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Shame: A Different Criminal Law Proposal for Bullies

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SHAME: A DIFFERENT CRIMINAL LAW PROPOSAL FOR BULLIES

XIYIN TANG*

ABSTRACT

Public concern over bullying has reached an all-time high. The absence of a sensible criminal charging and sentencing regime for the problem recently reared its head in the highly publicized prosecution of Dharun Ravi, who was convicted of fifteen counts and faced the possibility of ten years in prison. This Essay argues that existing criminal statutes used to address the problem, like bias intimidation and invasion of privacy, do not fit neatly with the specific wrongs of bullying. However, recently-enacted “cyber bullying” laws, which give complete discretion to school administrators, are weak and ineffective. I propose another solution: first, to criminalize the act of bullying itself, thus sending a powerful, expressive message that can flip the high school and teenage norm of meanness as virtue. Then, to reinforce that message, sentence a bully to shaming, not imprisonment, which better serves utilitarian, expressive, rehabilitative, and retributive goals specific to the wrongs of bullying.

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I. INTRODUCTION

Bullying is on the rise, and prosecutors are eager to do something about it. In the absence of a statute directed specifically toward the problem of bullying, a series of tenuous ones—bias intimidation, invasion of privacy—have been cobbled together to create an ad hoc way of getting at an underlying social and moral failure (i.e., meanness) that the criminal justice system was not designed to address. My proposed solution allows the criminal law to express moral condemnation of adolescent bullying through a statute that criminalizes the act of bullying itself—but with *shame*, not imprisonment, as its sentence. As I will argue, court-mandated shaming better serves utilitarian, expressive, and retributive goals specific to the wrongs of bullying that imprisonment simply cannot accomplish.

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The recent trial of eighteen-year-old Dharun Ravi has brought national awareness and hysteria over bullying to its apex. On September 22, 2010, an eighteen-year old Rutgers freshman named Tyler Clementi jumped to his death from the George Washington Bridge. Clementi, a shy, introverted kid with a penchant for playing the violin, also happened to be gay.¹ In the days and weeks leading up to his suicide, Clementi's sexual encounters with another man had been viewed and made public via webcam by his roommate, another eighteen-year old named Dharun Ravi, who publicized these video sessions through Twitter messages.² When news of Clementi's suicide broke, it became a banner story for the evils of bullying, homosexual intolerance, and, perhaps worst of all—the dangers of reckless kids playing on the Internet. But what followed was, as some commentators argue, far out of hand.³ In March of 2012, Ravi was convicted of fifteen counts, including bias intimidation, invasion of privacy, and witness and evidence tampering. Ravi effectively faced as much as ten years in prison—for what was, most would agree, a cruel teenage prank.⁴

Yet the Ravi prosecution is just the latest in a string of highly publicized instances of teenage bullying. For example, in 2010, fifteen-year-old Phoebe Prince killed herself after being relentlessly taunted by several peers in the Massachusetts suburb of South Hadley.⁵ That same year, three gay teens, aged thirteen to fifteen, committed suicide across the United States as a result of separate instances of anti-gay harassment.⁶ As national awareness about bullying has increased, forty-four states and Washington, D.C. have enacted “cyber bullying” laws that allow school administrators to suspend or expel bullies.⁷ However, many feel that these cyber bullying statutes, applicable only in the secondary school context and most of which do not carry criminal penalties, are not potent enough.⁸ The Ravi case amplifies

¹ See Ian Parker, *The Story of a Suicide*, THE NEW YORKER (Feb. 6, 2012), http://www.newyorker.com/reporting/2012/02/06/120206fa_fact_parker?currentPage=all.

² *Id.*

³ See, e.g., Emily Bazelon, *Make the Punishment Fit the Cybercrime*, N.Y. TIMES (Mar. 19, 2012), http://www.nytimes.com/2012/03/20/opinion/make-the-punishment-fit-the-cyber-crime.html?_r=1.

⁴ Beth DeFalco, *Roommate Charged with Hate Crime in N.J. Suicide*, ASSOCIATED PRESS (Apr. 20, 2011), <http://www.staradvertiser.com/news/breaking/120288464.html?id=120288464>.

⁵ See Emily Bazelon, *What Really Happened to Phoebe Prince?*, SLATE (July 20, 2010), http://img.slate.com/media/31/100721_Bull-E_final_3.pdf [hereinafter Bazelon, *Prince*].

⁶ See Lisa C. Connolly, Note, *Anti-Gay Bullying in Schools—Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U. L. REV. 248, 248 (2012).

⁷ See Elizabeth M. Jaffe, *Cyberbullies Beware: Reconsidering Vosburg v. Putney in the Internet Age*, 5 CHARLESTON L. REV. 379, 386-88 (2011).

⁸ *Id.*; Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 858-61 (2010). For a brief review of states' cyberbullying laws, including whether they carry criminal penalties (most do not) and whether they apply to off-campus activities, see SAMEER HINDUJA & JUSTIN W. PATCHIN, STATE CYBERBULLYING LAWS (July 2013), available at http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf.

these concerns: since he was a college student, cyber bullying statutes have no applicability to him. Yet neither, it seems, do statutes designed for peeping toms and racist bigots.

