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Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons

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Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons

A blessing on the righteous Colony of the Massachusetts, where iniquity is dragged out into the sunshine! Come along, Madame Hester, and show your scarlet letter in the market-place!

—Nathaniel Hawthorne, *The Scarlet Letter*¹

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1. Nathaniel Hawthorne, *The Scarlet Letter* 58 (Heritage Press, 1935).

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I. INTRODUCTION

An interstate billboard warns visitors to La Mesa, California: "Attention johns: We take pictures."² In 1994, to widespread political accolades, the city initiated a policy of publishing names and pictures of prostitutes' patrons in local newspapers.³ La Mesa is not alone. If nightmares about the revelation of the contents of Heidi Fleiss's little black book sent shivers down the spines of Hollywood's rich and famous,⁴ the tremors have traveled through La Mesa and sent similar shudders across the nation. The anonymous sex once so sought-after for its secrecy has been slapped up on billboards as communities,

2. John Larrabee, *Fighting Crime With a Dose of Shame/In Some Communities, Old-Fashioned Public Humiliation Has Returned*, USA Today 3A (June 19, 1995).

3. Chet Barfield, *Dear John, If You're Caught, Your Photo Might Be Published*, San Diego Union-Tribune B2 (Nov. 5, 1994).

4. Heidi Fleiss was allegedly "madam" to Hollywood's elite. When she was on trial, prosecutors talked of discovering the contents of her client list and using it to prosecute clients. See Andrea Ford, *Prosecution of Fleiss' Alleged Clients Studied*, L.A. Times B1 (Dec. 4, 1993).

desperate to disinfect their crime-ridden streets, expose solicitors'⁵ secret sins to sunlight.

Critics of this practice raise questions about effectiveness and cost. City attorneys and public defenders pose questions about its constitutionality. Newspapers worry about civil liability. Editorials call it inhumane, disproportionate. But police insist that nothing else has worked, and community groups figure perhaps it's worth a try.

Past john-shaming schemes, however, have not been without costs. In 1994, a paper in New Jersey listed a young engineer among other prostitution arrestees. The recent widower and father of three killed himself when he saw his name in the paper.⁶ Perhaps it's worth answering some questions before giving john-shaming a try.

City councils, mayors, police officers, judges, and state legislators confront a host of competing policy considerations when debating a policy of shaming johns. This Note seeks to define the parameters of debate for policymakers considering such a course of action. After examining the origins of shame punishments for prostitutes' patrons,⁷ it defines the circumstances under which such punishments may be effective,⁸ cost-efficient,⁹ and constitutional.¹⁰ This Note then explores the non-financial costs of shaming johns, highlighting some of the more subtle policy considerations.¹¹ In the end, however, rather than advocating either position—to shame or not to shame—this Note leaves policy judgments to those elected, hired, and appointed to make them. Instead, it uses close analysis of the competing policy considerations to outline the priorities furthered by john-shaming schemes.

On a broader scale, shame advertisements speak not only about those arrested but also about the society in which we live.

5. This Note uses the words "patron," "solicitor," "customer," "client," "trick," and "john" to refer to the paying party in prostitution. "Patron" and "solicitor" derive from statutes criminalizing the act of buying sex, and they carry with them the verbs "patronize" and "solicit," the actions of which crime codes accuse this group. "Customer" and "client" connote an understanding of prostitution as a business. Prostitutes themselves use the words "trick" and "john." "Trick" seems to refer to the mendacity employed in the essential encounter, and "john" communicates namelessness and anonymity and incorporates the reality that the overwhelming majority of payers are male. For a further discussion of the implications of some of these terms, see generally Holly B. Fechner, *Three Stories of Prostitution in the West: Prostitutes' Groups, Law and Feminist "Truth"*, 4 Colum. J. Gender & L. 26, 33 n.25 (1994).

6. Gil Spencer, *Since When Does Arrest Equal Guilt?*, Denver Post D1 (July 24, 1994).

7. See Part II.

8. See Part IV.

9. See Part V.

10. See Part VI.

11. See Part VII.

Hence, by "outing" johns and shedding sunlight on secret sex, policy-makers place society in the sunlight as well. For that reason, this Note concludes by examining the statements john-shaming schemes make about society's priorities.¹²

II. THE ORIGINS OF SHAME PUNISHMENTS FOR PROSTITUTION

Shame punishments for prostitutes' patrons derive from two concurrent forces: ongoing frustration with the prevalence and persistence of prostitution and the contemporary resurgence of shame as a criminal punishment.

A. *The Prevalence and Persistence of Prostitution*

Maybe they just moved [the prostitutes] off somewhere else. Trying to get rid of it altogether is like trying to stamp out mice, you know?

—Margaret Atwood, *The Handmaid's Tale*¹³

Dubbed "the most ancient profession in the world,"¹⁴ prostitution is commonly seen as the root of modern crime and a barrier to urban revitalization.¹⁵ A worldwide phenomenon,¹⁶ the sale of sex defies social mores, law, and, in many cases, personal conscience. From what does the demand for prostitution derive its tenacity? What is the allure of buying sex?

12. See Part VIII.

13. Margaret Atwood, *The Handmaid's Tale* 226 (Ballantine Books, 1987).

14. Rudyard Kipling, *On the City Wall*, in *In Black and White* 283 (Doubleday, Page, 1923). See also *Joshua* 2:1-24 (story of Rahab the prostitute); *Genesis* 38:11-30 (Judah mistakes Tamar for a prostitute).

15. "It's not only prostitution, it's drugs and everything else that comes with it. . . . We can sink all the money we want in Original Aurora . . . but until we get rid of some of the prostitution, it's not going to do a darn bit of good." Renate Robey, *Prostitute-Soliciting Law Backed: Formal Vote Slated on Plan to Run Photos of Those Arrested*, *Denver Post* B2 (June 7, 1994) (quoting statement of City Councilwoman who proposed john-shaming scheme). See also William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 *Yale J. L. & Human.* 265, 333 (1993) (summarizing the reasoning behind the 1970s movement against decriminalization of prostitution).

These perceptions, however, may not reflect reality. See Barbara Milman, *New Rules for The Oldest Profession: Should We Change Our Prostitution Laws?*, 3 *Harv. Women's L. J.* 1, 8-36 (1980) (citing a Boston study discovering no conclusive evidence that prostitution leads to crime, drug addiction, or neighborhood deterioration).

16. See note 32 (contrasting international punishment schemes with those traditionally employed in the United States).

The answer must be more than the bare power of sexual desire;¹⁷ statistics suggest that few of prostitutes' customers perceive prostitutes as their only sexual option.¹⁸ Rather, patrons are largely married men,¹⁹ not uncommonly "attractive" and "comfortable."²⁰ Most of them have "at least a little disposable income."²¹ Considering the dire threat of sexually transmitted disease, what motivates people with other sexual options to choose to patronize prostitutes?

Anonymity plays a central role in the persistence of prostitution's appeal.²² The very title "john" emphasizes the temporary namelessness granted patrons in the context of prostitution. This escape from one's identity allows johns the freedom to explore desires for a variety of sexual partners and experiences without some of the adverse consequences that would result from openly engaging in the same sort of experimentation.²³ Unlike open promiscuity, which

17. John F. Decker, *Prostitution: Regulation and Control* 216 (Rothman, 1979) ("Prostitution") (questioning the theory that men are simply driven to prostitutes by an "imperious" male sex drive) (citing Howard Woolsten, *Prostitution in the United States* 80 (Patterson Smith, 1969); Edward Dengrove, *Sex Differences*, in Albert Ellis and Albert Abarbanel, eds., *The Encyclopedia of Sexual Behavior* 931, 933-34, 936-37 (Hawthorn Books, 1961)).

18. "[I]t is rare that [a patron] is tetally dependent on prostitutes for his sexual outlet." Decker, *Prostitution* at 217 (cited in note 17) (citing Ned Polsky, *Hustlers, Beats, and Others* 33 (U. of Chicago, 1985)). There are individuals who, for one reason or another, see prostitutes as their only sexual option, but that group is in the minority. *Id.* at 223-24.

19. Margaret A. Baldwin, *Strategies of Connection: Prostitution and Feminist Politics*, 1 Mich. J. Gender & L. 65, 74 (1993). See also Decker, *Prostitution* at 217-18 (cited in note 17) (noting that johns are "more likely to be married than unmarried" and citing various studies); Harry Benjamin and R.E.L. Masters, *Prostitution and Morality* 201 (Julian Press, 1964) (finding that 50-75% of johns are married).

20. Michael Colton and Dennis Romero, *Grant's Arrest Leaves Many Asking "Why?"* L.A. Times E1 (June 30, 1995).

21. Baldwin, 1 Mich. J. Gender & L. at 74 (cited in note 19).

22. Benjamin and Masters, *Prostitution and Morality* at 196 (cited in note 19).

23. Though outside stimuli such as panderers, cohorts, alcohol, and news images of prostitutes may inspire would-be johns, these stimuli act primarily as catalysts. "[C]lients go to prostitutes more for their own reasons than at the instigation of others." Decker, *Prostitution* at 225 (cited in note 17). The desire for variety is one commonly cited attraction. As one patron put it, "if you eat steak at every meal, then you occasionally want chicken or a lamb chop." *Id.* at 219 (quoting Martha L. Stein, *Lovers, Friends, Slaves . . . The Nine Male Sexual Types: Their Psychosexual Transactions With Call Girls* 124 (Berkeley Publishing, 1974) ("*Lovers, Friends, Slaves*"); Albert Ellis, *Sex and the Single Man* 186-87 (1963)); Woolsten, *Prostitution in the United States* at 81 (cited in note 17). See also Benjamin and Masters, *Prostitution and Morality* at 194 (cited in note 19). See generally Atwood, *The Handmaid's Tale* at 308-09 (cited in note 13) (words of the Commander explaining prostitution's survival: "Everyone's human, after all You can't cheat Nature Nature demands variety, for men It stimulates trade. It's a good place to meet people. You can hardly do business without it. We try to provide at least as good as they can get elsewhere."). Recently, however, Hugh Grant's escapades with Divine Brown further focused the inquiry. Movie star Hugh Grant was chastised by the press after being arrested for patronizing prostitute Divine Brown. Colton and

might hurt a wife or career, the anonymity of prostitution offers an escape from accountability.²⁴ In addition, prostitutes specialize in sex acts that might otherwise be considered deviant.²⁵ The demand for prostitution thus stems partially from temptation regarding sexual desires and fear of the shame that might result were those desires revealed.

In addition to the appeal of anonymity, the promise of commitment-free sex,²⁶ some illusion of power,²⁷ and the thrill of risk²⁸

Romero, L.A. Times at E1 (cited in note 20). Presumably, Hugh Grant could have opted for variety without paying for it. One admirer's placard, quipping, "Gee, Hugh, I would have paid you," spoke volumes. Deborah L. Rhode, *Who is the Criminal*, Nat'l L. J. A21, A27 (Sept. 25, 1995) (saying the sign "captured widespread views"). "As tabloid journalist Maryanne Norbum put in a widely quoted quip, 'He could have sat at the Four Seasons bar and had action in three minutes.'" Colton and Romero, L.A. Times at E1 (cited in note 20). Notably, Hugh Grant is hardly a typical patron. Celebrities' reasons for patronizing prostitutes may include several fears not common to the average patron. Famous people who want to engage in sexual dalliance may fear lawsuits for paternity or even rape. Benjamin and Masters, *Prostitution and Morality* at 207 (cited in note 19). In addition, before the Hugh Grant incident, celebrities might have entertained notions that patronizing a prostitute was less likely than other sexual encounters to leak to tabloids.

24. See generally Colton and Romero, L.A. Times at E1 (cited in note 20). See also Benjamin and Masters, *Prostitution and Morality* at 195 (cited in note 19) (asserting that some married men think patronizing prostitutes safeguards their marriage by keeping them from seeking other extramarital affairs).

25. Richard A. Posner, *Sex and Reason* 132 (Harvard U., 1992) (citing Richard Symanski, *The Immoral Landscape: Female Prostitution in Western Societies* 66-68 (Butterworth, 1981); Jennifer James, *Prostitutes and Prostitution*, in Edward Sagarin and Fred Montanino, *Deviants: Voluntary Acts in a Hostile World* 368, 402-09 (General Learning Press, 1977) (attributing this to the fact that "prostitutes cannot underprice the wives or girlfriends"). Prostitutes are frequently asked to perform fellatio. Decker, *Prostitution* at 219 (cited in note 17) (citing various studies finding that patrons rarely request "normal intercourse" and frequently ask for oral sex). In addition, prostitution may provide the sole venue for masochistic, sadistic, homosexual, transvestite, or fetishistic tendencies. *Id.* (citing Stoin, *Lovers, Friends, Slaves* at 192, 243-65 (cited in note 23); Charles Winick and Paul M. Kinsie, *The Lively Commerce: Prostitution in the United States* 206-09 (Quadrangle Books, 1971) ("*The Lively Commerce*"); Benjamin and Masters, *Prostitution and Morality* at 194-95 (cited in note 19).

26. By placing sex in the context of a business transaction, prostitution purports to purge those acts of commitment. The commitment implied by extra-contractual sexual relations is multi-faceted and varies from one individual to the next. One common understanding of shared responsibility, that of bearing the risk of pregnancy, is alleviated in prostitution transactions by the implication that the john bears no responsibility for any consequences. See Benjamin and Masters, *Prostitution and Morality* at 195 (cited in note 19). Prostitution's contractual nature also reduces the risk of unwanted emotional entanglement. Colton and Romero, L.A. Times at E1 (cited in note 20) (quoting UCLA psychiatrist D. Joshua Gelden). But see Decker, *Prostitution* at 220 (cited in note 17) (quoting Winick and Kinsie, *The Lively Commerce* at 206-09 (cited in note 25) (noting that although the lack of responsibility produced by anonymity and detachment may be the primary motivation for patronizing prostitutions, association with a prostitute may lead to emotional attachment, particularly in the case of a frequent customer)).

Sex with a prostitute can be quick, easy, and even relatively cheap. In one survey, 29% of customers said they patronized prostitutes because it was "cheaper than dating." Decker, *Prostitution* at 219 (cited in note 17) (quoting Winick and Kinsie, *The Lively Commerce* at 206-09 (cited in note 25)).

seem to have secured prostitution's place as an unconquerable crime. Singularly difficult to extinguish,²⁹ prostitution may shift to a different community or even disappear for a time.³⁰ Before long, however, the age-old demand for prostitutes resurfaces and is met by an equally bottomless supply.³¹

In most states, the traditional pattern of punishment involves jailing or fining the prostitute and issuing the customer a citation.³²

27. In addition to offering an escape from accountability and responsibility, buying the services of a prostitute may evoke an illusion of power. One study found power of particular importance in transactions involving homosexuality, transvestitism, and fetishism, or masochism and sadism. Decker, *Prostitution* at 222 (cited in note 17) (citing Winick and Kinsie, *The Lively Commerce* at 244 (cited in note 25)). Masters' sexual exploitation of slaves and stories of kings and concubines exemplify the supposed historical precedent linking men of power to prostitution. "For Black women in the United States, the relation between prostitution and slavery is less one of analogy than of continuity with their sexual use under slavery." Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 Mich. J. Gender & L. 13, 22 n.31 (1993) (citing Vendita Nelson, *Prostitution: Where Racism & Sexism Intersect*, 1 Mich. J. Gender & L. 81, 84, 85 (1993)). See also Baldwin, 1 Mich. J. Gender & L. at 76-77 n.35 (cited in note 19) (citing Deborah Gray White, *Ar'n't I a Woman* 37-42 (Norton, 1985); Paula Giddings, *When and Where I Enter* 43-44, 61-62 (Morrow, 1984)). Prostitution offers temporary control over the actions of another human being—a control that might not occur in non-purchased sexual encounters. In addition, some proportion of patrons may even harbor conscious thoughts to affirm their belief in male dominance and to denigrate women. See Decker, *Prostitution* at 226 (cited in note 17).

28. Prostitution's promises of anonymity, detachment, and power are bolstered for some patrons by the very risk of danger. One "self-confessed thrill-seeker" explained prostitution's hazards as "part of the high:" "You're in public, you don't know these people, they could rob you, they could give you a disease . . . I've gone to a room with a prostitute and someone chased her down the hall over drugs. I've gotten in car accidents, not paying attention to the road. I've stayed up till sun up doing this." Colton and Romero, L.A. Times at E1 (cited in note 20).

