

ALTERNATIVE SANCTIONS AND SOCIAL
NORMS IN INTERNATIONAL LAW:
THE CASE OF ABU GHRAIB

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2007 MICH. ST. L. REV. 785

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I. INTRODUCTION

*But the point which drew all eyes, and, as it were, transfigured the wearer
. . . was that Scarlet Letter, so fantastically embroidered and illuminated
upon her bosom. It had the effect of a spell, taking her out of the ordinary*

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relations with humanity, and enclosing her in a sphere by herself.
—Nathaniel Hawthorne¹

This Article examines the use of alternative sanctions in international law using the exemplar of the abuses at Abu Ghraib.² It argues that social sanctions like shaming have a powerful role to play in enforcing international law norms. When properly deployed, shaming activity by the international community can serve to influence the offending state to take corrective action and fill the enforcement gap in international law. This is the lesson from Abu Ghraib.³ There is evidence that the abuses so vividly depicted in the now infamous photographs were not an aberration, but had occurred for a considerable time despite complaints.⁴ It took a shaming campaign for expressions of regret and corrective action to ensue.⁵ The campaign forced U.S. citizens to come to terms with the fact that their government was acting in violation of internalized international norms (against

1. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 51 (Bantam Classic ed. 1986).

2. There is a rich strain of scholarship that chronicles the abuses at Abu Ghraib and discusses their legal implications from a positive law oriented perspective. See, e.g., Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269 (2005); Charles H. Brower II, *The Lives of Animals, the Lives of Prisoners, and the Revelations of Abu Ghraib*, 37 VAND. J. TRANSNAT'L L. 1353 (2004).

3. See generally AMNESTY INT'L, UNITED STATES OF AMERICA: HUMAN DIGNITY DENIED TORTURE AND ACCOUNTABILITY IN THE "WAR ON TERROR" 1 (Nov. 3, 2004), http://www.amnesty.org/en/alfresco_asset/875c3688-a46d-11dc-bac90158df32ab50/amr511-452004en.pdf; see also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 579, 595-96 (2004); Johanna McGeary, *The Scandal's Growing Stain*, TIME, May 17, 2004, at 26, 32; Tim Reid, *Abuse of Prisoners 'Widespread'*, TIMES (London), May 27, 2004, at 19; Mark Bowden, *Lessons of Abu Ghraib*, ATLANTIC MONTHLY, July 11, 2004, at 37, 40.

4. The High Commissioner, *The Present Situation of Human Rights in Iraq*, ¶ 43, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2005/4 (June 4, 2004); Memorandum from Amnesty Int'l, Iraq Memorandum on Concerns Relating to Law and Order 1 (July 2003) (on file with author); INT'L COMM. OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION ¶ 27 (Feb. 2004), <http://www.stopwar.org.uk/Resources/icrc.pdf>; Reed Brody, *The Road to Abu Ghraib*, HUM. RTS. WATCH 30 (June 2004), <http://www.hrw.org/reports/2004/usa0604/usa0604.pdf>; Eric Schmitt, *Congress's Inquiry Into Abuse of Iraqi Prisoners Bogs Down*, N.Y. TIMES, July 16, 2004, at A8; *Terror, Torture and the Political Consequences*, ECONOMIST, May 15, 2004, at 25; Hendrik Hertzberg, *Terror and Torture*, NEW YORKER, Mar. 24, 2003, at 29.

5. This kind of action is also seen in the case of the infamous torture memo. See Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics is Disavowed*, WASH. POST, June 23, 2004, at A1; Adam Liptak, *Author of '02 Memo on Torture: 'Gentle' Soul for a Harsh Topic*, N.Y. TIMES, June 24, 2004, at A1; R. Jeffrey Smith, *Lawyer for State Dept. Disputed Detainee Memo*, WASH. POST, June 24, 2004, at A7; Richard W. Stevenson, *White House Says Prisoner Policy Set Humane Tone*, N.Y. TIMES, June 23, 2004, at A1.

torture).⁶ The coincidence of international law norms with internalized domestic norms facilitated expeditious corrective action.⁷

Reputations are valued national assets.⁸ They are built over time and are the very currency of international relations, protected almost as jealously as territory.⁹ States attempt to hide¹⁰ the true nature and extent of conduct violating international norms,¹¹ suggesting that there are behavioral reasons

6. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (“[Th]e torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind.”). The Convention Against Torture, which has been ratified by the United States, prohibits states from engaging in acts of torture. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 113 [hereinafter Convention Against Torture]. The Convention defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” *Id.* art. 1. It also prohibits “cruel, inhuman or degrading treatment or punishment.” *Id.* art. 16. The Geneva Convention Relative to the Treatment of Prisoners of War art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 3328, 75 U.N.T.S. 135 [hereinafter Geneva Convention Relative to the Treatment of Prisoners of War], provides that prisoners of war “must at all times be humanely treated” and that “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.” *Id.* arts. 13, 17.

7. See Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195, 202 n.25 (2004) (“Both U.S. government officials and the American public were deeply embarrassed by the Abu Ghraib prison episode; . . . one could also ascribe the shame to indigenous norms against such conduct; . . . Americans were embarrassed by the events because they were inconsistent not with international norms but with national ones.”).

8. Richard B. Bilder, *On Being an International Lawyer*, 3 LOY. U. CHI. INT’L L. REV. 135, 139 (2006).

9. Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 695 (2004) (“A nation’s reputation for decency and respect for law is a vital national asset that can strongly affect its influence and leadership. . . . [D]isclosure of abuses at Abu Ghraib and elsewhere seriously damaged the United States’ international standing.”).

10. See Ruth Jamieson & Kieran McEvoy, *State Crime by Proxy and Juridical Othering*, 45 BRIT. J. CRIMINOLOGY 504, 517-18 (2005) (“One relatively crude way of [avoiding accountability through the employ of “othering” strategies] . . . is for a state to arrest, detain, torture and simply deny the existence of particular detainees altogether. . . . Chile and Argentina in the 1970s, Saddam Hussein’s regime in Iraq and the Russians in Chechnya . . . are all examples of the same basic template of denial. Keeping ‘ghost detainees’ unregistered, off the books and moving them between detention locales or within particular facilities (e.g. at Abu Ghraib . . .) constitutes a fairly unequivocal form of deception involving ‘othering’—the outright denial of the person’s existence”).

11. See Mark W. Bina, *Private Military Contractor Liability and Accountability After Abu Ghraib*, 38 J. MARSHALL L. REV. 1237, 1252 n.104 (2005) (writing that the U.S. sought to disavow the Bybee Memo that stated that conduct, in order to be torture, “‘must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure’” and that “‘cruel, inhuman, or degrading treatment’” does not suffice (quoting Memorandum from Assistant Att’y Gen. Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, Regarding the Standards of Conduct for Interrogation under 18 U.S.C. §§

for their actions, and that disclosure might produce beneficial outcomes.¹² It is revealing that attempts by international nongovernmental organizations to ensure that the international public is informed about violations of international norms are frequently met with vociferous objections by the offending states and furtive attempts at concealment.¹³ Tactics such as denials of responsibility,¹⁴ secrecy,¹⁵ creation of legal black holes,¹⁶ location of questionable facilities offshore,¹⁷ outsourcing of tasks to private actors,¹⁸ and subcontracting of illegal actions,¹⁹ are all indicative of shame experienced by

2340-2340A 46 (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>).

12. See Peter H. Huang, *Regulating Irrational Exuberance and Anxiety in Securities Markets* 35 (Inst. for L. & Econ. Research Paper No. 03-34, 2003), available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID474661_code031202570.pdf?abstractid=474661&mirid=1 (“Mandatory disclosures generate not only information, but also such emotions as perhaps anxiety, embarrassment, euphoria, exuberance, feeling stupid, relief, or shame.”).

13. Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1.

14. Richard A. Serrano, *Pentagon Cites Widespread Involvement in Prison Abuses*, L.A. TIMES, Aug. 26, 2004, at A6 (“From the earliest stages of the prison scandal, top Bush administration officials have sought to portray the abuse as the work of a renegade band of night-shift MPs.”).

15. Editorial, *Abu Ghraib, Stonewalled*, N.Y. TIMES, June 30, 2004, at A22 (“[T]he Bush administration has spent nearly two months obstructing investigations” and has “withheld crucial government documents”); Josh White, *Army, CIA Agreed on ‘Ghost’ Prisoners*, WASH. POST, Mar. 11, 2005, at A16 (“Top military intelligence officials at the Abu Graib prison came to an agreement with the CIA to hide certain detainees at the facility without officially registering them Keeping such ‘ghost’ detainees is a violation of international law Defense Department officials have said that there were as many as 100 ghost detainees held in prisons in Iraq”).

16. Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1, 8 (2004); Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT’L L. 337, 348-49 (2004).

17. David Johnston, *Uncertainty About Interrogation Rules Seen as Slowing the Hunt for Information on Terrorists*, N.Y. TIMES, June 28, 2004, at A8 (“[T]he C.I.A. decided early in the war on terrorism to isolate top-level Qaeda detainees in remote and undisclosed locations outside the United States, keeping them far removed from the rules governing the American judicial system.”); Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogation*, WASH. POST, Dec. 26, 2002, at A1.

18. Wilson P. Dizard III, *DHS Eyes Outsourcing Intelligence Work*, WASH. TECH., Oct. 6, 2004, available at http://www.washingtontechnology.com/online/1_1/24666-1.html?topic=daily_news.

19. Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL’Y REV. 549 (2005); Griff Witte, *Contractors Were Poorly Monitored, GAO Says*, WASH. POST, Apr. 30, 2005, at E1; Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A1.

the offending state.²⁰ In addition, states or their agents attempt to silence whistleblowers and witnesses in order to put a lid on embarrassing revelations.²¹ If, indeed, there was no sense of shame aroused by disclosure, it is hardly likely that states would fear it and go to extreme lengths to conceal damaging information.²²

The direct result of concealment is that the international community is making decisions without the benefit of crucial information, thus preventing the triggering of emotions that might be useful to international law.²³ Such emotions might motivate relevant actors to react with outrage or anger and inflict social sanctions on offending states and their leaders. Social sanctions in international law can include shaming, withholding of esteem, shunning, expulsion from group membership, negative voting by other states in international organizations, and resolutions by political groups in domestic legislatures²⁴—all of which have the potential to influence leaders and states in positive ways.²⁵ The determined efforts to keep violations secret suggests that concealment is aimed at preventing the levying of these social sanctions and that sunshine alone might serve as a powerful sanction. If shaming is a possibility, disclosure becomes even more potent, and rational actors who desire to avoid being shamed will act in conformity with

20. Jamieson & McEvoy, *supra* note 10, at 520 (writing that the U.S. strategy of othering is done “with a brash lack of concern about admitting it”).

21. Neil A. Lewis, *F.B.I. Memos Criticized Practices at Guantánamo*, N.Y. TIMES, Dec. 7, 2004, at A19.

22. Deborah Horan, *Ex-UN Envoy: U.S. Feared Discovery of Prison Abuse*, CHI. TRIB., Apr. 29, 2005, § 1, at 6.

23. Behavioral economics research shows that emotions motivate people to punish opportunistic conduct. Studies show that subjects in experiments are more likely to inflict punishment when they are angry. See Ronald Bosman & Frans van Winden, *Emotional Hazard in a Power-to-Take Experiment*, 112 ECON. J. 147, 154-55 (2002). There is also a demonstrable correlation between the degree of anger and the willingness to incur costs in order to punish offenders. Dominique J.-F. de Quervain et al., *The Neural Basis of Altruistic Punishment*, 305 SCI. 1254 (2004).

24. Norimitsu Onishi, *Asked for Apology, Japan Plays for Time in Sex Slavery Standoff*, N.Y. TIMES, June 27, 2007, available at <http://www.nytimes.com/2007/06/27/world/asia/27japan.html>; *US Senate Wants Philippines to Improve Human Rights Before Approving Aid: Philippine Official*, INT’L HERALD TRIB., Nov. 5, 2007, <http://www.ihf.com/articles/ap/2007/11/05/asia/AS-GEN-Philippines-US-HumanRights.php>.

25. Studies also show that the ability to express punishment has important implications for cooperative behavior. Astrid Hopfensitz & Ernesto Reuben, *The Importance of Emotions for the Effectiveness of Social Punishment* 19 (Tinbergen Inst. Discussion Paper No. 2005-075/1, 2005), available at <http://ssrn.com/abstract=775524> (“[I]ndividuals who are willing to punish are also willing to keep on cooperating This guaranties that, as long as these individuals have the opportunity to punish, cooperation can be sustained. . . . [T]he same type of people is necessary to support punishment in the presence of retaliation. If retaliation deters individuals from using the punishment mechanism, cooperation can unravel”).

the norm.²⁶ If conformity with the norm is not possible, and a shame sanction has been imposed, the offender is likely to try to lessen the blow by being cooperative and expressing remorse.²⁷ Shaming is also likely to result in norm-internalization and acceptance of the sanction, resulting in the offenders becoming “good types” in the future. Norm-internalization in this context is not limited to the offending state—non-offending observer states realize the disutility of violation and embrace the norm, or at least conform to it despite being previously disposed to violate it. There is some evidence of certain kinds of violations declining in the aftermath of shaming-like activity, leading to optimism that the model proposed here could be preferable to other types of sanctions.²⁸

Hiding important information also hinders vital oversight over states and leaders falling short of their international obligations. If these actors are indeed motivated by shame and embarrassment, international institutions might benefit from intervention aimed at taking advantage of such emotions.²⁹ This reduces the need for crafting expensive legal sanctions if social sanctions can achieve similar results.³⁰ International law sanctions are not

26. A study of “sin” stocks found that “there is a societal norm against funding operations that promote human vice and that some investors, particularly institutions subject to public scrutiny and social norms, pay a financial price for not holding these stocks.” Harrison Hong & Marcin Kacperczyk, *The Price of Sin: The Effects of Social Norms on Markets* 32 (Sauder Sch. of Bus. Working Paper, 2007), available at <http://ssrn.com/abstract=766465>.

27. *New Zealand Apologises to Samoa*, BBC NEWS, June 4, 2002, <http://news.bbc.co.uk/1/hi/world/asia-pacific/2024214.stm>. Prime Minister Helen Clark is quoted as saying, “[o]n behalf of the New Zealand government, I wish to offer today a formal apology to the people of Samoa for the injustices arising from New Zealand’s administration of Samoa in its earlier years, and to express sorrow and regret for those injustices[.]” *Id.*; see also *Japan PM Apology on Sex Slaves*, BBC NEWS, Mar. 26, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6495115.stm>.

28. Liz Fuller, *Chechnya: Rights Situation May Be Improving*, RADIO FREE EUROPE, June 21, 2007, <http://www.rferl.org/featuresarticle/2007/06/1b705109-2463-46be-b400-c5955272513a.html>; *Indonesia Improving on Human Rights, but Stronger Steps Needed—UN Expert*, UN NEWS CENTRE, June 12, 2007, <http://www.un.org/apps/news/story.asp?NewsID=22883&Cr=indonesia&Cr1>.

29. One example of this is the furor generated by top United Nations official Jan Egeland calling rich nations “stingy.” Colum Lynch, *U.N. Report Urges Rich to Give More*, WASH. POST, Jan. 18, 2005, at A13. Despite its protests, following the labeling, the United States doubled its aid package. Caroline Overington, *US Rejects Stingy Tag, and Praises Australia*, SYDNEY MORNING HERALD, Dec. 30, 2004, available at <http://www.smh.com.au/news/Asia-Tsunami/US-rejects-stingy-tag-and-praisesAustralia/2004/12/29/1103996616123.html>.

30. Abigail Barr’s study in Zimbabwe shows that shame-based sanctions could work just as effectively as fines. Abigail Barr, *Social Dilemmas and Shame-Based Sanctions: Experimental Results from Rural Zimbabwe* 4 (Ctr. for the Study of African Economies, Working Paper No. 149, 2001), available at <http://www.csae.ox.ac.uk/workingpapers/pdfs/2001-11text.pdf>. She writes that “[i]ndividuals who feel external shame respond to anticipated shame-based sanctions just as they respond to anticipated pecuniary sanctions;

easy to impose even where they exist.³¹ By tapping into social sanctions that already exist, and leveraging their power to lower agency costs,³² international law can play a salutary role without being heavy-handed and distortive.³³ This Article argues that emotions like shame and guilt have a role to play in influencing state behavior, and that the scholarship on international law can draw on insights from psychology and behavioral economics to advance our understanding of the pathways for influencing state conduct.³⁴ It helps to advance the scholarship beyond the hackneyed arguments about compliance and sanctions that are routinely bandied about, often based purely upon rational choice³⁵ models that are severely stunted.³⁶ It also offers a different approach to enhancing cooperative behavior by states.

This approach sheds light on the role of shame and embarrassment in enforcing international norms.³⁷ Clear and credible information that discloses the facts pertaining to a violation will help norms entrepreneurs to deploy social sanctions like shame in order to ensure compliance with inter-

they choose a level of cooperation that equates the marginal expected loss in utility due to feeling external shame with the marginal loss in utility due to cooperating.” *Id.*

31. Attila Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 EUR. J. INT’L L. 1 (1995), available at <http://www.ejil.org/journal/Vol6/No4/art2.pdf> (“In the body of general law and practice concerning enforcement of international rules the principle of self-help remains prominent.”).

32. Agents are primarily employed in order to make up for the gaps in information, knowledge, skill, and time that prevent principals from accomplishing the tasks that are delegated to their agents on their own. It is these very advantages enjoyed by agents that create problems of “adverse selection” and “moral hazard.” To be sure, these problems are addressed by the various incentive and monitoring structures that are created by principals—by limiting discretion, tying incentives to the principal’s returns, careful selection of the agent, etc., principals try to ensure that they remain the masters of the relationship. In our case, the principals are the citizens, and agents are the rulers. Despite this, the rulers are more powerful, primarily because of real barriers to removal caused by collective action problems, and the constitutional structure.

33. Robert Carswell, *The Need for Planning and Coordination of Economic Sanctions*, 19 N.Y.U. J. INT’L L. & POL. 857, 857-58 (1987) (“financial or trade sanctions have often proved not only ineffective in achieving an ascertainable objective, but have also proven to be very expensive . . .”).

