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*

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I. INTRODUCTION

An interstate billboard warns visitors to La Mesa, California: “Attention johns: We take pictures.” In 1994, to widespread political accolades, the city initiated a policy of publishing names and pictures of prostitutes' patrons in local newspapers. 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, 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,

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' 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. 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, it defines the circumstances under which such punishments may be effective, cost-efficient, and constitutional. This Note then explores the non-financial costs of shaming johns, highlighting some of the more subtle policy considerations. 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.

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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).


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.\(^\text{12}\)

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*\(^\text{13}\)

Dubbed “the most ancient profession in the world,”\(^\text{14}\) prostitution is commonly seen as the root of modern crime and a barrier to urban revitalization.\(^\text{15}\) A worldwide phenomenon,\(^\text{16}\) 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).

\(^{16}\) 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).
The answer must be more than the bare power of sexual desire;\textsuperscript{17} statistics suggest that few of prostitutes' customers perceive prostitutes as their only sexual option.\textsuperscript{18} Rather, patrons are largely married men,\textsuperscript{19} not uncommonly "attractive" and "comfortable."\textsuperscript{20} Most of them have "at least a little disposable income."\textsuperscript{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.\textsuperscript{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.\textsuperscript{23} Unlike open promiscuity, which

\begin{itemize}
\item[17.] John F. Decker, \textit{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 Woolston, \textit{Prostitution in the United States} 80 (Patterson Smith, 1969); Edward Dengrove, \textit{Sex Differences}, in Albert Ellis and Albert Abarbanel, eds., \textit{The Encyclopedia of Sexual Behavior} 831, 933-34, 936-37 (Hawthorn Books, 1961)).
\item[18.] "[I]t is rare that [a patron] is totally dependent on prostitutes for his sexual outlet." Decker, \textit{Prostitution} at 217 (cited in note 17) (citing Ned Polsky, \textit{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.
\item[19.] Margaret A. Baldwin, \textit{Strategies of Connection: Prostitution and Feminist Politics}, 1 Mich. J. Gender & L. 65, 74 (1993). See also Decker, \textit{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, \textit{Prostitution and Morality} 201 (Julian Press, 1964) (finding that 50-75\% of johns are married).
\item[20.] Michael Colton and Dennis Romero, \textit{Grant's Arrest Leaves Many Asking "Why?"}, L.A. Times E1 (June 30, 1995).
\item[21.] Baldwin, 1 Mich. J. Gender & L. at 74 (cited in note 19).
\item[22.] Benjamin and Masters, \textit{Prostitution and Morality} at 196 (cited in note 19).
\item[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, \textit{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, \textit{Lovers, Friends, Slaves . . . The Nine Male Sexual Types: Their Psychosexual Transactions With Call Girls} 124 (Berkeley Publishing, 1974) ("Lovers, Friends, Slaves"); Albert Ellis, \textit{Sex and the Single Man} 186-87 (1963); Woolston, \textit{Prostitution in the United States} at 81 (cited in note 17). See also Benjamin and Masters, \textit{Prostitution and Morality} at 194 (cited in note 19). See generally Atwood, \textit{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. In addition, prostitutes specialize in sex acts that might otherwise be considered deviant. 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, some illusion of power, and the thrill of risk.

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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).


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 prostitutes, 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, prostitution may shift to a different community or even disappear for a time. Before long, however, the age-old demand for prostitutes resurfaces and is met by an equally bottomless supply.

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


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 El (cited in note 29).

29. 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 . . .").


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 2B (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.\textsuperscript{3} Prostitute-focused punishment schemes, however, have generated countless complaints due to their disproportionate impact on women.\textsuperscript{4} They have also proven unsuccessful at stamping 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.\textsuperscript{5} As one mayor explained: "The reality is, what we've

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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."


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, \textit{Prostitution: Naming an International Offense}, 18 Fordham Int'l L. J. 163, 165, 167 (1994) (summarizing the history of international efforts against prostitution).


34. See, for example, Rhode, Nat'l L. J. at A21 (cited in note 23). But see \textit{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 "profitier" 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, \textit{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, \textit{Report of the Florida Supreme Court Gender Bias Study Commission}, 42 Fla. L. Rev. 803, 822 (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 \textit{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."

