

# ESSAY

## SHAME AND THE MEANINGS OF PUNISHMENT

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### I. INTRODUCTION

Punishment supplies liberals with an especially intractable problem—justifying an institution which has as one of its main functions the infliction of suffering or “hard treatment”<sup>1</sup> on people. If one of the foundational norms of liberalism is the duty to treat citizens with equal respect, then punishment is a paradigmatically illiberal institution, because it is based on the idea that others can be treated in ways that would otherwise be instances of extreme disrespect or even cruelty. It is of course possible to simply define criminals as those who are outside the bounds of respect, or maintain that punishment is an institution justified on utilitarian grounds, so that violating the dignity of some is necessary for the preservation of the dignity of many others. These two solutions evade the problem that punishment presents for liberals, rather than address it squarely. They both abandon the idea that all individuals are worthy of respect and cannot be used merely as means for the benefit of others. The liberal principle of equal respect is a radical one; even committing a crime, however horrible, does not give a license for the state to behave cruelly toward the offender. But phrasing the principle of

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<sup>1</sup>Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 397 (1965) (including “hard treatment” in his influential definition of punishment).

equal respect this way makes the paradox of punishment appear insoluble: How can society deliberately inflict pain and suffering on citizens who commit crimes and still claim that it is treating them with respect? Thus, punishment is an institution that is fundamentally at odds with one of liberalism's most basic commitments.<sup>2</sup>

Recently, there has been considerable debate about the ethics of "shaming" punishments for criminal behavior.<sup>3</sup> This Essay argues that the two sides of the shaming-punishments debate have failed squarely to confront the dilemma in the previous paragraph. As a result, the debate has been less than fruitful in helping to find an accommodation between liberalism and punishment, if such an accommodation is possible.

Although there is some disagreement about whether shaming punishments are properly named, most scholars agree that shaming punishments involve the deliberate public humiliation of the offender.<sup>4</sup> One typical example is having the offender wear a T-shirt or sign declaring his crimes while standing outside of a courthouse or some other public building. Another example is for an offender convicted of drunk driving to put special license plates or bumper stickers on his car.<sup>5</sup> Those who defend shaming punishments see them as efficient ways to punish the offender, because they adequately express the state's condemnation of the crime at a much lower cost than imprisonment. Opponents of shaming

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<sup>2</sup>For other closely related statements of this paradox, see Danielle S. Allen, *Democratic Dis-ease: Of Anger and the Troubling Nature of Punishment*, in *THE PASSIONS OF LAW* 191 (Susan M. Bandes ed., 1999); Stanley C. Brubaker, *Can Liberals Punish?*, 82 *AM. POL. SCI. REV.* 821 (1988); John Kekes, *Cruelty and Liberalism*, 106 *ETHICS* 834 (1996); AVISHAI MARGALIT, *THE DECENT SOCIETY* 262-70 (1996); Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 *PHIL. & PUB. AFF.* 327 (1985).

<sup>3</sup>The volume of literature is now quite expansive. See Dan M. Kahan, *Punishment Incommensurability*, 1 *BUFF. CRIM. L. REV.* 691 (1998); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 *VA. L. REV.* 349 (1997); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 *J. LEGAL STUD.* 609 (1998); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. CHI. L. REV.* 591 (1996) [hereinafter Kahan, *Alternative Sanctions*]; see also MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY* (2004); Stephen A. Garvey, *Can Shaming Punishments Educate?*, 65 *U. CHI. L. REV.* 733 (1998); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 *VAND. L. REV.* 2157 (2001); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 *MICH. L. REV.* 1880 (1991) [hereinafter Massaro, *Criminal Law*]; Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 *PSYCHOL. PUB. POL'Y & L.* 645 (1997) [hereinafter Massaro, *Implications*].

<sup>4</sup>Judge Richard Posner, following Lawrence Lessig, thinks they are actually "humiliation punishments." Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 *J. LEGAL STUD.* 553, 557 (1998). Dan Kahan, a defender of shaming penalties, says that they may be better termed "degradation penalties." Kahan, *Alternative Sanctions*, *supra* note 3, at 636. I will not go into the (possible) distinction between punishments that induce guilt and those that induce shame—but my inclination is to say that too much can be made of this distinction.

<sup>5</sup>For more examples, see Garvey, *supra* note 3; Kahan, *Alternative Sanctions*, *supra* note 3.

punishments argue that shaming is a uniquely cruel thing to do, especially when the shaming is endorsed by the state as its main aim in punishing.

The problem with each side of the debate is not that the position is wrong or flawed, but that it is not completely thought through. The proponents of shaming punishments are correct in noting that society should want to condemn crime, but they fail to address what normative boundaries there are that constrain how society expresses its disapproval. They are far too complacent in accepting what is conventionally understood to express condemnation, and they ignore the possibility that what the public perceives as necessary to condemn a crime might not be consistent with the respect we owe to one another as human beings. By contrast, the opponents of shaming punishments are right to stress that some punishments may be humiliating to criminals and therefore should not be adopted by a liberal society. At the same time, their argument may not be pitched at the appropriate level of generality; nearly all types of punishment involve some humiliation, and thus, the objections they advance against shaming penalties in particular are better directed at a much broader class of criminal sanctions. In any case, it is hard in the abstract to say why a week of shaming is necessarily more humiliating than six months in prison.

This Essay critiques the shaming punishments debate, not in the interest of defending one side or the other, but to make more explicit the paradox with which this Essay began. This Essay also advances the proposal that a consistent liberalism, one that demands that all citizens be respected equally, is incompatible with any punishment that requires the infliction of hard treatment (treatment which inflicts pain or suffering) or humiliation on the offender. It is important to bracket the practical consequences of this proposal. Perhaps it was proposals like this one that made Nietzsche worry about the progressive softening of societies to the point where they one day become too timid to punish.<sup>6</sup> Nietzsche's worry is more of a practical consideration than a normative one, and taken as such, it has some force. For the most part, however, this Essay puts aside practical considerations. This may mean that however normatively attractive this picture of a liberal society, it may be a society that is not immediately realizable or easily sustainable once it has been achieved. Nevertheless, it is one of the luxuries of political theory to sketch out the utopias we aspire to, even if we do not know how to achieve them or how to sustain them. At the very least, these utopian aspirations clarify our normative commitments and where they may lead us if we take them seriously. By doing this, they may also lessen our temptation to make easy and unjustifiable accommodations to maintain the status quo.

## II. SHAME AND THE EXPRESSIVE FUNCTION OF PUNISHMENT

The rise in advocacy of shaming punishments has gone hand in hand with an increased interest in the "expressive" dimension of the law.<sup>7</sup> The law does not exist merely to allocate benefits and burdens; it also *says* things through its

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<sup>6</sup>FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 112-14 (trans. Walter Kaufmann, Random House 1966) (1886).

<sup>7</sup>For a good general theory of expressivism in law, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

actions. Consider what the law says when it places certain ethnic or racial classifications on the census form instead of on others, or when it uses a particular racial categorization rather than another.<sup>8</sup> The expressive dimension of the law gains a special salience when it comes to criminal law and punishment. Punishments are a way of telling the criminal that society does not approve of his actions. It is not as if society punishes by inflicting suffering and then stating in words that it does not approve of the offender's conduct. Rather, the punishment *is* the expression of condemnation: Society gives out harsh punishments for serious crimes because it wants to condemn those crimes in no uncertain terms. This is to say that, conventionally, hard treatment is society's way of expressing disapproval of criminal acts. Words alone are not good enough; the walls of a prison are. But the conventional linkage of inflicting suffering and expressing condemnation should be a source of worry for liberals, because it suggests that the only way society can adequately express its disapproval of behavior is by inflicting cruelty upon some citizens. The dilemma for the liberal is that the liberal should want to, as much as possible, secure the condemnatory dimension of punishment without the hard treatment aspect. However, this does not seem possible given current social meanings, which seem to automatically associate condemnation of criminal acts with the infliction of suffering on offenders. It appears that it is not possible to condemn without inflicting cruelty at the same time.

Shaming punishments are best interpreted as responses to this dilemma. On the one hand, shaming punishments express condemnation of the offender. By having the offender publicly display his criminal status, and by allowing citizens to directly criticize and cast shame upon him, society sends a clear message that it strongly disapproves of the offender's conduct. On the other hand, shaming does not involve the deliberate infliction of physical suffering on the offender. Compared to imprisonment, shaming punishments inflict much less physical cruelty. Indeed, they replace damage to one's physical integrity with mere damage to one's status or reputation. Shaming punishments are a paradigmatically liberal effort to replace the hard treatment aspect of punishment with something else that expresses society's condemnation of the criminal act without the pain associated with imprisonment. More generally, shaming punishments replace a concrete physical harm with a largely symbolic or expressive one, which is something liberals should see as desirable. Furthermore, shaming punishments fulfill all of the traditional rationales for punishment—deterrence, rehabilitation, and retribution. Importantly, this shows that it is possible to advance the traditional goals of punishment with sanctions that do not involve physical cruelty. Even if liberals go on to reject shaming punishments, as they should, they nonetheless should acknowledge the ways in which shaming approaches a genuinely liberal reform.

