

## Against Shaming: Preserving Dignity, Decency, and a Moral-Educative Mission in American Schools

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## ARTICLES

### AGAINST SHAMING: PRESERVING DIGNITY, DECENCY, AND A MORAL-EDUCATIVE MISSION IN AMERICAN SCHOOLS

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*“Nam ego illum periisse duco, cui quidem perit pudor.”*<sup>1</sup>

#### INTRODUCTION

In Clayton County, Georgia, D.H., a twelve-year-old seventh grader, was suspected of possessing marijuana and was then subjected to an invasively shaming strip search.<sup>2</sup> The school’s assistant principal conducted the strip search in the view of the school resource officer and three of D.H.’s peers.<sup>3</sup> When stripped to his underwear, D.H. requested that the search continue in the restroom; this request was denied.<sup>4</sup> A reviewing court determined that the school administrator then instructed D.H. to

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<sup>1</sup> TITUS MACCIUS PLAUTUS, BACCHIDES act 3, sc. 3, line 80.

<sup>2</sup> See Dawson *ex rel.* D.H. v. Clayton Cty. Sch. Dist., 830 F.3d 1306, 1308, 1312 (11th Cir. 2016). In holding the search to be unconstitutionally excessive, the Eleventh Circuit emphasized its shaming nature: “We have no doubt that a fully nude strip search in the presence of one’s peers would exponentially intensify the ‘embarrass[ment], fright[], and humiliati[on]’ a student experiences when undergoing a strip search.” *Id.* at 1317 (alteration in original) (quoting Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 374–75 (2009)).

<sup>3</sup> See *id.* at 1311–12 (describing the witnesses to the strip search).

<sup>4</sup> See *id.* at 1312.

pull his underpants down to his ankles and stand completely nude while the search was completed.<sup>5</sup> The search yielded no marijuana or other illegal contraband.<sup>6</sup>

In Smithfield, Utah, a high school football player, Brian Seamons, was brutally assaulted by four of his teammates who bound him naked to a locker room towel rack with athletic tape and then displayed him to a former girlfriend.<sup>7</sup> After reporting the hazing assault to school authorities and the police, Brian was informed by his coach that the assailants would not face any disciplinary action.<sup>8</sup> Instead, Brian was disciplined by the coach, who told him that he would be required to apologize to the team for reporting the assault in order to continue to play football.<sup>9</sup> When Brian refused to comply with this shaming sanction, he was removed from the team.<sup>10</sup>

On her third day at a Clay County, Florida high school, fifteen-year-old Miranda Larkin wore a skirt that was less than one inch shorter than the dress code permitted.<sup>11</sup> Students who violate the dress code of that high school are provided three options: attending in-school suspension while wearing the noncompliant clothing, arranging for someone to bring them a new set of compliant clothes, or wearing the school's dress code "shame suit."<sup>12</sup> Miranda maintains she was only given the last option.<sup>13</sup> The school-mandated outfit was an ill-fitting, neon yellow T-shirt and a pair of scarlet red sweatpants, with the words "DRESS CODE VIOLATION" emblazoned across the chest

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<sup>5</sup> See *id.* (making factual assumptions in the light most favorable to the student).

<sup>6</sup> *Id.*

<sup>7</sup> See *Seamons v. Snow*, 206 F.3d 1021, 1023 (10th Cir. 2000) (describing the incident).

<sup>8</sup> *Id.*

<sup>9</sup> See *id.* at 1024.

<sup>10</sup> *Id.*

<sup>11</sup> See Gail Sullivan, *New Kid at School Forced To Wear 'Shame Suit' for Dress Code Violation*, WASH. POST (Sept. 5, 2014), [https://www.washingtonpost.com/news/morning-mix/wp/2014/09/05/new-kid-at-school-forced-to-wear-shame-suit-for-dress-code-violation/?utm\\_term=.8843d9a98e53](https://www.washingtonpost.com/news/morning-mix/wp/2014/09/05/new-kid-at-school-forced-to-wear-shame-suit-for-dress-code-violation/?utm_term=.8843d9a98e53).

<sup>12</sup> See Eliza Murphy, *Student Forced To Wear 'Shame Suit' for Dress Code Violation*, ABC NEWS (Sept. 4, 2014, 5:43 PM), <http://abcnews.go.com/US/student-forced-wear-shame-suit-dress-code-violation/story?id=25252041>.

<sup>13</sup> *Id.*

of the shirt and the leg of the pants.<sup>14</sup> After changing into the outfit, Miranda broke out in hives.<sup>15</sup> In reference to the punishment, Miranda claims “[t]he school . . . said this is to embarrass you’ . . . . ‘It’s supposed to embarrass you so you don’t do it again.’”<sup>16</sup>

In response to six-year-old Kai Shappley’s request to the Pearland Independent School District in Texas to use the girls’ restroom as a reflection of her gender identity, she was informed that she could only use the boys’ restroom or the nurse’s restroom.<sup>17</sup> As a result of this “othering” via either mandated use of a restroom that did not reflect her gender identity or of a segregated restroom that other children did not use, Kai felt stigmatized.<sup>18</sup> Subsequently, this shaming was intensified when Pearland Independent School District Superintendent Dr. John Kelly provided the following statement to the local newspaper that criticized Obama Administration guidance directives that Title IX generally requires schools to treat transgender students according to their gender identity:

[T]his is one more example of unconstitutional interference and social engineering by the federal government . . . . What’s next? Legalizing pedophilia and polygamy? Unless we return to the Biblical basis on which our nation’s laws were established, we are in serious trouble—and cannot expect God’s continued favor.<sup>19</sup>

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<sup>14</sup> Sullivan, *supra* note 11 (describing the shame suit). The parallels between the shame suit and Nathaniel Hawthorne’s *Scarlet Letter* are obvious. See NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 53 (Barnes & Noble Books 1993) (1892) (“On the breast of her gown, in fine red cloth, surrounded with an elaborate embroidery and fantastic flourishes of gold thread, appeared the letter A.”).

<sup>15</sup> See Sullivan, *supra* note 11.

<sup>16</sup> Madeline Roth, *This Girl Was Forced To Wear a ‘Shame Suit’ on Her Third Day at a New School*, MTV NEWS (Sept. 6, 2014), <http://www.mtv.com/news/1922772/miranda-larkin-shame-suit-dress-code-violation>.

<sup>17</sup> See Emily McCombs, *Christian, Conservative and Parenting a Transgender Child in Texas*, HUFFINGTON POST (Mar. 2, 2017, 5:18 PM), [http://www.huffingtonpost.com/entry/kimberly-and-kai-shappley-transgender-child-bathroom-rights\\_us\\_58b5b5b6e4b060480e0c4393?39rg4x6r&](http://www.huffingtonpost.com/entry/kimberly-and-kai-shappley-transgender-child-bathroom-rights_us_58b5b5b6e4b060480e0c4393?39rg4x6r&).

<sup>18</sup> See *id.*

<sup>19</sup> Jim Molony, *Districts Unfazed by ‘Bathroom Guidance’*, HOUS. CHRON. (May 17, 2016, 3:53 AM), <http://www.chron.com/neighborhood/pearland/news/article/Districts-unfazed-by-bathroom-guidance-9770204.php>.

Throughout America, public schoolchildren are being disciplined by shaming for alleged violations of school rules and community norms.<sup>20</sup> These disciplinary measures penalize student conduct by degrading the student in an intentionally public way and by exposing the child to condemnation from the school community.<sup>21</sup> School-shaming punishments include all forms of “scolding, rebuking, ridiculing, scorning, avoiding, and shunning . . . .”<sup>22</sup> Specific examples of these shaming sanctions are strip searches, forced apologies, dress code violation punishments, and transgender student restroom access denials.<sup>23</sup> Despite their divergent forms, these shaming punishments share a common disintegrative variable: the stigmatization of the student by fellow students, teachers, and administrators.<sup>24</sup>

Consequently, educational shaming is a burgeoning issue that requires scholarly and policy attention.<sup>25</sup> While there has been an extensive amount of scholarly discourse regarding the propriety of shaming as a criminal sanction,<sup>26</sup> there has been almost no critical discussion about the validity of shaming punishments as disciplinary measures in schools.<sup>27</sup> This Article

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<sup>20</sup> See Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI.-KENT L. REV. 1181, 1183 (2005) (discussing how norms are compelled through shaming); Amy L. Wax, *Caring Enough: Sex Roles, Work and Taxing Women*, 44 VILL. L. REV. 495, 500 (1999) (same); Kerrin Wolf, Mary Kate Kalinich & Susan L. DeJarnatt, *Charting School Discipline*, 48 URB. LAW. 1, 40–41 (2016) (discussing examples of K-12 school-shaming punishments).

<sup>21</sup> See Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2162–63 (2001) [hereinafter Markel, *Shaming Punishments*] (noting the public nature and public participation elements of shaming punishments).

<sup>22</sup> Elizabeth L. Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 DEPAUL L. REV. 1, 8 (2013).

<sup>23</sup> See, e.g., *supra* notes 1–19 and accompanying text.

<sup>24</sup> See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 55 (1989) (defining disintegrative shaming as an intense condemnation of the punished that creates community division and a class of outcasts).

<sup>25</sup> See Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 NEB. L. REV. 197, 266 n.304 (2008) (noting how shaming is not uniquely a criminal law issue).

<sup>26</sup> See Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 993–94 (2009) (discussing how an increased “recognition of the importance of social controls” has contributed to the expansive scholarly literature regarding criminal shaming).

<sup>27</sup> See Amanda Harmon Cooley, *An Efficacy Examination and Constitutional Critique of School Shaming*, 79 OHIO ST. L.J. (forthcoming 2018) (discussing the paucity of legal scholarship on educational shaming).

is designed to initiate this needed dialogue by arguing for the cessation of school shaming through a legal theory lenses. To accomplish this objective, Part I of this Article provides a definitional foundation of shaming punishments.<sup>28</sup> Part II of the Article presents the normative rejection of school shaming, which is grounded in both legal punishment theory and educational theory.<sup>29</sup> It provides a philosophical extrapolation of the rejection of shaming sanctions in the criminal law context to the education law context, highlighting the analytical division between the perspectives on criminal shaming held by Dan Kahan, Martha Nussbaum, Toni Massaro, Dan Markel, Stephen Garvey, Eric Posner, and James Whitman.<sup>30</sup> That Part advocates for the termination of school shaming based on the tenets of dignity, decency, and moral-educative mission that have been at the core of critiques of shaming punishments in criminal law and that are central pedagogical goals and civic aims of the American K-12 educational system.<sup>31</sup> Finally, Part II concludes this argument by calling for a rejection of school-shaming punishments in order to make schools communities of respect, rather than communities of stigma.<sup>32</sup> A liberal democratic society demands this preservation of dignity and decency be part of the moral-educative mission of its public schools for children.

#### I. A FOUNDATIONAL DEFINITION OF SHAMING

All punishments express condemnation of a behavior through the imposition of a negative experience.<sup>33</sup> However, state-sponsored shaming punishments are punishments that are targeted to humiliate and degrade the offender with a public,

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<sup>28</sup> See *infra* Part I.

<sup>29</sup> See *infra* Part II.B.

<sup>30</sup> See *infra* Part II.C.

<sup>31</sup> See Christine N. Coughlin et al., *See One, Do One, Teach One: Dissecting the Use of Medical Education's Signature Pedagogy in the Law School Curriculum*, 26 GA. ST. U. L. REV. 361, 393–94 (2010) (arguing student shaming does not result in positive learning outcomes); Saira Mohamed, *Shame in the Security Council*, 90 WASH. U. L. REV. 1191, 1204 (2013) (discussing how shaming invokes equivalent moral and legal obligations).

<sup>32</sup> See *infra* Conclusion.

<sup>33</sup> See John Bronsteen et al., *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463, 1469 (2010) (outlining the communicative and experiential aspects of punishment).

expressive communication that the individual is inferior.<sup>34</sup> Consequently, shaming is inherently stigmatic.<sup>35</sup> The term “stigma” originates from the Greek practice of cutting or burning symbols into the body, which was designed to expose the unsavory moral status of the inflicted individual.<sup>36</sup> These rituals designated the individual as “polluted, to be avoided, especially in public places.”<sup>37</sup> Erving Goffman analyzed this concept of stigma in the context of shaming as a sociological phenomenon that subordinates and dehumanizes people.<sup>38</sup>

This shaming subordination of the punished individual often results in pariah status.<sup>39</sup> As Daniel Farber and Suzanna Sherry detailed, “To be a pariah is to be shunned and isolated, to be treated as if one had a loathsome and contagious disease.”<sup>40</sup> This idea that outcasts are inferior and that “contact with them is dangerous and degrading”<sup>41</sup> dovetails with Professor Goffman’s perspective that stigmatized people are deemed to be and subsequently viewed as subhuman.<sup>42</sup> State imposition of pariahdom and its resulting dehumanization of the shamed individual are “profoundly subversive of the ideas of equality and dignity on which liberal society is based.”<sup>43</sup>

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<sup>34</sup> Markel, *Shaming Punishments*, *supra* note 21, at 2162–63 (defining the essential nature of shaming punishments).

<sup>35</sup> See David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right To Clear One’s Name*, 2009 BYU L. REV. 1277, 1310 (connecting shaming and stigmatization).

<sup>36</sup> See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 1* (1963).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 5.

<sup>39</sup> See John Braithwaite, *Holism, Justice, and Atonement*, 2003 UTAH L. REV. 389, 409 (implying that non-restorative shaming results in stigmatization and pariah status).

<sup>40</sup> Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 266 (1996).

<sup>41</sup> *Id.*

<sup>42</sup> GOFFMAN, *supra* note 36, at 5.

<sup>43</sup> MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 232 (2004).

Despite its marked subversion of democratic ideals, shaming has deep roots in global and American history.<sup>44</sup> Over the last thirty years, shaming has experienced a modern resurgence in the criminal law context as an alternative or a corollary punishment to fines and imprisonment for convicted criminal defendants.<sup>45</sup> Analogously, many public schools now use shaming punishments as alternative or corollary punishments to corporal or exclusionary punishments.<sup>46</sup> School shaming has become increasingly punitive, which is reflective of a recent, “massive and troubling intensification of American punitiveness.”<sup>47</sup> This disciplinary approach that injects the punitive constructs of criminal alternative sanctions into school environments is a malignancy that needs intense critical examination and, ultimately, excision in order to safeguard American schoolchildren and the core tenets of the American educational system.

## II. A PHILOSOPHICAL REJECTION OF SCHOOL SHAMING

A philosophical critique of school shaming forms a solid foundation for the rejection of these sanctions in public schools. This rejection is premised upon an extrapolation of the law and theory rejection of shaming punishments in criminal law onto school law.<sup>48</sup> This comparison utilizes the bases of dignity, decency, and a moral-educative mission as foundational shared criticisms of criminal shaming, as these core principles also

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<sup>44</sup> See Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 664 (discussing how shaming can be traced back to biblical times); Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 783 (1999) (noting how American colonists readily used shaming punishments); W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 1977 (2001) (discussing historical and contemporaneous examples of state-imposed shaming).

