DUI GILT PL8:

AN EVALUATION OF THE PROPOSED SHAMING SANCTION FOR MULTIPLE DUI OFFENDERS

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I. INTRODUCTION

For the second year, the Virginia General Assembly tabled discussion on a bill that would create special license plates for individuals holding multiple convictions of driving under the influence (DUI).[1] House Bill 1281 proposes an amendment to Virginia Code section 18.2-270(A) that would require individuals convicted of a third or subsequent violation of the driving while intoxicated statute[2] to display yellow license plates with red characters on all registered vehicles.[3] The plates must remain on the vehicles for five years after the restoration of driving privileges.[4] The bill would also add a section to the Code requiring the Department of Motor Vehicles to issue these specialized plates at a charge of $500 in addition to the standard license plate charges.[5] Despite the lack of deliberation on this meas-

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1. *See* Legislative Information Services, Bill Tracking: HB1281, 2008 Session, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=hb1281 (last visited Mar. 14, 2008). The bill originated in the House Committee on Transportation. *Id.* It was later referred out of the Transportation Committee and sent to the House Committee for Courts of Justice. *Id.* After sending the measure to the Criminal subcommittee, the Committee continued the bill on February 8, 2008 to later sessions. *Id.*

2. VA. CODE ANN. § 18.2-266 (Repl. Vol. 2004 & Supp. 2007).

3. H.B. 1281, Va. Gen. Assembly (Reg. Sess. 2008).

4. *Id.* Under current DUI penalties, a person's privilege to drive or operate a motor vehicle is suspended following a conviction. VA. CODE ANN. § 18.2-271 (Repl. Vol. 2004). The suspension lasts one year for a first conviction, three years for a second conviction within ten years, and indefinitely for a third conviction within ten years. *Id.* Additional penalties also apply to DUI convictions. *See id.* § 18.2-270 (Repl. Vol. 2004 & Supp. 2007) (describing the fines and potential jail sentences for findings of guilt); *id.* § 18.2-270.01 (Rep. Vol. 2004) (requiring offenders convicted of a DUI to make a payment to the Trauma Center Fund); *id.* § 18.2-270.1 (Repl. Vol. 2004 & Supp. 2007) (allowing the requirement of ignition interlock systems for DUI offenders).

5. H.B. 1281, Va. Gen. Assembly (Reg. Sess. 2008).

ure, the bill's chief patron, Delegate Lionell Spruill, intends to reintroduce the bill for a discussion on the merits of this proposal.[6] Although consideration of this particular bill will be left for future legislative sessions, analysis of similar shaming sanctions continues in an effort to discover whether these measures achieve any reasonable goal.

This comment seeks to analyze House Bill 1281 in the larger social context of shaming sanctions. It begins by tracing a brief history of offender punishment from the common use of shaming mechanisms to their disappearance and gradual resurgence. It further looks to the theoretical foundations of such alternative sanctions, as well as their potential effects on both individual conduct and social norms. Finally, it looks at the relationship between other approaches to DUI convictions and the methods proposed in Virginia.

II. THE DEVELOPMENT OF SHAMING SANCTIONS

Punishment is a component of the criminal justice system that seeks to achieve the goals of prevention, deterrence, rehabilitation, and retribution.[7] Incarceration is one of the most commonly used forms of punishment,[8] although alternatives exist.[9] The available substitutes include shaming sanctions, which use publicity of an offender's illegal conduct to humiliate the offender in the public eye.[10] These sanctions humiliate or shame the offender by challenging his or her status in society, which often includes la-

6. E-mail from Susan Rowland, Chief of Staff, Office of Delegate Lionell Spruill, Sr., to Theresa M. Young, University of Richmond: T.C. Williams School of Law (Mar. 10, 2008, 15:19 EST) (on file with author).

7. United States v. Brown, 381 U.S. 437, 458 (1965).

8. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 591 (1996); *see* Bureau of Justice Statistics, Corrections Statistics, http://www.ojp.usdoj.gov/bjs/correct.html (last visited Mar. 12, 2008) (noting that, in 2006, state and federal prisons housed over 1,570,861 individuals, local jails held 766,010 individuals awaiting trial or serving a sentence, and jails supervised the sentences of 60,222 individuals in the community).

9. Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2161 (2001); Brian Netter, Comment, *Avoiding the Shameful Backlash: Social Repercussions for the Increased Use of Alternative Sanctions*, 96 J. CRIM. L. & CRIMINOLOGY 187, 187 (2005).

10. Markel, *supra* note 9, at 2178; Netter, *supra* note 9, at 187; Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2187 (2003). These sanctions differ from guilt punishments, which eliminate the public aspect of the punishment and focus on the individual. *See* Markel, *supra* note 9, at 2229. Guilt punishments do not use publicity to shame the offender. *Id.* Instead, they try to apply a punishment that parallels the offense to the individual offender. *Id.* at 2230. For example, an offender who blinded another person as a result of his or her recklessness could be required to wear an eye patch to experience the effects of his or her actions. *Id.* at 2229. Thus, guilt punishments address the individual actions of an offender without regard for public involvement. *See id.* at 2231.

beling the offender as a "bad type."[11] As a result, the sanctions reinforce social norms disapproving of the illegal behavior.[12] Further, the penalties imposed from a shaming sanction often stigmatize an offender in a way that does not occur with conventional punishments.[13] These shaming methods have the potential to be diverse, reflecting the creativity of judicial officers in imposing conditions on sentencing, the broad scope of legislators in crafting punishments for criminal offenses, and the history of such punishments.[14]

A. The Progression of Shaming Sanctions

Historically, punishment centered on the public humiliation of an offender.[15] Communities used the stocks, pillory, ducking stool, bilbo, public labor, and whippings as sentences for deviant conduct.[16] The consequence for a minor offense often included temporary labeling in the form of a sign listing all instances of "wrongness."[17] However, more serious offenses resulted in permanent branding.[18] In these instances, the offender was marked with letters signifying the offense.[19] Although these methods involved corporal punishment, which was common, the accompanying shame was just as important.[20] In colonial Virginia, for example, admonitions served as a customary punishment.[21] The diversity of punishment extended to their application, which varied depending on the background and characteristics of the individual offender[22] or the nature of the offense.[23] Despite

11. Markel, *supra* note 9, at 2162-63.

12. Note, *supra* note 10, at 2187.

13. *Id.* at 2188; *see also* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 743 (1998).

14. *See* Note, *supra* note 10, at 2187-88.

15. James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1055 (1998).

16. Garvey, *supra* note 13, at 733; Markel, *supra* note 9, at 2168; Toni M. Massaro, *The Meanings of Shame Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 680-81 (1997) [hereinafter Massaro, *Meanings of Shame*].

17. Markel, *supra* note 9, at 2168; *see* Massaro, *Meanings of Shame*, *supra* note 16, at 680. While the label itself represented the offender's transgressions, its removal demonstrated the acceptance and forgiveness of the community at large. Markel, *supra* note 9, at 2168.

18. Markel, *supra* note 9, at 2168.

19. *Id.*

20. Kahan, *supra* note 8, at 611.

21. Markel, *supra* note 9, at 2168. Admonitions incorporated both private and public elements. *See id.* First, an official, such as a member of the church, would scold the offender in private. *Id.* Then, the offender would receive a public scolding. *Id.* In some instances, the final element of an admonition was a public apology from the offender. *Id.* Maoist China used a similar structure of punishment. Whitman, *supra* note 15, at 1055.

22. *See* Massaro, *Meanings of Shame*, *supra* note 16, at 681; Whitman, *supra* note 15, at 1070. Ducking stools, for example, commonly were used for women. Massaro, *Meanings of Shame*, *supra* note 16,

the variations in punishments, shaming sanctions were most successful in smaller communities.[24] These tightly-bound units would hold each other responsible in an effective method of crime control, but the shaming foundation of these communities slowly faded.[25]

