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Eighteenth Century Public Humiliation Penalties in Twenty-First Century America: The “Shameful” Return of “Scarlet Letter” Punishments in *U.S. v. Gementera*

I. INTRODUCTION

Nathaniel Hawthorne’s timeless classic, *The Scarlet Letter*, highlighted the shaming punishments and public humiliation tactics commonly employed in colonial America. Few who have read this masterpiece could forget the tragic journey of the novel’s central character, Hester Prynne, who exemplifies shaming punishments. Hester committed the unthinkable crime of bearing a child out of wedlock and subsequently received a punishment requiring her to display a large scarlet letter “A” on her bosom. Today, many Americans would probably scoff at punishments creating public spectacles, yet a trend is emerging in our courts indicating that the judiciary is beginning to view shaming penalties as acceptable punishments. Most recently, the Ninth Circuit Court of Appeals asserted the validity of so-called “Scarlet Letter” sentences in *U.S. v. Gementera*.¹

In *Gementera*, the Ninth Circuit upheld a district court probation requirement that a convicted mail thief must stand outside of a post office with a sandwich board sign containing the following message: “I stole mail. This is my punishment.”² While the *Gementera* court “is to be commended for seeking innovative ways of dealing with a serious social problem,”³ sanctioning penalties intended to subject persons to humiliation raise substantial concerns. Specifically, the *Gementera* court improperly exercised its authority by imposing a punishment contrary to the Federal Sentencing Guidelines, which were in place at the time of this holding.⁴ In circumventing Congress, *Gementera* set poor precedent, likely created several unintended consequences, and raised substantial constitutional concerns.

This Note begins with a brief historical perspective of shaming punishments in colonial America. Part III outlines the facts, procedural

1. *U.S. v. Gementera*, 379 F.3d 596 (9th Cir. 2004).

2. *Id.* at 598.

3. *Ballenger v. State*, 436 S.E.2d 793, 796 (Ga. Ct. App. 1993).

4. *See* 18 U.S.C. § 3553(a)(2)(B)–(D) (2004). Subsequent to the *Gementera* holding, the United States Supreme Court struck down mandatory compliance with the Federal Sentencing Guidelines. *See infra* Part IV.B.

posture, and holding surrounding *Gementera*. This section also analyzes the trend favoring shaming penalties as an alternative form of punishment. Part IV argues that the *Gementera* court improperly usurped the legislative powers under the guise that shaming rehabilitates offenders. Part V explores the ill-effects and unintended consequences that could result from the *Gementera* court circumventing Congress. Part VI analyzes potential constitutional challenges to which “Scarlet Letter” sentences may be subject under the First, Fifth, Eighth, and Fourteenth Amendments. Part VII acknowledges the increasing need for alternative forms of sentencing and offers a brief conclusion.

II. BACKGROUND OF SHAMING PUNISHMENTS IN AMERICA

A. *The Rise of Shaming Sentences in the Colonial American Theocracy*

Thoughts of 17th and 18th century America invoke vivid images of mindless witch-hunts and public punishment involving stocks and pillories.⁵ Also popular during this period were laws requiring criminals to publicly confess their misdeeds⁶ or display signs and wear letters⁷ proclaiming their sins.⁸ Other punishments actually “involved branding the criminal on a visible part of the body, such as the cheek or forehead, so as to unmistakably alert the public to the offender’s criminal tendencies.”⁹ Officials conducted these punishments in prominent places during busy times of the day for all to see.¹⁰

Several theories attempt to explain the popularity of public humiliation in colonial times. For example, many historians agree that the governing theocracy contributed significantly to this phenomenon.¹¹ The primary reason why this theocracy fostered an environment in which shaming thrived is that it “regarded social status as the highest good.”¹² One commentator also noted that the “citizenry . . . preoccupied itself

5. *Gementera*, 379 F.3d at 612.

6. Barbara Clare Morton, *Bringing Skeletons out of the Closet and into the Light – “Scarlet Letter” Sentencing Can Meet the Goals of Probation in Modern America Because It Deprives Offenders of Privacy*, 35 SUFFOLK U. L. REV. 97, 101 (2001).

7. Such as the letter “A” worn by Hester Prynne.

8. Barbara Clare Morton, *Bringing Skeletons out of the Closet and into the Light – “Scarlet Letter” Sentencing Can Meet the Goals of Probation in Modern America Because It Deprives Offenders of Privacy*, 35 SUFFOLK U. L. REV. 97, 101 (2001).

9. *Id.* at 101-02.

10. *Id.* at 101.

11. *Id.* at 102.

12. Deni Smith Garcia, Notes & Comments: *Three Worlds Collide: A Novel Approach to the Law, Literature, and Psychology of Shame*, 6 TEX. WESLEYAN L. REV. 105, 109 (1999).

with conforming to the common moral norms and rules.”¹³ These various forms of stripping citizens of social standing quickly became effective and preferred methods of punishment in this hierarchical society.¹⁴

The theocratic system of government is not the only factor responsible for the development of shaming penalties in colonial America. Communities were small and citizens depended on one another for survival.¹⁵ Persons living under such circumstances wanted to maintain a strong relationship with the community because significant hardships accompanied individuals with tainted reputations.¹⁶ One commentator recognized that “shame penalties led to shunning by the community, a high price to pay in . . . close-knit communities.”¹⁷ Shunned colonists endured “the judgmental, jeering eyes of community peers with whom they worked and encountered daily.”¹⁸

Lack of mobility also contributed to the rise of shaming.¹⁹ “Most residents were life-long . . . [and] in the mid-seventeenth century, migration in and out of Massachusetts’ towns stood at less than one percent annually.”²⁰ This factor, along with the governing theocracy and the interdependence of the colonial citizenry, combine to explain the effectiveness of shaming during this period. These factors quickly dissipated in the latter-half of the 18th Century and the beginning of the 19th Century.

B. The Rise of Democracy and Corresponding Decline of Shaming Sentences

By 1776, the theocracy and social hierarchy of early colonial times were notions of the past.²¹ America had entered a new enlightened era best articulated by the *Declaration of Independence*, stating that “[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”²² In light of this ideological shift, the degradation of the social status of others

13. Barbara Clare Morton, *Bringing Skeletons out of the Closet and into the Light – “Scarlet Letter” Sentencing Can Meet the Goals of Probation in Modern America Because It Deprives Offenders of Privacy*, 35 SUFFOLK U. L. REV. 97, 104 (2001).

14. *Id.*

15. *Id.* at 102.

