

SIGNS OF THE TIMES: SCARLET LETTER PROBATION CONDITIONS*

“Measures are effective which have the impact of the ‘scarlet letter’ described by Nathaniel Hawthorne. . . .”**

On May 20, 1987, the Multnomah County Circuit Court in Portland, Oregon convicted Richard J. Bateman of two counts of sexual abuse in the first degree.¹ The trial judge suspended imposition of a sentence and instead placed Bateman on probation for five years.² As a condition of probation, the judge required Bateman to post signs reading “DANGEROUS SEX OFFENDER — NO CHILDREN ALLOWED,” in three-inch lettering, on the front door of his residence and both doors of any vehicle he operates.³

* The Author wishes to express his appreciation to Ms. Diane Alessi, Deputy Public Defender, Public Defender’s Office, Salem, Oregon, for her invaluable assistance. This Recent Development is dedicated to my wife, Karen, who gave birth to and almost single-handedly cared for a different sort of “recent development” named Samantha and a prior publication named Kate, while this was being written.

** *Goldschmitt v. State*, 490 So. 2d 123, 126 (Fla. Dist. Ct. App.), *rev. denied*, 496 So.2d 142 (Fla. 1986). “Measures” refers to probation conditions.

1. Brief for Appellant at 2, *State v. Bateman*, 94 Or. App. 449, 765 P.2d 249 (1987) (No. A44854) [hereinafter Appellant’s Brief]. See *infra* notes 146-56 and accompanying text for a detailed discussion of the *Bateman* case.

2. Under Oregon law, sexual abuse in the first degree is a class C felony. OR. REV. STAT. § 163.425(2) (1985). The maximum penalty for the offense is 5 years imprisonment or a \$100,000 fine. OR. REV. STAT. §§ 161.605(3) and 161.625(1) (1985). Thus, Bateman faced a possible sentence of ten years imprisonment and a \$200,000 fine.

In Oregon, courts may place convicted sex offenders on probation if the court determines the defendant is treatable. As a condition of probation, the defendant must “participate in and successfully complete a treatment program for sexually dangerous persons.” OR. REV. STAT. § 426.675(3)(a) (1987). The trial judge imposed treatment on Bateman. See *infra* note 149 and accompanying text for the complete list of conditions imposed.

3. Silverman, *A Modern Day Scarlet Letter for Sex Offender*, 9 NAT’L L.J., August 31, 1987 at 8. See *Scarlet Letter’ Sentence OK’d By Oregon Court*, 10 NAT’L L.J., (No-

An Urbana, Illinois circuit court judge requires convicted drunk drivers to publicly apologize for their crimes by publishing an advertisement in their local newspaper. The advertisement must include a picture of the offender, a description of the crime and an apology to the citizens of the area.⁴

In Florida, a trial court required a convicted drunk driver to affix bumper stickers to his car reading "CONVICTED D.U.I. — RESTRICTED LICENSE" as a condition of probation.⁵

This Recent Development discusses the constitutionality of such 'scarlet letter' probation conditions.⁶ Section I briefly outlines the history of probation. Section II explains the nature of probation including its definition, process and its intended purposes and rationales. Section III discusses state probation statutes, probation conditions, and the discretion these statutes offer trial judges in granting probation and setting special conditions. Section IV examines judicial review and responses

ember 23, 1987, at 9 (appellate court lifted stay of an order requiring posting of warning signs); See also *infra* note 153 and accompanying text for the judge's comments and rationale for imposing this special condition.

4. See *infra* notes 156-60 and accompanying text for a discussion of published apologies and the text of ads.

5. *Goldschmitt v. State*, 490 So. 2d 123, 124 (Fla. Dist. Ct. App.), *rev. denied*, 496 So. 2d 142 (Fla. 1986) discussed *infra* notes 116-25, 130-33 and accompanying text.

6. For purposes of this Recent Development, a 'scarlet letter' probation condition requires the defendant to disclose publicly the nature of his crime and to identify himself as the perpetrator.

The term 'scarlet letter' is taken from Nathaniel Hawthorne's novel *The Scarlet Letter* about a Puritan woman accused of adultery and required to wear a red letter 'A' on her clothing. Magistrates used such badges of infamy in Puritan Massachusetts. Kealey, *Patterns of Punishment: Massachusetts in the Eighteenth Century*, 30 AM. J. LEGAL HIST. 163 (April 1986). This badge and other public punishments and "shaming techniques" such as "branding, cutting off an ear, exposure in the pillory, sitting in a gallows with a rope around the neck, or standing in a public place with a sign proclaiming the offense" were commonplace. *Id.* at 163-64.

The Puritan society believed that the imposition of the aforementioned punishments would lead to the transgressor's reformation. A more frequent punishment consisted of whipping, which aimed to reinforce the law by announcing the infraction to the community and involving the community in its denunciation. However, whipping did not foster reformation. *Id.* at 172.

These conditions are referred to as "a new mark of Cain." See Zelevansky, *Criminal Justice: 'Consider A New Mark of Cain,'* New York Times, Dec. 2, 1983, at A26, col. 3 where the author notes with approval the imposition of a condition that a convicted drunk driver attach a bumper sticker "warning other motorists of his past offenses and present probationary status." The author states that "[c]riminals should be made to feel directly responsible for the pain and destruction they cause. In that might lie some hope of rehabilitation." *Id.*

to constitutionally challenged probation conditions. Section V considers the constitutionality of 'scarlet letter' probation conditions and critiques this recent development in the law.

SECTION I — A BRIEF HISTORY OF PROBATION

Probation descends directly from the common law doctrine of recognition.⁷ Under this doctrine, a court would release the defendant from custody, with a third party acting as surety, if the accused swore to "keep the peace" or "be of good behavior."⁸ The surety, a forerunner to the modern-day probation officer, was responsible for enforcing the accused's oath and returning him to court if he failed to keep his promise.⁹ Massachusetts enacted the nation's first probation statute in 1878.¹⁰ Today, all fifty states¹¹ and the federal government¹² have pro-

7. Greenberg, *Probation Conditions and the First Amendment: When Reasonableness is Not Enough*, 17 COLUM. J. L. AND SOC. PROBS. 45, 47 (1981). To some extent, probation's heritage also includes the common law doctrines of benefit of clergy and reprieve. Both doctrines offered courts an alternative to meting out punishment or ordering incarceration. *Id.*

Courts granted the benefit of clergy privilege to religious personnel as a means of avoiding punishment in secular courts. Judges later extended the privilege to secular clerks and literate individuals. *Id.* at 48 (citing C. CHURT & M. BELL, *CRIME, COURTS, AND PROBATION* (1956)).

Reprieve was a temporary order blocking the execution of a sentence to allow the defendant to seek a pardon. Courts used reprieve in doubtful cases "where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy; or sometimes if it be a small felony, or any favorable circumstances appear in the criminal character. . . ." Greenberg, *supra* at 48 (citing W. BLACKSTONE, *COMMENTARIES*).

8. Greenberg, *supra* note 7, at 48.

9. *Id.* Massachusetts and New York adopted this procedure, referred to as "laying on file," in the seventeenth century. *Id.*

A Boston cobbler and frequent surety, John Augustus, was the original probation officer. Augustus first stood surety in 1841 and referred to his task as "bailing on probation." *Id.* at 48-49 (citing J. AUGUSTUS, *A REPORT ON THE LABORS OF JOHN AUGUSTUS FOR THE LAST TEN YEARS* (Boston 1852), reprinted in NATIONAL PROBATION ASSOCIATION, *JOHN AUGUSTUS* 1, 4 (1939)). During his seventeen year career, Augustus stood surety for 1,946 offenders. He not only enforced his charges' court-ordered good behavior but also evaluated the defendant's background. He also suggested appropriate case dispositions to the court, found jobs for adult probationers and guardians for minor offenders and ensured that minor offenders attended school. Greenberg, *supra* note 7, at 49.

10. Greenberg, *supra* note 7, at 49. Entitled "An Act relative to placing on probation persons accused or convicted of crimes and misdemeanors in the county of Suffolk," the law outlined duties for county probation officers. *Id.* at 49-50. Two years later, the statute extended coverage to all cities and towns. *Id.* Under the original law,

bation statutes.

SECTION II — THE NATURE OF PROBATION

Generally, probation is the suspension of a sentence that conditions liberty on professional supervision, court imposed conditions, and a revocation provision triggered by failure to comply with the conditions imposed.¹³ While courts use probation as an alternative to incarceration

the mayor of Boston appointed probation officers. An 1891 statute transferred this appointment power to judges. *Id.*

11. ALA. CODE § 15-22-50 (1982 & Supp. 1988); ALASKA STAT. § 12.55.090 (1984); ARIZ. REV. STAT. ANN. § 13-901 (1978 & Supp. 1988); ARK. STAT. ANN. § 5-4-301 (1987); CAL. PENAL CODE § 1203 (West 1982 & Supp. 1989); COLO. REV. STAT. § 16-11-201 (1986 & Supp. 1988); CONN. GEN. STAT. ANN. § 53a-29 (West 1985 & Supp. 1988); DEL. CODE ANN. tit. 11, § 4301 (1987); FLA. STAT. ANN. § 948.001 (West 1985 & Supp. 1989); GA. CODE ANN. § 42-8-1 (1985 & Supp. 1988); HAW. REV. STAT. § 706-620 (1985 & Supp. 1987); IDAHO CODE § 19-2601 (1987 & Supp. 1988); ILL. ANN. STAT. ch. 38, para. 1005-6-1 (Smith-Hurd 1982 & Supp. 1988); IND. CODE ANN. § 35-38-2-1 (Burns 1985 & Supp. 1988); IOWA CODE ANN. § 907.1 (West 1979 & Supp. 1988); KAN. CRIM. CODE ANN. § 21-4601 (Vernon 1971 & Supp. 1989); KY. REV. STAT. ANN. § 533.010 (Michie/Bobbs-Merrill 1985 & Supp. 1988); LA. CODE CRIM. PROC. ANN. art. 893 (West 1969 & Supp. 1989); ME. REV. STAT. ANN. tit. 17-A, § 1201 (1983 & Supp. 1988); MD. ANN. CODE § 27-641 (1988 & Supp.); MASS. ANN. LAWS ch. 279, §§ 1-1A (Law. Co-op. 1980 & Supp. 1988); MICH. COMP. LAWS ANN. § 771.1 (West 1982 & Supp. 1988); MINN. STAT. ANN. § 609.135 (West 1987 & Supp. 1989); MISS. CODE ANN. § 47-7-1 (1981 & Supp. 1988); MO. ANN. STAT. § 599.012 (Vernon 1979 & Supp. 1989); MONT. CODE ANN. § 46-18-201 (1985); NEB. REV. STAT. § 29-2250 (1985); NEV. REV. STAT. § 176.175 (1987); N.H. REV. STAT. ANN. § 651:2 (1986 & Supp. 1988); N.J. STAT. ANN. § 2C:43-2(b)(2) (West 1982 & Supp. 1988); N.M. STAT. ANN. § 31-20-5 (1987); N.Y. PENAL LAW § 65.00 (Consol. 1984 & Supp. 1988); N.C. GEN. STAT. § 15A-1341 (1988); N.D. CENT. CODE § 12.1-32-02 (1985); OHIO REV. CODE ANN. § 2951.01 (Anderson 1987 & Supp. 1988); OKLA. STAT. ANN. tit. 22, § 991a (West 1987 & Supp. 1989); OR. REV. STAT. ANN. § 137.520 (1984); 42 PA. CONS. STAT. ANN. § 9721 (Purdon 1982 & Supp. 1988); R.I. GEN. LAWS § 12-19-2 (1981 & Supp. 1988); S.C. CODE ANN. § 24-21-410 (Law. Co-op. 1988); S.D. CODIFIED LAWS ANN. § 23A-27-12 (1988); TENN. CODE ANN. § 40-28-101 (1982 & Supp. 1988); TEX. CRIM. PROC. CODE ANN. § 42.12 (Vernon 1979 & Supp. 1989); UTAH CODE ANN. § 77-18-1 (1982 & Supp. 1988); VT. STAT. ANN. tit. 28, § 201 (1986); VA. CODE ANN. § 19.2-303 (1983 & Supp. 1988); WASH. REV. CODE ANN. § 9.95.200 (West 1988); W. VA. CODE § 62-12-1 (1989); WIS. STAT. ANN. § 973.09 (West 1985 & Supp. 1988); WYO. STAT. § 7-13-201 (1987).

12. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987 (codified at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3672, 28 U.S.C. §§ 991-998 (Supp. III 1985)) (section 3656 redesignated as 18 U.S.C. § 3672). See *infra* notes 35-37 and accompanying text discussing this new Act.

13. R. MONTGOMERY, JR. & S. DILLINGHAM, PROBATION AND PAROLE IN PRACTICE 4 (1983).

Some state statutes define probation. See CAL. PENAL CODE § 1203(a) (West 1982 &

tion, courts do not view probation as the equivalent of a sentence. Probation uses a "carrot and stick" approach to achieve compliance with imposed conditions. When the court places a defendant on probation, the trial judge imposes specific conditions (the "carrot") that the probationer must follow throughout the probation period. Intentional failure to comply with one or more conditions may result in a revocation hearing and imposition of the original sentence (the "stick").¹⁴ Successful completion of the conditions discharges the defendant from liability for the crime committed.¹⁵ The defendant's fulfillment of the imposed conditions also achieves probation's goals. Traditionally, probation's purpose, justification and goal has been the defendant's rehabilitation.¹⁶ Consequently, courts impose probation conditions to assist defendants in successful reformation and to reintegrate the defendants into society.¹⁷

Supp. 1989) ("probation shall mean the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of the probation officer."); FLA. STAT. ANN. § 948.001 (2) (West 1985) (" 'probation' means a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in [the statute]"); IOWA CODE ANN. § 907.1 (West 1979 & Supp. 1988) ("[p]robation is the procedure under which a defendant, against whom a judgment of conviction of a public offense may be entered, is released by the court subject to supervision by a resident of this state or by the judicial district department of correctional services"); N.M. STAT. ANN. § 31-21-5(A) (1987) ("probation means the procedure under which an adult defendant, found guilty of a crime upon verdict or plea, is released by the court without imprisonment under a suspended or deferred sentence and subject to conditions").

14. See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (fourteenth amendment due process rights require a hearing prior to revocation of probation).

15. *Montgomery & Dillingham*, *supra* note 13, at 5. See also N. COHEN & J. GOBERT, *THE LAW OF PROBATION AND PAROLE* 13 (1983) (satisfactory completion of the probationary period occurs in approximately 60% to 90% of all cases).

16. On this, state legislatures, courts and commentators agree. See, e.g., ARIZ. REV. STAT. ANN. RULES OF CRIM. PROC., Rule 27.1 (1987) ("The sentencing court may impose . . . such conditions as will promote rehabilitation."); DEL. CODE ANN. tit. 11, § 4301 (1987); N.M. STAT. ANN. § 31-21-4 (1987) (the purpose of the probation statute is a "uniformly organized system of constructive rehabilitation."); *State v. Esdale*, 253 Ala. 550, 45 So. 2d 865 (1950) (probation's goal is to give the defendant a chance to show he might rehabilitate and become an acceptable citizen); *State v. Darrin*, 325 N.W.2d 110 (Iowa 1982) (probation must promote rehabilitation and protection of the community); *In re White*, 97 Cal. App. 3d 141, 158 Cal. Rptr. 562 (1979) and *Freeman v. State*, 382 So. 2d 1307 (Fla. Dist. Ct. App. 1980) *petition denied* 401 So. 2d 1334 (Fla. 1981) (purpose of probation is to foster rehabilitation); Best and Birzon, *Conditions of Probation: An Analysis*, 51 GEO L.J. 809, 810 (1963) and Greenberg, *supra* note 7, at 54-55 (society's protection is an implied goal of probation).

17. See, e.g., ARK. STAT. ANN. § 5-4-303(a) (1987) (If the court places the defendant on probation, conditions should attach that "are reasonably necessary to assist the

In 1970 the American Bar Association endorsed probation as a desirable disposition in appropriate cases because:

(i) it maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of the law;

(ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts; (iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community;

(iv) it greatly reduces the financial costs to the public treasury of an effective correctional system;

(v) it minimizes the impact of the conviction upon innocent dependents of the offender.¹⁸

As noted previously, society considers probation as an alternative to sentencing.¹⁹ An increasing number of states, however, are treating probation as a sentence.²⁰ Additionally, courts are reconsidering their

defendant in leading a law-abiding life."); COLO. REV. STAT. § 16-11-204(1) (1986) and N.Y. PENAL LAW § 65.10(1) (Consol. 1984 & Supp. 1988) (conditions shall ensure and assist the defendant in leading a law-abiding life.)

18. ABA STANDARD RELATING TO PROBATION 27 (Approved Draft 1970).

Regarding item (iii), *see also* U.S. Dept. of Justice, Law Enforcement Assistance Administration, COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS (2d ed. June 1975) at 111 [hereinafter COMPENDIUM] (probation and community supervision offers more hope than institutionalization because the defendant will not enter the depressing cycle which makes the prison gates resemble a revolving door rather than a barrier to crime). *See also* PROBATION IN PRACTICE, *supra* note 13, at 2 (incarceration is not the best primary punishment technique given overcrowded prison conditions, staggering economic costs and harmless defendants to the community).

19. *See, e.g.,* Pickett v. Boykin, 118 Ariz. 261, 262, 576 P.2d 120, 121 (1978) (probation is not a sentence but a suspension of imposition of a sentence); Freeman v. State, 382 So.2d 1307, 1308 (Fla. App. 1980); State v. Pietrowski, 136 N.J. Super. 383, 346 A.2d 427, 429 (1975) ("[t]here is a clear distinction between a sentence and a condition of probation").

Most statutes treat probation as an alternative applied after suspending a sentence or in lieu of imposing one. *See e.g.,* ALA. CODE § 15-22-50 (1982 & Supp. 1988) (circuit and district courts have the authority to suspend sentence and place convicted person on parole); GA. CODE ANN. § 42-8-34(c) (1985 & Supp. 1988) (court can put defendant on probation if he is not likely to engage in criminal acts); MISS. CODE ANN. § 47-7-33 (1981) (probation allowed if it serves the ends of justice and is in the best interest of the public and the defendant). *See also supra* note 13 and accompanying text.

20. *See, e.g.,* DEL. CODE ANN. tit. 11, § 4302(13) (1987) ("probation" means sentencing an offender, without imprisonment, by judgment of the court following establishment of guilt); ILL. ANN. STAT. ch. 38, para. 1005-5-3(b)(1) (Smith-Hurd 1982 & Supp. 1988) (probation is an appropriate disposition); KAN. CRIM. CODE ANN. § 21-

views on probation.²¹

The distinction between probation as a sentencing alternative and probation as a sentence itself is important.²² A sentence is the punishment or penalty society exacts from a convicted defendant for his crime. The traditional rationales for punishing criminal behavior are retribution, deterrence, incapacitation and rehabilitation.²³ Thus, if courts use probation as a sentence, its function must expand to include retribution and deterrence as well as its traditional goals of rehabilitation and public protection.

While courts traditionally neither viewed nor applied probation as a punishment²⁴ this attitude has changed. In 1982, commentator James Weissman identified four "converging influences" that modify probation's traditional functions.²⁵ The trend of these modifications is to treat probation as a sentence. These influences and their impact on probation include: 1) replacing the "rehabilitative ideal" in the criminal justice system with "sentencing values advocating retribution" re-

4603(2) (Vernon 1971 & Supp. 1989) (dispositions available to the court after conviction are imprisonment, fine or probation); NEB. REV. STAT. § 29-2246(4) (1985) ("Probation shall mean a sentence under which a person found guilty of a crime . . . is released by a court subject to conditions imposed by the court and subject to supervision."); N.H. REV. STAT. ANN. § 651:2(I) (1986 & Supp. 1988) ("A person convicted of a felony or misdemeanor may be sentenced to imprisonment, probation, conditional or unconditional discharges, or a fine."); N.J. STAT. ANN. § 2C:43-2(b) (West 1982 & Supp. 1988) (except where prohibited, a court may sentence a person convicted of an offense to pay a fine or make restitution and to go on probation or face imprisonment).

21. See, e.g., *Epps v. Levine*, 457 F. Supp. 561, 570 (D. Md. 1978) (state courts can still transfer pretrial detainees to the state correctional division).

22. "There is a clear distinction between a sentence and a condition of probation (citation omitted). A sentence may be imposed for one or more of the following purposes: (a) to punish; (b) to deter similar criminal acts; (c) to protect society; or (d) to rehabilitate. [Probation's] underlying concept is rehabilitation." *Freeman v. State*, 382 So. 2d 1307, 1308 (Fla. Dist Ct. App. 1980).

23. *Montgomery & Dillingham*, *supra* note 13, at 3.

24. See *Viel v. Potter*, 20 Conn. Supp. 173, 129 A.2d 230 (1957) in which the court stated:

[p]robation is not ordered for the purpose of punishment for the wrong for which there has been a conviction or for general wrongdoing. Its aim is reformatory and not punitive. It is to bring one who has fallen into evil ways under oversight and influences which may lead him to a better living. The end sought is the good of the individual wrongdoer, and not his punishment.

Id. at 176-77, 129 A.2d at 232.

25. Weissman, *Constitutional Primer on Modern Probation Conditions*, 8 NEW ENG. J. ON PRISON L. 367 (1982).

sulting in probation becoming a "just deserts" sanction;²⁶ 2) prominent proposals by the American Bar Association²⁷ and the Uniform Law Commissioner²⁸ making probation the preferred sentencing option over incarceration;²⁹ 3) prison overcrowding and consequent litigation resulting in the creation and imposition of specialized probation condi-

26. *Id.* at 367-68. The court, in *United States v. William Anderson Co.*, 698 F.2d 911, 913 (8th Cir. 1982), implicitly equated probation with punishment and stated that "[t]he deterrent effect of punishment is heightened if it inflicts disgrace and contumely in a dramatic and spectacular manner." *Id.* *United States v. Missouri Valley Construction Company*, 741 F.2d 1542 (8th Cir. 1984), overruled the *William Anderson* case. The *Missouri Valley* court carefully pointed out the continuing validity of *William Anderson's* general analysis of probation. *Id.* at 1550. See *Goldschmitt v. State*, 490 So. 2d 123 (Fla. App. Dist Ct. 1986) (although decided two years after *William Anderson* was overruled, the decision relied heavily on the *William Anderson* philosophy).

27. American Bar Association, *Sentencing Alternatives and Procedures in STANDARDS FOR CRIMINAL JUSTICE* § 18-2.3(a) & (d) (2d ed. 1980 & Supp. 1986). These sections provide:

(a) The legislature should authorize the sentencing authorities to consider a sentence of probation or a similar sentence not involving confinement for all crime categories. As used in these standards, the term "probation" means a sentence not involving confinement which imposes conditions and retains authority in the sentencing court to modify the conditions of the sentence or to resentence the offender if its conditions are violated.

. . .

(d) Probation conditions should not be required by statute, other than for the general condition that the probationer lead a law-abiding life during the period of probation. The sentencing court should be authorized to individualize the conditions of probation to fit the circumstances of each case. Development of standard probation conditions and guidelines concerning their use is desirable and should be addressed . . . , but the sentencing court should not mechanically impose the same conditions in all cases.

Id.

28. National Conference of Commissioners on Uniform State Laws, *MODEL SENTENCING AND CORRECTIONS ACT* § 3-102(4) (1979). Section 3-102(4) provides that: Sentences not involving confinement should be preferred unless:

(i) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(ii) confinement is necessary to avoid deprecating the seriousness of the offense or justly to punish the defendant;

(iii) confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses;

(iv) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant; or

(v) the purposes of this Article would be fulfilled only by a sentence involving confinement.

Id.

