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## Have We No Shame?: Thoughts on Shaming, "White Collar" Criminals, and the Federal Sentencing Guidelines

## HAVE WE NO SHAME?: THOUGHTS ON SHAMING, “WHITE COLLAR” CRIMINALS, AND THE FEDERAL SENTENCING GUIDELINES

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### INTRODUCTION

Like the stocks and pillories of colonial times, public embarrassment has returned as a popular means of punishment. Judge Judy leads a pack of “real life” courtroom dramas securing spectacular ratings by using nationwide humiliation to punish the losing party,<sup>1</sup> and now real courts are getting into the act. More and more frequently, judges are using bumper stickers, billboards, T-shirts, and even community access television to publicize a defendant’s transgressions.<sup>2</sup> As Jerry Lee Lewis might say, there’s a whole lot of shaming going on.

Some of legal academia’s brightest stars have jumped on the shame train, arguing that modern versions of the dunce cap, rather than shackles, best fit the “white collar” criminal. The influential Dan Kahan, one of shaming’s biggest supporters, has proposed that it

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1. See Marc Gunther, *The Little Judge Who Kicked Oprah’s Butt: Daytime Television’s Hottest Property*, FORTUNE, May 10, 1999, at 32 (noting the meteoric rise in popularity of Judge Judy Sheindlin’s courtroom television show and books, which demonstrates a “no-baloney, common-sense approach to the law”). Judge Judy “lectures litigants on everything from good behavior to proper grooming” and does not hesitate to tell parties that they “both acted like idiots.” *Id.*

2. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631-33 (1996) [hereinafter Kahan, *Alternative Sanctions*].

become a regular part of the sentencing process and replace incarceration as the penalty for many "white collar" offenders under the Federal Sentencing Guidelines ("Guidelines"). According to Kahan, shaming is more efficient than incarceration because it provides the same level of deterrence while requiring less of society's resources.<sup>3</sup> He argues that the Guidelines, which Congress designed to limit disparities in sentencing, currently prevent federal district court judges from using shame to punish "white collar" offenders.<sup>4</sup> Yet, in his efforts to reintroduce shaming into the sentencing process, Kahan ignores the shame that already exists in the current federal criminal justice system. Federal government attorneys and federal judges routinely employ shaming devices when prosecuting and sentencing "white collar" criminals, including the very shaming sanction that Kahan urges the Sentencing Commission to adopt.<sup>5</sup>

This Essay challenges Kahan's positions and presumptions about shaming, "white collar" criminals, and the Guidelines. Part I outlines Kahan's position on shaming, why he believes it is the answer for "white collar" criminals, and his proposed changes to the Guidelines. Part II argues that "white collar" criminals do not fit into the "one size fits all" model that Kahan uses to promote shaming. Part III illustrates how the Guidelines provide federal district court judges with ample discretion to fashion unique conditions to deter these criminals, including the shaming that Kahan proposes.

## I. SHAMING AND KAHAN

In a series of articles, Professor Dan Kahan defines and advocates shaming as an alternative means of punishment.<sup>6</sup> He cites several

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3. See *id.* at 635 (explaining that shaming penalties are growing in popularity because they are less expensive than imprisonment and provide different ways to punish the same offenses as well as offenses that otherwise would not be punished). But see Toni M. Massaro, *The Meaning of Shame Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 650 (1997) [hereinafter Massaro, *Shame Implications*] ("Shame is central to individual emotional development, and doubtless influences the creation and enforcement of social norms; but governmental attempts to manipulate and exploit shame through public humiliation rituals may be far more complicated, costly, and counterproductive than the [shame] reformers seem to appreciate.").

4. 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, 368-72 (1999).

5. See, e.g., Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1885-86 (1991) [hereinafter Massaro, *Shame*] (stating that shaming has already occurred in the form of "furlough programs, community service sentences, home surveillance systems, . . . shock probation, forced charitable contributions, chemical therapy, forced birth control, and . . . castration").