In the face of the failure of traditional remedies, and perhaps in an effort to equalize punishment of buyers and sellers, recent proposals for combating prostitution focus not on stunting the availability of prostitutes but on decreasing the demand for them.\textsuperscript{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."\textsuperscript{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, \textit{The Scarlet Letter}\textsuperscript{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.\textsuperscript{40} They considered the pillory, the ducking stool, and the stocks excellent tools for deterrence, denunciation, and rehabilitation.\textsuperscript{41}

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

41. Id.
brutality... did as much to legitimate brutality as [they] did to dele-
gitimate crime.”42 In addition, because colonial communities pos-
sessed 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 punish-
ment, 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 pur-
pose.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 19914 is evolving into a com-
mon practice, surfacing mostly in areas where prison is deemed inap-
propriate. A few examples illustrate the phenomenon: the landlord of

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).
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.\footnote{Larrabee, USA Today at 3A (cited in note 2).} In the corporate sphere, the new Federal Sentencing Guidelines authorize bad publicity as a punishment for corporations violating criminal laws.\footnote{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).} 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.\footnote{Larrabee, USA Today at 3A (cited in note 2).}

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.\footnote{“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).} 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.
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 sentence of any person twice found guilty of patronizing a prostitute.53

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, scattered billboards, hand painted signs, 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. 691, 691-34 (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.


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).


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. In Miami, Florida, however, "names, addresses, birth dates and arrest dates scroll across the screen every half hour." Arrest reports also echo on radio waves and telephone wires. Kansas City has a "Hooker Hotline." Like several other communities, it also sends "outing" letters to homes, breaking the news to loved ones.

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.

As a probation condition, a bargaining chip for a lower sentence, or a sentence for those...
found guilty, 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. 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. The point of retribution is not to affect the offender but merely to "satisfy a community's interest in revenge." 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, 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." In reintegrative shaming, stigmatization is followed by efforts to reunite the offender with the

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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.\textsuperscript{73}

Contemporary American society, however, may lack the tools to accomplish such reintegration.\textsuperscript{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.\textsuperscript{75}

None of these five factors is present in contemporary United States communities.\textsuperscript{76} It is the absence of the fifth and final factor,\textsuperscript{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.\textsuperscript{78} Without reintegration, shaming will be bare

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\textsuperscript{73} Id. Reintegration ceremonies have been particularly effective in Japan. Id. at 61-65.
\textsuperscript{74} Massaro, 89 Mich. L. Rev. at 1884 (cited in note 40).
\textsuperscript{75} Id. at 1883.
\textsuperscript{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.
\textsuperscript{77} "[F]ederal and state law enforcement includes no public ritual or ceremony for reintegrating or 'forgiving' a shamed offender." Id. at 1884.
\textsuperscript{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, \textit{Crime, Shame, and Reintegration} at 86 (cited in noto 42).
\end{flushright}
"stigmatizing." While stigmatizing may be effective in other
regards, it does little to rehabilitate the offender.

The individual is assigned a “master status trait.” ... This label will domi-
nate all other “characteristics” of the individual; “good athlete,” “good conversa-
tionalist,” “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.

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. 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
ostacization 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.

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

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79. See id. at 102.
80. Id. at 55-56.
81. Id. at 56 (quoting R. M. Page, Stigma 10 (Routledge and Kegan Paul, 1984)).
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 behavior 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.\textsuperscript{88} In contrast, authorities generally reject proposals to shame prostitutes, reasoning that prostitutes are undaunted by the prospect of publicity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{91} However, initiators and executors of john-shaming schemes tout their plans as excellent deterrents.\textsuperscript{92} In addition, some whose

\textsuperscript{88} See, for example, Cities Try 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?”).

\textsuperscript{89} 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 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, “About 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 strong incentive—psychological, economic, and otherwise—to avoid criminality.” Kahan, 63 U. Chi. L. Rev. at 643 (cited in note 53).

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{91} Kahan, 63 U. Chi. L. Rev. at 638 (cited in note 53).

\textsuperscript{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 john] 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.\textsuperscript{93} Generally speaking, however, legal and sociological scholars have raised serious questions about the power of any punishment to deter crimes.\textsuperscript{94} In addition, several communities have shamed prostitutes’ customers for some time without experiencing the expected radical decrease in demand.\textsuperscript{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.\textsuperscript{96} Miami, Florida posted convicted johns’ names on billboards for three years

\begin{quote}
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, 1984) (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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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. 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.

