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**YALE LAW SCHOOL**



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**Dan M. Kahan**

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## What's *Really* Wrong with Shaming Sanctions

Dan M. Kahan\*

*In this article, I renounce my previous defense of shaming penalties. Sort of. In What Do Alternative Sanctions Mean, 63 U. Chi. L. Rev. 591 (1996), I argued that shaming penalties would likely be a politically viable substitute for imprisonment for a range of nonviolent (or relatively nonviolent) offenses because unlike fines, community service, and other alternative sanctions that have encountered decisive resistance, shaming unambiguously expresses moral denunciation of criminal wrongdoers. Drawing on work that I've done since then, I now acknowledge that the premise of this analysis was flawed. Ordinary citizens expect punishments not merely to condemn but to do so in ways that affirm rather than denigrate their core values. By ritualistically stigmatizing wrongdoers as transgressors of shared moral norms, shaming penalties grate against the sensibilities of persons who subscribe to egalitarian and individualistic worldviews. To maximize its chances of widespread adoption, an alternative sanction must be expressively overdetermined — that is, sufficiently rich in meanings to appeal simultaneously to citizens of diverse cultural and moral persuasions. I suggest that restorative justice can satisfy that criterion — if its proponents resist the impulse to purge it of expressive elements that make it appealing to the very citizens who were willing to endorse shame.*

The time has come for me to recant. A decade ago I wrote an article, *What Do Alternative Sanctions Mean?*,<sup>1</sup> that defended shaming penalties as an alternative sanction. I recommended shaming penalties—ritualistic publicity sanctions of various sorts—as embodying a sort of magic cocktail of instrumental utility and social meaning.<sup>2</sup> Like fines and community service, shaming penalties would be less costly for society and less debilitating for offenders.<sup>3</sup> But unlike these conventional alternative sanctions, shaming sanctions would satisfy a popular expectation that punishment *express* moral condemnation in

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1. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591 (1996).

2. *Id.* at 635–36.

3. *Id.* at 635.

unambiguous and dramatic terms.<sup>4</sup> The rough expressive equivalence of shame to imprisonment, I maintained, would overcome the political resistance that had historically defeated efforts to wean American jurisdictions off of short terms of incarceration for nonviolent offenders.<sup>5</sup> I've now had an extended period to reflect on this argument. And I've concluded that I was wrong.

I have to admit, though, that I don't think I was wrong for any of the reasons suggested by the many thoughtful commentators who criticized my position. I don't think shaming penalties should be rejected either because offenders are "shameless," and thus unlikely to be deterred by the threat of humiliation,<sup>6</sup> or because shaming penalties are horrifically stigmatizing, and thus inconsistent with individual dignity.<sup>7</sup> I'm not persuaded by the claim that the spectacle of shaming will excite either an uncontrollable appetite to degrade or a spiraling attitude of indifference toward offenses revealed to be more common than previously thought.<sup>8</sup> In truth, I'm pretty much happy to stand by the arguments I offered in anticipation of these claims, all of which, in my view, fail to evaluate carefully the potential costs and benefits of shaming penalties *relative* to the known deficiencies of imprisonment—the mode of punishment to which society defaults when shame is removed from the table.

Yet, it was the very persistence of the shame opponents' refusal to accept this comparative framing of the issue—what's worse, shame or *imprisonment?*—that eventually made me realize what I'd missed in my earlier argument. I *too* hadn't paid sufficient attention to the relative strengths and weaknesses of these two forms of punishment. If I had, I would have seen that shame, far from being the expressive equivalent of imprisonment, is afflicted with a social meaning handicap that, as a practical political matter, makes it an unacceptable alternative sanction for a significant and influential segment of our society.

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4. *Id.*

5. *Id.* at 649–50.

6. Toni M. Massaro, *The Meanings of Shame*, 3 Psychol. Pub. Pol'y & L. 645, 648 (1997).

7. Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* 230–33 (2004).

8. Eric A. Posner, *Law and Social Norms* 93, 108 (2000).

Essentially, my account of the expressive dimension of punishment was too flat. I emphasized that punishments, to be politically acceptable, must express authoritative moral condemnation.<sup>9</sup> That's true, but incomplete. Members of society also expect punishments—and essentially all laws for that matter—to *affirm* the core values that animate their preferred ways of life. Modes of punishments that are equivalent in their power to convey moral disapproval might still convey radically conflicting messages about the nature of the ideal society. What's *really* wrong with shaming penalties, I believe, is that they are deeply partisan: when society picks them, it picks sides, aligning itself with those who subscribe to norms that give pride of place to community and social differentiation rather than to individuality and equality.

Ironically, what's *right* about imprisonment, at least from an expressive political economy point of view, is that it is robustly pluralistic. Imprisonment is endowed with a sufficiently rich and diverse array of meanings that persons of diverse worldviews—solidaristic and individualistic, hierarchic and egalitarian—can all find affirmation of their values in it simultaneously.<sup>10</sup> Institutions, laws, and policies that exhibit this form of expressive overdetermination are uniquely suited to negotiate the obstacles to political agreement posed by persistent cultural status competition within our society. Wholly apart from their impact on the material well-being of the public, expressively overdetermined institutions and policies are thus likely to prevail over alternatives that convey more univocal meanings.<sup>11</sup>

To fashion an acceptable alternative to imprisonment for minor forms of criminality, then, it is necessary to identify a form of punishment that not only condemns as forcefully as imprisonment but that also condemns as *ambiguously* as imprisonment does. I believe that “restorative justice” programs might well meet this description. If I'm right, the philosophical incoherence that some commentators perceive in this form of punishment is not a deficiency to be remedied but a form of social capital to be exploited.

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9. Kahan, *supra* note 1, at 598.

10. See *infra* Part III.

11. See *infra* notes 69–73 and accompanying text.

Let me elaborate. I'll start, in Part I, with a brief overview of the "shame debate" within the legal academy and what it has taught me—namely, that my earlier argument reflected too crude an understanding of the expressive political economy of punishment. In Part II, I'll sketch out some of the things I've since learned about expressive politics: synthesizing bodies of work associated with Joseph Gusfield and Aaron Wildavsky, I'll describe how the phenomenon of expressive overdetermination regulates the political acceptability of penal and other laws. In Part III, I'll describe what's really wrong with shaming punishments: they aren't expressively overdetermined, while imprisonment, ironically and tragically, is. Finally, in Part IV I'll examine and defend the expressive ambiguity of restorative justice.

### I. The Shame Debate

The goal of *What Do Alternative Sanctions Mean?* wasn't primarily to promote shaming punishments. Rather, it was to identify social meaning as an important constraint on the political acceptability of progressive reforms of penal law.<sup>12</sup> In this sense, the argument was primarily an extended application of what might be called expressive political economy.

