"Friend to the Martyr, a Friend to the Woman of Shame": Thinking About The Law, Shame and Humiliation

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Introduction

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

Interestingly, in one of his most important articles, Cover, in passing, discussed the relationship between shame and violence, noting: "There are societies in which contrition or shame control defendants' behavior to a greater extent than does violence. Such societies require and have received their own distinctive form of analysis."[4] We believe that, on many levels, our society has become one in which shame – along with violence – is used as a modality to control defendants' (and other litigants') behavior. We thus seek to

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

[2] See , for a sample of legal scholarship quoting this passage, e.g., Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 404 (1991); Jamal Greene, O*n the Origins of Originalism*, 88 TEX. L. REV. 1, 75 n. 516 (2009); Arlene Kanter, *The Law: What's Disability Studies Got to Do With It or an Introduction to Disability Legal Studies,* 42 COLUM. HUM. RTS. L. REV. 403, 433 n. 102 (2011).

[3] A simple WESTLAW JLR database search of "Robert Cover" /s influen! reveals 45 articles, almost all referring to how influential his work has been.

[4] Robert Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1607 (1986). This article has been cited in at least 650 subsequent law review articles. See WESTLAW JLR database search <cover /s "violence and the word" /s yale> (search performed September 10, 2013).

address a collateral question that has not been the topic of nearly as much attention as has the intersection between law and violence, but is one that, we believe, must be examined if we are to take seriously the dignitarian values that the law optimally expresses:[5] the intersection between law, humiliation and shame, and how the law has the capacity to allow for, to encourage, or (in some cases) to remediate humiliation, or humiliating or shaming behavior.[6] The need for new attention to be paid to this question has increased exponentially as we begin to also take more seriously international human rights mandates, especially – although certainly not exclusively – in the context of the recently-ratified United Nations Convention on the Rights of Persons with Disabilities,[7] a Convention that

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[5] See e.g., MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW (2013); Michael L. Perlin, *"The Judge, He Cast His Robe Aside": Mental Health Courts, Dignity and Due Process*, 3 J. MENT. HEALTH L. & POL'Y 1 (2013) (Perlin, *Cast His Robe)*; *"There Are No Trials Inside the Gates of Eden": Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, in COERCIVE CARE: LAW AND POLICY 193 (Bernadette McSherry & Ian Freckelton, eds. 2013) (Perlin, *Gates of Eden)*; Michael L. Perlin, *Understanding the Intersection between International Human Rights and Mental Disability Law: The Role of Dignity,* in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES 191(Bruce Arrigo & Heather Bersot, eds.(2013) (INTERNATIONAL CRIME) (Perlin, *The Role of Dignity)*; Michael L. Perlin, *"Dignity Was the First to Leave":* Godinez v. Moran, *Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61 (1996) (Perlin, *Dignity Was the First to Leave)*.

[6] The most important piece in the scholarly literature is Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform,* 3 PYSCHOL. PUB. POL'Y & L. 645 (1997). For a more recent psychological analysis of the structure of humiliation, see Walter J. Torres & Raymond M. Bergner, *Humiliation: Its Nature and Consequences,* 38 J. AM. ACAD. PSYCHIATRY & L. 195 (2010). On key differences between shame and humiliation (shame being inward-directed, and humiliation coming from another), see generally, ANDREW GILBERT, SHAME : INTERPERSONAL BEHAVIOR, PSYCHOPATHOLOGY, AND CULTURE (1998).

[7] UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2008) (CRPD).

calls for “respect for inherent dignity,”[8] and characterizes "discrimination against any person on the basis of disability [as] a violation of the inherent dignity and worth of the human person...."[9]

Humiliation and shaming, we believe, contravene basic fundamental human rights and raise important constitutional questions implicating the due process and equal protection clauses. Humiliation and shaming practices include “scarlet letter”-like criminal sanctions,[10] police stop-and-frisk practices,[11] the treatment of persons with mental disabilities in the justice system,[12] and the use of sex offender registries.[13] Moreover, humiliation and shame are detrimental in ways that lead to recidivism,[14] inhibit rehabilitation,[15] discourage treatment,[16] and injure victims.[17] They also directly contravene

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[8] *Id.,* Article 3(a).

[9] *Id.,* Preamble, para. h. On how dignity is the first “fundamental axiom” upon which the Convention is premised, see Raymond Lang, *The United Nations Convention on the Right and Dignities for Persons with Disabilities: A Panacea for Ending Disability Discrimination?* 3 ALTER: EUR. J. DISABIL. 266, 273 (2009).

[10] See *infra* text accompanying notes 91-164.

[11] See *infra* text accompanying notes 165-71.

[12] See *infra* text accompanying notes 173-241.

[13] See *infra* text accompanying notes 242-303.
Generally beyond the scope of this paper are discussions of the *passive* use of shame (e.g., in the ways that certain testimony is accepted in divorce and custody cases and in some “victim impact statements”). See e.g., Kathryn A. Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?,* 94 MINN. L. REV. 1997 (2010); Grant Morris, *Teaching With Emotion: Enriching the Educational Experience of First-Year Law Students*, 47 SAN DIEGO L. REV. 465 (2010).

[14] See *infra* text accompanying notes 144-45, 260-64, and 275-78.

[15] See *infra* text accompanying notes 126-28, 154 and 293.

[16] See *infra* text accompanying note 205.

[17] See *infra* note 162.

the guiding principles of therapeutic jurisprudence, especially in the context of its relationship to the importance of dignity in the law,[18] and potentially violate international human rights law principles as well.[19]

In recent years, scholars and activists from multiple disciplines have begun to devote themselves to the study of humiliation and how it robs the legal system – and society – of dignity. The Human Dignity and Humiliation Studies Network explicitly underscores this in its mandate: "We wish to stimulate systemic change, globally and locally, to open space for dignity and mutual respect and esteem to take root and grow, thus ending humiliating practices and breaking cycles of humiliation throughout the world."[20]

In this paper, we will explore how humiliation and shaming are bad for all participants in the legal system, and bad for the law itself. We will urge that humiliating and shaming techniques be banned, and that, this ban will enhance dignity for the entire legal system and society as a whole. First, we consider the meaning of shame and humiliation. Then, we briefly discuss principles of therapeutic jurisprudence (TJ) and its relationship to the significance of dignity, and then consider recent developments in international human rights law, both of which are valuable interpretive tools in this conversation. Next, we consider how the United States Supreme Court has considered these concepts in recent cases. Following this, we consider several relevant areas of law and policy from the perspective of how overt shaming is employed: scarlet letter punishments, use of the police

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[18] See *infra* text accompanying notes 304-23.

[19] See *infra* text accompanying notes 324-27.

[20] See http://www.humiliationstudies.org/. The Network is in the process of launching a JOURNAL OF HUMAN DIGNITY AND HUMILIATION STUDIES. See http://www.humiliationstudies.upeace.org/.

power, treatment of institutionalized persons with mental disabilities and elders, and sex offender registry law. We then, using a TJ filter and drawing on international human rights law principles, examine why these shaming tactics are contrary to bedrock principles of the legal system: the mandates to honor dignity, to minimize recidivism, and to enhance rehabilitation.

Our title comes in part from Bob Dylan's 1983 song *Jokerman.,* a song that some critics see as "a mediation on the duality between good and evil."[21] In the most elaborate discussion of the song's meaning, the critic Michael Gray points out that it "insist[s[that `evil' is not `out there,' `among the others,' but is inside us all, and that all progress, individual and social, must be built upon coming to terms with this literally inescapable, fundamental truth."[22] Some verses after the "friend to the woman of shame" line, Dylan sings, "False-hearted judges dying in the webs that they spin/ Only a matter of time 'til the night comes stepping in."[23] Shaming litigants -- the men and women of shame – is often the work of such "false-hearted judges," and the result of these shaming and humiliating tactics is often a reflection of the evil that is, in Gray's words, "inside us all."[24] We believe that these words are crucial to understanding the legal issues we are about to discuss.

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[21] http://www.sing365.com/music/lyric.nsf/Jokerman-lyrics-Bob-Dylan/148338D8A2769472482569690039BE01

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

[23] http://www.sing365.com/music/lyric.nsf/Jokerman-lyrics-Bob-Dylan/148338D8A2769472482569690039BE01

[24] There are, as with all major Dylan works, multiple interpretations of who the "Jokerman" is. Is he a Jewish symbol (see http://www.radiohazak.com/Jokerman.html)? A stand-in for former President Reagan (President when the song was written) (see TIM RILEY, HARD RAIN: A DYLAN COMMENTARY 271 (1992)? Is he meant to depict Jesus (see GRAY, *supra*, note 22, at 362)? We demur

I. **What is shame?**

Shame itself is a difficult concept to define. "Shame is bordered by embarrassment, humiliation, and mortification, in porous ways that are difficult to predict or contain."[25] It is one of the most important, painful and intensive of all emotions.[26] Each person reacts differently to shame.[27] However, what is not contested is "the self-shattering pain that shame can produce in an individual…and that the shame experience may vary widely among individuals, to the extent that cognition and experience mold emotional responses."[28] Shame is considered to be more painful than guilt because, in shame, "one's core self – not simply one's behavior – is at stake."[29] Typically, scholars note how sexual abuse can cause such reactions,[30] but the range of behaviors is far wider, including, but

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to any of these interpretations. What matters here is Dylan's focus on shame, and how evil can be internalized as well as externalized.

[25] Massaro, *supra* note 6, at 655.

[26] Robert Svensson et al, *Moral Emotions and Offending: Do Feelings of Anticipated Shame and Guilt Mediate the Effect of Socializing on Offending?* 10 EUR. J. CRIMINOL. 22, 23 (2013).

[27] Massaro, *supra* note 6, at 656.

[28] *Id.* at 661.

[29] June Price Tangney, Jeff Stuewig & Debra J. Mashek, *Moral Emotions and Moral Behavior,* 58 AM. REV. PSYCHOLOGY 345, 347(2007).

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

certainly not limited to, college hazing,[31] societal response to transgendered individuals,[32] and on-line invasions of privacy.[33] According to Prof. Martha Nussbaum, when "shame is a large part of their problem . . . expos[ing] that person to humiliation may often shatter the all-too-fragile defenses of the person's ego. The result might be utter collapse."[34]

"A civilized society is one whose members do not humiliate one another."[35]Broadly, humiliation has been defined as "the rejection of human beings as human, that is, treating people as if they were not human beings but merely things, tools, animals, subhumans, or inferior humans."[36] Humiliation can also reflect a loss of control over one's identity.[37] It may simply be a matter of being denied a certain status in communion with others.[38]

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[31] Claire Wright, *Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN'S L.J. 457, 557 (2013).

[32] Amy D. Ronner, *Let's Get the "Trans" and "Sex" Out of it and Free Us All*, 16 J. GENDER RACE & JUST. 859, 908 n. 326 (2013), quoting Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology,* 41 ARIZ. L. REV. 265, 267 (1999).

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

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

[35] AVISHAI MARGALIT, THE DECENT SOCIETY 1 (1996), as discussed in Anita Bernstein, *Treating Sexual Harassment with Respect,* 111 HARV. L. REV. 445, 487 n. 260 (1997).

[36]MARGALIT, *supra* note 35, at 121, as discussed in Bernstein, *supra* note 35, at 489..See generally, e.g., Linda M. Hartling & Tracey Luchetta, *Humiliation: Assessing the Impact of Derision, Degradation and Debasement*, 19 J. PRIMARY PREVENTION 259 (1999).

[37] JACK KATZ, SEDUCTION OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL 114 (1988), as discussed in Claire Wright, *Censoring the Censors in the WTO: Reconciling the Communitarian and Human Rights Theories of International Law,* 3 J. INT'L MEDIA & ENT. L. 17, 104 n. 534 (2010).

[38] AXEL HONNETH, THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS 131-39 (Joel Anderson trans., 1995), as discussed in Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition,* 41 CORNELL INT'L L.J. 675, 691 (2008).

Certainly, apology may have a role in remediating shame and humiliation. In his book, *On Apology,* Aaron Lazare notes:

> Apologies have the power to heal humiliations and grudges, remove the desire for vengeance, and generate forgiveness on the part of the offended parties. For the offender, they can diminish the fear of retaliation and relieve the guilt and shame that can grip the mind with a persistence and tenacity that are hard to ignore.[39]

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

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

> As one researcher has written, "few psychotherapists or litigants are truly prepared for the forces of aggression that are released and sanctioned by our judicial system." Litigation presents the ultimate psychological threat because it puts each party's integrity at issue. A person who is sued fears a judgment that will bankrupt him. Even if that does not happen, he may not be able to get a loan or change jobs while the lawsuit is pending. A suit against a professional assaults his professional competence or even morality. On the

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[39] AARON LAZARE, ON APOLOGY 1 (2004); see also, Aaron Lazare, *Apology in Medical Practice: An Emerging Clinical Skill*, 296 J.A.M.A. 1401 (2006). But compare, Richard Bilder, *The Role of Apology in International Law and Diplomacy,* 46 VA. J. INT'L L. 433, 441 (2006): "Stronger states have coerced apologies from weaker states or peoples as expressions of dominance or means of humiliation."

other hand, a person who sues fears the rejection and humiliation that accompany a courtroom defeat.[40].