29. Weissman, *supra* note 25, at 368. See also *supra* note 18 and accompanying text for 1970 A.B.A. Standards Relating to Probation.

tions such as weekend jail confinement,³⁰ commitment to a halfway house,³¹ and stricter reporting requirements³² which increase the court's capacity to monitor a probationer's activities and grant probation to perpetrators of more serious crimes,³³ and, 4) increased prosecution of white-collar crime and effective punishment for these "non-traditional criminals" leading to creative sentencing, usually probation with reparation conditions such as fines, restitution and community service.³⁴

The Federal Sentencing Reform Act of 1984³⁵ illustrates this trend

30. See, e.g., W. VA. CODE § 62-12-9 (intermittent jail confinement provision).

31. See, e.g., CONN. GEN. STAT. ANN. § 53a-30(a)(8) (West 1985 & Supp. 1988) ("reside in a residential community center or halfway house approved by the commissioner of correction, and contribute to the cost incident to such residence.")

32. See, e.g., LA. CODE CRIM. PROC. ANN. art 895(a)(1) (West 1969 & Supp. 1989) (defendant shall make a full and truthful report at the end of each month).

33. Weissman, *supra* note 25, at 369. See, e.g., S.C. CODE ANN. §§ 24-21-430(9) and (11) (Law. Co-op 1989) (probationer may have to submit to curfew restrictions or intensive surveillance which may include surveillance by electronic means). Many states include provisions permitting the court to require confinement in either a jail or halfway house. See, e.g., ALASKA STAT. § 12.55.086 (1984); ILL. ANN. STAT. ch. 38, para. 1005-6-3(b)(1) and (5) (Smith-Hurd 1982 & Supp. 1988); IND. CODE ANN. § 35-38-2-2(a)(3) (Burns 1985 & Supp. 1988); MICH. COMP. LAWS ANN. § 771.3(2)(a) (West 1982 & Supp. 1988). Statutes also include provisions allowing courts to require probationers to remain within the court's jurisdiction unless allowed to leave by the court or probation officer. See, e.g., HAW. REV. STAT. § 706-624(1)(c) (1985 & Supp. 1987); see also *infra* note 53 and accompanying text.

Prison overcrowding is such a problem that states are forced to find alternate sites for incarceration facilities. See *The far shore of America's bulging prisons*, 105 U.S. NEWS & WORLD REPORT 11 (November 14, 1988). (States utilize barges in the middle of rivers, temporary canvas tents, trailers, and converted schools and hospitals to house inmates). The article notes the U.S. prison population will reach one million before 1990. *Id.*

Another factor is the expense of housing inmates. A recent article estimates the annual cost of housing one inmate is around \$20,000. In contrast, community monitoring and probation costs roughly \$3,600 per person per year. ALTERNATIVE SENTENCING, 73 A.B.A. J. 32 (November 1, 1987).

34. Weissman, *supra* note 25, at 369-70. See, e.g., *United States v. Carlston*, 562 F. Supp. 181, 182-83 (N.D. Cal. 1983) (convicted tax evader required to purchase computers and teach probationers and parolees how to use them.). See also *United States v. William Anderson Co.*, 698 F.2d 911, 913 (8th Cir. 1982) (the court mentioned, with approval, a case in which corporate antitrust defendants were placed on probation and required to address civic groups about the evils of price-fixing).

35. Pub. L. No. 98-473, 98 Stat. 1837, 1987 (codified at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3672, 28 U.S.C. §§ 991-998 (Supp. III 1985)) (§ 3656 redesignated at 18 U.S.C. § 3672). This Act, effective on November 1, 1987, replaces the Federal Probation Act, 18 U.S.C. §§ 3651-3656 (1982).

toward viewing probation as a sentence. The Act treats probation as a sentence rather than a sentencing alternative.³⁶ Sentences and, by implication, probation must:

reflect the seriousness of the offense, . . . promote respect for the law and provide just punishment for the offense, . . . afford adequate deterrence to criminal conduct, . . . protect the public from further crimes of the defendant, . . . [and] provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.³⁷

Thus, changing attitudes on probation suggest that, although rehabilitation remains a driving force, probation is evolving into a broad, flexible means of dispensing criminal justice. Likewise, criminal justice philosophy is expanding the use of probation as an affirmative correctional device and sentence.³⁸

SECTION III — PROBATION STATUTES AND CONDITIONS

Statutes grant courts broad discretion in determining whether proba-

36. 18 U.S.C. § 3551(b) (Supp. III 1985) ("An individual found guilty of an offense shall be sentenced . . . to . . . a term of probation. . . ."); see also S. Rep. No. 225, 98th Cong., 2d Sess. 88, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3271 ("In keeping with modern criminal justice philosophy, probation is described as a form of sentence rather than, as in current law, a suspension of the imposition or execution of sentence.")

37. 18 U.S.C. § 3553(a) (Supp. III 1985). A detailed discussion and analysis of the Federal Sentencing Reform Act is beyond the scope of this Recent Development. For a brief general discussion of the Act, see PROJECT Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987: *IV Sentencing, Probation, and Parole*, 76 GEO. L.J. 1073, 1166-82 [hereinafter PROJECT] (1988). Compare traditional sentencing goals discussed *infra* notes 22 & 23 and accompanying text with PROJECT at 1166-74 presenting a modern view on probation.

A new California statute reflects broader probation functions. CAL. PENAL CODE § 1203.1 (West 1982 & Supp. 1989). Under the statute, a California court granting probation "may impose and require any . . . reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of law, for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer." *Id.* See also HAW. REV. STAT. § 706-606 (1985 & Supp. 1987) (sentence for offense of murder).

38. "[P]robation can be imposed for purposes other than rehabilitation. By the use of appropriate conditions, probation can serve such legitimate goals as retribution, deterrence, and incapacitation." COHEN & GOBERT *supra* note 15, at 26. See also COMPENDIUM, *supra* note 18, at 111-1; *People v. McDowell*, 59 Cal. App. 3d 807, 812-13, 130 Cal. Rptr. 839, 843 (1976) (probation's advantage as an alternative to incarceration is that courts can tailor terms to fit the individual defendant.)

tion is an appropriate disposition for a particular defendant.³⁹ As a statutory creation derived solely from legislative "grace" which courts grant at their discretion,⁴⁰ probation is a privilege, not a right.⁴¹ In determining whether probation should apply in a particular case, judges resort to investigative presentence reports, usually prepared by the court's probation service, and statutory guidelines.

The presentence report is a detailed document that includes the defendant's history and background, the nature and circumstances surrounding the offense, the results of professional observation, physical and psychological examinations and other information to aid the judge's decision.⁴² The report may also include specific recommendations to the judge regarding potential probation conditions.⁴³ In some states, the presentence report is a statutory requirement that must be fulfilled prior to granting or denying probation.⁴⁴

Probation statutes grant courts broad discretion in deciding whether

39. See *State v. Darrin*, 325 N.W.2d 110 (Iowa 1982) (trial court granted wide discretion in granting probation subject only to provisions that the grant shall promote rehabilitation and community protection); *State v. Evans*, 127 N.H. 501, 504-05, 506 A.2d 695, 698 (1985) (trial court has broad discretion to grant probation in order to achieve goals of punishment, deterrence, safety and rehabilitation); See also *supra* note 11 for citations to probation statutes and *infra* notes 46 and 47 and accompanying text illustrating the discretion probation statutes offer judges.

40. *People v. Main*, 152 Cal. App.3d 686, 693, 199 Cal Rptr. 683, 686 (1984). Some view probation as a contract between the state and the probationer. Under this theory, probation offers exemption from incarceration if the defendant agrees to abide by the imposed conditions. By entering into the contract, the probationer may not later appeal the conditions. For many reasons, the Supreme Court rejected this theory and several circuit courts attacked it. Greenberg, *supra* note 7, at 57-60.

41. Weissman, *supra* note 25, at 371. See, e.g., *Main*, 152 Cal. App. 3d at 693, 199 Cal. Rptr. at 686 (legislature grants probation as a privilege, not a right); *State v. DeCourcy*, 224 Kan. 278, 280, 580 P.2d 86, 88 (1978) (probation is privilege, not a right). But see *People v. Free*, 112 Ill. App. 3d 449, 456, 445 N.E.2d 529, 534 (1983) (when a statute grants defendant eligibility for probation, trial court consideration of probation is mandatory).

42. Best & Birzon, *supra* note 16, at 814-15.

43. *Id.* at 815. See also DEL. CODE ANN. tit. 11, § 4332 (1987) ("The pre-sentence report may recommend conditions to be imposed by the court."); *People v. Dominguez*, 256 Cal. App. 2d 623, 625, 64 Cal. Rptr. 290, 292 (1967) ("The probation officer recommended that appellant be granted probation on specified conditions. . . .").

44. Best & Birzon, *supra* note 16, at 815. See, e.g., NEB. REV. STAT. § 176.135(1) (1987) which states:

"The department of parole and probation shall make a presentence investigation and report to the court on each defendant who pleads guilty or nolo contendere to or is found guilty of a felony. The report must be made before the imposition of sentence or the granting of probation. . . ."

to grant probation and what conditions to impose.⁴⁵ State legislatures often suggest factors a judge should consider before granting probation. These may be stated broadly, giving the judge near absolute discretion,⁴⁶ or may present detailed criteria.⁴⁷ Most state statutes clearly identify those defendants ineligible for probation. Frequently, ineligible defendants have committed crimes punishable by life imprisonment

Id. Presentence reports for misdemeanants are optional at the court's request. *Id.* at § 176.135(2).

45. See *supra* note 11 listing state probation statutes.

46. For example, Connecticut's statute provides:

The court may sentence a person to a period of probation upon conviction of any crime, other than a class A felony, if it is of the opinion that: (1) present or extended institutional confinement of the defendant is not necessary for the protection of the public; (2) the defendant is in need of guidance, training or assistance which, in his case, can be effectively administered through probation supervision; and (3) such disposition is not inconsistent with the ends of justice.

CONN. GEN. STAT. ANN. § 53a-29(a) (West 1985). See also FLA. STAT. ANN. § 948.01 (West 1985 & Supp. 1989) and GA. CODE ANN. § 42-8-34(c) (1985 & Supp. 1988) (probation is appropriate when the court believes the defendant is unlikely to repeatedly manifest criminal conduct and when the ends of justice and society's welfare do not require the defendant to suffer the penalty imposed by law).

47. Colorado's statute, for example, provides:

Criteria for granting probation. (1) The court, subject to the provisions of this title, in its discretion may grant probation to a defendant unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant, it is satisfied that imprisonment is the more appropriate sentence for the protection of the public because:

(a) There is undue risk that during a period of probation the defendant will commit another crime; or

(b) The defendant is in need of correctional treatment that can most effectively be provided by a sentence to imprisonment. . . ; or

(c) A sentence to probation will unduly depreciate the seriousness of the defendant's crime or undermine respect for the law; or

(d) His past criminal record indicates that probation would fail to accomplish its intended purposes; or

(e) The crime, the facts surrounding it, or the defendant's history and character when considered in relation to statewide sentencing practices relating to persons in circumstances substantially similar to those of the defendant do not justify the granting of probation.

(2) The following factors, or the converse thereof where appropriate, while not

or death.⁴⁸ Some statutes, however, encompass a broader class of ineligible criminals.⁴⁹

State probation statutes typically contain provisions regarding pro-

controlling the discretion of the court, shall be accorded weight in making determinations called for by subsection (1) of this section:

(a) The defendant's criminal conduct neither caused nor threatened serious harm to another person or his property;

(b) The defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property;

(c) The defendant acted under strong provocation;

(d) There were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct;

(e) The victim of the defendant's conduct induced or facilitated its commission;

(f) The defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained;

(g) The defendant has no history of prior criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(h) The defendant's conduct was the result of circumstances unlikely to recur;

(i) The character, history, and attitudes of the defendant indicate that he is unlikely to commit another crime;

(j) The defendant is particularly likely to respond affirmatively to probationary treatment;

(k) The imprisonment of the defendant would entail undo hardship to himself or his dependents;

(l) The defendant is elderly or in poor health;

(m) The defendant did not abuse a public position of responsibility or trust;

(n) The defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise;

(3) Nothing in this section shall be deemed to require explicit reference to these factors in a presentence report or by the court at sentencing.

