. REV. 73, 93 (2003) (quoting Representative Mark Green); Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 339 (2001) (quoting Senator Hutchison).

[255] *See* Rachel Rodriguez, *The Sex Offender Under the Bridge: Has Megan's Law Run Amok?*, 62 RUTGERS L. REV. 1023, 1031–32 (2010) (quoting John G. Winder, *The Monster Next Door: The Plague of American Sex Offenders*, CYPRESS TIMES (Nov. 20, 2009, 1:49 PM), http://www.thecypresstimes.com/article/News/Your_News/THE_MONSTER_NEXT_DOOR_THE_PLAGUE_OF_AMERICAN_SEX_OFFENDERS/25925) ("There's no such thing as monsters. We tell our kids that. The truth is that monsters are real. . . . These monsters are called Sex Offenders, a label that is far too innocuous to convey the evil of those who have earned it." (internal quotation marks omitted))

demonization of this population has helped create a "moral panic"[256] that has driven the passage of legislation[257]—much of which has been found by valid and reliable research to be counterproductive and engendering a *more* dangerous set of conditions—and judicial decisions, at the trial, intermediate appellate, and Supreme Court levels.[258] These actions all reflect the anger and hostility the public has for this population.[259]

The government condones the use of humiliation as a remediative tool through sex offender zoning restrictions and registries that bar sex offenders from residing in certain communities or residing within a certain distance from schools, parks, churches, recreational areas, or libraries.[260] These laws are so restrictive that in some cases there is no viable place left for a sex offender to live except in a makeshift "shantytown" under a bridge.[261] Sex offender registries require a person to notify the police and the community of their crimes, while probation conditions for some sex offenders require shaming conditions such as signs and bumper stickers.[262] These offenders are "forever branded with a 'scarlet letter' notwithstanding the fact that they have already been criminally punished for their offenses,"[263] and have already served their sentences.[264]

---

[256] *See* STANLEY COHEN, FOLK DEVILS AND MORAL PANICS 1–2 (3d ed. 2002); Filler, *supra* note 254, at 317–20 ("Megan's Law reflects a recurring type of 'moral panic' . . . ."); Eric Fink, *Liars and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases*, 83 NOTRE DAME L. REV. 2019, 2038–39 (2008) (noting how moral panics can have "serious and long-lasting repercussions").

[257] *See* Wayne Logan, *Megan's Laws as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 371 (2011) (discussing "legislative panic" in context); Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317, 1320 (1998) (same).

[258] *See* John Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1146 (1999) (discussing "judicial panic" in context); David Karp, *The Judicial and Judicious Use of Shame Penalties*, 44 CRIME & DELINQ. 277, 291(1998) (discussing how shame penalties that emphasize humiliation are likely to be counterproductive as they "drive a wedge between offenders and conventional society").

[259] Meghan Gilligan, *It's Not Popular But It Sure Is Right: The (In)Admissibility of Statements Made Pursuant to Sexual Offender Treatment Programs*, 62 SYRACUSE L. REV. 255, 271 (2012); *see also* Kenneth Cloke, Revenge, *Forgiveness, and the Magic of Mediation*, 11 MEDIATION Q. 67 (1993) ("[R]evenge is humiliating and degrading, even if it is also satisfying.").

[260] Caleb Durling, *Never Going Home: Does It Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J. CRIM. L. & CRIMINOLOGY 317, 318–19 (2006).

[261] Sharon Brett, *"No Contact" Parole Restrictions: Unconstitutional and Counterproductive*, 18 MICH. J. GENDER & L. 485, 493 (2012).

[262] Durling, *supra* note 260, at 327.

[263] Cucolo & Perlin, *supra* note 146, at 21–22.

[264] *Id.*

2. Sex offender registration acts

Sex offender registration acts ("SORAs") are present in every state in the US and have been met with resounding public support, despite their prohibitive cost.[265] SORAs are rationalized under theories of deterrence and protecting the public.[266] They are intended to shame sex offenders into having greater respect for the law and create a powerful deterrent to reoffending.[267]

However, SORAs are based on flawed reasoning. They assume that most sex offenses involve victims unfamiliar with their attackers and that there is a correlation between how close an offender lives to a school and increased recidivism.[268] "A study of the newspaper coverage of child molesters arrested over the course of one year found that media coverage tended to focus on the 'the extreme and unusual,' while the reporting of typical cases, such as those involving family members or acquaintances, was infrequent to non-existent."[269] Ninety percent of child sex offense cases are committed by a family member or acquaintance of the child.[270] Thus, social proximity, not residential proximity, is the most significant factor for sex offender recidivism.[271] Studies have demonstrated that proximity to a school or playground has little effect on recidivism rates.[272] The public assumes that sex offenders recidivate at higher rates than other criminals;[273] studies have shown that sex offenders recidivate at much lower rates than commonly believed.[274]