Legal scholars have suggested a panoply of remedies ranging from tort liability to educational programs, while looking upon criminalization with distaste.⁹ Indeed, the popular proposal of increased educational initiatives flows from the idea that without a change in school climate overall, we cannot expect ex-post criminalization to have any effect on ex ante actions.¹⁰ This Essay argues that criminalization can indeed change normative behavior on the ex-ante level, but such criminalization and its attendant sentencing must be acutely aimed toward addressing the underlying wrong: meanness. Thus, this Essay proposes that such convicted bullies be sentenced to a court-mandated regime of *shaming*, rather than fines and/or imprisonment, as their sole punishment.

Shaming as a legitimate form of punishment has been widely debated over the past couple decades.¹¹ Despite its detractors, courts have sentenced white collar criminals, sex offenders, and common thieves to shaming. Yet it seems that the deterrent, rehabilitative, retributive, and expressive benefits of shaming are *most* applicable in the bullying context. This Essay will first examine how shaming has been used and justified as a viable alternative to traditional criminal sanctions. It will then apply these rationales to the specific instance of bullying; looking in particular at the closeness of fit between bullying's public rituals of degradation and the publicized regime of shaming. Lastly, I respond briefly to potential criticisms of this proposal and suggest ways in which a sensible shaming regime for bullies would be crafted by state judges.

II. SHAMING AS AN ALTERNATIVE CRIMINAL SANCTION

At first blush, sentencing a criminal to shaming rather than imprisonment, probation, community service, or paying a fine seems like a strange and cruel form of punishment relegated to more medieval times.¹² Not so. In fact, shaming has enjoyed a recent stint of popularity in American criminal sentencing. To name just a few: in New York, a court ordered a slumlord to live in one of his own vermin-infested buildings and post signs outside the building advertising its condemnation;¹³ in Missouri, the names and faces of men convicted of prostitute solicitation were

⁹ See, e.g., Connolly, *supra* note 6; Jaffe, *supra* note 7; R. Kent Piacenti, *Toward a Meaningful Response to the Problem of Anti-Gay Bullying in American Public Schools*, 19 VA. J. SOC. POL'Y & L. 58 (2011); Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 438-40 (2012).

¹⁰ Waldman, *supra* note 9, at 437.

¹¹ See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998); James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998).

¹² Any objections to their inherent cruelty have been mostly discounted. See, e.g., Whitman, *supra* note 11, at 1057-80 (describing how it is unlikely that shaming sanctions violate the modern, liberal sense of dignity).

¹³ See Garvey, *supra* note 11, at 736.

displayed on a community access channel;¹⁴ in New Jersey, a court forced bankers and brokers who were convicted of public urination to take out ads in local newspapers revealing their dirty secret.¹⁵

As Dan Kahan outlines, such shaming rituals typically fall into one of three categories: “stigmatizing publicity” (such as taking out an ad in a paper), “literal stigmatization” (such as wearing a sign on your body or posting one on your property), and “self-debasement rituals” (forcing the convicted to undergo a degrading experience similar to the one he is found guilty of).¹⁶ These rituals have been justified under a utilitarian, retributive, expressive, and even rehabilitative calculus.¹⁷ I will briefly examine each of these justifications in turn.

The utilitarian justifications underlying criminal law theory are perhaps the most obvious and well known. As Jeremy Bentham famously argued, a utilitarian theory of punishment should aim for optimal deterrence, so that the punishment given is no more than necessary to bring citizens into compliance with the law, or in other words to dissuade someone from breaking the law.¹⁸ Professor Kahan, one of shaming’s foremost advocates, argues that shaming deters by (1) increasing the cost of criminal behavior and (2) influencing preference formation.¹⁹ It does the former because shaming involves destroying the criminal’s reputation, and the threat of a bad reputation is unpleasant enough to deter one from committing a crime (as Kahan and Richard Posner have argued, this is especially true for white collar criminals, whose reputations are a valuable asset in gaining future employment opportunities).²⁰ In addition to influencing behavior, however, Kahan and Posner argue that shaming also influences beliefs by affirmatively marking out what was before thought of as “harmless” behavior as one now reserved for “bad types.”²¹ Therefore, those who think themselves “good types” will likewise refrain from X behavior because their preferences have changed—they now have a natural, moral aversion to X prohibited behavior.²²

The retributive appeal of shaming is the most obvious—shaming tactics aim to bring the criminal to the same low depths of degradation to which he subjected his victims. If deterrence is about social utility, retributivism is about justice. For

¹⁴ *Id.*

¹⁵ Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 365 (1999).

¹⁶ *Id.* at 384.

¹⁷ Shaming has also been recommended as a form of incapacitation that is cheaper than prison. However, I do not discuss this argument here because it has less relevance for teen bullies, where the young age of bullies renders incapacitation somewhat of a less admirable goal than rehabilitation and education. For a fuller discussion of the incapacitation argument, see Kahan & Posner, *supra* note 15, at 371.

¹⁸ 1 JEREMY BENTHAM, *Principles of Penal Law*, in THE WORKS OF JEREMY BENTHAM 399, 400 (John Bowring ed., Edinburgh, William Tait 1843).

