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Placing Shame in Context: A Response to Thomas Scheff on Community Conferences and Therapeutic Jurisprudence

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that it blows out of proportion the role of the emotion of shame in the context of punishment and criminal responsibility.

While I, like Scheff, may support community conferencing, I do so because of the way that it treats the participants and likely shapes their understanding of themselves and their role in society. I especially appreciate the focus on the behavior and not on the person of the accused. Only a small fraction of my enthusiasm relates to the emotion of shame. The far weightier part concerns participation, empowerment, self-understanding, acceptance of responsibility, and the numerous other ways that conferencing may affect the participants and society as a whole. In the end, Scheff's provocative essay triggers for me a research agenda: to figure out how exactly community conferencing—in contrast to judicial adjudication—shapes the perception and self-understanding of the accused, the victim, their relatives, community participants, as well as those that are not directly touched by community conferencing.

Scheff's essay provides, first, a model of the way to integrate the emotion of shame in the context of criminal punishment. In contrast to shaming sanctions that are intended to impose shame on the punished, community conferencing creates a space within which the emotion of shame can be experienced by the defendant, by the victim and by their family and friends. By creating a space within which shame can be felt and expressed, community conferencing facilitates the translation of the emotion into a therapeutic experience for all participants.

Toni Massaro has very perceptively drawn our attention to the slippage, in the discussion of shame, from noun to verb.⁷ Community conferencing is a model for the use of shame, the noun. It bears a strong resemblance to other contemporary alternatives to formal adjudication, like truth commissions⁸ and teen courts.⁹ These alternatives create space for the expression of emotion in a way that few formal adjudicative bodies do.

⁷ See Toni M. Massaro, *The Meaning of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. (forthcoming).

⁸ See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (Boston: Beacon Press forthcoming).

⁹ See Allison R. Shiff & David B. Wexler, *Teen Courts: A therapeutic Jurisprudence Perspective*, in *LAW IN A THERAPEUTIC KEY* 287, 293 (DAVID B. WEXLER & BRUCE J. WINICK eds. 1996).

In this regard, Scheff's article is also an important contribution to the literature on community conferencing. From his observation of several conferences, Scheff reports that the most important moment of symbolic reparation—what Scheff calls “the core sequence”—may actually occur after the formal meeting is over. In two cases, symbolic reparation seemed to occur while the participants were waiting to sign forms, and in another case, it occurred as the participants left the building. Scheff recommends that we “build in a delay after the formal end of the conference, such as the signing of a written agreement.”¹⁰ His recommendation makes a lot of sense and is an insightful contribution to the literature on community conferencing.

Second, Scheff's essay underscores one of the most compelling arguments against most of the shame sanctions that are being imposed in this country today, namely that so many of the shaming penalties do not incorporate the essential moment of reintegration in the community. The use of shame in community conferencing is built around the notion of reintegration. Tragically, stigmatization—shaming without reintegration—is the principal way that shaming sanctions are being imposed today. In this respect, the essay develops and illustrates the work of John Braithwaite on reintegrative shaming.¹¹ Braithwaite summarizes his theory—a general theory of crime—as follows:

The shaming produced by interdependency and communitarianism can be either of two types—shaming that becomes stigmatization or shaming that is followed by reintegration In societies where shaming does become reintegrative, low crime rates are the result because disapproval is dispensed without eliciting a rejection of the disapprovers, so that the potentialities for future disapproval are not dismantled

Shaming that is stigmatizing, in contrast, makes criminal subcultures more attractive because these are in some sense subcultures which reject the rejectors Thus, to the extent that shaming is of the stigmatizing rather than the reintegrative sort, and that criminal subcultures are widespread and accessible in the society,

¹⁰ Scheff, *supra* note 5, at 102.

¹¹ See generally JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).

higher crime rates will be the result.¹²

Braithwaite's impressive study has not received enough attention by shame proponents.¹³ Dan Kahan, for instance, groups shame penalties into four different categories, "stigmatizing publicity, literal stigmatization, self-debasement, and contrition."¹⁴ What the categories all have in common is stigma. Kahan suggests that stigma "can be ameliorated" and makes a passing reference to Braithwaite's work.¹⁵ But clearly, Kahan does not appreciate Braithwaite's contribution. If he did, he would not write that "even if we assume that shaming penalties are uniquely and irreparably stigmatizing, the critics have failed to demonstrate that they are self-defeating."¹⁶

Accordingly, Scheff's essay answers the seemingly unanswerable question in the shame debate. "Surely, one thinks," Whitman writes, "there must be something in the writings of Immanuel Kant, or of John Stuart Mill, or of someone in the great liberal tradition, that reveals why shame sanctions are wrong."¹⁷ Kant may be the wrong place to look given his special relationship to liberalism on the issue of *jus taliones*.¹⁸ But, the theory of reintegrative shame fits perfectly within the traditional lib-

¹² *Id.* at 102.

¹³ For a very persuasive argument on this point see Toni M. Massaro, *The Meaning of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. (forthcoming).

¹⁴ Kahan, *supra* note 4, at 631.

¹⁵ See *id.* at 645 and n.223.