29. See, for example, Chet Barfield, *La Mesa Aims to Combat Prostitution With Focus on Johns—Get the Picture?*, San Diego Union-Tribune B3 (Sept. 29, 1994) (quoting La Mesa Mayor Art Madrid: "It's a known fact that the 'oldest profession' will never cease . . .").

30. *Will Publishing Names of "Johns" Deter Prostitution?* (CNN television broadcast, Dec. 8, 1992) (transcript available on NEXIS, NEWS library, CNN file).

31. "Nothing—not the reality of AIDS, car confiscation, fines or humiliation—stops johns from seeking prostitutes." Doug Grow, *She May be Famous, Even Colorful, But the Lady Is No Madam*, Minneapolis Star Tribune 3B (Mar. 20, 1992) (reporting the sentiments of Minneapolis's Vice Unit Head Lieutenant Ed Conroy). See also *Will Publishing Names of "Johns" Deter Prostitution?* (cited in note 30) (City Commissioner admitting, "I don't see us eradicating prostitution").

32. "Until recently, anti-prostitution statutes were rarely, if ever, used to punish a prostitute's clients." 63A Am. Jur. 2d Prostitution § 12 (1984). A 1985 report found that in United States jurisdictions, customers, while punishable under statutes, are rarely arrested. Report of the Special Committee on Pornography and Prostitution, 2 *Pornography and Prostitution in Canada* 390-91 (1985). See, for example, *Sexism Purged From Sex Statute*, Morning Call (Allentown) B1 (June 21, 1995) (noting that in Allentown, before the statutory amendment cited in note 54, the prostitute usually received a misdemeanor and was often jailed while the "john" typically got a mere citation).

William Nelson characterized judges' sentiments regarding punishment for prostitution during the first half of this century:

In the late 1970s, New York's experimental john-shaming policy ended in protest, and law enforcement returned to the norm, in which prostitutes were far more likely to be arrested.³³ Prostitute-focused punishment schemes, however, have generated countless complaints due to their disproportionate impact on women.³⁴ They have also proven unsuccessful at stomping out prostitution. In particular, fines on prostitutes and the costs of bail tend only to drive prostitutes deeper into poverty (or into debt to pimps), leading to continued prostitution.³⁵ As one mayor explained: "The reality is, what we've

Elite male judges found it better to permit upper-class men to dominate, control, and ultimately coerce lower-class women for purposes of sexual gratification than to subject their "erring brothers" to criminal liability and "blackmail" and thereby place them "at the mercy" of "those conscienceless vampires who make merchandise of the passions of men."

Nelson, 5 Yale J. L. & Human. at 277 (cited in note 15) (quoting *People v. Odierno*, 2 N.Y.S.2d 99, 101, 103 (1938), and noting that such language originated in *People v. Draper*, 154 N.Y.S. 1034, 1038 (N.Y. App. Div. 1915), and was used as late as *People v. Jelke*, 152 N.Y.S.2d 479, 483, 135 N.E.2d 213, 216 (1956)).

In contrast, international anti-prostitution efforts focus neither on the prostitute nor on the customer, seeking to protect the female victim and punish traffickers. See generally Nora V. Demleitner, *Prostitution: Naming an International Offense*, 18 Fordham Int'l L. J. 163, 165, 167 (1994) (summarizing the history of international efforts against prostitution).

33. Nelson, 5 Yale J. L. & Human. at 333-34 (cited in note 15) (citing *Female Officers Arrest Men Searching for Prostitutes*, N.Y. Times 8 (July 4, 1978); *First 'John Hour' on WNYC Names Clients of Prostitutes*, N.Y. Times B3 (Oct. 24, 1979); *Jail Terms Planned for Vice Customers*, N.Y. Times D17 (Nov. 16, 1977); *WNYC May Discontinue Broadcasts of 'John Hour'*, N.Y. Times B3 (Nov. 9, 1979); *In re P.*, 400 N.Y.S.2d 455, 460 (N.Y. Fam. Ct. 1977), rev'd, 418 N.Y.S.2d 597 (N.Y. App. Div. 1979)).

34. See, for example, Rhode, Nat'l L. J. at A21 (cited in note 23). But see *People v. Superior Court*, 19 Cal. 3d 338, 562 P.2d 1315 (1977) (upholding targeting of prostitutes as a rational attempt to concentrate on the "profiteer" rather than the customer).

Although there are male prostitutes, statistics demonstrate that the overwhelming majority of prostitutes are female, and an even greater proportion of customers, male. Decker, *Prostitution* at 181, 211 (cited in note 17). Hence, marked tendencies to punish prostitutes more severely than their patrons, while gender-neutral in treatment, are unequal in effect. See generally Ricki Lewis Tannen, *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 Fla. L. Rev. 803, 892 (1990) (calling the traditional response to prostitution "some of the most egregious gender bias to be found anywhere"); MacKinnon, 1 Mich. J. Gender & L. at 18 (cited in note 27) (saying discriminatory prosecution "sounds like" sex discrimination).

Most contemporary approaches strive for equality in punishment. In contrast, "radical feminists" strive not for equality but for a reversal of the traditional imbalance. They see sexuality as an exercise of male power, and prostitution as one of many examples of the victimization of women. Radical feminists would end all punishment of prostitutes while increasing punishment of pimps and johns. Fechner, 4 Colum. J. Gender & L. at 47-53 (cited in note 5).

For a fuller discussion of gender inequality in punishment of prostitution, see Part VI.B.1.

35. "The women have nowhere but pimps to turn to bail them out after arrest, leaving them in debt for their fines which must be worked out in trade." MacKinnon, 1 Mich. J. Gender & L. at 25 (cited in note 27). See also *People v. James*, 415 N.Y.S.2d 342, 346 (N.Y. Crim. Ct. 1979) (discussing the adverse effects of imposing fines for first prostitution offenses).

been doing hasn't been working. And it's time we tried something different."³⁶

In the face of the failure of traditional remedies, and perhaps in an effort to equalize punishment of buyers and sellers, recent proposals for combatting prostitution focus not on stunting the availability of prostitutes but on decreasing the demand for them.³⁷ Shame punishments for prostitutes' patrons attempt to accomplish this goal by asserting the criminality of johns, making a customer more than "a witness against the prostitute."³⁸

B. *The Appeal of Shame*

. . . that instrument of discipline, so fashioned as to confine the human head in its tight grasp, and thus hold it up to the public gaze. . . to forbid the culprit to hide his face for shame.

—Nathaniel Hawthorne, *The Scarlet Letter*³⁹

1. Colonial Shame Punishments

From public "go and sin no more" admonitions and confessions to forced sign-wearing, branding, and maiming, shame punishments were the primary tools of discipline for early American colonists.⁴⁰ They considered the pillory, the ducking stool, and the stocks excellent tools for deterrence, denunciation, and rehabilitation.⁴¹

Even in colonial times, however, shaming was of questionable utility. One scholar asserts that "public exhibitions of state acts of

36. *Cities Try to Shame Prostitutes and Johns Out of Town* (NPR radio broadcast, Morning Edition, Feb. 17, 1995) (transcript available on NEXIS, NEWS library, NPR file) (comments of Jim White, Mayor of Kent, Washington).

37. See, for example, Anthony Cardinale, *Prostitutes' Clients Take an Impounding in Vice Crackdown*, Buffalo News (Jan. 25, 1994) (reporting movements in Buffalo, New York to require a one year prison sentence for prostitutes' patrons and the city's new policy of requiring community service and seizing johns' cars); 63A Am. Jur. 2d Prostitution § 12 (1984) (noting the reversal of the punishment trend). Catharine MacKinnon, who says she does "not know what to do, legally, about prostitution," MacKinnon, 1 Mich. J. Gender & L. at 31 (cited in note 27), seems nonetheless to advocate decriminalization of prostitutes' actions and strict enforcement against pimps and tricks. *Id.* at 20.

38. Jane Prendergast, *Citizens to Help Combat Hookers*, Cincinnati Enquirer (Kentucky Edition) B1 (Jan. 4, 1995) (noting the shift in Kentucky policy).

39. Hawthorne, *The Scarlet Letter* at 41 (cited in note 1) (describing the pillory).

40. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880, 1912-15 (1991).

41. *Id.*

brutality . . . did as much to legitimate brutality as [they] did to delegitimize crime."⁴² In addition, because colonial communities possessed no viable mechanisms for reintegrating shamed criminals, shaming often had anti-deterrent effects on offenders.⁴³ Once labelled criminals, offenders simply became the more desperate.⁴⁴ Thus, to some extent, colonial shame punishments backfired: they highlighted state brutality and further alienated offenders.

In addition, stigmatizing sanctions lost favor with the public as universal community norms disappeared.⁴⁵ The efficacy of shame originated in a perceived moral consensus. As normative morality faded, so did shame punishments.

2. Contemporary Uses of Shame to Punish Crime

While the prison has replaced the pillory in modern punishment, courts and legislators have not removed all elements of shame from criminal prosecutions. Every criminal proceeding is a matter of public record. In addition, newspapers often find criminal trials and convictions to be of public interest, and for public figures, the paper becomes the pillory. Any punishment may result in some degree of embarrassment and social separation. However, specific shaming penalties make these byproducts of punishment into a primary purpose.⁴⁶

In recent years, deliberate shaming by government actors as a criminal punishment has reemerged with strong political support.⁴⁷ What was labelled "a modest trend" in 1991⁴⁸ is evolving into a common practice, surfacing mostly in areas where prison is deemed inappropriate. A few examples illustrate the phenomenon: the landlord of

42. John Braithwaite, *Crime, Shame, and Reintegration* 59 (Cambridge U., 1989).

43. *Id.* at 59-60.

44. *Id.* at 60 (quoting L.O. Pike, *2 A History of Crime in England* 280-81 (Smith Elder, 1876)).

45. Massaro, 89 Mich. L. Rev. at 1915 (cited in note 40) (noting that ". . . colonial shaming practices can only be understood in light of the community's religious beliefs, childrearing techniques, and other culture-specific features. . . . [T]he white colonists lived in intimate, closely bound, and normatively cohesive communities . . .").

46. *Id.* at 1886.

47. See Jonathan Alter and Pat Wingert, *The Return of Shame*, Newsweek, 21, 24 (Feb. 6, 1995) (finding widespread support for shame penalties for some offenses but doubt about their effectiveness).

Professor Massaro highlights sentencing judges' sentiments that prison may be ineffective and inhumane, communities' fear of criminals returning to their neighborhoods, and society's frustration with allowing criminals to go unpunished. Massaro, 89 Mich. L. Rev. at 1884-85 (cited in note 40).

48. Massaro, 89 Mich. L. Rev. at 1884 (cited in note 40).

a boarded-up, condemned house in Framingham, Massachusetts was recently punished for letting the house fall into disrepair by the posting of his name on the property.⁴⁹ In the corporate sphere, the new Federal Sentencing Guidelines authorize bad publicity as a punishment for corporations violating criminal laws.⁵⁰ Even prisons have begun to use shaming techniques: inmates who expose themselves to female guards in Alabama's Holman Prison are forced to wear hot-pink uniforms.⁵¹

The resurgence of shame punishments comes as no surprise. Shame punishments allow courts and communities dissatisfied with existing modes of punishment to strike back. In addition, like the colonial pillory, modern-day shame punishments denounce conduct outside shared moral norms. And like the pillory, they segregate lawbreakers from those who adhere to such norms by labelling them criminals. Shame punishments give teeth to the value-shaping properties of legislation by announcing to the world that drunk drivers, sex offenders, and other targeted persons have engaged in socially unacceptable actions.⁵² Unlike other punishments, which may not filter through the media to the public eye, shame punishments are directly, pointedly, and consistently aimed at communication to wider society.

The appeal of shame as a mode of contemporary punishment is thus twofold. First, it offers an alternative to punishments proven ineffective, promising a solution to a seemingly unsolvable crime, and second, it gives moralists a pulpit, establishing a forum for labelling bad actors.

49. Larrabee, USA Today at 3A (cited in note 2).

50. See generally Andrew Cowan, Note, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. Cal. L. Rev. 2387 (1992) (discussing sentencing guidelines that authorize the punishment of corporations that have violated criminal laws by requiring them to publicize information pertaining to the conviction).

51. Larrabee, USA Today at 3A (cited in note 2).

52. "Society may not be able to enforce morality . . . [but] it clearly can legislate it." *People v. Costello*, 395 N.Y.S.2d 139, 142 (N.Y. Sup. Ct. 1977).

III. USING STIGMATIZING PUBLICITY TO PUNISH PROSTITUTES' PATRONS

On March 31, 1995, the Pennsylvania state legislature approved an amendment to its criminal code requiring courts to publish the name and the sentence⁵³ of any person twice found guilty of patronizing a prostitute.⁵⁴

While Pennsylvania stands alone in its statutory prescription of a mandatory shame punishment for prostitutes' patrons, hundreds of communities across the nation employ various methods of systematically shaming johns. The names or faces of those arrested for soliciting prostitutes may flash across local papers,⁵⁵ scattered billboards,⁵⁶ hand painted signs,⁵⁷ or city-run cable television channels.

53. Professor Kahan divides shame punishments into four classes: stigmatizing publicity (publishing a conviction), literal stigmatization (marking the offender in some identifying way), self debasement (a public ritual of identification), and contrition (confession or apology). Dan M. Kahan, *What Do Alternative Sanctions Mean*, 63 U. Chi. L. Rev. 591, 631-34 (1996). This Note deals almost exclusively with pure stigmatizing publicity, in which the government uses broadcast or print media to publish arrest or conviction, because this is almost always the type of shaming used against johns. Car seizures, another contemporary penalty for johns, might also be considered shame punishments. However, car seizures and other variations involve countless tangential legal problems outside the scope of this Note. See, for example, *Bennis v. Michigan*, 116 S. Ct. 994, 134 L. Ed. 2d 68 (1996) (ascertaining the property rights of a wife whose car was seized because her husband, a joint owner, had used it in procuring a prostitute).

54. As amended the statute reads, in relevant part:

Patronizing prostitutes—

(1) A person commits a misdemeanor of the third degree if that person hires a prostitute or any other person to engage in sexual activity with him or her or if that person enters or remains in a house of prostitution for the purpose of engaging in sexual activity.

(2) A person commits a misdemeanor of the third degree if, after being sentenced under paragraph (1), he or she hires a prostitute or any other person to engage in sexual activity with him or her or if that person enters or remains in a house of prostitution for the purpose of engaging in sexual activity. Upon conviction under this paragraph, a defendant shall be sentenced to pay a fine of not less than \$300 nor more than \$2,500, plus court costs, and to community service of not less than 75 hours. A court imposing a sentence under this paragraph shall publish the sentencing order in a newspaper of general circulation in the judicial district in which the court sits. As used in this paragraph, court costs include the cost of publishing the sentencing order.

18 Pa. Stat. § 5902(e) (West, 1996 Supp.).

55. Most communities publish the information in the community in which johns were arrested. But see *Lima Pays to Publish Clients of Prostitutes*, Dayton Daily News 4B (Dec. 30, 1994) (reporting a plan to publish in the arrestee's home town).

56. In 1992, Miami, Florida began posting convicted patrons' names throughout the city on freeway billboards. No one seemed to notice. Danny Westneat, *Humiliation is Latest Weapon in Crime Fight—But Some Cities Have Found People Have No Shame*, Seattle Times A1 (Jan. 27, 1995).

57. See *Mayor Buys an Ad on Alleged "Johns"*, Minneapolis Star Tribune 11A (Dec. 7, 1992) (mentioning "John of the Week" signs in New Haven, Connecticut); Lori Rozsa, *"Johns" Caught in Sting May Find Surprise in Ads*, Seattle Times A2 (Nov. 28, 1992) (describing citizens posting signs on telephone poles).

