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Should Shaming Be an Element of Criminal Punishment?

Primate Criminal Punishment Requires Shaming the Person Convicted

Advocate: Dan M. Kahan, Elizabeth K. Dollard Professor of Law, Yale Law School.

Source: "Punishment Incommensurability," *Buffalo Criminal Law Review*, Volume 1 (1998): 691-709.

There Are No Positive Grounds for Shaming Punishments

Advocate: Michael Tonry, Marvin J. Sonosky Professor of Law and Public Policy at University of Minnesota Law School.

Source: From "Formerly Unthinkable Policies," in *Thinking About Crime: Sense and Sensibility in American Penal Culture* (New York: Oxford University Press, 2004): 156-167.

Shaming punishments may seem a relic of a harsh and primitive era, but some—including some judges—wish to revive punitive measures that are expressly designed to publicly shame the offender: punishments like standing in public with signs stating what crimes they have committed (such as shoplifting). For example, the state of Tennessee passed legislation requiring those convicted of violations to spend three supervised sessions picking up litter along public highways while wearing a bright vest stating (in bold letters) "I AM A DRUNK DRIVER."

There are two fundamentally different concepts of shaming, with very different purposes and methods: *reintegrative* shaming as distinguished from *disintegrative* shaming. In disintegrative shaming, the offender is made an object of ridicule and contempt: someone who is used as a punitive object lesson to reaffirm the importance of the community standards the offender violated. In reintegrative shaming—which some restorative justice theorists, such as Braithwaite, consider an

important element of restorative justice—the offender is not so much a pariah to society as by the recognition of falling short of community standards and the offender shares and embraces. While in reintegrative shaming, shame and distance are elements of restoration of the offender to the community, disintegrative shaming labels the offender as different and despised. Moreover, in reintegrative shaming, the shame is temporary, rather than a long-term shaming that makes the offender a pariah to the community; and the shame is followed by forgiveness and reintegration into the society.

Disintegrative shaming is sometimes celebrated as a way of affirming the offender has violated, and using the offender for that purpose. In terms of its effectiveness in value affirmation, it seems unlikely to have a successful effect on the shamed offender. To the contrary, it may drive the offender into a despised subculture that rejects the values of society and bands together those who share those values (for example, a subculture of pedophiles).

The basic advantage of disintegrative shaming punishments is that they are less expensive than incarceration. Public humiliation is less expensive than incarceration. The basic disadvantage of shaming punishments is that they attack the dignity of the offender: they dehumanize the offender. And they draw the larger public into the process of humiliation by making them witnesses to the spectacle. A major objection is that such sentences tend to be “quirky” and thus undermine the principle of uniform justice. As Jonathan Turley stated (in a September 1990 *Washington Post* editorial): “Once you allow judges to indulge their own fantasies, defendants become their personal playthings—freaks on a parade paraded at the judges’ pleasure.” And finally, shaming punishments shift the burden over to the family of the shamed offender.

Points to Ponder

- Suppose that David has shoplifted several items from the local grocery store, and has been found guilty of that offense. The judge offers David a choice: spend two weekends walking around the parking lot of the store carrying a large sign saying “I am a shoplifter” or go to jail for one month. Does being offered a choice make the shaming punishment better?
- Suppose that your friend David has been sentenced to spend the weekend walking with a sign in front of the grocery store. You were not at the store at the time of David’s shoplifting conviction, nor did you know that he would be walking with a sign. You stop by the grocery, and as you walk toward the grocery store you encounter your friend David and his sign, and you (an innocent bystander) are profoundly embarrassed. Is that a reason against shaming punishments? Is this a trivial and unimportant and irrelevant issue? A part of your duty as an upright, law-abiding citizen?
- David’s shoplifting offense occurred in his hometown, one hour’s drive from the university he attends; and only one other student at David’s university knows about his shoplifting conviction. However, the student happens to work as a reporter for the college newspaper, and he

the weekend that David carries his sign. The reporter snaps a photo, and the newspaper runs a large picture of David and the shoplifting sign on its front page, and David's shaming experience becomes much more severe. Is that legitimate? Should shaming be restricted? *Could* it be restricted?

- Restorative justice programs (as discussed in Debate 8) often include some element of shaming. What is the difference between shaming as integrated into a restorative justice program and shaming as advocated by Dan Kahan?
- Are shaming punishments—of the sort favored by Kahan—likely to help in the rehabilitation of offenders? If research showed that such punishments do *not* play any positive role in rehabilitation, would that change Kahan's opinion of shaming punishments?

Punishment Incommensurability

Dan M. Kahan

The Alternative Sanctions Puzzle

Why do American jurisdictions insist on imprisoning so many offenders who don't need to be incapacitated and who could be effectively disciplined by alternatives such as fines and community service? I'll call this the alternative sanctions puzzle. My goal in this article is to develop the theoretical resources necessary to solve it.

