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## Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions

Andrew Horwitz

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# Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions

Andrew Horwitz\*

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### *I. Introduction*

Picture yourself having just been convicted of a relatively minor criminal offense. Imagine that you are living in a country in which the judge could prohibit you from participating in political speech or protest, prohibit you from associating with "known homosexuals," prohibit you from associating with your spouse or fiancé, prohibit you from belonging to the religious organization of your choice, require you to submit to a search of your person or your home at any time of day or night, require you to wear a fluorescent pink bracelet proclaiming your offense, or banish you from the country altogether. This country must be an authoritarian dictatorship of some kind, a country that is not governed by a constitution or the rule of law, right? Wrong. This nation is the United States of America as the legal system exists today. A trial judge has imposed each of the sentences just listed, and an appellate court has allowed each to stand.<sup>1</sup>

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1. See *United States v. Bortels*, 962 F.2d 558, 560 (6th Cir. 1992) (upholding probation condition prohibiting defendant from associating with her fiancé); *United States v. Sharp*, 931 F.2d 1310, 1311 (8th Cir. 1991) (approving probation condition requiring defendant to submit to warrantless searches); *United States v. Janko*, 865 F.2d 1246, 1247 (11th Cir. 1989) (sustain-

The continuing existence of this sweeping deference to the quirks and peculiarities of individual sentencing is particularly striking in today's political climate in which state and federal legislatures cannot seem to act quickly enough to reduce judicial discretion through the imposition of rigid sentencing schemes and mandatory minimum sentences. In the face of an overwhelming national movement toward the enforcement of uniformity and predictability in sentencing, a significant and growing trend has emerged toward the use of probation conditions as a means for the imposition of a vast array of unusual, idiosyncratic, and often quite alarming criminal sentences.<sup>2</sup> Published cases and media accounts provide a seemingly endless array of examples that involve significant infringements on constitutional and basic human rights.<sup>3</sup> One particularly disturbing thread of the case law reflects a growing movement toward sanctions that are designed primarily to inflict shame or humiliation on the offender.<sup>4</sup>

The published cases in the area of probation conditions reveal an extraordinary level of judicial reliance on the judge's own values and sense of morality combined with the judge's best guess or intuition about the potential deterrent or rehabilitative impact of a particular sanction.<sup>5</sup> The sentencing judge's broad discretion leaves significant room for racial, ethnic, and religious bias to enter into the sentencing judgment. Very little empirical data documents the impact of any of the more common "innovative" sentences, but substantial anecdotal evidence documents unpredicted outcomes, such as the destruction of families, vigilantism, and even suicides.<sup>6</sup>

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ing probation condition banishing defendant from United States); *Malone v. United States*, 502 F.2d 554, 556-57 (9th Cir. 1974) (allowing probation condition prohibiting defendant from belonging to or participating in "any Irish Catholic organizations or groups"); *United States v. Kohlberg*, 472 F.2d 1189, 1190 (9th Cir. 1973) (permitting probation condition prohibiting defendant from associating with "known homosexuals"); *State v. Nickerson*, 791 P.2d 647, 648-49 (Ariz. Ct. App. 1990) (upholding condition prohibiting defendant from associating with his wife without consent of parole officer); *People v. Mason*, 488 P.2d 630, 632-34 (Cal. 1971) (sustaining probation condition requiring defendant to submit to warrantless searches); *People v. King*, 73 Cal. Rptr. 440, 445-48 (Ct. App. 1968) (upholding probation condition prohibiting defendant from "making speeches" or participating in demonstrations); *Ballenger v. State*, 436 S.E.2d 793, 794-95 (Ga. Ct. App. 1993) (approving probation condition that drunk driving defendant wear pink fluorescent bracelet identifying his crime); *State v. Karan*, 525 A.2d 933, 934 (R.I. 1987) (upholding probation condition banishing defendant from United States); *Edwards v. State*, 246 N.W.2d 109, 110-12 (Wis. 1976) (sustaining probation condition prohibiting defendant from associating with her fiancé).

2. See *infra* Part III (discussing wide variety of probation conditions).
3. See *infra* Part III (giving numerous examples of how probation conditions infringe upon rights of defendants).
4. See *infra* Parts III.B.1 & III.H (discussing humiliation as sentencing approach).
5. See *infra* Part III (exploring impact of judicial morality and intuition in sentencing).
6. See *infra* Part III.H (exploring negative effects of humiliation as sentencing approach).

Currently, appellate scrutiny of probation conditions is highly unlikely. The primary reason that appellate courts seldom address the issue is that defendants rarely challenge probation conditions on appeal.<sup>7</sup> Because defendants often accept the conditions as part of a negotiated plea agreement, defendants frequently believe they cannot challenge the probation conditions, no matter how inappropriate or unconstitutionally intrusive. Case law often supports this belief. Moreover, if the judge has suggested that the probation conditions were imposed as an alternative to incarceration, the defendant often is unwilling to risk filing an appeal for fear of going to prison if appellate review overturns the conditions.

When the defendant does appeal a probation condition, that appeal frequently is doomed to failure for several reasons. Many appeals fail because the court finds that the defendant consented to the condition, sometimes merely by accepting probation in lieu of incarceration and sometimes by failing to note an objection at the time of sentencing.<sup>8</sup> Of course, the voicing of an objection at the time of sentencing commonly would result in incarceration. Other appeals fail because the conditions were part of a negotiated agreement, in which case many courts look at the plea itself as a form of waiver or at the agreement as some sort of an enforceable contract.<sup>9</sup> Of course, these theories completely ignore the enormous disparity in bargaining power and the highly coercive environment in which the agreement is generally reached.

Even when an appellate court reaches the merits of a challenge to a probation condition, often a poorly articulated and extraordinarily deferential standard of review guides the court's consideration. A survey of the case law involving challenges to probation conditions reveals that appellate courts most often simply defer to the trial court's broad sentencing discretion; in the cases in which appellate courts do something more than simply defer to the trial court, they tend to be extremely result-oriented, often applying the exact same legal standard in seemingly indistinguishable cases to reach conflicting results.<sup>10</sup> In a number of those relatively rare cases in which a condition of probation is overturned, the appellate court often does little more than substitute its own intuition or morality for that of the trial court.<sup>11</sup> The general rule appears to be that if the appellate court cannot categorically describe the probation condition as irrational, the condition survives.<sup>12</sup> As a consequence, trial courts currently operate under virtually no restraints, even when imposing

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7. See *infra* Part II.A.1 (describing defendants' failure to appeal).

8. See *infra* Part II.A.2 (explaining contract and waiver theories).

9. See *infra* Part II.A.2 (considering courts' reliance on contract and waiver theories).

10. See *infra* Part II (discussing appellate review of probation requirements).

11. See *infra* Part III (providing examples of cases in which appellate courts substitute their judgment for judgment of trial courts).

12. See *infra* Part II.B (describing limitations on substantive appellate review).

probation conditions that severely restrict the probationer's exercise of his or her constitutional rights.<sup>13</sup>

In Part II of this Article, I begin with a brief overview of the use of probation as a sentencing tool and of the statutory authority for the imposition of probation conditions. I then explore the significant barriers to appellate review of probation conditions, including the various reasons why defendants rarely file appeals and why the appeals that are filed rarely succeed. Part III of this Article catalogues some of the more significant judicial abuses of probation conditions, with a particular emphasis on the extraordinary infringement on the constitutional rights of the probationers. I explore some of the more disturbing motivations and reasoning underlying these special conditions, including the judge's personal pop-psychology, the judge's personal morality and values, and the judge's desire for publicity and electoral support. In addition, I consider the use of probation conditions as a vehicle for addressing perceived problems or injustices unrelated to the criminal offense or as a vehicle for circumventing statutory maximum sentences. In Part IV of this Article, I propose some potential solutions to the various problems that the Article identifies and describes. At the outset, I suggest that sentencing innovations belong in the legislative domain, where lawmakers can give serious consideration to the theory underlying the sanction, rather than in the domain of an individual judge's fancy. But perhaps more importantly, I propose specific changes in the system for appellate review that would allow the challenge of special conditions that the defendant accepted under adverse circumstances without the fear that a challenge may result in further incarceration.<sup>14</sup> At the outset, courts should eliminate the most significant barriers to appellate review, such as the objection requirement, the waiver theory, and the contract theory. With those barriers removed, courts then should create meaningful appellate review by adopting clear appellate standards, involving a *de novo* review and a true strict scrutiny approach concerning the defendant's constitutional rights. Moreover, courts should discard the antiquated notion that cruel and unusual punishment analysis is inapplicable to probationary sentences.

## II. *The Sad State of Affairs*

Although the concept of probation in a criminal case has its origins in the common law,<sup>15</sup> the current probationary disposition is entirely a creature of

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13. See *infra* Part III (surveying infringements of various constitutional rights).

14. See *infra* Part IV.A (proposing elimination of barriers to appellate review).

15. See Bruce D. Greenberg, *Probation Conditions and the First Amendment: When Reasonableness Is Not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 47-48 (1981) (discussing evolution of probation); Jeffrey C. Filcik, Note, *Signs of the Times: Scarlet Letter Probation Conditions*, 37 WASH. U. J. URB. & CONTEMP. L. 291, 293 (1990) (same).

statute. Massachusetts enacted the first probation statute in 1878,<sup>16</sup> basing it largely upon the groundwork laid by a Boston cobbler named John Augustus, commonly referred to as the inventor of probation.<sup>17</sup> A number of other states quickly followed,<sup>18</sup> joined by the federal probation legislation passed in 1925.<sup>19</sup> Currently, all fifty states and the federal government have probation statutes,<sup>20</sup> and a truly extraordinary number of people are under probationary supervision at any given time. In 1984, for example, there were 1.7 million people – one out of every thirty-five adult American males – on probationary supervision.<sup>21</sup> By 1996, that number had skyrocketed to well over three million probationers.<sup>22</sup> The numbers are equally staggering when one looks at the percentage of convicted criminals who are placed on probation: Forty-nine percent of the defendants convicted of a felony in a state court in 1994 were placed on some form of probation.<sup>23</sup>

Despite the heavy reliance that sentencing courts place on the use of probation, legislatures tend to phrase probation statutes in broad language that offers very little guidance to a sentencing court. Most statutes neither define the term "probation" nor enunciate any specific rationales underlying the appropriate use of probation.<sup>24</sup> After setting out numerous conditions of probation that courts either may or must impose, these statutes include a "nearly ubiquitous clause"<sup>25</sup> authorizing the addition of any special condition that the sentencing court deems to be appropriate.<sup>26</sup> Courts have quite accurately described the scope of the sentencing court's discretion as "breathhtaking,"<sup>27</sup> and commentators have observed that any legislative limitations on that

16. ANDREW R. KLEIN, *ALTERNATIVE SENTENCING, INTERMEDIATE SANCTIONS AND PROBATION* 68 (2d ed. 1997); Greenberg, *supra* note 15, at 49-50.

17. See KLEIN, *supra* note 16, at 68 (documenting evolution of probation).

18. Greenberg, *supra* note 15, at 50.

19. *Id.* at 51-52.

20. See Filcik, *supra* note 15, at 293-94 nn.11-12 (listing all 50 state statutes and federal statute).

21. KLEIN, *supra* note 16, at 68-69.

22. *Id.* at 70.

23. JODI M. BROWN & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, *STATE COURT SENTENCING OF CONVICTED FELONS*, 1994, at 30 (1998).

24. See Greenberg, *supra* note 15, at 53 (stating that very few states define "probation").

25. *Developments in the Law – Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1947 (1998) [hereinafter *Alternatives to Incarceration*].

26. See KLEIN, *supra* note 16, at 80 (noting that state statutes frequently allow nonstatutorily defined conditions); Leonore H. Tavill, Note, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty Is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613, 621 (1988) (noting that probation statutes give judges significant latitude).

27. *Lindsay v. State*, 606 So. 2d 652, 655 (Fla. Dist. Ct. App. 1992).



discretion are "conspicuously absent."<sup>28</sup> One recent media account suggested that the content of special conditions "is limited only by the sentencing judge's imagination."<sup>29</sup>

In light of the lack of legislative guidance or limitation, one might hope that appellate courts would step in to fill the vacuum. Quite the opposite is the case, however, as appellate courts historically have shown a tremendous reluctance to establish any meaningful standards with respect to the imposition of special conditions.<sup>30</sup> Indeed, as this Article discusses below, appellate courts frequently have interposed numerous barriers to any substantive review of probation conditions, and the appellate standards of review that are in place when a court reaches the merits tend to be vague, malleable, and extraordinarily deferential.<sup>31</sup>

### A. Procedural Obstacles to Appellate Review

#### 1. Failure to Appeal

Neither the nature of probation statutes nor the reluctance of appellate courts to engage in any serious review poses the most significant barrier to appellate review. The sad truth is that most defendants, having received probation as part of a negotiated disposition, feel that they are in no position to challenge the propriety of any conditions that have been attached to probation ostensibly in lieu of incarceration. Moreover, many defendants fear, with good cause, that a successful appeal of a condition may result in the imposition of incarceration.<sup>32</sup> Indeed, in *Fiore v. United States*,<sup>33</sup> the Second Circuit

28. Louis K. Polonsky, Note, *Limitations upon Trial Court Discretion in Imposing Conditions of Probation*, 8 GA. L. REV. 466, 468 (1974); see also Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 181 (1967) [hereinafter *Judicial Review*] (stating that legislatures are reluctant to devise pervasive standards of control).

29. Kelly McMurry, *For Shame: Paying for Crime Without Serving Time, But with a Dose of Humility*, TRIAL, May 1997, at 12, 12.

30. See Judah Best & Paul I. Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809, 811 (1963) (noting appellate courts' reluctance to review probation conditions); Heinz R. Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 484 (1962) (stating that appellate courts are reluctant to establish criteria to guide trial judges); *Judicial Review*, *supra* note 28, at 181-82 (same).

31. See *infra* Part II.B (discussing limitations on substantive appellate review).

32. See Edward Felsenthal, *Environmental Sentences Upset Some Lawyers*, WALL ST. J., Sept. 7, 1993, at B1 (noting that "defendants think twice before appealing [because] [t]he threat of more jail time 'is quite a heavy hammer'" (quoting defense attorney James Neal)); Patrick E. Gauen, *Making Felon Put Up Sign Ruled Illegal*, ST. LOUIS POST-DISPATCH, Apr. 18, 1997, at 1B (noting recognition by defense attorney in *People v. Meyer*, 680 N.E.2d 315 (Ill. 1997), that pursuing appeal of validity of probation condition created risk of prison sentence upon remand).

33. 696 F.2d 205 (2d Cir. 1982).

decided against remanding a case for resentencing after invalidating a probation condition, reasoning that "[f]orcing defendants who raise valid claims to take such a gamble could 'chill' the assertion of defendant's rights."<sup>34</sup> Unfortunately, many jurisdictions do not follow that practice.<sup>35</sup> As a consequence, the validity of even some of the most extreme conditions of probation rarely faces litigation at all, as many offenders choose an inappropriate or unconstitutional probation condition over the threat of incarceration.<sup>36</sup>

A prime example of the magnitude of this problem is the sentencing practices of Judge Ted Poe, who sits in a state district court in Houston, Texas. Poe has become a nationally recognized figure, sometimes referred to as the "King of Shame," for imposing probation conditions intended to humiliate the offender.<sup>37</sup> Some of the conditions he has imposed have required offenders to parade in front of the courthouse with placards declaring their offenses, to apologize publicly on the courthouse steps to the victims of their crimes, and

34. *Fiore v. United States*, 696 F.2d 205, 211 (2d Cir. 1982).

35. See, e.g., *United States v. Tonry*, 605 F.2d 144, 148 (5th Cir. 1979) (explicitly leaving open question of whether, had it invalidated challenged conditions, court would have remanded for resentencing, including possibility of "a longer term of confinement"); *State v. Evans*, 796 P.2d 178, 180 (Kan. Ct. App. 1990) (remanding for resentencing before different judge after invalidating condition requiring attendance at church); *People v. Letterlough*, 655 N.E.2d 146, 147, 151 (N.Y. 1995) (vacating entire plea agreement after invalidating challenged condition, despite fact that defendant had rejected this option in trial court); *State v. Brown*, 326 S.E.2d 410, 412 (S.C. 1985) (remanding for resentencing after invalidating condition requiring surgical castration, suggesting possibility of imposing specified alternative 30-year sentence); *State v. Whitechurch*, 577 A.2d 690, 693 (Vt. 1990) (suggesting that invalidation of challenged condition might have "constituted such a breach of the plea agreement that the original judgment and sentence could be reopened"); *State v. Dean*, 306 N.W.2d 286, 289 & n.4 (Wis. 1981) (remanding for resentencing after invalidation of challenged condition and explicitly inviting trial court to "reconsider the appropriateness of probation").

36. See 1 NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 7:32, at 7-58 (2d ed. 1999) (suggesting that probationers rarely litigate validity of probation conditions because most are "delighted to receive probation"); Melissa Burke, Note, *The Constitutionality of the Use of the Norplant Contraceptive Device as a Condition of Probation*, 20 HASTINGS CONST. L.Q. 207, 217 n.74 (1992) (noting that imposition of probation conditions as part of plea negotiation process circumvents constitutional scrutiny of those conditions); Tavill, *supra* note 26, at 624 (stating that "[t]he scarcity of challenges is due mainly to the fact that most offenders are delighted merely at the thought of not having to go to prison"); Jeffrey Abramson, *Are Courts Getting Too Creative?*, N.Y. TIMES, Mar. 11, 1999, at A27 (noting that unauthorized "creative" sentences are typically imposed as conditions of probation, thereby evading appellate review); Martha Brannigan & Karen Blumenthal, *Courts Using Humiliation as Punishment*, WALL ST. J., Nov. 9, 1989, at B11 (noting that probation conditions designed to humiliate defendant are rarely challenged because defendant has most often "readily agreed to the punishment as a preferred alternative to prison").

37. See McMurry, *supra* note 29, at 12 (discussing Poe's sentencing record); *Sentencing Criminals to Shame*, FLA. TIMES-UNION, Apr. 26, 1998, at A19 [hereinafter *Sentencing Criminals*] (same).

to shovel manure in the Houston Police Department's horse stables.<sup>38</sup> But Judge Poe does not limit his probation conditions to those involving humiliation. Another condition that he imposes with some regularity requires offenders who are single and who have illegitimate children either to marry the mother or to file the papers necessary to pay child support.<sup>39</sup> He ordered a forger who had fathered thirteen illegitimate children to attend Planned Parenthood meetings and instructed a piano teacher who molested two students not to play the piano for twenty years.<sup>40</sup> He also ordered a car thief to hand over the keys of his Trans Am to the seventy-five-year-old victim of his theft.<sup>41</sup> One recent media report revealed that although Judge Poe imposed over fifty such sentences during the previous three years, not a single defendant challenged one on appeal.<sup>42</sup>

A similar pattern has emerged as judges impose the surgical insertion of the Norplant contraceptive device<sup>43</sup> as a condition of probation. One noted commentator has aptly called it "shocking that some judges have tried to compel convicted child abusers to have the contraceptive device Norplant implanted as a condition of probation."<sup>44</sup> Such a condition is an extraordinary intrusion into the constitutionally protected realm of privacy and reproductive freedom, carrying with it further First Amendment implications if the use of contraceptives is inconsistent with a probationer's religious beliefs.<sup>45</sup> Nonetheless, of the four cases reported in an early commentary on the subject, only one had been appealed, and for procedural reasons even that appeal was never heard.<sup>46</sup> Similarly, while trial courts in a number of states have required

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38. See Nicole Koch, *Houston Judge Teaches "Humiliation in Sentencing,"* WICHITA EAGLE, May 22, 1997, at 17A (explaining Poe's sentencing record); McMurry, *supra* note 29, at 12 (same).

39. See Koch, *supra* note 38 (summarizing Poe's practices in sentencing).

40. See Henry J. Reske, *Scarlet Letter Sentences*, A.B.A. J., Jan. 1996, at 16, 17 (discussing sentences Poe has imposed).

41. See *id.* (discussing Poe's sentencing record); Koch, *supra* note 38 (same).

42. See *Sentencing Criminals*, *supra* note 37 (noting that Poe's sentences have not been challenged); see also Reske, *supra* note 40, at 16-17 (noting that, although Poe has been handing down similar sentences since 1980s, most are never challenged because they are "tied to plea agreements").

43. For a description of the Norplant contraceptive device, see Burke, *supra* note 36, at 208-11; Kristyn M. Walker, Note, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779, 787-89 (1993).

44. Abramson, *supra* note 36.

45. For two sound discussions supporting these contentions, see generally Burke, *supra* note 36, and Walker, *supra* note 43.

