

# VIRAL SHAMING PUNISHMENTS AND THE EIGHTH AMENDMENT

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## INTRODUCTION

A court ordered vasectomy;<sup>1</sup> scooping up animal manure at a local fair or parade;<sup>2</sup> signs reading: “Sorry for the Jackass Offense”<sup>3</sup> and “Only an idiot would drive on the sidewalk to avoid a school bus.”<sup>4</sup> These are examples of shaming punishments, the long-past punishment of choice in early America.<sup>5</sup> Shaming punishments can take a variety of forms,<sup>6</sup> but the basic concept is simple: shaming punishments are penalties imposed by a moral authority within a community to separate, humiliate, and make an example of an offender who acts contrary to values and morals of the community, while simultaneously communicating to the community at large that conduct similar to that of the offender will not go unpunished.<sup>7</sup> Shaming punishments aim to publicly stigmatize and disgrace the offender by requiring them to display

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<sup>1</sup> See *infra* notes 54–58 and accompanying text (referring to a case involving a man accepting to undergo a vasectomy as part of a plea deal).

<sup>2</sup> See *infra* notes 59–62 and accompanying text.

<sup>3</sup> See *infra* note 52 and accompanying text.

<sup>4</sup> See *infra* notes 50–51 and accompanying text.

<sup>5</sup> See, e.g., Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2167–69 (2001) (discussing types of shaming punishments in colonial America); Paul Ziel, *Eighteenth Century Public Humiliation Penalties in Twenty-First Century America: The “Shameful” Return of “Scarlet Letter” Punishments* in U.S. v. Gementera, 19 BYU J. PUB. L. 499, 499–500 (2005) (noting popular shaming punishments throughout the colonial era). But see Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 733 & n.3 (1998) (discussing that, while shaming punishments were used, they were not the preferred punishment method in colonial America).

<sup>6</sup> See Garvey, *supra* note 5, at 734–37 (identifying specific instances of popular shaming punishments).

<sup>7</sup> See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 636–37 (1996).

their offense and conviction, apologize publicly, and, of course, experience shame.<sup>8</sup> Shame is what “a person experiences when she believes that she has been disgraced in the eyes of persons whom she respects,”<sup>9</sup> which is represented by the community at large in shaming punishments.<sup>10</sup> A key part of shaming punishments is the public setting in which they are executed, as well as the personal and individualized aspect of the punishment.<sup>11</sup>

Although popular in early America, the influence of the Internet, social media, and news outlets have since changed the application and effects of shaming punishments.<sup>12</sup> Today, the stigma caused by shaming punishments handed down for even minor offenses is easily spread on the Internet and social media and can be nearly impossible to remove therefrom.<sup>13</sup> The inability to “scrub” from the Internet evidence of the punishment creates a permanency problem that has the potential to change lives in the same way a felony conviction or lengthy prison sentence for a serious offense can.<sup>14</sup> For example, once viral, shaming punishments for minor offenses can cause unintended consequences such as rejections from colleges, loss of potential employment opportunities, or long-term shunning from an offender’s social circle.<sup>15</sup> This everlasting stigma undermines the intended functions and goals of sentencing

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<sup>8</sup> *Id.* at 631–34 (discussing different types of shaming punishments and their respective goals).

<sup>9</sup> *Id.* at 636.

<sup>10</sup> *See id.* (identifying the public as the persons expressing condemnation of offenders for shaming purposes).

<sup>11</sup> *See* Kahan, *supra* note 7, at 635–36 (discussing the public expression of condemnation as central to shaming penalties and the diversity of shaming punishments that exist to facilitate shaming punishments for different types of offenses).

<sup>12</sup> *See* Bailey Wharton, *To Shame or Not to Shame? That is the Question*, U. CIN. L. REV. (Mar. 28, 2022), <https://uclawreview.org/2022/03/28/to-shame-or-not-to-shame-that-is-the-question/> (discussing the potential exacerbating effects that the Internet could have on shaming punishments).

<sup>13</sup> *Id.* (“Once something goes on the internet, the original poster loses control of it, and it remains there forever.”).

<sup>14</sup> *See* Lauren M. Goldman, Note, *Trending Now: The Use of Social Media Websites in Public Shaming Punishments*, 52 AM. CRIM. L. REV. 415, 443 (2015) (discussing the permanency of the Internet as it relates to shaming punishments).

<sup>15</sup> *See id.* at 444 (discussing the “permanence problem” that could render the punishment unproportional to the offender’s crime); *infra* notes 152–65 and accompanying text; *see also* *People v. Meyer*, 680 N.E.2d 315, 320 (Ill. 1997) (holding that a public shaming punishment was inappropriate because the “sign may have unpredictable or unintended consequences” and even “an adverse effect on innocent individuals” who associate with the defendant).

as a whole.<sup>16</sup> Since shaming punishments for minor offenses lead to harsher, longer lasting, and more invasive effects than traditional punishments,<sup>17</sup> modern American shaming punishments raise questions under the Eighth Amendment.<sup>18</sup> The Ninth Circuit examined the Eighth Amendment implications of shaming punishments in *United States v. Gementera*, in which the court echoed the functions of sentencing and established that human dignity must be a consideration in sentencing.<sup>19</sup>

Further complicating the issue is that, once viral online, shaming punishments can lead sentencing judges to be pushed into the spotlight.<sup>20</sup> The fame and recognition received by these judges for the punishments they deliver can create a dangerous temptation for other judges.<sup>21</sup> As a result of levying extreme shaming punishments, some judges have even been given lucrative television contracts.<sup>22</sup> Such media attention may be seen by some judges as a justification for their outlandish sentences, leading judges to enhance the strangeness of their own sentencings and to push the line of acceptability.<sup>23</sup>

## I. HISTORY OF SHAMING PUNISHMENTS IN THE UNITED STATES

### A. *The Presence and Decline of Shaming Punishments in Early America*

Public shaming is not new; in Colonial America, it was one of the most popular punishments for criminal offenses.<sup>24</sup> Public punishments included public floggings, which incorporate corporal punishment in the form of whippings and beatings,<sup>25</sup> brandings,<sup>26</sup>

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<sup>16</sup> See discussion *infra* Section III.B.

<sup>17</sup> Goldman, *supra* note 14, at 443; see *infra* text accompanying notes 152–65.

<sup>18</sup> See discussion *infra* Section III.A.

<sup>19</sup> *United States v. Gementera*, 379 F.3d 596, 598, 608 (9th Cir. 2004) (reiterating that human dignity must be preserved in criminal sentencing but affirming the constitutionality of the shaming punishment at issue).

<sup>20</sup> See *infra* note 63 and accompanying text and Section III.C.

<sup>21</sup> See discussion *infra* Section III.C (discussing the media coverage encouraging judges to increase their creativity in creating shaming punishments).

<sup>22</sup> See *infra* notes 195–97 and accompanying text.

<sup>23</sup> See *infra* notes 195–97 and accompanying text.

<sup>24</sup> Goldman, *supra* note 14, at 418 (“In early America, shaming punishments were among the most popular methods of criminal sanctioning.”).

<sup>25</sup> *Flog*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/flog> (last visited Sept. 25, 2024).

<sup>26</sup> *Brand*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/brand> (last visited Sept. 25, 2024); see also Scott E.

the use of signs, and pillories or stocks, which involve a wooden device to constrain the offender's head, feet, and hands in order to display them in a public place.<sup>27</sup> Shaming punishments often invoke the image of Hester Prynne in Nathaniel Hawthorne's *The Scarlet Letter*, in which she is forced to wear a scarlet letter "A" as a punishment for her adultery.<sup>28</sup>

Shaming punishments in Colonial America relied on the close-knit nature of communities to provide awareness of the offender's crime.<sup>29</sup> The resulting humiliation deterred the offender and others from committing similar offenses.<sup>30</sup> Colonial American communities believed that these punishments resulted in guilt and remorse that fortified the moral beliefs of the community, leading to the use of such punishments to become popular and effective in controlling criminal behavior.<sup>31</sup> Indeed, another frequent practice required offenders to beg the church congregation to forgive their offense, a practice that iterated and reinforced the offender and the community members' understanding of the prevailing moral standards.<sup>32</sup>

Early American communities were few and far between, which caused members of a community to have an intimate knowledge of every other member.<sup>33</sup> This strengthened shaming punishments

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Sanders, *Scarlet Letters, Bilboes and Cable TV: Are Shame Punishments Cruel and Outdated or Are They a Viable Option for American Jurisprudence?*, 37 WASHBURN L.J. 359, 364–65 (1998) (noting how authorities in colonial America would brand the first letter of a criminal offense onto the offender's skin, distinguishing "the criminal from law-abiding members of the community").

<sup>27</sup> See Goldman, *supra* note 14, at 418–19 (noting how stocks and pillories are similar in that both mechanisms bound the offender's hands and feet, except that pillories also constrain the offender's head).

<sup>28</sup> NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Thomas E. Connolly, ed., Penguin Classics 1st ed. 2015) (1850); see also Goldman, *supra* note 14, at 418; Sanders, *supra* note 26, at 359 (discussing *The Scarlet Letter* and shaming punishments in contemporary America).

<sup>29</sup> Goldman, *supra* note 14, at 419–20; Sanders, *supra* note 26, at 361 ("Such close-knit communities meant that criminals were well-known to the law-abiding colonists of their respective communities. Therefore, offenders were fearful of the resulting disgrace from a public shame punishment.").

<sup>30</sup> Goldman, *supra* note 14, at 419–20 ("Fear of public exposure and community disapproval made public shaming punishments extremely effective because it deterred crime and controlled deviant behavior.").

<sup>31</sup> Sanders, *supra* note 26, at 361–63.

<sup>32</sup> *Id.* at 363.

