

CA No. 03-10103

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,)	
)	CA No. 03-10103
Plaintiff-Appellee,)	
)	D.C. No. CR 01-0454 VRW
v.)	
)	(N.D. Cal., San Francisco)
)	
SHAWN GEMENTERA,)	
)	
Defendant-Appellant.)	
)	
)	
)	

***AMICI CURIAE* BRIEF OF LAW PROFESSORS
SUBMITTED IN SUPPORT OF APPELLANT SHAWN GEMENTERA'S
PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING
EN BANC**

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IDENTITY AND INTEREST OF THE AMICI CURIAE¹

The undersigned law professors submit this brief in support of Defendant Shawn Gementera's petition for rehearing with suggestion for rehearing en banc of the decision in, *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004), authored by Judge O'Scannlain over Judge Hawkins' dissent. *Amici* are law professors who teach and publish in the areas of criminal law, criminal procedure, penal policy, as well as American constitutional law. Many of the *amici* have published law review articles on the legality and propriety of shaming punishments, and some of those articles were cited in the underlying decision. The *amici* all agree that the supervised release condition that exposes Shawn Gementera to public shame and humiliation is inconsistent with this Court's precedent, the applicable statute, judicial precedent, and the Constitution. *Amici* therefore support Mr. Gementera's petition for rehearing and/or rehearing en banc.

STATEMENT OF CONSENT

All parties to the appeal have consented to the filing of this amicus brief.

SUMMARY OF THE ARGUMENT

In this case, the majority approved the district court's use of a supervised release condition designed to publicly shame and humiliate Mr. Gementera by

¹ No counsel for any party authored this brief in whole or in part. The brief was written by counsel for *Amici Curiae* with the assistance of Sam Daughety, Academic Fellow to Dean Toni Massaro (U. Arizona).

requiring him to wear a sandwich board proclaiming his offense in front of a post office in San Francisco. The majority’s blessing of this condition contravenes precedent and congressional intent, and violates the Sentencing Reform Act. Moreover, the shaming condition imposed conflicts with decisions of the Supreme Court and this Court regarding its constitutionality. This Court should thus grant rehearing to resolve this important conflict.

ARGUMENT

I. Rehearing Should Be Granted To Review the Condition *De Novo*

As the majority of the panel below held, the unusual condition at issue here is subject to *de novo* review.² *See Gementera*, 379 F.3d at 600 n.5. *See also United States v. Johnson*, 998 F.2d 696, 697 (9th Cir. 1993) (affording *de novo* review regarding the legality and constitutionality of the sentence); *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) (“[W]e have cautioned that we will carefully scrutinize unusual and severe conditions.”).³

² Although a district court’s imposition of a condition of supervised release is generally reviewed for abuse of discretion, *United States v. Lakatos*, 241 F.3d 690, 692 (9th Cir. 2001), *de novo* review is appropriate to determine whether the sentence imposed is legal under the Sentencing Reform Act and the Sentencing Guidelines.

³ Even if the district court’s action should be reviewed under an abuse of discretion standard, reversal would be warranted. “[A]n erroneous view of the law” amounts to an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

The majority erred by using the doctrinal framework established in *United States v. Terrigno*, 838 F.2d 371 (9th Cir. 1988), which states that the Court must first “determine whether the sentencing judge imposed the conditions for permissible purposes, and then it must determine whether the conditions are reasonably related to the purposes.” *Id.* at 374. That framework was designed to evaluate whether a condition unquestionably authorized by Congress was properly applied in the particular circumstances of a specific case. Hence, the *Terrigno* test cannot answer the separate question whether Congress authorized application of a particular condition under any circumstances because the framework assumes that the condition is, itself, permissible. For example, under *Terrigno*, amputation of a pickpocket’s hands is unquestionably reasonably related to deterrence, and requiring a U.S. citizen drug dealer to live in Greenland will prevent recidivism. That these conditions satisfy *Terrigno* offers no assurance, however, that Congress authorized their imposition as conditions of supervised release under 18 U.S.C. § 3583. Instead, when the question is whether a condition was authorized by Congress, this Court must review the condition *de novo*, not simply evaluate whether the district court acted reasonably.

II. Rehearing Should Be Granted Because Shaming Is Not Authorized By the Sentencing Reform Act

This appeal raises the question whether 18 U.S.C. § 3583(d) permits imposition of a statutorily unenumerated condition of supervised release that is designed to humiliate in public – in other words, to shame – an offender.⁴

A. A Condition Expressly Designed To Punish and Shame the Offender Violates the Applicable Law

1. The Governing Statute Does Not Permit Punishment As a Purpose of Supervised Release Conditions

The Sentencing Reform Act does not authorize any supervised release condition that is designed to or aimed at punishing an offender.