¹⁹ Kahan, *supra* note 11, at 638.

²⁰ Kahan & Posner, *supra* note 15, at 369.

²¹ *Id.* at 377.

²² *Id.*

example, the New York court that forced the slumlord to live in his own slum perfectly encapsulates the *lex talionis* principle: “an eye for an eye.”²³ Generally, proponents of retributivism, like Jean Hampton, argue that “[t]he higher wrongdoers believe themselves to be (and thus the more grievously they wrong others), the harder and farther they must fall.”²⁴ While I note that *lex talionis* and retribution are not perfectly aligned—the former is more concerned with the *form* of punishment (i.e., the perfect shaming regime would literally mimic the crime it is punishing) and the latter with the *amount* of punishment (e.g., life imprisonment would seem an apt retaliation for a grisly murder no matter that the criminal himself is not being grisly murdered)—the general principle of *proportionality* binds both theories together. Thus, while many court-mandated shaming tactics have literally mimicked the crime itself (in one instance, a Florida teen convicted of throwing a brick and blinding his victim was ordered to wear an eye patch),²⁵ ordering a white collar criminal to take out public ads describing his wrongs, while not literally mimicking his crime, could be said to be proportionate to his crime because it effectively destroys his professional life. However, some have argued that the latter fails under a retributivist proportionality framework because it is difficult for judges crafting such penalties to predict what its effect will be on the specific criminal. Some criminals may not be fazed or destroyed by such publicity; others might react severely.²⁶

It is in response to this criticism that shaming’s expressive functions may be more powerful than its retributive ones. While retribution in itself seems like a form of expressive condemnation, the two are not entirely equal. Retributivists aim for proportionality of punishment so that the criminal feels what his victim felt. Expressivists, like Joel Feinberg, argue that the sentence *itself* carries meaning, independent of its effect on the criminal.²⁷ The community may morally condemn the criminal whether or not he feels or cares for this moral condemnation at all—as Kahan puts it, “[i]f anything, the perception that the offender is not shamed by what is commonly understood to be shameful would reinforce onlookers’ conclusion that he is depraved and worthy of condemnation.”²⁸ Shaming as a degradation ceremony is ritualistic and communitarian—it effectively ostracizes the criminal from the otherwise presumed morally upright.²⁹ In this sense, shaming’s expressive qualities speak more to its normative power than does the retributive impulse—insofar as the

²³ Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 111, 133-34 (1988).

²⁴ *Id.* at 134.

²⁵ Debbie Salamone, *Judge Orders Teen Who Maimed Tourists to Wear Eye Patch*, ORLANDO SENTINEL (May 30, 1996), http://articles.orlandosentinel.com/1996-05-30/news/9605291318_1_martin-hartmann-wear-an-eye-patch.

²⁶ See Garvey, *supra* note 11, at 747-50.

²⁷ Joel Feinberg, *The Expressive Function of Punishment*, in WHY PUNISH? HOW MUCH? 111, 113-14 (Michael Tonry ed., 2011) (“[P]unishment surely expresses the community’s strong disapproval of what the criminal did. Indeed, it can be said that punishment expresses the judgment (as distinct from any emotion) of the community that what the criminal did was wrong.”).

²⁸ Kahan, *supra* note 11, at 636.

²⁹ *Id.*

rest of us want to believe we are morally good, we must shun and condemn the very activity the criminal has committed.³⁰

Yet some might object that ostracizing the condemned brings little hope for rehabilitation of the criminal. Because the idea of punishment as “rehabilitation” or reform has been largely discredited in modern day criminal law jurisprudence,³¹ I will spend little time discussing it. However, shaming’s defenders have nonetheless worked to fit it into the rehabilitative model. An obvious argument would be that shaming rehabilitates because by forcing the wrongdoer to repent or else experience the pain that her victims felt, she will come to realize the error of her ways and thus become reformed.³² Of course, this depends entirely on the individual wrongdoer and so is, in many ways, as unpredictable as the retributivist objection above. There is at least some evidence that shaming is de facto not rehabilitative because it wreaks psychological damage,³³ but its rehabilitative possibilities are at least more likely than traditional forms of punishment like prison.³⁴ And to the extent that rehabilitation has been defined as a change in the criminal’s preferences (rather than a fear of being punished),³⁵ it has already been argued that shaming can influence preference-formation, as outlined above.

Professor Steven Garvey has also argued for the educational function of shaming punishments, which follows a similar trajectory as rehabilitation in the sense that he “recommends the infliction of hardship on an offender that ‘mirrors’ his own wrongdoing in order to morally ‘educate’ him, to make him see the error of his ways, and ideally, to lead him to repentance.”³⁶ Yet not all shaming penalties can educate. According to Garvey, only those that are “talionic” (i.e., those that mimic the crime) can be educational because it forces the criminal to either experience the harm he caused to his victim or otherwise to indelibly impress upon him that specific harm.³⁷ Garvey’s proposal is interesting in light of the strong push for increased education initiatives as a response to bullying, out of the belief that criminal penalties like imprisonment will do little for the bully. While it is arguable how well talionic punishment or restitution might educate ordinary offenders due to the highly variable

³⁰ I briefly discuss the objection that such “morals education” is illiberal in Part III of this article. *See infra* Part III.