¹⁶ *Id.* at 645. That Kahan has failed to appreciate Braithwaite's contribution is also evidenced by his discussion of deterrence, where he writes: "Does shame deter criminality? The short and simple answer is that we don't know. Shaming penalties have not yet been subject to rigorous empirical evaluation." *Id.* at 638.

¹⁷ Whitman, *supra* note 2, at 1062-63 (1998).

¹⁸ Immanuel Kant did, in fact, have some words to say about shaming sanctions, but not what Whitman would have wanted to hear. Kant is reported to have lectured that:

[A] child which tells lies should not be punished, but shamed: it should feel ashamed, contemptible, nauseated as though it had been bespattered with dirt. By repeated doses of such treatment we can inspire the child with such an abhorrence of vice as will become in him a *habitus*. If, however, he is punished instead -say, at school- he thinks to himself that once out of school he runs no risk of being punished and he will also try by jesuitical tricks to escape punishment.

IMMANUEL KANT, LECTURES ON ETHICS 46 (1963).

eral theory of deterrence—and in a very straightforward way. From a liberal perspective, Braithwaite's theory suggests that shaming should only be used as a punitive device within a context of reintegration. Community conferencing provides that context. Bumper stickers, billboards, t-shirts and placards may not. Stigmatization will likely backfire and reinforce criminality.¹⁹ Simply put, deterrence is the argument from a "straightforward liberal tradition . . . that shows why engaging in the mere public display of offenders, without corporal violence, is wrong."²⁰

All in all, however, Scheff's essay confirms my suspicion that too much attention is being focused on the emotion of shame within the context of punishment, responsibility and social solidarity—and here, naturally, I also part company with Braithwaite insofar as he suggests that his is a *general theory of crime* and not just an analysis of reintegrative shame. The spotlight on shame is having a distorting effect. The emotion of shame is, after all, just one of a large number of complex emotions and feelings that are experienced and elicited in the process of community conferencing. Why elevate shame to a status above sadness, grief, anger, embarrassment, compassion, empathy, hatred, contempt, or remorse? And how do you separate shame from all those other complex emotions and from the entire moral fabric of society? Is it really possible to isolate shame from the larger moral, emotional and social context and then operate on that one emotion? Is it masking other factors that may contribute to recidivism?

Scheff suggests that the proper management of shame is the key to a successful conference. He writes:

Some community conferences work better than others.
How can the difference between an effective and an inef-

¹⁹ In addition, it may reinforce racism and alienation. As Carol Steiker argues, "in a society as divided as ours is along the lines of race and class, the use of 'shaming penalties' on many criminal defendants—who are disproportionately poor and members of minority groups—would likely reinforce prevailing social contempt for members of such groups and add to the rage and alienation of group members." Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L. J. 775, 797 n.120 (1997). Whitman disagrees with Steiker, suggesting that shame sanctions are currently imposed on upper-status offenders. If, however, the trend favoring shaming penalties continues, then surely they will begin to have disparate effects along the lines of race and class.

²⁰ Whitman, *supra* note 2, at 1058.

fective conference be explained? The emphasis here is on a new idea: the emotion of shame. This emotion, which is usually hidden, is a strategic part of the conference process (and of all forms of mediation); if managed properly, it can be the key to a successful conference.²¹

Perhaps it is *a key* to successful conferences in some cases. But is it really *the key*? Might there not be other circumstances where the management of other emotions is crucial?

Scheff asks elsewhere “what are the emotions involved in feeling sorry?” His answer: “the most important emotion in a genuine apology is probably shame: the offender must be ashamed of what he did, and this shame must be visible to the person receiving the apology.”²² But why *probably* shame? Why not sadness? Or the emotion associated with the knowledge that the other person acknowledges having done something wrong? Isn’t what makes an apology genuine, in some large measure, the feeling that the other person—the person apologizing—believes he or she did something wrong? And certainly shame is not always a part of that, is it? If not, why elevate shame above all else?

Perhaps community conferencing is a good idea because the accused, the victim, their families and friends, and the greater community can participate in the resolution of conflict. It may be a good idea because it focuses on the improper behavior rather than on the person of the accused. Maybe it is a good idea because it creates a space for the expression of complex emotions. Moreover, it may have advantages because it may encourage the accused to accept responsibility. Therapeutic jurisprudence also addresses these issues, emphasizing, for instance, that individuals view decision-making processes as more fair when they are allowed to participate in the process.²³ To be sure, Scheff discusses these other factors; but the key to his essay is shame. In the final analysis, then, I too may favor community conferencing, but not necessarily for the same reasons as Scheff. I do not find his emphasis on shame entirely convincing. Shame may play a role in community conferencing, as it

²¹ Scheff, *supra* note 5, at 102.

²² *Id.* at 105.