<sup>33</sup> See Goldman, *supra* note 14, at 419; see also Charles Hirschman & Elizabeth Mogford, *Immigration and the American Industrial Revolution from 1880 to 1920*, 38 SOC. SCI. RSCH. 897, 897 (2009) ("Prior to the American industrial revolution, most Americans were reared in largely isolated agricultural households and small towns that were linked to the external world by horse drawn wagons.").

because the offender would be subjected to embarrassment in front of people they knew and had to continue interacting with. In short, the connection to the community was crucial to the effectiveness of the punishment.<sup>34</sup> As one would expect, “[s]uch methods of punishment had effects transcending the punishment itself. . . . The shame lasted well beyond the punishment, and the stigmatization of the criminal was assured.”<sup>35</sup> Additionally, “[a] person punished in such a manner was often shunned by the entire community . . . [and] never would return to their previous place in society.”<sup>36</sup>

In Colonial America, the effects of shaming punishments were limited by the memory of the offender’s community and the small scope of word of mouth communication due to the technological and logistic inability to widely publicize the punishment.<sup>37</sup> Even if there had been a way to widely publicize the punishment beyond an individual community, the publication probably would not have worsened the punishment because the otherwise isolated nature of communities, and the resulting lack of connection to those outside of one’s own community, would have rendered the publication irrelevant.<sup>38</sup>

Shaming punishments steeply declined and eventually stopped when the tightly-knit communities that ensured their effectiveness were broken up by large waves of new immigrant groups and transformed into bustling cities.<sup>39</sup> Because community members no longer knew each other as intimately, the effectiveness of shaming punishments dwindled as cities blossomed.<sup>40</sup> However, public shaming has seen a revival “[since] the 1990s in the US, with judges turning to alternative

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<sup>34</sup> See Goldman, *supra* note 14, at 419.

<sup>35</sup> Mark Spatz, Comment, *Shame’s Revival: An Unconstitutional Regression*, 4 U. PA. J. CONST. L. 827, 832 (2002).

<sup>36</sup> *Id.* (internal quotations omitted).

<sup>37</sup> See Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1051 (2016) (discussing the limited scope of shaming punishments in pre-Internet America); see also Hirschman & Mogford, *supra* note 33, at 897 (discussing the isolated, small-town life that dominated America prior to the industrial revolution).

<sup>38</sup> Goldman, *supra* note 14, at 419–20 (“[I]f a wrongdoer did not have a connection with the community, public shaming sanctions would most likely not affect that criminal’s behavior.”).

<sup>39</sup> Sanders, *supra* note 26, at 365.

<sup>40</sup> *Id.*; see also Hirschman & Mogford, *supra* note 33, at 897 (“Within the span of a few decades from the late 19th to the early 20th century, the United States was transformed from a predominately rural agrarian society to an industrial economy centered in large metropolitan cities.”).

punishments designed to humiliate and send a stern message.”<sup>41</sup>

### *B. Modern America and Viral Shaming Punishments*

The terms “going viral” and “went viral” are common parlance.<sup>42</sup> Going viral “refers to a digital video, image, or article that has spiked in popularity and has reached a large number of [Internet] users in a short period of time.”<sup>43</sup> Often, it is the funny, outrageous, and eye-catching content that goes viral. Numerous studies have shown that “appeals to sexuality, as well as shock, violence, and other inflammatory content [are] key elements of message virality.”<sup>44</sup> The outrageousness of shocking modern shaming punishments explains why they tend to go viral.<sup>45</sup>

During this period of shaming punishment resurgence in modern America, judges and the bizarre punishments they levy have made headlines.<sup>46</sup> In 2004,<sup>47</sup> for example, Shawn Gementera was convicted of stealing mail out of several mailboxes.<sup>48</sup> As per the federal judge’s ruling in *United States v. Gementera*:

Gementera was required to (1) observe postal patrons visiting the “lost or missing mail” window; (2) “write letters of apology to any identifiable victims of his crime;” (3) “deliver lectures at a local school;” and (4) perform one day of eight total hours “of community service during which time he shall either (i)

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<sup>41</sup> *The Resurgence of Public Shaming*, NSW CTS. (Apr. 7, 2016), <https://nswcourts.com.au/articles/the-resurgence-of-public-shaming>.

<sup>42</sup> A.W. Ohlheiser, *Maybe it’s Time to Retire the Idea of “Going Viral,”* MIT TECH. REV. (May 17, 2020), <https://www.technologyreview.com/2020/05/17/1001809/maybe-its-time-to-retire-the-idea-of-going-viral/> (describing “viral” as an adjective that has been “part of the language of internet culture since its beginnings”); *see also* *Viral*, CAMBRIDGE ENG. DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/viral> (last visited Sept. 8, 2024).

<sup>43</sup> *Viral Definition*, TECHTERMS.COM, <https://techterms.com/definition/viral> (Feb. 9, 2011).

<sup>44</sup> Itai Himelboim & Guy J. Golan, *A Social Networks Approach to Viral Advertising: The Role of Primary, Contextual, and Low Influencers*, 5 SOC. MEDIA + SOC’Y 1, 3 (2019).

<sup>45</sup> *See* Klonick, *supra* note 37, at 1031 (discussing the limits of modern shaming and why they often go viral); *see also infra* text accompanying note 176.

<sup>46</sup> *See infra* text accompanying notes 166–68, 176.

<sup>47</sup> The shaming punishments examined in this Article all predate 2020. These examples were chosen over newer and more recent examples to highlight the long-lasting effects of shaming punishments.

<sup>48</sup> *United States v. Gementera*, 379 F.3d 596, 598 (9th Cir. 2004), *cert. denied*, 546 U.S. 1031 (2005).

wear a two-sided sandwich board-style sign or (ii) carry a large two-sided sign stating, 'I stole mail; this is my punishment,' in front of a San Francisco postal facility identified by the probation officer."<sup>49</sup>

In 2012, thirty-two-year-old Shena Hardin was charged with driving her car on the sidewalk to avoid having to wait for students to board a stopped school bus.<sup>50</sup> Her sentence required her to stand at the intersection where one of her offenses occurred, holding a sign reading: "Only an idiot would drive on the sidewalk to avoid a school bus."<sup>51</sup> In 2003, the sentencing of two teens required them to march through their town with a donkey and a sign reading, "Sorry for the Jackass Offense," after stealing and defacing a statue from the town's nativity scene.<sup>52</sup> In another instance, Judge Poe, a former state judge from Houston, Texas, sentenced a shoplifter to seven eight-hour days of wearing a sign reading: "I stole from this store. Don't be a thief or this could happen to you."<sup>53</sup>

However, even harsher forms of shaming have been handed down. In 2014, Jessie Lee Herald, a twenty-seven-year-old man, agreed to a prosecutor's offer to undergo a vasectomy in return for a reduction in his sentence.<sup>54</sup> Herald was charged with child endangerment because of an incident where Herald, driving on a suspended license, was involved in a hit and run incident.<sup>55</sup> The incident resulted in minor injuries to his three-year-old son who was in the car at the time.<sup>56</sup> While the prosecutor claimed that the offer was intended to prevent the offender from having more

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<sup>49</sup> Goldman, *supra* note 14, at 424 (quoting *Gementera*, 379 F.3d at 599).

<sup>50</sup> Marvin Fong, *Cleveland Woman Holds 'Idiot' Sign as Part of Sentence for Passing School Bus (Video)*, CLEVELAND.COM (Nov. 13, 2012), [https://www.cleveland.com/metro/2012/11/cleveland\\_woman\\_holds\\_idiot\\_si.html](https://www.cleveland.com/metro/2012/11/cleveland_woman_holds_idiot_si.html).

<sup>51</sup> *Id.*

<sup>52</sup> See Jonathan Turley, *Shame on You*, WASH. POST (Sept. 18, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/17/AR2005091700064.html>.

<sup>53</sup> Sanders, *supra* note 26, at 367.

<sup>54</sup> David M. Reutter, *For Shame! Public Shaming Sentences on the Rise*, PRISON LEGAL NEWS (Feb. 4, 2015), <https://www.prisonlegalnews.org/news/2015/feb/4/shame-public-shaming-sentences-rise>.

<sup>55</sup> See *id.*; Brendan Smialowski, *Bioethicist Says Vasectomy Has No Place in Plea Deal*, NBC NEWS: MEN'S HEALTH (June 27, 2014, 1:43 PM), <https://www.nbcnews.com/health/mens-health/bioethicist-says-vasectomy-has-no-place-plea-deal-n142711>.

<sup>56</sup> See Smialowski, *supra* note 55; see also Reutter, *supra* note 54.

children,<sup>57</sup> the ruling was widely covered in the media and operated as a shaming punishment due to the amount of attention received, most of which focused on the fact that he fathered children with multiple women.<sup>58</sup>

Outrageous punishments can be exacerbated when coupled with inciting words from the sentencing judge. In 2018, Bayley Toth of Painesville, Ohio, was found guilty of criminal mischief after tipping over a port-a-potty during a night out with friends.<sup>59</sup> Judge Michael Cicconetti, “known for his very creative sentences,” sentenced Toth to three days of scooping horse manure during the county fair and parade.<sup>60</sup> Cicconetti admonished Toth with statements like “[y]ou like to screw around with crap? That’s what you’re gonna do for 3 days,” and “[y]ou act like an animal, you’re going to take care of animals. You can go [to the Lake County Fair] with the horses and goats and cows and pigs and sheep and after the fair you can shovel out their crap[.]”<sup>61</sup> Toth’s sentence also included a suspended 120-day jail sentence on the condition that Toth enrolled in at least six hours of college for the following fall semester, performed an additional five days of community service, abided by an 11 p.m. curfew, and paid restitution to the park.<sup>62</sup>

Each of these punishments garnered widespread coverage in the media and on the Internet.<sup>63</sup> Searching the names of these

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<sup>57</sup> See Reutter, *supra* note 54.