18 U.S.C. § 3583(d) (referring only to deterrence, protection of the public, and rehabilitative treatment as permissible purposes for a supervised release condition (“SRC”)). Indeed, this Court has noted that the statute expressly omits punishment of the offender as a purpose to be served for any condition of release. *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003); *United States v. Jackson*, 189 F.3d 820, 823 (9th Cir. 1999); *United States v. Balogun*, 146 F.3d 141, 146 (2d Cir.

⁴ The act of shaming or publicly humiliating someone is distinct from a person’s feeling of shame or humiliation. A person may feel shame or humiliation for something that occurred in private and that has not been exposed to the wider world. *Cf. Gementera*, 379 F.3d at 610-11 (Hawkins, J., dissenting) (defining shaming punishment).

1998) (citing legislative history in support of Congressional disavowal of punishment as a purpose of SRC).

2. *The District Court Acknowledged Its Intention To Punish the Defendant Through the Shaming Condition*

The district court here required Mr. Gementera to wear a “sandwich board” for eight hours in public, in front of a San Francisco postal facility. The sign would proclaim (“in large letters”) for all passersby to see: “**I STOLE MAIL. THIS IS MY PUNISHMENT.**” ER 18 (emphasis added). The sign thus declares its punitive intention on its face. Indeed, the district court made its punitive purpose abundantly clear to Mr. Gementera:

[The] idea of you standing out in front of a post office with a board labeling you as somebody who has stolen mail . . . 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.

Id. at 24-25. The district court, in other words, sought to punish Mr. Gementera by making him an object of public scorn.⁵

When alerted to its error in the defendant’s Rule 35 motion to correct the sentence, the court adopted a post-hoc rationalization for its shaming punishment, holding – without empirical foundation or legal support – that the shaming

⁵ The district court further stated the shaming condition prescribed would “effectuate the several goals of the criminal sentencing laws – *to punish defendant for the crime committed*, to deter future criminal conduct of this kind by defendant

sanction it imposed served a *rehabilitative* purpose. The court simply speculated that forcing Mr. Gementera to wear a sandwich board for eight hours outside a public building “should have a specific rehabilitative effect on [him] that could not be accomplished by other means, certainly not by a more extended term of imprisonment.” ER 39. Words alone, however, cannot cure an otherwise impermissible condition.⁶

3. *The Majority’s Position That the Shaming Condition Is Not Punishment Contradicts Precedent and Congressional Intent*

This Court, in a decision authored by the *Gementera* majority’s author, Judge O’Scannlain, has itself previously described in-person shaming sanctions, as would be utilized in this case, as “punishment.” *See Russell v. Gregoire*, 124 F.3d 1079, 1087 (9th Cir. 1997). In *Russell*, the court differentiated sex-offender notification provisions from shaming provisions by observing that notification provisions merely disclosed information about the offender, while noting that public shaming had a more punitive effect: it “generally required the physical participation of the offender, and typically required a direct confrontation between the offender and members of the public.” *Id.* at 1091. The Court found that shaming had a punitive purpose: “More importantly, the Washington [notification]

and others.” *Id.* at 30 (emphasis added). Strangely, the district court used the Orwellian term “community service” to describe this shaming punishment. ER 18.

law is not intended to be punitive – it has protective purposes – while shaming *punishments* were intended to and did visit society’s wrath directly upon the offender.” *Id.* at 1092 (emphasis added).

When it has authorized shaming in the past, Congress’s intent to punish has been unmistakable. At its founding, the United States authorized punishments based on humiliation through use of the pillory.⁷ Although Congress eventually chose to abolish the pillory in 1839, *see* Act of Feb. 28, 1839 § 5, 5 Stat. 321, 322 (1839), the use of the pillory had always been considered to be a discrete form of punishment for specific offenses; for example, the Crimes Act of 1790 provided that anyone convicted of perjury, among certain other penalties, “shall stand in the pillory for one hour.” Act of Apr. 30, 1790 § 18, 1 Stat. 112, 116 (1790).⁸ Indeed, to permit federal courts now to resuscitate humiliation punishments as an acceptable condition of supervised release – 160-plus years after such punishments were expressly renounced by Congress – bespeaks a flagrant disregard for separation of powers. *See Dorszynski v. United States*, 418 U.S. 424, 440 n.14

⁶ *Trop v. Dulles*, 356 U.S. 86, 94 (1958) (“How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!”).

⁷ Noting the pillory’s punitive effect, the Supreme Court stated: “[a]mong the punishments ‘that consist principally in their ignominy,’ Sir William Blackstone classes . . . the pillory, or the stocks.” *Ex Parte Wilson*, 114 U.S. 417, 428 (1885) (quoting 4 Bl. Comm. 377).

(1974) (noting the Court’s “unwilling[ness] to ascribe to the Congress an intent to import, *sub silentio*, sentencing doctrine”); *Director of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 323 (2001). Moreover, the specificity with which Congress authorized shaming punishments like the pillory suggests strongly that Congress intended any future reintroduction to come solely by way of legislation.