During the nineteenth century, the use of shaming sanctions declined as new ideals emerged.[26] Society welcomed the Victorian era that prized a sense of dignity and decency above all.[27] This perspective rejected the corporal punishments and public displays that provided the foundation for shaming sanctions.[28] Similarly, the criminal justice system moved away from public sanctions due to the rise of the Christian tradition of penance and the idea of rehabilitation.[29] The notion of private penance influenced the development of the penitentiary in Quaker Pennsylvania.[30] As the origin of incarceration, the penitentiary became the most common form of punishment, combining the private elements of guilt with the theory of redemption.[31] As the penitentiary removed offenders from the public view, offenders were able to address their own wrong acts and change.[32] Consequently, the criminal justice system structured punishments to rehabilitate offenders and to eventually lead to community re-entry.[33] The movement away from public shaming persisted through most of the twentieth cen-

at 681. Similarly, members of nobility were subject to public decapitation while punishment for members of the lower classes included hanging in the public square. Whitman, *supra* note 15, at 1070.

23. *See* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913-14 (1991) [hereinafter Massaro, *Shame, Culture, and American Criminal Law*]. Individuals sentenced to the pillory would have to go with something on their heads signifying their offense. *Id.* at 1914. Further, in some communities, individuals found to be bankrupt "were often required to bang their bare buttocks against rocks in public." Whitman, *supra* note 15, at 1066.

24. *See* Markel, *supra* note 9, at 2167-68. In these environments, individuals were less likely to move from one place to the next. *Id.* at 2167. As a result, individuals were sensitive to attacks on their reputations. *Id.* at 2167-68; *see* Massaro, *Shame, Culture, and American Criminal Law*, *supra* note 23, at 1916.

25. *See* Whitman, *supra* note 15, at 1072.

26. Kahan, *supra* note 8, at 612-13; Whitman, *supra* note 15, at 1072.

27. Whitman, *supra* note 15, at 1073, 1075. In some instances, this translated literally as clothing became more elaborate and expansive, covering the entire body. *See id.* at 1075.

28. *Id.* at 1073. The Victorian ideals went beyond the use of humiliation punishments, condemning the displays as harmful to the public. *See* FRANCIS WAYLAND, THE ELEMENTS OF MORAL SCIENCE 246 (Joseph L. Blau ed., Harvard Univ. Press 1963) (1835) (arguing that viewing public sanctions was "sinful," "injurious," and "corrupting").

29. *See* Massaro, *Shame, Culture, and American Criminal Law*, *supra* note 23, at 1935; Whitman, *supra* note 15, at 1079-80.

30. Whitman, *supra* note 15, at 1080-81.

31. Markel, *supra* note 9, at 2169; *see* Massaro, *Shame, Culture, and American Criminal Law*, *supra* note 23, at 1935.

32. *See* Kahan, *supra* note 8, at 612-13. The core of this new perspective was the reformed offender, and it limited the focus to the individual instead of including the public as a whole. Whitman, *supra* note 15, at 1080.

33. *See* Kahan, *supra* note 8, at 612-13.

tury,[34] and American judges and legislators only recently inspired the resurgence of public sanctions in response to increasing prison populations and a need for an alternative type of punishment.[35]

The contemporary American criminal justice system uses a wide range of punishments from incarceration or diversion to the resurging shaming sanctions.[36] Although public punishments have returned to the sentencing structure, the application is limited to sex offenses, commercial offenses, and more minor offenses, particularly in relation to first-time offenders.[37] Perhaps more diverse than the offenses for which the courts and legislatures assign shaming sanctions are the different methods used for imposing shame and humiliation on offenders. For example, courts publish lists of individuals convicted of prostitution or solicitation,[38] require landlords who

34. France rejected the use of public sanctions out of concern for possible widespread riots. Whitman, *supra* note 15, at 1083. Additionally, even Nazi Germany limited the use of public humiliation sanctions. *Id.* at 1084-84. Although the Nazi regime used badges, including gold stars, to identify members of specific communities, it condemned the public display of shaming sanctions. Markel, *supra* note 9, at 2175 (quoting Amitai Etzioni, *Back to the Pillory?*, AM. SCHOLAR, Summer 1999, at 43, 44); Whitman, *supra* note 15, at 1083-84. Instead, the regime preferred to conduct public shaming rituals only in the presence of officers and troops. Whitman, *supra* note 15, at 1084. While this did not reject the notion of public shaming and certainly did not provide any validity to the Nazi regime's actions, it continued the tradition of removing the offender from the public. *See id.*

35. Netter, *supra* note 9, at 187; Note, *supra* note 10, at 2186; *see* Bureau of Justice Statistics, Corrections Statistics, http://www.ojp.usdoj.gov/bjs/correct.html (last visited Mar. 12, 2008).

