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 ON BEHALF OF APPELLANT SHAWN GEMENTERA'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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IDENTITY AND INTEREST OF THE AMICI CURIAE[1]

The undersigned law professors submit this brief in support of Defendant Shawn Gementera's petition for rehearing en banc of the opinion, *United States v. Gementera*, -- F.3d --, 2004 WL 1770101 (9th Cir., Aug. 9, 2004), authored by Judge O'Scannlain over Judge Hawkin's dissent. *Amici Curiae* are law professors who possess expertise in criminal law, procedure, and policy and/or related doctrines of American constitutional law; individual names of *amici* appear *ante*, pages *i-ii*. Many of us have written about the principles that appellant invokes in this appeal. Additionally, certain of the undersigned have published law review articles on the legality and propriety of shaming punishments, some of whose articles were cited by either the majority or the dissent in the underlying decision. There may be disagreement among us about the best way for society to respond to criminal wrongdoing, but all of us agree that the supervised release condition that exposes Shawn Gementera to public shame and humiliation is at odds with this Court's precedent, the applicable statute, and the Constitution. *Amici* therefore support Mr. Gementera's petition for rehearing en banc. This is a matter of first impression in this Court. It is therefore appropriate to raise all the issues of the legality and constitutionality of such a condition at one time.

[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, University of Arizona James E. Rogers College of Law.

STATEMENT OF CONSENT

All parties to the appeal have consented to the filing of this amicus brief. Such consent was obtained in August 2004 from Hannah Horsley, Chief-Appellate Division, United States Attorney's Office for the Northern District of California, counsel for appellee United States of America, and Arthur K. Wachtel, counsel for appellant Shawn Gementera.

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 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 the precedents of this Court and the Supreme Court, violates the Sentencing Reform Act, and flies in the face of congressional intent regarding the imposition of punitive sentences as a part of an offender's supervised release conditions. Moreover, the shaming punishment approved by the majority in this case directly conflicts with decisions of the Supreme Court and this Court indicating that punishments imposed for the purpose of inflicting shame and humiliation are cruel and unusual punishment. This Court should thus grant *en banc* review to resolve this conflict in opinions and to unequivocally hold that punishments imposed for the purpose of shaming are cruel and unusual punishment.

ARGUMENT

I. Rehearing En Banc Should Be Granted To Review the Condition De Novo Because the Analysis Concerns the Legality of the Condition Imposed by the District Court.

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. The majority did not dispute that de novo review here is appropriate. *See Gementera* at *2 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") (internal quotation marks omitted).[2] Because this is a legal question of first impression, the Court must "look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy." *See United States v. Trenter*, 201 F.3d 1262, 1262-63 (9th Cir. 2000) (internal quotation marks omitted).

[2] Even if the Court were to conclude that the district court's action should be reviewed under an abuse of discretion standard, reversal would be warranted. This is because "an erroneous view of the law," such as here, 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, 374 (9th Cir. 1988) ("first, this court must 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") (citation omitted). 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 distinct question of whether Congress authorized application of a particular condition in any case under any circumstances because the frameworks assumes that the conditions are themselves permissible. For example, under *Terrigno*, amputation of a pickpocket's hands is unquestionably reasonably related to deterrence; requiring a U.S. citizen drug dealer to live in Greenland will prevent recidivism; mandating conversion to a religion with high moral standards may promote a forger's rehabilitation. 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, as this Court and others have recognized, when the question is whether a condition was authorized by Congress, this Court must construe the condition under the statute de novo, not simply by evaluating whether the district court acted reasonably.

II. Rehearing En Banc Should Be Granted Because, as a Punitive Sanction, This Shaming Condition Is Not Authorized By the Sentencing Reform Act

This appeal raises the question of whether 18 U.S.C. § 3583(d) permits imposition of a statutorily unenumerated condition of supervised release that is designed to humiliate in public -- to shame -- an offender.[3] De novo review using the traditional tools of statutory analysis shows that Congress did not authorize the condition imposed in this case.