16. *Id.*

17. *Id.* (Internal quotes omitted).

18. *Id.*

19. *Id.*

20. *Id.* at 103.

21. See Garcia, *supra* note 12, 109-10.

22. The DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

became less effective than depriving criminal offenders of their right to liberty.²³ Incarceration emerged as a more appropriate mode of punishment because it directly targeted the highest value, that of liberty, as reflected by the new political ideology.²⁴

In addition to democracy, logistical problems arose with shaming that rendered it largely ineffective as a penological scheme.²⁵ Two primary factors explain this decline. First, America no longer consisted of isolated towns where citizens depended upon each other for sustenance.²⁶ Rapid development of urban centers resulted in increased anonymity and decreased citizens' dependence on other individuals and their relationships in the community.²⁷ Second, America's transportation infrastructure substantially advanced during this era and individuals experienced unprecedented mobility.²⁸ In short, the foundation enabling the effectiveness of shaming crumbled and the ideology became archaic. Although humiliation as punishment has been disfavored in American sentencing for nearly two centuries, an increasing number of courts, including the *Gementera* court, are resorting to the practice as an alternative means of punishment.

III. U.S. v. GEMENTERA

A. *The Facts*

A police officer observed Shawn Gementera and his friend Andrew Choi taking mail on Fulton Street in San Francisco in May of 2001.²⁹ Choi quickly stashed letters into his coat while Gementera appeared to serve as a lookout.³⁰ The police officer noticed that Gementera said

23. Garcia, *supra* note 12, at 109.

24. Morton, *supra* note 6, at 97, 107.

Morton explained the new political ideology as follows:

The United States' independence from Britain and its accompanying reformation of penal ideology also contributed to the disuse of shaming penalties. The late eighteenth century marked a time where a new United States questioned its old forms of punishment in favor of other methods, such as incarceration. The optimism accompanying its "fresh start" and determination to break away from old methods of punishment peppered with British influence helped propel the country out of its habit of using humiliating punishments. As one historian observed "the very act of revolution produced a climate conducive to legal change . . . [and] . . . the move to criminal incarceration."

Id.

25. *Id.* at 105-06.

26. *Id.* at 105.

27. *Id.* at 106.

28. *Id.* at 107.

29. U.S. v. Gementera, 379 F.3d 596, 598 (9th Cir. 2004).

30. *Id.*

something to Choi after which the two walked slowly toward the officer.³¹ The officer identified himself and then questioned the pair in order to find out whether they lived in the building.³² Gementera responded, “Oh, yeah my friend lives there.”³³ After Gementera’s response, Choi proceeded to get into a car; however, the officer immediately ordered them to step away from the car and to lie on the ground.³⁴

The officer called for backup and subsequently searched Choi.³⁵ The search yielded several letters not addressed to Choi or Gementera on the inside of his jacket.³⁶ At this point, the police officer asked Choi whether one letter was his to which he replied, “Yes it is.”³⁷ Gementera, spontaneously exclaimed: “That black binder in there is not mine, it belongs to Andrew . . . I tell you everything.”³⁸ Gementera also mentioned that he owned the car that Choi previously attempted to enter.³⁹

The Police arrested the duo and searched the car incident to the arrest.⁴⁰ While searching the car, the police discovered the black binder to which Gementera previously referred.⁴¹ The binder contained a letter to an individual located at an address around the corner from where the police initially observed Choi and Gementera.⁴² Additionally, the police recovered several checks and tax refunds issued to persons other than Choi and Gementera.⁴³ In total, Gementera possessed forty-two pieces of stolen mail, “including a U.S. Treasury check worth over \$1500.”⁴⁴ Gementera eventually plead guilty to mail theft as part of a plea agreement.⁴⁵

Unfortunately, this incident was a continuation of a long-standing conflict with the law for Gementera.⁴⁶ Gementera’s past conduct

31. Brief of Appellee, 2004 WL 545743, at 4, U.S. v. Genmentera, 370 F.3d 596 (9th Cir. 2004) (No.03-10103).

32. *Id.* at 4.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 4-5.

38. *Id.* at 5 (internal quotes omitted).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. U.S. v. Gementera, 379 F.3d 596, 598 (9th Cir. 2004) (dismissing a second count of receiving a stolen U.S. Treasury check as part of the plea agreement).

46. *Id.*

included misdemeanor criminal mischief,⁴⁷ driving with a suspended license and without proof of financial responsibility,⁴⁸ misdemeanor battery,⁴⁹ possession of drug paraphernalia,⁵⁰ taking a vehicle without the owner's consent,⁵¹ and other driving offenses.⁵²

B. Procedural History

After the plea agreement, Judge Vaughn Walker of the United States District Court for the Northern District of California sentenced Gementera.⁵³ Judge Walker considered Gementera's lengthy criminal record and followed the U.S. Federal Sentencing Guidelines ("the Guidelines") in sentencing Gementera to two months in prison and three years supervised release.⁵⁴ As part of the supervised release,⁵⁵ the court sentenced Gementera to "perform 100 hours of community service . . . [consisting] of standing in front of a postal facility in the city and county of San Francisco with a sandwich board which in large letters declares: 'I stole mail. This is my punishment.'"⁵⁶

After "inviting both parties to present 'an alternative form or forms of public service that would better comport with the aims of the court,'" Judge Walker modified the one hundred hour requirement.⁵⁷ Instead of standing outside several postal facilities for one hundred hours, Gementera's sentence was reduced to standing outside one post office for the duration of eight hours.⁵⁸ Additionally, "[the court] mandated that the defendant observe postal patrons visiting the 'lost or missing mail' window, write letters of apology to any identifiable victims of his crime, and deliver several lectures at a local school."⁵⁹ Gementera appealed the sandwich board condition asserting 1) the supervised release condition did not reasonably relate to the goals of the Sentencing Reform Act;⁶⁰

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* (noting that most of Gementera's driving offenses involved driving on a license suspended for his failure to take chemical tests).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 599.

58. *Id.*

59. *Id.*

60. *Id.* at 598-600; *see also* 18 U.S.C. § 3583(d) (2003). This statute allowed district courts broad discretion in creating conditions for supervised release. However, the statute required that district court judges meet the legitimate goals of probation set out in 18 U.S.C. §§ 3553(a)(1)

and 2) the probation condition violated Gementera's Constitutional rights under the Eighth Amendment.⁶¹ The Ninth Circuit Court of Appeals granted certiorari.