In Kent, Washington, a cable television channel broadcasts the names of convicted prostitutes and johns, drunk drivers, drug pushers, and other criminals. Several times a day, the names appear in a green and purple graphic display to a background beat of rock music. In Kent, no pictures accompany the names.⁵⁸ In Miami, Florida, however, "names, addresses, birth dates and arrest dates scroll across the screen every half hour."⁵⁹ Arrest reports also echo on radio waves⁶⁰ and telephone wires. Kansas City has a "Hooker Hotline."⁶¹ Like several other communities, it also sends "outing" letters to homes, breaking the news to loved ones.⁶²

Each of the above actions has been taken not only by private citizens' groups, but also by the government. In West Palm Beach, even the mayor got in on the act, using mayoral office funds to purchase an ad listing arrestees.⁶³

As a probation condition,⁶⁴ a bargaining chip for a lower sentence,⁶⁵ an automatic consequence of arrest,⁶⁶ or a sentence for those

58. *Cities Try to Shame Prostitutes and Johns Out of Town* (cited in note 36).

59. *Miami to Shame Johns*, Sun-Sentinel, Fort Lauderdale 3B (Aug. 1, 1994). Los Angeles has also passed an ordinance to televise johns' names. Chet Barfield, *Prostitution Arrests Climb Despite La Mesa's Efforts*, San Diego Union-Tribune A1 (May 10, 1995) (citing an ordinance passed in April 1995). Similarly, the city of Boston, Massachusetts seeks to televise videotaped arraignments. *Cities Try to Shame Prostitutes and Johns Out of Town* (cited in note 36).

60. See *Police Told to Release Lists of Prostitutes' Clients*, L.A. Times B2 (Apr. 13, 1995) (reporting Los Angeles's plan to release the names of those arrested for prostitution to local radio stations as well as newspapers and the local cable television channel).

61. See, for example, Kendall J. Willis, *Group Fights Hookers With a Barb for Their Customers*, Seattle Times A7 (Feb. 7, 1993) (describing the listing of names on recorded telephone messages in Kansas City, Missouri); Monica Davey, *Their 15 Minutes of Infamy: Florida Cable TV Show to Name Hookers' Clients: Public Humiliation to Fight Prostitution*, San Francisco Examiner (May 30, 1993) (reporting on the Kansas City "Hooker Hotline"); Editorial, *Prostitution: Northern Kentucky Leaders Fight the Blight*, Cincinnati Enquirer (Kentucky Edition) A14 (Jan. 12, 1995) (offering "three cheers" for the plan).

62. See, for example, Willis, Seattle Times at A7 (cited in note 61) (announcing Kansas City, Missouri police policy of mailing documentation of offenses and warnings about AIDS to the homes of those arrested for soliciting prostitutes); Sarah Lyall, *Stung by Prostitution, Town Shames Customers*, N.Y. Times B1 (July 18, 1991) (describing a similar move in Wyandanch, New York).

63. See note 154 and accompanying text.

64. One judge required that a sex offender post signs on his house and car as a condition of probation. *State v. Bateman*, 95 Or. App. 456, 771 P.2d 314, 316 (1989). See generally Henry Reske, *Scarlet Letter Sentences*, ABA Journal 16 (Jan. 1996); *People v. Meyer*, 661 N.E.2d 526 (Ill. Ct. App. 1996) (upholding a warning sign as a reasonable probation condition for battery).

65. Prosecutors in Lincoln County offer anyone arrested for a nonviolent crime a chance to plead guilty to a lesser crime upon declaration of guilt in the local paper. *I or We*, Foundation for National Progress 20 (May 1994).

66. See Mike Folks, *Sting Victim Cleared, Wants Ad From Mayor*, Sun-Sentinel (Fort Lauderdale) 20A (Jan. 6, 1994) (defendant later found not guilty).

found guilty,⁶⁷ public humiliation has become a popular tool for the enforcement of prostitution laws.

IV. EFFECTIVENESS

A large part of the appeal of shaming johns lies in its theoretical effectiveness. Applying punishment theories to those factors peculiar to public humiliation of prostitutes' patrons demonstrates that the chance of some measurable effect is strong.

A. Retribution

A retributive punishment exacts an eye for an eye, inflicting pain in return for the pain the offender has imposed on the community. Hence, stigmatizing publicity acts as an effective agent of retribution if it inflicts pain.⁶⁸ Interestingly, the question is not whether the offender or the offender's immediate community perceives shame as painful. Instead, the focus is on whether the larger community perceives stigmatizing publicity as a negative sanction.⁶⁹ The point of retribution is not to affect the offender but merely to "satisfy a community's interest in revenge."⁷⁰

In all likelihood, prostitutes' patrons, their immediate communities, and the surrounding public will all perceive stigmatizing publicity as painful. Because prostitutes' patrons are largely married, middle-class, working people,⁷¹ their loss of reputation will likely be a sufficient penalty to satisfy vengeful urges.

B. Rehabilitation

Rehabilitation is accomplished through what one scholar describes as "reintegrative shaming."⁷² In reintegrative shaming, stigmatization is followed by efforts to reunite the offender with the

67. See note 54 and accompanying text.

68. As Professor Massaro explains, "[i]f wearing a sign extracts pain, then it is justified by the offender's past pain-inflicting acts. Community outrage is expressed, and the moral calculus is set right." 89 Mich. L. Rev. at 1892-93 (cited in note 40). The stipulation that stigmatization must be perceived as a painful prospect concedes that among some categories of offenders, publicity of criminal acts might be perceived as a badge of honor rather than a mark of shame. Gangs, for instance, might take pride in members' defiance of the law.

69. *Id.* at 1893.

70. *Id.*

71. See notes 19-21 and accompanying text.

72. Braithwaite, *Crime, Shame, and Reintegration* at 100 (cited in note 42).

community. This reunion may be accomplished through words or gestures of forgiveness or through deliberate reintegration ceremonies.⁷³

Contemporary American society, however, may lack the tools to accomplish such reintegration.⁷⁴ According to one scholar, there are five factors necessary to achieve optimum reintegrative shaming:

First, the potential offenders must be members of an identifiable group, such as a close-knit religious or ethnic community. Second, the legal sanctions must actually compromise potential offenders' social group standing. . . . Third, the shaming must be communicated to the group and the group must withdraw from the offender—shun her—physically, emotionally, financially, or otherwise. Fourth, the shamed person must fear withdrawal by the group. Finally, the shamed person must be afforded some means of regaining community esteem, unless the misdeed is so grave that the offender must be permanently exiled or demoted.⁷⁵

None of these five factors is present in contemporary United States communities.⁷⁶ It is the absence of the fifth and final factor,⁷⁷ however, which truly prevents shaming from achieving rehabilitation. Even assuming that all of the other factors were present, without some mechanism for reintegration, the offender simply remains shunned.⁷⁸ Without reintegration, shaming will be bare

73. *Id.* Reintegration ceremonies have been particularly effective in Japan. *Id.* at 61-65.

74. Massaro, 89 Mich. L. Rev. at 1884 (cited in note 40).

75. *Id.* at 1883.

76. As Professor Massaro explains, "dominant social and cultural traditions in the United States do not reflect the level of interdependence, strong norm cohesion, and robust communitarianism that tends to characterize cultures in which shaming is prevalent and effective." *Id.* at 1883-84. Further:

Unlike the intimate face-to-face cultures that rely heavily on shaming, cities in the United States typically are not characterized by high interdependence among citizens, strong norm cohesiveness, or robust communitarianism. Moreover, the primary conditions to effective shaming—audience awareness and participation, a cohesive body of would-be offenders who perceive and are sensitive to the same shame, judicial personnel and procedures that can tailor sanctions to the target audience sensitivities, and a formal means of reintegrating shamed offenders—seem only weakly present in these settings.

Id. at 1917.

77. "[F]ederal and state law enforcement includes no public ritual or ceremony for reintegrating or 'forgiving' a shamed offender." *Id.* at 1884.

78. Professor Braithwaite agrees that Western cultures generally cannot be characterized as "communitarian" enough to accomplish reintegration: "Most Western societies might be characterized more by individualism than by communitarianism." Braithwaite, *Crime, Shame, and Reintegration* at 86 (cited in note 42).

"stigmatizing."⁷⁹ While stigmatizing may be effective in other regards,⁸⁰ it does little to rehabilitate the offender.

The individual is assigned a "master status trait." . . . [T]his label will dominate all other "characteristics" of the individual; "good athlete," "good conversationalist," "good dancer," and the like are subordinated to or negated by this trait which is immediately felt to be more central to the "actual" identity of the individual.⁸¹

Hence, because the shamed individual is labelled as deviant, he comes to see himself as deviant and may continue to behave accordingly.

Professor Dan Kahan argues that although shame punishments may ostracize offenders and stunt rehabilitation, they do so no more than prison.⁸² Such an observation seems irrelevant, however, to the shaming of prostitutes' patrons: the real alternative for those particular arrestees has not been awarding prison time but imposing fines. Because the shame punishment is a cheaper route to ostracization than prison, legislators seem eager to impose it on many classes of offenders for whom prison would not be financially feasible. For offenders who would not otherwise have been imprisoned, the assertion that prison is less rehabilitative than shaming offers little consolation.

Indeed, even prison and parole, although hardly touted for their rehabilitative capacity, arguably promise more theoretically positive effects on an offender than an outright, permanent lowering of self-perception. Any prison sentence short of life promises release; there is no certain end to the demotion a shame sanction imposes.⁸³

C. Incapacitation

A punishment accomplishes incapacitation if it deprives offenders of the power to repeat their crimes. The focus of incapacitative punishments is to locate likely recidivists and prevent them from striking again. Prison, for example, incapacitates offenders by physically depriving them of the freedom of movement necessary to commit most criminal acts. Similarly, chemical

79. See *id.* at 102.

80. *Id.* at 55-56.

81. *Id.* at 55 (quoting R. M. Page, *Stigma* 10 (Routledge and Kegan Paul, 1984)).

82. Kahan, 63 U. Chi. L. Rev. at 637 (cited in note 53).

83. As one court said in reference to a different shaming scheme, "although the stigma of a short jail term should eventually fade, the ignominious badge carried by the convicted sex offender can remain for a lifetime." *In re Birch*, 10 Cal. 3d 314, 515 P.2d 12, 17 (1973).

castration has recently been proposed as a tool of incapacitation for violent sex offenders.

Regardless of society's capacity for reintegration, shaming may, under some circumstances, incapacitate the offender from committing certain types of crimes. A requirement that a sex offender post a sign warning potential victims, a pickpocket wear tap shoes, or a drunk driver place a sticker on his car, might largely prevent repetition of the criminal behavior. Shaming johns may also have some indirect incapacitative effect. Family members and significant others who see a shame ad may keep a tighter reign on the offender, effectively preventing another offense.⁸⁴

D. Deterrence

Punitive attempts to deter crime presuppose a subconscious balancing test capable of swaying future behavior: if the cost of engaging in certain behavior outweighs the pleasure it produces, rational actors will avoid that behavior. General deterrents seek to tilt that balance for prospective offenders, and specific deterrents impact the perceptions of the individuals who are punished.

Every unpleasant consequence of crime raises the cost of proscribed behavior⁸⁵ and therefore, in theory, deters future crime. Hypothetically, because shame punishments involve unpleasantness for at least some arrestees, they should work as effective deterrents. Although there is no empirical evidence to that effect,⁸⁶ a distinction may nonetheless be drawn between the theoretical estimates of general and specific deterrence.

1. General Deterrence

Perhaps the strongest support for shame punishments comes from their hypothetical effectiveness in accomplishing general deterrence.⁸⁷ Prospective johns, unlike would-be perpetrators of other

84. See generally Massaro, 89 Mich L. Rev. at 1899-1900 (cited in note 40) (suggesting similar incapacitative effects of shame punishments for other crimes).

85. See generally Kahan, 63 U. Chi. L. Rev. at 638 (cited in note 53) ("Criminal penalties deter . . . by raising the cost of criminal behavior.").

86. "The question requires, and deserves, the kind of empirical assessment that a dogmatic opposition to shaming penalties would only obstruct." *Id.* at 646.

87. "That's very effective. Once the names are published and everybody knows that this is a possibility, hopefully, it'll slow down [prostitution] in our community." *Will Publishing Names of "Johns" Deter Prostitution?* (cited in note 30) (words of a police sergeant). See also *Cities Try*

crimes, tend to have the status and stake in the community that make shame punishments a particularly effective deterrent: loss of self-esteem and loss of face are apt to be especially unpleasant when a moral reputation holds high value.⁸⁸ In contrast, authorities generally reject proposals to shame prostitutes, reasoning that prostitutes are undaunted by the prospect of publicity.⁸⁹

In addition, "outing" seems an especially apt punishment in a criminal market that thrives on anonymity. Removing anonymity would theoretically devastate prostitution's appeal.⁹⁰ Thus, shame punishments might deter not only by raising the cost of criminal behavior but also by attacking the other side of the equation, decreasing the pleasure involved in the behavior itself.

Theoretical effectiveness notwithstanding, no empirical evaluation has analyzed the actual deterrent value of shame punishments.⁹¹ However, initiators and executors of john-shaming schemes tout their plans as excellent deterrents.⁹² In addition, some whose

to *Shame Prostitutes and Johns Out of Town* (cited in note 30) (comments of local merchant Mark Toland: "Would you want your name on there?").

88. See, for example, *Cities Try to Shame Prostitutes and Johns Out of Town* (cited in note 30) (comments of police officer, estimating that whereas those arrested for theft "don't have the stake in the community [or] the status of some of the offenders who engage in prostitution," about 50% of those arrested for patronizing prostitutes have identities, jobs, and families to protect); David Jacobs, *Toledo Wants to Name Prostitutes' Customers*, *Dayton Daily News* 2B (Dec. 5, 1995) ("[T]hose we arrest they are mainly married men' who have a job."); Carl Allen, *Florida Mayor Urges Neighborhoods to Battle Prostitution, Street Crime*, *Buffalo News* (May 4, 1994) (reciting Mayor Graham's estimate that 60% of johns are married). One woman who had served as a decoy prostitute commented, "[a]bout 74 percent of [the johns] come from the suburbs. . . . A lot of them are married; sometimes they even have a baby seat in the car." Stacey Baca, *Aurora's Sting Nabs 19 "Johns": First Test of Policy on Photos to Follow*, *Denver Post* B1 (Sept. 8, 1994).

Professor Massaro, generally skeptical about the deterrent value of shame punishments, concedes that middle-class crimes might offer "windows of shaming opportunity." Massaro, 89 *Mich. L. Rev.* at 1933-95 (cited in note 40). Professor Kahan agrees: "Consider, for example, a corporate executive who is deciding whether to bribe a public official. . . . [H]e probably cares a lot about what his family, his colleagues, his firm's customers, his neighbors, and even the members of his health club think. The prospect of being disgraced in their eyes thus continues to furnish a steng incentive—psychological, economic, and otherwise—to avoid criminality." Kahan, 63 *U. Chi. L. Rev.* at 643 (cited in note 53).

89. See, for example, Robey, *Denver Post* at B2 (cited in note 15) (noting that council members questioned whether prostitutes would care if their photos ran in the paper). Publicity might even be good for business.

90. "We need to begin to understand the stake 'real' men have in this silence, in not being named as johns, whether by themselves, by other men, or by women." Baldwin, 1 *Mich. J. Gender & L.* at 76 n.34 (cited in note 19).

91. Kahan, 63 *U. Chi. L. Rev.* at 638 (cited in note 53).

92. Renate Robey, *Judge Delays Aurora Ad With "John" Pictures*, *Denver Post* A1 (May 11, 1995) (reporting City Attorney Charles Richardson's estimation only a few months after initiating shaming ads in local weekly papers that "the [shame the johns] ordinance is working 'We're very satisfied with the deterrent effect it's having'").

pictures have been published say, in retrospect, that they would not have patronized had they known of publishing schemes.⁹³

Generally speaking, however, legal and sociological scholars have raised serious questions about the power of any punishment to deter crimes.⁹⁴ In addition, several communities have shamed prostitutes' customers for some time without experiencing the expected radical decrease in demand.⁹⁵ In 1982, a survey of thirteen cities that had begun systematically giving out the names of prostitutes' patrons showed no discernible decline in prostitution arrests.⁹⁶ Miami, Florida posted convicted johns' names on billboards for three years

In one particularly aggressive scheme implemented in the Bronx, the local paper agreed to publish the names of suspected johns only if all the names of those arrested were published. When a member of the community council was arrested, his name was published along with the names of all others arrested in the sweep. The police also seized cars. Police officers in the Bronx claim the scheme has been most effective: "It used to take an hour to make six arrests and now it takes six or seven hours." Derek Alger, *Soliciting is a Losing Proposition: Anti-Prostitution Team Takes Cars, Publishes Names of Would-Be Johns*, *Newsday* B7 (Nov. 15, 1994) (quoting newspaper editor's summary of police sweeps). "It really seems to be working. Our last operation we made two arrests, but it took three hours." *Id.* (quoting the commander of the 49th precinct).