A. A Condition Expressly Designed to Punish and Humiliate 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 supervised release conditions that are designed to and are aimed at punishing an offender, let alone through humiliation and shaming. Indeed, the statute expressly omits punishment of the offender as a purpose to be served for any condition of release. *See* 18 U.S.C. § 3583(d) (referring to deterrence, protection of the public, and rehabilitative

[3] In this brief, the words to shame and to publicly humiliate are used interchangeably. However, it is important to distinguish between the acts of shaming or publicly humiliating someone 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. At issue in this case is the permissibility of a condition imposed by the state that is designed to and aimed at the public shaming of a person, or to engage in punitive tactics that have as their aim the debasement of the offender before and with the aid of the public. *See Gementera* at *8 (Hawkins, J., dissenting) (defining shaming punishment).

treatment as the only permissible purposes for a supervised release condition ("SRC")). As this Court has noted, an SRC may serve only the "goal[s] of deterrence, protection of the public, or rehabilitation of the offender." *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003); *see also United States v. Jackson*, 189 F.3d 820, 823 (9th Cir. 1999) (noting omission of punishment as purpose of SRC); *United States v. Balogun*, 146 F.3d 141, 146 (2d Cir. 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 Several Times.

The district court here required Mr. Gementera to wear (or carry) 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 at 18 (emphasis added). Not only is the sign misleading -- because the signboard condition was only one small part of his punishment -- but it is also clearly punitive in nature. Indeed, the district court made its punitive purpose abundantly clear in its statement on the record to Mr. Gementera:

> You need to be reminded in a very graphic way of exactly what the crime you committed means to society. That is, the idea of you standing in front of a post office with a board labeling you as somebody who has stolen mail…[I]t should be humiliation of having to stand and be labeled in front of

> people coming and going from the post office as somebody who has stolen mail.

ER at 24-25. The district court, in other words, sought to punish Mr. Gementera by making him an object of public scorn.[4] The district court strangely used the Orwellian term "community service" to describe this shaming punishment. ER at 18.

When alerted to its error in the defendant's Fed. R. Crim. Proc. 35 motion to correct the sentence, the court adopted a post-hoc rationalization of its shaming punishment, holding -- without empirical foundation or legal support -- that the shaming 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 at 39. Words alone, however, cannot cure an otherwise impermissible condition.[5]

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[4] 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 the kind by defendant and others and to aid defendant in successfully rehabilitating himself . . . ." ER at 30-31 (emphasis added).

[5] Indeed, in addressing the punitive intent of a law expatriating military deserters, the Supreme Court rejected the notion that the mere classification of a law as "non-penal" was enough to decide the issue: "How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be

3. *The Majority's Position that the Shaming Condition Is Not Punishment Contradicts This Court's Own Prior Holdings and the Intent of Congress.*

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. Writing for this Court, Judge O'Scannlain found that shaming had a punitive purpose: "More importantly, the Washington [notification] 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 (internal quoatation marks omitted) (emphasis added).

Congressional legislation regarding shaming punishments makes its intent even more clear. While at its founding, the United States authorized punishments

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solved by inspection of the labels pasted on them!" *Trop v. Dulles*, 356 U.S. 86, 94 (1958) (plurality opinion).

based on humiliation through use of the pillory,[6] Congress eventually chose to abolish use of the pillory in 1839. *See* Act of Feb. 28, 1839 § 5, 5 Stat. 321, 322 (1839). What's more, there was no beating around the bush about the punitive purpose of the pillory. During the years such punishments received Congressional authority they were considered discrete forms 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).[7] Indeed, to permit federal courts to now 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 (1974) (noting the Court's "unwilling[ness] to ascribe to the Congress an intent to import, *sub silentio*, sentencing doctrine.. . ."); *cf. Director of Revenue of Missouri v. CoBank ACB*, 531

[6] 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. 4 Bl. Comm. 377." *Ex Parte Wilson*, 114 U.S. 417, 428 (1885); *see also* Mark Spatz, Comment, *Shame's Revival: An Unconstitutional Regression*, 4 U. Pa. J. Const. L. 827, 831-32 & n.40 (2002) ("The pillory was largely used to 'bring about the feeling of humiliation naturally attendant upon the infliction of public disgrace.'") (quoting *Harry Elmer Barnes, The Story of Punishment: A Record of Man's Inhumanity to Man* 62-63 (1930)).

[7] It bears mentioning that the district court saw fit to impose an allegedly "non-punitive" shaming condition that would last *eight times* longer than a "punitive" shaming sentence imposed two hundred years ago.