COLO. REV. STAT. § 16-11-203 (1986). *See also* HAW. REV. STAT. § 706-621 (1985 & Supp. 1987) (enumerates "[f]actors to be considered in imposing a term of probation").

48. *See, e.g.*, FLA. STAT. ANN. § 948.01(1) (West 1985) (death); GA. CODE ANN. § 42-8-34(c) (1985 & Supp. 1988) and S.D. CODIFIED LAWS ANN. § 23A-27-12 (1988) (death or life imprisonment); KY. REV. STAT. ANN. § 533.010(1) (Michie/Bobbs-Merrill 1985) (probation appropriate for any person not sentenced to death); N.C. GEN. STAT. § 15A-1341(a) (1988) (life imprisonment).

49. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-604 (1978 & Supp. 1988) (dangerous repetitive offenders); ARK. STAT. ANN. § 5-4-301(a) (1987) (defendants guilty of capital murder, first and second degree murder, first degree rape, kidnapping, aggravated robbery or previously convicted of two or more felonies); COLO. REV. STAT. § 16-11-201(2) (1986) (twice convicted felons, persons convicted of class 1 felony or class 2 petty offense); CAL. PENAL CODE § 1203.06 (West 1982 & Supp. 1989) (extensive list of persons ineligible for probation); IDAHO CODE § 19-2601 (1987) (persons convicted for treason or murder); MICH. COMP. LAWS ANN. § 771.1(1) (West 1982 & Supp. 1988) (defendants convicted of murder, treason, first or third degree criminal sexual assault, armed robbery or major controlled substance offenses).

bation conditions and give trial courts broad discretion in determining conditions to impose.⁵⁰ Most statutes list conditions from which the court must choose. In its discretion, the court may choose any combination, or all, of the conditions.

A. *General Conditions*

Many state legislatures drafted and enacted probation statutes with rehabilitation as the goal. Therefore, many enumerated conditions serve to assist the probationer in reforming and becoming a productive citizen.⁵¹ Additionally, the conditions assist the probation service or

50. See: ALA. CODE § 15-22-52 (1982); ALASKA STAT. § 12.55.100 (1984); ARIZ. REV. STAT. ANN. § 13-901 (1978 & Supp. 1988); ARK. STAT. ANN. § 5-4-303 (1987); CAL. PENAL CODE § 1203.1 (West 1982 & Supp. 1989); COLO. REV. STAT. § 16-11-204 (1986 & Supp. 1988); CONN. GEN. STAT. ANN. § 53a-30 (West 1985 & Supp. 1988); DEL. CODE ANN. tit. 11, § 4332 (1987); FLA. STAT. ANN. § 948.03 (West 1985 & Supp. 1989); GA. CODE ANN. § 42-8-35 (1985); HAW. REV. STAT. § 706-624 (1985 & Supp. 1987); IDAHO CODE § 19-2601(2) (1987); ILL. ANN. STAT. ch. 38, para. 1005-6-3 (Smith-Hurd 1982 & Supp 1988); IND. CODE ANN. § 35-38-2-2 (Burns 1985 & Supp. 1988); IOWA CODE ANN. § 907.6 (West 1979 & Supp. 1988); KAN. CRIM. CODE ANN. § 21-4610 (Vernon 1971 & Supp. 1989); KY. REV. STAT. ANN. § 533.030 (Michie/Bobbs-Merrill 1985 & Supp. 1988); LA. CODE CRIM. PROC. ANN. art. 895 (West 1969 & Supp. 1989); ME. REV. STAT. ANN. tit. 17-A, § 1204 (1983 & Supp. 1988); MD. ANN. CODE § 27-641 (1988 & Supp.); MASS. ANN. LAWS ch. 279, §§ 1, 1A (Law. Co-op. 1980 & Supp. 1988); MICH. COMP. LAWS ANN. § 771.3 (West 1982 & Supp. 1988); MINN. STAT. ANN. § 609.135 (West 1987 & Supp. 1989); MISS. CODE ANN. § 47-7-35 (1981 & Supp. 1988); MO. ANN. STAT. § 599.021 (Vernon 1979 & Supp. 1989); MONT. CODE ANN. §§ 46-18-201-202 (1985); NEB. REV. STAT. § 29-2262 (1985); NEV. REV. STAT. § 176.185 (1987); N.H. REV. STAT. ANN. § 651:2(v) (1986 & Supp. 1988); N.J. STAT. ANN. § 2C:45-1 (West 1982 & Supp. 1988); N.M. STAT. ANN. § 31-20-6 (Supp. 1988); N.Y. PENAL LAW § 65.10 (Consol. 1984 & Supp. 1988); N.C. GEN. STAT. § 15A-1343 (1988); N.D. CENT. CODE § 12.1-32-07 (1985); OHIO REV. CODE ANN. § 2951.02 (Anderson 1987 & Supp. 1988); OKLA. STAT. ANN. tit. 22, § 991a (West 1987 & Supp. 1989); OR. REV. STAT. ANN. § 137.540 (1984); 42 PA. CONS. STAT. ANN. § 9754 (Purdon 1982 & Supp. 1988); RI. GEN. LAWS § 12-19-8 (1981); S.C. CODE ANN. § 24-21-430 (Law. Co-op. (1988); S.D. CODIFIED LAWS ANN. §§ 23A-27-18.1 - 18.3 (1988); TENN. CODE ANN. § 40-35-303 (1982 & Supp. 1988); TEX. CRIM. PROC. CODE ANN. § 42.12(6) (Vernon 1979 & Supp. 1989); UTAH CODE ANN. § 77-18-1(5) (1982 & Supp. 1988); VT. STAT. ANN. tit. 28, § 252 (1986); VA. CODE ANN. § 19.2-305 (1983 & Supp. 1988); WASH. REV. CODE ANN. § 9.95.210 (West 1988); W. VA. CODE § 62-12-9 (1989); WIS. STAT. ANN. § 973.09 (West 1985 & Supp. 1988); WYO. STAT. §§ 7-13-301-302 (1987).

51. See, e.g.: ALA. CODE § 15-22-52(1) (1982) and GA. CODE ANN. § 42-8-35(1) (1985) (avoid injurious or vicious habits); KAN. CRIM. CODE ANN. § 21-4610(3)(b) (Vernon 1971 & Supp. 1989) and N.Y. PENAL LAW § 65.10(2)(b) (Consol. 1984) (avoid disreputable persons or places); ARK. STAT. ANN. § 5-4-303(c)(2) (1987) and ME. REV. STAT. ANN. tit. 17-A, § 1204(2-A)(C) (1983) (work faithfully at suitable and approved employment); ALASKA STAT. § 12.55.100(a)(3) (1984) (support his or her dependents);

court in monitoring the probationer to ensure that he leads a law-abiding life.⁵² Under certain conditions, the court may exercise control over the defendant's mobility.⁵³ Some conditions require the probationer to compensate the victim or society for losses suffered as a result

CONN. GEN. STAT. ANN. § 53a-30(a)(7) (West 1985 & Supp. 1989) and NEB. REV. STAT. § 29-2262(2)(a) (1985) (abstain from further crimes); IND. CODE ANN. § 35-38-2-2-(a)(1) (Burns 1985 & Supp. 1988) and 42 PA. CONS. STAT. ANN. § 9754(c)(4) (Purdon 1982) (pursue a prescribed course of secular study); COLO. REV. STAT. § 16-11-204(2)(g) (1986) and HAW. REV. STAT. § 706-624(2)(i) (1985 & Supp. 1987) (abstain from alcohol or drugs); N.Y. PENAL LAW § 65.10(2)(d)(e) (Consol. 1984) and OR. REV. STAT. § 137.540(2)(c), (1984) (undergo medical or psychological treatment including drug and alcohol treatment); ARK. STAT. ANN. § 5-4-303(c)(7) (1987) and LA. CODE CRIM. PROC. ANN. art. 895(A)(6) (West 1969 & Supp. 1989) (do not possess firearms or dangerous weapons). For states that impose some unique conditions, see: OR. REV. STAT. § 137.540(2)(i) (1984) (take antabuse, a drug used to treat alcoholism, if medically approved); TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6(a)(19) (Vernon 1979 & Supp. 1989) (participate in a program that teaches functional illiterates to read); LA. CODE CRIM. PROC. ANN. art. 895(A)(10) (West 1969 & Supp. 1989) (enroll in and pay for an approved reading program if unable to read English).

52. See, e.g., FLA. STAT. ANN. § 948.03(1)(b) (West 1985 & Supp. 1989) and S.C. CODE ANN. § 24-21-430(4) (Law. Co-op. 1989) (permitting the probation officer to visit the probationer at home, work, or elsewhere); COLO. REV. STAT. § 16-11-204(2)(k) (1986) and KY. REV. STAT. ANN. § 533.030(2)(k) (Michie/Bobbs-Merrill 1985 & Supp. 1988) (answer all reasonable inquiries); CAL. PENAL CODE § 1203.1 (West 1982 & Supp. 1989) (keep track of earnings and report them to the probation officer); OR. REV. STAT. § 137.540(2)(e),(j) (1984) and S.C. CODE ANN. § 24-21-430(8) (Law. Co-op. 1989) (submit to drug or alcohol testing through breath analysis, blood tests, or urinalysis); HAW. REV. STAT. § 706.624(1)(e) (1985 & Supp. 1987) (notify the probation officer if arrested or questioned by a law enforcement officer); LA. CODE CRIM. PROC. ANN. art. 895(A)(1) (West 1969 & Supp. 1988) (make full and truthful monthly report of activities); N.C. GEN. STAT. § 15A-1343(b1)(7) (1988) and N.D. CENT. CODE § 12.1-32-07(2)(o) (1985) (submit to warrantless searches to car or premises); OR. REV. STAT. ANN. § 137-540(2)(b) (1984) (and submit to polygraph tests).

53. These conditions allow courts to grant probation to more serious offenders. See *supra* notes 30-33 and accompanying text (illustrating such probation conditions). For examples of mobility restricting conditions, see: ALA. CODE § 15-22-52(6) (1982), KAN. CRIM. CODE ANN. § 21-4610(3)(f) (Vernon 1971 & Supp. 1989) and IND. CODE ANN. § 35-38-2-2(a)(11) (Burns 1985 & Supp. 1988) (defendant must remain within the court's jurisdiction or in a specified place); IND. CODE ANN. § 35-38-2-2(c) (Burns 1985 & Supp. 1988) and N.C. GEN. STAT. § 15A-1343(b1)(2) (1988) (remain confined to a jail or halfway house for a period of time or intermittently); IND. CODE ANN. § 35-38-2-2(a)(12) (Burns 1985 & Supp. 1988) and ME. REV. STAT. ANN. tit. 17-A, § 1204(2-A)(H) (1983) (notify the court or probation officer of changes in address or employment); HAW. REV. STAT. § 706-624(2)(p) (1985 & Supp. 1987) and N.H. REV. STAT. ANN. § 651:2(v) (1986 & Supp. 1988) (remain under house arrest); S.C. CODE ANN. § 24-21-430(9) (Law. Co-op. 1989) (submit to curfew restrictions); CAL. PENAL CODE § 1203.016 (West 1982 & Supp. 1989); N.H. REV. STAT. ANN. § 651:2(v) (1986 & Supp. 1988), S.C. CODE ANN. § 24-21-430(11) (Law. Co-op. 1989) (submit to intensive surveillance or electronic monitoring).

of the criminal act.⁵⁴ Other conditions reflect contemporary legislative concerns.⁵⁵ While most legislatures grant the judge broad discretion to determine which conditions to impose, some jurisdictions require the judge to impose certain conditions on all probationers.⁵⁶ Alternatively,

54. *See, e.g.*, KAN. CRIM. CODE ANN. § 21-4610(3)(g),(4)(b) (Vernon 1971 & Supp. 1989) and N.C. GEN. STAT. § 15A-1343(b)(9) (1988)(defendant must pay court costs and/or probation fees); ARIZ. REV. STAT. ANN. § 13-901(A) (1978 & Supp. 1988) and MO. ANN. STAT. § 559.021.2(1) (Vernon 1979 & Supp. 1989)(pay restitution or perform reparation to the victim); FLA. STAT. ANN. § 948.031 (West 1985 & Supp. 1989) and MD. ANN. CODE § 27-641(a)(1)(i) (1988 & Supp. 1988)(perform community service); NEV. REV. STAT. § 176.189(1) (1987)(pay for the victim's medical or psychological treatment necessitated by the defendant's crime); ILL. ANN. STAT. ch. 38, para. 1005-6-5(b)(12) (Smith-Hurd 1982 & Supp. 1988) and N.M. STAT. ANN. § 31-20-6(E) (1988)(reimburse local anti-crime program for costs incurred in the defendant's arrest or contribute to a local anti-crime program); OKLA. STAT. ANN. tit. 57, § 991a(A)(1)(F) (West 1987 & Supp. 1989) and UTAH CODE ANN. § 77-18-1(5)(b) (1982 & Supp. 1988)(reimburse the state general fund for counsel/defense provided); S.D. CODIFIED LAWS ANN. § 23A-27-18.3 (1988)(pay for the defendant's own medical, psychological, or substance abuse treatment); WASH. REV. CODE ANN. § 9.95.210(4) (West 1988)(contribute to local or county drug fund); CONN. GEN. STAT. ANN. § 53a-30(a)(6) (West 1985 & Supp. 1988) and KY. REV. STAT. ANN. § 533.030(2)(e) (Michie/Bobbs-Merrill 1985 & Supp. 1989)(or post bond conditioned on performance of the conditions).