<sup>58</sup> For examples of media coverage, see *Vasectomy Requirement Part of Virginia Man’s Plea Deal*, CBS DC (June 23, 2014, 3:37 PM), <https://web.archive.org/web/20140626034508/http://washington.cbslocal.com/2014/06/23/virginia-mans-plea-deal-includes-vasectomy-requirement/>; Greg Hambrick, *Vasectomy Plea Deal for Dad of at Least Seven*, PATCH.COM (June 24, 2014, 12:36 PM), <https://patch.com/virginia/mclean/vasectomy-plea-deal-for-dad-of-six>; *Virginia Man Agrees to Vasectomy to Reduce Prison Sentence*, N.Y. DAILY NEWS (June 23, 2014, 9:39 PM), <http://web.archive.org/web/20140624075406/www.nydailynews.com/news/national/virginia-man-agrees-vasectomy-plea-deal-article-1.1841196>.

<sup>59</sup> *Painesville Judge’s Creative Sentence Will Have Man Scooping Out Pens at County Fair*, FOX 8 (July 25, 2018, 1:46 PM), <https://fox8.com/news/painesville-judges-creative-sentence-will-have-man-scooping-out-pens-at-county-fair>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See, e.g., *Judge Orders Man Who Knocked Over Toilet to Shovel Manure*, AP NEWS, <https://apnews.com/general-news-87982f6ae68b4776b7a817c85fb96ccc> (July 31, 2018, 12:03 AM); *Unique Punishment: Man Sentenced to Shovel Manure for Criminal Mischief*, WKYC CHANNEL 3, <https://www.wkyc.com/article/news/local/lake-county/unique-punishment-man-sentenced-to-clean-animal-pens-for-criminal-mischief/95-578623757> (July 30, 2018, 6:23 PM); *Judge Orders Man Who Knocked Over Port-A-Potty To Shovel Manure*, CBS PITT. (July 31, 2018, 7:01 AM),



offenders or details of their shaming punishments yields an abundance of articles and photographs.<sup>64</sup>

## II. THE EIGHTH AMENDMENT AND THE GOALS OF SENTENCING

### A. *The Eighth Amendment*

The Eighth Amendment is the foundation of government-sanctioned punishments in the United States.<sup>65</sup> In the context of the Eighth Amendment, the term “punishment” has been interpreted as “all that a legislature or sentencer expects and intends a prisoner to endure.”<sup>66</sup> The Eighth Amendment provides “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>67</sup> The often-quoted phrase “no[] cruel and unusual punishment” from the United States Constitution is derived from the idea of proportionality and traces back to the English Declaration of Rights of 1689.<sup>68</sup> The abuse of punishing power in England in the seventeenth century caused an increase in arbitrary and disproportionate punishments.<sup>69</sup> The English Declaration of Rights of 1689 incorporated the phrase to protect citizens from abnormal punishments in the future.<sup>70</sup> The American Constitution drafters, inspired, then included the phrase in the United States Constitution in 1791.<sup>71</sup> The Supreme Court’s 1972 landmark decision in *Furman v. Georgia* described the protections of the Eighth Amendment, stating “the fundamental premise of the Clause [is] that even the vilest criminal remains a human being possessed of common human dignity.”<sup>72</sup>

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<https://www.cbsnews.com/pittsburgh/news/man-knocks-over-toilet-sentenced-shovel-manure/>; *Man Sentenced to Shovel Manure for Knocking Over Port-A-Potty*, N.Y. POST (July 31, 2018), <https://nypost.com/2018/07/31/man-sentenced-to-shovel-manure-for-knocking-over-port-a-potty/>.

<sup>64</sup> See *supra* notes 45–63 and accompanying text.

<sup>65</sup> See Thomas K. Landry, “Punishment” and the Eighth Amendment, 57 OHIO ST. L.J. 1607, 1609 (1996).

<sup>66</sup> *Id.* at 1611.

<sup>67</sup> U.S. CONST. amend. VIII.

<sup>68</sup> See Shelley A. Nieto Dahlberg, Comment, *The React Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether its Use Is Permissible Under the United States and Texas Constitutions*, 30 ST. MARY’S L.J. 239, 255 (1998) (discussing the origins of the phrase “cruel and unusual punishment”).

<sup>69</sup> *Id.* at 255.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 256.

<sup>72</sup> *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).

B. *Goals of Sentencing*

Traditionally, there are four goals of criminal sentencing: deterrence, rehabilitation, retribution, and incapacitation.<sup>73</sup> These goals are formally set forth in 18 U.S.C. § 3553.<sup>74</sup> The Sentencing Reform Act analyzes the goals of sentencing and explains that these goals effectuate certain, consistent, and proportional punishments.<sup>75</sup> Consistent, certain, and proportional punishments enable fairness and ensure that a punishment deters or incapacitates the offender, while also rehabilitating the offender's morals and making sure they are held responsible for their offense.<sup>76</sup> When applied to punishments, the Sentencing Reform Act's analysis of sentencing goals helps to provide judges with sentencing guidelines that are flexible enough to consider mitigating factors, yet sufficiently rigid to avoid sentencing disparity.<sup>77</sup> Flexible but consistent and proportional punishments support the four traditional goals of sentencing by offering a framework within which judges can determine appropriate forms and levels of punishments for a given offense.<sup>78</sup> By using these principles as guiding standards, punishments can be tailored to offenses while still reflecting the four goals of sentencing.<sup>79</sup> These values and goals of sentencing are reflective of the guarantees provided by the Eighth Amendment.<sup>80</sup>

Certainty in sentencing<sup>81</sup> provides context to judges who

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<sup>73</sup> See DORIS LAYTON MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE, NAT'L INST. JUST. 1, 1 (2001).

<sup>74</sup> 18 U.S.C. § 3553(a)(2)(A)–(D); see Michael Edmund O'Neill & Linda Drazga Maxfield, *Judicial Perspectives on the Federal Sentencing Guidelines and the Goals of Sentencing: Debunking the Myths*, 56 ALA. L. REV. 85, 88 (2004) (discussing the traditional and emerging goals of sentencing).

<sup>75</sup> Sentencing Reform Act of 1984, Pub L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.); O'Neill & Maxfield, *supra* note 74, at 88–89.

<sup>76</sup> See Burt W. Griffin & Lewis R. Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan*, 53 CASE W. RES. L. REV. 1, 12–13 (2002) (discussing the role of consistency in sentencing).

<sup>77</sup> *Id.* at 12–13, 15.

<sup>78</sup> *Id.* at 2, 5–6, 9, 12–15; see O'Neill & Maxfield, *supra* note 74, at 86, 88–89, 109–10.

<sup>79</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361, 374 (1989) (identifying the Sentencing Commission's duty to “provide certainty and fairness in meeting with the purposes of sentencing . . . while maintaining sufficient flexibility to permit individualized sentences” in carrying out the four purposes of sentencing codified in 18 U.S.C. § 3553(a)(2)) (quoting 28 U.S.C. § 991(b)(1)).

<sup>80</sup> *United States v. Gementera*, 379 F.3d 596, 610 (9th Cir. 2004).

<sup>81</sup> See 28 U.S.C. § 991(b)(1)(B) (explaining that the goal of certainty in sentencing is to avoid unwarranted disparities among defendants with similar

sentence outside the norm so they can recognize that their sentence may be inappropriate and may potentially infringe upon the rights of an offender.<sup>82</sup> Additionally, consistency, certainty, and proportionality allow offenders to understand the risks associated with their offenses and to identify when their rights are being violated.<sup>83</sup> For example, a motorist who exceeds the speed limit knows with certainty that the appropriate punishment for this conduct is a monetary fine, not jail time nor corporal punishment, because the standard penalty for speeding is as such.<sup>84</sup> The motorcyclist should also know that a different punishment will attach if the offense is extreme,<sup>85</sup> as offenders are aware that more severe conduct justifies increased punishment.<sup>86</sup> Norms in sentencing also provide certainty regarding the duration of a punishment at the time of sentencing.<sup>87</sup> For example, a person sentenced to seven to ten years in prison knows that at the conclusion of ten years, the punishment for that specific offense

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records and criminal conduct, while allowing flexibility for individualized sentences based on mitigating or aggravating factors not addressed by general sentencing guidelines).

<sup>82</sup> See Griffin & Katz, *supra* note 76, at 12–14.

<sup>83</sup> See *Beckles v. United States*, 580 U.S. 256, 265 (2017) (holding that, by identifying applicable statutory ranges for offenses, the Sentencing Reform Act “provide[s] notice and prevent[s] arbitrary enforcement”); see also *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (explaining that crimes must provide potential offenders with fair notice regarding the potential punishments sufficient to “enable the ordinary citizen to conform his or her conduct to the law” because speculation as to the meaning of penal statutes cannot deprive any person of life, liberty, or property).

<sup>84</sup> See *State v. Williams*, Nos. L-00-1027, L-00-1028 2000 WL 1739283 (Ohio Ct. App. Nov. 30, 2000) (vacating consecutive three-year sentences for aggravated vehicular homicide, ruling that the sentence was inconsistent with those imposed for similar offenses, and remanding the case for resentencing). See generally NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 811 769, SUMMARY OF STATE SPEED LAWS (12th ed. 2013) (identifying and summarizing the key provisions of state speeding laws in every state, the District of Columbia, and Puerto Rico).

<sup>85</sup> See, e.g., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 84, at 159 (outlining penalties for various traffic violations and offenses in New York); *id.* at 47–48 (classifying “careless driving” as a moving violation and “racing on highway” as a misdemeanor in the first degree in Florida); *id.* at 33 (classifying “racing on highway” as a misdemeanor and first offense of “reckless driving” as an infraction in Connecticut).

<sup>86</sup> See, e.g., Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 42 (2016) (“Proportionality in sentencing is a widely recognized principle of justice.”).

