

Determinate Sentencing and the Rise of Alternative Sanctions: Does Shame Meet the Goals of Sentencing Reform?

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INTRODUCTION

The American justice system is failing. Or, at least, that is what many journalists and their headlines would have us believe.¹ The goals of our federal system, including rehabilitating criminals and deterring new crimes from occurring,² are noble and lofty goals. But if meeting those goals is how we measure the success of our justice system, those journalists might be right. One of the best indicators that we are neither rehabilitating nor deterring offenders is the fact that rates of recidivism remain high.³ Even worse, there seem to be countless areas in which we can point to the injustices caused by the justice system.⁴ State systems, which typically

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1. See, e.g., Craig DeRoche, *A Failing Criminal Justice System*, N.Y. TIMES (Mar. 12, 2012), <https://www.nytimes.com/roomfordebate/2012/03/12/young-black-and-male-in-america/a-failing-criminal-justice-system>; Conrad Black, *America's Justice System Has Failed Us All*, HUFFINGTON POST (Nov. 24, 2011), http://www.huffingtonpost.com/conrad-black/us-justice-system_b_1110623.html.

2. Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 924 (2007). Simmons lists the goals of the criminal justice system as retribution, incapacitation, and deterrence, with a footnote addressing what he calls the fourth goal, "rehabilitation," which he notes has been increasingly absent from modern criminal justice. *Id.* at 924 n.59.

3. Interestingly, there seems to have been few comprehensive studies to determine exactly how high recidivism rates are, particularly at the federal level. The Bureau of Justice Statistics (BJS) suggested in a 2014 report examining recidivism rates in thirty states the difficulty in determining the exact recidivism rate may be the result of varying definitions of recidivism. Some use a broad definition that considers "any new contact with the criminal justice system, no matter how minor" recidivism, while others define recidivism as "the commission of a new crime, resulting in a new sentence." The BJS found that at the end of five years following release, more than 75% of the prisoners released in 2005 were rearrested, but only 55.4% of those that were rearrested were convicted of a new crime. NATHAN JAMES, CONG. RESEARCH SERV., RL34287, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 5-6, 9 (2015). While the way in which recidivism is defined matters, the conclusion remains the same. The rates of recidivism are high, and increasing. *Id.* at 21.

4. See Conrad Black, *supra* note 1 ("Almost everything about the American system is wrong."); see also Ana Swanson, *The U.S. Court System is Criminally Unjust*, Washington Post (July 20, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/07/20/why-the-u-s-court-system-is-criminally-unjust/?utm_term=.a86bb3406191 (recounting an interview with professor Adam Benforado, who authored a book that "examine[s] and expose[s] the illogical and unfair ways that judges, jurors

have the same goals and layout as the federal system, are dealing with the same issues.⁵

But this is not the first time in history that there has been unhappiness with our criminal justice system. In the early 1900s there was general discord with the criminal justice system largely due to the rigid and degrading nature of the system.⁶ As a result, the parole system was introduced, and with it innovations such as the possibility of a reduction in prison time as a reward for good behavior.⁷

While the parole system served to settle some of the nation's concerns for a time, eventually it was determined that the new system was not doing enough to reduce recidivism, and the reformers once again looked for new solutions.⁸ The Sentencing Reform Act⁹ (SRA) was the most recent overhaul of the criminal justice system, which attempted to address some of the problems of the parole system.¹⁰ The SRA abolished parole in favor of a more determinate system, which established a range for the acceptable term of imprisonment for each crime.¹¹ Even more significantly, the SRA created supervised release, which also allowed a prisoner to be released early, but with certain conditions imposed on his release that, if violated, would lead to reincarceration.¹²

attorneys and others in the legal system make decisions about who is sent to prison, and who walks free.”)

5. See generally Dhammika Dharmapala, Nuno Garoupa, & Joanna M. Shepherd, *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037 (2010) (discussing the parallel shift at the state level from indeterminate to determinate sentencing and some problems states have faced using determinate sentencing).

6. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 976 (2013). The American reform movement in the late 1800s and early 1900s was influenced by Australian and Irish reforms. *Id.* Those reforms were provoked on by two men in particular, Maconochie and Crofton, who were interested in increasing rehabilitation efforts by giving prisoners more in control of their own fate. *Id.* Maconochie created reports that “argued that a disciplinary system premised on physical abuse imposed with little process or restraint served only to humiliate and demoralize offenders.” *Id.*

7. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 226 (1993) (discussing the introduction of the federal system of parole in 1910).

8. Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKLEY J. CRIM. L. 180, 189 (2013).

9. 18 U.S.C. § 3551 (2012).

10. Scott-Hayward, *supra* note 8, at 190.

11. *Id.*

12. *Id.* at 190-91.

While punishment and deterrence remained goals of the justice system under the SRA, supervised release was created to put new emphasis on rehabilitation.¹³ However, while incarceration may serve its goal by removing the individual from the public and imposing a set term of punishment, post-release supervision has failed to remedy the problems it was created to fix. As a result, the major goals of the SRA, deterrence and rehabilitation, have shown little improvement, and unhappiness with the justice system abounds.¹⁴

Some judges and courts have taken the failure of supervised release into their own hands and imposed unique conditions they hope will be more effective in serving the goals of supervised release.¹⁵ This idea has included the resurgence of punishments intended to shame or humiliate the offender, which had notably been largely absent from the American justice system since the colonial era.¹⁶ A range of “shaming conditions” have been imposed, but a great deal of uncertainty remains amongst courts as to what conditions are legitimate, and whether shaming conditions should be valid at all.

This Note will address some of the concerns surrounding shaming conditions, and their failure to meet the goals of the SRA. Part I lays out the history of the parole system, the transition to the Sentencing Reform Act, and the rise of shaming conditions in the United States. Part I also analyzes some of the jurisprudence on shaming conditions and finds that federal courts have rarely taken up the issue. Finally, in Part II, an alternative to shaming conditions is proposed. It suggests judges should refrain from “shame” and move towards conditions that encourage the offender to become part of the community, such as community service, a

13. *Id.*

14. Associated Press, *Nearly Half of Millennials Believe U.S. Justice System Is Unfair*, N.Y. POST (April 29, 2015), <http://nypost.com/2015/04/29/nearly-half-of-millennials-believe-u-s-justice-system-is-unfair/>.