<sup>45</sup> See, e.g., Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1884–85 (1991) [hereinafter Massaro, *Shame, Culture*] (“The revival of [criminal] shaming springs from profound and widespread dissatisfaction with existing methods of punishment.”); James Q. Whitman, *Making Happy Punishers*, 118 HARV. L. REV. 2698, 2716 (2005) [hereinafter Whitman, *Making Happy Punishers*] (reviewing NUSSBAUM, *supra* note 43).

<sup>46</sup> See, e.g., *supra* notes 1–24 and accompanying text (detailing a variety of school-shaming punishments).

<sup>47</sup> Whitman, *Making Happy Punishers*, *supra* note 45, at 2716–17.

<sup>48</sup> See *infra* Part II.A.



constitute focal points of the pedagogical goals and civic aims of education of children in American schools.<sup>49</sup> Because school-shaming punishments contradict these foundational tenets of dignity, decency, and an educative mission, analogical connections to shaming punishments imposed in the criminal justice system support a valid framework to attack the imposition of shaming of schoolchildren.<sup>50</sup> The normative goals of this Article are to use this framework (1) to generate the type of robust dialogue that has been present in a philosophical rejection of criminal shaming punishments for educational shaming punishments and (2) to argue that the view of scholars who advocate for the cessation of criminal shaming punishments is the proper view in the education law context. Consequently, this argument will conclude that disintegrative school-shaming punishments are not an appropriate tool for state discipline and control of schoolchildren.<sup>51</sup>

A. *The Extrapolation of Critical Analysis of Criminal Shaming to the Critical Analysis of School Shaming*

The parallels between state control in the criminal justice system and in K-12 schools justify an extrapolation of the rejection of shaming sanctions in criminal law to education law.<sup>52</sup> A foundational analogue between educational shaming punishments and criminal shaming punishments has been their development as an alternative to exclusionary and corporal punishments.<sup>53</sup> The critical debate on shaming in criminal law

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<sup>49</sup> See *infra* Part II.B.

<sup>50</sup> The application of such an analogical foundation is not without precedent in other areas of legal scholarship. See, e.g., Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1037 (2016) (using the criminal shaming debate as a foundational framework to discuss shaming in cyberlaw).

<sup>51</sup> It is offered in a similar vein as Professor Dan Markel's critiques of criminal shaming, as "a project in philosophy, law, and ultimately, social hope." Markel, *Shaming Punishments*, *supra* note 21, at 2241.

<sup>52</sup> See, e.g., *Mashburn v. Yamhill County*, 698 F. Supp. 2d 1233, 1238 (D. Or. 2010) (discussing the "unique concerns of children and of the government, which have analogies in both prisons and schools . . ."); Barbara Fedders, *The Anti-Pipeline Collaborative*, 51 WAKE FOREST L. REV. 565, 569 (2016) (arguing school discipline "incorporates the retributive underpinnings of criminal law").

<sup>53</sup> See, e.g., Paul H. Robinson, *Natural Law and Lawlessness: Modern Lessons from Pirates, Lepers, Eskimos, and Survivors*, 2013 U. ILL. L. REV. 433, 486 (discussing the imposition of shaming penalties as an alternative to incarceration);

was spurred by the pursuit for alternative or corollary punishments to incarceration,<sup>54</sup> which excludes individuals from participation in free society.<sup>55</sup> Likewise, the application of this philosophical debate to educational shaming punishments serves as the jumping-off point of evaluating the propriety of shaming punishments as alternative or corollary punishments to suspension or expulsion from school, which exclude students from the school community.<sup>56</sup>

Additionally, the rejection of shaming in criminal law can be translated to a corresponding rejection of shaming in education law, because as a baseline, children in schools should not be subject to the types of shaming punishments inflicted by adult and institutional state actors on adult criminal offenders and incarcerated prisoners.<sup>57</sup> The United States Supreme Court in *New Jersey v. T.L.O.* stated that it was “not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment,” implying that students should have at least more rights than those of prisoners in the context of government searches.<sup>58</sup> This notion aligns with other Supreme Court articulations that the risk of harm is greater for children than adults in settings of possible constitutional criminal

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Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1860 (2005) (articulating the view that criminal shaming is innovative compared to other forms of criminal punishment).

<sup>54</sup> See, e.g., Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 UC IRVINE L. REV. 297, 311 (2013) (discussing the “scholars who have argued that certain types of shaming might be more effective, more just, and less costly than incarceration”); Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1557 (2002) (discussing the alternatives—including shaming—states have used instead of incarceration for criminal violations).

<sup>55</sup> See *Ingraham v. Wright*, 430 U.S. 651, 669 (1977) (“The prisoner’s . . . incarceration deprives [her or] him of the freedom ‘to be with family and friends and to form the other enduring attachments of normal life.’”) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)).

<sup>56</sup> See *supra* notes 1–24 and accompanying text (detailing a variety of school-shaming punishments).

<sup>57</sup> See NUSSBAUM, *supra* note 43, at 211 (noting that because “children are in general more labile than adults, . . . special care needs to be taken over the use of shame in their case”); Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71, 105 (2010) (discussing the dangerous consequences of judicial equations of constitutional protections between schoolchildren and adults and advocating for the termination of such equations).

<sup>58</sup> 469 U.S. 325, 338–39 (1985).

procedure violations.<sup>59</sup> Therefore, if the correct view of criminal shaming sanctions is that they are not appropriate disciplinary mechanisms for adults in the criminal justice system, then that view is only magnified in supporting the end to their use on children in K-12 schools.

*B. The Philosophical Rejection of Shaming in Criminal Law*

In 1940, Columbia Law Professor Herbert Wechsler,<sup>60</sup> who initiated and framed the American Law Institute's Model Penal Code,<sup>61</sup> and his colleague Jerome Michael wrote in their influential criminal law casebook that "the desire for revenge, the belief that retributive punishment is just, and the feeling that examples must be made of those guilty of shocking crimes are to a very considerable degree entrenched in the general population."<sup>62</sup> The debate over the propriety of retribution's role in American criminal law and theory has continued since the publication of the Michael-Wechsler book,<sup>63</sup> which was one of the first to incorporate social values into legal practice.<sup>64</sup> Due to increasing academic and political support of principles of

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<sup>59</sup> See, e.g., *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 273 (2011) (discussing how the risks of false confessions in custodial interrogations are "more troubling" and "more acute" for juvenile suspects as compared to adult suspects based on the differences in maturity and responsibility between children and adults).

<sup>60</sup> See Ruth Bader Ginsburg, *In Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1359, 1359 (2000) (discussing Professor Wechsler's career).

<sup>61</sup> See George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CALIF. L. REV. 687, 688 (2000) (outlining the origins of the Model Penal Code).

<sup>62</sup> JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES* 16 (1940).

<sup>63</sup> See Sol Rubin, *The Law Schools and the Law of Sentencing and Correctional Treatment*, 43 TEX. L. REV. 332, 337-38 (1965) (discussing the groundbreaking nature of the casebook); see also Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 WIS. L. REV. 1017, 1018 (denoting criticism of the American Law Institute's 2007 revisions regarding retribution).

<sup>64</sup> See Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 245 (1943) (discussing the casebook's paradigmatic nature with its explicit organization of social values as an application of legal practice).

retribution and an environment of popular punitiveness,<sup>65</sup> there has been a renaissance of shaming punishments in criminal law, which has enlivened the debate in the contemporary context.<sup>66</sup>

This spirited dialogue regarding the validity of criminal shaming punishments was largely initiated by Dan Kahan in his 1996 article, *What Do Alternative Sanctions Mean?*<sup>67</sup> In this article, Professor Kahan advocated for shaming in criminal law as a better alternative to exclusionary imprisonment,<sup>68</sup> rejecting along the way the “barely conceivable” alternative of corporal punishment<sup>69</sup> and emphasizing the necessity of connections of criminal punishments with social norms.<sup>70</sup> Kahan’s seminal article endorses shaming punishments as they effectively “express appropriate moral condemnation,”<sup>71</sup> they “denounce the wrongdoer and his [or her] conduct as contrary to shared moral norms,”<sup>72</sup> and they “ritualistically separate the wrongdoer from those who subscribe to such norms.”<sup>73</sup> However, Professor Kahan acknowledges the stigmatizing harm of shaming penalties,<sup>74</sup> their cruel nature,<sup>75</sup> and their potential to gain hierarchical meaning when focused on traditionally socially marginalized groups of people.<sup>76</sup> Still, under his criminal punishment theory calculus, Kahan’s assessment concludes that shaming sanctions are a valid form of criminal discipline.<sup>77</sup>

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<sup>65</sup> See Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1188 (2006) (quoting Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217, 219 (2001)) (“Cruelty and pain, long treated as inappropriate ends of public policy, are steadily making inroads into the discourse and practice of punishment.”).

<sup>66</sup> See Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737, 750 (2000) (discussing the resurgence of criminal shaming).

<sup>67</sup> Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594 (1996) [hereinafter Kahan, *Alternative Sanctions*].

<sup>68</sup> See *id.* at 652 (identifying shaming penalties as a feasible alternative criminal sanction).

<sup>69</sup> *Id.* at 591.

<sup>70</sup> See *id.* at 593.

<sup>71</sup> *Id.* at 635.

<sup>72</sup> *Id.* at 636.

<sup>73</sup> *Id.*

<sup>74</sup> See *id.* at 638.

<sup>75</sup> See *id.* at 646.

<sup>76</sup> See *id.* at 647–48.

<sup>77</sup> See *id.* at 652.

Professor Kahan's article set off a critical firestorm regarding the propriety of criminal shaming punishments.<sup>78</sup> The critiques of criminal shaming draw from a diverse range of theoretical justifications.<sup>79</sup> Broadly construed, these critiques can be situated in ideals of dignity, decency, and moral-educative mission.<sup>80</sup> The lack of fulfillment of each of these ideals undercuts the legitimacy of the state's use of shaming punishments for adult criminal offenders.<sup>81</sup>

### 1. Dignity

One major critique of criminal shaming punishments is that their inherent stigma menaces and eradicates individual dignity.<sup>82</sup> Martha Nussbaum and Toni Massaro are leading opponents of criminal shaming based on the perspective that it is offensive to human dignity.<sup>83</sup> Under Professor Nussbaum's view, "law should protect the equal dignity of all citizens, both by devising ways in which those already stigmatized as different can enjoy lives of greater dignity and by refusing to make law a partner to the social infliction of shame."<sup>84</sup> However, as Toni Massaro argues, "[s]tate-enforced shaming authorizes public officials to search for and destroy or damage an offender's dignity."<sup>85</sup> Professor Nussbaum emphasizes how shaming punishments degrade the civic democratic ideals of dignity and

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<sup>78</sup> See Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2079 (2006) [hereinafter Kahan, *Shaming Sanctions*] (admitting that his previous article "provoked a torrent of criticism"); Markel, *Shaming Punishments*, *supra* note 21, at 2162 (discussing the intense critical controversy regarding criminal shaming).

<sup>79</sup> See NUSSBAUM, *supra* note 43, at 4 ("Nor do opponents of shaming penalties agree about what the best rationale for opposition is.").

<sup>80</sup> See *infra* Part II.B.1–3.

<sup>81</sup> See, e.g., Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1764–71 (1999) (discussing the lack of legitimacy of criminal shaming punishments on the bases of dignity, decency, and moral-educative mission).

<sup>82</sup> See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 739 (1998) [hereinafter Garvey, *Shaming Punishments*] (discussing the menacing effect on dignity of criminal shaming punishments).

<sup>83</sup> See, e.g., NUSSBAUM, *supra* note 43, at 230 (emphasizing the invalidity of criminal shaming due to dignitary concerns); Massaro, *Shame, Culture*, *supra* note 45, at 1943 (rejecting criminal shaming because it offends human dignity).

<sup>84</sup> NUSSBAUM, *supra* note 43, at 174.

<sup>85</sup> Massaro, *Shame, Culture*, *supra* note 45, at 1943.

equality<sup>86</sup> and, echoing Professor Goffman,<sup>87</sup> how this degradation results in the denigration of the shamed individual's basic humanity.<sup>88</sup>

Another dignity-based critique of criminal shaming concentrates on the harmful permanence of stripping away dignity. For example, Professor Markel's critical rejection of shaming punishments focuses on their significant reputational damage to individual dignity, likening them to "reputational homicide"<sup>89</sup> and criticizing Professor Kahan's advocacy of a "punishment that effectively ends the life of the offender by taking away all his [or her] dignity."<sup>90</sup> Also echoing Professor Goffman, Professor Markel's definition of shaming punishments displays their inherently negative nature: "When one shames another person, the goal is to degrade the object of shame, to place him [or her] lower in the chain of being, to dehumanize him [or her],"<sup>91</sup> and "to express to the public that this offender is a bad person."<sup>92</sup> Professor Markel's scholarship highlights how shaming punishments "make[] the offender an instrument of the state; [she or] he is being used (even if indirectly) for display purposes rather than being treated as someone possessing the basic dignity that attaches to a responsible moral agent."<sup>93</sup> Professor Nussbaum also spends considerable time describing the harm of stigmatizing shaming punishments, which includes legal and civil disabilities, long-term individual collateral consequences, and the permanent pain from the loss of dignity that occurs intrinsically with shaming.<sup>94</sup> In sum, these punishments destroy the potential for the punished individual to ever again be recognized as having basic human dignity.<sup>95</sup>

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<sup>86</sup> See NUSSBAUM, *supra* note 43, at 226.

<sup>87</sup> See *supra* note 38 and accompanying text.

<sup>88</sup> See NUSSBAUM, *supra* note 43, at 232.

<sup>89</sup> Markel, *Shaming Punishments*, *supra* note 21, at 2220.

<sup>90</sup> *Id.* at 2174 n.84.

<sup>91</sup> *Id.* at 2179.

<sup>92</sup> Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385, 1390 n.25 (2007) [hereinafter Markel, *Wrong Turns*].

<sup>93</sup> Markel, *Shaming Punishments*, *supra* note 21, at 2219.

<sup>94</sup> See NUSSBAUM, *supra* note 43, at 225.

<sup>95</sup> See Markel, *Shaming Punishments*, *supra* note 21, at 2220 (emphasizing the permanence of dignitary harm with criminal shaming).

James Whitman, another opponent of shaming sanctions, focuses his critique of these punishments on the claim that they violate transactional or marketplace dignity, due to their reliance on the inherently unpredictable community to participate in the shaming process.<sup>96</sup> Specifically, Professor Whitman argues that “[s]ubjecting offenders to the public’s unpredictable response to shame sanctions is a violation of our modern sense of what we might call *transactional* dignity. It is a deeply rooted norm of our society that persons should never be forced to deal with wild or unpredictable partners.”<sup>97</sup> This scholarship argues that harshness is a certain consequence of shaming sanctions, as they require privately-inflicted sanctions, which are per se violative of the punished individual’s dignity.<sup>98</sup>

This quadrumvirate of legal scholars provides a deeply persuasive argument against the validity of criminal shaming punishments based on the claim that they are antithetical to the value of human dignity. By highlighting the permanently deleterious impact of this loss of dignity on both an individual and transactional level, the dignitary opposition to criminal shaming sanctions argues that these punishments are violative of the true social norms of a civic democracy. Consequently, this dignity critique of criminal shaming punishments strongly supports the termination of their use in the U.S. criminal justice system.