Further, any doubt that shaming is designed to be punitive was put to rest by this Court just this past month when it upheld a district court’s preliminary injunction against the use of webcams in a Phoenix jail. *See Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004). The Court held that the public exposure of pretrial detainee processing via the Internet was not rationally related to the government’s interest in public scrutiny of the judicial process and that it constituted “a level of humiliation that almost anyone would regard as profoundly undesirable and strive to avoid.” *Id.* at 1030. The Court likened the practice at issue to the use of pillories: “[P]lacing arrestees on public display in the stocks is a part of our distant past and shocks the modern conscience.” *Id.* at 1032 n.5. While the Court’s decision addressed the concerns of arrestees yet to be convicted, its disapproval of purposefully shameful punishments is undeniable, as is its conclusion that the plaintiffs were “certainly harmed” by the webcams. *Id.* at 1029. The harm

⁸ Indeed the district court imposed an allegedly “non-punitive” shaming condition that would last *eight times* longer than a “punitive” shaming sentence imposed two hundred years ago.

imposed does not attenuate simply when the object of humiliation changes from an arrestee to a person on supervised release. *Demery*'s plain affirmation that public shaming "shocks the modern conscience" renders untenable the majority's assertion that the shaming here is rehabilitative and/or non-punitive in aim. *Id.* at 1032 n.5.

B. The Majority's Conclusion That the Shaming Condition Was Rehabilitative Is Unfounded

Instead of focusing on the trial court's initially articulated punitive purpose of the shaming condition, the majority accepted the court's belated and unsupported claim that the shaming sanction was rehabilitative. According to the majority, "[r]ead in its entirety, the record unambiguously establishes that the district court imposed the condition for the stated and legitimate statutory purpose of rehabilitation and, to a lesser extent, for general deterrence and for the protection of the public." *Gementera*, 379 F.3d at 602. But, as reflected in the district court's earlier statements, the record is hardly unambiguous, and in fact, it strongly supports the opposite conclusion: namely, that the shaming condition was imposed for punitive purposes and that the trial court adopted a post-hoc rationalization without any support for its assertion that the shaming condition would lead to the rehabilitation of the offender.

Indeed, the majority could only muster one single case to support its conclusion that the shaming condition had a rehabilitative purpose, *United States v.*

Clark, 918 F.2d 843, 848 (9th Cir. 1990), *overruled on other grounds by United States v. Keys*, 95 F.3d 874 (9th Cir. 1998). *Clark*, however, does not support the majority’s conclusion. First, the *Clark* defendants were subject to probation, which, unlike supervised release, can involve “conditions that are punitive in nature.” *United States v. Eycler*, 67 F.3d 1386, 1393 (9th Cir. 1995). Second, unlike the defendants in *Clark*, Mr. Gementera admitted his guilt and willingly agreed to spend four days observing postal patrons inquiring about lost or stolen mail, to write letters of apology to his known victims, and to deliver “educational lectures” at three San Francisco public high schools. ER 7. Therefore, to the extent that the *Clark* court believed an expression of contrition serves as a “first step toward rehabilitation,” 918 F.2d at 848, such a rehabilitative purpose was amply satisfied by other conditions imposed on and agreed to by Mr. Gementera. Third, the nature of the condition required of the *Clark* defendants pales in comparison to that imposed upon Mr. Gementera. Requiring a person to stand for eight hours before a busy public building during business hours in a major urban area, with a two-sided sign proclaiming in “large letters” that he is being punished for a crime, is a far cry from requiring, as in *Clark*, the mere publication of an apology in a newspaper.

The majority further attempts to minimize the punitive quality of the shaming here by observing that arrests, convictions and punishments generally

may cause shame or embarrassment and that a condition is not automatically rendered objectionable merely because the “condition causes shame or embarrassment.” *Gementera*, 379 F.3d at 605. No one disputes that it is possible that an offender may feel shame or embarrassment by dint of his wrongdoing or his conviction or punishment. Rather, the gravamen of the dispute centers on the critical distinction between a condition that *may* cause some shame or embarrassment as a *byproduct* of a legitimate governmental objective and a condition whose *express purpose* is to humiliate, shame and debase an offender before, and with the participation of, the public. By overlooking this distinction, the majority permitted the district court to circumvent the clear intent of Congress to prohibit punitive conditions of supervised release.