Subsequently, Munford notes that litigation "keeps the injury alive and present" in such a way that "discussion of personal matters in public testimony may shame [the litigant]."[41] The inherent feelings of shame invoked merely through the judicial process itself, coupled with the use of overt shaming in the judicial system, can only lead to greater negative consequences.

In the next sections, we consider both therapeutic jurisprudence and international human rights as potential tools in potentially remediating some of the issues discussed above.

II.Therapeutic jurisprudence and the significance of dignity

Humiliation in the law utterly contradicts the aims of therapeutic jurisprudence and undermines the role of dignity. Therapeutic jurisprudence is one of the most important legal theoretical developments of the past two decades.[42] Initially employed in cases

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

[41] Munford, *supra* note 40, at 388. On how *mediation* might obviate some of the shame of the legal process, see Tamara Relis, *Consequences of Power,* 12 HARV. NEGOT. L. REV. 445 (2007).

[42] *See e.g.,* DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990) ;); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008); 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 2D-3, at 534-41 (2d ed. 1999) Wexler first used the term in a paper he presented to the National Institute of Mental Health in

involving individuals with mental disabilities, but subsequently expanded far beyond that narrow area, therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti‐therapeutic consequences.[43] The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[44] There is an inherent tension in this inquiry, but David Wexler clearly

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1987. *See* David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence,* 16 L. & HUM. BEHAV. 27, 27, 32-33 (1992).

[43]*See* Michael L. Perlin, "*His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?,* 42 AKRON L. REV. 885, 912 (2009); *see* Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, *in* DISPUTES AND DILEMMAS IN HEALTH LAW 91 (Ian Freckelton & Kate Peterson eds., 2006) (for a transnational perspective).

[44] Michael L. Perlin, "*You Have Discussed Lepers and Crooks:": Sanism in Clinical Teaching,* 9 CLINICAL L. REV. 683 (2003); Michael L. Perlin, "*Everybody Is Making Love/Or Else Expecting Rain": Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia,* 83 U. WASH. L. REV. 481 (2008).

On how therapeutic jurisprudence "might be a redemptive tool in efforts to combat sanism, as a means of `strip[ping] bare the law's sanist façade,'" see Michael L. Perlin, *"Baby, Look Inside Your Mirror": The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities,* 69 U. PITT. L. REV. 589, 591 (2008), quoting, in part, MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 301 (2000). *See also*, Bernard P. Perlmutter, *George's Story: Voice and Transformation through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 599 n. 111 (2005). Ian Freckelton*, Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence,* 30 T. JEFFERSON L. REV. 575, 585-86 (2008).

identifies how it must be resolved: "the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[45]

Therapeutic jurisprudence "asks us to look at law as it actually impacts people's lives"[46] and focuses on the law's influence on emotional life and psychological well-being. [47] It suggests that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness".[48]

In recent years, scholars have considered a vast range of topics through a therapeutic jurisprudence lens, including, but not limited to, all aspects of mental disability law, domestic relations law, criminal law and procedure, employment law, gay rights law, and tort law.[49] As Ian Freckelton has noted, "it is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications."[50] It is also part of a growing comprehensive movement in the law towards establishing more

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[45] David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993). *See also*, e.g., David Wexler, *Applying the Law Therapeutically,* 5 APPL. & PREVENT. PSYCHOL. 179 (1996).

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

[47] David B. Wexler*, Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies, in* DANIEL P. STOLLE, DAVID B. WEXLER & BRUCE J. WINICK, PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (2006) (STOLLE).

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

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

[50] Diesfeld & Freckelton, *supra* note 43, at 582.

humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.[51] In its aim to use the law to empower individuals, enhance rights, and promote well-being, therapeutic jurisprudence has been described as "…a sea-change in ethical thinking about the role of law…a movement towards a more distinctly relational approach to the practice of law…which emphasises psychological wellness over adversarial triumphalism".[52] That is, therapeutic jurisprudence supports an ethic of care.[53]

One of the central principles of therapeutic jurisprudence is a commitment to dignity.[54] Prof. Carol Sanger suggests that dignity means that people "possess an intrinsic worth that should be recognized and respected," and that they should not be subjected to

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[51] Susan Daicoff, *The Role of Therapeutic Jurisprudence Within The Comprehensive Law Movement, in* STOLLE , *supra* note 47, at 365.

[52] Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework,* 8 J.L. & MED. 328, 329-30 (2001); *see also*, Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 342 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic,* 13 CLINICAL L. REV. 605, 605-06 (2006). The use of the phrase dates to CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

[53] *See* e.g., Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605-07 (2006); David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering,* 48 B.C. L. REV. 597, 599 (2007); Brookbanks, *supra* note 52; Gregory Baker, *Do You Hear the Knocking at the Door? A "Therapeutic" Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006).

[54] *See* BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005).

treatment by the state that is inconsistent with their intrinsic worth.[55] The right to dignity is memorialized in many state constitutions, human rights documents, judicial opinions, and constitutions of other nations.[56] The legal process upholds human dignity by allowing the litigant—including the criminal defendant—to tell his own story.[57] A notion of individual dignity, "generally articulated through concepts of autonomy, respect, equality, and freedom from undue government interference, was at the heart of a jurisprudential and moral outlook that resulted in the reform, not only of criminal procedure, but of the various institutions more or less directly linked with the criminal justice system, including juvenile courts, prisons, and mental institutions."[58] Fair process norms such as the right to counsel "operate as substantive and procedural restraints on state power to ensure that the individual suspect is treated with dignity and respect." [59] Dignity concepts are expansive; a Canadian Supreme Court case has declared that disenfranchisement of incarcerated persons violated their dignity interests.[60]

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

[56] Perlin, *The Role of Dignity*, *supra* note 5, at 9.

[57] Katherine Kruse, *The Human Dignity of Clients*, 93 CORNELL L. REV. 1343, 1353 (2008).

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

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

[60] Sauvé v. Canada, [2002] 3 S.C.R. 519, discussed in this context in Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race* and *Dignity*, 85 N.Y.U. L. REV. 457, 464 (2010). On these issues, see generally, Perlin, *Cast His Robe, supra* note 5.

Professor Amy Ronner describes the "three Vs": voice, validation and voluntariness,[61] arguing:

> What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions. [62]

The question to be posed here is this: how can judicial and legislative policies be changed to reflect the aims of TJ? By way of examples, how can TJ be used to reduce the humiliation felt by persons with mental disabilities and the elderly? Should sex offender

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[61] Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008). On the importance of "voice," see also, Diesfeld & Freckelton, *supra* note 43, at 588.

[62] Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94-95 (2002); *See generally*, AMY D. RONNER, LAW, LITERATURE AND THERAPEUTIC JURISPRUDENCE (2010).

residency restrictions simply be abolished? What are the authentic impacts of the sort of "scarlet letter" punishments discussed extensively below?

III. International human rights law[63]

The state of the law as it relates to persons with disabilities must be radically reconsidered in light of the ratification of the United Nations' Convention on the Rights of Persons with Disabilities[64](CRPD), "regarded as having finally empowered the 'world's largest minority' to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection."[65] This Convention is the most revolutionary international human rights

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[63] This section is generally adapted from Michael L. Perlin & Meredith Rose Schriver, *"You That Hide Behind Walls": The Relationship between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients,* in: TORTURE AND ILL-TREATMENT IN HEALTH- CARE SETTINGS: A COMPILATION (Center for Human Rights and Humanitarian Law, American University Washington College of Law ed. 2013).

[64] See generally, MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD (2011).

[65] Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities,*8 HUM. RTS. L. REV. 1, 4 n. 17 (2008). See, for example, statements made by the High Commissioner For Human Rights, Louise Arbour, and the permanent representative of New Zealand and chair of the ad-hoc committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Ambassador Don Mackay, at a special event on the Convention on the Rights of Persons with Disabilities, convened by the UN Human Rights Council, 26 March 2007, available at: Http://Www.Unog.Ch/80256EDD006B9C2E/ (HTTPNEWSBYYEAR_EN)/7444B2E219117CE8C12572AA004C5701?OPENDOCUMENT [AUGUST 23, 2011]].

document ever created that applies to persons with disabilities.[66] The Disability Convention furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most every aspect of life.[67] It firmly endorses a social model of disability and reconceptualizes mental health rights as disability rights – a clear and direct repudiation of the medical model that traditionally was part-and-parcel of mental disability law.[68] "The Convention sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities."[69] It provides a framework for insuring that mental health laws "fully recognize

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[66]See generally, Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 98 (Michael Dudley et al eds. 2012); PERLIN, *supra* note 64, at 3-21; Michael L. Perlin, *"A Change Is Gonna Come": The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 NO. ILL. U. L. REV. 483 (2009).

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

[68] Phillip Fennel, *Human Rights, Bioethics, and Mental Disorder,* 27 MED. & L. 95 (2008). See generally, Michael L. Perlin, "*Abandoned Love": The Impact of* Wyatt v. Stickney *On The Intersection Between International Human Rights And Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121 (2011).

[69] Janet E. Lord & Michael A. Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT'L L. J. 249, 256 (2009); See also, Ronald McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections.* Accessible at Http://Ssrn.Com/Abstract=1563883 (2010).

the rights of those with mental illness."[70] There is no question that it has "ushered in a new era of disability rights policy."[71]

It describes disability as a condition arising from "interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others" instead of inherent limitations,[72] and extends existing human rights to take into account the specific rights experiences of persons with disabilities.[73] It calls for "respect for inherent dignity"[74] and "non-discrimination."[75] Subsequent articles declare "freedom from torture or cruel, inhuman or degrading treatment or punishment,"[76] "freedom from exploitation, violence and abuse,"[77] and a right to protection of the "integrity of the person."[78]

The CRPD is unique because it is the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities. It not only clarifies that States should not discriminate against persons with disabilities, but also sets out explicitly

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[70] Bernadette McSherry, *International Trends in Mental Health Laws: Introduction,* 26 LAW IN CONTEXT 1, 8 (2008).

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

[72] CRPD, *supra* note 7, Art. 1 and Pmbl., Para. E

[73] Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 514-15 (2008); See PERLIN, *supra* note 64, at 143-58.

[74] CRPD, *supra* note 7, Article 3(A).

[75] *Id.*, Article 3(B).

[76] *Id.,* Article 15.

[77] *Id.*, Article 16.

[78] *Id.*, Article 17

the many steps that States must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society.[79]

IV. Humiliating and shaming sanctions

As indicated above, the law shames and humiliates in many ways, sometimes purposively and sometime inadvertently. In this section, we explore in some detail some of those shaming and humiliating modalities; in each instance, the question must be raised: do these tactics/schemes subordinate or privilege dignity? Are they consonant with therapeutic jurisprudential principles? Do they potentially violate international human rights law?

I. A. Supreme Court decisions discussing humiliation and shame

[79] On the changes that ratifying states need to make in their domestic involuntary civil commitment laws to comply with Convention mandates, see Bryan Y. Lee, *The U.N. Convention on the Rights of Persons with Disabilities and Its Impact upon Involuntary Civil Commitment of Individuals with Developmental Disabilities,* 44 COLUM. J. L. & SOC'L PROBS. 393 (2011). See also, István Hoffman & György Könczei*, Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code*, 33 LOY. L.A. INT'L & COMP. L. REV. 143 (2010) (on the application of the CRPD to capacity issues); Kathryn D. DeMarco, *Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and Its Impact on The Use of Supermax Solitary Confinement*, 66 U. MIAMI L. REV. 523 (2012) (on the application of the CRPD to solitary confinement in correctional institutions); Michael L. Perlin, *"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law,* 117 PENN ST. L. REV. 1159 (2013) (Perlin, *Guardians*) (on the application of the CRPD to guardianship law); *Michael L. Perlin, "Yonder Stands Your Orphan with His Gun": The International Human Rights Implications of Juvenile Punishment Schemes*,– TEXAS TECH L. REV. – (2013) (in press) (on the application of the CRPD to juvenile punishment schemes); Perlin, G*ates of Eden, supra* note 5 (on the application of the CRPD to mental health court systems).

The Supreme Court has recognized the humiliating consequences that can result from legislative enactments, and has underscored the important role of dignity.[80] In several landmark decisions, the Court has struck down both criminal and civil statutes that humiliate and shame.[81] In one of the most famous examples, *Lawrence v. Texas*, the Court struck down a Texas statute that criminalized certain intimate voluntary sexual conduct engaged in by two persons of the same sex.[82] Specifically, the Court found:

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

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

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

[82] Lawrence v. Texas, 539 U.S. 558 (2003).

within the registration laws of at least four States were he or she to be subject to their jurisdiction. Pet. for Cert. 13, and n. 12 [citing to state laws in Idaho, Louisiana, Mississippi and South Carolina]. This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.[83]

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[83] *Id.* at 575. See *infra* text accompanying notes 286-89 considering the discussion of shame and humiliation in the Sex Offender Registration and Notification Act (SORNA) case of Smith v. Doe, 538 U.S. 84, 86 (2002).