34. Huang, *supra* note 12, at 14 (“Many of the cognitive psychological insights of behavioral finance were already an accepted part of the folk-wisdom that formed the basis and rationale for our federal system of securities regulation.”).

35. Social sanctions like shame and ostracism might not work under the assumption of selfish utility maximization unless the offender values what other people think about him, because if he does not, no loss in utility is experienced.

36. Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977) (attacking the limitations of preferences in explaining conduct that shows that individuals do not always make personal welfare maximizing choices).

37. That social norms can play an important role in promoting cooperative behavior is well documented. See Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Goods Experiments*, 90 AM. ECON. REV. 980 (2000).

national norms. It will allow other states, international organizations, and the public to determine if a state's action is violative of international law norms, and if so, it will allow them to participate in sanctioning states and their leaders.³⁸ Clarity in disclosure also facilitates the creation of a norm requiring other states to engage in sanctioning behavior. The creation of such a norm will minimize the free-rider problem by imposing costs on parties who choose not to pay the costs associated with enforcing the primary norm. States that do not sanction offending states and their leaders by shaming and/or expulsion from international institutions of which they are members, might themselves become targets of shaming activity by other states and the broader international community.

The enormous expense and inefficiency of international legal sanctions should prompt states and scholars to seriously examine the role of alternative social sanctions like shaming.³⁹ While there has been attention devoted to shaming in other areas of the law, most particularly the criminal law,⁴⁰ international law scholars have only tended to discuss shaming in passing.⁴¹ Given the financial and institutional costs imposed by legal sanctions, and the hostility of the international community towards bearing those costs, shaming is particularly attractive due to its low cost and decentralized enforcement potential.⁴² The fact that much of the law on state conduct in international law is morally driven should have occasioned a greater focus on shaming sanctions by international law scholars, because at their very

38. Clare Dyer, *Blair's Guantánamo 'shame'—ex-law lord*, THE GUARDIAN, Apr. 12, 2006, available at http://www.guardian.co.uk/uk_news/story/0,,1751830,00.html (quoting Lord Steyn as saying: "You may ask: how will it help in regard to the continuing outrage at Guantánamo Bay for our government now to condemn it? The answer is that it would at last be a powerful signal to the world that Britain supports the international rule of law").

39. See Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561, 566 (2003).

40. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) [hereinafter Kahan, *Alternative Sanctions*]; Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991) [hereinafter Massaro, *American Criminal Law*]; James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998). For a brilliant piece on the role of shame in corporate law, see David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001).

41. See Therese O'Donnell, *Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)*, 17 EUR. J. INT'L L. 945 (2006); Adam Liptak, *Mideast Turmoil: Geneva Conventions; When Letter of the Law Does Not Spell 'Clarity'*, N.Y. TIMES, May 1, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9900E7DE1431F932A35756C0A9649C8B63&sec=&spon=&pagewanted=all>.

42. Wexler, *supra* note 39, at 564 (pointing out that "[o]ne advantage of shaming penalties, as compared to incarceration, is their cheapness").

core, they are forms of moral disapprobation. The relative shortage of analysis of shaming in the international law area is all the more curious given the increased use of rhetoric that invokes shaming-like language and tactics by participants, mostly international institutions and nongovernmental organizations.⁴³ Such rhetoric has also increasingly been deployed by norms entrepreneurs like Amnesty International, and the work of these actors is key to the application of social sanctions.

Shaming, as it is used in this Article, refers to a deliberate attempt to negatively impact a state or leader's reputation by publicizing and targeting violations of international law norms.⁴⁴ This should be distinguished from unintentional reputational damage that might be sustained by mere fact reporting by the news media or other agencies.⁴⁵ While this definition seems to be accepted by many legal scholars, some do not characterize these kinds of sanctions as shaming, requiring an internal element in addition to external enforcement.⁴⁶ This internal element, "moral shame," refers "to a collision between one's actual self—past or present—and one's internalized and moral ego ideal."⁴⁷ This Article prefers to adopt a definition of shame that includes both facets. The actions of outsiders are aimed at instilling shame and can be characterized as shame's external element. One's own feelings of shame, either in response to the actions of others, or because of one's own conception of having fallen short of an ideal, can be characterized as its

43. Dyer, *supra* note 38 (quoting Lord Steyn as saying: "Unfortunately, our prime minister is not prepared to go further than to say that Guantánamo Bay is an understandable anomaly. In its feebleness this response to a flagrant breach of the rule of law, reminiscent of the worst actions of totalitarian states, is shaming for our country").

44. See Chad Flanders, *Shame and the Meanings of Punishment*, 54 CLEV. ST. L. REV. 609, 610 (2006) ("[M]ost scholars agree that shaming punishments involve the deliberate public humiliation of the offender."). It is also to be distinguished from guilt. According to some scholars, "shame is related to a devaluation of the self, and therefore the action tendency of shame is withdrawal and avoidance of further contact. On the other hand, guilt is more related to the blameworthiness of an act and is thus more likely to result in reparation and action." Hopfensitz & Reuben, *supra* note 25, at 21. Psychologist Donald L. Nathanson writes that "guilt is the painful emotion triggered when we become aware that we have acted in a way to bring harm to another person or to violate some important code." DONALD L. NATHANSON, SHAME AND PRIDE: AFFECT, SEX, AND THE BIRTH OF THE SELF 19 (1994).

45. *E.B. v. Verniero*, 119 F.3d 1077, 1099-1100 (3rd Cir. 1997) ("Public shaming, humiliation and banishment all involve more than the dissemination of information. . . . [T]hese colonial practices inflicted punishment because they either physically held the person up before his or her fellow citizens for shaming or physically removed him or her from the community."); *W.P. v. Poritz*, 931 F. Supp. 1199, 1217 (D.N.J. 1996) ("The shaming punishments of colonial times were intended to and did visit society's wrath directly upon the offender . . .").

46. Jeffrie G. Murphy, *Shame Creeps Through Guilt and Feels Like Retribution*, 18 LAW & PHIL. 327, 337-38 (1999) ("[T]hese punishments (e.g., requiring prisoners to work on chain gangs or wear pink underwear . . .) have little or nothing to do with moral shame but . . . [are] coercive exercises in humiliation and degradation . . .").

47. *Id.* at 338.

internal element. While shaming activity is perfectly possible without the internal dimension being present, in order for it to be successful, both elements must be present.

Shaming in the international law arena is aimed at achieving the following outcomes—labeling a state as an offender, creating a reputation as a bad actor and non-cooperator, expulsion from international organizations,⁴⁸ causing economic harm, shunning by other states and commercial entities, and mobilizing domestic public opinion against the offending regime or leader. Shame sanctions are most effective in tightly-knit societies with shared norms.⁴⁹ Such ideal conditions are unlikely to exist for the deployment of shame sanctions in international law. However, there are epistemic, religious, ethnic, gender, class, and language bonds that transcend national borders presenting conditions favorable for shaming to work in international law.⁵⁰

Despite the differences in religion, ethnicity, education, goals, political affiliations, race, and gender, all participants in the international law system share, at a minimum, an opprobrium for torture,⁵¹ slavery,⁵² piracy,⁵³ genocide,⁵⁴ prostitution,⁵⁵ and narcotic drugs,⁵⁶ as reflected by international law instruments in these areas. Yet, these norms are violated by states, and legal

48. See Katherine Butler, *Pakistan Told to Reform or Face Isolation*, THE INDEP., Oct. 19, 1999, available at <http://news.independent.co.uk/world/asia/article287802.ece>; Richard Dowden, *Blair Fails to Reach Commonwealth Agreement on Zimbabwe Exclusion*, THE INDEP., Dec. 6, 2003, available at <http://news.independent.co.uk/world/africa/article81411.ece>.

49. Skeel, Jr., *supra* note 40.

50. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) (defining an epistemic community as a "network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area").

51. Convention Against Torture, *supra* note 6.

52. See Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

53. See Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

54. See Convention on the Prevention of the Crime of Genocide, G.A. Res. 260A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 9, 1948).

55. See Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271.

56. See Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna), Dec. 20, 1988, 28 I.L.M. 493 (1988); Protocol Amending the Single Convention on Narcotic Drugs (New York), 1961, Mar. 25, 1972, 11 I.L.M. 804 (1972); Convention on Psychotropic Substances (Vienna), Feb. 21, 1971, 32 U.S.T. 543; Convention Relating to the Suppression of the Abuse of Opium and Other Drugs, Jan. 23, 1912, 38 Stat. 1912, 8 L.N.T.S. 187.

sanctions, even where they exist, have proved to be inadequate. Can shame sanctions do better? Intuitively, the lower cost, decentralization of enforcement, and value placed in reputation suggests that shaming should be effective. Evidence from the Abu Ghraib case will be considered to understand the extent to which shaming constrains state behavior, and the ways in which it can be used as a sanction to enforce international law norms.

States are not isolated entities—they are members of international institutions, clubs, and other organizations. Interdependence and networking are indeed the very currency of state action on the international level. It is this enmeshment in groups that presents conditions ripe for the deployment of shame sanctions. Group membership invites scrutiny and makes reputation matter. At a minimum, bad behavior invites questions and subjects the state to embarrassment. Even if the leader or state is shameless, the very process of shaming has the effect of establishing and cementing the asserted norm—not a trivial function because it informs potential offenders that bad conduct invites shaming.⁵⁷ Thus, as long as reputation is not completely irrelevant, shame matters.⁵⁸

It is difficult to see how leaders and states can be callous about their reputations. Indeed, reputations are most important to such actors.⁵⁹ They have to win elections, protect their positions, make business deals, and advance interests—all of which are founded on the possession of a good reputation. As is readily apparent, the stakes are much higher for these actors than they are for the average offender, and shame, at least theoretically, must have a constraining effect on reputation-conscious actors if they wish to be repeat players.⁶⁰ This might explain the hand wringing that goes on

57. See Kahan, *Alternative Sanctions*, *supra* note 40, at 639. Professor Kahan argues that shaming has the effect of shaping preferences. If individuals are shamed for contravening a particular asserted norm, other observers will modify their own behavior to fit that asserted norm.

58. Professor Kahan's widely reported recantation of his earlier views on shaming expressly rejects the argument that shaming is inappropriate because some offenders are shameless. Instead, he seems to be basing his recantation on the idea that shaming is partisan. See Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2076 (2006) [hereinafter Kahan, *Shaming Sanctions*] ("What'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.").

59. Scott Wolford, *The Turnover Trap: New Leaders, Reputation, and International Conflict*, 51 AM. J. POL. SCI. 772-88 (2007); Alexandra Guisinger & Alastair Smith, *Honest Threats: The Interaction of Reputation and Political Institutions in International Crises*, 46 J. CONFLICT RESOL. 175 (2002).

60. *Jordan Sentences Former Lawmaker to Prison for Harming State's Reputation*, INT'L HERALD TRIB., Oct. 6, 2007, available at <http://www.iht.com/articles/ap/2007/10/09/africa/ME-GEN-Jordan-Lawmaker.php> (writing about the conviction of "Ahmad Oweidi al-Abbadi, the head of a small right-wing party called the Jordanian National Movement, . . . for . . . sending an e-mail to U.S. Senate majority leader Harry Reid, . . . in which

within the ruling group in a state when egregious violations of international law norms are highlighted in the media.⁶¹ The fear of tarnishment can extend to observers—it has been suggested that high profile cases like that of General Pinochet make dictators more afraid and, hence, more cautious, even if liability did not result in that instance.⁶²

Why are powerful actors so afraid? The reason is simple: the primary motivation for these actors is esteem. This is supported by the large number of people who covet high political office despite the relatively low compensation for prime ministers and presidents⁶³ when the risks of office are disproportionately high.⁶⁴ If financial gain is not the primary motivation (although it can be a motivation) for political office, it is possible that considerations of prestige and social esteem have major roles to play as motivational factors for people to covet these appointments. This suggests that sanctions like shame can be powerful constraints because they strike at the very root of the motivation for these individuals to want the good (political office). If the risk of being shamed is high, these individuals might be constrained to conform to international law norms. To be sure, this constraint

he decried an allegedly steep increase in corruption among top Jordanian officials.” He was convicted for “harming the government’s reputation and sentenced . . . to two years in prison”).

61. *Racism Alive and Well: After Attack on Indians, Germany Fears For its Reputation*, SPIEGEL ONLINE, Aug. 22, 2007, available at <http://www.spiegel.de/international/germany/0,1518,501352,00.html> (quoting Wolfgang Thierse, Social Democrat Vice President of the Bundestag Lower House of Parliament, as saying: “The worse Germany’s reputation becomes, the fewer people who we need for our progress and prosperity will come here”).

62. Reed Brody, *One Year Later, The ‘Pinochet Precedent’ Puts Tyrants on Notice*, HUM. RTS. WATCH, available at <http://hrw.org/english/docs/1999/10/14/global12796.htm> (“Pinochet’s arrest awakened the hopes of victims around the world, many of whom are now exploring how to use foreign courts to bring their tormentors to justice.”); Steve Boggan, *Kissinger Begins to Stoop Under the Weight of Legal Scrutiny*, THE INDEP., Apr. 25, 2002, available at <http://www.independent.co.uk/news/uk/home-news/kissinger-begins-to-stoop-under--the-weight-of-legal-scrutiny-658118.html> (“To imagine Dr.] Kissinger being arrested was impossible, but such a move had seemed just as unlikely in 1998 with General Pinochet.”).

63. *World Leader Salary Comparison*, INT’L HERALD TRIB., Apr. 9, 2007, available at <http://www.iht.com/articles/2007/04/09/asia/singbox.php>; *Bolivia Leader Halves His Own Pay*, BBC NEWS, Jan. 27, 2006, <http://news.bbc.co.uk/2/hi/americas/4652940.stm>; Ben Hall, *Sarkozy’s Salary Will Double to Match Peers*, FIN. TIMES, Oct. 30, 2007, available at <http://search.ft.com/ftArticle?ct=0&id=071030000664> (“By international and domestic comparisons, the French president is poorly paid.”); *Ahern Defends ‘Modest’ Pay Increase*, BREAKING NEWS, Nov. 11, 2007, available at <http://www.breakingnews.ie/ireland/mhmgbeysnau/rss2/> (quoting Irish Prime Minister Bertie Ahern as saying: “It would not be hard for a member of the media to write a glowing article about how poverty-stricken we are compared to other countries”).

64. In the 2008 U.S. presidential elections, for example, there were almost a dozen candidates in the early stages.

comes into conflict with the urge for self-preservation—since it is the state’s population that ultimately determines if a person can rule or stay in power, actions that bring the individual into conflict with popular opinion will be avoided unless there are powerful incentives for engaging in them. Shaming might provide such an incentive.⁶⁵ In the corporate law context, Professor Bebchuk refers to “outrage costs” that directors have to bear when excessive compensation agreements are revealed.⁶⁶ Although he does not expressly refer to it, shaming appears to be at work here. Similarly, when outrage is expressed at a violation of an international law norm, it is inevitable that some, if not all, leaders will be shamed, either in the internal or external dimension. Faced with this choice, the leader is caught between (the clichéd) Scylla and Charybdis—if he ignores the deleterious effects of breaching the norm for the state and proceeds to do so, he runs the risk of being subjected to a shaming sanction at the international level. If, on the other hand, he retreats from the offending action, the prospect of being targeted by opposing political actors for cowardice is real. This might not be ideal for individual leaders, but it might be good for the international community as it makes them more cautious about violating international law.

This Article will attempt to explore linkages between shaming sanctions and the violation of international law norms in the Abu Ghraib case. Part II provides a brief sketch of the scholarly treatment of shame sanctions in some areas of the law and their role in strengthening social norms. In Part III, this Article elaborates on the relationship between norms and the law and addresses the costs of enforcing social sanctions. It draws on insights from behavioral economics and examines relevant experimental evidence. Part IV focuses on the deployment of shaming in targeting the abuses at Abu Ghraib. Part V presents some tentative general conclusions on the role of alternative sanctions in international law and tries to craft a basic architecture for the deployment of these sanctions. In doing the above, this Article seeks to make a contribution in moving the state of the scholarship beyond passing mentions of the role of social norms and shame sanctions in international law, to providing a clear conceptual framework which identifies the relevant target for the deployment of the shame sanction; the enforcers of the sanction; and the limitations of the sanction as it is

65. Australian Lawmaker Says Military to Monitor Japan’s Whalers if Opposition Wins Government, INT’L HERALD TRIB., Nov. 15, 2007, available at <http://www.iht.com/articles/ap/2007/11/15/asia/AS-GEN-Australia-Japan-Whaling.php>; *China, India Expected to Stick with Coal Despite Calls to Reduce Carbon Emissions*, INT’L HERALD TRIB., Nov. 14, 2007, available at <http://www.iht.com/articles/ap/2007/11/14/business/EU-GEN-Energy-Congress-Coal.php>.

66. LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 5 (2004) (“The more outrage a compensation arrangement is expected to generate, the more reluctant directors will be to approve it and the more hesitant managers will be to propose it in the first place.”).

deployed by the enforcers against the target. By doing the above, the Article opens up new areas for the study of the ways in which social sanctions can help to sanction offenders and promote the observance of international law norms.

II. SHAME: A BRIEF EXCURSUS

The role of shame sanctions in constraining human behavior has been debated fiercely by criminal law scholars. The dominant view is that shaming is “the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions.”⁶⁷ This has manifested itself in a variety of ways—publication of the names of patrons of prostitutes in newspapers,⁶⁸ and special license plates for people convicted of driving under the influence of alcohol or drugs being two examples.⁶⁹ Several courts have employed shaming sanctions as part of the sentencing process.⁷⁰ Shame sanctions allow negative emotions aroused by

67. Kahan & Posner, *supra* note 40, at 368. Dan Markel writes that shaming is “marked by two features: first, there is an attempt to debase, degrade, or humiliate the offender; and second, the degradation occurs before the public eye, often but not always with the aid of the public.” Markel, *supra* note 40, at 2178.

68. Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 735 n.12 (1998); Courtney Guyton Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes’ Patrons*, 49 VAND. L. REV. 1525, 1527 (1996).