The advantage of separating expression from hard treatment is retaining the benefits of condemning an offense without the physical pain that is usually necessary to condemn. However, because of the conventional linkage between punishment and hard treatment, it will always be difficult to reform the nature of punishments to be purely expressive. Society may see punishments that do not

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<sup>8</sup>See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (2000) and JACOB T. LEVY, *THE MULTICULTURALISM OF FEAR* (2000) for similar examples.

inflict physical suffering as not sufficiently expressing its condemnation. This concept was demonstrated in the 1970s when a proposal by Randy Barnett<sup>9</sup> failed to win many followers. Barnett suggested a replacement of conventional forms of punishment, such as imprisonment, with a system of restitution. Barnett proposed that punishments, like imprisonment, should be replaced with an elaborate system of fines, whereby offenders would pay for the damage and harm caused by their crimes. Almost immediately, the critical reply came back: Restitution sends the wrong message; it does not condemn with enough strength, because it suggests that one can simply buy his way out of punishment. In other words, Barnett's critics maintained that crimes cannot be set right by paying cash to the victim.<sup>10</sup> Even if the offender were to pay punitive financial damages (more than what would compensate the victim for the damage done), money is perceived as the wrong medium for punishment: Punishment is not something you can buy your way out of, as if you could simply purchase a license to commit a crime. As Dan Kahan writes, to replace a system of hard treatment with a system of fines is to send a message that "the offenders' conduct is being priced rather than sanctioned."<sup>11</sup> Barnett's proposal does not work, not because it is important that punishments necessarily inflict physical suffering, but because punishments should successfully express society's denunciation of the offense. It is not that restitution sends *no* message, but it sends the wrong message—one of condonation rather than condemnation. What society accepts as expressing condemnation serves as a limit on the types of punishment that are acceptable and on what is considered sufficient denunciation of a crime.<sup>12</sup> This is ultimately why Barnett's proposal failed.

Barnett's proposal, even though it failed in its expressive aspect, nonetheless sheds light on what is most desirable for liberals when it comes to punishment: Liberals prefer sanctions that have adequate expressive power (that is, they serve to express society's condemnation of the criminal act) but which cause the least suffering to the criminals. Shaming punishments are most charitably viewed in this progressive light. Shaming punishments, as most famously proposed and defended by Dan Kahan, were introduced as suitable substitutes for crimes that would normally receive short prison terms.<sup>13</sup> The dilemma, as Kahan frames it, is to find punishments that will have the same expressive power as a prison sentence but cause less suffering and cost less money than imprisonment.<sup>14</sup> Replacing imprisonment with fines would certainly be cost-effective and, depending on the

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<sup>9</sup>Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 *ETHICS* 279 (1977).

<sup>10</sup>*See, e.g.*, Franklin G. Miller, *Restitution and Punishment: A Reply to Barnett*, 88 *ETHICS* 358 (1978); Roger Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, 88 *ETHICS* 348 (1978).

<sup>11</sup>Kahan, *Alternative Sanctions*, *supra* note 3, at 621.

<sup>12</sup>*See id.* at 594 ("[S]ocial meaning objectively constrains the political acceptability of alternative sanctions.").

<sup>13</sup>*See id.*

<sup>14</sup>*See id.* at 593-94.

actual amount of the fine, might cause less actual suffering than prison.<sup>15</sup> But as demonstrated above, restitution fails miserably along the expressive dimension, conveying the message that crime is merely costly behavior rather than something that society unequivocally condemns. By contrast, a system of corporal punishment might achieve great success on the expressive dimension by showing criminals that society will inflict physical evils on those who violate the law. Still, especially for those who commit relatively minor crimes, corporal punishment seems too extreme, causing a great deal of suffering while challenging intuitions about how a liberal society should treat its citizens. For Kahan and others, shaming punishments represent the perfect middle ground between imprisonment and other costly punishments that cause disproportionate suffering, and those sanctions that ineffectively condemn criminal behavior.<sup>16</sup> By subjecting an offender to public humiliation, society expresses that his offense is intolerable, and at the same time, society keeps the offender from the degradation that he might experience in prison.

Thus far, this Essay has treated shaming punishments as a response to the dilemma of finding a punishment that both suffices to express society's condemnation and that does not cause much in the way of physical suffering. This makes it possible to view shaming punishments as a potentially humanitarian reform and part of the liberal project of replacing physically cruel punishments with those that are largely symbolic and expressive. Yet traditional justifications of punishment have largely neglected the expressive aspect of punishment, focusing on hard treatment as the aspect of punishment that needs to be justified. Thus, it has been argued that, to deter others from committing similar crimes, society needs to impose physical suffering on the offender. Or, as retributive theorists have claimed, physical suffering is necessary to "pay back" the offender for what he has done to his victim. Finally, those in favor of rehabilitation see physical suffering as a means of communicating to the offender that what he has done is wrong and helping him change his ways. These traditional justifications raise the question of whether shaming punishments can do what hard treatment has done, because placing such weight on expression may risk abandoning the other goals of deterrence, retribution, and reform. Therefore, expression may be *per se* suspect, because it achieves none of these things, opting instead for simply sending a message of condemnation.<sup>17</sup> And then one might argue that none of the traditional goals of punishment are worthwhile or compatible with treating others with equal respect.

Condemnation thus emerges as the only worthy goal of punishment, and it is clear that purely expressive punishments potentially could do this. This appraisal of the usual justifications of punishment is fairly close to the truth. Still, it would give added strength for the case of shaming punishments if they did the work that hard treatment is supposed to do. This would make it possible to accept the

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<sup>15</sup>See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1415-21 (2000) (noting the distinction between punishments which are hard treatments and punishments which merely express). Of course, this does not rule out hard treatments being *also* expressive.

<sup>16</sup>Kahan, *Alternative Sanctions*, *supra* note 3, at 594.

<sup>17</sup>See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

traditional justifications for punishment, while at the same time getting rid of the idea that hard treatment is the only type of punishment that can do the things that punishment is called upon to do. Accepting expression as a goal of punishment is, thus, unnecessary to favor the replacement of hard treatment with pure expression.

Purely expressive punishments can at least, in principle, serve deterrent and retributive aims. Of course, both of these justifications involve extremely murky empirical territory. Do imprisonment and other forms of hard treatment really deter? Can hard treatment rehabilitate? As a precautionary note, it is important to comment briefly about the empirical aspect of these justifications. Although brief, the following comments show how shaming serves both deterrent and rehabilitative functions. On deterrence, it is clear that hard treatment is not necessary to deter. In fact, for most of those reading this Essay, fear of imprisonment does not deter: It is more likely the fear of society's disapproval, or the fear of not living up to one's own ideals, that keeps one from committing crimes.<sup>18</sup> Insofar as this point is correct, it shows how shaming will deter, because shaming relies precisely on social disapproval and on publicizing one's wrongdoing. Shaming enacts directly that which deters most people—social disapproval—while imprisonment or hard treatment only indirectly achieves this end. Imprisonment and hard treatment are conventionally interpreted as expressing society's disapproval of the offender's conduct. On rehabilitation, the idea that hard treatment might prompt the offender to change his ways has always been somewhat mysterious: Why hard treatment, rather than a college education or religious instruction? Shaming has at least an equal, if not a better, claim to reforming the offender's motives: The offender is put in public, made to recognize that his crime invites social stigma, and left to dwell on what this means. There is no guarantee that he will not get the wrong message and instead become embittered at the state and society; still, there is no guarantee that this will not happen with hard treatment. Shaming can at least, in principle, deter and rehabilitate in the loose sense, where rehabilitation means prompting the offender to reflect and reform.

Moreover, shaming may be preferred as more humane, precisely because it communicates a message of societal disapproval to the offender, rather than just threatening him with sanctions. Hard treatment simply speaks the language of pain (or in Hegel's words, treats people like dogs), whereas shaming is a bit more complex. Shaming communicates society's disapproval of the offender's conduct and does not simply attempt to condition the offender by physically hurting him.

Retribution is a slightly tougher case, for it might seem that retribution is simply a matter of trading pain for pain and not a matter of sending a message to the offender. In essence, retribution says: The offender has done me wrong and caused me suffering, and in turn, he deserves to suffer himself. In theory, then, retributive punishment could be done completely in private, because all that matters is striking the right balance between the offender and his victim, which has been upset.<sup>19</sup> So the question of where public expression of society's disapproval

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<sup>18</sup>See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 122-25 (2001).