15. For example, a judge in Cleveland ordered a woman to hold up a sign during rush hour traffic referring to herself as an “idiot” for driving on the sidewalk to pass a school bus. When asked about the sentence, the judge noted he “began handing out odd punishments after he started to see some offenders who committed crimes return to his court. It is too easy to put people in jail . . . it does not deter the crime.” *Cleveland Woman Holding ‘Idiot’ Sign Only the Latest Oddball Sentences from Northeast Ohio Judges*, CLEVELAND.COM (Nov. 12, 2012), http://www.cleveland.com/metro/index.ssf/2012/11/cleveland_woman_holding_idiot.html.

16. See Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1885 (1991).

condition that carries a much greater potential to rehabilitate an offender.

Ultimately, the goals of the SRA, particularly rehabilitation, are not being adequately served by supervised release, and the new “shaming punishments” do little to resurrect these goals. Instead, a movement away from shame and towards community involvement has a much greater potential to rehabilitate and deter an offender than humiliation. Accordingly, community service conditions of supervised release would be greatly superior in meeting the goals of the SRA.

I. HISTORY

A. The Sentencing Reform Act and the Shift from Probation to Supervised Release

By 1942, the United States federal government adopted what was at the time a growing trend by implementing an indeterminate sentencing system combined with a parole release system.¹⁷ In an indeterminate system, the judge has a small amount of discretion to determine the type of sentence to impose, but there is a maximum sentence of imprisonment the judge cannot exceed mandated by statute.¹⁸ Parole, an integral part of that system, was the label for an inmate’s term of post-release supervision, served in the community, determined by a parole board rather than by a judge.¹⁹ Parole functioned as a substitute for incarceration, as good behavior triggered parole and allowed the individual to serve the remainder of his sentence in the community under supervision.²⁰

The system of parole had different goals than those of sentencing.²¹ While sentencing was intended as punishment or retribution for the crime, parole was meant to serve the dual purposes of rehabilitation and maintenance of public safety by continuing to monitor the individual after release.²² It was thought that parole would also encourage good behavior

17. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 489 (1999).

18. Scott-Hayward, *supra* note 8, at 188.

19. Stith & Koh, *supra* note 7, at 226 (1993). *See also* Scott-Hayward, *supra* note 8, at 188.

20. *See* Petersilia, *supra* note 17, at 480.

21. *See* Petersilia, *supra* note 17, at 482-83.

22. *See* Scott-Hayward, *supra* note 8, at 189.

during the term of sentencing, as better behavior was a factor considered by the parole board in granting offenders early release.²³

Parole originated in Ireland and Australia in the mid-1800s before being adopted in the United States.²⁴ It was created as an alternative to “definite prison terms,” instead establishing a system in which an inmate would be rewarded for good conduct.²⁵ Parole also created “intermediate prisons” where inmates could acquire good marks for “work performance, behavior, and educational improvement.”²⁶ Eventually, the individual would be fully released back into the community, but he would be required to regularly report to the police.²⁷ The police in turn would assist the former-inmate in acquiring a job and would continue to keep a watchful eye over the individual.²⁸

Following the adoption of parole systems in Ireland and Australia, various American states took notice and began to duplicate those models.²⁹ In 1907 New York became the first state to formally adopt the parole system.³⁰ Twenty years later, all but three states had yet to adopt the system.³¹ Eventually, the federal government followed suit, formally adopting the parole system for federal prisons by 1942.³²

Despite the widespread adoption of the indeterminate sentencing and parole systems, it was not long before the public began to criticize the systems as being ineffective.³³ Critics argued that the uncertainty about release date was causing anxiety amongst prisoners, major discrepancies in sentences were contrary to the goal of equality in the rule of law, and ultimately that the rehabilitative purposes of the system were not being

23. See Stith & Koh, *supra* note 7, at 226. The authors note, however, that the parole boards were generally limited to giving inmates credit for only one-third of their imposed sentence, and inmates only became eligible for parole after serving one-third of their original sentence. Stith & Koh, *supra* note 7, at 226.

24. See Petersilia, *supra* note 17, at 487.

25. See Petersilia, *supra* note 17, at 487.

26. See Petersilia, *supra* note 17, at 488.

27. See Petersilia, *supra* note 17, at 488.

28. See Petersilia, *supra* note 17, at 488.

29. See Petersilia, *supra* note 17, at 489.

30. See Petersilia, *supra* note 17, at 489.

31. See Petersilia, *supra* note 17, at 489.

32. See Petersilia, *supra* note 17, at 489.

33. See Scott-Hayward, *supra* note 8, at 189.

adequately served.³⁴ As a result of the criticisms, Congress created and passed the SRA in 1984.³⁵

The reform goals of the SRA were twofold.³⁶ The first goal was to eliminate some of the uncertainty that judges and prisoners had faced under the previous system as a result of sentences being handed down by judges while parole was left up to the discretion of a separate parole board.³⁷ To remedy this problem, Congress decided to eliminate parole, so that when handing down a sentence, a judge could better dictate how much time that individual would spend incarcerated.³⁸ Next, Congress hoped to eliminate the disparity in sentencing, so that crimes of a similar nature would receive comparable punishments.³⁹ Here, Congress created the United States Sentencing Commission, which was tasked with creating sentencing guidelines.⁴⁰ The guidelines would essentially eliminate indeterminate sentencing by providing a sentencing range for an offense.⁴¹ Judges would be expected to give a sentence within that range, unless she chose to depart for reasons she would need to explain.⁴²

To replace the system of parole, the SRA created supervised release.⁴³ Like parole, supervised release was intended to rehabilitate the inmate and

34. See Stith & Koh, *supra* note 8, at 227, writing that reformers felt the indeterminate system was flawed for multiple reasons:

First, to the extent it was premised on rehabilitation, it was said to be unsuccessful. Second, indeterminacy bred anxiety among prisoners because of uncertainty in their release dates and because of disparity in the sentences received by persons who had committed the same crime. Third, this discrepancy in sentences was said to be fundamentally at odds with ideals of equality and the rule of law. In particular, permitting judges and parole officials to exercise unguided discretion assertedly resulted in 'unwarranted disparity' (including alleged bias against minorities) in criminal sentences. *Id.*

35. See Scott-Hayward, *supra* note 8, at 190.

36. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

37. Stephen Breyer, *supra* note 36, at 4 (1988). In explaining how the inequalities resulted, Justice Breyer (at the time a Circuit Judge) wrote, "Since release by the Parole Commission in such circumstances was likely, but not inevitable, this system sometimes fooled the judges, sometimes disappointed the offender, and often misled the public." *Id.*

38. Stephen Breyer, *supra* note 36.

39. Stephen Breyer, *supra* note 36, at 4-5.

40. Stephen Breyer, *supra* note 36, at 6.

41. Stephen Breyer, *supra* note 36, at 7.

42. Stephen Breyer, *supra* note 36, at 7; see also Scott-Hayward, *supra* note 8, at 190.

43. Scott-Hayward, *supra* note 8, at 190.

help him transition back into society.⁴⁴ In addition to rehabilitation, supervised release was intended to serve the complementary goals of deterrence and treatment.⁴⁵ Unlike parole, supervised release would not act as a replacement for time the individual was sentenced to incarceration.⁴⁶ Further, the imposition of supervised release was largely discretionary.⁴⁷ In many circumstances it was to be imposed only when the judge considered whether supervised release would advance the goals of rehabilitation, deterrence, and treatment.⁴⁸

The statute does mandate that supervised release be imposed in some instances, particularly when certain crimes are committed.⁴⁹ Additionally, some conditions themselves are required when supervised release is imposed, such as, “that the defendant not commit another Federal, State, or local crime during the term of supervision . . . and that the defendant not unlawfully possess a controlled substance.”⁵⁰ However, in more than half of all cases, the judge is not required to impose a term of supervised release.⁵¹ Further, while the statute sometimes mandates that specific crimes require the imposition of certain conditions, the statute also “gives courts wide discretion to order any other condition as long as the condition is ‘reasonably related’ to the factors that courts are required to consider when imposing supervised release, [and] ‘involves no greater deprivation of liberty than is reasonably necessary’ for those factors, and is consistent with Sentencing Commission policy statements.”⁵² Some conditions that

44. *Id.* at 190 (citing S. REP. NO. 98-225, at 124 (1983)).

45. *Id.*

46. *Id.*

47. *Id.* at 192-93.

48. *Id.* at 193. Scott-Hayward lists the factors as including, “the nature and circumstances of the offense and the history and characteristics of the defendant,’ deterrence, protecting the public, treating the defendant, the Sentencing Guidelines, the need to avoid ‘unwarranted sentence disparities,’ and restitution.” *Id.*

49. 18 U.S.C. § 3583 (2016). *See* Scott-Hayward, *supra* note 8, at 193-94 (“The Guidelines advise that a term ‘shall’ be imposed in all felonies where a term of imprisonment of more than one year is imposed.”).

50. 18 U.S.C. § 3583(d) (2016).

51. *See* Scott-Hayward, *supra* note 8, at 192 (citing U.S. SENTENCING COMM’N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 3 (2010), available at http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2012/2_Federal_Offenders_Sentenced_to_Supervised_Release.pdf [hereinafter SUPERVISED RELEASE REPORT]).

52. *See* Scott-Hayward, *supra* note 8, at 196 (citing 18 U.S.C. § 3583(d)). The statute indicates that the imposed condition should be reasonably related to the factors set forth in 18 U.S.C. § 3553(a)(1).

are regularly imposed for offenders on supervised release include regularly reporting to a probation officer, avoiding excessive alcohol use, avoiding associating with other convicted felons, and submitting to random drug testing.⁵³ But occasionally the conditions are even more severe, such as requiring the individual to provide a DNA sample, or mandating that on request the defendant must provide any requested financial information to probation officers.⁵⁴

On appeal, judges are held to an abuse of discretion standard when determining whether the imposed condition of supervised release is appropriate.⁵⁵ In some instances, courts look to whether there is a nexus between the imposed condition and the crime committed or the defendant's specific situation.⁵⁶ Allowing judicial discretion in deciding whether to impose conditions of supervised release, and additional discretion to determine the conditions of supervised release, has occasionally resulted in judges getting creative with the conditions they impose.⁵⁷ In some such instances, judges create conditions that use humiliation as a form of punishment, sometimes called "shaming conditions."⁵⁸

18 U.S.C. § 3583(d). These factors include considerations such as the nature of the offense, defendant's prior criminal history, and the defendant's educational and medical needs. 18 U.S.C. § 3553(a) (2010). Courts have interpreted these statutes as requiring an "individualized assessment," often attempting to create a link between a condition imposed and the circumstances or crime of the defendant in an attempt to legitimize the condition. *See* United States v. Martinez-Torres, 795 F.3d 1233, 1238 (10th Cir. 2015). *See also* United States v. Cortez Ponce, 339 Fed. Appx. 249, 252 (3d Cir. 2009).

53. *See* Scott-Hayward, *supra* note 8, at 201.

54. Scott-Hayward, *supra* note 8, at 201.

55. Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH & LEE L. REV. 75, 90-91 (2000).

56. *See* Martinez-Torres, 795 F.3d at 1238. This is particularly the case with sex crimes, where Internet use is often restricted. When such a freedom is restricted, the courts "require a stronger nexus . . . between the defendant's history and characteristics and the sex-offender-related conditions before we could conclude that the latter were 'reasonably related' to the former, as required by 18 U.S.C. § 3583(d)(1)." *Id.*

57. *See, e.g.*, United States v. Gementera, 379 F.3d 596 (9th Cir. 2004); Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986).