69. Donna DiGiovanni, Comment, *The Bumper Sticker: The Innovation That Failed*, 22 NEW ENG. L. REV. 643, 644 (1988).

70. Some reported cases where shaming has been employed are: *United States v. Gementera*, 379 F.3d 596, 599 (9th Cir. 2004) (requiring a convict to wear a signboard proclaiming his guilt); *United States v. Coenen*, 135 F.3d 938, 939 (5th Cir. 1998) (requiring the defendant to publish notice in the official journal of the parish); *United States v. Schechter*, 13 F.3d 1117, 1118 (7th Cir. 1994) (requiring the defendant to notify all future employers of the defendant’s past tax offenses); *People v. Letterlough*, 613 N.Y.S.2d 687 (N.Y. App. Div. 1994) (“CONVICTED DWI” sign on license plate); *People v. McDowell*, 130 Cal. Rptr. 839 (Cal. Ct. App. 1976) (tap shoes for purse thief who used tennis shoes to approach his victims quietly and flee swiftly); *Goldschmitt v. Florida*, 490 So. 2d 123, 124 (Fla. Dist. Ct. App. 1986) (requiring a defendant to place a sticker on his automobile: “CONVICTED D.U.I.—RESTRICTED LICENSE”); *Ballenger v. Georgia*, 436 S.E.2d 793, 794 (Ga. Ct. App. 1993) (imposing a condition requiring the offender to wear a fluorescent pink plastic bracelet imprinted with the words “D.U.I. CONVICT”). *Contra* *People v. Hackler*, 16 Cal. Rptr. 2d 681, 686-87 (Cal. Ct. App. 1993) (requiring a shoplifting offender to wear a t-shirt whenever he left the house reading: “My record plus two six-packs equals four years” on the front and “I am on felony probation for theft” on the back. This was struck down on appeal on the ground that the objective was to “public[ly] ridicule and humiliate[e]” and not “to foster rehabilitation”); *People v. Johnson*, 528 N.E.2d 1360, 1362 (Ill. App. Ct. 1988) (requiring a DWI offender to publish a newspaper advertisement with an apology and a mug shot. This was struck down because it “possibly, adds public ridicule as a condition” and was contrary to the goal of rehabilitation).

the offender to be ventilated.⁷¹ Often the enforcer of the shaming sanction expresses the collective emotion, by acting with outrage and disapproval on behalf of the group.⁷² It is not necessary that prior approval be obtained by the enforcer before embarking on this action.⁷³ The enforcer is taking a chance that his conduct accords with the general consensus. Such presumptive action, apart from sanctioning conduct that is wrong, is designed to serve a signaling function by cautioning bystanders to the possibility of shaming if they commit similar acts. Shame sanctions are aimed at deterrence.⁷⁴ It is possible for the sanction to over-deter—individuals who are excessively cautious might be deterred from good conduct, for fear of offending aggressive enforcers.

Before his recent recantation,⁷⁵ the doyen exponent of shame sanctions in the criminal law was Professor Dan Kahan. Kahan's views on shaming flow from his belief that criminal law must be expressive of disapproval if it is to be effective.⁷⁶ He argued that shame had the ability to express this disapproval better than incarceration, and was, therefore, preferable.⁷⁷ According to him, the damage to reputation serves as both the deterrent and retributive objectives of the criminal law.⁷⁸ Shame is more attractive than incarceration because it does not entail bureaucratic expenditure.⁷⁹ The task of enforcement is delegated to the community, and the state does not have to expend money on carrying out the sanction.⁸⁰ Shame is also advantageous when deployed in conjunction with penalties and fines, which may

71. Skeel, Jr., *supra* note 40, at 1814-16.

72. *Id.*

73. *Id.*

74. *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004); *E.B. v. Verniero*, 119 F.3d 1077, 1120-21 (3rd Cir. 1997) (“[N]otification results in shaming the offender, thereby effecting some amount of retribution. This suffering ‘serves as a threat of negative repercussions [thereby] discourag[ing] people from engaging in certain behavior.’ It is, therefore, also a deterrent. There is no disputing this deterrent signal; the notification provisions are triggered by behavior that is already a crime, suggesting that those who consider engaging in such behavior should beware.” (citation omitted)).

75. Kahan, *Shaming Sanctions*, *supra* note 58, at 2075. The recantation appears to be based on his belief that shaming was partisan and that incarceration is preferable to shaming because it is expressively overdetermined. Professor Kahan explains that a “law or policy can be said to be expressively overdetermined when it bears meanings sufficiently rich in nature and large in number to enable diverse cultural groups to find simultaneously affirmation of their values within it.” *Id.* at 2085.

76. Kahan, *Alternative Sanctions*, *supra* note 40.

77. *Id.* See also Flanders, *supra* note 44, at 612 (“Compared to imprisonment, shaming punishments inflict much less physical cruelty. Indeed, they replace damage to one’s physical integrity with mere damage to one’s status or reputation.”).

78. Flanders, *supra* note 44, at 612; see also Kahan, *Alternative Sanctions*, *supra* note 40, at 630.

79. See Kahan & Posner, *supra* note 40, at 372.

80. Kahan, *Alternative Sanctions*, *supra* note 40, at 630-49.

not be effective if the offender has significant economic resources.⁸¹ Reputation is perhaps most significant for such offenders, and when combined, the fine and the shame sanction can be an extremely powerful cocktail.

Shaming meshes neatly with the debate on the bindingness of international law because it resolves some of the deficiencies of legal sanctions when the subjects are states. Legal sanctions are crude in their application—imprisonment and financial penalties do not always correlate with the actions of the offender. This is particularly the case when one is dealing with state action—several levels of omission and commission are involved and attributing responsibility to individuals at a degree sufficient to justify incarceration or fines might prove difficult in many cases. Even where this is possible, individuals who are held guilty are probably low in the hierarchy because the potential for provable violations is greater when those charged with executing imprecise commands and objectives of those higher up the chain are involved. Thus, while it is possible to jail the soldier or policeman, those higher up the ladder are harder to prosecute, undermining the objective of the sanction. Further, for most indirect non-dangerous offenses, all that the international community wants is that outrage be expressed at the offending state in order to coerce it to modify its behavior, rather than to see individual state actors go to jail or to make them pay fines. Addressing this concern has to be part of international law's expressive dimension. In the case of violations such as those at Abu Ghraib, one is not trying to get the state, which has disregarded an international law norm, or the citizenry, which does not curtail the actions of the government, punished with the tools conventionally used to mete out legal punishment. The international law community recognizes that while the individual perpetrators can be punished by jail time, it is the state's creation of conducive circumstances for the offenders that is the real mischief—a situation not amenable to traditional legal sanctions. Further, financial penalties are crude matches for the actions of the state, and even where they are feasible might have little teeth if the state possesses enormous financial resources. If, indeed, the fine packs significant economic punch, the state might justify it on nationalistic grounds and might characterize it as a defense expenditure, for example, effectively removing the stigma out of the sanction. Legal sanctions, then, become inappropriate tools for what international society really wants to do. Any sanction, if it has to be meaningful and reflective of a sophisticated system, must match the message that society is trying to convey to the offender, and be proportional to the offense.⁸² Social sanctions

81. *Id.* This problem persists in most areas where fines are the punishment. For example, a fine would have been a rather weak sanction when applied to Martha Stewart because of her vast financial resources, whereas shaming can strike at a commodity that might not be so easily replaceable—reputation.

82. Kahan, *Alternative Sanctions*, *supra* note 40.

like shaming are more appropriate sanctions because they serve the expressive function of the law insofar as they tell the offending state that it has acted in a way that meets with society's disapproval. It leaves other consequences to individual states to administer.

A. Problems with Shame Sanctions

If shame sanctions are effective and less costly than legal sanctions, why have they been met with resistance? Several scholars have attacked shaming on the ground that it has debilitating negative effects.⁸³ One such effect is the possibility for those shamed to form subcommunities of offenders who explicitly embrace their wrongs and defy the majority.⁸⁴ The so called "axis of evil" might be one example of such a phenomenon in the international arena.⁸⁵ These subcommunities make it a virtue to engage in criminal activity, and shaming will have no effect on them.⁸⁶ Criminal law scholars have pointed to the existence of gangs, where criminal activity is celebrated rather than abhorred, as an example of such subcommunities.⁸⁷ Another frequently raised objection to shaming sanctions is that offenders may be treated differently based on extraneous factors, even though their offenses are similar. Kahan and Posner provide the example of a gifted stockbroker who may not suffer too much from shaming for insider trading in the long run in comparison with a run-of-the-mill broker who may pay a heavier price.⁸⁸ The potential for this is not exclusive to criminal law sanctions. All too frequently, one sees some states being attacked as violators of human rights when other states seem to escape such treatment. Compare in this connection the international response to the violations of human rights by Russia in Chechnya, and China in Tibet, against that to abuses by Serbia in Kosovo. Aside from the lack of consistency in application, critics of shame sanctions also contend that the purported cost-benefits of shaming

83. MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 15 (2004); Garvey, *supra* note 68, at 733; Markel, *supra* note 40; Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 *PSYCHOL. PUB. POL'Y & L.* 645, 646 (1997) [hereinafter Massaro, *Legal Reform*]; Massaro, *American Criminal Law*, *supra* note 40.

84. Braithwaite writes that "[offenders] associate with others who are perceived in some limited or total way as also at odds with mainstream standards." JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 67 (1989).

85. President Bush accused Iraq, Iran, and North Korea of being part of the axis of evil in his State of the Union speech in 2002. See President George W. Bush, State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>. ("States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world.")

86. Kahan, *Alternative Sanctions*, *supra* note 40, at 636.

87. BRAITHWAITE, *supra* note 84, at 4.

88. See Kahan & Posner, *supra* note 40, at 372-73.

are not as significant as its proponents claim.⁸⁹ This attack on shaming's inexpensiveness is based on its proponents undervaluing the cost of establishing reputations and maintaining them. If expensive reputations are destroyed without commensurate gain, critics contend that shaming sanctions lose much of their cost advantage.⁹⁰

Further, costs are incurred when shame sanctions have to be imposed. This is principally the cost of engaging in the conduct signifying the moral disapproval. Whether it is the forgoing of otherwise profitable interactions or the cost of conveying the disapproval in another manner, these measures are costly.⁹¹ Professor Skeel lists several costs that might have to be incurred in the corporate context.⁹² Analogous costs are readily apparent in international law.

Given the dependence on group membership, some scholars attack shaming as unworkable when a coherent community does not exist.⁹³ The key exponent of this view is Professor Massaro, who points out that the United States is not socially interdependent, and the heterogeneity in society creates problems of definition pertaining to the kinds of punishments that might engender a feeling of shame.⁹⁴ This strain of criticism is rooted in the external dimensions of shaming. While there is some merit in the argument, it is by no means necessary for there to be a community, in the strict sense of the term, for shaming sanctions to work. It is sufficient that people share certain values or ideals with others, regardless of whether they belong to any kind of community with those that share them. In the international arena, the fact that states belong to organizations and alliances, and that people across states share religions, languages, and values, and engage in mutually beneficial transactions, suggests that there is enough in common to satisfy the external dimension of shame. To be sure, these common norms are possibly few in number, and there is dispute as to what kinds of conduct fall under their aegis. For example, a substantial portion of the international public shares the norm that torture should not be used as an instrument of coercion by states, and that prisoners of war should be treated with dignity.⁹⁵

89. *Id.* at 372.

90. Massaro, *American Criminal Law*, *supra* note 40.

91. Skeel, Jr., *supra* note 40.

92. *Id.*

93. Massaro, *American Criminal Law*, *supra* note 40.

94. *Id.* at 1923. *See also* Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2194 (2003) ("Thus, even if a particular community could theoretically impose shame on an offender, a given judge's particular method of accomplishing that goal may still be off the mark.").

95. A BBC World Service poll of more than 27,000 people in 25 countries found that 59 percent of the world's citizens were "unwilling to compromise on the protection of human rights while 29 percent think governments should be allowed to use some degree of torture in order to combat terrorism." World Public Opinion.org, *World Citizens Reject Torture, BBC Global Poll Reveals* (Oct. 18, 2006), <http://www.worldpublicopinion.org/pi->

It is indeed the basis for our laws of war.⁹⁶ Secondly, the international law universe is extremely interdependent. Commercial and social linkages are so strong that no state can afford to ignore other actors without paying a very heavy price. This price can, *inter alia*, take the form of lost business opportunities, withdrawal of state invitations, flight of capital, collapse of the state's credit rating, derision of peers, removal from international institutions, and expulsion from social clubs and other organizations.⁹⁷ Mas-saro's point about heterogeneity, while particularly apposite in the international law context at the surface level, is less of a problem when it comes to the norms this Article is concerned with. Most people are peace-loving and consider cruelty to be shameful. Even if the populace of the state does not regard cruelty toward prisoners as shameful,⁹⁸ the very process of interaction with others who do, and make it known, is unlikely to make all but the most thick-skinned of people immune to feelings of shame and embarrassment. This fact makes shame work for the rational actor who finds that the conduct has low utility.

Martha Nussbaum offers a different critique in her book *Hiding from Humanity*, arguing that legal actors should abjure shame and disgust because it allows them to hide from their humanity.⁹⁹ This is similar to Mas-saro's contention that shaming penalties convey the message that "offenders

pa/articles/home_page/261.php?nid=&id=&pnt=261&lb=hmpg1. 58% of Americans were against the use of torture. *Id.* A series of polls by Retro Poll on the use of torture by the U.S. government found that 67.3% of the respondents "knew torture is against U.S. laws and a war crime." Press Release, Retro Poll, Public Opinion on Torture, the Iraq War, and Civil Liberties, New Findings from Retro Poll (May 5, 2005), <http://www.commondreams.org/news2005/0505-14.htm>. An ACLU poll found that 80% of Democrats, 87% of Independents, and 74% of Republicans who responded wanted to "make it clear that the policy of the United States is to oppose torture and follow the Geneva Conventions." American Civil Liberties Union, *New Poll: Majority of American Voters Want Next President to Restore and Protect Civil Liberties; Seek a More Assertive Congress* (Oct. 4, 2007), <http://www.aclu.org/safefree/general/32084res20071004.html>. See also Empirical Legal Studies Blog, *The Polls—Torture* (Dec. 18, 2007), http://www.elsblog.org/the_empirical_legal_studi/2007/12/the-polls---tor.html.

96. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 6, art. 3; Convention Against Torture, *supra* note 6.

97. For example, Pakistan was suspended from the Commonwealth after its military coup. See *Should Pakistan be Readmitted to the Commonwealth?*, BBC NEWS, Nov. 4, 2002, http://news.bbc.co.uk/1/hi/talking_point/2385943.stm.

98. The BBC Poll referred to in note 97, for example, found that more respondents from India favored relaxing the rules against torture than not. Press Release, BBC, *World Citizens Reject Torture, Global Poll Suggests* (Oct. 19, 2006), http://www.bbc.co.uk/pressoffice/pressreleases/stories/2006/10_october/19/poll.shtml ("Thirty-two percent say using physical coercion is sometimes permissible—a bit more than the 23% who say existing rules should be maintained."). The poll also found that the "largest percentage endorsing torture is found in Israel where 43% say that some degree of torture should be allowed, though slightly more (48%) say the practice should be prohibited." *Id.*

99. NUSSBAUM, *supra* note 83.

subjected to these penalties are less than human others who deserve our contempt.”¹⁰⁰ The dehumanizing aspect of shaming is also troubling to Flanders, who writes that “shaming punishments involve the public in an exceptionally intimate way, and thereby risk making punishment a mob-like affair, where personal vengeance rules, instead of professional, bureaucratic impartiality”¹⁰¹

Nussbaum contends that shame and disgust are never constructive in law.¹⁰² In circumstances where disgust has salience, she argues that indignation is actually the preferable emotion.¹⁰³ Her case is predicated on the idea that disgust is not an emotion that is the product of logic and rationality, or that has a significant correlation with the harm that has been caused by the offender, and that when one feels disgust, the usual reaction is to turn away or recoil from the issue rather than to deal with it effectively.¹⁰⁴ With regard to shame, Nussbaum believes that it can spill over onto family members and associates of those who are shamed. This feature is not unique to social sanctions and can have beneficial consequences—the fear that they will be tarnished by the imposition of the sanction creates strong incentives for family members and associates to attempt to influence the offender’s behavior by putting pressure on the offender to conform to the law or norm. Such influence can commence from the very early years of each individual, with the parents instilling values and morals, with the objective of ensuring that the child grows up to become a good person. While seemingly conceding that point, Nussbaum seems to focus more on the negative consequences of shaming innocent third parties without corresponding deterrence benefits, a

100. Massaro, *Legal Reform*, *supra* note 83, at 699-700 (she is troubled by “the caste features of punishment” which are “jarring in a political order that makes equality a cultural baseline”).

101. Flanders, *supra* note 44, at 16 (“Unlike imprisonment, shaming punishments require that citizens participate in degrading the offender: They require that citizens adopt certain negative attitudes towards the offender, in order that he literally *feels* society’s disgust toward him. It does not seem right that a liberal state encourages its citizens to act this way”).

102. NUSSBAUM, *supra* note 83, at 231-32 (writing about the divisive nature of shaming activity, she contends that “the shamers set themselves up as a ‘normal’ class above the shamed, and thus divide society into ranks and hierarchies”). For a critique, 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, 1055 (2006) (“[T]his argument alone is insufficient to convince the reader that it is necessary to purge disgust from legal and social thinking. We draw a different conclusion from the same information, which is that before disgust can be potentially useful, it must be actively managed.”).

103. NUSSBAUM, *supra* note 83, at 75. Nussbaum defines “indignation” as anger triggered by unfairness. *Id.*

104. Nussbaum writes that disgust is “unworthy of guiding public action” and “a dangerous social sentiment.” *Id.* at 171.

problem not unique to social sanctions.¹⁰⁵ Nussbaum's point about hiding from humanity is apt. Indeed, there are serious dangers in the international context due to cultural barriers and the ready tendency to demonize that which is unknown. The risk of tarring whole cultures with a broad brush is a possibility, and has materialized in some contexts. One possible check is for enforcement to be delegated to the hands of responsible institutions rather than the masses.