<sup>19</sup>See Markel, *supra* note 3 (defending a theory that has this result as one of its implications).

fits into the retributive theory is a pressing one. Retributive theorists have always had some difficulty in identifying what exactly is being balanced—that is, what the offender has taken unfairly and what needs to be taken from him in turn. Retributive theorists also have trouble explaining the concern about balancing things in the first place. According to one recent and influential theory, when the criminal breaks the law, he has taken a greater liberty than other citizens, and therefore, he should pay by having his liberty taken away from him.<sup>20</sup> This theory is implausible because it is a mistake to say that the wrongdoer gains a greater liberty, as if the liberty to commit wrongs is a desired liberty and as if the criminal gains an *unfair* advantage by having this liberty. In other words, this theory of retribution balances something insignificant, because the liberty the criminal has is one that most citizens do not see as a good.<sup>21</sup> Thus, along more traditional lines, the criminal is owed the infliction of pain for the pain he has caused his victim. However, the problem with this theory is that it is unclear what interest there is in balancing the amount of pain in the universe—what interest there is to make sure that every pain caused is repaid by an equal infliction of pain. Even ignoring the problem of making the pain commensurate between victim and offender, “suffering—abstracted from all else—should not be a value anyone cares about.”<sup>22</sup> What good is achieved by creating a greater amount of suffering in the universe? It is unhelpful to say that exchanging pain for pain is something “intuitive.”

Rather than abandon retribution as a plausible theory of punishment, some, most notably Jean Hampton, have asked what crimes and punishments *express* in order to see what needs balancing.<sup>23</sup> According to this view, what crime expresses is a diminishment of the status of the victim; it is a way of saying to the victim that he does not matter and that he is someone to whom horrible things can be done.<sup>24</sup> What punishment represents, Hampton’s theory goes, is a forceful denial of the message that the criminal has sent: The state is saying that it sides with the victim and the correct understanding of the victim’s worth.<sup>25</sup> In other words, crime and punishment are parts in a dialogue, and what the criminal affirms by his crime (that the victim is worth less than he is) the state denies by its punishment.<sup>26</sup> This version of retribution, unlike the implausible version that treats retribution as trading pain for pain, can be satisfied by punishments that do not involve hard treatment. If the important goal is to ensure that the criminal’s message is not taken seriously, an effective public denunciation of his act, as occurs in a shaming penalty, can do the job just as well as imprisonment. By publicly humiliating the offender, society expresses its firm belief that the offender is in the wrong and that his victim was unjustly slandered by the crime. This Essay addresses Hampton’s

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<sup>20</sup>See, e.g., Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968).

<sup>21</sup>See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659, 1681 (1992) (making this reply most forcefully).

<sup>22</sup>Kahan, *Alternative Sanctions*, *supra* note 3, at 649 (1996).

<sup>23</sup>See Hampton, *supra* note 21.

<sup>24</sup>*Id.* at 1679.

<sup>25</sup>*Id.* at 1686.

<sup>26</sup>*Id.*

theory in greater detail below. The immediate point is that in order to satisfy the constraints of one plausible theory of retributive punishments, it is not necessary to endorse hard treatment. It is enough to show, in a dramatic way, that society does not approve of the criminal and his behavior by shaming him. This trades a true meaning for a false meaning, instead of one pain for another. It is not necessary to add hard treatment to the humiliation that the offender already suffers by being shamed.

Therefore, it can plausibly be asserted that shaming punishments, even though they do not involve hard treatment and instead involve direct societal condemnation of the offender, fulfill the traditional purposes of punishment. By expressing its disapproval of the offender by publicly humiliating him, society tries to deter others from doing the same thing (deterrence), make the offender understand his wrongdoing (reform), or negate the message conveyed by the criminal's wrongdoing with an emphatic denunciation of that message (retribution). If this is correct, the defenders of shaming penalties have shown that hard treatment is not necessary for justified punishment of some crimes. Capturing the expressive element of punishment without the hard treatment aspect is all the better for liberals who seek to avoid unnecessary physical cruelty. By replacing punishments that inflict physical suffering on the offender with those that merely do damage to the offender's reputation, the defenders of shaming make a plausible claim that shaming is a liberal project of reform. They show how, within existing social meanings, society can reduce physical suffering, fulfill the traditional goals of punishment, and maintain a message of condemnation by adopting an alternative to imprisonment. Whether embracing shaming penalties goes far enough in this reform effort is the subject of Part III.

### III. SHAMING AND DIGNITY

As discussed in Part II, the defense of shaming penalties can be most charitably interpreted as a response to a dilemma; namely, how can society express its condemnation of criminal acts without at the same time causing the offender to suffer unnecessarily? The key to answering this question is detaching the expressive element of punishment from the hard treatment aspect: So long as punishments successfully express society's disapproval of crime, it is immaterial whether punishments *also* cause the offender to suffer. It is enough for society to communicate its condemnation. Shaming punishments supply an answer to this dilemma, because they offer a punishment that is maximally expressive and yet is not objectionably harsh or degrading. However, critics have faulted shaming punishments on the grounds that such punishments *are* harsh and degrading. Indeed, critics argue they are unnecessarily cruel and vicious and express not merely attitudes of condemnation, but attitudes of humiliation and dehumanization. Shaming penalties represent the state's assault on the dignity of the offender. Moreover, critics allege that shaming penalties involve the state asking citizens to take part in the act of degradation by encouraging them to publicly mock and shame the offender. That is, shaming penalties threaten not only to degrade the offender, but, by enlisting the public as a party to the punishment, threaten to bring out the worst in humanity by encouraging the public to vent its feelings of hatred and vindictiveness directly onto the offender. Shaming penalties manifest an objective disrespect for the offender by shaming

him, *and* they incite subjective attitudes of disrespect in the public by making individual citizens instruments of the offender's punishment.

Yet Dan Kahan, in his defense of shaming penalties, argues that critics of shaming penalties are in a bind; it is the critics' effort to escape this bind that drives the analysis in this Part.<sup>27</sup> On one hand, Kahan claims that critics of shaming penalties have "a massive baseline problem," because shaming penalties are usually substitutes for imprisonment, and imprisonment is at least as bad, if not worse, than shaming.<sup>28</sup> Critics fall into Kahan's trap when they either explicitly or implicitly accept imprisonment as their baseline.<sup>29</sup> Critics do not argue, as they should, that shaming and imprisonment are both very bad punishments indeed, though perhaps not bad in exactly the same way, even considering the ideal forms of both punishments. On the other hand, Kahan contends that any plausible alternative to shaming lacks the appropriate condemnatory force.<sup>30</sup> Fines and community service, although they cause the offender inconvenience and possibly suffering, do not adequately express society's disapproval of the crime, even if they cause the same amount of inconvenience and suffering that imprisonment or shaming causes.<sup>31</sup> Kahan is right about this. But Kahan's critics have not aggressively argued that what counts as expressively adequate in the status quo has no normative force for liberals. The correct solution to Kahan's dilemma is not to endorse other forms of punishment that have the same dignity-violating problems as shaming, but to challenge the societal assumption that *only* dignity-violating sanctions will have the appropriate condemnatory weight. Getting the right angle on the shaming punishment debate means seeing that the arguments against shaming penalties apply to nearly all forms of punishment for criminal offenders. Therefore, the need is not for another supposedly more acceptable form of humiliating punishment, but for a critical attack on the conventional social understanding that the only adequate condemnation for crimes is to treat people with less than equal respect.

To begin to examine the critics' attack on shaming penalties, it is first necessary to confront a skeptical challenge that asks whether liberalism has the resources to identify shaming's particular offense against dignity.<sup>32</sup> Imagine a form of liberalism that protects people's dignity by giving them only a negative freedom, that is, a freedom from interference by the state and others. To have dignity, at least in the political context, is to be free to exercise one's capacity for rational choice.<sup>33</sup> According to this understanding of liberalism, there is no question that being imprisoned infringes on one's dignity, even if that

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<sup>27</sup>Kahan, *Alternative Sanctions*, *supra* note 3, at 644-45.

<sup>28</sup>*Id.* at 644, 646.

<sup>29</sup>*Id.* at 646.

<sup>30</sup>*Id.* at 592.

<sup>31</sup>*Id.* at 626-27.

<sup>32</sup>See James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1092 (1998). Whitman may be operating under a similar philosophy.

<sup>33</sup>See Sarah Buss, *Appearing Respectful: The Moral Significance of Manners*, 109 ETHICS 804 (1999).

infringement might somehow be justified. Imprisonment is a serious curtailment of one's negative freedom, insofar as it drastically limits one's choices. But considering shaming penalties within this picture of liberalism, it is harder to see exactly where one's dignity is violated. Suppose that, as a punishment, you were forced to wear a T-shirt declaring your crime for a week. During that week you could live your life as you normally live it—go to work, spend time with your family, play golf—with the only caveat that you must wear this shirt. Here, the restriction on one's choices is rather minimal (you cannot wear the shirt you want to wear for one week) and does not rise to the same level of choice-curtailment as imprisonment. If liberalism is construed as believing that one's dignity is in one's negative freedom, then shaming penalties, at least those that do not involve physical confinement of any sort, are at best slight damages to one's dignity. Given that the offender being shamed has virtually the same negative freedom he had before the punishment, at least according to some versions of liberalism, shaming is dignity-preserving while imprisonment is dignity-diminishing. Furthermore, some shaming penalties, such as having one's name and offense publicized in the newspaper or on television, are entirely unobjectionable under this type of liberalism. No deprivation of liberty means no diminishment of one's dignity. Accepting this liberalism, the choice of shaming punishments, provided they express the appropriate condemnation, is an easy one.

