

Shaming Sanctions

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“Only an idiot drives on the sidewalk to avoid a school bus.” So read a sign that an Ohio judge ordered a woman to wear after being convicted for the acts caught on video [here](#). Apparently it was not an isolated incident. A parent whose daughter rode the bus said the defendant “did this almost every day last year.” (That sort of thing could result in a more serious punishment in North Carolina. See [G.S. 20-217](#), one of the very few crimes for which the General Assembly has explicitly said a defendant may not receive a prayer for judgment continued.)

People occasionally ask me about the propriety of nontraditional sentences like the one described above—sometimes called shaming sanctions or “Hester Prynne” conditions, in reference to the protagonist of *The Scarlet Letter*. When I get those questions, it’s often a judge trying to come up with a creative way to get through to a younger, repeat offender—the kind of defendant the judge senses would accept a short jail sentence with a shrug or, worse, a smile.

Some of the conditions I have read about include:

- A DWI offender ordered to place an identifying bumper sticker or special license plate on his or her car, or to wear a special bracelet;
- Men convicted of soliciting prostitutes required to have their names and faces displayed on a local access television program popularly known as “John TV”;
- A shoplifter required to wear a court-provided t-shirt reading “My record plus two six-packs equals four years.”

There are lots of other examples.

As a matter of statute, North Carolina judges may order any condition of probation determined by the court to be reasonably related to the defendant’s rehabilitation. [G.S. 15A-1343\(b1\)\(10\)](#). The condition should also have a reasonable relation to the defendant’s crime, but the appellate courts are pretty deferential to trial judges on that point. See *State v. Cooper*, 304 N.C. 180 (upholding an ad hoc probation condition forbidding a defendant, convicted of possessing stolen credit cards, from driving between midnight and 5:30 a.m.).

No North Carolina appellate case explores the question of whether such a condition is permissible for an adult probationer. The closest case we have factually is *In re M.E.B.*, in which the court of appeals struck a condition of a juvenile probation requiring a child to wear to 12 x 12 sign saying “I AM A JUVENILE CRIMINAL” any time she went out in public. 153 N.C. App. 278 (2002). But the court’s rationale in *M.E.B.* was very much focused on the particularities of the Juvenile Code (the need for confidentiality and promotion of the child’s best interests), and probably should not be read to extend to adult probation.

In a leading federal case, the Ninth Circuit upheld a condition of supervised release requiring a defendant convicted of mail theft to spend a day outside the post office wearing a sign that said “I stole mail. This is my punishment.” *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004). The court concluded that the punishment was reasonably related to the defendant’s crime and had a legitimate rehabilitative and deterrent effect. The court further held that the condition did not violate the Eighth Amendment’s prohibition on cruel and unusual punishment. To the contrary, shaming sanctions of far greater severity were common when the Bill of Rights was adopted and still fit within our evolving

standards of decency. Judge Hawkins dissented, arguing that humiliation is not a proper goal of the Sentencing Reform Act, and that in any event, shaming sanctions “have no place in the majesty of an Article III courtroom.” Gementera, 379 F.3d at 610–11 (Hawkins, J., dissenting).

There are some good arguments in favor of shaming sanctions. A well-crafted condition might punish an offender, protect the public from future harm, and deter future crime by reinforcing public norms against criminality—sometimes precisely because the condition draws more attention than a run of the mill sentence of imprisonment. Shaming conditions have also been defended on economic grounds as an inexpensive alternative to incarceration. See Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & Econ 365, 371 (1999). And ultimately, many would say that shaming sanctions are not really any more stigmatic or embarrassing than other criminal punishments.

There are also strong arguments against shaming sanctions. First, they have a tendency to be disproportionate to the crime itself, in ways that often come across as undignified or dehumanizing. Second, they have been characterized as coerced speech in violation of defendants’ First Amendment rights. See *United States v. Trainer*, 265 F. Supp. 2d 589 (D. Md. 2003) (rejecting such a challenge). Third, they can put the defendant at risk by inviting retaliation from members of the public at large. And finally there is a question of effectiveness—I’m not aware of a study resolving the question of whether these types of sanctions actually work. See Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 Harv. L. Rev. 2186 (2003).

I’m curious what our readers think about sanctions such as these. Have you seen other examples in your work? And what do you think of the “Only an idiot” sign mentioned at the beginning of this post? Would it have been just as effective—and perhaps less susceptible to the argument that it was undignified—if it had read simply “I drove on the sidewalk to avoid a school bus”?