The proposition that the United States relies excessively on imprisonment shouldn't be controversial. Leaving aside capital punishment, incarceration might be the only option for many violent offenders, including murderers, rapists, and armed robbers.

But they make up less than half the American prison population. The rest have engaged in nonviolent offenses—from larceny, to fraud, to drug distribution, to drunk driving. The short terms of imprisonment they typically receive deter no more effectively than fines and community service, yet are much more costly for society, not to mention harsher for offenders. Theorists of nearly every ideological stripe are thus united in their support for alternative sanctions.

Notwithstanding this expert consensus, however, the call for alternative sanctions has fallen on deaf ears, politically speaking. In the last decade, prison sentences have been dramatically

Dan M. Kahan, "Punishment Incommensurability," *Buffalo Criminal Law Review*, Volume 1, Number 2 (Jan 1998): 691–709. Copyright © 1998 by University of California Press – Journals. Reproduced with permission of University of California Press – Journals in the format of a book via Copyright Clearance Center.

lengthened for many offenses and extended to others that have traditionally been punished only with fines and probation. Large fines have also become common—especially in federal criminal law—but almost exclusively as supplements to imprisonment, not as substitutes for it. Similarly, community service is now a common disposition, but mainly as an additional punishment for offenders who would otherwise have received straight probation.

Solving the alternative sanctions puzzle requires identifying the cause of the public's disagreement with the experts. The experts blame the public, whom they see as too uninformed or too vindictive to see the benefits of prison's rivals. I want to suggest that it's the experts who are at fault for overlooking a phenomenon that I'll call punishment incommensurability.

The conventional defense of alternative sanctions assumes that all forms of punishment are commensurable—or fungible—along the dimension of severity. The primary function of imprisonment, on this view, is to make offenders suffer. The threat of such discomfort is intended to deter criminality, and the imposition of it to afford a criminal his just deserts. But liberty deprivation, the defenders of alternative sanctions point out, is not the only way to make criminals uncomfortable. On this account, it should be possible to translate any particular term of imprisonment into alternative sanctions that impose an equal amount of suffering. The alternatives, moreover, should be preferred whenever they can feasibly be imposed and whenever they cost less than the equivalent term of imprisonment.

What this account misses is the social meaning of punishment.

Punishment is not just a way to offenders suffer; it is a special convention that expresses moral condemnation. Not all modes of suffering express condemnation or express the same way. The message of condemnation is very clear when sentences an offender to prison when it merely fines him for the act, the message is likely to be different: you may do what you have but must pay for the privilege. But community service penalties and activities that conventionally require someone to respect and admit they also fail to express condemnation in an unambiguous way. It is the difference between the suffering that a sentence imposes and the meaning that for society that makes imprisonment and alternative sanctions incommensurable: because imprisonment and its rivals don't say the same thing. A politically acceptable exchange can be constructed between the purposes of criminal punishment.

The remainder of this essay outlines these claims. The next part discusses the related concepts of social meaning and incommensurability, and spells out their significance for criminal law. The two after that use the concepts to explain the political unacceptability of fines and community service. The penultimate one shows how the constraint of punishment incommensurability can be overcome through alternative penalties. And the final sum-

Social Meaning and Incommensurability

Actions have meanings, as well as consequences. Many of the roles we play (spouse, parent, teacher) and the

...a way to make value (love, dignity, status) are constructed by social norms. Against the background of these norms, actions become invested with meaning; they signify to others what a person (or community) believes and cares about. From our friends, for example, we expect shared time and experience; thus, a person's failure to share time and experiences with others—because, say, she is preoccupied with her professional life—conveys that she either doesn't value them as friends or doesn't really know how to.

Two goods can be said to be commensurable if their respective worth can be assessed according to a common unitary metric, such as monetary value; they are incommensurable if their relative worth cannot be assessed in this way. It should be obvious that the incommensurability of this sort is context-, purpose-, and community-specific. For a commercial dealer, two techniques may be commensurable in terms of their cash value. But for another person, the same two pieces may be incommensurable if one of them is a family heirloom; what the heirloom signifies for her may have a value that cannot be reproduced by either antiques or by any amount of money.

The phenomena of social meaning and incommensurability constrain rational choice (individual and collective). Generalizing, it is irrational to treat goods as commensurable where the use of a quantitative metric effaces some dimension of meaning essential to one's purposes or goals. It would be irrational, for example, for a person who wanted to be a good colleague within an academic community to offer another scholar cash instead of

comments on her manuscript. Against the background of social norms, the comment's signification of respect cannot be reproduced by any amount of money; even to attempt the substitution conveys that the person does not value his colleague in the way appropriate to their relationship.

Punishment has a distinctive social meaning. By imposing the proper form and degree of affliction, society morally condemns the wrongdoer and reaffirms the worth of the crime victim. Moreover, this expressive function of punishment can't be flatly equated with the suffering an affliction imposes. As Henry Hart pointed out in a famous essay, military service might in some sense be equivalent to imprisonment if we consider their effect on a person's liberty. But the reason that only imprisonment and not conscription is regarded as punishment is that against the background of social norms, only imprisonment expresses society's authoritative moral condemnation.