B. Dependence on Internalization

Shaming is most effective when the offender has internalized the norm that is allegedly violated.¹⁰⁶ The very purpose of shaming on the external dimension is for the individual to understand the seriousness of his actions and to internalize the norm.¹⁰⁷ In the absence of internalization, the enforcement action humiliates the offender without corresponding gain. In *United States v. Gementera*, a case involving mail theft, the district court pointed out that "ultimately, the objective here is, one, to deter criminal conduct, and, number two, to rehabilitate the offender so that after he has paid his punishment, he does not reoffend, and a public expiation of having offended is, or at least it should be, rehabilitating in its effect."¹⁰⁸ The court was keen to emphasize that humiliation was not the objective.¹⁰⁹ Rather, after internalization the offender must accept that his conduct has lowered himself either in his own eyes or in the eyes of people whose opinion he cares about.¹¹⁰ Internalization facilitates conformity whereas humiliation is

105. See *United States v. Koon*, 34 F.3d 1416, 1454 (9th Cir. 1994) ("Virtually all individuals who are convicted of serious crimes suffer humiliation and shame, and many may be ostracized by their communities.").

106. Internalization makes the offender follow the norm regardless of its enforcement. See Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the "Bad Man" of Holmes*, 78 B.U. L. REV. 903 (1998); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253 (1999).

107. As the U.S. District Court said in *United States v. Gementera*, [H]e needs to understand the disapproval that society has for this kind of conduct, and that's the idea behind the humiliation. And it should be humiliation of having to stand and be labeled in front of people coming and going from a post office as somebody who has stolen the mail. 379 F.3d 596, 601 (9th Cir. 2004) (noting the district court's remarks at the first sentencing hearing).

108. *Id.*

109. The objective was not "to subject defendant to humiliation for humiliation's sake, but rather to create a situation in which the public exposure of defendant's crime and the public exposure of defendant to the victims of his crime." *Id.* at 602.

110. As the Ninth Circuit noted in *United States v. Gementera*,

He needs to be shown that stealing mail has victims; that there are people who depend upon the integrity and security of the mail in very important ways and that a crime of the kind that he committed abuses that trust which people place in the

more likely to engender resentment. This poses problems in the international law context because of the difficulty presented by the actors being aggregations rather than individuals, and the possibility for some constituents to become extremely resentful. Is it possible for aggregations like states to internalize norms? At a theoretical level, there is no reason why aggregate entities cannot internalize certain norms. Even if this is arguable, for the purposes of this Article, it suffices that disaggregating a state presents conditions suitable for norm internalization. If individuals within a state have internalized a norm, at some tipping point it can be said that the state has internalized the norm. This is especially true if that group with the internalized norm controls the state's agenda because it is in power. Without internalization, reputational taints can certainly be suffered, but shame cannot be felt. In the absence of internalization, it is very likely that the reaction of the offender will be anger against those enforcing the sanction.¹¹¹ Confronted with retaliation, the enforcers also experience anger and engage in a fresh round of punishment.¹¹² Thus, multiple rounds of sanctioning behavior can stem from anger at the primary sanction, causing a rapid spiraling down effect.¹¹³ Au contraire, if the offender has internalized the norm, remorse and guilt are the likely emotions. This stops the parties from falling into a retaliatory sanctioning cycle and will make the punishment

mail. He needs to see that there are people who count on the mails and integrity of the mails. How else can he be made to realize that than by coming face-to-face with people who use the postal service? That's the idea.

379 F.3d 596, 604 (9th Cir. 2004) (noting the determination of the district court).

111. Hopfensitz & Reuben, *supra* note 25, at 16.

The effect of anger becomes obvious once we examine the interaction of anger and shame. In this case, a clear result is obtained. Namely, second movers who were angry and felt no shame retaliate more and more frequently than second movers who were angry and felt shame For second movers who were not angry, there are no significant differences between those who felt no shame and those who did

. . . .
Id.

112. *Id.* at 2 (“[W]e find that many individuals punish back after being punished. In various cases this escalates as individuals punish each other in turns, resulting in considerable welfare losses.”). See also Nikos Nikiforakis, *Punishment and Counter-punishment in Public Good Games: Can We Still Govern Ourselves?* (Univ. of Melbourne Dept. of Econ., Working Paper, 2005), available at <http://ssrn.com/abstract=764185>. Nikiforakis's experiment allowed two rounds of sanctions. After the first round of sanctions, each participant knows the quantity of punishment points that each individual assigned to him. The second round allows him to sanction those who sanctioned him. This round of sanctioning is truly retaliatory, and is not a case of punishing those who did not adequately sanction free riders. *Id.* at 3-4.

113. Hopfensitz & Reuben, *supra* note 25, at 15 (“RESULT 2—*First movers who punish do so because they are angry. High intensities of anger are triggered by opportunistic behavior by the second mover, especially if it is unexpected and considered unfair. Retaliation by second movers also makes first movers angry and leads to additional punishment.*”).

effective.¹¹⁴ Experimental studies confirm that shame and guilt can prevent angry responses to punishment.¹¹⁵ One study showed that people who act unkindly are not immune from anger when their unkindness is punished, apparently expecting kindness despite their own unkindness.¹¹⁶ It was only when they internalized the punishment and felt shame did they desist from retaliatory behavior.¹¹⁷ The authors of the study, Hopfensitz and Reuben, made the actors repeat their behavior in the experiment and found that they acted with kindness in the future only when punishment induced shame.¹¹⁸ This presents interesting insights for punishing torture in international law. If states engaging in torture do not acknowledge violating an international law norm, they are likely to be angered by the imposition of a shame sanction by other states. It is only when they accept that their actions are not in line with international law norms will shaming work by inspiring the internal element and motivating them to act differently in the future. It is possible that they will change their behavior even without accepting that torture is wrong because, as rational actors, they realize the disutility created by the shaming sanction in the form of negative reputational or financial consequences. Angry and indignant states might thus modify their behavior without norm internalization. While this behavioral modification might serve the purpose, it cannot be accurately characterized as stemming from shame.

If internalization is essential, does knowledge of the offense by third parties matter? In the international arena, can a state feel shame if the offense is completely unknown to others? Theory suggests that this is possi-

114. *Id.* at 17 (“[O]ur results suggest that high intensities of anger provide second movers with a motivation to retaliate and high intensities of shame restrain them from doing so. Furthermore, shame seems to be necessary for punishment to have an effect on how second movers adjust their behavior.”).

115. *Id.* at 15 (“[S]econd movers who felt no shame are more likely to retaliate than other second movers. Furthermore, we also find that, for second movers who were punished, experiencing shame induces them to correct their behavior.”).

116. *Id.* at 17.

RESULT 3—*Second movers who retaliate do so because they are angry and do not feel shame. In addition, following the feeling of shame, second movers rectify their opportunistic behavior. High intensities of anger are triggered by punishment, especially if the second mover had returned a positive amount. High intensities of shame are triggered by opportunistic behavior and are not affected by punishment.*

Id. at 19.

117. Hopfensitz & Reuben, *supra* note 25, at 17.

118. *Id.* Their experiments showed the need for monetary punishments, too: “[O]ur results indicate that, it is the combination of feeling shame and receiving monetary punishment that has a significant effect on behavior. This suggests that shame alone will not have an effect if the cooperative norm is not actively enforced.” *Id.* at 21.

ble.¹¹⁹ There is a body of research in psychology showing that people feel shame even when offenses committed by them were hidden from others.¹²⁰ If this view is correct, internalization assumes even greater importance. Internalization is a check against self-serving attempts at characterizing the actions of enforcers as guided by ulterior motives. Many legal writers¹²¹ have not paid enough attention to this internal dimension.¹²² Some concede that shaming has two dimensions, but prefer to focus only on the second dimension.¹²³ For example, Posner writes that one can feel shame even when the action does not violate a norm that one has internalized.¹²⁴ Accordingly, a state could experience shame because norms entrepreneurs publicize torture by its agents, even though it has an internalized norm allowing torture.

119. Some economists differentiate shame from guilt by the visibility of the offense. If the offense is visible to others, under this view, shame is the appropriate emotion. If, on the other hand, the offense has not been observed by others, guilt is the appropriate emotion. See Eugene Kandel & Edward P. Lazear, *Peer Pressure and Partnerships*, 100 J. POL. ECON. 801 (1992).

120. June Price Tangney et al., *Are Shame, Guilt and Embarrassment Distinct Emotions?*, 70 J. PERSONALITY & SOC. PSYCHOL. 1256 (1996).

121. Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy* (Yale Law School Program for Studies in Law, Econ., and Pub. Pol'y Working Paper Group, Paper No. 230, 1999), available at <http://ssrn.com/abstract=191392> (pointing out that norms scholars continue to base their work on rational choice theory).

122. Richard A. Posner & Eric B. Rasmussen, *Creating and Enforcing Norms, With Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369, 371 (1999).

[W]e shall treat humiliation as a form of shame, and shame itself as (1) a purely external sanction for (2) violations of the moral code. It is important to note, however, that even when viewed purely as an external sanction, that is, as the product of the actions or reactions of other people, shame (like guilt) is felt even if other people take no action.

Id.

123. See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 116 (1992) (discussing importance of reputational concerns in ensuring compliance with industry norms); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1665, 1668-69 (1996) [hereinafter Cooter, *Decentralized Law*] (suggesting that third-party enforcement is important in explaining emergence of norms); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996) (“[A] norm is like a law, except that a private person sanctions the violator of a norm, whereas a state actor sanctions the violator of a law.”); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 915 (1996) (discussing norms as enforced through social sanctions).

124. Posner & Rasmussen, *supra* note 122, at 371 (“One can also be shamed (though the better word here would be ‘humiliated’) for conduct that violates a moral code not one’s own, where there is no question of guilt. During the Cultural Revolution in China, people paraded through the streets in dunce caps felt humiliated even if they disapproved of the regime and therefore felt no guilt at violating its norms.”).

C. Inconsistent Application and the Lack of Due Process

Shame sanctions have been attacked as being violative of due process principles.¹²⁵ By their very nature, shaming punishments are frequently imposed without any opportunity for the offender to present his case. Given a healthy public appetite for sensationalism and gossip, shaming substitutes mob justice for due process.¹²⁶ There is no means of calibrating the extent of the punishment leading to excesses that might destroy the offender.¹²⁷ It is also likely that the task of enforcement will be undertaken by actors with particular political agendas that are not shared by the majority, and people will be victimized even if they have done nothing wrong.¹²⁸ There are processual checks against this occurring with legal sanctions, but with no controls against the abuse of shame sanctions, unequal and inconsistent results are possible. Interest-group capture is a realistic fear in the case of deploying shame sanctions against states and their leaders, and is a concern that has been expressed in other contexts in international law. For example, in the eyes of third-world countries, the non-proliferation norm is used by Western nations to prevent them from getting too powerful.¹²⁹ What is proliferation to a Western nation might not be so for many third-world states, and the deployment of shame sanctions based on political ideologies and/or economic status can be a threat to their efficacy.

D. An Excess of Shaming

Can there be too much shaming? Professor Massaro advances such a claim.¹³⁰ If there is a shaming “overload,” people might withdraw from

125. Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 5-12 (1991).

126. Whitman, *supra* note 40, at 1088 (worrying that shaming confers too much “enforcement power to a fickle and uncontrolled general populace”).

127. The suicide of a prosecutor who allegedly solicited a person he believed to be thirteen years of age following a Dateline NBC sting is a sobering reminder of the dangerous consequences. See Tim Eaton, *Prosecutor Kills Himself in Texas Raid over Child Sex*, N.Y. TIMES, Nov. 6, 2006, available at <http://www.nytimes.com/2006/11/07/us/07pedophile.html?ex=1320555600&en=9a849fc4db0d28ce&ei=5088&partner=rssnyt&emc=rss>.

128. Stephen Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601 (2006).

129. Geoffrey Hunt, *China's Case against the Nuclear Non-Proliferation Treaty: Rationality and Morality*, 3(2) J. APPLIED PHIL. 183, 183-99 (1986).

130. Massaro, *American Criminal Law*, *supra* note 40, at 1930. A similar point is made by Harel and Klement: “increasing the rate of detection decreases the deterrent effects of shaming since it increases the number of shamed individuals in the society and, as was shown earlier, such an increase decreases the expected costs of shaming due to the larger search costs it imposes on law-abiding individuals.” Alon Harel & Alon Klement, *The Economics of Shame: Why More Shaming May Deter Less* 15 (Am. Law & Econ. Ass'n Annual Mtgs., Working Paper 20, 2005), available at <http://ssrn.com/abstract=789244>.

enforcement actions. Excessive shaming dilutes the norm that is sought to be enforced. If, for example, several states were to embark on nuclear weapons programs and all were shamed by multiple enforcers, the stigma associated with the action would be lost. This could lead to the non-proliferation norm losing its potency, eventually losing its status as a norm. Harel and Klement write that the loss of potency creates a dissonance

between the law's disapproval of the illegal act, and the willingness of individuals to overlook it. Increasing the rate of shaming may therefore fail not only in substituting for traditional sanctions' deterrent functions, but also in reinforcing community's cooperation with the law. Thus, an increased rate of shaming may paradoxically undermine the law's expressive value.¹³¹

As more offenders are shamed, it becomes harder for non-offenders to identify and isolate them, with the result that the offender does not suffer the consequences of shaming.¹³² Secondly, an increase in the number of shamed offenders empowers them to form groups, making enforcement ineffective.¹³³ They also write that "the more people shamed, the lesser the ability of law-abiding individuals to form law-abiding communities."¹³⁴ This appears to be curious given that it is inconceivable that the law-abiding group will be smaller than the offending group. The proportion of the shamers to the shamed at all times must be quite high if the norm is to have any meaning. Otherwise, the norm will be deviance, rather than the conduct prescribed by the law.

Arguments about excess have some truth to them, but the problem of excess is not unique to shame. Similar problems plague every system of punishment. Further, the number of values or norms that characterize the relevant international law community is rather small in comparison with the number of crimes that might exist in a given national legal system. The fact that the number of possible offenders—at the end of the line of responsibility—is limited to the number of states and their leaders, limits the possibility that the community is unable to identify the offender due to the overload. At a minimum, shaming can be just as excessive as other forms of punishment—without the costs.

131. Harel & Klement, *supra* note 130, at 21; *id.* at 22 ("Shaming penalties can be 'self destructive' as an extensive use of them may erode their effectiveness.").

132. *Id.*

133. *Id.*

134. *Id.* at n.38.

III. NORMS AND SHAMING

Social sanctions like shaming can only be effective in achieving desirable behavior when they reinforce norms or law.¹³⁵ There is now a vast literature on social norms¹³⁶ that sheds light on the expressive dimensions of labeling conduct as prosocial or antisocial.¹³⁷ This scholarship could provide a rich vein of material for international law because of its emphasis on the role of groups, and their ability to influence behavior. Norms theorists argue that law interacts with social norms by strengthening them, thus facilitating prosocial behavior.¹³⁸

Social norms act as a constraint on otherwise self-interested actions.¹³⁹ Several experiments conducted by behavioral economists have shown that subjects are constrained by considerations of equity and fairness despite the opportunity to be greedy and self-regarding.¹⁴⁰ There are several interesting problems that crop up when one attempts to apply the social norms scholarship to the use of torture. The first of these is the perpetual conflict between various social norms, each vying for primacy. *Aliter*, the norm against torture is competing with a norm favoring the use of illegal force by the state to protect its citizens. It is difficult to determine which norm should triumph. It is certainly true that a law that flies in the face of a social norm encouraging state violence against prisoners is doomed to fail. As proven by Ellickson's famous study in Shasta County, the community's norms more effectively allocate the costs of interactions than the law is capable of doing.¹⁴¹ Further, as Professor McAdams writes, dissonance between law

135. See generally Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 391 (1997) (explaining the significance of norms in deterring crime); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 812 (1998) (explaining the significance of promoting norms through law enforcement in inner cities).

136. See, e.g., Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Non-Legal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996) [hereinafter Eric A. Posner, *Regulation of Groups*]; Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365 (1997) [hereinafter Richard A. Posner, *Social Norms*]; Sunstein, *supra* note 123. Owing to the number of scholars at the University of Chicago doing this work, some have referred to it as the "New Chicago School." See, e.g., Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998).

137. McAdams, *supra* note 136, at 341-42.

138. Richard A. Posner, *Social Norms*, *supra* note 136.

139. See McAdams, *supra* note 136, at 340-42; Sunstein, *supra* note 123, at 904-14.

140. See Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators, and Manners*, 9 J. ECON. PERSP. 209, 216-18 (1995).

141. Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 542-43 (1998).

and social norms makes enforcing laws against antisocial conduct difficult.¹⁴²

What explains the power of social norms? One theory posits that it is owed to the value placed by people in belonging to groups.¹⁴³ If membership is so valuable, the argument is that people will go a long way to preserve that membership, and thus expulsion from the group serves as a powerful sanction. McAdams bases his thesis on the idea that humans are social animals, and that acceptance by others is inherently important.¹⁴⁴ It does not matter that other rewards flow from this acceptance. If acceptance is its own reward, then people will behave in ways aimed at attaining acceptance, even in the absence of other rewards, and in the presence of other costs.¹⁴⁵ Thus, purely self-interested behavior will be constrained to the extent that it invites disapprobation, or fails to win approbation. A pioneering study by Lisa Bernstein focusing on the diamond industry showed that the persistence of industry customs can be explained by the value placed by members in belonging to the industry group.¹⁴⁶ This puts a lid on members' proclivities to attempt to gain advantages by short-term competitive behavior—based on the idea that these short-term benefits are smaller than those provided by membership in the group. Studies have shown that groups establish norms even in incipient or protean conditions, and that these norms seem to persist even when the group is absent.¹⁴⁷ This might hold explanatory power in the context of state behavior.

Group or club membership also has other significant purposes—for example, to signal type to onlookers. By belonging to NATO, a state could signal its hostility to communism. Thus, membership itself is a source of information about the type of actor one is.¹⁴⁸ In many instances, the benefits of such membership far outweigh the costs of such signaling, and individuals might join purely for the benefits, regardless of whether they agree with the ideology of the group.¹⁴⁹

142. McAdams, *supra* note 136, at 348.

143. *Id.* at 356.

144. The core assumption of esteem theory is that people have a preference for something that other people can give or withhold at zero cost: esteem. *Id.* at 355. The assumption serves to avoid the collective action problem of norm enforcement. Because esteem is costless it is not subject to a free rider problem. Although the preference for esteem is assumed to be slight, McAdams shows that it can explain even very costly norm-guided behavior. *Id.* at 356.