U.S. 316, 323 (2001) (given longstanding federal policy that certain federally chartered entities were subject to state taxation, "it would be surprising, indeed, if Congress had eliminated this important fact *sub silentio*."). Moreover, the specificity with which Congress authorized shaming punishments like the pillory and the sweeping manner of their abolishment 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 enjoinment of the use of webcams in a Phoenix jail. *See Demery v. Arpaio* 378 F.3d 1020 (9th Cir. 2004). The Court noted 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: "Placing arrestees on public display in the stocks is a part of our distant past and shocks the modern conscience." *Id.* at 1031 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.[8] *Id.* at 1029. The harm imposed by the public humiliation via webcam cannot reasonably be said to attenuate 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.

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 passively 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 protection of the public." *Gementera* at *4. But as shown before by the district court's earlier utterances, the record is hardly unambiguous, and in fact, indicates quite the opposite: namely, that the shaming condition was imposed for punitive purposes and that the trial court adopted a post-hoc rationalization without any empirical or

[8] Indeed, even the dissent in *Demery* appears to accept as fact that shame meted out for the sake of shame would be punishment (and thus, again, an impermissible condition of supervised release). *Id.* at 1038 n.7.

legal support for its baseless assertion that the shaming condition would inure 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, fails as precedent sufficient to redeem the punitive purpose of the condition imposed on Mr. Gementera. In *Clark*, the defendants, convicted of perjury, were forced to publish a public apology, which the Court agreed had a valid rehabilitative purpose. The instant facts, however, differ in several significant respects. First, unlike the defendants in *Clark*, Mr. Gementera admitted his guilt, and willingly agreed to observe postal patrons who suffered 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 at 7. Therefore, to the extent that the *Clark* court believed an expression of contrition serves as "first step toward rehabilitation," *see id.*, rehabilitative purpose was amply satisfied by other conditions imposed on and agreed to by Mr. Gementera. Second, and more important, 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. Finally, the *Clark* defendants were subject to probation, which, unlike supervised release, can involve "conditions that are punitive in nature." *United States v. Eyler*, 67 F.3d 1386, 1393 (9th Cir. 1995).

The majority further attempts to minimize the purposeful punishment via shaming of the offender 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* at *6 ("criminal offenses, and the penalties that accompany them, nearly always cause shame and embarrassment."). 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 the social meaning of a condition that *may* cause some shame or embarrassment as a *byproduct* of a legitimate governmental objective and the social meaning of 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 intentionally punitive conditions of supervised release – and that should not be countenanced.

1. Shaming Conditions Are Not Reasonably Related to The Purpose of Advancing 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 majority[9] – the majority's determination that the condition was "reasonably related" to rehabilitative purpose is clearly erroneous and warrants reconsideration by the Court. As with the threshold question of purpose, a court is not free to merely posit in an ad hoc and unsupported manner the existence of a "reasonable relationship" between avowed purpose and method, and thereby redeem an otherwise impermissible condition of supervised release. By omitting punishment as a valid purpose of supervised release, and requiring that the condition imposed be "reasonably related" to such non-punitive purpose, Congress made clear its intent that purpose be carefully examined and justified. This expectation was not satisfied here. 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." *Gementera* at *6.[10]

[9] Although the majority alluded to alternative purposes mentioned by the sentencing court, its holding was ultimately based on the supposed rehabilitative worth of the condition. *Gementera*, at *7 n. 16.

[10] *Cf. State 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

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. U.S.S.G. § 5D1.3(d)(5) & (7). Both provisions, in turn, must be predicated on a demonstrated need for such care on the part of the defendant. *Id*.[11] 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

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

[11] Similarly, treatment of batterers must be in a "program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts." 18 U.S.C. § 3583(d).

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");[12] *Neal v. Shimoda*, 131 F.3d 818, 833 (9th Cir. 1997) (referring to state sex offender program as "correctional treatment program").[13] The principle that "correctional treatment" must be based on scientific and professional standards is bolstered by the text of § 3583 as a whole.[14]

Additionally, under both the Sentencing Reform Act and the 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 or the Commission has specifically determined that particular forms of correctional treatment may be employed during supervised

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

[13] *See also United States v. Brown*, 224 F.3d 1237, 1241 (11th Cir. 2000) (drug treatment program was "correctional treatment"); *United States v. Cooper*, 171 F.3d 582, 587 (8th Cir. 1999) (batterer's education program was "correctional treatment").