1. *Shaming Conditions Are Not Reasonably Related to the Rehabilitation of the Offender*

Assuming *arguendo* that the shaming condition was authorized by Congress and was imposed for the purpose of rehabilitation – the purpose ultimately and chiefly relied upon by the majority⁹ – the majority’s determination that the condition was “reasonably related” to rehabilitative purpose is clearly erroneous and warrants reconsideration by the Court. By omitting punishment as a valid purpose of supervised release, and requiring that the condition imposed be “reasonably related” to a non-punitive purpose, Congress made clear its intent that

such a purpose be carefully examined and justified. The district court failed to do that in this case. Indeed, the majority effectively conceded it had no way of knowing whether the release condition would achieve rehabilitation, calling it “crude” and acknowledging that it created a “risk of social withdrawal and stigmatization.” *Id.* at 606.¹⁰

2. *Congress Intended Rehabilitative Conditions To Conform to Established and Effective Standards of Treatment*

That Congress intended federal courts to insist upon the existence of a close, empirically based nexus between the avowed purpose of rehabilitation and the actual effects of a condition is clear from the language of the Sentencing Reform Act itself. 18 U.S.C. § 3553(a)(2)(D) (specifying that the rehabilitative purpose, *i.e.*, “correctional treatment,” be satisfied in “the most effective manner”). This expectation of efficacy is also evidenced in the Sentencing Commission’s Policy Statements. For example, a court can only order participation in a substance abuse program “approved by the United States Probation Office.”

U.S.S.G. § 5D1.3(d)(4). Mental health treatment and sex offender treatment also may be ordered, but they are subject to the same requirement. *Id.* § 5D1.3(a)(7) &(d)(5). Both provisions, in turn, must be predicated on a demonstrated need for

⁹ 379 F.3d at 607 n.16.

¹⁰ *Cf. People v. Meyer*, 680 N.E.2d 315, 320 (Ill. 1997) (invalidating requirement that a defendant post a warning sign at his house because “the erection of a sign as

such care on the part of the defendant. *Id.* When dealing with conditions that involve technical or scientific knowledge, this Court has consistently understood “correctional treatment” to mean structured, formal treatment programs. *See, e.g., United States v. Leon*, 205 F.3d 1353 (Table), 1999 WL 1217909 (9th Cir. 1999) (condition imposing 500 hour requirement of residential drug and alcohol treatment program constituted “correctional treatment”); *United States v. Willard*, 162 F.3d 1171 (Table) 1998 WL 741165 (9th Cir. 1998) (mental health counseling constituted “correctional treatment”);¹¹ *Neal v. Shimoda*, 131 F.3d 818, 833 (9th Cir. 1997) (referring to state sex offender program as “correctional treatment program”).¹² The principle that “correctional treatment” must be based on scientific and professional standards is thus bolstered by the text and structure of section 3583 as a whole.¹³

a condition of probation was unreasonable, and may be counterproductive to defendant’s rehabilitative potential.”).

¹¹ Unpublished dispositions of this Court are cited pursuant to Circuit Rule 36-3(b)(iii).

¹² *See also United States v. Brown*, 224 F.3d 1237, 1241 (11th Cir. 2000) (drug treatment program was “*correctional treatment*”) (emphasis added); *United States v. Cooper*, 171 F.3d 582, 587 (8th Cir. 1999) (batterer’s education program was “correctional treatment”).

¹³ Courts have rightfully insisted, in addition to requiring formal treatment under certain circumstances, that the conditions relate to the particular characteristics of the offense and the offender. *E.g., United States v. Pendergrast*, 979 F.2d 1289, 1292 (8th Cir. 1992) (invalidating condition imposed on mail thief to abstain from alcohol in absence of evidence indicating alcoholism).

Additionally, under both the Sentencing Reform Act and the Sentencing Guidelines, when specialized scientific or technical knowledge with respect to treatment is required, the treatment must be administered with the benefit of that knowledge. Even when, unlike here, Congress specifically determined that particular forms of correctional treatment may be employed during supervised release, they require that the treatment comport with professional standards. Reading the applicable law to allow imposition of unorthodox methods as “correctional treatment” would effectively repeal this careful regime, and thereby frustrate the principle that every word in a statute must be given effect. *See United States v. Ramirez-Sanchez*, 338 F.3d 977, 979 (9th Cir. 2003) (“statutory language should not be read in such a way as to render words or phrases as mere surplusage”).

The foregoing reveals the unlawfulness of the majority’s extension of *carte blanche* to the district court. If “correctional treatment” were meant to authorize essentially anything the district court concludes might have rehabilitative effect, then Congress would not have insisted that the condition be “reasonably related” to a permissible goal.¹⁴ Moreover, if such unfettered discretion were contemplated by

¹⁴ The majority’s decision is also contradicted by the nature of the other conditions authorized by 18 U.S.C. § 3553(a)(2)(D). Any required medical care or educational program must be offered in accordance with professional standards; a court could require an offender to see a physician but not an unlicensed holistic healer.

Congress, then many decisions of this Court and others would have come out the other way. *See, e.g., United States v. Yuvavanich*, 64 Fed. Appx. 49, 51 (9th Cir. 2003) (invalidating condition requiring an offender to refrain from drinking alcoholic beverages in the absence of evidence that the offender was a problem drinker).¹⁵

In short, Congress's grant of authority did not permit district courts to engage in unfounded speculation over the conceivable rehabilitative merits of unorthodox sanctions. Nor is the sandwich board shaming condition permissible because it is of "the same general kind" as one specifically authorized by Congress or the Sentencing Commission. *United States v. Daddato*, 996 F.2d 903, 905 (7th Cir. 1993); *see also Eyler*, 67 F.3d at 1393 & n.9 (noting that supervised release conditions "must be consistent with pertinent policy statements of the Sentencing Commission" and rejecting a condition in part because it was not among the "25 recommended conditions of supervised release that meet the statutory requirements").