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, their ostracizing and labelling qualities may produce precisely the opposite effect, 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, hampering not only rehabilitation 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, 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.


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

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,\textsuperscript{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.

\textbf{E. Denunciation}

Another primary aim of shaming johns is to denounce prostitution.\textsuperscript{105} Although all punishment has been generally characterized as a "sign indicating . . . the sentiments of the collectivity,"\textsuperscript{106} some critics consider it inhumane to use an individual to express the moral values of the majority.\textsuperscript{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.\textsuperscript{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

\textsuperscript{104} See note 90 and accompanying text.
\textsuperscript{105} "I don't know if it will stop [prostitution] . . . but it will send a message that we don't condone it." Chet Barfield, \textit{Get the Picture?: La Mesa Plans to Publish Photos of Prostitution Solicitors}, San Diego Union-Tribune B1 (Oct. 27, 1994) (quoting councilwoman Donna Alm).
\textsuperscript{106} Emile Durkenheim, \textit{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)).
\textsuperscript{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, \textit{Law, Liberty, and Morality} 65-66 (Stanford U., 1963).
\textsuperscript{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.\textsuperscript{109}

Non-prison sentences such as fines and community service express moral condemnation only equivocally.\textsuperscript{110} Fines implicitly condone criminal activity so long as the offender is willing to pay the penalty, pricing the conduct rather than sanctioning it.\textsuperscript{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.\textsuperscript{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,\textsuperscript{113} shame punishments unambiguously label certain behavior as contrary to community morals.\textsuperscript{114} They are also thought to reinforce any preexisting propensities to obey the law, and to promote confidence in the law.\textsuperscript{115} They bypass the media and speak directly to the public, and for that reason, they possess enormous denunciative potential.\textsuperscript{116}

\textit{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.\textsuperscript{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.\textsuperscript{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

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\item \textsuperscript{109} Kahan, 63 U. Chi. L. Rev. at 635 (cited in note 53).
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id. at 621.
\item \textsuperscript{112} Id. at 625-30.
\item \textsuperscript{113} Id. at 635.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id. at 639.
\item \textsuperscript{116} Whether that potential is realized—or even realizable—forms the topic of this Note's conclusion.
\item \textsuperscript{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).
\item \textsuperscript{118} Cities Try to Shame Prostitutes and Johns Out of Town (cited in note 36) (comments of Professor William Boborov).
\end{itemize}
\end{footnotesize}
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 areas\textsuperscript{19} or even in areas that do not proscribe prostitution.\textsuperscript{20} 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.\textsuperscript{21} 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.\textsuperscript{22}

\textit{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

\begin{footnotes}
\item[19] "If you scare the johns, they'll go someplace else." Lori Roza, Seattle Times at A2 (cited in note 57) (quoting a police spokesman).
\item[22] "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." \textit{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.").
\end{footnotes}
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 Rent, 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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textbf{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

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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, \textit{Hustling for Rights}, 1 Civ. Liberties Rev. 8, 14 (1974)).

\textsuperscript{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. Indeed, an ordinance publishing the ads may pay for itself by imposing additional fines on the Johns themselves to cover publication costs.

Tapping into another source of funds, the mayor of West Palm Beach paid for shame advertisements using a citizen-supported “John Hooker Memorial Fund.”

2. Court Costs

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

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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). 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”).

133. 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. In most cases, no money changes hands and no sexual act occurs. 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. 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.

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.

3. 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

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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).
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 261 (1962).
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-negligently\textsuperscript{145} when identifying arrestees. This might arguably entail including addresses or pictures in addition to mere names, especially common names.\textsuperscript{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.

\textit{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.\textsuperscript{147} Because arrest records, including mug shots and addresses, are public information,\textsuperscript{148} no action for invasion of privacy arises upon publication of the identities of johns.

\textit{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

\begin{itemize}
\item were placed in an ad reading “INDIVIDUALS ARRESTED FOR PATRONIZING PROSTITUTES,” B would have no action in libel.
\item 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. \textit{Gertz v. Robert Welch, Inc.}, \textit{418 U.S.} 323 (1974).
\item See \textit{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).
\item \textit{United States Dep’t of Justice v. Reporters’ Comm. for Freedom of the Press}, \textit{489 U.S.} 749, 753 (1989) (enumerating the types of information that are part of the public record).
\end{itemize}
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. 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. If found unconstitutional, a john-shaming scheme could be considered such a policy.