145. A similar idea is contained in the peer-pressure-based model of Kandel and Lazear. See Kandel & Lazear, *supra* note 119, at 802.

146. Bernstein, *supra* note 123, at 116.

147. Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHL.-KENT L. REV. 1537, 1548 (2000) (sheriff's experiments).

148. Eric A. Posner, *Regulation of Groups*, *supra* note 136, at 161.

149. *Id.* at 148.

Social norms do exist in international law.¹⁵⁰ Despite the absence of clear legal standards and liability in many instances, states act in ways that are, at least facially, geared at signaling cooperative intent.¹⁵¹ This sort of conduct can be explained by the operation of social sanctions.¹⁵² Scholars argue that actors do the right thing because of the fear of shame or embarrassment.¹⁵³ Other theorists are skeptical about the ability of international law to serve as a meaningful constraint on state conduct.¹⁵⁴

A. Social Norm Creation

Cooter defines a social norm in terms of societal consensus about desirable conduct.¹⁵⁵ He explains that agreement about what people ought to do is indicative of a possible social norm, but disagreement might be suggestive of a struggle to establish a social norm.¹⁵⁶ This is, however, not a sufficient condition for the establishment of a social norm. Cooter's formulation requires that the social norm be an "effective consensus obligation"—people must not only agree that a social norm exists, but must act in accordance with that norm.¹⁵⁷ He gives due attention to a somewhat neglected aspect of social norms—the internalization element, writing that people make a moral commitment when they internalize a social norm.¹⁵⁸ Cooter's

150. See generally Wexler, *supra* note 39 (explaining the expansion of international norms); Symposium, *Norms and Corporate Law*, 149 U. PA. L. REV. 1607 (2001).

151. See, e.g., ROYAL EMBASSY OF SAUDI ARABIA, SAUDI ARABIA AND THE UNITED STATES ANNOUNCE JOINT DESIGNATION (2004) http://www.saudiembassy.net/documents/Newsletter_JointPressConference_Jan04.pdf (announcing the Saudi-U.S. cooperation on terrorism).

152. See Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77, 84 (2007).

153. See Wexler, *supra* note 39, at 566.

154. JACK L. GOLDSMITH & ERIC A. POSNER, *LIMITS OF INTERNATIONAL LAW* 9-10 (2005).

155. Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 586-87 (1998), available at <http://ssrn.com/abstract=111408>, at *2 [hereinafter Cooter, *Expressive Law*]. Ellickson defines norms as rules of behavior that are enforced primarily not by courts, but by other forces. See Ellickson, *supra* note 121, at 35-37. For Posner & Rasmussen:

A norm is a social rule that does not depend on government for either promulgation or enforcement. Examples range from table manners and the rules of grammar to country club regulations and standard business practice. Norms may be independent of laws, as in the examples just given, or may overlap them; there are norms against stealing and lying, but also laws against these behaviors.

Posner & Rasmussen, *supra* note 122, at 369.

156. Cooter, *Expressive Law*, *supra* note 155, at 587.

157. *Id.*

158. "Internalizing a social norm is a moral commitment that attaches a psychological penalty to a forbidden act. A rational person internalizes a norm when commitment conveys an advantage relative to the original preferences and the changed preferences." Cooter,

emphasis on internalization is a richer formulation and is in contrast to several other scholars who seem content to rely upon norms being enforced by third parties without much regard for the impact on the offender, beyond considerations such as negatively affected reputation.

Cooter distinguishes between the consequences of internalization for cooperative and noncooperative settings, stating that internalization can be beneficial in the former.¹⁵⁹ It is precisely this scenario that we are confronted with in the case of torture. If states engage in concealing all instances of torture, it is inevitable that other states and international organizations will work towards monitoring them with greater vigor. This will divert resources away from more productive uses, and while both these states/international organizations and the torturing state will have to bear these costs, it is probable that the latter bears the brunt of the costs. This is because of the relatively large number of other states, which brings down individual costs for each state, and because several egregious programs will be unraveled by the increased scrutiny. Thus, while the most secretive of states will succeed in concealing torture, the mediocre and worst states will suffer heavily because of this increased monitoring. Given this reality, all states would be better off by internalizing a social norm against torture.

The nub of Cooter's argument is that positive law can influence rational actors to change their character.¹⁶⁰ Ergo, if a law sanctions torture, it is likely that states would be influenced to give up cruelty toward prisoners of war. Given the costs associated with this, Cooter seems to imply that shaming can achieve the same result at lower cost. Thus, the ability to publicly shame states that engage in torture makes it possible that states will be influenced to give up torture as an instrument of state policy. Abstinence signals to the international community respect for the rule of law and individual dignity. The use of torture, on the other hand, signals to the international community that these states are not good participants in cooperative settings and that they are liable to privilege short-term self-interest over individual dignity and rule of law. This can only work if the details of acts

Expressive Law, *supra* note 155, at 586; *see also* Cooter, *Decentralized Law*, *supra* note 123, at 1665.

159. He writes:

In a noncooperative setting, moral restraint is a disadvantage, rather like fighting with one hand tied behind your back. In cooperation ventures, however, moral restraint can increase productivity, so people with good character may enjoy an advantage over people with bad character. For example, agents who faithfully serve their principals increase the productivity of principal-agent relationships by reducing monitoring costs.

Cooter, *Expressive Law*, *supra* note 155, at 587. McAdams also stresses that people obey internalized norms even when they would suffer no adverse consequences if they disobeyed them. *See* McAdams, *supra* note 136, at 376; Symposium, *supra* note 150.

160. Cooter, *Expressive Law*, *supra* note 155, at 586.

of torture are made public and if states are parties to future interactions that require cooperation with other states.¹⁶¹

There is considerable evidence for the view that rational actors do behave in ways that are other-regarding. The expectations of others appear to be a key determinant in several experimental studies.¹⁶² Perhaps obviously, these studies show that such expectations only play a role up to a point when they are in conflict with self-interest. An analysis of social dilemma games found that as the personal cost incurred by cooperating in a social dilemma rises, cooperation rates tended to fall.¹⁶³ Studies of dictator games show that if a proposer offers a relatively larger share of the money, the likelihood that the responder will spitefully reject it decreases.¹⁶⁴ Thus, people are only willing to be spiteful if the cost of being spiteful is not too high. While this is true for participants in the game, spite might be costless to observers, and they might step into the breach and engage in spiteful behavior, ensuring that proposers are honest. So, while states having interests that cannot be compromised might evaluate the cost of spiteful behavior and conclude that it is too high, observers who are not in that position, either because of geographic or financial distance, can engage in spiteful behavior at low or no cost. This can serve as a sufficient sanction for enforcing the social norm.

A norm can only be created with common knowledge and awareness of the sanctions that befall violation. Norms entrepreneurs have a powerful role to play in this regard. They are likely to be much more successful at creating norms than states are.¹⁶⁵ Norms have long gestation periods, and acceptable conduct does not become unacceptable without conditioning. Norms entrepreneurs facilitate conditioning, frequently with the assistance of the law. The social meaning of conduct can be changed by the law, and

161. Stout makes a similar point:

[E]xternal incentives, alone, can only influence the behavior of the rationally self-ish actor when two criteria are met. First, her behavior must be observable to others. Second, some one (or something) must be both willing and able to reward her good behavior and to punish her bad behavior—and to reward or punish sufficiently.

Lynn Stout, *Other-Regarding Preferences and Social Norms* 20 (Geo. Law & Econ. Research Paper No. 265902, 2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=265902.

162. *Id.* at 13, 15.

163. David Sally, *Conversation and Cooperation in Social Dilemmas: A Meta-Analysis of Experiments from 1958 to 1992*, 7 *RATIONALITY & SOC'Y* 58, 66 (1995).

164. Stout, *supra* note 161, at 17.

165. Posner and Rasmussen make a similar point about nongovernmental organizations: "Nongovernmental organizations may be more effective than either individuals or governments in this regard, but it is not clear whether a society that gives ample scope to norm changing organizations will have more or less norm creation and stability." Posner & Rasmussen, *supra* note 122, at 379.

norms entrepreneurs employ this for conditioning. This is precisely what has transpired in the torture case. Norms entrepreneurs frequently highlight instances of torture and put pressure on state agencies to take corrective action.¹⁶⁶ This serves to condition both the state and citizens.

B. The Cost of Enforcing Social Sanctions

To be sure, inflicting any kind of sanction is costly.¹⁶⁷ Even in the McAdams Esteem Model,¹⁶⁸ the very act of withholding esteem is not as costless as he suggests. The enforcer of the sanction, whether it is even a relatively passive sanction such as shunning or avoiding the wrongdoer, still has to pay a price, which might range from confrontation to embarrassment. This cost is the measure of the enforcer's position post-sanction relative to the enforcer's position pre-sanction.¹⁶⁹ The costs are not distributed

166. See, e.g., Amnesty Int'l, Counter Terror with Justice, <http://www.amnesty.org/stoptorture> (last visited Mar. 27, 2008); Amnesty Int'l, *Cruel. Inhuman. Degrades us All. Stop Torture and Ill-Treatment In . . .* (2005), <http://www.amnesty.org/en/library/asset/ACT40/010/2005/en/Xc3jXzDa2LwJ>; Rights for All, Torture and Abuse of Prisoners, <http://www.rightsforall.amnesty.org/what/appeals/torture.htm> (last visited Mar. 27, 2008); AMNESTY INT'L, INDIA: TIME TO ACT TO STOP TORTURE AND IMPUNITY IN WEST BENGAL (2001), <http://asiapacific.amnesty.org/library/Index/ENGASA2003320-01?open&of=ENG-IND>; Amnesty Int'l, Egypt, <http://thereport.amnesty.org/eng/Regions/Middle-East-and-North-Africa/Egypt> (last visited Mar. 27, 2008); Human Rights Watch, Human Rights News, Torture and Abuse, <http://www.hrw.org/doc/?t=torture> (last visited Mar. 27, 2008); Human Rights First, Law & Security, http://www.humanrights-first.org/us_law/etn/index.asp (last visited Mar. 27, 2008).

167. RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 211 (1981). See also Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. 355, 363 (2005) ("In the context of SORNLS, for example, these costs include setting up notification websites, updating these websites, tracking down offenders, and actively notifying communities."). Teichman points out that:

[n]on-legal sanctions are unique because through their use, the government can externalize some of the costs of sanctioning to the public. The amount of sanctions inflicted can therefore be raised without tapping into a limited government budget. Not only is this true both of the costs of non-legal sanctions, which are quite obviously born by the sanctioning public, but is also true with respect to the costs of inducing non-legal sanctions.

Id. at 364 n.38.

168. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

169. Julia A. Houston, Note, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729, 732-33 (1994) (pointing out problems of implementing SORNLS associated with their costs). Denise M. Bonilla & Joy L. Woodson, *Continuing Debate Over Megan's Law: Some Question Whether Sex Offender List Curbs Crime. The State Statute is Set to Expire Next Year*, L.A. TIMES, Feb. 14, 2003, at B2 (California Attorney General pointing out that verifying registration would cost the state \$15 million to \$20 million, which is a "hefty request" given the California budget deficit).

evenly—free-riding is a real possibility.¹⁷⁰ To be sure, secondary benefits such as a reputation for courage, integrity, and willingness to enforce the norm accrue to those who pay the price. States will engage in a cost-benefit calculation to determine if these secondary benefits outweigh the free-rider problem. Some scholars characterize such actors as “shame-centered enforcers.”¹⁷¹ Paying the enforcement price also helps to stave off a sanction against passivity that other enforcers might impose.¹⁷² There is evidence of passive actors being punished by aggressive enforcers.¹⁷³ Effective secondary shaming mitigates the free-rider problem.¹⁷⁴

This suggests that enforcers must engage in a cost-benefit calculus to ensure their individual benefits exceed costs, unless they are content to impose the sanction regardless of costs, because of principle, altruism, or some similar reason. If such a calculation is inevitable, then the enforcer will quickly realize that he has several options in the sanction shopping-basket, each with a different cost. If he chooses the shunning sanction, the cost is likely to be the opportunity cost of interacting with the offender, which itself varies with the unique attributes of the offender. If the offender is a close relative or friend, opportunities for interaction are likely to be frequent, and shunning might require more effort. If, on the other hand, the

170. McAdams, *supra* note 168, at 352-53.

171. Harel & Klement, *supra* note 130, at 5 (“They do not care whether the individuals they interact with are offenders or not. They are, however, reluctant to interact with shamed individuals. Such reluctance may be attributed to the unwillingness to be publicly observed interacting with shamed individuals. Interaction with the shamed might signal to third parties that those interacting with them are also ‘bad types.’”).

172. This is the idea behind the signaling theory postulated by Eric Posner, whereby people are either “co-operators” who have a low discount rate, or “cheaters” who have a high discount rate. See Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 765-72 (1998). Cooperators and cheaters all play repeated games in which the former maximize their payoffs by interacting among themselves. *Id.* To exclude cheaters, cooperators can use costly signals that only individuals who expect the high cooperative payoff can afford to send. *Id.* The cost incurred by the sanctioning party is exactly what makes the infliction of the non-legal sanction a credible signal. *Id.* People who are passive are seen to be non-co-operators, and are excluded from profitable interactions with cooperators. *Id.*

173. See William Muraskin, *The Harlem Boycott of 1934: Black Nationalism and the Rise of Labor-Union Consciousness*, 13 LAB. HIST. 361, 364 (1972) (presenting a case in which the photographers of boycott violators were published in a local newspaper); Sankar Sen et al., *Withholding Consumption: A Social Dilemma Perspective on Consumer Boycotts*, 28 J. CONSUMER RES. 399, 401 (2001) (pointing out the connection between consumer boycotts and group membership).

174. Laurent Denant-Boemont et al., *Punishment, Counterpunishment and Sanction Enforcement in a Social Dilemma Experiment* 3 (2005), available at <http://userwww.service.emory.edu/~cnoussa/index.html> (“Because individuals who administer sanctions bear the cost of doing so, while all players benefit from the resulting increase in contributions, there is an incentive for individuals to free ride on others’ provision of sanctions against low contributors.”).

offender is a state which is a member of the same regional organization, shunning may not be terribly costly. If the enforcer wants to pick shaming from the basket, the cost is clearly greater than shunning. The enforcer has to undertake more positive actions, such as speaking out publicly about the offender's bad conduct, with the increased risk of confrontation by the offender. The enforcer might conclude that he is willing to pay the price that shunning presents, but is unwilling to pay the price of shaming. In other words, shunning is more affordable than shaming.

If all sanctions come with costs, why and when are enforcers willing to bear those costs? Experiments conducted by behavioral economists show that people are frequently motivated to impose sanctions based on reciprocity.¹⁷⁵ In other words, people want to do unto others as has been done to them. Results from ultimatum games have shown that people are willing to pay a monetary cost in order to punish those who have treated them in ways that they perceive to be deserving of punishment.¹⁷⁶ Reciprocity, in turn, seems to allow participants in repeated games to maximize their personal payoffs.¹⁷⁷ While reciprocity in bilateral situations seems intuitive enough, what is interesting for our purposes is the evidence suggesting that reciprocity seems to be transferable—people view injustices perpetrated on others as if they had been perpetrated on themselves, and punish the offender.¹⁷⁸ One example is the anti-Nazi boycotts during World War II.¹⁷⁹ Thus, states might be willing to sanction other states that torture regardless of the fact that the individuals tortured were not their citizens. It suffices that the citizens of other states are at risk. Transferable reciprocity is key to explaining why states bear the costs of norm enforcement in international law. This explains the harsh reaction of European states to the Abu Ghraib episode although few (if any) European citizens were victims of abuse.

175. Werner Güth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982).

176. *Id.* See generally Ernst Fehr & Armin Falk, *Psychological Foundations of Incentives*, 46 EURO. ECON. REV. 687, 689-704 (2002); Werner Güth, *On Ultimatum Bargaining Experiments—A Personal Review*, 27 J. ECON. BEHAV. & ORG. 329, 329-43 (1995); RICHARD H. THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 21-35 (1992).

177. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 27-54 (1984) (showing how a reciprocal strategy can lead to higher payoffs for a player in a repeated prisoners' dilemma).

178. Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. BUS. S285, S290-92 (1986). The results of the experiment were clear—seventy-four percent of the players in the second round chose to sacrifice their monetary well-being in order to sanction individuals that treated *other* players unfairly. *Id.*

179. William Orbach, *Shattering the Shackles of Powerlessness: The Debate Surrounding the Anti-Nazi Boycott of 1933-41*, 2 MOD. JUDAISM 149, 161-66 (1982).

C. The Role of Norms Entrepreneurs and Change Agents

These actors facilitate the creation of new norms.¹⁸⁰ Their advantage in supplying new norms is based on superior technical knowledge and leadership skills. Professor Ellickson defines “norms entrepreneurs” as people who “possess a relatively high level of technical knowledge relevant to the norms within [their] specialty. . . . [They are] likely to be cognizant that there are appreciative experts . . . who are likely immediately to esteem the norm entrepreneur for trying to change the social practice at issue.”¹⁸¹ There are several examples of norms entrepreneurs resorting to shaming techniques to enforce social norms in international law.¹⁸²

Politicians and international bureaucrats, in some instances, attempt to appease these norms entrepreneurs. Their success is owed to a signaling effect—politicians want to signal to their constituents that they are working to advance their welfare, and by adopting the agendas of norms entrepreneurs, such signaling is achieved at low cost. It might also be dangerous for politicians with constituents who support the work of norms entrepreneurs to be seen doing nothing.¹⁸³ They might be exposing themselves to secondary shaming—as people who are too cowardly to enforce the social norm, and hence undeserving of reelection. Norms entrepreneurs create conditions for the birth of a secondary sanction in order to enforce the underlying norm. When the risk of this sanction attaches to powerful groups like politicians who might otherwise free-ride, it advances the enforcement of the social norm enormously. This seems to be at the root of the activity against torture.

180. Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2112 (2001) (giving the example of Murakami in Japanese corporate law).