## 2. Decency

Criminal shaming punishments have also been criticized in terms of their lack of decency<sup>99</sup>—essentially, that a decent state should not inflict punishments that eradicate individual dignity<sup>100</sup> and that shaming punishments fail “the litmus test of

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<sup>96</sup> See James Q. Whitman, Essay, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1090 (1998) [hereinafter Whitman, *Shame Sanctions*].

<sup>97</sup> *Id.* (emphasis in original).

<sup>98</sup> See *id.* (deeming harshness an inevitable byproduct of shaming punishments).

<sup>99</sup> Critics in this camp set a low bar on what constitutes decency. See, e.g., James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1289 (2000) (“[R]ules of decency speak, as a general matter, to problems in differentiating the human from the bestial.”).

<sup>100</sup> See Garvey, *Shaming Punishments*, *supra* note 82, at 758 (“[S]haming penalties violate an offender’s dignity, which no morally decent state should do.”).

the decent society.”<sup>101</sup> Although this critique is related to the first critique of dignity,<sup>102</sup> its primary focus is not on the individual being punished, but instead upon the punisher and the larger society’s degradation as a result of shaming punishments.<sup>103</sup> As Professor Markel’s scholarship emphasizes, “shaming sanctions encourage a practice that inevitably coarsens our sensitivity to the dignity of other persons, and thus, ourselves.”<sup>104</sup> This erosion of dignity commensurately erodes the essential decency of society.<sup>105</sup> A decent state should not engage in punishment practices that allow this erosion to occur.<sup>106</sup>

Eric Posner articulates another decency critique that builds upon this connection to dignity in its concern for the normalizing effect of shaming and how it incites an unacceptable urge to degrade through the exploitation of crowd dynamics.<sup>107</sup> As Professor Massaro also points out, “[t]he decency concern is based on the sense that shaming may be cruel and that normalizing cruelty may encourage its proliferation . . . .”<sup>108</sup> The communicative stigmatic effect of shaming punishments, which

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<sup>101</sup> AVISHAI MARGALIT, *THE DECENT SOCIETY* 262 (Naomi Goldblum trans., 1996).

<sup>102</sup> See NUSSBAUM, *supra* note 43, at 223 (“A decent society . . . would treat its citizens with respect for their human dignity, rather than degrading or humiliating them. A decent society would also protect its citizens from at least some types of degradation or humiliation.”).

<sup>103</sup> See, e.g., Markel, *Shaming Punishments*, *supra* note 21, at 2176 (noting how some punishments degrade both the punished and the punishers); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL’Y & L. 645, 702 (1997) [hereinafter Massaro, *Shame Implications*] (discussing the primacy “of preserving the community’s commitment to decency, not preserving the offender’s dignity per se” with this critique of shaming).

<sup>104</sup> Markel, *Shaming Punishments*, *supra* note 21, at 2220.

<sup>105</sup> See Massaro, *Shame Implications*, *supra* note 103, at 649 (arguing that criminal shaming irreparably damages social norms of decency through the degradation of individual dignity).

<sup>106</sup> See MARGALIT, *supra* note 101, at 1 (asserting humiliation should not be an institutional practice of a decent society).

<sup>107</sup> See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 106 (2000) (deeming shaming punishments to be “messy” as “[t]hey are intended to exploit the independent force of crowd dynamics, but crowd dynamics are unpredictable”).

<sup>108</sup> Massaro, *Shame Implications*, *supra* note 103, at 699.



demarks the subhuman status of criminal offenders<sup>109</sup> and which often snowballs with its dissemination to the public,<sup>110</sup> does not jibe with a decent, egalitarian political state.<sup>111</sup>

Building upon this latter analysis, another decency critique emphasizes how shaming punishments are unacceptable because they incite the potential for a state-initiated, uncontrollable mob mentality.<sup>112</sup> Professor Whitman centers his primary rejection of shaming punishments on this aspect, stating that “[t]he chief evil in public humiliation sanctions is that they involve an ugly, and politically dangerous, complicity between the state and the crowd” and deeming them “a peculiarly disturbing . . . species of official lynch justice.”<sup>113</sup> Therefore, Whitman’s concern with shaming sanctions is that once the state initiates them, it no longer has the ability to control the manner in which the public will treat the punished individual.<sup>114</sup> Professor Nussbaum shares this concern about the loss of control with shaming punishments: “Shaming behavior is not to be easily trusted, or taken at face value. It can easily get out of control, and it will be difficult both to keep it tethered to genuinely valuable norms and to calibrate it properly.”<sup>115</sup> This state-initiated devolution of control through the public’s infliction of shaming as a punishment certainly conflicts with notions of decency in society, as they indicate the government’s perilous willingness “to delegate part of its enforcement power to a fickle and uncontrolled general populace.”<sup>116</sup> This can lead to an interminable punishment, which lacks “any redemptive, dues-paid end point.”<sup>117</sup> Clearly, a

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<sup>109</sup> See GOFFMAN, *supra* note 36, at 5 (analyzing the subordination and stigmatization of the shamed).

<sup>110</sup> See POSNER, *supra* note 107, at 95 (noting the problem of shaming is “that the government cannot control the level of ostracism it provokes”).

<sup>111</sup> See Massaro, *Shame Implications*, *supra* note 103, at 700 (arguing shaming punishments are, “and should be, jarring in a political order that makes equality a cultural baseline”).

<sup>112</sup> See Robinson, *supra* note 53, at 485 (discussing how shaming opponents have an especial concern with “the chance of incidents of vigilantism against shamed defendants, which they believe promote a spirit of public indecency and brutality”).

<sup>113</sup> Whitman, *Shame Sanctions*, *supra* note 96, at 1059.

<sup>114</sup> See *id.* at 1088. Professor Posner is likewise troubled by this aspect of shaming penalties. See POSNER, *supra* note 107, at 106.

<sup>115</sup> NUSSBAUM, *supra* note 43, at 220.

<sup>116</sup> Whitman, *Shame Sanctions*, *supra* note 96, at 1088.

<sup>117</sup> Massaro, *Shame Implications*, *supra* note 103, at 694.

decent state should not inflict shaming punishments that last in perpetuity; however, this critical view advances this very potentiality as a basis for their rejection.<sup>118</sup>

Additionally, there is a proportionality and efficacy critique of shaming that revolves around decency.<sup>119</sup> As Stephen Garvey articulates, “Insofar as shaming penalties, unlike fines and imprisonment, are intended to make an offender’s actual emotional response a part of the severity of the sanction, they make the proportionality calculus much more difficult, increasing the risk of disproportionate punishment.”<sup>120</sup> Professor Massaro deems this calibration regarding the proportionality of shaming punishments to be unfeasible.<sup>121</sup> Because of this inconsistency, shaming penalties can have an unstable or unanticipated effect, which violates notions of decency in the administration and impact of criminal punishment.<sup>122</sup>

There is also an equality argument in the decency critique of shaming punishments. Here, Professor Massaro provides a compelling stance that a danger of the ad hoc nature of shaming is that the most likely group to be targeted consists of individuals with the least political and social capital.<sup>123</sup> The equality argument also rejects shaming sanctions as they can lead to disproportionately punitive penalties for these offenders that exceed any recognized parameters of specific or general deterrence.<sup>124</sup> Further, as Professor Posner notes, the potential spillover effect of stigma in shaming, whereby individuals associated with the offender are collaterally stigmatized, certainly violates notions of equality in a decent society.<sup>125</sup> Under

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<sup>118</sup> See, e.g., Massaro, *Shame, Culture*, *supra* note 45, at 1937–38 (noting how shaming does not work within a discrete time period).

<sup>119</sup> See, e.g., *id.* at 1937–40 (detailing a proportionality critique of criminal shaming, which has no place in a decent society).

<sup>120</sup> Garvey, *Shaming Punishments*, *supra* note 82, at 748.

<sup>121</sup> See Massaro, *Shame Implications*, *supra* note 103, at 692 (describing this fine-tuning as impractical).

<sup>122</sup> See *id.* (discussing this widely variant effect in a critique of shaming sanctions).

<sup>123</sup> See Massaro, *Shame, Culture*, *supra* note 45, at 1940.

<sup>124</sup> See *id.* at 1941 (discussing the disconnections between deterrence and shaming punishments for socially marginalized offenders).

<sup>125</sup> See POSNER, *supra* note 107, at 93 (noting how shaming can also target the punished’s family members).

this critique, because shaming punishments violate notions of equality, which are at the core of decent democracy, they should be rejected as means of discipline.

Working with similar roots of this equality and decency critique, the hierarchical nature of criminal shaming punishments, which was previewed by Professor Kahan's first article on shaming,<sup>126</sup> has also been criticized as a characteristic that is not expressive of the decency of an egalitarian society.<sup>127</sup> As articulated by Jessica Clarke, "Shaming penalties have historically been employed to reaffirm class relationships and reinforce the shamed person's subordinate status."<sup>128</sup> Professor Nussbaum has also criticized shaming punishments as being contradictory to decency with this respect: "[T]here is surely something indecent about the idea that a liberal society, one built upon ideas of human dignity and equality, and respect for the individual, would express [a hierarchy of a 'normal class above the shamed'] *through its public system of law*."<sup>129</sup>

Another lens of this hierarchical critique was expressed by Professor Kahan in his 2006 article *What's Really Wrong with Shaming Sanctions*,<sup>130</sup> which recants his 1996 article, *What Do Alternative Sanctions Mean?*<sup>131</sup> In this latter article, Kahan determined that "[w]hat's *really* wrong with shaming penalties . . . 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."<sup>132</sup> Adopting the Gusfield-Wildavsky theory of expressive political economy,<sup>133</sup> Kahan formulated that shaming punishments suffer from a lack of expressive overdetermination, in that they "bear meanings perceived as affirming the values of only some cultural

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<sup>126</sup> See *supra* notes 67–77 and accompanying text.

<sup>127</sup> See Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 21 (2015) (quoting Kahan, *Shaming Sanctions*, *supra* note 78, at 2086–88) ("[M]any egalitarians oppose shaming practices as being 'characteristic of hierarchical relationships.'").

<sup>128</sup> See *id.* at 21–22.

<sup>129</sup> NUSSBAUM, *supra* note 43, at 232 (emphasis in original).

<sup>130</sup> See Kahan, *Shaming Sanctions*, *supra* note 78, at 2075.

<sup>131</sup> See Kahan, *Alternative Sanctions*, *supra* note 67, at 591.

<sup>132</sup> Kahan, *Shaming Sanctions*, *supra* note 78, at 2076.

<sup>133</sup> See *id.* at 2081–82 (describing the sociopolitical basis for this perspective).

perspectives and as denigrating others.”<sup>134</sup> For Kahan, the true problem of shaming punishments is that they “resonate with significations of hierarchy and community that assault the sensibilities of those who favor more egalitarian and individualistic forms of social organization.”<sup>135</sup> This risk of hegemonic partisanship runs counter to the ideals of a decent society.<sup>136</sup>

Consequently, the decency critique of criminal shaming punishments is a multifaceted one. It provides that the erosion of dignity that is inherent in shaming penalties results in a commensurate erosion of decency within society. It argues that shaming penalties introduce the malevolent normalization of cruelty. This argument has pointed concern with how shaming can lead to uncontrollable outcomes via the government’s delegation of punishment through the transfer of the imposition of stigma on the offender to the unpredictable populace. It also argues that shaming sanctions fail to meet effective punishment theory parameters as they lack proportionality, and, therefore, efficacy; in sum, these sanctions exceed any type of general or specific deterrence requirements. Finally, this critique argues that shaming penalties—characterized by their hierarchical and hegemonic means—violate notions of equality at the heart of a decent society. Each prong of the decency critique provides a valid basis for the discontinuation of the use of shaming punishments in the American criminal justice system.

### 3. A Moral-Educative Mission

Criminal shaming punishments have also been criticized in terms of their inability to fulfill an overall moral-educative mission.<sup>137</sup> Criminal punishments should not just deter, punish,

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<sup>134</sup> *Id.* at 2085.

<sup>135</sup> *Id.* at 2087.

<sup>136</sup> *Id.* at 2076. This perception has been criticized. See Markel, *Wrong Turns*, *supra* note 92, at 1393 (criticizing Kahan’s recanting perspective because it indicates “that the state should not pursue punishments that lack public consensus because a liberal state should remain neutral among the competing worldviews of diverse citizens”).

<sup>137</sup> See, e.g., Kimberly A. Thomas, *Beyond Mitigation: Towards A Theory of Allocation*, 75 *FORDHAM L. REV.* 2641, 2677 (2007) (discussing the difficulty of tailoring an appropriate shaming punishment for a defendant that will educate the individual about conduct avoidance and lead him or her towards more positive outcomes).

or incentivize; they must also instruct and educate.<sup>138</sup> This moral-educative perspective on punishment comes from “the Durkheimian functionalist notion that the criminal law serves to identify and reinforce basic social norms about right and wrong, that ‘[c]rime brings together upright consciences and concentrates them.’”<sup>139</sup> Professor Garvey illuminates this point by focusing on the moral education or moral reform theory of punishment, whereby punishment is designed to provide moral instruction to the offender through bilateral dialogue, rather than through unilateral condemnation.<sup>140</sup> However, Garvey deems shaming as a punishment that does not satisfy moral education parameters; it is, instead, “a monologue in which the state expresses its disapproval and disavowal of the offender’s wrongdoing,”<sup>141</sup> which “do[es] little to educate.”<sup>142</sup>

Another aspect of the moral-educative mission critique extends the focus from the punished individual to the community that also must endure the shaming penalty, which connects with key aspects of the decency critique.<sup>143</sup> This particular argument analyzes the negative net-widening educative effects of shaming punishments in terms of naturalizing citizens to rights constriction, rather than educating them for active participation in a liberal democracy.<sup>144</sup> As advanced by Steven Schulhofer, this view asserts that the government’s use of shaming sanctions results in ever-increasing attempts by the state to place people within the vise of social control.<sup>145</sup> Therefore, in line with

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<sup>138</sup> See Mark K. Moller, Comment, *Sympathy, Community, and Promising: Adam Smith’s Case for Reviving Moral Consideration*, 66 U. CHI. L. REV. 213, 241 (1999) (emphasizing these functions of law).

<sup>139</sup> Tonry, *supra* note 81, at 1764 (quoting EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 102 (George Simson trans., Free Press 1933)).

<sup>140</sup> See Garvey, *Shaming Punishments*, *supra* note 82, at 738–39, 742, 763 (outlining the moral education theory of punishment and defining the nature of its expressive impact).

<sup>141</sup> *Id.* at 763.

<sup>142</sup> *Id.* at 784.

<sup>143</sup> See *supra* Part II.B.2.

<sup>144</sup> See NUSSBAUM, *supra* note 43, at 237 (discussing this argument against shaming).