36. In addition to the continuing use of incarceration, some courts impose community service as a condition of sentencing. Kahan, *supra* note 8, at 625. Some scholars, however, object to the ongoing use of community service as a punishment because it is an activity for which individuals are rewarded and stigmatizing the activity may discourage people from participating in volunteer work. *See id.* The return to shaming sanctions demonstrates a response to the current prison population and limited financial resources. *See* Markel, *supra* note 9, at 2162. Shaming sanctions generally require less financial support compared to traditional incarceration measures. *See* Netter, *supra* note 9, at 188. Contemporary shaming has replaced the physical aspect of shaming sanctions used in colonial America with a heavy reliance on publicity. *See id.* at 187-88. Further, the return of public shaming is not limited to the United States. Whitman, *supra* note 15, at 1055 (noting that the People's Republic of China forces "economic offenders" to wear signs describing their offenses).

37. Whitman, *supra* note 15, at 1064; *see also* Garvey, *supra* note 13, at 743; Preston H. Neel, Comment, *Punishment or Not?: The Effect of* United States v. Gementera*'s Shame Condition on the Ever-Changing Concept of Supervised Release Conditions*, 31 AM. J. TRIAL ADVOC. 153, 173 (2007). Specifically, courts have used shaming penalties to punish offenses such as assault, burglary, larceny, embezzlement, perjury, and driving while intoxicated. Kahan, *supra* note 8, at 635.

38. *See* Jill Young Miller, *City Advisor: "Johns" Get Too Little Scrutiny*, ATLANTA J.-CONSTITUTION, May 21, 2007, at 5B. Some lists also include pictures. *Id.* A similar approach is used in Kansas City, Missouri, where a community television station airs the names and pictures of men caught soliciting prostitutes. Edward Walsh, *Kansas City Tunes In as New Program Aims at Sex Trade: "John TV,"* WASH. POST, July 8, 1997, at A3. Other communities use similar approaches to shaming individuals soliciting prostitution. *See* Editorial, *The Shame Game*, BOSTON GLOBE, Apr. 2, 1996, at 14; Courtney Guyton Persons, Note, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1526 (1996) (citing Chet Barfield, *Dear John, If You're Caught, Your Photo Might Be Published*, SAN DIEGO UNION-TRIB., Nov. 5, 1994, at B2; John Larrabee, *Fighting Crime with a Dose of Shame: In Some Communities, Old-Fashioned Public Humiliation Has Returned*, USA TODAY, June 19, 1995, at 3A).

do not keep their properties up to code to live in their buildings for a certain period of time,[39] and force offenders to give a public speech explaining their offense and extending an apology.[40] Further, courts order some offenders to wear signs or placards indicating a conviction[41] or to post signs on their property with language indicating a conviction.[42] Although the assigned punishments vary,[43] each of these punishments takes place in the public eye as a modern form of shaming.[44]

B. The Theoretical Foundation of Shaming Sanctions

As the use of shame increases in the modern criminal justice system, its ability to accomplish the intended goals of punishment ultimately will determine the sanction's validity. The sentencing and correctional aspect of the criminal justice system uses punishment in both a retributivist and rehabilitative fashion.[45] Public punishment, in any of its forms, as a response to deviant behavior can cause the offender to feel condemnation, degrading the individual's self-esteem.[46] The offender then receives punishment for doing something wrong in accordance with the retributivist perspective[47] while undergoing a method of "moral education," which leads to personal

39. *Instead of Jail: "Welcome, Reptile!,"* N.Y. TIMES, Feb. 27, 1988, at A22; *Judge Orders Landlord to Live in His Own Slum*, CHI. TRIB., Jan. 20, 1992, at C10; *Landlord Told to Begin Sentence: Thirty Days in His Squalid Apartment*, N.Y. TIMES, July 11, 1987, at A10.