Remarkably, the Eleventh Circuit Court of Appeals chose to ignore those aspects of *Lawrence* that deal with shame and dignity in its decision upholding a statute in Alabama banning the sale of sexual devices of the sort typically used by women. Williams v. Attorney General of Alabama, 378 F. 3d 1232 (11th Cir. 2004), *cert. den. sub. nom.*, Williams v. King, 543 U.S. 1152 (2005). In its opinion, the Court declined to "extrapolate from *Lawrence* and its *dicta* a right to sexual privacy triggering strict scrutiny" and rejected the dissent's argument that public morality is no longer a rational basis for legislation. *Id.* at 1238. In writing about this case, Professors Waldman and Herald have noted ironically, that besides stigmatizing private sexual conduct, the court's holding disproportionately affected women by leaving the sale of products used by males undisturbed. Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J. L. & GENDER 285, 305 (2005). And see *id:* "The court's main point seems to be that this would all be easier if women would keep quiet and be happy with the few 'body massagers' that they are able to procure." On how the sexual device cases "effectively criminalize… or pathologize… all women who use sexual devices," see Alana Chazan, *Good Vibrations: Liberating Sexuality from the Commercial Regulation of Sexual Devices,* 18 TEX. J. WOMEN & L. 263, 295 (2009).

Elsewhere, the Court has specifically recognized the shame that can result when dignity is not present. In *Indiana v. Edwards*, the Court found that a right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel.[84] The Court stated that "to the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling."[85]

The Court has also recognized that age can play a role in the humiliation experienced. *Safford Unified School District #1 v. Redding*[86] involved a strip search of a 13-year-old female by her school's Assistant Principal. The Court found that the student's expectation of privacy is "inherent in her account of it as embarrassing, frightening, and humiliating" and that the reasonableness of her expectation of privacy is indicated by

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[84] 554 U.S. 164, 176 (2008) citing McKaskle v. Wiggins, 465 U.S. 168 (1984) (pro se defendant's Sixth Amendment right to conduct his own defense was not violated by unsolicited participation of standby counsel). *Edwards* had modified the holding of *Godinez v. Moran,* 509 U.S. 389 (1993), that had mandated a unitary competency standard in all aspects of the criminal trial process, including trial, guilty pleas and counsel waivers. See generally, MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 8B-3.1c(1), at 44-51 (2012 Cum. Supp).

[85] *Edwards,* 554 U.S. at 176. On how the Supreme Court's focus on dignity and the perceptions of justice are, perhaps, its first implicit endorsement of important principles of therapeutic jurisprudence in a criminal procedure context, see PERLIN & CUCOLO, *supra* note 84, at 48. On therapeutic jurisprudence generally, see *supra* text accompanying notes 42-62.

[86] 557 U.S. 364 (2009).

"consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."[87]

Most recently, in *United States v. Windsor,*[88] in striking down the Defense of Marriage Act (DOMA)'s definition of marriage as unconstitutional, the court recognized the humiliating consequences resulting from DOMA and the importance of the role of dignity,[89] stating:

> DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world,

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

[88] 133 S. Ct. 2675 (2013).

[89] *Id.* at 2694.

that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, [citing *Lawrence, supra*], and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.[90]

> In each of these landmark decisions, the Court has taken into account not only the shame and humiliation that the party directly affected by the law experiences, but also the population at large. With these cases, the Court has acknowledged the importance of the role of dignity.

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

II. V. Shame and humiliation in specific legal contexts

A. "Scarlet Letter" Punishments

Shaming penalties, also known as "Scarlet Letter" punishments, have arisen in the criminal justice system[91] as an alternative sanction that allegedly is economically sound, but nevertheless satisfies the community's desire to punish and condemn crime.[92] "Scarlet Letter" punishments are sanctions that "shine a spotlight on offenders in order to warn others of antisocial activity and of the miscreants perpetrating the deeds."[93] The concept of "shaming punishments" has "leaped from the 19th century fiction of Nathaniel Hawthorne[94] into the 20th century courtroom."[95] Public humiliation is explicitly justified as based on an

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

[92] Massaro, *supra* note 6 at 688.

We need to be explicit. This sort of "shaming sanction" is completely unmoored from and totally unrelated to the sort of shaming sanctions discussed by John Braithwaite in his writings about "reintegrative shaming theory," in which he writes about the consequences of shaming after an offense is committed. See e.g., JOHN BRAITHWAITE, CRIME, SHAME AND REINTRGRATION (1989), as discussed in this context in Cesar J. Rebellon et al, *Anticipated Shaming and Criminal Offending,* 38 J. CRIM. JUST. 988, 989 (2010).

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

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

[95] Scott Sanders, *Scarlet Letters, Bilboes and Cable TV: Are Shame Punishments Cruel and Outdated or Are They a Viable Option for American Jurisprudence?* 37 WASHBURN L.J. 359, 359 (1998) (quoting Julia C. Martinez, *Judges Using 'Shame Punishment' More to Emphasize Message*, FLA. TIMES-UNION, Feb. 16, 1997, at F1). For a history of the use of shaming punishments in the American criminal justice system, see Luke Coyne, *Can Shame Be Therapeutic?,* accessible at

expectation that it will deter individuals from committing anti-social acts.[96] Some judges who use shaming sanctions in the sentencing of criminals state explicitly that these sanctions work to deter future criminal behavior because they involve public humiliation,[97] an approach that apparently meets with the support and approval of both a significant portion of the public[98] as well as some scholars.[99]

The range of humiliation sanctions is robust, Examples include these:

- A warning sign placed on the front door of a child molester's home following his release from jail, reading "No children under the age of 18 allowed on these

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214413. Coyne notes that shame was a prominent part of punishment of non-capital offenses in 16th to early 19th century America and Europe. *Id.*, manuscript at 2.

> See also, for a recent fictional reference, ELIZABETH STROUT, THE BURGESS BOYS 35-36 (2013): Bob's mind went to his grandmother, who use to tell stories of their English ancestors arriving ten generations earlier... One day, his grandmother told him how thieves would be made to walk through the town. She said if a man stole a fish he had to walk around town holding the fish, calling out, " I stole the fish and I am sorry!" While the town crier followed, beating a drum.

[96] *See e.g.,*Ted Poe, *Public Humiliation Is Effective Deterrent,* DALLAS MORNING NEWS, Apr. 11, 1997, at 31A.

[97] *See* generally, Sanders, *supra* note 95; Barbara Clare Morton, *Bringing Skeletons out of the Closet and into the Light--"Scarlet Letter" Sentencing Can Meet the Goals of Probation in Modern America Because it Deprives Offenders of Privacy,* 35 SUFFOLK U. L. REV. 97 (2001).

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

[99] Aaron S. Book, *Shame on You,* 40 WM. & MARY L. REV. 653 (1999). The most prominent scholar identified with this position is Dan Kahan. *See e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?,* 63 U. CHI. L. REV. 591 (1996). (arguing that shaming sanctions reinforce public norms against criminality).

premises by court order."[100]

- A witness who committed perjury in court being ordered to wear a sign in front of the courthouse which read: "I lied in court. Tell the truth or walk with me."[101]
- A convicted thief being ordered that to place an ad in the newspaper following his release from prison – at least four inches in height and bearing the felon's photograph – reading: "I am a convicted thief."[102]
- Convicted drunk drivers being ordered to wear pink hats during their performance of community service projects or to affix bumper stickers to their vehicles warning others of their crime.[103]
- Prison inmates who expose themselves in the presence of female guards being forced to wear pink uniforms.[104]
- A burglary victim was allowed to take something of like value out of the burglar's home.[105]
- A convicted purse snatcher being forced to wear tap shoes while out in public.[106]

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[100] Sanders, *supra* note 95, at 368, citing Poe, *supra* note 96, at 31A

[101] *Id.*

[102] *Id.*, citing *Fort Pierce Judge Tries Humiliating Defendants,* FLORIDA TODAY, Dec. 6, 1996, at 5B.

[103] Sanders, *supra* note 95, at 368, citing *Fort Pierce Judge Tries Humiliating Defendants,* FLORIDA TODAY, Dec. 6, 1996, at 5B.

[104] *Id.* at 369, citing Courtney Guyton Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons,* 49 VAND. L. REV. 1525, 1535 (1996).

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

[106] *Id.*, citing Kirsten R. Bredlie, *Keeping Children Out of Double Jeopardy: An Assessment of Punishment and Megan's Law in* Doe v. Poritz, 81 MINN. L. REV. 501, 514 (1996).

Other examples include forcing shoplifters to parade in front of the stores they have victimized, carrying signs that announce their offenses or forcing DUI offenders to affix bumper stickers to their cars that read "I am a convicted drunk driver."[107] There are many, many more similar examples.[108] The trial judge in one sex offender case said, about persons who molest children, "It is my feeling that we should probably dye them green."[109]

Judges who use shaming penalties hope that it will deter individuals from committing antisocial acts.[110] Some scholars argue that the reemergence of shaming penalties is due to society's growing belief that prison terms, fines, and parole are not rehabilitating criminals.[111] But it is clear that, in almost every instance, the humiliating measures are punitive in design and scope.[112]

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[107] Massaro, *supra* note 6, at 689.

[108] Other-than-honorable discharges from the military have also been likened to scarlet letter punishments when involving persons who suffer from post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) who are denied mental health and other social support services. *See Other-Than-Honorable Discharges Burdens Like a Scarlet Letter*, Around the Nation, National Public Radio, 9 Dec. 2013, Transcript, *available at* http://www.npr.org/templates/transcript/transcript.php?storyId=249342610 (last accessed December 11, 2013). For a full discussion, see Evan Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1 (2011).

[109] Leonore Tavill, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty Is Today's Probation Condition*, 36 CLEVE. ST. L. REV. 613, 644 n. 193 (1988) (quoting trial transcript in Oregon v. Bateman, (No C 85-10-34220) (Or. 1987)).

[110] Sanders, *supra* note 95, at 359.

[111] Morton, *supra* note 97, at 98.

[112] *See* Misner , *supra* note 98, at 1364-65

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

Most of the cases involving shaming sanctions were never appealed.[118] Indeed, many of them followed the entry of plea bargains in which the defendant *agreed* to this punishment as a way of potentially forestalling incarceration. There have, however, been appeals in some, generally resulting in appellate courts upholding the use of such "Scarlet Letter" punishments. In *Ballenger v. State*, for instance, the Georgia Court of Appeals, upheld a shaming condition where the defendant was required to wear a fluorescent pink

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[113] Kahan, *supra* note 99, at 631.

[114] *Id.* at 632.

[115] *Id*.

[116] *Id.* at 633.

[117] *Id.* at 634. On how apologies can be "benign, yet humiliating," see W. Reed Leverton, *The Case for Best Practice Standards in Restorative Justice Processes*, 31 AM. J. TRIAL ADVOC. 501, 506 (2008). See *supra* text accompanying note 39.

[118] It should be noted that such punishments have been rejected by some courts. See Coyne, *supra* note 95, at 12 (discussing decisions in State v. Schad, 206 P.3d 22 (Kan. App. 2009); State v. Muhammad, 43 P.3d 318 (Mont. 2002), and People v. Meyer, 680 N.E.2d 315 (Ill. 1997), all ruling that the use of shaming signs violated sentencing statutes for not meeting the goals of rehabilitation and protection of the public).

plastic bracelet imprinted with the words, "D.U.I. CONVICT."[119] The court rejected the defendant's arguments that wearing the bracelet violated his equal protection rights and constitutes cruel and unusual punishment.[120] The Court stated that "being jurists rather than psychologists, we cannot say that the stigmatizing effect of wearing the bracelet may not have a rehabilitative, deterrent effect on Ballenger."[121]

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

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[119] 436 S.E.2d 793, 794 (Ga. Ct. App. 1993).

[120] *Id*.

[121] *Id*.

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

[123] 490 So. 2d 123, 124 (Fla. Dist Ct. App. 1986).

[124] *Id.* at 126. The Court's only concern was the potential humiliation suffered by someone other than the defendant, insofar as the defendant's vehicle might be owned or operated by others.