6. Kahan has presented his shaming arguments in the following: Dan M. Kahan, *Unthinkable Misrepresentations: A Response to Tonry*, 46 UCLA L. REV. 1933, 1935 (1999); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 617 (1998); Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L.

contemporary examples, including the City of Hoboken's practice of advertising the identities of individuals convicted of public urination as well as requiring that these offenders clean the city's streets.<sup>7</sup> Kahan uses these examples and anecdotes as the background for defining shaming. “Shaming is the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those activities.”<sup>8</sup> According to Kahan, there are four variants of shaming that provide sufficient deterrence to white collar crime offenders. First, *stigmatizing publicity* includes penalties that “attempt to magnify the humiliation inherent in conviction by communicating the offender's status to a wider audience.”<sup>9</sup> Hoboken's publication of public urinators' identities in local newspapers is an example of this first category.<sup>10</sup> Second, *literal stigmatization* involves “the stamping of an offender with a mark or symbol that invites ridicule.”<sup>11</sup> Common examples include requiring offenders to wear T-shirts or signs proclaiming their crimes.<sup>12</sup> Third, *self-debasement* concerns “[c]eremonies or rituals that publicly disgrace the offender.”<sup>13</sup> Hoboken's requirement that public urinators also clean the City's streets exemplifies this variant. Finally, *contrition* always involves a description of the crime and a public apology, such as an executive apologizing for his company's pollution of a local river.<sup>14</sup>

Kahan prefers shaming over incarceration due to its efficiency. First, he explains that “[w]hite-collar offenders do not pose physical threats to others; the threat they pose consists of their ability to gain the confidence of a victim and then cheat him.”<sup>15</sup> If the federal government effectively shames the “white collar” offender, then “everyone knows or can easily discover that the offender is a bad

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REV. 691, 704-06 (1998); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 384-85 (1997); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1639-43 (1997); Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2483-84 (1997); Kahan, *Alternative Sanctions*, *supra* note 2.

7. Kahan & Posner, *supra* note 4, at 365-67. Kahan offers other examples, including a slumlord in New York who was sentenced to live in one of his own buildings with a banner reading “Welcome Reptile.” *Id.*

8. *Id.* at 368.

9. Kahan, *Alternative Sanctions*, *supra* note 2, at 631-32.

10. Other examples include televising offenders' crimes on community access television. *Id.*

11. *Id.* at 632.

12. *See id.*

13. *Id.* at 633.

14. *See id.* at 631-34.

15. Kahan & Posner, *supra* note 4, at 371.

type.”<sup>16</sup> The offender is effectively incapacitated because the general public will avoid him. Thus, it would be as though the offender walks around surrounded by bars. In addition, traditional sentencing options such as imprisonment carry much higher societal costs than shaming.<sup>17</sup> Finally, the harm to an offender’s reputation is also why shaming is more effective than monetary fines. Even though a defendant frequently can pay fines and ultimately continue his business, “shaming directly destroys an asset that the fine cannot destroy—the offender’s reputation.”<sup>18</sup> In other words, a publicly destroyed reputation puts a “white collar” criminal out of business, for potential victims know to steer clear of the offender and his schemes.

According to Kahan, the Guidelines do not permit federal judges sufficient latitude to shame the defendant as part of the sentence.<sup>19</sup> Therefore, Kahan proposes incorporation of a special hybrid penalty “consisting of a fixed shaming component and a variable fine component.”<sup>20</sup> The fixed shaming component would permit a judge to order a “white collar” defendant, at his own expense, “in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.”<sup>21</sup> The amount of the fine would vary

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16. *Id.*

17. *See id.*

18. *Id.*

19. *See id.* at 384 (discussing how the Guidelines eliminate variability in sentencing).

20. *Id.* at 385-86.