²³ See TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Allison R. Shiff & David B. Wexler, *Teen Courts: A therapeutic Jurisprudence Perspective*, in LAW IN A THERAPEUTIC KEY, *supra* note 9, at 287, 293.

does in all punishments and all sentencing procedures. But shame has to be put back in context. Nor do I necessarily believe, as Scheff suggests, that community conferencing decreases recidivism. "The evidence is now available that victim-offender mediation is not only cheaper than court and prison," Scheff argues, "but also more effective in decreasing recidivism."²⁴ Yet the social science evidence that Scheff relies on does not bear out his claim. The study Scheff refers to, in fact, concludes that the effect on future criminal behavior is not statistically significant²⁵ and that "this finding of no significant impact of mediation on recidivism is consistent with two English studies of victim offender mediation."²⁶ The authors of the study go on to observe:

For some, a finding of a nonsignificant impact of the mediation process upon further reducing offender recidivism (when compared to a structured court restitution program) may come as a disappointment. For others, including the authors, it comes as no surprise. It could be argued that it is naive to think that a time-limited intervention such as mediation by itself (perhaps 4 to 8 hours per case) would have a dramatic effect on altering criminal and delinquent behavior that is influenced by many other factors, including family life, education, chemical abuse, and available opportunities for treatment and growth.²⁷

Moreover, if the key to community conferencing is reintegrative shame followed by forgiveness—what Scheff calls "the core sequence"—then the procedure is not a success, at least in a majority of the cases observed by Scheff.²⁸

The fact that the social scientific evidence is not presently overwhelming, however, is not a reason to abandon the project. We are relatively confident that structured restitution programs, at least for juveniles, have a significant impact in reducing re-

²⁴ Scheff, *supra* note 5, at 98.

²⁵ See Mark S. Umbreit & Robert B. Coates, *Cross-Site Analysis of Victim-Offender Mediation in Four States*, 39 CRIME & DELINQUENCY 565, 579 (1993) (cited in Scheff, *supra* note 5, at 98 n.2).

²⁶ *Id.* at 579.

²⁷ *Id.*

²⁸ See Scheff, *supra* note 5, at 101 (Scheff indicates that the core sequence occurred only in 4 out of 9 conferences -1 during the formal part of the conferences and 3 immediately after the formal meeting was over).

cidivism.²⁹ Community conferences seem to offer additional benefits. They reflect and promote a different self-understanding of the accused and the victim. Rather than the defendant being silenced, marginalized, and routinized, the accused is afforded an opportunity to control, or share in the control, of his punishment. The victim, rather than being voiceless, is empowered. Both are placed in the position of resolving conflict and determining just punishment.

I favor community conferencing, at least preliminarily, because of the ways that it constructs the accused, the victim and the community. By enabling the defendant to participate in the conversation, it focuses on his improper behavior rather than on his character.³⁰ This triggers, then, the need for further research. How is it exactly that community conferences shape us as individuals? What do they make us believe about ourselves or others in the conference and outside? What does it do to the accused to have him participate in the setting of his own punishment? How does it shape the victim? And what is the likely affect on society at large? Note that these questions should also be asked about the types of shaming sanctions that are being imposed today. The question I would ask Thomas Scheff is, why is shame, and not rather the *expression of emotion*, at the heart of the therapeutic aspect of community conferencing?

²⁹ See Umbreit & Coates, *supra* note 25, at 579.

³⁰ See Scheff and Braithwaite recognize and value this, of course. See Thomas Scheff, *Review Essay: A New Durkheim*, 96 AMERICAN JOURNAL OF SOCIOLOGY 741, 742 (1990) (reviewing BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989)).

COMMUNITY, SHAME AND ANGER: FAMILY GROUP CONFERENCES AND DOMESTIC VIOLENCE*

KATE PARADINE**

The themes of community, shame and anger, around which Thomas Scheff's article revolves, are prominent in current legal debates in Britain. *Zero tolerance* campaigns have emerged in police forces across the country, driven by claims that such policies have the potential to bring safety and a renewed sense of community to our streets. "Community safety orders" are proposed as a solution to anti-social behaviour, ranging from noise pollution to harassment, which plagues many neighbourhoods. Under the Crime and Disorder Bill, currently before Parliament, the police or local authority will be able to apply for civil orders to stop such behaviour. Breaches of the orders could result in five years imprisonment.¹ *Naming and shaming* is offered as an effective means of tackling crime. Small groups of young offenders are said to terrorise whole neighbourhoods. There are increasingly insistent calls to name them, so that those in the community can protect themselves, and the young criminals can be shamed into correcting the errors of their ways. New legal powers in the Sex Offenders Act I 997, require those convicted of, or cautioned for, a sex offence to notify police of their current addresses and any subsequent changes. These can be made public so that communities are aware of their presence. All these law reform efforts are underpinned by the anger of communities against beggars and vandals (for who there will be *zero tolerance*), noisy neighbours (who will be subject to community safety orders), persistent young offenders and sex offenders (who will be *named and shamed*). This anger has been acted upon by

* For the purpose of this comment the Editorial Board has preserved the author's original British spelling.

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¹ It has been suggested that the fact that breaches of the orders can lead to criminal sanctions means that the new legislation will breach the European Convention on Human Rights unless the Bill specifies that the criminal rather than the civil standard of proof must be met before orders will be issued. See Vikram Dodd, *Straw and Disorder*, THE GUARDIAN, Jan. 27, 1998.