The Ninth Circuit upheld the punishment imposed by the district court stating that the sentence "reasonably related to the legitimate statutory objective of rehabilitation."⁶² In justifying its decision, the court further reasoned that "the district court outlined a sensible logic underlying its conclusion"⁶³ and included "reintegrative provisions."⁶⁴ The Ninth Circuit also determined that the probation condition failed to infringe on Gementera's Eighth Amendment rights. The court noted that Gementera "offered no evidence whatsoever . . . that shaming sanctions violate contemporary standards of decency."⁶⁵

C. Gementera is Indicative of an Emerging Trend

Several states have implemented "Scarlet Letter" punishments over the past twenty years. For example, states have used shaming in an effort to reduce drunk driving. Successful state humiliation penalties include bumper stickers and license plate covers proclaiming messages such as "Convicted DUI – Restricted License."⁶⁶ Other offenders subjected to shaming punishments have been required to post mug shots in local newspapers for driving under the influence.⁶⁷ One court forced a DUI offender to wear a pink bracelet stating "D.U.I. CONVICT."⁶⁸

DUI offenders are not the only persons subjected to public humiliation. Judge Ted Poe of Houston, particularly well known for imposing shaming sanctions,⁶⁹ forced a shoplifter to stand outside a K-

(requiring that judges consider the nature and circumstances of the offense and the history and characteristics of the defendant), (a)(2)(B) (deterrence of future crime), (a)(2)(C) (protecting the public), (a)(2)(d) (rehabilitation).

61. *Gementera*, 379 F.3d at 607. Although Gementera based his assertion solely on the Eighth Amendment, Amicus argued that the condition violated Gementera's First, Fifth, and Fourteenth Amendment rights in addition to his Eighth Amendment rights. *Id.* at 607. Gementera urged the Ninth Circuit to consider these assertions as well. The court, however, declined to inquire into the validity of these claims. *Id.* at 607-08.

62. *Id.* at 607.

63. *Id.*

64. *Id.*

65. *Id.* at 608.

66. *See* Goldschmitt v. State, 490 So. 2d 123 (Fla. App. 1986) (DUI offender required to post bumper sticker on car so other motorists know he is driving with a restricted license).

67. *See* Lindsay v. State, 606 So. 2d 652 (Fla. App. 1992) (DUI offender required to post mug shot in local paper with his name and a declaration that he is "DUI-Convicted").

68. *See* Ballenger v. State, 436 S.E.2d 793, 794 (Ga. Ct. App. 1993).

69. *See* Scott E. Sanders, Note, *Scarlet Letters, Bilboes and Cable TV: Are Shame Punishments Cruel and Outdated or Are They a Viable Option for American Jurisprudence?* 37 WASHBURN L.J. 359, 367 (1998) (stating Judge Poe is "[o]ne of the most creative, yet controversial,

Mart and wear a sign similar to *Gementera* stating “I stole from this store. Don’t be a thief or this could happen to you.”⁷⁰ The judge also ordered a child molester to post a sign on his door, which read: “No children under the age of 18 allowed on these premises by court order.”⁷¹ Another person convicted of perjury paraded in front of the courthouse wearing a sign with the message “I lied in court. Tell the truth or walk with me.”⁷² Florida Judge Larry Schack ordered a mother convicted of buying drugs in front of her children to take out an ad in the newspaper in order to confess her crime.⁷³

Despite the trend growing among some state courts in favor of shaming sentences, *Gementera* is a groundbreaking federal case. As the *Gementera* dissent noted, “[t]here is precious little federal authority on sentences that include shaming components”⁷⁴ The stringent regulations of the Guidelines likely account for the discrepancy between shaming sentences in state and federal courts. The Guidelines not only help explain the difference between state and federal sentencing but also implicate important questions about the validity of the sentence in *Gementera*.

IV. THE *GEMENTERA* COURT IMPROPERLY USURPED THE LEGISLATIVE BRANCH’S POWER

A. *The Legislative Intent of the Federal Sentencing Guidelines*

The *Gementera* court improperly circumvented the legislative intent of the Guidelines, which were in place at the time of this decision, in determining that humiliation is “reasonably related to the legitimate statutory objective of rehabilitation.”⁷⁵ The plain language of the Guidelines indicates that Congress did not intend for humiliation to be part of rehabilitation. Rather than incorporating shame, Congress clearly sought to achieve the three goals of deterrence, protection of the public, and rehabilitation.⁷⁶ Furthermore, the Guidelines state that sentences need to foster uniformity in sentencing,⁷⁷ “reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment

judges in the nation . . .”).

70. *Id.*

71. *Id.* at 368.

72. *Id.*

73. *Id.*

74. *U.S. v. Gementera*, 379 F.3d 596, 611 (9th Cir. 2004) (Hawkins, J., dissenting).

75. *Id.* at 607.

76. 18 U.S.C. § 3553(a)(2)(B)–(D) (2004).

77. *Gementera*, 379 F.3d at 606.

for the offense.”⁷⁸ The following sections will show how the Ninth Circuit disregarded Congress’s explicit intent and failed to satisfy many of the Guidelines’ goals.

B. Evaluating Gementera in Light of United States v. Booker

It should be noted that the U.S. Supreme Court recently invalidated the mandatory compliance with the Federal Sentencing Guidelines in two landmark companion cases – *Booker* and *Fanfan*.⁷⁹ Writing for the majority in part, Justice Breyer noted that the Court’s *Booker* opinion “requires a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well”⁸⁰ This Note acknowledges the argument that *Gementera* was wrong because it disregarded the sentencing guidelines is now partially moot. However, the logic underpinning this Note’s analysis still stands and is relevant for two important reasons.

First, even though the Guidelines have been reduced to merely “advisory” status, humiliation is no less of an important issue. Next, such a radical departure from federal precedent suggests that the court engaged in making a policy decision. In fact, the dissent in *Gementera* characterized the decision as “bad policy.”⁸¹ If as a society, we decide to adopt Eighteenth Century style public humiliation penalties, it should be accomplished through legislatures⁸² that are better equipped to evaluate the merit of such important policy shifts.⁸³ Indeed, Justice Breyer specifically stated that courts must consider “other statutory concerns”⁸⁴ indicating that courts cannot invent sentences contrary to statutory law. The bottom line is that the Guidelines were still in place in August 2004 when the Ninth Circuit handed down *Gementera* and this analysis illustrates the damage courts can potentially do when they stray too far from proper discretion and usurp legislative authority.

78. 18 U.S.C. § 3553(a)(2)(A).

79. *U.S. v. Booker*, 125 S. Ct. 738 (2005).