58. *See* Massaro, *supra* note 16, at 1885 (noting that dissatisfaction with the usual punishment options "has led to experimental, creative sanctions"). Massaro also notes that shaming sanctions are intended to publicly humiliate the offender and attempts to categorize these public punishments into common categories. *Id.* at 1886. The first are sign sanctions, in which the offender must place a sign (such as a bumper sticker on his car, for example) to identify himself as a criminal. *Id.* at 1886-87. Second are public apologies or confessions, often published in a local newspaper. *Id.* at 1888. A third

In *People v. McDowell*, a California appellate court was asked to review one of these “shaming conditions.”⁵⁹ McDowell had been convicted of “purse snatching,” and as a condition of probation, McDowell was required to “wear leather shoes with metal taps on the heels and toes anytime he leaves his house.”⁶⁰ The court considered the condition reasonable, indicating that the tennis shoes he wore at the time of the crime had helped him silently approach his victim, and that noisy shoes, therefore, would foil any similar attempts.⁶¹

The court in *McDowell* specifically noted that a condition being “out of the ordinary” does not make it unreasonable, and in fact indicated that one of the advantages of our system is that judges may impose terms “tailored . . . to fit the individual defendant.”⁶² While the punishment in *McDowell* may have seemed like an isolated occurrence, it is far from the only case in which a shaming condition has been imposed and subsequently upheld.

B. History of Humiliation As a Form of Punishment

The theory that shame could be an effective method of punishment is not a new one.⁶³ Often shaming punishments are referred to as “modern-day scarlet letters.”⁶⁴ Punishments intended to shame were abundant a few hundred years ago, with penalties ranging from being placed in the stocks

type of sanction, which Massaro calls “compelled interaction,” may require the offender to interact with his victims or those that have been victims of a similar crime. *Id.* at 1888-89.

59. *People v. McDowell*, 59 Cal. App. 3d 807 (1976).

60. *Id.* at 812.

61. *Id.* at 813. The *McDowell* court also pointed to the fact that this was the defendant’s third conviction for purse snatching, and that the crime was committed while he was still on probation for a prior purse-snatching conviction. *Id.* The court reasoned that the tapping sound from the shoes “would be a reminder to [defendant] of the fact that he is on probation and that failure to adhere to the terms of that probation would not be to his benefit.” *Id.* Ultimately, however the Court remanded the case to clarify the wording of the condition, as they found it was not sufficiently precise as to which times defendant was required to wear the tap shoes. *Id.* at 814.

62. *Id.* at 812-13.

63. Massaro, *supra* note 16, at 1881-82. Massaro refers to modern day shaming punishments as “throwbacks to colonial-type penalties” and relates them to shaming punishments proscribed in the late 1600s, including being banished, branded, whipped, or placed in public stocks. Massaro, *supra* note 16, at 1882.

64. Stephen P. Garvey, *Can Shaming Punishments Educate?* 65 U. CHI. L. REV. 733, 756 (1998); Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385, 1389 (2007).

to being branded with a letter symbolizing the crime committed.⁶⁵ Then, as today, shaming punishments were intended to, “expose the offender to public view and heap ignominy upon him in a way that other alternative sanctions to imprisonment, like fines and community service, do not.”⁶⁶ A penalty intended to shame requires the wrongdoer to, in some public manner, announce or display his wrongdoing.⁶⁷ The theory is that the public admission will cause the wrongdoer to feel embarrassed or ashamed of his actions, a feeling he will want to avoid in the future.⁶⁸

As shaming punishments reappear in the American justice system, they are taking a decidedly different form than those imposed in the colonial era.⁶⁹ Rather than directing physical violence toward the offender, modern shaming punishments have typically had the offender publically announce his crime by erecting a sign,⁷⁰ placing a sticker on his vehicle,⁷¹ or wearing a t-shirt announcing his offense.⁷² But while the punishments themselves differ, the goals of the shaming punishments seem to be the same. Shaming punishments, in whatever form, are intended to humiliate the offender, in the hope that the public nature of the punishment will deter the offender from committing further offenses.⁷³

A multitude of state courts have dealt with the question of whether shaming conditions are valid punishments under the parole and supervised release systems. For example, the Tennessee Supreme Court reviewed a condition requiring the defendant to erect a large sign in his yard warning

65. See Massaro, *supra* note 16, at 1881-884 (in which Massaro argues that the United States lacks the characteristics required to make shaming conditions effective). See also James Q. Whitman, *What Is Wrong With Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1055 (1998) (in which Whitman attempts to pinpoint the problems with shaming conditions, by examining the social and political arguments against such conditions).

66. See Garvey, *supra* note 64, at 737.

67. See Garvey, *supra* note 64, at 737.

68. See Garvey, *supra* note 64, at 743.

69. Shaming punishments were largely nonexistent by 1975, but have “begun to reappear.” Whitman, *supra* note 65, at 1056.

70. See, e.g., *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004) (upholding a District Judge’s ruling that as a condition of supervised release, the defendant was required to hold a signboard outside of a post office stating that he had stolen mail).

71. See, e.g., *Goldschmitt v. State*, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986).

72. See Whitman, *supra* note 65, at 1056. See, e.g., *People v. Hackler*, 16 Cal. Rptr. 2d 681 (Cal. Ct. App. 1993).

73. See Garvey, *supra* note 64, at 743.

parents that he was a convicted child molester.⁷⁴ Additionally, Illinois overturned a similar condition in which the sign warned those that approached defendant's home that a "violent felon lives here."⁷⁵ However, in contrast, the Georgia court of appeals upheld a condition that required the defendant to wear a fluorescent pink bracelet for his entire probationary period indicating he had been convicted of a DUI.⁷⁶ Similarly, a Florida court found a condition of probation valid that required the defendant to pay to publish his own mug shot in the local newspaper along with his name and a caption indicating he had been convicted of a DUI.⁷⁷ There is no clear consensus amongst the states addressing the issue as to whether shaming conditions themselves are invalid. At the federal level, however, the issue has seldom been addressed, with only one circuit court directly addressing the issue of shaming conditions.⁷⁸