93. See, for example, Jill Tucker, *Newspaper Spread Stings Alleged Johns*, *Denver Post* B1 (Mar. 2, 1995) (statement of one arrestee whose picture had been published the previous day).

94. Hanah Arendt's conclusion typifies critics' sentiments regarding deterrence and goes on to warn of the dangers of exposing crime: "No punishment has ever possessed enough power of deterrence to prevent the commission of crimes. On the contrary, whatever the punishment, once a specific crime has appeared for the first time, its reappearance is more likely than its initial emergence could have been." Hanah Arendt, *Eichman in Jerusalem: A Report on the Banality of Evil* ch. 15 (Viking Press, 1963).

95. See Barfield, *San Diego Union-Tribune* at A1 (cited in note 59) (reporting that after one year of shaming johns, Long Beach police have noticed no difference). In La Mesa California, after six months of publishing johns' photos in the paper, solicitation of arrests reached a four-year high. *Id.* (noting the mayor's initial prediction of a complete disappearance of prostitution). The mayor insists that more time will bring results, and the police chief explains that arrests are up not because the crime level has increased, but because of heightened enforcement measures. The *Brockton Enterprise*, a Massachusetts paper with a circulation of 58,000, has published names of prostitutes' patrons since 1990, when local police solicited the paper's help. The paper's editors have questioned the policy's efficacy: "I can still walk . . . three blocks . . . and get propositioned three times . . . It shames certain people. Certain people can't be shamed." *Id.* A defense lawyer in the area agreed: "I don't think people think that out before they do it . . . no more than a murderer is not going to commit a murder because he thinks he's going to get the death penalty." Renate Robey, *Aurora Anti-Hooker Effort Goes to Vote: Plan to Publish Photos Debated*, *Denver Post* B2 (July 11, 1994).

96. Henry Chu, *Activists Back Plan to Curb Prostitution*, *L.A. Times* 1 (Apr. 11, 1995) (reporting the results of a survey taken by Los Angeles officials who were considering initiating such a policy). See also Eric Harrison, *A Once Rollicking City Cleans Up, While Some Disgruntled Bar Operators Say It's a Sin*, *L.A. Times* 4 (Nov. 27, 1989) (citing the Newport, Kentucky john-shaming campaign as the exception to the relative success of a campaign to clean up the city).

without any effect on prostitution.⁹⁷ Some critics of the public humiliation technique even blame the ads themselves, saying they only "hang a bright red light" in the community and attract more prostitutes to the area.⁹⁸

2. Specific Deterrence

A punishment acts as an effective specific deterrent if it makes those individuals who are punished aware of the costs of their behavior and less likely to commit the same crime in the future. Despite their inherent unpleasantness, shame punishments are particularly unlikely to deter those whose photos are published. Indeed, as explained above,⁹⁹ their ostracizing and labelling qualities may produce precisely the opposite effect,¹⁰⁰ driving those shamed to succumb to their labels as prostitutes' patrons and continue their patronage. Because shame punishments condemn the actor as well as the act, they may serve to undermine previous reputational incentives to adhere to moral norms,¹⁰¹ hampering not only rehabilitation¹⁰² but also specific deterrence.

In addition, whereas the first shame punishment against a particular individual may be a devastating revelation to friends, business associates, and loved ones, a second labelling merely confirms the first; exacting a far smaller toll. Because shame punishments most affect those who have status to lose,¹⁰³ those who have already lost status from one punishment are less susceptible to the deterrent

97. Westneat, *Seattle Times* at A1 (cited in note 56) (noting officials' surprise that no one seemed to have noticed and their suspicion that shame punishments might be "more effective in small towns where 'everybody knows everybody else'").

98. Barfield, *San Diego Union-Tribune* at A1 (cited in note 59) (quoting an attorney who blames La Mesa, California's increase in john arrest rates on the initiation of shame punishments themselves). One organization of prostitutes has published posters flaunting the ads' failure to stop prostitution: "[I]t's apparent that these laws aren't working. Because prostitutes still are." Terry Gover, *The Shame Game: Who Profits from Prostitution?*, *Playboy* 58 (June 1, 1996).

99. See notes 78-81 and accompanying text.

100. As one john noted:

Speaking for one who utilizes the services of prostitutes, if the city council wishes to use my name, or publish it, by all means, let them help themselves. It wouldn't bother me any. And, as a matter of fact, it might give me some ideas to call some of the other people to find out where they're getting their prostitutes at. . . . I'm single, and sexual activity is a normal thing. So, you're never going to cut it all off because there's no way to cut the demand. You have to cut the demand in order to stop the act.

Will Publishing Names of "Johns" Deter Prostitution? (cited in note 30).

101. See Massaro, 89 *Mich. L. Rev.* at 199 (cited in note 40).

102. See Part IV.B (discussing rehabilitation).

103. Kahan, 63 *U. Chi. L. Rev.* at 648 (cited in note 53). See notes 88-89 and accompanying text.

effects of threatened future shaming than are other potential offenders.

In summary, although they may decrease the pleasure side of the prostitution equation for all potential patrons,¹⁰⁴ shame punishments theoretically hold a higher cost for those who have not yet been shamed. Thus, in theory, they possess great value as general deterrents but scant value as specific deterrents.

E. Denunciation

Another primary aim of shaming johns is to denounce prostitution.¹⁰⁵ Although all punishment has been generally characterized as a "sign indicating . . . the sentiments of the collectivity,"¹⁰⁶ some critics consider it inhumane to use an individual to express the moral values of the majority.¹⁰⁷ However, while denunciation alone might not be thought to justify a particular scheme of punishment today, in collusion with another effect, such as general deterrence, the denunciative effect of a punishment might properly bear on its advisability.

As speech, a denunciative punishment may act as a super-general deterrent, injecting anti-prostitution speech into the public mind.¹⁰⁸ Punishments that accomplish general deterrence use the threat of unpleasant consequences to deter other people similarly tempted from committing the same offense. In contrast, denunciation seeks to permeate the public consciousness and sway the norms of the population to prevent temptation. It attempts to make procuring a prostitute a distasteful option not because the adverse consequences of the act outweigh its benefits but because of the reprehensibility of the act itself. Like media campaigns against drunk driving, DUI plates and other shame punishments seek to create an atmosphere of

104. See note 90 and accompanying text.

105. "I don't know if it will stop [prostitution] . . . but it will send a message that we don't condone it." Chet Barfield, *Get the Picture?: La Mesa Plans to Publish Photos of Prostitution Solicitors*, San Diego Union-Tribune B1 (Oct. 27, 1994) (quoting councilwoman Donna Alm).

106. Emile Durkenheim, *The Division of Labor in Society* 63 (Free Press, W.D. Halls, trans., 1984) (quoted in Kahan, 63 U. Chi. L. Rev. at 594 (cited in note 53)).

107. "The idea that we may punish offenders against a moral code, not to prevent harm or suffering or even the repetition of the offense but simply as a means of venting or emphatically expressing moral condemnation, is uncomfortably close to human sacrifice as an expression of religious worship." H.L.A. Hart, *Law, Liberty, and Morality* 65-66 (Stanford U., 1963).

108. Advocating a revival of the expressive theory of punishment, Professor Kahan pinpoints three mechanisms through which the expressive character of the law has a moralizing effect: preference adaptation, shaping "belief-dependent" preferences, and goodwill. Kahan, 63 U. Chi. L. Rev. at 603-04, 638-40 (cited in note 53).

disfavor for culpable conduct. This "expressive" quality of shame punishments may explain their appeal to the public.¹⁰⁹

Non-prison sentences such as fines and community service express moral condemnation only equivocally.¹¹⁰ Fines implicitly condone criminal activity so long as the offender is willing to pay the penalty, pricing the conduct rather than sanctioning it.¹¹¹ Community service punishments almost seem to "reward" the offender by mandating the performance of something society generally considers an admirable, respectable thing to do.¹¹²

Like shame punishments, prison sentences express unequivocal condemnation, but they do so at great fiscal and social expense. For what appears to be a far lower cost,¹¹³ shame punishments unambiguously label certain behavior as contrary to community morals.¹¹⁴ They are also thought to reinforce any preexisting propensities to obey the law, and to promote confidence in the law.¹¹⁵ They bypass the media and speak directly to the public, and for that reason, they possess enormous denunciative potential.¹¹⁶

F. Banishment: Not in My Back Yard

The primary effect of shame punishments may be not to decrease overall demand but to push prostitution either further underground or to other communities outside the purview of the shamers.¹¹⁷ During the "progressive era" between 1900 and 1910, reformers encouraged media exposure of prostitutes to drive them out of American cities. Such methods, while they did not end prostitution, may have driven prostitutes out of town or behind closed doors.¹¹⁸

Current shame punishments differ from those of the progressive era in that they shame customers rather than prostitutes. Customers with families and non-prostitution jobs seem less transient

109. Kahan, 63 U. Chi. L. Rev. at 635 (cited in note 53).

110. *Id.*

111. *Id.* at 621.

112. *Id.* at 625-30.

113. *Id.* at 635.

114. *Id.*

115. *Id.* at 639.

116. Whether that potential is realized—or even realizable—forms the topic of this Note's conclusion.

117. As one shame-promoter stated, "I'm the president of the Civic Association. . . . All I can do is try to look after my little community and hope that other people are going to look after their little community." *Community Cameras Catch Criminals in the Act* (NPR Morning Edition, June 6, 1994) (transcript available on NEXIS, NEWS library, NPR file).

118. *Cities Try to Shame Prostitutes and Johns Out of Town* (cited in note 36) (comments of Professor William Boborov).

and therefore less likely to flee than prostitutes. If the elements necessary for deterrence are present, however, and the customer is ostracized by the community, in today's mobile society, customers might be shamed out of town as well. Especially in extreme cases where public humiliation leads to loss of employment or severance of family ties, those who patronize prostitutes might eventually relocate to non-shaming areas¹¹⁹ or even in areas that do not proscribe prostitution.¹²⁰ Mobility might thus undermine deterrence and make banishment the primary effect of shame punishments.

To alleviate this danger, a community might require offenders who relocate to publish their offenses again in their new communities.¹²¹ Some communities, however, may not want to hamper relocation. While driving patrons out of town or out of sight is not a traditional aim of punishment, it might appeal to voters or elected officials in search of a quick fix for red light districts and other public eyesores.¹²²

G. Summary

Shame punishments for prostitutes' patrons are theoretically effective as instruments of retribution, incapacitation, general deterrence, denunciation, and banishment. They are particularly poor tools of rehabilitation and specific deterrence. Empirical evidence is still needed to show whether public humiliation can actually accomplish any of these goals. The ineffectiveness of traditional punishments, however, drastically enhances the appeal of any

119. "If you scare the johns, they'll go someplace else." Lori Rozsa, *Seattle Times* at A2 (cited in note 57) (quoting a police spokesman).

120. In the United States, only Nevada has no blanket proscription of prostitution. Erin McCormick, *Giving Green Light to Red Light District: City Approves Task Force to Consider Ways to Legalize Prostitution*, *San Francisco Examiner* A12 (Dec. 5, 1993).

121. See Kerry Elizabeth Knobelsdorff, *Choosing Between Public Humiliation and Jail*, *Christian Science Monitor* 3 (Jan. 2, 1987) (referring to Oregon authorities' re-publishing requirement).

122. "Mayor JIM WHITE, Kent: If we can cause someone embarrassment, that's the main purpose. If you're going to do crime, do it somewhere else. Don't do it in the city of Kent, or we're going to do everything we can to embarrass you." *Cities Try to Shame Prostitutes and Johns Out of Town* (cited in note 36) (also describing local merchants' frustration with a street riddled with beer bottles, lighters, underwear, and contraceptives); Robey, *Denver Post* at B2 (cited in note 95) (quoting City Attorney Charles Richardson: "We want to get the message out that as a customer of a prostitute, you don't want to go to Aurora, Colorado.").

alternative offering even the slightest possibility of a reduction in prostitution.¹²³

V. EFFICIENCY

Even assuming some degree of effectiveness, many who attack john-shaming schemes argue that they are not worth the money.¹²⁴ Implicit in such an argument is a cost/benefit analysis. A punishment is economically inefficient if financial costs outweigh derived benefits. In addition, the cost-effectiveness of john-shaming schemes may be compared with the utility of alternative remedies for prostitution. Compared to costs of the traditional remedies, shaming may be a cost-effective alternative.¹²⁵

A. *Financial Cost of Traditional Remedies*

One 1987 study analyzed the public costs incurred by sixteen of the nation's largest cities in enforcing prostitution laws. It found these costs "highly disproportionate in light of the stated priorities of citizens and judges alike."¹²⁶ The study serves as an appropriate measure of the costs of traditional remedies because almost all arrests considered were of prostitutes, not of johns. More importantly, the remedies for which costs were computed were fines and imprisonment rather than public shaming.

In 1985, the cities polled, ranging in population from 500,000 to over one million, spent an average of \$7.5 million each enforcing

123. In the words of Los Angeles City Councilman Hal Bernson, "It can't hurt. . . . If it works, fine. If it doesn't, then we gave it a try." Chu, L.A. Times at 1 (cited in note 96). Mayor Jim White of Kent, Washington agrees: "Shame and humiliation may not be the total answer, but if it will deter one person . . ." *Cities Try to Shame Prostitutes and Johns Out of Town* (cited in note 36).

124. "DAVID SMITH, West Palm Beach City Commission: I don't know how we can afford \$1,000 a week, or a month, or whatever it takes . . ." *Will Publishing Names of "Johns" Deter Prostitution?* (cited in note 30). One local editorial in Aurora, Colorado complained that "the city's plan to publish pictures of men accused of soliciting prostitutes could cost the city big bucks" in court costs as well as publishing fees. Aurora's ordinance, however, forces those arrested for patronizing to pay for their own shaming. *Running Pix of "Johns" Could Cost Aurora Plenty*, Denver Post B10 (Nov. 11, 1994).

125. See, for example, *Public Humiliation Used As a Means to Deter Criminal Acts* (NPR radio broadcast, Morning Edition, June 10, 1996) (transcript available on NEXIS, NEWS library, NPR file); Richard Lacayo, *Considering the Alternatives*, Time 60 (Feb. 2, 1987) (citing cost-effectiveness of shaming as an underlying rationale); Jay Matthews, *Freedom Means Having to Say You're Sorry*, Wash. Post A3 (Nov. 9, 1986).

126. Julie Pearl, *The Highest Paying Customers: American Cities and the Costs of Prostitution Control*, 38 Hastings L. J. 769, 790 (1987).

prostitution laws. The study separated costs into three categories: police costs, judicial costs, and corrections costs. Police costs took the greatest toll on the public wallet, accounting for over forty percent of public funds used in prostitution law enforcement. These costs derive largely from the more than twenty-one person hours required per arrest.¹²⁷

Judicial personnel costs are also substantial, due partially to the usual need for more than one court appearance per arrest. Various requests for continuances and counsel often postpone sentencing until an arrestee's third appearance in court, requiring nearly four hours of a court's full attention for an average arrest.¹²⁸

In addition to police costs and court costs, traditional punishments involve corrections costs. The study found that eleven percent of convicted prostitutes in the United States were sentenced to jail time, usually serving longer sentences than women found guilty of other misdemeanors.¹²⁹ The study found that the significant costs of incarcerating prostitutes constituted over twenty-five percent of the total cost of traditional punishment, tolling a mean annual cost of \$1,985,638 per city.¹³⁰

These findings demonstrate the enormous financial commitment required to continue traditional punishments. Inflation and the evolution of the prostitution industry continue to increase the cost of punishing prostitutes with prison or fines.