<sup>87</sup> See Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U.J. GENDER SOC. POL’Y & L. 427, 467–68 (2000) (discussing how state and federal sentencing guidelines attempt to promote uniformity in sentencing by judges and enforcement by parole boards).

will end.<sup>88</sup>

Courts use shaming punishments for a variety of reasons. They can be cost-effective and politically popular punishments.<sup>89</sup> Shaming punishments impose little cost on the government (e.g., the price of a poster and a marker on which to write a message compared to the costs of paying employees to supervise community service or the monetary costs of incarceration).<sup>90</sup> Shaming punishments are politically popular because of people's desire to see a message of moral condemnation sent to offenders.<sup>91</sup> Courts may also be incentivized to impose shaming punishments to bridge incarceration (which is expensive and perhaps too harsh for some offenses, particularly non-violent offenses) and lesser punishments like probation or fines that a judge may feel are too lenient.<sup>92</sup> Shaming punishments are also used as a deterrence tool, as judges have become increasingly frustrated with the lack of deterrence offered by traditional punishments and sanctions.<sup>93</sup> Monetary fines and community service may send ambiguous messages to offenders and society, with monetary fines perhaps suggesting that an offender can "buy" their way out of a punishment,<sup>94</sup> and community service often viewed as a civic duty and not seen as a punishment at all.<sup>95</sup> Shaming punishments, conversely, are said to offer a clear, unambiguous message of

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<sup>88</sup> See Jonathan D. Casper, *Prison Crowding: Determining Sentencing and Prison Crowding in Illinois*, U. ILL. L. REV. 231, 233 (1984) ("Under [determinate sentencing] systems, the judge set[s] the term at the time of sentencing, and except for rare cases . . . the prisoner serve[s] out the time and [i]s then released.").

<sup>89</sup> See Aaron S. Book, *Shame on You: An Analysis of Modern Shame Punishments as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653, 654, 677 (1999) (discussing reasons why judges impose shaming punishments).

<sup>90</sup> See *id.* at 654; Douglas Litowitz, *The Trouble with 'Scarlet Letter' Punishments: Subjecting Criminals to Public Shaming Rituals as a Sentencing Alternative Will Not Work.*, 81 JUDICATURE 52, 54 (1997).

<sup>91</sup> Book, *supra* note 89, at 654.

<sup>92</sup> Garvey, *supra* note 5, at 744, 750–51, 754 (discussing shaming penalties as a viable middle ground between imprisonment and probation, especially for nonviolent offenders, where imprisonment may be too harsh and probation too lenient).

<sup>93</sup> Book, *supra* note 89, at 654, 677.

<sup>94</sup> See generally Lindsay Bing et al., *Incomparable Punishments: How Economic Inequality Contributes to the Disparate Impact of Legal Fines and Fees*, 8 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 118, 130 (2022) (discussing how monetary fines and community service may allow wealthier offenders to "buy" their way out of punishment, creating an inequitable system where financially disadvantaged individuals face harsher consequences).

<sup>95</sup> Garvey, *supra* note 5, at 745.

moral disapproval.<sup>96</sup>

### C. *Shaming Punishments in the US Courts*

Offenders have challenged the constitutionality of shaming punishments in the US courts.<sup>97</sup> In *Gementera*, the postal theft case, the Ninth Circuit set forth a two-part test guided by the Sentencing Reform Act in order to review the sentence of the district court.<sup>98</sup> The Sentencing Reform Act specifically allows for special conditions to be imposed as part of a punishment, provided that three requirements are met.<sup>99</sup> First, the statute requires that the special condition be reasonably related to the nature and circumstances of the offense and the history of the offender; second, the special condition must not involve a greater deprivation of liberty than is reasonably necessary to provide deterrence, provide safety to the public, or provide needed resources to the offender; finally, the special condition must be consistent with policy statements issued by the Sentencing Commission.<sup>100</sup>

Cognizant of these conditions, the Ninth Circuit's two-part test prioritized deterrence, protection of the public, and rehabilitation of the offender, to determine whether the "condition reasonably relate[d] to a legitimate statutory purpose."<sup>101</sup> The two-part test requires (1) that the punishment must be imposed for a permissible purpose, and (2) that the punishment must be

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<sup>96</sup> See *id.*

<sup>97</sup> See *United States v. Gementera*, 379 F.3d 596, 598–610 (9th Cir. 2004) (defendant arguing that shaming condition requiring him to spend a day standing outside a post office wearing a signboard stating that he stole mail violated the Sentencing Reform Act and the Eighth Amendment); *People v. Letterlough*, 86 N.Y.2d 259, 261 (1995) (defendant challenging condition of probation requiring him to affix "to the license plate of any vehicle he drives a fluorescent sign stating 'CONVICTED DWI'"); *People v. Hackler*, 16 Cal. Rptr. 2d 681, 682–83 (Ct. App. 1993) (defendant challenging condition of probation requiring him to wear an outer garment bearing a bold, printed statement of his status as a felony theft probationer whenever he left his home); *Ballenger v. State*, 436 S.E.2d 793, 794–95 (Ga. Ct. App. 1993) (defendant arguing unconstitutionality of the special condition imposed upon the probated portion of his sentence requiring him to wear a fluorescent pink plastic bracelet stating "D.U.I. convict.").

<sup>98</sup> *Goldman*, *supra* note 14, at 425–26 (quoting *Gementera*, 379 F.3d at 601–03, 605–06).

<sup>99</sup> See *Gementera*, 379 F.3d at 600 (first quoting 18 U.S.C. §§ 3553, 3563, 3583; then quoting 28 U.S.C. § 994(a)).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 600–01.

reasonably related to the permissible purpose.<sup>102</sup> Explaining the second prong, the court stated, “we have emphasized that the ‘reasonable relation’ test is necessarily a ‘very flexible standard.’”<sup>103</sup> The court suggests that the test must be flexible, because although rehabilitation is a difficult goal to accomplish, it may be achieved through crude or potentially harmful conditions when coupled with “socially useful” provisions.<sup>104</sup>

The Ninth Circuit held that the district court demonstrated acceptable rationale and Gementera’s public punishment passed the two-part test.<sup>105</sup> In its application of the two-pronged test, the Ninth Circuit reasoned that the punishment passed the first prong because it was imposed for the permissible purposes of rehabilitation and deterrence.<sup>106</sup> The court also found that the punishment met the second prong and was reasonably related to deterrence, as the public would be discouraged from committing similar offenses after witnessing Gementera’s punishment.<sup>107</sup> Likewise, after experiencing this punishment, Gementera himself would be deterred from future offenses.<sup>108</sup> The Ninth Circuit also relied upon its own prior holding in *United States v. Clark* and noted that it had “explicitly held that ‘a public apology may serve a rehabilitative purpose,’” aiding in the decision that Gementera’s shaming punishment was reasonably related to the goal of rehabilitation.<sup>109</sup> Making an important point, the court noted that although a stigma could have developed and led to Gementera being an outcast from the community, the punishment was paired with other useful rehabilitative measures, including lecturing at schools and writing apology letters, allowing the community to

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<sup>102</sup> *Id.* at 601 (quoting *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988)).

<sup>103</sup> *Id.* at 603 (quoting *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 264 (1975)).

<sup>104</sup> *See id.* at 603–06 (“[H]ere we consider not a stand-alone condition intended solely to humiliate, but rather a comprehensive set of provisions that expose the defendant to social disapprobation, but that also then provide an opportunity for Gementera to repair his relationship with society . . . . These provisions, tailored to the specific needs of the offender, counsel in favor of concluding that the condition passes the threshold of being reasonably related to the rehabilitation.”) *Id.* at 606.

<sup>105</sup> *Gementera*, 379 F.3d at 602, 606–07, 610.

<sup>106</sup> *Id.* at 601–02.

<sup>107</sup> *Id.* at 602, 606.

<sup>108</sup> *Id.* at 602.

<sup>109</sup> *Id.* at 603–04 (first quoting *United States v. Clark*, 918 F.2d 843, 848 (9th Cir. 1990); and then citing *Gollaher v. United States*, 419 F.2d 520, 30 (9th Cir. 1969)).

have a personal connection to Gementera that could promote reintegration.<sup>110</sup>

The Ninth Circuit also considered the implications of the Eighth Amendment.<sup>111</sup> The court acknowledged that the Eighth Amendment was based on human dignity, and that the state's power to punish is limited by "civilized standards."<sup>112</sup> The court further stated that the Constitution is an adaptive document and the "evolving standards of decency" of modern America must be applied when considering the legality of a punishment.<sup>113</sup> The court noted that no current caselaw held any shaming punishments to be unconstitutional.<sup>114</sup> The Ninth Circuit then cited the 1989 DUI case of *Blanton v. North Las Vegas* to illustrate how courts have interpreted shaming punishments in light of modern standards of decency.<sup>115</sup> In *Blanton*, a DUI defendant was faced with a possible sentence of "perform[ing] 48 hours of work for the community while dressed in distinctive garb which identifie[d] him as [a DUI offender]" instead of up to six months of incarceration.<sup>116</sup> The Ninth Circuit in *Gementera* considered the reasoning of the Supreme Court in *Blanton*, which determined that although it would be embarrassing to Blanton to have his punishment on public display, it would be "less embarrassing" than incarceration.<sup>117</sup> The Ninth Circuit agreed, concluding that Gementera's sentence would be less humiliating than incarceration.<sup>118</sup> From this, the Ninth Circuit upheld the sentence, holding that the special conditions of Gementera's punishment passed the two-part test and therefore did not violate the Eighth Amendment.<sup>119</sup>

Shaming punishments continue to exist within the United States criminal justice system and are analyzed using tests like the one applied in *Gementera*.<sup>120</sup> In upholding Gementera's public

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<sup>110</sup> *Id.* at 606.

<sup>111</sup> *Gementera*, 379 F.3d at 608–09.