In *United States v. Clark*, two police officers violated the police department's sick leave policy by falsely calling in sick, and both were charged with perjury.⁷⁹ The two were found guilty of the offense by a jury

74. *State v. Burdin*, 924 S.W.2d 82 (Tenn. 1996). In that case, the court found the imposition of such a condition was beyond the limits of the authority of the courts, citing the Tenn. Code Ann. *Id.* Further, the court determined, "[t]he consequences of imposing such a condition without the normal safeguards of legislative study and debate are uncertain. . . . [C]ompliance with the condition would have consequences in the community perhaps beneficial, perhaps detrimental, but in any event unforeseen and unpredictable." *Id.* at 87. Ultimately, however, the Tennessee Supreme Court did not address the defendant's constitutional arguments against the condition. *Id.*

75. *People v. Meyer*, 680 N.E.2d 315, 317 (Ill. 1997). The court looked for specific authorization for shaming conditions in the Illinois state code, and finding that there was no explicit authorization for "public humiliation," determined that the condition was impermissible. *Id.* at 320. The Illinois court went further, however, in warning that the sign at issue in the case could have "unpredictable or unintended consequences." *Id.*

76. *Ballenger v. State*, 436 S.E.2d 793 (Ga. Ct. App. 1993). The Georgia court notably took an opposite approach when presented with an argument similar to the argument the Illinois court made in *Meyer*. Although the court found no explicit authorization for the kind of condition imposed, it indicated that trial judges have the authority to impose conditions they see proper, and the list of possible conditions is not an exclusive list. *Id.* at 794. In fact, the Illinois court decided that absent an express indication to the contrary, the imposition of this kind of condition was left to the discretion of the trial judge. *Id.*

77. *Lindsay v. State*, 606 So. 2d 652, 656 (Fla. Dist. Ct. App. 1992). The Florida court noted, "[r]ehabilitation and punishment are not mutually exclusive ideas. They can co-exist in any single, particular consequence of a conviction without robbing one another of effect." *Id.* at 656.

78. See *United States v. Clark*, 918 F.2d 843 (9th Cir. 1990).

79. *Id.* at 844-45. Clark received an additional charge of making a false statement to an agency. *Id.*

and given probation by the judge.⁸⁰ As a condition of probation, the two were required to publish an apology for the offense, written by the judge, in both the local newspaper and a police department newsletter.⁸¹ On appeal, the defendants argued the probation condition was a violation of their First Amendment rights to refrain from speaking.⁸²

The court in *Clark* relied on a two-prong test for the validity of the probation decision, first articulated in *United States v. Terrigno*.⁸³ That court wrote, “[t]his test is applied in a two-step process; 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.”⁸⁴

Without much analysis, the court in *Clark* found that the public apology met this test.⁸⁵ The only factor the court seemed to consider was the fact that neither defendant had admitted guilt or otherwise accepted responsibility on their own, and therefore the court felt that the public apology could serve rehabilitative purposes.⁸⁶

Ultimately, it seems that appellate courts at the state level have been more willing to take up the issue of the validity of shaming punishments than the federal appellate courts.⁸⁷ But this does not negate the fact that

80. *Id.* Originally they were given a sentence of three years incarceration, but the judge suspended their sentences in favor of probation. *Id.*

81. *Id.*

82. *Id.* at 847.

83. *Id.* at 848 (citing *United States v. Terrigno*, 838 F.2d 371(9th Cir. 1988)).

84. *Terrigno*, 838 F.2d at 374.

85. *Clark*, 918 F.2d at 848.

86. *Id.* It is worth noting that there appears to be some racial undertones or motivations behind this case. The officers in question were black, and after violating the sick leave policy, they filed an EEOC complaint alleging the department’s arrest quota system was unconstitutional. *Id.* at 844. After being disciplined for violating the sick leave policy, the two filed an additional complaint with the EEOC, which is what ultimately led to the charges of perjury. *Id.* They also filed a civil rights lawsuit against the department and their supervisor. *Id.* Although I do not intend to diminish the gravity of the charge of perjury, it seems somewhat excessive that the two were eventually given a three-year sentence. The potential racial undertones of this case, combined with the fact that the defendants here did not plead guilty, and that this case was dealt with probation rather than supervised release, seems to make it all the more odd that the Ninth Circuit would later cite this case as support for their position that a shaming condition was valid under the Sentencing Reform Act in *United States v. Gemenetera*, 379 F.3d 596 (9th Cir. 2004). See *infra* note 101.

87. See, e.g., *State v. Burdin*, 924 S.W.2d 82 (Tenn. 1996); *People v. Meyer*, 680 N.E.2d 315 (Ill. 1997); *Ballenger v. State*, 436 S.E.2d 793 (Ga. Ct. App. 1993); *Lindsay v. State*, 606 So. 2d 652 (Fla. Dist. Ct. App. 1992); *supra* notes 74-77 and accompanying text.

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federal district judges still occasionally impose shaming punishments.⁸⁸ Because of the lack of guidance from federal appellate courts, the validity of these punishments both constitutionally and under federal law seems to remain in question, just as the effectiveness of shaming punishments in successfully meeting the goals of our criminal justice system remains in question.⁸⁹

C. Humiliation As a Form of Punishment Under the SRA

Although the number of cases in which district judges have given shaming conditions seems to be on the rise,⁹⁰ the circuit courts have not, for the most part, addressed the issue. But there is one notable exception.

In *United States v. Gementera*,⁹¹ the Ninth Circuit formally addressed the question of whether punishments intended to shame the wrongdoer were acceptable as conditions of supervised release under the SRA. In *Gementera*, the defendant was accused of pilfering letters from a mailbox.⁹² Gementera consented to a plea agreement with the government, and was then sentenced by the judge to two months imprisonment and a period of supervised release.⁹³ One of the conditions of supervised release required Gementera to hold a signboard for eight hours in front of a post office that read “I stole mail; this is my punishment.”⁹⁴ On appeal, Gementera argued the condition was a violation of the SRA.⁹⁵ The Ninth Circuit disagreed.⁹⁶

88. See *Clark*, 918 F.2d 843; *Gementera*, 379 F.3d 596.

89. Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385, 1389-90 (2007). Markel notes, shaming “penalties [are] designed to humiliate and degrade an offender in public while inviting some element of public participation in that humiliation and degradation.” *Id.* Humiliation, degradation, and public participation in those forms of punishment are not the goals of the SRA, which instead include rehabilitation, retribution, incapacitation, and deterrence. Simmons, *supra* note 2, at 924.