<sup>145</sup> See *id.* at 236 (citing to personal correspondence with Stephen Schulhofer for the basis for his claims).

Professor Nussbaum's view, shaming does "not function as a progressive reform, but rather as an agent of increased social homogeneity and social control."<sup>146</sup>

Shaming punishments do not teach lessons regarding dignity, decency, or other positive moral values.<sup>147</sup> As stated by Professor Markel, "[P]unishment should aim at connecting the offender to an understanding of lawfulness and give the offender an opportunity to internalize those lawful values in the life he [or she] leads during and after the retributive encounter."<sup>148</sup> However, shaming sanctions provide no opportunities for atonement and fail to fulfill any form of a moral-educative mission.<sup>149</sup> Instead, as Professor Markel concludes, shaming results in, "at most, a retributive spectacle that is devoid of other positive community-expressive or community-reinforcing content,"<sup>150</sup> and that can have a rights-constriction spillover effect for the greater community.<sup>151</sup> Therefore, criminal shaming punishments are not compatible with the educative mission of instruction of liberal moral values in a civic democracy.<sup>152</sup>

#### 4. Conclusion

Criminal shaming punishments "exhibit none of the features necessary to create a 'political community united by basic principles' of decency and dignity."<sup>153</sup> They also fail to fulfill any

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<sup>146</sup> *Id.* at 237.

<sup>147</sup> See Tonry, *supra* note 81, at 1755 (categorizing Professor Kahan's "theory of disintegrative shaming [as one] that takes traditional sociological ideas about the moral-educative effects of punishment and humane modern ideas about 'reintegrative shaming' and turns them into deeply repressive ideas about the use of human beings to the end of appeasing public appetites for 'debasement' ") (footnotes omitted).

<sup>148</sup> Markel, *Shaming Punishments*, *supra* note 21, at 2220.

<sup>149</sup> See Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1812 (1999) ("[S]hame forms no part of the atonement model. Guilt leads to atonement; shame leads nowhere.").

<sup>150</sup> Markel, *Shaming Punishments*, *supra* note 21, at 2180 (emphasis omitted).

<sup>151</sup> See *supra* notes 125, 144 and accompanying text.

<sup>152</sup> See, e.g., Markel, *Shaming Punishments*, *supra* note 21, at 2228 (arguing the embrace of intentional degradation in shaming punishments renders them incompatible with liberal virtues); Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 963 (2003) (noting the attenuated educative effects of criminal law shaming sanctions).

<sup>153</sup> Markel, *Shaming Punishments*, *supra* note 21, at 2228 (quoting Stephen Macedo, *In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?*,

of the aspects of a moral-educative mission approach to punishment theory.<sup>154</sup> Consequently, under each of the critiques of criminal shaming penalties—dignity, decency, and a moral-educative mission—these punishments should be abandoned as sanctions in the American criminal justice system.

*C. The Philosophical Rejection of School-Shaming Punishments*

Many K-12 schools have adopted a retributively punitive approach, rather than a rehabilitative or reformatory one, in disciplining their students.<sup>155</sup> Within this educational disciplinary approach, the use of disintegrative shaming punishments has flourished.<sup>156</sup> However, shaming discipline has no more place in the schoolhouse than it does in criminal law. The core philosophical critiques of criminal shaming—dignity, decency, and a moral-educative mission—support the philosophical rejection of school-shaming punishments.<sup>157</sup> In fact, these critiques have more resonance in an educational milieu because the key tenets of dignity, decency, and a moral-educative mission are the desired pedagogical goals and civic aims of

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in NATURAL LAW AND PUBLIC REASON 11, 14 (Robert P. George & Christopher Wolfe eds., 2000)).

<sup>154</sup> See *supra* Part II.B.3.

<sup>155</sup> See Marilyn Armour, *Restorative Practices: Righting the Wrongs of Exclusionary School Discipline*, 50 U. RICH. L. REV. 999, 1001 (2016) (discussing “increasingly negative school climates” and “educators’ retributive orientation to student behavior”); Fedders, *supra* note 52, at 569 (“No longer viewed as deserving of second chances or entitled to rehabilitation efforts, students are seen as meriting harsh and punitive treatment.”); Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 494 (1980) (identifying the “retributive element to school discipline”).

<sup>156</sup> See, e.g., Barbara Fedders & Jason Langberg, *School Discipline Reform: Incorporating the Supreme Court’s “Age Matters” Jurisprudence*, 46 LOY. L.A. L. REV. 933, 954 (2013) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)) (arguing that schools for many reasons, including their infliction of shaming punishments, have become “enclaves of totalitarianism”) (internal quotation marks omitted).

<sup>157</sup> See William Haft, *More than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools*, 77 DENV. U. L. REV. 795, 800 (2000) (emphasis omitted) (discussing the heightened moral responsibility educators have in fashioning disciplinary policies of dignity and decency and urging a philosophical-pedagogical approach to determine whether a disciplinary policy “ought to be enforced from an educational standpoint”).

American education.<sup>158</sup> Therefore, the violations that occur when shaming is imposed in schools tear apart the very foundations of what public schooling in a liberal democratic state should be.

This Section of the Article demonstrates the applicability of the core critiques of criminal shaming onto school shaming to support the rejection of these sanctions in the educational environment.<sup>159</sup> Although this philosophical argument applies equally to all school shaming,<sup>160</sup> it will use the paradigmatic examples of strip searches, compelled apologies, dress code shaming punishments, and denials of gender-identity restroom access as concrete illustrations of why schools must abandon the shaming form of discipline.<sup>161</sup> Because school-shaming punishments are violative of dignity, decency, and a moral-

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<sup>158</sup> See Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L. REV. 421, 444 (1995) (arguing American public schools must inculcate students with the values of individual dignity); Thomas C. Grey, *How To Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891, 928 (1996) (discussing how "conventions of decency" are paramount in public schools); Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 267–68 (2012) (articulating the American pedagogical philosophies that emphasize a moral-educative mission in preparation of students for citizenship).

<sup>159</sup> This approach is appropriate given the parallels between school discipline and criminal punishment. See, e.g., Cara Suvall, Essay, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. C.R.-C.L. L. REV. 547, 565 (2009) (identifying retributive justice as a common denominator between school discipline and criminal justice punishments).

<sup>160</sup> School-shaming punishments are not limited to this Article's examples. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 826 (2002) (discussing a school policy that would shame students by barring their access to extracurricular activities for a refusal to consent to a monitored, suspicionless drug urinalysis test). Although an exhaustive catalogue of such punishments goes beyond the scope of this Article, this philosophical rejection extends to all rights-violative punitive school-shaming measures.

<sup>161</sup> These shaming punishments are particularly appropriate for a legal philosophical rejection, as they all violate students' constitutional rights as well. See Cooley, *supra* note 27 (manuscript at 31, 42–43) (arguing compelled apologies are violative of students' First Amendment rights and strip searches are violative of students' Fourth Amendment rights). Future scholarship by this author will advocate that gender-discriminatory dress code violation punishments and transgender student restroom access denials are violations of the Fourteenth Amendment's Equal Protection Clause.



educative mission—and are therefore violative of the guiding philosophies of K-12 American education—they should and must be rejected as school disciplinary measures.<sup>162</sup>

### 1. Dignity

School-shaming punishments are antithetical to the concept of dignity, which is a central tenet of the pedagogical goals and moral aims of American schools.<sup>163</sup> Specific examples of school-shaming sanctions that degrade students, depriving them of their dignity, include strip searches, compelled apologies, dress code shaming punishments, and restroom access denials.<sup>164</sup> By examining how school shaming violates dignity, it becomes clear that the same dignitary concerns raised in critiques of criminal law shaming sanctions are present in the evaluation of the validity of shaming sanctions in schools. Specifically, school-shaming penalties—like their criminal equivalents—are inapposite to notions of equality of dignity, result in the degradation of humanity, and impose a permanent harm through loss of dignity on both an individual and transactional level in violation of the social norms of a civic democracy.<sup>165</sup> Consequently, like the dignity critique of criminal shaming, a dignity critique of educational shaming supports the view that these practices should be abandoned as disciplinary measures as they are violative of the pedagogical goal of dignity.<sup>166</sup>

Strip searches are a type of school shaming that poses a “serious affront to human dignity.”<sup>167</sup> School strip searches qualify as shaming rituals, because they are administered in a

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<sup>162</sup> See Brown, *supra* note 158, at 315 (“[A]ppropriate responses to [school]children should be grounded in . . . respect for children as persons.”).

<sup>163</sup> See, e.g., Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 204 n.177 (2011) (characterizing equality and dignity as core functions of American public schools); Charles Robert Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293, 1310 (1988) (discussing the Supreme Court’s recognition of “the overriding constitutional objective of affirming human dignity” in schools).

<sup>164</sup> See *infra* text accompanying notes 167–194.

<sup>165</sup> See *infra* text accompanying notes 195–202.

<sup>166</sup> See Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 800 (2017) (emphasizing the critical role schools can and should play in “conveying in word and deed that all students are entitled to equal respect and dignity”).

<sup>167</sup> *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 347 (2012) (Breyer, J., dissenting).

punitive way in front of some type of school community audience when a student is suspected of noncompliant behavior and are inherently shaming based.<sup>168</sup> The indignity of school strip searches and the corresponding degradation of students<sup>169</sup> have no place in an environment that is preparing students for citizenship in a liberal democracy.<sup>170</sup> Strip searches “impose unjustified humiliation”<sup>171</sup> and assure harm.<sup>172</sup> This harmful humiliation in the K-12 context was recognized by the Supreme Court to give rise to a constitutional injury<sup>173</sup> in *Safford Unified School District No. 1 v. Redding*, which held that a student’s Fourth Amendment rights were violated by a school strip search.<sup>174</sup> Given the indisputable indignity of student strip searches, they should no longer be used as a disciplinary shaming method as they do not align with the aim of dignity in the schooling of American children.

Compelled apologies that are used as school-shaming punishments for subjective value judgment forms of discipline also frustrate the pedagogical goal of dignity.<sup>175</sup> These shaming sanctions are problematic when school officials deem student speech discreditable or dishonorable,<sup>176</sup> but it does not

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<sup>168</sup> See, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009) (finding a student’s exposure of the body “for a search is responding to an accusation reserved for suspected wrongdoers”).

<sup>169</sup> See *id.* at 376–77 (discussing these characteristics of student strip searches).

<sup>170</sup> See, e.g., Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 348 (1988) (deeming strip searches to be procedures of degradation that require safeguards to protect “[h]umaneness and [r]espect for [i]ndividual [d]ignity”).

<sup>171</sup> Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 1001 (2016).

<sup>172</sup> See *Florence*, 566 U.S. at 345 (Breyer, J., dissenting) (calling strip searches “inherently harmful, humiliating, and degrading”).

<sup>173</sup> See Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 STAN. L. REV. 987, 1018 (2014) (discussing the Court’s discovery of “a constitutional injury in humiliation” in *Redding*).

<sup>174</sup> See *Redding*, 557 U.S. at 368.

<sup>175</sup> See, e.g., Stephanos Bibas & Richard A. Bierschbach, *Essay, Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 125 (2004) (discussing how apology should not be used “to inflict pain,” “satisfy the community’s bloodlust,” or “ostracize offenders”).

<sup>176</sup> See, e.g., *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 789 (N.D. Ind. 2011) (finding a school policy that required a compelled apology for dishonorable or discreditable student conduct “introduce[d] a nebulous degree of

“materially and substantially interfere with the requirements of appropriate discipline in the operation of the school” as required for constitutional regulation per *Tinker*.<sup>177</sup> Here, a compelled apology expresses that the penalized student should be condemned by school authority figures for the speech,<sup>178</sup> despite the student’s First Amendment rights to engage in such expressive conduct.<sup>179</sup> When used in cases where students are punished for constitutionally protected sexually expressive behavior,<sup>180</sup> these punishments become mechanisms of slut-shaming primarily female students.<sup>181</sup> In all of these circumstances, forced apologies defy the justifications offered by their proponents that they “promote harmony by offering truth, breaking punitive cycles, and analyzing the original cause of discord.”<sup>182</sup> Instead, they are painfully humiliating social rituals designed to exact suffering on the punished individual.<sup>183</sup> Consequently, forced apologies, which issue from the

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value judgment [because] issues of character and values involve such a broad spectrum of reasonable interpretation (but also strongly-held disagreement) as to be insufficiently conclusive for a disciplinary standard”).

<sup>177</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

<sup>178</sup> See LiJia Gong & Alina Hoffman, Note, *Sexting and Slut-Shaming: Why Prosecution of Teen Self-Sexters Harms Women*, 13 GEO. J. GENDER & L. 577, 583 (2012) (arguing against these destructively critical forms of school shaming).

<sup>179</sup> See, e.g., *Seamons v. Snow*, 206 F.3d 1021, 1028, 1030–31 (10th Cir. 2000) (determining that a reasonably competent school official would be aware that a forced apology for nondisruptive, nonobscene, and nonschool-sponsored speech—specifically, the truthful reporting of criminal and tortious behavior—violated the student’s First Amendment rights).

<sup>180</sup> See, e.g., *T.V.*, 807 F. Supp. 2d at 784–85 (determining that a compelled apology for two female high school students who engaged in off-campus sexually expressive online speech that did not meet the *Tinker* standard of regulation was a violation of the students’ First Amendment rights).

<sup>181</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 353 n.47 (2014) (“‘Slut-shaming’ criticizes women for [any type of conduct related to] sexual activity.”); see also Aya Gruber, *Anti-Rape Culture*, 64 U. KAN. L. REV. 1027, 1046 (2016) (noting how this oppressive phenomenon is often inflicted as a hierarchal weapon against marginalized women).

<sup>182</sup> Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515, 1539 (2009).

<sup>183</sup> See Jeffrie G. Murphy, *Well Excuse Me!—Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. L.J. 371, 384 (2006) (describing the humiliation of a compelled apology).

enforcement of value judgment-laden disciplinary policies, should be abandoned as they are violative of the pedagogical and moral aims of instilling dignity in the American classroom.

Dress code violation shaming punishments also are in direct conflict with the pedagogical goal of dignity.<sup>184</sup> “[E]merging conceptions of gender equality and identity should alter outdated dress code rules”<sup>185</sup> to eliminate the indignity of such shaming punishments. For sanctions of dress codes that focus on the ideology that girls should dress modestly, the implication is that such girls are immodest, and without dignity, and invite “disruption because the presumptively heterosexual male students would be distracted.”<sup>186</sup> Institutional disdain for effeminate boys is perpetuated through dress code shaming punishments that treat or impact male students differently, thereby divesting penalized boys of their dignity.<sup>187</sup> Transgender students are also often targeted by dress code violations, based on discriminatory treatment and sex and gender stereotyping that stand in direct opposition to the concepts of fundamental dignity of all students.<sup>188</sup> Given the indignity that is imputed upon both boys and girls by dress code shaming punishments, they should no longer be used as a disciplinary method as they do not align with the pedagogy of equality of dignity in the schooling of American children.

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<sup>184</sup> In some instances, dress code violations have led to the arrest of children, which is an extreme example of how these shaming punishments take away the essential dignity of students. See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 706 (2005) (“[P]olice have been used to enforce a school’s internal rules of conduct, with children arrested for . . . violating the student dress code.”).