<sup>112</sup> *Id.* at 608 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

<sup>113</sup> *Id.* (citing *Trop*, 356 U.S. at 100–01).

<sup>114</sup> *Id.* at 608–09 (9th Cir. 2004).

<sup>115</sup> *Id.* at 609 (citing *Blanton v. N. Las Vegas*, 489 U.S. 538 (1989)).

<sup>116</sup> *Blanton*, 489 U.S. at 539 (quoting Nev. Rev. Stat. § 484.379(1) (1987)).

<sup>117</sup> *Gementera*, 379 F.3d at 610 (quoting *Blanton*, 489 U.S. at 544).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; see Goldman, *supra* note 14, at 415 ("The Ninth Circuit held that the district's court rationale aligned with permissible statutory objectives, specifically the goal of rehabilitation, and to a lesser extent, general deterrence and protection of the public.").

<sup>120</sup> See Jon Michael Hilsheimer, Ohio's Not So Uncommon Punishment: Hold

shaming sentence, the Ninth Circuit has aided in affirming the validity of shaming punishments in today's society.<sup>121</sup> *Gementera* further contributed to shaming punishment jurisprudence by establishing a subjective criterion in which a court is to weigh the embarrassment factor of a shaming punishment against that of the traditional punishment for the offense to determine if the punishment violates the Eighth Amendment.<sup>122</sup>

Not all shaming punishments should pass the subjective standard set forth in *Gementera* as borrowed from *Blanton*. The punishment assigned to Hardin, the school zone defendant, for example, raises concerns under Eighth Amendment jurisprudence.<sup>123</sup> The alternative sanction to Hardin's shaming punishment was a fine and a revocation of her driver's license.<sup>124</sup> Had Hardin received a fine and had her driver's license been revoked, there would have been little to no public embarrassment. In fact, her punishments would likely have been known only to those closest to her, as they would be the ones experiencing the monetary impact and potentially needing to assist with her transportation. This undoubtedly is less embarrassing than standing in public with a sign and the immense stigma perpetuated and spread across both the Internet and media at large, as discussed below.<sup>125</sup> In Hardin's case, then, the *Blanton* logic, as applied in *Gementera*, fails.<sup>126</sup> The Eighth Amendment considerations of *Gementera* must be applied on an individual basis, with the court giving due consideration of each case.<sup>127</sup>

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Your Sign in Shame 4 (Oct. 2022) (Drug Enforcement and Policy Center Student Paper Series) (on file with Ohio State University) (discussing the sentencing actions within the state of Ohio and how shaming punishments have been, and continue to be, consistently used by multiple trial courts as an alternative to incarceration); Christie Thompson, *Public Shamings*, THE MARSHALL PROJECT: THE LOWDOWN (Mar. 31, 2015, 4:13 PM), <https://www.themarshallproject.org/2015/03/31/public-shamings> (exploring and analyzing recent shaming punishments); Christopher Zoukis, *Shaming Offenders Misses the Point; Rehabilitate Them*, ZOUKIS CONSULTING GRP. (July 31, 2014), <https://federalcriminaldefenseattorney.com/shaming-offenders-misses-the-point-rehabilitate-them-html/> (discussing recent shaming punishments and explaining the inadequacy of shaming punishments).

<sup>121</sup> See *supra* note 120 and accompanying text.

<sup>122</sup> *Gementera*, 379 F.3d at 609–10 (citing *Blanton v. N. Las Vegas*, 489 U.S. 538 (1989)).

<sup>123</sup> See Fong, *supra* note 50.

<sup>124</sup> See OHIO REV. CODE ANN. § 4511.75 (F)(1)–(2) (LexisNexis 2024).

<sup>125</sup> See *infra* note 132 and accompanying text.

<sup>126</sup> See *Gementera*, 379 F.3d at 609–10.

<sup>127</sup> See *id.*



### III. EIGHTH AMENDMENT ISSUES RAISED BY SHAMING PUNISHMENTS IN MODERN AMERICA

#### A. *Lack of Certainty, Proportionality, and Rehabilitation*

Certainty and consistency are key components of punishments in the American justice system.<sup>128</sup> Shaming quickly threatens these ideals.<sup>129</sup> Shaming is used to send a message that morally condemns the offender in order to rehabilitate their sense of morals to be more in line with those of the community.<sup>130</sup> This moral rehabilitation goal is frustrated when the punishment results in no rehabilitative outcome.<sup>131</sup> For example, Hardin, the school zone defendant forced to hold the “idiot” signage, was seemingly unembarrassed by her punishment.<sup>132</sup> Although she released a statement that she had learned her lesson, her conduct during her punishment indicated a lack of rehabilitation.<sup>133</sup> Hardin stood unphased with her sign held low while texting and smoking throughout her punishment.<sup>134</sup> Her conduct prompted the sentencing judge to publicly state: “[I]f I wanted someone standing there for an hour texting and smoking cigarettes, I would have had that as part of her sentence. . . . But, clearly, she’s missing the point. Clearly, it’s still a situation where she’s defiant.”<sup>135</sup> Hardin’s dismissive behavior indicates her shaming punishment’s ineffectiveness in realigning her values with those deemed appropriate by the community.<sup>136</sup>

Certainty and proportionality are compromised when the punitive function of shaming punishments becomes the focus point of a sentence.<sup>137</sup> The creative discretion that judges take with shaming punishments pushes sentences in many unpredictable directions, leading offenders to have no knowledge of the

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<sup>128</sup> Griffin & Katz, *supra* note 76, at 12.

<sup>129</sup> See Kathi Valeii, *Can We Fight Crime With Public Shaming?*, CRIM. L. NEWS (Mar. 6, 2019), <https://www.criminallegalnews.org/news/2019/mar/6/can-we-fight-crime-public-shaming/>.

<sup>130</sup> See Book, *supra* note 89, at 654.

<sup>131</sup> See *id.* at 654–55.

<sup>132</sup> See Fong, *supra* note 50; see also Mark Memmott, *Cleveland’s Convicted Idiot Finishes Punishment; Says She’s Learned Lesson*, NPR (Nov. 13, 2012, 10:54 AM), <https://www.npr.org/sections/thetwo-way/2012/11/13/165027763/convicted-idiot-driver-who-passed-school-bus-holds-her-sign-of-shame>.

<sup>133</sup> Memmott, *supra* note 132.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (internal quotations omitted).

<sup>136</sup> See Turley, *supra* note 52.

<sup>137</sup> See Book, *supra* note 89, at 667.

consequences of their actions prior to offending.<sup>138</sup> For example, it is unrealistic to expect that the offender who was sentenced by a Tennessee judge to write an apology 100,000 times for bouncing a check would have even the slightest inkling as she signed her check that such a punishment was plausible or that she was in jeopardy of receiving such a sentence.<sup>139</sup> Even someone well-versed in the justice system and the typical consequences of bouncing a check could not foresee such a punishment.<sup>140</sup>

Certainty and proportionality play an important role in enabling potential offenders to assess the consequences of their actions prior to offending, and even more so before potentially reoffending.<sup>141</sup> A simple, yet exaggerated, example of this is a child stealing a cookie from a cookie jar. If a child repeatedly watches their sibling steal cookies from the cookie jar and sees that the sibling is punished with a scolding and a thirty-second timeout, the child can reasonably expect the same punishment for the same offense, which they may be willing to endure in exchange for the enjoyment of the cookie.<sup>142</sup> However, if the child is unexpectedly met with the punishment of having a finger removed for stealing a cookie, they were not given a fair chance to weigh the risks and rewards.<sup>143</sup> The child may be willing to face the short and finite punishment of scolding and a brief timeout, and if caught, may be deterred from stealing another cookie in the future.<sup>144</sup> This punishment is certain and consistent with previous offenses and

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<sup>138</sup> See *id.* at 663.

<sup>139</sup> James Barron, *Cover Story: A Crowded Docket of Courtroom Shows*, N.Y. TIMES (Jan. 3, 1999), <http://www.nytimes.com/1999/01/03/tv/cover-story-a-crowded-docket-of-courtroom-shows.html>.

<sup>140</sup> See *id.*; Book, *supra* note 89, at 663.

<sup>141</sup> See Michael M. O'Hear, 74 U. CIN. L. REV. 749, 793-94 (2006). See generally Heiko Rauhut & Marcel Junker, *Punishment Deters Crime Because Humans Are Bounded in Their Strategic Decision-Making*, 12 J. ARTIFICIAL SOC'YS AND SOC. STIMULATION 1, 1 (2009) (explaining the rational-choice theory of crime and arguing that criminals choose to commit crimes if and only if the reward outweighs the punishment).

<sup>142</sup> See Katie Ely, *Consistency: The #1 Rule of Successful Discipline*, PARENTING WITH FOCUS (Aug. 26, 2022), <https://www.parentingwithfocus.org/post/discipline-techniques-for-well-behaved-children> (discussing how consistent and predictable punishments encourage children to comply with rules and reduce anxiety children may feel when they are unsure of the consequences of their actions). See generally Rauhut & Junker, *supra* note 143, at 1-3 (discussing considerations salient to a decision-making analysis humans intuitively engage in before committing crimes, including weighing the potential crime's benefits and expected consequences).

<sup>143</sup> See *supra* note 142 and accompanying text.