21. *Id.* at 385 (discussing FEDERAL SENTENCING GUIDELINES MANUAL § 8D1.4(a) (1999)). Guideline § 8D1.4(a) permits a district court to require an offending corporation to publicize its crimes. FEDERAL SENTENCING GUIDELINES MANUAL § 8D1.4 (1999). This section went into effect on November 1, 1991. *Id.* For a review of articles discussing section 8D1.4(a), see Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 960-1007 (1999) (discussing the “corporate icon” provision, which provides that a sentencing judge may require the chief executive officer to appear personally in court to receive the corporation’s punishment for violating federal laws); Cynthia E. Carrasco & Michael K. Dupee, *Corporate Criminal Liability*, 36 AM. CRIM. L. REV. 445, 462 (1999) (outlining the possible terms of probation and the imposition of fines by federal courts); Andrew Cowan, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387, 2387-420 (1992) (analyzing the sentencing guidelines for organizational crimes that require public disclosure of the conviction); Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 361-62 (1996) (describing public notification sanctions); Richard S. Gruner, *Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines*, 71 WASH. U. L.Q. 261, 320-24 (1993) (reviewing the sentencing guidelines’ support for organizations paying for their own adverse publicity that results from their convictions); Martin Harrell, *Organizational Environmental Crime and the Sentencing Reform Act of 1984: Combining Fines with Restitution, Remedial Orders, Community Service, and Probation to Benefit the Environment While Punishing the Guilty*, 6

with the severity of the crime, “conserv[ing] the rational proportionality of the current Guidelines regime.”<sup>22</sup> According to Kahan, this hybrid system would provide the same amount of deterrence as incarceration for “white collar” criminals, but at a much lower societal price.<sup>23</sup>

## II. SHAMING AND “WHITE COLLAR” CRIMINALS

Kahan never defines “white collar” criminals. Before deciding how society generally and the Guidelines specifically should define and punish white collar criminals, it is very important to recognize that such criminals are far more complex and diverse than the stereotypical “grifters” that Kahan uses as his model.<sup>24</sup> For example, “white collar” criminals often harm more than the checkbooks of their victims. Hospital patients whose computer medical records have been erased by hackers,<sup>25</sup> families of the victims of the ValuJet crash,<sup>26</sup> and consumers who purchase bogus HIV self-test kits over the Internet<sup>27</sup> would disagree with Kahan’s assertion that “[w]hite collar offenders do not pose physical threats to others.”<sup>28</sup>

In addition, contrary to Kahan’s contentions, many, if not most, “white collar” criminals do not need “to gain the confidence of a victim and then cheat him” to succeed.<sup>29</sup> Computer hackers and other “white collar” criminals, such as identity thieves and individuals who covertly access telephone networks to make unauthorized phone calls, perfect their crafts without first befriending prospective victims.<sup>30</sup> The ever-growing “white collar” crime service industry,

VILL. ENVTL. L.J. 243, 266 (1995) (providing the history of Section Eight’s use of alternative sanctions); Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2031-32 (1992) (identifying common examples of probation under the sentencing guidelines).

22. Kahan & Posner, *supra* note 4, at 386-87.

23. *See id.* at 371.

24. *See* JIM THOMPSON, *THE GRIFTERS* 33-40 (1963) (depicting the classic image of a con man who survives with small face-to-face swindles).

25. *See* Scott Charney & Kent Alexander, *Computer Crime*, 45 EMORY L.J. 931, 937-38 (1996) (describing hospitals in Britain, Italy and the United States that lost vital patient records, including hematology reports and AIDS records, due to computer hacking).

26. *See* Martha Brannigan, *SabreTech Convicted of 9 Charges in Trial Related to ValuJet Crash*, WALL ST. J., Dec. 7, 1999, at A4 (reporting that SabreTech, Inc., was convicted of nine felony charges for mishandling hazardous oxygen canisters that caused the crash of a ValuJet airplane in 1996).

27. *See Bogus HIV Test Kits*, GRAY SHEET, Feb. 22, 1999, available in 1999 WL 10789446 (describing the conviction of a man sentenced to 63 months in prison for “fraudulently marketing and selling unapproved and medically useless HIV test kits for home use”).