The fact that shaming is almost invisible on some accounts of liberalism should not lead to the conclusion that shaming is compatible with being treated in a dignified manner. Rather, it should lead to dispensing with a minimal, negative-liberty brand of liberalism in favor of something more robust—a liberalism that sees the infliction of cruelty not just in manifestations of physical cruelty, such as impairments of freedom, but also in *expressive* cruelty. The shortcoming of negative-liberty liberalism is that it merely focuses on what the law can concretely do to limit one's freedom from interference and forgets the importance of what the law expresses about the worth of citizens. As Sarah Buss remarked in a related context, even if the state allows every citizen to exercise "his capacity for rational choice," the state could still disrespect citizens by hurting their feelings, offending their dignity, or treating them "discourteously, inconsiderately, impolitely."<sup>34</sup> The state not only has an obligation to distribute benefits and burdens fairly; it must do so in a way that expresses respect for its citizens. Consider the census example mentioned briefly at the start of Part I. Although a census may be necessary in order to secure a just distribution of political and economic goods, and in that respect, for securing the dignified treatment of citizens, the state still may fail to express the appropriate respect for some of its citizens if, for example, it replaced a racial classification with a racially derogatory epitaph.<sup>35</sup> The way in which the state potentially falls short of showing dignity is lost on negative-liberty liberalism, because all that matters is what the state actually does, not in what manner the state does it. But there are many ways in which the state fails to treat citizens respectfully that do not involve concrete deprivations of liberty or political or economic goods. Moreover, being expressively respectful is not merely a good

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<sup>34</sup>*Id.* Buss applies her remark to what citizens can do to one another. But I think it applies with equal (or greater) force to what the state can do to citizens.

<sup>35</sup>LEVY, *supra* note 8, at 19-39 (using this example to great effect).

that is instrumental to protections against physical cruelty, as some have suggested.<sup>36</sup> The right expression is an intrinsic good in that it is important for the state in its own right, not merely because an expression of disrespect against certain members of a society may lead others to physically attack or otherwise discriminate against them.

Understanding how the liberal state offends the dignity of its citizens in this way is vital for seeing how shaming penalties, no less than imprisonment, represent an assault on the dignity of criminal offenders. Shaming punishments may be objectionable because they are expressively cruel, even if they are less physically cruel than imprisonment. Yet defining the way that something is expressively cruel is tricky, because it is hard to pick out assaults on people's dignity; it is harder than, for example, picking out the obvious injuries to their bodies or economic welfare. What most critics of shaming punishments agree on is that shaming punishments convey a particularly strong form of contempt for the offender, by treating him as occupying a lower status than other citizens. Shaming is no minor injury to the offender's self-esteem.<sup>37</sup> Thus, Toni Massaro writes that shaming penalties imply that "offenders subjected to these penalties are less than human others who deserve our contempt," noting that relying on the status-degrading aspect of shame emphasizes "the caste features of punishment," which is "jarring in a political order that makes equality a cultural baseline."<sup>38</sup> In a similar vein, Martha Nussbaum argues that, "in shaming people as deviant, the shamers set themselves up as a 'normal' class above the shamed, and thus divide society into ranks and hierarchies."<sup>39</sup> Nussbaum also notes that, because the shaming is enforced by the state, the hierarchy between shamer and shamed is a matter of political reality, something intolerable in a society "built upon ideas of human dignity and equality."<sup>40</sup> Finally, Dan Markel postulates that shame creates distinctions in status, which is inconsistent with a liberalism that believes "the law does not give effect to different social statuses."<sup>41</sup> The basic claim of all of these critics is that shaming punishments, even though they may not deprive the offender of any concrete, tangible good, can still deprive the offender of his status as a person among equals. By endorsing the public humiliation of an offender, the state sends a clear message that the offender has a less than equal dignity than all other citizens, precisely because he can be paraded in public for his offense and made open to the ridicule of others. As Richard Posner summarizes, shaming punishments treat criminals as "children or animals" by "making them parade in

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<sup>36</sup>*Id.* Levy seems to go in this direction.

<sup>37</sup>*Cf.* MARGALIT, *supra* note 2, at 9-27 (on the objective status of humiliation).

<sup>38</sup>Massaro, *Implications*, *supra* note 3, at 699.

<sup>39</sup>NUSSBAUM, *supra* note 3, at 231.

<sup>40</sup>*Id.* at 232.

<sup>41</sup>Markel, *supra* note 3, at 2224.

public in dunce caps ('distinctive clothing' as Kahan delicately puts it)" and "introduce into the government" a "kind of we-they thinking."<sup>42</sup>

This makes shaming punishments unique: After all, they have a public aspect that imprisonment does not. There is a clear difference between the condemnation expressed when someone is forced to announce his crime in public by wearing "distinctive clothing" and the condemnation expressed when someone is confined to a prison far away from the crowd. Nussbaum explicitly conveys this when she writes that "there is no reason to think that the whole institution of imprisonment is incompatible with basic human dignity and respect."<sup>43</sup> That is, even though prison conditions may be less than ideal, they can at least be improved; on the other hand, there is nothing that will make shaming punishments less humiliating short of abandoning them altogether. Imprisonment, by contrast, is not intrinsically humiliating, for "the freedom for a period of time does not express the view that this person is not fully human."<sup>44</sup> Massaro contends that shaming is worse than imprisonment, precisely because shaming sends the message that criminals are "less than human others who deserve our contempt."<sup>45</sup> Finally, though he does not explicitly mention imprisonment, James Whitman stresses that we should "limit the business of inflicting criminal sanctions to criminal justice professionals."<sup>46</sup> The comparison with imprisonment clarifies the criticism made by those who oppose shaming penalties. Shaming penalties are public in a way that imprisonment is not. Shaming penalties encourage ordinary people to take part in a ritual of degradation, as compared to imprisonment, where "criminal justice professionals" oversee the prisoners. There is something uniquely worrisome about making a public show of punishment as in shaming rituals, because it demonstrates that the person being shamed is not to be considered an equal, a message which the state apparently endorses itself and wants to convey to the masses. At least in prison, an inmate retains a measure of dignity, as he can serve his term in relative obscurity.

Yet, in stressing how shaming can degrade the status of the offender, even though it might not cause his physical harm, some critics imagine that imprisonment is the preferred method of punishment. Imprisonment, after all, is the conventional alternative to shaming, and it appears to alleviate the expressive risks of humiliation embodied by shaming. This defense of imprisonment is worrisome for two reasons. First, it is dangerous to compare one method of punishment with another, rather than examining each one in isolation and on its own terms. As Albert Von Hirsch wrote, "a penal measure needs to be justified in

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<sup>42</sup>Posner, *supra* note 4, at 557. It is interesting to note that Kahan raises many of these same objections as objections to corporal punishment. Oddly, he doesn't see them as applying to shaming penalties. See Kahan, *Alternative Sanctions*, *supra* note 3, at 608-17.

<sup>43</sup>NUSSBAUM, *supra* note 3, at 249.

<sup>44</sup>*Id.* at 233.

<sup>45</sup>Massaro, *Implications*, *supra* note 3, at 699.

<sup>46</sup>Whitman, *supra* note 32, at 1092; Markel, *supra* note 3, at 2231 (implicitly endorsing incarceration). Incarceration "may well be the most widely accepted way to deny the offender's claims to superiority and achieve other legitimate goals." *Id.*

its own right, not merely by comparison with another, possibly worse measure.”<sup>47</sup> The danger is that one punishment will be favored, not because it is compatible with objective criteria of respectful treatment, but because it is the lesser of two evils. Many of shaming’s critics make this mistake. Second, more specifically, the problem with comparing the expressive harm of shaming with the concrete harm of imprisonment is that imprisonment has *expressive* harms as well. Just as shaming sends a strong message to the offender about his worth and status in society, so too does prison. It is certainly not the same message; as this Essay will demonstrate, there are important differences between the message sent by shaming and the message sent by imprisonment. However, imprisonment is not itself free from any social message or stigma being placed on the offender. In fact, imprisonment sends a degrading message as well. The critics of shaming penalties sometimes forget that imprisonment has an expressive meaning, which leads them to explicitly or implicitly favor imprisonment over shaming. This is why Kahan alleges that critics of shaming penalties have a “massive baseline problem”; their preferred alternative to shaming is just as bad.<sup>48</sup> Of course, this rejoinder by Kahan only masks the deeper problem, which is that shaming and imprisonment may both be unacceptable to a society governed by liberal principles. To think that the choice must be between shaming and imprisonment is to be captivated by an illusion: The correct choice may be to reject both.