The meanings of different forms of affliction constrain society's options for constructing punishments. Just as it would be irrational for a person who wishes to express respect and affection for a friend to offer her money rather than shared experiences, so would it be irrational for society to attempt to express condemnation of a wrongdoer through an affliction that does not have that signification within a particular cultural setting. Punishment, as a language, has a vocabulary uniquely suited for getting its meaning across.

When those who try to speak the language of punishment use the wrong vocabulary, the problem they'll

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encounter is punishment incommensurability. Forms of affliction that may be equivalent for some purposes—say, for inflicting suffering or for deterring future wrongdoing—might nonetheless be radically inequivalent in expressing condemnation. Since condemning is central to what society is trying to accomplish when it punishes, substituting a form of affliction that doesn't convey that meaning for one that does is expressively irrational.

That's exactly the problem, I want to argue, for fines and community service, at least in their present forms. Unlike imprisonment, these alternative sanctions just don't express condemnation. Consequently, they turn out to be incommensurable with imprisonment along the critical dimension of social meaning.

Fines vs. Imprisonment

The imposition of a prison sentence is an unambiguous sign of society's moral disapproval. This can be linked to the sacred place of individual liberty in our culture. Because liberty is such a powerful symbol of what individuals are due in a democratic society, taking it away leaves no doubt about society's condemnation of a criminal wrongdoer.

Fines, in contrast, condemn much more ambivalently. Their expressive ambiguity is captured in the distinction that Robert Cooter has drawn between "sanctions" and "prices." Sanctions are the legal detriments that society imposes on someone for doing what's morally forbidden; prices, in contrast, are the fees or taxes that society exacts for doing what's permitted. When combined with a term of imprisonment, no one doubts that fines are sanctions—

that is, that they are being imposed for doing what's morally forbidden. When fines are used as a substitute for imprisonment, then they look more like prices. That contrast, moreover, is inconsistent with the social meaning of condemnation; while we might think that charging a high price for something makes the purchaser suffer, we don't condemn someone for buying something they are willing to sell.

This sensibility is at the heart of the political resistance to alternative sanctions for white collar crime. When Congress enacted the Sentencing Reform Act, for example, it directed the Sentencing Commission to use imprisonment for white collar offenders because the law "imposed, in Congress' words, penalties that accurately reflect the seriousness of [white collar] offenses." In other words, different penalties reflect different attitudes toward crime. Fines just don't reflect how society takes white collar crime.

Private citizens often see the same thing. The use of a fine for a white collar offender, for example, typically provokes the outburst that the offender is being paid to "buy his way out" of the consequences of his actions. If the offense is committed in the course of business activities, then a fine is described as merely the "cost of doing business." These, too, are contrary to the social meaning of fines.

Criminologists Anthonio V. La Mar and Voula Marinos provide empirical confirmation of this. They gave subjects a list of crimes and asked them to identify which crimes they thought should be punished appropriately by fines and which by imprisonment.

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done. For a great number of offenses, the majority of respondents indicated that no fine—of any amount—would be an appropriate substitute for a prison sentence. It might be fair to assume that the respondents demanded prison for violent offenses in order to incapacitate; but other offenses for which they also viewed fines to be inappropriate—including nonconsensual sexual touching and cocaine distribution—were relatively nonviolent. In addition, when asked to assume that stipulated prison sentences were appropriate for the same offenses, the respondents were unable to specify appropriate alternative fines for some but not for others.

These and like findings suggest that a politically acceptable exchange rate for fines and imprisonment cannot be constructed for at least some serious offenses. Such a translation may be possible for certain, relatively trivial offenses, but for those that exceed a certain threshold of seriousness, no fine of any amount will adequately satisfy the demand for appropriate condemnation. . . .

Punishment incommensurability is an important normative as well as descriptive implication. The standard retributive critique of fines is that they don't make offenders suffer enough. A related point is that they create inequality by treating affluent white collar offenders less severely than common offenders, who are likely to be too poor to pay a large fine or too violent not to require imprisonment for purposes of incapacitation.

The standard reply to this argument asserts punishment commensurability. If potential offenders would be deterred by a particular fine as they would by a particular term of

imprisonment, it can be inferred that losing that amount of money hurts them just as much as that amount of incarceration. By thus fashioning a proper exchange rate between imprisonment and fines, and imposing the latter whenever feasible, society would get equal retribution at a smaller cost. Indeed, John Lott has argued that affluent offenders likely suffer more when imprisoned than do nonaffluent ones because they lose more income and endure greater reputational harm. Thus, the retributivist's narrow "same treatment" conception of equality not only raises the cost of punishment but in fact discriminates against wealthy offenders by making them suffer disproportionately relative to poor ones.