³¹ *See* *Mistretta v. United States*, 488 U.S. 361, 365 (1989) (“Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases.”). *See generally* Francis Allen, Book Review, 131 U. PA. L. REV. 819 (1983).

³² Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1893-95 (1991).

³³ *See* *United States v. Gementera*, 379 F.3d 596, 604-05 (9th Cir. 2004).

³⁴ *See, e.g.*, Massaro, *supra* note 32, at 1890-900.

³⁵ Garvey, *supra* note 11, at 757.

³⁶ *Id.* at 739. While Garvey claims that his educational proposal is distinct from rehabilitation, it seems that the distinction he draws between rehabilitation and his proposed method of education is merely that rehabilitation has been conflated with deterrence theory in many court opinions. *See id.* at 754-57.

³⁷ *Id.* at 784-91.

nature of each individual's reactions to such penalties,³⁸ I argue that all shaming penalties in general are appropriately talionic as applied to bullying. Below, I discuss the specific social and psychological conditions of bullying that make it particularly susceptible to the ritualistic and communitarian nature of shaming.

III. WHY SHAMING WORKS FOR BULLIES

Shame is the name of the game of bullying. The bully's goal is to publicly humiliate, cut low, bring down, and terrorize his victim. The ritual of public hazing at large school functions like proms, the cafeteria, or the hallway has been a theme in movies depicting the cruelties of high school kids in everything from *She's All That* to *Mean Girls*. That bullies need an audience in order to torment their victims is a very real truth. Bullying prevention programs have attempted to address the problem by urging bystanders to walk away from the scene in order to deprive them of their audience.³⁹ Bullies rule by mob consensus: they need the approval and support of their peers as encouragement and impetus to exact pain from their victims.⁴⁰ At best, their will to dominate relies on the fact that few bystanders will step in to stop them. Though many students report feeling uncomfortable or disagreeing with a bully's actions, they fear speaking out because they do not want to be the next target.⁴¹

Existing cyber bullying laws effectively remove the bully from his peers' consciousness by either suspending or expelling him, as if school administrators are eager to cover up their own failures by wiping the slate clean of the ugliness that had occurred.⁴² Criminal trials, on the other hand, take bullies out of the social sphere of the school grounds and into the scary world of orderly, adult society—that is, the courthouse. While criminal trials no doubt garner the same amount of negative publicity for the bully as shaming would, it does so on a far more abstract scale than shaming a bully in front of his peers. Instead, the bully is confronted with angry adults, admonishing judges, and frenzied press. In both the cyber bullying and criminal trial context, bullies become divorced from and entirely forgotten by the only people whose opinions and approval they care about and have worked so hard (by degrading others) to gain: their peers. And even more importantly, the bully has learned nothing. A criminal charge coupled with modest jail time or probation at most deters future action by inculcating a fear of punishment in the bully, but it does little to educate. Expulsion, on the other hand, removes bullies permanently from the educative environment of school—at a time when a bully needs it the most.

No wonder, then, that commentators are complaining that even the highly-publicized criminal prosecutions and adult outrage over bullying has done little to change the overall school climate,⁴³ where mean-beats-weak unquestioningly

³⁸ See *id.* at 747-50; *supra* text accompanying note 26.

³⁹ Bazelon, *Prince*, *supra* note 5, at 6.

⁴⁰ *Id.* (“One tenth grader told me about listening in class as [one of Phoebe Prince’s bullies] talked about going up to Phoebe to yell at her. . . . ‘And everyone in the class was like, ‘Good idea.’ Or else we just sat there,’ the girl remembered.”).

⁴¹ See *Bullying*, AM. SOC’Y FOR POSITIVE CHILD CARE, <http://americanspcc.org/education/bullying/> (last visited May 10, 2012).

⁴² Bazelon, *Prince*, *supra* note 5, at 14.

⁴³ See Waldman, *supra* note 9, at 437; *supra* text accompanying note 10.

continues to be the social order.⁴⁴ This is where shaming a bully in front of his classmates might come in as the most effective means of turning the tide on the perverse norms of teenage sociality. Shaming is both a ritualistic and communitarian form of punishment. Unlike other forms of criminal sentencing, in which the bully is removed from school and thus erased from his peers' consciousness, shaming re-integrates the bully within school but flips the social order. It re-integrates him as debilitated rather than domineering, as socially weak rather than strong. It deters not only future action by the bully himself, but also by other would-be bullies, because the public ritual of reverse humiliation is a visible, palpable, utterly real reminder to all students that bullying can backfire.