46. See Burke, *supra* note 36, at 214-17 & n.74 (discussing early Norplant probation cases). A recent Supreme Court of Michigan decision suggests one other case in which the defendant filed an appeal after the trial court imposed the implantation of Norplant as a probation condition. *People v. Walsh*, 593 N.W.2d 558, 558 (Mich. 1999) (table decision) (denying

probationers to join or to make charitable contributions to advocacy groups with whose agendas they disagree, defendants rarely have challenged those probation conditions.<sup>47</sup>

## 2. *Reliance on the Contract and Waiver Theories*

When a defendant actually challenges a probation condition, either on direct appeal or in some other post-conviction setting, he or she frequently encounters one of several procedural obstacles that make such challenges unlikely even to be heard on the merits, let alone to prevail. The obstacle that is by far the most pervasive and intractable appears in several different formulations, but each leads to the same result. The basic concept is that an offender is free to reject the imposition of probation and to accept the alternative, presumably incarceration.<sup>48</sup> Therefore, once the defendant has accepted the imposition of probation and has failed to file a specific objection to any of the conditions attached to that probation, the theory precludes the defendant from challenging the validity of any of those conditions.

Perhaps the most common formulation of this preclusion theory is the "contract theory," which analogizes the acceptance of probation to the formation of a contractual agreement between the defendant and the sentencing court.<sup>49</sup> The United States Supreme Court has noted that probation should not be viewed as a contract,<sup>50</sup> and the United States Congress disavowed the

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appeal). Because the defendant decided to undergo a tubal ligation, the case was rendered moot and leave to appeal was denied. *Id.*

47. See Felsenthal, *supra* note 32 (noting lack of challenge).

48. Some scant authority does support the proposition that a defendant may not refuse to be placed on probation. See, e.g., *Cooper v. United States*, 91 F.2d 195, 199 (5th Cir. 1937) (rejecting contention that defendant may refuse probation). Because a probationer can effectively force the imposition of a sentence by simply violating any one of the conditions of probation, this rule makes little practical sense. Consequently, it is a fair summary of the law to state that a defendant does have some "choice" in accepting or refusing the imposition of probation. See, e.g., *People v. Osslo*, 323 P.2d 397, 413 (Cal. 1958) (noting that although defendant has "no right to probation[,] he does have the right, if he feels that the terms of probation are more harsh than the sentence imposed by law, to refuse probation and undergo such sentence"); *People v. Sarnoff*, 4 N.W.2d 544, 547 (Mich. 1942) (explaining that defendant could "exercise the option of either [abiding by the conditions of probation] or of serving the full sentence required by law").

49. See Greenberg, *supra* note 15, at 57 (discussing contract theory); *Alternatives to Incarceration*, *supra* note 25, at 1950 (same); Jaimy M. Levine, Comment, "Join the Sierra Club!": *Imposition of Ideology as a Condition of Probation*, 142 U. PA. L. REV. 1841, 1853 (1994) (same); *Judicial Review*, *supra* note 28, at 191 (same).

50. See *Burns v. United States*, 287 U.S. 216, 220 (1932) (finding that "probation is a matter of favor, not of contract"); see also *Roberts v. United States*, 320 U.S. 264, 274 (1943) (Frankfurter, J., dissenting) (maintaining that probation should not be treated as "a kind of bargain").

contract theory of probation in the Sentencing Reform Act of 1984.<sup>51</sup> Nevertheless, courts have continued to use the contract theory either to evade completely review on the merits or to justify an exceptionally deferential form of review.<sup>52</sup> Appellate courts have cited or suggested the contract theory in upholding some extraordinary probation conditions, including those imposing surgical sterilization,<sup>53</sup> banishment,<sup>54</sup> and significant infringements on First Amendment rights.<sup>55</sup> The Supreme Court of South Dakota recently relied on this theory to justify the imposition of a period of probation extending beyond the statutory maximum sentence for the underlying crime.<sup>56</sup>

Other formulations of the same basic notion speak in broader terms about the concept of waiver. In some instances, the courts find that by accepting or consenting to the conditions of probation, a defendant has forfeited the right to challenge them.<sup>57</sup> In other cases, the courts conclude that the absence of a

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51. See *Alternatives to Incarceration*, *supra* note 25, at 1950 (reporting congressional rejection of contract theory); Levine, *supra* note 49, at 1853-54 (same).

52. See Greenberg, *supra* note 15, at 57 (explaining that use of contract theory had "flowered" despite Supreme Court's rejection of analogy); *Alternatives to Incarceration*, *supra* note 25, at 1950 (noting that "many courts have continued to rely" on contract theory even after Sentencing Reform Act of 1984).

53. See *People v. Blankenship*, 61 P.2d 352, 354 (Cal. Dist. Ct. App. 1936) (upholding probation condition that required sterilization). In upholding the condition, the court explained that the defendant "was permitted to elect whether he would comply with the condition and receive the clemency which he asked or decline to submit to the operation and accept the penalty which the law provides as punishment for his offense." *Id.* at 353-54. The defendant's alternative to surgical sterilization was a prison term of five years. *Id.* at 352.

54. See *State v. Karan*, 525 A.2d 933, 934 (R.I. 1987) (per curiam) (upholding probation condition banishing defendant from United States even though banishment was outside sentencing court's authority, reasoning that defendant was precluded from "complain[ing] of an agreement that he proposed and voluntarily entered into"); see also *United States v. Janko*, 865 F.2d 1246, 1247 (11th Cir. 1989) (sustaining probation condition requiring defendants to leave United States, reasoning that "condition of probation is not unconstitutional where it resulted from a negotiated plea agreement and was requested by the defense as an appropriate sentence").

55. See, e.g., *United States v. Smith*, 414 F.2d 630, 636 (5th Cir. 1969), *rev'd on other grounds sub nom.* *Schacht v. United States*, 398 U.S. 58, 65 (1970) (upholding probation condition prohibiting defendant from associating with Students for Democratic Society or Humanists because, having "chose[n] to enjoy the benefits of probation," defendant "must also endure its restrictions"); *State v. D'Amario*, 725 A.2d 276, 280 (R.I. 1999) (upholding probation condition severely limiting defendant's right of access to courts, reasoning that "defendant may not now succeed in claiming that his rights were violated by the very plea agreement he designed to avoid facing trial and a possible prison sentence").

56. *State v. Macy*, 403 N.W.2d 743, 745 (S.D. 1987) (upholding duration of defendant's probation and reasoning that defendant "chose probation but now challenges what he voluntarily accepted").

57. See, e.g., *State v. Bynes*, 403 S.E.2d 126, 127 (S.C. Ct. App. 1991) (upholding probation condition requiring restitution for crimes that prosecutor had *not* charged because

specific objection at the trial level constitutes a waiver of the defendant's right to challenge a probation condition.<sup>58</sup>

For quite some time, scholars have criticized each formulation of the preclusion theory. Virtually all scholars believe that the extraordinary inequality in bargaining power and the highly coercive setting in which parties negotiate probation conditions make any analogy to contract law entirely unpersuasive.<sup>59</sup> As one commentator noted, "It requires no sophisticated analysis to demonstrate that the acceptance of probation by the offender bears little resemblance to a contract."<sup>60</sup> A few notable court decisions have expressed the same viewpoint.<sup>61</sup>

On the broader question of whether any objection requirement or waiver theory ought to apply, the scholarly consensus seems equally strong.<sup>62</sup> In addi-

defendant had "consented" to condition rather than face 14-year sentence on crimes that prosecutor had charged); 24 C.J.S. *Criminal* § 1556 (1989) (suggesting general rule that one who has accepted probation condition cannot subsequently challenge its validity).

58. See, e.g., *State v. Nickerson*, 791 P.2d 647, 648 (Ariz. Ct. App. 1990) (permitting probation condition prohibiting defendant from having any contact with his wife without written consent of his probation officer and noting that defendant "waived any objection to the condition by failing to raise it" at trial level); *State v. Topovski*, No. 2870, 1994 WL 619786, at \*3 (Ohio Ct. App. Nov. 9, 1994) (upholding probation condition prohibiting farmer from "hav[ing] any livestock on his property or under his control" because defendant did not establish that he had objected to condition "at the time the trial court imposed it"); *State v. Dziuba*, 435 N.W.2d 258, 262 (Wis. 1989) (sustaining probation condition requiring sale of defendant's home, despite state constitutional provision prohibiting such condition, on theory that "it is unsustainable in principle to now grant the defendant[] relief when the defendant failed to object to a condition of probation which infringed on this constitutional right").

59. See, e.g., Best & Birzon, *supra* note 30, at 832-34 (criticizing contract theory); Greenberg, *supra* note 15, at 57 (discussing disparity in bargaining power between state and defendant); Levine, *supra* note 49, at 1853 (noting disparity in bargaining power); *Judicial Review*, *supra* note 28, at 192-93 (criticizing contract theory); Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 324 (1959) (same). But see Stephen S. Cook, *Selected Constitutional Questions Regarding Federal Offender Supervision*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 27 (1997) (approving court holding that "defendant's approval of conditions waives any argument of constitutionality . . . unless, of course, acceptance of these conditions is somehow coerced").

60. *Judicial Review*, *supra* note 28, at 192.

61. See, e.g., *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 n.15 (9th Cir. 1975) (noting that *Morrissey v. Brewer*, 408 U.S. 471 (1972), implicitly rejected contract theory in parole setting and opining that contract theory is "equally inappropriate when applied in the probation setting"); *Hahn v. Burke*, 430 F.2d 100, 104 (7th Cir. 1970) (finding contract theory "unpersuasive" because "[t]he probationer does not enter into the agreement on an equal status with the state"); cf. *Rose v. Haskins*, 388 F.2d 91, 100 (6th Cir. 1968) (Celebrezze, J., dissenting) (rejecting contract theory in parole context and asserting that "when the 'choice' of the parolee is to remain in prison or accept . . . a burdensome provision, the 'choice' to accept parole can hardly be termed a voluntary waiver of the right [to challenge the provision at issue]").

62. See, e.g., Best & Birzon, *supra* note 30, at 833-34 (referring to contract and waiver theories as "misleading"); James C. Weissman, *Constitutional Primer on Modern Probation*

tion to highlighting the "nominal" or "hypothetical" nature of any purported consent to probation conditions negotiated under the threat of incarceration,<sup>63</sup> commentators and a handful of courts have argued that for public policy reasons appellate courts should prevent trial courts from imposing unfair, unlawful, or unreasonably burdensome conditions.<sup>64</sup> Moreover, a number of sources have discussed the obvious reason that prevents most defendants from voicing an objection at the time that an offensive condition is imposed: the fear, often justified, that the government will withdraw the offer of probation.<sup>65</sup>

Despite the apparent consensus among commentators that these preclusive rules are inappropriate, many courts continue to employ them as a means of avoiding any substantive appellate review of the validity of probation

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*Conditions*, 8 NEW ENG. J. ON PRISON L. 367, 391 (1982) (advocating repudiation of "act of grace" and waiver theories); Polonsky, *supra* note 28, at 483 (criticizing procedural obstacles to challenging probation conditions); *Judicial Review*, *supra* note 28, at 193-95 (same).

63. See *Consuelo-Gonzalez*, 521 F.2d at 274 (Wright, J., dissenting) (noting that "consent" under threat of incarceration "is more likely to be nominal than real"); Polonsky, *supra* note 28, at 483 (calling agreement under threat of incarceration "glaringly hypothetical consent"); see also Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 762 (1998) (asserting that if sentence "should be straight probation and not imprisonment then what looks like an offer is in fact a threat, and the offender's consent to [a probation condition] is coerced and thus invalid").

64. See, e.g., *Dear Wing Jung v. United States*, 312 F.2d 73, 75-76 (9th Cir. 1962) (rejecting waiver theory and noting that "[i]t is not enough for the government to answer that [the imposition of an unlawful] condition merely gave the defendant a 'choice'"); *People v. Dominguez*, 64 Cal. Rptr. 290, 294 (Ct. App. 1967) (rejecting waiver theory because "[t]he law can not suffer the state's interest and concern in the observance and enforcement of [fundamental public] policy to be thwarted through the guise of waiver of a personal right by an individual"); *People v. Becker*, 84 N.W.2d 833, 836 (Mich. 1957) (rejecting waiver theory and noting that, although defendant was "given an alternative," appropriate question was "whether the alternative [was] lawful"); *Best & Birzon*, *supra* note 30, at 833-34 (maintaining that "[t]he conduct of the defendant is largely irrelevant if the real question is the legality or illegality of a condition" and that "the public policy of the state should mark [inappropriate conditions] as invalid regardless of any consent of the parties"); *Judicial Review*, *supra* note 28, at 192 (asserting applicability of doctrine that "agreements which are contrary to public policy will be denied enforcement in both law and equity").

65. See, e.g., *People v. Welch*, 851 P.2d 802, 810 (Cal. 1993) (Arabian, J., concurring) (explaining that "the trial court may respond to a defendant's valid objection by improperly refusing to grant probation on the remaining, adequate terms and conditions"); *People v. Higgins*, 177 N.W.2d 716, 717 (Mich. Ct. App. 1970) (refusing to apply waiver theory because "[t]he defendant could understandably have believed that if he did not accept the probationary terms set down by the trial judge, the offer of probation would be revoked and he would be sent to jail"); *State v. Burdin*, No. 02C01-9306-CR-00121, 1994 WL 716262, at \*2 (Tenn. Crim. App. Dec. 28, 1994) (stating that when defendant accepted probation on condition that he place sign on his property declaring him to be child molester, he "[o]bviously . . . knew, at that point, that if he declined the placement of the sign, he would be denied probation"), *aff'd*, 924 S.W.2d 82 (Tenn. 1996).

conditions.<sup>66</sup> If a discernable trend characterizes the evolution of the case law, it appears to be moving in the direction of erecting, not eliminating, this sort of procedural barrier to review.<sup>67</sup>

### 3. Reliance on the Act of Grace Theory

Another significant procedural obstacle to substantive appellate review, generally referred to as the "act of grace" theory, suggests that courts impose probation as a pure act of leniency and the decision therefore is immune from review.<sup>68</sup> The act of grace theory has its origins in two United States Supreme Court cases from the 1930s: *Burns v. United States*<sup>69</sup> and *Escoe v. Zerbst*.<sup>70</sup>

66. See, e.g., *Welch*, 851 P.2d at 808 (embracing waiver theory); *Alternatives to Incarceration*, *supra* note 25, at 1950 (reporting continued reliance on contract and waiver theories); *supra* Part II.A.2 (listing cases upholding probation conditions based on contract and waiver theories); see also *Larson v. State*, 572 So. 2d 1368, 1370-71 (Fla. 1991) (adopting contemporaneous objection rule unless condition is "illegal," which court defined as "so egregious as to be the equivalent of fundamental error"); *State v. McSweeney*, 860 P.2d 305, 306 (Or. Ct. App. 1993) (noting that, by statute, guilty plea limited appellate review to claims that sentence exceeded statutory maximum or constituted cruel and unusual punishment); *State v. Vasby*, 788 P.2d 1024, 1025 n.1 (Or. Ct. App. 1990) (refusing to review challenges to probation conditions because defendant did not raise objections before trial court); *State v. Cantwell*, No. 01C01-9701-CC-00035, 1998 WL 792220, at \*7 (Tenn. Crim. App. Nov. 16, 1998) (suggesting that defendant could negotiate plea agreement with State to establish probation condition, even though law did not authorize imposition absent agreement). But cf. *Thomas v. State*, 519 So. 2d 1113, 1114 (Fla. Dist. Ct. App. 1988) (noting lack of preservation for review, but "in the interest of justice" striking condition that defendant not become pregnant unless married); *People v. Warren*, 452 N.Y.S.2d 50, 51 (App. Div. 1982) (stating that lack of preservation, although perhaps otherwise applicable, is not bar to review in light of "the serious constitutional issue presented" by probation condition requiring contribution to gun control advocacy group).

67. Compare *Welch*, 851 P.2d at 808 (embracing waiver theory) with *In re Bushman*, 463 P.2d 727, 733 (Cal. 1970) (rejecting implicitly waiver theory). California is the prime example of this trend. Prior to 1993, many California cases held that a defendant's acceptance of probation did not preclude his or her challenge of a condition of probation on appeal. See, e.g., *Bushman*, 463 P.2d at 733 (rejecting implicitly waiver theory); *People v. Hackler*, 16 Cal. Rptr. 2d 681, 684 (Ct. App. 1993) (same); *People v. Hernandez*, 277 Cal. Rptr. 444, 445 (Ct. App. 1991) (same). Indeed, the *Hackler* court referred to the rejection of the waiver theory as "established law." *Hackler*, 16 Cal. Rptr. 2d at 683. In 1993, however, the Supreme Court of California reversed itself, holding in *People v. Welch* that the "failure to timely challenge a probation condition . . . in the trial court waives the claim on appeal." *Welch*, 851 P.2d at 808.

68. See, e.g., *Greenberg*, *supra* note 15, at 55-56 (discussing act of grace theory); *Alternatives to Incarceration*, *supra* note 25, at 1949-50 (same); *Levine*, *supra* note 49, at 1852 (same); *Judicial Review*, *supra* note 28, at 188-89 (same).

69. 287 U.S. 216 (1932). The Supreme Court observed in passing that "probation is a matter of grace." *Burns v. United States*, 287 U.S. 216, 223 (1932).

70. 295 U.S. 490 (1935). According to the Court, "Probation or suspension of sentence comes as an act of grace to one convicted of a crime." *Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935).



Although the statements about grace were not central to the Court's holdings in either case, other courts began to rely heavily on the concept, thereby avoiding any appellate review of the validity or propriety of probation conditions.<sup>71</sup> As explained by one early commentator, the theory holds that

the convicted defendant has no right to expect anything less than the full penalty prescribed by law. Thus, the sentencing judge has untrammelled [sic] discretion to grant or withhold probation, and should he decide to offer the offender a modicum of freedom, he may make the grant subject to any conditions he believes to be proper. The probationer will not be heard to complain of this voluntary act of clemency, even though the conditions imposed are arbitrary, unfair, vague, or otherwise invalid.<sup>72</sup>

Not surprisingly, this theory has been the subject of significant criticism from scholars and from the occasional appellate court.<sup>73</sup> Perhaps the Supreme Court of Oregon said it best in *State v. Martin*:<sup>74</sup> the court noted that over seventy percent of the state's defendants received probation and then concluded that it was "unrealistic to approach a probation case as one of unusual clemency when probation is in fact resorted to by the trial courts in the majority of cases."<sup>75</sup>

In 1973, the United States Supreme Court seemed to call for an end to any reliance on the act of grace theory, declaring it to be "clear . . . that a probationer c[ould] no longer be denied due process in reliance on the dictum in *Escoe v. Zerbst* that probation is an 'act of grace.'"<sup>76</sup> Despite this unambiguous language, some appellate courts continue to rely on the theory, in whole or in part, as a justification for denying substantive appellate review of probation conditions.<sup>77</sup>

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71. See, e.g., Greenberg, *supra* note 15, at 56 & n.109 (citing cases invoking act of grace theory); *Alternatives to Incarceration*, *supra* note 25, at 1949-50 & n.49 (same); *Judicial Review*, *supra* note 28, at 188-89 (same).

72. *Judicial Review*, *supra* note 28, at 189 (footnote omitted).

73. See, e.g., *State v. Martin*, 580 P.2d 536, 539 n.3 (Or. 1978) (noting decline of act of grace theory in Oregon); Greenberg, *supra* note 15, at 56-57 (criticizing act of grace theory); Weissman, *supra* note 62, at 371 & n.21, 391 (same); *Judicial Review*, *supra* note 28, at 189-91 (same).

74. 580 P.2d 536 (Or. 1978).

75. *Martin*, 580 P.2d at 539 n.3.

76. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973) (citation omitted) (quoting *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935)).

77. See, e.g., *United States v. Kohlberg*, 472 F.2d 1189, 1190 (9th Cir. 1973) (relying on act of grace theory to uphold several probation conditions, including one that precluded association with "known homosexuals"); *State v. Kohlman*, 854 P.2d 318, 319 (Kan. Ct. App. 1993) (relying on act of grace theory to uphold unspecified probation conditions); *State v. Means*, 257 N.W.2d 595, 600-02 (S.D. 1977) (relying on act of grace theory and applying probation review standards to uphold several bail conditions that prohibited defendant from participating in activ-

This same concept frequently appears in a slightly different formulation, in which courts suggest that, because probation is "not a right but a privilege," the defendant has little or no standing to complain about the fashion in which the trial court has exercised its sentencing discretion.<sup>78</sup> Like the "act of grace" theory, the courts cite this language as a justification for minimizing or completely denying substantive appellate review.

