

THE PLACE OF SHAME IN RESPONSES TO ANTI-SOCIAL BEHAVIOUR

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Abstract

Government responses to 'anti-social behaviour' have included, amongst others, two trends that employ shame in pursuit of crime prevention: "naming and shaming" of those subject to anti-social behaviour orders (ASBOs) on one hand and restorative justice on the other. This article considers how the Government has made use of each, the dynamics of each shaming process, and the compatibility of these approaches. It argues that they are mutually exclusive, and that restorative justice should be preferred as a potentially more constructive shaming process.

Keywords: ASBO; Restorative Justice; Shaming; Anti-Social Behaviour

Introduction

'Anti-social behaviour' dominates contemporary British political discourse on law and order. The Government's 2003 White Paper *Respect and Responsibility: Taking a Stand Against Anti-Social Behaviour* stated:

As a society, our rights as individuals are based on the sense of responsibility we have towards others and to our families and communities. This means respecting each other's property, respecting the streets and public places we share and respecting our neighbours' right to live free from harassment and distress. It is the foundation of a civic society...Our aim is a "something for something" society where we treat one another with respect and where we all share responsibility for taking a stand against what is unacceptable (Home Office, 2003: Ministerial Foreword).

The Government's focus on anti-social behaviour is laudable as part of a broader aim to create a "decent, civil society in which people can shape their own lives and participate fully in their local community." (Home Office, 2003: Ministerial Foreword). The Government's overriding priority, announced in the 2002 *Justice for All* White Paper, is

to rebalance criminal justice in favour of victims and communities (Home Office, 2002). The centrality of the community and victims in the Government's policy priorities was reflected in the *Respect and Responsibility* White Paper's emphasis on community involvement in preventing, and responding to, such behaviour:

Anti-social behaviour is a problem experienced at local level and therefore requires effective action locally. This includes individuals, families, residents' associations, community groups and also the public services. It is vital that the right people have the power, the authority and the support to tackle anti-social behaviour" (Home Office, 2003 p51).

Two Government strategies in responding to "anti-social behaviour" appear similar in employing "shame" as a guiding concept. The first, "naming and shaming" of individuals subject to anti-social behaviour orders (ASBOs), focuses on drawing community attention to the identity of offenders ostensibly to inform and reassure the community as well as deter offenders. The second, restorative justice, seeks to confront offenders with the harm caused by their offences, encouraging or requiring them to repair that harm either to victims or the wider community.

This article explores the similarities and differences between these two strategies. First, I consider ways in which the Government is employing them. Second, I highlight their common heritage, both being rooted in a form of expressive justice: both involve shaming processes. Third, I evaluate the possible effects of each process. Finally, I analyse the implications of pursuing both strategies simultaneously.

The Government's Uses of Shame in Responses to Anti-Social Behaviour

Publicising ASBOs: Using "Naming And Shaming"

A civil order, an ASBO prohibits a specified person (aged 10 or over) from doing anything described in it (s. 1(4) *Crime and Disorder Act 1998*). ASBOs have effect for not less than 2 years (s. 1(7)) and breach of an ASBO is an offence punishable with up to 5 years imprisonment if tried on indictment, six months if tried summarily. They can be applied for by local authorities, police forces (including the British Transport Police), registered social landlords and housing action trusts, but not by members of the public. Court statistics reveal that between 1st April 1999 and 31st December 2005 9853 ASBOs were issued (www.crimereduction.gov.uk/asbos2.htm) and the rate at which ASBOs have been imposed has grown steeply year-on-year.

The Government considers publicity central to the success of ASBOs. The Home Office stated in the 2003 *White Paper Respect and Responsibility* that for too long a "culture of resignation" has prevailed, with communities lacking the powers and support to respond

effectively to anti-social behaviour (Home Office, 2003: 45). To tackle communities' despairing submission to low-level disorder's inevitability, the Government proposed to:

take measures to improve community accountability. For example, appropriate publicity of action taken is a key part of any strategy to tackle anti-social behaviour: we will lift automatic reporting restrictions on ASBOs on convictions made in the youth court (Home Office, 2003 p12).

In 2005, the Government reversed a presumption in favour of reporting restrictions in criminal proceedings under s. 1(10) of the Crime and Disorder Act 1998 involving children or young persons for breach of ASBOs (the reversal was effected by s. 141 of Serious Organised Crime and Police Act 2005). S. 49 of the Children and Young Persons Act 1933 imposes a blanket ban on any publicity of, inter alia, youth court proceedings, but youth courts do have discretion to allow publicity following conviction if the court "is satisfied that it is in the public interest to do so" (s. 49(4A)). ASBO breach proceedings under s. 1(10) of the Crime and Disorder Act 1998 are no longer covered by s. 49. Instead, s. 45 of Youth Justice and Criminal Evidence Act 1999 now applies: courts have discretion to impose reporting restrictions, but must give reasons if they choose to do so. Under s. 45(6) the court must have regard to the child's welfare in making its decision.