<sup>144</sup> See *supra* note 142 and accompanying text.

is reasonably proportional to the offense. However, if her finger is unexpectedly cut off as punishment, she is left with lifelong consequences, which she was unable to weigh prior to stealing the cookie, which therefore served no deterrent purpose prior to her initial offense. Such a long-lasting punishment is both uncertain, because other offenders were not subjected to a similar punishment,<sup>145</sup> and disproportionate, because she is now facing lifelong ramifications from a minor offense.<sup>146</sup> Although exaggerated, this example is reflective of the lifelong ramifications faced by offenders such as Hardin or the “Jackass Offense” teenagers, who did not know that their offenses would result in shaming punishments heightened by the effects of the Internet, as described below.<sup>147</sup>

The unforeseeable long-term effects of shaming punishments contradict the Eighth Amendment interpretation of punishment as being “all that a legislature or sentencer expects and intends a prisoner to endure,”<sup>148</sup> as well as the traditional goals of sentencing grounded in the Eighth Amendment, such as proportionality and the preservation of common human dignity.<sup>149</sup>

### *B. Effect of the Internet on Shaming Punishments*

In modern America, where cell phones and other devices “are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy,”<sup>150</sup> the accessibility of the Internet and social media hold an unjustifiable and incalculable influence over shaming punishments.<sup>151</sup> The Internet and social media sites create a situation where shared articles, pictures, and videos of shaming punishments evolve into never-ending punishments, attaching a much broader and more widely known stigma to the offender.<sup>152</sup> The Internet allows shaming

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<sup>145</sup> MERRIAM-WEBSTER, *Uncertain*, <https://www.merriam-webster.com/dictionary/uncertain> (last visited Oct. 25, 2024) (defining uncertain as “not constant: variable, fitful”).

<sup>146</sup> MERRIAM-WEBSTER, *Disproportionate*, <https://www.merriam-webster.com/dictionary/disproportionate> (last visited Oct. 26, 2024).

<sup>147</sup> See *infra* notes 161–71 and accompanying text; see Goldman, *supra* note 14, at 443–44.

<sup>148</sup> Landry, *supra* note 65, at 1611.

<sup>149</sup> *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

<sup>150</sup> *Riley v. California*, 573 U.S. 373, 385 (2014).

<sup>151</sup> See Klonick, *supra* note 37, at 1045.

<sup>152</sup> See *id.*; Markel, *supra* note 5, at 2220.

punishments to extend beyond the control of the government that imposed them.<sup>153</sup> Rather than being controlled by the government, the ability to watch and share shaming punishments lies in the hands of the public, removing the government's control over the spread and duration of the effects of the punishment.<sup>154</sup> Because of this, shaming punishments "can exist entirely absent of the due process considerations that are afforded to individuals accused of crimes."<sup>155</sup>

Oftentimes, shaming punishments are accompanied by a stigma that carries long-term effects on the offender.<sup>156</sup> While the goals of sentencing and punishments include certainty, proportionality, consistency, and deterrence,<sup>157</sup> shaming punishments impose a "reputational homicide" that serves a punitive purpose and destroys the dignity of the offender with an absence of any rehabilitative value.<sup>158</sup> A shaming punishment deprives an offender of an opportunity to recognize and reflect on the morals of the community.<sup>159</sup> This is only exacerbated by the Internet; the Internet and social media sites create a problem of permanency, in that once something is on the Internet, it will always be easily accessible.<sup>160</sup>

Once on the Internet, photos of shaming punishments and articles describing the punishment and offenses will remain there

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<sup>153</sup> See Klonick, *supra* note 37, at 1051.

<sup>154</sup> Teodora Pasca, *Tweeting Out Torture: A Foucauldian Analysis of Social Media Shaming as the Modern Form of Punishment as Spectacle*, MINDFUL J. OF ETHICS, SOC'Y & L., 2018, at 81, 81, 86 (discussing the government's lack of control with online shaming); see also Wharton, *supra* note 12 (discussing the concern of the government no longer controlling enforcement of criminal punishment when public shaming methods are used).

<sup>155</sup> Pasca, *supra* note 154, at 86.

<sup>156</sup> See Markel, *supra* note 5, at 2220 (discussing the lasting impacts of shaming punishments); Klonick, *supra* note 39, at 1045 (discussing the continuing effects of shaming).

<sup>157</sup> O'Neill & Maxfield, *supra* note 74, at 86 (discussing the traditional purposes of punishment); see 18 U.S.C. § 3553(a)(2)(A) (explaining that sentences imposed should "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense").

<sup>158</sup> Markel, *supra* note 5, at 2220.

<sup>159</sup> See *id.* (discussing that punishment should aim to connect the offender with an understanding of lawfulness and give the offender an opportunity to internalize those values, and stating that punishments designed to result in "reputational homicide" are not designed to accomplish reflection).

<sup>160</sup> Goldman, *supra* note 14, at 443–44 (discussing the permanence problem of the Internet); see also Wharton, *supra* note 12 (discussing the loss of control of Internet posts and their permanency in the public shaming context).

indefinitely.<sup>161</sup> If the names of the offenders are typed into a search engine like Google, the photos and articles will always appear.<sup>162</sup> For example, the two teenagers given a shaming punishment will likely experience repercussions for the rest of their lives; when potential employers, colleges, or even mortgage lenders conduct background searches on the teens, the entities will find the news articles recounting their offenses and punishments, and the stigma will then attach.<sup>163</sup> The sharing of their punishment online is impossible to control and theoretically can cause a teenager indefinite punishment.<sup>164</sup> An immature and relatively harmless offense can have a lifetime of unforeseen and un contemplated ramifications that traditional sanctions such as fines, community service, or probation do not cause.<sup>165</sup>

Hardin is a prime example of an indefinite stigma caused by a shaming punishment.<sup>166</sup> A simple Google search of her name leads to a plethora of articles about her punishment, with several headlines containing the word “idiot.”<sup>167</sup> Among these results is a link to the video of her driving that caused her punishment, as well

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<sup>161</sup> Goldman, *supra* note 14, at 443–44.

<sup>162</sup> *See id.* (discussing how a simple name search will result in articles appearing).

<sup>163</sup> *See* Turley, *supra* note 52 (explaining the *Gementera* case and the shaming punishment); Goldman, *supra* note 14, at 443–44 (discussing the “permanence problem” and ability to look up information online in the future); *see also* Matthew Metz, Opinion, *Perp Walking’ Children Will Not Make Community Any Safer*, DAYTONA BEACH NEWS-J. (Sept. 30, 2024, 2:57 AM), <https://www.news-journalonline.com/story/opinion/columns/guest/2024/09/30/public-shaming-of-children-serves-no-deterrent-purpose/75448015007/> (condemning public shaming of children who commit crimes as compounding the lifelong consequences the children already face from involvement with the criminal justice system).

<sup>164</sup> *See* Metz, *supra* note 163; Pasca, *supra* note 154, at 86 (discussing how damage to one’s reputation and relationships from public shaming can continue indefinitely and is almost impossible to control).

<sup>165</sup> *See* Goldman, *supra* note 14, at 443–44 (discussing how information stays always available online).

<sup>166</sup> *See* Memmott, *supra* note 132.

<sup>167</sup> *See id.* (illustrating a Google search that produces headlines with “idiot”); *see also* Stan Donaldson, *Cleveland Woman Holds ‘Idiot’ Sign as Part of Sentence for Passing School Bus*, CLEVELAND.COM (Nov. 13, 2012, 12:50 PM), [https://www.cleveland.com/metro/2012/11/cleveland\\_woman\\_holds\\_idiot\\_si.html](https://www.cleveland.com/metro/2012/11/cleveland_woman_holds_idiot_si.html); Gabe Spiegel, *Driver Holding ‘Idiot’ Sign Breaks Her Silence*, FOX 8 (Nov. 14, 2012, 6:10 PM), <https://fox8.com/news/driver-holding-idiot-sign-breaks-her-silence/>; Crimesider Staff, *Shena Hardin, Ohio Woman Who Drove Car on Sidewalk Around Bus, Holds ‘Idiot’ Sign as Part of Sentence*, CBS NEWS (Nov. 13, 2012, 3:14 PM), <https://www.cbsnews.com/news/shena-hardin-ohio-woman-who-drove-car-on-sidewalk-around-bus-holds-idiot-sign-as-part-of-sentence/>.

as pictures of Hardin holding her sign and appearing in court.<sup>168</sup> The punishment in Ohio for her offense of failing to stop for a stopped school bus is normally a fine up to five hundred dollars, the revocation or suspension of a driver's license, or both.<sup>169</sup> Hardin's punishment instead now includes an overwhelming and inescapable database of bad publicity and negative news articles about Hardin and her offense, all available for the world to see.<sup>170</sup> In essence, Hardin's shaming punishment may last forever, while her traditional punishment would have long expired by now.<sup>171</sup>

The expansive nature of Internet social media sites and a person's ability to easily share any story to everyone connected to their account means that anyone on the Internet can stumble across articles about shaming punishments, without even seeking out the information on a search engine directly.<sup>172</sup> National or international coverage (or at least knowledge) of the punishment of a minor offense and recognition of the offender can potentially stem from an image of a shaming punishment being posted and shared on a social media site.<sup>173</sup> For instance, every account on Facebook is equipped with a "News Feed" as its main page, which lists stories, updates, photos, videos, and links from other people with whom the account holder is connected ("Facebook Friends").<sup>174</sup> The types of posts shown on an account's News Feed

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<sup>168</sup> *Cleveland Driver Holds 'Idiot' Sign After Court Order – Video*, THE GUARDIAN (Nov. 14, 2012, 7:55 AM), <https://www.theguardian.com/world/video/2012/nov/14/cleveland-driver-idiot-sign-video>; Memmott, *supra* note 132.

<sup>169</sup> OHIO REV. CODE ANN. § 4511.75 (F)(1)–(2).

<sup>170</sup> See *supra* note 166–69 and accompanying text. See generally Goldman, *supra* note 14, at 443–44 (discussing that once articles are posted, they are online permanently); Wharton, *supra* note 12 (explaining how a public shaming punishment "creates a disproportionate (and indefinite) scheme in situations where the original offense was something minor" due to the permanence problem).

<sup>171</sup> Compare Goldman, *supra* note 14, at 443–44 (explaining that public shaming punishments are indefinite once something is posted online), and Wharton, *supra* note 12 (explaining the long-term consequences of public shaming punishments in the modern era), with § 4511.75 (F)(1)–(2).