28. Kahan & Posner, *supra* note 4, at 371.

29. *See id.*

30. For articles discussing the problems of identity fraud and responsive

which ranges from money laundering to automobile title washing, also operates without first gaining the confidence of prospective victims. Environmental criminals do not “trick” a lake before dumping toxins into it. In addition, many “white collar” criminals view governmental shaming as a badge of honor. For example, government identification and condemnation of a computer hacker often inspires the hacker to continue her destruction, and others to follow her lead.<sup>31</sup>

With existing technology, even those white collar criminals who rely upon gaining “the confidence of a victim” succeed despite shaming. For instance, telemarketers and Internet scam artists recreate themselves overnight or use multiple personalities simultaneously, making the “bars of shaming” transparent at best.<sup>32</sup> White collar criminals use shells and fronts to hide their involvement from the victim completely. Better yet, they steal someone else’s good reputation via identity theft and use it to gain the trust of a new batch of victims.<sup>33</sup> After all, the best paper criminals never appear on the incriminating papers. The con man’s job is to con, and no matter how much society tars and feathers him, he will devise some scheme to cut through the “bars of shame” and defraud new, unsuspecting victims. As Toni Massaro has pointed out, the more diverse and sprawling our society becomes, the less it relies upon close personal interaction to function, and thus the less effective shaming becomes.<sup>34</sup> Thus, reinstituting shaming wholesale may deter

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legislation, see Kristen S. Provenza, *Identity Theft: Prevention and Liability*, 3 N.C. BANKING INST. 319, 319-36 (1999) (explaining that the victims of identity theft do not know they are being harmed until after the fact because there is no criminal-victim contact); Martha A. Sabol, *The Identity Theft and Assumption Deterrence Act of 1998: Do Individual Victims Finally Get Their Day in Court?*, 11 LOY. CONSUMER L. REV. 165, 165-73 (1999) (discussing the effects of the Identity Theft and Assumption Deterrence Act on victims of identity theft).

31. For example, the devastating “I Love You” computer virus was followed by numerous copy cat viruses. See, e.g., Carolyn Said, “Love Bug” Suspect Sought In Philippines; Copycats Strike, S.F. CHRON., May 6, 2000, at A1.

32. See, e.g., Margaret Mannix, *Bidder Beware*, U.S. NEWS & WORLD REP., Sept. 27, 1999, at 58 (describing Internet scam artists).

33. See *supra* note 30.

34. See Massaro, *Shame*, *supra* note 5, at 1921 (“The cultural conditions of effective shaming seem weakly present, at best, in many contemporary American cities.”); Massaro, *Shame Implications*, *supra* note 3, at 693-94 (“The cultural conditions that so many shaming advocates claim have eroded and hope would be restored by a greater emphasis on shame, are the very conditions necessary to any effective revival of public shame practices. Thus the likely general deterrence effects of shaming too are doubtful in many modern settings, especially major urban centers.”). But see James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1063-68 (1998) (rejecting Massaro’s modernity argument and noting that “[t]he argument from modernity rests on a questionable notion of shame, one that reduces it too casually to an emotion experienced only when we are under the direct gaze of others . . .”).



some “white collar” criminals, but certainly not the vast majority of them.<sup>35</sup>

### III. SHAMING AND THE GUIDELINES

Assuming that shaming deters some “white collar” criminals, it appears that Kahan’s proposal is ineffective because it adds little to the shaming that currently exists under the Guidelines. The criminal process is an inherently public and humiliating experience. Federal criminal cases often begin with a search of the defendant’s home or business, a very public event. The defendant’s family, neighbors, and business associates quickly realize that something is amiss. So, too, does the media, which often publicizes the search warrant with its accompanying affidavit. A grand jury convenes, and friends, family, and co-workers may be subpoenaed to testify. Even though grand jury proceedings generally are secret, Federal Rule of Criminal Procedure 6(e) does not require witnesses to remain quiet about what transpired, and many do not.<sup>36</sup> The next step in a contested criminal case is the Indictment, a public document that often describes the alleged crimes in considerable detail. Many U.S. Attorney Offices issue press releases and brief the media on the Grand Jury’s decision in a case. Often an arrest quickly follows the Indictment, an event that U.S. Attorneys (including former U.S. Attorney Rudy Giuliani) have used as an orchestrated walk of shame before the media.<sup>37</sup> Soon thereafter, the notice of first appearance and arraignment, also a press-covered public event, follows. After discovery and pretrial motions comes the trial, a designedly public spectacle that is sure to humiliate the defendant regardless of the jury’s conclusions as to guilt or innocence.