<sup>185</sup> Brown, *supra* note 158, at 288.

<sup>186</sup> RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* 73 (2013).

<sup>187</sup> See Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375, 1403 (2010) (discussing the existence within American culture of “strong reactions, sometimes bordering on disgust, toward effeminate men and boys”).

<sup>188</sup> See Holly V. Franson, Comment, *The Rise of the Transgender Child: Overcoming Societal Stigma, Institutional Discrimination, and Individual Bias To Enact and Enforce Nondiscriminatory Dress Code Policies*, 84 U. COLO. L. REV. 497, 518–22 (2013) (outlining dignitary and legal claims against schools involving transgender students being targeted by dress code shaming punishments).

Finally, restroom shaming practices that bar transgender students from using the restroom that conforms with their gender identity or that require transgender students to use a segregated restroom that is not used by other students are in direct opposition to the pedagogical goal of dignity.<sup>189</sup> These restroom mandates are shaming punishments that fall squarely into the category of a state-sponsored “othering” of transgender students for a violation of claimed school community norms.<sup>190</sup> It is ironic that schools have raised dignity claims as purported justifications for these shaming punishments,<sup>191</sup> because they categorically deny the dignity of the targeted students.<sup>192</sup> Schools should teach students that they have fundamental liberties of dignity.<sup>193</sup> However, these restroom access denials erode the fundamental dignity of the student because they are premised on his or her gender identity not conforming with the school’s primacy on birth-assigned sex.<sup>194</sup> Given the indignity that is forced upon transgender students by restroom shaming mandates, these shaming devices should no longer be permitted as they do not align with the aim of dignity in the schooling of American children.

The examination of these school-shaming examples affirmatively gives rise to the same dignity concerns that have been at the forefront of the critique of criminal shaming

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<sup>189</sup> See Henry, *supra* note 163, at 203 (“[T]he [Supreme] Court’s equal protection jurisprudence continues to rely on equality as dignity to give substance to its egalitarian mandate.”); M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law To Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 1004 (2015) (characterizing institutional restroom access discrimination against transgender individuals as an act of shaming and a “refus[al] to recognize transgender people as people”).

<sup>190</sup> See *Developments in the Law—Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1680, 1728 (2014) [hereinafter *Transgender Youth*] (noting the difficulty in teaching community when transgender youth, as “a highly visible minority [are] forced to suffer based solely on who they are”).

<sup>191</sup> See *infra* text accompanying note 208.

<sup>192</sup> See Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC’Y 301, 306–07 (2013) (analyzing the degradation that transgender students endure when forced to use gender-inappropriate or segregated restroom facilities).

<sup>193</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (discussing liberty rights attached to dignity).

<sup>194</sup> See, e.g., *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 749 (E.D. Va. 2015) (discussing the loss of dignity incurred by a transgender student when he was subjected to a restroom shaming mandate).

punishments. School shaming, like criminal shaming, eradicates individual dignity and imposes stigma<sup>195</sup> in the ways examined by Professors Goffman, Massaro, and Nussbaum.<sup>196</sup> By stripping away the targeted student's humanity,<sup>197</sup> shaming degrades the civic democratic ideals of dignity and equality that should be at the core of public schools' values<sup>198</sup> and disciplinary practices.<sup>199</sup> This degradation is squarely within the ambit of Professor Markel's dignity critique of criminal shaming sanctions.<sup>200</sup> In fact, this degradation is amplified because its targets are schoolchildren,<sup>201</sup> as opposed to convicted criminal defendants.

The taking away of dignity, which results from school-shaming punishments, is not a fleeting consequence, either. Like criminal shaming punishments, these educational sanctions often result in significant, long-lasting reputational damage to the penalized student.<sup>202</sup> This harm can result in subsequent legal and civil disabilities,<sup>203</sup> permanent emotional and

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<sup>195</sup> See Clarke, *supra* note 127, at 22 (discussing the stigmatizing effect of shaming punishments through their removal of dignity and “reinforce[ment of] the shamed person's subordinate status”).

<sup>196</sup> See *supra* notes 82–98 and accompanying text.

<sup>197</sup> See Clarke, *supra* note 127, at 22 (describing shaming as conflicting with a liberal democratic society's ideals).

<sup>198</sup> See MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 54 (1983) (arguing schools should promote values of equality and “respect for individual dignity”); Robert Trager & Joseph A. Russomanno, *Free Speech for Public School Students: A “Basic Educational Mission,”* 17 HAMLIN L. REV. 275, 301 (1993) (arguing respect for individual dignity should be fostered in public schools).

<sup>199</sup> See Sarah Jane Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 SCHOLAR 301, 373 (2011) (“[Schools'] disciplinary policies and practices should comport with their special role in the socialization of future democratic citizens; to this end, they should respect students' autonomy, dignity, and individual rights.”).

<sup>200</sup> See *supra* notes 92–93 and accompanying text.

<sup>201</sup> See Josie Foehrenbach Brown, *Developmental Due Process: Waging A Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 995 (2009) (arguing schools have the educational and constitutional responsibility “to affirm the dignity of each student”).

<sup>202</sup> See Melissa Mortazavi, *Consuming Identities: Law, School Lunches, and What It Means To Be American*, 24 CORNELL J.L. & PUB. POL'Y 1, 21 (2014) (discussing how children's impressionability means that schools often determine the permanent dignity and self-respect of students).

<sup>203</sup> See Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 147–48 (2000) (arguing that labeling individuals as deviant, which results from shaming, can lead to future deviant behavior and further punishments).

psychological harms,<sup>204</sup> and deleterious collateral consequences<sup>205</sup> that run parallel to the harms articulated by Professor Nussbaum.<sup>206</sup> These collateral consequences impact both the individual student and the greater school community.<sup>207</sup> By teaching students that it is appropriate to stigmatize students through shaming, schools stand in direct contravention with their long-standing role of inculcating “an understanding that citizenship . . . should include attention to the dignity and safety of other[s].”<sup>208</sup> Finally, the violations of transactional dignity that result from school shaming are commensurate, if not more magnified,<sup>209</sup> with the transactional dignity harms that are incurred by criminal shaming as outlined by Professor Whitman.<sup>210</sup> Consequently, analyzing school shaming through the lens of personal dignity being a basic right of humanity,<sup>211</sup>

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<sup>204</sup> See Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 1005 (2009) (discussing the anger that results from punitive shaming); Clarke, *supra* note 127, at 22 (“Those targeted by shaming practices often internalize stigma, coming to believe themselves to be deficient.”); Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, 98 MINN. L. REV. 1374, 1393 (2014) (categorizing behaviors that “convey messages that gender nonconformity or same-sex orientation is shameful, sinful, or otherwise devalued” as harmful to the long-term physical and mental health of LGBT youth).

<sup>205</sup> See Peter H. Huang & Christopher J. Anderson, *A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice*, 90 MINN. L. REV. 1045, 1064 (2006) (reviewing NUSSBAUM, *supra* note 43) (highlighting the immunizing effect shaming has on its intended targets and its inverse effect of intended deterrence); Mortazavi, *supra* note 202, at 21 (“[W]hat is normalized (or stigmatized) in the school setting often directly modifies and supplants the child’s original sense of identity.”).

<sup>206</sup> See *supra* note 94 and accompanying text.

<sup>207</sup> See Brown, *supra* note 201, at 994 (discussing how school disciplinary measures, like shaming, demonstrate mistreatment of other students and result in a lack of general deterrence).

<sup>208</sup> Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1476 (2011) (discussing educators’ long-standing role against bullying as “they endeavor to teach children and adults alike how to treat others with respect”).

<sup>209</sup> See Clarke, *supra* note 127, at 22 (discussing how the loss of dignity and exclusion from the stigma of shaming results in a breakdown of community empathy for the stigmatized).

<sup>210</sup> See *supra* notes 96–98 and accompanying text.

<sup>211</sup> See Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 118 (1978) (“Because the concept of personal dignity is basic to humanity, it can serve as a useful focus for our attempt to apply moral values, such as fairness, to our perception of the persons, institutions, and forces confronting us.”).

like scholars have done for criminal shaming,<sup>212</sup> yields a similarly strong, if not stronger, critique against the use of such sanctions within the schoolhouse as disciplinary measures.<sup>213</sup>

Sadly, an aspect of shaming punishments that has been advocated as a benefit for some scholars in the criminal law context is the imposition of stigma on and loss of dignity for the punished individual.<sup>214</sup> However, a core civic aim of American schools is to teach, maintain, and protect an environment of human dignity.<sup>215</sup> As argued by Ronald Dworkin, such “principles of human dignity that . . . are embodied in the Constitution and are now common ground in America” should be a “dominant pedagogical strategy” in America’s K-12 public schools.<sup>216</sup> As defined by Leslie Meltzer Henry, “equality as dignity” consists of these elements:

First, dignity is universal. It is an intrinsic quality of all human beings, bestowed upon individuals not by social rank, but simply by nature of being human. Human existence, whether derived from God’s image or as an icon of humanity, confers dignity. Second, dignity is permanent. Unlike institutional status as dignity, equality as dignity does not wax and wane, but instead remains constant. Third, as a consequence of these two features, dignity functions as a horizontal and relational value. Guided by the idea of

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<sup>212</sup> See *supra* notes 82–98 and accompanying text.

<sup>213</sup> See Maryam Ahranjani, *Can They Do That to Me?! Does the Eighth Amendment Protect Children’s Best Interests?*, 63 S.C. L. REV. 403, 404 (2011) (discussing the Framers’ concern with “protecting citizens, particularly the most vulnerable, from government imposition of excessive punishment in recognition of human dignity”).

<sup>214</sup> See, e.g., Kahan, *Alternative Sanctions*, *supra* note 67, at 638 (positively framing shaming sanction consequences as “extremely unpleasant[, as t]hose who lose the respect of their peers often suffer a crippling diminishment of self-esteem”).

<sup>215</sup> See Martha Minow, *Education for Co-Existence*, 44 ARIZ. L. REV. 1, 18 (2002) (arguing schools should aspire to “join every person in the network of mutual recognition, individual dignity, and equality”); Miriam Rokeach & John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 278 (2006) (advocating that, as a matter of dignity, “[s]tudents, as citizens, have a right to an education as well as to fair and respectful treatment while obtaining it”).

<sup>216</sup> Ronald Dworkin, *Three Questions for America*, N.Y. REV. BOOKS (Sept. 21, 2006), <http://www.nybooks.com/articles/2006/09/21/three-questions-for-america>.



reciprocity, all humans owe respect to, and deserve respect from, each other as beings of equal worth. Whether young or old, sinner or saint, mentally high-performing or mentally disabled, each person deserves the same basic respect.<sup>217</sup>

An egalitarian state must ascribe to this theory of equality as dignity in all of its institutions, including in its public schools.<sup>218</sup> This concept—that “every person possesses dignity that requires the government to treat them with respect”—has “special significance in the educational setting.”<sup>219</sup> In order for public schools to incorporate this principle in a way that fosters the well-being of children, administrators and teachers must provide students with a learning environment that allows for the safeguarding of individual and collective dignity.<sup>220</sup> Consequently, any disciplinary measure that erodes dignity, like shaming, must be eliminated from the schools’ behavioral management systems.

## 2. Decency

School-shaming punishments are also adversative to the concept of decency, which is another central tenet of the pedagogical goals and moral aims of American schools.<sup>221</sup> Specific examples of school-shaming sanctions that dissolve decency in the school community include strip searches, compelled apologies, dress code violation shaming punishments, and restroom access denials.<sup>222</sup> By examining how school-shaming punishments, such as these examples, violate decency, it becomes clear that the decency concerns raised in critiques of criminal law shaming are present in the evaluation of the

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<sup>217</sup> Henry, *supra* note 163, at 202–03.

<sup>218</sup> See Alan E. Garfield, *What Should We Celebrate on Constitution Day?*, 41 GA. L. REV. 453, 498 (2007) (arguing “public schools should teach children that every individual is deserving of dignity and respect” because of the constitutional “commitment to create a society based on respect for human dignity”).

<sup>219</sup> Rokeach & Denvir, *supra* note 215, at 288.

<sup>220</sup> See Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 133–34 (“The way that school officials primarily go about providing for the well-being of children is to treat them with dignity and to provide them with an appropriate learning environment.”).

<sup>221</sup> See Dent Gitchel, *Funding the Education of Arkansas’s Children: A Summary of the Problems and Challenges*, 27 U. ARK. LITTLE ROCK L. REV. 1, 25 (2004) (arguing “the first priority of state government” is a decent education).

<sup>222</sup> See *infra* notes 225–256 and accompanying text.

validity of school-shaming sanctions. Specifically, school-shaming penalties, like their criminal equivalents, harm community decency through their erosion of individual dignity, normalize cruelty with often uncontrollable outcomes, fail to meet effective punishment theory requirements of either specific or general deterrence due to their lack of proportionality, and reinforce harmful notions of hierarchy and hegemony that run counter to the ideals of equality in a decent democratic society.<sup>223</sup> Consequently, like the decency critique of criminal shaming, a commensurate critique of educational shaming supports the view that they should be abandoned as disciplinary measures as they are violative of the social norm in educational theory of decency.<sup>224</sup>

School-shaming strip searches undercut the pedagogical goal of decency. All searching disciplinary schemes are inherently adversarial.<sup>225</sup> This is magnified with school searches given the hierarchical and hegemonic power differential between the adult school actor and the targeted child.<sup>226</sup> Shaming strip searches transcend the pedagogical goal of decency given that “the adverse psychological effect of a strip search is likely to be more severe upon a child than an adult, especially a child who has been the victim of sexual abuse.”<sup>227</sup> Consequently, strip searches violate the tenets of decency as they excessively intrude upon and alienate the child’s acute vulnerability.<sup>228</sup> This alienation of individual student dignity violates the concept of decency within the school community and normalizes cruelty.<sup>229</sup> School strip

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<sup>223</sup> See *supra* Part II.B.2.

<sup>224</sup> See Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 736 (2011) (“A state should run a decent public school system.”).

<sup>225</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 677 (1995) (O’Connor, J., dissenting) (noting the adversarial nature of school searches).

<sup>226</sup> See *Mashburn v. Yamhill County*, 698 F. Supp. 2d 1233, 1238 (D. Or. 2010) (discussing the harmful power dynamics when an adult searches a child).

<sup>227</sup> *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 232 (2d Cir. 2004).

<sup>228</sup> See, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374–75 (2009) (noting how the consistent experience of strip-searched children, “whose adolescent vulnerability intensifies the patent intrusiveness of the exposure,” is embarrassment, fright, and humiliation).