40. *See, e.g.*, Markel, *supra* note 9, at 2171 (citing David Doege, *Shaming Sentences Group Is Diverse*, MILWAUKEE J. SENT., Apr. 6, 1997, at 1).

41. *See, e.g.*, United States v. Gementera, 379 F.3d 596 (9th Cir. 2004); Jeanie Russell, *Shame! Shame! Shame!*, GOOD HOUSEKEEPING, Aug. 1, 1997, at 102. *But see* California v. Hackler, 16 Cal. Rptr. 2d 681 (Cal. Ct. App. 1993) (holding that to require a shoplifter to wear a shirt proclaiming his status as a felony-theft probationer was unreasonably overbroad).

42. *See, e.g.*, Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, N.Y. TIMES, Jan. 16, 1997, at A1; Dean E. Murphy, *Justice as a Morality Play That Ends with Shame*, N.Y. TIMES, June 3, 2001, § 4, at 5.

43. *See, e.g.*, VA. CODE ANN. §§ 9.1-900 to 902. (2004); Joe B. Brown, *Judge Devises Instructional Penalties*, N.Y. TIMES, Feb. 16, 1993, at B16 (describing a sentence where the victim of a burglar was sent to the burglar's home with law enforcement supervision to take something of equal value).

44. The return to shaming sanctions is not surprising given the movement toward increased transparency in the criminal justice system. *See* Markel, *supra* 2187. As the police make their regulations available to the public and court proceedings are open to all members of the community, the public nature of sentencing demonstrates the expansion of government accessibility. *See id.*

45. *See* Massaro, *Shame, Culture, and American Criminal Law*, *supra* note 23, at 1891-95. Under the retributivist theory, punishment is used against a person who deserves some type of sanction. *Id.* at 1891. Ultimately, this perspective focuses on the idea of retaliation. *Id.* On the other hand, the rehabilitative approach focuses on changing behavior that violates social norms. *Id.* at 1893. As a result, the offender can re-enter society as a law-abiding member of the community. *Id.* at 1893-94.

46. Kahan, *supra* note 8, at 638; *see* Massaro, *Meanings of Shame*, *supra* note 16, at 660; Garvey, *supra* note 13, at 741; Neel, *supra* note 37, at 173. *But cf.* Whitman, *supra* note 15, at 1065-66 (noting that punishment can also impose shame on an individual level without a public element).

47. *See* Massaro, *Shame, Culture, and American Criminal Law*, *supra* note 23, at 1891.

rehabilitation.[48] Shaming sanctions achieve both the retributive and rehabilitative goals of punishment, although they incorporate more community interaction than traditional sentencing methods.[49]

Shaming sanctions also have the potential to deter future illegal behavior by both the offender and members of the public.[50] Because an individual offender will associate shame with the deviant conduct, scholars assert that he or she will refrain from future illegal behavior.[51] In addition, public punishments can define societal boundaries by demonstrating behavior not tolerated by a community.[52] Although it is unclear whether these sanctions are a reaction to the costs of traditional sentences or an attempt to impose more effective measures,[53] judges and legislators will continue to employ shame techniques on those offenders who might be most affected.[54]

C. The Effects of Shaming Sanctions

Because shaming sanctions are a form of punishment imposed by the criminal justice system, their results should conform to the goals of punishment.[55] Shaming sanctions that identify the offender as a community deviant may lead to specific deterrence because the individual offender experiences severe stigmatization.[56] Following the sanction, the offender can regain community respect by incorporating himself as a law-abiding citizen.[57] Further, the punishment deters society in general because it demon-

48. Markel, *supra* note 9, at 2176; *see* Garvey, *supra* note 13, at 763; Kahan, *supra* note 8, at 603. *But see* Neel, *supra* note 10, at 169-70 (noting that shaming can either rely on public exposure or aim to educate the offender about the deviant conduct).

49. *See* Neel, *supra* note 37, at 169.