In fact, the deterrent effects of shaming bullies are perhaps stronger than they would be for other offenders. As Kahan and Posner raised in their argument for shaming white collar criminals, it's possible that injuring an offender's reputation will not achieve marginal deterrence.⁴⁵ This is so because shaming a white collar criminal might not ruin his reputation enough to have any effect on his professional life.⁴⁶ He might, for example, have "highly marketable skills that do not require trust on the part of the purchaser."⁴⁷ He might also simply contract with his clients that they need only pay him if their stock rises in value, thus making it irrelevant whether his clients trust him or not.⁴⁸ These objections arise because by ruining a white collar criminal's reputation, we are only hoping that the ruined reputation will *in fact* cause lost job opportunities, which is what the white collar criminal cares about. This is not the case with shaming a bully, as his reputation *is* what the bully cares about. The bully does not wager his skills or professional life when he cuts others down. What the bully wagers is precisely his reputation, for being popular (or being thought of as "cool") is precisely that of having a good reputation. Thus, the next time a student is tempted to wage another's pain for his popularity, he will be deterred in knowing that his actions could backfire, that *he* could be the one who becomes ostracized instead.

In this sense, shaming's retributive power is also more effective than it would be for other offenders. As discussed previously, retributivists question shaming's effectiveness because some individual offenders may not care what others think about him, and thus will be little affected by a shaming regime.⁴⁹ Similarly, those, like Stephen Garvey, who advocate a talionic form of punishment, question the large majority of shaming tactics, which do not force the criminal to experience his own bitter medicine.⁵⁰ Garvey argues that many shaming tactics, which focus on literal

⁴⁴ Even after Phoebe Prince's suicide, a girl who dared to speak to a television crew about bullying at South Hadley High was punched and beaten up against the lockers by one of Prince's bullies as soon as the television crew left. See Kevin Cullen, *The Untouchable Mean Girls*, BOSTON GLOBE (Jan. 24, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/01/24/the_untouchable_mean_girls/.

⁴⁵ Kahan & Posner, *supra* note 15, at 373.

⁴⁶ *Id.* at 372-73.

⁴⁷ *Id.* at 372.

⁴⁸ *Id.*

⁴⁹ See Garvey, *supra* note 11, at 748-49.

⁵⁰ See *supra* notes 11, 36 and accompanying text.

stigmatization (e.g., forcing the criminal to stand in public holding a sign), do not educate because they are little related to the actual crime (rather, they describe the crime committed).⁵¹ Yet any tactic that shames the bully is de facto talionic because shaming others is precisely what the bully is guilty of. More importantly, since we know that bullies thrive off of the approval of their peers, whether it's silent complicity or active encouragement, bullies are necessarily adversely affected by the negative treatment of their classmates.⁵² Shaming, by destroying his reputation amongst his peers, effectively strips him of his popular status and casts him into the ranks of the social pariahs, his most feared and loathed Siberia.

I have so far mostly focused on shaming's effect on the bully himself. Yet I believe that the greatest power of shaming lies in its ability to influence the preference formation of others, for therein lies its normative power. As discussed above, because of its ritualistic and highly public nature, shaming can change the beliefs of others about an activity they once thought harmless.⁵³ Kahan and Posner applied this argument to insider trading, which might have once been thought harmless and yet is now affirmatively identified with "bad types."⁵⁴ The same cannot be truer for bullying, which teens currently view as simply a rite of passage or a harmless part of growing up.⁵⁵ But those who observe the public drama of shaming will naturally want to identify as *not* the shamed—as *not* a bully, as a "good type" who scorns "bad type" behavior like bullying.⁵⁶ By shifting teenage perception of bullying from normal, harmless behavior to behavior for social outcasts and the morally deficient, the persistence of a shamed bully in the hallways could subconsciously induce teens to change their beliefs over time.

I have argued throughout this section that shaming is not merely an ex-post criminal sanction with little to no effect on ex-ante behavior. Rather, it can educate by shaping the beliefs of other students ("bystanders"⁵⁷) while simultaneously acting as a deterrent to would-be bullies. Further, shaming's retributive appeal cannot be denied. As Kahan has pointed out, shaming's very drama "satisf[ies] rather than disappoint[s] the public demand for condemnation" (compare this with what is so often an outraged response on the part of the public that not enough has been done to combat the bully in the face of tragedy⁵⁸).⁵⁹ Yet it does more. Shaming forces rather than recommends the implementation of the morally correct social order—a social order in which meanness is condemned and kindness no longer equated with a form

⁵¹ Garvey, *supra* note 11, at 784.

⁵² See Bazelon, *Prince*, *supra* note 5, at 6; *supra* text accompanying note 39.

⁵³ Kahan & Posner, *supra* note 15, at 377; *supra* text accompanying notes 21-22.

⁵⁴ Kahan & Posner, *supra* note 15, at 377.

⁵⁵ See Bazelon, *Prince*, *supra* note 5, at 8 (describing how teens characterize the taunting that drove Phoebe Prince to kill herself as "normal girl drama").

⁵⁶ See Kahan & Posner, *supra* note 15, at 377.

⁵⁷ See AM. SOC'Y FOR POSITIVE CHILD CARE, *supra* note 41.

⁵⁸ For example, in response to the suicide of Tyler Clementi, the public called for life imprisonment of Ravi. Ellen DeGeneress implored on national television for something to be done. See Parker, *supra* note 1.