### *B. Limitations on Substantive Appellate Review*

Potential challenges to probation conditions fall into two broad categories: statutory challenges, which focus on the reasonableness of a challenged condition, and constitutional challenges, which focus on the extent to which a challenged condition infringes upon a defendant's constitutional rights.<sup>79</sup> Although a resemblance of a national consensus exists on how to address the merits of a statutory challenge, widespread confusion surrounds whether a constitutional challenge lies at all and, if so, what the standard of review should be.

#### *1. Statutory Challenges*

##### *a. Articulating the Standard*

Appellate review of a statutory challenge to a probation condition generally begins with the proposition that the statute authorizing the use of probation either explicitly or implicitly limits trial courts to the imposition of conditions that are reasonable.<sup>80</sup> Beyond this point of widespread agreement, however, courts have so diverged in the precise application of the concept of reasonableness that several observers have concluded that no coherent standard exists for this sort of appellate review.<sup>81</sup> In addition to the conception of

ities of American Indian Movement); *see also* *People v. Pointer*, 199 Cal. Rptr. 357, 363 n.7 (Ct. App. 1984) (noting that "some reviewing courts continue to give lip service to [the act of grace] theory" even though United States Supreme Court has "repudiated" it); Greenberg, *supra* note 15, at 56 (explaining that, "though the doctrine is 'thoroughly discredited,' courts continue ritualistically to mouth it" (quoting F. COHEN, *THE LEGAL CHALLENGE TO CORRECTIONS* 32 (1969))); *Alternatives to Incarceration*, *supra* note 25, at 1949-50 (stating that many courts still employ act of grace theory); Levine, *supra* note 49, at 1853 (asserting that even though "the Supreme Court [has] disavowed the 'act of grace' theory, lower courts continue to pay it homage").

78. *See, e.g.*, *Gilliam v. Los Angeles Mun. Ct.*, 159 Cal. Rptr. 74, 77 (Ct. App. 1979) (commenting that probation is privilege, not right); *State v. Heyn*, 456 N.W.2d 157, 160 (Wis. 1990) (same).

79. *See* 1 COHEN, *supra* note 36, § 7:32, at 7-59 (outlining grounds for challenging probation conditions).

80. *Id.* § 7:33-7:35, at 7-59 to 7-64 (discussing statutory challenges to probation conditions).

81. *See, e.g.*, Greenberg, *supra* note 15, at 55 (maintaining that "the courts have not developed a uniform, well-defined rule" for deciding challenges to probation conditions); Thomas E. Bartrum, Note, *Birth Control as a Condition of Probation—A New Weapon in the War Against*

reasonableness, another common thread runs through the case law: that courts should review the conditions using the extremely deferential "abuse of discretion" standard.<sup>82</sup> Because trial courts' decisions receive such deference regardless of the specific test applied, appellate courts have upheld the majority of challenged conditions.<sup>83</sup>

Several variants on the concept of reasonableness appear with frequency in the case law. Although the most basic formulation merely asserts that probation conditions must be "reasonable," this formulation is generally accompanied either by the specific adoption of some other mode of analysis or by a broader discussion that reveals several factors that the court has considered.<sup>84</sup> Perhaps the most common formulation of the reasonableness standard flowed in large part from early editions of the American Bar Associa-

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*Child Abuse*, 80 KY. L.J. 1037, 1044 (1992) (contending that "confusion in imposing conditions on probation is apparent" and that "a more coherent approach is desirable"); Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1384 (asserting that "[n]o coherent limitation is currently available to appellate judges who review [the] lower court's imposition of probation conditions"); Levine, *supra* note 49, at 1848 (declaring that "courts have defined several different standards, none of which have [sic] been applied with any certainty or regularity").

82. See, e.g., *United States v. Showalter*, 933 F.2d 573, 574 (7th Cir. 1991) (explaining that court reviews conditions "under the deferential 'abuse of discretion' standard"); *United States v. Clark*, 918 F.2d 843, 847 (9th Cir. 1990) (observing that court reviews conditions "for an abuse of discretion"); *United States v. Beros*, 833 F.2d 455, 467 (3d Cir. 1987) (noting that court conducts "review for abuse of [the sentencing court's] discretion"), *overruled on other grounds*, *United States v. Keys*, 95 F.3d 874 (9th Cir. 1996); *People v. Burleigh*, 727 P.2d 873, 874-75 (Colo. Ct. App. 1986) (applying abuse of discretion standard to review); *State v. Allen*, 506 P.2d 528, 529 (Or. Ct. App. 1973) (same); *Cook*, *supra* note 59, at 2 (noting that probation conditions "are reviewed through the 'abuse of discretion' standard, which substantially defers to the trial court").

83. See, e.g., 1 COHEN, *supra* note 36, § 7:32, at 7-58 ("Irrespective of the stage at which they are questioned, . . . most probation and parole conditions are upheld."); Best & Birzon, *supra* note 30, at 832 (explaining that because conditions that trial court imposes "normally are not such as would shock the conscience, invariably all manner of conditions are termed reasonable"); *Alternatives to Incarceration*, *supra* note 25, at 1968 (describing statutory and judicial constraints on the imposition of probation conditions as "little more than . . . surface barrier[s]").

84. See, e.g., *Ballenger v. State*, 436 S.E.2d 793, 794-95 (Ga. Ct. App. 1993) (stating that standard was that "any reasonable condition" should be upheld, but evaluating relationship between challenged condition and underlying purposes of probation); *State v. Livingston*, 372 N.E.2d 1335, 1337 (Ohio Ct. App. 1976) (asserting that "[r]easonableness is the test of the propriety of the conditions of probation," but citing ABA Standards and evaluating relationship between challenged condition and underlying purposes of probation); *State v. Allen*, 506 P.2d 528, 529 (Or. Ct. App. 1973) (declaring that appellate court's task is to "assess[] the reasonableness of probation conditions," but that in doing so the appellate court "will bear in mind the purposes sought to be served by probation"); *State v. Macy*, 403 N.W.2d 743, 745-46 (S.D. 1987) (observing that "[t]he test is one of reasonableness," but referring to "nature of the crime" and nature of condition).

tion's Standards for Criminal Justice.<sup>85</sup> It focuses on whether the condition is "reasonably related" to the underlying purpose of probation.<sup>86</sup> Another formulation that appears with some regularity, although somewhat less frequently than the American Bar Association formulation, analyzes whether the probation condition is reasonably related to the underlying criminal offense.<sup>87</sup> Some states, such as Rhode Island, have never articulated any standard of review at all.

In the cases that focus on the relationship between a probation condition and the purposes underlying the imposition of probation, courts have applied varying approaches to the analysis. As a starting point, the majority of states continue to treat probation as an alternative to criminal sentencing rather than as a sentence, finding that the primary or exclusive purpose of probation is the rehabilitation of the offender.<sup>88</sup> As a consequence, many courts have

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85. Cf. ABA STANDARDS FOR CRIMINAL JUSTICE § 18-2.3(e) (2d ed. 1979) (providing that probation conditions "should be reasonably related to the purposes of sentencing"). Similar formulations appear in the Model Penal Code, which provides that probation conditions should "be reasonably related to the rehabilitation of the defendant," MODEL PENAL CODE § 301.1(2)(f) (1962), and the Model Sentencing and Corrections Act, which provides that probation conditions should be "reasonably related to the purpose of [the] sentence," MODEL SENTENCING AND CORRECTIONS ACT § 3-302(a)(9) (1978). The United States Code requires that probation conditions imposed in federal courts be reasonably related to the underlying purpose of the sentence. 18 U.S.C. § 3563(b) (1994 & Supp. III 1997).

86. See, e.g., *United States v. Turner*, 44 F.3d 900, 903 (10th Cir. 1995) (stating that probation conditions are "consistently upheld" if they "bear a reasonable relationship to the goals of probation"); *Malone v. United States*, 502 F.2d 554, 556 (9th Cir. 1974) (upholding probation conditions after finding "reasonable nexus between the probation conditions and the goals of probation"); *State v. Pieger*, 692 A.2d 1273, 1277 (Conn. 1997) (explaining that probation conditions must be reasonably related to purposes of probation); *State v. Burdin*, 924 S.W.2d 82, 85 (Tenn. 1996) (noting that Tennessee probation statute provides that conditions must be "reasonably related to the purpose of the offender's sentence" (internal quotations omitted) (quoting TENN. CODE ANN. § 40-35-303(d) (Supp. 1995))); 1 COHEN, *supra* note 36, § 7:34, at 7-61 (noting that general standard is whether condition is reasonably related to underlying purpose of probation).

87. See, e.g., *State v. Asher*, 595 P.2d 839, 841 (Or. Ct. App. 1979) (stating that "conditions imposed must be 'reasonably related to the offense for which the defendant was convicted or to the needs of an effective probation'" (quoting *State v. Age*, 590 P.2d 759, 763 (Or. 1979))); *State v. Whitchurch*, 577 A.2d 690, 692 (Vt. 1990) (stating "general rule that a probation condition is valid if it is reasonably related to the crime for which the defendant was convicted" (citing *State v. Peck*, 547 A.2d 1329, 1333 (Vt. 1988))); KLEIN, *supra* note 16, at 80 (explaining that "appellate courts typically allow conditions of probation that are reasonably related to the crime committed or to the prevention of future criminal behavior by the defendant or [that] satisfy other legitimate probationary goals"); Filcik, *supra* note 15, at 308-09 (stating that, under "traditional standard of review," probation conditions "must be reasonably related to the crime committed, the defendant's rehabilitation, or the public safety").

88. See, e.g., *Young v. State*, 692 S.W.2d 752, 755 (Ark. 1985) ("The broad objectives sought by probation are education and rehabilitation."); *People v. Hackler*, 16 Cal. Rptr. 2d 681, 686 (Ct. App. 1993) ("The purpose of probation is rehabilitation."); *State v. Burdin*, 924 S.W.2d

restricted their review to whether the condition is reasonably related to the offender's rehabilitation.<sup>89</sup> A number of other courts, however, have conducted a slightly different review, exploring whether the condition is reasonably related not only to the offender's rehabilitation but also to the protection of the public.<sup>90</sup> Still other courts have explored whether a condition is reasonably related to "future criminality."<sup>91</sup> A small minority of states as well as, notably, the federal legislature have explicitly declared probation to be a sentence, thereby broadening the permissible purposes of probation to include deterrence or retribution.<sup>92</sup> Commentators have agreed for some time, however, that even in those systems in which trial courts are ostensibly limited to imposing rehabilitative conditions of probation judges use conditions of probation to effect deterrence or to extract retribution.<sup>93</sup>

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82, 86 (Tenn. 1996) ("The primary goal of probation, under the [state's Criminal Sentencing] Act and the decisions of the appellate courts of [Tennessee], is rehabilitation of the defendant."); *Alternatives to Incarceration*, *supra* note 25, at 1956 (noting that by 1998 "[s]tate legislatures ha[d] yet to broaden the statutory goals of probation beyond public protection and rehabilitation"); Brilliant, *supra* note 81, at 1368-70 (explaining that both case law and state statutes generally provide that rehabilitation is primary purpose of probation); Levine, *supra* note 49, at 1850 ("The primary purpose of probation is rehabilitation.").

89. See, e.g., *Hines v. State*, 358 So. 2d 183, 185 (Fla. 1978) (noting that trial court may "impose any valid condition of probation which would serve a useful rehabilitative purpose"); *State v. Mummert*, 566 P.2d 1110, 1112 (Idaho 1977) (explaining that "terms of probation must be reasonably related to the purpose of probation, rehabilitation"); *State v. Norman*, 484 So. 2d 952, 953 (La. Ct. App. 1986) ("Probation conditions, to be valid, must be reasonably related to rehabilitation of the defendant.").

90. See, e.g., *United States v. Bortels*, 962 F.2d 558, 560 (6th Cir. 1992) (asserting that if condition "is reasonably related to the dual goals of probation, the rehabilitation of the defendant and the protection of the public, it must be upheld"); *United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991) (maintaining that condition is valid if it is "primarily designed to meet the ends of rehabilitation and protection of the public" and if it is "reasonably related to such ends"); *Alternatives to Incarceration*, *supra* note 25, at 1956 (noting that "many courts have found that probation conditions may limit a probationer's rights only if they are 'primarily designed' to effect" goals of "public protection" and "offender rehabilitation"); Tavill, *supra* note 26, at 622 (asserting "the well settled rule" that "probation conditions must have a reasonable relationship to both the rehabilitative treatment of the accused and the protection of the public").

91. See, e.g., *Young v. State*, 692 S.W.2d 752, 755 (Ark. 1985) ("[C]onditions for probation will be upheld if they bear a reasonable relationship to the crime committed or to future criminality."); *Coulson v. State*, 342 So. 2d 1042, 1043 (Fla. Ct. App. 1977) ("[C]onditions of probation are valid if the activities restricted bear a reasonable relationship to the past or future criminality of the probationer.").

92. See, e.g., 18 U.S.C. § 3551(b) (1994) (identifying probation as sentence); Bartrum, *supra* note 81, at 1039 (noting "trend . . . toward expanding the permissible goals of probation"); Filcik, *supra* note 15, at 296 (commenting that "an increasing number of states . . . are treating probation as a sentence").

93. See, e.g., Best & Birzon, *supra* note 30, at 811 (explaining, in 1963, that probation conditions were sometimes "used as a vehicle for ends wholly unrelated to the reformation of the offender"); Greenberg, *supra* note 15, at 96 (writing, in 1981, that judges "ha[d] frequently

Some jurisdictions have adopted language that appears to provide some protection for probationers beyond the requirement of reasonableness. The American Bar Association's Standards for Criminal Justice Sentencing are again a common reference point, providing that probation conditions "should not be unduly restrictive of an offender's liberty or autonomy."<sup>94</sup> Many jurisdictions have not adopted this limiting language,<sup>95</sup> and even within those jurisdictions that have, the restriction frequently adds little to the analysis given the extremely deferential abuse of discretion standard applied to the review.<sup>96</sup> Indeed, a fair summary of this entire discussion is that the courts tend to employ a variety of formulations to arrive at the same end point: a standard of appellate review that can be extraordinarily deferential but that

imposed conditions which punish the probationer and unnecessarily burden his rights"); Hink, *supra* note 30, at 494 (noting, in 1962, "increased use of probation as a modern substitute for traditional forms of legal punishment"); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1884 (1991) (discussing, in 1991, reemergence of public shaming as condition of probation and concluding that such condition is "a retributive spectacle that is devoid of other positive . . . content").

94. ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING § 18-3.13(c)(ii) (3d ed. 1994). The analogous sections of the Model Penal Code and the Model Sentencing and Corrections Act each provide that conditions should not be "unduly restrictive of [the probationer's] liberty" nor "incompatible with [the probationer's] freedom of conscience." MODEL PENAL CODE § 301.1(2)(f) (1962); MODEL SENTENCING AND CORRECTIONS ACT § 3-302(a)(9) (1978). The federal legislative configuration is similar, providing that probation conditions may "involve only such deprivations of liberty . . . as are reasonably necessary for the purposes" of the sentence. 18 U.S.C. § 3563(b) (1994 & Supp. IV 1998).

95. *See, e.g.,* *People v. Burleigh*, 727 P.2d 873, 874 (Colo. Ct. App. 1986) (stating that only limitation on trial court's "broad discretion" is that probation conditions must be "reasonably related to [the probationer's] rehabilitation and the purposes of probation" (quoting COLO. REV. STAT. § 16-11-204(2)(1) (1978))); *State v. Pieger*, 692 A.2d 1273, 1277-78 (Conn. 1997) (describing extent of appellate review as follows: "If it appears [to the appellate court] that the trial court reasonably was satisfied that the terms of probation had a beneficial purpose consistent with the defendant's reformation and rehabilitation, then the order must stand."); *Land v. State*, 426 S.E.2d 370, 374 (Ga. 1993) (upholding broad restrictions on association and travel because condition was "tied to the rehabilitative purpose of [the] probationary sentence" and "rationally related to the purpose underlying the sentencing objective").

96. *See, e.g.,* *United States v. Showalter*, 933 F.2d 573, 575 (7th Cir. 1991) (upholding probation condition prohibiting participation in or association with members of skinhead or neo-Nazi organizations and applying abuse of discretion standard to question of whether condition involved "no greater deprivation of liberty than is reasonably necessary" (quoting 18 U.S.C. § 3583(d)(2) (Supp. 1999))); *State v. Emery*, 593 A.2d 77, 79-80 (Vt. 1991) (sustaining probation condition requiring probationer to participate in sexual offender treatment program that violated his religious beliefs, despite requirement that probation conditions "not be unduly restrictive of the probationer's liberty or autonomy" (internal quotations omitted) (quoting ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING § 18-2.3(e))); *Edwards v. State*, 246 N.W.2d 109, 111-12 (Wis. 1976) (approving probation condition prohibiting contact with probationer's fiancé, despite requirement that probation conditions not be "unduly restrictive of [the probationer's] liberty").

has enough teeth in it to enable a court to overturn a condition that it finds offensive or troubling.

*b. Applying the Standard*

At this point, a select series of examples from the case law should illustrate the malleability of the standards of review, the selective fashion in which courts apply those standards, and the extent to which some appellate courts are willing to defer to trial courts. Florida's Court of Appeals makes a useful case study, as it has had the opportunity to decide a significant number of challenges to conditions of probation. *Rodriguez v. State*,<sup>97</sup> decided in 1979 by the Second District of the Court of Appeals, concerned the validity of probation conditions that prohibited the defendant from getting married without the court's consent, from getting pregnant, and from obtaining custody of any children, including her own.<sup>98</sup> The court laid down a series of broad principles and specific standards by which to conduct the appellate review of probation conditions. Initially, the court maintained that it would have "no constitutional difficulty" with *any* conditions as long as they were "otherwise valid conditions of probation."<sup>99</sup> Then the court noted the overriding principle that "a trial court may impose any valid condition of probation which serves a useful rehabilitative purpose"<sup>100</sup> if that condition is not "so punitive as to be unrelated to rehabilitation."<sup>101</sup> From there, the court quoted an earlier version of the American Bar Association Standards, which required not only that conditions be "reasonably related to [the probationer's] rehabilitation," but also that they not be "unduly restrictive of his liberty or incompatible with his freedom of religion."<sup>102</sup> In order to determine whether a condition of probation was reasonably related to rehabilitation, the court adopted a three-part test that was first established in a California case.<sup>103</sup> That test declared a condition invalid "if it (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."<sup>104</sup>

The court ostensibly applied all of these principles and standards to the facts of the case, in which the defendant admitted by a plea of *nolo contendere*

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97. 378 So. 2d 7 (Fla. Dist. Ct. App. 1979).

98. *Rodriguez v. State*, 378 So. 2d 7, 8 (Fla. Dist. Ct. App. 1979).

99. *Id.* at 9.

100. *Id.* (citing *Hines v. State*, 358 So. 2d 183, 185 (Fla. 1978)).

101. *Id.* (citing *Coulson v. State*, 342 So. 2d 1042, 1043 (Fla. Dist. Ct. App. 1977)).

102. *Id.* (quoting ABA STANDARDS RELATING TO PROBATION § 3.2(b) (1970)).

103. *Id.* (citing *People v. Lent*, 541 P.2d 545 (Cal. 1975)). This three-part test originated in *People v. Dominguez*, 64 Cal. Rptr. 290, 293 (Ct. App. 1967).

104. *Rodriguez*, 378 So. 2d at 9.

that she had hit her nine-year-old child "about the face" and "against an automobile, causing bruises."<sup>105</sup> The court upheld the condition that precluded the defendant from maintaining custody of her child (and of the child that she was expecting at the time of the sentence) for the duration of her ten-year probationary period, concluding without any explanation that the condition "ha[d] a clear relationship to the crime of child abuse and [wa]s therefore valid."<sup>106</sup> Presumably, the court found that this condition was "not unduly restrictive of [the defendant's] liberty," although the court neglected to specify how it reached this somewhat startling conclusion. However, the court went on to hold that the probation conditions prohibiting marriage without permission and prohibiting pregnancy had "no relationship to the crime of child abuse" and were "not reasonably related to future criminality" because the defendant was already precluded from having custody of any minor children.<sup>107</sup> Thus, those particular conditions were stricken from the sentence, which the court otherwise affirmed.<sup>108</sup>

Just seven years later, in a highly publicized case, the same court reviewed a special condition attached to probation imposed after a drunk driving conviction. In *Goldschmitt v. State*,<sup>109</sup> the Florida court upheld a probation condition that required the defendant, a first-time offender, to affix to his automobile a bumper sticker that read "CONVICTED D.U.I.—RESTRICTED LICENSE."<sup>110</sup> Although this particular condition had "become standard for all first-time D.U.I. offenders sentenced by two of the county's four judges,"<sup>111</sup> the defendant was apparently the first to challenge it on appeal. Remarkably, the *Goldschmitt* court's only citation to its extensive review in *Rodriguez* was in a footnote, which simply stated that a probation condition "should bear *some* relationship to the nature of the offense of conviction and should have *some*

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105. *Id.* at 8.