181. Ellickson, *supra* note 121, at 19 (citation omitted).

182. See discussion of Amnesty International *infra*.

183. Abigail Barr, *Social Dilemmas and Shame-Based Sanctions: Experimental Results from Rural Zimbabwe* (Ctr. for the Study of African Economies, Working Paper Series No. 2001-11, 2001), available at <http://www.bepress.com/csae/paper149/>. “[S]anctions would be imposed upon non-cooperators by cooperators because by not cooperating the former are preventing the latter from getting their fair share. If the imposition of sanctions reduces the payoff to the sanctionee more than the payoff to the sanctioner, cooperators can redress this imbalance by sanctioning non-cooperators.” *Id.* at 3. Barr writes that her, results provide strong evidence that the shame-based sanctions anticipated and imposed by the communities that took part in my experiments were effective at promoting cooperation. Villagers in Zimbabwe clearly care about what other people think of them and will modify their behaviour in order to improve their status in the eyes of their neighbours.

Id. at 13. See also Ernest Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q.J. ECON. 817 (1999).

The credibility of the nongovernmental organization or the norm entrepreneur is closely related to its efficacy. One example is Amnesty International (AI), an independent nongovernmental organization that campaigns for human rights. It is essentially a network of people from around the world, and at latest count, its membership is about 2.2 million strong.¹⁸⁴ AI conducts research to highlight abuses around the world by traveling to the major conflict zones, speaking to the relevant actors, and then determining if human rights abuses are taking place and to what extent. Its objective is to determine the level of participation of the government in the violations of human rights, and to ultimately establish the particular pieces of international law that the abuses violate. These are documented in their *Annual Report* of human rights abuses worldwide, or in a country or regional report published occasionally. Describing the work of AI, William Schultz, a key officer said:

Our power is primarily the power of mobilizing grass-roots people to speak out. ‘The mobilization of shame’ is one way to put it. The eyes of the world shining on the prisons and into the dark corners of police stations and military barracks all over the world to try to bring international pressure to bear upon governments which are committing human rights violations.¹⁸⁵

Shaming is a key facet of AI’s work: the advertisements, leaflets, posters, postcards, newsletters, and websites are all elements of the deployment of shame. By publicizing abuses, AI hopes to modify behavior by putting pressure on wrongdoers. Given the scale of the network, and the credibility acquired over decades of work, a campaign by AI can have significant impact.¹⁸⁶ Apart from providing information to opinion leaders, Amnesty is certainly emphasizing a moral component in the nature of its campaigning. Very frequently, the reports issued call to the reader’s moral compass, perhaps a necessity if the offending state has not ratified a legal instrument, which it can be said to be violating. Moral arguments are also important because international law instruments like the Universal Declaration on Human Rights have no teeth. The kinds of abuses at the heart of

184. See Amnesty Int’l, Who We Are, <http://amnesty.org/en/who-we-are> (last visited Mar. 27, 2008).

185. Bill Steigerwald, *Human Rights and Wrongs*, PITT. TRIB.-REV., Mar. 29, 2003, available at http://pittsburghlive.com/x/pittsburghtrib/opinion/columnists/steigerwald/s_126235.html. See also Am. Soc’y of Int’l Law Proceedings, *Aids Crisis Breakfast*, 84 AM. SOC’Y INT’L L. PROC. 177, 179 (1990) (stating that “what Amnesty International calls a ‘mobilization of shame,’ can be effective” in lifting travel restrictions on people with AIDS).

186. See Amnesty Int’l, The History of Amnesty International, <http://amnesty.org/en/who-we-are/history> (last visited Mar. 27, 2008). A sample Amnesty International flyer has the following quote from a former torturer from El Salvador: “[I]f there’s lots of pressure—like from Amnesty International or some foreign countries—we might pass them on to a judge. But if there’s no pressure, then they’re dead.” Amnesty Int’l, www.amnestyusa.org/youth/doc/sample_tabling_materials.doc (last visited Mar. 27, 2008).

AI's work involve the commission of atrocities in connection with war or internal conflict—both scenarios ripe for the infliction of harm on a scale most conducive to inciting outrage in those who learn of the atrocities.¹⁸⁷ AI's work also appears to be more effective when the reports pertain to certain countries. A brief examination reveals that democracies are more responsive to shaming by AI, probably owed to the fact that domestic constituencies opposed to the political party in power can use the report to attack the government, and thereby cause it to change its behavior.¹⁸⁸ It is also likely that AI fares better when it shames larger and more prominent states, rather than when it shames smaller and strategically less important states. This is owed to the newsworthiness of the reports issued by AI—a bad report about an important or large state is likely to be more attractive to the international news media and is hence likely to be carried widely in other outlets. A report about a small or strategically less important state is more likely to be ignored. One successful example of a shaming campaign by NGOs against a large state is that against the United States for the execution of juvenile offenders. Amnesty repeatedly named and shamed the United States as one of only a handful of countries that had executed children since 1990.¹⁸⁹ The long campaign against the United States appears to have played a role in the Supreme Court's decision to abolish the death penalty for minors.¹⁹⁰ The external dimension of shaming seems to have been recognized by President Carter, who said that the ruling made the United States a part of “the community of nations.”¹⁹¹ Agencies like Amnesty International have long called the death penalty “a human rights violation

187. Lynne Miriam Baum, *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court*, 19 WIS. INT'L L.J. 197 (2001).

188. Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 264 (1997); see also Vijayashri Sripati, *India's National Human Rights Commission: A Shackled Commission?*, 18 B.U. INT'L L.J. 1 (2000).

189. AMNESTY INT'L, UNITED STATES OF AMERICA. SHAME IN THE 21ST CENTURY. THREE CHILD OFFENDERS SCHEDULED FOR EXECUTION IN JANUARY 2000 (Report—AMR 51/189/99, Dec. 1999), available at <http://www.childrenfirstinternational.org/official/shame21.htm>. An earlier Amnesty Report said, “The USA's repeated claims that it is the most progressive force for human rights in the world are contradicted by its blatant flouting of the global moral and legal consensus that killing people for their childhood crimes is wrong.” Press Release, Amnesty International, *Midnight Shame—USA Executes Child Offender* (Feb. 4, 1999), available at <http://www.commondreams.org/pressreleases/feb99/020499b.htm>.

190. Julian Borger, *US Becomes Last Country to End Death Penalty for Under-18s*, THE GUARDIAN, Mar. 2, 2005, at 3. Justice Anthony Kennedy wrote: “It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.” *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

191. Julian Borger, *supra* note 190, at 3.

that brings shame on those countries that use it.”¹⁹² In a letter from Carole Nagengast, Chair of the Board of Directors for Amnesty International USA, to Senator Claiborne Pell, Chairman of the Senate Foreign Relations Committee, AI pointed out that only seven countries—Bangladesh, Iran, Iraq, Nigeria, Pakistan, Saudi Arabia, and Yemen—apart from the United States had executed juveniles since 1990.¹⁹³ One writer argued that the United States was in violation of international law norms by continuing to execute juvenile offenders.¹⁹⁴ Nagengast wrote that organizations like Amnesty “have success records as effective organizers of letter-writing campaigns which could aid in applying legislative pressure” and recognized the effect of shame on the political process in the United States.¹⁹⁵ Reputation-conscious states like the United States do not want to be in the company of states with the worst records for human rights compliance. Repeatedly naming the United States in that group worked primarily because of the existence of a domestic constituency that cared about international opinion. The lumping of the United States with states like Iran, Iraq, and China also appears to have worked in persuading it to abandon its unilateralist stance against the Landmine Ban Treaty.¹⁹⁶

AI has worked primarily by using the Universal Declaration of Human Rights as the embodiment of accepted norms of human rights and has sought to highlight conduct that runs afoul of these rights.¹⁹⁷ In doing so, it can be argued that AI is acting somewhat like a prosecutor. The absence of

192. *Id.* (quoting Kate Allen, Amnesty International’s United Kingdom Director).

193. Letter of Carole Nagengast, Chair, Board of Directors, Amnesty Int’l USA, to Sen. Claiborne Pell, Chairman, Senate Foreign Relations Committee, U.S. Senate, Mar. 27, 1992, reprinted in 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992).

194. Elizabeth A. Reimels, *Playing For Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty—The U.S. Wants to Play the International Human Rights Game, But Only if it Makes the Rules*, 15 EMORY INT’L L. REV. 303 (2001) (listing the International Covenant on Civil and Political Rights, 6 I.L.M. 368, art. 6(5); Convention on the Rights of the Child, G.A. Res. 44/25, art. 37(a), U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736 (Nov. 20, 1989); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 68, Aug. 12, 1949, 6 U.S.T. 3516; and the American Convention on Human Rights, art 4(5), Nov. 22, 1969, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, 9 I.L.M. 101 (1970), as examples of international law embodying such a norm).

195. Reimels, *supra* note 194, at 347 (“It is likely that most Americans are unaware that the current position of the United States is so removed from the global consensus. No doubt, many citizens would be horrified to learn that the U.S. position on the juvenile death penalty places it in the company of such countries as Bangladesh, Iran, Iraq, Nigeria, Pakistan, Saudi Arabia, and Yemen.”).

196. Wexler, *supra* note 39, at 575.

197. AI USA’s website declares that “Amnesty International’s vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.” Amnesty Int’l, Our Mission and the Movement, http://www.amnestyusa.org/About_Us/Our_Mission_and_the_Movement/page.do?id=110178&n1=2&n2=762 (last visited Mar. 27, 2008).

a body to assess the evidence to find culpability is arguably not insurmountable because of the opportunity for the state that is allegedly engaging in illegal conduct to rebut the version of the facts put forth by Amnesty. However, there are obvious problems that are hard to overcome. For example, an Amnesty report may highlight custodial torture that is a matter of routine in a particular region of a third-world nation. It may be that the central government has no idea that the torture has been going on, or may know of it but may be prevented from doing much because of the lack of cooperation from the local government. Regardless of these facts, the entire state is shamed by the report. This over-inclusiveness of shaming is a serious threat to its viability. Should it matter that the central government did not know of the torture or that it tried to stop it but was unable to because of an obstinate local government that was comprised of politicians from a different political party? Should Amnesty have desisted from shaming due to these factors? Probably not, because the report and consequent shame might provide just the impetus to end the abuses.

Another concern with nongovernmental organizations and private norms entrepreneurs pertains to the motivations that these agencies possess. It is naiveté to assume that all nongovernmental agencies and norms entrepreneurs are ideologically neutral and that they do not canvass particular agendas. When judges and arbitrators are not immune from accusations of bias, it is foolish to imagine that international NGOs would be. Several governments have accused Amnesty International of bias.¹⁹⁸ Notwithstanding these criticisms, AI's status as a successful norms entrepreneur is not in doubt.

IV. THE CASE OF ABU GHRAIB

Highlighted first by a CBS 60 Minutes story in April 2004 breaking the news of Iraqi prisoners being abused at the Abu Ghraib prison, the episode has been one of the most embarrassing chapters in U.S. foreign policy.¹⁹⁹ The abuse scandal shocked Americans and became a cause for shame

198. Hezbollah accused AI of coming under pressure from the U.S. and Israel. *Hizballah Rejects Amnesty Report*, THE JERUSALEM POST, Sept. 14, 2006, <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1157913630456>. The Anti-Defamation League calls AI anti-Semitic. Press Release, Anti-Defamation League, ADL Calls Amnesty International Report "Bigoted, Biased, and Borderline Anti-Semitic" (Aug. 23, 2006), available at http://www.adl.org/PresRele/ISLME_62/4878_62.html. Elsewhere AI has been accused of being anti-U.S. Christopher Archangelli, *Amnesty International's War on America*, FRONTPAGEMAGAZINE.COM, June 5, 2003, <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=8231>.

199. General Mark Kimmit, deputy-director of coalition operations in Iraq, recognized the consequences to America's ideological battle in his interview with Dan Rather: "And if we can't hold ourselves up as an example of how to treat people with dignity and

internationally.²⁰⁰ Between October and December 2003, evidence uncovered showed thousands of photographs and dozens of video clips where Iraqi detainees were being humiliated and tortured.²⁰¹ These included revolting images of Iraqi prisoners being made to masturbate in front of female prison guards²⁰² and simulate sex acts upon each other, being hooded and attached to electrical cables, thrown before baying prison dogs, and wearing women's underwear on their heads.²⁰³ The scandal first came to light on January 13, 2004, and the United States acted swiftly and suspended seventeen soldiers, and also launched a criminal investigation.²⁰⁴

respect . . . We can't ask that other nations [do] that to our soldiers as well. So what would I tell the people of Iraq? This is wrong. This is reprehensible." CBS News, 60 Minutes, *Abuse at Abu Ghraib* (May 4, 2004), available at <http://www.cbsnews.com/stories/2004/05/05/60II/main615781.shtml>.

200. Darius Rejali, *Viewpoint: The Real Shame of Abu Ghraib*, TIME, May 20, 2004, available at <http://www.time.com/time/nation/article/0,8599,640375,00.html>; Suzanne Goldenberg, *Abu Ghraib, Symbol of America's Shame, to Close Within Three Months*, THE GUARDIAN, May 4, 2004, available at <http://www.guardian.co.uk/Iraq/Story-/0,2763,1207484,00.html> (the events inside Abu Ghraib prison open a shameful episode of U.S. ill-treatment of its prisoners, and have provoked worldwide condemnation); *America's Shame: Torture in the Name of Freedom*, DER SPIEGEL, Feb. 20, 2006, available at <http://www.spiegel.de/international/spiegel/0,1518,401899,00.html> ("The new pictures from Abu Ghraib provide the most recent evidence: America's moral bank account is empty—and it has lost the image wars.").

201. A later *New York Times* report included testimony suggesting that the following events had taken place at Abu Ghraib: urinating on detainees; jumping on a detainee's leg (a limb already wounded by gunfire) with such force that it could not thereafter heal properly; and continuing by pounding detainee's wounded leg with collapsible metal baton. Kate Zernike, *Detainees Depict Abuses by Guard in Prison in Iraq*, N.Y. TIMES, Jan. 12, 2005, at A2. Additionally, a *Slate* report included testimony regarding pouring phosphoric acid on detainees and sodomization of detainees with a baton. See also William Saletan, *Rape Rooms: A Chronology*, SLATE, May 5, 2004.

202. Saletan, *supra* note 201 (citing Testimony of Military Police Specialist Matthew Wisdom, Hearing on Charges of Prisoner Abuse (Apr. 9, 2004), available at <http://slate.msn.com/id/2100014/>).

203. Goldenberg, *supra* note 200. Other abuses uncovered by the Army's investigation conducted by Major General Taguba found the following:

Using military working dogs (without muzzles) to intimidate and frighten detainees and, and in at least one case biting and severely injuring a detainee[;] . . . Breaking chemical lights and pouring the phosphoric liquid on detainees; . . . Pouring cold water on naked detainees; Beating detainees with a broom handle and a chair; Threatening male detainees with rape; Sodomizing a detainee with a chemical light and perhaps a broom stick.

Saletan, *supra* note 201.

204. Transcript of Defense Department Operational Update Briefing, May 4, 2004, available at <http://www.defenselink.mil/transcripts/2004/tr20040504-secdef1423.html>. Amnesty International was not satisfied with a U.S. investigation and demanded an "independent and public inquiry into all allegations of the torture of Iraqi prisoners by U.S. and coalition troops." *Amnesty International Calls for Inquiry into Abuse of Iraqi Prisoners*, THE

Investigations were also launched into the detention facilities at Guantanamo Bay.²⁰⁵ On January 19, 2004, the military launched an investigation by Major General Taguba.²⁰⁶ The Taguba Report concluded that “[s]everal US Army Soldiers have committed egregious acts and grave breaches of international law at Abu Ghraib/BCCF and Camp Bucca, Iraq.”²⁰⁷ Following expressions of outrage in the international community, the International Committee of the Red Cross conducted its own investigation and issued a report detailing several human rights abuses committed by coalition forces.²⁰⁸ In the outside world, the scandal deepened anger at America for the invasion of Iraq,²⁰⁹ and was allegedly indicative of American disdain for Muslims and their culture.²¹⁰ Several states and international organizations reacted with outrage. The International Commission of Jurists in a statement said:

EPOCH TIMES, May 4, 2004, available at <http://english.epochtimes.com/news/4-5-4/21248.html>.

205. Defense Department Operational Update Briefing, *supra* note 204. Human Rights Watch reported that:

[a]ccording to [Vice Admiral] Church, he found only eight instances of minor infractions involving contact dating back to 2002. Two guards were demoted in rank and a third was acquitted in a court martial. Church’s findings were based on interviews with interrogators, guards, military civilians, and contractors. Somewhat surprisingly, he did not interview any detainees.

Guantanamo: America’s “Black Hole,” HUM. RTS. WATCH, June 2004, available at <http://hrw.org/reports/2004/usa0604/3.htm>.

206. Saletan, *supra* note 201.

207. MAJOR GEN. ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004), available at <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>.

208. INT’L COMM. OF THE RED CROSS (ICRC), REPORT ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (Feb. 2004) (on file with author).

209. Ed Finn, *Ghraib Diggers*, SLATE, May 6, 2004, available at <http://slate.msn.com/id/2100092>; James Risen, *G.I.’s are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15; David Enders, *US Torture Nothing New, Say Iraqis; Pictures of Troops and their Prisoners Shocked the World, But Many in the Country Are Not Surprised*, S. CHINA MORNING POST, May 5, 2004, at 11.

210.

Qatar’s *Al Rayah* said “that had the abuse of prisoners in Iraq’s Abu Ghraib prison been committed by any developing Third World country, international reaction, especially American, would have been filled with denunciation and punishment ‘that perhaps includes the liberation of the concerned country in defense of humanity’.” (The paper) opined that torture, rape, sodomy and murder continue, which it said reflects the ‘decline of the values of American civilization to a point never witnessed in history.’”

John Burke, *Overseas Reaction: Disgust over Abu Ghraib, Disbelief over Guantanamo*, NIEMAN WATCHDOG, Feb. 20, 2006, available at <http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=0074>.