55. In the wake of the AIDS epidemic, some states permit or require the defendant to submit to and pay for confidential AIDS testing. *See, e.g.*, ILL. ANN. STAT. ch. 38, para. 1005-5-3(g),(h) (Smith-Hurd 1982 & Supp. 1988); IND. CODE ANN. § 35-38-2-2(a)(16) (Burns 1985 & Supp. 1988).

56. *See, e.g.*, ARK. STAT. ANN. § 5-4-303(b) (1987) and COLO. REV. STAT. ANN. § 16-11-204(1) (1986)(defendant must not commit another crime); HAW. REV. STAT. § 706-624(1)(b) (1985 & Supp. 1987) and N.C. GEN. STAT. § 15A-1343(b)(3) (1988)(report to probation officer as directed); MICH. COMP. LAWS ANN. § 771.3(1)(b) (West 1982 & Supp. 1988) and OHIO REV. CODE ANN. § 2951.02(C) (Anderson 1987 & Supp. 1988)(not leave the state unless granted permission); HAW. REV. STAT. § 706-624(1)(d) (1985 & Supp. 1987) and OR. REV. STAT. § 137.540(1)(g) (1984)(notify the probation officer or court prior to or of changes in addresses or employment); HAW. REV. STAT. § 706-624(1)(e) (1985 & Supp. 1987)(notify the probation officer if arrested or questioned by a law enforcement officer); ILL. ANN. STAT. ch. 38, para. 1005-6-3(a)(5) (Smith-Hurd 1982 & Supp. 1988)(permit the probation officer to visit the defendant at home or elsewhere); COLO. REV. STAT. ANN. § 16-11-204(1) (1986) and OR. REV. STAT. § 137.540(1)(k) (1984)(refrain from possessing any firearms or dangerous weapons); KAN. CRIM. CODE ANN. § 21-4610(4)(b) (Vernon 1971 & Supp. 1989) and TENN. CODE ANN. § 40-28-201(a)(1) (1982 & Supp. 1988)(pay probation fee); KAN. CRIM. CODE ANN. § 21-4610(4)(c) (Vernon 1971 & Supp. 1989) and OR. REV. STAT. ANN. § 137.540(1)(k) (1984)(reimburse the state for counsel/defense expenses); N.Y. PENAL LAW § 65.10(3)(c) (Consol. 1984) and N.C. GEN. STAT. § 15A-1343(b)(3) (1988)(answer all reasonable inquiries); N.C. GEN. STAT. § 15A-1343(b)(7),(8) (1988)(work faithfully at suitable employment and notify the probation officer if unable to find a job); N.C. GEN. STAT. § 15A-1343(b)(9) (1988) and OR. REV. STAT. § 137.540(1)(k) (1984)(pay court costs); N.C. GEN. STAT. § 15A-1343(b)(9) (1988)(pay a fine); LA.

some statutes require the judge to impose certain conditions on the perpetrators of specifically enumerated crimes.⁵⁷

B. "Other" or "Special" Conditions

Many statutes include a provision that the defendant "satisfy any other conditions reasonably related to his rehabilitation and the purposes of probation."⁵⁸ This provision allows the trial judge to create and impose individualized conditions, such as 'scarlet letter' conditions. The court's discretion is limited only by the "reasonableness" requirement.⁵⁹ To fulfill this requirement, special conditions need

CODE CRIM. PROC. ANN. art. 895(A)(1) (West 1969 & Supp. 1989) and OR. REV. STAT. § 137.540(1)(d) (1984)(make full and truthful reports each month); OR. REV. STAT. § 137.540(1)(i) (1984) and VA. CODE ANN. § 19.2-303 (1983 & Supp. 1988)(submit to fingerprinting and photographing); N.M. STAT. § 31-20-6(E) (1988)(reimburse law enforcement agency or local crime-stopper program for any reward paid by the agency or program for information leading to the defendant's arrest, prosecution or conviction).

57. For example, California requires defendants convicted of certain sex offenses to totally abstain from alcohol if alcoholism or intoxication was manifest when the defendant committed the offense. CAL. PENAL CODE. § 1203.02 (West 1982). Maryland requires convicted drunk drivers to participate in an alcohol treatment or education program. MD. CODE ANN. § 27-641(a)(1)(ii)(1) (1988 & Supp.). Similarly, Nebraska requires mandatory counseling when the offender is guilty of assault and battery and the victim is the defendant's spouse. NEB. REV. STAT. § 29-2262(3) (1985).

58. COLO. REV. STAT. § 16-11-204(2)(1) (1986). See also ARK. STAT. ANN. § 5-4-303(c)(10) (1987), N.J. STAT. ANN. § 2C:45-1(b)(12) (West 1982 & Supp. 1988); and 42 PA. CONS. STAT. ANN. § 9754(c)(13) (Purdon 1982) (each statute provides that the defendant must "satisfy any other conditions reasonably related to rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience"); TENN. CODE ANN. § 40-35-303(c)(9) (1982 & Supp. 1988) ("satisfy any other conditions reasonably related to rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience or otherwise prohibited by this chapter"); CONN. GEN. STAT. ANN. § 53a-30(a)(9) (West 1985 & Supp. 1988), IND. CODE ANN. § 35-38-2-2(a)(14) (Burns 1985 & Supp. 1988), N.Y. PENAL LAW § 65.10(2)(1) (Consol. 1984 & Supp. 1988), N.C. GEN. STAT. § 15A-1343(b1)(10) (1988) and VT. STAT. ANN. tit. 28, § 252(b)(13) (1986) (statutes provide that the defendant must "satisfy any other conditions reasonably related to his rehabilitation"); HAW. REV. STAT. § 706-624(2)(n) (1985 & Supp. 1987) (satisfy other reasonable conditions as the court may impose); ME. REV. STAT. ANN. tit. 17-A, § 1204(2-A)(M) (1983) (satisfy any other conditions reasonably related to the rehabilitation of the convicted person or the public safety or security); OR. REV. STAT. § 137.540(2) (1984) ("In addition to [mandatory enumerated] general conditions, the court may impose special conditions of probation for the protection of the public or reformation of the offender, or both, including but not limited to [further enumerated conditions]").

59. See *infra* note 83 and accompanying text for an articulation of the general factors for reasonableness.

careful planning to meet the defendant's needs.⁶⁰ Examples of such conditions include requiring the probationer to: post signs on his residence and any vehicle he operates stating "DANGEROUS SEX OFFENDER — NO CHILDREN ALLOWED;"⁶¹ affix bumper stickers to his car reading "CONVICTED D.U.I. — RESTRICTED LICENSE;"⁶² refrain from sexual intercourse with anyone other than his spouse;⁶³ wear taps on the soles and heels of his shoes;⁶⁴ speak to civic groups on the evils of price fixing;⁶⁵ publish apologies in local newspapers with a recitation of the offense(s);⁶⁶ and attend church weekly.⁶⁷

SECTION IV — JUDICIAL REVIEW OF CONSTITUTIONALLY CHALLENGED PROBATION CONDITIONS

The traditional standard of review for any probation condition is

60. *United States v. Tonry*, 605 F.2d 144, 148 (5th Cir. 1979). Indeed, this is one of the benefits of a court's discretion to impose special conditions. *See People v. McDowell*, 59 Cal. App. 3d 807, 812-13, 130 Cal. Rptr. 839, 843, (1976) ("One of the advantages of probation . . . is that its terms can be tailored by the court to fit the individual defendant."). *See also infra* note 75 (further discussion of *Tonry*).

61. *Silverman*, *supra* note 3 at 8. *See infra* notes 146-56 and accompanying text for discussion of this case.

62. *Goldschmitt v. State*, 490 So. 2d 123, 124 (Fla. Dist. Ct. App.), *rev. denied*, 496 So. 2d 142 (Fla. 1986). *See infra* note 116-25, 130-33 and accompanying text for discussion of this case.

63. *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980). *See infra* note 144 discussing this case.

64. *People v. McDowell*, 59 Cal. App. 3d 807, 130 Cal. Rptr. 839 (1976). For discussion of this case, *see infra* notes 134-42 and accompanying text.

65. *See United States v. William Anderson Co., Inc.*, 698 F.2d 911, 913 (8th Cir. 1982).

66. *See Alternative Sentencing*, A.B.A. J., November 1, 1987, at 32. *See infra* notes 156-60 and accompanying text for a description of this condition in practice.

67. *Commonwealth v. Kuhn*, 327 Pa. Super. 72, 83, 475 A.2d 103, 108 (1984). In *Kuhn*, the Pennsylvania Superior Court did not strike down the condition that the defendant attend church services. Rather, the court issued a warning to the state's trial courts that such conditions may violate the first amendment, convicted *Kuhn*, a chronic alcoholic, of burglary, theft, and causing or risking a catastrophe and sentenced him to fifteen years probation. The sentencing judge stated that the purpose of the church attendance condition would keep the defendant "within the light you have seen." *Id.* The defendant did not appeal this condition. Nevertheless, the appeals court addressed the condition's constitutionality with a cautionary note to trial courts, that such a requirement probably violates the first amendment establishment clause. The court pointed out that neither the possible effectiveness of the condition nor its general nature (i.e., defendant could attend any church) were enough to legitimize it. *Id.*

reasonableness.⁶⁸ The condition must be reasonably related to the crime committed, the defendant's rehabilitation, or the public safety. Courts apply this standard even when the defendant raises a constitutional challenge to the imposed condition.⁶⁹ Generally, courts will uphold conditions impinging on constitutionally protected rights if the condition is reasonably related to the crime committed or the defendant's future criminality.⁷⁰

A probationer's status lies somewhere between a prison inmate and a free citizen.⁷¹ Whether probation is itself a sentence or it is granted upon suspension of a sentence, the probationer remains a convicted criminal. Therefore, probation may include conditions that would fail to pass constitutional muster if the government attempted to impose them on the citizenry at large. For example, state and federal courts uphold conditions restricting probationers' freedom of speech and association,⁷² freedom from warrantless searches,⁷³ right to earn a living in one's chosen career⁷⁴ and the right to hold political office.⁷⁵ The "rea-

68. See *State v. Macy*, 403 N.W.2d 743, 745 (S.D. 1987) ("The test is one of reasonableness"); *In re White*, 97 Cal. App. 3d 141, 146-48, 158 Cal. Rptr. 562, 565-66 (1979) ("There is an overall requirement of reasonableness in relation to the seriousness of the offense for which the defendant is convicted. . . . There is no exact formula for the determination of reasonableness. Each case must be decided on its own atmosphere").

69. For a discussion of reasonableness and constitutionality, see *infra* notes 70, 73-76 and 86-145 and accompanying text.