Indeed, to have the situation otherwise would risk the proliferation of correctional quackery in the federal courts, along with the negative human

¹⁵Although abstaining from alcohol is "correctional treatment" under a broad definition, the *Yuvavanich* court reversed. *See also United States v. Bello*, 310 F.3d 56, 61 (2d Cir. 2002) (invalidating prohibition on watching television for individual convicted of possessing a stolen credit card even though it was designed

consequences and cynicism among the public and offenders alike arising from failed experiments at social control. *See* Edward J. Latessa *et al.*, *Beyond Correctional Quackery*, 66 Fed. Probation 43 (2002) (surveying correctional excesses of recent times and assessing their negative effects). Thankfully, there is a wealth of information about professionally constructed and operated interventions designed to make offenders appreciate the seriousness of their misconduct and the harm it caused, both nationally and in this Circuit. *See* Faye S. Taxman, *Supervision—Exploring the Dimensions of Effectiveness*, 66 Fed. Probation 14 (2002) (surveying literature on successful interventions and endorsing an “evidence-based model of supervision”). The exceedingly deferential view of the majority, if left intact, would leave critical questions of policy and evaluation entirely to the discretion of individual district judges, contrary to a central purpose of the Sentencing Reform Act, to “avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). As this Court has recognized, the sort of primary policymaking judgment required to permit shaming punishments is better done by the legislature than by courts: “Congress is an institution better equipped to amass

to encourage “deprivation and self-reflection” to reduce the likelihood of recidivism).

and evaluate the vast amounts of data bearing on such an issue.” *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995).¹⁶

3. *The Majority’s Position That Shaming Is Rehabilitative Is Unsupported by the Applicable Literature*

While it is true that “uncertainty exists” over how rehabilitation is best achieved, and that the reasonable relationship test is “very flexible,” *Gementera*, 379 F.3d at 603-04, careful scrutiny is warranted in cases like this one. *See Sofsky*, 287 F.3d at 126 (cautioning that the court must “carefully scrutinize unusual and severe conditions”). The condition to which Mr. Gementera was subjected was not based on evidence. It was, instead, the product of an *ad hoc* determination that the district court thought might be a good idea. The majority nonetheless approved the shaming condition in deference to the district court, even though there is no record evidence that the court knew what effects might occur as a result of its sentencing experimentalism.

In fact, convincing psychological studies indicate that efforts to humiliate or debase a person actually may thwart the community’s interest in rehabilitating or

¹⁶ *See also State v. Burdin*, 924 S.W.2d 82, 87 (Tenn. 1996) (“The consequences of imposing such a condition without the normal safeguards of legislative study and debate are uncertain.”).

incapacitating the offender.¹⁷ Studies show that the public loss of “face” can inspire anger, defiance, and a transformation of one’s sense of belonging in the community in ways that promote, rather than inhibit, further misconduct.¹⁸ A person who is shamed is likely to feel redefined by the experience – a process referred to as “labeling” in some criminal justice literature. *See, e.g.*, Walter R. Gove, *The Labeling of Deviance: Evaluating a Perspective* (2d ed. 1980). Post-labeling, an offender may have little incentive to obey the applicable laws because he or she has already become, in a highly publicized way, identified as a criminal. *See* Charles E. Frazier & Thomas Meisenholder, *Explanatory Notes on Criminality and Emotional Ambivalence*, 8 *Qualitative Sociology* 266 (1985). That is, the shamed offender subsequently will have no status or self-conception as a law-abiding citizen, should he recommit the offense in question.¹⁹ These unintended

¹⁷ *See* Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 *Psych. Pub. Pol. and L.* 645, 672 (1997); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 *U. Chi. L. Rev.* 733, 757 (1998) (arguing that rehabilitation associated with shaming punishments is largely illusory).

¹⁸ *See, e.g.*, June Price Tangney, Patricia Wagner, Carey Fletcher & Richard Gramzow, *Shamed Into Anger? The Relation of Shame and Guilt to Anger and Self-Reported Aggression*, 62 *J. Personality and Social Psych.* 669, 673 (1992) (noting that an “initial sense of shame fosters subsequent anger and hostility”); June Price Tangney, Rowland S. Miller, Laura Flicker, & Deborah Hill Barlow, *Are Shame, Guilt and Embarrassment Distinct Emotions?*, 70 *J. Personality and Social Psych.* 1256, 1267 (1996) (noting that shaming results in an “externalization of blame”).