But of those that have been considered on appeal, perhaps the most important decision is *United States v. Gementera*.[125] There, the Ninth Circuit Court of Appeals upheld a supervised release condition that required a convicted mail thief to spend a day wearing a signboard that stated "I stole mail. This is my punishment." The court found this punishment reasonably related to the legitimate statutory objective of rehabilitation,[126] and also rejected that the shaming sanction violated the Eighth Amendment.[127] It underscored:

> Any condition must be "reasonably related" to "the nature and circumstances of the offense and the history and characteristics of the defendant." Moreover, it must be both "reasonably related" to and "involve no greater deprivation of liberty than is reasonably necessary" to "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant," and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."... The 'reasonable relation' test is necessarily a 'very flexible standard,' and that such flexibility is necessary because of 'our uncertainty about how rehabilitation is accomplished, [as reflected in the] vigorous, multifaceted, scholarly debate on shaming sanctions' efficacy, desirability, and underlying rationales [as it] continues within the academy."[128]

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[125] 379 F.3d 596 (9th Cir. 2004). *See generally,* Preston H. Neel*, Punishment or Not: The Effect of* United States v. Gementera'*s Shame Condition on the Ever-changing Concept of Supervised Release Conditions,* 31 AM. J. TRIAL ADVOC. 153 (2007).

[126] *Gementera,* 379 F.3d at 607.

[127] *Id.* at 609.

[128] *Id.* at 605.

Arguing for form over substance, the Ninth Circuit loosely connected shaming supervised release conditions with the inherent qualities found in all criminal offenses by stating they "nearly always cause shame and embarrassment."[129] Some legal scholars argue that Scarlet Letter punishments generally can help to establish and reinforce social norms. Specifically, they argue that shaming penalties "effectively and cheaply communicate opprobrium for criminal behavior and thereby increase the social, emotional, and other costs of this behavior."[130] Yet these arguments fail to take into account that the alleged deterrence effects of shaming sanctions are doubtful in modern settings, especially in urban areas,[131] and in situations where the potential offenders are not "members of an identifiable group, such as a close-knit religious or ethnic community."[132] The alleged

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

[130] Massaro, *supra* note 6, at 689.

[131] *Id.* at 694. There has also been scant consideration in the case law of how different the nation was in the 18th and 19th centuries – when early colonists intensely feared and dreaded humiliation (often leading to shunning in small, closely-knit communities), and such sanctions were seen as greatly effective, *See e.g.,* Morton, *supra* note 97, at 104, citing, inter alia, Toni Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1915 (1991) – and as it is today, with dramatically different cultural conditions (large cities, much greater likelihood of anonymity, greater value placed on privacy rights, etc.). Barbara Morton, a scholar who has studied this issue, thus has concluded that "scarlet letter sentences scarlet letter sentences successfully control and deter criminal conduct only under very limited, and currently nonexistent, societal conditions." Morton, *supra* note 97, at 109.

[132] Massaro, *supra* note 131, at 1883.

deterrence effects justification is further weakened because the government cannot assess with certainty how the public will react to these public spectacles.[133]

An increase in the use of shaming sanctions could decrease any deterrence effects because it may actually change social norms whereby shaming would no longer be effective.[134] For example, "if there is a convict with a sandwich board on every street corner, then the potential criminal would conclude that the stigma was less burdensome."[135] Moreover, in a society that values privacy and independence, rather than community and dependence, the effectiveness of shaming is reduced.[136] In fact, there is no empirical evidence showing that shaming sanctions work for the better of society.[137] Importantly, there have been no comprehensive studies as to their effectiveness,[138] and there is no empirical work available through which the practical impact of such sanctions can be tested."[139] Professor Kahan -- the leading academic supporter of such judicial interventions – believes it is "too early to determine the success of shame punishments."[140] Professor Stephen Garvey concludes, "No one knows for certain."[141]

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[133] Paul Ziel, *Eighteenth Century Public Humiliation Penalties in Twenty-First Century America: The "Shameful" Return of "Scarlet Letter" Punishments in* U.S. v. Gementera, 19 BYU J. PUB. L. 499, 508 (2005).

[134] See generally, Netter, *supra* note 93, and Morton, *supra* note 97, at 121-122

[135] Netter, *supra* note 93, at 198-199.

[136] Morton, *supra* note 97, at 121.

[137] Netter, *supra* note 93, at 215.

[138] Sanders, *supra* note 95, at 378.

[139] Massaro, *supra* note 131, at 1918.

[140] Sanders, *supra* note 95, at 378, quoting June Arney, *Shame and Punishment: Our Forebears Put Scoundrels in Stocks, or Branded Them with the "Scarlet Letter." Now, 300 Years Later, "Shame"*

The lack of valid and reliable research – or even systemic empirical inquiry – must be considered in light of the judicial narcissism reflected in the statements of some of the judges who are the strongest proponents of shaming sanctions. An Ohio judge has stated (on the "Dr. Phil" television show), "I've been a judge for almost 14 years, and the most effective punishments are those that fit the crime. They teach the offenders a lesson they'll never forget. My court is a people's court."[142] A Florida judge -- named Poe and who labels these sanctions as "Poe-etic punishments" (in some cases, ordering the use of sandwich boards advertising the defendant's crime) -- explains: "[O]ur founders knew that the judgment of a friend, a neighbor, or family member held far greater significance than that of the jailer or judge."[143] Such proponents of shaming are "sure" that their sanctions reduce

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Sentences Are Back in Vogue, VIRGINIAN-PILOT LEDGER-STAR, Mar. 2, 1997, at J1 (quoting Kahan); Kahan, *supra* note 99, at 638 (same).

[141] Garvey, *supra* note 105, at 753.

[142] Coyne, *supra* note 94, manuscript at 17.

[143] *Id..* manuscript at 8-9, quoting Sanders, *supra* note 95, at 366-67.

recidivism (based on their "ordinary common sense"[144] and limited personal knowledge), but in no case do they rely on valid statistical literature to support their position.[145]

Shaming sanctions may be psychologically debilitating. The director of a mental health program for juveniles has directly criticized Judge Cicconetti's approach[146] on precisely these grounds:

> All of our mental health programs end up having more and more people come in with trauma at the hands of humiliation. When you do this creative type of justice, the problem is that it's just going to make the behavior show up in different ways. So,

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

> To a great extent, this all flows from the pernicious impact of heuristic thinking and the meretricious impact of a false "ordinary common sense" ("OCS") on judicial decision-making. OCS is self-referential and non-reflective ("I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is"). In criminal procedure, by way of example, "OCS presupposes two self-evident truths: 1) everyone knows how to assess an individual's behavior, and 2) everyone knows when to blame someone for doing wrong."

[145] See Coyne, *supra* note 95, manuscript at 27:

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

[146] See *supra* note 145.

> Judge Cicconetti may never see that person again, but mental health programs will see that person, other judges may see that person or, unfortunately, the morgue may see that person.[147]

In addition, proponents of shaming sanctions fail to recognize that shaming sanctions can be more harmful than prison because it conveys the message that offenders subject to shaming sanctions are less than human and who deserve our individual and collective contempt.[148] "Sending this kind of message, even about criminal offenders, is, and should be, jarring in a political order that makes equality a cultural baseline."[149] It is hard to imagine how shaming penalties that are crude and degrading will foster respect for the law.[150] It is more likely that they are frequently counter-productive. The philosopher Jeremy Waldron has noted that the predictable response to humiliation is for its target to "lash out at the humiliator," via a combination of anger and fear."[151] Such responses might logically be expected to lead to more criminal activity.

Humiliation is also utterly contradictory to the aims of therapeutic jurisprudence and/or restorative justice,[152] as it robs the process of dignity, and by so doing, is ultimately

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[147] Coyne, *supra* note 95, manuscript at 23.

[148] Massaro, *supra* note 6, at 699.

[149] *Id.* at 700.

[150] Ziel, *supra* note 133, at 510.

[151] Jeremy Waldron, *On Humiliation*, 93 MICH. L. REV. 1787, 1901 (1995).

[152] *See e.g.,* Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic,* 13 CLINICAL L. REV. 605 (2006); Kathleen Daly, *Restorative Justice and Sexual Assault,* 46 BRIT. J. CRIMINOL. 334 (2006). On the relationship between therapeutic jurisprudence, restorative justice and dignity, see PERLIN, *supra* note 5, at 79-108.

demeaning to the victims of the initial criminal activity.[153] A commentator has characterized them as "particularly poor tools of rehabilitation and specific deterrence."[154] James Whitman has argued that the chief evil of public humiliation sanctions is not their effect on an offender but their effect on a society of onlookers whose punitive sensibilities will be inflamed by publicly sanctioned shaming.[155] Finally, a law-and-economics analysis of such sanctions concludes that shaming penalties are self-destructive.[156]

There has been recent academic interest in this topic from a wide range of perspectives. Although we disagree with her ultimate conclusion, Barbara Morton examines the issue through the prism of our heightened expectations of privacy, and finds that this expectation serves as a "powerful deterrent and rehabilitative mechanism attendant in [the use of such sanctions.]"[157] Robert Misner, on the other hand, makes a plea for the incorporation of mercy into any sentencing system.[158] Stephanos Bibas and Richard Bierschbach call on us to consider (and expand) the role of apology and remorse in the

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[153] One of us (MLP) makes this argument in a very different context in Perlin, *Dignity Was the First to Leave, supra* note 5 (arguing that allowing seriously mentally disabled defendants to represent themselves in criminal trials is demeaning to the victims of the underlying crimes). *See also*, Massaro, *supra* note 131, at 1943 (discussing how state-enforced shaming "authorizes public officials to search for and destroy or damage an offender's dignity").

[154] Persons, *supra* note 104, at 1547.

[155] James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?,* 107 YALE L.J. 1055 (1998

[156] Alon Harel & Alon Klement, *The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization,* 36 J. LEG. STUD. 355 (2007). *See also,* Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case against Privately Inflicted Sanctions,* 14 LEGAL THEORY 113 (2008); Doron Teichman*, Sex, Shame, and the Law: An Economic Perspective on Megan's Laws,* 42 HARV. J. ON LEGIS. 355, 371 (2005) ("there is currently limited empirical data evaluating this issue").

[157] Morton, *supra* note 97, at 100.

[158] Misner, *supra* note 98.

criminal justice system.[159] Sharon Lamb looks at the need to consider parenting techniques and moral development in aiding the law, "as a collective expression of cultural values," to employ "moral standards to balance its condemnatory function."[160]

In actuality, Scarlet Letter punishments often have a detrimental impact on both the perpetrator and the victim. The use of shaming sanctions frequently lessens the likelihood that the defendant will authentically be reintegrated into society, as they may lead to ostracism, leading then to a situation in which the offender suffers degradation indefinitely and loses social status, putting him in peril of losing employment.[161] Further, the victim is forced to relive the offense and confront the perpetrator, and there is no evidence that there is a rehabilitative effect for offenders who come face to face with their victims.[162] It may also lead the perpetrator to commit further crimes, if the offender is permanently

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

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

[161] Massaro, *supra* note 6, at 695.

[162] Massaro, *supra* note 131, at 1895. Contrary to what Coyne argues, there is no empirical evidence supporting that shaming sanctions are beneficial to the victims of the offense. Coyne, *supra* note 95, at manuscript 25-26. Further, there is clear harm to the victim found in the restorative justice context when the victim feels shame and anger in response to the offense against him and the offender reacts defensively rather than acknowledging the victim's hurt feelings, which can lead to an indefinite shame-rage spiral. *See* Raffaele Rodogno, *Shame and Guilt in Restorative Justice*, 14 PSYCHOL. PUB. POL'Y & L. 142, 146 (2008).

marked and unable to rejoin society.[163] Scarlet Letter punishments also affect third parties, such as children or spouses of the recipient of the punishment.[164]

The evidence clearly shows that Scarlet Letter punishments are harmful and punitive in nature. The harm that these shaming sanctions produce clearly outweighs any potential benefit. In light of the fact that there is no empirical evidence showing that these shaming sanctions are actually effective in deterring criminal behavior, these humiliating practices must be ended.

B. How coercive police authority shames by intruding on dignity

In the course of her recent magisterial opinion, holding unconstitutional the New York City Police Department's stop-and-frisk policies,[165] Judge Shira Scheindlin focused on the issue of humiliation:

> The Supreme Court has recognized that "the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security." In light of the very

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[163] Coyne, *supra* note 95, at manuscript 23.

[164] Ziel, *supra* note 133, at 511. Indeed the Florida District Court recognized this in *Goldschmitt*. "Initially we were concerned by the possibility that innocent persons might be punished by the bumper sticker, insofar as appellant's vehicle might be owned or operated by others. However, at oral argument the parties advised that the bumper stickers come equipped with a special Velcro strip that enables the "CONVICTED-D.U.I." message to be obscured when persons other than the probationer are using the vehicle. 409 So. 2d at 126.

[165] Floyd v. City of New York, --- F.Supp.2d ----, 2013 WL 4046209 (S.D.N.Y. 2013). The *Floyd* decision has since been stayed, see Ligon v. City of New York, --- Fed. Appx. ----, 2013 WL 5835441 (2d Cir. 2013), but the observations made in *Floyd* by Judge Scheindlin still resonate. And subsequent to the stay, the City's motion to vacate has been denied. See Ligon v. City of New York, --- F.3d ----, 2013 WL 6124389 (2nd Cir. 2013).