This argument fails, however, if we understand the retributivist argument in expressive terms. What makes fines (when viewed as mere prices) unacceptable is that they fail to impose the condemnation that the offender deserves, however much disutility they impose. Thus, even if the white collar offender who is fined suffers as much as the common offender who is imprisoned, the two clearly aren't being condemned equally given what these afflictions signify in our culture. And this matters to the public, which views expressing appropriate condemnation to be just as important as securing deterrence and inflicting deserved pain.

Imprisonment vs. Community Service

Community service is another alternative sanction that has failed the test of political acceptability. As with fines, the problem for community service is punishment incommensurability.

The substitution of community service for imprisonment creates dissonance. We don't ordinarily condemn individuals who work in "community-owned nursing homes, city parks, churches, local YMCA branches, . . . organizations restoring run-down and abandoned buildings for low-income housing, senior citizens' centers, day care centers, Salvation Army centers" and the like; we admire them. Because such activities just don't express condemnation, "it is difficult to conceive of them as 'punishments' at all." If society really took the offense seriously, it would select an affliction, like imprisonment, that unambiguously says as much. Against the background of social norms, community service—like fines—trivializes the magnitude of the offense and devalues the worth of the victim.

Even worse, community service conflicts with the positive connotations of nonpenal service. We expect society to punish individuals with a mode of affliction that signals their disgraceful status. Not surprisingly, then, for the law to say that being made to serve others is a fitting punishment for criminals insults the persons who voluntarily perform the same services and demeans those whom such services are meant to benefit:

Many of us noncriminals perform community service not to avoid jail but because we want to. Perhaps the bench thinks the inconvenience of not being able to go after big bucks for a while is fitting punishment for corporate wrongdoers. I consider community service an honor that should not be tainted by judicial wrist slapping. Is this community service construed as some sort of penance, like having to recite

a string of Hail Marys? If so, does that make the everyday of drug counselors, educators, law enforcement officers in antidrug effort? Or does community service constitute punishment only when imposed on a bureaucrat fallen from the initial heights? Doesn't the person have a choice? Suppose parents are less than thrilled with the performance of Mr. North doing his community service bit as part of their children's civics lesson. . . . the downtrodden, homeless, needy—how do they feel about swarms of felons swooping down on them? What about their choice? It is important that people with memories recall that not so long ago—but before Watergate, contra, junk bonds—community service was inspired only by spiritedness and generosity. It or not, there are people without charisma or notoriety among the needy, not because they are sentenced to do so by the law but rather because they are by the dictates of their own choice. As a teacher, I find it insulting to my profession that this person pleading guilty to a felony, to perform in the capacity of an educator as punishment for an offense. The only risk is that community service will give labor a bad name: cleaning shouldn't be tainted by their association with celebrities. 2 Gabor should only be so lucky

These are the dominant criticisms of community service, and they lead again to p

If so, what is the politically acceptable exchange rate between imprisonment and hours of community service. For in no matter what amount it is imposed, community service (in its present form) always says the wrong thing.

Shame

So far I have argued that the social meaning of punishment creates the effective constraint of punishment incommensurability. But there is nothing intrinsically negative about my thesis. The lesson of punishment incommensurability is that substitutes for imprisonment must express comparable condemnation in order to be politically acceptable. So what we should be looking for are alternatives that meaningfully condemn. The leading candidate is shaming penalties. Jurisdictions throughout the United States are rediscovering public humiliation as a criminal punishment. The courts, for example, now require offenders convicted of drunk driving and other offenses to use special license plates or bumper stickers. Other states make offenders appear on newspaper ads, post signs on their property, or even wear distinctive pieces of clothing announcing their crimes. Many cities broadcast the names and pictures of offenders on public access television or display them on billboards. Others have experimented with even more innovative actions, including self-debasement and apology rituals.

Such penalties are being used, however, not just for petty misdemeanors, but for more serious offenses that would otherwise be punished by

imprisonment. Examples include drunk driving, larceny, embezzlement, assault, burglary, perjury, toxic-waste dumping, and drug distribution. These are the same kinds of crimes, in essence, for which conventional alternative sanctions are typically advocated.

If we want to know why shaming penalties are succeeding where conventional alternatives have not, social meaning again supplies an answer. These punishments gratify rather than disappoint the public demand for condemnation. Like imprisonment but unlike fines and community service, shaming penalties supply an unambiguous and dramatic sign of the wrongdoer's disgrace. As a result, substituting shame for imprisonment doesn't offend the public's expressive sensibilities.

Of course, it's one thing to show that shaming penalties are politically acceptable, and another to show that they will work. There's good reason to think that mere status deprivation would furnish a powerful incentive for individuals to obey the law; but in fact, the utility of shaming penalties doesn't depend on that. For the simplest and most effective way to use shaming penalties is simply to add them to the conventional alternatives such as fines and community service. This strategy would combine the known deterrent effects of the conventional alternatives with the demonstrated political acceptability of shaming penalties.

