Last week a federal panel from the Ninth Circuit Court of Appeals ruled that trial judges in western states can sentence convicts to be publicly shamed. After ordering Shawn Gementera to serve time in prison for stealing some letters, a San Francisco judge required the offender, as part of his supervised release conditions, to stand outside a local post office wearing a sandwich board that said, "I stole mail. This is my punishment." Then last week, Judge Diarmuid O'Scanlain, writing for the Ninth Circuit's majority, upheld this scarlet letter treatment, ruling that the condition served the statutory purpose of rehabilitation. (Full disclosure on two counts: I am currently serving as amicus counsel for a group of law professors who are seeking rehearing of this case; and several years ago I clerked for Judge Michael Hawkins, who sharply dissented from the majority view.)

Shaming punishments have experienced something of a recrudescence in state courts in recent years--which makes this federal ruling the latest development in an alarming legal trend. The Ninth Circuit's ruling rests on bad reasoning and misinterpretation of the available evidence on public shaming. But the ruling is not just bad law; it also condones a practice that flies in the face of settled constitutional values. And now that the practice has the approval of a federal panel, there is reason to believe that the situation is only going to get worse--unless the Ninth Circuit reverses course.

Consider first the narrow problems with the ruling itself. The Ninth Circuit conceded it had no way of knowing whether the release conditions would achieve rehabilitation--indeed the majority called it "crude" and said it created a "risk of social withdrawal and stigmatization." But the panel approved the punishment anyway in deference to the trial court. This is surpassingly odd. The trial court could easily have conducted some basic research into shaming punishments to find out their known effects, or asked for some briefing by the lawyers before setting out on its sentencing experimentalism. It did neither. On appeal, moreover, the Ninth Circuit panel was presented with various psychological studies demonstrating that, far from exercising a corrective influence, shaming punishments cause harm to the offender. Nonetheless the Ninth Circuit endorsed the trial judge's reckless guesswork.

The main academic defenses of shaming
punishments cited by O'Scannlain offer little sanctuary for the supervised release condition in this case. Yale Professor Dan Kahan and University of Chicago Professor Eric Posner defend shaming punishments on economic grounds. They argue that shaming punishments of some nonviolent offenders are desirable because they offer a cheap and feasible way of conveying social condemnation without incurring the steep costs imposed by incarceration. In this case, though, the shaming punishment was used as a supplement to incarceration, not as a substitute. Additionally, Kahan and Posner specifically defend shaming as a cheap means of social condemnation; but the law in this case does not permit social condemnation—that is, punishment—as a justification for conditions of prison release.

O'Scannlain also relied on Cornell Professor Stephen Garvey's law review article, "Can Shaming Punishments Educate?" But it's doubtful that he or his law clerk read much past the title. Garvey writes, after all, that a shaming punishment "menaces certain ideals that any morally respectable mode of punishment should honor, not the least of which is human dignity." Instead Garvey defends what have been variously called "guilt punishments" (see here) or "educative" punishments. These punishments do not involve public humiliation; rather they can occur in relative privacy and are designed to induce contrition and moral education. For example, a landlord who kept his apartments below code may be required to sleep there for a period of time; or someone who threatens an interracial couple may be required to view civil rights movies. Depending on the severity of the offense, and the tailoring of the sentence, these kinds of punishments can be useful supplements to, or substitutes for, incarceration—but they are not the same as the public humiliation that Shawn Gementera was ordered to undergo.

So the Ninth Circuit's arguments pertaining to the specifics of Gementera's case are shaky at best. But there is a deeper problem with the panel's ruling. Put simply, the Constitution's Eighth Amendment prohibits cruel and unusual punishments. Most lawyers can recite the Supreme Court's precept that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man." The Court further directs that we draw the meaning of that instruction from "the evolving standards of decency that mark the progress of a maturing society."

Juxtaposed against this standard, shaming offenders is simply wrong, regardless of whether it is labeled rehabilitative or punitive. The very goal of shaming, as the dissent by Hawkins recognized, is the dehumanization of another person before, and with the participation of, the public. Before we permit democratic institutions to subject an offender to ridicule, scorn, and humiliation, we have to ask whether this kind of punishment comports with evolving standards of decency and the dignity of humankind. The answer is clearly no. Such punishment involves an unacceptable form of preening and immodest sanctimony. What's more, the condition imposed here constitutes a coerced self-laceration that conjures images of the denunciation rallies and ritual debasements of history's least liberal regimes.
Unfortunately there is reason to believe that shaming punishments could become more common. First there is an important feedback loop at play in the Ninth Circuit's decision. When an esteemed federal appellate court lends its prestige to the propriety of certain practices, other courts are likely to follow suit—and perhaps go farther. One example demonstrates this effect in stark relief. Two years ago the Ninth Circuit upheld—again, over a spirited dissent by Hawkins, later embraced by Judge Alex Kozinski—instructions to a grand jury that were misleading as to the jurors' constitutional power to refuse to indict someone notwithstanding evidence of probable cause. Shortly thereafter, a district court relied on that appellate opinion to sit back and do nothing upon discovering that a prosecutor had lied to grand jurors in response to their questions.

In addition, with the Ninth Circuit having approved this shaming punishment in the narrow context of a supervised release condition, judges may now feel emboldened to order shaming as a punishment unto itself. This is especially true in state courts, where judges have greater discretion to determine punishments. But it may also be of significance to some federal courts, which have reacted to the Supreme Court's recent decision in Blakely v. Washington by tossing out federal sentencing guidelines as unconstitutional—and reverting to the virtually unfettered sentencing discretion they enjoyed prior to Congress's passage of the Sentencing Reform Act in 1984.

Of course, from many people's perspective, standing with a demeaning signboard around one's body for eight hours in a public square is better than spending many more months locked up in the teeming and fetid pestholes that are some of our nation's prisons. But this merely shows that there's more work to be done in the name of decency and dignity, not less. To be sure, this case is far from the judicial equivalent of Abu Ghraib. But think about what was repugnant about the abuses at Abu Ghraib: the basic and unhinged assault on the human personality that occurred in our name. Can we plausibly claim there is virtue in parading criminals around in the public square? Of course not. Yet that is exactly what the Ninth Circuit has now permitted. For shame.

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