80. *Id.* at 757 (citations omitted).

81. *Gementera*, 379 F.3d at 612 (Hawkins, J., dissenting).

82. This Note is not suggesting that society should implement shaming penalties; indeed, the opposite is true.

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

84. *Id.* at 651-52.

C. The Gementera Decision Neglected to Give Proper Consideration to the Goals of Deterrence and Protecting the Public

Perhaps one of the most striking examples that illustrate the *Gementera* Court's overreaching is a blatant disregard for the Guidelines dual goals of deterrence and protecting the public.⁸⁵ In fact, the Ninth Circuit clearly stated that it would not consider these goals in view of its holding that the provision of the punishment "reasonably related to the legitimate statutory objective of rehabilitation."⁸⁶ This is a clear example of a court circumventing the legislative process. These factors, particularly deterrence, should receive full consideration from the court under the Guidelines and under the circumstances involved in *Germentera*.

Advocates of shaming argue that humiliation sentences deter future crimes from being committed by both the public and the offender.⁸⁷ The conventional wisdom is that the public will see the consequences of the criminal behavior and abstain from participating in similar conduct for fear of becoming the next example.⁸⁸ Proponents additionally contend that public humiliation helps the offender to recognize and forsake the misconduct.⁸⁹ This reasoning remains weak in regard to deterrence and public protection because the government cannot assess with certainty how the public will react to public spectacles of this nature.⁹⁰

France's history with humiliation teaches us that shaming "'excited the evil passions of the populace,' creating difficult problems for the police."⁹¹ Indeed, shaming sanctions have caused riots and significant crowd control issues.⁹² One commentator also noted that beyond riots, "[o]ther things happen too—things are more difficult to detect and therefore more disturbing. Who knows how private persons will treat the shamed john, the shamed merchant, the shamed shoplifter, the shamed drunk driver?"⁹³ The fact of the matter is that humiliation penalties frequently have the effect of causing further criminal conduct rather than deterring it.

Gementera's sentence would unlikely create the mob scenes played

85. *Gementera*, 379 F.3d at 607.

86. *Id.*

87. *See id.* at 601.

88. *Id.* at 602.

89. *Id.*

90. James Q. Whitman, ESSAY: *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1083 (1998). France, similar to colonial America and Great Britain, commonly employed public humiliation in punishments until the mid 19th Century. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1088.

out in 19th century France and other parts of continental Europe. Nevertheless, the unpredictability of the manner in which private individuals would react to Gementera's penalty, especially if it were a violent reaction, is extremely relevant to the issue here. Who is to say that the next court will not implement a provision that goes further and does have the effect of inciting a mob? The fact that the majority failed to consider the potentially negative effect shaming penalties may have on deterrence bolsters the argument that the imposition of this form of punishment is an issue for legislative bodies to decide, not the courts.

V. IN CIRCUMVENTING THE LEGISLATIVE BRANCH, THE *GEMENTERA* COURT CREATED SEVERAL UNINTENDED CONSEQUENCES

A. *The Gementera Decision Will Likely Foster Disrespect for the Legal System and Raise Questions Regarding Whether Humiliation Constitutes Just Punishment*

In addition to the three goals of deterrence, rehabilitation, and protecting the public, the Guidelines state that sentences need "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"⁹⁴ Both the district court and the Ninth Circuit majority articulated how humiliation would sufficiently impose upon Gementera the seriousness of his actions.⁹⁵ However, the accomplishment of the latter two purposes remains suspect under the *Gementera* court's reasoning.

First, the court never explains how humiliation promotes respect for the law. Interestingly, the majority concedes that "the district court's sandwich board condition was somewhat crude"⁹⁶ The dissent later refers to one commentator's observation that the first part of shaming "is an attempt to debase, degrade, or humiliate the offender"⁹⁷ How can court-sanctioned penalties that are "crude" and that "degrade" foster respect for the law? One could counter the argument that these "crude"

94. 18 U.S.C. § 3553(a)(2)(A) (2004).

95. *U.S. v. Gementera*, 379 F.3d 596, 604 (9th Cir. 2004). The Ninth Circuit quoted the language of the district court:

This is a young man who needs to be brought face-to-face with the consequences of his conduct. He's going down the wrong path in life. At age 24, committing this kind of an offense, he's already in a criminal history category 4, two-thirds of the way up the criminal history scale. He needs a wake-up call.

Id. at 604.

96. *Id.* at 606.

97. *Id.* at 611 (Hawkins, J., dissenting) (quoting Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2178 (Nov. 2001)).

and “degrading” punishments foster respect by forcing observers to respect the law for fear that they will become the next public spectacle. However, it must be considered whether or not respect founded in fear of becoming a public spectacle is the type of respect government wants. Authoritarian governments, such as the colonial American government, the current communist Chinese government, and the former Taliban in Afghanistan tend to embrace public humiliation.⁹⁸ These governments gain the respect of their citizens in the sense of keeping law and order, but it is hard to imagine that our modern society would have much respect for such methodology. One must exercise caution not to compare this decision with the evils associated with the Taliban, however, governments that embrace shaming tend to lack the true respect and admiration associated with our enlightened understanding of liberty articulated in the *Declaration of Independence*.⁹⁹

The Guidelines also require that sentences “provide just punishment for the offense.”¹⁰⁰ Shaming sanctions elicit serious constitutional concerns and raise questions of poor public policy. Even if these penalties are able to withstand constitutional scrutiny, the fact that they raise so many questions suggests that they are not “just” punishments.

B. A Legislative Body Would Likely Discover the Ill-Effects That Shaming Penalties Have on Rehabilitation.

The *Gementera* court’s failure to consider the full range of issues associated with shaming represents perhaps the most dangerous consequence of the courts usurpation of legislative authority. Regrettably, the court’s only rationale for humiliation was the following:

While humiliation may well be—indeed—likely will be—a feature of defendant’s experience in standing before a post office with such a sign, the humiliation or shame he experiences should serve the salutary purpose of bringing defendant in close touch with the real significance of the crime he has acknowledged committing. Such an experience should have a specific rehabilitative effect on defendant that could not be accomplished by other means, certainly not by a more extended term of imprisonment.¹⁰¹

The court should have offered greater justification for humiliating

98. Whitman, *supra* note 87, at 1059, 1082.

99. See The DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

100. 18 U.S.C. § 3553(a)(2)(A).

101. *Gementera*, 379 F.3d at 602.