Research suggests that SORAs are not effective.[275] There is no distinction between "those who will be dangerous in the future from those who were formerly dangerous. Statutory rape cases [dealing] with sexual

---

[265] Amber Leigh Bagley, *"An Era of Human Zoning": Banishing Sex Offenders From Communities Through Residence and Work Restrictions*, 57 EMORY L.J. 1347, 1376, 1391 (2008); Durling, *supra* note 261, at 321.

[266] ANNE-MARIE MCALINDEN, THE SHAMING OF SEXUAL OFFENDERS: RISK, RETRIBUTION AND REINTEGRATION 107 (2007).

[267] *Id.* at 118.

[268] Durling, *supra* note 260, at 329–30.

[269] Lindsay A. Wagner, *Sex Offender Residency Restrictions: How Common Sense Places Children at Risk*, 1 DREXEL L. REV. 175, 185 (2009).

[270] Bagley, *supra* note 265, at 1378.

[271] Wagner, *supra* note 269, at 192–93.

[272] *Id.* at 193.

[273] Durling, *supra* note 260, at 329.

[274] Wagner, *supra* note 269, at 193.

[275] *Id.* at 187.

interactions between teenagers . . . that would otherwise be consensual but for age," are treated the same as cases dealing with "violent pedophilic offenses."[276] Such a system is clearly unreliable and unfair.[277] In fact, research indicates that SORAs do not protect children and might even increase the danger to the community.[278]

Empirical evidence demonstrates "that strong support networks are among the most effective means of combating recidivism."[279] Sex offenders need support systems comprised of people who accept their potential for deviant behavior and empower them to engage in healthy, law-abiding and respectful relationships and activities.[280] Studies have shown a correlation between strong family ties and lower recidivism rates for offenders reentering society.[281] Moreover, restrictive parole supervision might not lead to lower recidivism rates.[282] The labeling and stigmatization of sex offenders can have a disintegrative impact on the offender's rehabilitation, which may ultimately make relapse more likely.[283]

Further, SORAs disproportionately affect low-income offenders and cause them to be further isolated and marginalized from society because they are forced to live far away from work opportunities.[284] Zoning restrictions are severely detrimental to sex offenders and the community because "[s]table employment is an important part of preventing stress and decreasing recidivism."[285] SORAs and zoning laws shame and stigmatize

---

[276] Cucolo & Perlin, *supra* note 146, at 21 (discussing how the current system "bundles statutory rape cases that deal with sexual interactions between teenagers—interactions that would otherwise be consensual but for the age of one of the partners—with cases of individuals who have committed violent pedophilic offenses"); *see also* ALA. CODE § 13A-12-131 (2014) (discussing a driver who posted an allegedly-obscene bumper sticker and how that was considered a sex offense); Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1208 (1998) (discussing the imprecision and overbreadth of this category, ranging from the stranger pedophiliac rapist to the teenager consensually sending "sexting" pictures of herself to her boyfriend and how "sex offenders do not share a common set of psychological and behavioral characteristics"). Preliminary studies indicate that approximately 20% of teenagers have engaged in "sexting." *See* Carissa Byrne Hessick & Judith M. Stinson, *Juveniles, Sex Offenses, and the Scope of Substantive Law*, 46 TEXAS TECH L. REV. 5, 8 n.7 (2013).

[277] Cucolo & Perlin, *supra* note 146, at 21.

[278] *Id*. at 28.

[279] Brett, *supra* note 261, at 503.

[280] *Id.* at 504.

[281] *Id.* at 503.

[282] *Id.*

[283] MCALINDEN, *supra* note 266, at 118.

[284] Durling, *supra* note 260, at 335.