106. *Id.* at 10 & n.5.

107. *Id.* In *Howland v. State*, a court in Florida's First District reached a similar conclusion under similar facts. *Howland v. State*, 420 So. 2d 918, 919-20 (Fla. Dist. Ct. App. 1982). There, the court imposed several probation conditions on a defendant who stood convicted of negligent child abuse involving his own child. The conditions included prohibiting contact with that child, living with any children under the age of 16, and fathering any other children. *Id.* at 919. The court upheld the first two conditions, finding them to be "reasonably related to the crime of negligent child abuse and to appellant's future criminality," but struck down the third as not reasonably related because the defendant was effectively prohibited from obtaining custody of any such child. *Id.* at 919-20.

108. *Rodriguez*, 378 So. 2d at 10.

109. 490 So. 2d 123 (Fla. Dist. Ct. App. 1986).

110. *Goldschmitt v. State*, 490 So. 2d 123, 124-26 (Fla. Dist. Ct. App. 1986) (finding that lower court's judgment that bumper sticker was rehabilitative was not "utterly without foundation").

111. *Id.* at 125.



reasonable rehabilitative basis.<sup>1112</sup> In reaching its decision, the court addressed the merits of the defendant's constitutional arguments,<sup>1113</sup> an analytic step that it expressly rejected in *Rodriguez*.<sup>1114</sup> After dispensing rather quickly with those arguments,<sup>1115</sup> the court started and ended its statutory review with the following comment: "In the final analysis, we are unable to state as a matter of law . . . that the lower court's belief that such a sticker is 'rehabilitative' is so utterly without foundation that we are empowered to substitute our judgment for its."<sup>1116</sup> At no point in the opinion did the court make reference to any of the several tests and significant limitations that it enunciated in *Rodriguez*. The case represents a striking but rather typical example of several pervasive themes running through the case law: the malleability of the standards of review, the unpredictable and result-oriented application of those standards, and the significant degree to which most appellate courts will defer to the trial court.

An examination of a few other Florida cases further emphasizes these points. In 1977 in *Coulson v. State*,<sup>1117</sup> the Fourth District Court of Appeals of Florida imposed what seemed to be a reasonably rigorous standard of review in striking down a probation condition that precluded the probationer from collecting unemployment benefits during the pendency of his probation.<sup>1118</sup> The court began by asserting a general rule that "conditions of probation are valid if the activities restricted bear a reasonable relation to the past or future criminality of the probationer."<sup>1119</sup> The court went on to state that it would strike a condition of probation if the condition were "so punitive as to be unrelated to rehabilitation,"<sup>1120</sup> which it described as "the primary purpose of probation."<sup>1121</sup> In addition, the court stated that "the valid exercise of a valuable right" should be abridged only if "there are no other available alternative

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112. *Id.* at 125 n.3 (citing *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979)) (emphasis added).

113. *Id.* at 125-26.

114. See *Rodriguez*, 378 So. 2d at 9 (noting that probationer's constitutional rights "are limited by conditions of probation which are desirable for the purposes of rehabilitation").

115. The defendant had maintained that the condition violated his First Amendment rights by requiring him to display an ideological message and that the condition constituted cruel and unusual punishment. *Goldschmitt*, 490 So. 2d at 125-26. The court concluded that the message on the bumper sticker was not ideological and that the sentence was not cruel and unusual. *Id.*

116. *Id.* at 126.

117. 342 So. 2d 1042 (Fla. Dist. Ct. App. 1977).

118. See *Coulson v. State*, 342 So. 2d 1042, 1043 (Fla. Dist. Ct. App. 1977) (striking down condition because other ways existed to insure probationer's continuous efforts to gain employment).

119. *Id.*

120. *Id.*

121. *Id.* at 1042.

means to accomplish the desired end."<sup>122</sup> Relying on that set of standards and referring to another condition that already required the defendant to try to obtain and to maintain employment, the court found that the challenged condition was unnecessary.<sup>123</sup>

Fifteen years after *Coulson* and six years after *Goldschmitt*, the Fourth District of the Court of Appeals decided another highly publicized drunk driving case. In *Lindsay v. State*,<sup>124</sup> the court upheld a probation condition that required the probationer, another first time offender, to consent to the placement of an advertisement containing his "mug shot" and the caption "DUI-Convicted" in a local newspaper.<sup>125</sup> Although the trial judge had apparently imposed this condition on other probationers, this defendant, like the defendant in *Goldschmitt*, was the first to have filed an appeal.<sup>126</sup> The court began its analysis by noting that under established Florida law "a trial court has the power to impose *any* valid condition of probation that serves a rehabilitational purpose."<sup>127</sup> Unlike its predecessor court in *Goldschmitt*, however, the *Lindsay* court declined to reach the merits of the defendant's constitutional arguments, asserting that "the fact that a valid condition of probation burdens constitutional rights is no basis by itself to set it aside."<sup>128</sup> That conclusion left the court with only the defendant's claim that there was "no reasonable relationship between the condition and [the defendant's] criminal conduct."<sup>129</sup> The court then engaged in superficial speculation about whether "the humiliation arising from the publicizing of the fact of a conviction" might have a deterrent effect, but ultimately concluded that "[t]he question whether there is a reasonable relationship between criminal conduct and a condition of probation is one of fact, or at least mixed fact and law."<sup>130</sup> By reaching that conclusion, the court effectively eliminated the prospect of any meaningful appellate review. Thus, because it was "unable to say that the trial judge's decision to add this particular condition of probation [was] . . . 'utterly without foundation,'" the court upheld the condition.<sup>131</sup> The court never referred to or applied any of the limiting standards set out in its previous *Coulson*

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122. *Id.* at 1043.

123. *Id.* The court also suggested in passing that the condition "could in fact have a very detrimental effect on [the defendant's] rehabilitation." *Id.*

124. 606 So. 2d 652 (Fla. Dist. Ct. App. 1992).

125. *Lindsay v. State*, 606 So. 2d 652, 653 (Fla. Dist. Ct. App. 1992).

126. *Id.* at 654.

127. *Id.* at 657 (citing *Hines v. State*, 358 So. 2d 183 (Fla. 1978)) (emphasis added).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 658 (quoting *Goldschmitt v. State*, 490 So. 2d 123, 126 (Fla. Dist. Ct. App. 1986)).

opinion, nor did it even cite the case. It is clear that the *Lindsay* court never contemplated whether the probation condition at issue was "so punitive as to be unrelated to rehabilitation"<sup>132</sup> or whether there were "no other available alternative means to accomplish the desired end."<sup>133</sup>

Indeed, the extraordinary level of deference seen in *Goldschmitt* and *Lindsay* also stands in marked contrast to an earlier Florida case, *Kominsky v. State*,<sup>134</sup> in which the appellate court showed a remarkable willingness to substitute its own judgment for that of the trial court.<sup>135</sup> The case involved a defendant convicted of marijuana possession, and the sentencing judge imposed a curfew extending from 8:00 p.m. until 6:00 a.m. as a condition of probation.<sup>136</sup> After stating the principle that a probation condition could not be "so punitive that it is unrelated to rehabilitation,"<sup>137</sup> the appellate court found that the curfew restriction, which was to last for the duration of the five year probationary term, was "so harsh that it w[ould] counteract the concept of rehabilitation."<sup>138</sup> The court then amended the curfew condition so that the curfew would begin each evening at 11:00 p.m. instead of 8:00 p.m.,<sup>139</sup> thereby presumably eliminating the harshness that, at least in the eyes of the appellate court, would have undermined the defendant's rehabilitation. This holding is a rather far cry from the assertion in *Goldschmitt*, repeated in *Lindsay*, that a condition will be invalidated only if the "lower court's belief that [the condition] is 'rehabilitative' is . . . utterly without foundation."<sup>140</sup>

## 2. Constitutional Challenges

In a significant number of jurisdictions in the United States, appellate courts will not hear, in any meaningful fashion, a direct challenge to the constitutionality of a condition of probation. In some of these jurisdictions, courts have directly held that the probationer is in no position to assert constitutional protection if the infringement that the probation condition imposes is otherwise lawful because the constitutional rights of probationers are inher-

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132. *Coulson v. State*, 342 So. 2d 1042, 1043 (Fla. Dist. Ct. App. 1977).

133. *Id.*

134. 330 So. 2d 800 (Fla. Dist. Ct. App. 1976).

135. *See Kominsky v. State*, 330 So. 2d 800, 802 (Fla. Dist. Ct. App. 1976) (directing trial court to amend its probation order).

136. *Id.* at 801.

137. *Id.* at 802.

138. *Id.*

139. *Id.*

140. *Lindsay v. State*, 606 So. 2d 652, 657 (Fla. Dist. Ct. App. 1992) (quoting *Goldschmitt v. State*, 490 So. 2d 123, 126 (Fla. Dist. Ct. App. 1986)).

ently subject to limitation.<sup>141</sup> Much more commonly, however, the standard of review applied to constitutional challenges simply parallels the court's review on statutory grounds because the constitutional standard is a variant on the "reasonableness" test.<sup>142</sup> As this Article discusses below, some jurisdictions claim to take a more serious look at probation conditions that infringe on constitutional rights, using language like "special scrutiny."<sup>143</sup> However, the standard of review in these jurisdictions is some form of a loosely worded, result-oriented balancing test, often still framed under the rubric of reasonableness and abuse of discretion. Thus, recent observers have noted appropriately that, as a rule, challenges to probation conditions based on individual constitutional rights "have made limited headway."<sup>144</sup>

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141. See, e.g., *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972) (calling constitutional argument "frivolous" because government can impose any condition that is "reasonably and necessarily related to the advancement of some justifiable purpose of imprisonment"); *Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979) (finding "no constitutional difficulty with [probation] conditions imposed, if they are otherwise valid conditions").

142. See, e.g., *United States v. Turner*, 44 F.3d 900, 903 (10th Cir. 1995) ("Courts have consistently upheld [the] imposition of conditions of probation that restrict a defendant's freedom of speech and association when those conditions bear a reasonable relationship to the goals of probation."); *United States v. Bortels*, 962 F.2d 558, 560 (6th Cir. 1992) (upholding prohibition on association with fiancé, noting that "where a condition of supervised release is reasonably related to the dual goals of probation, the rehabilitation of the defendant and the protection of the public, it must be upheld"); *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988) (explaining that "test for validity of probation conditions, even where 'preferred' rights are affected, is whether . . . the sentencing judge imposed the conditions for permissible purposes, and . . . whether the conditions are reasonably related to the purposes"); *State v. Conkle*, 717 N.E.2d 411, 412 (Ohio Ct. App. 1998) (rejecting probationer's constitutional challenge and stating that "[a]s long as a condition of probation meets [the reasonableness] test, the imposition of the condition is not grounds for reversal"); *Filcik*, *supra* note 15, at 309 (noting that courts generally apply reasonableness standard "even when the defendant raises a constitutional challenge to the imposed condition").

143. See, e.g., *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975) ("Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny."); *People v. Keller*, 143 Cal. Rptr. 184, 192 (Ct. App. 1978) ("When a condition unquestionably restricts otherwise inviolable constitutional rights, it is properly subjected to 'special scrutiny.'" (quoting *Consuelo-Gonzalez*, 521 F.2d at 265)); *Larson v. State*, 572 So. 2d 1368, 1371 (Fla. 1991) ("[A] condition of probation that burdens the exercise of a legal or constitutional right should be given special scrutiny."); *State v. Emery*, 593 A.2d 77, 80 (Vt. 1991) (noting Ninth Circuit's use of special scrutiny standard (citing *Consuelo-Gonzalez*, 521 F.2d at 265)).

144. *Alternatives to Incarceration*, *supra* note 25, at 1950; see *Bartrum*, *supra* note 81, at 1039 (explaining that, as general rule, "conditions of probation will not be overturned unless an appellate court determines that the condition is not reasonably related to the crime committed and to the prevention of future criminality"); *Filcik*, *supra* note 15, at 318 ("A constitutional argument . . . adds little to a defendant's case and will not persuade a court to invalidate an otherwise reasonable condition.").

*a. The Consuelo-Gonzalez Test*

When an appellate court engages in a distinct constitutional review of probation conditions, that review tends to take one of two forms. The form that perhaps is more common first appeared in *United States v. Consuelo-Gonzalez*,<sup>145</sup> decided by the Ninth Circuit in 1975.<sup>146</sup> In that case, the court considered the legality of a probation condition that required the probationer to "submit to [a] search of her person or property at any [t]ime when requested by a law-enforcement officer."<sup>147</sup> The court noted as a base-line proposition that "even though the trial judge has very broad discretion in fixing the terms and conditions of probation, such terms must be reasonably related to the purposes of the [Federal Probation] Act."<sup>148</sup> The court then fashioned the following standard for its analysis: "In determining whether a reasonable relationship exists, we have found it necessary to give consideration to the purposes sought to be served by probation, the extent to which the full constitutional guarantees available to those not under probation should be accorded probationers, and the legitimate needs of law enforcement."<sup>149</sup>

A number of jurisdictions have adopted this three-part test as a means for assessing the constitutionality of a challenged condition.<sup>150</sup> As at least one commentator has pointed out, however, "The crux of the standard of review as defined by the *Consuelo-Gonzalez* court is the second prong, which re-

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145. 521 F.2d 259 (9th Cir. 1975).

146. See *Consuelo-Gonzalez*, 521 F.2d at 266 (finding probation condition requiring defendant to submit to search of her person or property at any time law enforcement officer so requested invalid).

147. *Id.* at 261 n.1. The procedural posture of the case was not a direct appeal of this condition, but rather a collateral attack on the condition after it was used to justify a warrantless search of the defendant. *Id.* at 261-62. Ultimately, the court suppressed the fruits of the search because it found the probation condition to be invalid. *Id.* at 262, 266. The court concluded that the defendant could have been required to submit to warrantless searches by a probation officer, but even then only when such a search was reasonable under the circumstances. *Id.* at 266.

148. *Id.* at 262.

149. *Id.*

150. See, e.g., *Owens v. Kelley*, 681 F.2d 1362, 1366 (11th Cir. 1982) (noting that three-part test "provides an appropriate standard to judge the constitutionality of conditions of probation"); *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979) (adopting three-part test to "determine whether a probation condition is unduly intrusive on constitutionally protected freedoms"); *Markley v. State*, 507 So. 2d 1043, 1051 (Ala. Crim. App. 1987) (recognizing three-part test as standard for constitutional review); *Young v. State*, 692 S.W.2d 752, 755 (Ark. 1985) (adopting three-part test to "determine whether a probation condition is unduly intrusive on constitutional rights"); *State v. Smith*, 540 A.2d 679, 689 (Conn. 1988) (adopting three-part test to determine "whether a condition of probation impinges unduly upon a constitutional right"); *Patton v. State*, 580 N.E.2d 693, 698 (Ind. Ct. App. 1991) (adopting three-part test as the "appropriate standard to judge the constitutionality of conditions of probation").

quires determining the extent to which the probationer should be accorded constitutional rights."<sup>151</sup> It is hard to imagine a constitutional standard that could be less definitive or more subject to a result-oriented approach. Because each assessment is fact-specific, "each subsequent court is, in practice, left without guidance to initially weigh the interests at issue. As a result, 'the test allow[s] a court to reach either conclusion in almost every case.'"<sup>152</sup>

A few examples of the application of the *Consuelo-Gonzalez* test suffice to expose its limitations. In *United States v. Tonry*,<sup>153</sup> the Fifth Circuit considered a case in which the defendant, a former United States congressman, pleaded guilty to four misdemeanor counts of violating the Federal Election Campaign Act.<sup>154</sup> One of the conditions of the defendant's probation precluded the defendant from "engag[ing] in any political activity, be it federal, state, local, municipal, or parochial, during the period of probation."<sup>155</sup> Among other claims, the defendant maintained that this condition was "an unconstitutional infringement on rights protected by the [F]irst [A]mendment."<sup>156</sup> Before reaching its constitutional analysis, the court determined that the condition conformed with the federal probation statute. The court highlighted the "wide discretion" granted to the trial court, pointing out that "[a] condition of probation satisfies the statute so long as it is reasonably related to rehabilitation of the probationer, protection of the public against other offenses during its term, deterrence of future misconduct by the probationer or general deterrence of others, condign punishment, or some combination of these objectives."<sup>157</sup> Finding that the ban on political activity "was evidently intended to prevent [the defendant] from impairing the integrity of the electoral and political process as a whole, . . . either for the purpose of rehabilitation, so far as that might be possible, or for the purposes of public protection and punishment,"<sup>158</sup> the court concluded that it "[could] not say that the formula reached by the district judge . . . was inappropriate."<sup>159</sup> Thus, the court's statutory review consisted of little more than deferring to the trial court's sense of what measures would accomplish rehabilitation, deterrence, or retribution.

151. Levine, *supra* note 49, at 1862.

152. *Id.* at 1866 (quoting Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 913 (1963)).

153. 605 F.2d 144 (5th Cir. 1979).

154. *United States v. Tonry*, 605 F.2d 144, 145 (5th Cir. 1979).

155. *Id.* at 146 (emphasis added).

156. *Id.* at 150.

157. *Id.* at 148.

158. *Id.* at 147.

159. *Id.* at 148.

Turning to its analysis of the defendant's First Amendment claim, the court applied the three-part test first articulated in *Consuelo-Gonzalez*.<sup>160</sup> Having already determined that the condition served an appropriate probationary purpose, the court proceeded to the second prong of the test, finding that the district court had not been "unreasonable" in determining that "the very limited activity" prohibited by the condition should not be constitutionally protected for the defendant during the period of his probation.<sup>161</sup> The court explained its extremely deferential finding by observing that the constitutional deprivation seemed "appropriate to the nature of his crimes," that the ban on all political activity would prevent the defendant from being "tempted to engage in illicit electoral activity during his probation," and that the ban was "not harsh."<sup>162</sup> Concluding that the condition served the "general purposes of enforcement of the particular criminal law that [the defendant] violated," the court upheld the challenged condition.<sup>163</sup> It cited a string of federal cases upholding probation conditions that infringed upon First Amendment rights,<sup>164</sup> noting that the defendant could have avoided the condition altogether by accepting a term of incarceration.<sup>165</sup> The court also asserted that the condition did not "restrict [the defendant's] First [A]mendment rights totally" because it "focused only on politically related activity."<sup>166</sup>

In *United States v. Lowe*,<sup>167</sup> the Ninth Circuit engaged in an equally deferential analysis of substantial First Amendment claims.<sup>168</sup> There, the defendants stood convicted of entering upon naval property in violation of federal law.<sup>169</sup> During the trial, the defendants admitted that they had entered the naval base without permission as an act of protest against the government's maintenance of nuclear weapons.<sup>170</sup> The trial court placed those defendants

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160. *Id.* at 150. The court quoted from a slightly reworded version of the *Consuelo-Gonzalez* test found in *United States v. Pierce*, 561 F.2d 735 (9th Cir. 1977).

161. *Tomry*, 605 F.2d at 151. The court did not explain its rather extraordinary use of the term "very limited" to describe an absolute prohibition on any political activity.

162. *Id.*

163. *Id.*

164. *Id.* (citing *United States v. Albanese*, 554 F.2d 543 (2d Cir. 1977); *United States v. Adderly*, 529 F.2d 1182 (5th Cir. 1976); *Malone v. United States*, 502 F.2d 554 (9th Cir. 1974); *Porth v. Templar*, 453 F.2d 330 (10th Cir. 1971); and *United States v. Smith*, 414 F.2d 630 (5th Cir. 1969), *rev'd on other grounds sub nom. Schacht v. United States*, 398 U.S. 58 (1970)).

165. *Id.*

166. *Id.* at 152.

167. 654 F.2d 562 (9th Cir. 1981).

168. *See United States v. Lowe*, 654 F.2d 562, 567-68 (9th Cir. 1981) (considering probation condition).

169. *Id.* at 564.