<sup>229</sup> See Jessica R. Feierman & Riya S. Shah, *Protecting Personhood: Legal Strategies To Combat the Use of Strip Searches on Youth in Detention*, 60 RUTGERS L. REV. 67, 99 (2007) (discussing the cruelty and violations of individual dignity in child strip searches).

searches are not proportional to the targeted student's *alleged* offense, and thereby, they fail to meet effective punishment theory requirements that are required in a decent society.<sup>230</sup> Finally, strip searches of students have been "fairly understood as so degrading that a number of communities have decided that [they] are never reasonable and have banned them no matter what the facts may be."<sup>231</sup> These discrete community bans should be implemented nationwide, as school-shaming strip searches are not only "an invasion of constitutional rights of some magnitude," but, "[m]ore than that: [they are] a violation of any known principle of human decency."<sup>232</sup>

Forced apologies that are used as school-shaming punishments also undermine the pedagogical goal of moral decency.<sup>233</sup> The perceived injustice of a forced apology often results in a response of student entrenchment, whereby the students "harden[] their positions and elevat[e] their resistance through either overt or covert actions."<sup>234</sup> This shaming-anger cycle with all of its attendant, and perhaps uncontrollable, opprobrium often will infect an entire school community, thereby eroding any standing lessons of decent treatment of others.<sup>235</sup> As a result, these punishments' actual and perceived lack of proportionality fail to meet effective punishment theory requirements of deterrence.<sup>236</sup> Further, there is something indecent about a society that forces "expressions of remorse because of the leverage" of disciplinary authority,<sup>237</sup> where

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<sup>230</sup> See Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 347 (2015) (discussing the Supreme Court's determination that a student strip search was unconstitutional "in light of its lack of proportionality to the student's [alleged] offense").

<sup>231</sup> *Redding*, 557 U.S. at 375.

<sup>232</sup> *Tarter v. Raybuck*, 742 F.2d 977, 983 (6th Cir. 1984).

<sup>233</sup> See, e.g., Stephen E. Henderson, *Hijacked from Both Sides—Why Religious Extremists and Religious Bigots Share an Interest in Preventing Academic Discourse on Criminal Jurisprudence Based on the First Principles of Christianity*, 37 IDAHO L. REV. 103, 129 (2000) (arguing the most egregious shaming punishments are compelled apologies).

<sup>234</sup> Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1289 (2006).

<sup>235</sup> See *infra* note 260 and accompanying text.

<sup>236</sup> See Martha Minow, *Forgiveness, Law, and Justice*, 103 CALIF. L. REV. 1615, 1620 (2015) (arguing forced apologies "cannot compel the feelings they are meant to express").

<sup>237</sup> *Griffin*, *supra* note 182, at 1541.

“adults appear to ‘gang up’ on the child or attempt to ‘shame’ the child into . . . apology.”<sup>238</sup> These harmful notions of hierarchy and hegemony do not agree with the egalitarian ideals of a liberal society’s educational system.<sup>239</sup> Consequently, the indecency that results from using compelled apologies as shaming punishments serves as a basis for the cessation of their use in schools.

Dress code shaming punishments are inapposite to the pedagogical goal of decency. It is ironic that many dress code shaming advocates premise their support for these sanctions on claims of a “dress code of decency,”<sup>240</sup> because these punishments operate in the inverse.<sup>241</sup> They teach and perpetuate pernicious sex and gender stereotyping,<sup>242</sup> which corrodes community decency through the harmful taking away of individual dignity of the penalized students and which normalizes cruelty.<sup>243</sup> Further, the gender-biased enforcement and outcomes of dress code discipline instill a damaging environment of hierarchy and hegemony by reinforcing patriarchal, rather than egalitarian, norms within the schoolhouse.<sup>244</sup>

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<sup>238</sup> Kristin Henning, *What’s Wrong with Victims’ Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1167 (2009).

<sup>239</sup> See Susan Cleary Morse, *Using Salience and Influence To Narrow the Tax Gap*, 40 LOY. U. CHI. L.J. 483, 514 (2009) (noting the appeal of shaming to hierarchists but not to egalitarians).

<sup>240</sup> Lorraine Nencel, *Professionalization, Sexualization: When Global Meets Local in the Working Identities of Secretaries in Lima, Peru*, in THE GENDER QUESTION IN GLOBALIZATION: CHANGING PERSPECTIVES AND PRACTICES 41, 51 (Tine Davids & Francien van Driel eds., 2005) (coining the term a “dress code of decency”); see also Haft, *supra* note 157, at 800 (“Educators who support dress codes often assert that they encourage discipline, enhance self-esteem, and promote unity in the school setting.”).

<sup>241</sup> See Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 YALE J.L. & FEMINISM 353, 372 (2008) (“Rather than being a benign reflection of cultural norms, gender-based dress codes . . . lie at the heart of the problem that equality guarantees seek to address.”).

<sup>242</sup> See Natalie Smith, *Eliminating Gender Stereotypes in Public School Dress Codes: The Necessity of Respecting Personal Preference*, 41 J.L. & EDUC. 251, 252 (2012) (discussing school dress codes’ rigidity and perpetuation of “archaic gender-based” stereotypes).

<sup>243</sup> See *id.* at 255–56; see also Meredith Johnson Harbach, *Sexualization, Sex Discrimination, and Public School Dress Codes*, 50 U. RICH. L. REV. 1039, 1043–44 (2016).

<sup>244</sup> See Ann C. McGinley, *Reconsidering Legal Regulation of Race, Sex, and Sexual Orientation*, 50 TULSA L. REV. 341, 361–66 (2015) (detailing the interconnections between dress codes and “concepts of hierarchy, class, and gender”); see also Martha Minow, *Between Intimates and Between Nations: Can Law Stop the*

Quite simply, the bulk of these student shaming punishments unequally and indecently burden female and effeminate male schoolchildren via enforcement of both sexually discriminatory dress codes and facially neutral ones.<sup>245</sup> “Under the guise of social order,” these punishments inappropriately put the onus of “self-control, public decency, and sexual morality in the school on girls’ shoulders.”<sup>246</sup> As argued by Professor Meredith Johnson Harbach, community-normed dress code violation punishments are not “entirely sanguine . . . [as they] automatically incorporate sexualized assumptions about girls’ bodies, reinforcing images of distracting female bodies that should be covered up.”<sup>247</sup> Professor Noa Ben-Asher identifies a deep-rooted American cultural anxiety about male effeminacy as the basis for the judicial tendency since the 1980s “to uphold mandatory gender appearance policies in schools.”<sup>248</sup> This results in an indecent “‘everyday pedagogy,’ [that] reproduce[s negative] normative gender and sexuality preferences.”<sup>249</sup> The deleterious curriculum of these shaming punishments educates schoolchildren to shy away from effeminate boys, to sexualize girls, and to excuse boys’ objectification and harassment of girls as a biological response.<sup>250</sup> These teaching lessons do not reflect the pedagogical goal of decency;<sup>251</sup> they should be abandoned.

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*Violence?*, Essay, 50 CASE W. RES. L. REV. 851, 863 (2000) (discussing how the humiliation of women results from “a world that assigns radically different roles by gender, and monitors them through internalized notions of honor and shame”).

<sup>245</sup> See Harbach, *supra* note 243, at 1056–57 (identifying dress codes’ indecent imposition of “unequal burdens based on sex”).

<sup>246</sup> SHAUNA POMERANTZ, GIRLS, STYLE, AND SCHOOL IDENTITIES: DRESSING THE PART 8 (2008).

<sup>247</sup> See Harbach, *supra* note 243, at 1056.

<sup>248</sup> Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1216 (2016).

<sup>249</sup> Harbach, *supra* note 243, at 1044 (footnote omitted) (quoting Shauna Pomerantz, *Cleavage in a Tank Top: Bodily Prohibition and the Discourses of School Dress Codes*, 53 ALBERTA J. EDUC. RES. 373, 374 (2007)).

<sup>250</sup> See Laura Bates, *How School Dress Codes Shame Girls and Perpetuate Rape Culture*, TIME (May 22, 2015), <http://time.com/3892965/everydaysexism-school-dress-codes-rape-culture> (arguing school dress codes “teach[] our children that girls’ bodies are dangerous, powerful and sexualised, and that boys are biologically programmed to objectify and harass them”); Ben-Asher, *supra* note 248, at 1216.

<sup>251</sup> See Amy L. Wax, *Against Nature—On Robert Wright’s The Moral Animal*, 63 U. CHI. L. REV. 307, 356 (1996) (noting how “[p]ublic shaming and stigmatization” clash with feminism as “they routinely have been used to control female sexuality

Finally, restroom access denials that bar transgender students from using the restroom that conforms with their gender identity or that require them to use a segregated restroom not used by other students sharply conflict with the pedagogical goal of decency.<sup>252</sup> These restroom mandates impinge on students' privacy in contravention of the protections of a decent society.<sup>253</sup> Such actions clash with decent treatment that should be accorded to every student in a positive educational environment, and they will lead to additional retractions into indecency.<sup>254</sup> As Professor Martha Minow argues, "Until every student is identified as different[,] . . . the tendency to create a 'normal' group and to label others as 'deviant' will remain pronounced and take on forms of childish cruelty in the school setting."<sup>255</sup> By labeling transgender students as deviant through restroom access denials, schools reproduce injurious concepts of hegemony, hierarchy, and inequality.<sup>256</sup> Denying transgender students access to restrooms conflicts with the pedagogical aims of a positive learning environment and results in a devolution from decency. Therefore, these shaming practices should no longer be utilized.

The examination of these school-shaming punishments affirmatively gives rise to the same decency concerns that have been at the forefront of the critique of criminal shaming punishments.<sup>257</sup> School-shaming sanctions erode school community decency through their erasure of individual student

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and female social choice or to place women on the front lines of efforts to curb male sexuality").

<sup>252</sup> See Tobin & Levi, *supra* note 192, at 306–07 (discussing the indecent communicative impact that results from forcing transgender students to use gender-inappropriate or segregated facilities).

<sup>253</sup> See Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371, 405 (2003) (claiming "privacy as a pre-political value basic to a decent society").

<sup>254</sup> See *Transgender Youth*, *supra* note 190, at 1729 (discussing how transgender youth fear discrimination, harassment, and violence in restrooms).

<sup>255</sup> MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 31 (1990).

<sup>256</sup> See Tobin & Levi, *supra* note 192, at 307 (arguing transgender restroom access denials "communicate to the student and the entire community that he or she is not normal[, which] reinforces any bias that peers may have about the student and empowers them to engage in bullying").

<sup>257</sup> See *supra* Part II.B.2.

dignity,<sup>258</sup> similar to the dissolution that is at the core of Professor Markel's criminal shaming decency critique.<sup>259</sup> The normalization of cruelty is a natural result of school-shaming punishments,<sup>260</sup> which is commensurate to the normalizing effect that Professors Posner and Massaro argued as a basis for the rejection of shaming in criminal law.<sup>261</sup> This normalization of indecent treatment of schoolchildren is particularly problematic,<sup>262</sup> as the community involvement aspect of shaming results in the school as state delegating—and likely losing—punishment controls to the crowd within the school community.<sup>263</sup> With a shaming punishment, a child “is held up to the moral judgment of persons whose opinions he [or she] values and is caused to feel unworthy of their esteem—or even their love—unless he [or she] changes.”<sup>264</sup> The concerns about uncontrollable mob outcomes raised by Professors Whitman and Nussbaum in their decency critiques of criminal shaming<sup>265</sup> become magnified when extrapolated to school shaming as the crowd at issue consists of minor schoolchildren,<sup>266</sup> whose

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<sup>258</sup> See Fedders & Langberg, *supra* note 156, at 956 (footnotes omitted) (“The current school discipline regime is alienating and isolating, and increasingly instills in children a sense of hopelessness and despair.”); David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUS. L. REV. 147, 177 (1998) (discussing how the undervaluation of children in American social institutions results in a failure to provide them a life of decency).

<sup>259</sup> See *supra* note 104 and accompanying text.

<sup>260</sup> See Massaro, *Shame Implications*, *supra* note 103, at 699 (“The decency concern is based on the sense that shaming may be cruel and that normalizing cruelty may encourage its proliferation, especially if the expressive accounts of punishment’s effects on norms hold true.”).

<sup>261</sup> See *supra* notes 107–108 and accompanying text.

<sup>262</sup> See, e.g., Bruce E. Boyden, *Constitutional Safety Valve: The Privileges or Immunities Clause and Status Regimes in a Federalist System*, 62 ALA. L. REV. 111, 166 (2010) (discussing how shaming enforces harmful gender-based norms).

<sup>263</sup> See Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1256 (2008) (arguing shaming is designed to generate emotions in the participating community).

<sup>264</sup> Jayne W. Barnard, *Allocation for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 80 (2001).

<sup>265</sup> See *supra* notes 113–116 and accompanying text.

<sup>266</sup> See Susan Hanley Duncan, *MySpace Is Also Their Space: Ideas for Keeping Children Safe from Sexual Predators on Social-Networking Sites*, 96 KY. L.J. 527, 556 (2008) (discussing how interaction with peers or emotional stimulation dominates over individual cognitive control in adolescents).

cognitive, emotional, and social development is not yet complete<sup>267</sup> and whose safety has been entrusted to the adult leaders of the school.<sup>268</sup>

Additionally, school-shaming punishments fail to comply with the parameters of effective punishment theory.<sup>269</sup> They result in neither specific nor general deterrence due to their lack of proportionality, which raises the same concerns used by Professors Garvey and Massaro in their rejection of criminal shaming sanctions through a decency lens.<sup>270</sup> Finally, school shaming reinforces the same harmful notions of hierarchy and hegemony that Professor Nussbaum and eventually even Professor Kahan articulated as central foundations of opposition to criminal shaming punishments.<sup>271</sup> As a result, school-shaming punishments conflict with the ideals of equality in a decent democratic society<sup>272</sup> that were explored by Professors Massaro and Posner.<sup>273</sup> These are the ideals that should be at the core of all decent liberal institutions, especially schools,<sup>274</sup> whose pedagogy is essential to kids' identity formation and

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<sup>267</sup> See Beatriz Luna, *The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation*, 63 HASTINGS L.J. 1469, 1474–82 (2012) (identifying the different stages of structural and functional maturation in the cognitive development of adolescents); Carina Muir, Comment, *Protecting America's Children: Why an Executive Order Banning Juvenile Solitary Confinement Is Not Enough*, 44 PEPP. L. REV. 151, 189 (2016) (“In terms of incomplete psychological development, adolescents' prefrontal cortexes are not yet fully developed, leaving them more impulsive and vulnerable than adults, which also mitigates their decision-making ability.”).

<sup>268</sup> See Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1738 (1993) (arguing schools must safeguard children).

<sup>269</sup> See John A. Bozza, “*The Devil Made Me Do It*”: *Legal Implications of the New Treatment Imperative*, 12 S. CAL. INTERDISC. L.J. 55, 81–82 (2002) (discussing the lack of any empirical data to support a deterrence claim for shaming); Garvey, *Shaming Punishments*, *supra* note 82, at 753–54 (finding the lack of empirical inquiry regarding shaming punishments makes deterrence claims “highly speculative”).

<sup>270</sup> See *supra* notes 120–121 and accompanying text.

<sup>271</sup> See *supra* notes 129–135 and accompanying text.

<sup>272</sup> See David C. Gray, *Extraordinary Justice*, 62 ALA. L. REV. 55, 94 (2010) (discussing how shaming perpetuates status inequality and subordination).