In comparing imprisonment and shaming, critics of shaming are misled when they view shaming as maximally expressive and imprisonment as minimally so, insofar as shaming is a public spectacle and imprisonment is a relatively hidden affair. To a certain extent, this is a correct picture: Shaming does degrade the status of the offender, and it uses public humiliation as the mechanism of this degradation. But it does not follow from the fact that shaming works only in public and imprisonment does not that the latter type of punishment sends no message to the offender about his relative worth. Indeed, prison’s expressive message may be just as powerful as shaming’s expressive message. However, prison’s expressive message is all the more troubling because of the imaginative distance created by having “criminal justice professionals” do the dirty work. Although imprisonment can be equated with putting people in small boxes with bars, it is closer to the truth if it is equated with putting people in cages like animals.<sup>49</sup> Furthermore, in a society like America that especially values liberty, the expressive dimension of imprisonment is unmistakable: By depriving criminals of one of Americans’ most prized values, society sends the signal that the criminal is less than fully human. As Thomas Dumm stated the point, “in America, everyone is free: prison is the negation of that freedom. Hence the prison experience is a negation of the conditions which allow one to define oneself as a person, for when the ability to choose is taken away, one ceases to be a willing entity.”<sup>50</sup> This is true of imprisonment even when it is ideally conceived, with guards who do not

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<sup>47</sup>Garvey, *supra* note 3, at 794 n.145 (citing ANDREW VON HIRSCH, CENSURE AND SANCTIONS 81 (1993)).

<sup>48</sup>Kahan, *Alternative Sanctions*, *supra* note 3, at 645.

<sup>49</sup>Garvey, *supra* note 3, at 760.

<sup>50</sup>THOMAS M. DUMM, DEMOCRACY AND PUNISHMENT 3 (1987).

brutalize inmates, and with cells that are fit for human habitation.<sup>51</sup> That is, even if imprisonment caused *no* physical suffering or discomfort, it is still stigmatizing and humiliating precisely because of what it says about the offender: He has been excommunicated from society. Does imprisonment send any less of a message about the criminal's second-class status than shaming does? Both shaming and imprisonment meet the criteria for what sociologist Harold Garfinkel has called "successful degradation ceremonies."<sup>52</sup>

To summarize, both shaming punishments and imprisonment have expressive meanings that send substantially the same message, namely, that the criminal is not a member of society, that he is a person of lower dignity and status. This relates to a general worry that liberals have when punishment is something that expresses condemnation of the wrongdoer. In order for a punishment to be intelligible as a condemnation, it must be consistent with society's conventional expression of condemnation. Feinberg makes this gap explicit when he writes that, because of "different symbolic conventions," different forms of treatment are considered expressively punitive.<sup>53</sup> In this regard, expression is worrisome because what counts as a successful way of expressing society's disapproval might not be consistent with the core principles of liberalism. According to Kahan, both imprisonment and shaming are punishments that present-day society would see as sending an effective message of condemnation against criminal acts. Kahan, of course, defends shaming as a way of showing condemnation without causing as much suffering as imprisonment. But Kahan's critics correctly have pointed out that publicly humiliating people is inconsistent with a form of liberalism that puts a high priority on expressing respect for all citizens. This is an instance where what counts as a way of expressing society's core commitments must be ruled out because the mode of expression is not consistent with those commitments. What this Essay adds to the argument made by shaming's critics is that incarceration is likewise an objectionable method of punishment, because it expresses a message of degradation, and so it too should be abandoned by liberals. Both shaming and imprisonment are illiberal forms of expression, because they promote disrespect for certain members of society. It is not a question of which is worse, because both are bad, and both should be rejected.

But there is an additional way that certain methods of expression are illiberal—not because they impose sanctions that insult the offender's dignity, but because they express or incite objectionable emotions. A punishment on its face might be consistent with liberal doctrines regarding physical and expressive cruelty, but nonetheless be driven by vicious and illiberal emotions, such as hatred or vengeance.<sup>54</sup> So shaming's critics might allege that asking citizens to shame the

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<sup>51</sup>See TED CONOVER, *NEWJACK: GUARDING SING SING* (2000) (providing a particularly disturbing account of modern jails).

<sup>52</sup>Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 *AM. J. SOC.* 420 (1956).

<sup>53</sup>Feinberg, *supra* note 1, at 400.

<sup>54</sup>Here the conservative roots of expressivism are relevant. See 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81-82 (London, Macmillan and Co. 1883) (Punishment might "justify and gratify the public desire for vengeance upon such offenders," and give "expression and a solemn ratification and justification to the hatred

offender publicly gives a tacit endorsement and encourages citizens to take dehumanizing and brutalizing attitudes toward the offender. Unlike imprisonment, shaming punishments require that citizens participate in degrading the offender: They require that citizens adopt certain negative attitudes towards the offender, in order that he literally *feels* society's disgust toward him. It does not seem right that a liberal state encourages its citizens to act this way and to treat the criminal offender in such a condescending manner. Imprisonment puts punishment in the hands of disinterested professionals. By contrast, shaming punishments involve the public in an exceptionally intimate way and thereby risk making punishment a mob-like affair, where personal vengeance rules, instead of professional, bureaucratic impartiality. Shaming, Whitman writes, lends itself to "a politics of stirring up demons."<sup>55</sup> This important point shows, in yet another way, how shaming punishments are inconsistent with a liberal emphasis on treating citizens with dignity. The dignity of citizens is jeopardized, not only by a particular punishment, but by particular *attitudes* that drive the punishment, such as vicious anger or hatred. The problem is not just the objectively humiliating message the state sends by giving the offender a shaming penalty, but the subjective attitudes the punishment requires citizens to have toward the offender in order for the shaming punishment to "work." Shaming penalties directly involve the crowd and encourage the crowd's potentially dehumanizing emotions in a way that imprisonment does not.

Similar to the last point, this claim is not as compelling in favor of imprisonment as shaming's critics make it out to be. Imprisonment may not directly encourage the emotions of hatred and vengefulness, but it does invoke the equally dehumanizing emotions of indifference and fear. Imprisonment represents the feeling that criminals must be segregated, so that they are out of sight and subject to indifference. This attitude is no less brutalizing to the citizenry and the inmates than the more direct emotions of vindictiveness and rage that are incited by shaming punishments. Indeed, without endorsing this argument, a case could be made that if such anger toward criminals exists, it is better to have it out in the open and let it be expressed than to tuck it safely out of sight.<sup>56</sup> When these emotions are acknowledged, it leads to the questions of whether they are proper and how to best manage them. Imprisonment suppresses these questions, and thus, imprisonment encourages passivity with regard to the plight of those who have been incarcerated. Again, it is not that shaming punishments and imprisonment provoke the same emotions, but that they both encourage emotions that are rightly termed illiberal—on the one hand, a hatred for the criminal class, and on the other, an indifference to their fate. These are both detrimental emotions that are

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which is excited by the commission of the offense."); PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 17 (1965) (defending the idea that the law was based on "intolerance, indignation, and disgust"). Even contemporary expressivist liberals such as Dan Kahan and Eric Posner talk about how shaming penalties might "gratify rather than disappoint the public demand for condemnation," language which is disturbingly reminiscent of Stephen. See, e.g., Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 *J.L. & ECON.* 365, 383 (1999).

<sup>55</sup>Whitman, *supra* note 32, at 1091.

<sup>56</sup>Allen, *supra* note 2. Allen might be seen as advancing such an argument, though hers is much more subtle than the one I present.

inconsistent with treating criminals with the dignity they deserve as human beings. Shaming's critics are correct in their analysis of shaming, but wrong when they seek to single out shaming as unique relative to other sorts of punishment, such as imprisonment.

The conclusion to be drawn from this analysis is that the forms of punishment that are consistent with liberalism are those that both respect the dignity of the offender and discourage emotions which view the offender as less than human or an unequal citizen. Imprisonment and shaming punishments fail both of these tests, and a consistent liberalism must abandon them as methods of expressing society's condemnation of criminal offenses. Liberals must look to places other than the prison or the pillory. Some of shaming's critics have, to their credit, urged other alternatives to imprisonment. For example, Massaro cautions against accepting Kahan's dichotomy between imprisonment and shaming: "The pertinent questions throughout should be: How should we distinguish among the many, relatively inexpensive methods of punishment *other than prison* that do express condemnation?"<sup>57</sup> This is the precise question to be asked. Shaming's critics only fall short in their failure to clearly describe where their analysis leads them. It is not only imperative to exhaustively canvass the alternatives to imprisonment, but also to recognize that imprisonment is flatly inconsistent with the liberal value of respect. Thus, even though Markel and Nussbaum suggest alternatives to imprisonment, they still accept imprisonment as an acceptable form of punishment. The problem is that they do not take their own critiques of shaming penalties seriously: The problems with the humiliation involved in shaming are also there with incarceration, although in a different way. Understanding the appropriate generality of shaming's criticisms facilitates the search for more appropriate alternatives to both shaming and imprisonment.