<sup>172</sup> See Jason Riddle, *All Too Easy: Spreading Information Through Social Media*, ARK. J. OF SOC. CHANGE & PUB. SERV. BLOG (Mar. 1, 2017), <https://ualr.edu/socialchange/2017/03/01/blog-riddle-social-media/> (discussing how information can appear on social media users' feeds and thus users can learn information without explicitly searching for such information).

<sup>173</sup> See *id.*; Farah Mohammed, *The Danger of Public Shaming in the Internet Age*, JSTOR DAILY (Jan. 25, 2018), <https://daily.jstor.org/the-danger-of-public-shaming-in-the-internet-age/> (explaining how one single offense can result in mass online retribution and public shaming in modern Internet culture).

<sup>174</sup> *How Feed Works*, FACEBOOK HELP CTR.,

are influenced by factors such as popularity of a post and whether a Facebook Friend has liked, commented, or shared the post.<sup>175</sup> Once a photo of a shaming punishment is posted on a social media platform like Facebook, it has the potential to be shared with every other account connected to the poster almost instantly.<sup>176</sup>

The “Alex from Target” craze is an example of how quickly and widely the commingled forces of the Internet and the news media can disseminate information.<sup>177</sup> In 2014, a photograph of a Target employee bagging items at a cash register was “tweeted” on the social media site Twitter (now known as “X”) and dubbed “Alex from Target.”<sup>178</sup> Within twelve hours of the initial tweet (the photograph was taken a week earlier and posted originally on a separate site),<sup>179</sup> “Alex from Target” was trending on Twitter and being covered by news stations.<sup>180</sup> His own following on Twitter grew exponentially, hitting almost 275,000 followers.<sup>181</sup> Alex’s instant fame and sensationalism “happened without anyone really knowing Alex’s full name, age or location.”<sup>182</sup> Alex’s virality did not end in 2014: As recently as April 2024, entertainment magazines continue to publish articles with headlines such as “Remember ‘Alex from Target’? All About the Former Internet Star’s Quiet Life Now.”<sup>183</sup>

All of this fame and recognition happened for an innocent reason: simply because a teenage girl thought Alex was attractive and decided to tweet his picture.<sup>184</sup> In the case of shaming

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<https://www.facebook.com/help/327131014036297> (last visited Sept. 10, 2024).

<sup>175</sup> *Id.*

<sup>176</sup> *See id.* (posts on Facebook are shared with connected accounts immediately).

<sup>177</sup> Elena Cresci, *What Happens When You Accidentally Become Internet Famous?*, THE GUARDIAN (Nov. 3, 2014, 1:39 PM), <https://www.theguardian.com/technology/2014/nov/03/alex-from-target-what-happens-if-you-accidentally-become-internet-famous>.

<sup>178</sup> *Id.*; Dean Seal, *Musk’s X Completes Rebranding Away from Twitter*, WALL ST. J., <https://www.wsj.com/tech/twitter-rebrand-x-elon-musk-d55c0c2d> (May 17, 2024, 7:15 AM).

<sup>179</sup> Nick Bilton, *Alex from Target: The Other Side of Fame*, N.Y. TIMES (Nov. 12, 2014), <https://www.nytimes.com/2014/11/13/style/alex-from-target-the-other-side-of-fame.html> (identifying Tumblr as the original source of the picture of Alex used in the tweet).

<sup>180</sup> Cresci, *supra* note 177.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Lizzie Hyman, *Remember ‘Alex from Target’? All About the Former Internet Star’s Quiet Life Now*, PEOPLE (Apr. 26, 2024, 12:24 PM), <https://people.com/alex-from-target-where-is-he-now-8638486>.

<sup>184</sup> Bilton, *supra* note 179.

punishments, where coverage is embarrassing and often salacious, particularly when accompanied by a headline indicating that a judge ordered the punishment, the virality does not cause only fame and recognition, but continued ostracization and humiliation.<sup>185</sup>

The stigma accompanying the bad publicity exhibited in cases like Hardin's violates the proportionality and certainty aims of punishments.<sup>186</sup> Proportionality and certainty seek to ensure fair and appropriate punishments with a definitive conclusion.<sup>187</sup> By spreading and preserving the stigma of their offenses, the Internet subjects offenders to long-term ramifications of shaming punishments.<sup>188</sup> Offenders effectively have to relive their punishment for the rest of their lives whenever an employer or neighbor searches their name on the Internet.

Due to the "endless memory, ubiquity, and ease of access" provided by the Internet and social media,<sup>189</sup> these punishments are able to reach an audience wider than ever before and create lasting humiliation by remaining on the Internet indefinitely.<sup>190</sup> As a result, the offender's punishment continues much longer than intended, and the punishment becomes disproportionate to the offense.<sup>191</sup> These qualities push shaming punishments past the sentiment of punishments encapsulating "all that a legislature or sentencer expects and intends a prisoner to endure"<sup>192</sup> and the idea of maintaining common human dignity,<sup>193</sup> therefore violating the Eighth Amendment.<sup>194</sup>

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<sup>185</sup> See Goldman, *supra* note 14, at 433–34, 436–37 (explaining the social repercussions of public shaming and negative psychological effects of public shaming on offenders); Wharton, *supra* note 12 (explaining that public shaming punishments have wide ranging and pervasive social consequences).

<sup>186</sup> See *supra* notes 169–70 and accompanying text; see Wharton, *supra* note 12 (modern shaming punishments "create[s] . . . disproportionate (and indefinite) [punishment] scheme[s] in situations where the original offense was something minor" due to the unending stigma that accompanies public shaming punishments).

<sup>187</sup> See *supra* Section II.B.

<sup>188</sup> See *supra* notes 157–66 and accompanying text.

<sup>189</sup> Klonick, *supra* note 37, at 1051.

<sup>190</sup> See *supra* Section II.B.

<sup>191</sup> See *supra* Section II.B.

<sup>192</sup> Landry, *supra* note 65, at 1609.

<sup>193</sup> See *United States v. Gementera*, 379 F.3d 596, 608 (9th Cir. 2004) ("Consistent with human dignity, the state must exercise its power to punish 'within the limits of civilized standards.'" (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958))).

<sup>194</sup> See *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) ("The State, even as it punishes, must treat its members with respect for their



C. *Encouragement of Judges and their Shaming Punishments by the Media*

The American media has expanded the scope and effects of shaming punishments.<sup>195</sup> Extensive media coverage of shaming punishments has inspired judges to be increasingly creative in creating outlandish consequences for legal offenses.<sup>196</sup> Judges have also been rewarded with TV shows, fame, and recognition for humiliating punishments, which further encourages them (and other judges) to push the limits when it comes to shaming punishments.<sup>197</sup> Judge Joe Brown, a former Tennessee judge, gained notoriety and fame by allowing burglary victims to enter the homes of the offenders and take items equaling the value of the items stolen from them.<sup>198</sup> Brown has also required an offender to write and rewrite an apology 100,000 times for bouncing a check.<sup>199</sup> Brown's bizarre punishments eventually resulted in his own television show titled "Judge Joe Brown."<sup>200</sup> Judge Ted Poe, a former Texas judge, also gained attention for his harsh, shaming punishments.<sup>201</sup> Dubbed "The King of Shame," Poe sentenced multiple defendants to shoveling manure because he felt that "people have too good a self-esteem."<sup>202</sup>

The attention received by both Poe and Brown regarding their shaming punishments could be construed as "justifying" their actions. For Poe, his shaming punishment fame eventually

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intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity.").

<sup>195</sup> See Klonick, *supra* note 37, at 1044–45 (explaining how media, namely the Internet, impacts public shaming by spreading awareness farther than before).

<sup>196</sup> Turley, *supra* note 52 (discussing outrageous shaming punishments recently ordered by judges and exploring judges' motivation for ordering shaming punishments, including pleasing the public by "hoisting a wretch in public").

<sup>197</sup> *Id.*; Reutter, *supra* note 52 (providing additional examples of notoriety judges have received for their viral punishments).

<sup>198</sup> Turley, *supra* note 52; Barron, *supra* note 139.

<sup>199</sup> Barron, *supra* note 139.

<sup>200</sup> See Alex Ben Block, *'Judge Joe Brown' Cancelled After 15 Years*, NBC NEWS (Mar. 27, 2013), <https://www.nbcnews.com/news/world/judge-joe-brown-cancelled-after-15-years-flna1c9097217> ("Before [the television show premiered], [Judge Joe Brown] was a real life criminal court[] judge in Shelby County, Tennessee."); see also Reutter, *supra* note 54 ("The notoriety of that shaming sentence helped make Judge Joe Brown a household name for those who watch reality court TV."); Turley, *supra* note 52 ("Brown eventually took his brand of justice to television as the host of his own syndicated court show.").

<sup>201</sup> Reutter, *supra* note 54 (highlighting Judge Ted Poe's rise into public fame).

<sup>202</sup> *Id.*

contributed to his election as a Congressman in 2004.<sup>203</sup> As mentioned, Brown was rewarded with his own television show.<sup>204</sup> The court room antics that landed Brown this spot on television also rewarded him with a multi-million dollar annual paycheck.<sup>205</sup> Concerningly, Brown remained in his position as a judge for two years during the run of his show, and was even reelected during that time.<sup>206</sup> Because of his popularity, Brown received offers from political parties to run for office, and even potentially for a seat in the US Senate.<sup>207</sup> Tangible results such as television shows and congressional seats only encourage and reinforce such forms of shaming, and elicit copycat judges seeking similar fame and rewards.<sup>208</sup> One critic, who questions “whether the dispensation of justice can survive the pressures of celebrity,” observed:

Brown achieved stardom by being a street-smart, no-nonsense judge. His continued success in the ratings war depends on his ability to maintain that same persona. In a sense, Joe Brown can no longer deviate from his script, since he risks losing the audience’s favor if he goes soft or gets fooled. Unfortunately, the way he handles his real cases can have an impact on his television contract. . . . How many other sitting judges are at this very moment wondering what they can do to become the next Joe Brown? . . . Whatever the case, the audition might be today, in a courtroom near you.<sup>209</sup>

Unfortunately, judges who hand out extreme forms of shaming punishments create issues for themselves and for other judges. Such appearances call into question potential ethical violations and, accordingly, some states have reprimanded judges for

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*; Turley, *supra* note 52.