Because many constitutional questions surrounding shame punishments remain unsettled, the door is wide open for section 1983 claims based on shaming schemes. While many arrestees would "just as soon forget about it" 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

152. See Part VI.
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. 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. 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." Essentially, under the Supreme Court's analysis in Mathews v. Eldridge, 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

155. Id.
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.


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 n. 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. 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.

2. Right to a Trial

When Dominic Petrocco, a 56-year-old farmer from Westminster, Colorado, was arrested for patronizing a prostitute, he had never before been arrested. 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 punishment and would cause him

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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.").


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

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

The public nature of arrest records also seems to weigh against a finding that publication is punishment; arrest reports commonly appear in private newspapers or on television. 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

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).
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).
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.”)
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*, 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. 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.

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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 Facto, Bill of Attainder, and
Applying that analysis, in *Kennedy v. Mendoza-Martinez*, 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.

Confusion results when a sanction imposes multiple effects. For example, detention before trial is administrative in purpose. 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. 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. Most courts have found registration requirements to be administrative despite their stigmatizing effects, citing protecting the community as the administrative purpose served. In *In re Birch*,

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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.\footnote{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."\footnote{188} A member of the city council that passed the ordinance admitted to "eliminating the presumption of innocence."\footnote{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."\footnote{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.

\footnote{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).

\footnote{186. 110 Cal. Rptr. 212, 515 P.2d 12 (1973).} The court required the judge to inform the defendant of the possibility of registration because it was a possible punishment. Id. at 17.


\footnote{190. Folks, Sun-Sentinel at 20A (cited in note 67).}
B. Equal Protection

The Fourteenth Amendment's Equal Protection Clause has been held to invalidate many instances of state discrimination. State discrimination must always be supported by a rational basis. In addition, government discrimination on the basis of a suspect classification is subject to a heightened level of scrutiny, and state discrimination with regard to a fundamental right is subject to strict scrutiny. 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. 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 punishment to equalize impacts on men and women. Despite current contentions that shaming johns "equals things out" by focusing on the customer, 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).


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, Petrocco 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


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

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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.


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.


206. See Part VI.A.1.
Bowers's admonition that there is no fundamental right to engage in "traditionally disfavored" forms of sex.  

3. Rational Basis

Even a benign distinction, although not inherently "suspect," must rest on a rational basis. 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, 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." 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," raises frequent questions about the constitutional validity of shame penalties. 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.\textsuperscript{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.\textsuperscript{214} Although the law defining "cruel and unusual" continues to develop,\textsuperscript{215} the general inquiry remains that announced by the Supreme Court in \textit{Coker v. Georgia}:\textsuperscript{216} a punishment violates the Eighth Amendment if it does not contribute to acceptable goals of

\begin{footnotesize}
\textsuperscript{213} See Part IV.A.2.
\textsuperscript{214} Kahan, 63 U. Chi. L. Rev. at 608 (cited in note 53) (summarizing cases upholding corporal punishment against eighth amendment attacks).
\textsuperscript{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 \textit{Rummel v. Estelle}, 445 U.S. 263, 272 (1980) (noting the trend "in recent years" as of 1980) (citing \textit{Coker v. Georgia}, 433 U.S. 584, 592 (1977) (plurality opinion); \textit{Gregg v. Georgia}, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); \textit{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 \textit{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 290, 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 \textit{Solem}, lower courts dutifully applied the three factors until the Supreme Court heard a proportionality challenge in \textit{Harmelin v. Michigan}, 501 U.S. 957 (1991). In \textit{Harmelin}, the plurality opinion, written by Justice Scalia and joined only by Chief Justice Rehnquist, specifically called for the overruling of \textit{Solem} in favor of the deference to the legislature mandated in \textit{Rummel v. Estelle}. Id. at 985-90. It limited proportionality review to the \textit{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 \textit{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 \textit{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 \textit{Harmelin} left lower courts without clear direction on the appropriate proportionality analysis for noncapital crimes.