However, considering the most widely advocated alternative sanctions, such as fines or community service, leads to the second horn of Kahan's dilemma, which is that these punishments do not send the appropriate message of condemnation. This raises an additional worrisome prospect that the only acceptable punishments on the expressive dimension will be those that degrade the offender; only humiliation is enough to convey society's disapproval. As previously discussed, fines do not carry the proper expressive meaning; they suggest that crime is a privilege you can get away with, provided you have the money to pay for it. Community service sends a similarly misleading message, by having felons do work that normally is altruistic, even supererogatory.<sup>58</sup> The problem, as previously discussed, is that if punishments express society's disapproval, they are limited to what conventionally expresses disapproval. Imprisonment and shaming may do this; fines and community service may not, and if they do not, they are not adequate as punishments, because they are expressively inadequate. Kahan puts shaming's critics in the following dilemma: Once shaming and imprisonment are rejected as too degrading, there is no punishment that is not both degrading *and* expressively adequate. If shaming punishments and imprisonment are truly our only options, then Kahan arguably has a case that it is more humane to side with shaming penalties.

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<sup>57</sup>Massaro, *Implications*, *supra* note 3, at 697.

<sup>58</sup>Kahan, *Alternative Sanctions*, *supra* note 3, at 625-32.

Kahan's dilemma has force along the practical dimension, though even here, as suggested in Part IV, he may overstate his case. As a theoretical matter, the option for liberals is rather clear: They should reject existing social meanings as not having any normative weight. If certain punishments disrespect the offender, or if punishments evoke emotions that dehumanize the criminal, those punishments must be rejected as illiberal and unacceptable. This also necessitates rejecting the underlying social understanding that these punishments are the only adequate ways to express society's disapproval of the criminal and his actions. But this judgment is too quick if there is some societal expectation that criminals should suffer or undergo humiliation for their crimes. This suggests that existing social meanings do not merely serve as a practical barrier to reform, but also raise normative issues as well. What the social meanings regarding appropriate punishment demonstrate, after all, is not how little society cares for the criminal, but how much society cares for the principles that the criminal has violated. Society's desire to inflict suffering or humiliation on the criminal is simply the flip side of society's attachment to its core liberal commitments. Is it possible to deny the expression of that anger in the form of hard treatment, while at the same time cherishing the principles the criminal has betrayed? As Elizabeth Anderson and Richard Pildes have noted, a mere verbal condemnation will not adequately convey society's anger: Society may have to resort to hard treatment to show how serious it is about the offender's wrongdoing.<sup>59</sup> It seems odd that society condemns the offender's wrongdoing by doing much less to him than what he has done to society. All of this is to ask: Can society really abandon hard treatment as an essential aspect of punishment, without at the same time abandoning the gravity of its disapproval? Even disregarding current social meanings, is there something inherent in the link between denouncing a crime and having the offender suffer or be humiliated for it? These questions are addressed in Part IV.

#### IV. LIBERALISM AND PUNISHMENT

In light of the preceding parts, liberals should strive to detach the condemnation aspect of punishment, that is, punishment as an expression of society's disapproval, from the degradation aspect of punishment, that is, punishment as a means to make the offender suffer or undergo humiliation. This is the only way to make the expressive dimension of punishment consistent with a reasonable liberalism. To suggest that liberals get rid of the punishments that inflict suffering or humiliation is to suggest that liberals should avoid two things: (a) punishments that treat the offender in ways that cause him physical suffering or humiliation, and (b) punishments that evoke certain attitudes, such as virulent anger or disgust, that move society to view the offender in a dehumanizing way. Unless the expressive theory of punishment is separated from these two things, it risks being a mere conduit for conventional illiberal sentiments. But in removing these things from punishment, is punishment turned into something that it is not? Consider the idea that the wrongdoer should suffer and experience disgrace for his wrongdoing. It would be odd to strongly condemn an act and simultaneously wish

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<sup>59</sup>Anderson & Pildes, *supra* note 7, at 1567. In the case of vicious crimes, "to condemn meaningfully requires not a mere utterance, even in the form of a stern lecture from the bench, but a practice of punishment socially understood to express condemnation effectively, such as incarceration." *Id.*

the offender well. These two attitudes are inconsistent. Of course, the condemnation of the act and the subsequent wishing well are analytically distinct—otherwise, it is impossible to explain the possibility of forgiving the offender for his wrongdoing. Forgiveness, though, is something supererogatory, which highlights the fact that connecting wrongdoing with ill-will is the normal approach. Is it possible to separate hard treatment and humiliation from punishment and still communicate the message? It likewise seems odd to say that liberals are not entitled to disgust those who violate its core principles. Again, it is strange to condemn crimes in a dispassionate tone. It is reasonable to suspect that a person who condemns in this way is not upset at the loss and does not value what was taken away from him. Is it reasonable to expect that any condemnation will not direct some emotion at the wrongdoing? And is it irrational to be very upset over serious crimes, and to express rage or hatred?<sup>60</sup>

Obviously, strong emotions and punishments that inflict suffering or humiliation are closely related. But how closely related? James Fitzjames Stephen, for example, thought that punishment should be used to gratify feelings of hatred and vengeance in the public and that only punishments which caused suffering would be sufficient to express this hatred.<sup>61</sup> Thus, it is possible to define the extreme emotions of hatred and vindictiveness just in terms of doing harm, either by inflicting physical suffering or damaging the offender's dignity. In fact, this is precisely what this Essay proposes. The extreme emotions of hatred and vengeance toward the offender are unjustified under liberal principles, insofar as they embody the desire to harm the offender and to treat him as less than human. This does not mean that the liberal cannot appropriately be angry with those who violate the core principles of liberalism. But being angry about a wrongdoing, wishing it had not been done, and desiring that the situation be rectified, are not the same as wanting to make the offender suffer or undergo humiliation for the harm he has caused. There is no necessary connection between effective condemnation of a crime and the hard treatment and humiliation of the person responsible.<sup>62</sup> Indeed, in order for a system of punishment to be consistent with a liberal respect for the integrity and dignity of each citizen, these things must be separate from condemnation. The goal for a liberal system of punishment is to replace punishments that deliberately humiliate or degrade the offender with symbolic acts of denunciation and efforts directed toward the offender's reform.<sup>63</sup> The idea that hard treatment or humiliation is an essential aspect of punishment is a mistake, and one that misleadingly suggests that punishment is inherently illiberal.

Why was there a necessary connection between the infliction of suffering or humiliation on the offender and punishment? There are two main reasons, one that

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<sup>60</sup>See MARTHA C. NUSSBAUM, *THE THERAPY OF DESIRE: THEORY AND PRACTICE IN HELLENISTIC ETHICS* (1994) (raising these issues in an especially provocative way).

<sup>61</sup>See I STEPHEN, *supra* note 54, at 82-83.

<sup>62</sup>See Cheshire C. Calhoun, *Changing One's Heart*, 103 *ETHICS* 76 (1992) (noting that even if we fail to punish someone for a crime, it is a mistake to infer that somehow we are condoning that bad act).

<sup>63</sup>See Feinberg, *supra* note 1, for a similar suggestion.

stems from a bad theory about the nature of punishment and the other that results from the bad practical circumstances that occur. The bad theory, which suggests that there is an obligation to give the offender hard treatment, is a version of the retributive theory previously discussed. According to this theory, the pain that the offender has inflicted upon his victim must in turn be inflicted upon the offender to balance the wrong that the offender has done. This theory has two main problems. The first problem is that its priority is matching pain for pain. To be sure, society does not want to condone the wrongdoing, but not condoning the wrongdoing and not inflicting pain upon the wrongdoer are two different things. Insofar as liberals want to avoid cruelty, absent a very strong justification, the retributive theory offers no convincing reason why this balance is desirable. Even more devastating to this retributive theory is the problem in matching the offender's pain to the victim's suffering. People have different degrees of susceptibility to pain: The pain one person feels during a week in prison might be the same as the pain another feels after only a day. Any exact balancing of pain for pain will inevitably be arbitrary, simply because it is impossible to know precisely what individual people feel for any given punishment. Even if pain thresholds were ascertainable, there would be no guarantee that the appropriate punishment would not be counter-intuitive, because it may be necessary for an offender to spend only a day in jail to feel the same level of pain that he has caused his victim.

Is it possible to remedy the problems of this retributive theory with a better version? Recall Jean Hampton's retributive theory. Hampton suggested that instead of balancing the amount of pain in the universe, so that bad people feel just as much pain as good people, the expressive message sent by crime should be denounced. Crime expresses something about the victim, namely, that she is the type of person who can be abused, an expression that must be forcefully denied by the state. This version of retributivism is plausible in a way that the previous version was not; it focuses on a balance that matters—the false message the criminal sends about his victim via his crime, not the quantity of pain in the universe. Hampton's theory may not work descriptively, because for many crimes it is hard to see that the offender intends to send a false message about his victim. When someone steals your car, did they really do it because they valued you less, or because they needed a car?<sup>64</sup> Or, even if what the criminal does is an effort to communicate the victim's lack of worth, the message might be so obviously false that the state does not need to counteract it—no one took his threat to the victim's value seriously in the first place. There are also problems of proportionality: *How much* humiliation does the offender need to have his false message negated? Even ignoring these concerns about Hampton's retributive theory, her theory is no help to those who seek a necessary relationship between punishment and humiliating the offender, or giving him some sort of hard treatment. As Hampton herself stresses, it is not necessary to make the offender suffer in order to negate his false message. Such a message is effectively negated by giving the victim a parade or by making a speech in her honor, to show how much the state values her. As Hampton writes, "in fact *any non-painful method*, so long as it was still a method of *defeating* the wrongdoer, can still count as retributive punishment."<sup>65</sup> If the

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<sup>64</sup>See R. A. Duff, *Justice, Mercy, and Forgiveness*, 9 CRIM. JUST. ETHICS 51 (1990).