170. *Id.*

without prior criminal records on probation on the condition that they remain at least 250 feet away from the naval base.<sup>171</sup> In imposing the condition, the trial court "knew that the defendants would thereby be unable to distribute literature to [naval base] employees on the public roadway at the entry to the base or to attend weekly meetings" of anti-nuclear protesters conducted in a privately owned building just outside the base.<sup>172</sup> Not surprisingly, the defendants maintained that the condition violated their First Amendment rights of free speech and association.<sup>173</sup>

The court began its constitutional analysis by noting the "broad discretion" of the trial judge in establishing probation conditions.<sup>174</sup> Claiming that the "[e]xercise of this discretion is reviewed carefully where probation conditions restrict fundamental rights," the court stated that "[t]he test for the validity of probation conditions, even where 'preferred' rights are affected, is whether they are primarily designed to meet the ends of rehabilitation and protection of the public."<sup>175</sup> The court then set out a restated version of the *Consuelo-Gonzalez* three-part test.<sup>176</sup> First, the court found that the condition "reasonably me[t] the goal of keeping the peace and deterring future criminal activity."<sup>177</sup> Then, implicitly acknowledging significant interference with the defendants' First Amendment rights, the court nonetheless concluded that, "[a]bsent [a] compelling reason for appellate interference, the task of line-drawing in probation matters is best left to the discretion of the sentencing judge."<sup>178</sup> Apparently finding no such "compelling reason," the court upheld the condition.<sup>179</sup> How to reconcile the court's absolute deference to the trial court's discretion with the court's earlier claim that a sentencing court's discretion will be "reviewed carefully where probation conditions restrict fundamental rights"<sup>180</sup> remains a mystery.

Perhaps Judge Boochever's strongly worded opinion in *Lowe*, dissenting from the portion of the majority opinion that upheld the condition, is the best evidence of the proposition that the *Consuelo-Gonzalez* constitutional standard actually provides no appellate guidance.<sup>181</sup> Emphasizing that probation

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171. *Id.* at 567.

172. *Id.*

173. *Id.*

174. *Id.* (citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975)).

175. *Id.*

176. *Id.* (citing *United States v. Pierce*, 561 F.2d 735 (9th Cir. 1977)).

177. *Id.*

178. *Id.* at 568.

179. *Id.*

180. *Id.* at 567.

181. *See id.* at 568 (Boochever, J., concurring in part and dissenting in part) (arguing that probation condition "substantially impedes" defendants' First Amendment rights).



conditions infringing on constitutional rights merit "careful review,"<sup>182</sup> Judge Boochever concluded that the condition keeping the defendants away from the naval base had "at best, a marginal relationship to protection against trespass," given that "[n]o planned legal leafletting [sic] or demonstration ha[d] ever ripened into an illegal one" and that all previous "[a]cts of trespass [we]re planned months in advance."<sup>183</sup> Moreover, because the condition prohibited association with other protesters only in one particular area, Judge Boochever concluded that the condition had "no effect on rehabilitation."<sup>184</sup> His opinion continued:

Weighing the minimal probational benefits against the infringement imposed, it is clear that the prohibition strikes at the core of constitutional rights vital to the fabric of our political system, which permits free criticism of governmental decisions. By this relatively innocuous appearing condition, the appellants' right to protest and seek change is substantially muzzled.<sup>185</sup>

Finally, in contrast to the majority, Judge Boochever concluded that "[t]he application of any balancing test results in the conclusion that under the circumstances of this case the restriction is unwarranted."<sup>186</sup>

#### *b. The Unconstitutional Conditions Test*

The only other constitutional standard that courts apply when testing the validity of probation conditions is the "unconstitutional conditions" doctrine. As described by the United States Supreme Court in 1926, the principle underlying the doctrine is that the government "is without power to impose an unconstitutional requirement as a condition for granting a privilege."<sup>187</sup> This configuration merely begs the question of what constitutes an "unconstitutional requirement." Because the "infringement of liberties is tolerated" under the doctrine if the state action is "reasonably related to legitimate policy objectives and substitute measures are unavailable, . . . [a] balancing test is implicit."<sup>188</sup> This balancing test generally involves four factors: "(1) the

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182. *Id.* (Boochever, J., concurring in part and dissenting in part).

183. *Id.* at 569 (Boochever, J., concurring in part and dissenting in part).

184. *Id.* (Boochever, J., concurring in part and dissenting in part).

185. *Id.* (Boochever, J., concurring in part and dissenting in part).

186. *Id.* (Boochever, J., concurring in part and dissenting in part).

187. *Frost v. Railroad Comm'n*, 271 U.S. 583, 598 (1926). Put another way, "[t]he doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

188. Weissman, *supra* note 62, at 372-73.

nature of the right affected; (2) the degree of the infringement of the right; (3) the nature of the benefit conferred; and (4) the nature of the state's interest in conditioning the benefit.<sup>189</sup> Although the doctrine is derived from regulatory and taxation principles,<sup>190</sup> a number of courts and commentators have applied it to a constitutional analysis of probation conditions.<sup>191</sup>

Some examples from the case law reveal the analytical weaknesses of the doctrine as applied to probation conditions. In *In re Mannino*,<sup>192</sup> the California Court of Appeal wrestled with the validity of a number of broadly worded probation conditions imposed on a defendant convicted of felonious assault during a political demonstration on a college campus.<sup>193</sup> Several conditions imposed outright bans on otherwise constitutionally protected activities, including the following:

[The defendant] shall . . . not become a member, either actively or passively, of any political or other organization . . . that participates in or advocates any form of protest or change in existing conditions . . . . He shall . . . not contribute any newspaper articles or other writings to any publication . . . . He shall not . . . speak for any organization on any college, high school, or junior high school campus or at any public function. . . .

He shall not participate in, actively or passively, nor shall he be an advisor to any . . . demonstration for any purpose whatsoever.<sup>194</sup>

The sentencing judge told the defendant that he was "going to be gagged . . . as far as participating in campus activities, not because I am opposed to pro-

189. *Id.* at 373 n.8 (citing Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144, 151 (1968)).

190. *Id.* at 372.

191. See, e.g., *People v. Pointer*, 199 Cal. Rptr. 357, 365 n.11 (Ct. App. 1984) (asserting that unconstitutional conditions doctrine requires that conditions impinging on constitutional rights be reasonably related to compelling state interest in rehabilitation and that no less restrictive alternative be available); *In re Mannino*, 92 Cal. Rptr. 880, 889 (Ct. App. 1971) (applying unconstitutional conditions doctrine); Weissman, *supra* note 62, at 371 (maintaining that unconstitutional condition doctrine "serves as the organizing concept for analyzing probation conditions"); Michael G. Honeyman, Jr., Note, *Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does it Amount to Establishment of Religion?*, 97 COLUM. L. REV. 437, 439-40 n.9 (1997) ("Various commentators have applied this doctrine to analyze the constitutionality of certain probationary conditions."); Christopher K. Smith, Note, *State Compelled Spiritual Revelation: The First Amendment and Alcoholics Anonymous as a Condition of Drunk Driving Probation*, 1 WM. & MARY BILL RTS. J. 299, 310 (1992) (maintaining that "the prohibition on unconstitutional conditions applies to terms of probation").

192. 92 Cal. Rptr. 880 (Ct. App. 1971).

193. See *In re Mannino*, 92 Cal. Rptr. 880, 881 n.2 (Ct. App. 1971) (setting out probation conditions). Specifically, the defendant was convicted of kicking the victim in the face while wearing "heavy boots," severely fracturing the victim's jaw. *Id.* at 887 n.8. It was alleged at sentencing that, during a prior demonstration, the defendant had kicked campus police officers with heavy boots. *Id.* at 885.

194. *Id.* at 881 n.2.

test, but of the fact that you were not able to control yourself while you were in fact engaged in a protest movement."<sup>195</sup>

In the first level of its analysis, the appellate court considered whether the conditions were reasonably related to the statutory ends of probation.<sup>196</sup> The court invalidated a number of the conditions, noting that "[p]utting the gag' on the convicted probationer, insofar as it [was] not directly related to a past criminal abuse of the privilege of freedom of speech itself, or to the prospect of future criminality, [did] not serve to further" the purposes of the probation statute.<sup>197</sup> The court "clarified" those portions of the challenged conditions that it considered reasonably related to the purposes of the statute, creating a new condition that precluded the defendant from "actively participat[ing] or engag[ing] in any on-campus or off-campus demonstration, or protest, or passive resistance for any purpose whatsoever."<sup>198</sup>

Having determined that the condition quoted above was reasonably related to the statutory purposes of probation, the court next engaged in a constitutional analysis employing the unconstitutional conditions doctrine.<sup>199</sup> The court began by citing a previous decision of the Supreme Court of California, *In re Allen*,<sup>200</sup> which suggested that the doctrine was "applicable to conditions of probation."<sup>201</sup> The court described the doctrine as requiring the government to establish the following:

(1) that the conditions reasonably relate to the purposes sought by the legislation which confers the benefit; (2) that the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) that there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.<sup>202</sup>

One might think that such concepts as "manifestly outweighs," "no alternative means," and "narrowly drawn" would imply a much more rigorous review than a reasonably related analysis conducted under an abuse of discretion

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195. *Id.* at 885 (internal quotations omitted).

196. *Id.* at 882-83 (explaining requirement that probation terms be reasonable).

197. *Id.* at 888.

198. *Id.*

199. *See id.* at 888-90 (finding that probation condition interfered with defendant's constitutional rights).

200. 455 P.2d 143 (Cal. 1969).

201. *Mannino*, 92 Cal. Rptr. at 889; *see In re Allen*, 455 P.2d 143, 145 (Cal. 1969) ("[G]overnment is without constitutional authority to impose a predetermined condition on the exercise of a constitutional right or penalize in some manner its use.").

202. *Mannino*, 92 Cal. Rptr. at 889 (internal quotations omitted) (quoting *Parrish v. Civil Serv. Comm'n*, 425 P.2d 223, 230-31 (Cal. 1967)).

standard. However, the court strongly implied that the two tests were indistinguishable, stating that it was "unnecessary to determine whether the two tests are coterminous."<sup>203</sup> In just one sentence, the court concluded that the probation condition that it had essentially drafted satisfied the requirements of the unconstitutional conditions doctrine.<sup>204</sup>

The majority opinion's use of the varying levels of review did not escape at least one judge on the court, who filed a vigorous dissent.<sup>205</sup> Although the court could have invalidated most or all of the probation conditions by applying the rigorous review suggested by the unconstitutional conditions doctrine, it chose instead to find that the conditions constituted an abuse of the trial judge's discretion.<sup>206</sup> As the dissent pointed out, the majority "necessarily sa[id] that no [r]easonable man, or judge, would have imposed similar conditions under the facts of this case, for, 'discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered.'"<sup>207</sup> The dissent suggested that the appellate court reached its holding by merely substituting its factual findings for those of the trial court,<sup>208</sup> something that the abuse of discretion standard precludes but that the application of the unconstitutional conditions doctrine might well require. In the end, the majority opinion's analysis rendered the unconstitutional conditions doctrine meaningless.

A few months after *Mannino* was decided, the Supreme Court of California in *People v. Mason*<sup>209</sup> considered the validity of a probation condition that required a probationer convicted of marijuana possession to "submit his person, place of residence, [or] vehicle, to search and seizure at any time of day or night, with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer."<sup>210</sup> The court declared it to be "beyond dispute" that the condition was "reasonably related to the probationer's prior criminal conduct and . . . aimed at deterring or discovering sub-

203. *Id.*

204. *See id.* (concluding that condition "reasonably relates to [defendant's] reformation and rehabilitation, that the value accruing to the public . . . outweighs the resulting impairment of constitutional rights and the narrow restriction . . . correlates closely with the purposes to be served by probation").

205. *Id.* at 890-98 (Elkington, J., dissenting).

206. *Id.* at 892 (Elkington, J., dissenting).

207. *Id.* (Elkington, J., dissenting) (quoting *Crummer v. Beeler*, 8 Cal. Rptr. 698, 702 (Dist. Ct. App. 1960)).

208. *See id.* at 894 (Elkington, J., dissenting) ("Any rule which compels appellate courts to substitute their factual findings for those of a trial court . . . must necessarily result in less credible factual resolutions.").

209. 488 P.2d 630 (Cal. 1971).

210. *People v. Mason*, 488 P.2d 630, 631 (Cal. 1971) (internal quotations omitted).

sequent criminal offenses."<sup>211</sup> The court then turned to its purported constitutional analysis. Without citation to *Mannino* or to its own opinion in *Allen*, the court expressed the view that reasonable intrusions that would otherwise be unconstitutional could be imposed upon probationers, "at least to the extent that such intrusions are necessitated by legitimate governmental demands."<sup>212</sup> The court then noted that a defendant granted probation under such a condition "may have no reasonable expectation of traditional Fourth Amendment protection."<sup>213</sup> In any case, by agreeing to the condition, the defendant "voluntarily waived whatever claim of privacy he might otherwise have had."<sup>214</sup> Thus, the court reduced to mere surplus language the notion of assuring that constitutional infringements are "necessitated by legitimate governmental demands," which might imply a least-restrictive-alternative analysis.

Once again, a dissenting justice noted the complete absence of any genuine constitutional review of the probation condition at issue: Citing both *Mannino* and *Allen*, the dissent restated the unconstitutional conditions doctrine and noted its applicability to probation conditions.<sup>215</sup> Under that analysis, the dissenting justice stated his view that "such a total denial of Fourth Amendment rights is [neither] necessary [n]or even desirable in rehabilitating a criminal offender."<sup>216</sup> Acknowledging that the prospect of surprise searches by a probation officer might deter future criminal conduct, the dissent found "no justification" for allowing searches by law enforcement officers.<sup>217</sup> Consequently, the dissenting judge would have invalidated the condition as "overbroad."<sup>218</sup> Whether or not the dissent reached the proper legal conclusion, it is clear that the majority did not subject the probation condition to substantive constitutional scrutiny.

Not surprisingly, the disincentives to filing an appeal, the absence of coherent legal doctrine in the field, and the failure of appellate courts to engage in substantive review have created an environment in which trial courts feel free to impose probation conditions with little or no restriction. The next section of this Article explores and analyzes the wide variety of probation conditions found in case law, legal scholarship, and media accounts.

211. *Id.* at 632.

212. *Id.* at 633.

213. *Id.*

214. *Id.* at 634. The court did state that a probationer is not "barred from objecting to the unreasonable manner in which that condition is carried out by police officers." *Id.* at 633 n.3.

215. *See id.* at 634-35 (Peters, J., dissenting) (maintaining that doctrine limits judicial impairment of constitutional rights and "applies to persons granted conditional freedom, including . . . probationers").

216. *Id.* at 635 (Peters, J., dissenting).

217. *Id.* at 636 (Peters, J., dissenting).

218. *Id.* (Peters, J., dissenting).

### III. The Parade of Horribles

The previous section of this Article discussed the fact that probation conditions are rarely subjected to any appellate review and that, when they face review, the review is usually extremely deferential and occasionally and idiosyncratically substantive. Many of the more unusual or constitutionally invasive probation conditions are described only in media accounts because defendants seldom appeal the conditions; many more undoubtedly escape any notice whatsoever. What follows are examples of the wide variety of conditions that judges have imposed. These judges feel progressively less constrained by the prospect of substantive appellate review, a trend that results in an increasing reliance on pop-psychology, personal values and morality, and various degrees of bias and prejudice.

#### A. Infringements on the Right to Free Speech

The most common and most constitutionally intrusive probation conditions involve significant limitations on the probationer's right to free speech. Frequently, courts impose these conditions when the defendants have engaged in politically controversial activities or hold unpopular views – the very defendants most in need of constitutional protection.<sup>219</sup> As a number of courts and commentators have noted, appellate courts routinely uphold probation conditions that infringe on the right to free speech.<sup>220</sup>

One need not delve very far into the case law to find examples of significant free speech limitations that seem to be of questionable correctional utility. A trio of California cases decided in the late 1960s and early 1970s suggests the length to which political protest can be effectively silenced through the use

219. As Justice Jackson wrote prior to his elevation to the United States Supreme Court, "[T]he very essence of constitutional freedom of . . . speech is to allow more liberty than the good citizen will take. The test of its vitality is whether we will suffer and protect much that we think false, mischievous and bad, both in taste and intent." *Williamson v. United States*, 184 F.2d 280, 283 (2d Cir. 1950).

220. See, e.g., *United States v. Turner*, 44 F.3d 900, 903 (10th Cir. 1995) ("Courts have consistently upheld imposition of conditions of probation that restrict a defendant's freedom of speech . . . when those conditions bear a reasonable relationship to the goals of probation."); Cook, *supra* note 59, at 3 ("Courts have consistently upheld imposition of probation conditions that restrict the defendant's freedom[] of speech."); Dan Connally, Note, *When Hester Prynne Drives Drunk: An Examination of the Constitutional Challenges to the Requirement of a "Scarlet Bumper Sticker" as a Condition of Probation on DUI Offenses*, 41 OKLA. L. REV. 529, 534 (1988) (stating that "[t]raditionally, first amendment values were of little concern to courts dealing with conditions of probation," and that, while "[l]ater decisions have given the issue more serious consideration, . . . the results are often the same"); *Judicial Review*, *supra* note 28, at 203 ("[P]ersons convicted of offenses growing out of some form of political protest have often been required, as a condition of their release, to refrain from participation in political demonstrations.").

of probation conditions.<sup>221</sup> In *People v. King*,<sup>222</sup> the California Court of Appeal affirmed a probation condition imposed upon a defendant who had been convicted of an assault that occurred during an anti-war demonstration.<sup>223</sup> The probation condition, delivered orally in open court, precluded the defendant from "tak[ing] an active or official part in any other demonstrations of this kind."<sup>224</sup> When asked to elaborate, the trial judge clarified that his intention was to preclude the defendant from a variety of activities, including "making speeches."<sup>225</sup> Despite this clarification on the record, the appellate court concluded that it "c[ould] not hold under the circumstances of th[e] case [t]hat the condition of probation in any manner abridge[d] [the] defendant's First Amendment freedoms."<sup>226</sup> Incredibly, the court then upheld the trial court's revocation of the defendant's probation because the defendant had been observed blowing up balloons at an entirely peaceful protest of the Dow Chemical Company's campus recruitment efforts at the University of California at Los Angeles.<sup>227</sup>

The same court reached similar conclusions in two other political protest cases: *In re Mannino*<sup>228</sup> and *People v. Arvanites*.<sup>229</sup> In each of these cases, the defendants had been convicted of criminal activity that took place during a college campus political protest.<sup>230</sup> Although the appellate courts engaged in a reasonably rigorous review of the various conditions that each trial judge imposed, each court left in place a broadly worded and restrictive probation condition. In *Mannino*, the court upheld the condition that the defendant "not actively participate or engage in any on-campus or off-campus demonstration, or protest, or passive resistance for any purpose whatsoever."<sup>231</sup> In *Arvanites*, the court upheld a "prohibition against planning and engaging in demonstrations."<sup>232</sup>

221. See *infra* notes 222-32 and accompanying text (discussing *People v. King*, *In re Mannino*, and *In re Arvanites*).

222. 73 Cal. Rptr. 440 (Ct. App. 1968).

223. *People v. King*, 73 Cal. Rptr. 440, 448 (Ct. App. 1968) (finding no abuse of discretion in trial court's revocation of probation in light of defendant's violation of probation condition).

224. *Id.* at 443.

225. *Id.* at 447 n.6.

226. *Id.* at 448 (emphasis added).

227. *Id.*

228. 92 Cal. Rptr. 880 (Ct. App. 1971). For a more complete discussion of this case, see *supra* notes 200-08 and accompanying text.

229. 95 Cal. Rptr. 493 (Ct. App. 1971).

230. *People v. Arvanites*, 95 Cal. Rptr. 493, 494-96 (Ct. App. 1971); *In re Mannino*, 92 Cal. Rptr. 880, 885 (Ct. App. 1971).

231. *Mannino*, 92 Cal. Rptr. at 888.

232. *Arvanites*, 95 Cal. Rptr. at 500.

The imposition of restraints on free speech has not been confined to the California courts or to the political turmoil of the Vietnam War era. Various courts also have directed limitations on free speech at those espousing other politically charged views, including those advocating the legalization of marijuana,<sup>233</sup> members of the American Indian Movement,<sup>234</sup> members of the Ku Klux Klan,<sup>235</sup> and, perhaps most commonly, members of the anti-abortion movement.<sup>236</sup> Broadly worded bans on political activity have also been imposed in cases in which the underlying criminal offense has nothing to do with speech, but rather to do with the functioning of the political process.<sup>237</sup>

Perhaps the most striking example of the restraint of free speech comes from a recent Ninth Circuit case, *United States v. Richey*,<sup>238</sup> in which the court's procedural history of the case revealed an extraordinary sentence handed down by a judge of the United States District Court for the Eastern District of Washington.<sup>239</sup> A jury convicted the defendant, a former Internal Revenue Service agent, of conspiracy to defraud the government and of aiding and assisting in the preparation of false and fraudulent tax returns.<sup>240</sup> The trial judge imposed a probationary sentence, but as a condition of probation "enjoined [the defendant] from making derogatory remarks about the United States government."<sup>241</sup> The Ninth Circuit never reached the validity of the condition because it found the defendant to have otherwise violated the conditions of his probation.<sup>242</sup>

233. See *Activist Banned from Talking About Marijuana*, THE WEEK ONLINE WITH DRCNET, No. 96 (June 25, 1999) <<http://www.drcnet.org/wol/096.html#nospeech>> (discussing probation condition that marijuana activist refrain from speaking publicly about marijuana).