70. See, e.g., text accompanying *supra* note 91. See also *Young v. State*, 286 Ark. 413, 418, 692 S.W.2d 752, 755 (1985), *cert. denied*, 474 U.S. 1070 (1986) (a probation condition is not necessarily invalid simply because it restricts a probationer's ability to exercise constitutionally protected rights as conditions are upheld if they bear a reasonable relationship to the crime committed or to future criminality).

71. See text accompanying *infra* notes 108-09.

72. *Commonwealth v. McBride*, 289 Pa. Super. 396, 399, 433 A.2d 509, 511 (1981); *United States v. Lowe*, 654 F.2d 562 (9th Cir. 1981); *Porth v. Templar*, 453 F.2d 330 (10th Cir. 1971); *Malone v. United States*, 502 F.2d 554 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975). See *infra* note 101 regarding first amendment protections.

73. *State v. Gawron*, 112 Idaho 841, 736 P.2d 1295 (1987); *State v. Lingle*, 209 Neb. 492, 502, 308 N.W.2d 531, 537 (1981); *State v. Culbertson*, 29 Or. App. 363, 563 P.2d 1224 (1977); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *United States v. Williams*, 787 F.2d 1182 (7th Cir. 1986). *But see State v. Gawron, supra*, at 1299 (Bistline, J., dissenting) (warrantless searches are a great infringement on probationer's rights); *United States v. Boatwright*, 822 F.2d 862 (9th Cir. 1987) (warrantless search invalid as no independent search would have occurred).

Warrantless search conditions arguably violate the fourth amendment which guarantees in pertinent part "[t]he right . . . to be secure . . . against unreasonable searches and seizures, . . ." U.S. CONST. amend. IV.

74. *McPike v. State*, 473 So. 2d 291, 292-93 (Fla. Dist. Ct. App. 1985). In *McPike*, the court found the defendant, a licensed physician, guilty of 22 counts of grand theft.

sonableness" standard affords trial courts broad discretion in fashioning special probation conditions. Although reviewing courts frequently defer to a trial court's discretion, the standard is not without stringency. Hence, a court will not hesitate to invalidate conditions it believes unreasonable.⁷⁶

McPike's sentence included 3 years in state prison and 10 years probation. Fifteen years prior to the 1985 trial, McPike received and completed treatment for a Demoral addiction. As a special condition, the court mandated that McPike not prescribe medicine for others. *Id.* McPike appealed arguing that the condition impacted his fundamental right to earn a livelihood by any lawful calling. On appeal, the District Court of Appeals of Florida for the Second District held this condition improper because it did not reasonably relate to McPike's rehabilitation, provide a standard of conduct essential to protect the public and did not have any relationship to the crime of grand theft. *Id.* Additionally, the court believed that prescribing drugs was not a criminal act inasmuch as it was related to the practice of medicine and the condition was not reasonably related to future criminality. However, because McPike failed to raise an objection to the condition at trial and the condition did not abrogate McPike's fundamental right (it merely impacted on it), the court affirmed the condition. *Id.* See also *United States v. Tolla*, 781 F.2d 29 (2d Cir. 1986) (court prevented defendant from teaching for one year as a probation condition); *United States v. Brockway*, 769 F.2d 263 (5th Cir. 1985) (court prevented defendant sheriff from holding a position as a law enforcement officer during the probation period); *United States v. Alexander*, 743 F.2d 472 (7th Cir. 1984) (appellate court allowed condition of probation of not holding a proprietary interest in a scale business during probation); HAW. REV. STAT. § 706-624(2)(g) (1985 & Supp. 1987) (court may require, as probation condition, that defendant "[r]efrain from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the crime.") .

75. *United States v. Tonry*, 605 F.2d 144 (5th Cir. 1979). In *Tonry*, the court adopted a three-part test to determine whether a probation condition unduly intrudes on constitutionally protected rights. Under the test:

The conditions must be "reasonably related" to the purposes of the Act [here the Federal Probation Act]. Consideration of three factors is required to determine whether a reasonable relationship exists: (1) the purposes sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement.

605 F.2d at 150. The significance of this test is questionable. The second factor does little more than restate the issue: if probationers enjoy the full panoply of constitutional rights, a condition which infringes those rights is invalid. If a probationer's rights are limited, the extent of the limitation is for the court to decide, which is frequently the issue when probation conditions are challenged under the Constitution. See also *In re White*, 97 Cal. App. 3d 141, 146, 158 Cal. Rptr. 562, 565-66 (1979) ("Where a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn; to the extent it is overbroad it is *not* reasonably related to the compelling state interest in reformation and is an unconstitutional restriction on the exercise of fundamental rights."). See also MONT. CODE ANN. § 46-18-202(1)(a) (1985) (the court may prohibit a probationer from holding public office).

76. See *Colburn v. State*, 510 So. 2d 652, 653 (Fla. Dist. Ct. App. 1987) (condition

In *People v. Dominguez*,⁷⁷ the court convicted Mercedes Dominguez of second degree robbery and placed her on probation.⁷⁸ The trial court imposed the condition that she "not . . . live with any man to whom you are not married and . . . not to become pregnant until after you become married."⁷⁹ Dominguez, who had never married, was pregnant with her third child when convicted.⁸⁰ During probation she again became pregnant and the court revoked her probation.⁸¹ On appeal, the California Court of Appeal voided the condition.⁸² The court promulgated the following test to determine a condition's validity: "A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . is invalid."⁸³

In voiding the condition, the court noted that it is not a crime for an unmarried woman to become pregnant. In addition, the court noted that the future pregnancy was not reasonably related to robbery or to future criminality.⁸⁴ Other jurisdictions have similarly adopted the *Dominguez* reasonable relationship test.⁸⁵

Although the appellant in *Dominguez* did not challenge the constitutionality of her probation condition, in *Rodriguez v. State*⁸⁶ a similarly

that defendant convicted of burglary and petit theft get Graduate Equivalency Degree held invalid under the *Dominguez* test as trial court's belief that degree would aid rehabilitation and benefit the defendant were not enough to save the condition.); text accompanying *infra* note 83 for a discussion of the *Dominguez* test; see also *State v. Parker*, 55 N.C. App. 643, 286 S.E.2d 366 (1982) (condition that defendant convicted of unlawfully injuring personal property by sawing down a light pole refrain from possessing firearms or dangerous weapons upheld as conditions designed to aid rehabilitation, which the condition arguably does, are valid even though they appear unrelated.); *Smith v. State*, 513 So. 2d 1367 (Fla. Dist. Ct. App. 1987) (prohibition on consumption of alcohol during probation for defendant convicted of possession of cocaine reasonably related and upheld).

77. 256 Cal. App. 2d 623, 64 Cal. Rptr. 290 (1967).

78. *Id.* at 624, 64 Cal. Rptr. at 292.

79. *Id.* at 625, 64 Cal. Rptr. at 292.

80. *Id.*

81. *Id.* at 626, 64 Cal. Rptr. at 292.

82. *Id.* at 627, 64 Cal. Rptr. at 294.

83. *Id.* at 627, 64 Cal. Rptr. at 293.

84. *Id.*

85. *State v. Livingston*, 53 Ohio App. 2d 195, 197-98, 372 N.E.2d 1335, 1337 (1976); *State v. Means*, 257 N.W.2d 595 (S.D. 1977); *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979).

86. 378 So. 2d 7 (Fla. Dist. Ct. App. 1979).

situated defendant challenged the constitutionality of her probation conditions of aggravated child abuse.⁸⁷ The trial court forbade Rodriguez to have custody of any children, to become pregnant during the probation period and to marry without the court's consent.⁸⁸ Rodriguez claimed the conditions violated her fundamental rights of procreation and marriage.⁸⁹

The Florida District Court of Appeal agreed and invalidated the pregnancy and marriage restrictions.⁹⁰ The basis for the invalidity, however, did not rest on the constitutional question but on the court's belief that the conditions did not meet the *Dominguez* reasonable relationship test. Regarding the constitutional challenge, the court noted that a probationer's constitutional rights are qualified by probationary status.⁹¹ The court cited cases upholding probation conditions that infringed on constitutionally protected rights such as freedom from unreasonable searches and seizures, the privilege against self-incrimination and rights of free speech and association. The court concluded, "[w]e thus have no constitutional difficulty with the conditions imposed, if they are otherwise valid conditions of probation."⁹²

Adopting the *Dominguez* test, the court held that the marriage and pregnancy conditions are unrelated to the crime of child abuse, that marriage and pregnancy are not per se criminal and that the conditions relate only tangentially to future criminality.⁹³ Although the court upheld the condition that denied Rodriguez custody of the children, it held the other two conditions unreasonable because they were excessive.⁹⁴

In *Gillian v. Los Angeles Municipal Court*,⁹⁵ a California court of appeals upheld the validity of a probation condition requiring the defendant to abstain from drinking or shopping in stores with alcoholic

87. *Id.* at 8. Rodriguez pleaded nolo contendere to the charge of aggravated child abuse. *Id.*

88. *Id.* This last condition is premised on the notion that the court would deny Rodriguez permission to marry a man with young children.

89. *Id.*

90. *Id.* at 10.

91. *Id.* at 9.

92. *Id.* "Otherwise valid conditions" are those which satisfy the "reasonableness" test. *Id.*

93. *Id.* at 10.

94. *Id.* See *infra* note 153 regarding this holding.

95. 97 Cal. App. 3d 704, 159 Cal. Rptr. 74 (1979), cert. denied, 445 U.S. 907 (1980).

beverages as the chief item of sale. In *Gillian*, a defendant convicted of drunk driving raised right to privacy and first amendment speech and association issues.⁹⁶ In upholding the conditions, the court stated that conditions requiring the surrender of constitutional rights are not *per se* unconstitutional.⁹⁷ The court stated that the *Dominguez* reasonableness test should be applied when evaluating the validity of a probation condition. The condition's impact on the defendant's constitutional rights has no bearing upon the court's decision.⁹⁸ Because probation is a privilege, the court reasoned, the probationer should not merit the same constitutional protection afforded ordinary citizens.⁹⁹ The court held that the conditions satisfied the *Dominguez* test and were therefore reasonable even though they impinged upon the defendant's constitutional rights.¹⁰⁰

'Scarlet letter' probation conditions, such as the "DANGEROUS SEX OFFENDER — NO CHILDREN ALLOWED" signs, arguably impinge on the defendant's first amendment guarantees of free speech and association,¹⁰¹ the right to privacy¹⁰² and the eighth amendment

96. *Id.* at 707, 159 Cal. Rptr. at 76.

97. *Id.* at 708, 159 Cal. Rptr. at 77. *But see* State v. Simpson, 25 N.C. App. 176, 179-80, 212 S.E.2d 566, 569, *cert. denied*, 287 N.C. 263, 214 S.E.2d 436 (1975), where, in dicta, the court said "[a] condition which is a violation of the defendant's constitutional right and, therefore, beyond the power of the court to impose is *per se* unreasonable."

98. 97 Cal. App. 3d at 708, 159 Cal. Rptr. at 77.

99. *Id.* at 709.

100. *Id.* Courts have upheld other travel restrictions against fourteenth amendment challenges. *People v. Ison*, 132 Mich. App. 61, 64, 346 N.W.2d 894, 896 (1984). In *Ison*, the court convicted the defendant of assault with intent to commit second-degree criminal sexual conduct and placed him on probation. *Ison*, as a probation condition, could not leave the state without the court's consent. He claimed this condition violated the fourteenth amendment right to travel. In upholding the condition, the court noted that due process may diminish fourteenth amendment rights. "A criminal conviction *constitutionally* deprives the defendant of much of his liberty; convicts retain some constitutional rights, but those rights are subject to restrictions imposed by the nature of the regime to which they have been lawfully committed." *Id.* at 896 (emphasis added). Therefore, the infringement was constitutional and was valid. *Id.*

101. The first amendment states in pertinent part: "Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech, . . . ; or the right of the people to peaceably assemble." U.S. CONST. amend. I.