[285] Bagley, *supra* note 265, at 1383.

sex offenders and deny them meaningful opportunities for rehabilitation.[286] They forever brand an offender with a "'scarlet letter' notwithstanding the fact that they have already been criminally punished for their offenses."[287] "With so many sex offenders struggling to find suitable housing and being pushed away from their social networks, the restrictions may actually be placing communities at an increased risk."[288] These schemes are so restrictive that they often drive sex offenders to "disappear underground [or] to go across state lines."[289]

Homeowner associations have recorded covenants barring the sale of homes to registered sex offenders.[290] In *Mulligan v. Panther Valley Property Owners Association*, a resident of a homeowner association challenged the prohibition on the sale of her home to what is characterized in New Jersey as a Tier 3 sex offender.[291] The court held that "the restriction did not constitute an unreasonable restraint on alienation" because "there were only eighty Tier 3 sex offenders living in New Jersey at the time," to whom the plaintiff could not sell her house.[292] It is also telling that the exclusion of sex offenders by homeowner's associations does not include exclusion of people convicted for other crimes like murder, burglary, kidnapping, sedition, fraud, or theft.[293]

In *Smith v. Doe*, the Supreme Court rejected the respondent's argument that Alaska's notification requirements resembled "shaming punishments of the colonial period."[294] The Court held that unlike shaming punishments of the past, the stigma that resulted from Alaska's notification requirements results from the dissemination of accurate information about a criminal record, not "from public display for ridicule and shaming."[295] This was held despite the fact that the offender

---

[286] *Id.* at 1385.

[287] Cucolo & Perlin, *supra* note 146, at 21–22.

[288] Wagner, *supra* note 269, at 195.

[289] Bagley, *supra* note 265, at 1389 (quoting Mark Agee, *No Room for Sex Offenders*, FORT WORTH STAR-TELEGRAM, Sept. 28, 2006, at A1).

[290] Lior Jacob Strahilevitz, *Information Assymetries and the Right to Exclude*, 104 MICH. L. REV. 1835, 1844–45 (2006).

[291] *Id.* (citing Mulligan v. Panther Valley Prop. Owners Ass'n, 766 A.2d 1186, 1189, 1192 (N.J. Super. Ct. App. Div. 2001) (discussing how Tier 3 is the highest classification in New Jersey and is used to classify sex offenders whom the state has deemed to pose a high risk of recidivating)).

[292] *Id.* at 1192.

[293] *See* Strahilevitz, *supra* note 290, at 1890 (nothing that these crimes are not listed).

[294] Smith v. Doe, 538 U.S. 84, 86, 97 (2002).

[295] *Id.* at 98. In her dissent, Justice Ginsburg underscored that Alaska's SORNA "applies to all convicted sex offenders, without regard to their future dangerousness." *Id.* at 116 (Ginsburg, J.,

successfully completed a treatment program, gained early release, subsequently remarried, established a business, reunited with his family, and was granted custody of a minor child based on a judge's determination that he had been successfully rehabilitated.[296] Further, the offender's registration pursuant to SORNA is unlikely to increase public safety since SORNA does not thwart the victimization of those in close, trusting relationships as exemplified by an offender who was convicted of sexually abusing his daughter.[297]

But, even in light of the Supreme Court's approval of *Smith's* notification requirements, it is more difficult to justify the use of other shaming sanctions, such as forcing sex offenders to post signs or affix a bumper sticker to their cars.[298] These shaming conditions affix labels against the offenders and may cause feelings of hopelessness that could cause them to engage in deviant behavior.[299] It also leads to public humiliation, which cannot be seen as an acceptable goal of probation,[300] unlike rehabilitation of the offender and protection of the community.[301]

Because of these shaming conditions, sex offenders often find themselves and their families threatened.[302] In July 2000, *News of the World* (a garish British tabloid) developed the "Name and Shame" campaign which outed suspected and known pedophiles and printed their photographs and addresses along with brief details of their alleged offending history.[303] Angry protestors issued threats against the alleged pedophiles, and overturned and burned cars.[304] Several families were forced to flee, one convicted pedophile disappeared, two alleged pedophiles committed suicide, and one person's house was attacked merely because she shared her surname with a known sex offender.[305] The moral panic associated with sex offenders is primarily due to the media's

---

dissenting).

[296] *Id.* at 117.

[297] Steven R. Morrison, *Creating Sex Offender Registries: The Religious Right and the Failure to Protect Society's Vulnerable*, 35 AM. J. CRIM. L. 23, 59–60 (2007).

[298] *See supra*, text accompanying note 122–25.

[299] Kenya A. Jenkins, *"Shaming" Probation Penalties and the Sexual Offender: A Dangerous Combination*, 23 N. ILL. U. L. REV. 81, 100 (2002).

[300] *Id.* at 101.

[301] *Id.* at 102–03.

[302] *Id.*

[303] MCALINDEN, *supra* note 266, at 22.