> active and public debate on the issues addressed in this Opinion—and the passionate positions taken by both sides—it is important to recognize the human toll of unconstitutional stops. While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police. This alienation cannot be good for the police, the community, or its leaders. Fostering trust and confidence between the police and the community would be an improvement for everyone.[166]

Importantly, Judge Scheindlin approvingly cites a Ninth Circuit decision focusing on how such stops "are *humiliating*, damaging to the detainees' self-esteem, and reinforce the reality that racism and intolerance are for many African–Americans a regular part of their daily lives."[167]

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[166] *Id.* at *2.

[167] *Id*. at *33, citing Washington v. Lambert, 98 F.3d 1181, 1188 (9th Cir. 1996), and see *id* at 1187 ("In this nation, all people have a right to be free from the terrifying and humiliating experience of being pulled from their cars at gunpoint, handcuffed, or made to lie face down on the pavement when insufficient reason for such intrusive police conduct exists"); see generally, e.g., David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked,* 69 IND. L.J. 659, 679–80 (1994); Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause,* 20 FORD. URB. L.J. 621, 623–25 (1993); Tracey Maclin, *Black and Blue*

Prof. Jeffrey Fagan has recently written about the indignities of "order maintenance policing," and how this sort of policing intrudes on the dignity of citizens by "proactively interdict[ion] and temporar[y] detain[ing of] citizens whose behavior is deemed sufficiently suspicious for police to conclude that `crime in afoot.'"[168] In this paper, Fagan discusses the indignity of the unreasonable searches, and explains how such searches "accord with the common understanding of humiliation, in particular humiliations that involve intrusions on highly private spheres: intrusion in bodily functions (such as urine tests); searches of the person, especially strip searches, and searches of personal belongings that are perceived as private such as purse or carry-on luggage."[169] He calls for a "jurisprudence of respect,[170] arguing that "the systematic and cumulative denial of recognition – respect from the state – has stigmatizing effects that can lead to a deprivation on top of a breach with the moral bases of the law."[171] The sort of stigmatizing indignity referred to here by Professor Fagan humiliates and shames citizens; perhaps Judge Scheindlin's decision in the *Floyd* case will lead to a new reconceptualization of the impacts of current policies.

C. Treatment of persons with mental disabilities and elders

In light of the recently ratified UN Convention for the Rights of Persons with Disabilities

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Encounters—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 250–57 (1991).

[168] Jeffrey Fagan, *Indignities of Order Maintenance Policing,* manuscript, at 3 (accessible at http://www.law.arizona.edu/Events/Soll_Lectures/Soll_lecture_2013.cfm).

[169] *Id.* at 7.

[170] *Id.* at 21.

[171] *Id.* at 23.

(CRPD),[172] it follows that persons with mental disabilities should be afforded greater protection from being humiliated and shamed. In this section we will first address the importance of the CRPD in this context, and then explore five areas that highlight the passive and overt use of humiliation and shame subjected to persons with mental disabilities and the elderly: the institutionalization of persons with mental illness, involuntary outpatient treatment, gun control, treatment of institutionalized elderly persons, and guardianships.

1. Institutionalization

The rights of persons with mental disabilities have been systematically violated in virtually all societies.[173] Persons with disabilities face degradation, stigmatization and discrimination.[174] Disproportionally, persons with mental disabilities are involuntarily committed to institutions, and deprived of their freedom, dignity and basic human rights.[175] These psychiatric institutions to which persons with mental disabilities are relegated often isolate such persons and subject them to deplorable conditions that threaten their health and, in some cases, their lives.[176]

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[172] See *supra* text accompanying notes 63-79.

[173] Dhir, *supra* note 67; see generally, MICHAEL L. PERLIN ET AL , INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW: CASES AND MATERIALS (2006).

[174] Perlin & Szeli, *supra* note 66.

[175] *See* PERLIN, *supra* note 64, at 14; see generally, Perlin & Schriver, *supra* note 63.

[176] Lance Gable, Javier Vasquez, Lawrence O. Gostin, & Heidi V. Jiminez, *Mental Health and Due Process in the Americas: Protecting Human Rights of Persons Involuntarily Admitted and Detained in Psychiatric Institutions*, 18 PAN. AM. J PUBLIC HEALTH 365 (2005).This includes persons with psychosocial and intellectual disabilities.

In the United States, despite a movement starting in the 1950s to deinstitutionalize,[177] persons with mental disabilities are still frequently housed in institutions that shock the conscience and humiliate the persons who live there.[178] Court decisions and statutes have legalized the forced isolation of persons with mental illness through personal protections orders, denial of evaluations, inpatient treatment, assisted outpatient treatment, and inadequate treatment in jails and prisons.[179] This isolation leads to feelings of shame for persons living with mental disabilities.[180] Thus, it might discourage

[177] Although it is commonly thought that the deinstitutionalization movement began in the 1970s, in truth, it began in the 1950s with the patenting of the first generation of antipsychotic drugs (such as Thorazine), which allowed persons with severe mental illness to function in the community. See e.g., (Judge) Edmund Ludwig, *The Mentally Ill Homeless: Evolving Involuntary Commitment Issues,* 36 VILL. L. REV. 1085, 1088 (1991). Some believe that the deinstitutionalization movement even began before that. See e.g., ANDREW SCULL, DECARCERATION, COMMUNITY TREATMENT AND THE DEVIANT—A RADICAL VIEW (1984).

[178] *See* 2 PERLIN *supra* note 42, Chapter 3A, at 3-154 (2d ed. 1999).

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

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

treatment and encourages persons living with mental illness to keep their illness a secret.[181]

Olmstead v. L.C. ex rel. Zimring sought to enforce the right to community integration for persons with mental disabilities.[182] The Supreme Court held that the Americans with Disabilities Act requires States to provide community-based treatment, and that unjustified isolation is properly regarded as discrimination based on disability,[183] noting that the ADA "specifically identifies unjustified `segregation' of persons with disabilities as a `for[m] of discrimination.'"[184] The CRPD also guarantees the right for persons with disabilities to live in the community.[185] Nevertheless, approximately 40,000 Americans continue to reside in psychiatric hospitals.[186]

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[181] On how patients may want to keep their admission to hospitals a secret, see Maria Squera, *The Competing Doctrines of Privacy and Free Speech Take Center Stage after Princess Diana's Death*, 15 N.Y.L. SCH. J. HUM. RTS. 205, 220 (1998), citing Martin London, *Greater Legal Restrictions on the Paparazzi? Yes*, N.Y.L.J., Sept. 22, 1997, at 2 (discussing the ordeals of one such patient).

[182] 527 U.S. 581 (1999).

[183] *Id.* at 597

[184] *Id.* at 583, citing 42 U.S.C. §§ 12101(a)(2) and 12101(a)(5).

[185] CRPD, *supra* note 7, Article 19. President Obama signed the CRPD three years ago, *see* Michelle Diament, *Obama Urges Senate To Ratify Disability Treaty* (May 18, 2012), accessible at http://www.disabilityscoop.Com/2012/05/18/Obama-Urges-Senate-Treaty/15654/, but the Senate failed to ratify on December 4, 2012 for lack of a "super majority" of votes. The Senate Foreign Relations Committee again held hearings on the Convention in November 2013, but as of the writing of this paper, no date has been set for a full Senate vote. See http://usicd.org/index.cfm/crpdupdates. Although the United States has not ratified the CRPD, "a state's obligations under it are controlled by the Vienna Convention of the Law of Treaties[,] which requires signatories 'to refrain from acts which would defeat [the Disability Convention's] object and purpose,.'" Henry A. Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 331, 362-63

Institutional settings for people with mental disabilities are not just limited to psychiatric hospitals. Many such individuals are also housed in adult homes.[187] Moving people with disabilities from state mental hospitals to privately owned board and care homes has been described as transintitutionalization,[188] the transfer of a population from one institutional system to another as an inadvertent consequence of policies intended to deinstitutionalize the target population.[189] These adult homes can be as isolative as inpatient units and therefore invoke similar feelings of shame for people who are forced to live there.[190]

(2011), discussing In re Mark C.H., 906 N.Y.S.2d 419, 433 (Sur. 2010) (guardianship appointments must be subject to requirements of periodic reporting and review). See Perlin, *Guardians, supra* note 79.

The CRPD *has* been relied upon by domestic state courts both before and after the failed ratification vote. See e.g., In re Guardianship of Dameris L., 956 N.Y.S.2d 848 (Sur. Ct. 2012); *Mark C.H.*, *supra,*; see generally, Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93 (2012) (article author was trial judge in *Dameris L.* and M*ark C.H.* cases).

[186] US Census Bureau 2010, Table PCT20: Group Quarters Population by Group Quarters Type, available at http://
factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_PCT20&prodType=table (showing that 42,035 people reside in "[m]ental (psychiatric) hospitals and psychiatric units in other hospitals").

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

[188] *Id.* at 156.

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

[190] On the shame of nursing homes, see e.g., Bryan A. Liang, *Elder Abuse Detection in Nursing Facilities: Using Paid Clinical Competence to Address the Nation's Shame*, 39J. HEALTH L. 527 (2006)

There have been litigation efforts to abate the negative outcomes of this transinstitutionalization. By way of example, in *Disability Advocates Inc. v. Patterson,* a federal district court found that such "adult homes" were institutions that impeded residents' community integration.[191] The court further held that New York State defendants had "denied thousands of individuals with mental illness in New York City the opportunity to receive services in the most integrated setting appropriate to their needs," and that these actions constituted discrimination in violation of Title II of the Americans with Disabilities Act (ADA).[192] Although that decision was subsequently vacated on standing grounds by the Second Circuit (in an opinion that never touched on the substance of the lower court's findings), [193] the state of New York nevertheless subsequently signed a consent agreement that provides funding for the development of 1,050 supported housing units in Kings and Queens counties and a development of a Community Transition Unit to facilitate transitioning individuals with serious mental illness in transitional adult homes to the community, and an independent reviewer to ensure compliance.[194] Also, in *Brooklyn Center for Independence of the Disabled v. Bloomberg,*[195] a federal court has certified a class action of over 900,000 individuals against the mayor and City of New York, alleging that city's emergency and disaster planning failed to address the needs of persons with

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[191] 653 F.Supp.2d 184, 198 (E.D.N.Y. 2009).

[192] *Id.* at 314.

[193] 675 F.3d 149 (2d Cir. 2012).

[194] United States v. New York , Docket # 13-cv-4165 (E.D.N.Y. 2013) consent judgment available at http://www.ada.gov/olmstead/documents/new-york-sa-olmstead.pdf (last accessed November 1 , 2013) .

[195] 287 F.R.D. 240 (S.D.N.Y. 2012).

disabilities, in violation of Rehabilitation Act, Title II of the Americans with Disabilities Act (ADA), and state human rights law.

Despite these litigation efforts, persons with mental disabilities continue to be housed in institutions that are humiliating and induce feelings of shame. Fully integrating persons with mental disabilities into society in a way that enhances dignity and reduces shame is required both under federal and state law and international human rights law.

2. Outpatient treatment

Besides being subject to institutionalization, persons with mental disabilities are also subject to involuntary outpatient treatment, a statutory mechanism that can be as humiliating and shameful as inpatient hospital treatment, in taking away the autonomy of patients and residents by not giving them choices in their treatment and living conditions.[196] In New York, this process of outpatient treatment is popularly known as *Kendra's Law* or Assisted Outpatient Treatment ("AOT").[197] Persons are subject to AOT laws in New York if they are over the age of eighteen, suffering from a mental illness, deemed as unlikely to survive in the community without supervision, have a history of noncompliance with treatment, and have been hospitalized at least twice in the prior thirty-six months, or have been accused of an act of serious violent behavior toward self or others in the prior forty-eight months.[198] AOT is similar to involuntary inpatient treatment in that it forces a person to take certain medication, to live in a particular place, and in

[196] Rae E. Unzicker, *From Privileges to Rights*, 17 T.M. COOLEY L. REV. 171, 172-173 (2000).

[197] *See* N.Y. MENTAL HYGIENE LAW § 9.60. See, for an early consideration, Michael L. Perlin, *Therapeutic Jurisprudence and Outpatient Commitment: Kendra's Law as Case Study*, 9 PSYCHOL. PUB. POL'Y & L. 183 (2003).

[198] N. Y. MENTAL HYGIENE LAW §9.60(c).

some cases to attend certain outpatient clinics.[199] In New York, the law is used mainly on people with multiple hospitalizations.[200]

In theory, AOT is supposed to enable a person with mental illness to live in the community by providing a case manager, psychiatrist, or, in some cases, offering residential facilities or day treatment programs.[201] However, a person may feel coerced due to the judicial decree that he or she must comply with a prescribed course of treatment or be forcibly brought to an emergency room and held in the hospital for seventy-two hours without the option of leaving.[202] Of course, the mere fact that a patient is even classified as "voluntary" does not mean that the process is necessarily free from coercion.[203] AOTs also

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[199] *Id*. The New York Court of Appeals found in Rivers v. Katz, 67 N.Y.2d 485, 497-98 (1986), that involuntarily committed patient in a psychiatric hospital could not be medicated over his or her objection unless the hospital proved by clear and convincing evidence that the person suffers from a mental illness, lacks capacity to make a reasoned decision, and that the proposed treatment was the least restrictive alternative and in the patient's best interests. However, this decision does not extend to AOTs in New York. *See In re* K.L., 1 N.E.2d 480 (2004)(threshold question as to capacity to make medical decisions was not required for AOT).