50. Note, *supra* note 10, at 2189.

51. *See* Kahan, *supra* note 8, at 636. For shaming to be effective, however, the behavior at the source of the punishment must be something society condemns. Massaro, *Meanings of Shame*, *supra* note 16, at 685.

52. *See* Massaro, *Meanings of Shame*, *supra* note 16, at 694-95.

53. Markel, *supra* note 9, at 2175.

54. *See* Whitman, *supra* note 15, at 1067-68. Some commentators suggest that shame sanctions are best imposed on first-time offenders and used for minor offenses because they would serve as a warning to the illegal behavior. *Id.*

55. Punishment seeks to accomplish a variety of objectives, including incapacitation, retribution, specific deterrence, general deterrence, and guilt. *See* Markel, *supra* note 9, at 2192 (quoting FREDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 80-81 (Walter Kaufmann & R.J. Hollingdale trans., 1989)). Any punishment could conform to the retributivist goal because the offender is forced to accept a consequence that he or she would not face but for the illegal conduct. *See* Garvey, *supra* note 13, at 747. The question remains whether the result is proportional to the original offense. *Id.*

56. *See* Netter, *supra* note 9, at 188. *But see* Massaro, *Meanings of Shame*, *supra* note 16, at 655; *cf.* Neel, *supra* note 37, at 172 (citing June Price Tagney et al., *Shamed Into Anger? The Relation of Shame and Guilt to Anger and Guilt to Anger and Self Reported Aggression*, 62 J. PERSONALITY & SOC. PSYCHOL. 669, 673 (1992)).

57. Note, *supra* note 10, at 2192.

strates the applicable consequence while educating the community on the limits of acceptable behavior.[58]

The sanctions not only define behavior for the community but also incorporate an active public into the punishment process.[59] Because shame depends on a loss of community respect, society must play a role in the sanction by shaming the offender.[60] The judicial officers and legislators imposing shaming sanctions, however, cannot control public reaction to the offender or the offense.[61] The result can be a form of vigilante justice controlled by a fervent crowd.[62]

In addition, shaming depends on personal interactions among members of a community.[63] Some analysts assert that modern American communities lack this interaction, thereby making shaming unlikely.[64] Effective shaming also hinges on a universal interpretation of punitive action and deviant behavior.[65] Cultures and subcultures, however, often disagree over what behavior warrants shaming and what punishments invite shame.[66] As a result, conditions for effective shaming sanctions are lacking, preventing realization of the theorized outcome of practical shaming.

III. SHAMING SANCTIONS FOR DUI OFFENDERS

While the implementation of shaming sanctions varies widely, these alternatives to traditional punishment target DUI offenders. Courts and legislators classify shaming punishments for these offenders as particularly effective because drunk drivers are members of society who value their social

58. *See* Markel, *supra* note 9, at 2194; Note, *supra* note 10, at 2192. If shaming sanctions become commonplace, however, they could lose their effect due to "shaming overload." Massaro, *Shame, Culture, and American Criminal Law*, *supra* note 23, at 1930; Neel, *supra* note 37, at 173.

59. Markel, *supra* note 9, at 2219.

60. *See* Note, *supra* note 10, at 2190.

61. Whitman, *supra* note 15, at 1088.

62. *See id.* at 1059, 1091.

63. *See supra* notes 59-60 and accompanying text.

64. Massaro, *Meanings of Shame*, *supra* note 16, at 682-83; Whitman, *supra* note 15, at 1063. *But see* Kahan, *supra* note 8, at 642.

65. *See* Massaro, *Shame, Culture, and American Criminal Law*, *supra* note 23, at 1917.