[304] *Id.*

[305] *Id.*

depiction of them.[306]

By shaming and humiliating convicted sex offenders, sex offender residency restrictions ostracize, isolate, and destroy any hope of reintegration, and may even increase the likelihood of recidivism.[307] SORAs provoke feelings of being less than human, hopelessness, unworthiness, and results in a lack of dignity.[308] As Professor Michelle Alexander has noted, "some convicted felons and registered sex offenders have found the 'lifetime of shame, contempt, scorn, and exclusion' that follows the actual sentence to be the most difficult aspect of their conviction."[309] With the imposition of serious penalties following teenage "sexting" (the sending of sexually explicit images or messages via cellular phone), one commentator has concluded, "[s]tripping teens of democratic rights, erecting roadblocks to their future careers, and subjecting them to a 'lifetime of shame' is not consistent with the central aim of the juvenile justice system—rehabilitation."[310] Not only are these actions demeaning, they may also unconstitutionally infringe upon the freedom of speech, the freedom of association, the right to privacy, the right to work, the takings clause, and the prohibition on cruel and unusual punishment, all while being unconstitutionally vague.[311]

VI. THE RELATIONSHIP BETWEEN THERAPEUTIC JURISPRUDENCE, INTERNATIONAL HUMAN RIGHTS LAW, THE ROLE OF DIGNITY AND HUMILIATING/SHAMING SANCTIONS

As noted earlier, TJ aims to determine whether legal rules, procedure, and lawyer roles can be reshaped to enhance therapeutic potential while not subordinating due process principles.[312] Recall the "three Vs" listed by Professor Ronner in her discussion of TJ: voice, validation, and

---

[306] Cucolo & Perlin, *supra* note 146, at 2 n.6; Kristen M. Zgoba, *Spin Doctors and Moral Crusaders: The Moral Panic Behind Child Safety Legislation*, 17 CRIM. JUST. STUD. 385, 386 (2004).

[307] Cucolo & Perlin, *supra* note 146, at 5.

[308] *Id.* at 30.

[309] Sidney L. Leasure, *Criminal Law—Teenage Sexting in Arkansas: How Special Legislation Addressing Sexting Behavior in Minors Can Salvage Arkansas's Teens' Futures*, 35 U. ARK. LITTLE ROCK L. REV. 141, 150 (2012) (quoting MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 139 (2010)).

[310] Leasure, *supra* note 309, at 150 (citing Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 778–79 (2002)).

[311] Tavill, supra note 110, at 544.

[312] *See* sources cited *supra* note 48.

voluntariness,[313] and also consider how our humiliating and shaming strategies reject these values. Scarlet letter punishments do not meet the three Vs and are in direct contravention of TJ principles and the development of problem-solving courts.[314] Although problem-solving courts developed separately from TJ, they share similar aims.[315] Instead of shaming and humiliating people, courts should use the law as an instrument for helping people and should function as psychosocial agencies.[316] Judges need to be good listeners and avoid trite paternalism in the lecturing and shaming of offenders.[317] TJ and problem-solving courts should also be employed for persons with mental disabilities subject to AOTs.[318] "Judges, court personnel, treatment providers, and defense attorneys should take care to instruct the [offenders] carefully and understandably concerning [their] obligations relating to participation in the treatment program and reporting to court."[319] Most importantly, an offender should not feel coerced into treatment or into agreeing to probation.[320] For example, a Minnesota statute has rejected criminal sanctions for prenatal substance abuse as well as the classification of drug use during pregnancy as child abuse,[321] and has been lauded as "a model for other states, replacing ineffective punitive measures that deter pregnant substance abusing women from obtaining treatment and that encourage these women to feel guilt and shame."[322]

Some argue that shaming is a necessary part of TJ.[323] However, reintegrative shaming differs from the humiliating tactics currently

---

[313] Ronner, *supra* note 66, at 627.

[314] *See* Perlin, Cast His Robes, *supra* note 6, at 9–10 (discussing the relationship between therapeutic jurisprudence and problem-solving courts). *See generally* Perlin, *Gates of Eden*, *supra* note 6 (same).

[315] Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1064 (2003).

[316] *Id.* at 1066; *see* Perlin, *Cast His Robe*, *supra* note 6, at 9–11 (discussing mental health courts).

[317] Winick, *supra* note 315, at 1070–71.

[318] *See* Perlin, *supra* note 203.

[319] Winick, *supra* note 315, at 1084.

[320] *Id.* at 1079–80.

[321] MINN. STAT. ANN. § 626.5561 (2014).

[322] Marilena Lencewicz, *Don't Crack the Cradle: Minnesota's Effective Solution for the Prevention of Prenatal Substance Abuse—Analysis of Minnesota Statute Section 626.5561*, 63 REV. JUR. U.P.R. 599, 628 (1994).