¹⁹ This is not the case with fines or imprisonment because, although those sanctions are matters of public record, the object of such punishments is not ordinarily thrust into the public eye in such a leering fashion.

consequences are greatly exacerbated when, as here, a punishment is designed *precisely to produce this stigma*. Indeed, it is difficult to think of a purpose of the shaming punishment inflicted on Mr. Gementera other than to make him feel debased, much in the way that colonial “stocks” and pillories and the Communist Chinese walls of infamy achieved the same ends.

Oddly, the majority condoned the shaming condition in the absence of empirical support that it is rehabilitative, finding solace in the ongoing scholarly debate over the propriety of shaming sanctions. *See Gementera*, 379 F.3d at 605 (citing Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & Econ. 365, 371 (1999); Stephen P. Garvey, 65 U. Chi. L. Rev. at 738-39; Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591 (1996)). The majority’s reliance on these sources, however, is misplaced.

First, Kahan and Posner themselves express doubt that the use of shaming sanctions would be consistent with the goals of the current Sentencing Guidelines:

Devised on a largely ad hoc basis and implemented through state court judges’ discretion to set conditions on probation, existing shaming penalties assume a rich diversity of forms. . . . Were individual federal district court judges permitted the same latitude to fashion such *penalties*, shaming could revive the variability in sentencing that the Guidelines were meant to eliminate.

42 J.L. & Econ. at 384 (emphasis added). Second, Kahan and Posner defend shaming punishments expressly as punitive measures, not as rehabilitation.

Indeed, they are adamant that any effective shaming alternative must include this public humiliation component to work as a politically feasible alternative to incarceration. *Id.* at 383. While such a goal may be crucial for a shaming punishment to “work” as punishment, it is impermissible as a condition of supervised release, as explained *supra*, because such conditions may not be punitive. Third, they argue that shaming punishments for some offenders are desirable because they offer a cheap way of conveying social condemnation without incurring the steep social costs imposed by incarceration. In other words, shaming is best employed as a substitute for incarceration, not a supplement. Here, Mr. Gementera got both.

The court also relied on Professor Stephen Garvey’s article, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733 (1998). But far from endorsing the kind of shaming punishment at issue here, Garvey writes that such a shaming punishment “menaces certain ideals that any morally respectable mode of punishment should honor, not the least of which is human dignity.” *Id.* at 739. Instead Garvey defends what have been variously called “guilt punishments” or “educative” punishments.²⁰ These punishments do not involve public humiliation; rather they can occur in relative privacy and are designed to induce contrition and

²⁰ See Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. at 765; Dan Markel, *Are Shaming Punishments Beautifully Retributive?*, 54 Vand. L. Rev. 2157 (2001).

moral education. In sum, the articles by Kahan, Posner, and Garvey offer little support for the supervised release condition in this case.

The majority's reasoning was similarly flawed when it claimed that the combination of an impermissible shaming sanction with other potentially rehabilitative conditions would somehow suffice to "reintegrate" the offender into society. *Gementera*, 379 F.3d at 606 n.13. The majority fundamentally misunderstood the nature of "reintegrative shaming." According to Professor John Braithwaite, the leading advocate of reintegrative shaming cited by the majority, reintegrative shaming sanctions involve officially imposed rituals for *reintegrating* the offender back into the community. *See* John Braithwaite, *Crime, Shame, and Reintegration* 74 (1989). The majority claimed that coupling *Gementera*'s public shaming with "more socially useful" sanctions, such as the high school lectures and letters of apology, would satisfy this reintegrative requirement. *Gementera*, 379 F.3d at 606.

Braithwaite's position, however, is not that a shaming sanction magically becomes reintegrative merely by coupling it with more proper sanctions. Rather, there must be some positive affirmation *by the community* after the shaming so that the offender once again becomes an integral part of that community. *See* Braithwaite, *Crime, Shame, and Reintegration* at 74. The majority does not explain how the added sanctions will somehow fulfill this affirmative reintegration.

This is precisely because there are no such reintegrative rituals in place through which Mr. Gementera can rehabilitate his spoiled reputation after he has served his time with the sandwich board. The letters and lectures are merely further forced “contrition” on the part of the offender; they do not invite or require the community to once again accept Mr. Gementera as one of them. Indeed, the lectures before adolescents might invite even further scorn, derision, and humiliation. In sum, the shaming condition at issue is illegal because it is not plausibly, let alone reasonably, related to the purpose of rehabilitation.

C. The Condition Is Illegal Because It Is Excessive

Finally, both this Court and Congress have made clear that even if a given condition is found to reasonably relate to a non-punitive purpose, such as rehabilitation, the condition must still “involve ‘no greater deprivation of liberty than is reasonably necessary for the purposes’” of supervised release. *T.M.*, 330 F.3d at 1240 (quoting 18 U.S.C. § 3583(d)(2)). The Guidelines reinforce this requirement, *see* U.S.S.G. § 5D1.3(b), yet it was clearly not satisfied here. The district court imposed, in addition to the sandwich board shaming condition, three additional conditions, each possessing rehabilitative potential. Mr. Gementera was required to: (1) spend four days at a postal facility window observing postal patrons inquire about lost or missing mail; (2) compose and address personal letters to each of his victims, expressing his remorse; and (3) deliver lectures at

three high schools, in which he was to describe his offense and express his remorse. ER 7. Although these three conditions are not reintegrative, they may plausibly serve the rehabilitative goals of forcing Mr. Gementera to realize the consequences of his crime and to acknowledge its wrongfulness. In light of these other conditions, the shaming condition amounted to nothing more than the piling on of an additional and quite gratuitous requirement – designed simply to publicly humiliate him – in contravention of federal law.