<sup>65</sup>Jean Hampton, *An Expressive Theory of Retribution*, in 1 RETRIBUTIVISM AND ITS CRITICS 1, 16 (Wesley Cragg ed., 1992).

emphasis is on ensuring that the wrongdoer's claim is "defeated," there is no necessary relationship between humiliating and inflicting hard treatment on the offender and the offender's punishment.

Still, Hampton comments that "[m]erely making a speech praising the victim or giving the victim a tickertape parade will not normally result in a successful denial."<sup>66</sup> This suggests that the best retributive theory, while it does not require that punishment and hard treatment and humiliation all go together, necessitates certain types of illiberal punishments. Therefore, the second main reason that hard treatment and punishment are intimately related is that, in society, the successful denial of a criminal's claim against his victim *will* require some sort of hard treatment, or some sort of humiliation, at the hands of the state. Suppose that someone murders a homosexual and claims that he is disgusted by gays.<sup>67</sup> Assume further that the judge gives him a very short prison term, finding his defense that gays provoke strong feelings in him a plausible one.

To be outraged at such a verdict would be understandable, because the sentence demonstrates that the state puts a lower value on the lives of homosexuals. It communicates the message that gay lives are worth less, because one can kill homosexuals and receive only a mild rebuke from the state. Here, in the absence of a firm condemnation, the state condones what has been done. And this is intolerable. The only way the state can successfully deny the murderer's message is to give him an appropriately harsh sentence. At least in the context of present day sentencing practices, it is simply unacceptable to give the murderer a lenient sentence.

This argument is very plausible and true as far as it goes. It is true that, even if no theory supports the idea that society must impose hard treatment to successfully condemn the offender, it is still the case that, *in terms of our present social meanings*, hard treatment and humiliation *are* necessary to show society's disapproval of criminal behavior. But this disconnect between what is necessary to express condemnation and what actually expresses condemnation is worrisome. Does what society needs to express its disapproval exceed what is necessary for that disapproval to be expressed? This suggests that there is work to do to make present social reality in line with society's liberal commitments regarding how people should be treated, no matter how bad they are. Illiberal punishments cannot be justified, without circularity, simply by an appeal to the conventions of an illiberal status quo. So, although Kahan may be right about shaming's success as a punishment given society's present conventions, it is not enough to stop there: It is important to investigate those meanings to see if following them yields a truly liberal result. The answer may not lead to new and different punishments that suitably express condemnation in the status quo, but to showing that current social meanings are irrational or unjustified, insofar as they demand greater punishments than are necessary for adequate condemnation and in important respects illiberal. This does not make the theorist useless in offering reforms for punishment,

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<sup>66</sup>*Id.* at 15.

<sup>67</sup>See the cases discussed in Martha C. Nussbaum, "*Secret Sewers of Vice*": *Disgust, Bodies, and the Law*, in *THE PASSIONS OF LAW*, *supra* note 2, at 19, 35.

although it does make the job more difficult.<sup>68</sup> The theorist will not be able to defer to what citizens want in punishment. Convention is often a dangerous guide in determining how to act, and this is especially so in our punishment practices.

It is possible to go further in analyzing social meanings, by diagnosing how they have arrived at this unwanted result, where the only adequate punishments are those that make the offender suffer or humiliate him. Society's present social meanings were not arrived at via a perfectly rational process; rather, they are the product of a tangled history. The problem with present social conventions about punishment can be traced to society's difficulty with the traditional "pain should be matched with pain" version of retribution. There is no simple way to match the pain the offender has caused the victim with a punishment that will cause the offender *exactly* the same amount of pain. In order to circumvent this difficulty, many advocates of retributivism propose a ranking of the possible punishments to administer from the most severe to the least harsh. Then, they propose a similar list of criminal offenses from the most severe to the least severe. When a criminal commits a crime, his appropriate punishment is calculated by comparing the two charts.<sup>69</sup> To be sure, this ranking system has its flaws, because it merely circumvents the problem of whether the subjective pain rankings will match the objective pain rankings. It may be, after all, that kidnapping is considered a very bad crime that gets matched up with a severe prison term, but that the suffering the offender experiences greatly outweighs the suffering the victim felt. There is no way to guarantee a neat balance between the victim's suffering and the offender's suffering. This is a serious problem that dooms every version of a retributivism that attempts to match pain for pain.

However, the point is that when punishments are ranked by their painfulness, they are not ranked against an absolute scale. Instead, society first decides which punishments are permissible. Only then does society rank punishments according to their painfulness; ranking always takes place in a context, and that context is not the universe of all possible punishments, but the universe of permissible punishments. As a result, the harshest punishment is not the one that causes the most pain, but the one that causes the most pain relative to all other punishments judged permissible. And of course, it is never actual painfulness that is ranked, but *perceived* painfulness. This same point applies with even more force to the expressive dimension of punishment. For when it comes to punishments that cause the offender to suffer, there is at least a vague sense of which punishments are really more painful than others. It is also possible to rule out punishments that do not cause pain as not really punishments. With expressive judgments, however, there is no element that tethers what is an appropriate expression and what is not. There is no punishment that intrinsically expresses condemnation of an offense. All that matters is what citizens accept as expressing condemnation. This means that when punishments are ranked as more or less expressive, society can rely on its current social meanings; society will decide what is more or less condemnatory depending on what is normally used to condemn a certain type of crime. The

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<sup>68</sup>Cf. Kahan, *Alternative Sanctions*, *supra* note 3, at 630 (discussing what theorists must do to be useful).

<sup>69</sup>See the essays collected in MICHAEL DAVIS, *TO MAKE THE PUNISHMENT FIT THE CRIME* (1992).

lenient sentence for the person who murdered the homosexual is so outrageous, because if he had killed a heterosexual, he would have gotten a much harsher sentence. That understanding, not the punishment *per se*, is what makes the punishment expressively outrageous.

This may seem to be an obvious point. But it has enormous power in explaining how methods of punishment have become so illiberal and how society might correct this state of affairs. When citizens call for a certain sentence against an offender because it is fitting or just, they do not do so against some absolute standard of justice. They do so relative to the social meanings and conventions of their society. A related phenomena relates to people who pursue luxury goods, as Robert Frank exhaustively detailed. What people pursue are not luxury goods *an sich*, because a luxury good cannot be defined in the absence of context: It is necessary to know what counts as a necessity in order to say what counts as a luxury.<sup>70</sup> People who seek luxury goods do not compete on an absolute scale, but compete against one another—and what counts as a necessity or a luxury is continually redefined, because once *everybody* has a luxury, it ceases to become a luxury and becomes a necessity. A similar dynamic works in the realm of punishment. Once there is a certain baseline understanding as to what is an appropriate punishment, citizens work off that baseline and view any punishments below the baseline as condoning the crime. Furthermore, when a particularly egregious crime occurs and citizens believe it deserves a harsh punishment, they will again consult the baseline and demand that the crime be punished in a way that is greater than the typical sentence. Over time the baseline naturally creeps upward, as more people demand that a particular crime be punished more severely than others. Eventually, the baseline gets redefined, so that the next time an egregious crime is committed, citizens will seek a punishment that exceeds the new baseline.<sup>71</sup> However, the important point is *that the baseline is not fixed, but rather a product of existing cultural circumstances*. Considering the expressive power of a given punishment, its expressive function is almost entirely a function of the baseline. To defer to the baseline is not to defer to any natural ordering of punishments, but to defer to what is conventionally accepted as expressing condemnation. This raises the radical possibility that fines and community service are not intrinsically non-punitive, but only as a matter of conventional fact. If society lowers the baseline of which punishments express condemnation, punishments that do not cause suffering or humiliation could perform the *exact same* expressive function that imprisonment and shaming penalties do now.<sup>72</sup>

Thus, liberals should make the baseline for punishments something akin to fines and community service and give greater or lesser amounts of fines or

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<sup>70</sup>See ROBERT H. FRANK, *LUXURY FEVER* (1999).

<sup>71</sup>For data on the cognitive biases that interfere with how we think about crime and punishment, see JULIAN V. ROBERTS & LORETTA J. STALANS, *PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE* (1997). Reflection on this data makes Kahan's reliance on anecdotal evidence and letters to the editor all the more problematic. See also Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 *UCLA L. REV.* 1751 (1999).