⁵⁹ Kahan, *supra* note 11, at 650.

of weakness that could ultimately result in death by suicide. But, of course, this is all a very provocative proposal. In the final Part, I respond to a few objections before crafting one possible version of a shaming regime for bullies.

IV. TOWARD A PRACTICAL SHAMING REGIME

A. *Objections*

There is probably an immediate objection that one could make to this proposal: “court-mandated shaming is merely bullying itself by another name. As James Whitman has pointed out about our discomfort with shaming penalties, it is the state’s compliance with lynch mob rule that should most trouble us about such punishments.”⁶⁰ And yet expressivism teaches us that *all* criminal punishments carry with it the moral condemnation of a community, whether it chooses to enact that condemnation via imprisonment or probation or something else. As Feinberg points out, it does not do to say that the “unpleasant consequences” following conviction are separate and distinct from the declaration of community condemnation.⁶¹ Rather, punishment and condemnation go hand-in-hand. If the unsupervised high school hallways are mob rule as determined by teens themselves, then shaming is at the very least adult society righting this wrong by imposing its own form of morally sound values back upon the mob. It seems to me the important issue is not whether bystander abuse of the shamed is possible,⁶² but what specific conditions we can impose on the public performance of shame to dramatically reduce the probability of such mob mistreatment. My proposal in Part B for one version of a shaming regime for bullies hopes to address, at least in part, this issue.

At any rate, the shaming of bullies is unique in some respects from the shaming of other criminals like thieves and drunk drivers, for the former shames individual cruelty and domination. It would seem that if Kahan and Posner are right that the public spectacle of shaming X behavior forces observers to self-identify as *not X*,⁶³ then bystanders would necessarily shun being cruel—even if it is to the bully himself. Rather, it is the silent, reproachful watch of his peers that is more powerful than the angriest of mobs, because in that reproach a certain, better social meaning is conveyed—that of pity and high-mindedness. If bystanders were to give in to denigration of the shamed, then they would be no better than the bully. Indeed, as I suggest below, school administrators should focus on segregating the bully completely from *all* contact (negative and positive) with his peers, so that his utter alienation becomes the hallmark and tragedy of his punishment.

Nor should we find this form of state “morals reform” troubling. For one, the idea that the state’s inculcation of moral values upon its citizens is somehow illiberal could be attacked by replying that the state has a right to educate its citizens to conform to the criminal law (and as we know, the criminal law has expressive, not

⁶⁰ Whitman, *supra* note 11, at 1089.

⁶¹ Feinberg, *supra* note 27, at 114.

⁶² *See* Whitman, *supra* note 11, at 1088.

⁶³ Kahan & Posner, *supra* note 15, at 377; *supra* text accompanying notes 21-22.

just utilitarian, meaning⁶⁴).⁶⁵ At best, that objection is more one of *what*, rather than *should we at all?* As Stephen Garvey argues, forcing offenders to attend church more clearly offends liberal sensibilities than forcing a slumlord to spend time in his own slum.⁶⁶ Whether a particular form of morals education is illiberal should be evaluated on a case-by-case basis. But more importantly, in the case of bullying, it has long been acknowledged that secondary schools (and even, though to a lesser extent, undergraduate institutions) enjoy a much broader power to inculcate moral values upon its students.⁶⁷ Thus, even a minor's First Amendment rights (that citadel of liberal self meaning-making) are far more attenuated than that of an adult—especially in the secondary school context.⁶⁸

One last objection one might make is the debilitating effect of shaming on a young person's adult life. Must one instance of bullying in one's teenage years destroy all possibilities of redemption? Certainly, Kahan and Posner's argument that shaming incapacitates as well as prison, suggests that it is at least as equally harsh as putting a young teen behind bars for most of his life.⁶⁹ And yet my response to this is that shaming is far more rehabilitative than either expulsion or suspension under cyber bullying laws or imprisonment/probation under the criminal law. That shaming is more rehabilitative than prison seems quite obvious. After all, prison's

⁶⁴ See, e.g., Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999) (arguing that referring to deterrence theories in fact masks contentious expressive condemnation, ideologies, and norms).

⁶⁵ Garvey, *supra* note 11, at 773.

⁶⁶ *Id.* at 774-75.

⁶⁷ See, e.g., WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 868-69 (3d ed. 2011); Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 15-20.

⁶⁸ In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court recognized that the State has ample power to regulate the well-being of its minors, and that the legislature could conclude that both parents and teachers are able to instill those values. One might immediately object and point to the classic case *Tinker v. Des Moines*, 393 U.S. 503 (1969), which recognized that a student does have viable First Amendment rights in the classroom. However, *Tinker* (a) has since been whittled away at by subsequent student First Amendment cases and (b) was about political speech, which, as "core" speech, has long enjoyed more protection than other forms of speech. For other secondary school First Amendment cases since *Tinker*'s passage that have distinguished *Tinker*, see *Morse v. Frederick*, 551 U.S. 393 (2007) ("BONG HiTS 4 JESUS" sign is not protected political speech and thus subject to school regulation); *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that student newspapers published by the school receive less First Amendment protection than traditional newspapers); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding that the school board was within its bounds for disciplining a student for his elaborate sexual speech). In response to those who would object that a bullying statute could significantly dampen a student's First Amendment rights, I note that it is unlikely that typical "bullying" speech (likely denigrations of sex, status, color, ethnicity, or otherwise—generally, speech aimed solely at making another feel bad about himself with little to no ideological bent) would fall under "political speech." Thus, the First Amendment argument, at least as applied to on-campus behavior, is largely moot.