In March 2005 the Government published its document *Guidance on Publicising Anti-Social Behaviour Orders* (Home Office, 2005), containing strongly-worded encouragement to those empowered to order publication of personal information about offenders (of any age over 10) to do so. The guidance was published in response to the Divisional Court's ruling in *R (on application of Stanley, Marshall and Kelly) v Commissioner of Police for the Metropolis and Chief Executive of London Borough of Brent* [2004] EWHC 2229 (Admin). The claimants sought judicial review of a decision by a police force and local authority to distribute leaflets and publicise information containing S's photographs, names and ages, and details of anti-social behaviour orders (ASBOs) issued against them. Dismissing the application, Lord Justice Kennedy in Stanley said:

It is clear to me that whether publicity is intended to inform, to reassure, to assist in enforcing the existing orders by policing, to inhibit the behaviour of those against whom the orders have been made, or to deter others, it is unlikely to be effective unless it includes photographs, names and at least partial addresses. Not only do the readers need to know against whom orders have been made, but those responsible for publicity must leave no room for mis-identification (Stanley, 2005 p42-3).

The stated aims of the Government's 2005 Guidance are: to inform those individuals making a decision whether to publicise the personal information of those who are the subject of an ASBO; what medium to consider and what information should be included;

to inform individuals, who might find themselves subject to an ASBO, what they can expect in the way of publicity (Home Office, 2005 p3). The Guidance's central message is that, as Kennedy LJ stated in Stanley, the effectiveness of ASBOs depends on communities knowing that action has been taken, and that consequently "publicity should be expected in most cases" and should be "the norm not the exception" (Home Office, 2005 p4).

The stated benefits of publicity are five-fold (Home Office, 2005 p4-5). First, it assists in enforcing orders: local people "have the information they need to identify and report breaches." Second, publicising those subject to ASBOs provides reassurance to the public about their safety: "victims and witnesses know that action has been taken to protect them, and to protect their human rights in relation to safety and/or quiet enjoyment of their property." Third, publicity promotes "public confidence in local services": local people are reassured that if they report anti-social behaviour, action will be taken by local authorities, the police or other agencies. Fourth, publicity acts as a deterrent to the individual subject to the order: the guidance argues that the "perpetrator is aware that breaches are more likely to be reported because details of the order are in the public domain." Finally, publicising ASBOs acts as a deterrent to other potential miscreants: publicity about ASBOs acts as a warning to others who are causing a nuisance in the community.

The decision whether to restrict publicity thus rests with the courts. The 2005 Guidance outlines key principles that should guide courts' decisions. In particular it asserts that courts must balance the human rights of those individuals subject to ASBOs against those of the community as a whole. The Divisional Court's decision in Stanley held that those seeking to publicise individuals should recognise that publicity might infringe a person's rights under article 8(1) of the European Convention on Human Rights, and should consider whether the publicity was "necessary and proportionate to their legitimate aims." The Guidance states that "There should be a correlation between the purpose of publicity and the necessity test: that is, what is the least interference with privacy that is possible in order to promote the purpose identified" (p. 5). With publicity expected to become the norm not the exception, youth court publicity is entering a new phase. The Government's stated aims are multifarious, but underpinning the impetus for publicity is the desire to "name and shame"; to make the public aware of who offenders are, with shaming and deterrent effects anticipated.

Shaming as an explicit aim or implicit necessity of punishment has a long history (see Braithwaite, 1993). Some penologists have argued that we are witnessing a resurgence of penalties which employ shame at their heart (e.g. Pratt, 2000; Pratt, 1998). The trend is particularly evident in the USA. Kahan delineates different types of shame penalties evident there (Kahan, 1996). The first, "stigmatising publicity", involves offenders having their personal details broadcast on community-access TV channels, billboards, and newspapers (e.g. men convicted of soliciting prostitutes in Kansas City have their names and faces displayed on a TV programme dubbed "John TV" (Garvey, 1998). In England

and Wales, such strategies are evident at localised levels, having been employed by amongst others, Central Trains to name and shame train "fare dodgers" on posters around Birmingham (BBC News Online, 2005a) and Liverpool City Council to name and shame "litter louts" on its website (BBC News Online, 2005b).