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

[201] N.Y. MENTAL HYGIENE LAW § 9.60(a)(1).

[202] Dlugacz, *supra* note 200, at 88. On how judicial hearings engender feelings of powerlessness in persons with mental disabilities, see KATEY THOM ET AL, BALANCING INDIVIDUAL RIGHTS WITH PUBLIC POLICY: THE DECISION-MAKING OF THE MENTAL HEALTH REVIEW TRIBUNAL 15 (2014), citing, inter alia, Terry Carney, *Mental Health Tribunals - Rights, Protection, or Treatment? Lessons From the ARC Linkage Grant Study?* 18 PSYCHIATRY, PSYCHOL. & L. 137 (2011).

[203] Coercion is also often present in the allegedly *voluntary* civil commitment process as well. See 1 PERLIN, *supra* note 44, §§ 2C-7.2 to 7.2a, at 281-91; Susan C. Reed & Dan A. Lewis, *The Negotiation of Voluntary Admission in Chicago's State Mental Hospitals,* 18 J. PSYCHIATRY & L. 137 (1990). See generally, Birgit Volmm, *Coercive Measures in Psychiatry: Reactions by Patients and Staff* (paper

disproportionately coerce racial minorities into involuntary treatment and forced drugging.[204] The court process can be humiliating because it shames people who are hospitalized twice or more in three years; such shaming in and of itself can discourage treatment. Forced outpatient treatment is more likely to "inspire distrust of the therapist, resentment, and lack of genuine cooperation."[205] Further, forcing a person to take medication against their will who would not otherwise be subject to forced medication, devalues the individual being served.[206] Judges often take a paternalistic approach and feel that it is "better [to be] safe than sorry" and are more willing to grant AOTs, rather than "risk" having a patient not be subject to monitoring and potentially commit a criminal act. In fact, "court-ordered participation in treatment in the community is more preventive commitment than it is assisted community treatment."[207] This sort of rationalization feeds

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presented to the World Psychiatric Association International Congress., Vienna Austria, Oct. 28, 2013; powerpoints on file with the authors).

[204] Dlugacz, *supra* note 200, at 82, relying on N.Y. LAWYERS FOR PUB. INTEREST, IMPLEMENTATION OF "KENDRA'S LAW" IS SEVERELY BIASED, (Apr. 7, 2005), *available at* http://www.prisonpolicy.org/scans/Kendras_Law_04-07-05.pdf.

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

[206] Perlin, *supra* note 197, at 191.

[207] Winick, *supra* note 205, at 109.

the misconception that persons with mental illness are inherently more dangerous than others.[208]

Conversely, persons with mental illness can face involuntary confinement because they do not meet eligibility requirements for AOTs. *Mental Disability Law Clinic v. Hogan*[209] was a class action lawsuit that challenged institutional aspect of AOTs and was brought on behalf of individuals who face involuntary confinement because they do not meet eligibility requirements for AOTs.[210] The plaintiffs alleged that "by failing to authorize outpatient services to individuals who do not satisfy the criteria for [AOT]" the Statute results in "unnecessarily segregating mentally ill individuals."[211] Although the case was ultimately dismissed, plaintiffs' arguments raise important questions as to whether AOTs are the least restrictive alternative and whether AOTs should continue only on a strictly voluntary basis.

3. Gun control issues

One of the great controversies of recent times is gun control and its relationship to persons with mental illness. Instead of focusing on better access to and quality of treatment, legislation often focuses on a "knee-jerk" reaction to solve a complex problem.

The response of the public, the press and the legislatures to recent mass killings has been to assume a causal relationship between mental illness and homicidal acts of violence.[212] This persists – a case-study of flawed "ordinary common sense"[213] –

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[208] Dlugacz, *supra* note 200, at 89. See also, Winick, *supra* note 205, at 107.

[209] 2008 WL 4104460 (E.D. N.Y. 2008).

[210] *Id.*

[211] *Id.* at *15.

[212] Michael L. Perlin, *On "Sanism"*, 46 SMU L. REV. 373 (1992).

notwithstanding the availability of valid and reliable research that tells us, rather, that *a* diagnosis of a major mental disorder -- especially a diagnosis of schizophrenia -- was associated with a *lower* rate of violence than a diagnosis of a personality or adjustment disorder, although a co-occurring diagnosis of substance abuse was strongly predictive of violence.[214]

The New York Secure Ammunitions and Firearms Enforcement (SAFE) Act is a recent example of such a "knee-jerk" legislative reaction that humiliates persons with mental disabilities. [215] Under a vague standard of "likely to engage in conduct that would result in serious harm to self or others," the SAFE Act requires designated mental health professionals, to report such persons to the Division of Criminal Justice Services (DCJS), regardless of whether they are seeking treatment voluntarily or involuntarily.[216] Not only

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[213] On the meretricious impact of a false ordinary common sense, on judicial decision-making, see Cucolo & Perlin, supra note 144, at 38: "OCS is self-referential and non-reflective (`I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is'"). *Id,* citing Michael L. Perlin, "*She Breaks Just Like a Little Girl": Neonaticide, The Insanity Defense, and the Irrelevance of Ordinary Common Sense,* 10 WM. & MARY J. WOMEN & L. 1, 8 (2003).

[214] THE MACARTHUR VIOLENCE RISK ASSESSMENT STUDY, accessible at http://www.macarthur.virginia.edu/risk.html (last accessed, November 1, 2013). See also *id.*:

- *Delusions.* The presence of delusions – or the type of delusions or the content of delusions – was not associated with violence. A generally "suspicious" attitude toward others was related to later violence.
- *Hallucinations.* Neither hallucinations in general, nor "command" hallucinations per se, elevated the risk of violence. If voices specifically commanded a violent act, however, the likelihood of violence was increased.

[215] The bill passed the NY State Senate on January 14, 2013 and, the governor of NY waiving the legally required three-day waiting period, it was passed by the State Assembly and signed by the governor on January 15, 2013.Leg Bill S. 2230

[216] N.Y. MENTAL HYGIENE LAW § 9.46.

does the SAFE Act apply to persons applying for new licenses, but it also applies to licenses already issued. Thus, if a person with a mental disability legally owns a licensed gun, that person is required to turn in the gun to law enforcement authorities.[217] The collected information regarding a person's mental health treatment is supposed to only be used to determine if the person has a gun license issued that should be suspended or revoked because they suffer from a mental illness.[218] The names of the persons are entered in a database kept indefinitely by the DCJS.[219]

However, the potential unintended consequences, such as damage to the therapeutic relationship between the patient and provider and violations of a patient's right to privacy, have yet to be addressed in the legal literature.[220] A person seeking mental health treatment has an expectation of privacy and confidentiality of their medical treatment.[221] In the past, according to the *Tarasoff* case, a psychiatrist only would report a patient to the authorities or the potential victim when "disclosure is essential to avert

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[217] N.Y. State Assembly Bill S. 2230 (2013).

[218] N.Y. MENTAL HYGIENE LAW § 9.46.

[219] What is to be done with the database has yet to be seen.

[220] But see Jeffrey Swanson, *Mental Illness and New Gun Law Reforms: The Promise and Peril of Crisis-Driven Policy*, 309 JAMA # 12(March 27, 2013), accessible at http://jama.jamanetwork.com/article.aspx?articleID=1569361&utm_source=Silverchair%20Information%20Systems&utm_medium=email&utm_campaign=JAMA:OnlineFirst02/07/2013 (critiquing SAFE for problems of overidentification, having a chilling effect on individuals who might otherwise have sought treatment, and invasion of privacy).

[221] *See* Health Insurance Portability Accountability Act of 1996 (HIPAA) 42 U.S.C. 1320d-9 (2010). There are other exceptions to confidentiality, including a patient's decision to put his mental state in issue in civil litigation, conflicts with police power statutes (such as those criminalizing child abuse) and inquiries into such public welfare matters as an individual's competency to operate a motor vehicle). See 3 PERLIN, *supra* note 44, § 7A-5, at 333-34.

danger to others."[222] But, the SAFE Act makes it a much lower threshold for reporting the patient's information to the DCJS.[223] Further, it adds to the misconception that persons with mental disabilities are inherently more dangerous by assuming that taking away access to guns from persons potentially suffering from a mental illness will end mass violence.[224]

4. Issues involving elders with cognitive deficits

The humiliation that persons with disabilities experience as a result of their treatment is also shared by the elderly. Technology and medical interventions have allowed people to live longer at the same time that the number of institutionalized elders has grown significantly. Currently there are about 1,832,000 people living in skilled nursing facilities in the US.[225] This vulnerable population can be subject to abuse and neglect while housed

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[222] Tarasoff v. The Regents of the University of California, 551 P.2d 334 (Cal. 1976). *Tarasoff* is not universally accepted by all state courts. See 3 PERLIN, *supra* note 44, § 7C-2.4h, at 479-81. For a recent state-by-state guide to the state of *Tarasoff* in all jurisdictions, see http://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx (last accessed, December 23, 2013).

[223] N.Y. Assembly Bill S. 2230 (2013).

[224] See also, Jana R. McCreary, *"Mentally Defective" Language in the Gun Control Act*, 45 CONN. L. REV 813,842 (2013), discussing the Federal Gun Control Act of 1968, 18 U.S.C. § 922(d)(4) (2006), arguing that determining who is irresponsible and dangerous has been done irresponsibly.

[225] US Census Bureau 2012,Group Quarters, Table 73: Group Quarters Population by Type of Group Quarter and Selected Characteristics, available at http://www.census.gov/compendia/statab/2012/tables/12s0073.pdf. In 2004, 1,492,200 people were in nursing homes. CDC 2004 National Nursing Home Survey, available at: http://www.cdc.gov/nchs/data/nnhsd/Estimates/nnhs/Estimates_PaymentSource_Tables.pdf. In the US Census Bureau 2000, 4,059,039 people were living in institutions total (not distinguished between psychiatric hospitals and nursing homes). US Census Bureau 2000, Table 1: Total Population in Households and Group Quarters by Sex and Selected Age Groups for the United States,

in nursing homes.[226] In a situation that parallels what was previously discussed about deinsitutitonalization from psychiatric hospitals, many people are kept in nursing homes despite the availability of residences in the community in which where they could live with the support of community-based services.[227]

5. Guardianships

Guardianships can also be humiliating to the person subject to the guardianship.[228] In many nations, entry of a guardianship order became the "civil death" of the person affected.[229] It is so characterized:

> because a person subjected to the measure is not only fully stripped of their legal capacity in all matters related to their finance and property, but is also deprived of, or severely restricted in, many other fundamental rights, [including] the right to

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available at http://www.census.gov/population/www/cen2000/briefs/phc-t7/tables/grpqtr01.pdf.

[226] See e.g., Iaian Johnson, *Gay And Gray: The Need for Federal Regulation of Assisted Living Facilities and the Inclusion of LGBT Individuals,* 16 J. GENDER RACE & JUST. 293, 298 (2013), reporting on a study specifically finding an "unprecedented number" of reports of abuse of elderly residents within nursing homes, and noting further that only forty percent of nursing homes met the minimum standards required by federal law, relying on Patrick A. Bruce, *The Ascendancy of Assisted Living: The Case for Federal Regulation*, 14 ELDER L.J. 61, 69 (2006), and JOHN B. WILLIAMSON ET AL., AGING AND PUBLIC POLICY: SOCIAL CONTROL OR SOCIAL JUSTICE? (1985).

[227] Jennifer Matta, *Informed Choice: Expanding Housing Options in an Aging Society,* 48 WAYNE L. REV. 1503, 1523 (2003).

[228] See generally, Perlin, *Guardians,* supra note 79; Dlugacz & Wimmer, *supra* note 185.

[229] Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn*? 34 SYRACUSE J. INT'L. L. & COM. 563, 569 (2007); *see also* Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?*, 34 SYRACUSE J. INT'L. L. & COM. 429, 445 n.77 (2007) (explaining "civil death").

vote, the right to consent or refuse medical treatment (including forced psychiatric treatment), freedom of association and the right to marry and have a family.[230]

Medical testimony and deeply personal information are often aired in court. Guardianships also can take away all the rights of allegedly incapacitated persons, and can take away their dignity by stripping such persons of any ability to make decisions for themselves. [231]

Advocates have argued that under the CRPD, substituted decision-making should be abolished altogether.[232] Article 12 of the CRPD guarantees that persons with disabilities have the right to recognition everywhere before the law. The International Disability Alliance, a network of global and regional organizations of persons with disabilities, argues that the following must be abolished: plenary guardianship; unlimited time-frames for exercise of guardianship; the legal status of guardianship as permitting any person to override the decisions of another; any individual guardianship arrangement upon a person's request to be released from it; any substituted decision-making mechanism that overrides a person's own will, whether it is concerned with a single decision or a long-term

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[230] Oliver Lewis, *New Project on Reforming Guardianship in Russia*, MENTAL DISABILITY ADVOCACY CTR. (Aug. 11, 2009), http://bit.ly/Xd7qR3 (*New Project*).