ICJ members . . . and the African human rights community are deeply concerned by recent reports on the treatment of prisoners at Abu Ghraib in Iraq. The reports of sadistic, wanton and criminal abuses are obscene and shocking. The international human rights community has registered its disapproval of the systematic and illegal abuse of detainees at the Abu Ghraib prison, notorious for state sponsored torture in the Saddam Hussein era. The African human rights community joins the international community in condemning the deliberate dehumanization of prisoners, by American soldiers, which amounts to torture and is contrary to established international human rights treaties.²¹¹

The growing outrage prompted President Bush to say in his May 2004 speech to the Carlisle Barracks War College: “[t]hat same prison became a symbol of disgraceful conduct by a few American troops who dishonored our country and disregarded our values[.]”²¹² Nine soldiers were convicted and are serving sentences ranging from three years to ten years.²¹³ The official U.S. view was that the outrageous conduct was committed by rogue soldiers²¹⁴ acting without instructions from their superiors.²¹⁵ This characterization was rejected by observers. Pierre Krähenbühl, Director of Operations for the ICRC, said that Abu Ghraib represented more than “individual acts There was a pattern and a system.”²¹⁶

The United States tried to distance itself from the events. President Bush reiterated that it “does not reflect the nature of the American people.”²¹⁷ The reaction from Defense Secretary Rumsfeld seemed to stress technicalities over substance:

[W]hat has been charged thus far is abuse, which I believe technically is different from torture. . . . I don’t know if . . . it is correct to say what you just said, that tor-

211. *Programme Management Note*, AFRICAN HUM. RTS. AND ACCESS TO JUST. PROGRAMME (Int’l Comm’n of Jurists), May 2004, at 1, available at http://www.icj-kenya.org/ahraj/ahraj_2_5_0504.pdf.

212. Dana Milbank, *Bush Seeks to Reassure Nation on Iraq; President Vows to Raze Abu Ghraib Prison to Mark ‘New Beginning’*, WASH. POST, May 25, 2004, at A1; see also Bradley Graham & David Von Drehle, *Bush Apologizes for Abuse of Prisoners; Criticism of Rumsfeld Intensifies, But President Says His Job is Safe*, WASH. POST, May 7, 2004, at A22.

213. *New Abu Ghraib Images Broadcast*, BBC NEWS, Feb. 15, 2006, http://news.bbc.co.uk/2/hi/middle_east/4715540.stm; Eric Schmitt, *Army Dog Handler is Convicted in Detainee Abuse at Abu Ghraib Prison*, N.Y. TIMES, Mar. 22, 2006, at A1.

214. Editorial, *Torture Policy*, WASH. POST, June 16, 2004, at A26; *Crime and Punishment; War and the Law in Iraq*, ECONOMIST, May 6, 2004; Kate Zernike & David Rohde, *Forced Nudity of Iraqi Prisoners is Seen as a Pervasive Pattern, Not Isolated Incidents*, N.Y. TIMES, June 8, 2004, at A14.

215. *Iraqi Government Denounces Abu Ghraib Abuse*, CNN.com, Feb. 16, 2006, <http://www.cnn.com/2006/WORLD/meast/02/16/abughraib.photos/index.html>.

216. Hendrik Hertzberg, *Comment: Unconventional War*, NEW YORKER, May 24, 2004, at 32.

217. Defense Department Operational Update Briefing, *supra* note 204.

ture has taken place, or that there's been a conviction for torture. And therefore I'm not going to address the torture word."²¹⁸

Yet, in a speech to the Congressional Armed Services Committee, his words seemed to show that shaming worked: "Mr. Chairman, I know you join me today in saying to the world, 'Judge us by our actions. Watch how Americans, watch how a democracy, deals with wrongdoing and with scandal and the pain of acknowledging and correcting our own mistakes and our own weaknesses.'"²¹⁹ Supporting the argument made in the preceding pages about the need for internalization if anger at shaming is to be prevented, some on the conservative extremes of the political spectrum expressed outrage at the outrage from the international community²²⁰ and domestic liberal constituencies!²²¹ However, reactions from the majority of U.S. legislators appeared to be at odds with Secretary Rumsfeld. After being shown photographs and videos of the abuses, Senate Majority Leader Bill Frist said, "[w]hat we saw is appalling."²²² Senator Richard J. Durbin said, "[t]here were some awful scenes. It felt like you were descending into one of the rings of hell, and sadly it was our own creation."²²³ Representative Jane Harman said, "I saw cruel, sadistic torture."²²⁴ All of this is indicative of internalization of the norm against torture, and the experience of shame upon discovery of violation of the norm.

218. *Id.* For criticism, see Sidney Blumenthal, *This is the New Gulag*, THE GUARDIAN, May 6, 2004, available at <http://www.guardian.co.uk/usa/story/0,12271,1210588,00.html>.

219. *Allegations of Mistreatment of Iraqi Prisoners: Hearing Before the S. Comm. on Armed Services*, 108th Cong. 7 (2004) (testimony of Secretary Rumsfeld).

220. Dana Milbank, *U.S. Tries to Calm Furor Caused by Photos*, WASH. POST, May 1, 2004, at A1 ("Arab countries were more strident, with the Arab League calling the mistreatment 'savage acts' . . .").

221. Oklahoma Senator James Inhofe said at a Senate Armed Services Committee hearing on the scandal, "I'm probably not the only one up at this table that is more outraged by the outrage than we are by the treatment." See Walter Shapiro, *Senator 'Outraged' by Reaction to Prisoner Abuse*, USA TODAY, May 11, 2004, available at http://www.usatoday.com/news/opinion/columnist/shapiro/2004-05-11-hype_x.htm. He seemed to reserve his contempt for the "many humanitarian do-gooders right now crawling all over these prisons, looking for human-rights violations, while our troops, our heroes, are fighting and dying." *Id.* See also Frank Rich, *Saving Private England*, N.Y. TIMES, May 16, 2004, at B1 (quoting Rush Limbaugh: "The photos of the abuses at Abu Ghraib 'look like standard good old American pornography . . .").

222. Charles Babington, *Lawmakers Are Stunned By New Images of Abuse*, WASH. POST, May 13, 2004, at B8, available at <http://www.washingtonpost.com/wp-dyn/articles/A22464-2004May12.html>.

223. *Id.*

224. *Id.*

Because of the shame, about 475 prisoners were released from Abu Ghraib in May 2004.²²⁵ The pressure on Secretary Rumsfeld grew intensely following his statement about the actions not being torture, and several prominent senators and congressmen called for his resignation. It is unlikely that the prison would have been shut down if the horrific nature of the abuses had not been publicized and if the international community had not engaged in shaming.²²⁶ Given the experience with the prison in Guantanamo Bay, it is likely that the administration would have weathered the storm of complaints and cited national security interests.²²⁷ The methodology adopted by the international media and nongovernmental organizations like Amnesty International and Human Rights Watch was shaming.²²⁸ By showing the administration that the conduct of the troops was revolting to the international community, AI and Human Rights Watch conveyed the disutility of national security arguments.²²⁹ In addition, the harsh rhetoric and labeling were calculated to shame on the internal dimension.²³⁰ Given the importance of a reputation for respecting human rights if the United States is to have the moral authority to call other countries to task for their

225. Transcript of CNN American Morning, May 21, 2004, available at <http://transcripts.cnn.com/TRANSCRIPTS/0405/21/ltm.03.html>.

226. Monica Hakimi, *The Media As Participants In The International Legal Process*, 16 DUKE J. COMP. & INT'L L. 1, 7 (2006).

227. One writer notes:

The *Rasul* litigation also illustrates the critical role that international human rights law can play The Guantanamo litigants prevailed not because of the strength of their legal arguments in court—the majority’s statutory construction argument is more than a little strained, as Justice Scalia amply illustrates in his dissent—but because Guantanamo had become an international embarrassment to the United States. Until Abu Ghraib, Guantanamo was the symbol around the world for what was wrong with the United States’ “war on terror.” . . . That international condemnation, reflected in open criticism from British law lords, public demonstrations, highly critical foreign press accounts, and diplomatic complaints, very likely played a role in the Supreme Court’s decision

David Cole, *The Idea Of Humanity: Human Rights and Immigrants’ Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 653 (2006).

228. *The Road to Abu Ghraib*, HUM. RTS. WATCH, June 2004, available at <http://www.hrw.org/reports/2004/usa0604/usa0604.pdf>; see also Kenneth Roth, *Darfur and Abu Ghraib*, HUM. RTS. WATCH, available at <http://www.hrw.org/wr2k5/darfurandabughraib/darfurandabughraib/pdf>; *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, HUM. RTS. WATCH, Aug. 2002, available at <http://www.hrw.org/reports/-2002/us911/USA0802.pdf>.

229. Alan Cowell, *Amnesty Report on 14,000 Finds Prisoner Abuse Continues in Iraq*, N.Y. TIMES, Mar. 7, 2006, at A3; Elizabeth A. Lewis, Book Review, 48 HARV. INT’L L.J. 293 (2007) (reviewing MICHAEL BYERS, *WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT* (2005)) (“The press and the international public exerted considerable pressure on the administration after the Abu Ghraib scandal[.]”).

230. Press Release, Amnesty Int’l, USA: Pattern of Brutality and Cruelty—War Crimes at Abu Ghraib (May 7, 2004), available at <http://www.news.amnesty.org/index/ENGAMR510772004>.

poor records on that front, it became imperative for the administration to act.²³¹ This call to moral authority and the sense of internalization of the norm was highlighted by Human Rights Watch in its report in 2005. It wrote that

The U.S. government's use of torture at Abu Ghraib prison in Iraq poses a different kind of challenge: not because the scale of the abuse is as large as Darfur, but because the abuser is so powerful. . . . That unlawful conduct has also undermined Washington's much-needed credibility as a proponent of human rights and a leader of the campaign against terrorism. . . . Washington's weakened moral authority is felt acutely.²³²

The danger of the norm being displaced because of the United States' actions is a matter of serious shame for a state that has championed the norm.²³³ There is some evidence, according to some writers, that norm erosion has occurred as more states adopt imitative strategies of their own, aping the actions of the violator.²³⁴

The perceived loss of reputation abroad roused domestic public opinion in the United States and gave rise to embarrassment and shame.²³⁵ This shame, at the individual citizen level, in turn must have moved up the ladder to the political leadership.²³⁶ It was pointed out by several observers that the

231. Strauss, *supra* note 2, at 1276 ("Reluctance to confront the truth about the atrocities was no longer an option once the pictures aired.").

232. Roth, *supra* note 228, at 2.

233. See Koh, *supra* note 16, at 350-51. Koh also wrote:

By treating these legal regimes as a nuisance to be disregarded in the war against terrorism, the Bush administration forgot the critical role that these legal protections play both in protecting our troops from violations and in protecting our country from needless humiliation by conduct that most Americans find abhorrent. . . . [T]he United States has diminished its standing in the international regimes in which it takes part, limiting its . . . power to persuade in the global arena. . . . [T]his strategy has converted us from the major supporter of the post-war global legal exoskeleton into the most visible outlier trying to break free of the very legal framework we created and supported for half a century.

Id.

234. Jamieson & McEvoy, *supra* note 10, at 520.

The global war on terror now serves as a pretext for intensifying repression of political opposition or, in some cases (e.g., Egypt or Saudi Arabia), a vindication of long-established abusive practices. China, India, Georgia, Indonesia, Uzbekistan and others have all similarly formalized categories of juridical others in taking increasingly brutal and egregious action against their own 'terrorists' by removing many of their substantive and procedural protections.

Id. (citations omitted).

235. Victor Kelley, *Abu Ghraib as an Opportunity*, 64 OR. ST. B. BULL. 70 (2004) ("The alleged prisoner abuse of Iraqi detainees by some of our soldiers at Abu Ghraib is a national embarrassment. The damage to American credibility and to the war effort is incalculable.").

236. For one instance of such shame, see Anne-Marie Slaughter, *Hubris and Hypocrisy: America Is Failing to Honor Its Own Codes*, INT'L HERALD TRIB., May 22, 2004, avail-

abuses would have the effect of mobilizing the enemy.²³⁷ They had the effect of undermining the moral basis for the invasion of Iraq and grievously hurt the claim that the United States was a force for good.²³⁸ It had the potential to erode the American case for human rights and good governance in several parts of the world, thus undoing the efforts of several decades of foreign policy.²³⁹ This is clearly an example of shaming working effectively

able at http://www.iht.com/articles/2004/05/22/edslaughter_ed3_php (“felt tainted and ashamed”). See also Richard Cohen, *A Plunge from the Moral Heights*, WASH. POST, June 10, 2004, at A19 (“The Bush administration has shamed us all, reducing us to the level of those governments that also have wonderful laws forbidding torture, but condone it anyway.”); Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004 (“The torture and death of prisoners . . . have a powerful claim on our national conscience.”).

237. David Cole, *Reviving The Nixon Doctrine: NSA Spying, The Commander-In-Chief, and Executive Power In The War On Terror*, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 17, 39 (2006) (“[T]hose practices, once disclosed, fueled anti-American sentiment around the world and handed al Qaeda and other terrorists the best propaganda it could hope for.”); Biden Urges U.S. to Take Steps To Close Prison at Guantanamo, N.Y. TIMES, June 6, 2005, at A1 (writing that the prison camp serves as a propaganda tool for terrorists); Marc Kaufman, *Cheney: U.S. Not Aiming to Close Guantanamo; Other Republicans Say Prison is a Liability*, WASH. POST, June 13, 2005, at A2 (Senators Chuck Hagel, Mel Martinez, and Patrick Leahy call for closure of the detention center); Mark A. Drumbl, *Guantánamo*, Rasul, and the Twilight of Law, 53 DRAKE L. REV. 897, 919 (2005).

238. Jeffrey K. Cassin, *United States' Moral Authority Undermined: The Foreign Affairs Costs of Abusive Detentions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 421, 446-47 (2006) (“[T]he United States' credibility in promoting principles, such as the 'rule of law,' is weakened because abusive detentions defy international law and United States domestic law.”); Editorial, *Finding a Way in Iraq*, WASH. POST, May 9, 2004, at B6 (“It is impossible yet to calculate the damage to U.S. prospects in Iraq and the Middle East caused by the mistreatment of Iraqi detainees.”); Editorial, *Rule of Lawlessness*, WASH. POST, May 2, 2004, at B6 (“It's impossible even to guess how much damage they have done to America's image in the world, to the cause of stability in Iraq and even to the cause of democracy in the greater Middle East.”); Editorial, *A System of Abuse*, WASH. POST, May 5, 2004, at A28 (“[The scandal] has done incalculable damage to the U.S. position in Iraq and around the world.”); Sewell Chan, *Rage Is on Display During Prison Tour; General Touts Reforms, New Facilities*, WASH. POST, May 6, 2004, at A19; Dana Milbank, *U.S. Tries to Calm Furor Caused by Photos; Bush Vows Punishment for Abuse of Prisoners*, WASH. POST, May 1, 2004, at A1 (“Foreign policy experts said the photos could cause lasting damage to U.S. efforts.”); Robin Wright, *Top U.S. Officials Apologize to Arabs for Prisoner Abuse*, WASH. POST, May 5, 2004, at A19 (“Biden called the abuse ‘the single most damaging act’ to U.S. interests in the Middle East in a decade and warned that it would have a broad and negative impact on U.S. national security.”); Robin Wright, *U.S. Faces Lasting Damage Abroad; Moral High Ground Lost, Experts Say*, WASH. POST, May 7, 2004, at A26 (“The White House is so gloomy about the repercussions that senior adviser Karl Rove suggested this week that the consequences of the graphic photographs documenting the U.S. abuse of Iraqi detainees are so enormous that it will take decades for the United States to recover[.]”); Scott Cooper, Editorial, *The Prism of Abu Ghraib*, WASH. POST, June 4, 2004, at A23 (observing that “Abu Ghraib threatens to serve as a . . . metaphor for [the] war in Iraq”).

239. Noah Feldman, *Ugly Americans*, THE NEW REPUBLIC, May 30, 2005, at 23 (“Abu Ghraib . . . constituted the greatest single blow thus far to the American policy of democratization in the Middle East.”); Marc Sandalow, *American Treatment of Prisoners*

in international law.²⁴⁰ The campaign was primarily directed at bringing disrepute to the United States. Many of the campaigners had nothing to gain by bringing the individual perpetrators to justice—if they did, perhaps a complaint to the relevant authorities would have sufficed. The campaign had all the attributes of shaming and was aimed at “expos[ing] the offender to public view and heap[ing] ignominy upon him”²⁴¹ Serious reputational damage was indeed suffered by the United States as a result of these campaigns.²⁴² Scholars have written about the effect that the revelations had in the Muslim world.²⁴³ Some have even analogized the atrocities to the Mai Lai incident in Vietnam.²⁴⁴

The administration is unlikely to have reacted in the manner that it did but for shame. Given its repeated claim that those detained in places like Guantanamo Bay and Abu Ghraib were not prisoners of war, and that the interrogation methods did not amount to torture, there was no legal requirement that was breached by the United States.²⁴⁵ Even if it were possi-

Assailed, S.F. CHRON., May 26, 2005, at A1 (“Amnesty International said . . . the United States’ treatment of prisoners at Guantanamo Bay and Abu Ghraib had emboldened abusive regimes and weakened human rights around the world.”).

240. Cole, *supra* note 227, at 655 (“These efforts, which employ the traditional tactic of reporting human rights abuses with the idea of ‘shaming’ perpetrators into respecting human rights norms, have been very effective in galvanizing resistance to the Administration’s abuses, both here and abroad.”). See also Nsongurua J. Udombana, *An Escape from Reason: Genocide and the International Commission of Inquiry on Darfur*, 40 INT’L LAW. 41, 62 (2006).

241. Garvey, *supra* note 68.

242. See Jennifer Trahan, *Military Commission Trials at Guantanamo Bay, Cuba: Do They Satisfy International and Constitutional Law?*, 30 FORDHAM INT’L L.J. 780 (2007); Hina Shamsi, *Command’s Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan*, HUM. RTS. FIRST (2006), available at <http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf>; Michael Petrusic, *Enemy Combatants in the War on Terror and the Implications for the U.S. Armed Forces*, 85 N.C. L. REV. 636 (2007).

243. See, e.g., Stephanie M. Weinstein, *A Needed Image Makeover: Interest Convergence and the United States’ War on Terror*, 11 ROGER WILLIAMS U. L. REV. 403, 418 (2006) (quoting senator Herb Kohl).

244. Major Andras M. Marton, Book Review, 74 ARMY LAW 79 (2006) (reviewing MICHAL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURTMARTIAL OF LIEUTENANT CALLEY* (2002)) (“[T]he prisoner abuse at Abu Ghraib serves as a modern day embarrassment for the United States and its’ military and has certainly angered many people abroad.”).