Other types of shaming strategies Kahan identifies, literal stigmatization and self-debasement, are less evident in Britain but there are some notorious examples from USA. In Tennessee a burglar was ordered to allow his victim, accompanied by law enforcement personnel, to enter his home unannounced and take something of comparable value to what he stole (Garvey, 1998 p736). Others have been ordered to wear T-shirts emblazoned with details of their offences or display special licence plates on their cars. In the same vein, the Government in England and Wales mooted in 2005 the possibility of young offenders having to wear high-visibility uniforms (dubbed "Jackets of Shame" in the Daily Mail (Slack, 2005 p4)) while undertaking punishment in the community (Hinsliff, 2005). This notion of greater visibility "Community Payback" for adult and young offenders was mooted again in 2008 by some within Government anxious to bolster public trust in the criminal process (Wintour, 2008 p1). Although this has not developed into a national strategy, the Government emphasised in its 2006 Respect Action Plan that the public must have confidence in community sentences and one way that public credibility can be gained is "for any unpaid work ordered by the court to be visible, and for the public to understand what work is carried out in their communities as part of a sentence." (Home Office, 2006 p35).

The Government And Restorative Justice

While ASBOs have attracted many headlines, the Government has been promoting another strategy which appears also to depend on "shame" for effectiveness: restorative justice (RJ).

RJ has been defined by Tony Marshall, in a widely accepted definition, as "a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future." (Marshall, 1999). Van Ness states its principal objective to be the "restoration into safe communities of victims and offenders who have resolved their conflicts" (van Ness, 1993 p257). From the wealth of RJ literature (which seems to grow exponentially: see www.restorativejustice.org) we can distil two central aims of RJ: first, reparation to the victim or community, and second, offender reintegration. RJ proponents argue that the primary aim of criminal justice should be to place the harm resulting from offenders' actions at the heart of the process; victims and community members should be given opportunities to engage with offenders and offenders have the opportunity to apologise and make amends for the offence. Typically RJ processes are dialogic, with offenders and victims actively engaged in resolving the conflict arising from crime. According to its advocates, RJ provides an effective means of both holding offenders accountable for their actions and reintegrating them into the community. Such achievements are thought to be absent from formal court

processes in which the dominance of legalism and lawyers means offenders are not forced to confront the consequences of their actions; the conflict lying at the heart of much crime is, in Nil Christie's oft-quoted metaphor, "stolen" from the real participants (Christie, 1977).

RJ also employs shame as a foundational concept. John Braithwaite's theory of reintegrative shaming is one strand of RJ theory (Braithwaite, 1989). Braithwaite argues that offenders can be reintegrated into the community when their criminal behaviour is condemned by those whom the offender respects, such as friends and family members. Such a condemnatory process should foster in the offender a feeling of shame at his conduct and a desire to repair the harm caused, while the supportive atmosphere in which the condemnation takes place should enable him to re-enter the community which accepts him as a citizen who has repaid his debt to the victim and wider society. I will explore below the extent to which the shaming strategy inherent in RJ is similar to that in "naming and shaming" those subject to ASBOs.

The Government has endorsed RJ as a promising strategy for responding to both adults and young people involved in anti-social behaviour. RJ:

ensures that punishment for an offence is accountable and responsive to the wider community. This includes working in the community, bringing together the victim and the offender or wider victim support work. It helps offenders understand that their offending behaviour is not just against the law, but also has a damaging effect on their victims, themselves and on their communities (Home Office, 2003: para. 5.32).

There are numerous RJ schemes across the country (see www.restorativejustice.org.uk/; Miers, 2001). Youth Offending Teams (YOTs) have been implementing RJ since 1997, and are required to organise 'Community Payback' to ensure that young people on Reparation Orders and Referral Orders "repay their debt to the community" (Home Office, 2003: para. 5.35). Requiring young people to undertake 'Community Payback' aims to prevent reoffending by bringing home to them the consequences of their behaviour and enabling them to make amends either to their victims or the wider community or to both. Referral Orders involve trained volunteers, members of the public, as "community panel members" who sit on Youth Offender Panels at which young offenders agree to a contract which requires them, along with their parents, to tackle their offending behaviour and make amends to their victim or the wider community. While ASBOs have grabbed the headlines, Referral Orders have become much more significant in terms of sheer numbers and the work of YOTs: there were 28394 such orders imposed in 2005/6 (Youth Justice Board, 2006a). YOTs must now ensure that restorative processes are used in 100% of Referral Orders and at least 75% of other YOT interventions (Home Office, 2003: para. 5.35).