\textsuperscript{216} 433 U.S. 584 (1977).
\end{footnotesize}
punishment or if its severity is grossly disproportionate to the offense.\textsuperscript{217}

As explained above, shame punishments at least theoretically further accepted goals of punishment.\textsuperscript{218} Under \textit{Coker}, however, even a proper punishment may be so disproportionate as to be unconstitutionally cruel and unusual.\textsuperscript{219} Many have suggested that shame and humiliation may be too harsh a penalty for patronizing a prostitute,\textsuperscript{220} especially in the case of a first-time offender.\textsuperscript{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.\textsuperscript{222} Printing "a rogue's gallery of America's Least Wanted"\textsuperscript{223} certainly risks an enormous toll on the individuals depicted. The tragic reaction of the young New Jersey engineer,\textsuperscript{224} while hardly typical, is not altogether an anomaly. A Massachusetts man also committed suicide upon seeing his name in the paper.\textsuperscript{225} Families, too, are affected by the deliberate imposition of public humiliation.\textsuperscript{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.\textsuperscript{227}

\begin{itemize}
\item \textsuperscript{217} Id at 592.
\item \textsuperscript{218} See Part IV.
\item \textsuperscript{219} \textit{Coker} itself held that the death penalty was so disproportionate in a rape case as to be unconstitutional. 433 U.S. at 599.
\item \textsuperscript{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.
\item \textsuperscript{221} See \textit{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).
\item \textsuperscript{222} Massaro, 89 Mich. L. Rev. at 1337 (cited in note 40).
\item \textsuperscript{223} Kevin Simpson, \textit{Now Look Who's Pandering to the Public's Prurient Interest}, Denver Post B1 (June 23, 1994).
\item \textsuperscript{224} See note 6 and accompanying text.
\item \textsuperscript{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).
\item \textsuperscript{226} Tucker, Denver Post at B1 (cited in note 93) (reporting the devastated reaction of the wife of an arrested man).
\item \textsuperscript{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").
\end{itemize}
Furthermore, once the public receives the shaming information, it may do with it as it pleases. More than one community notified of a sex offender in its midst has harassed him or vandalized his home. 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*, the Supreme Court's most recent statement on disproportionality, two justices advocated eliminating proportionality review for non-capital cases. In *People v. Mills*, the California Supreme Court held that a sex offender, by committing his reprehensible act, had sacrificed his constitutional rights. The Illinois Supreme Court in *People v. Adams* asserted that stigmatization of an offender resulted not from a state registration statute but from the offender's own culpable actions. Indeed, every court to reach the issue has denied that shame punishments are unconstitutionally cruel and unusual. 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
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-

ceptable as well.\textsuperscript{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."\textsuperscript{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.\textsuperscript{240} Instead, shame punishments may sacrifice individuals' dignity with little discernible impact on prostitution.\textsuperscript{241} Whatever their meaning, shame punishments' qualitative distinction from other sanctions raises humaneness concerns that form a possible cost of selecting shaming.

\begin{itemize}
\item \textsuperscript{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).
\item \textsuperscript{239} Massaro, 89 Mich. L. Rev. at 1886 (cited in note 40).
\item \textsuperscript{240} See note 76.
\item \textsuperscript{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).
\end{itemize}
B. Society’s Loss of the Shamed Individual

They 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*

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. 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. 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. 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, 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. Theoretically, publicity alone may prevent bad acts by threatening

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. 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. When the authority imposing shame makes no effort at reconciliation, deviance itself may become status, creating subcultures that amplify deviance. 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.

Contrary to shamers' predictions, shame punishments may not unequivocally condemn offenders' conduct. They may evoke sympathy 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. 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. If that is true, might not publication of the identities of large numbers of prostitutes' patrons exacerbate the prostitution problem rather than curing it?

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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).
251. Id.
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, Wardell 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)).
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.\textsuperscript{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.\textsuperscript{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, \textit{Into the Woods}\textsuperscript{257}

\begin{itemize}
\item \textsuperscript{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).
\item \textsuperscript{256} While decriminalization would not be an unthinkable alternative, it is likely not in keeping with shamers’ hopes.
\item \textsuperscript{257} Stephen Sondheim and James Lapine, \textit{Into the Woods} 136 (Theatre Communications Group, 1989).
\end{itemize}
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,” 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. 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.” 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.


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.

*Courtney Guyton Persons*

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