66. *See* Massaro, *Meanings of Shame*, *supra* note 16, at 673; Note, *supra* note 10, at 2194.

standing.[67] These individuals value their reputation in both their residential and professional communities, which makes them vulnerable to threats of potential stigmatization.[68] Thus, because the criminal justice system must respond in some way to illegal conduct and the traditional punitive measures lack effectiveness,[69] courts and legislatures are more likely to extend shaming sanctions to DUI offenders.[70]

Often, when DUI offenders are recipients of alternative sentencing, courts and legislators use literal labels when assigning these sanctions. Some offenders must perform community service dressed in distinctive outfits that include a label identifying them as DUI offenders.[71] Others must display "Convicted: DUI" bumper stickers on their vehicles.[72] Still other offenders must use license plates that identify them as DUI offenders.[73] DUI offenders receive a variety of shaming sanctions, and Virginia is only one of many states to consider the use of shame in DUI sentences. [74]

Currently, Virginia has a number of statutes addressing the penalties of a DUI conviction. Any finding of guilt on a DUI charge will result in a fine and a possible jail sentence.[75] A conviction will also result in a suspension of driving privileges.[76] The legislature also established additional require-

67. Massaro, *Shame, Culture, and American Criminal Law*, *supra* note 23, at 1887.

68. *See id.*; *see also* Massaro, *Meanings of Shame*, *supra* note 16, at 691 (describing literal stigmatizations as instances where labels are attached to an individual).

69. *See* Markel, *supra* note 9, at 2201-02.

70. *See id.* at 2171-72; Massaro, *Shame, Culture, and American Criminal Law*, *supra* note 23, at 1887; Note, *supra* note 10, at 2188.

71. *See, e.g.*, NEV. REV. STAT. § 484.3792 (Repl. Vol. 2007).

72. Jon Nordheimer, *In-House Dispute: Drunken-Driver Bumper Sticker*, N.Y. TIMES, June 6, 1985, at A22; *Scarlet Bumper: Humiliating Drunk Drivers*, TIME, June 17, 1985, at 52; *see* Goldschmitt v. Florida, 11 Fla. L. Weekly 1099, 490 So.2d 123 (Fla. Dist. Ct. App. 1986); Andrea Estes, *Scarlet Sticker: Judge Wants to Brand Repeat Drunk Drivers*, BOSTON HERALD, June 12, 1998, at 1.

73. *See, e.g.*, OHIO REV. CODE ANN. § 4503.231 (LexisNexis Rep. Vol. 2003). *But cf.* New York v. Letterlough, 86 N.Y.2d 259, 277-78, 655 N.E.2d 146, 156-57 (N.Y. 1995) (finding a probation condition requiring the defendant to affix a fluorescent sign to his license plate that said "convicted dwi" did not conform to the statute granting courts the authority to impose probationary conditions).

74. *See, e.g.*, H.B. 1281, Va. Gen. Assembly (Reg. Sess. 2008). *But see* Illinois v. Johnson, 174 Ill. App. 3d 812, 815, 528 N.E.2d 1360, 1362 (Ill. App. Ct. 1988) (finding the requirement to place an ad in a newspaper with a booking photo and an apology for drunk driving did not aim to achieve the rehabilitative intent of the sentencing statute).

75. VA. CODE ANN. § 18.2-270 (Repl. Vol. 2004 & Supp. 2007). A first-time offender will pay a $250 fine and receive a jail sentence depending on their blood alcohol level. *Id.* A second conviction within five years of the first conviction carries a fine twice the original amount in addition to at least twenty days in jail in contrast to the mandatory ten days in jail from a second conviction within ten years. *Id.* Further, a third conviction within five years is considered a felony offense carrying a fine of at least $1,000 and a mandatory sentence of at least six months in jail. *Id.* If a third conviction occurs within ten years, then the jail sentence's mandatory minimum becomes ninety days. *Id.* A fourth or subsequent offense committed within ten years carries a $1,000 fine and a mandatory minimum jail sentence of one year. *Id.*

76. VA. CODE ANN. § 18.2-271 (Repl. Vol. 2004). The suspension lasts for a year for a first conviction,

ments for DUI offenders.[77] House Bill 1281 would add the penalty of specialized plates to the current array of DUI punishments.[78]

Although other states impose similar sanctions for DUI offenders, Virginia's proposed measure works as a slightly different shaming sanction. While most shaming sanctions function as a warning for first-time offenders,[79] House Bill 1281 provides a punishment after an individual receives three convictions.[80] Further, the bill imposes this shaming sanction when offenders with three convictions in ten years permanently lose their driving privileges.[81] In theory, the bill applies only to individuals with DUI offenses accumulated over ten years, when a shaming sanction would be of little use. Consequently, the bill does not address the deterrence arguments for shaming sanctions because it only applies to offenders who continue to offend.