Gementera other than “bringing [the] defendant in close touch with the real significance of [his] crime . . . [will] have a specific rehabilitative effect on [the] defendant”¹⁰² Several additional factors involving shaming penalties exist for which legislative bodies are more aptly equipped to address.

One of the most alarming factors overlooked by the court is the effect of shaming penalties on third parties. Returning to Hawthorne’s novel, Pearl, the daughter of Hester, serves as another reminder of the inappropriateness of shaming.¹⁰³ Pearl was the innocent outcome of Hester’s indiscretion. Yet, she suffered alongside her mother and never became an integrated member of her community.¹⁰⁴ One need not look far to find modern-day embodiments of Pearl’s character. A very striking example occurred in New Jersey when a recently widowed “father of three killed himself when he saw his name in the paper” for soliciting a prostitute.¹⁰⁵ Of course, this man made the decision to commit suicide, but his orphaned children were the indirect victims of shaming. The impact on this and other families in similar circumstances is immeasurable. The following quote likely summarizes the effects families incur when one member receives a shaming sentence:

Kids are ridiculed; marriages are probably going to be broken up. The question is, is the kind of deterrent value [judges] are trying to gain worth the damage done to people innocent of this crime? I cannot imagine it is worth it. There are some very substantial costs.¹⁰⁶

Another staggering effect of public humiliation ignored by the Ninth Circuit is the wide range of psychological reactions to shaming.¹⁰⁷ It may be true that public humiliation rehabilitates some offenders¹⁰⁸ but others may become withdrawn, depressed, or even angry.¹⁰⁹ Still others may

102. *Id.*

103. Garcia, *supra* note 12, at 128.

104. Garcia, *supra* note 12, at 128.

105. Courtney Guyton Persons, Note: *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitute’s Patrons*, 49 VAND. L. REV. 1525, 1527 (1996). It should be noted that the local newspaper, not the judiciary, decided to publish this incident on its own. The point here, however, is still relevant to this analysis because in Florida, Judge Larry Shack required that a mother confess her sin of distributing drugs in a local newspaper. The unfortunate outcome of in the instant example could just as easily occur if a judge, rather than a newspaper, ordered a publication proclaiming the offender’s transgressions. See Sanders, *supra* note 69, at 368.

106. Deni Smith Garcia, Notes & Comments: *Three Worlds Collide: A Novel Approach to the Law, Literature, and Psychology of Shame*, 6 TEX. WESLEYAN L. REV. 105, 118 (1999).

107. *Id.* at 121.

108. *Id.* at 122.

109. *Id.* at 121-22.

wear their “Scarlet Letter” as a badge of honor.¹¹⁰ The theory backing shaming is rooted in the idea that offenders will feel shame and remorse for their crimes.¹¹¹ However, many criminals who come before courts already have low self-esteem.¹¹² Therefore, it logically follows that many offenders will not internalize the conduct as morally wrong.¹¹³ The fact is, psychologists cannot accurately predict how an individual will react to public shaming.¹¹⁴ Cast in this light, it becomes apparent that the notion of “rehabilitation” in any given case is a wild card, subject to the circumstances of the case. It follows then, that the rationale that shaming serves as a rehabilitative tool often fails.

Commendably, the court did include a provision stating that Gementera could opt out of the shaming penalty upon proof that he would suffer psychological harm.¹¹⁵ While this was a prudent step, the issue remains that legislatures are more qualified to evaluate the potential pitfalls and benefits of implementing this public policy than is the judiciary. For example, legislatures can conduct studies¹¹⁶ and debate on a wider scale. Legislative debate and consideration generally accommodate a more reasonable balance between competing public policy issues¹¹⁷ and thus result in a more equitable outcome.¹¹⁸ Legislative guidelines also restrict the possibility that judges will “act upon their personal biases and prejudices, personal morality, or pop psychological theories.”¹¹⁹ Not only will legislatures do a better job than judges of addressing the public policy concerns related to shaming, but also the public will perceive the “system as essentially fair, just, and even-handed . . . [rather than] quirky, eccentric, and [engaged in] idiosyncratic sentencing practices.”¹²⁰

110. *Id.*

111. *Id.*

111. *Id.* at 122.

112. *Id.*

113. *Id.*

114. *Id.*

115. *U.S. v. Gementera*, 379 F.3d 596, 606 (9th Cir. 2004).

116. *See Horwitz, supra* note 83, at 160.

117. *Id.*

118. While this Note stands for the proposition that the legislative branch should implement policy of this nature, it is important to note that the judiciary is in a better position to evaluate individual cases.

119. *Horwitz, supra* note 83, at 160.

120. *Horwitz, supra* note 83, at 160.

C. The Ninth Circuit Failed to Reconcile Modern-Day Circumstances with Those of the Past That Were Favorable to the Effective Use of Shaming Penalties

Shaming was an effective deterrent to crime in colonial America.¹²¹ The primary factors for its effectiveness included the governing theocracy,¹²² the interdependence of the colonial citizenry,¹²³ and the lack of mobility.¹²⁴ These factors are either nonexistent or severely limited today. Applying these factors to *Gementera*, it is apparent that none of these historical factors are relevant. San Francisco is not a theocracy and *Gementera* was not dependant on the residents of the city for his survival. Finally, one could hardly assert that San Francisco residents suffer from a lack of mobility. Therefore, it may be asked, why did the court impose a shaming sanction? The court offers no explanation of how this penalty is effective in light of shaming's historical context.

A legislative body would likely consider the fact that humiliation sentences fell out of favor in light of modern developments and enlightened thinking embodied in the *Declaration of Independence*. However, the court neglected these considerations and now *Gementera's* precedent encompasses some of the most rural areas of the United States such as parts of Hawaii, Idaho, Nevada, and Alaska. While residents in these areas are probably not dependent on each other for survival and not subjects of a theocracy, many, especially poor persons in Hawaii and Alaska, are essentially immobile. Although Scarlet Letter punishments could be an effective deterrent to crime in some of these rural areas, the bottom line is that the court applied a humiliation sanction in an urban center where the penalty will unlikely have much of an effect. The Court fails to address how applying the same penalty in a rural region could prove effective in an urban area. These factors, viewed collectively, illustrate that this dynamic problem deserves nothing less than a full, rich legislative debate.

D. The Gementera Decision Is Inconsistent with Other Federal Decisions and Creates Poor Precedent

Uniformity is one of the reasons for the Guidelines.¹²⁵ The fact that

121. Barbara Clare Morton, *Bringing Skeletons out of the Closet and into the Light – "Scarlet Letter" Sentencing Can Meet the Goals of Probation in Modern America Because It Deprives Offenders of Privacy*, 35 SUFFOLK U. L. REV. 97, 97 (2001).

