

**“Friend to the Martyr, a Friend to the Woman of Shame”: Thinking About
The Law and Humiliation**

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I am a newcomer to this group, and want to begin by thanking Evelin for asking me to join you, and by telling you how happy I am to be here, and to be working with you on this project, or better, this way of seeing the world. I was introduced to Evelin no more than two months ago by your board member George Woods (we both serve on the Board of Directors of the International Academy of Law and Mental Health; more about that in a minute), and I am so glad that George connected us to give me this opportunity to meet all of you, to share some ideas, but, mostly, to learn from all of you.

I am a professor at New York Law School, where I wear multiple hats. For today's purposes, the two important ones are that I am director of the law school's online mental disability law program, and director of the law school's International Mental Disability Law Reform Project. (I was what I always call a "real lawyer" for 13 years before I began teaching; for three of those years, I was head Public Defender in Mercer County, NJ (Trenton), and for eight, I was director of the NJ Division of Mental Health Advocacy in the NJ Department of the Public Advocate, so I spent my entire career representing what is, correctly, called "The Other"). I have been working with George in an effort to create, under the auspices of the International Academy, a program in Uganda through which we would teach one or more of my courses, courses in forensic psychiatry, and seek to work with lawyers, mental health professionals, advocates, activists to help them construct a forensic human rights initiative based on restorative justice, utilizing, among other tools, alternative dispute resolution. This fall, George and I went to California State University in

Sacramento, and met with the board of the African Center for Peace Studies and Conflict Resolution, and we have been working on this project since (and George has made an initial trip to Kampala; I hope to go this spring).

George and I are in frequent (daily? Hourly?) email contact, and at one point, he introduced me to Evelin. I eagerly read the website, and jumped in. Clearly, there was a significant connection between the work that we hoped to do in East Africa, the work that I have done and will be doing in other nations (I have taught, conducted advocacy workshops and site visits throughout Central and Eastern Europe, Central and South America, and the Pacific Rim, the bulk of this work having taken place in Nicaragua and Japan). Evelin was good enough to invite me here today to speak to you about my thoughts on law and humiliation, and, although, at first blush what I will be speaking about may not appear to be directly related to the Uganda work, I believe that the connection is both robust and important.

The law and the concept of humiliation intersect in several important, partially overlapping ways. I will first consider four of these, but this categorization is in no way the extent of the intersection. I am skipping over cases that involve what I can call "testimonial humiliation" (a divorce case in which one party testifies as to the sexual inadequacy of his or her spouse); a criminal case in which a victim testifies as to the humiliating abuse (sexual or otherwise) that he or she suffered at the hands of a perpetrator, and many others. I am limiting my remarks here only to areas in which the substantive law either allows for, encourages, or, instead, seeks to remediate humiliation or humiliating behavior:

- X Sentences in criminal cases that involve versions of Hawthorne's "Scarlet Letter" (cases in which trial judges order, by way of example, an individual convicted of aggravated battery to post a sign on his property line that read "Warning: A Violent Felon Lives Here. Travel at Your Own Risk," or variously require other convicted defendants to affix bumper stickers to their car, take out newspaper ads or wear sandwich signs to publicize their offense¹
- X Sex offender zoning laws that bar certain individuals convicted of certain crimes (commonly known, though often incorrectly, as sexually violent predator laws), from (a) residing in certain communities, or (b) residing within a certain number of feet of schools, parks, churches, recreational areas, or libraries.²
- X The passive or active sanctioning by governments of conditions in institutions in which persons with mental disabilities are housed that shock the conscience and humiliate the persons who live there.³
- X The creation of "truth and reconciliation" commissions to seek to remediate the humiliation, pain and suffering caused by a prior governmental regime's political processes that invidiously discriminated

¹ See Toni M. Massaro, *The Meanings of Shame*, 3 PSYCHOL. PUB. POL'Y & L. 645, 690-91 (1997).

² See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835 (2006).

³ See MICHAEL L. PERLIN ET AL, INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW: CASES AND MATERIALS (2006).

against groups because of their race, religion, ethnic origins, or political views.⁴

At first blush, these four categories look like they have little in common. One focuses solely on an individual (the “Scarlet A” sentencing shaming sanction), one on a class (those convicted of sexual offenses), one on a government whose pattern and practice of inflicting pain and suffering has gone unnoticed for decades (the treatment of those in psychiatric institutions), and one on a *response* to governments who regularly used their power systemically brutalize and subjugate their citizenry (often a *majority* of its citizenry). Yet, if we look at this array from a different perspective, we see that there is a common thread: that the legal system comprehends the importance of *humiliation* in human behavioral interactions, that, in some instances, it *condones* the use of humiliation as a remediative tool (in the cases of sentencing and sex offender zoning exclusions), in others it *ignores* it (in the case of the treatment of persons institutionalized because of mental disabilities), and in others it *creates* new administrative bodies to seek to eviscerate the residue of state-sanctioned humiliation (the truth & reconciliation commissions).