Shame can buy political acceptability for the conventional alternatives by transforming their social meaning. Consider fines. American jurisdictions are reluctant to use fines as a substitute for imprisonment because they don't unambiguously

express moral condemnation. The reluctance to fine, however, disappears when fines are used in conjunction with imprisonment. Even short terms of imprisonment unambiguously condemn, and against that background fines no longer carry a permissive connotation. The same effect can be achieved with shaming penalties. Where the law imposes shame in addition to a fine, the inference that the law is merely pricing rather than sanctioning an offender's conduct is impossible to sustain.

The meaning of community service is subject to similar reform. One way to infuse this sanction with shame is to order offenders to perform services that unambiguously denote humiliation. Some tasks, such as trash collection or manure shoveling, fit this description because they are believed intrinsically repulsive. But even services that are not inherently distasteful can acquire degrading connotations if strictly confined to criminal offenders. One municipality, for example, uses only offenders to maintain its community garden. Because it is known that only criminal offenders work there, being seen at work in the garden effectively stigmatizes offenders. And because offenders work nowhere else, the degrading connotations of such service don't demean the work performed by law-abiding members of the community.

Finally, simply changing the name of community service would likely ease some of the tension between this mode of discipline and public expressive sensibilities. A label like "shameful service" would underscore the law's commitment to distinguishing the types of affliction used to mark the

disgrace of criminals from the *for* public service that ought to entitle citizens to admiration and respect.

Solving the Puzzle

The dominant position of imprisonment is usually attributed either to public's ignorance or to its appetite for human suffering. My analysis suggests a more complicated but ultimately disturbing explanation: punishment is incommensurable. The public's punishment not only to deter criminals but to express appropriate moral condemnation. Because of the value of imprisonment in our culture, imprisonment usually conveys society's denunciation of wrongdoers. The conventional alternatives, however, express condemnation much more ambivalently. Fines used in lieu of imprisonment imply that society is merely pricing and sanctioning offenders' behavior. Community service seems to suggest that society doesn't sincerely believe the offender to be vicious, or, even worse, that it doesn't genuinely respect the virtue of those who voluntarily perform such work for the public. Whatever equivalence might be between these sanctions and imprisonment along the dimensions of regulatory effect and pain, they frequently remain incommensurable with imprisonment along the dimension of meaning. When this is so, they are inadequate substitutes for imprisonment in whatever amount is imposed.

The lesson of punishment's incommensurability, in short, is that punishment must become much more sophisticated about the social meaning of punishment. To recognize that punishment is a convention for signifying con-

in the form of... to entitle... respect.

of imprisonment... its appetite... analysis suggests... ultimately... punishment... public exposure... deter crime... moral condemnation... value of liberty... present unequally... denunciation... alternative... condemnation... Fines... imprisonment... pricing... behavior... suggest... believe... even... respect... voluntarily... equivalence... sanctions... dimensions... they will... measurable... dimensions... they will... for imprisonment... they... punishment... attribution of culpability and... disposition of deserved punishments,

to understand punishment as a special kind of language. Just as the speaker of a real language can't hope to be understood if she uses words in an idiosyncratic way, so those who wish to reform a punishment regime can't hope to make their proposals acceptable if they advocate forms of affliction that don't express condemnation. The question confronting the proponents of alternative sanctions, then, is whether the alternatives to imprisonment can be translated into a punitive vocabulary that makes them a meaningful substitute for imprisonment.

I have tried to show that they can—through shaming penalties. These sanctions, used alone, are already proving to be a politically acceptable alternative to imprisonment for many offenses. If combined with fines and community service, moreover, these sanctions would likely resolve the expressive ambiguity that makes these sanctions incommensurable with imprisonment. At that point, we will not only have solved the alternative sanctions puzzle, but dispelled it as well. ■

Formerly Unthinkable Policies

Michael Tonry

Integrative Shaming

Twenty years ago, Kahan's arguments for disintegrative shaming would have been widely considered bizarre. In our time, they won him appointments at two of America's pre-eminent law schools, the University of Chicago and the University of Michigan. Though he has written about shaming repeatedly and at great length, the basic argument can be briefly summarized. Punishment is not, as most people who write about punishment theory suppose, primarily about attributions of culpability and disposition of deserved punishments, but primarily about crime prevention, but about shaming. Most writers about punishment do not understand this, he says, and if they hope ever to influence policy must accept that punishments should "unambiguously express disgust" of the offender. Explaining, for example, that community penalties will not win public favor until they are made more debasing, he compares them unfavorably with imprisonment:

Prison, in contrast, does unequivocally evince disgust. . . . By stripping individuals of liberty—a venerated symbol of individual

Prison, in contrast, does unequivocally evince disgust. . . . By stripping individuals of liberty—a venerated symbol of individual

Michael Tonry, "Formerly Unthinkable Policies," *Thinking About Crime: Sense and Sensibility in American Penal Culture* (New York: Oxford University Press, 2004): 156–167. Reprinted by permission of Oxford University Press, Inc.

worth in our culture—and by inflicting countless other indignities—from exposure to the view of others when urinating and defecating to rape at the hand of other inmates—prison unambiguously marks the lowliness of those we consign to it.