B. Financial Cost of Imposing Shame

Many of the costs of traditional punishments would persist under a new regime of john-shaming. Most police costs would remain the same. Corrections costs, however, would certainly differ because

127. For each arrest, officers must: (1) obtain a solicitation from, and make an arrest of, a suspected prostitute or customer; (2) transport the arrestee to the police station or detention center; (3) complete fingerprinting and identification process; (4) write and file a report; and (5) testify in court. Of the five tasks, officers estimate that testifying in court consumes the lion's share of the twenty-one hours. *Id.* at 773-76.

128. *Id.* at 777. A 1976 Boston Municipal Court (BMC) study commented, "Many of the court officers, administrators, and judges interviewed by our staff expressed the belief that if not for prostitution cases, the Second Session of the BMC, as it currently functions, would not be necessary." *Id.* at 778.

129. *Id.* at 779 (citing Interview with Arlene Carmen, Director of the Judson Memorial Church Prostitution Project, in New York City (May 1, 1985); Telephone Interview with Priscilla Alexander, Co-Director of National Organization of Women Task Force on Prostitution (Apr. 29, 1985); Haft, *Hustling for Rights*, 1 *Civ. Liberties Rev.* 8, 14 (1974)).

130. *Id.* at 779-80.

the price of publishing would replace the price of prison. In addition, court costs could change, especially if a trial or a guilty plea must precede publication. Finally, civil liability and litigation costs present a possible new financial burden.

1. Corrections Costs: The Price of Publishing

Even if newspapers will not donate space for shaming patrons, publishing a newsletter or buying an advertisement is likely to be significantly cheaper than imprisoning prostitutes.¹³¹ Indeed, an ordinance publishing the ads may pay for itself by imposing additional fines on the johns themselves to cover publication costs.¹³² Tapping into another source of funds, the mayor of West Palm Beach paid for shame advertisements using a citizen-supported "John Hooker Memorial Fund."¹³³

2. Court Costs

Although some communities shame only after conviction, in other jurisdictions, shame operates as an automatic consequence of arrest.¹³⁴ Because of the costs of trial, waiting until after conviction to publish advertisements may be far more expensive than publication on arrest.

131. The Richmond, Virginia City Manager's Office estimated an annual cost of \$30,000 to \$35,000 to buy advertising space in both local papers. *City to List Men Charged in Prostitution Solicitation*, Richmond Times-Dispatch B6 (Mar. 11, 1993). Publishing names or pictures is also significantly less costly than seizing johns' cars. See Renate Robey, *Prostitutes' Clients May Gain "Fame": Aurora Considers Putting Photos of Those Arrested in Paid Newspaper Ads*, Denver Post B1 (May 20, 1994) (noting the city council's decision to publish names because of the exorbitant cost of seizing cars: "[A]fter studying a similar problem in Portland, Ore., the public safety committee estimated it would cost the police department about \$322,000 the first year to hire people to run the program, rent office space and build a secure place to keep the impounded cars. And the city's attorney's office would need about \$70,000 to handle the additional legal paperwork."); Hugo Martin, *Valleywide Publicizing Prostitute Customers Is Opposed*, L.A. Times B3 (June 19, 1996) (citing L.A.P.D. chief's estimate that publishing scheme would cost \$387,000 per year to implement).

132. See Baca, Denver Post at B01 (cited in note 88) (citing an Aurora city ordinance that imposes a mandatory \$1,000 fine to pay for the advertisements). Making the offender pay for publication might take publication out of the realm of pure stigmatizing publication and turn it into a forced confession: effectively making a john buy an ad announcing his crime forces him to confess. See generally Kahan, 63 U. Chi. L. Rev. at 634 (discussing shaming as a form of confession) (cited in note 53).

133. Allen, Buffalo News (cited in note 88) (noting that the mayor of West Palm Beach has gained national attention for her publishing campaigns and has paid for shame advertisements using a citizen-supported "John Hooker Memorial Fund").

134. For a discussion of constitutional problems with this practice, see Part VI.A.

While the court costs of the traditional system are high, guilty pleas and *nolo contendere* pleas are common from prostitutes and johns alike. The desire to avoid the humiliation of trial—not an expectation of defeat in court—usually causes such acquiescence. Proof against johns is usually insubstantial. Police often arrest men for talking to prostitutes or decoys, without proof that such conversations would have led to the exchange of money for sex.¹³⁵ In most cases, no money changes hands and no sexual act occurs.¹³⁶ Nonetheless, even if a customer arrested in one of these situations is unlikely to be found guilty at trial, it is easier for him to pay a fine and forget the whole incident than to contest a false accusation in trial.

Stigmatizing publicity, however, offers no opportunity to forget the incident. For that reason, if there is a threat of shaming on conviction, a guilty plea will be more difficult to obtain. Before accepting any guilty plea, a judge must alert a defendant to the possible consequences of his plea.¹³⁷ When judges warn defendants of the possibility of publishing, the threat of stigmatizing publicity will almost certainly increase the number of not-guilty pleas and demands for full trials. Clearly, the resulting trial exacts a far greater cost on the court system than a mechanical guilty plea.

In contrast, a policy of publishing photos as an automatic consequence of arrest may offer marked savings over traditional remedies. Because such ads merely report arrests without giving defendants the chance to stand trial, they avoid the serious threat of an increase in demands for a full trial. Publishing arrests is therefore far less costly than waiting until after conviction to publish.

135. See Glenn Martin, *S.F. Prostitution Sting Pays Off/Surprised Customers Arrested, Humiliated*, San Francisco Chronicle A17 (Apr. 13, 1994) (describing the logistics of a “sting”).

136. *Id.*

137. See F.R.Cr.P. 11(c)(1). Most states have similar statutes. In *In re Birch*, the California Supreme Court denied the validity of a guilty plea entered without knowledge of possible publication. Birch was charged with lewd and dissolute conduct for urinating in public. 515 P.2d at 12. When he pled guilty, he was aware of the possibility of a five-day suspended sentence but not of his obligation to register under California’s sex offender registration statute. *Id.* at 13. Because the magistrate who accepted the plea had failed to advise him of the second consequence, the court set aside the plea, noting that “[a]lthough the stigma of a short jail sentence should eventually fade, the ignominious badge carried by the convicted sex offender can remain for a lifetime.” *Id.* at 17.

3. Civil Liability

One 75-year-old man whose name was published as a suspected john in West Palm Beach was later found not guilty. He then filed a civil action for defamation and invasion of privacy.¹³⁸ Two judges ruled for the city, denying civil liability, but the city has already spent \$100,000 defending the action, and appeals are still pending.¹³⁹ These and other sources of civil liability may place additional costs on government actors inflicting shame.

a. Defamation

Government actors enjoy some degree of immunity from defamation actions while acting within the scope of their duties. High state officials, such as governors, have an absolute immunity.¹⁴⁰ State courts have split, however, on the immunity of lower-ranking officials: some grant an absolute immunity¹⁴¹ while others grant only a qualified privilege.¹⁴²

The absolute defense of truth is more likely to prove an effective shield to defamation actions. In some sense, reporting arrests or convictions is merely stating true facts. Thus, because proof of truth absolutely bars an action for defamation, a successful action for defamation suit could arise from a shame ad only in a case of mistaken identity¹⁴³ or overstatement.¹⁴⁴ In order to avoid a mistaken

138. Westneat, *Seattle Times* at A1 (cited in note 56) (reporting details of the "backfire").

139. *Id.*

140. *Blair v. Walker*, 64 Ill. 2d 1, 349 N.E.2d 385 (1976) (holding the governor of Illinois absolutely immune from defamation claims when acting within the scope of official duties).

Courts have held the same immunity applies to press releases informing the public of officials actions. *Hackworth v. Larson*, 83 S.D. 674, 165 N.W.2d 705 (1969) (holding South Dakota Secretary of State's immunity is limited to informative purposes); *Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952) (holding same with regard to state attorney general).

141. See, for example, *McNayr v. Kelly*, 184 So.2d 428 (Fla. 1966) (holding that executive officers are absolutely privileged and immune from suit when acting in their official capacity); *Sheridan v. Crisona*, 249 N.Y.S.2d 161, 198 N.E.2d 359 (1964) (extending absolute immunity to burrough president during course of official duties).

142. See, for example, *Chamberlain v. Mathis*, 151 Ariz. 551, 729 P.2d 905 (1986) (extending qualified immunity to director of Department of Health Services); *Gardner v. Hollifield*, 96 Idaho 609, 533 P.2d 730 (1975); *Ranous v. Hughes*, 30 Wis. 2d 452, 141 N.W.2d 251 (1966).

143. For example, if A1 has the same name as A2 and A2's name is published as having patronized a prostitute, A1 might have an action in libel. The requirement of accurate identification originated in *Jones v. E. Hulton & Co.*, 2 K.B.D. 444 (C.A. 1909), and has since been applied in the United States. See, for example, *Washington Post Co. v. Kennedy*, 3 F.2d 207 (D.C. Cir. 1925) (citing *Hulton*).

144. For example, if the ad lists B under the heading "PATRONS OF PROSTITUTES" and B has not yet been tried, B may have an action in libel. However, if before B's trial B's name

identity claim, a government actor need only act non-negligently¹⁴⁵ when identifying arrestees. This might arguably entail including addresses or pictures in addition to mere names, especially common names.¹⁴⁶ A claim alleging overstatement is equally easy to avoid. Delaying publication until after conviction would avoid most defamation claims because after conviction the status of those arrested has been proven beyond a reasonable doubt. Even a pre-conviction publishing could avoid defamation liability by using a label such as "arrestees" or "alleged patrons" to refer to those listed.

b. Invasion of Privacy

Even true statements may create a cause of action in tort if they divulge certain categories of private information. Information that is part of the public record, however, is generally not considered private information for purposes of an invasion of privacy action.¹⁴⁷ Because arrest records, including mug shots and addresses, are public information,¹⁴⁸ no action for invasion of privacy arises upon publication of the identities of johns.

c. The Federal Civil Rights Statute

A government actor's violation of a criminal defendant's civil rights may entitle the defendant to damages pursuant to the federal

were placed in an ad reading "INDIVIDUALS ARRESTED FOR PATRONIZING PROSTITUTES," B would have no action in libel.

145. The Supreme Court has held that in regulating the dissemination of private information about private figures, states may decide for themselves the appropriate standard of liability, but may not impose liability without fault. Effectively, its holding dictates that to be liable for libel, a defendant must have acted negligently. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

146. See *Cities Try to Shame Prostitutes and Johns Out of Town* (cited in note 36) (explaining the necessity of including birth dates in order to avoid confusion upon the reporting of the arrest of a suspect with a common name).

147. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding no invasion of privacy for publication of rape victim's name because the name had appeared in court documents given to reporters, and was therefore public information); *Bell v. Courier-Journal & Louisville Times*, 402 S.W.2d 84 (Ky. Ct. App. 1966); *Meetze v. Associated Press*, 95 S.E.2d 606 (S.C. 1956) (dates of birth and marriage); *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 670, 238 P.2d 670 (1951) (military service record). But see *Rome Sentinel Co. v. Boustedt*, 252 N.Y.S.2d 10 (1964) (funding publication of a death certificate to be an invasion of privacy); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931) (reformed prostitute's name and experiences published years later); *Briscoe v. Reader's Digest Ass'n, Inc.*, 4 Cal. 3d 529, 483 P.2d 34 (1971) (rehabilitated truck hijacker).

148. See *United States Dep't of Justice v. Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 753 (1989) (enumerating the types of information that are part of the public record).

civil rights statute, 42 U.S.C. section 1983.¹⁴⁹ Whereas a defendant might file a constitutional claim seeking an injunction before the state's publishing took place, such a pursuit would be moot after publication. Under section 1983, however, a defendant made victim to unconstitutional state action could sue after the fact for damages. Thus, an arrestee who was unable to get a restraining order in time to keep his picture from appearing in the paper could bring a section 1983 claim, making the same constitutional arguments in federal court and seeking civil damages.

A municipality does not enjoy traditional tort immunity under section 1983, and it may not assert the defense of good faith.¹⁵⁰ In addition, although a municipality is not vicariously liable for the acts of employees, it is liable for the execution of its own unconstitutional policies.¹⁵¹ If found unconstitutional, a john-shaming scheme could be considered such a policy.

Because many constitutional questions surrounding shame punishments remain unsettled,¹⁵² the door is wide open for section 1983 claims based on shaming schemes. While many arrestees would "just as soon forget about it"¹⁵³ because further litigation will only extend publicity, arrestees' attorneys may be anxious to pursue such claims, either to stop civil rights violations or to share in damages. Hence, section 1983 claims may add high litigation costs to the price of shame punishments.

C. Summary

At first glance, shame penalties appear to be an inexpensive alternative to traditional remedies for prostitution. Publication of ads is certainly far less costly than imprisonment. Closer inspection, however, reveals the hidden costs of shame punishments.

One added cost arises only when publication follows conviction: the added threat of stigmatizing publicity may influence defendants to insist on costly trials instead of offering the traditional guilty pleas. Some communities avoid that added cost by making publication an automatic consequence of arrest. In addition, constitutional issues

149. 42 U.S.C. § 1983 (1994 ed.).

150. *Owen v. City of Independence*, 445 U.S. 622 (1980) (denying municipal immunity from liability under § 1983 and prohibiting the use of good faith defenses in such cases).

151. *Monell v. Departmenet of Social Services of New York City*, 436 U.S. 658 (1978).

152. See Part VI.

153. See Renate Robey, *Prostitution Law Passes Test: Denver Man's Legal Challenge Rejected by Judge in Aurora*, Denver Post B2 (Dec. 20, 1994) (quoting the defendant but noting that his attorney wanted to appeal).

raise the spectre of civil liability and litigation costs. Shame penalties may still cost less than traditional tactics, but the savings are not as substantial as they first seem.

VI. CONSTITUTIONALITY

A. *Procedural Problems with Shame Before Conviction*

In a West Palm Beach sting, police arrested fifty-seven suspected patrons of prostitutes. When the local newspaper report failed to list all the suspects' names, the mayor took money from her office budget to buy a newspaper ad listing the names of all those arrested in the sting, including the name of one juvenile suspect.¹⁵⁴ Similarly, when a local paper refused one New Jersey city council's request to publish names of 1,000 men arrested for patronizing prostitutes, the council published an eight-page newsletter containing the names.¹⁵⁵ In neither case had any of those listed been convicted, and many of the suspects had not pled guilty.

As discussed above, shaming as an automatic consequence of arrest avoids the costs of securing a conviction. Communities that shame upon arrest, however, face two possible constitutional barriers for doing so: the fourteenth amendment right to procedural due process and the sixth amendment right to a trial before punishment.

1. Procedural Due Process

The Fourteenth Amendment guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law."¹⁵⁶ Essentially, under the Supreme Court's analysis in *Mathews v. Eldridge*,¹⁵⁷ the Fourteenth Amendment guarantees that the state will use procedures sufficient to ensure that its applications of law to individuals are accurate. The term "State" refers to all state actors, including municipalities, mayors, police officers, and city

154. *Will Publishing Names of "Johns" Deter Prostitution?* (cited in note 30).

155. *Id.*

156. U.S. Const., Amend. XIV, § 1.

157. 424 U.S. 319 (1976).

councils.¹⁵⁸ Furthermore, arrest may fail to provide sufficient "process" to ensure the accuracy the Court requires.¹⁵⁹

Curiously, however, the Supreme Court has short-circuited the possibility of suspected johns making such an argument by holding that reputation does not constitute a life, liberty, or property interest for purposes of procedural due process. In *Paul v. Davis*,¹⁶⁰ the plaintiff sued for damages after police distributed flyers naming him as a suspected shoplifter. He claimed he had been deprived of property—his reputation—without due process. The Court created an absolute barrier to relief, holding that reputation was not a life, liberty, or property interest under the Fourteenth Amendment.¹⁶¹

158. See, for example, *Monell*, 436 U.S. at 690 (defining state actors for purposes of § 1983 causes of action).

159. *Mathews* outlines three factors for consideration: (1) the private interest at stake; (2) the risk of erroneous deprivation; and (3) the cost of safeguards sufficient to insure accuracy. 424 U.S. at 335.

160. 424 U.S. at 693 (1976).