The focus of the essay was a puzzle: why do American jurisdictions rely so heavily on imprisonment? Criminal justice experts have long agreed that as many as half the persons in American prisons and jails—those serving relatively short terms of incarceration for petty theft, various forms of white collar crime, drunk driving, drug possession, and various other minor offenses—could be deterred as effectively, and at considerably less cost, by fines and community service.<sup>13</sup> Why had the argument for alternative sanctions made such little headway as a practical political matter?

The answer, I suggested, was that the conventional alternative sanctions are deficient along the *expressive dimension* of punishment.<sup>14</sup> As Joel Feinberg<sup>15</sup> and Jean Hampton<sup>16</sup> have famously argued, mem-

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12. Kahan, *supra* note 1, at 592–93.

13. *See id.* at 592, 617–18, 625.

14. Kahan, *supra* note 1, at 592–93.

15. Joel Feinberg, *The Expressive Function of Punishment*, in *Doing and Deserving: Essays in the Theory of Responsibility* 95, 98 (1970).

16. Jean Hampton, *An Expressive Theory of Retribution*, in *Retributivism and Its*

bers of the public expect punishments not only to protect them from harm or to inflict condign pain on offenders but also to express moral disapprobation. Because of the symbolic association of liberty with human worth in our society, taking away a person's freedom unambiguously signifies condemnation.<sup>17</sup> Merely fining someone, however, seems to connote that we are attaching a *price tag* to that person's behavior. That signification is inconsistent with condemnation: we might believe that charging a high price makes a consumer suffer, but we don't condemn someone for buying what we ourselves are willing to sell.<sup>18</sup> Community service creates a similar form of dissonance: because we ordinarily *admire* persons who restore dilapidated low-income housing, educate the retarded, furnish aid to the elderly, and the like, it's hard for members of society to believe that law genuinely means to condemn persons when it orders them to perform such services as criminal punishments.<sup>19</sup> What alternative sanctions say (or don't say), I argued, causes members of the public, and popularly accountable lawmakers and judges, to resist substituting fines and community service for imprisonment when an offender's behavior warrants a clear statement of denunciation.<sup>20</sup>

What *shaming punishments* mean, I argued, equips them to overcome this constraint on the political acceptability of conventional alternative sanctions.<sup>21</sup> In a famous article, Harold Garfinkel described the conditions of "successful degradation ceremonies"—ritualized deprivations that, against the background of social norms, mark someone as a wrongdoer unentitled to the respect and consideration afforded virtuous members of the community.<sup>22</sup> Shaming penalties, whether in the form of adverse publicity, stigmatizing forms of clothing or property markings, coerced gestures of contrition, or more ornate self-debasement rituals, all satisfy these conditions.<sup>23</sup> When soci-

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Critics 1, 11–15 (Wesley Cragg ed., 1992).

17. See Feinberg, *supra* note 15, at 98–100 (stressing that incarceration expresses society's condemnation of an action as wrong).

18. Kahan, *supra* note 1, at 620–21.

19. *Id.* at 625–30.

20. *Id.* at 617–30.

21. *Id.* at 635–37.

22. Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 Am. J. Soc. 420, 422–23 (1956).

23. Kahan, *supra* note 1, at 636–37.

ety forces a person to endure this sort of experience, it leaves no doubt that it means to morally condemn him or her.<sup>24</sup> Because shaming, unlike fines and community service, gratifies rather than disappoints the demand for denunciation, I argued that substituting shame for imprisonment would not provoke the sort of popular resistance that had frustrated the alternative sanctions movement.<sup>25</sup>

This account of the political acceptability of shaming penalties is essentially descriptive; because I believe that social meanings are *not* normative in themselves, I offered an independent policy defense of shaming punishments. The argument did *not* turn on the intrinsic value of shaming offenders but rather on the *relative* value of shaming instead of incarcerating them. Like conventional alternatives such as fines and community service, shame, I speculated, would likely deter and incapacitate as or nearly as well as short terms of incarceration without imposing nearly so much cost on society or suffering on offenders.<sup>26</sup> I recognized that shame is open to moral objections and anxieties of various sorts; but because I was proposing shaming as *an alternative* to prison, it struck me as a decisive rejoinder that shame was unquestionably *less* problematic than imprisonment along nearly every dimension of what constitutes just punishment.<sup>27</sup> The best should not be permitted to be an enemy of the good, or even the less bad, when the less bad seems like the best we can do.

My argument provoked a torrent of criticism. Many of the arguments were practical and empirical in nature: that shaming punishments couldn't be expected to deter, for example, because most offenders don't value their reputations enough to be influenced by the threat of humiliation; or, alternatively, that shaming punishments would actually backfire because they would destroy offenders' reputations and feelings of self-esteem and thus simultaneously extinguish their incentive to protect their good standing and their opportunities to be reintegrated into law-abiding society.<sup>28</sup> Others worried about

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24. *Id.* at 631, 635–37.

25. *Id.* at 630–37.

26. *Id.* at 638–41.

27. *Id.* at 642–49.

28. *See, e.g.,* Massaro, *supra* note 6, at 691–703 (noting that shaming penalties yield unpredictable results because the efficacy of such penalties is largely dependent on the responses of both the individual offender and the larger community).



the justice of shaming: purposefully degrading offenders, they argued, was cruel and illiberal.<sup>29</sup> Still others fretted that shaming, because it depended for its effect on public condemnation, would activate preferences for debasement or other social dynamics that would threaten civility or order.<sup>30</sup>

Many of these arguments reflected highly contentious, and often mutually inconsistent, premises. But rather than try to pick at them in a fine-grained way, my instinct was to offer a sort of demurrer grounded in the pragmatic underpinnings of my own normative defense of shaming as an *alternative* to imprisonment. “Status quo bias” refers to a fallacious form of reasoning policy deliberations.<sup>31</sup> It occurs when persons insist that society forgo a policy reform unless that innovation can be implemented without risk of undesirable consequences.<sup>32</sup> What makes this way of thinking a fallacy is that it compares the suggested reform to a hypothetical ideal state of affairs rather than to the existing state of affairs.<sup>33</sup> If the status quo also involves undesirable consequences or risks, the reform might be unambiguously better notwithstanding its own potential downside.<sup>34</sup>

The shame critics, I was convinced, were suffering from status quo bias. The potential dangers they detected in shame were not fanciful. But treating them as dispositive grounds for rejecting shame would result in the *certainty* of the even greater evils of imprison-

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29. See, e.g., Nussbaum, *supra* note 7, at 278 (arguing that a refusal to “use shaming as part of the public system of punishment” is one of the “essentials of a decent society”).