Elsewhere, he writes that offenders should be subjected to “intrinsically repulsive,” “degrading,” or at least “effectively stigmatizing” punishments and that, for example, community service should be renamed “shameful service.”

So far as I can tell, these ideas derive from two intellectual developments of recent decades, both of which Kahan misunderstands or misinterprets. The first is increased attention to the norm-reinforcing, moral-educative, and expressive effects of punishment. Until the last ten years, most scholarly writing on punishment was by lawyers and philosophers, and they tended to concentrate on procedures and policies as they affected the convicted offender standing before the judge, or on the possible crime-reductive effects of particular sentences or policies. Since then, precipitated by sociologist David Garland’s writing on the sociology of punishment and psychologist Tom Tyler’s work on procedural justice, much more attention has been given to the broader normative and social-psychological effects of punishment.

The second development Kahan apparently misconceives is the growing and increasingly subtle literature on public understanding and opinion about punishment. This shows broadly that the general public believes sentences are too lenient, but it also

shows that public opinion is based on misconceptions of crime and punishment attributable to media concentration on exceptional cases, that its sentences are harsher than the public realizes, that the sentences citizens they would prefer are less severe than are actually imposed, and that there is widespread support for rehabilitation programs and community penalties.

Kahan is an appropriate figure to whom to focus because, more than other contemporary American scholars, he offers views about criminal justice policy that seem best understood in terms of prevailing penal sensibilities. It is hard to imagine how else this could be explained. . . .

I discuss the intellectual background to Kahan’s disintegrative scholarship in some detail to make a general point and a specific point. The specific point is that, looked at with any care, existing systematic evidence and research findings provide a credible evidentiary base for his proposals. The general point, however, is that proposals such as Kahan’s, in perfect sense, of a sort, in the light of the penal sensibilities of the last ten years.

Expressive Punishments

Three major literatures—in philosophy, criminal law theory, and social psychology—have revived interest in expressive punishments. Philosophers have developed communicative theories with a central aim of punishment to express to the offender the wrongness of his or her behavior. Criminal theorists have emphasized that expressive punishments reinforce social norms. Sociologists have investigated ways in which public responses to crime shape

on is based on the idea of retribution and punishment. The media concentrate on the fact that judges are more than the public. The public sees citizens as less severe than the judges. And that there is a rehabilitative purpose in the penalties. The appropriate figure is more than an American writer. Criminal justice is understood in a moral sensibility. How else can the actual background of the punitive shaming be made a general point. The book is looked at with a dramatic knowledge. The things provide a case for Kahan. The point, however, is Kahan's main point in the context of the theories of the

offenders perceive the integrity of the system and have argued that more respectful, nurturing, and holistic approaches may increase offenders' prospects for achieving law-abiding lives.

Communicative Theories of Punishment The first is the development in the philosophical literature, exemplified by the writings of Antony Duff, Joel Feinberg, Jean Hampton, and Jeffrie Murphy, of "communicative" theories of punishment. All of these are moral theories, premised on respect for the moral autonomy of the offender, in Dworkin's terms showing "equal respect and concern" for each offender, and call in various ways for punishment to express to the offender the wrongfulness of his acts.

The prevailing image is of a judge, looking deeply into an offender's eyes, more in sorrow than in anger, and wanting to help her understand why what she has done is wrong. If it works, the offender will come to understand that she was temporarily distracted from right values by egoism, emotion, impulse, and be ready to reclaim her place among right-thinking people. This will not happen because she was bullied, threatened, or brainwashed, but because as a morally autonomous person she now understands that, and why, her actions were wrong.

There are differences in view among philosophers working within the communicative punishment tradition as to whether the aim is solely to express norms to the offender, so that as a morally responsible actor can come to understand the wrongfulness of her acts, or whether in addition there is a collateral aim through

punishment to express norms to the general community as bystander. There are differences in view as to whether her regret, repentance, contrition, or remorse is a sufficient outcome or whether, for her sake or the larger society's, some material punishment should also be imposed or borne. There is also a question of how offenders who are insensitive, defiant, or impervious to moral reasoning should be handled. However, nowhere in this literature are there indications that the aim of punishment should be to express disgust of the offender or to debase her in order to placate public opinion. That, in the conventional Kantian language, would be to use the offender merely as a means, and that is something no mainstream moral theory would allow.