102. The United States Supreme Court recognizes "privacy" as a constitutional right. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Probationers challenge probation conditions as a violation of their right to privacy. *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980), discussed *infra* note 145. *See also* State v. Turner, 142 Ariz. 138, 142, 688 P.2d 1030, 1034 (Ariz. Ct. App. 1984) (In upholding a warrantless search

protection from cruel and unusual punishment.¹⁰³ Courts will uphold conditions restricting first amendment rights of free speech and association so long as the restrictions are reasonably related to the crime and the defendant's rehabilitation. In *Commonwealth v. McBride*¹⁰⁴ the Superior Court of Pennsylvania held that a defendant convicted of corrupting the morals of a minor could not contact or communicate with the minor.¹⁰⁵ The defendant claimed that the condition restricted his right to free speech and association.¹⁰⁶ Finding the condition necessary to the defendant's rehabilitation and society's protection, the court held the condition valid.¹⁰⁷ Conditions designed to rehabilitate criminals and protect society, the court noted, will necessarily infringe upon a defendant's personal liberties.¹⁰⁸ Conversely, persons who have not broken the law enjoy the full panoply of constitutional rights. Probationers, who by definition have broken the law, do not.¹⁰⁹

The Court of Appeals for the Ninth Circuit held that courts could impose probation conditions that infringed upon first amendment rights if reasonably necessary to prevent future criminality.¹¹⁰ In *Malone v. United States*¹¹¹ the court convicted the defendant of exporting arms to the United Kingdom to aid the Irish Republican Army (IRA).¹¹² The court imposed conditions that forbade the defendant from participating in or belonging to the American Irish Republican movement or any Irish organizations. Moreover, the court denied the

probation condition, the court noted that a probationer's expectations of privacy are less than those of other citizens not so categorized).

103. The eighth amendment reads: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

104. 289 Pa. Super. 396, 433 A.2d 509 (1981).

105. *Id.* at 399, 433 A.2d at 511.

106. *Id.* at 398, 433 A.2d at 510.

107. *Id.* at 399, 433 A.2d at 511.

108. *Id.* at 398-99, 433 A.2d at 510.

109. *Id.*

110. *Malone v. United States*, 502 F.2d 554, 555 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975). This is a federal case decided under the Federal Probation Act, state courts cite *Malone* for the proposition that probation conditions infringing first amendment rights are valid. *See, e.g.*, *Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979); *see also Porth v. Templar*, 453 F.2d 330 (10th Cir. 1971) (probation conditions may curtail first amendment protections where such curtailment is reasonably related to treatment of the accused and protection of the public).

111. 502 F.2d 554 (9th Cir. 1974).

112. *Id.* at 556.

defendant the freedom to visit Irish pubs or accepting employment that directly or indirectly associated him with Irish organizations or movements.¹¹³ Noting the broad discretion trial courts wield in setting probation conditions, the Ninth Circuit found a reasonable nexus between the conditions imposed and the purposes of probation.¹¹⁴ The restrictions were reasonably related to preventing Malone's future criminality given his strong affinity towards the IRA.¹¹⁵

The District Court of Appeal of Florida for the Second District is thus far the only court to address the validity of a 'scarlet letter' probation condition. In *Goldschmitt v. State*¹¹⁶ the trial court required a convicted drunk driver to affix a bumper sticker to his car reading "CONVICTED D.U.I. — RESTRICTED LICENSE."¹¹⁷ In a per curiam decision, the court upheld the validity of the condition against first and eighth amendment attacks.¹¹⁸

Claiming a First amendment violation, Goldschmitt argued that the signs constituted "forced speech" because they required him to convey an ideological message through the bumper stickers.¹¹⁹ Goldschmitt based this claim on the United States Supreme Court's decision in *Wooley v. Maynard*.¹²⁰ *Wooley* held that a New Hampshire Jehovah's Witness could permissibly cover the state's "live Free or Die" motto on the state's license tags without facing criminal charges. Rejecting this argument, the *Goldschmitt* court likened the bumper sticker's ideological content to that of a permit to park in a handicapped parking

113. *Id.* at 555.

114. *Id.* at 556.

115. *Id.* at 557.

116. 490 So. 2d 123 (Fla. Dist. Ct. App. 1986), *rev. denied*, 496 So. 2d 142 (Fla. 1986).

117. *Id.* at 124.

118. Goldschmitt's eighth amendment arguments and the court's related disposition are noted at *infra* notes 130-33 and accompanying text.

119. 490 So. 2d at 125. The United States Supreme Court has held that first amendment precludes states from forcing a citizen to speak just as it protects the right to speak. *See* West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (school children not required to participate in a flag salute ceremony); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (newspapers not required to publish political rebuttals by candidates the newspaper criticizes); *Wooley v. Maynard*, 430 U.S. 705 (1977) (Jehovah's Witness may obliterate a state's motto on his license plate without criminal sanction). These cases are premised on the ideological nature of the speech the law required. *See* Brief for Appellant at 31-32, *State v. Bateman*, 94 Or. App. 449, 765 P.2d 249 (1987) (No. A44854) for a discussion of "coerced speech."

120. 430 U.S. 705 (1977).

space.¹²¹ The Florida court stated that “[t]he deterrent, and thus the rehabilitative, effect of punishment is enhanced if it ‘inflicts disgrace and contumely in a drastic and spectacular manner.’”¹²² The court also noted that ‘scarlet letter’ punishment conditions do not offend the Constitution when the court requires the defendant to merely display a scarlet letter as part of his punishment.¹²³ Citing *Rodriguez*,¹²⁴ the court upheld the condition as reasonably related to the nature of the offense.¹²⁵

The eighth amendment guarantees citizens freedom from cruel and unusual punishment.¹²⁶ A threshold question when a court considers an eighth amendment challenge is whether probation constitutes a sentence or a punishment. In *State v. Macy*¹²⁷ the Supreme Court of South Dakota held that the reasonableness of probation conditions should be measured under the cruel and unusual punishment standard because probation is not a sentence but a sentence alternative.¹²⁸ Therefore, the argument that a condition constitutes cruel and unusual punishment is inappropriate. Nonetheless, in states that treat probation as a sentence, the eighth amendment may, in an appropriate situation, apply to probation conditions.¹²⁹

121. 490 So. 2d at 125.

122. *Id.*

123. *Id.*

124. *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979). See *supra* notes 86-94 and accompanying text for a discussion of the *Rodriguez* case.

125. 490 So. 2d at 125, n.3. The court agreed with the lower court’s holding that the bumper sticker served a rehabilitative purpose. *Id.*

126. See *supra* note 103 for the constitutional text. It appears no court has ever invalidated a probation condition under the eighth amendment. See Brief for Appellee at 35, *State v. Bateman*, 94 Or. App. 449, 765 P.2d 249 (1987) (No. A44854) [hereinafter Appellee’s Brief].

127. 403 N.W.2d 743 (S.D. 1987).

128. *Id.* at 745.

129. See *State v. Brown*, 284 S.C. 407, 411, 326 S.E.2d 410, 412 (1985) (in dicta, the Supreme Court of South Carolina said it is cruel and unusual punishment to impose castration as a probation condition).

The United States Supreme Court articulated the factors to consider in determining whether a punishment inflicted is cruel and unusual in *Solem v. Helm*, 463 U.S. 277 (1983). These factors are “the gravity of the offense and the harshness of the penalty, . . . the sentences imposed on other criminals in the same jurisdiction, . . . [and] the sentences imposed for commission of the same crime in other jurisdictions.” *Id.* at 290-92. In *Solem*, the trial court sentenced the defendant to life imprisonment without parole for passing a bad check, his seventh conviction for a non-violent felony. The Supreme Court held the sanction invalid under the eighth amendment. *Id.*

In *Goldschmitt*¹³⁰ a Florida District Court of Appeals rejected the argument that a probation condition requiring a convicted drunk driver to place bumper stickers on his car reading "CONVICTED D.U.I. — RESTRICTED LICENSE" constituted cruel and unusual punishment.¹³¹ The defendant likened the bumper stickers to the public punishment of the pillory of colonial times.¹³² The court rejected that argument, noting the differences between the degrading physical rigors of the pillory and a bumper sticker outweigh their similarities.¹³³

In *People v. McDowell*¹³⁴ a California trial court required the defendant, a thrice-convicted purse snatcher, to wear shoes with taps on the heels and the soles any time he left his house.¹³⁵ The court imposed the condition to alert intended victims. The court also wanted to make it difficult for the defendant to flee after stealing a purse.¹³⁶

On appeal, the defendant attempted to classify the taps requirement as a 'scarlet letter' condition tantamount to requiring him to wear a sign saying "I am a thief."¹³⁷ The defendant petitioned for invalidation of the condition as cruel and unusual punishment.¹³⁸ The California Court of Appeals held the condition valid¹³⁹ because not everyone who wears taps is a thief.¹⁴⁰ In addition, the court held that the condition passed the *Dominguez* reasonableness test as the trial court had broad discretion in imposing probation conditions.¹⁴¹ Finally, the condition fostered rehabilitation because the sound of the taps served as a reminder of the probation and the threat of incarceration should the de-

130. 490 So. 2d 123, 126 (Fla. Dist. Ct. App. 1986). See *supra* notes 117-25 and accompanying text for a discussion of the first amendment challenge.

131. *Id.* at 126. See also *People v. McDowell*, 59 Cal. App. 3d 807, 130 Cal. Rptr. 839 (1976), *infra* notes 134-42 and accompanying text where the court rejected the claim that a probation condition imposed on a convicted purse snatcher constituted cruel and unusual punishment. The condition mandated that the defendant not leave home without tap shoes. *Id.* at 843.

132. 490 So. 2d at 125.

133. *Id.*

134. 59 Cal. App. 3d 807, 130 Cal. Rptr. 839 (1976).

135. *Id.* at 812, 130 Cal. Rptr. at 842-43.

136. *Id.* at 813, 130 Cal. Rptr. at 843.

137. *Id.* at 812.

138. *Id.*

139. *Id.* at 812, 130 Cal. Rptr. at 843.

140. *Id.* The court remanded the case to the trial court to clarify the condition but upheld the condition's validity. *Id.* at 813-14, 130 Cal. Rptr. at 843.

141. *Id.*

fendant violate the probation.¹⁴²

In summary, courts do not consider the constitutional aspects of an imposed condition to determine its validity. Rather, courts employ a reasonableness test.¹⁴³ If the condition is reasonably related to the crime and deters future criminality, the court will uphold the condition even if it impinges on a constitutionally protected liberty.¹⁴⁴ A constitutional argument, therefore, adds little to a defendant's case and will not persuade a court to invalidate an otherwise reasonable condition.¹⁴⁵

142. *Id.*

143. *See Jones v. State*, 727 P.2d 6 (Alaska Ct. App. 1986). The trial court convicted Jones for selling one gram of marijuana to an undercover police officer and placed Jones on probation. *Id.* at 7. One condition for Jones' probation required him not to enter a 45 block area in downtown Anchorage that the court characterized as a high crime district. *Id.* Although Jones lived and worked within the 45 block area, the trial court desired that Jones to "find a new environment to live and play in." *Id.* On appeal, the Alaska Court of Appeals did not address Jones' constitutional argument (cruel and unusual punishment, free speech and association) because it held the condition did not "comport with the requirement that it be 'reasonably related to the rehabilitation of the offender and the protection of the public and . . . not be unduly restrictive of liberty.'" *Id.* Despite acknowledging that the area in question was a high crime district the court found no "clear nexus between the area and Jones' misconduct." *Id.* at 8. Instead, the court determined that drugs could be sold anywhere in Anchorage. *Id.* at 8. *See also In re White*, 97 Cal. App. 3d 141, 158 Cal. Rptr. 562 (1979) (similar condition struck down as applied to convicted prostitute). *See supra* notes 68-142 and accompanying text discussing application of the reasonableness requirement.

144. In a Florida case, the Court of Appeals invalidated the condition that the defendants refrain from sexual intercourse with anyone other than their spouses. *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980) Defendants were convicted for forgery, uttering a forged instrument, and burglary. All three defendants were unmarried and had five children between them. The defendants challenged the condition as an unconstitutional infringement on their right to privacy. "Under Florida law, constitutionally protected rights can be abridged by conditions of probation if they are reasonably related to the probationer's past or future criminality or to the rehabilitative purpose of probation." The court invalidated the condition as unrelated either to the crime or the defendants' future criminality. The trial judge originally imposed the condition because defendants claimed the reason for their criminal conduct amounted to feeding their children. *Id.* at 47-48.