30. See, e.g., Posner, *supra* note 8, at 89–111 (concluding that shaming penalties create deviant subcommunities); James Q. Whitman, *What's Wrong with Inflicting Shame Sanctions?*, 107 *Yale L.J.* 1055, 1060–68 (1998) (describing shame sanctions as a partnership between the public and the state that is incompatible with modern society).

31. Dan M. Kahan, *Response to Professor Abramson*, 12 *Fed. Sent'g Rep.* 59, 59 (1999); see also Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *Econometrica* 263, 274 (1979) (discussing empirical evidence that demonstrates that individuals often observe outcomes as a gain or a loss relative to an initial reference point rather than as an absolute welfare position).

32. Kahan, *supra* note 31, at 59.

33. *Id.*

34. *Id.*

ment—the default punishment in the absence of an expressively viable alternative sanction.<sup>35</sup>

It's obviously false, for example, to think that shaming uniquely enlists members of the public to visit condemnation on criminal wrongdoers. Imprisonment, every bit as much as shame, is a degradation ceremony. Imprisonment so evocatively expresses moral condemnation precisely because, in our society, liberty deprivation successfully marks someone as being unworthy of the respect we believe virtuous persons are due.<sup>36</sup> As such, imprisonment clearly invites continued—indeed, usually permanent—shunning. Just as clearly, at least to anyone who keeps an eye on media coverage of white collar crimes in particular, imprisonment excites a conspicuous public appetite to demean those who engage in offenses for which prison is usually meted out.<sup>37</sup>

Likewise, it is myopic to worry that shaming will vitiate the reputational stake a person has in resuming a law-abiding life, or the opportunities she'll have to do so. *Nothing* interferes with an offender's prospects for social reintegration nearly so much as a record of incarceration does! Precisely because we *should* worry about the impact of having been shamed on a person's reputational incentive to comply with the law *ex post*, moreover, it's naïve to suggest that the prospect of being shamed won't have a deterrent impact *ex ante*.

If we worry that shaming is cruel—and we should—then we should worry all the more about *imprisoning* rather than shaming, since the former is unquestionably more painful and degrading than the latter. All one has to do to confirm this is ask individual offenders,

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35. *Id.*

36. See Kahan, *supra* note 1, at 613 (describing how, in the nineteenth century, imprisonment became a primary form of punishment “because liberty was so intensely and universally valued, [that] imprisonment [became] an effective instrument for conveying public condemnation and inducing shame even in a society of strangers”).

37. See, e.g., Jonathan D. Glater, *Mad as Hell: Hard Time for White-Collar Crime*, N.Y. Times, July 28, 2002, at [CU: either C5 or § 4 at 5] (covering public outrage over investor fraud and a growing consensus that white-collar criminals should receive stiffer incarceration terms); Leon Lazaroff, *Ex-chiefs at Tyco Get 8-25 Years: Kozłowski, Swartz Ordered to Pay Millions in Fines, Restitution*, Balt. Sun, Sept. 20, 2005, at 1C (reporting on harsh sentences for corporate executives and the popular movement toward harsher penalties for white-collar offenders).

who typically opt for shaming as a condition of probation rather than go to jail.<sup>38</sup>

Knowing the critics were (by and large) political progressives who despised incarceration, I had high hopes that this charge of cognitive conservatism would jolt my adversaries into re-evaluating their opposition to shame. I was quite mistaken. This argument proved wholly inert with alternative-sanctions proponents. Shame made headway, but in my view with the wrong persons and for the wrong reasons.

The inefficacy of my arguments was sobering. Recognizing that I was in a state of persistent disagreement with persons of immense intelligence whose moral commitments I shared, I began to reflect on what mistake *I* must necessarily be making. I didn't conclude that I was mistaken, necessarily, in my pragmatic defense of shame; more painfully, I came to the realization that I was in error about matters even more central to the argument in *What Do Alternative Sanctions Mean?* If, as I'd argued, identifying a politically acceptable alternative to imprisonment required a sophisticated understanding of what punishments mean, then the persistent resistance to shaming *among persons I identified with* suggested that my own understanding of what shame and imprisonment mean lacked sophistication.

There was some element of the expressive political economy of penal law I obviously wasn't getting. As a result of work that I have since done on the expressive dynamics of law and politics generally (much of it in collaboration with anthropologist Donald Braman), I think I now have a much better idea of what it was.

## **II. Expressive Political Economy: An Overview**

As I've indicated, I've been led to a more refined analysis of what shame and imprisonment mean through a more general account of the expressive political economy of law. The foundation of this account has two sources, one in sociology and the other in political science.

The sociological source is Joseph Gusfield's work on symbolic politics.<sup>39</sup> Gusfield describes a form of political conflict in which ad-

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38. See Kahan, *supra* note 1, at 641.

39. Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American*

herents of competing cultural styles jockey to enact legislation that symbolically “glorifies the values of one group and demeans those of another,” thereby “enhanc[ing] the social status of . . . the affirmed culture” at the expense of the one “condemned as deviant.”<sup>40</sup> Because individuals care as much about their status as they do about their material welfare, “[t]he struggle to control the symbolic actions of government is often as bitter and as fateful as the struggle to control its tangible effects.”<sup>41</sup>

The political science source is Aaron Wildavsky’s cultural theory of political preference formation.<sup>42</sup> Like Gusfield, Wildavsky attacks rational choice theories as incomplete because of their failure to comprehend the centrality of cultural commitments, and resulting cultural conflict, to political action.<sup>43</sup> Wildavsky systematizes these commitments using a scheme of culture types derived from the work of anthropologist Mary Douglas.<sup>44</sup> The scheme characterizes preferred modes of social organization along two cross-cutting dimensions (“group” and “grid”) that generate essentially four distinct cultural worldviews—hierocracy, egalitarianism, individualism, and solidarism or communitarianism.<sup>45</sup>

Moreover, whereas Gusfield tends to depict affirmation of cultural values as an end in itself, one that competes with or even displaces pursuit of more material “interests,”<sup>46</sup> Wildavsky sees worldviews as heuristic determinants of what individuals perceive their in-

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Temperance Movement 21 (2d ed. 1986) [hereinafter Gusfield, *Symbolic Crusade*]; Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 Cal. L. Rev. 54, 56 (1968) [hereinafter Gusfield, *On Legislating Morals*].

40. Gusfield, *On Legislating Morals*, *supra* note 39, at 57–58.

41. Gusfield, *Symbolic Crusade*, *supra* note 39, at 167.

42. Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 Am. Pol. Sci. Rev. 1 (1987).

43. *Id.* at 6–18.

44. *Id.* at 6; *see generally* Mary Douglas, *Natural Symbols: Exploration in Cosmology* 54–68 (1970).