122. *Id.*

123. *Id.*

124. *Id.*

125. *U.S. v. Gementera*, 379 F.3d 596, 606 n.15 (9th Cir. 2004).

shaming sentences are rare in the federal system shows that this decision is out of step. Indeed, the court frankly admitted “that one purpose of the Sentencing Guidelines was to promote greater uniformity in federal sentencing, and that permitting certain conditions of supervised release, as imposed here, may lead to less regularized sentences.”¹²⁶ Unfortunately, *Gementera* is more than an anomaly; it is an example of the dangers presented by courts exercising authority better left to elected bodies.

Congress, an elected body accountable to the people, determined that there should be some level of uniformity in the sentencing process. Even if one does not agree with the Guidelines, as this author does not, one must concede that reserving power to the legislature to set standards regarding public policy is wise¹²⁷ because it prevents judges from imposing their own morality.¹²⁸ The *Gementera* majority openly admitted that the district court’s one hundred hour provision constituted a “difficult case.”¹²⁹ Interestingly, however, the district court judge had no problem whatsoever with the one hundred hour requirement. He explained that “*Gementera* should have to suffer the ‘humiliation of having to stand and be labeled in front of people coming and going from a post office as somebody who has stolen mail.’”¹³⁰ The district court judge saw humiliation in a different light than the Ninth Circuit. This illustrates the proposition that courts should at least follow some

126. *Id.* at 606.

127. Indeed, the Supreme Court has affirmed the notion that authority properly rests with legislative bodies on the matter of setting standards. The Court has held that:

Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures. . . . [W]e should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great.”

Gregg v. Georgia, 428 U.S. 153, 175 (1976) (citing *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring affirmance of judgment)). The Court also held that:

[T]herefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Gregg, 428 U.S. at 175.

128. While authority rests with Congress to determine general sentencing standards, Justice Stewart explained that our system of checks and balances enables the Court to “safeguard individuals from the abuse of legislative power.” See *Gregg*, 428 U.S. at 174.

129. *Gementera*, 379 F.3d at 606.

130. *Id.* at 596, 611 (Hawkins, J., dissenting).

guidelines prescribed by legislatures. Otherwise, who is to say that the next court will not believe that five hundred or one thousand hours of public humiliation is necessary for rehabilitation?

To the Ninth Circuit's credit, it included the following paragraph acknowledging that courts have responsibility to defer to legislatures:

[W]e are careful not to articulate a principle broader than that presented by the facts of this case. With care and specificity, the district court outlined a sensible logic underlying its conclusion that a set of conditions, including the signboard provision, but also including reintegrative provisions, would better promote this defendant's rehabilitation and amendment of life than would a lengthier term of incarceration. By contrast, a *per se* rule that the mandatory public airing of one's offense can *never* assist an offender to reassume his duty of obedience to the law would impose a narrow penological orthodoxy not contemplated by the Guidelines' express approval of "any other condition [the district court] considers to be appropriate." 18 U.S.C. § 3583(d).¹³¹

Many agree that the prison system needs reform. Operating under this premise, the court was probably correct in determining that the additional reintegration provisions "better promote[d] this defendant's rehabilitation and amendment of life than would a lengthier term of incarceration."¹³² However, this does not change the fact that the imposition of shaming penalties departs from federal precedent. Nor does it alter the conclusion that it is inappropriate to impose shaming sanctions, especially without the benefit of legislative debate. The dissent emphasized that the majority considered the shaming "conditionally acceptable because it was 'coupled with more socially useful provisions.'"¹³³ Such reasons justify neither departing from precedent nor disregarding congressional intent.

VI. CONSTITUTIONAL CONCERNS OF SHAMING PENALTIES

A. Probation Conditions and the Constitution

The return of shaming sanctions to U.S. courts is troubling in light of constitutional jurisprudence. Though courts have yet to find shaming

131. *Id.* at 607.

132. *Id.*

133. *Id.* at 611 (Hawkins, J., dissenting).

sanctions per se unconstitutional,¹³⁴ legitimate debate persists regarding humiliation in relation to the Constitution. In fact, an amicus brief filed on Gementera's behalf, raised First, Fifth, and Fourteenth Amendment concerns.¹³⁵ Gementera additionally cited potential pitfalls regarding the Eighth Amendment.¹³⁶

Before evaluating the constitutional validity of humiliation sentences, it is necessary to note that supervised release conditions, whether they involve house arrest or humiliation, may severely limit a probationer's constitutional rights.¹³⁷ One commentator, discussing the limited rights of probationers, quipped, "in light of . . . probationers' lesser constitutional rights, it seems unlikely that courts will invalidate scarlet letter sanctions on constitutional grounds, provided the sentences do not rise to extreme levels."¹³⁸ However, despite probationers' limited rights, when impinging upon constitutional rights, district courts "must review . . . restrictions with particular care."¹³⁹ Furthermore, in the Ninth Circuit, "probation conditions that impose on constitutional rights are entitled to heightened scrutiny."¹⁴⁰ Specifically, the Ninth Circuit created the following two-part test to determine the constitutionality of the discretionary conditions of a supervised release: 1) the sentencing judge must impose the conditions for permissible purposes, and 2) the conditions must reasonably relate to the purposes of rehabilitation and protecting the public.¹⁴¹

134. *Id.* at 609.

135. See Amicus Curiae Brief of the Federal Public Defender in the Northern District of California, 2003 WL 23273930, at 19, *U.S. v. Gementera*, 379 F.3d 596 (9th Cir. 2004) (No. 03-10103).

136. *Gementera*, 379 F.3d at 607.

137. Kenya A. Jenkins, Comment, "Shaming" Probation Penalties and the Sexual Offender: A Dangerous Combination, 23 N. ILL. U. L. REV. 81, 86 (2002).

138. Morton, *supra* note 6, at 117-18.

139. Amicus Curiae Brief of the Federal Public Defender in the Northern District of California, 2003 WL 23273930, at 18, *U.S. v. Gementera*, 379 F.3d 596 (9th Cir. 2004) (No. 03-10103) (citing *United States v. Hughes*, 964 F.2d 536, 542 (6th Cir. 1992); *United States v. Peete*, 919 F.2d 1168, 1181 (6th Cir. 1990)).