[231] See Perlin, *Guardians, supra* note 79, at 1170; see also, Chinese Hum. Rts. Defenders, *The Darkest Corners: Abuses of Involuntary Psychiatric Commitment in China* 12 (2012), available at http://bit.ly/YBkK23 (reported to the UN Committee on the Rights of Persons with Disabilities for its review of the People's Republic of China in September 2012).

[232] CRPD, *supra* note 7, Arts. 12, 15, 17, and 25. International Disability Alliance, *International Disability Alliance's Forum for the Convention on the Rights of Persons with Disabilities,* Sept. 15, 2008, available at http://www.internationalDisabilityalliance.org/representation/legal-capacity-working-group (last accessed November 23, 2013).

arrangement; and any other substituted decision-making mechanisms, unless the person does not object, and there is a concomitant requirement to establish supports in a person's life so they can eventually exercise full legal capacity.[233]

The CRPD states:

Equal recognition before the law:

(1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

(2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

(3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

(4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

(5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank

[233] *International Disability Alliance's Forum for the Convention on the Rights of Persons with Disabilities*, *supra* note 232.

loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.[234]

At the least, as Professor Arlene Kanter notes:

Instead of parentalistic guardianship laws, which substitute a guardian's decision for the decision of the individual, the CRPD's supported-decision making model recognizes first, that all people have the right to make decisions and choices about their own lives.[235]

Guardianships are also seen as a violation of the integration mandate of the ADA to provide services in the most integrated and least restrictive manner.[236] Like institutionalization, guardianship entails the loss of civic participation and creates a legal construct that parallels the isolation of institutional confinement.[237] When the state appoints a guardian and restricts an individual from making his or her own decisions, the individual loses crucial opportunities for interacting with others.[238] Further, there is evidence that guardianships often leads to institutionalization.[239]

By taking away all of a person's rights to make decisions regarding his or her life, guardianships shame and humiliate the person subject to the guardianship. The fact that

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[234] CRPD, *supra* note 7, art. 12. *See generally* Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8 (Winter 2012).

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

[236] Cremin, *supra* note 187, at 179.

[237] *Id*.

[238] *Id*.

[239] *Id*.

guardianships can lead to institutionalization is further humiliating.[240] Moreover, the court guardianship-determination process itself can be humiliating as medical and personal history are aired in public testimony.[241] Instead of substituted decisionmaking, assistance to persons in need of help with their day to day living should be done in conjunction with their wishes and affording them the greatest amount of independence possible. Guardianship hearings should be closed to anyone not directly involved in the case; further, even private medical testimony, which can be embarrassing to the person subject to the guardianship, should be minimized in order to reduce potential feelings of shame and humiliation.

Although these five areas -- the institutionalization of persons with mental illness, involuntary outpatient treatment, gun control, treatment of institutionalized elderly persons, and guardianships -- appear to be varied in scope, there are shared underlying issues involving the overt and passive uses of shame. Despite the ratification of the CRPD, persons with mental disabilities and physical disabilities continue to suffer socially-inflicted shame and humiliation

d. Sex offender residency restrictions

1. Introduction[242]

Sex offenders are arguably the most despised members of our society and therefore warrant our harshest condemnation.[243] Regularly reviled as "monsters" by district

[240] See *supra* text accompanying notes 228-31.

[241] On issues related to public civil commitment hearings, see 1 PERLIN, *supra* note 44, § 2C-4.4, at 322-28.

[242] See generally, Heather Ellis Cucolo & Michael L. Perlin, *"They're Planting Stories In the Press": The Impact of Media Distortions on Sex Offender Law and Policy* 3 U. DENV. CRIM. L. REV. 185 (2013).

attorneys in jury summations,[244] by judges at sentencings,[245] by elected representatives at legislative hearings,[246] and by the media,[247] the demonization of this population has helped create a "moral panic"[248] that has driven the passage of legislation[249] – much of which has

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

[244] We have yet to find an appellate reversal of a case in which this inflammatory language was used. See e.g., State v. Henry, --- So.3d ----, 2012 WL 5269220 (La. App. 2012); Comer v. Schriro, 463 F.3d 934, 960 (9th Cir. 2006), *cert. den.,* 550 U.S. 966 (2007) ; Jackson v. Ludwick, 2011 WL 4374281 (E.D. Mich. 2011); People v. Bonner, 2010 WL 3503858 (Tex. App. 2010); Kellogg v. Skon, 176 F.3d 447, 452 (8th Cir. 1999).

[245] See e.g., People v. Ball, 2011 WL 1086557, *3 (Mich. App. 2011).

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

[247] See Rachel Rodriguez, *The Sex Offender Under the Bridge: Has Megan's Law Run Amok?* 62 RUTGERS L. REV. 1023, 1031-32 (2010), quoting John G. Winder, *The Monster Next Door: The Plague of American Sex Offenders,* CYPRESS TIMES (Nov. 20, 2009, 1:49 PM), http:// www.thecypresstimes.com/article/News/Your_News/THE_MONSTER_NEXT_DOOR_THE_ PLAGUE_OF_AMERICAN_SEX_OFFENDERS/25925. ("`'There's no such thing as monsters.' We tell our kids that. The truth is that monsters are real. . . . These monsters are called 'Sex Offenders'.

[248] See e.g., Filler, supra note 246, at 346-66 ; Eric Fink, *Liars and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases*, 83 NOTRE DAME L. REV. 2019, 2038-39 (2008); Eamonn Carrabine, *Media, Crime and Culture: Simulating Identities, Constructing Realities*, in INTERNATIONAL CRIME, *supra* note 5, at 397. See generally, STANLEY COHEN, FOLK DEVILS AND MORAL PANICS 1-2 (3d ed. 2002).

been found by valid and reliable research to be counter-productive and engendering a *more* dangerous set of conditions – and judicial decisions, at the trial, intermediate appellate and Supreme Court levels,[250] all reflecting the "anger and hostility the public feels" about this population.[251]

The government condones the use of humiliation as a remediative tool through the use of sex offender zoning restrictions and registries. These zoning laws bar sex offenders from residing in certain communities or residing within a certain number of feet of schools, parks, churches, recreational areas, or libraries.[252] These laws are so restrictive that in some cases there is no viable place left for a sex offender to live except in a tent under a bridge.[253] Sex offender registries require a person to notify the police and the community of their crimes. Probation conditions for some sex offenders require shaming conditions

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

[250] On "judicial panic" in the context of same-sex marriage cases, see John Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1146 (1999). On how shame penalties

that emphasize humiliation are likely to be counterproductive as they "drive a wedge between offenders and conventional society," see David Karp, *The Judicial and Judicious Use of Shame Penalties,* 44 CRIME & DELINQ. 277, 291(1998).

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

[252] Caleb Durling, *Never Going Home: Does It Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J. CRIM. L. & CRIMINOLOGY 317, 319 (2006).

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

such as posting signs and bumper stickers announcing their crimes.[254] These offenders are "forever branded with a "scarlet letter" notwithstanding the fact that they have already been criminally punished for their offenses,"[255] and have already served their sentences.[256]

2. Sex offender registration acts

Sex offender registration acts (SORAs) are present in every state in the US and have been met with resounding public support, despite their prohibitive cost.[257] Deterrence and protection of the public is the rationale used to justify SORAs.[258] SORAs are intended to shame sex offenders into having greater respect for the law and create a powerful deterrent to reoffending.[259]

However, SORAs are based on flawed reasoning. First, they assume that most sex offenses involve stranger victims and that there is a correlation between how close an offender lives to a school and increased recidivism.[260] A study of the newspaper coverage of child molesters arrested over the course of one year found that media coverage tended to focus on the "the extreme and unusual," while the reporting of typical cases, such as those

[254] Durling, *supra* note 252, at 327.

[255] Cucolo & Perlin, *supra* note 144, at 22.

[256] *Id.* at 21-22.

[257] Amber Leigh Bagley, *"An Era of Human Zoning": Banishing Sex Offenders From Communities Through Residence and Work Restrictions*, 57 EMORY L.J. 1347, 1391 (2008); and Durling *supra* note 252, at 321.

[258] Anne-Marie McAlinden, *The Shaming of Sexual Offenders: Risk, Retribution and Reintegration* 107 (2007).

[259] *Id.* at 118.

[260] Durling, *supra* note 252, at 329.

involving family members or acquaintances, was infrequent to non-existent.[261] In actuality, ninety percent of child sex offense cases are committed by a family member or acquaintance of the child.[262] Thus, social proximity, not residential proximity, is the most significant factor for sex offender recidivism.[263] In fact, studies have demonstrated that proximity to a school or playground has little effect on recidivism rates.[264] Second, the public assumes that sex offenders recidivate at higher rates than other criminals.[265] However, studies have shown that sex offenders recidivate at much lower rates than commonly believed.[266]

Further, there is research that suggests SORAs are not effective.[267] There is no distinction from those who will be dangerous in the future from those who were formerly dangerous.[268] Statutory rape cases dealing with sexual interactions between teenagers that would otherwise be consensual but for age, are treated the same as cases dealing with violent pedophilic offenses.[269] Such a system is clearly "unreliable and unfair.[270] In fact,

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

[262] Bagley, *supra* note 257, at 1378.

[263] Wagner, *supra* note 261, at 192.

[264] *Id.*at 193

[265] Durling, *supra* note 252, at 329.

[266] Cucolo & Perlin, *supra* note 144, at 5; Wagner, *supra* note 261, at 193.

[267] Wagner, *supra* note 261, at 187.

[268] Cucolo & Perlin, *supra* note 144, at 21

[269] *Id.* On the imprecision and overbreadth of this category, ranging from the stranger pedophiliac rapist to the teenager consensually sending "sexting" pictures of herself to her boyfriend, see Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1208 (1998) ("sex offenders do not share a common set of psychological and behavioral characteristics"), or the driver who posts an allegedly-obscene bumper sticker, see e.g.,

research indicates that that SORAs do not protect children and might even increase the danger to the community.[271]

Empirical evidence demonstrates that strong support networks are among the most effective means of combating recidivism.[272] Sex offenders need support systems comprised of people who accept their potential for deviant behavior and empower them to engage in healthy, law-abiding and respectful relationships and activities.[273] Studies have shown a correlation between strong family ties and lower recidivism rates for reentering offenders.[274] Other studies show that restrictive parole supervision does not necessarily lead to lower recidivism rates.[275] In fact, the labeling and stigmatization of sex offenders

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ALA. CODE § 13A-12-131 (LexisNexis 2005) (including displaying such a bumper sticker as a sex offense). See generally, Cucolo & Perlin, *supra* note 144, at 21 (current system "bundles statutory rape cases that deal with sexual interactions between teenagers -- interactions that would otherwise be consensual but for the age of one of the partners -- with cases of individuals who have committed violent pedophilic offenses"). Preliminary studies indicate that approximately 20% of teenagers have engaged in "sexting." *See* The National Campaign to Prevent Teen and Unplanned Pregnancy, http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (last visited Nov. 6, 2012), as discussed in Carissa Byrne Hessick & Judith M. Stinson*, Juveniles, Sex Offenses, and the Scope of*
Substantive Law, 46 TEXAS TECH L. REV. – (2014) (in press).

[270] Cucolo & Perlin, *supra* note 144, at 21.

[271] Cucolo & Perlin, *supra* note 242, at 210

[272] Brett, *supra* note 253, at 503.

[273] *Id.* at 504.

[274] *Id.* at 503.

[275] *Id.*

can have a disintegrative impact on the offender's rehabilitation which may ultimately make relapse more likely.[276]

Further, SORAs disproportionately affect low-income offenders and cause them to be further isolated from society. By being forced to live far away from work opportunities, they become even more marginalized.[277] "Stable employment is an important part of preventing stress and decreasing recidivism, but zoning schemes make finding and keeping employment difficult."[278]

SORAs and zoning laws shame and stigmatize sex offenders and deny them meaningful opportunities for rehabilitation.[279] They forever brand an offender with a "'scarlet letter' notwithstanding the fact that they have already been criminally punished for their offenses.[280] "With so many sex offenders struggling to find suitable housing and being pushed away from their social networks, the restrictions may actually be placing communities at an increased risk.[281] These schemes are so restrictive that they often drive sex offenders to "disappear underground or go across state lines."[282]

Homeowner associations have recorded covenants barring the sale of homes to registered sex offenders.[283] In *Mulligan v. Panther Valley Panther Valley Property Ass'n*, a

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[276] McAlinden, *supra* note 258, at 118.