Defendants who plead guilty face similar embarrassment. Although they do not undergo the spectacle of trial, they still face the same publicity machine that many U.S. Attorneys employ. Moreover, when the defendant pleads guilty, Federal Rule of Criminal

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35. This Essay does not address another big assumption that Kahan makes, namely that prison terms of less than 18 months “offer no appreciable advantage in deterrence or incapacitation for individuals convicted of nonviolent offenses.” Kahan & Posner, *supra* note 4, at 384. In my experience, the one thing “white collar” offenders dread the most is prison, even a term of less than 18 months, and will do almost anything to avoid it.

36. See Fed. R. CRIM. P. 6(e) (2) (requiring secrecy about the contents of grand jury proceedings from grand jurors, interpreters, recording device operators, typists and attorneys, but not from witnesses).

37. See Whitman, *supra* note 34, at 1066. For an excellent description of the many shaming techniques that Giuliani employed, including public arrests, press conferences, and television talk shows, see JAMES B. STEWART, *DEN OF THIEVES* (1991).

Procedure 11(f) requires the sentencing judge to ensure that the defendant is in fact guilty.<sup>38</sup> In many districts, this requirement means that the defendant, in open court and often in front of her family and victims, must explain in detail why she is guilty of the charged crimes, the very "contrition" that Kahan describes.<sup>39</sup> Public cooperation that the defendant provides, such as trial or sentencing testimony against a coconspirator, only further shames her and destroys what remains of her reputation. Recall that all of this occurs before the Guidelines come into play.

At the time of sentencing, the Guidelines permit ample opportunity to shame the defendant, whether the defendant receives probation or a term of imprisonment. Section 5B1.1 authorizes probation if the defendant's offense level falls in the zero to twelve month range.<sup>40</sup> For prisoners that receive jail time, Guidelines section 5D1.1 provides that a term of supervised release shall follow a sentence of imprisonment of more than one year, and may follow shorter sentences.<sup>41</sup> The recommended conditions of probation and supervised release are virtually identical. Both permit the judge to prohibit the defendant from frequenting certain places,<sup>42</sup> to require the defendant, as directed by the probation officer, "to notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics,"<sup>43</sup> and to prevent the defendant "from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so."<sup>44</sup> The Guidelines also permit a judge to sentence the "white collar" offender to community service.<sup>45</sup> Furthermore, both the probation and the supervised release guidelines provide a catch-all provision that permits additional conditions so long as they reasonably relate to certain factors, including the nature and circumstances of the offense, the history and characteristics of the defendant, deterrence, and protecting the public.<sup>46</sup> Once the court

38. See FED. R. CRIM. P. 11(f).

39. See *supra* Kahan, *Alternative Sanctions*, *supra* note 2, at 631-34 (describing contrition under Kahan's analysis).

40. See FEDERAL SENTENCING GUIDELINES MANUAL § 5B1.1(a) (1999).

41. See *id.* § 5D1.1(b).

42. See *id.* §§ 5B1.3(c) (8), 5D1.3(c) (8).

43. *Id.* §§ 5B1.3(c) (13), 5D1.3(c) (13).

44. *Id.* §§ 5B1.3(e) (4), 5D1.3(e) (4), 5F1.5.

45. See *id.* §§ 5B1.3(e) (3), 5D1.3(e) (3).

46. See *id.* §§ 5B1.3(b), 5D1.3(b). Other factors include "the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *Id.* § 5B1.3(b) (1) (E). Section 5B1.3(b) also provides that the court may impose a probation condition "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." *Id.* § 5B1.3(b) (1) (B).

hands down its sentence, with all its special conditions, the U.S. Attorney’s Office once again can fire up its publicity machine to tell the world of the defendant’s evil deeds.<sup>47</sup>

Kahan argues that shaming deters recidivism by destroying the reputation of the “white collar” defendant, thereby ensuring that no one else falls prey to his schemes.<sup>48</sup> Yet the probation and supervised release conditions better dissuade a convicted criminal from defrauding additional victims than would Kahan’s shaming proposal. For example, a court can deny the defendant access to the tools of her “white collar” trade, including credit lines and computers.<sup>49</sup> The court may prevent the defendant from associating with certain individuals,<sup>50</sup> or going to certain places.<sup>51</sup> Even more effectively, courts have restricted many “white collar” criminals from returning to their former fraudulent trade.<sup>52</sup> Considering that these restrictions directly prevent the “white collar” defendant from resuming his earlier illegal conduct, it is unclear what additional deterrence Kahan’s publication proposal would add.