[323] Thomas J. Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 97, 105–06 (1998).

employed by courts.[324] Namely, the cornerstone of reintegrative shaming is the voluntary participation of victims and offenders.[325] The idea of reintegrative shaming is to have enough shame to "bring home the seriousness of the offense, but not so much to humiliate and harden."[326] Further it is directed at the evil of the act, rather than the evil of the person.[327]

Nothing so clearly violates "the dignity of persons as treatment that demeans or humiliates them" as shaming.[328] Thus, by way of specific examples of marginalized populations, the treatment of persons with mental disabilities and the elderly must be radically changed.[329] Persons with mental disabilities should be entitled to the right to receive treatment in a way that does not isolate them and invoke feelings of shame while the elderly should be given the most opportunity to make decisions regarding their personal needs and property and afforded the greatest amount of independence.

Instead of laws that aim to shame, isolate and humiliate sex offenders, the focus must be on reintegrating sex offenders into society and promoting sex offenders' self-respect and dignity while fostering family and community relationships.[330] "Residency restrictions should be completely dismantled due to their anti-therapeutic effect and unfounded ability to have any impact on diminishing re-offense and making communities safer."[331] The perception of receiving a fair hearing is therapeutic because it contributes to the individual's sense of dignity and conveys that he or she is being taken seriously."[332] The shaming and humiliating practices discussed throughout this Article fail miserably at achieving the goals of TJ.

Finally, the CRPD declares a right to "freedom from . . . degrading

---

[324] *See supra* text accompanying note 102–09.

[325] MCALINDEN, *supra* note 266, at 187.

[326] Scheff, *supra* note 323, at 104.

[327] MCALINDEN, *supra* note 266, at 173.

[328] R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 549 (2006).

[329] *See generally* MARSHALL KAPP, THE LAW AND OLDER PERSONS: IS GERIATRIC JURISPRUDENCE THERAPEUTIC? (2003) (explaining the application of therapeutic jurisprudence to nursing home conditions).

[330] Cucolo & Perlin, *supra* note 146, at 40.

[331] *Id.* at 41.

[332] Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL. PUB. POL'Y & L. 80, 114 (1995).

treatment or punishment,"[333] and a "respect for inherent dignity."[334] It promotes "awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities."[335] An understanding of dignity is absolutely central to an understanding of the intersection between international human rights and mental disability law.[336] The punishments described in this paper contravene international human rights law and deprive individuals of dignity through their degradation and therefore must be changed.

VII. CONCLUSION

The law regularly shames and humiliates those who come before it. As has been illustrated throughout this Article, there is little reliable evidence that these approaches "work" in the sense of lowering recidivism, making the streets safer, or creating a more humane society. Often, the individuals who are so shamed and humiliated are either despised, like sex offenders, convicted of criminal charges, again like sex offenders, or ignored, like those who are institutionalized for mental disabilities. As a result, there is rarely outcry when these individuals' rights are violated. In all cases, the shaming and humiliating tactics deprive them of dignity, and, in the cases of individuals with disabilities, contravene the CRPD.[337] Most importantly, they violate the cardinal principle of dignity that is central to TJ.[338]

This Article hopes to call attention to these rights violations, and that it causes those who support them to think more carefully about the impact that the tactics in question have on the persons being shamed and humiliated. Recall again what Dylan critic Michael Gray had to say about *Jokerman*, the song from which the first part of the title of this Article is derived: that "'evil' is not 'out there,' 'among the others,' but is inside us

---

[333] CRPD, *supra* note 7, at 12; Charles R. Beitz, *Human Dignity in the Theory of Human Rights: Nothing but a Phrase?*, 41 PHIL. & PUB. AFFAIRS 259, 289 (2013) (discussing the relationship between human dignity and the "importance of . . . specific protections . . . such as the prohibition of torture and cruel or degrading treatment in international human rights treaties and conventions").

[334] CRPD, *supra* note 7, at 5.

[335] *Id.* at 8.

[336] *See* Beitz, *supra* note 333, at 281 (noting that a special class of "dignitary harms" denies individuals "the capacity for dignified conduct").

[337] *See supra* text accompanying notes 333–36.

[338] *See* Perlin, *supra* note 81, at 333 (noting how TJ must be a voluntary system); Winick, *supra* note 52, at 161 (same); *supra* text accompanying notes 325–40.

all."[339] We close our eyes to this reality, and that allows us to humiliate and shame others that we often treat as subhuman. It is time to acknowledge this, and end these behaviors.

[339] GRAY, *supra* note 24, at 264.