<sup>273</sup> See *supra* notes 123–125 and accompanying text.

<sup>274</sup> See Patsy E. Johnson, *Equity, Motivation, and Leadership: A Matter of Justice*, 27 U. ARK. LITTLE ROCK L. REV. 53, 59 (2004) (“In schools, justice includes the belief that all children deserve a decent life and to have basic needs met such as safety, respect, a sense of belonging (in response to hostile and unfriendly environments), and fair treatment.”).



understanding of the meaning of a civic democracy.<sup>275</sup> Instead, punitive shaming discipline leads to “a missed opportunity for positive socialization, affirming democratic norms, and meeting the developmental needs of students.”<sup>276</sup> Consequently, the indecent power differential that is abused during school shaming requires its disuse, as liberal democracies must “insist that school officials behave with common decency to their students.”<sup>277</sup>

For many shaming proponents in the criminal law context, the fact that shaming penalties are degradation ceremonies that require public participation is viewed as a positive attribute of these punishments.<sup>278</sup> However, such tenets are not reflective of the ideals of decency that should be taught in public schools.<sup>279</sup> Decency is a key pedagogical goal and moral aim of American education,<sup>280</sup> dating back to the earliest years of the United States' democracy.<sup>281</sup> As a corollary to teaching decency and guarding against the devolution of human behavior in order to maintain order in schools, schools should ascribe to the belief that “[i]f there are some punishments that are so barbaric that they may not be imposed for the commission of crimes, designated by our social system as the most thoroughly reprehensible acts an individual can commit, then . . . similar

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<sup>275</sup> See Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 259 (1991) (discussing public schools' “inculcation role and the importance [they play in] assimilating students into cultural norms of civility and decency”).

<sup>276</sup> Fedders & Langberg, *supra* note 156, at 956.

<sup>277</sup> Marshall S. Shapo, *In the Looking Glass: What Torts Scholarship Can Teach Us About the American Experience*, 89 NW. U. L. REV. 1567, 1584 (1995).

<sup>278</sup> See Kahan, *Alternative Sanctions*, *supra* note 67, at 636 (characterizing this aspect of shaming in a positive way).

<sup>279</sup> See NUSSBAUM, *supra* note 43, at 282 (“[A] decent society needs to go further, finding ways to protect the dignity of its members against shame and stigma through law.”); Mark A. Hall, *Genetic Enhancement, Distributive Justice, and the Goals of Medicine*, 39 SAN DIEGO L. REV. 669, 673 (2002) (describing public schools as “a highly egalitarian system”).

<sup>280</sup> See Lynn S. Brackman, Note, *High Schools and the First Amendment: The Eighth Circuit Leaves Students' Rights at the Schoolhouse Gate*, 66 MO. L. REV. 169, 177 (2001) (discussing American schools' “responsibility to promote decency and civility among [their] students”).

<sup>281</sup> See Kate Strickland, Note, *The School Finance Reform Movement, a History and Prognosis: Will Massachusetts Join the Third Wave of Reform?*, 32 B.C. L. REV. 1105, 1166 (1991) (describing a 1789 Massachusetts law that required schools to teach “decent behavior” to help students “understand that virtues such as piety, justice, industry and frugality would preserve and perfect the constitution, and secure the blessing of liberty”).

punishments may not be imposed . . . for . . . breaches of school discipline.”<sup>282</sup> Just as criminal law shaming should be discarded under the decency critique, school shaming should be abandoned under the same critique.<sup>283</sup> The continued preservation of decency as a core component of American public schools requires no less, because “[a] decent society is one whose institutions do not humiliate people.”<sup>284</sup>

### 3. Moral-Educative Mission

School-shaming punishments are asymmetrical to the fulfillment of a moral-educative mission, which is, perhaps, the most central tenet of the pedagogical goals and civic aims of American schools.<sup>285</sup> Specific examples of school shaming that harm the moral-educative mission in the school community include strip searches, compelled apologies, dress code shaming punishments, and restroom access denials.<sup>286</sup> By examining how school shaming violates the concept of a moral-educative mission, it becomes clear the same concerns raised in critiques of criminal law shaming are present in the evaluation of the validity of shaming sanctions in schools.<sup>287</sup> School-shaming penalties, like their criminal equivalents, do not provide moral instruction or education to the targeted student or the larger school community; quite simply, they do not teach lessons regarding dignity, decency, or any other positive, rights-recognitive moral values.<sup>288</sup> Instead, school shaming teaches harmful notions of rights

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<sup>282</sup> *Ingraham v. Wright*, 430 U.S. 651, 684 (1977) (White, J., dissenting).

<sup>283</sup> See Susan H. Bitensky, *The Poverty of Precedent for School Corporal Punishment’s Constitutionality Under the Eighth Amendment*, 77 U. CIN. L. REV. 1327, 1370 (2009) (discussing how incompatibility between a punishment and standards of decency can be the basis for the invalidation of that punishment).

<sup>284</sup> MARGALIT, *supra* note 101, at 1.

<sup>285</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 373 (1985) (Stevens, J., concurring in part and dissenting in part) (“Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry.”); Andrew A. Cheng, *The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 U. HAW. L. REV. 697, 759 (1997) (discussing how schools are charged with providing “education that inculcates democratic values—the civic republican virtues that will enable students to be citizens in society”).

<sup>286</sup> See *infra* notes 291–316 and accompanying text.

<sup>287</sup> Ann Monroe, *Shame Solutions: How Shame Impacts School-Aged Children and What Teachers Can Do To Help*, 73 EDUC. F. 58, 62 (2009).

<sup>288</sup> See *supra* notes 50–51 and accompanying text.

constriction, social homogeneity, and state control.<sup>289</sup> Consequently, like the moral-educative mission critique of criminal shaming, a commensurate critique of educational shaming punishments supports the view that they should be abandoned as disciplinary measures as they are violative of the pedagogical imperative of fulfilling schools' moral-educative missions.<sup>290</sup>

Strip searches do not satisfy the school's moral-educative mission.<sup>291</sup> The shame that results from the required and nonconsensual exposure of students' private body parts to adults in a disciplinary strip search objectifies children<sup>292</sup> and fails to teach them about the sanctity of the body and core expectations of bodily privacy.<sup>293</sup> As Professor William Buss argues, "It would be highly desirable if the citizens of the United States who are now in school learn to value privacy, learn by the school's example that the society respects it, and learn that the courts will protect it from invasion by governmental searches that violate fourth amendment principles."<sup>294</sup> However, instead, the lesson taught by strip searches is "an erosion of privacy and the destruction of human values that go with privacy."<sup>295</sup> The education that is imparted by strip search shaming punishments

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<sup>289</sup> See Amanda H. Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 BAYLOR L. REV. 235, 238 (2014) (discussing how the United States Supreme Court's control discourse, which has been capitalized upon by schools in the infliction of student punishments, has resulted in the "dramatic curtailment of the scope of student constitutional rights").

<sup>290</sup> See Sandra Day O'Connor, Foreword, *The Rule of Law and Civic Education*, 67 SMU L. REV. 693, 699 (2014) ("The first American public schools were founded with this civic mission in mind, and throughout most of our Nation's history, civic education was prioritized.").

<sup>291</sup> Barry C. Feld, T.L.O. and Redding's *Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 943 (2011) ("In addition to the psychological trauma, a school official's decision to strip search a student conveys a moral message, teaches negative lessons about rights and responsibilities, and strongly affects the student's future relationship with teachers and staff.").

<sup>292</sup> *Highhouse v. Wayne Highlands Sch. Dist.*, 205 F. Supp. 3d 639, 647 (M.D. Pa. 2016) (determining that school strip searches objectify students).

<sup>293</sup> See, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374 (2009) (finding that a student strip search violated "both subjective and reasonable societal expectations of personal privacy").

<sup>294</sup> William G. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 792 (1974).

<sup>295</sup> *Id.*

is not one of dignity, decency, or any other positive moral value. Because the use of strip searches in schools instructs children in a way that contravenes the pedagogical mission of educating them for participation in a democratic society that values dignity and decency, these shaming practices must be eliminated from schools.<sup>296</sup>

Forced apologies, as an example of an “induced-compliance paradigm,” also do not serve the educative mission of schools.<sup>297</sup> They are not an efficacious way to impart positive moral positioning for students, as a true *mea culpa* cannot be forced by an intermediary.<sup>298</sup> Instead, “moral development and educational theory suggest that the only way to effect consistent behavioral change is by encouraging autonomous moral reasoning, wherein wrongdoers come to appreciate the wrongfulness of their actions more or less of their own accord . . . .”<sup>299</sup> As Professor Brent White has explained:

[I]ndividuals who apologize only when told to are operating at Kohlberg’s “pre-conventional level” or Gilligan’s “self-interested stage” of moral development, which refer [sic] to the level of moral development of an average seven-year-old. Individuals at the pre-conventional or self-interested stage have not developed the capacity for moral reasoning based on the importance of respecting conventional social norms, honoring higher ethical principles, or fulfilling relational responsibilities. Rather, they are simply responding to the threat of punishment or the promise of reward without any principled understanding of why the authority figure is asking them to behave in a certain way. In the context of forced apology, such an individual might

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<sup>296</sup> See Scott A. Gartner, Note, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. CAL. L. REV. 921, 943 (1997) (“[S]trip searches of children set[] a curious moral for the nation’s youth.”).

<sup>297</sup> White, *supra* note 234, at 1289.

<sup>298</sup> See Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 CORNELL INT’L L.J. 675, 727 (2008) (“If the emotion of sorrow and remorse is the ‘engine’ of apology, then the intervention of third parties or collective actors seems somewhat antithetical to the apologetic act (which, typically, calls for direct exchanges between the offender and the offended).”).

<sup>299</sup> White, *supra* note 234, at 1290.

refrain from the behavior that precipitated the forced apology as long as the threat level was high enough. As soon as the authority figures were out of the picture, however, he might revert to the harmful behavior.<sup>300</sup>

What is even more problematic about forced apologies as school-shaming punishments is that they are often required in response to rights-protected behavior.<sup>301</sup> So, even though Professor Garvey, who generally disfavors criminal shaming, endorses forced apology rituals as meeting the moral education theory of criminal punishment, such endorsement is premised upon an apology for an established violation of criminal law.<sup>302</sup> In schools, typically, there has been no such establishment of clear wrongdoing of this caliber. By compelling apologies to effectuate shaming, school officials are, in fact, acting in direct contravention of an education of morality; they are instead “vitiating [the] moral force” of an effective apology and eliminating ideals of dignity and decency.<sup>303</sup> Consequently, forced apologies should be eliminated from schools’ disciplinary repertoires as they clash with the moral-educative mission of K-12 schools.

Additionally, dress code shaming punishments undermine the pedagogical goal of fulfilling schools’ moral-educative mission. As determined by Professor Harbach, “The consequences of being ‘dress coded’ have a negative impact on student learning and participation [with] . . . studies suggest[ing] that a preoccupation with physical appearance based on sexualized norms disrupts mental capacity and cognitive

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<sup>300</sup> *Id.* (footnotes omitted).

<sup>301</sup> See Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 826 (2009) (“[P]rotecting freedom of speech advances a core goal of school education: teaching students about the Constitution and their rights. At the very least, there is dissonance, if not hypocrisy, in teaching students that free speech matters when school officials themselves provide virtually no protection for student speech.”).

<sup>302</sup> See Garvey, *Shaming Punishments*, *supra* note 82, at 792–93 (discussing how forced apologies can educate where there has been an unjustifiable violation and established wrongdoing).

<sup>303</sup> NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 49 (1991) (“[A]n authentic apology cannot be delegated, consigned, exacted, or assumed by the principals, no less outsiders, without totally altering its meaning and vitiating its moral force.”).

function.”<sup>304</sup> Although all student learning is impacted by these types of punishment and culture, dress code sanctions are disproportionately meted out on girls, and with perhaps even more force on girls of color,<sup>305</sup> which results in missed instructional time while being shamed and a lesson of indignity and indecency for the witnessing community of schoolchildren.<sup>306</sup> These “[u]nequal results are unfair, and unfair procedures lead to inequality,”<sup>307</sup> which expressly conflicts with the pedagogical goal to offer equal education to all public school students.<sup>308</sup> Consequently, because these dress code shaming punishments take away from the moral-educative mission of schools, they should no longer be inflicted upon students.

Finally, restroom access denials that bar transgender students from using the restroom that conforms with their gender identity or that require transgender students to use a restroom that is not used by other students damage the pedagogical goal of fulfilling schools’ moral-educative mission.<sup>309</sup> Although transgender youth are entitled to “non-disciplinary and protected spaces in education,”<sup>310</sup> students who are punished by

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<sup>304</sup> Harbach, *supra* note 243, at 1043–44 (citing AM. PSYCHOLOGICAL ASS’N, APA TASK FORCE ON THE SEXUALIZATION OF GIRLS, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS 21 (2007), <http://www.apa.org/pi/women/programs/girls/report-full.pdf>).

<sup>305</sup> See Ariel G. Siner, Comment, *Dressing to Impress? A Legal Examination of Dress Codes in Public Schools*, 57 SANTA CLARA L. REV. 259, 260 (2017) (warning that school dress codes perpetuate “archaic sexist standards”); MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 184–85 (2016) (discussing how dress code discipline often disproportionately targets African American girls in schools).

<sup>306</sup> See Harbach, *supra* note 243, at 1057 (outlining the missed learning opportunities that result from school dress code shaming punishments and how these disciplinary punishments are unequally inflicted on girls).

<sup>307</sup> Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 74 (1992).

<sup>308</sup> See Maurice R. Dyson, *Promise Zones, Poverty, and the Future of Public Schools: Confronting the Challenges of Socioeconomic Integration & School Culture in High-Poverty Schools*, 2014 MICH. ST. L. REV. 711, 733 (arguing school-shaming punishments “reinforce a ‘badge of inferiority’ that was at the crux of the *Brown v. Board of Education* rationale in striking down segregation in public schools”).

<sup>309</sup> See, e.g., Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L.J. 774, 790 (2006) (discussing the lessons of indignity and indecency that are taught by transgender student restroom access denials).

<sup>310</sup> Neo Khuu, Comment, *Obergefell v. Hodges: Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. REV. 184, 192 n.40 (2017).

restroom access denials no longer have safe spaces for basic human needs.<sup>311</sup> Consequently, these students tend to withdraw from the school community and miss valuable learning opportunities,<sup>312</sup> hampering their attainment of current and future successes.<sup>313</sup> By stigmatizing children with these mandates, schools and their employees are educating the school community that discrimination and ostracism based on gender are acceptable.<sup>314</sup> By engaging in restroom access denials, schools are instructing cisgender students that anyone who is not like them does not deserve basic rights of dignity, decency, or legal protection.<sup>315</sup> Such pernicious and detrimental pedagogy erodes the basic moral-educative mission of public schools.<sup>316</sup> Consequently, these restroom shaming mandates should no longer be inflicted upon students.

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<sup>311</sup> See Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 202 (2012) (discussing how the denial of basic bodily needs by civil rights reform opponents is "a potent tool for preserving existing arrangements of status and power").