140. *US v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1981). Concerning heightened scrutiny, the *Consuelo-Gonzalez* court wrote:

Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety. But this is not to say that there is any presumption, however weak, that such limitations are impermissible. Rather, it is necessary to recognize that when fundamental rights are curbed it must be done sensitively and with a keen appreciation that the infringement must serve the broad purposes of the Probation Act. This burden cannot be avoided by asserting either that the probationer has voluntarily waived his rights by not objecting in a proper manner to the conditions imposed upon him or that he must accept any condition the court "deems best" as a consequence of being "in custody."

Id.

141. *United States v. Terrigno*, 838 F.2d 371, 373 (9th Cir. 1987).

The *Gementera* court declined to address the defendant's First, Fifth, and Fourteenth Amendment claims because an amici raised these issues rather than *Gementera*.¹⁴² While the court properly declined to hear issues raised for the first time through amicus,¹⁴³ it is unfortunate that the court failed to deliberate on these issues. At the very least, careful consideration of each of these constitutional amendments calls into question this sentence as measured against the Ninth Circuit's two-part test.

B. First Amendment Challenges to Public Humiliation

First Amendment jurisprudence teaches us that citizens generally cannot be compelled to engage in speech. For example, the Supreme Court's famous 1943 case, *West Virginia State Board of Education v. Barnette*, clearly established the doctrine that a state could not require teachers and students to salute and pledge allegiance to the flag.¹⁴⁴ The Court remained faithful to this principle more than three decades later in its renowned *Wooley v. Maynard* decision.¹⁴⁵ In *Wooley*, the Court found that Vermont erred in forcing its residents to drive with the license plate slogan "live free or die."¹⁴⁶ The *Wooley* Court observed "the right to speak and the right to refrain from speaking are complementary components of the broader concepts of 'individual freedom of mind.'"¹⁴⁷

Gementera's probation condition clearly compelled him to speak his mind.¹⁴⁸ Therefore, even though *Gementera*'s rights were limited as a probationer, this limitation would have triggered an analysis under the heightened scrutiny standard.¹⁴⁹

Under the higher standard, the shame sanction likely fails. Regarding the permissible purpose prong, the court improperly circumvented the legislative intent of the Guidelines. The plain language of the Guidelines provides no evidence indicating that Congress intended for humiliation

142. U.S. v. *Gementera*, 379 F.3d 596, 607 (9th Cir. 2004).

143. See *Russian River Watershed Protection Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998).

144. 319 U.S. 624 (1943).

145. 430 U.S. 705 (1977).

146. *Id.* at 714.

147. Amicus Curiae Brief of the Federal Public Defender in the Northern District of California, 2003 WL 23273930, at 20, U.S. v. *Gementera*, 379 F.3d 596 (9th Cir. 2004) (No. 03-10103) (some citations omitted) (citing *Wooley*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 637)).

148. *Id.*

149. See *supra* note 140. Again, this heightened standard requires that 1) the sentencing judge impose the conditions for permissible purposes, and that 2) the conditions must reasonably relate to the purposes of rehabilitation and protecting the public. U.S. v. *Gementera*, 379 F.3d 596, 601 (9th Cir. 2004).

to be part of rehabilitation.¹⁵⁰ Additionally, as the dissent notes, the *Gementera* decision is not consistent with federal precedent.¹⁵¹ Justice Hawkins, elaborating on the deviation from precedent wrote, “There is precious little federal authority on sentences that include shaming components, perhaps indicative of a recognition that whatever legal justification may be marshaled in support of sentences involving public humiliation, they simply have no place in the majesty of an Article III courtroom.”¹⁵² The court neglected to give full and proper consideration to many of the important issues surrounding shaming, such as its effects on the general public and innocent third parties, thereby further indicating that the court had impermissibly imposed the humiliation condition.¹⁵³

The shaming sanction did not reasonably relate to rehabilitation nor did it adequately address public safety issues. On the count of not reasonably relating to rehabilitation, courts cannot properly gauge the psychological reactions of a probationer.¹⁵⁴ Additionally, there is little or no federal authority to serve as a guide to determine whether shaming does indeed rehabilitate. Therefore, it follows that the Ninth Circuit does not know whether *Gementera*’s probation condition reasonably relates to *Gementera*’s rehabilitation. Finally, the court, by its own admission, decided against addressing the issue of dealing with public safety.¹⁵⁵

C. *The Fifth Amendment and Self-Incrimination*

Just as the Ninth Circuit declined to address First Amendment arguments in *Gementera*, the court refused to entertain Fifth Amendment claims. Amicus, however, highlighted some potential flaws in this approach. Under the doctrine of dual sovereignty, the State of California could also prosecute *Gementera*.¹⁵⁶ The United States Supreme Court has held that “an act denounced as a crime by both national and state sovereignties is an offense against peace and dignity of man and may be punished by each.”¹⁵⁷ Amicus correctly reasoned that these provisions potentially placed *Gementera* “in a Hobson’s choice dilemma of either

150. See *supra* Part IV.A.

151. See *supra* Part V.D; see also *Gementera*, 379 F.3d at 611 (Hawkins, J., dissenting).

152. *Gementera*, 379 F.3d at 611 (Hawkins, J., dissenting).

153. See *supra* Part V.B.

154. See Garcia, *supra* note 12, at 120-21.

155. *Gementera*, 379 F.3d at 607.

156. Amicus Curiae Brief of the Federal Public Defender in the Northern District of California, 2003 WL 23273930, at 23, *U.S. v. Gementera*, 379 F.3d 596 (9th Cir. 2004) (No. 03-10103).

157. *Id.* (citing *United States v. Lanza*, 260 U.S. 377, 382 (1922) (citing *Westfall v. U.S.*, 274 U.S. 256, 258 (1927)).

incriminating himself or violating the terms of his supervised release.”¹⁵⁸ Amicus further noted the following:

To protect his Fifth Amendment rights, a defendant must refuse to perform the condition and instead face the revocation of his supervised release. Supervised release conditions that force a defendant into such a situation in violation of due process, can never be reasonably related to the required goals of deterrence, public safety, or rehabilitation under these circumstances.¹⁵⁹

This analysis reveals an important point. Almost without exception state courts have heard Fifth Amendment claims regarding humiliation. Perhaps the reason why no court has found shaming unconstitutional under the Fifth Amendment is precisely because there were no federal claims. Hence, the public humiliation did not incriminate the probationer on pending federal action and did not violate the Fifth Amendment. The unfortunate aspect of this case is the fact that it has not been tried at the state level. If the State of California decided to prosecute Gementera, he would likely find that his Fifth Amendment right not to incriminate himself had been violated.