45. *Id.*

46. *See* Gusfield, *On Legislating Morals*, *supra* note 39, at 57 (“Law is not only a means of social control but also symbolizes the public affirmation of social and ideal norms. The statement, promulgation, or announcement of law has a symbolic dimension unrelated to its function of influencing behavior through enforcement.”).

terests to be: “Without knowing much about [a proposed policy,] those who identify with each particular way of life,” simply by considering the social meaning or resonance of the policy, can usually “guess whether its effect is to increase or decrease social distinctions, impose, avoid, or reject authority.”<sup>47</sup> Moreover, because the cultural proclivities of others are likewise readily apparent from their ordinary life behavior, anyone who harbors any doubt about the meaning of a policy proposal need merely “observ[e] what like-minded individuals” or unlike-minded ones have to say.<sup>48</sup>

An expressive theory of politics that melds Gusfield and Wildavsky furnishes a powerful explanation, I believe, for many otherwise puzzling legal and political conflicts. It helps to explain, for example, why so many issues that seem to have only a small or ambiguous impact on our material well-being nonetheless occupy such a central role in our politics. Gay marriage, flag desecration, the teaching of evolution in public schools, drug prohibition, and other “symbolic” issues pit competing egalitarian and hierarchical, individualist and solidarist, values against each other. Politicians take positions on these issues to gain the allegiance not only of citizens who care about the cultural values laws express, but also of those who care much more about mundane, material matters yet who naturally impute trustworthiness and competence to policy advocates who share their cultural identities.<sup>49</sup>

A Gusfield-Wildavsky theory also helps to make sense of who believes what about various policies that appear to have an undeniably large impact on our material welfare. Beliefs about the efficacy of environmental regulations, gun control, public health laws, and the like are distributed in patterns—within and across issues—that map onto individuals’ cultural worldviews. As Wildavsky surmised, individuals are naturally disposed to believe that policies that cohere with and are supported by others who hold their values also promote their interests.<sup>50</sup> Indeed, once cultural worldviews are controlled for, education, income, party affiliation and other factors that might be

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47. Wildavsky, *supra* note 42, at 7.

48. *Id.*

49. Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 Yale L. & Pol’y Rev. 149, 151 (2006).

50. Wildavsky, *supra* note 42, at 7.

thought to determine perceptions of whose interests these policies promote fade into insignificance.<sup>51</sup>

Just as important as its power to explain political conflict, however, is the power of a Gusfield-Wildavsky theory to explain *consensus*. Individuals tend to favor policies that express their cultural values—both because they attach intrinsic value to what laws say, and because they are naturally disposed to believe that expressively congenial laws promote good consequences.<sup>52</sup> Laws that manage to affirm diverse cultural worldviews simultaneously, then, are the ones most likely to overcome political conflict and generate broad scale support.<sup>53</sup>

For an example, consider the success of abortion reform in France.<sup>54</sup> Decades' long conflict on that issue was quieted when the national legislature adopted a law that conditioned abortion on an unreviewable certification of personal "distress."<sup>55</sup> That policy made it possible for hierarchical and solidaristic religious traditionalists, who interpreted certification as symbolizing the sanctity of life, and egalitarians and individualists, who interpreted unreviewability as affirming the autonomy of women, to see their commitments affirmed by the law simultaneously.<sup>56</sup> Thereafter, the two sides converged on a set of policies involving counseling and enhanced social support for

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51. See John Gastil et al., The "Wildavsky Heuristic" and The Cultural Orientation of Mass Political Opinion 19–20 (Oct. 15, 2005) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=834264](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=834264) (using empirical research to show that cultural orientation was more predictive of policy attitudes about environmental regulation, gun control, capital punishment, and gay marriage than were demographic factors or even political self-identification); Wildavsky, *supra* note 42, at 11–13 (arguing that viewing American political history as a competition among opposing cultural theories is more coherent than using traditional left-right distinctions).

52. See Kahan & Braman, *supra* note 49, at 171 ("It's only when they perceive that a policy bears a social meaning congenial to their cultural values that citizens become receptive to sound empirical evidence about what consequences that policy will have.").

53. See *id.* ("It's therefore essential to devise policies that can bear acceptable social meanings to citizens of diverse cultural persuasions simultaneously.").

54. See generally Mary Ann Glendon, Abortion and Divorce in Western Law 15–22 (1987) (comparing the French and American response to abortion).

55. Kahan & Braman, *supra* note 49, at 168.

56. *Id.* at 168.

single mothers, measures that in fact reduced the abortion rate.<sup>57</sup> The evidence that such policies would work in exactly this way existed *before* adoption of the nation's abortion reform law.<sup>58</sup> But, as Wildavsky might have predicted, because individuals conform their views about what policies do to their beliefs about what policies mean, the two sides were unable to perceive this convergence of their interests until they settled on a policy backdrop that made all sides feel their worldviews were affirmed.<sup>59</sup>

Steven Teles tells a similar story about the formation—and ultimate dissolution—of consensus in favor of social welfare policies in the U.S.<sup>60</sup> According to Teles, social welfare policies enjoyed deep and widespread support for nearly three decades because they too were framed in a manner that made it possible for culturally diverse citizens to see their worldviews affirmed by them.<sup>61</sup> Egalitarians, for example, naturally saw social welfare policies as counteracting the injustice of unconstrained markets.<sup>62</sup> Hierarchists and solidarists could also support such policies because they understood safety nets for dislocated male workers as signs of society's commitment to protecting traditional families from economic pressures that might push women into the workplace.<sup>63</sup> The breakdown of consensus surrounding welfare, according to Teles, occurred when the social meaning of the policy became more partisan: in particular, the hegemony of the egalitarian association of welfare with support of *single* mothers flipped hierarchists and solidarists, who then found common cause with individualists in attacking social support programs.<sup>64</sup>

A final example comes from environmental law.<sup>65</sup> Environmental regulation is a highly productive font of cultural conflict. Egalitarians and solidarists are naturally sensitive to environmental

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57. *Id.* at 169.

58. *Id.* at 169.

59. *Id.* at 169.

60. Steven M. Teles, *Whose welfare?: AFDC and Elite Politics* (1996).

61. *Id.* at 40, 55.

62. *Id.* at 55.

63. *Id.*

64. *Id.* at 69–74, 76–79.