III. Rehearing Should Be Granted To Resolve Whether A Shaming Punishment Violates the Constitution

For almost a century, the United States Supreme Court has held that the Eighth Amendment’s prohibition of cruel and unusual punishment limits the types of sentences that may be imposed. *See Trop*, 356 U.S. at 100 (“Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.”). In *Weems v. United States*, 217 U.S. 349, 367 (1910), the Supreme Court found that imposing the punishment of *cadena temporal* – hard and painful labor with chains fastened to the wrists and ankles at all times – was cruel and unusual punishment in violation of the Eighth Amendment. As recently as last year, all nine Justices of the Supreme Court reaffirmed that the Eighth Amendment limits the punishments that the government may impose. *See Ewing v. California*, 538 U.S. 11, 20 (2003).

The majority’s decision upholding shaming thus stands in conflict with the Supreme Court’s clear command that “[t]he basic concept underlying the Eighth Amendment [was] nothing less than the dignity of man.” *Trop*, 356 U.S. at 100 n.31. Punishments aimed at imposing shame and humiliation are inconsistent with a constitutional requirement that punishments, even for heinous crimes, be consistent with human dignity. *See Furman v. Georgia*, 408 U.S. 238, 272 (1972) (Brennan, J., concurring) (“The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.”). It is precisely because notions of dignity change that the Supreme Court long has recognized that what constitutes cruel and unusual punishment “is not static” and the “Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop*, 356 U.S. at 100-01. Thus, in *Weems*, the Supreme Court explained that the prohibition on cruel and unusual punishment “is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.” *Weems*, 217 U.S. at 378. More recently, the Court has noted that the Eighth Amendment conception of dignity includes the “dignity of society itself.” *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

Although shaming punishments may have been acceptable in 1791 when the Eighth Amendment was adopted, the Supreme Court has clearly indicated since then that sentences that aim at humiliating offenders in public no longer comport

with the dignity of the offender or of society. For example, last year, in *Smith v. Doe*, 538 U.S. 84 (2003), in upholding a state law requiring sex offenders to register, the Supreme Court stressed that it was not adopted with the sole goal being to shame violators. The Court noted that “[s]ome colonial punishments indeed were meant to inflict public disgrace.” *Id.* at 97. But the Court said that the registration of sex offenders was different because “the stigma of Alaska’s Megan’s Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.” *Id.* at 98. The Court concluded that “[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.” *Id.* at 99.

As described in Part II.A., *supra*, there is a clear difference between the possible secondary effect of shame derived from a legitimate sentence and the use of shame as a tool to humiliate an offender. This Court repeatedly has found that the latter constitutes cruel and unusual punishment in violation of the Eighth Amendment. For example, in *Demery*, this Court explained that “[a]lthough a regulation that has the incidental effect of shaming may not be a form of punishment, . . . we have no doubt that when the government acts with the purpose of shaming an unconvicted detainee, it most definitely is committing an act of punishment in violation of the [constitution].” *Demery*, 378 F.3d at 1032 n.5.

Similarly, in upholding a state’s community notification law for sex offenders, this Court expressly contrasted that to public shaming. The Court explained: “Public shaming, humiliation and banishment all involve more than the dissemination of information. . . . [T]he potential ostracism and opprobrium that may result from [notification] is not inevitable, as it was with the person whipped, pilloried or branded in public.” *Russell*, 124 F.3d at 1091-92 (internal quotation marks omitted). The Supreme Court agreed: “Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community.” *Smith*, 538 U.S. at 98.²¹

Unlike notification laws, which the *Russell* court distinguished from “face-to-face” shaming, the condition here forces Mr. Gementera to stand outside a post office for eight hours, wearing the aforementioned signboard; the condition, as the trial court stated clearly, is designed to shame and humiliate him. 379 F.3d at 611 (“[Gementera] needs to understand the disapproval that society has for this kind of conduct, and that's the idea behind the humiliation.”) (quoting district court).

While such a condition clearly strikes at the heart of dignity in both the shamed

²¹ In *Trop*, the Court struck down a law expatriating military deserters precisely because it could lead to banishment, “a fate universally decried by civilized people.” *Trop*, 356 U.S. at 102.

offender and the society that permits it, the majority decided that the condition was permissible because “[a]side from a single case presenting concerns not at issue here, we are aware of no case holding that contemporary shaming sanctions violate our Constitution’s prohibition [of] cruel and unusual punishment.” *Gementera*, 379 F.3d at 608-09.