234. See *State v. Means*, 257 N.W.2d 595, 599-601 (S.D. 1977) (upholding bail condition that defendant refrain from participating in any American Indian Movement activities).

235. See *Land v. State*, 426 S.E.2d 370, 373-74 (Ga. 1993) (sustaining probation condition prohibiting participation in Ku Klux Klan activities).

236. See *United States v. Turner*, 44 F.3d 900, 903 (10th Cir. 1995) (allowing probation condition that prohibited picketing and harassment by defendant); *Markley v. State*, 507 So. 2d 1043, 1051-52 (Ala. Crim. App. 1987) (upholding prohibition of anti-abortion protest activities as requirement of probation); *State v. Friberg*, 435 N.W.2d 509, 515-17 (Minn. 1989) (sustaining probation condition that defendants stay 500 feet away from abortion clinic).

237. See *United States v. Tonry*, 605 F.2d 144, 146 (5th Cir. 1979) (upholding probation condition precluding defendant from "engag[ing] in any political activity"). But see *State v. Davis*, 499 N.E.2d 1255, 1260 (Ohio Ct. App. 1985) (striking probation condition precluding defendant from "engag[ing] in any political activity" because it "border[ed] on the infringement of [the defendant's] First Amendment rights").

238. 924 F.2d 857 (9th Cir. 1991).

239. *United States v. Richey*, 924 F.2d 857, 858 (9th Cir. 1991) (stating that condition of probation prohibited defendant from making derogatory comments about government).

240. *Id.*

241. *Id.*

242. *Id.* at 865 (Reinhardt, J., dissenting) (citing *United States v. Richey*, 874 F.2d 817 (9th Cir. 1989) (unpublished memorandum disposition)).



These cases provide but a few examples of significant free speech infringements trial courts have imposed upon probationers. Because probation conditions are so rarely appealed, these examples should make the magnitude of the issue readily apparent. While the First Amendment clearly prohibits content-based censorship, these cases precisely reflect such censorship. Total deference to the trial court's discretion grossly undervalues the central importance of freedom of speech in a democratic state, thereby establishing dangerous possibilities for the repression of unpopular speech under the guise of correctional policy. Moreover, prohibiting free speech seems a peculiar means, if not a totally counter-productive means, of attempting to reform and rehabilitate an offender.

### *B. Infringements on the Right to Refrain from Speaking*

As the United States Supreme Court recognized in its landmark decision *Wooley v. Maynard*,<sup>243</sup> "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."<sup>244</sup> Despite the apparent breadth of that constitutional protection, probation conditions frequently require defendants to speak in a fashion that involves the adoption of a particular ideological perspective.<sup>245</sup> When probationers appeal those conditions, which appears to be infrequently,<sup>246</sup> courts almost invariably uphold them. Two broad categories of court-ordered ideological speech are readily apparent from the case law and from media accounts: a public acknowledgment of guilt and apology, most often in the form of an essay, speech, or newspaper advertisement; and forced contributions of money or time to organizations with an ideological viewpoint.

#### *1. Public Apologies*

The first of these categories, the public apology, has grown in popularity as part of a relatively recent trend toward imposing probation conditions intended to shame or humiliate the probationer.<sup>247</sup> Little to no research focuses

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243. 430 U.S. 705 (1977).

244. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The specific holding of the case was that the State of New Hampshire could not constitutionally require a motorist to display the slogan "Live Free or Die" on his automobile license plates. *Id.* at 707, 717.

245. See *infra* Part III.B.2 (discussing mandatory contributions); *infra* Part III.C (addressing mandatory association with political and social groups).

246. See *supra* Part II.A (discussing procedural barriers to appellate review).

247. A good indication of the strength of this trend is that *Newsweek Magazine* ran a cover story in February of 1995 on the increasing popularity of shaming punishments. Jonathan Alter & Pat Wingert, *The Return of Shame*, *NEWSWEEK*, Feb. 6, 1995, at 20, 21. Numerous law review articles and popular publications have commented on the trend. See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631 (1996) (discussing rediscovery of shaming penalties in America); Massaro, *supra* note 93, at 1884-86 (arguing that

on the efficacy of shaming sentences in general,<sup>248</sup> and despite the current popularity of such sentences among judges, many experts have theorized that shaming is either totally ineffective or counter-productive as a response to criminality.<sup>249</sup> Nonetheless, the few appellate courts that have addressed the imposition of a public apology as a probation condition have upheld the condition.<sup>250</sup>

In *United States v. Clark*,<sup>251</sup> the Ninth Circuit upheld the imposition of a probation condition that required the defendants to speak a particular message.<sup>252</sup> The defendants were former police officers who had been tried and convicted of perjury for statements made under oath concerning a dispute over sick leave.<sup>253</sup> As a condition of probation, the judge ordered the defendants to publish an apology composed by the judge in the local newspaper and in the police department's newsletter.<sup>254</sup> In its review of the defendants' First Amendment attack on the condition, the Ninth Circuit concluded that because "a public apology *may* serve a rehabilitative purpose," its imposition "was not an abuse of discretion."<sup>255</sup> Apparently, neither the trial court nor the Ninth

discontent with existing punishment has led to revival of shaming penalties); Aaron S. Book, Note, *Shame on You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653, 654 (1999) (reporting trend of sentencing judges to rely on sentences of shame); Abramson, *supra* note 36 (recognizing increase in experimentation with creative alternative penalties); Brannigan & Blumenthal, *supra* note 36 (documenting recent trend of humiliation as punishment); Douglas Litowitz, *The Trouble with "Scarlet Letter" Punishments*, 81 JUDICATURE 52, 52-53 (1997) (analyzing trend towards more "scarlet letter" punishments); Reske, *supra* note 40, at 16 (describing comeback of sentences that humiliate).

248. See, e.g., Garvey, *supra* note 63, at 753-54 (reporting lack of empirical inquiry into effectiveness of shame penalties); Kahan, *supra* note 247, at 638 (same); Massaro, *supra* note 93, at 1918 (same); *Alternatives to Incarceration*, *supra* note 25, at 1957 (same); Book, *supra* note 247, at 656 (same).

249. See, e.g., *Alternatives to Incarceration*, *supra* note 25, at 1957 (discussing numerous claims that shaming is counter-productive); Litowitz, *supra* note 247, at 55-57 (examining explanations of why shaming is either ineffective or counter-productive); Courtney Guyton Persons, Note, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1572-73 (1996) (exploring reasons why shaming can be counter-productive).

250. See Weissman, *supra* note 62, at 384 (recounting that appellate courts "sustain the practice" of "requiring the probationer to write essays of contrition or present expiatory speeches"); Litowitz, *supra* note 247, at 53 (stating that "state and federal courts have rejected th[e] argument" that "requiring criminals to publish confessions scripted by judges . . . violate[s] the criminal's right to free speech").

251. 918 F.2d 843 (9th Cir. 1990).

252. See *United States v. Clark*, 918 F.2d 843, 848 (9th Cir. 1990) (finding that public apology served purpose of rehabilitation and therefore imposition was not abuse of discretion).

253. *Id.* at 845.

254. *Id.*

255. *Id.* at 848 (emphasis added).

Circuit did any more than engage in idle speculation about the potential ramifications of forcing both defendants to speak against their will.

In *People v. Stocke*,<sup>256</sup> the Appellate Court of Illinois similarly upheld a condition that required a series of public speeches with a content specified by the trial judge.<sup>257</sup> The defendant, an eighteen-year-old special education student who had been involved in a serious motor vehicle accident, was convicted of the petty offense of "driving too fast for conditions."<sup>258</sup> As a consequence, the court ordered him to "prepar[e] a speech about the disastrous effect of driving a motor vehicle too fast for conditions and present[] it to driver's education classes throughout the school district."<sup>259</sup> Again, the appellate court held that the trial court "did not abuse its discretion in ordering defendant to perform this public service."<sup>260</sup> And again, neither the trial nor the appellate court appeared to have seriously considered or sought expert advice on the impact of this serious infringement of this young man's First Amendment right to refrain from speaking.

The court's decision in *Stocke* stands in rather stark contrast to a decision that the same court issued just three years earlier: In *People v. Johnson*,<sup>261</sup> the court struck down a condition of supervision requiring a drunk driving defendant to place a newspaper advertisement containing her booking photograph and an apology.<sup>262</sup> The court noted that the defendant was "a young lady with a history of being a good student, ha[d] no prior criminal record, and ha[d] been evaluated as not having an alcohol or drug problem," and it expressed concern that the condition would subject the defendant to "public ridicule."<sup>263</sup> Because "[n]either the trial court nor [the appellate] court, without professional assistance, c[ould] determine the psychological or psychiatric effect of the publication" and because "[a]n adverse effect upon the defendant would certainly be inconsistent with rehabilitation," the court vacated the condition.<sup>264</sup> In a concurring opinion, one judge criticized the majority's speculation about potential harm to the defendant, particularly in the absence of citation to a

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256. 571 N.E.2d 192 (Ill. App. Ct. 1991).

257. *People v. Stocke*, 571 N.E.2d 192, 193 (Ill. App. Ct. 1991). In this particular case, the condition was imposed as a part of a conditional discharge, not as a condition of probation. *Id.* However, it is clear from the court's decision, which engages in a discussion of reasonableness, that the court applied the same standard of review as it would have applied had the case involved a probation condition. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 196.

261. 528 N.E.2d 1360 (Ill. App. Ct. 1988).

262. *People v. Johnson*, 528 N.E.2d 1360, 1362 (Ill. App. Ct. 1988).

263. *Id.*

264. *Id.*

treatise or article to that effect.<sup>265</sup> His opinion misread the apparent thrust of the majority opinion, which suggested by its holding that the benefit of any doubt ought to be given to the defendant, not to the whim of the trial judge. The remainder of the concurring opinion seemed to pick up on this theme, however, condemning the condition because of the judge's expressed fear that upholding the condition "would encourage other courts to impose other unusual, dramatic conditions."<sup>266</sup> Because "the proliferation of these types of conditions would cause problems of a greater magnitude than their propensity to rehabilitate," the concurring judge preferred to "fairly strictly limit the unspecified type of reasonable conditions of supervision that can be imposed and let those conditions similar to that imposed here await legislative study and definition."<sup>267</sup> To that extent, the views expressed in the concurrence, although not shared by a majority of trial or appellate judges, mirror those of this author.<sup>268</sup>

It is clear from a survey of law review articles and media accounts that the published cases involving the imposition of public speech provides only the smallest window into this area of probation conditions. Dean Toni M. Massaro has documented a wide variety of apology conditions, including one that required a defendant to confess his crime before a church congregation.<sup>269</sup> Professor Dan M. Kahan similarly has collected accounts of what he refers to as "contrition penalties," noting that when judges impose these conditions, "the sincerity of the offenders' remorse seems largely irrelevant."<sup>270</sup> An article in the Los Angeles Times in 1991 not only verified the widespread use of newspaper apology advertisements, but also reported that a number of newspapers had decided not to publish these types of advertisements.<sup>271</sup> The article described "an incipient backlash" against participating in this sort of probation condition, "caused, in part, by the newspapers' concerns over the propriety of accepting these so-called 'humiliation' ads."<sup>272</sup>

Humiliation as a sentencing approach raises other concerns beyond those already described. Judges, particularly those who obtain or retain their status by popular election, have a strong incentive to impose conditions that achieve public notice. A handful of judges have been the object of national media attention as a result of the imposition of conditions intended to shame or humiliate the offender. If the goal is attention, the message to the judges

265. *Id.* at 1363 (Green, J., specially concurring).

266. *Id.* (Green, J., specially concurring).

267. *Id.* (Green, J., specially concurring).

268. *See infra* Part V (giving author's proposed response).

269. Massaro, *supra* note 93, at 1888.

270. Kahan, *supra* note 247, at 634.

271. Robin Abcarian, "Apology Ads" Raise Issue of Fair Play Punishment, L.A. TIMES, Feb. 4, 1991, at E1.

272. *Id.*

seems to be that the more outrageous the condition, the wider the coverage is likely to be. In addition, there is good reason to fear that judges will impose these sorts of punishments, which they create episodically and idiosyncratically, in a fashion that represents the class, gender, and racial biases of the individual trial judges.

## 2. *Mandatory Contributions*

The second broad category of probation conditions that require a probationer to speak involves court orders requiring probationers to make "charitable contributions" to, participate in, or sometimes even join an organization that espouses a particular political or social viewpoint. The most common of these types of conditions appears to be in the environmental realm, where a number of courts have ordered defendants convicted of environmental crimes to attend meetings of, join, and make cash contributions to the Sierra Club and other environmental advocacy groups.<sup>273</sup> Of the many documented cases of such environmental sentences, only one appears to have resulted in a legal challenge; in that case, a conservative think tank filed a disciplinary complaint against the sentencing judge for imposing such a sentence, but the Ohio Supreme Court dismissed the complaint without comment.<sup>274</sup> Other examples that have appeared only in media reports include two hunters who were required to make cash contributions to the National Wildlife Federation<sup>275</sup> and a forgery defendant with thirteen illegitimate children who was required to attend Planned Parenthood meetings.<sup>276</sup>

Several published court opinions have dealt with the issue of court ordered "charitable contributions," upholding those conditions of probation in all but one case. In *State v. Pieger*,<sup>277</sup> the Supreme Court of Connecticut upheld a probation condition imposed upon a defendant convicted of leaving the scene of an accident.<sup>278</sup> Even though the defendant had been acquitted of reckless driving, he was ordered as a condition of probation to make a \$2,500 contribution to a local hospital where the accident victim received treatment.<sup>279</sup> Similarly, the Colorado Court of Appeals in *People v. Burleigh*<sup>280</sup> upheld a probation condition requiring a doctor convicted of the unlawful distribution of a

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273. See Levine, *supra* note 49, at 1841-42 & n.7 (documenting several cases in which defendants were forced to make contributions to or to join environmental advocacy groups); Felsenthal, *supra* note 32 (same).

274. Felsenthal, *supra* note 32.

275. *Id.*

276. Reske, *supra* note 40, at 17.

277. 692 A.2d 1273 (Conn. 1997).

278. *State v. Pieger*, 692 A.2d 1273, 1274 (Conn. 1997).

279. *Id.* at 1275.

280. 727 P.2d 873 (Colo. Ct. App. 1986).

controlled substance to contribute \$5,000 to a drug treatment program.<sup>281</sup> In federal court cases, judges have required defendants to make a \$10,000 contribution to the United States Probation Office<sup>282</sup> and a \$3,000,000 contribution to a program "dedicated to alleviating the problem of the homeless."<sup>283</sup> Most recently, in the highly publicized case against Stephen Fagan, who was accused of kidnaping his own daughters in order to keep them from his ex-wife for twenty years, Fagan was sentenced to make a contribution of \$100,000 to a children's charity to be selected by his ex-wife.<sup>284</sup> In just one published case involving a court-ordered "charitable contribution" did the court appropriately acknowledge the magnitude of the First Amendment impact of compelling a probationer to speak. In *People v. Warren*,<sup>285</sup> the New York Appellate Division struck down a condition that required a defendant convicted of the attempted possession of a pistol to contribute \$2,500 to an organization advocating gun control.<sup>286</sup> The court declared the condition to be "patently unconstitutional."<sup>287</sup>

In light of the infrequency with which such conditions face appeal and the limited success that such appeals have had, it seems clear that significant intrusions on the First Amendment right to refrain from speaking will continue to be imposed with regularity. The issue is particularly troubling not only because of the fact that it significantly undervalues the importance of the right to refrain from speaking, but also because it allows an individual trial justice to impose his or her morality and values onto an unwilling offender.

### *C. Infringements on the Right to Freedom of Association*

Courts have trampled upon and virtually disregarded the right of a defendant to freedom of association perhaps more than any other cherished constitutional right. The Second Circuit has gone so far as to label a freedom of association attack on a condition of parole as "frivolous," maintaining that "no one has questioned the Government's power totally to deprive a convicted person of his freedom of association."<sup>288</sup> A number of commentators have agreed that appellate courts are particularly deferential when probation conditions abridge the right to freedom of association.<sup>289</sup>

281. *People v. Burleigh*, 727 P.2d 873, 874-85 (Colo. Ct. App. 1986).

282. *United States v. Carlston*, 562 F. Supp. 181, 183 (N.D. Cal. 1983).

283. *United States v. Posner*, 694 F. Supp. 881, 883 (S.D. Fla. 1988).

284. *Father Spared Prison in Abduction*, PROV. J., May 29, 1999, at A2.

285. 452 N.Y.S.2d 50 (App. Div. 1982).

286. *People v. Warren*, 452 N.Y.S.2d 50, 51 (App. Div. 1982). In this case, the condition was part of a conditional discharge, not a condition of probation. *Id.*

287. *Id.*

288. *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972).

289. See, e.g., Cook, *supra* note 59, at 3-4 (stating that "[c]ourts have consistently upheld imposition of probation conditions that restrict the defendant's freedoms of speech and associa-

### 1. Association with Political or Social Groups

One need not dig very far into the case law to find extraordinary restrictions on association when the defendant is a member of an unpopular or controversial group or when the defendant has been engaged in controversial political activity. Perhaps the most shocking condition that a federal appellate court has upheld is found in *United States v. Kohlberg*,<sup>290</sup> in which the Ninth Circuit upheld a probation condition that the probationer could not "associate with any known homosexuals."<sup>291</sup> Because the underlying criminal charge was the mailing of obscene matter,<sup>292</sup> it seems hard to imagine that the resulting sentence was anything short of an outrageous display of ignorance, bias, and bigoted stereotyping on the part of the trial judge. Indeed, nothing in the Ninth Circuit's opinion even suggested any connection at all between the pornographic materials involved and homosexuality, not that such a connection could justify the condition. The court's opinion did nothing more than assert that the trial judge "is afforded the widest latitude in the imposition of conditions"<sup>293</sup> before summarily concluding that the defendant's constitutional arguments had "no merit."<sup>294</sup>

Other courts have imposed equally onerous associational restrictions on those who belong to unpopular groups. In *United States v. Showalter*,<sup>295</sup> the Seventh Circuit upheld a probation condition that the defendant "not participate in, or associate with those who do participate in, the organization known as 'skinheads,' or in any neo-Nazi organization."<sup>296</sup> As much as most of us wish such organizations would cease to exist, it seems quite hard to justify using the defendant's conviction for the possession of an unregistered firearm<sup>297</sup> as an excuse to obliterate his constitutional right to free association. Similarly, the Supreme Court of Georgia has upheld a probation condition precluding a defendant from participating in any activities of the Ku Klux

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tion" and that "[a]ttempts by courts to restrict associations have been much more successful" than attempts to restrict speech); Weissman, *supra* note 62, at 376 ("For the most part, associational restrictions supported by evidence of a reasonable relationship to crime prevention will be upheld."); Polonsky, *supra* note 28, at 480-81 n.98 (citing several appellate decisions that "reflect the failure of some courts properly to limit" restrictions on probationer's freedom of association).

290. 472 F.2d 1189 (9th Cir. 1973).

291. *United States v. Kohlberg*, 472 F.2d 1189, 1190 (9th Cir. 1973).

292. *Id.*

293. *Id.* (internal quotations omitted) (quoting *United States v. Chapel*, 428 F.2d 472, 474 (9th Cir. 1970)).

294. *Id.*

295. 933 F.2d 573 (7th Cir. 1991).

296. *United States v. Showalter*, 933 F.2d 573, 574 (7th Cir. 1991) (internal quotations omitted).