<sup>65</sup> Here I draw on Kahan & Braman, *supra* note 49.

risk, the abatement of which justifies regulating commercial behavior that generates inequality and is symbolic of unconstrained self-interest. By the same token, individualists resist claims of environmental risk, which they see as portending restrictions of markets and other private orderings.<sup>66</sup> So do hierarchists, who see assertions of impending environmental catastrophe as impugning the competence of societal and governmental elites.<sup>67</sup>

All sides managed to converge, however, in support of tradeable emissions permits as a means of regulating air pollution in the late 1980s and early 1990s. Because such permits involve a market mechanism for controlling pollution, this regulatory strategy vindicated the individualists' belief that private orderings conduce to societal well-being. Hierarchists could also feel affirmed by a policy that promised to empower rather than constrain powerful commercial firms. Shown a solution that affirmed rather than threatened their identities, it thus became easier for persons of these persuasions to accept that air pollution was a problem to begin with. At the same time, because this policy was aimed at improving air quality, egalitarians and solidarists could see its adoption as recognizing their view of the dangers of unconstrained commerce and industry. The affirmation of their values thus made it easier for them to accept evidence that uniform, centrally enforced air-quality standards don't work.<sup>68</sup>

Generalizing, then, the Gusfield-Wildavsky account of expressive political economy suggests an important principle about the political acceptability of various laws and institutions. Call it the principle of *expressive overdetermination*.<sup>69</sup> A law or policy can be said to be expressively overdetermined when it bears meanings sufficiently rich in nature and large in number to enable diverse cultural groups to find simultaneously affirmation of their values within it.<sup>70</sup> Such a pol-

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66. *Id.* at 154.

67. *Id.* at 154.

68. *Id.* at 169.

69. See generally Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 *Emory L.J.* (forthcoming 2006), available at [http://research.yale.edu/culturalcognition/documents/Overcoming\\_fear\\_cultural\\_politics.pdf](http://research.yale.edu/culturalcognition/documents/Overcoming_fear_cultural_politics.pdf) (developing and applying the concept of expressive overdetermination in the context of the American gun control debate).

70. *Id.* at 20.



icy will enjoy widespread appeal in part because it satisfies the desire individuals have to see their worldviews endorsed (or at least not trampled upon) by law, and it is likely to strike them as advancing their material well-being.<sup>71</sup>

Laws that lack expressive overdetermination—ones that bear meanings perceived as affirming the values of only some cultural perspectives and as denigrating others—are in a much more precarious position. Such laws will generate persistent resistance from powerful constituencies, who will see such laws as simultaneously assaulting their status and imperiling their material welfare. They are thus less likely to be adopted in the first place and, if they are adopted, are more vulnerable to being overturned.

It follows that, in a contest between a policy or law that is expressively overdetermined and one that isn't, the former will enjoy an advantage. This has important implications, obviously, for anyone who wants to reform the law.

### **III. The Expressive Political Economy of Shame and Imprisonment**

The expressive overdetermination principle, I believe, is what was missing from my earlier account of shame as an alternative sanction. Simply stated, imprisonment is expressively overdetermined and shaming punishments are not.

More generally, the analysis of *What Do Alternative Sanctions Mean?* reflected too simplistic an understanding of the expressive political economy of penal law. My main claim was that the political acceptability of various forms of punishments turns on whether they express moral denunciation.<sup>72</sup> There's obviously more to it, even from a purely expressive standpoint. The Gusfield-Wildavsky theory says that citizens are sensitive to whether institutions, policies, and laws affirm the values that construct their preferred way of life.<sup>73</sup> It follows, then, that citizens will expect punishments not only to express condemnation but also to express condemnation in a way that

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71. See, e.g., *id.* at 33–35 (demonstrating how an expressively overdetermined gun control reform can appear to both sides in the gun debate as advancing their material interests).

72. Kahan, *supra* note 1, at 592.

73. See *supra* notes 69–71 and accompanying text.

coheres with, rather than assaults, their more basic cultural commitments.

Forms of punishment that unambiguously express condemnation can nevertheless do so in ways that affirm only some ways of life while denigrating others. An example is corporal punishment. Historically, the imposition of physical pain as a mode of punishment was characteristic of hierarchical relationships: it was the way that sovereigns disciplined subjects, masters disciplined slaves, parents disciplined children, and husbands disciplined wives.<sup>74</sup> Persons of higher classes, in fact, were often exempt from corporal punishment.<sup>75</sup> As Myra Glenn,<sup>76</sup> Michael Hindus,<sup>77</sup> Adam Hirsch<sup>78</sup> and others have documented, this history imbued corporal punishment with social meanings that made it particularly congenial to the aristocratic South in the eighteenth and nineteenth centuries, and an anathema to the more egalitarian and individualistic Northern states, which during this time gravitated toward imprisonment as a mode of discipline more fitting for a “republic.” These resonances persist, I believe, and explain why corporal punishment, notwithstanding its clear expression of condemnation, remains a largely unthinkable punishment in the contemporary United States.<sup>79</sup>

I’m persuaded that shaming punishments are afflicted with a similar social meaning tax. Like corporal punishments, they resonate with significations of hierarchy and community that assault the sensibilities of those who favor more egalitarian and individualistic forms of social organization.

In some sense, these meanings are out of keeping with the motivations behind and feel of shaming on the ground. In particular, shaming penalties often have a strong populist flavor; I think of the

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74. Kahan, *supra* note 1, at 611–12.

75. *E.g., id.* at 612 n.85 (noting that English law exempted gentlemen from corporal punishment).

76. Myra C. Glenn, *Campaigns Against Corporal Punishment: Prisoners, Sailors, Women, and Children in Antebellum America* (1984).

77. Michael Stephen Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767–1878* (1980).

78. Adam J. Hirsch, *The Rise of the Penitentiary: Prisons and Punishments in Early America* (1992).

79. Kahan, *supra* note 1, at 615–17.

support for shaming rather than fining white collar offenders in general,<sup>80</sup> and of Hoboken's experiment with ordering Manhattan yuppies convicted of public urination to scrub the city streets in particular,<sup>81</sup> as examples. I also believe that shaming can very easily be appropriated by egalitarians to reinforce obligations—e.g., delinquent child support payments due to poor, single mothers—that typically go underenforced in a legal system that is more concerned with protecting the powerful.

But punishments mean not what a policy advocate would have them mean but what they do in fact mean to the public—call this the “Humpty Dumpty” constraint on expressive political reform.<sup>82</sup> And for a sizable portion of the public, including many who hold the sorts of progressive sensibilities that otherwise incline them to support alternative sanctions, shaming does connote objectionable forms of social stratification and potentially suffocating impositions of communal norms.<sup>83</sup> This is so, I think, in part because of the history of shaming. Like corporal punishment, shaming punishments occupied a conspicuous place in the penal tool kit of hierarchical regimes; indeed, shame played as large a part as the infliction of pain in many colonial corporal punishments—the stocks being a prime example.<sup>84</sup>

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80. See generally Dan. M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & Econ. 365, 365–67, 380–83, 381 n.39 (1999) (evaluating the feasibility of incorporating shaming penalties for white-collar offenses into the Federal Sentencing Guidelines).