[14] Conditions requiring special knowledge are to be distinguished from more general conditions frequently imposed under the Act without a formal structure, such as requirements that the offender maintain suitable employment or refrain from contact with certain persons. While the imposition of release conditions necessarily embodies some individualization, the 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 offender convicted of mail fraud to abstain from consuming alcohol in absence of evidence indicating alcoholism or that alcohol in any way contributed to the crime of conviction).

release, they require that the treatment comport with professional standards. Reading the applicable law to allow imposition of unorthodox methods or forms of treatment as "correctional treatment" would effectively repeal this careful and elaborate 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) ("As a rule, 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 imposition of effectively anything the district court concludes might have rehabilitative effect as "correctional treatment," then Congress would not have insisted that the condition be "reasonably related" to a permissible goal.[15] Moreover, if such unfettered discretion were contemplated by Congress, then many decisions of this Court and others would have come out the other way. *See, e.g.*,

[15] 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. In other words, a court could require attendance at a trade school, but not order an offender to spend two weeks in the woods with nothing but a bow and arrow on the theory that it would be an educational experience. That the earlier terms include professional standards implies that "other correctional treatment" does as well. *See In re Application of the United States*, 349 F.3d 1132, 1142 (9th Cir. 2003) ("[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.").

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).[16]

In short, Congress' grant of authority did not permit district courts to engage in idle, 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

[16] It is perfectly imaginable that refraining from any drinking would in some cases save the offender money (removing an incentive to reoffend), leave more time for more elevating pursuits, and provide the opportunity for sober reflection on the offender's misconduct. Although 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 to encourage "deprivation and self-reflection" to reduce the likelihood of recidivism); *United States v. Kent*, 209 F.3d 1073, 1077 (8th Cir. 2000) (invalidating condition of mental health treatment for offender convicted of mail fraud; the government provided "no testimony from a medical expert" that it was necessary); *United States v. Abrar*, 58 F.3d 43, 47 (2d Cir. 1995) (invalidating requirement that offender repay his personal debts because condition lacked adequate connection to conviction for transferring false documents, despite district court's "understandable indignation that Abrar was not paying his debts").

requirements."). Accordingly, nothing in the text of applicable law suggests that this condition is consistent with and reasonably related to the purposes articulated in the statutory structure.

Indeed, to have the situation otherwise would be to risk the proliferation of correctional quackery in the federal courts, along with the negative human 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—Professionalism and the Possibility of Effective Treatment*, 66 Fed. Probation 43 (2002) (surveying correctional excesses of recent times and assessing their negative effects). Thankfully, the field of corrections has moved beyond the pessimistic surmise that "nothing works." 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 generally* 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). If Congress or the Sentencing Commission wanted district courts to employ shaming conditions, presumably they would carefully examine the experiences of jurisdictions using some form of novel conditions to see how they could best be implemented, and then identify the categories of cases and other conditions where they were appropriately imposed. As this Court has recognized in other contexts, that sort of primary policymaking and social and political judgment is better done by the legislature than by courts: "Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995) (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985)).[17]

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*, at *4-5, 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

[17] *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."); *State v. Muhammad*, 43 P.3d 318, 325 (Mont. 2002) (finding shaming condition exceeded "express or implicit statutory authority granted to trial courts.").

conditions"). The condition to which Mr. Gementera was subjected was not based on "evidence-based" models of supervised release conditions. It was instead an ad hoc determination that the district court, without any specific basis, thought "should" work out well. 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.[18]

The most formidable problem with this kind of broad judicial discretion in the shaming arena is that the penalties are not likely to work in the ways that the court intends. In fact, convincing psychological studies indicate that some efforts to humiliate or debase a person actually may thwart the community's interest in rehabilitating or incapacitating the offender.[19] 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

[18] Appellate tribunals charged with reviewing these conditions must make every effort to discern punitive purpose -- especially with respect to conditions imposed under the capacious rubric of rehabilitation. *See* Louis P. Carney, Probation and Parole: Legal and Social Dimensions 85 (1977) (observing that rehabilitation "is probably the most overworked word in the correctional lexicon. It is also the least understood and the most misused").