<sup>205</sup> Jackson Baker, *Judge Joe Brown, Ousted from His CBS Courtroom, Could Run for the Senate*, MEM. FLYER (Apr. 21, 2013, 5:02 PM), <https://www.memphisflyer.com/JacksonBaker/archives/2013/04/21/judge-joe-brown-ousted-from-his-cbs-courtroom-could-run-for-the-senate>. There was dispute about the actual amount Brown was paid. CBS claims it was \$20 million annually. Brown claims it was \$5 million annually, which is still a major monetary reward. *Id.*

<sup>206</sup> *Id.*; see also Steven Lubet, *Stupid Judge Tricks*, 41 S. TEX. L. REV. 1301, 1311–12 (2000).

<sup>207</sup> Baker, *supra* note 205.

<sup>208</sup> See Turley, *supra* note 52 (Texas judge Ted Poe became so popular through his “signature use of punishments . . . that he literally shamed himself right into Congress and . . . [served] as a member of the House of Representatives”).

<sup>209</sup> Lubet, *supra* note 206, at 1313.

appearing on television or have ordered judges to stop appearing on television altogether.<sup>210</sup> Shaming punishments can also lead to legal ambiguities and battles. For example, in 2017, Tennessee Judge Sam Benningfield issued an order offering convicted inmates thirty days off of their sentences in exchange for agreeing to receive a vasectomy or birth control implant.<sup>211</sup> Judge Benningfield's order was eventually rescinded after being challenged by the American Civil Liberties Union of Tennessee as unconstitutional.<sup>212</sup> The media attention judges receive following outrageous public shaming orders can encourage impermissible judicial conduct at the expense of fairness and equity in criminal sentencing.<sup>213</sup>

However, not all viral judges rise to fame because of outrageous punishments. Judge Frank Caprio served as a Municipal Court Judge in Providence, Rhode Island, from 1985 until his retirement in 2023.<sup>214</sup> His courtroom became the subject of a nationally syndicated television show, "Caught in Providence," "which highlight[ed] his day-to-day life reviewing traffic cases and misdemeanors in Rhode Island."<sup>215</sup> The show earned Daytime Emmy nominations in 2021 and 2022.<sup>216</sup> A recent *CBS Mornings* article begins with a succinct sentence which separates Caprio from many other viral judges: "Judge Frank Caprio is renowned for his sense of humor and mercy on the bench."<sup>217</sup> Caprio's humanity is exemplified in merciful decisions, like dismissing a school zone violation against a ninety-six-year-old man who sped while taking his handicapped son to a doctor's appointment.<sup>218</sup> Victor Colella, the ninety-six-year-old, was cited for driving thirty

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<sup>210</sup> *Id.*

<sup>211</sup> Press Release, ACLU, White County Judge Rescinds Order Coercing Sterilization and Birth Control Implants (July 27, 2017, 5:00 PM) (on file with author).

<sup>212</sup> *Id.*

<sup>213</sup> See Lubet, *supra* note 206, at 1311–14.

<sup>214</sup> Steph Machado, *Judge Frank Caprio to Retire from Providence Municipal Court*, WPRI.COM (Jan. 13, 2023, 10:06 PM), <https://www.wpri.com/news/local-news/providence/judge-frank-caprio-to-retire-from-providence-municipal-court/>.

<sup>215</sup> David Begnaud & Analisa Novak, *Social Media Sensation Judge Frank Caprio on Compassion, Kindness and His Cancer Diagnosis*, CBS NEWS (June 24, 2024, 1:18 PM), <https://www.cbsnews.com/news/social-media-sensation-judge-frank-caprio-on-compassion-kindness-and-his-cancer-diagnosis/>.

<sup>216</sup> Michael Fisch, *Caught in Providence Nominated for Second Emmy*, SUFFOLK U., <https://www.suffolk.edu/law/alumni/suffolk-law-magazine/2023/alum-nominated-for-second-emmy> (last visited Oct. 26, 2024).

<sup>217</sup> Begnaud & Novak, *supra* note 215.

<sup>218</sup> *Id.*

miles per hour in a twenty-five mile per hour zone.<sup>219</sup> On the date of his hearing, Colella appeared before Caprio and explained that at the time of the infraction, he was taking his cancer-stricken son to his biweekly appointment for bloodwork.<sup>220</sup> Caprio dismissed the citation, telling Colella, “I wish the best for you son. And I wish you good health and your case is dismissed. Good luck to you and God bless you.”<sup>221</sup>

Caprio’s good deeds have inspired many. After becoming a viral sensation, viewers from across the nation began sending unsolicited donations to Caprio with notes asking that the donations be used to help people in need.<sup>222</sup> Caprio started the Filomena Fund, named after his mother, to direct the funds to people appearing before him who needed a helping hand.<sup>223</sup> In one instance, Caprio used funds from the Filomena Fund to pay for Daniel Murray’s transportation home and to settle his fines after he walked one hour and thirty-five minutes to appear before the judge.<sup>224</sup> From the bench, Caprio read notes from donors to Murray and told him he would be receiving the donations.<sup>225</sup> Caprio told Murray that at some point, he would be in a position to help others, just as he was being helped from the Filomena Fund, telling him, “Don’t forget them.”<sup>226</sup>

Electronic media, such as news stations and social media “viral” videos, create a spotlight for judges, sometimes to highlight good, but often to grab views of the bad and the ugly. Spotlights on unorthodox judges may encourage other judges to increase their sentences with shaming components.<sup>227</sup> These increasingly common shaming conditions undermine the uniformity and

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<sup>219</sup> Kim Kalunian, *Devoted Johnstown Dad, 96, Is a Viral Sensation After Court Date with Caprio*, WPRI.COM (Aug. 16, 2019, 7:00 PM), <https://www.wpri.com/dont-miss/devoted-johnston-dad-96-is-a-viral-sensation-after-court-date-with-caprio/>.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> Christine Pellegrini, *Filomena Fund*, R.I. FOUND (Aug. 7, 2023), <https://rifoundation.org/stories/filomena-fund>.

<sup>223</sup> *Id.*

<sup>224</sup> Sarah Jensen, *Touched by an Accused’s Story, This Generous Judge Gave Him the Greatest Gift*, WECB RADIO (Mar. 28, 2024), [https://www.wecb.fm/touched-by-an-accuseds-story-this-generous-judge-gave-him-the-greatest-gift/#google\\_vignette](https://www.wecb.fm/touched-by-an-accuseds-story-this-generous-judge-gave-him-the-greatest-gift/#google_vignette).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> See Turley, *supra* note 52 (highlighting a variety of judges who have issued shaming punishments and exploring whether the positive attention such judges receive incentivizes other judges to order outrageous public shaming conditions).

common values of punitive sentences as today's ubiquitous and expansive Internet use stigmatizes and compounds the punishments.<sup>228</sup> Internet recognition of shaming punishments may encourage recognition-seeking judges to sentence offenders to wilder and harsher shaming punishments, further perpetuating the issue as the wilder punishments gain additional coverage and restart the cycle.<sup>229</sup>

### CONCLUSION

A host of new problems have emerged with the recent resurgence of shaming punishments in America.<sup>230</sup> In part because of the absence of technology and media in early America, the basic goals of sentencing and punishment could be met by shaming punishments.<sup>231</sup> Today, however, the long-lasting impact of shaming punishments and the inescapable stigma these punishments can produce take the punishments out of the hands of the judiciary and raise Eighth Amendment concerns.<sup>232</sup> The basic goals of sentencing have also suffered due to the resurgent nature of shaming punishments: as shaming punishments are reemerging after 150 years, the values of society have changed, as have the way society expects the goals of sentencing to be met.<sup>233</sup> For generations, shaming punishments were nonexistent, and were therefore not part of the societal norms and standards of punishment.<sup>234</sup> Because the cruel and unusual nature of punishments must be based on contemporary notions of decency, the now uncommon nature of shaming conditions contributes to the Eighth Amendment issues implicated by shaming punishments in America.<sup>235</sup>

The media presents a unique issue for judges, too. Judges are now rewarded with fame, money, and television shows for creating bizarre shaming punishments that toe, if not cross, the line of constitutionality.<sup>236</sup> This increases the incentive for these judges, and could tempt all judges, to incorporate unjust shaming

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<sup>228</sup> See *supra* Section III.B.

<sup>229</sup> See Turley, *supra* note 52.

<sup>230</sup> See *supra* Section III.B.

<sup>231</sup> See *supra* Section I.A.

<sup>232</sup> See *supra* Section III.

<sup>233</sup> See *supra* Section II.C.

<sup>234</sup> See *supra* Section II.C.

<sup>235</sup> See *supra* Section II.C.

<sup>236</sup> See *supra* Section III.C.

punishments into their judicial decisions.<sup>237</sup> The potential for personal gain from punishments handed out creates ethical concerns for the judges, who then must weigh equity in sentencing against their own self interests.<sup>238</sup>

Shaming punishments had their place in early America; they were effective due to the nature of society at that time and were widely accepted in the morals of society.<sup>239</sup> However, shaming punishments no longer serve the same purpose in modern America and the concerns and complicated issues raised outweigh the benefits of shaming punishments.

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<sup>237</sup> See Lubet, *supra* note 206, at 1313.

<sup>238</sup> See *id.*

<sup>239</sup> See *supra* Section I.A.