81. Kahan, *supra* note 1, at 633.

82. See Lewis Carroll, *Through the Looking-Glass and What Alice Found There*, in *The Annotated Alice: The Definitive Edition* 213 (Martin Gardner ed., W.W. Norton 2000) (“‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’ ‘The question is,’ said Alice, ‘whether you *can* make words mean so many different things.’ ‘The question is,’ said Humpty Dumpty, ‘which is to be master—that’s all.’”).

83. See Nussbaum, *supra* note 7, at 231–32 (“[I]n shaming people as deviant, the shamers set themselves up as a ‘normal’ class above the shamed, and thus divide society into ranks and hierarchies.”).

84. See Kahan, *supra* note 1, at 611 (“For early Americans, shame was an even more salient ingredient of corporal punishment than was physical pain. ‘The sting of the lash and the contortions of the stocks were surely no balm, but even worse for community members were the piercing stares of neighbors who witnessed their disgrace and with whom they would continue to live and work.’” (quoting Adam J. Hirsch, *The Rise of the Penitentiary: Prisons and Punishments in Early America* 4–

Shaming also played a role in enforcing conformity with communal norms, themselves often hierarchical, as Hawthorne's *The Scarlet Letter* famously illustrates.<sup>85</sup>

Beyond history (but likely related to it), the aesthetics of shame seem inescapably to conjure up the specter of hierarchy and coerced conformity. This is especially true for the more ritualized forms of shaming. When a court orders a man convicted of harassing his ex-wife to permit her to spit in his face, as happened in one well-publicized case,<sup>86</sup> the law announces, and invites members of the consuming public to infer, that the offender is contemptibly low in status.<sup>87</sup> When a court orders an offender to engage in an abject form of public apology, it asserts, at least symbolically, the right of the community not just to impose disabilities on those who break the law, but also to force them to renounce their deviant values.<sup>88</sup> For some, even milder publicity sanctions—the posting of the pictures of men convicted of soliciting prostitutes on billboards or internet sites—project a frightening image of the state self-consciously wielding the cudgel of public denunciation to cow reluctant individuals into obedience with communal norms.<sup>89</sup>

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5, 38 (1992)).

85. See Nathaniel Hawthorne, *The Scarlet Letter* 48 (Stanley Appelbaum ed., Dover Publications 1994) (1850) (“Hester Prynne, meanwhile, kept her place upon the pedestal of shame, with glazed eyes, and an air of weary indifference. She had borne, that morning, all that nature could endure; and as her temperament was not of the order that escapes from too intense suffering by a swoon, her spirit could only shelter itself beneath a stony crust of insensibility, while the faculties of animal life remained entire. . . . [S]he was led back to prison, and vanished from the public gaze within its iron-clamped portal. It was whispered, by those who peered after her, that the scarlet letter threw a lurid gleam along the dark passage-way of the interior.”).

86. See Paul A. Long, *Judges Tailor Sentence to Fit the Crime*, Cincinnati Post, May 11, 1994, at A4 (“[Judge] Sheehan also used an alternative sentence in a domestic violence case in which a man was convicted of spitting on his ex-wife: He could pay a fine of \$100 or let his ex-wife spit in his face.”).

87. See Posner, *supra* note 8, at 88–111 (summarizing the history and utility of shaming punishments).

88. See Garfinkel, *supra* note 22, at 422–23 (describing the steps necessary for an offender to make a successful renunciation).

89. Cf. Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. Legal Stud. 553, 557–58 (1998) (arguing that shame penalties inappropriately impose humiliation rather than confront individuals with the prices

These resonances, Gusfield would surely argue, predictably generate resistance for their own sake. But that's not the only problem they create for the political acceptability of shame, at least for those who hold egalitarian and individualist cultural orientations. These resonances also dispose such individuals to believe that shaming is likely to be inefficacious.

As I've already noted, shame critics advance a barrage of empirical claims: that shaming won't deter *ex ante* because most potential offenders don't value their reputations; that because shaming penalties shatter offenders' reputations it will undermine their primary social incentives to obey the law *ex post*; that shaming will incite the public to mob violence against the targets of shame; that shaming will lull the public into a state of indifference to criminality by exposing law-breaking to be common place.<sup>90</sup> These arguments, like most deterrence-based ones, are highly speculative and, in many cases, self-contradictory. I think the egalitarian and individualist critics of shame are motivated to accept these arguments nonetheless *because of* the congeniality of these arguments to the critics' cultural appraisals of shame. As Wildavsky most prominently emphasized, social meanings enter, heuristically, into the cognitive processes by which individuals process empirical information, inducing them to believe that practices inimical to their values are also destructive of society's material welfare.<sup>91</sup>

It is well established that such processes cause individuals to selectively credit empirical claims about the deterrent effect of the death penalty and the impact of firearms on public safety.<sup>92</sup> I myself

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for wrongdoing).

90. See *supra* notes 28–31 and accompanying text.

91. See Gastil, *supra* note 51, at 3–4, 11–12 (explaining that culture plays a central role in how individuals process information and respond to policy proposals); Wildavsky, *supra* note 42, at 7–10 (explaining how cultural identification is the mechanism through which individuals are able to translate “inches of fact” in to “miles of preferences”).

92. E.g., Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 *Crime & Delinq.* 116, 162 (1983) (noting that “most of [the] respondents [in the study] willingly admitted that their attitudes [toward the death penalty] would remain the same even if it turned out that they were mistaken about deterrence”); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 *Penn. L. Rev.* 1291, 1305–11 (2003) (using empirical evidence to verify

have argued that the influence social meanings exert on the acceptance of such claims makes it a mistake to assume that simply bombarding people with empirical data will make them change their minds on these issues. It turns out, though, that I was making the same mistake when I assumed that all I had to do to convince people that shame would, or at least might, work was to point out how flimsy and self-contradictory the empirical arguments to the contrary were.

I was also making some related mistakes about the expressive political economy of imprisonment. Again, my analysis of the political acceptability of imprisonment was too flat. An immensely rich and ambiguous institution, imprisonment not only condemns, but condemns in a multiplicity of registers that make it simultaneously agreeable to persons of diverse cultural outlooks: hierarchists can see it as supplying a delicious form of debasement for those who resist their proper place in the social order; communitarians, a fitting gesture of banishment for those who wrongfully renounce social obligation; individualists, a reciprocal deprivation of liberty for those who fail to respect the liberty of others; and egalitarians, a uniquely democratic metric of punishment for persons who enjoy value by virtue of their capacity for autonomy. Neither the ascendancy of imprisonment nor its stubborn persistence can be understood without an appreciation of the political advantages it has enjoyed over rival forms of punishment by virtue of its expressive overdetermination.