297. *Id.*

Klan.<sup>298</sup> In addition to its decision in *Kohlberg*, the Ninth Circuit has also upheld a probation condition that a defendant, apparently a motorcycle enthusiast, could not "participate in the activities, or be a member of any motorcycle clubs" after his conviction for being a felon in possession of a firearm.<sup>299</sup> Along somewhat similar lines, the Supreme Court of Hawaii has upheld a probation condition that a probationer convicted of marijuana possession "refrain from the company of people of questionable character."<sup>300</sup>

Perhaps even more common than the imposition of onerous restrictions on the associational rights of unpopular defendants is the imposition of such restrictions on defendants who have engaged in political activity. Often, these conditions seem designed effectively to prevent the defendant from continued political activity. In *United States v. Smith*,<sup>301</sup> the Fifth Circuit upheld a probation condition requiring the defendant to "forego any association whatever with the Students for Democratic Society" and to "[d]iscontinue [his] association with the members of the Humanists group with which [he] violated the law."<sup>302</sup> Unlike in some of the political protest cases mentioned in the section describing limitations on free speech,<sup>303</sup> the protest that led to this defendant's conviction was entirely peaceful, involving a two hour gathering in front of an Army induction center intended to protest the United States's involvement in the Vietnam war.<sup>304</sup> The sole charge lodged against the defendant, and therefore the sole conviction against the defendant, was for the "unauthorized wearing of a distinctive part of an Army uniform."<sup>305</sup> Rather than question the justification for such an extraordinary restriction of the defendant's constitutional right to free association, the Fifth Circuit merely noted that the defendant "could have rejected probation and elected prison," and that, having "chose[n] to enjoy the benefits of probation," the defendant had to "endure its restrictions."<sup>306</sup>

298. *Land v. State*, 426 S.E.2d 370, 374 (Ga. 1993). In this case, there was at least a marginally better excuse for this incredibly broad restriction in that the underlying conviction was for "inciting to riot" while the defendant was "dressed in the ceremonial garb and pointed hood of a knight of the Ku Klux Klan." *Id.* at 372.

299. *United States v. Bolinger*, 940 F.2d 478, 480-81 (9th Cir. 1991).

300. *State v. Martinez*, 580 P.2d 1282, 1286-88 (Haw. 1978).

301. 414 F.2d 630 (5th Cir. 1969), *rev'd on other grounds sub nom.* *Schacht v. United States*, 398 U.S. 58 (1970).

302. *United States v. Smith*, 414 F.2d 630, 636 (5th Cir. 1969), *rev'd on other grounds sub nom.* *Schacht v. United States*, 398 U.S. 58 (1970).

303. See *supra* Part III.A (discussing cases in which probation conditions resulted from convictions following violent political protests).

304. *Smith*, 414 F.2d at 631-32.

305. *Id.* at 632.

306. *Id.* at 636; see also *supra* Part II.A.2 (discussing contract theory as procedural obstacle to appellate review).



Similarly, in *Malone v. United States*,<sup>307</sup> the Ninth Circuit heard an appeal involving a defendant who had been convicted of the unlawful exportation of firearms from the United States to the United Kingdom, apparently as part of an effort to aid the Irish Republican movement.<sup>308</sup> The trial court imposed an array of probation conditions that set out broad associational restrictions, including a restriction that the defendant "not participate in any American Irish Republican movement," that he "belong to no Irish organizations, cultural or otherwise," that he "not belong or participate in any Irish Catholic organizations or groups," that he "not visit any Irish pubs," and that he "accept no employment that directly or indirectly associates him with any Irish organization or movement."<sup>309</sup> Noting the "[g]reat discretion" vested in the trial court, the Ninth Circuit upheld the conditions because it concluded that there was "a reasonable nexus between the probation conditions and the goals of probation."<sup>310</sup> Likewise, the Supreme Court of South Dakota has upheld a broad associational restriction prohibiting the defendant, a well known Native American activist, from "participating in any American Indian Movement activities."<sup>311</sup> Because it found that the trial court had "a rational basis upon which to impose [the] condition," the court found "no infringement of [the] defendant's right[ ] to freedom of association."<sup>312</sup> Several federal circuit courts have upheld probation conditions prohibiting tax resisters from associating with groups or people that advocate tax resistance.<sup>313</sup>

## 2. Association with Spouse or Fiancé

Another area of restrictive probation conditions involves an intersection of the right to freedom of association and the right to privacy. A number of courts have upheld restrictions upon a defendant's association with his or her spouse or fiancé, presumably based on the trial judge's personal opinion that such association would be detrimental to the defendant's rehabilitation.

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307. 502 F.2d 554 (9th Cir. 1974).

308. *Malone v. United States*, 502 F.2d 554, 555 (9th Cir. 1974).

309. *Id.* at 555.

310. *Id.* at 556-57.

311. *State v. Means*, 257 N.W.2d 595, 596 (S.D. 1977). The restrictive condition was actually a condition of bail, not of probation, but the court explicitly stated that its standard of review was identical. *Id.* at 600. The condition did allow for narrow exceptions in the areas of fundraising and litigation within the court system. *Id.* at 596.

312. *Id.* at 601.

313. See, e.g., *United States v. Schiff*, 876 F.2d 272, 276-77 (2d Cir. 1989) (upholding probation condition prohibiting tax resister from associating with those advocating noncompliance with tax laws); *United States v. Lawson*, 670 F.2d 923, 929-30 (10th Cir. 1982) (same); *United States v. Patterson*, 627 F.2d 760, 760-61 (5th Cir. 1980) (same); *United States v. Smith*, 618 F.2d 280, 282 (5th Cir. 1980) (same).

While such familial restrictions have "received more equivocal treatment" by appellate courts than other associational restrictions,<sup>314</sup> most such conditions continue to be upheld.

In *In re Peeler*,<sup>315</sup> the California Court of Appeal upheld a probation condition that, while not directly so worded, was acknowledged by the court to be "a command that she live apart from her husband."<sup>316</sup> The defendant had been convicted of possession of marijuana, and, in an entirely unrelated set of charges, her husband stood accused of distributing marijuana.<sup>317</sup> Despite its claim that it "ha[d] not lost sight of the [possible] eventual acquittal of the presumptively innocent husband,"<sup>318</sup> the court approved of the condition. In support of its holding, the court deferred completely to a balancing test that it merely assumed the trial court had conducted: "The trial court in the matter before us undoubtedly weighed [the] public policy [supporting the integrity of marriage] in relation to the public policy involved in an attempt to rescue [the defendant] from involvement in narcotic violations to her possible permanent destruction."<sup>319</sup> Along similar lines, the Court of Appeals of Arizona in *State v. Nickerson*<sup>320</sup> upheld a probation condition that allowed the defendant to have contact with his wife only upon the "prior written consent of his probation officer."<sup>321</sup> In that case, the defendant had been convicted of one count of theft involving property valued at under \$250.<sup>322</sup> The court found that "the record amply support[ed] the trial court's apparent conclusion that separating [the defendant] and his wife for a period of time . . . serves a rehabilitative purpose,"<sup>323</sup> apparently because the defendant and his wife had been *arrested* together – with no mention of conviction or acquittal – on a total of three occasions.<sup>324</sup>

By contrast, the Supreme Court of Oregon seems to have taken a harder look at the imposition of a probation condition that restricted a defendant's association with her husband. In *State v. Martin*,<sup>325</sup> the court narrowed the scope of a probation condition that precluded a convicted forger from associating with "any person who has ever been convicted of a crime" so that the

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314. Weissman, *supra* note 62, at 376-77.

315. 72 Cal. Rptr. 254 (Ct. App. 1968).

316. *In re Peeler*, 72 Cal. Rptr. 254, 256-58 (Ct. App. 1968).

317. *Id.* at 256-58.

318. *Id.* at 261.

319. *Id.* at 260.

320. 791 P.2d 647 (Ariz. Ct. App. 1990).

321. *State v. Nickerson*, 791 P.2d 647, 648 (Ariz. Ct. App. 1990).

322. *Id.*

323. *Id.* at 649.

324. *Id.* at 648.

325. 580 P.2d 536 (Or. 1978).

condition no longer included the defendant's husband.<sup>326</sup> Although the defendant's lawyer had argued for leniency at the time of sentencing by arguing that the defendant's husband was "largely to blame for [her] crimes,"<sup>327</sup> the court maintained that the "factual record in th[e] case was incomplete."<sup>328</sup> In particular, the court felt that the trial court "should have determined from the record whether as a matter of fact the spouse would be a bad influence so as to endanger rehabilitation or public safety and, if so, what interference with marital rights less than complete separation would serve to protect society's interests."<sup>329</sup> In deciding to narrow the probation condition to exclude the defendant's husband, the court highlighted its general rule that "where fundamental rights are involved, the sentencing court has less discretion to impose conditions in conflict therewith."<sup>330</sup> This sort of general rule, while not widely adopted, makes perfect sense, as does the notion that restrictive conditions should be based upon findings of fact from the trial court record. It is unclear whether the court meant to imply that such facts could have been found from the record without any professional or expert testimony, but the better rule would require such testimony in order to avoid judicial guesswork or reliance on pop-psychology.

Conditions restricting association with fiancés have received much the same treatment. For example, in *Edwards v. State*<sup>331</sup> the Supreme Court of Wisconsin upheld a condition prohibiting the defendant from associating with her fiancé, who had been her co-defendant.<sup>332</sup> Interestingly, a dissenting justice argued that because a less restrictive condition could have been devised and because "[t]here is reason to believe that freedom of association promotes rehabilitation by enabling a probationer to establish and maintain normal relationships," the condition should have been vacated.<sup>333</sup> In *United States v. Bortels*,<sup>334</sup> the Sixth Circuit similarly upheld a condition that prohibited the defendant from associating with her fiancé, deferring to the trial court's conclusion that "her rehabilitation would be aided if she avoided future contact with her fiancé."<sup>335</sup> In *State v. Allen*,<sup>336</sup> the Court of Appeals of Oregon upheld a probation condition that required the court's permission to

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326. *State v. Martin*, 580 P.2d 536, 540 (Or. 1978).

327. *Id.* at 538.

328. *Id.* at 540.

329. *Id.*

330. *Id.*

331. 246 N.W.2d 109 (Wis. 1976).

332. *Edwards v. State*, 246 N.W.2d 109, 110 (Wis. 1976).

333. *Id.* at 112 (Abrahamson, J., dissenting).

334. 962 F.2d 558 (6th Cir. 1992).

335. *United States v. Bortels*, 962 F.2d 558, 559 (6th Cir. 1992).

336. 506 P.2d 528 (Or. Ct. App. 1973).

"enter into any marriage contract."<sup>337</sup> Although the defendant's fiancé did not appear to have had any direct involvement in the defendant's criminal activity, the fiancé had a number of criminal convictions on his record.<sup>338</sup> Stressing the "wide discretion of the trial court," the appellate court upheld the condition because "[a]pparently the sentencing court concluded that [the] defendant's criminal activity was related to her association with [her fiancé] and that her chances for success on probation would be enhanced if she stayed away from him."<sup>339</sup> The court's use of the word "apparently" made it clear that appellate court's speculation about the trial court's reasoning was sufficient to justify upholding the condition.

One disturbing – and undoubtedly not coincidental – element of the cases involving restrictions on association with a spouse or a fiancé is that, almost without exception, the defendant subject to the restriction is a woman. Indeed, a fair reading of this set of cases reveals an extraordinary level of paternalism. One can almost hear the father figure in each of the judges doing his best to keep his teenaged daughter away from the evil influence of the bad boyfriend. It becomes hard for that father to accept the inevitable: that the daughter must take personal responsibility for her actions, and that she can grow and mature only if she is allowed to make her own choices about with whom she will associate.

#### *D. Infringements on the Right of Access to the Courts*

Several published cases reveal efforts on the part of a sentencing judge to place significant limitations, if not total prohibitions, on a probationer's constitutionally protected right of access to the courts. These cases seem to be prime examples of another easily recognizable pattern that emerges from the probation condition case law: the use of probation conditions to address issues or perceived problems above and beyond the underlying criminal behavior. One set of access to court cases involves the use of probation conditions to resolve tangentially related legal issues that could and should be litigated in another forum specifically designed for that purpose; another involves the use of probation conditions to muzzle the active *pro se* litigator.

##### *1. Resolving Tangentially Related or Unrelated Issues*

One broad category of judicial abuses in this area involves the use of probation conditions not in such a way as to categorically restrain access to the courts, but rather to resolve in a preemptive fashion legal issues that could and should be litigated in another forum specifically designed for that

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337. State v. Allen, 506 P.2d 528, 529 (Or. Ct. App. 1973).

338. *Id.*

339. *Id.* (emphasis added).

purpose. The most common examples involve probation conditions that regulate custody or visitation issues involving the defendant's children, that regulate the defendant's employment or professional licensing status, that regulate the defendant's immigration and naturalization status, and that require the payment of restitution for offenses for which the defendant was not convicted.

*a. Regulation of Custody or Visitation*

Several appellate cases have upheld probation conditions that preclude a parent from having custody of or any contact with his or her natural children.<sup>340</sup> Not surprisingly, the majority of these cases involve convictions for some form of child abuse.<sup>341</sup> What is surprising is that these cases do not even acknowledge, let alone defer to, the pre-existing legal mechanisms designed specifically to regulate these vital constitutional rights and relationships. In only a very small handful of cases has a court appropriately recognized that these issues are best resolved in a family court setting, where the defendant's due process rights are accorded full weight and where the best interests of the child or children can be determined, normally with some expert assistance.

In *Smith v. State*,<sup>342</sup> for example, the Court of Special Appeals of Maryland vacated a probation condition that precluded the defendant from seeking custody of her children without permission from the trial judge.<sup>343</sup> Unlike in the ordinary case, in which the judge imposes sentence with little or no input from those with any professional expertise, the judge in this case, which involved a charge of child abuse, heard testimony from a representative of the Department of Social Services.<sup>344</sup> When that representative indicated that the defendant's custody of her children could eventually be restored if she "demonstrated her fitness," the judge responded by imposing the condition at issue.<sup>345</sup> As the appellate court aptly noted, the trial judge "inject[ed] himself into a matter that the Legislature ha[d] decided best rests in the jurisdiction of

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340. See, e.g., *People v. Pointer*, 199 Cal. Rptr. 357, 365-66 (Ct. App. 1984) (noting, in case ruling condition that defendant refrain from becoming pregnant was overbroad, that defendant did not challenge condition that she have no contact with her children); *Howland v. State*, 420 So. 2d 918, 919 (Fla. Ct. App. 1982) (affirming condition of probation prohibiting defendant from having contact with his child); *Rodriguez v. State*, 378 So. 2d 7, 10 (Fla. Ct. App. 1979) (affirming condition prohibiting custody of children); *State v. Whitchurch*, 577 A.2d 690, 693 (Vt. 1990) (affirming condition prohibiting contact with children).

341. See *supra* note 340 (citing relevant cases).

342. 563 A.2d 1129 (Md. Ct. Spec. App. 1989).

343. *Smith v. State*, 563 A.2d 1129, 1130 (Md. Ct. Spec. App. 1989).

344. *Id.*

345. *Id.*

the juvenile court."<sup>346</sup> The court pointed out that, because "the trial judge was without jurisdiction to decide custody directly, he [was] seeking to do indirectly that which he could not do directly, i.e., nevertheless control custody of the children insofar as their mother . . . is concerned."<sup>347</sup> The court concluded its opinion by maintaining that "custody matters are best not decided in a criminal proceeding."<sup>348</sup>

The Supreme Court of Oregon reached a similar conclusion in *State v. Donovan*,<sup>349</sup> in which the defendant had been accused of custodial interference after absconding with his children during a period of court-ordered visitation.<sup>350</sup> Much like in *Smith*, the trial court imposed a probation condition precluding the defendant from moving for custody of the children without the trial court's permission.<sup>351</sup> The court there emphasized that "[t]he public [did] not need protection from [the] defendant's recourse to the courts," concluding that "barring such recourse [is not] a proper means of rehabilitation."<sup>352</sup> But perhaps more to the point, the court recognized that "how custody should be decided in the children's best interests [is a] question[] for a domestic relations or juvenile court proceeding, not for a criminal sentencing proceeding."<sup>353</sup> Unfortunately, particularly given the very small number of sentences that are ever appealed, decisions in line with *Donovan* and *Smith* undoubtedly represent only the tiniest percentage of cases in which custody determinations are handed down at the whim of a sentencing judge.

#### *b. Regulation of Employment or Professional Licensing*

Another series of cases that involve the same concept – keeping the defendant from litigating an issue in its appropriate forum by deciding it with a condition of probation – involves conditions that regulate the defendant's employment or professional licensing status. One common example arises when probation conditions preclude defendants who are licensed attorneys from engaging in the practice of law, thereby side-stepping the appropriate disciplinary proceedings in effect in the jurisdiction. In *Yarbrough v. State*,<sup>354</sup> for example, the Court of Appeals of Georgia upheld such a probation condition imposed upon an attorney who had pled nolo contendere to a charge of

346. *Id.* at 1131.

347. *Id.* at 1130.

348. *Id.* at 1131.

349. 770 P.2d 581 (Or. 1989).

350. *State v. Donovan*, 770 P.2d 581, 582 (Or. 1989).

351. *Id.*

352. *Id.* at 584.

353. *Id.* at 583.

354. 166 S.E.2d 35 (Ga. Ct. App. 1969).

forging a warranty deed.<sup>355</sup> Similarly, the Court of Appeal of Louisiana in *State v. Matthews*<sup>356</sup> upheld a probation condition precluding the defendant from practicing law for the duration of his probation.<sup>357</sup>

When it comes to the issue of permanent disbarment, however, the appellate courts have shown a little more interest in the argument that sentencing courts should leave professional licensing decisions to the established procedural channels. The Second Circuit held this way in *United States v. Pastore*,<sup>358</sup> vacating a probation condition that required an attorney convicted of filing a false income tax return to resign as a member of the bar.<sup>359</sup> The essence of the court's opinion was summarized in the following passage:

[B]efore any defendant is required to give up his job, or trade or profession, he should be given a meaningful opportunity to demonstrate why such a condition might be inappropriate. If there is already in existence a well-defined procedure for resolution of that issue, it makes sense to utilize it.<sup>360</sup>

While some other courts have likewise vacated conditions that have the effect of permanent disbarment of attorneys, they have generally done so on the theory that only the highest court in the jurisdiction has the authority to impose such a condition.<sup>361</sup> Probation conditions have also been used to temporarily or permanently terminate the professional careers of physicians,<sup>362</sup> law enforcement officers<sup>363</sup> and labor union officials.<sup>364</sup>

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355. *Yarborough v. State*, 166 S.E.2d 35, 36-37 (Ga. Ct. App. 1969).

356. 572 So. 2d 250 (La. Ct. App. 1990).

357. *State v. Matthews*, 572 So. 2d 250, 255 (La. Ct. App. 1990).

358. 537 F.2d 675 (2d Cir. 1976).

359. *United States v. Pastore*, 537 F.2d 675, 682-84 (2d Cir. 1976).

360. *Id.* at 682.

361. See, e.g., *People v. Battershell*, 569 N.E.2d 308, 311-12 (Ill. Ct. App. 1991) (ruling that trial judge did not have power to prohibit defendant from practicing law); *State v. Matthews*, 572 So. 2d 250, 255 (La. Ct. App. 1990) (ruling that defendant could not be precluded from representing himself as condition of probation).

362. See, e.g., *People v. Frank*, 211 P.2d 350, 352 (Cal. Dist. Ct. App. 1949) (ruling condition prohibiting defendant from practicing medicine was not abuse of discretion); *State v. Dean*, 306 N.W.2d 286, 289 (Wis. Ct. App. 1981) (noting that defendant was required to refrain from practicing psychiatry during probation).

363. See, e.g., *United States v. Brockway*, 769 F.2d 263, 265 (5th Cir. 1985) (ruling condition that defendant not serve as law enforcement officer did not exceed trial court's discretion); *United States v. Villarin Gerena*, 553 F.2d 723, 726 (1st Cir. 1977) (ruling trial court did not abuse discretion by requiring defendant to resign as law enforcement officer).

364. See, e.g., *United States v. Barrasso*, 372 F.2d 136, 137 (3d Cir. 1967) (ruling that condition defendant refrain from seeking employment by labor union was proper); *People v. Osslo*, 323 P.2d 397, 412-13 (Cal. 1958) (ruling that restriction that defendant not hold any union position was proper).

c. *Regulation of Immigration Status*

The banishment of a criminal defendant is frequently held out as the prototypical example of a probation condition that will be vacated as violative of public policy.<sup>365</sup> Nonetheless, a number of courts have upheld probation conditions that have effectuated the deportation of the defendants without any involvement by the Immigration and Naturalization Service. In *United States v. Janko*,<sup>366</sup> for example, the Eleventh Circuit upheld a probation condition requiring two defendants to leave the United States.<sup>367</sup> The court held that by entering into a plea agreement that included this condition, the defendants "waived any right to have their deportation determined by the Immigration and Naturalization Service's exclusion proceedings."<sup>368</sup> Similarly, the Supreme Court of Rhode Island in *State v. Karan*<sup>369</sup> upheld a probation condition requiring the defendant to leave the United States and not return.<sup>370</sup> In that case, the court acknowledged the obvious fact that a state court "does not have the power to deport an individual from the United States" because "[s]uch power is conferred solely upon the appropriate federal authorities pursuant to [federal law]."<sup>371</sup> Despite those acknowledgments, however, the court upheld the condition at issue, reasoning that the defendant, by entering into the plea agreement, had waived the right to object to its terms.<sup>372</sup> These cases serve as excellent examples both of the lengths to which some trial courts are willing to go to circumvent normal channels of litigation concerning important rights,<sup>373</sup> and the lengths to which some appellate courts are willing to go to avoid any substantive appellate review even of sentences that appear to be patently unlawful.