Moral-Educative Theories of Punishment A second relevant punishment literature derives from the Durkheimian functionalist notion that the criminal law serves to identify and reinforce basic social ideas about right and wrong, that "crime brings together upright consciences and concentrates them." The Norwegian writer Johannes Andenaes, who wrote about the "moral-educative functions" of the criminal law, was influential in reviving interest in such views. The criminal law is seen as performing a dramaturgical function, with punishment directed primarily at the community and not at the offender. Crime is a part of every human society, possibly a necessary part, a functional mechanism that helps set and then illuminate and reinforce the boundaries of acceptable behavior. The primary aim of punishment is to restate and reinforce

prevailing norms: "[Punishment] does not serve, or else serves only secondarily, in correcting the culpable, or in intimidating possible followers. From this point of view, its efficacy is justly doubtful and, in any case, mediocre. Its true function is to maintain social cohesion intact."

There has been a revival of interest in Durkheimian ideas about punishment in Germany and Scandinavia, as an alternative to retributive and utilitarian ideas. Influential elaborations of such views have been offered by Finnish writers under the name "general prevention," and in Germany under the name "positive general prevention." Both traditions distinguish their neo-Durkheimian ideas from Anglo-American "(negative) general prevention," which operates through the utilitarian processes of deterrence, incapacitation, and rehabilitation.

The German and Scandinavian ideas emphasize that punishment has an important role to play in setting and reinforcing norms, but it is a secondary role. For the most part, extraordinary circumstances aside, people do or do not commit crimes because of the socialization they do or do not receive from primary institutions such as the home, the family, the church, the school, and the community. The primary work of crime prevention must be done in those places. It is important that the criminal law confirm basic behavioral norms, and be seen to do so, but the primary work must be done elsewhere. This has important, perhaps to most Americans surprising, implications.

First, because the law should perform its back-up role, it is important

that criminal acts have consequences. As a result, all Finns, Swedes, and other Scandinavians have among the lowest imprisonment rates in the world in terms of people in prison per average day per 100,000; they have among the highest admission rates in the world, expressed in terms of number of people per 100,000 prison in a year.

Second, because the law must perform its back-up role, important that punishments be proportional to the gravity of the crimes for which they are imposed. In short, proportionality is a principle; unless more serious crimes receive harsher penalties and less serious crimes lesser ones, the law's messages will be morally inconsistent and contradict the primary setting processes.

Third, there is no reason to expect changes in the severity of punishment to be effective or desirable. Other social institutions play the major roles, and punishment can occasionally reinforce or undermine norms; it would be unrealistic to expect that changes in the severity of punishment can have much effect. As Törnudd thus observed, "The belief in general prevention and the utilitarian rationale of the criminal law system thus does not imply that a change in policy, such as increases in the severity of punishment, would widely improve an appropriate or cost-effective way of controlling crime."

Once again, there is no reason to expect express or implied, about deterrence, disgust, or stigmatization to be effective since Northern European

penal consequences seriously the European Torture Convention's prohibition of inhumane and degrading punishments, it would be surprising if there were.

Reintegrative Shaming "Reintegrative Shaming" is a reconceptualization of punishment proposed by Australian criminologist John Braithwaite. The proposal is simultaneously a hypothesis that restorative responses to criminal offenders might have greater crime-reducing effects than criminal justice responses and a normative argument that reintegrative processes are more humane and respectful of human dignity. Braithwaite's notion is that reactions to crime should simultaneously express disapprobation and support, in much the same way as parents communicate to children that they have misbehaved but that they are still loved. "Shaming" communicates through disapproval the importance of the norms or expectations that were violated but in a way that also communicates respect for the individual and concern for her well-being, and is therefore "reintegrative." This is contrasted with the destructive shaming of the traditional criminal justice system which ostracizes, alienates, and often leads to defiance or rejection of social norms and attachment to the social ones. Braithwaite has proposed a number of reasons why traditional criminal justice approaches are less effective at socializing offenders and preventing crime than reintegrative approaches.

Even this brief summary should make it clear that Braithwaite's alternative theories of shaming have much in common with Kahan's proposal which, to the contrary, embody

even celebrate, the kind of destructive processes that Braithwaite decries.

Public Knowledge and Opinion

The second growing literature that might support Kahan's ideas, but does not, concerns public knowledge and opinion about punishment. In particular, Kahan cites a study by Canadian psychologists Anthony Doob and Voula Marinou of Canadians' support for the use of fines as punishments for various crimes. A majority of respondents indicated that, for many crimes, a fine would not be a normatively appropriate substitute for imprisonment. Tom Tyler and Robert Boeckmann's study of reasons (primarily "expressive") why ordinary people support three-strikes laws even though there are sound reasons to doubt their instrumental effectiveness offers comparable findings: imposing a lengthy prison sentence for a third violent crime sends a message people believe should be sent. Hans Boutellier and Joseph Kennedy more recently argue that punishment and crime control policy should be understood in our time as having primarily expressive functions. Kahan, drawing on a hodgepodge of newspaper clippings and letters to the editor as authority, makes similar arguments about community service.

There are serious problems with Kahan's claim that public support for punishment practices requires disintegrative shaming. It is poorly informed. A large literature shows that public attitudes are much more complex and less single-mindedly vengeful than he suggests. It is overbroad. Even if nonincarcerative punishments for some very serious crimes would, in Model Penal Code language, "unduly depreciate the

seriousness of the offense," most crimes are not that serious. It is parochial. In many Western countries, fines and community service are commonly used as sanctions for quite serious, including violent and sexual, crimes.