Indeed, this feature of imprisonment explains better than status quo bias<sup>93</sup> why the pragmatic defense of shame proved so impotent. I had assumed that aversion to imprisonment would of its own force drive progressive supporters of alternative sanctions to embrace shame as a lesser evil. But it was a mistake to think that imprisonment really would be seen as more evil than shame by those who are averse to degradation and illiberal moralizing in law. Hierarchists and communitarians understand that imprisonment degrades and moralizes; they like it for exactly that reason. But these features of imprisonment are essentially invisible to egalitarians and individualists, who by virtue of the expressive richness of imprisonment can tell them-

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the hypothesis that cultural attitudes impact individual beliefs regarding gun control).

93. See *supra* notes 31–35 and accompanying text.

selves that prison is really about something else—controlling dangerous persons, deterring harm, or even (the ultimate delusion) *reforming* offenders.

Social meanings guide political action, the Gusfield-Wildavsky theory suggests, both as ends in themselves and as forces that enter into their perception of the efficacy of legal institutions. It should come as no surprise that, put to a choice, egalitarians and individualists, as much as they disliked imprisonment, preferred it to shame, which confronted them inescapably with meanings assaultive of their preferred vision of the good society.

I have emphasized the potential for using techniques of expressive overdetermination to make welfare-enhancing reforms of law politically acceptable. But the story of the prison is one of malignant expressive overdetermination—the power of an expressively ambiguous institution to entrench itself despite its horrific costs, not just for efficiency but for human dignity as well.

#### **IV. The Constructive Ambiguity of Restorative Justice**

In *What Do Alternative Sanctions Mean?*, my explanation for the unpopularity of fines and community service was that an alternative sanction must condemn as clearly as imprisonment does. But the truth is that to be politically acceptable any alternative to imprisonment must condemn as *ambiguously* as imprisonment as well. I now want to identify a form of punishment that might well satisfy this criterion.

“Restorative justice” is a recent and conspicuous addition to the alternative-sanctions inventory. The conventional restorative justice program contemplates the diversion of a case from the criminal justice system to an informal mediation process involving the offender, the victim, and representatives of the community. Under the guidance of a professional facilitator, the participants negotiate an appropriate disposition, one that ordinarily includes some type of apology by the offender and an agreement on his part to furnish monetary or in-kind reparations to the victim. In addition, community representatives typically devise employment opportunities for the offender and

steer him or her into counseling or support groups (often faith-based ones).<sup>94</sup>

Implemented most systematically in Vermont and Minnesota,<sup>95</sup> restorative justice programs patterned on this model have reportedly been used widely on a local level in the United States.<sup>96</sup> Offenses diverted into such programs, moreover, include a variety of ones that might otherwise receive short terms of incarceration, including theft, burglary, drunk driving, domestic and stranger assaults, and minor sex offenses.<sup>97</sup>

Nevertheless, it would be premature to say that restorative justice has already established itself as a serious alternative to imprisonment. For it to do so, moreover, its proponents will not only have to solve various practical issues related to its administration. They will have to negotiate the *symbolic* constraints that have blocked adoption of so many of imprisonment's rivals as well. Indeed, because beliefs about the efficacy of a policy tend to conform to expressive evaluations of it, these two tasks go hand in hand.

So what does restorative justice mean? The answer, it turns out, depends on who you ask.

Restorative justice has historically been as much a social movement as a policy proposal. Its founders, many of whom were religiously affiliated, were motivated by their aversion to what they perceived to be the stigmatizing impact of criminal punishment, particularly incarceration, on offenders, and its fracturing effect on commu-

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<sup>94</sup> See generally Mark Umbreit, *Restorative Justice* in Encyclopedia of Crime and Justice 1334-35 (ed. Joshua Dressler, 2d ed. 2002).

<sup>95</sup> See Robert P. Mosteller, *New Dimensions of Sentencing Reform in the Twenty-First Century*, 82 Or. L. Rev. 1, 22 (2003).

<sup>96</sup> See Umbreit, *supra* note 94 at 1336 ("There are individual restorative justice programs in virtually every state. . ."); see also Leena Kurki, *Incorporating Restorative and Community Justice Into American Sentencing and Corrections*, Sentencing & Corrections: Issues for the 21<sup>st</sup> Century 4 (U.S. Dept. of Justice, Sept. 1999) (estimating "300 programs" in the United States jurisdictions).

<sup>97</sup> See, e.g., Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 Yale L.J. 85, 122 (2004); Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 Utah L. Rev. 413, 473-74.



nities.<sup>98</sup> For these individuals – who have continued to remain central to the promotion of restorative justice programs<sup>99</sup> – this sanction affirms a more conciliatory set of meanings. Whereas imprisonment seeks to reverse the symbolic dominance of the victim by the offender, restorative justice dispositions “promot[e] a healing response,”<sup>100</sup> first by creating an atmosphere of rapprochement, and then by initiating a process by which the offender can make the victim whole. Whereas imprisonment cleanses the community by stigmatizing the offender as a deviant and expelling him,<sup>101</sup> “restorative justice emphasizes the need to treat offenders with respect and to reintegrate them into the larger community.”<sup>102</sup>

But if these are the meanings that inspired the restorative justice movement, they don’t seem to be the ones that account for its growing popularity. Many members of the public apparently approve of restorative justice because they see it as *accentuating*, not muting, stigma. Taking on the trapping of a degradation ritual,<sup>103</sup> restorative justice proceedings enable victims to “‘face down’ their offenders” in front of a supportive audience, “inflicting a measure of humiliation on them that responds to the humiliation they themselves felt as victims.”<sup>104</sup>

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<sup>98</sup> See Brenda Sims Blackwell & Clark D. Cunningham, *Taking The Punishment out of the Process: From Substantive Criminal Justice Through Procedural Justice to Restorative Justice*, 67 L. & Contemp. Probs. 68 (2004).

<sup>99</sup> See, e.g., United States Conference of Catholic Bishops, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* (2000), available at <http://www.usccb.org/sdwp/criminal.htm> (“A Catholic approach leads us to encourage models of restorative justice that seek to address crime in terms of the harm done to victims and communities, not simply as a violation of law.”). See generally Mark S. Umbreit & Jean Greenwood, *National Survey of Victim Offender Programs in the U.S.* 4 (St. Paul, Minnesota: Center for Restorative Justice & Peacemaking, University of Minnesota, 1998) (22% of U.S. restorative justice programs supervised by church groups).

<sup>100</sup> See Umbreit, *supra* note at 1334.

<sup>101</sup> See Martha Grace Duncan, *Romantic Outlaws, Beloved Prisons: the Unconscious Meanings of Crime and Punishment* 122, 146 (1996).

<sup>102</sup> See Umbreit, *supra* note 94 at 1334

<sup>103</sup> See Garfinkel, *supra* note 94.