The Government has repeatedly indicated that RJ is a key part of its crime strategy. The 2003 White Paper states that the Government was committed to considering:

the availability of restorative justice across all age groups and at all stages of the criminal process: pre-crime, especially with juveniles, pre-charge, post conviction/pre sentence, and post sentence...give a high priority to the needs of victims (research suggests that victims who participate in restorative processes find it a positive experience)...[and] seek to maximise the potential of restorative justice to reduce re-offending", "promote consistent, appropriate and effective use of restorative justice techniques (Home Office, 2003: para. 5.34).

In 2006, the YJB published an action plan for developing RJ (Youth Justice Board, 2006b). From April 2008, a new Youth Restorative Justice Disposal (a disposal for "particularly low level, first offences") has been piloted (Children's Plan: Building Brighter Futures (2007 para. 6.75-6.77).

"Naming and shaming" and RJ are just two of a plethora of responses to anti-social behaviour. Observing that the Government is employing a variety of strategies to deal with a particular problem is neither new nor controversial. Eclecticism, collage and pastiche characterise postmodern penalty (Pratt, 2000), and it is perhaps naïve to expect conceptual coherence across government policy. However there is an important overlap between the two identified strategies which merits attention. Both focus on preventing reoffending by inducing a feeling of shame in offenders; both strategies' attendant processes involve the community, and both involve victims as part of their underlying rationales, putting them centre-stage.

But whilst the approaches are ostensibly similar they are also fundamentally different. Pursuing both approaches raises two issues. First, they both rely on similar but different expressive shaming processes; how do the dynamics of each shaming process compare? Second and consequently, what are or may be the effects of each process?

The Dynamics of each Shaming Process: What is being Expressed?

Both restorative justice and "naming and shaming" rely on shaming processes with a particular dynamic. The two strategies have normative roots in the literature on punishment's expressive functions, yet ultimately differ because of their individual focus: one on the individual, the other on the individual's conduct.

Advocates of "naming and shaming" as punishment highlight the expressive function and social meaning of punishment, which communicates a clear denunciation of unacceptable behaviour, an expressive force that non-penal sanctions lack. Moral disapproval underpins punishment: it aims at chastening the offender, denting his reputation,

depriving him of dignity and consequently ensuring he avoids behaviour in future which may lead to further disapproval (Kahan, 1996). Punishment is a "special social convention that signifies moral condemnation" (Kahan, 1996: 593). Further, "What punishments say...is an irreducible component of what they do. For this reason, theories of punishment that disregard meaning are certain not to make any sense." (Kahan, 1996 p653).

These justifications for publishing an offender's identity are connected to other texts on punishment's expressive function. James Fitzjames Stephen for example wrote that punishment is the means by which "law gives definite expression and a solemn ratification...to the hatred which is excited by the commission of the offence..." (quoted in Kahan, 1996 p591) Von Hirsch's pioneering work on modern conceptions of retribution, devoid of the obloquy attaching to talionic theories of retribution, places censure at its heart:

The criminal sanction censures...A sanction that treats the conduct as wrong – that is, not a "neutral" sanction – has two important moral functions that are not reducible to crime prevention. One is to recognise the importance of the rights that have been infringed. The censure in punishment conveys to victims and potential victims the acknowledgment that they are wronged by criminal conduct, that rights to which they properly are entitled have been infringed. The other...role of censure is that of addressing the offender as a moral agent, by appealing to his or her sense of right and wrong (Von Hirsch: 1998 p169-70).

Feinberg argues that punishment can have functions that presuppose an expressive function including: "authoritative disavowal" of conduct; "symbolic non-acquiescence"; "vindication of the law"; and "absolution of others" (most importantly accusers, complainants, victims) (Feinberg, 1970 p103-5).

Duff argues, in his communicative theory of punishment, that punishment's justification comes from seeing the hard treatment that punishment necessarily involves as a secular species of penance (Duff, 1998 p164). It is a communicative process addressing the offender as a moral agent and community member, which aims to induce repentance, reform and reconciliation. Duff argues that such a penance serves several purposes: it focuses the wrongdoers attention onto his wrongdoing, forcing him to confront it; it communicates a "symbolic portrayal of the character and implications of that wrong"; it aims to persuade him to accept the judgment of the condemners, to come to recognise and repent the wrong he has done; punishment thus becomes a "vehicle of self-reform", enabling him to "strengthen that penitent understanding of what he has done, to express it to others, and thus to reconcile himself with them" (Duff, 1998 p164-5).