161. *Id.* at 711-12. The Fourteenth Amendment's due process guarantee not only establishes general procedural safeguards, but also regulates the substance of legislation. Traditional substantive due process analysis requires a rational basis for government interference with "life, liberty or property." See *Williamson v. Lee Optical*, 348 U.S. 483, 488-89 (1955) (characterizing the Supreme Court's minimal scrutiny for analysis under the rational basis test). In contrast, this guarantee places strict scrutiny on government interference with "fundamental" rights. See, for example, *Casey v. Planned Parenthood of Pennsylvania*, 510 U.S. 1309 (1994); *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1973).

Because reputation is not considered to be a life, liberty, or property for purposes of procedural due process under *Paul v. Davis*, 424 U.S. at 711-12, deprivation of reputation also fails to trigger the substantive due process inquiry. A john might argue, however, that criminalization of prostitution violates his right to have sex. He would have to argue that laws against patronizing prostitutes constitute an undue burden on his fundamental right to have sex and that such laws are not narrowly tailored to achieve a compelling governmental interest.

Such an argument would not be unprecedented. In response to West Palm Beach john-shaming campaigns, a woman calling herself "Jane Roe II" brought a suit in federal court claiming a constitutional right to be a prostitute. She claimed that under *Roe v. Wade's* interpretation of the Fourteenth Amendment, a woman has the right "to use her own reproductive organs to give sex away or charge for it as she sees fit." Ronnie Greene, *Roe v. Wade Cited in Suit to Legalize Prostitution*, *Seattle Times* A5 (June 6, 1995) (quoting from affidavit filed by Jane Roe II).

When such a case reached a court, however, it would face two substantial legal barriers: *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), and the Supreme Court's refusal to safeguard economic rights as personal rights. Catherine MacKinnon asserts a third barrier, arguing that to proscribe state criminalization of prostitution would "extend the aura of privacy . . . from sex to sexual abuse." MacKinnon, 1 *Mich. J. Gender & L.* at 15 (cited in note 27).

Bowers refused to extend the right to personal autonomy granted in *Roe* to consensual homosexual sodomy. The Court insisted that there was no right to engage in traditionally disfavored forms of sexual activity. 478 U.S. at 191-94. Facing a similar history of condemnation, prostitution would likely fall into the same category. Compare *Bowers*, 478 U.S. at 191-94 with *Decker, Prostitution* at 27-78 (cited in note 17). In addition, even if the court hearing Jane Roe II's claim did acknowledge her right to choose sexual partners, it might yet deny her the right to sell sex. From wage and hour laws to child labor laws, economic rights are subject to pervasive regulation and effectively immune from constitutional substantive due process

The situation in *Paul v. Davis*, however, differs slightly from the plight of a falsely accused john. In *Paul v. Davis*, flyers were disseminated to find the suspect—not just to punish him. The pictures of the accused served as “Wanted” posters. In john-shaming schemes, the sole purpose of publication is punishment: the government intentionally acts to deprive arrestees of reputation. Nonetheless, the Court’s firm stance in *Paul v. Davis* precludes imposing Fourteenth Amendment procedural limitations on governmental deprivations of reputation.¹⁶² Thus, regardless of whether a deprivation of reputation is the goal or the byproduct of government action, it need not adhere to the *Mathews* requirements for procedural due process.¹⁶³

2. Right to a Trial

When Dominic Petrocco, a 56-year-old farmer from Westminster, Colorado, was arrested for patronizing a prostitute,¹⁶⁴ he had never before been arrested.¹⁶⁵ Under a city ordinance, Petrocco’s name and photograph were to be published before trial in the local paper. At his initial appearance, he pled not guilty and requested a jury trial. Petrocco sought a temporary restraining order to keep the ad from appearing until after his trial, contending that publishing the photos was punishment¹⁶⁶ and would cause him

challenges. Compare *Williamson*, 348 U.S. at 488 (describing the constitutionality of economic restrictions in the context of the Fourteenth Amendment) with *Roe*, 410 U.S. at 154 (personal rights). The right to sell sex might easily be categorized as the right to sell rather than the right to have sex. In that case, it would receive significantly less protection and would certainly not qualify as a fundamental right.

A john making a similar argument would face the same *Bowers* obstacle and the barrier of economic right classification. *Bowers* alone, however, would most likely provide an adequate basis for undermining his claim. Indeed, the District of Columbia Court of Appeals held in 1981 that the right of sexual privacy does not include the right to solicit for prostitution. *Lutz v. United States*, 434 A.2d 442, 445 (D.C. App. 1981).

162. Recent challenges before the Supreme Court have only reaffirmed *Paul*’s absolute preclusion of reputation as a protected interest. See *Siegert v. Gilley*, 500 U.S. 226 (1991) (“Defamation by itself is . . . not a constitutional deprivation.”).

163. Despite its recent reaffirmation, *Paul v. Davis* is a decision of questionable wisdom. Before *Siegert*, federal district courts had begun to question *Paul*. See, for example, *McClendon v. Turner*, 765 F. Supp. 251 (W.D. Pa. 1991) (recognizing partial abrogation of the *Paul* holding); *Scheetz v. Morning Call, Inc.*, 747 F. Supp. 1515 (E.D. Pa. 1990) (declining to follow *Paul*). Shame punishment’s frontal assault on reputation might present an excellent context in which to raise a new challenge to *Paul*.

164. Renato Rebey, *Court Rejects “John” Appeal: Man Loses Bid to Keep Photo Out of Hooker-Solicitation Ads*, Denver Post B2 (May 12, 1995).

165. Robey, Denver Post at A1 (cited in note 92).

166. Robey, Denver Post at B2 (cited in note 164).

"irreparable harm" as a businessman, a husband, and a father.¹⁶⁷ Because of the punitive nature of the publication, Petrocco argued that publication without a trial violated the Sixth Amendment.¹⁶⁸

Petrocco's request was denied. After reviewing his petition, the Colorado Supreme Court refused to intervene,¹⁶⁹ leaving undisturbed an earlier Colorado decision holding that such publications were not punitive but administrative.¹⁷⁰ To counter Petrocco's argument, the prosecutor had maintained that whereas the \$1,000 fine imposed a punishment, publishing the photos did not.¹⁷¹ He noted that a disclaimer on the ad explained that those depicted hadn't been convicted.¹⁷²

The public nature of arrest records¹⁷³ also seems to weigh against a finding that publication is punishment;¹⁷⁴ arrest reports commonly appear in private newspapers or on television.¹⁷⁵ However, what is permissible for the media is not necessarily within the power of the state, and the state's traditional passive allowance of media access to public records is hardly analogous to the state's own affirmative publishing of pictures in an admitted effort to shame

167. Robey, Denver Post at A1 (cited in note 92).

168. The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U. S. Const., Amend. VI. Although it only explicitly binds the federal government, the Sixth Amendment has been applied to the states by incorporation through the Fourteenth Amendment. See *Duncan v. Louisiana*, 391 U.S. 145, 148-58 (1968). Petrocco argued the punitive nature of the ads converted publication into "criminal prosecution" for purposes of the Sixth Amendment. Robey, Denver Post at B2 (cited in note 164).

169. Robey, Denver Post at B2 (cited in note 164).

170. Ronate Robey, *Prostitution Law Passes Test: Denver Man's Legal Challenge Rejected by Judge in Aurora*, Denver Post B2 (Dec. 20, 1994) (reporting the Dec. 19 ruling of Aurora Judge Steven Fisher). For a discussion of the argument that shaming is cruel and unusual punishment, see Part VI.C.

171. Robey, Denver Post at B2 (cited in note 164).

172. Robey, Denver Post at A1 (cited in note 92). While truth is an absolute defense to a civil claim in libel, see Part V.B.3.a, the truth of state speech bears little relevance to its status as punishment. An after-the-fact disclaimer publishing an actual finding of innocence, see Robey, Denver Post at B2 (suggesting the possibility) (cited in note 164), could be similarly inconsequential.

173. See Robey, Denver Post at B1 (cited in note 131) (noting that even mug shots are public information) (cited in note 131).

174. *Will Publishing Names of "Johns" Deter Prostitution?* (cited in note 30). See also Renate Rebey, *Prostitute-Soliciting Law Backed: Formal Vote Slated on Plan to Run Photos of Those Arrested*, Denver Post B2 (June 7, 1994) (noting City Attorney's comment that the media often uses photographs of suspects before trial).

175. Among recent examples of such capitalism-driven publicity is that of Hugh Grant's arrest following his solicitation of Divine Brown. See, for example, *Grant's Ill-Fated Pursuit Trivialized*, *Gazette* (Montreal, Early Edition) E5 (Oct. 2, 1995) ("Hugh Grant's escapade with a Hollywood tart will be a question in the 1996 British edition of *Trivial Pursuit*.")

johns.¹⁷⁶ Private publication may be tortious, but if state action publishing the names and photos of prostitutes patrons is punitive, it violates the Sixth Amendment.

Many consequences may follow an arrest. Discerning the line between punitive consequences and administrative consequences is a difficult task. In *Trop v. Dulles*,¹⁷⁷ the Supreme Court stated that regardless of ancillary effects, only a statute that is punitive in purpose is considered penal and subject to constitutional restrictions on punishment.¹⁷⁸ The Court's inquiry does not end, however, with examination of the legislature's stated purpose. Regardless of a claimed regulatory purpose, a court may ask several questions to determine whether the effects of a statute are so punitive as to negate stated legislative intent:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on the finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may be rationally connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.¹⁷⁹

176. Interestingly, many papers have declined to publish shame ads. Their reluctance most likely arises out of a fear of libel liability in case of an error. See *T-D Won't Run Ads Naming Those Arrested*, Richmond Times-Dispatch B6 (Mar. 12, 1993). The San-Diego Tribune summarized its sentiments in a different way: "[T]he newspaper's responsibility is to make news judgments, not to act as a pillory." Gina Lubrano, *Prostitution is a Problem But is Publishing Photos of Johns News or Punishment?*, San Diego Union-Tribune B7 (Aug. 15, 1994). The Kentucky Edition of the Cincinnati Enquirer refused, saying, "We base such decisions on whether or not a specific incident is newsworthy." Jane Prendergast, *AIDS Tests, New Laws Among Anti-Hooker Plans*, Cincinnati Enquirer (Kentucky Edition) A1 (Mar. 1, 1995). Similarly, the Fresno Bee editor distinguished newspapers' coverage of arrests of prominent people by saying those stories had "news value." Hugo Martinez McNaught, *Samuels Proposes Publishing Names of Prostitutes "Johns" * Police Also Request the Power to Seize Arrested Customers' Vehicles*, Fresno Bee B1 (July 24, 1992). Both Denver daily papers have refused to sell space to the city of Aurora for publishing john-shaming ads. Denver Post publisher Ryan McKibben commented, "I don't believe that we should be an arm of the justice system." Renate Rebey, *Prostitute-Client Ads Hit Snag: Post Won't Run Photos; Rocky Mountain News Undecided*, Denver Post B2 (July 13, 1994). See also Renate Rebey, *Aurora Has a Surprise for the Prostitutes, Johns*, Denver Post B2 (Apr. 6, 1995) (noting both daily papers' refusal to publish the pictures).

177. 356 U.S. 86 (1958).

178. *Id.* at 96.

179. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). In *Austin v. United States*, the Supreme Court reaffirmed the viability of the *Mendoza-Martinez* standard to determine whether a given action is so punitive that it must be considered criminal for purposes of sixth amendment trial protections. 509 U.S. 602 (1993). See also *Artway v. New Jersey*, 81 F.3d 1235 (1996) (refusing to apply the standard in analysis under the Ex Post Facte, Bill of Attainder, and

Applying that analysis, in *Kennedy v. Mendoza-Martinez*,¹⁸⁰ the Court held that despite an asserted regulatory purpose for a particular deportation mechanism, its punitive effects demonstrated a truly punitive purpose. The Court held the government to the right to a trial specifically listed in the Sixth Amendment.¹⁸¹

Confusion results when a sanction imposes multiple effects. For example, detention before trial is administrative in purpose.¹⁸² In effect, however, it not only accomplishes the administrative purposes of protecting the community from harm and ensuring the suspect's presence at trial; it also inflicts unpleasantness on the suspect as a result of reasonable suspicion of criminal acts. Even though the suspect is presumed innocent until proven guilty beyond a reasonable doubt, we accept this punitive effect as a byproduct of accomplishing important administrative goals.¹⁸³ Similarly, "Wanted" posters, which may, in effect, damage the reputation of the accused, are accepted as legitimate precedents to trial. They, too, further an administrative purpose: the capture of dangerous criminals.

Sex offender registration and notification statutes raise a closer question. Under such statutes, a suspect convicted for a violent sex crime must register with police after serving jail time. The police then notify community members of the sex offender's presence.¹⁸⁴ Most courts have found registration requirements to be administrative despite their stigmatizing effects, citing protecting the community as the administrative purpose served.¹⁸⁵ In *In re Birch*,¹⁸⁶

Double Jeopardy Clauses). But see *United States v. Ward*, 448 U.S. 242, 249 (1980) (noting that the list of factors is "neither exhaustive nor dispositive").

180. 372 U.S. 144 (1963).

181. *Id.* at 168-69.

182. See *Bell v. Wolfish*, 441 U.S. 520, 536-37 (1979) (noting two administrative purposes: pursuing the suspect's presence at trial and maintaining a secure detention facility).

183. *Id.* (holding that force may be used to detain the suspect as long as it does not constitute punishment).

184. Although under sex offender registration acts, the offender has been convicted, courts have been asked to rule on whether or not shaming is punishment as a threshold inquiry to cruel and unusual punishment claims, see, for example, *People v. Adams*, 144 Ill. 2d 381, 581 N.E.2d 637 (1991) (considering registration as a habitual sex offender), and ex post facto claims, see, for example, *State v. Ward*, 123 Wash. 2d 488, 869 P. 2d 1062, 1067-74 (1994) (considering whether registration as a sex offender violated Ex Post Facto Clause of the Constitution). Of course, the context plays a large part in determining punitiveness. The general standard for classifying punishment is the same, however, for cruel and unusual punishment as it is for punishment without trial. But see *Artway*, 81 F.3d at 1261 (applying a slightly different test for ex post facto, bill of attainder, and double jeopardy challenges).

185. See, for example, *Ward*, 869 P.2d at 1062. In *Ward*, a convicted rapist who had been imprisoned and released was required to register with officials. In order to protect potential victims, community members were notified of his presence. The court held that the purpose of registration and notification was not punitive but regulatory. The court also denied the defendant's ex post facto claim, holding that "the appropriate dissemination of relevant and

however, the California Supreme Court treated registration of a sex offender as a punishment, not simply an administrative convenience.¹⁸⁷

Shame punishments for prostitutes' patrons present a simpler question than do sex offender notification statutes. They bear no rational relation to an administrative purpose. Publication does not protect the public, it does not ensure the suspect's presence at trial, and it does not aid in the capture of criminals. Its purpose and its effect are damage to the accused. It does no more and it intends no more than to punish. Direct, deliberate stigmatizing by the state is punitive, and publication before trial violates arrestees' right to a trial before punishment.

Even those who inflict shame penalties acknowledge their punitive purpose and effect. The prosecutor in Petrocco's case noted that the city of Aurora intended to defend the ordinance all the way to the Supreme Court because of "the deterrent effect it's having."¹⁸⁸ A member of the city council that passed the ordinance admitted to "eliminating the presumption of innocence."¹⁸⁹ The West Palm Beach Mayor cited two punitive purposes for her "shame the johns" campaign: "to embarrass those arrested and to scare off any future customers."¹⁹⁰

In short, john-shaming applies a historical punishment to a traditional criminal activity, purporting to serve the purposes of punishment. It is not rationally related to an administrative purpose, and even stated legislative intent may be provably punitive. Government publishing of the names and pictures of those accused of patronizing prostitutes must therefore follow the establishment of guilt beyond a reasonable doubt. As an automatic consequence of arrest, shaming violates the sixth amendment right to a trial.

necessary information does not constitute punishment for purposes of ex post facto analysis." *Id.* at 1072. See also *Artway*, 81 F.3d at 1235-67 (making a similar finding).

186. 110 Cal. Rptr. 212, 515 P.2d 12 (1973).

187. The court required the judge to inform the defendant of the possibility of registration because it was a possible punishment. *Id.* at 17.