[277] Durling, *supra* note 252, at 335.

[278] Bagley, *supra* note 257, at 1383.

[279] *Id.* at 1385.

[280] Cucolo & Perlin, *supra* note 144, at 22.

[281] Wagner, *supra* note 261, at 195.

[282] Bagley, *supra* note 257, at 1389.

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

resident of a homeowner association challenged the prohibition on the sale of her home to what is characterized in New Jersey as a Tier 3 sex offender.[284] The court found that the restriction did not constitute an unreasonable restraint on alienation because there were only eighty Tier 3 sex offenders living in New Jersey at the time, thus the Court reasoned that there were thus only 80 people to whom the plaintiff could not sell her house.[285] It is also telling that the exclusion of sex offenders by homeowner's associations does not include exclusion of people convicted for other crimes like murder, burglary, kidnapping, sedition, fraud, or theft.[286]

In *Smith v. Doe*, the United States Supreme Court rejected the respondent's argument that Alaska's notification requirements resembled "shaming punishments of the colonial period."[287] The Court found that unlike shaming punishments of the past, the stigma that resulted from Alaska's notification requirements results from the dissemination of accurate information about a criminal record, not "from public display for ridicule and shaming."[288] This was found despite the fact that the defendant successfully completed a treatment program, gained early release, subsequently remarried, established a business, reunited with his family, and granted custody of a minor child based on a

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[284] 766 A.2d 1186, 1192 (N.J. App. Div. 2001). Tier 3 is the highest classification in New Jersey and is used to classify sex offenders whom the state has deemed to pose a high risk of recidivating. *id.* at 1189.

[285] 766 A.2d 1186, 1192

[286] Strahilevitz, *supra* note 283, at 1890. Nor are defendants convicted of kidnapping or sedition covered by such provisions.

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

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

judge's determination that he had been successfully rehabilitated.[289] Further, the defendant's registration pursuant to SORNA is unlikely to increase public safety since SORNA does not thwart the victimization of close, trusting people as exemplified by the defendant who was convicted of sexually abusing his daughter.[290]

But, even given the Supreme Court's approval of such notification requirements mandated under the Alaska statutory scheme upheld in *Smith,* it is more difficult to justify the use of other shaming sanctions, such as forcing sex offenders to post signs or affix a bumper sticker to their cars. These shaming conditions are problematic because it labels them and may cause feelings of hopelessness that could cause them to engage in deviant behavior.[291] It also leads to public humiliation which cannot be seen as an acceptable goal of probation,[292] such as rehabilitation of the defendant and/or protection of the community.[293]

Often because of these shaming conditions, sex offenders find themselves and their families threatened.[294] An example of the dire consequences of "naming and shaming" sex offenders is from England. In July 2000, *News of the World* (a garish British tabloid) developed the "Name and Shame" Campaign which centered on outing suspected and known pedophiles by printing their photographs and addresses along with brief details of

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[289] *Id.* at 117.

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

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

[292] *Id.* at 101.

[293] *Id.* at 103.

[294] *Id.* at 101.

their alleged offending history.[295] Angry protestors issued threats and overturned and burned cars.[296] Several families were forced to flee, one convicted pedophile disappeared, two alleged pedophiles committed suicide, and one person's house was attacked merely because she shared the same surname of a known sex offender.[297] The moral panic associated with sex offenders is primarily due to the media's depiction of "sex offenders."[298]

By shaming and humiliating convicted sex offenders, sex offender residency restrictions ostracize, isolate and destroy any hope of re-integration and may even increase the likelihood of recividisim.[299] SORAs provoke feelings of being less than human, hopelessness, unworthiness, and results in a lack of dignity.[300] As Professor Michelle Alexander has noted, "some convicted felons and registered sex offenders have found the `lifetime of shame, contempt, scorn, and exclusion' that follows the actual sentence to be the most difficult aspect of their conviction."[301] In a different sexual offense context -- the imposition of serious penalties following teenage "sexting" (the sending of sexually explicit images or messages via cellular phone) -- one commentator has concluded, "Stripping

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[295] McAlinden, *supra* note 258, at 22.

[296] *Id*.

[297] *Id*.

[298] Cucolo & Perlin, *supra* note 242 at 219; see also, Kristen M. Zgoba, *Spin Doctors and Moral Crusaders: The Moral Panic Behind Child Safety Legislation*, 17 CRIM. JUST. STUD.385, 385 (2004).

[299] Cucolo & Perlin, *supra* note 144, at 5.

[300] *Id.* at 30.

[301] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 139 (2010), as quoted in Sidney L. Leasure, *Criminal Law—Teenage Sexting in Arkansas: How Special Legislation Addressing Sexting Behavior in Minors Can Salvage Arkansas's Teens' Futures*, 35 U. ARK. LITTLE ROCK L. REV. 141, 150 (2012). See *supra* note 269.

teens of democratic rights, erecting roadblocks to their future careers, and subjecting them to a `lifetime of shame' is not consistent with the central aim of the juvenile justice system: rehabilitation."[302] Moreover, in a careful analysis of these sanctions aimed at sex offenders from a variety of constitutional perspectives – freedom of speech, freedom of association, right to privacy, right to work, the taking clause, vagueness, and cruel and unusual punishment – Leonore Tavill concludes that such sanctions are unconstitutional.[303]

VI. The relationship between therapeutic jurisprudence, international human rights law, the role of dignity and humiliating/shaming sanctions

As noted earlier, therapeutic jurisprudence aims to determine whether legal rules, procedure, and lawyer roles can be reshaped to enhance therapeutic potential while not subordinating due process principles.[304] Recall the "three Vs" listed by Professor Ronner in her discussion of TJ: voice, validation and voluntariness,[305] and consider how our humiliating and shaming strategies reject these values. "Scarlet letter" punishments do not meet "the three Vs" and are in direct contravention of TJ principles and the development of problem solving courts.[306] Although problem solving courts developed separately from TJ,

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[302] Leasure, *supra* note 302, at 150, citing Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 778-79 (2002).

[303] Tavill, *supra* note 109, at 544.

[304] See *supra* note 145, and authorities cited.

[305] Ronner, *supra* note 61, at 627.

[306] On the relationship between TJ and problem solving courts, see Perlin, *Cast His Robes, supra* note 5; Perlin, *Gates of Eden, supra* note 5.

they share similar aims.[307] Instead of shaming and humiliating people, courts should use the law as an instrument for helping people and should function as psychosocial agencies.[308] Judges need to be good listeners and avoid trite paternalism in the lecturing and shaming of defendants.[309] TJ and problem solving courts should also be employed for persons with mental disabilities subject to AOTs.[310] "Judges, court personnel, treatment providers, and defense attorneys should take care to instruct the individual carefully and understandably concerning her obligations relating to participation in the treatment program and reporting to court."[311] Most importantly, the individual should not feel coerced into treatment or into agreeing to probation.[312] By way of example, a Minnesota statute -- one that has rejected criminal sanctions for prenatal substance abuse as well as the classification of drug use during pregnancy as child abuse[313] -- has been lauded as "a model for other states, replacing ineffective punitive measures that deter pregnant substance abusing women from obtaining treatment and that encourage these women to feel guilt and shame."[314]

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

[308] *Id.* at 1066. See generally, Perlin, *Cast His Robe, supra* note 5, for a full discussion of mental health courts in this context.

[309] Winick, *supra* note 307, at 1071.

[310] See Perlin, *supra* note 197.

[311] Winick, *supra* note 307, at 1084.

[312] *Id.* at 1080.

[313] MINN. STAT. ANN. §626.5561.

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

Some argue that shaming is a necessary part of TJ.[315] However, reintegrative shaming differs from the humiliating tactics currently employed by courts.[316] Namely, the cornerstone of reintegrative shaming is the voluntary participation of victims and offenders.[317] The idea of reintegrative shaming is to have enough shame to bring "home the seriousness of the offense, but not so much to humiliate and harden."[318] Further it is directed at the evil of the act, rather than the evil of the person.[319]

Nothing so clearly violates the dignity of persons than treatment that demeans or humiliates them.[320] Thus, the treatment of persons with mental disabilities and the elderly must be radically changed.[321] Persons with mental disabilities have a right to receive treatment in a way that does not isolate them and invoke feelings of shame. The elderly deserve to be given the most opportunity to make decisions regarding their personal needs and property and afforded the greatest amount of independence.

Instead of laws whose purpose it is to shame, isolate and humiliate sex offenders, focus must be placed instead on reintegrating sex offenders into society and promoting sex offenders' self-respect and dignity while fostering family and community relationships.[322]

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

[316] See *supra* note 92.

[317] McAlinden, *supra* note 258, at 187

[318] Scheff, *supra* note 315 at 104.

[319] McAlinden, *supra* note 258, at 173.

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

[321] On the application of TJ to nursing home conditions, see MARSHALL KAPP, THE LAW AND OLDER PERSONS: IS GERIATRIC JURISPRUDENCE THERAPEUTIC? (2003).

[322] Cucolo & Perlin, *supra* note 144, at 40.

"Residency restrictions should be dismantled due to their anti-therapeutic effect and unfounded ability to have any impact on diminishing re-offense and making communities safer."[323] There is no question that the humiliation and shame that is at the foundation of the SORA registries have a counterproductive impact on what they ostensibly are set out to do. If, as one of us (MLP) has previously argued, "the perception of receiving a fair hearing is therapeutic because it contributes to the individual's sense of dignity and conveys that he or she is being taken seriously,"[324] then, the shaming and humiliating practices discussed throughout this paper fail miserably.

Finally, the CRPD declares a right to "freedom from degrading punishment,"[325] and a "respect for inherent dignity.[326] It promotes "awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities."[327] An understanding of dignity is absolutely central to an understanding of the intersection between international human rights and mental

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[323] *Id.* at 41.

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

[325] CRPD, *supra* note 7, Article 15. On the relationship between this Convention and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, see Perlin & Schriver, *supra* note 63. On the relationship between human dignity and the "importance of .. specific protections .. such as the prohibition of torture and cruel or degrading treatment" in international human rights treaties and conventions, see Charles R. Beitz, *Human Dignity in the Theory of Human Rights: Nothing but a Phrase?* 41 PHIL. & PUB. AFFAIRS 259, 289 (2013).

[326] CRPD, *supra* note 7, Article 3(a).

[327] *Id.*, Article 8.

disability law.[328] The punishments described in this paper – when applied to persons with mental disabilities – clearly contravene international human rights law. They deprive individuals of dignity via degrading means.

VI. Conclusion

The law regularly shames and humiliates those who come before it. In some cases, the shame and humiliation are inflicted as specific punishments in a range of criminal cases (often involving misdemeanors and traffic offenses as well as in felonies). In others, they are a by-product of how we treat classes of individuals (persons with disabilities, sex offenders, young minority individuals in public spaces). In some of these, the shaming is explicit and motivated (e.g., the judge in the sex offender case who said that he wished he could dye the defendant green[329]); in others, it is a byproduct of legislative act (e.g., guardianship acts that are the equivalent of "civil death")[330] or of administrative norms (e.g., New York City's now-discredited "stop and frisk" policy).[331] In no instance is there an iota of valid or reliable evidence that these approaches "work" (in the sense of lowering recidivism, making the streets safer, or creating a more humane society).

Often, the persons who are so shamed and humiliated are either despised (sex offenders) or ignored (persons institutionalized because of mental disabilities). Others have been convicted of criminal charges. They are rarely persons about whom there is an outcry when rights violations take place. In all cases, the shaming and humiliating tactics

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[328] *See* Perlin, *The Role of Dignity*, supra note 5. On how a special class of "dignitary harms" denies individuals "the capacity for dignified conduct," see Beitz, *supra* note 325, at 281.

[329] Tavill, *supra* note 109, at 644 n. 193.

[330] Perlin, *Guardians, supra* note 79, at 1162-63, quoting, *New Project supra* note 230.

[331] See *Floyd, supra* note 165.

deprive them of dignity, and, in the cases of individuals with disabilities, contravene the UN Convention on the Rights of Persons with Disabilities.[332] They all also violate the cardinal principles of therapeutic jurisprudence.[333] Although some may be inspired by noble aspirations, in the end, they ultimately all fail to meet any of their proffered goals.

We hope that this article calls attention to these rights violations, and that it causes those who support them to think more carefully about the impact that the tactics in question have on the persons being shamed and humiliated, and, ultimately, on all of us. Recall again what Dylan critic Michael Gray had to say about *Jokerman*, the song from which the first part of the title of this article is derived: that "`evil' is not `out there,' `among the others,' but is inside us all,"[334] We close our eyes to this reality, and that allows us to humiliate and shame others that we often treat as less than human. It is time to acknowledge this, and to end these behaviors.

[332] See *supra* text accompanying notes 325-28.

[333] See *supra* text accompanying notes 308-23.

[334] GRAY, *supra* note 22, at 264.