⁶⁹ Kahan & Posner, *supra* note 15, at 371.

“rehabilitative” possibilities have been destroyed and discounted.⁷⁰ If other scholars are right that shaming can educate, then it rehabilitates better than prison simply because it carries with it the possibility of moral reform.⁷¹ The more interesting point at issue is whether shaming can in fact be superior to the current practice of expelling or suspending a student. I argue that it is.

It is more rehabilitative than expulsion or suspension because the latter withdraws the student from school life. Even if he could simply enroll in another school, expulsion or suspension from one school marks the bully out as a bad student rather than morally deformed, and so in many ways destroys his life via eradication of higher education and hence, job opportunities. Kahan and Posner, in arguing for shaming’s incapacitative abilities, have relied on the idea that having a bad reputation for being dishonest (e.g., by engaging in insider trading) is likely to severely damage one’s professional career, as so much of it depends on cooperative teamwork where trust in one’s business partner is vital.⁷² However, the effects of having a reputation for being a bully are far less clear. Certainly, one might argue that it could result in having fewer friends. Equally as likely, one could suggest that bullying’s age-specific nature could render this reputation less pernicious as time passes. Empirical data is needed to evaluate the effects of having a “mean” reputation on one’s professional opportunities. Intuitively, at least, one might surmise that it could be viewed as neutral or even an asset, as many professions actively encourage domination and ruthlessness.

B. Proposed Criminal Bullying Statute

All of which brings me to what such a shaming regime would look like. One is no doubt curious and likely outraged: am I recommending that the bully be beat up by his victims? That he sit saddled with a sign around his neck? My proposal is far less grotesque and simple.

First, states should enact a new criminal statute addressing bullying specifically, a prohibition that would apply to all (and only) on-campus behavior in both secondary schools and undergraduate institutions. The statute would mirror the state’s bias intimidation statute *but without* the specific categories of “race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin or ethnicity.”⁷³ Rather, a purpose to intimidate an individual and acting with knowledge that the conduct would cause the victim to be intimidated is enough. Oftentimes, bullying happens just because someone is different, nerdy, quiet, or

⁷⁰ See, e.g., NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 20-26 (1974) (focusing on the “hypocrisy of rehabilitation as a purpose of imprisonment”); DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (2002) (a history of incarceration and its failures).

⁷¹ See Garvey, *supra* note 11, at 764 (distinguishing moral reform from traditional rehabilitative theory because the former aims to reform “*through* punishment, not as an adjunct to punishment”) (emphasis added).

⁷² Kahan & Posner, *supra* note 15, at 370-71.

⁷³ For one version of a typical bias intimidation statute, see 33 & 33A GERALD MILLER & SUSAN GYSS, *Criminal Law*, in N.J. PRACTICE SERIES § 13.1(B) (4th ed. 2013).

weird—as may have very well been the case with Clementi⁷⁴—and it makes little sense to try and hammer, for example, a racially motivated bias into a simple act of teenage pugnaciousness. Further, the victim, like in a cause of action for the tort of intentional infliction of emotional distress,⁷⁵ must prove that he suffered severe emotional distress as a result.⁷⁶

This formulation of the statute serves two purposes: first, *unlike* in a traditional bias intimidation sentence-booster, the statute acknowledges that getting used to suffering unpleasantness is a fact of life, and that not every verbal barb thrown will, or should, scar. We cannot shield our children from the meanness of the world forever—learning how to fend for one’s self is a fact of growing up. However, nor can we expect a child to suffer severe emotional distress without a remedy. Second, however, unlike the tort of severe emotional distress, “outrageousness” of the defendant’s behavior need not be proved.⁷⁷ This is so because the defendant can simply claim that bullying is just par for the course in the school environment—or, as the kids would put it—“everyone does it.” This is an unacceptable answer, which brings me to my next point: that bullying should be a criminal, rather than a civil,⁷⁸ statute because of the normative judgments that attach.

Indeed, as other criminal law scholars have noted, “[t]he essence of punishment for moral delinquency lies in the criminal conviction itself. . . . It is the expression of the community’s hatred, fear, or contempt for the convict.”⁷⁹ To a non-wealthy citizen, a civil fine of many thousand dollars may be more unpleasant than a punishment consisting of a few months of community service, but the label of “crime” inspires more fear, both on the part of the community who has condemned the criminal and for the criminal himself.

As the public outrage over and subsequent criminal conviction of Dharun Ravi has shown, bullying itself evinces some sort of moral deficiency that society wants to condemn, a price the bully has extolled from his victim (and good, upstanding

⁷⁴ Parker, *supra* note 1 (“[Ravi] felt that he knew these essential facts: his roommate was gay, profoundly uncool, and not well off. . . . Clementi’s Yahoo e-mail address symbolized a grim, dorky world, half seen, of fish tanks and violins. Ravi’s I.M.s about Tyler’s presumed poverty were far more blunt than those about sexual orientation. . . . Ravi drove a BMW in high school; Clementi didn’t have a car.”).