<sup>72</sup>See Kahan, *Alternative Sanctions*, *supra* note 3, at 591 n.134 ("The expressive inadequacy of criminal fines is no doubt in part an artifact of the law itself.").

community service for more or less egregious crimes.<sup>73</sup> These punishments are at least consistent with protecting the human dignity of the offender. Moreover, because they are things that non-criminal citizens do, for example, in paying parking tickets or volunteering, they are less likely to convey the belief that criminals are not people or create a sense that criminals occupy a different status in society.<sup>74</sup> Real liberals are not concerned with accommodating an illiberal status quo, but in trying to persuade citizens that punishments can still express anger and condemnation without dehumanizing the offender. But suppose the baseline does change, so that fines and community service are accepted as sufficient to express society's condemnation. Even though the actual punishment has changed, does the stigma and the humiliation of being punished remain? After all, the offender is still labeled a "criminal" and still forced to pay a certain amount in fines or do a certain amount of community service.<sup>75</sup> Hard treatment may not be essential to punishment, but it is impossible to remove the stigma of criminal conviction from the mix. It is inevitably intertwined with any punishment, no matter how tame the contemporary standards. The expressive dimension and the stigma of the punishment remain, because the offender is nevertheless singled out for punishment and condemnation. Nor is it clear that society should erase this stigma. There may be objectionable hierarchies, but the hierarchy between good and bad is one that should definitely be preserved. As Toni Massaro writes, when we commit a crime, "we deserve rebuke. This rebuke may well lower our social standing, and hence compromise our self-image."<sup>76</sup> *This* is an intrinsic part of punishment, which cannot be removed without abolishing punishment altogether. And does this not entail treating some citizens as less than equal? How does society eliminate this aspect of punishment, without getting rid of punishment altogether?

There are two answers to this objection, one concessive and the other not. The concessive answer is that it is enough to eliminate the hard treatment aspect and the gross humiliation that accompanies shaming, while leaving the milder forms of humiliation that come with the stigma of being a convicted criminal. Recall the charitable interpretation of Kahan's defense of shaming penalties: He was concerned with moving away from punishments that involve hard treatment, such as prisons, and toward punishments that are closer to being purely expressive, such as shaming. Such a move is progressive insofar as it removes criminals from the suffering inflicted upon them, which is what happens in prison. But as previously

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<sup>73</sup>This is my way of trying to vindicate Barnett against his critics; it is not that his proposal is flawed, but that the social meanings that make his proposal a non-starter are flawed.

<sup>74</sup>See JEFFRIE G. MURPHY, *CHARACTER, LIBERTY, AND LAW* 86 (1998); Johnson v. Phelan, 69 F.3d 144, 152 (7th Cir. 1995) (Posner, C. J., concurring and dissenting) ("We must not exaggerate the distance between 'us,' the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.").

<sup>75</sup>Duff, *supra* note 64, at 99-106 (explaining that such punishments will still be coerced, so we are still forcing offenders to do something against their will). This may be a separate problem, but I believe the answer I give to the present problem may suffice for it as well.

<sup>76</sup>Massaro, *Criminal Law*, *supra* note 3, at 1943.

discussed, punishments should not simply be geared toward reducing suffering; punishments should bear in mind the humiliation they cause the offender. Reducing humiliation is also essential to preserving the dignity of the offender. It could simply be said that although the stigma may never be removed from punishment, it can be reduced, and fines and community service are less stigmatizing than imprisonment and shaming. That is, fines and community service do not invite others to believe that the offender is less than human. Concededly, the stigma cannot be entirely removed, because part of the stigma is inherent in the condemnation for the wrongdoing. However, the stigma can certainly be lessened by choosing punishments that do not isolate the offender, as imprisonment and shaming punishments do. There is at least less suffering and humiliation with fines and community service. And this is a very good thing.

However, this concedes too much. A proper rebuke for a wrong done, combined with a fine or community service, does not necessarily stigmatize the offender in a way it should not. It does not make for status differentiation. Rather, it places the offender in a situation where he is asked to do certain things that are consistent with his dignity as a way of compensating society for his crime. The desire for such a response on the offender's part does not embody a stigma or an attitude that the offender is a different or lower type of being. Society's anger about the crime finds an outlet in its desire to condemn the criminal, but this anger is compatible with treating the criminal as a responsible agent. Indeed, if society did not condemn him and express its disapproval of his wrongdoing, *then* he is considered less than an agent who is responsible for and accountable for his actions.<sup>77</sup> The trouble with imprisonment and shaming is that they take an acceptable sort of communication with the offender and add to it suffering and humiliation. This is more than what is necessary, and may even qualify as vengefulness: This is the aspect of punishment that is akin to human sacrifice, namely, the desire to degrade the offender just to satisfy society's anger. By contrast, being condemned for a wrongdoing *as such* should not be considered a humiliation—even a minor one. It is part of being a responsible human agent to be reprimanded, to feel remorse, and to desire to atone one's mistakes. The real problem, the humiliation, comes when society demands *more* from the offender—that he suffer or be humiliated in public, for example. Interestingly, to change traditional punishments so that offenders are given fines or community service may affect the emotions that society feels toward their crimes. If citizens see the offender being punished in a way that they can identify with—a way that they themselves live in the world—it may make them less likely to adopt dehumanizing or brutalizing attitudes toward the offender.<sup>78</sup> It is too pessimistic to think that the only way to change things is to directly change the emotions citizens feel toward criminals. Change might come from above, from judges and legislatures implementing more humane punishments, or from below, from shifts in societal understanding about what is necessary to appropriately condemn. Or perhaps once

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<sup>77</sup>This is the important truth gleaned in the criticism of therapy as an alternative to punishment. See e.g., Morris, *supra* note 20, at 475; C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224 (1952). See also Markel, *supra* note 3.

<sup>78</sup>Compare this to imprisonment, where criminals are isolated from the rest of humankind.

the punishments change, the emotions themselves will change as well, not so that the crimes committed are condoned, but so that society's feelings as to what constitutes an acceptable punishment is more in line with the commitments of liberalism.<sup>79</sup> At least, this is the hope.

#### V. CONCLUSION

The assumption in this Essay is that the state should, ideally, never be cruel to a human being or humiliate a human being. This assumption could be contested. Perhaps we only owe equal respect to other people so long as we do not have sufficient reason to treat them otherwise.<sup>80</sup> And perhaps crime is sufficient reason to treat people with a less than equal respect.<sup>81</sup> This position could be argued. But this position is inconsistent with the highest hopes of liberalism, because liberalism does not simply promote the dignity of those who obey the law, but of all people. If this Essay is correct, most traditional punishments fail to promote and protect the dignity of criminals and are, thus, inconsistent with the idealistic version of liberalism. Liberals then should contest the social meanings that drive the belief that *only* imprisonment or shaming is fitting and proper to express society's disapproval of the crime and the criminal. Of course, changing these social meanings will not be easy—there are many risks in challenging deeply seated assumptions, not the least of which is a backlash against efforts to change those social norms.<sup>82</sup> So all of this may sound hopelessly impractical or even foolish; the social transformation required for punishments that do not humiliate or degrade as satisfactory condemnation may appear far too utopian.<sup>83</sup> Still, it is a

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<sup>79</sup>Both Kahan and Stephen suggest that we can never really eliminate emotions such as hatred, disgust, etc., so we might as well try to focus them against those who are very bad. STEPHEN, *supra* note 54; Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998). I am not at all convinced that our emotions work this way. Why couldn't we become increasingly compassionate, rather than just shifting around a fixed quantity of hatred? This seems an unduly pessimistic view. And, even if Kahan and Stephen are right, why couldn't our illiberal emotions be diverted (to sporting events, for example) or sublimated altogether?

<sup>80</sup>See CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* (1987). Larmore does not say whether committing a crime is a sufficient reason.

<sup>81</sup>See, e.g., Alan H. Goldman, *The Paradox of Punishment*, 9 PHIL. & PUB. AFF. 42 (1979); Christopher W. Morris, *Punishment and Loss of Moral Standing*, 21 CAN. J. PHIL. 53 (1991).

<sup>82</sup>See Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055 (1996).

<sup>83</sup>There may also be the more pressing problem of imagining what such a major shift in meanings would entail. We might worry how a system of fines instead of imprisonment would deal with dangerous offenders. Or we might wonder whether punishments without hard treatment could sufficiently deter potential offenders. Oddly, the society that has the most liberal and humane punishments may be illiberal, not because it punishes in illiberal ways, but because its failure to punish illiberally leads many to feel that they can be illiberal. Whether punishment might be best justified in this way is a tricky issue—but it is by no means a problem that is restricted to punishment and my proposal. It is simply the general problem of whether we are ever justified in violating a norm in order to produce a net decrease in norm violations. Even if we decide that some criminal offenders should be

good idea to ponder how things *ought* to be, were the world to cooperate with our highest ideals. This makes it more likely to move in the direction of the ideal and avoid the temptation to take existing social norms as inevitably fixed, objective, or true.

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incarcerated—and so treated with a less than equal respect—because (otherwise) many more would suffer, this is no different from the question of whether we might violate a person's rights in order to get information that would save the lives of many other people. In fact, it is exactly the same problem. My proposal doesn't present the liberal with a new kind of problem.