Punishment expresses the community's strong disapproval of and judgement on the offender's conduct, as well as expressing a kind of "vindictive resentment" (Feinberg, 1970 p100). The mere imposition of a sanction does this. It is a fundamental part of the penal process to transform the anger and resentment engendered by crime into a penal sanction, the imposition of which has inherent in it a melding of emotional responses to the conduct.

RJ and the "naming and shaming" of those subject to ASBOs are both expressive processes. But we need to distinguish the verb from the noun. Shame is an emotion experienced by the individual, but what does it mean "to shame"? What is it that is being expressed in each process?

Feinberg's observation that "condemnation (or denunciation) [is a] fusing of resentment and reprobation" (Feinberg, 1970 p101) helps us to explicate the tensions between the two strategies. "Naming and shaming" relies on communicating resentment, hatred and antipathy towards offenders, on expressing condemnation of the individual rather than the act they have committed. In Nussbaum's words, "naming and shaming" strategies are ways of marking a person with "a degraded identity...[and announcing] that spoiled identity to the world" (Nussbaum, 2004 p230). It is a form of inarticulate stigmatising, actively engaging negative emotions of the condemners.

RJ differs in its use of shaming for two reasons. First, RJ focuses on the act rather than the actor; the focus is essentially on "condemning the sin but not the sinner". Shaming is reintegrative, according to Braithwaite, when the offender's actions are subject to scrutiny by those with whom the offender is enmeshed by close ties of love, affection and respect. Condemnation attaches to the conduct, perhaps through expression of disappointment, anger or sadness, while the offender himself is esteemed and brought back within the supportive fold. This emphasis on expressing condemnation of the act and not the actor is not peculiar to RJ; it underpins the expressive function of von Hirsch's censure-based retributive theory, according to which the offender deserves censure in proportion to the seriousness of the offence, hinging principally on the blameworthiness of the individual for that particular act.

Second, RJ processes are inherently dialogic and communicative, rather than merely expressive. Merely expressive processes are essentially one-way, while communicative process are two-way (Duff, 2001p79). Communication requires someone with whom we try to communicate:

"It aims to engage that person as an active participant in the process who will receive and respond to the communication, and it appeals to the other's reason and understanding – the response it seeks is one that is mediated by the other's rational grasp of its content. Communication thus addresses the other as a rational agent, whereas expression need not" (Duff, 2001 p79-80).

Restorative justice aims to engage the offender in a dialogic process, seeking answers from him about the causes of his offending behaviour, his attitude towards his offence and the victim, as well as giving victims an opportunity to express themselves, to discuss with the offender ways in which the harm can be repaired or compensated, and perhaps to facilitate reconciliation between them. "Naming and shaming" by contrast seeks only to express to the offender condemnation of both his actions and him as a person.

Experiencing the Shaming Process: The Effects

Given the difference in what is being expressed in each process, in what ways might the effects of the two shaming processes differ? How is each process experienced by individuals subject to them? Although both seek to engender psychological effects derived from a loosely-knit family of shame-emotions, it will be argued that the effects of "naming and shaming" are likely to be broadly negative. RJ on the other hand has at least the potential to impact positively on offenders.

Shame, Shamers And The [A]Shamed

In evaluating the impact of shaming strategies on individuals, the lack of a clear, causative relationship between the shamers' intention and the effects of the process on the shamed's experience is problematic. As Maxwell and Morris point out, one can feel ashamed irrespective of the acts of others, and conversely attempts to shame may not have the desired effects: "[T]he intent of the shamer cannot determine the effects on the shamed." (Maxwell & Morris, 2004 p136-7).

Experiencing shame may be largely independent of shaming processes, so while the Government seems to assume that shame will inhere from "naming and shaming" the psychological literature on shame's ecology reveals the complexity of what is, after all, a visceral emotional state. The diversity of perspectives on the aetiology and ecology of shame (e.g. psychoanalytic, psychological, biopsychological, sociological, cultural, literary, philosophical (Pattison, 2000: Chap. 2)) should caution anyone against assuming that 'shame' can be induced it can be easily induced. Once the shamers have acted, once the leaflets have been distributed publicising an individual's identity and antecedents, what happens next may be unpredictable.