Even if Kahan’s shaming proposal is still necessary to deter “white

47. Many U.S. Attorney’s Offices have a full time press representative to publicize the office’s actions.

48. See *supra* notes 15-18 and accompanying text.

49. See *United States v. Mitnick*, 145 F.3d 1342, No. 97-50365, 1998 WL 255343, at \*1 (9th Cir. May 14, 1998) (unpublished table decision) (restricting hacker’s access to computers, computer-related equipment, and telecommunication devices, including cellular phones); *United States v. Johnson*, 45 F.3d 434, Nos. 94-2525, 94-2529, 1994 WL 589454, at \*1 (8th Cir. Oct. 26, 1994) (unpublished table decision) (prohibiting defendant from incurring new credit charges or opening additional lines of credit without approval from probation officer).

50. See, e.g., *United States v. Schave*, 186 F.3d 839, 843-44 (7th Cir. 1999) (upholding restriction preventing defendant from associating with “any member or organization which espouses violence or the supremacy of the white race”); *United States v. Jaramillo*, 156 F.3d 1245, No. 98-20005, 1998 WL 536387, at \*2 (10th Cir. Aug. 18, 1998) (unpublished table decision) (upholding restriction against contact with ex-wife and children); *United States v. Wilson*, 87 F.3d 1325, Nos. 95-30261, 95-30267, 1996 WL 297616, at \*2 (9th Cir. June 5, 1996) (unpublished table decision) (upholding restriction preventing robbers, who also had a child together, from contacting one another).

51. See, e.g., *United States v. Harker*, 48 F.3d 1225, No. 94-2813, 1995 WL 91886, at \*1 (8th Cir. Mar. 1, 1995) (unpublished table decision) (upholding restriction preventing defendant from patronizing establishments that primarily derive their income from alcohol).

52. See, e.g., *United States v. Clark*, 195 F.3d 446, 452 (9th Cir. 1999) (upholding probation condition preventing defendant from working in law office or “any institution in the business of providing legal services”); *United States v. Choate*, 101 F.3d 562, 566-67 (8th Cir. 1996) (upholding condition of supervised release preventing defendant from maintaining self-employment); *United States v. Whitlow*, 979 F.2d 1008, 1012 (5th Cir. 1992) (upholding condition of supervised release preventing defendant from working in used car industry); *United States v. Burnett*, 952 F.2d 187, 190 (8th Cir. 1991) (upholding condition of supervised release preventing defendant from working in business that requires travel or selling vending machines).

collar” criminals, the Guidelines already permit publication of the defendant’s crimes. For example, in *United States v. Coenen*,<sup>53</sup> the Fifth Circuit reviewed a shaming condition virtually identical to Kahan’s proposal. Douglas Coenen pleaded guilty to four counts of transmission of child pornography.<sup>54</sup> Special conditions of his supervised release required him to notify the police, his neighbors, and the school superintendent of his presence, and to publish notice of his crime at his expense in the local newspaper once he left prison,<sup>55</sup> all forms of the “stigmatizing publicity” that Kahan describes. The Fifth Circuit acknowledged that the supervised release terms would “shame, humiliate, and further isolate him,” but held that under the circumstances, the district court did not abuse its broad discretion in setting forth these requirements.<sup>56</sup> In a similar case, the Tenth Circuit in *United States v. Fabiano*<sup>57</sup> upheld a condition of supervised release requiring the defendant to register as a sex offender under Colorado law.<sup>58</sup>

*United States v. Schechter*<sup>59</sup> further demonstrates the latitude district court judges enjoy when fashioning “shaming” conditions of supervised release.<sup>60</sup> Schechter, a computer consultant, pleaded guilty to income tax evasion and willfully failing to file an income tax return.<sup>61</sup> In addition to his eighteen-month sentence, the district court ordered Schechter, as a condition of supervised release, to notify all future employers of his past criminal conduct and current status

53. 135 F.3d 938 (5th Cir. 1998).