<sup>312</sup> See Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 137 (2010) (identifying restroom discrimination as one of the leading causes of transgender students dropping out of school).

<sup>313</sup> See MINOW, *supra* note 255, at 27 ("[W]hen their identities are devalued in the society, children know it, and that message damages their self-esteem and ability to succeed.").

<sup>314</sup> See *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 294 (W.D. Pa. 2017) (noting in its finding of irreparable harm when transgender students are barred access to gender-identity restrooms that "[c]ourts have long recognized that disparate treatment itself stigmatizes members of a disfavored group as innately inferior, and raises the 'inevitable inference' of animosity toward those impacted by the involved classification") (citation omitted); Aaron J. Curtis, *Conformity or Nonconformity? Designing Legal Remedies To Protect Transgender Students from Discrimination*, 53 HARV. J. ON LEGIS. 459, 473 (2016) (analyzing how transgender student restroom access denials "might result in increased stigma and lead transgender students to be further ostracized by the cisgender majority").

<sup>315</sup> See Yofi Tirosh & Michael Birnhack, *Naked in Front of the Machine: Does Airport Scanning Violate Privacy?*, 74 OHIO ST. L.J. 1263, 1303 (2013) (citing Wolff, *supra* note 311, at 231) ("Tobias Wolff argues that invoking a sense of shame and bodily anxiety due to bodily differences has served as a rhetorical weapon by those objecting to granting civil rights to discriminated groups such as blacks, gays, or transgender people.").

<sup>316</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.").

The examination of these school-shaming punishments affirmatively gives rise to the same moral-educative concerns in the critique of criminal shaming punishments.<sup>317</sup> School shaming fails to provide an appropriate, positive moral education of the punished individual,<sup>318</sup> which was at the core of Professor Garvey's opposition to criminal shaming.<sup>319</sup> As even recognized by Professor Kahan in his touchstone article on shaming, these punishments do not guarantee an educative impact.<sup>320</sup> In the K-12 school context, shaming sanctions are inefficacious, "resulting in significantly unequal punishment and inefficient deterrence"<sup>321</sup> and teaching nothing of positive moral value, which contravenes the core pedagogical value of a moral-educative mission of public schools.<sup>322</sup>

School shaming also provides no positive moral education of the surrounding community.<sup>323</sup> Instead, these educational punishments teach rights constriction, which was articulated as an argument against criminal law shaming sanctions by Professor Schulhofer.<sup>324</sup> When schools inflict shaming, they are not abiding by their moral obligation "to 'teach by example' by avoiding symbolic measures that diminish constitutional protections."<sup>325</sup> This aspect of harmful state control,<sup>326</sup> along with

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<sup>317</sup> See *supra* notes 137–152 and accompanying text.

<sup>318</sup> See, e.g., Clarke, *supra* note 127, at 20–21 (discussing the lack of educative effect of shaming).

<sup>319</sup> See *supra* notes 140–142 and accompanying text; see also Rosenblatt, *supra* note 22, at 17 (arguing criminal shaming's popularity "waned in the nineteenth century, likely due in part to the influence of the Quakers—who advocated for rehabilitative and educative punishment").

<sup>320</sup> See Kahan, *Alternative Sanctions*, *supra* note 67, at 636 (noting that not all punished individuals will view their conduct as equally shameful as the punisher).

<sup>321</sup> Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 649 (2004).

<sup>322</sup> See Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243, 270–71 (2011) (arguing public schools should "treat[] and engage[] people as moral agents").

<sup>323</sup> See Jamila Jefferson-Jones, *A Good Name: Applying Regulatory Takings Analysis to Reputational Damage Caused by Criminal History*, 116 W. VA. L. REV. 497, 521 (2013) (discussing how shaming teaches the community to isolate and stigmatize the punished individual).

<sup>324</sup> See NUSSBAUM, *supra* note 43, at 236–37.

<sup>325</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822, 855 (2002) (Ginsburg, J., dissenting).

<sup>326</sup> See Justin R. Chapa, Comment, *Stripped of Meaning: The Supreme Court and the Government as Educator*, 2011 BYU EDUC. & L.J. 127, 168 (describing school dress codes as a form of highly-restrictive social control).



a focus on social homogeneity,<sup>327</sup> is conveyed with each administration of school shaming—issues identified by Professor Nussbaum as reasons for the invalidation of criminal shaming.<sup>328</sup> These concerns are even more problematic in K-12 schools, given that the school disciplinary process is not “a totally accurate, unerring process, never mistaken and never unfair,” which was recognized by the United States Supreme Court in *Goss v. Lopez*.<sup>329</sup> Also, the use of shaming against targeted minority or other marginalized students instructs the greater school community that it is normal and appropriate to discriminate against and stigmatize students based on these differences.<sup>330</sup> This contravenes the obligations of schools to convey civic education to prepare students to participate in a liberal democracy of diverse citizens.<sup>331</sup>

In sum, school-shaming punishments do not teach lessons of dignity, decency, or any other positive civic values,<sup>332</sup> which are core components of the moral-educative mission of American public schools.<sup>333</sup> This lack of moral-educative efficacy was a

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<sup>327</sup> See Gustafson, *supra* note 54, at 344 (discussing the centrifugal effects of shaming, as it pushes already marginalized individuals “farther to the margins”).

<sup>328</sup> See NUSSBAUM, *supra* note 43, at 232.

<sup>329</sup> 419 U.S. 565, 579–80 (1975) (noting that “[d]isciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process”).

<sup>330</sup> See, e.g., Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation's Schools*, 86 IND. L.J. 827, 847 (2011) (discussing educators' complicity in the bullying of gender nonconforming students by their peers based on their discriminatory treatment of those students).

<sup>331</sup> See Ronald C. Den Otter, *Can a Liberal Take His Own Side in an Argument? The Case for John Rawls's Idea of Political Liberalism*, 49 ST. LOUIS U. L.J. 319, 344 (2005) (“Any conception of civic education, which would be appropriate for a morally pluralistic society such as our own, would have to strike a more appropriate balance between tolerance for different ways of life and cultivation of the skills and virtues that make good citizenship possible in a liberal democracy.”); Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 640 (2008) (discussing the important roles schools play in conveying civic values to prepare students for “self-governance in a diverse society”).

<sup>332</sup> See Sharon Lamb, *The Psychology of Condemnation: Underlying Emotions and Their Symbolic Expression in Condemning and Shaming*, 68 BROOK. L. REV. 929, 954 (2003) (arguing that shaming demonstrates “that the world is very, very unsafe”).

<sup>333</sup> See Susan J. Becker, *The Immorality of Publicly Outing Private People*, 73 OR. L. REV. 159, 219 (1994) (“Virtually every school of morality embraces the

central part of the opposition of Professors Markel and Massaro to the use of shaming in the criminal justice system.<sup>334</sup> Consequently, like the scholarly rejection of criminal shaming punishments on the basis of their failure to fulfill a moral-educative mission, educational shaming punishments should be rejected as they fail to meet the key pedagogical goal of moral education in American schools.

School discipline “must work to support the educational mission of the school.”<sup>335</sup> However, shaming does scant to educate.<sup>336</sup> The humiliation of shaming young children is not “a sound means of” inculcating social norms or preparing students to participate in a society that values dignity and decency.<sup>337</sup> Egalitarianism is certainly being abandoned by school-shaming punishments as they tend to target the most vulnerable and marginalized groups in schools—students of color, female students, effeminate male students, and transgender students.<sup>338</sup> Instead, as Professor Markel argued, “The liberal way of life requires an education of citizens that appreciates the importance and order of individual freedom, moral responsibility, and respect for the procedures that guarantee a well-ordered polity.”<sup>339</sup> In order to fulfill this moral-educative mission, schools must teach the core civic values of dignity, decency, and respect and

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principle that all people should be accorded equal dignity . . . .”); E. Gary Spitko, *A Reform Agenda Premised upon the Reciprocal Relationship Between Anti-LGBT Bias in Role Model Occupations and the Bullying of LGBT Youth*, 48 CONN. L. REV. 71, 77 (2015) (discussing teachers’ role-modeling function in the instillation of core societal values in school children).

<sup>334</sup> See Massaro, *Shame, Culture*, *supra* note 45, at 1884.

<sup>335</sup> Rokeach & Denvir, *supra* note 215, at 288.

<sup>336</sup> See Garvey, *Shaming Punishments*, *supra* note 82, at 784 (discussing the lack of educative effect of shaming).

<sup>337</sup> Massaro, *Shame, Culture*, *supra* note 45, at 1930.

<sup>338</sup> See Whitman, *supra* note 96, at 1064 (arguing shaming sanctions are “inflicted only on certain, peculiarly vulnerable classes” of people).

<sup>339</sup> Markel, *Shaming Punishments*, *supra* note 21, at 2226.

recognition of rights.<sup>340</sup> This will require a termination of school-shaming punishments, as they are antithetical in every way to a virtuous, moral education.<sup>341</sup>

#### 4. Conclusion

Shaming punishments should no longer be implemented in schools, just as they should no longer be implemented in criminal law, as they violate principles of dignity, decency, and core civic value education. School “shaming punishments communicate brashly and unequivocally [with] . . . clear meaning and visible bite.”<sup>342</sup> This clear meaning of these shaming punishments does not jibe with the pedagogical and moral aims of the American educational system.<sup>343</sup> Consequently, school-shaming punishments should be rejected based on the same theoretical principles of the criminal shaming critique.

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<sup>340</sup> See PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* xi (1999) (discussing how these virtues “do not arise spontaneously but require education and cultivation”); Kevin J. Worthen, *One Small Step for Courts, One Giant Leap for Group Rights: Accommodating the Associational Role of “Intimate” Government Entities*, 71 N.C. L. REV. 595, 614 (1993) (“[P]ublic schools can and ought to teach the values of civic virtue . . .”).

<sup>341</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (stating schools have the duty to “inculcate the habits and manners of civility”); *New Jersey v. T.L.O.*, 469 U.S. 325, 354 (1985) (Brennan, J., dissenting) (“It would be incongruous and futile to charge teachers with the task of imbuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections.”); *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (stating the objective of public education is the “inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system”).

<sup>342</sup> Stephanos Bibas, *Essay, Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 948–49 (2006).

<sup>343</sup> Lia B. Epperson, *True Integration: Advancing Brown’s Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 217 (2005) (“[T]he fundamental goal of elementary and secondary education is to prepare children to be good citizens, which includes instilling civic values and developing strong social skills.”).

## CONCLUSION

If “[t]he law’s objective is to deter as much harm as possible while imposing the fewest costs,”<sup>344</sup> and shaming in legal contexts is only of utility when the benefits outweigh the costs,<sup>345</sup> then shaming is certainly not an appropriate mechanism to punish schoolchildren for the violation—or suspected violation—of school rules, policies, and norms. The harm is too great; the costs are too high; and the benefit is nil. Shaming’s dissonance with the pedagogical aims of the school environment should end its use in K-12 schools.<sup>346</sup> Educators should reject such disciplinary methods, as applied to predominantly minor schoolchildren in a tutelary environment, under a philosophical lens, just as preeminent scholars have rejected shaming sanctions for adults in the criminal justice system.<sup>347</sup> School shaming runs counter to dignity, decency, and schools’ institutional, moral-educative mission, which demonstrates how it is not reflective of the “think” perspective of “a set of techniques aimed at fostering the best conditions for arriving at collective societal preference.”<sup>348</sup> Therefore, shaming punishments must be abandoned as a school disciplinary method, because they clash with the core pedagogical and moral aims of American public education.<sup>349</sup>

Compared to criminal shaming, the rejection of these sanctions is easier in the school context, as they do not require their exchange for the equally harmful measures of exclusionary

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<sup>344</sup> Christopher Buccafusco & Jonathan S. Masur, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law*, 87 S. CAL. L. REV. 275, 284 (2014).

<sup>345</sup> See, e.g., Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1618 (2000).

<sup>346</sup> See, e.g., Jason P. Nance, *Random, Suspicionless Searches of Students’ Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. COLO. L. REV. 367, 398 (2013) (“If schools do not honor students’ constitutional rights, schools cannot effectively teach students about those rights.”).

<sup>347</sup> See *supra* notes 82–83 and accompanying text; see also NUSSBAUM, *supra* note 43, at 230.

<sup>348</sup> Ryan Calo, Essay, *Code, Nudge, or Notice?*, 99 IOWA L. REV. 773, 798 n.168 (2014) (citing PETER JOHN ET AL., *NUDGE, NUDGE, THINK, THINK: EXPERIMENTING WITH WAYS TO CHANGE CIVIC BEHAVIOUR* 13–14 (2011)).

<sup>349</sup> See Erica Frankenberg & Liliana M. Garces, *The Use of Social Science Evidence in Parents Involved and Meredith: Implications for Researchers and Schools*, 46 U. LOUISVILLE L. REV. 703, 729 (2008) (discussing schools’ “unique mission of preparing students for the duties of citizenship in our diverse, pluralistic nation”).

or corporal punishment.<sup>350</sup> In K-12 schools, there is “an expressively viable alternative sanction,”<sup>351</sup> in the form of disciplinary measures that incorporate positive behavioral strategies. School discipline can and should incorporate the basic tenets of dignity, decency, and moral-educative mission.<sup>352</sup> These are all steps in the right direction to achieve the aim of “a well-educated citizenry.”<sup>353</sup> Therefore, shaming should also be rejected in the K-12 school environment under any of the philosophical critiques of criminal shaming<sup>354</sup>—dignity, decency, and a moral-educative mission—which all shape the core pedagogical foundation of American education.<sup>355</sup>

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<sup>350</sup> See, e.g., Garvey, *Shaming Punishments*, *supra* note 82, at 760 (“If the alternative to [criminal] shame is imprisonment, then at worst, shame simply substitutes one set of indignities for another.”); Whitman, *supra* note 96, at 1058 (discussing how shaming punishments are no crueler than incarceration).

<sup>351</sup> Kahan, *Shaming Sanctions*, *supra* note 78, at 2080 (noting how the rejection of criminal shaming “would result in the *certainty* of the even greater evils of imprisonment: the default punishment in the absence of an expressively viable alternative sanction”).

<sup>352</sup> See Rokeach & Denvir, *supra* note 215, at 277 (arguing for “a new approach to school discipline based on the constitutional value of human dignity”).

<sup>353</sup> *Stell v. Bd. of Pub. Educ.*, 860 F. Supp. 1563, 1585 (S.D. Ga. 1994) (“[A] strong educational system is *essential* in preparing our children to meet the demands of an increasingly sophisticated world, and in enabling them to be productive, responsible and thoughtful citizens who may in turn contribute to the community in which they live.”).

<sup>354</sup> See Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Argument from Moral Burdens*, 28 CARDOZO L. REV. 2629, 2645 (2007) (discussing how shaming punishment theory exemplifies that these sanctions are “not merely theoretical”).

<sup>355</sup> See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (defining the U.S. public school system as “a most vital civic institution for the preservation of a democratic system of government”); *Ambach v. Norwick*, 441 U.S. 68, 79 (1979) (discussing how schools teach students “citizen’s social responsibilities” which is “crucial to the continued good health of a democracy”).