The Experiences Of Shame And Being Shamed

It's commonplace to identify shame as a problematic concept. Pattison (2000) for example, describes an unscientific survey of individuals who were asked to explain what they understood by "shame". He found most described it as a negative feeling of unpleasant self-judgment in which one feels "bad" or "uncomfortable" (p70). Beyond that though, subtle differences emerged: some felt it meant feeling "bad" without necessarily knowing why, others felt it related to feeling bad as a result of committing an offence, others felt it captured being exposed in some unwelcome way, and others felt it had something to do with feeling demeaned, diminished, defiled and unwanted. Pattison goes on to argue that shame is "more a family of concepts and usages than a unitary entity with a clear single meaning" (p70). There is a plurality of approaches to shame bound together loosely by some "family resemblance" (p63).

The bundle of such experiences reveals several key points about the experience of shame. Feeling ashamed typically involves feelings of: unwanted exposure to others, a feeling in Kaufman's words of "feel[ing] seen in a painfully diminished sense" (Kaufman, 1993 p17); of embarrassment; and of being objectified. Shame threatens the individual's identity in the world and his trust and security. A person experiencing shame is "internalising a critical gaze" (Pattison, 2000 p72), the experience of the self's scrutiny engendering a sense of heightened, tormented self-consciousness (p73). It can lead to individual feelings of isolation, despair, powerlessness, passivity, a sense of inferiority, uselessness, and self-contempt, but above all of exposure: as Pattison puts it, "The whole self feels as if it is available for global scrutiny" (Pattison, 2000 p73).

Advocates of naming and shaming may argue that these are precisely the effects we should be looking for in offenders. Not only are such effects deserved, but also they will have the desired effects in terms of crime prevention, leading the shamed to desist from anti-social behaviour and criminality. Some psychological studies reveal positive effects on individuals and their relationships; in particular, experiencing shame can lead individuals to adopt strategies of submissive appeasement towards those doing the shaming. Shame can register as a disruption in the interpersonal bridge between the self and others, creating a sense of longing for the bridge to be restored (Pattison, 2000 p79). In addition, shame performs a self-evaluative function, leading individuals to measure themselves against others and against external or internal ideals, providing a "compass for moral behavior" (Scheff, 1995 p1056). This internal policing function can inhibit actions that might violate values, standards and rules recognised as important by the individual.

In evaluating the effects of shame, there are two issues. First, how do those subjected to shaming processes actually experience them? Second, what are the possible negative consequences of experiencing a shaming process?

On the first issue, unfortunately there is limited research on how individuals experience "naming and shaming" processes, although there is more evidence in respect of RJ. "Naming and shaming" has not yet been subject to empirical evaluation. The Government, in its guidance on publicising ASBOs, has made several assumptions: first that publicising an offender's personal details will lead to him experiencing "shame"; that the "shame" he experiences as a consequence will be such as to lead him to reflect on his own behaviour and react submissively and contritely; and that experiencing "shame" will deter him from re-offending.

The anticipated general deterrent effect of "naming and shaming" is supposed to work when individuals see others shamed and fear the consequences of being shamed and suffering a loss of reputation and respect themselves; its advocates perceive it as "...the feared experience which generates...self-control" (Braithwaite, 1993 p5). Does shaming actually deter? The deterrence literature has been discussed at length elsewhere, but the broad conclusions we can draw from it are that increasing severity of punishment is unlikely to have a deterrent effect (outside of extremes), while there is evidence that an

increased likelihood of detection can have a deterrent effect (von Hirsch et al, 1999). The literature has little to say about the effect of a loss of reputation on desistance from offending amongst those likely to be subject to "naming and shaming" under the Government's anti-social behaviour strategy (although there is some evidence that for corporations tempted to commit offences such as environmental pollution, a loss of commercial reputation is a factor that can weigh significantly in the decision to offend (Braithwaite, 2002)).

The posited deterrent effects assume a fear of social disapproval amongst those subject to shaming processes. But being shamed is unlikely to deter if the individual cares little about community disapproval, or the censure of those doing the shaming. Shaming processes for such individuals can result in resentment, bitterness and disdain. Foucault, in *Discipline and Punish*, described the "spectacle of the scaffold" when during executions:

which ought to show only the terrorizing power of the prince, there was a whole aspect of the carnival, in which rules were inverted, authority mocked and criminals transformed into heroes. The shame was turned round; the courage, like the tears and the cries of the condemned, caused offence only to the law (Foucault, 1977 p61).

What is intended as shaming censure can be experienced by the shamed as risible, provoking only resentment and contempt (e.g. if a teacher tells students that they're lazy, and will fail their exams if they don't work harder).