188. Robey, *Denver Post* at A1 (cited in note 92) (statement of City Attorney Charles Richardson).

189. Robey, *Denver Post* at B2 (cited in note 164) (statement of councilwoman Debra Vickrey).

190. Folks, *Sun-Sentinel* at 20A (cited in note 67).

B. Equal Protection

The Fourteenth Amendment's Equal Protection Clause¹⁹¹ has been held to invalidate many instances of state discrimination. State discrimination must always be supported by a rational basis.¹⁹² In addition, government discrimination on the basis of a suspect classification is subject to a heightened level of scrutiny,¹⁹³ and state discrimination with regard to a fundamental right is subject to strict scrutiny.¹⁹⁴ Despite disproportionate impact on certain segments of the population, john-shaming schemes do not violate the Equal Protection Clause.

1. No Gender Discrimination

Gender is a suspect classification, necessitating a heightened level of scrutiny.¹⁹⁵ There is no question that john-shaming schemes have a disproportionate impact on males. When communities merely fined customers and jailed prostitutes, many protested that the sex buyer and the sex seller should receive the same punishment¹⁹⁶ to equalize impacts on men and women. Despite current contentions that shaming johns "equals things out" by focusing on the customer,¹⁹⁷ in truth it perpetuates unequal treatment, merely tilting the scale in the opposite direction.

191. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV.

192. See *United States v. Virginia*, 116 S. Ct. 2264, 2292, 135 L. Ed. 2d 735, 773 (1996) (Scalia, J., dissenting) (noting that every distinction is tested under one of three tests: the rational basis test; intermediate scrutiny; or strict scrutiny); *Romer v. Evans*, 116 S. Ct. 1620, 1629, 134 L. Ed. 2d 855, 868 (1996) (invalidating a distinction based on sexual orientation by way of a particularly stringent version of the rational basis test); *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (noting that a "classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity . . . [and] cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental interest").

193. See *Virginia*, 116 S. Ct. at 2274-75 (intermediate level of scrutiny for gender classification).

194. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (applying strict scrutiny to selective sterilization because reproduction is a fundamental right for purposes of equal protection); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966) (characterizing voting as a fundamental right and therefore applying strict scrutiny).

195. *Virginia*, 116 S. Ct. at 2275; *Kirchberg v. Feenstra*, 450 U.S. 455, 459-61 (1981) (gender discrimination); *Craig v. Boren*, 429 U.S. 190, 191-92 (1976) (reverse gender discrimination).

196. See, for example, *Sexism Purged From Sex Statute*, Morning Call (Allentown) B1 (June 21, 1995) (noting the "inequality in state prostitution laws").

197. *Id.* ("A recent amendment . . . makes the person who buys sex just as culpable as the person who sells it . . . [A] member . . . of the Allentown police department's vice unit said, . . . 'This certainly equals things out and will certainly make it tougher [than it used to be] on the customer.'").

Equal protection, however, does not prevent a state from providing different penalties for different crimes. In jurisdictions that shame johns but not prostitutes, the community has simply chosen to impose a different penalty for patronizing a prostitute than for being a prostitute. Unequal gender impact therefore forms no basis for a claim that shame punishments unconstitutionally deny men equal protection under the law.¹⁹⁸ Because men who patronize prostitutes are treated just like women who seek prostitutes, a state imposing john-shaming punishment does not discriminate on the basis of gender. The suspect classification analysis is therefore inapplicable.

2. No Fundamental Right at Stake

In a creative effort to establish an equal protection challenge to shame punishments, Petrocco¹⁹⁹ argued that he was denied equal protection because shame punishments were imposed only on johns caught in sting operations. Petrocco's community, like most, published only names and photos of johns caught soliciting on public streets, even though studies indicate that street prostitutes constitute only ten to twenty percent of all prostitutes.²⁰⁰ Men who solicited prostitutes on public streets were shamed, but those who solicited over the telephone were not.

While police, prosecutors, and city councils certainly have discretion to clean up the streets and to make decisions about current

198. See, for example, *In re Dora P.*, 418 N.Y.S.2d 597, 604 (N.Y. App. Div. 1979) (concluding that different statutes justify different treatment); *Commonwealth v. King*, 374 Mass. 5, 372 N.E.2d 196, 203-04 (1977) (holding lack of patron statute does not violate prostitute's equal protection rights).

But see *State v. McCollum*, 159 Wis. 2d 184, 464 N.W.2d 44, 48-49 (Wis. Ct. App. 1990) (holding that female performers must be treated like male patrons at a private club because the two groups could have been charged under the same statute); MacKinnon, 1 Mich. J. Gender & L. at 18 (cited in note 27) (asserting discriminatory prosecution of prostitutes and tricks "sounds like" sex discrimination). Professor MacKinnon asserts that any "practice participat[ing] in the subordination of women to men" should be treated as gender discrimination. Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 248 (Harvard U., 1989). She objects to the pretext that the current law is passive and neutral. *Id.*

199. See notes 165-72 and accompanying text.

200. Anne M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 Berkeley Women's L. J. 47, 48-49 (noting that "the remaining eighty to ninety percent work off the streets, in brothels, massage parlors, escort services, and similar establishments, or as independent 'call girls'").

priorities, municipal action is subject to heightened scrutiny under the Fourteenth Amendment if it involves a "fundamental right."²⁰¹

Petrocco's best tactic to invoke heightened scrutiny would be to analogize his situation to that of the chicken thief in *Skinner v. Oklahoma*.²⁰² In that case, the state had passed a law punishing those convicted three times of crimes involving "moral turpitude" with mandatory sterilization. Chicken thievery was considered among the crimes involving moral turpitude and Skinner was a chicken thief. Skinner argued that he had been denied equal protection because those convicted three times of embezzling and other non-turpitudinal crimes were not sterilized. While the class of three-time chicken thieves was an opt in/opt out class—Skinner had the choice whether or not to steal chickens—Skinner argued that the class had an implication of permanence about it. Furthermore, the bias against punishing white-collar crimes suggested congressional intent to discriminate against the poor. Largely because the right to reproduce was considered so important, even fundamental,²⁰³ the court held that there was insufficient basis for such a disparity in treatment between chicken thieves and embezzlers.

Similarly, even a convicted john might argue that an ordinance prescribing shame only for johns caught in stings discriminates against a class with some permanence about it,²⁰⁴ that the ordinance's exclusion of high-class telephone solicitation suggests discrimination against non-upper-class offenders, and that, for purposes of equal protection, reputation is a fundamental right. Because wealth is not a suspect classification,²⁰⁵ however, such an argument would not invoke strict scrutiny. Nor would reputation likely be considered a fundamental right for equal protection purposes after *Paul v. Davis*.²⁰⁶ Similarly, the right to have sex with a prostitute would run into

201. The list of fundamental rights for equal protection purposes is not the same as the category of fundamental rights for purposes of substantive due process. Although identical language is used in the two areas, each has a separate fundamental rights doctrine.

202. 316 U.S. 535 (1942).

203. Although the court questioned the classification as well, it emphasized the fact that it applied strict scrutiny because "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541.

204. Anne Lucas argues that the focus on street prostitution tends to target prostitutes who are "poor women and women of color." Lucas, 10 Berkeley Women's L. J. at 48-49 (cited in note 200). Petrocco might argue the same effective discrimination in prosecution of only street solicitors.

205. *James v. Valtierra*, 402 U.S. 137, 142-43 (1971).

206. See Part VI.A.1.

Bowers's admonition that there is no fundamental right to engage in "traditionally disfavored" forms of sex.²⁰⁷

3. Rational Basis

Even a benign distinction, although not inherently "suspect," must rest on a rational basis.²⁰⁸ Either classification discussed above, however, rests on solid rational footing. Just as *People v. Superior Court* upheld targeting of prostitutes as a rational decision to focus on the "profiteer" rather than the customer,²⁰⁹ the shift to a customer-focused punishment represents a change in public perception of the transaction—perhaps johns and not prostitutes are the real "profiteers."²¹⁰ Similarly, the focus on street prostitution is rationally related to the legitimate goal of cleaning up the streets. In summary, an equal protection challenge holds little or no promise of invalidating a shame scheme.

C. Cruel and Unusual Punishment

The Eighth Amendment's mandate that "cruel and unusual punishments [shall not be] inflicted,"²¹¹ raises frequent questions about the constitutional validity of shame penalties.²¹² Such questions are best answered in two parts: first, whether publishing names and

207. See note 161.

208. See note 192.

209. 562 P.2d at 1323.

210. *Id.* at 1319-23. This shift would move toward the view advocated by radical feminists, including the prostitutes' rights organization WHISPER: "As women are prostituted, men are the beneficiaries—both individually and as a class." Fechner, 4 Colum. L. J. at 64 (cited in note 5).

211. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., Amend. VIII. The Eighth Amendment's restriction on cruel and unusual punishment applies to the states through the Fourteenth Amendment. See *Robinson v. California*, 370 U.S. 660, 667 (1962).

212. See notes 220-21 and accompanying text. The United States Constitution establishes minimum safeguards for individual rights. A state is free to assume more limitations on its power through its own constitution. A state constitution might, for instance, have a lower threshold for cruel and unusual punishment. In *In re Reed*, 33 Cal. 3d 915, 663 P.2d 216 (1983), the California Supreme Court found a child molester's shame punishment to be cruel and unusual under its interpretation of the California Constitution. *Id.* at 222. In addition, many state constitutions affirmatively grant individuals a right to privacy. Such a constitutional provision could, in effect, nullify *Paul v. Davis*, raising procedural and substantive due process questions. In short, even if a shame punishment passes federal constitutional muster, it must also undergo each inquiry anew under the applicable state constitution.

photos of prostitutes' patrons constitutes punishment, and second, whether publication qualifies as "cruel and unusual."

The first of the two questions may quickly be answered in the affirmative. As previously explained, the purpose and the effect of publication of the names and photos of prostitutes' patrons are wholly punitive.²¹³ Even though publication qualifies as punishment, however, it is not likely to be found unconstitutionally cruel and unusual.

The Eighth Amendment generally does not prevent the government from inflicting harsh penalties on convicted offenders. Even corporal punishment is not patently violative of the Eighth Amendment.²¹⁴ Although the law defining "cruel and unusual" continues to develop,²¹⁵ the general inquiry remains that announced by the Supreme Court in *Coker v. Georgia*:²¹⁶ a punishment violates the Eighth Amendment if it does not contribute to acceptable goals of

213. See Part IV.A.2.

214. Kahan, 63 U. Chi. L. Rev. at 608 (cited in note 53) (summarizing cases upholding corporal punishment against eighth amendment attacks).

215. The Constitution's proscription of "cruel and unusual punishments," U.S. Const. Amend. VIII, has commonly been used to limit disproportionate applications of the death penalty. See *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (noting the trend "in recent years" as of 1980) (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Furman v. Georgia*, 408 U.S. 238, 458 (1972) (Powell, J., dissenting). More recently, however, the clause has supported challenges to non-capital sentences as well. In *Solem v. Helm*, 463 U.S. 277 (1983), the United States Supreme Court held that a life sentence was so disproportionate to the defendant's crime—the uttering of a "no-account" check—as to be unconstitutional under the Eighth Amendment. *Id.* at 302. The Court acknowledged that a finding of disproportionality would be "exceedingly rare" in a non-capital context, *id.* at 289, but reaffirmed the Constitution's commitment to preventing disproportionate punishments, *id.* at 290. Finding that its analysis should be guided by objective criteria, the Court established a set of factors to guide eighth amendment proportionality analysis: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292.

After *Solem*, lower courts dutifully applied the three factors until the Supreme Court heard a proportionality challenge in *Harmelin v. Michigan*, 501 U.S. 957 (1991). In *Harmelin*, the plurality opinion, written by Justice Scaha and joined only by Chief Justice Rehnquist, specifically called for the overruling of *Solem* in favor of the deference to the legislature mandated in *Rummel v. Estelle*. *Id.* at 985-90. It limited proportionality review to the *Coker* line of death penalty cases, calling eighth amendment proportionality analysis one of many areas in which "death is different." *Id.* at 993-94. In contrast to the plurality opinion, however, Justice Kennedy, joined by Justices O'Connor and Souter, maintained the concept of proportionality review. He concluded, however, that the last two prongs of the *Solem* analysis were to be applied only if analysis under the first prong, comparing the crime to the punishment, yielded a threshold finding of "gross disproportionality." *Id.* at 1005 (Kennedy, J., concurring). One dissent, written by Justice White and joined by Justices Blackmun and Stevens, applied all three *Solem* factors. *Id.* at 1009-27. Justice Marshall also dissented, writing separately only to express his view that the death penalty is unconstitutional in all instances. *Id.* at 1027.

The scattered opinions in *Harmelin* left lower courts without clear direction on the appropriate proportionality analysis for noncapital crimes.

216. 433 U.S. 584 (1977).

punishment or if its severity is grossly disproportionate to the offense.²¹⁷

As explained above, shame punishments at least theoretically further accepted goals of punishment.²¹⁸ Under *Coker*, however, even a proper punishment may be so disproportionate as to be unconstitutionally cruel and unusual.²¹⁹ Many have suggested that shame and humiliation may be too harsh a penalty for patronizing a prostitute,²²⁰ especially in the case of a first-time offender.²²¹

One scholar contends that difficulties in performing proportionality inquiries are especially acute with shame punishments because their effect on specific offenders is utterly unquantifiable.²²² Printing "a rogue's gallery of America's Least Wanted"²²³ certainly risks an enormous toll on the individuals depicted. The tragic reaction of the young New Jersey engineer,²²⁴ while hardly typical, is not altogether an anomaly. A Massachusetts man also committed suicide upon seeing his name in the paper.²²⁵ Families, too, are affected by the deliberate imposition of public humiliation.²²⁶ After fifty-seven arrestees were shamed in the Palm Beach Post, two of the men reported that the publication was partially responsible for leading their wives to divorce them.²²⁷

217. *Id.* at 592.

218. See Part IV.

219. *Coker* itself held that the death penalty was so disproportionate in a rape case as to be unconstitutional. 433 U.S. at 599.

220. See, for example, Barfield, *San Diego Union-Tribune* at B2 (cited in note 3) (reporting a newspaper editor's sentiment: "I don't think [johns are] the most serious offenders in our society."). One man who agreed to pay a decoy female police officer \$20 for oral sex had his picture published in the paper and was forced to pay the \$1000 fine used to cover costs of publishing the ads. He remarked, "guys go out and beat the hell out of their wives and get a \$20 fine." Robey, *Denver Post* at B2 (cited in note 153). Of course, if his characterization is no exaggeration, perhaps it is the penalty for domestic violence that should be raised.

221. See *Cities Try to Shame Prostitutes and Johns Out of Town* (cited in note 36) (comments of Jane Curtly of the Reporters' Committee for Freedom of the Press lamenting the harshness of the penalty). See also Spencer, *Denver Post* at D1 (cited in note 6) (proposing that only those twice convicted should be shamed).

222. Massaro, 89 Mich. L. Rev. at 1937 (cited in note 40).

223. Kevin Simpson, *Now Look Who's Pandering to the Public's Prurient Interest*, *Denver Post* B1 (June 23, 1994).

224. See note 6 and accompanying text.

225. The Brockton Enterprise in Massachusetts began publishing patrons' names in 1966, when police enlisted their help. When one man who had appeared in the list killed himself, many questioned the policy. Authorities claimed he "had other problems and might not even have known his name appeared." Robey, *Denver Post* at B2 (cited in note 95).

226. Tucker, *Denver Post* at B1 (cited in note 93) (reporting the devastated reaction of the wife of an arrested man).

227. Westneat, *Seattle Times* at A1 (cited in note 56) (noting, however, that one of the two admitted "he 'wasn't home much' before the publication anyway").

Furthermore, once the public receives the shaming information, it may do with it as it pleases.²²⁸ More than one community notified of a sex offender in its midst has harassed him or vandalized his home.²²⁹ Job loss and consequent economic hardship are easily foreseeable. One small shame ad may have far-reaching punitive consequences.

Despite such arguments of disproportionality, however, "cruel and unusual" challenges have recently proven increasingly difficult to sustain for any punishment short of the death penalty. In *Harmelin v. Michigan*,²³⁰ the Supreme Court's most recent statement on disproportionality, two justices advocated eliminating proportionality review for non-capital cases.²³¹ In *People v. Mills*,²³² the California Supreme Court held that a sex offender, by committing his reprehensible act, had sacrificed his constitutional rights.²³³ The Illinois Supreme Court in *People v. Adams*²³⁴ asserted that stigmatization of an offender resulted not from a state registration statute but from the offender's own culpable actions.²³⁵ Indeed, every court to reach the issue has denied that shame punishments are unconstitutionally cruel and unusual.²³⁶ Shaming thus rests on solid legal footing in this area.