As Judge Hawkins noted in his dissent, there are almost no federal court decisions concerning shaming punishments because such sanctions have virtually never been used in the federal courts. *Id.* This, of course, indicates that such punishments are truly “unusual” in addition to being cruel. Contrary to the majority’s assertion, this Court, among others, has found that shaming punishments “shock[] the modern conscience.” *Demery*, 378 F.3d at 1032 n.5.

Moreover, courts around the nation have found shaming punishments unreasonable, even if they did not all reach the constitutional issue of whether they constitute cruel and unusual punishment.²² Many of those cases involved conditions that primarily served other purposes, such as protection of the public, and nonetheless the courts found that they were unreasonable; thus, the weight of authority certainly indicates that the evolving standards of decency which are the basis for Eighth Amendment analysis, *see Trop*, 356 U.S. at 100-01, disapproves of

²² *E.g.*, *Meyer*, 680 N.E.2d at 316; *People v. Letterlough*, 655 N.E.2d 146, 149 (N.Y. 1995) (finding impermissible probation condition requiring sign of

punishments that are directly imposed for the purpose of shaming a person. This is especially salient in light of this Court’s own decision in *Demery, supra*, which explicitly recognized that shaming is a punishment that goes beyond the ordinary bounds of what is currently considered humane.

Indeed, penologists have recognized that society long ago moved away from public shaming as a punishment. *See, e.g.*, O. Lewis, *The Development of American Prisons and Prison Custom, 1776-1845* (1922); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880, 1929 (1991) (“The historical rise and fall of public shaming in the United States and Western Europe lends further support to the view that the revival of shaming is a wrong turn. Penal practices within the United States moved away from public spectacles toward incarceration during the nineteenth century.”). This is precisely because such penalties erode democratic norms of decency and thereby transform the role of the government in policing criminal conduct in sinister ways.²³ While the law clearly does need to communicate to offenders the wrongfulness of their crimes, the Constitution seeks to mitigate the caste features of punishment as much as possible. Unlike even the harshest of criminal penalties – capital punishment –

“convicted dwi” to the license plate of any vehicle driven by offender); *People v. Hacker*, 13 Cal. App. 4th 1049, 1052 (Cal. Ct. App. 1993).

²³ Indeed, our sister liberal democracies in western Europe make concerted efforts to avoid shaming offenders. *See* James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* 91-92 (2003).

shaming sanctions rely explicitly on their ability to *degrade* a defendant in the eyes of the community. This is in part because modern shaming sanctions “are, at base, a form of officially sponsored lynch justice.” James Q. Whitman, *What Is Wrong With Inflicting Shame Sanctions?*, 107 Yale L. J. 1055, 1089 (1998). Sending this kind of message – even about violent criminals – is jarring within a political order that makes equality under law a cultural baseline.

To put it another way: a shared sense of what is *shameful* is a necessary feature of orderly communal life. But public, official *shaming* is simply not a proper means of educating criminals or the community about what is shameful in a democratic society. Indeed, “[t]he litmus test of a decent society” is that its punishment policies and procedures aim at punishing criminals *without* humiliating them. Avishai Margalit, *The Decent Society* 262-63 (1996). The erosion of public decency through shaming is of paramount significance in light of the Eighth Amendment’s emphasis on human dignity, the exalted moral status that all human life possesses by virtue of human existence itself. Shaming is at bottom unconstitutional because it flouts our unwavering commitment to respecting the basic dignity of the offender, notwithstanding his past offense. Public shaming is equally at odds with human dignity because underlying shaming is a posture of immodest sanctimony. A system of criminal justice that recognizes both its own fallibility and that of its citizens does not strike that pose with the alacrity the

district court showed here – at least not without conjuring images of the denunciation rallies and ritual debasements of history’s least liberal regimes.

CONCLUSION

The majority’s decision to permit the shaming condition at issue here is inconsistent with the precedents of this Court, the applicable statute, and the Constitution. Rehearing is required to resolve the matter.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE UNDER
RULE 29(d) AND 9TH CIR. R. 32-1**

I, Dan Markel, hereby certify that the *Amici Curiae* Brief of Law Professors In Support of Appellant Shawn Gementera complies with the type-volume limitations of Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1. The attached brief is proportionally spaced, has a typeface of 14 points, and contains 6955 words as indicated by the word processing system used to prepare the brief. There is no rule discussing word limits for amicus briefs submitted at the petition for rehearing or rehearing en banc.

/s/ Dan Markel
Dan Markel

September 21, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing AMICI CURIAE BRIEF OF LAW PROFESSORS SUBMITTED IN SUPPORT OF APPELLANT SHAWN GEMENTERA'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC, in the case of *United States of America v. Shawn Gementera*, CA No. 03-10103, D.C. No. CR 01-0454 VRW, were served via overnight mail on this date, September 21, 2004 to the following parties:

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