The law has traditionally been mischaracterized as dry, impersonal, detached from human interaction. That has always been false. The pathbreaking work of Professor Robert Cover on the use of the law as a tool of violence⁵ first illuminated

⁴See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).

⁵See *e.g.*, NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1992).

this concept, and more recent work on the roles of passion and emotion in the law⁶ and the role of apology in the law⁷ have fleshed out Cover's concepts in different dimensions. But there has been remarkably little written about what I can (or should) call "The Law and Humiliation," or "The Law of Humiliation". My (concededly cursory) research as turned up only one law review article that discusses this issue from the perspective I am talking about here (interestingly, this article was part of a symposium about the book I referred to a minute ago regarding passion in the law). This is what Professor Catherine Fisk had to say:

Humiliation is more pervasive and destructive than the law currently acknowledges. Part of its destructiveness is in the pervasive powerlessness that the victim experiences. Creating institutions where one can quickly and readily obtain justice could ameliorate powerlessness. Psychological literature has asserted that a "strategy for preventing the humiliation dynamic from running its course is to alter either the reality of the power relationships among the triad of participants, or the perception of the power relationships." Law plays this role in some circumstances, by allowing the intended victim to confront or thwart the humiliator's plan by asserting a countervailing power. From the perspective of a lawyer, however, the optimism expressed in some of the psychological literature about the humiliation-thwarting potential of laws identifying humiliation as actionable seems misplaced, at least in some cases. Law may empower in some cases, but it may simply compound the humiliation in others.⁸

I think Professor Fisk's ideas are important to all of us; the focus of her article was on the way individuals can be humiliated in the workplace (by supervisors, co-workers,

⁶See e.g., THE PASSIONS OF LAW (Susan A. Bandes ed., 1999).

⁷See e.g., Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L. J. 85 (2004).

⁸Catherine Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 90 (2001).

etc.); I am arguing here that we need to consider these issues in the context of governmental actions.

I offer these ideas to you here simply to place some new items on the table for future discussion and development. I should add my own personal “take” on this entire issue. I told you when I began to speak about my background doing international mental disability law reform. Some of what I saw in institutions in other nations can barely be described.⁹ When I show my students videos of the treatment of persons with mental disabilities (including, pointedly, *children* with mental disabilities) in Paraguay and Turkey, *we* are humiliated by what we are forced to confront.

This category may be somewhat different from the others that I have listed above, in the sense that, here, the governments in question so deny the basic humanity of the residents of these institutions¹⁰ that the issue of humiliation - to

⁹I have written about this in Michael L. Perlin, *International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent*, 39 *ISR. L. REV.* 35, 53 n. 83 (2006), and Michael L. Perlin, *International Human Rights and Comparative Mental Disability Law: The Universal Factors*, - *SYR. U. J. INT'L L. & COMMERCE* - (2007) (in press):

On a site visit to a Nicaraguan public hospital in 2003, I observed male patients walking on wards totally naked (with both male and female staff present). Female patients were brought outside the hospital for lunch. They were wearing “doctor’s office”-type gowns, exposing their breasts and buttocks. Food was passed around in large bowls, and there were no utensils. Each patient had to reach in and scoop out food (some sort of vegetable stew) with her hands.

¹⁰See e.g., Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 *CLINICAL L. REV.* 683, 698 (2003) (“persons with mental disabilities are trivialized as persons, and the essence of their basic humanity is often questioned”).

them - did not arise (it is an issue that clearly was in the minds of the judges who invoke shaming sanctions, of the legislators who write restrictive zoning laws, and of the national governments that acknowledge the horrors of prior regimes, to use my other examples). Humiliation is a human emotion/attribute, and by failing to recognize the humanity of those locked up and brutalized, the governments can simply demur to these charges.

I am a serious Bob Dylan fan. I used a line from his song *Jokerman* (a song, from the album *Infidels* from 1983, that many think is actually about Ronald Reagan, but that's for another time), "Friend to the Martyr, a Friend to the Woman of Shame" as the beginning of the title of this talk. I have devoted most of my career to the representation of persons with mental disabilities, a cohort that often lives their lives in humiliating conditions with the tacit approval of the law. Some - including those who have bravely spoken up about the conditions of their confinements - actually have become martyrs for their cause; others have simply been treated as persons of shame. I hope that this conference, and this group of concerned friends and advocates can help me continue my efforts to change this.

Thank you.