D. Summary

As an automatic consequence of arrest, shame punishments may seem cheaper than post-conviction publishings, but they almost

228. Massaro, 89 Mich. L. Rev. at 1938 (cited in note 40).

229. See, for example, Larrabee, USA Today at 3A (cited in note 2) (reporting an incident in Snohomish County, Washington); Catherine A. Trinkle, *Federal Standards for Sex Offender Registration Public Disclosure Confronts the Right to Privacy*, 37 Wm. & Mary L. Rev. 299, 305-06 (1995).

230. 501 U.S. 957 (1991). See note 215.

231. See note 215.

232. 146 Cal. Rptr. 411 (Cal. Ct. App. 1978).

233. *Id.* at 417.

234. 144 Ill. 2d 381, 581 N.E.2d 637 (1991).

235. 581 N.E.2d at 641.

236. *Goldschmitt v. State*, 490 So.2d 123, 125 (Fla. Dist. Ct. App. 1986) (DUI bumper sticker); *State v. Bateman*, 95 Or. App. 456, 771 P.2d 314 (1988) (sign on property of sex offender); *State v. Letterlough*, 613 N.Y.S.2d 687, 688 (N.Y. App. Div. 1994) (DUI plates), rev'd on other grounds, 631 N.Y.S. 2d 105 (1995); *Ballenger v. State*, 210 Ga. App. 627, 436 S.E.2d 793, 794 (1993) (stigmatizing bracelet for DUI offenders); *Lindsay v. State*, 606 So.2d 652, 657 (Fla. Dist. Ct. App. 1992) (newspaper ad as probation condition for drunk driver); *People v. McDowell*, 59 Cal. App. 3d 807, 842-43 (1976) (taps on shoes of purse-snatcher). See also Rosalind K. Kelley, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional?*, 93 Dick. L. Rev. 759 (1989) (considering the constitutionality of shame punishments).

certainly violate the sixth amendment right to a trial. Communities must therefore try arrestees or secure their guilty pleas before publishing. Other arguments that shame punishments are unconstitutional, however, possess questionable merit under current law.

VII. SOCIAL COSTS OF IMPOSING SHAME

[H]ere if anywhere we live among uncertainties between which we have to choose. . . . [E]xisting law imposes only limits on our choice and not the choice itself.

—H.L.A. Hart²³⁷

Although the Constitution's limitations on government power establish boundaries for lawmakers, they do not serve as guardians of good public policy. Policymakers debating a john-shaming policy must balance the benefits of shaming against the costs, financial and social. Although shame punishments exact a smaller financial toll than do traditional punishments, they require social sacrifices different from those imposed by the traditional system of fines and imprisonment. Humaneness concerns, costs to society, and the danger of a backlash certainly raise the stakes and may tip the balance away from john-shaming.

A. *Humaneness Concerns*

Shame punishments may be either quantitatively or qualitatively inhumane. A punishment is quantitatively inhumane if it is too great for the gravity of the harm inflicted by the defendant. Thus the same concerns of disproportionality raised by the Eighth Amendment raise the specter of quantitative inhumaneness. For policymakers—who ask not only whether stigmatizing publicity is constitutional, but also whether it is advisable—disproportionality concerns do not vanish once they fail to establish an eighth amendment “cruel and unusual” claim.

Professor Kahan comments that because prison is an accepted mode of punishment and shame punishments are less debilitating and inhumane than prison, shame punishments must necessarily be ac-

237. H.L.A. Hart, *Positivism and Separation of Laws and Morals*, 71 Harv. L. Rev. 593, 629 (1958).

ceptable as well.²³⁸ This analysis, however, does not necessarily apply to those crimes for which prison is not an accepted mode of punishment. Because johns have traditionally not been imprisoned but fined, Professor Kahan's references to the inhumaneness of prison initially seem unpersuasive.

In some sense, however, shaming johns does act as an alternative to prison: policymakers have chosen to focus on shaming johns rather than on imprisoning prostitutes. If it is not intolerably inhumane to imprison prostitutes, therefore, how can it be intolerably inhumane to stigmatize johns? If we accept the initial assertion that prison is less humane than shaming, quantitative disproportionality becomes a difficult argument to sustain.

The question remains, however, whether deliberate state stigmatization is somehow qualitatively inhumane. A qualitative analysis is distinct from a quantitative analysis in that it does not argue that a certain punishment is too great a penalty for prostitutes' patrons. Instead, it asserts that a certain punishment is an improper type of penalty. For example, many would consider the loss of a finger a quantitatively smaller punishment than life in prison. However, for policymakers assessing the relative advisability of the two sanctions, the qualitative distinction between taking freedom and taking a body part forms a crucial consideration.

Unlike other types of penalties, shame punishments are "explicitly designed to make a public spectacle of the offender's conviction and punishment, and to trigger a negative, downward change in the offender's self-concept."²³⁹ Colonial society's sense of community and common faith may once have imbued shame penalties with some power to reinforce normative consensus. Today, however, in a climate of increasing normative fragmentation, that function seems unlikely.²⁴⁰ Instead, shame punishments may sacrifice individuals' dignity with little discernible impact on prostitution.²⁴¹ Whatever their meaning, shame punishments' qualitative distinction from other sanctions raises humaneness concerns that form a possible cost of selecting shaming.

238. "[S]ubstituting shaming for imprisonment only reduces severity by subtracting the afflictive elements of incarceration." Kahan, 63 U. Chi. L. Rev. at 611 (cited in note 53).

239. Massaro, 89 Mich. L. Rev. at 1886 (cited in note 40).

240. See note 76.

241. See also Kahan, 63 U. Chi. L. Rev. at 611 (cited in note 53) (explaining that prison is the punishment of choice because it deprives offenders of liberty, a prize possession of American citizens, common to all).

B. Society's Loss of the Shamed Individual

[T]hey shrink from displaying themselves black and filthy in the view of men; because, thenceforward, no good can be achieved by them; no evil of the past be redeemed by better service.

—Nathaniel Hawthorne, *The Scarlet Letter*²⁴²

Drastic impacts on individual offenders and their families also exact a toll on society. If shame forces the devaluing of a particular individual, value is lost not only to that person but also to society. As discussed above, non-reintegrative shame punishments hold no promise of rehabilitation or specific deterrence.²⁴³ Hence, perhaps even more so than prison, stigmatizing publicity sacrifices the offender, discarding him and encouraging him to lead a life of deviance. A salesman known for the strength of his character, for example, once shamed, would be of markedly less value to his company.²⁴⁴ If he lost his job, his contribution to the work force might be lost to society as well.

This is not to suggest that punishing johns exacts a higher toll on society than imprisonment of prostitutes.²⁴⁵ Rather, effective, non-reintegrative shame punishment of any group of criminals may be more costly to society than another type of punishment, especially if shame punishments publicly label offenders as deviants, pushing them into ongoing deviance. If, as predicted, the offense becomes the “master trait” to the exclusion of all other traits,²⁴⁶ many a good athlete, good conversationalist, and good dancer may be lost to society.

C. Photosynthesis: The Side Effects of Sunlight

Legal theory has long referred to sunlight as a disinfectant.²⁴⁷ Theoretically, publicity alone may prevent bad acts by threatening

242. Hawthorne, *The Scarlet Letter* at 142 (cited in note 1).

243. See Parts IV.B and IV.D.1.

244. See Kahan, 63 U. Chi. L. Rev. at 638 (cited in note 53) (claiming shamed individuals will be “shunned in the market-place”).

245. Harry Benjamin and R.E.L. Masters drew this problematic conclusion in 1964 because there were far more patrons than prostitutes and because customers were “an important source of support for family, business, church, state, and other institutions.” *Prostitution and Morality* at 386 (cited in note 19).

246. See note 81 and accompanying text.

247. “[S]unlight is thought to be the best of disinfectants.” Louis Brandeis, *Other People's Money* 92 (Stokes, 1933). The Sunshine Act was intended to disinfect the decision-making processes of government by opening it to public purview. 5 U.S.C. § 552b (1994 ed.).

exposure. Biologically speaking, however, sunlight not only disinfects but also acts as a crucial source of energy.²⁴⁸ It fosters growth.

The sunlight of shame punishments might disinfect johns and their communities. Theories of punishment support that hypothesis. Equally plausible, however, is the opposite effect; sunlight may make the prostitution industry grow. Even scholars convinced of society's potential to exercise reintegrative shaming acknowledge the potential backfire of purely stigmatizing, non-reintegrative punishment.²⁴⁹ When the authority imposing shame makes no effort at reconciliation, deviance itself may become status, creating subcultures that amplify deviance.²⁵⁰ Especially if shaming is perceived as disproportionate or inhumane, the offender's community may fight back, elevating the offender to heroic status and losing faith in the criminal justice system.²⁵¹

Contrary to shamers' predictions, shame punishments may not unequivocally condemn offenders' conduct. They may evoke sympathy²⁵² or even admiration. Because shame punishments depend so heavily on community disapproval of the offender's acts, they are powerless to change societal norms. Rather, they reinforce existing norms, whatever those norms may be, by disseminating the names and identities of prostitutes' patrons. Studies have indicated that a significant proportion of adult males have patronized prostitutes.²⁵³ In addition, empirical studies demonstrate that a perception of widespread compliance increases individuals' desire to obey the law while a belief that others disobey the law decreases people's commitment to follow the law.²⁵⁴ If that is true, might not publication of the identities of large numbers of prostitutes' patrons exacerbate the prostitution problem rather than curing it? If community

248. By photosynthesis, plant tissues, exposed to sunlight, produce the energy they need to grow. Helena Curtis and N. Sue Barnes, *Biology* G16 (Worth Publishers, 5th ed. 1989).

249. See Kahan, 63 U. Chi. L. Rev. at 644-45 (cited in note 53) (offering support for shaming punishments because they are no more stigmatizing than prison).

250. Braithwaite, *Crime, Shame, and Reintegration* at 101 (cited in note 42).

251. *Id.*

252. Massaro, 89 Mich. l. Rev. at 1932-33 (cited in note 40).

253. One study found that approximately 60% of adult men in the United States have used prostitutes. Fechner, 4 Colum. J. Gender & L. at 64 n.175 (cited in note 5) (citing Nancy Erbe, *Prostitutes: Victims of Men's Exploitation and Abuse*, 2 Law & Inequality J. 609, 624 n.117 (1984); James, *Prostitutes and Prostitution*, in Sagarin and Montanino, eds., *Deviants* at 402 (cited in note 25)). An earlier study found 69% of the total white male population had patronized prostitutes. Decker, *Prostitution* at 217 (cited in note 17) (citing Alfred C. Kinsey, Wordell B. Pomeroy, and Clyde E. Martin, *Sexual Behavior in the Human Male* 597 (Sanders, 1948) (noting, however, that at most, 15-20% of the total male population patronized prostitutes more than a few times a year)).

254. Kahan, 63 U. Chi. L. Rev. at 604 (cited in note 53) (citing various sources).

response is not negative but sympathetic or even positive, how will such a response affect general deterrence?

William E. Nelson explored the fragility of sexual mores in another context:

[S]exual repression before the [Second World W]ar depended on the maintenance of a gap between cultural leaders and those who violated norms—a gap that made the violators seem evil and inferior. But when one's best friend was discovered in an affair with one's next door neighbor, when the teenage daughter of the town's bank president became pregnant, or when the high school valedictorian joined a gay or lesbian community in San Francisco after graduation from college, the gap could no longer be maintained. The violators were now too much like oneself or one's children and, however much one must abhor their specific misconduct, it was impossible to treat them as norwise most respectable . . . "a moral crisis and an acute moral problem . . . for the administration of criminal justice" arose.²⁵⁵

Interestingly, statistics about johns suggest the possibility of a similar problem if prostitutes' patrons' identities are publicized. Rather than succeeding in fleeing from sexual deviants, shamers may discover that they—and their fathers, brothers, and sons—are the deviants. In the extreme, deviance may become the norm, eventually leading to the decriminalization of prostitution.²⁵⁶

VIII. CONCLUSION: SHAMING AS SPEECH

Careful the spell you cast,
Not just on children.
Sometimes the spell may last
Past what you can see
And turn against you. . .

Careful the tale you tell.
That is the spell.
Children will listen. . .

—Stephen Sondheim, *Into the Woods*²⁵⁷

255. Nelson, 5 Yale J. L. & Human. at 316-17 (cited in note 15) (discussing the origins of a post-World War II movement to decriminalize certain kinds of sexual conduct).

256. While decriminalization would not be an unthinkable alternative, it is likely not in keeping with shamers' hopes.

257. Stephen Sondheim and James Lapine, *Into the Woods* 136 (Theatre Communications Group, 1989).

Shaming's character as pure communication truly distinguishes it from other sanctions. Contrary to the estimation that stigmatizing shaming is "at most, a retributive spectacle that is devoid of other positive community-expressive or community-reinforcing content,"²⁵⁸ shame sanctions, regardless of their utility as punishments, cannot help but speak to the public. Most interesting is not the text of the ads but the subtext. Policy-makers must therefore consider the subtext of shame ads: what statements are made by publishing names and pictures of prostitutes' patrons?

First and foremost, shaming prostitutes' patrons asserts that customers are criminals. It thus represents a striking counter to the sentiment that johns are not really part of the criminal element.²⁵⁹ Second, shaming patrons indicates that prosecuting prostitution-related crimes is a priority. In a 1973 national poll, fewer than half of those surveyed agreed that "[p]rostitution does more harm than good."²⁶⁰ The reemergence of john-shaming schemes suggests that public sentiments have changed. Finally, shaming johns seems to speak to a hope that, at least within a given community, demand for prostitution can be decreased. It is not unassailable, and the prostitution problem is not unconquerable.

But pictures, names, and the "arrestee" label do not indicate that patronizing prostitutes is morally reprehensible. They simply communicate that a given group of people was convicted of or arrested for patronizing prostitutes. The community is left to draw its own moral conclusions. Indeed, even if an ad did seek to impose moral views on its audience, perhaps by saying, "The following men were convicted of the awful, immoral crime of patronizing prostitutes," its message would reflect as much upon the government as it would upon the offenders. Just as public floggings indicted state brutality, public shaming calls state moralizing into question.

258. Massaro, 89 Mich. L. Rev. at 1884 (cited in note 40). In Professor Massaro's defense, however, it may be correct to say that the expression involved in shaming produces no *positive* consequence.

259. See also Nelson, 5 Yale J. L. & Human. at 283-88 (cited in note 15) (discussing 1930s judges' aversion to "'class[ifying] an otherwise respectable man with those 'who are vagrants'" (quoting *People v. Anonymous*, 292 N.Y.S. 282, 286)).

260. Id. (citing M. Anne Jennings, Comment, *The Victim as Criminal: A Consideration of California's Prostitution Law*, 64 Calif. L. Rev. 1235, 1250 (1976) (citing 1973 Harris Survey)). Similarly, a 1985 Department of Justice survey measuring public perceptions of the severity of various crimes placed prostitution alongside making obscene phone calls and placing "large" eggs in "extra large" containers. Pearl, 38 Hastings L. J. at 788 (cited in note 126) (quoting Bureau of Justice Statistics, U.S. Dep't of Justice, *The National Survey of Crime Severity, NCJ-96017* (1985)).

Shame punishments provide no hope of rehabilitation or specific deterrence. Instead, they purport to offer possible banishment, general deterrence, incapacitation, denunciation, and retribution. Merely banishing a city's undesirable elements into another community reflects provincial urges quite contrary to, and perhaps in reaction to, current globalization. In addition, in the absence of rehabilitation and specific deterrence, general deterrence and incapacitation imply a sacrifice of the individual for what is perceived as the greater societal good. Denunciation and retribution combine similar individual sacrifices with additional consequences: denunciation uses the mechanism of the state to teach proper moral norms, and retribution exacts societal vengeance.

All public punishments display the government's priorities, and shame punishments are no exception. Like a State of the City address, La Mesa's billboard and its shame ads talk directly to the public. Shaming speaks.

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