90. See Whitman, *supra* note 65, at 1056 (noting of shaming punishments that “such sanctions have begun to reappear”).

91. 379 F.3d 596.

92. *Id.* at 598.

93. *Id.*

94. *Id.* at 599.

95. *Id.* at 599-600.

96. *Id.* at 607-08. In their decision, the Ninth Circuit notes that an amicus brief before the court also argued that the shaming condition was a violation of the First, Fifth, Eighth and Fourteenth Amendments, but the court declined to take up these arguments since they arose only in the amicus

The court first determined that a condition of supervised release should be “reasonably related” to “the nature and circumstances of the offense and the history and characteristics of the defendant.”⁹⁷ The court also took specific notice that in reading the statute, they understood the three legitimate purposes of a condition of supervised release to be “deterrence, protection of the public, and rehabilitation”⁹⁸ Gementera challenged the condition as having the singular goal of humiliation, but the court responded that while it may be humiliating, the condition would likely have a deterring effect, and therefore was permissible under this prong of the test.⁹⁹ Next, Gementera argued the condition was not reasonably related to rehabilitation.¹⁰⁰ The court again disagreed, looking in particular to Gementera’s criminal history as a failure to accept responsibility for his actions.¹⁰¹ Ultimately, the Ninth Circuit’s decision in *Gementera* has signaled to lower courts that it is possible for shaming conditions and the resulting humiliation to serve SRA’s goals of rehabilitation, protection of the public, and deterrence.

D. Community Service As a Condition of Supervised Release

While the majority of offenders are sentenced to imprisonment, supervised release, or probation, it is worth noting that there are alternative sanctions available to judges, aside from humiliation, that are rarely being used.¹⁰² Like shaming conditions, conditions of supervised release that

brief. *Id.* The court addressed only the Eighth Amendment challenge, noting “[t]he parties have offered no evidence whatsoever, aside from bare assertion, that shaming sanctions violate contemporary standards of decency [T]he occasional imposition of such sanctions is hardly unusual” *Id.* at 608.

97. *Id.* at 600 (citing 18 U.S.C. § 3553).

98. *Id.* at 600.

99. *Id.* at 602. The court in *Gementera* cited to the same two-prong test cited in *Clark. Id.* at 601. The Court made no mention of the fact that the Sentencing Reform Act had eliminated probation in favor of supervised release, but apparently assumed the same test would apply to both when deciding whether the condition was acceptable. *Id.* at 603.

100. *Id.* at 601-02.

101. *Id.* at 604. Here the court compared Gementera to the defendants in *Clark. Id.* The court said that even though Gementera pled guilty to the offense while the defendants in *Clark* never admitted guilt, Gementera’s plea was “unremarkable” and considering his criminal history, it was likely he had not truly accepted responsibility for his actions. *Id.* Therefore, the shaming punishment could serve to inform Gementera of the gravity of his offense and make him feel responsible for his actions. *Id.*

102. Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591, 591 (1996).

require an offender to complete community service are only occasionally imposed by judges.¹⁰³ Unlike shaming conditions, however, community service is a valid post-release punishment considered and included in at least some statutes, like the Comprehensive Crime Control Act of 1984.¹⁰⁴ Although its imposition was limited somewhat by the federal sentencing guidelines, community service may still be imposed by judges, particularly for less serious offenses and where the offender has a “relatively clean criminal histor[y].”¹⁰⁵ However, community service is only sporadically implemented either as an alternative to punishment or as a condition of supervised release.¹⁰⁶ Like shaming conditions, community service is sometimes lauded as an alternative to a harsh prison sentence and post-release probation, but it is actually more of a middle ground between the two.¹⁰⁷

Court-ordered community service is an “imposition of the obligation to work for the community,” but beyond that, there are no set requirements for what community service must be.¹⁰⁸ Instead, community service may

Kahan notes that although reforms have occurred, the justice system relies heavily on imprisonment rather than alternative sanctions. *Id.* at 605. Kahan ultimately advocates for shaming punishments over the use of community service, but his major criticism of community service is that it is “expressively irrational” because it “threatens the integrity” of the work of those who voluntarily undertake to improve the community. *Id.* at 629. Kahan also suggests it is perceived as a “slap on the wrist” by victims. *Id.* at 626. However, Kahan concludes his critique on community service by recognizing that in a different cultural setting (or with a shift in perception), community service could be a more effective sanction. *Id.* at 629.

103. 18 U.S.C. § 3583; Martin H. Pritkin, *Fine-Labor: The Symbiosis Between Monetary and Work Sanctions*, 81 U. COLO. L. REV. 343, 347 (2010) (noting that despite the benefits, “work sanctions outside of prisons are a rarity”); Garvey, *supra* note 64, at 744 (writing that while community service is a “conventional alternative” to probation and imprisonment, “[j]udges, it seems, simply don’t use [it] very much”).

104. 18 U.S.C. § 3563(b)(12) (1984).

105. Malcom M. Feely, Richard Berk, & Alec Campbell, *Between Two Extremes: An Examination of the Efficiency and Effectiveness of Community Service Orders and Their Implications for the U.S. Sentencing Guidelines*, 66 S. CAL. L. REV. 155, 160 (1992).

106. Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 236 (2000) (referring to community service and similar punishments as “untraditional criminal ... sanctions”). *See also* Kahan, *supra* note 102, at 591 (noting that punishment alternatives like community service are “used sparingly and with great reluctance”).

107. Garvey, *supra* note 64, at 734 (1998) (referring to community service as an “intermediate sanction” between imprisonment and “simple probation”). *See also* Feely et al., *supra* note 105, at 155 (referring to community service as an “intermediate punishment” between imprisonment and probation).