145. *See supra* notes 86-94 and accompanying text discussing the *Rodriguez* case that disregarded constitutional claims. *But see In re White* 97 Cal. App. 3d 141, 158 Cal. Rptr. 562 (1979) (court struck down condition prohibiting defendant from entering specific areas in the city as an unreasonable infringement on defendant's constitutional right to travel).

SECTION V — THE CONSTITUTIONALITY OF ‘SCARLET LETTER’ CONDITIONS

While trial judges around the country continue to create and impose a variety of ‘scarlet letter’ conditions, courts have yet to review them. The remainder of this article discusses the constitutionality of these conditions based on the case analysis in Section IV.

As previously noted, an Oregon Circuit Court convicted Richard J. Bateman on two counts of first degree sexual abuse and placed him on probation.¹⁴⁶ Richard Bateman, an alcoholic, had an extensive criminal record which included convictions for sexual abuse of children.¹⁴⁷ Bateman claimed that he was unable to control his propensity to abuse young children. In response, the court required Bateman to post signs reading “DANGEROUS SEX OFFENDER — NO CHILDREN ALLOWED,” in three-inch lettering, on the door to his residence and both doors of any vehicle he operated.¹⁴⁸ Bateman appealed asking the court to invalidate this condition as an unconstitutional infringement of his first amendment right to free speech (here, forced speech)¹⁴⁹ and association,¹⁵⁰ his right to privacy¹⁵¹ and his eighth amendment right

146. *State v. Bateman*, 94 Or. App. 449, 765 P.2d 249 (1987), discussed at *supra* notes 1-3 and accompanying text.

147. Appellee’s Brief *supra* note 126, at 4-9.

148. The other conditions imposed include:

(1) that he be incarcerated in the Multnomah County Jail for a period of One (1) Year, with *NO* passes, (2) that he participate in and successfully complete a thirty (30) day residential alcohol treatment program, and upon the completion of said program, the court will entertain a motion for passes for employment purposes only, (3) that he maintain fulltime employment, (4) that he abstain from the use of any alcoholic beverages, and further, any prescription drugs/narcotics without prior notification from doctor to defendant’s probation officer, (5) that he participate in any sexual offender treatment program as directed by his probation officer and upon this court’s approval, (6) that he submit to polygraph examination, at his expense, as directed by his probation officer, (7) that he submit to random breath testing and/or urinalysis testing upon the request of his probation officer, (8) that he not return within ten (10) blocks of 11300 Northeast Morris Street, [Bateman’s prior address and the site of the crimes], (9) that he have *NO* contact with minors, (10) [the sign condition for his residence], (11) that he be banned from parks, playgrounds, the zoo, school grounds or any place where children primarily congregate, and (12) [the sign condition for his vehicle].

Appellant’s Brief, *supra* note 1.

149. Appellant’s Brief, *supra* note 1, at 31-32. See *supra* note 119 and accompanying text discussing coerced speech.

150. Appellant’s Brief *supra* note 1, at 32-34.

151. *Id.* at 32-34.

to freedom from cruel and unusual punishment.¹⁵²

The trial judge found that the signs were necessary to protect the public and to aid in Bateman's rehabilitation.¹⁵³ Pending appeal, the trial court revoked Bateman's probation because he violated other conditions of probation.¹⁵⁴ The Oregon Court of Appeals subsequently dismissed the appeal as moot despite requests from the state that the court review the case and determine the validity of the condition.¹⁵⁵

The published apology is another example of a 'scarlet letter' condition.¹⁵⁶ In Newport, Oregon, a trial court gave defendants convicted of property offenses the option of prison or paying for an advertisement

152. *Id.* at 21-26. Bateman also argued the sign conditions excessive in the face of the other conditions limiting his contact with children. Appellant's Brief *supra* note 1, at 17-20. This is Bateman's strongest argument. While the signs would arguably pass the *Dominquez* test, (*see infra* notes 165-67 and accompanying text), Bateman might rely on the *Rodriguez* case, *supra* notes 86-94 and accompanying text. In *Rodriguez*, the Florida court reasoned that two conditions Ms. Rodriguez followed were excessive in light of a third condition. Analogously, Bateman might argue that the signs were excessive given that he could not have contact with minors.

153. The judge said:

"A couple of things that I have to consider in sentencing any individual on any charge is the possibility or likelihood [sic] of rehabilitating the defendant, and also protecting the community."

Appellant's Brief *supra* note 1, at 9.

The judge's exasperation with Bateman is evident. Responding to Bateman's argument that the sign condition precluded him from finding a place to live, the judge stated:

That may well be what happens, but the community has a right to know what his behavior is. It would probably be much better if we could dye all sex offenders green so we could tell our children to watch our [sic] for green people. We can't do that. Some people think that perhaps he should walk around with a sandwich board that says dangerous sex offender. It's time that something be done about people who are damaging our children, and Mr[.] Bateman, you are a serious sex offender that has caused much damage. I'm going to let that order stand to protect the community. That is a term of your probation, that's your choice, but that is a term of your probation.

Appellant's Brief *supra* note 1, at 13.

154. Currently, the state appealed the revocation and hopes to convince the court to address the validity of the signs. Telephone conversation with Diane Alessi, Deputy Public Defender, Public Defender's Office, Salem, Oregon, December 16, 1988. According to Ms. Alessi, Bateman complied with the sign provision and posted the sign on his front door. During the Christmas holidays, however, he hung Christmas cards on his front door and minimized the sign's appearance. *Id.*

155. *Id.*

156. *Alternative Sentencing*, *supra* note 66. *See also Drunk Driver Penalty*, NEWS-DAY, March 29, 1989, at 14 (1) Suffolk ed. (similar ad in Florida's Indian River County).

in the local newspaper to publicly apologize for their crimes. The defendants opted for the advertisements which contained their pictures, their criminal record and a signed apology.¹⁵⁷ The following is an example:

CRIMINAL'S APOLOGY — Thomas E. Kirby was convicted of Burglary First Degree for burglarizing a residence in South Beach, Oregon on October 25, 1985. He has previously been convicted of burglary in Portland. He was placed on probation . . . and ordered to . . . place this ad in the Newport News-Times apologizing for his conduct. At the time of his arrest, he was in a residence on Sam Creek Road in the Toledo/Newport area. Prior to this he resided in Waldport.

APOLOGY — I, Tom Kirby, wish to apologize to the people of the City of Newport for all of the problems I have caused. I know now what I did was selfish and wrong. I also realize that I have caused a lot of hardships on people that were my friends and also my own family. I want to thank the courts for a second chance to prove that I can be an honest upstanding person. My apologies again for causing any inconvenience to anyone.¹⁵⁸

Beneath the apology was this "Crime Stoppers Tip:"

As the jails and penitentiaries fill up and criminals remain in the community, be aware of which of your neighbors pose a threat to you and your family. Don't hesitate to call a person's probation officer or the police if you observe any suspicious activity on their part. Be aware of who has been convicted of crimes and who may be committing crimes in your neighborhood.¹⁵⁹

An Urbana, Illinois circuit court judge imposed a similar condition on convicted drunk drivers.¹⁶⁰

157. *Alternative Sentencing*, *supra* note 66.

158. *Id.*

159. *Id.*

160. *Picture This for an Apology*, 10 NAT'L. L.J., June 6, 1988 at 51. The text of the apology provides:

DRUNK DRIVER'S APOLOGY — [defendant's name] admitted to driving while under the influence of alcohol in open court on [date] at [time] in City (Town) of—
— in Champaign County and at that time was under the influence of alcohol.
APOLOGY — I, [defendant's name], have pleaded guilty to the offense of DUI and apologize to the citizens of Champaign County for endangering them. **NOTICE** — This defendant was placed on Court supervision. Part of the sentence required the defendant to apologize in this ad to the citizens of Champaign County. At this time, this defendant still retains the ability to drive. However, that privilege will be lost if the defendant violates any law.

Id. According to the National Law Journal article, one defendant planned to appeal this condition. *Id.*

Reviewing courts should uphold 'scarlet letter' conditions such as the *Bateman* signs, the *Goldschmitt* bumper stickers and the published apologies. While such conditions arguably conflict with constitutionally guaranteed rights and liberties, a probationer's status is conditional. Probationers are convicted criminals at liberty because of the legislature's and the court's largess.¹⁶¹ Under the emerging view, probation may legitimately include punitive aspects.¹⁶²

'Scarlet letter' conditions satisfy the *Dominguez* reasonableness test if they relate to the crime for which the defendant was convicted, do not relate to conduct which is not criminal and relate to future criminality. In *Bateman* the signs clearly relate to the defendant's crime of sexually abusing young children. The signs communicate a narrowly focused message and do not relate to conduct which is not itself criminal because they do not prohibit the defendant from engaging in non-criminal activity. Finally, the signs deter *Bateman*'s future criminality because they are a constant reminder of his crime and probationary status. Similarly, the *Goldschmitt* bumper stickers and published apologies also represent a reasonable condition of probation.

CONCLUSION

Courts impose probation conditions to aid in the defendant's rehabilitation and to protect the public from future criminal conduct. 'Scarlet letter' conditions, such as those required of *Bateman* and *Goldschmitt*, aid in the defendant's rehabilitation. They serve as a constant reminder that a court may revoke a defendant's liberties if the defendant violates the law or the conditions of probation. Additionally, the signs inform the public of the probationer's status affording them the opportunity to assist in the defendant's rehabilitation. In *Bateman*, for example, parents would probably distance their children from *Bateman*'s home or car, thus removing any temptation *Bateman* might have to violate them again. Public ostracism resulting from the signs can aid in rehabilitation as defendants learn that society will not tolerate unacceptable criminal behavior. Public ostracism also reinforces the punishment element.

Although harsh, 'scarlet letter' conditions broaden the base of potential probationers. They necessarily involve the community at large in

161. See *supra* notes 40 & 41 and accompanying text noting that probation is a privilege.

162. See *supra* notes 23-33, 36-38 and accompanying text for a discussion of the punitive aspects.

the rehabilitation process. Just as the addition of stringent monitoring conditions permitted courts to safely and effectively place a greater number of more serious offenders on probation,¹⁶³ the addition of 'scarlet letter' conditions will increase the number of potential probationers. By informing the public of who is on probation and for what crime, the public may assist in monitoring a probationer's behavior by contacting authorities when necessary. Moreover, the signs afford a probationer the benefits of conditional liberty while affording the public some of the benefits of incarceration which may reduce a defendant's criminal behavior.

'Scarlet letter' conditions are consistent with probation's evolving, broadening function as recognized in the new Federal Sentencing Reform Act and several state statutes.¹⁶⁴ The conditions reflect the seriousness of the offense, promote respect for the law, and provide just punishment. Probation is not meant to be painless. Although the signs are harsh and possess a punitive element, this does not render them unconstitutional.

The signs also afford adequate deterrence to criminal conduct. The increased potential for apprehension, should the probationer commit a crime, should deter him from future criminal conduct. The conditions also shield the public from this criminal conduct because the public will avoid assisting the defendant. Instead, the public will act as private enforcers of the law by reporting a defendant's wrongful behavior.

Probation is becoming, and should be, the favored disposition in criminal cases. Incarceration's rehabilitative shortcomings are apparent.¹⁶⁵ As criminal prosecutions increase, prison resources are stretched beyond capacity.¹⁶⁶ Consequently, probation offers a greater hope for rehabilitation, protecting the public and distributing criminal justice resources. Probation offers relief only if it exacts from the defendant what traditional criminal punishment exacts.

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163. See *supra* notes 30 & 33, 53 and accompanying text for a discussion of stringent monitoring conditions as applied to more serious offenders.

164. See *supra* notes 25-37 and accompanying text for this discussion.

165. See *supra* note 18 and accompanying text noting these shortcomings.

166. See *supra* notes 30-33 and accompanying text discussing prison overcrowding.

* J.D. 1989, Washington University.