⁷⁵ That a plaintiff can recover damages for an emotional, rather than physical, tort is a relatively recent phenomenon. For a brief history, see Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43-45 (1982). The four elements that a plaintiff must prove are: (1) that a defendant behaved outrageously; (2) intentionally or recklessly; (3) in directly causing the plaintiff’s (4) severe emotional distress. See RESTATEMENT (SECOND) OF TORTS § 46 (1965).

⁷⁶ See RESTATEMENT (SECOND) OF TORTS § 46 (1965).

⁷⁷ Courts have only found liability in intentional infliction of emotional distress cases where the defendant’s conduct has been “outrageous.” See Givelber, *supra* note 75.

⁷⁸ Note that while many states have enacted “cyberbullying” statutes, these statutes are not criminal, are mostly limited to bullying in the secondary school context, and create no liability for the bully—though school officials are allowed to suspend such students temporarily. For a brief discussion of such laws, see Jaffe, *supra* note 7.

⁷⁹ See Feinberg, *supra* note 27, at 113.

citizens at large) that we now demand be exacted from the perpetrator. If we criminalize the act of bullying itself—rather than acts that bullying seems incidentally related to, like hate crimes or spying on sexual acts—we are sending a message that we find bullying every bit as odious as the pervert who peeks through windows at a couple’s most intimate acts and a Klan member who chooses his victim based on race. We set norms about how to behave. We turn the idea of a childish prank gone wrong (i.e., Ravi’s antics resulted in a string of strange criminal convictions with odd-sounding names kids have probably never heard of like “witness tampering”) to the specific idea of bullying as a criminal act, and bullies themselves as the delinquent, dark underbelly of society. Suddenly, the blonde, peppy, yet horrifically mean Regina George of *Mean Girls* is not looking so pretty, or so cool.

To minimize the possibility of ad-hoc sentences that result in grotesquely varied degradation rituals, I propose one simple, uniform shaming regime. My proposal is, in effect, a temporary restraining order imposed on the bully that applies to his peers at large. It would entail the segregation of the bully from the rest of his peers for the entirety of the time he is on school grounds (including in the cafeteria, in the hallways, and in classes). The duration of such segregation would be determined by the gravity of his bullying on a case-by-case basis. To minimize the spectacle of such shaming while retaining the forced social exile of the bully, the bully should not wear any signs marking him out as such. Certainly, all precautions should be taken to ensure that the bully understands the alienation to which he has subjected his victims but does not fall into depression himself. As this is a very serious concern, close monitoring of the progression of the punishment is vital. Further, other students should not be permitted to in any way taunt or otherwise harass the shamed bully. At all points, it is important to keep in mind that the end goal of such ostracization is to successfully reintegrate the bully with his peers.

V. CONCLUSION

The adult public’s understanding of bullying and its severe ramifications have just begun to take shape. Recent studies show that reported incidents of bullying are rapidly on the rise, and that oftentimes the terrorized victims stay home out of fear of confronting their tormentors.⁸⁰ Bullying results in not just severe suicide and depression for the victims, but tragedies on a greater scale, as isolated, alone, and persistently harassed kids turn on their aggressors in school shootings (the tragedy at Virginia Tech stands as its most prominent example⁸¹). Bullying is as terrifying as it is inexplicable to adults, a strange game where behaving evilly (the opposite of professional “collegiality”) hoists one to the top of the high school “food chain”.

But if we are ready to give expressive meaning to our public horror, we must do so by replacing the perverse social structure of teenage bullying with the morally upright ideals of our greater adult community. Bullying today is often viewed by high school students as an annoying but inevitable part of ordinary life. But we cannot stand to live by such blithe standards. And while educational programs can simply attempt to *encourage* the shifting of this perverse norm toward one of peer

⁸⁰ See AM. SOC’Y FOR POSITIVE CHILD CARE, *supra* note 41.

⁸¹ See Alex Johnson et al., *Ex-Classmates Say Gunman was Bullied*, NBC NEWS (Apr. 19, 2007), http://www.msnbc.msn.com/id/18169776/ns/us_news-crime_and_courts/t/high-school-classmates-say-gunman-was-bullied/#.T7PCLWBZ3eQ.

support and friendliness, the threat of a criminal charge and shaming as its most horrifying result will serve as a far more effective means of actually bringing about this change. Criminalization is not merely a hard-line, overly zealous, prosecutorially evangelistic stance on bullying—it carries with it an expressive message about the moral abhorrence of bullying and an acknowledgment of its destructive consequences. Nonetheless, prosecuting bullies also does not mean irreparably ruining their lives, despite the retributivist response that they in turn have ruined other lives. Shaming reenacts the ritualistic public outings of bullying, but it does so in an organized fashion: it is backed by the rule of law and community standards, not by the mob rule of high school hallways. More importantly, shaming is as reformatory as the best of anti-bullying educational programs—but if properly implemented, it can do far more.