Under-Informed The large multinational public opinion literature offers much more complicated findings than Kahan suggests. Surveys consistently show that the general public believes that the average crime is more serious than it is, substantially underestimates the severity of punishments imposed, and generally supports punishments less severe than are now imposed. The public has ambivalent views about punishment, wanting offenders to be punished for their crimes but, believing that social disadvantage and drug dependence are primary causes of offending, also wanting (and being willing to pay for) offenders to be rehabilitated. Finally, for all but the most serious crimes and the most incorrigible criminals, the public is willing to have criminals sentenced to community penalties in place of prison, so long as the community penalty is burdensome or restitutive (community service or work release coupled with restitution are okay, house arrest without more is not). Thus, while there is something to be said for Kahan's claim that the public wants symbolically appropriate punishments, that by itself is a partial and misleading summary of the evidence. None of the major scholars of public opinions and attitudes about crime interprets the preference for symbolically appropriate sentences as a demand for shaming punishments.

There is substantial evidence of public support for wider use of

community services in place of incarceration for many kinds of offenses because it satisfies symbolic demands for punishments that are burdensome and express right values, and in an important sense restitutive. In contrast, community service is a sanction that Kahan argues must be "degrading," "stigmatizing," "humiliating," and "intrinsically repulsive" to win public support.

Overbreadth Even if Kahan were correct that the public insists on only short sentences for violent crimes, the public now admitted to prison for crimes not been convicted of violence. For example, of people committed to state prisons, 29.3 percent have been convicted of violent crimes, 29.1 percent of property crimes, 30.2 percent of drug crimes, and 11.3 percent of sex crimes. In federal prisons the percentages for the same categories in 1994 were 11.9 percent, 5.6 percent, 60.1 percent, and 22.4 percent. Among convicted inmates in 1996, the corresponding percentages were 21.8 percent, 23.7 percent, and 25.9 percent. The public opinion evidence summarized in the preceding paragraph suggests that for the nearly 80 percent of crimes sentenced to prison for nonviolent crimes, there is broad support for increased use of nonincarcerative sanctions that do not debase.

Parochialism Experience in many countries suggests that the public would be willing to accept community service as a punishment for all but the most serious crimes. Throughout Scandinavia and Germany, for example, day fines are the modal sanction. Day fines

sensibilities have been negative. None of the three policies and proposals principally discussed in this chapter could have been seriously put forward in the 1950s or the 1960s. The penal sensibilities of those decades were radically different. These three policy

ideas, however, stand as a statement about what can happen within a cyclical period of heightened intolerance of offenders and users, policy makers lose the sight of humility and proportion of timeless values. ■

III The Continuing Debate

What Is New

In 2005 the Ninth Circuit Court of Appeals approved shaming punishment as constitutional. In the case before the court, U.S. District Judge Vaughn (in addition to imposing a prison sentence) required Shawn Gementera, who had been convicted of stealing mail, to stand outside a post office wearing a sign claiming, "I stole mail. This is my punishment." Gementera appealed the ruling, claiming that such humiliation constituted cruel punishment in violation of the Eighth Amendment. Later that year, the U.S. Supreme Court rejected Gementera's appeal without comment, allowing the ruling of the Ninth Circuit Court to stand.

Where to Find More

In "What's Really Wrong with Shaming Sanctions," *Texas Law Review*, Volume 84 (2006), Kahan expresses doubts concerning his endorsement of shaming punishments. Dan Markel, a resolute opponent of shaming punishment, maintains that Kahan's doubts about shaming do not go far enough; see "Still Wrong? Kahan on the Fall of Shaming and the Rise of Restorative Justice," *Texas Law Review*, Volume 85 (May 2007). For Dan Kahan's earlier arguments in support of shaming, see his "The Anatomy of Disgust in Criminal Law," *Michigan Law Review*, Volume 96 (1998); "What Do Alternative Sanctions Mean?" *Journal of Chicago Law Review*, Volume 63 (1996); and (with Eric Posner) "White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines," *Journal of Law and Economics*, Volume 42 (1999).

Relevant works by Michael Tonry include *Thinking About Crime: Sensibility in American Penal Culture* (Oxford: Oxford University Press, 2004); "Symbol, Substance, and Severity in Western Penal Policies," *Punishment & Society*, Volume 3, Number 4 (2001): 517-536; and "Rethinking Unsettled Punishment Policies in America," *UCLA Law Review*, Volume 46 (1999).

Supporters of severe (disintegrative) shaming punishments include David G. Thelen, Book, "Shame on You: An Analysis of Modern Shame Punishment as a Viable Alternative to Incarceration," *William and Mary Law Review*, Volume 35 (2002). Other advocates of shaming punishments include Amitai Etzioni,