D. Eighth Amendment Concerns with Shaming

Of all the arguments articulated against public shaming, the Eighth Amendment is the most common. In fact, the *Gementera* court directly addressed this issue while refusing to comment on the First, Fifth, and Fourteenth Amendments.¹⁶⁰ To date, no court has invalidated a shaming penalty on grounds of an Eighth Amendment argument.¹⁶¹ However, there is a lot of room for interpretation depending upon the manner in which one reads Eighth Amendment jurisprudence. The following paragraph from the *Gementera* court explains how other courts have interpreted this constitutional amendment:

[The Eighth Amendment] . . . forbids the infliction of “cruel and unusual punishments. The basic concept underlying the Eight Amendment was nothing less than the dignity of man.” Consistent with human dignity, the state must exercise its power to punish “within the limits of civilized standards.” A particular punishment violates the

158. *Id.*

159. *Id.*

160. *Gementera*, 379 F.3d at 607-08.

161. *Id.* at 608-09.

Eighth Amendment if it constitutes one of “those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.” Shaming sanctions of far greater severity were common in the colonial era The [Eighth] Amendment’s prohibition extends beyond those practices deemed barbarous in the 18th century, however “The words of the Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. ‘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 assessing what standards have so evolved, [a court looks] “to those of modern American society as a whole,” relying upon “objective factors to the maximum possible extent,” rather than [the court’s] “own conceptions of decency.”¹⁶²

Precedent may invalidate Eighth Amendment challenges because courts evaluate this under a historical meaning of cruel and unusual punishment at the time the Bill of Rights was adopted. Wearing a sandwich board declaring that you are a thief clearly does not exceed standards in place in 1789. However, precedent also indicates that courts may consider the “evolving standard of decency that marks the progress of a maturing society.”¹⁶³ Reasonable persons can disagree on whether Gementera’s punishment exceeded decency in our society. Clearly, the Eighth Amendment raises many vexing questions regarding the prudence of the policy of humiliation.

E. Humiliation, Mail Thieves, and Equal Protection under the Fourteenth Amendment

Amicus challenged the court’s assertion that mail thieves constitute appropriate subjects for humiliation while the court has not deemed shame appropriate for most other categories of criminals.¹⁶⁴ The court

162. *Id.* at 608 (citations omitted).

163. *See Roper v. Simmons*, 125 S.Ct. 1183 (2005). *Roper* recently invalidated the death penalty for youths under the age of eighteen. The Court relied heavily on the evolving standard of decency analysis. Clearly, Gementera’s punishment does not rise to the level of capital punishment and nothing in the *Roper* holding indicates how the Court would treat this punishment. However, one could speculate that because of the reasoning employed in *Roper*, if the Court ever heard a scarlet letter challenge, it may focus more on the evolving standard analysis as opposed to the historical meaning of cruel and unusual punishment.

164. Amicus Curiae Brief of the Federal Public Defender in the Northern District of California, 2003 WL 23273930, at 25-26, *U.S. v. Gementera*, 379 F.3d 596 (9th Cir. 2004) (No. 03-

reasoned that shaming was suitable because mail theft is disruptive to society and the sanction would help impress upon Gementera the seriousness of his crime.¹⁶⁵ An Amicus points out that such a belief is irrational.¹⁶⁶ The Amicus further noted:

Many federal crimes disrupt people's affairs, such as assaults, burglaries on federal land, and securities fraud. The court offers no legitimate purpose for the assertion that the humiliation a *mail thief* feels when forced to wear a sandwich board in public will aptly punish the crime of *mail theft*, as opposed to other 'disruptive' crimes a defendant could be convicted of.¹⁶⁷

Classifying mail thieves in an arbitrary manner suggests that the defendant's equal protection rights under the Fourteenth Amendment may have been violated. Indeed, the Ninth Circuit has not made a practice of employing similar sentences; therefore, it must be asked why in this case such punishments were in order. Why, for example, did the court choose to shame Gementera, a seemingly unsympathetic individual, of little influence, residing in one of our nation's largest metropolitan areas. The court's choice on this occasion to implement shaming punishments is indeed suspicious. As indicated previously, studies show that shaming under these conditions is ineffective and ultimately contributed to the decline of humiliation sanctions in America.¹⁶⁸

VII. CONCLUSION

In *Gementera*, the Ninth Circuit highlighted the fact that an estimated two-thirds of inmates released from prison during 2004 will find themselves behind bars again within a few years.¹⁶⁹ In light of this statistic, the court was probably correct in reasoning that extended incarceration would not be in Gementera's best interest.¹⁷⁰ Accordingly, Gementera's probation condition required him to observe customers visiting postal facilities' lost mail windows, and in all likelihood, that requirement quite effectively served to reintegrate Gementera into society. Most reasonable persons would probably agree that such provisions are not extreme and constitute a proper exercise of judicial

10103).

165. See *id* at 26.

166. *Id.*

167. *Id.*

168. See *supra* Part II.B.

169. U.S. v. Gementera, 379 F.3d 596, 604 (9th Cir. 2004).

170. *Id.* at 603.

discretion. However, shaming provisions are not always clear and implementing them represents a change in policy that demands much more vigorous debate than is afforded by courts. Society should experiment with alternative forms of punishment and strive to reform our prisons. However, it is imperative that we implement solutions through proper channels to ensure that persons are not degraded and that constitutional rights remain respected.

In this case, if a branch of government decided that the policy of shaming were the solution to reforming our system, Congress would have been the proper body to set the policy. Congress could have an open, honest debate about the merits of whether shaming rehabilitates and furthermore, its members would find themselves accountable to the people. More importantly, if Congress passed legislation containing constitutionally suspect provisions, the judiciary could strike down the statute. In short, this would uphold our system of checks and balances and maintain the safeguard that keeps the judicial branch from becoming blind to constitutional concerns – after all, it is difficult to be an impartial judge of one’s own policy. One cannot help but wonder if the Ninth Circuit would have been more concerned about the First, Fifth, Eighth, and Fourteenth Amendment problems had it not been so busy defending its own policy.¹⁷¹

Society should reject public humiliation as a legitimate punishment no matter which branch of government chooses to adopt the policy. Justice Hawkins, writing for the dissent in *Gementera*, made the wise observation that even if there were justification for shaming, society should still reject the practice because “[a] fair measure of a civilized society is how its institutions behave in the space between what it may have the power to do and what it should do.”¹⁷²

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171. *See supra* Parts VI.B-E.

172. *Gementera*, 379 F.3d at 612.

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