54. *See id.* at 939 (describing that after the defendant pleaded guilty he was sentenced to a jail term of 33 months).

55. *See id.* at 946. Coenen’s sentence also provided that the probation officer could require Coenen to give notice to the community, including the provision of notice through the use of signs, handbills, bumper stickers, clothing labels, and door-to-door oral communication, all at his own expense. *Id.* at 939. Because the probation officer had not deemed this additional condition necessary, the Fifth Circuit did not review it. *Id.* at 946. At least one commentator argues that community notification requirements are not shaming sanctions. *See* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 737 n.21 (1998) (“[T]he primary aim of these sanctions is neither to shame nor educate. Public notification statutes appear designed primarily to protect third parties.”). Of course, proponents of shaming would argue that by shaming the offender, the notification requirements make clear whom potential victims should avoid.

56. *See Coenen*, 135 F.3d at 946 (holding that the notification conditions were reasonably related to Coenen’s history and characteristics, and to the nature and circumstances of his offenses).

57. 169 F.3d 1299 (10th Cir. 1999).

58. *See id.* at 1307-08; *see also* *United States v. White*, 902 F. Supp. 1347, 1353-54 (D. Kan. 1995) (requiring the defendant, who ran a daycare business, to report her substance abuse problem to local childcare licensing agencies).

59. 13 F.3d 1117 (7th Cir. 1994).

60. *See id.* at 1118 (noting that Congress has given district courts broad discretion in imposing special conditions of supervised release).

61. *See id.*

on supervised release and to permit the Probation Department to verify his notification.<sup>62</sup> Schecter challenged these terms, arguing that reference to his prior criminal background would spread to others in the computer consultant community and effectively prevent him from working in the computer consulting industry.<sup>63</sup> In other words, the terms would effectively shame him as “stigmatizing publicity” and destroy his reputation. Despite Schecter’s claims of shaming, the Seventh Circuit upheld the conditions of release as within the district court’s broad sentencing discretion.<sup>64</sup> The Sixth Circuit upheld a similar employer notification condition in *United States v. Ritter*,<sup>65</sup> reasoning that even though “Ritter is ashamed of his embezzlement conviction, [that] does not mean that he should be able to hide it from those who are particularly vulnerable to a repeat performance.”<sup>66</sup> The flexibility that district courts have under the Guidelines to fashion conditions of probation and supervised release specific to the defendant suggests that if the Hoboken urinators had done their duty on federal property, like a post office, a federal judge could sentence them to scrub the streets of Hoboken until they sparkled.<sup>67</sup>

#### CONCLUSION

Although the Guidelines promote uniformity in sentencing, these cases make clear that they also permit federal judges to institute many creative conditions of probation and supervised release, including shaming, to deal with the wide range of “white collar” criminals. Considering that the Guidelines provide the public shaming that Kahan desires, along with several other non-incarceration conditions designed to stop the “white collar” criminal, Kahan’s argument actually boils down to an old one: incarceration is unnecessary for “white collar” criminals. Obviously, this is the eternal question of “white collar” criminal justice, one that lies outside the scope of this Essay. Kahan believes that more empirical research is necessary to answer questions about shaming, “white collar” criminals, and the

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62. *See id.*

63. *See id.*

64. *See id.* at 1119 (“The court did not abuse its broad discretion, when it required Schecter to notify employers of his past criminal conduct and current status on supervised release.”). The Seventh Circuit recognized that the condition did not require notification if Schecter worked as an independent contractor. *Id.*

65. 118 F.3d 502 (6th Cir. 1997).

66. *Id.* at 506.

67. It is quite likely that a district court could sentence the urinators to swabbing the streets of Hoboken as a form of community service. *See* FEDERAL SENTENCING GUIDELINES MANUAL §§ 5B1.3(e)(3), 5D1.3(e)(3) (1999).

Guidelines,<sup>68</sup> and I agree. But before scholars conduct this empirical research, they need to ask the right question. The question is not whether the Sentencing Commission should add shaming to the Guidelines. Rather, it is whether the Commission should remove incarceration from the “white collar” offender equation.

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68. See Kahan & Posner, *supra* note 4, at 388 (outlining six areas that econometricians could study to determine the effectiveness of shaming).