With no guarantee that "naming and shaming" processes will be experienced as intended by shamers, how are RJ processes experienced? Do they induce the expected or anticipated emotional responses? Researching RJ faces particular methodological problems; there is now a broad range of RJ schemes in England and Wales, with differing conceptions of RJ and how it should be delivered, as well as a plethora of practical differences making comparisons difficult (Miers, 2004 p30). Different schemes employ RJ at different stages of the criminal process. Not all seek to induce the type of shame delineated by Braithwaite; some RJ schemes focus on ensuring reparation is made to victims or the community, with the offender's shamed emotional experience being only a subsidiary aim, if it is an aim at all. Such research as there is has tended to focus on participant satisfaction with restorative processes, finding that many victims and offenders feel positive about the experience of participating in them, with high levels of satisfaction about the processes. There is also evidence that RJ has the potential to achieve mutually satisfactory outcomes for victims and offenders (Miers, 2004 p32).

In terms of instrumental outcomes, some aspects of the RJ research indicates that participation in RJ processes can lead to lower reoffending rates than comparable offenders participating in traditional processes only (Miers, 2004 p33). However there is

little qualitative evidence that participation in RJ leads to behavioural or attitudinal change in offenders, and minimal research which has addressed the experiences of individual offenders to assess whether they experienced "shame" during or after participating in RJ schemes: as Miers' concise summary of British research and methodological issues indicates, "shame" has not yet been a key research issue (Miers, 2004). The best we can say at present is that RJ has the potential to induce attitudinal change, which may be linked to feelings of shame, but we do not yet have a detailed picture of how "naming and shaming" or RJ's reintegrative shaming objectives are experienced by offenders.

The second issue, the possible negative effects of shaming, raises more worrying issues. There are dangers associated with "naming and shaming" which RJ does not pose. Braithwaite's argument for reintegrative shaming posits that there is a crucial distinction which criminal justice systems overlook at their peril: shaming can be destructive or constructive. The former occurs when offenders are shamed and cast out of their communities while the latter occurs when shaming is reintegrative. Reintegrative shaming occurs when the offender is in relationships of "densely enmeshed interdependency, where the interdependencies are characterised by ...mutual obligation and trust, and...are interpreted as a matter of group loyalty rather than individual conscience" such as with family, friends, and those he respects (Braithwaite, 1989). When condemnation emanates from these supportive individuals, the individual can experience shame but is brought back "into the fold". The dangers of destructive or disintegrative shaming are that the offender will be humiliated, alienated and may retreat into a stigmatized sub-culture of others who have been similarly cast-out out of the community. Research by Solanki et al found that publicising ASBOs can be counter-productive, leading to ASBOs becoming "badges of honour" and exacerbating problems of social exclusion (Solanki et al, 2006).

This idea of offenders being "cast out" as a consequence of the imposition of criminal sanctions is of course not new: it is central to the work of labelling theorists such as Howard Becker in *Outsiders* (Becker, 1963), and Lemert in his account of primary and secondary deviance (Lemert, 1967). The key ideas of these theorists, and others such as Matza in *Becoming Deviant* (1969), are highly pertinent in evaluating "naming and shaming" strategies, particularly with their emphasis on how internalising a label imposed by remote legal authorities can deeply and negatively affect self-perception and lead to further criminal behaviour as a result.

For proponents of "naming and shaming" the policy underpinning such processes may actually be a "policy of casting out" (Braithwaite, 1993 p9), and the posited consequences of secondary deviance merely the conscious choice of individuals incapable of respecting community values. Arguably such processes are not solely or even primarily about inducing shame: "naming and shaming" processes, with their inherent tendency to humiliate and exclude, are actually about bolstering community solidarity against crime. Literary examples illustrate this. In Nathaniel Hawthorne's *The Scarlet Letter*

(Hawthorne, 1981) Hester Prynne is cast out by her community for adultery and forced to wear an embroidered red 'A' on her clothing. In Margaret Atwood's *The Handmaid's Tale*, the Wall is a place where traitors are hanged and displayed, which serves to make Gilead's citizens feel "hatred and scorn" (Atwood, 1987 p43). The most chilling example is perhaps Orwell's 1984: Winston Smith's participation in the "Two-Minutes Hate", the frenzied community denunciation of the Party's arch-enemy, Emmanuel Goldstein, serving also to bolster adoration of Big Brother (Orwell, 1990).

Does RJ raise the same concerns? If RJ is implemented according to principles of reintegrative shaming, with offenders' actions (rather than the offenders themselves) shamed by supportive community members, then the outcasting and disintegrative effects can be minimised. However the breadth of RJ schemes and the broad umbrella which the term "restorative justice" covers, means not all RJ schemes have reintegrative shaming as a guiding principle. Most importantly, to ensure that the process is supportive and constructive, those involved in operating RJ schemes must be trained to understand the objectives of reintegrative shaming, and the means by which it can be implemented. There is a danger that some RJ schemes will come to exhibit characteristics of degradation ceremonies (as outlined by Garfinkel, 1955), and thus face the same problems as "naming and shaming" initiatives.