[19] *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).

misconduct.[20] A person who is shamed may feel redefined by the experience – a process referred to as "labeling" in some criminal justice literature. *See, e.g., The Labeling of Deviance: Evaluating A Perspective* (Walter R. Gove, 2d ed., 1980). Post-labeling, an offender may have little incentive to obey the applicable laws because he or she has already lost, in a highly publicized way, identity as someone who would not commit criminal acts. *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 as a norm observer to lose, should he recommit the offense in question. These unintended consequences are greatly exacerbated when, as here, a punishment is designed *precisely to produce this stigma*. Indeed, it is difficult to think of another meaning of the shaming punishment inflicted on Mr. Gementera than that the judge wanted him to feel debased, much in the way that colonial

[20] *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"); Janice Lindsay-Hartz, Joseph de Rivera, & Michael F. Mascolo, *Differentiating Guilt and Shame and Their Effects of Motivation*, in *Self Conscious Emotions: The Psychology of Shame, Guilt, Embarrassment, and Pride* 274, 296 ("The ashamed person may literally become physically violent"); 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").

"stocks" and pillories and the Communist Chinese walls of infamy achieved the same ends.

Oddly, the majority condoned the highly unusual shaming condition in the total absence of empirical support that it is rehabilitative, finding solace in the ongoing scholarly debate over the propriety of shaming sanctions. *See Gementera* at *6 (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, *supra*, at 738-39 (1998); 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.

Id. 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 for his non-violent crime.

The court also relied on Professor Stephen Garvey's article, *Can Shaming Punishments Educate?*. But the Court appeared not to have read much past the title. 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. Furthermore, Garvey is unambiguously skeptical about the rehabilitative value of shaming punishments.[21] Instead Garvey defends what have been variously called "guilt punishments" or "educative" punishments.[22] These

[21] *See id.* at 757 ("Insofar as a particular offender is 'shame-able,' he will, having once experienced that unpleasant emotion, fear experiencing it again and so might refrain from future wrongdoing. If this is 'rehabilitation,' it is rehabilitation in the most minimal sense and really amounts to nothing more than "Pavlovian conditioning").

[22] *See* Garvey, *The Moral Emotions of the Criminal Law*, 22 Quinnipiac L. Rev. 145, 154 (2003) (arguing that "the criminal law is and should be concerned only with guilt, not shame"). For an explanation and endorsement of guilt punishments, *see* Garvey, *Can Shaming Punishments Educate?*, *supra*, at 765; Dan Markel, *Are*

punishments do not involve public humiliation; rather they can occur in relative privacy and are designed to induce contrition and moral education.[23] In sum, the articles by Kahan, Posner, and Garvey offer little sanctuary 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*, at *6. The majority fundamentally misunderstood the nature of "reintegrative shaming." According to Professor John Braithwaite, the leading advocate of reintegrative shaming punishments, 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, satisfy this reintegrative requirement. *Gementera* at *6.

Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate, 54 Vand. L. Rev. 2157 (2001).

[23] For example, a landlord who kept his apartments below code may be required to sleep there for a period of time, or someone who vandalizes the property of 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 conditions can be useful supplements to, or substitutes for, incarceration--but they are not the same as the public shaming Shawn Gementera was ordered to undergo.

However, Braithwaite's position 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. Braithwaite, *supra*, 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 here through which Mr. Gementera can rehabilitate his spoiled reputation after he has served his time in the "stocks." 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.[24] 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

[24] The lack of a reintegrative component in the district judge's sentencing scheme also raises serious concerns about the proportionality of Mr. Gementera's penalty. A shaming sanction's sting may persist long after the offender's time in the stocks has ended and the debt to society has been repaid. *See*, *e.g.*, Kahan & Posner, *supra*, at 385 (suggesting that shaming penalties may "imperil the goal of rational proportionality").

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).

This requirement 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 his each of his victims, expressing his remorse, and provide his victims with the means necessary to contact him; and (3) deliver educational lectures at three San Francisco public high schools, in which he was to describe his offense, express his remorse, and articulate to students how his "conviction and sentence have affected his life and future plans." ER at 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 to publicly humiliate—in contravention of federal law.