108. *See* Feely et al., *supra* note 105, at 156.

be tailored to fit an individual offender and his crime.¹⁰⁹ Community service started appearing as an alternative to “straight probation and incarceration” in the 1960s.¹¹⁰ However, rather than imposing a term of community service on virtually every offender as is typically the case with supervised release, factors such as the nature of the offense committed and the individual’s prior criminal record are generally considered before a judge will impose a term of community service.¹¹¹

For the most part, community service is seen as serving the purpose of rehabilitation, but also occasionally of providing restitution or reparation for the particular community that was injured by the offender in the course of his crime.¹¹² Community service is more flexible than imprisonment, sometimes allowing the offender to continue working, caring for children, or attending school while completing the requisite hours required for their community service.¹¹³

However, community service should not be considered a relaxed or easy punishment. In a case study of the Northern District of California, where community service is regularly imposed on offenders as a condition of supervised release, researchers found that offenders were given many more hours of community service than “conventional wisdom [held was] practicably possible,” implying the number of hours imposed were so high it would seem impossible for the offender to complete the sentence.¹¹⁴ This indicates that community service is not always a “slap on the wrist,” but can sometimes be a time-consuming and difficult imposition on the offender.¹¹⁵

109. Pritikin, *supra* note 103, at 364 (noting community service “can readily be scaled to meet the seriousness of the crime or culpability of the offender...”).

110. See Feely et al., *supra* note 105, at 159.

111. Feely et al., *supra* note 105, at 161-62. Feely and his co-authors note that the probation officers they talked to in doing their research agreed that community service was not an appropriate condition for violent offenders, as they may pose a risk to the community. They also considered factors like type of offender and ability to pay a fine (as an alternative to community service). *Id.*

112. Feely et al., *supra* note 105, at 160-61.

113. Feely et al., *supra* note 105, at 170.

114. Feely et al., *supra* note 105, at 206. Feely and his co-authors interviewed the probation officers in the Northern District of California and determined that all eight indicated they “recommended community service in at least half of the probation cases” and some recommended it “nearly all the time.” *Id.* These recommendations likely account for the high percentage of defendants given community service in this district.

115. Feely et al., *supra* note 105, at 204.

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Despite what appears to be a beneficial condition that judges have the discretion to impose, community service is rarely given to offenders as a condition of supervised release.¹¹⁶ The failure to regularly impose community service may be due to a variety of factors, including the fact that some individuals see community service as being an inadequate punishment for crime, or that some feel community service should never be used as a punishment because we should see it as a social good rather than a burden.¹¹⁷ However, these concerns are largely based on public perception of community service, rather than the effectiveness of the tool, and public perception alone should not influence judges if community service is an effective sanction.

II. ANALYSIS AND PROPOSAL

The SRA was intended to replace the system of parole, and to return at least some discretion to judges in deciding how to punish an offender. But for the most part, judges at the state and federal level alike have treated supervised release as a routine part of punishment, removing its effectiveness as a rehabilitative tool. In many cases, it is not even required that a judge impose conditions of supervised release.¹¹⁸ And yet, it is routinely imposed on all offenders, without much thought as to whether what imposed punishment will serve the goals of SRA or that state's criminal justice system. Where judges seek alternatives to incarceration and supervised release, they tend to stray too far, and begin to impose those conditions that qualify as shaming conditions. Instead of routinely imposing empty conditions, or even conditions intended to shame, judges should undertake to revive community service as an alternative sanction. Imposing terms of community service as a condition of supervised release regularly and on a national scale will much more effectively serve the goals of the SRA than shaming conditions, or even terms of supervised

116. Pritikin, *supra* note 103, at 364-65 (citing Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST. 99, 127-28 (1996) for the proposition that community service has been "the most underused intermediate sanction in the United States").

117. Pritikin, *supra* note 103, at 368. One criticism of community service is that it is viewed as a "slap on the wrist," while another criticism is that proscribing it as a punishment "'denigrate[s] the virtue' of those who volunteer to do it." *Id.* (citing Kahan, *supra* note 102, for both propositions).

118. Scott-Hayward, *supra* note 8, at 185-86.

release that do not include community service. Further, if the federal government adopts a policy that favors community service as a condition of supervised release that meets the goals of the SRA, the country may very well see an increase in the same condition at the state level, and consequently a decrease in shaming conditions.

Even though shaming punishments have only recently begun to reappear, there are legitimate reasons to doubt the effectiveness of shaming conditions in furthering the goals of the SRA, and therefore to limit an increase in their imposition on offenders. The underlying cultural factors that once made shaming punishments effective in colonial America will not make them effective today.¹¹⁹ Beyond the risk that they may be ineffective, there is a real potential that shaming conditions can seriously harm the individual on whom the condition is imposed. Shaming conditions often rely on public humiliation, but the public has the capability, if not the tendency, to take humiliation too far.¹²⁰ If an offender is required to announce his crime, there is also a risk that the “shaming punishments may be disproportionately too strong,”¹²¹ and that the shame will “spill over” and act as a punishment for the family of the offender.¹²²

The only positive aspects of shaming conditions seem to be linked to their position as an “alternative” sanction that attempts to take a unique approach. But if all judges are looking for is an alternative, they would much better serve the goals of the SRA, and avoid another seemingly ineffective reform movement, if they uniformly began imposing terms of

119. Massaro, *supra* note 16, at 1928. Massaro undertook to determine what cultural factors made shaming punishments effective in colonial America as well as in other cultures, and determined that they were premised on “inflated, ethnocentric, or otherwise inaccurate estimations of likely community responsiveness to public punishments,” and are therefore unlikely to be effective, at least in the United States, today. Massaro, *supra* note 16, at 1928.