Additionally, the specialized license plates do not include the personal interaction that serves as a staple of shaming punishments.[82] By attaching the specialized plates to registered vehicles, few members of the community will identify the plate with an individual offender unless they know the vehicle's owner. In addition, non-offenders sharing access to an offender's car are must drive the DUI labeled license plates. As a result, if the shaming sanction functioned as intended, a non-offender is the recipient of the license plate's stigma.

While the effectiveness of the specialized license plates as a shaming sanction is undetermined, a collateral issue exists in the potential enforcement of laws. Police officers have considerable discretion when initiating traffic stops, including detentions due to suspicions of drunk driving.[83] A specialized license plate identifying vehicles belonging to multiple DUI offenders could be subject to closer inspection by patrol officers. A police of-

three years for a second conviction within ten years, and indefinitely for a third conviction within ten years. *Id.*

77. For example, DUI convictions require the offender to make a payment to the Trauma Center Fund, which "defray[s] the cost of providing emergency medical care to victims of automobile accidents attributable to alcohol or drug use." VA. CODE ANN. § 18.2-270.01 (Repl. Vol. 2004). In addition, the court may require an ignition interlock system in an offender's vehicle for a first offense, and must do so for a second or higher offense, or in any offense for which the offender's BAC was 0.15 or more. VA. CODE ANN. § 18.2-270.1 (Repl. Vol. 2004 & Supp. 2007). These systems prevent a motor vehicle's engine from starting when the driver's blood alcohol content exceeds 0.02 percent. *Id.*

78. H.B. 1281, Va. Gen. Assembly (Reg. Sess. 2008); *see supra* notes 2-5 and accompanying text.

79. *See, e.g.*, NEV. REV. STAT. § 484.3792 (Repl. Vol. 2007); OHIO REV. CODE ANN. § 4503.231 (LexisNexis Rep. Vol. 2003).

80. H.B. 1281.

81. *See* VA. CODE ANN. § 18.2-271.

82. *See supra* notes 63-64 and accompanying text.

83. *See* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 269 (2007).

ficer may pull over a driver making minor adjustments on a road because the officer sees the specialized license plate and classifies the movements as weaving. Thus, the proposed license plates have a potential effect beyond shaming the offender and preventing future illegal conduct.

IV. CONCLUSION

Shaming sanctions have remerged as a fresh option for judges and legislatures seeking cheaper alternatives to traditional methods of punishment. Although some of these measures may result in an offender feeling remorse, their ability to fulfill their goals of rehabilitation and deterrence is questionable.[84] The criminal justice system and the public expect punishment to serve as both a deterrent and a reprimand.[85] Shaming sanctions, however, can lead to an irreversible stigma that, when applied to first-time and minor offenders, may not be the most appropriate method of achieving those goals.[86] Instead of achieving lower rates of recidivism and discouraging first-time offenders, the internet becomes a "cyber-pillor[y]" for offender names and license plates are modern day scarlet letters.[87]

House Bill 1281, on its face, appears to be a form of shaming sanction for multiple DUI offenders; however, its application appears to contradict some of the commonalities of public shaming punishments. When Delegate Spruill introduces the bill in subsequent legislative sessions, a full discussion of the bill's practical elements would provide a more complete review of the bill's effects. These discussions may reveal whether the bill would achieve the goals of punishment in general or would only serve to stigmatize the Hester Prynnes of contemporary society.

84. *See* Garvey, *supra* note 13, at 766 (contrasting the effects of shaming sanctions that result in retaliation and guilt sanctions that result in an offender's contrition).

85. Kahan, *supra* note 8, at 652.

86. *See* Massaro, *Shame, Culture, and American Criminal Law*, *supra* note 23, at 1937.

87. Markel, *supra* note 9, at 2172 (quoting *Now, CyberPillory Stocks*, NAT'L L.J., July 7, 1997, at A8).