<sup>104</sup> Kenworthy Bilz & John M. Darley, *What's Wrong with Harmless Theories of Pun-*

Many members of the public also seem to attach a different significance to the role of the community in restorative justice proceedings. Whereas members of the restorative justice movement construe such participation as “recogniz[ing] a community responsibility for conditions that contribute to offender behavior,”<sup>105</sup> many members of the public apparently value it as fortifying the resolve of state actors to punish. This sensibility is reflected in the association of restorative justice with “victim impact” statements and other elements of the “victims rights” movement,<sup>106</sup> the leaders of which indict the criminal justice system as unduly solicitous of offenders’insufficiently concerned with the stake of victims in avenging their mistreatment.<sup>107</sup>

The cacophonous mix of themes in restorative-justice advocacy disturbs many commentators. Some supportive theorists, for example, fret that restorative justice has been tarnished by popular retributivist values, which, in their view, should be explicitly repudiated by implementing legislation.<sup>108</sup> Other theorists view restorative justice’s commingling of rehabilitative, retributive, and instrumental elements as theoretically “incoherent” and oppose it for that reason.<sup>109</sup>

But the Gusfield-Wildavsky theory of expressive political economy puts this matter in a very different light. What the commentators see as incoherence, this theory recognizes as expressive overdetermination. Precisely because restorative justice bears a plurality of mean-

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*ishment*, 79 Chi.-Kent L. Rev. 1215, 1250 (2004).

<sup>105</sup> See Umbreit, *supra* note 94 at 1334.

<sup>106</sup> See Gordon Bazemore, *Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration*, 41 American Behavioral Scientist 768, 774 (1998).

<sup>107</sup> See George Fletcher, *With Justice for Some* (1995); Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 Stan. L. Rev. 937, 946-54, 990-95 (1985).

<sup>108</sup> See, e.g., John Braithwaite & Heather Strang, *Connecting Philosophy and Practice*, in *Restorative Justice: Philosophy to Practice* 204 (advocating “legislation” that would constrain courts to invalidate restorative justice dispositions that that involve “humiliation or degradation” through public shaming).

<sup>109</sup> See generally Andrew von Hirsch, Andrew Ashworth & Clifford Shearing, *Specifying Aims and Limits for Restorative Justice: A “Making Amends” Model?*, in *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* 22-23 (Andrew von Hirsch, Julian V. Roberts, Anthony Bottoms, Kent Roach & Mara Schiff, eds., 2003) (identifying numerous theoretical deficiencies including “[m]ultiple and unclear goals” and “[d]angling standards for evaluation”).

ings, it has the potential to satisfy the expectations of citizens holding a diversity of cultural persuasions.

All such persons can see restorative justice as condemning, but none of them is obliged to see it as doing so in a way that does violence to their preferred vision of a good society. Egalitarians, who balk at shaming sanctions precisely because they make a public spectacle of status degradation, can instead attend to restorative justice's founding aspiration to reintegrate offenders in a way that affirms their dignity. Restorative justice is also amenable to meanings that gratify communitarians: those of a more egalitarian bent, can take satisfaction in its signification of the community's responsibility for ameliorating the conditions that impel individuals toward criminality, those of a more hierarchical one, the vivid spectacle of public denunciation associated with the restorative justice mediation sessions.

This feature of restorative justice shows that it in fact operates as a *shaming* penalty, at least for those citizens who attach positive value to status degradation in punishment. Among those, of course, are hierarchists, who can focus on the function of restorative justice as degradation ceremonies.

Individualists, too, can form an understanding of the condemning retort of restorative justice that fits their core commitments. By disclaiming the objective of branding offenders as deviants, the founding vision assures individualists that restorative justice, unlike shaming, is not designed to promote a suffocating ethos of conformity to communal norms. In addition, the emphasis on reparations appeals to the individualists' sensibility that the condemnatory import of punishments should affirm the obligation of wrongdoers to take responsibility for their actions.

This account of the expressive political economy of restorative justice assumes that symbolic politics need not be a zero-sum game. The expressive-overdetermination stories I've already canvassed – including the happy ones of abortion compromise in France and the implementation of tradable emissions in the United States, as well as the unhappy one of the endurance of imprisonment – confirm that this is so. Because most citizens aren't expressive zealots, they don't insist that a law that affirms their cultural vision also denigrate the vision of those who hold competing worldviews.

But there is no inexorable necessity in expressive overdetermination either. Laws that could bear meanings available to all can be rendered incapable of doing so by forms of expressive discourse that are uncompromisingly sectarian. It was exactly the partisan insistence of intellectual elites that welfare law not merely affirm egalitarian values but also *renounce* hierarchical ones, Teles argues, that spoiled the historic consensus in favor of social welfare laws in the United States.

The same could easily happen to restorative justice. Indeed, the most obvious threat to its expressive overdetermination is the insistence of criminal justice commentators that restorative justice be made theoretically pure. Conspicuous theoretical defenders bent on ridding restorative justice of any denunciatory or retributive element, in particular, risk vitiating an important component of restorative justice's political capital. If they succeed in making restorative justice an unambiguous symbol of the law's refusal to stigmatize those who defy collective norms – in sum *to shame* criminal offenders – they will saddle restorative justice with a mirror image of the expressive univocality that has hobbled shaming sanctions.

Those who care most about denying their cultural adversaries access to the expressive capital of the law might cheer such a result. But because only an alternative sanction that bears meanings rich enough to be accepted by all cultural groups can hope to break the stranglehold of imprisonment, no one opposed the waste and brutality of mass incarceration will.

## V. Conclusion

My goal in this piece was to remedy a mistake in *What Do Alternative Sanctions Mean?* The central claim of that piece – that politically acceptable alternatives to imprisonment must express condemnation – was not wrong, but it was incomplete. A fuller account of the expressive political economy of law, one founded on the writings of Gusfield and Wildavsky, shows that citizens expect punishment to condemn in a way that affirms the values that animate their preferred way of life. The endurance of imprisonment as a punishment reflects its power to satisfy this demand for citizens of diverse cultural persuasions – hierarchical as well as egalitarian, individualistic as well as communitarian – at the same time. The stunted advance of shame derives, at least in part, from its inescapable expressive partisanship.

I have suggested that restorative justice has the potential to do better precisely because of its expressive ambiguity. By promiscuously combining degradation with rehabilitation, communal responsibility for ameliorating crime with individual accountability for criminal wrongdoing, restorative justice supplies meanings accessible to citizens of all cultural persuasions. The vice that many commentators see in this sanction – its supposed theoretical incoherence – turns out to be its greatest political strength.

It is said we grow wiser as we grow older. But to reduce our society's excessive reliance on imprisonment, the proponents of alternative sanctions will also have to grow more expressively sophisticated and pluralistic too.