More broadly, as several anthropologists and social psychologists have highlighted, the significance and experience of shame are culturally contingent (e.g. Riezler, 1943). The effects of any shaming process will only be properly understood when we appreciate the cultural nuances of both condemnation's transmission and the recipient's experience of it. As Harry Blagg argues, some writings on reintegrative shaming assume inappropriately that different cultures "manifest similar mechanisms for ensuring adherence to accepted standards of behaviour and that all societies maintain a similar balance between social structures and emotions such as shame." (Blagg, 1997 p487). The notion of shame implies consensus about the boundaries of acceptable behaviour; for those offenders who have never been part of the same community as those who are doing the the shaming, the notion of re-integration in to that community may lack meaning, particularly when those boundaries of acceptability are disputed. For example, Blagg has argued that in "family conferences" in Australia, often cited as leading examples of reintegrative shaming in practice, Aboriginal offenders and non-Aboriginal victims (for example) may not identify with the other, or share expectations of reintegration in to the same community (Blagg, 1997 p489). In addition, persons upon whom the condemnation is being visited may not perceive the process as legitimate or worthy of respect, depending on the cultural differences between them and other participants. In this respect, claims about the effectiveness of reintegrative shaming need to be tempered with appreciation of the possible cultural sensitivities involved.

The Dangers of Confusing the Two Ideas

The two penal strategies are qualitatively different in aims and methods, but there is a danger of conflating "naming and shaming" and RJ. Above all, the Government needs to ensure it recognises and reinforces the distinction between degrading shaming and constructive or reintegrative shaming. If it fails to do so, problems may arise.

First, the Government is in danger of using the language of "naming and shaming" to promote and implement RJ. The White Paper *Respect and Responsibility* emphasised the community accountability and reparative aspects of RJ, arguing that offenders can be held to account visibly for their actions while also benefitting victims; the White Paper was silent on the reintegrative shaming possibilities of RJ. It is also possible that organisations and individuals implementing RJ schemes will come to think of RJ as synonymous with "naming and shaming".

Second, with the two strategies in danger of being confused by the Government, new policy initiatives may be the confused progeny of the two ideas. For example, the Government is piloting 'Community Justice Centres' aimed at improving links between the community and the delivery of justice (<http://www.communityjustice.gov.uk/>). Such centres will:

be able to deal with all low-level disorder offences, housing related matters, especially those relevant to tackling anti-social behaviour. Those who adjudicate would receive specialist training. The aim would be to facilitate better liaison and communication with the courts, thereby reducing delays in the listing of cases and producing more consistent breach sentencing due to increased awareness of local issues and the impact of the anti-social behaviour
(Home Office, 2003: para. 5.26).

Such initiatives may involve community-centred expressive processes, and as such need clear principles to guide them. Will they be opportunities for expressions of community resentment and lynch-mob justice, or will they be dialogic processes seeking to engage offenders in constructive resolution of conflicts? Encouragingly, initial findings from evaluations of the Liverpool and Salford Community Justice Centres indicate that constructive problem-solving approaches are being adopted (www.communityjustice.gov.uk).

Third, obfuscating the strategies' differences will impact on those working with offenders. For example, Youth Offending Teams (YOTs) work with young offenders and are guided by the statutory aim of "preventing reoffending" (set out in s. 37 of the Crime and Disorder Act 1998). YOTs may well be working with young offenders who are subject to ASBOs and whose personal details have been publicised in line with the 2005 Guidance. Yet the effectiveness of the work that YOTs can do, including reparative and restorative activities, may be compromised by the harmful consequences of being subject to widespread community opprobrium.

Conclusion

Many commentators have noted that "naming and shaming" may be counter-productive (for discussion see Cobb, 2007). This article's aim has been to explicate some of the subtleties of the meaning of "shame" and the dynamics of shaming processes. The two types of shaming processes discussed here are qualitatively different, and the Government needs to recognise this; there may be dangers of conflating the two approaches, in terms of the aims and outcomes of community-based justice initiatives. To the extent that one type of shaming is to be preferred, RJ is by no means the panacea that some of its more fervent advocates claim. But we should be cautiously optimistic about its capacity to shame in constructive, reintegrative ways, subject to deeper understanding of the implications of culturally-sensitive experiences of shaming processes.

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