120. Whitman, *supra* note 65, at 1089 (citing lack of control over the “tendency of the public to become either a mob or a collection of petty private prison guards” as a reason why shaming punishments are ill-advised). *See also* Garvey, *supra* note 64, at 736 (citing *Judge Devises Instructional Penalties*, N.Y. TIMES (Feb. 26, 1993)). Garvey provides a number of examples of shaming punishments, including one where a victim of burglary is allowed to enter the home of the burglar, unannounced, and take something of similar value to the items stolen from the victim.

121. *See* Garvey, *supra* note 64, at 749, fn. 78 (citing Andrew von Hirsch, CENSURE AND SANCTIONS 7 (Clarendon 1993)).

122. Garvey notes that the family may not only feel shame for the offender’s behavior, but they may also be subject to the community’s scorn. Garvey, *supra* note 64, at fn. 79.

community service as a condition of supervised release, rather than shaming conditions.

There are many critics of community service as a punishment, but there are many benefits to community service that even those who seek to criticize the practice must admit are advantages to this sanction and not others. For instance, community service is significantly less expensive than imprisonment.¹²³ Further, the cost-effectiveness of community service becomes more apparent considering that it appears the rates of recidivism are lower amongst those who complete community service programs compared to those that complete terms of imprisonment.¹²⁴ Additionally, community service takes a unique approach that differs from most sanctions in that it embraces “restorative justice,”¹²⁵ as it allows the offender to repay his community for his crimes.¹²⁶ Community service forces the offender to participate in an activity with other individuals, and to see a different side of the community than he otherwise might not be exposed to. Ultimately, therefore, not only does community service seem better situated to serve the goal of rehabilitation, it may also better serve the goal of deterrence and ultimately decrease rates of recidivism.¹²⁷

Another major benefit of community service is that it can be scaled to fit the punishment.¹²⁸ While this is also true of shaming punishments, community service is the better sentence overall, since it entails becoming involved with members of the public, while shame creates an ostracizing

123. See Kahan, *supra* note 102, at 625. See also Feely et al., *supra* note 105, at 201 (“The Administrative Office estimates that the average cost for keeping someone in custody is \$ 1492 per month, whereas the Office of Probation estimates that the average cost of supervision of those doing community service is only \$ 115 per month.”).

124. See Feely et al., *supra* note 105, at 185-89.

125. The term “restorative justice” is used “to describe any untraditional criminal processes or sanctions that take place in communities instead of in prisons or jails.” Kurki, *supra* note 106, at 235-36.

126. Linda M. Ricci, *Focus on: Urban America: Hawking Neighborhood Justice: Unlicensed Vending in the Midtown Community Court*, 12 YALE L. & POL’Y REV. 231, 259 (1994).

127. It is worth noting that many articles on the topic discuss fines as alternative sanctions just as they discuss community service. But as at least one scholar points out, fines have a slightly different implication than community service, namely, that there is a monetary value associated with particular crimes. See Kahan, *supra* note 102, at 593. This also seems to suggest that you may do the crime, so long as you have the resources to pay for the crime. Because I find this a particularly compelling argument against the imposition of fines, I do not believe it is in the same category as community service.

128. See Pritkin, *supra* note 103, at 364.

effect. Because community service is an easily tailored punishment, it seems best to leave it up to judges to decide what kind of community service would best suit each offender. If community service is imposed regularly nation-wide, which would likely make it the most effective, the justice system would do well to seek out agencies that perform volunteer work to see if they would be willing to form partnerships in order to more efficiently determine where there is a demand for service. While this will require some resources upfront, imposing community service on a large scale would ultimately lead to decreases in spending on offenders. It is a low-cost alternative to many supervisory sanctions, and could decrease recidivism rates, saving money on housing the re-offender in the long term.

As for the public perception that community service is not a harsh enough penalty, or that it devalues the work of actual volunteers, this perception could likely be turned around if community service as a condition of supervised release was regularly imposed nationwide. The more offenders that are given community service as punishment, the more the people in the community will see those offenders giving back.¹²⁹ The increased participation in the community will allow community members to visibly see the criminal justice system at work, which very well could lead to increase satisfaction with the system overall.¹³⁰

Community service is not necessarily a viable alternative to incarceration.¹³¹ Instead, it seems a more attractive punishment if imposed as a condition of supervised release post-incarceration. If the public and federal judges are looking for suitable alternatives to what they see as failing punishments, they should look not to shame the offender, but rather to rehabilitate him through community interaction.

129. See Ricci, *supra* note 126, at 260.

130. See Ricci, *supra* note 126, at 260.

131. There will always be crimes that require removing the offender from the public in order to protect the public's safety. Community service is not a viable alternative to incarceration in those cases. It may be a viable alternative to incarceration for non-violent offenses, but what this Note suggests is that it be included in terms of post-incarceration supervision, which in general could be improved by the inclusion of more community involvement.

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CONCLUSION

It is understandable that the public, and even judges, have some concerns about our justice system and its ability to successfully punish, deter, and rehabilitate offenders. However, this concern should not give judges unfettered discretion to impose shaming punishments that do not adequately promote the goals of the Sentencing Reform Act, or the criminal justice system as a whole. In seeking out alternatives to conventional punishments, community service has a greater potential to meet the goals of the SRA than do shaming conditions.

Shaming conditions in particular may seem like a creative alternative, and therefore attractive punishment in the abstract, but they have not been proven to actually deter or rehabilitate the individual.¹³² There is also a real risk that shaming conditions could do psychological harm to the offender, negating any improvements the justice system may have made in encouraging the individual not to re-offend.

Community service is a better alternative to shaming conditions. It has the ability to both deter and rehabilitate the offender, while encouraging the individual to get to know the people in the community and to see firsthand the problems the community faces. Community service, not shaming conditions, should be the preferred alternative sanction if we hope to see the goals of supervised release, deterrence and rehabilitation, reached.

132. Those who study shaming conditions have not determined conclusively whether they are better or worse at deterring and rehabilitating offenders than imprisonment and probation. *See* Garvey, *supra* note 64, at 753-54 (writing of the effectiveness of shaming conditions that, “no one knows for certain.” And citing Kahan, *supra* note 102, at 638, for the proposition that “no one has yet subjected them to systematic empirical inquiry.”).