245. Department of Justice, Office of Legal Counsel Memorandum for Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (“We conclude that, under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A.”). The *Washington Post* quoted Tom Malinowski of Human Rights Watch as saying: “It is by leaps and bounds the worst thing I’ve seen since this whole Abu Ghraib scandal broke.” Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use*

ble to make an argument about the customary international law norm against torture, it can be rebutted because torture is quite common, suggesting that states do not abstain from torture out of any sense of legal obligation.²⁴⁶ A plausible legal argument could have been advanced by the administration to justify its case that the abuses were isolated and did not amount to torture. Further, history shows that even the flimsiest technical argument has been clutched at previously in the name of national security. Both support the conclusion that shame did work here.²⁴⁷ Indeed, there were attempts to cloud the United States's obligations under the Geneva Conventions to undermine criticism.²⁴⁸ Despite these attempts, shame proved more durable than legal technicalities in the face of an internalized norm against torture.

The horizontal accessibility to publishing techniques makes shaming work very efficiently. Whether the major news media would have given as much attention to the Abu Ghraib scandal as it did but for the noise generated by the NGO and blogging communities is open to debate.²⁴⁹ The availability of publishing techniques allowed secondary shaming to work, and imposed costs on free-riders.

V. ALTERNATIVE SANCTIONS AS THE MISSING LINK IN INTERNATIONAL LAW: SOME TENTATIVE CONCLUSIONS

It is clear from the foregoing analysis that shaming can be a powerful phenomenon in international relations. The central role played by the international media is also readily apparent. Nongovernmental organizations and other actors with limited resources rely enormously on the media to publicize their lists of shame and reports identifying violations. Without this publicity, it is certain that these reports and lists can have little, if any, effect. To be sure, the sheer scale of public awareness that the popular media can achieve is hard to duplicate without significant cost. While email newsletters and websites of international NGOs can carry the burden of dissemination to some extent, they pale in significance to the impact

of Torture, WASH. POST, June 8, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>.

246. See also GOLDSMITH & POSNER, *supra* note 154.

247. Brian Knowlton, *Rice Seems to Shift Policy on Prisoners*, INT'L HERALD TRIB., Dec. 8, 2005, available at <http://www.iht.com/articles/2005/12/07/news/torture.php> (describing the Secretary of State's recognition, in response to European pressure, of U.S. responsibility to refrain from cruel or inhumane treatment of prisoners anywhere in the world).

248. Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES, June 8, 2004, at A1; Priest & Smith, *supra* note 245.

249. See Philip M. Seib, *The Din of Many Voices: News Coverage, the Expansion of Discourse, and Conflict*, 13 DISP. RESOL. MAG. 18 (2007); Stephen J. Berry, *CBS Lets the Pentagon Taint Its News Process*, 58, 3 NIEMAN REP. 76, 77-78 (2004).

achieved when the popular media highlights the same reports and lists. The likely audience is also very different—email newsletters and websites of international NGOs are, in most instances, preaching to the choir. The media reaches sections that may be unaware of the work done by the particular international NGO, and in many instances lends a certain authority to the report by its publication. This is certainly related to the underlying credibility and reputation for integrity that the media outlet possesses. For example, *The Sun* is less likely to lend much authority to an Amnesty report than *The Guardian*, although the former might reach a wider audience. Therein hides at least one problem: *The Sun* is more likely to highlight an Amnesty report that details human rights abuses in Guantanamo and Abu Ghraib, than one which provides evidence of torture in Myanmar. This problem is not unique to publications like *The Sun*. It is likely to exist, albeit to a lesser degree, even in responsible publications like *The Guardian*. After all, no newspaper or magazine is immune from limitations of space, resources, and reader-interest, and only so many stories can be published. What is the effect of all this on shaming as a sanction in international law? One conspicuous effect is the inconsistent application of the sanction without regard to the certainty or degree of guilt, or the kinds of conduct alleged to be offenses.²⁵⁰ The United States is probably more likely to be the target of a shame sanction than Myanmar for the exact same international law violation. This obviously violates basic notions of fairness, and a ready solution does not suggest itself.

One possibility would be for an agency like the United Nations to address this problem by becoming more of a participant in the shaming process. Instead of passing resolutions that are largely toothless and unknown to most people, it could require the offending government to bear the cost of publishing either the resolution that shames that country, or a summary thereof, in the major newspapers in the offending country. Another possibility would be for the U.N. itself to bear this cost, if the offending government does not, and to place advertisements in the major newspapers of the offending country to publicize the shameful conduct of the government. This can only work in democratic societies with a free press. An advertisement by the U.N. is unlikely to be possible when the offender is a dictatorship where the press is under the control of the dictator. Even if it is possible to place an advertisement at the expense of the U.N., the absence of a meaningful opposition will militate against the effectiveness of the advertisement. The suggestion for requiring the offending government to bear the cost or in the alternative for the U.N. to do so, in the offender's media is deliberate. This leaves international public opinion untouched. The costs

250. Massaro, *Legal Reform*, *supra* note 83, at 691-99 (arguing that shaming sanctions' effects are inconsistent).

involved with placing advertisements outside the offender's news media would be enormous.

There is also the problem of identifying the relevant media in which to advertise. It is unlikely that an advertisement in a newspaper in Myanmar would be as effective as an advertisement in the *New York Times*. Yet, choosing the *New York Times* for the advertisement would expose the U.N. to familiar allegations of first-world bias. Making the U.N. pay for the advertisements is problematic from other angles, too: it will have the effect of overloading the market with shame sanctions to the point where their utility will decrease enormously.²⁵¹ It will do this because the transfer of the cost of shaming removes one check—that only those actions which deserve to be shamed will see the expenditure of significant and scarce resources, and that minor transgressions will be weeded out because the enforcers can only do so much. Instead, if parties wishing to enforce shame sanctions have the possibility of someone else bearing the burden, what would stop every transgression from being the subject of shaming? On the other hand, the free availability of resources has the effect of leveling the field for smaller players and prevents the kinds of biases caused by monopoly power.²⁵² A small NGO in Myanmar may have the same ability to shame that AI has. This would serve to minimize frequent complaints that organizations like Amnesty are mouthpieces for Western governments and only target third-world nations. However, despite these shortcomings, if shame sanctions have to be meaningful, those enforcing the sanction must bear the burdens associated with their imposition, and for want of a better alternative, the present situation is likely to be all that is feasible. This burden has fallen considerably because of the Internet, and it does not cost very much for NGOs even in poor countries to shame their governments. While they may not be immediately as effective as Amnesty, it must be remembered that Amnesty was not created in a day.

The lowering of costs and the proliferation of shaming utilizing the Internet has consequences on the impact of the shaming that must be addressed by the international legal system if shaming is to continue to be effective. One possibility is to differentiate shaming that follows after the imposition of a legal sanction by an official agency or tribunal, and to make the shame sanction an integral part of that legal sanction. Thus, for example, when the European Court of Human Rights determined that Russia was liable for various human rights violations in Chechnya, it could have imposed a shame sanction as a complement to the legal sanction—the damages

251. See Massaro, *American Criminal Law*, *supra* note 40, at 1930 (“[I]f the penalty were to become a common sanction, it may produce a shaming overload, which could reduce public interest in these displays and thereby lessen the deterrence impact.”).

252. See Posting of Alex Engwete to Afrikblog to <http://alexengwete.afrikblog.com/archives/2007/11/03/6763365.html> (Nov. 3, 2007) (describing similar claims).

award.²⁵³ This could be in the form of a prominently published apology, at the expense of the Russian government, in the Russian, Chechen, and international media; the publication, at the expense of the Russian government, of particular parts of the judgment of the court holding the government liable; and the publication, again at the government's expense, of the names of the individuals who were found to have perpetrated the atrocities. These are likely to be much more effective than the "moral damages" of \$35,000 imposed in one case where a Chechen had disappeared. Thirty-five thousand dollars, or indeed most amounts of money damages, are likely to be rather insignificant for many sovereign states. This argument is not new: it has been made in the criminal law in the context of fines.²⁵⁴ Besides, there is the problem that money damages paid by the state only serve to punish the innocent taxpayer rather than those who committed the offenses. This appears to be doubly cruel when a dictator rules the state—the poorer citizens have to bear both the burden of his or her rule, and have the common weal eroded due to atrocities committed by him or her. There is also the objection that imposition of money penalties does not express the international community's sense of outrage and condemnation at the conduct found to be violative of international law.²⁵⁵ This expressive dimension of international law has not been addressed sufficiently in the literature and is the subject of another paper.

The differentiation of shame sanctions based on their following the imposition of a legal sanction is by no means a perfect solution. This is on account of it being applicable only in a small number of cases, due to the absence of a centralized international court system, and because there can be inconsistencies in application depending on the familiarity and appetite for shame sanctions of the tribunal; however, these objections can be addressed. Given the absence of a world court with universal jurisdiction, restricting the imposition of shame sanctions to legal sanctions issued by courts would be too narrow to be of much use. Then, the place of the court could be taken by an organization of universal participation like the U.N., with the result that a resolution of the General Assembly or the Security Council could take the place of the sanction issued by a court, if the resolution makes a finding pertaining to the commission of an offense. Since the U.N. frequently appoints commissions of experts to conduct investigations

253. Nick Paton Walsh, *Russia Ordered to Pay for Chechen Deaths*, THE GUARDIAN, Feb. 25, 2005, available at <http://www.guardian.co.uk/world/2005/feb/25/chechnya.russia>.

254. Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1233 (1985); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1194 (1985).

255. There is a rich scholarship in criminal law on the expressive functions of punishment and how punishment is much more than the mere imposition of a penalty. See Joel Feinberg, *The Expressive Function of Punishment*, in JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 98 (1970).

in the kinds of cases that are discussed in the preceding pages, the objection that resolutions passed by the U.N. are without factual basis is unlikely to be true in all cases. Resolutions frequently reference the findings of these commissions of inquiry, and while one can make political arguments about the decision-making process itself, no institution known to man is immune from challenges about interest-group capture, time and resource constraints, populism, etc. Thus, they need not detain us unduly. As long as the U.N. consistently imposes the shame sanction upon every determination of fault, it would be an improvement. However, given the difficulty in arriving at agreement in the U.N. on anything even remotely controversial, one must temper optimism about the possibility of attaching shame sanctions as a complement or supplement to U.N. resolutions.

There are reasons for hope that shaming can fill an important vacuum in international law, and these are owed more to the work of international NGOs than to states and international institutions. The successful campaign against landmines,²⁵⁶ and the movement to ban cluster bombs²⁵⁷ and uranium bullets,²⁵⁸ all exemplify the deployment of shame by non-state actors as the source of constraint on state action. Although its success as a piece of in-

256. Culminating in the Landmine Ban Treaty, the effort saw a vigorous effort by NGOs to humanize the consequences that result from the use of landmines, and to shame states into banning their use. See Wexler, *supra* note 39, at 578. The author writes that over one thousand groups participated in the international campaign to ban landmines. *Id.* at 589.

257. See *Red Cross Steps Up Campaign Against Cluster Bombs, Urges Ban*, INT'L HERALD TRIB., Nov. 6, 2006, available at http://www.iht.com/articles/ap/2006/11/06/europe/EU_GEN_Red_Cross_Cluster_Bombs.php (quoting Philip Spoerri, Director of International Law, as saying: "The ICRC believes that the time has come for strong international action to end the predictable pattern of human tragedy associated with cluster munitions."). Handicap International, an organization devoted to the rights of the disabled, launched a campaign that resulted in the first ever law prohibiting cluster bombs in Belgium. *Ban Cluster Munitions* (July 3, 2006), http://en.handicapinternational.be/index.php?action=article&id_article=445107; Mines Action Canada, *The Campaign against Cluster Bombs: Key Considerations for Mines Action Canada*, http://www.minesactioncanada.org/documents/ct_cb_7june01.htm.

258. International Action Center, *Gijon, Spain: Meeting Launches Movement against Depleted Uranium* (Nov. 30, 2000), http://www.iacenter.org/depleted/du_spain.htm. See the European Parliament resolution in 2001 "call[ing] on Member States that are also NATO members to propose a moratorium on the use of depleted uranium weapons in accordance with the precautionary principle." European Parliament, *Daily Notebook: 17-01-2001*, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PRESS+DN200101-17-1+0+DOC+XML+V0//EN>. The UN Subcommittee on Prevention of Discrimination and Protection of Minorities passed a resolution in 1996 condemning the use of depleted uranium and "[urging] all States to be guided in their national policies by the need to curb the production and the spread of weapons of mass destruction or with indiscriminate effect, in particular nuclear weapons, chemical weapons, fuel-air bombs, napalm, cluster bombs, biological weaponry and weaponry containing depleted uranium[.]" *Depleted Uranium UN Resolutions*, available at <http://prop1.org/2000/du/resource/000310un.htm> (last visited Mar. 27, 2008).

international law is open to question because of the lack of ratification by countries like the United States,²⁵⁹ Russia, and China, it cannot be denied that getting 153 countries to ratify the landmine ban treaty (in just ten years) is no insignificant achievement.²⁶⁰ Shame has worked in tangible ways even for holdouts like the United States: it placed a moratorium on “dumb mines”²⁶¹ and destroyed millions of them following the naming and shaming campaigns.²⁶² Publications like the Ban Treaty News and Campaign against DU News, and coalitions of interest-based groups like the Cluster Munition Coalition,²⁶³ have served to show the strategic importance of grassroots activism to advance the reach of international law. These coalitions are acting in ways that mimic international institutions, as exemplified by the Oslo Conference on Cluster Munitions that took place in Vienna in February 2007.²⁶⁴

Another distinctive feature of international law shaming in contrast to shaming in criminal law is that the offenses targeted in the former are relatively major transgressions. In the criminal law, shaming is most frequently employed in the context of relatively minor offenses—such as traffic offenses—where the fine or punishment is itself not deterrent enough. In international law, the offenses that we have discussed—genocide, nuclear testing, and torture—are major transgressions. This might suggest that the cost-benefit analysis is more favorable for shaming as an acceptable sanction in international law.

This eruption of activity, and the ready resort to shaming, must not make us blind to the seriously troubling aspects about its use that made us jettison shaming in the criminal law as societies moved toward more civi-

259. Wexler points out that although the United States has not ratified the treaty, it has been impelled by shame to adopt several “second-best” responses. Wexler, *supra* note 39, at 598-600. Such second-best responses include providing \$80,000,000 in demining funding. *Id.* at 600. “The United States responded to shaming and internalized the norm against landmines by: (1) increased domestic funding for global demining efforts; (2) promotion of international landmine regulations; (3) adherence to a unilateral moratorium on landmine use; and (4) research on feasible replacement weapons.” *Id.* at 599.

260. Int’l Campaign to Ban Landmines, *Indonesia Ratifies Treaty to Ban Landmines* (Dec. 8, 2006), http://www.icbl.org/news/indonesia_ratification_jrs. Indonesia became the 153rd country to ratify the Landmine Ban Treaty. *Id.*

261. “Dumb mines” are mines that do not self-destruct after a period of time and are contrasted with “smart mines,” which do.

262. See U.S. Dep’t of State, *State Department Chronology on Humanitarian Landmine Action* (July 14, 2003), <http://www.globalsecurity.org/military/library/news/2003/07/mil-030714-usia02.htm>.

263. Cluster Munition Coalition, <http://www.stopclustermunitions.org/> (last visited Mar. 27, 2008). The CMC is an international network of over 200 civil society organizations in fifty countries.

264. The conference is expected to see the attendance of over fifty nongovernmental groups and is organized much like an international conference that the U.N. would typically host.

lized ways of dealing with offenders. Firstly, reputations are very hard to build and much easier to tarnish. Once destroyed, an innocent actor's reputation might not be easily repaired. To embark on a path of ready resort to shaming penalties in international law, without any processual checks to ensure that the alleged offender is really guilty, would be a grave mistake. Unlike in the criminal law, the default position in international law is not imprisonment, but inaction or ineffective action. While one might argue, perhaps disingenuously, that the loss of reputation is preferable to the loss of liberty when one is imprisoned, in order to apply the analogy to international law, it should be possible to persuasively contend that the loss of reputation (when one is innocent) is preferable to inaction or ineffective action. That, then, is the nub of the case. In the example provided in the preceding pages, what would be the risk that an improper use of shaming would yield? Arguably, that the United States was not responsible for the abuses at Abu Ghraib, but that it would still be subject to shame and embarrassment because of the imposition of the sanction. On the other hand, what would be the consequence of inaction or ineffective actions? That people would continue to be tortured with impunity by states, and offenders would go free. When viewed in this light, the moral objections that one finds difficult to overcome in the criminal law may not operate as powerfully in international law.

The account offered in the preceding pages is not meant to suggest, by any means, that shaming offers a perfect solution to the critiques about the lack of constraining power in international law. The account offered is essentially limited to an argument that shaming offers relatively high yields when compared with any of the other feasible options, and that it ought to fill the enforcement gap in international law. The near impossibility of creating a world court with universal jurisdiction in the foreseeable future means that discussions about the sanctioning or constraining power of international law in the traditional sense that constraining power is understood, i.e., via a court that punishes for breaches of the law, is only in the realm of fantasy. Even if such a court could be established, it is by no means certain that its judgments could be enforced without the need for other sanctioning mechanisms like shame. The costs imposed by such litigation are also likely to be enormous and unbearable by many of the parties most likely to need international law. Because a world court is unlikely to ever be given the power to incarcerate the head of a state or government, even after bearing all the costs of litigation before it, the successful party is probably only in a position of using the judgment to embarrass or shame the offender. In rare cases, money damages may be available. Shaming offers the prospect of similar results at much lower costs, within a much shorter time frame. The proliferation of non-state actors means that the enforcers of shaming possess more resources, at least in terms of the human element, than a world court is likely to possess. Given that reality, shaming offers quicker results

in comparison with a long wait for court time. If the experience with the backlogs at the European Court of Human Rights is any indicator, the speedy resolution of disputes is a hortative hope at best and a fiction at worst. When viewed thus, shaming is not the panacea for all the problems that ail international law, but merely a better alternative to other more fanciful options, with the added virtue that it can achieve results at a lower cost, and without the democratic deficit that is hard to avoid in international institutions. Besides, and perhaps more importantly, the purpose of shaming comports very well with a major objective of international law—to constrain, rather than to punish.