III. **The Court Should Grant En Banc Review to Resolve the Important Issue of Whether a Punishment Imposed Solely for the Purpose Of**

Inflicting Shame and Humiliation is Cruel and Unusual Punishment in Violation of the Eighth Amendment

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. *Trop v. Dulles*, 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. *Ewing v. California*, 538 U.S. 11, 20 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 72 (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. 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 decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 100-01. Thus, in *Weems v. United States*, 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." 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 Alaska law mandating 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*, 378 F.3d at 1026 n.5, this Court explained that "although 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]" (citations omitted).

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 agrees: "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.[25]

Unlike the 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 and without hesitation, is designed to shame and humiliate him. While such a condition clearly strikes at the heart of dignity in both the shamed 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* at *8.

At the outset, in appraising this statement it must be noted that there are almost no federal court decisions concerning shaming punishments because such sanctions have virtually never been used in the federal courts. *Gementera* at *8 (Hawkins, J., dissenting). This, of course, indicates that such punishments are

[25] 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." 356 U.S. at 102. In essence, the district court would resurrect banishment's cousin, shaming, notwithstanding their notorious pasts.

truly "unusual" in addition to being cruel. Contrary to the majority's assertion, this Court, among others, has found that punishments that as their purpose expose an offender to public shame and humiliation "shock the modern conscience." *Demery*, 378 F.3d at 1026 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.[26] 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, *Trop*, 356 U.S. at 100-01, disapproves of punishments which are directly imposed for the purpose of shaming a person. Indeed, long ago, penologists recognized that society has moved away from public shaming as a punishment. *See, e.g.*, O. Lewis, *The Development of American Prisons and Prison Custom*, 1776-1845 9 (1922); Toni M. Massaro, *Shame,*

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[26] *See People v. Meyer*, 680 N.E.2d 315 (Ill. 1997) (finding unreasonable the imposition of a sign in front of a house that warned that a violent felon lived there); *State v. Burdin*, 924 S.W. 2d at 84 (striking down a "shaming sign"); *People v. Letterlough*, 655 N.E. 2d at 149 (finding impermissible probation condition requiring sign of "convicted dwi" to the license plate of any vehicle driven by offender); *People v. Johnson*, 528 N.E.2d 1360, 1362 (Ill. App. Ct. 1988) (overturning sentence requiring public advertisement in local paper requiring mug shot and apology); *People v. Hacker*, 13 Cal.App.4th 1049, 1052 (Cal. Ct. App. 1993) (finding unreasonable the requirement that an offender wear a demeaning t-shirt ("I am on felony probation for theft") whenever he left the house).

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.[27] While law clearly does need to communicate to offenders the wrongness of their crimes, American criminal law seeks to mitigate the caste features of punishment insofar as possible. Unlike even the harshest of our criminal penalties – capital punishment – shaming sanctions rely exclusively and explicitly on their ability to *degrade* a defendant in the eyes of the community. Sending this kind of message – even about violent criminals – is jarring within a political order that makes equality under law a cultural baseline.

[27] Indeed, our sister liberal democracies in western Europe make concerted efforts to avoid shaming offenders, in order to safeguard the dignity of those offenders as well as to further their reintegration into society. James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* 91-92 (2003). This is in part because modern shaming sanctions "are, at base, a form of officially sponsored lynch justice, meted out by courts that have given up on the obligation of the state both to define what is criminal and to administer criminal sanctions itself." James Q. Whitman, *What is Wrong With Inflicting Shame Sanctions?*, 107 Yale L. J. 1055, 1089 (1998).

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. As Avishai Margalit has written, "[a] decent society is one whose institutions do not humiliate people." The reason is that this constitutes the "rejection of human beings as human." Avishai Margalit, *The Decent Society* 1 (1996). "The litmus test of a decent society," he continues, is that its punishment policies and procedures aim at punishing criminals *without* humiliating them. *Id.* at 262-263. 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. Such punishment is equally at odds with human dignity because underlying shaming is a posture of preening and immodest sanctimony. A system of criminal justice that recognizes both its own fallibility and that of its citizens does not seek to 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. For this reason, *en banc* review is required to resolve this conflict.

Respectfully submitted,

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