365. See, e.g., KLEIN, *supra* note 16, at 87 (calling banishment "an obvious and consistent example" of probation conditions "rejected by the courts for contravening public policy"); Polonsky, *supra* note 28, at 469-70 (noting that "[b]anishment has consistently been held void as a condition of probation").

366. 865 F.2d 1246 (11th Cir. 1989).

367. *United States v. Janko*, 865 F.2d 1246, 1247 (11th Cir. 1989).

368. *Id.*

369. 525 A.2d 933 (R.I. 1987).

370. *State v. Karan*, 525 A.2d 933, 933-34 (R.I. 1987).

371. *Id.* at 934.

372. *Id.*

373. In the immigration and deportation setting, a number of courts have vacated conditions on the theory suggested by this argument, holding that such a condition is outside the sentencing judge's authority in that it circumvents the established deportation procedures. See, e.g., *United States v. Abushaar*, 761 F.2d 954, 960-61 (3d Cir. 1985) (ruling that condition that defendant serve probation period outside country was impermissible); *United States v. Hernandez*, 588 F.2d 346, 350-52 (2d Cir. 1978) (ruling that condition that defendant leave country exceeded authority of court); *United States v. Castillo-Burgos*, 501 F.2d 217, 219-20 (9th Cir. 1974) (ruling that sentence of deportation following jail time exceeded authority of court).



*d. Requirement of Restitution*

The last major category of probation conditions that seem designed to avoid the proper use of normal judicial channels of litigation involves conditions that require the defendant to pay restitution for offenses for which he was not convicted. In perhaps the most extreme example of this sort of condition, the California Court of Appeal upheld in *People v. Miller*<sup>374</sup> the imposition of restitution for various outstanding debts under circumstances in which "there [was] *no indication* that any of the claims . . . were based on criminal conduct."<sup>375</sup> The court upheld the condition because the trial court "*may have concluded*" that the rehabilitation of the defendant, who was a building contractor, "could best be achieved in a context of complete reparation for the harm done to his former customers."<sup>376</sup> Although these aggrieved parties could certainly have sought a legal remedy for their alleged harms through civil litigation, it seems that the court was content to play the role of a collection agency, at the same time eliminating any potential defenses that the defendant might have raised through the appropriate litigation of the issues involved.<sup>377</sup>

Similarly, the Court of Appeals of South Carolina has upheld the imposition of restitution for crimes for which the defendant had not been indicted.<sup>378</sup> In that case, *State v. Bynes*,<sup>379</sup> the defendant had been indicted for and pled guilty to two counts of forgery.<sup>380</sup> At the time of his sentencing, however, the defendant was presented with information about uncharged forgery accusations and offered a rather stark "choice." As described by the Court of Appeals, the trial judge told the defendant that "he could either agree to pay the restitution [for the uncharged forgeries] and receive a reduced sentence and probation or face a fourteen year sentence for the two forgeries on which he had been indicted, without probation."<sup>381</sup> Not surprisingly, the defendant chose to minimize his jail time and to pay restitution for the uncharged crimes. The

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374. 64 Cal. Rptr. 20 (Ct. App. 1967).

375. *People v. Miller*, 64 Cal. Rptr. 20, 25 (Ct. App. 1967) (emphasis added).

376. *Id.* (emphasis added).

377. This sort of argument seems to have persuaded the Supreme Court of Michigan in *People v. Becker*, 84 N.W.2d 833 (Mich. 1957). In that case, the defendant had pled guilty to a charge of leaving the scene of a personal injury accident. *Id.* at 834. As a condition of his probation, the defendant was ordered to pay restitution for the medical bills of the parties who were injured in the accident. *Id.* The court focused on the fact that "the act of which the defendant was convicted was not that of striking down but of leaving," *id.* at 835, pointing out that, in arguing against the condition, the defendant was simply demanding what he was due: "a hearing as to his civil liability, with all his constitutional safeguards." *Id.* at 836. Based on that reasoning, the court vacated the condition. *Id.* at 840.

378. *State v. Bynes*, 403 S.E.2d 126, 127 (S.C. Ct. App. 1991).

379. 403 S.E.2d 126 (S.C. Ct. App. 1991).

380. *Id.* at 126.

381. *Id.* at 127.

Court of Appeals concluded that the defendant's "consent to full restitution as a condition of his probation preclude[d] him from challenging the condition on appeal."<sup>382</sup> Any regard for the presumption of innocence or for procedural fairness on the uncharged crimes seems to have been abandoned, presumably in the name of judicial efficiency. A similar conclusion seems justified concerning a decision by the Supreme Court of California in *People v. Lent*,<sup>383</sup> in which the court upheld the imposition of restitution for a charge of theft for which the defendant had actually been tried and *acquitted*.<sup>384</sup> Empowering trial judges to use the full weight of their authority in order to right what they personally perceive to be wrongs raises a very dangerous specter indeed.

## 2. Silencing the Pro Se Litigant

In a rather extreme example of cases in which a trial court seeks to deny access to the courts altogether, the Supreme Court of Rhode Island in *State v. D'Amario*<sup>385</sup> upheld a probation condition imposed on an active pro se litigator that precluded him from proceeding pro se in any court or agency within the state and also required him to dismiss all of his pending litigation, much of which was against the State.<sup>386</sup> As described by the court, the defendant had "an extensive history as a litigant in the Rhode Island courts," including the instigation of at least seventeen state court actions and at least nine federal court actions.<sup>387</sup> The criminal charges in the case involved one count of obstruction of the judicial system, which stemmed from a letter written by the defendant that "appeared to threaten [a public official's] life," and one count of disorderly conduct, which stemmed from a courtroom argument with a different public official.<sup>388</sup> Without any supporting evidence or expert testimony to this effect, and despite the isolated nature of these episodes in the context of a litigation history spanning almost two decades, the trial judge found that the defendant's proceeding pro se presented "a real threat to the judiciary, opposing counsel and to [the defendant's] own well being . . . ."<sup>389</sup>

382. *Id.*

383. 541 P.2d 545 (Cal. 1975).

384. *People v. Lent*, 541 P.2d 545, 549 (Cal. 1975). For an opinion reaching the opposite conclusion, see *State v. Labure*, 427 So. 2d 855 (La. 1983), in which the court struck down a probation condition requiring restitution for a charge that had been dismissed. The court described the condition as "patently erroneous" because the defendant "did not plead guilty to that offense and was not convicted of it." *Id.* at 857.

385. 725 A.2d 276 (R.I. 1999). It should be noted that the author of this Article represented the defendant, Mr. D'Amario, in the post-conviction aspects of this case.

386. *State v. D'Amario*, 725 A.2d 276, 278-81 (R.I. 1999).

387. *Id.* at 277.

388. *Id.* at 277-78.

389. *Id.* at 281.

The trial judge then imposed a probation condition that completely precluded the defendant from engaging in pro se litigation<sup>390</sup> and that required the dismissal of all pending litigation.<sup>391</sup>

On its face, the Supreme Court of Rhode Island's decision relied almost exclusively on its holding that the defendant waived any objection to the probation conditions by agreeing to them in order to obtain his release from incarceration.<sup>392</sup> A close reading of the case reveals a somewhat different agenda, however, as the court makes repeated references to preserving court resources and preventing frivolous or abusive litigation.<sup>393</sup> The trial court did not find that the defendant's pending litigation was frivolous or abusive,<sup>394</sup> and the supreme court neglected even to mention the most troubling aspect of the mandated dismissal of that pending litigation: the fact that the state appeared to have used its significant leverage in the criminal case to obtain final resolution of pending civil matters in which it was the defendant.<sup>395</sup> Even the supreme court recognized the excesses of the trial court's conditions. Thus, the court held that precluding the defendant from defending himself pro se or from petitioning a court for permission to proceed pro se was going too far, and it modified the condition accordingly.<sup>396</sup> The court did not discuss whether the remaining conditions were necessary as a matter of correctional policy or whether some other, less constitutionally intrusive conditions might have sufficed.

The Court of Appeals of Wisconsin reviewed a similar probation condition in *State v. Peckham*.<sup>397</sup> After the defendant's conviction on "various theft and forgery charges," the trial court imposed a probation condition that,

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390. *Id.* at 278-79. The probation condition did allow the defendant, "[t]hrough counsel," to file a petition to proceed pro se. *Id.* at 278. Because the defendant was indigent, however, this provision would offer him little assistance in the vast majority of circumstances.

391. *Id.* at 278-79. Again, the probation condition did allow the possibility that the defendant could avoid dismissal of two pending matters if he could prevail upon private counsel to enter an appearance. *Id.* That caveat turned out to offer the defendant no relief from the severity of the condition.

392. *Id.* at 279-80.

393. *Id.* at 280-81.

394. Indeed, much of the litigation had been pending for years. The fact that the cases had never been dismissed on summary judgment grounds suggests that it would be difficult to characterize them as frivolous.

395. This apparent conflict of interest was exaggerated by the fact that the very same office represents the State of Rhode Island in both civil and criminal matters and by the fact that the complainant in the more serious criminal charge was an attorney within that office. Although these issues were fully briefed and argued before the Supreme Court, see Appellant's Brief at 32-38, *State v. D'Amario*, 725 A.2d 276 (R.I. 1999) (No. 97-0567-C.A.) (on file with *Washington and Lee Law Review*), the court chose to ignore them entirely in rendering its opinion.

396. *D'Amario*, 725 A.2d at 281.

397. No. 95-1862-CR, 1996 WL 544096, at \*1 (Wis. Ct. App. Sept. 26, 1996).

among other restrictions, precluded the defendant from sending "communications of any type to any court . . . without the written permission of her probation agent."<sup>398</sup> Unlike *D'Amario*, however, the court properly recognized that the probation condition was "overly broad" because it "unduly restrict[ed] the defendant's] right of access to the courts."<sup>399</sup> The court remanded the case for resentencing and, citing the defendant's "undisputed record of harassing people involved in prosecuting her or supervising and regulating her behavior," suggested that the trial court could "refashion the condition so that it [was] directed solely toward the prevention of harassing behavior."<sup>400</sup> Even if a record of harassment were indeed undisputed, the court did not clarify why a probation condition in a theft and forgery case, rather than the rigorous enforcement of the pre-existing criminal statutes prohibiting harassment, was the appropriate mechanism for controlling that behavior.

### *E. Infringements on the Right to Freedom of Religion*

It has been suggested that, for whatever reason, probation conditions that either prohibit or require participation in religious activities are subjected to more rigorous appellate scrutiny than many other fundamental rights.<sup>401</sup> One commentator, writing in 1982, described "regular church attendance" as "the typical challenged condition," but opined that the imposition of the condition was on the decline.<sup>402</sup> Because he based that opinion largely on the condemnation of such conditions by other commentators and on the absence of published cases on point,<sup>403</sup> it seems hard to credit the notion that any appreciable decline has actually occurred. Indeed, neither this opinion nor the broader notion that the religious liberties of probationers are better protected than their other fundamental constitutional rights is supported by a reading of the case law in the field or by a reading of media accounts of sentences imposing such conditions.

Much as with the imposition of other constitutionally invasive probation conditions, there is good reason to believe that a very high percentage of cases goes unchallenged in the legal system. In a 1984 opinion striking down a probation condition requiring the defendant to "attend an organized church of his choice on a regular basis," the Court of Appeal of Louisiana noted that,

398. *State v. Peckham*, No. 95-1862-CR, 1996 WL 544096, at \*1 (Wis. Ct. App. Sept. 26, 1996).

399. *Id.*

400. *Id.* at \*1-\*2.

401. See, e.g., Greenberg, *supra* note 15, at 94-96 (arguing conditions implicating religious freedom are unlikely to be upheld); *Alternatives to Incarceration*, *supra* note 25, at 1951 (stating probation conditions implicating religious freedom violate Free Exercise clause).

402. Weissman, *supra* note 62, at 383 (arguing probation conditions implicating religious freedom are unconstitutional and becoming less frequent).

403. *Id.* at 383 n.86.

while this was "not the first time that church attendance ha[d] been made a condition of probation in Louisiana," it was the first time such a condition had been challenged.<sup>404</sup> In that same year, the Superior Court of Pennsylvania commented in dicta on a similar condition of probation, this time requiring weekly church attendance for the judge's articulated purpose of "keep[ing the defendant] within the light that [he had] seen."<sup>405</sup> Although the defendant had not challenged the legality of the condition on appeal, the court felt compelled to comment on it "as a cautionary note to courts below."<sup>406</sup> The court then concluded that the requirement of church attendance was "most likely unconstitutional."<sup>407</sup> It is hard to imagine any reason for the court to extend this cautionary note on an issue that had not been raised on appeal other than its concern that this sort of condition was being imposed on a regular basis, because the court's holding in the case affirmed both the conviction and the sentence, including the requirement of church attendance. Indeed, media accounts of probation conditions involving court-ordered participation in religious activities certainly seem to substantiate this concern.<sup>408</sup>

At least two appellate courts have explicitly upheld conditions of probation that squarely implicated the defendants' First Amendment right to religious freedom. In *Malone v. United States*,<sup>409</sup> the Second Circuit upheld a probation condition providing that a defendant could "not belong [to] or par-

404. *State v. Morgan*, 459 So. 2d 6, 8-10 (La. Ct. App. 1984) (citing *State ex rel. Wright*, 387 So. 2d 75, 76-77 (La. Ct. App. 1980)).

405. *Commonwealth v. Kuhn*, 475 A.2d 103, 108 (Pa. Super. Ct. 1984) (quoting trial judge).

406. *Id.*

407. *Id.* This position is consistent with that expressed in a few other court opinions. See *State v. Evans*, 796 P.2d 178, 178-80 (Kan. Ct. App. 1990) (reversing imposition of probation conditions requiring church attendance and community service at that church); *State v. Morgan*, 459 So. 2d 6, 10 (La. Ct. App. 1984) (vacating probation condition requiring church attendance); *Jones v. Commonwealth*, 38 S.E.2d 444, 448-49 (Va. 1946) (concluding in dicta that requiring regular church attendance violates Constitution).

408. See, e.g., Mark Curriden, *Making Punishment Fit Crime Often Not Popular*, ATLANTA CONST., Jan. 9, 1992, at A3 (describing sentence requiring defendant convicted of having sex with minor to observe "three months of faithful Sunday school attendance"); Robert A. Mintz, *Judge Turns Confessing to a Crime into a Religious Experience*, NAT'L L.J., Feb. 6, 1984, at 47 (describing sentence requiring defendant convicted of car theft to confess his crime before church congregation); Paul J. Toomey, *Rude Driver Ordered to Serve Time in Church*, THE REC., Feb. 1, 1996, at A1 (describing sentence requiring defendant convicted of disorderly conduct to "go to church, talk to a minister, and give the court a note from the minister saying he had counseled his congregant"); *World of Religion: ACLU Attacks Church Attendance Ruling*, WASH. POST, May 3, 1986, at H12 (describing rescission of eight to twenty-three month prison sentence for defendant convicted of receiving stolen property on condition that he attend church every Sunday). There is no evidence that any one of the conditions described in the articles cited here was the subject of a legal appeal.

409. 502 F.2d 554 (2d Cir. 1974).

ticipate in any Irish Catholic organizations or groups."<sup>410</sup> The defendant, who had apparently been active in the American Irish Republican movement, stood convicted of exporting firearms to the United Kingdom.<sup>411</sup> In the face of the defendant's First Amendment challenge, the court did little other than to highlight the breadth of the trial court's discretion and to find a "reasonable nexus between the probation condition[s] and the goals of probation."<sup>412</sup> The court never explicitly mentioned the defendant's free exercise rights, let alone tried to justify what appeared to be the total preclusion of the defendant's exercise of that right.

In a more interesting and more justifiable decision, the Supreme Court of Vermont in *State v. Emery*<sup>413</sup> upheld a probation condition against a First Amendment Establishment Clause challenge. In that case, the defendant pled nolo contendere to a charge of "lewd and lascivious behavior" with a minor and was sentenced to probation on the condition that he actively participate in and complete a particular sex offender program.<sup>414</sup> The defendant maintained that participating in the program would force him to violate his religious beliefs because the program required him to engage in sexual fantasy and masturbation.<sup>415</sup> The court acknowledged the "impact of the program on the defendant's federal and state constitutional rights to religious freedom," but still held that the condition requiring the program was "not overly restrictive of [his] liberty or autonomy."<sup>416</sup> To the credit of both the trial and appellate courts, each relied heavily on what appeared to be a well-developed record, including testimony from at least two psychologists and one mental health consultant who had some significant experience with sex offenders.<sup>417</sup> According to the Vermont Supreme Court, the testimony of these experts "amply supported" the conclusion that the challenged program represented "the best method of reducing recidivism in sexual offenders."<sup>418</sup> Unfortunately, the court's opinion failed to articulate any clear standard for the review of future probation conditions implicating fundamental constitutional rights, nor did it explicitly conclude that the condition involved the least restrictive alternative available to the sentencing court. Nonetheless, the opinion did seem to display a reasonably appropriate level of respect for the constitutional rights of the defendant.<sup>419</sup>

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410. *Malone v. United States*, 502 F.2d 554, 555 (2d Cir. 1974).

411. *Id.*

412. *Id.* at 556.

413. 593 A.2d 77 (Vt. 1991).

414. *State v. Emery*, 593 A. 2d 77, 78 (Vt. 1991).

415. *Id.* at 78-79.

416. *Id.* at 80-81.

417. *Id.* at 78-80.

418. *Id.* at 80.

419. The Eleventh Circuit showed a similarly appropriate level of concern for religious

Perhaps the most common probation condition with serious religious freedom implications is the requirement that a defendant participate in Alcoholics Anonymous (AA).<sup>420</sup> Although many sentencing judges may simply be unaware that the basic precepts of AA and the manner in which the program is administered are overwhelmingly religious in nature,<sup>421</sup> that fact has not escaped the appellate courts and commentators that have explored the issue.<sup>422</sup> The central teachings of the organization are published in a book that is alternatively referred to by members of the organization as the Big Book or the "Bible."<sup>423</sup> That book contains the famous "Twelve Steps" that constitute the heart of the AA recovery program; six of those twelve steps contain

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freedom in *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982). The probationer in that case brought an action under 42 U.S.C. § 1983 to challenge a number of probation conditions, including a rehabilitation program entitled Emotional Maturity Instruction (EMI). *Id.* at 1364. The probationer maintained that his forced participation in the EMI program violated the Establishment Clause because the program was "pervaded with Biblical teachings." *Id.* at 1365. While the district court resolved this claim against the probationer on summary judgment, the Eleventh Circuit remanded the case because it found "a material factual dispute" about the content of the program. *Id.* The court provided the following guidance to the district court upon remand:

While we intimate no position on the ultimate resolution of this issue it is clear that a condition of probation which requires the probationer to adopt religion or to adopt any particular religion would be unconstitutional. It follows that a condition of probation which requires the probationer to submit himself to a course advocating the adoption of religion or a particular religion also transgresses the First Amendment.

*Id.* (citation omitted). This statement, which implies a categorical preclusion of probation conditions infringing on the First Amendment right to freedom of religion, is in stark contrast to the court's holding in the same case upholding a probation condition that completely eliminated the probationer's Fourth Amendment rights. The sentencing court imposed a probation condition that required the probationer to "submit to a search of his person, houses, papers, and/or effects . . . [at] any time of day or night with or without a search warrant whenever requested to do so by a Probation Supervisor or any law enforcement officer." *Id.* at 1366. The Eleventh Circuit held that the search condition passed "constitutional muster" because it was "reasonably related to the purposes of probation." *Id.* at 1366-69.

420. Another probation condition that has been imposed with far less frequency, but that also has significant freedom of religion implications, is a condition requiring the use of contraception. See Jack P. Lipton & Colin F. Campbell, *The Constitutionality of Court-Imposed Birth Control as a Condition of Probation*, 6 N.Y.L. SCH. J. HUM. RTS. 271, 279-83 (1989) (discussing freedom of religion implications of such conditions). For more discussion of contraception as a probation condition, see *supra* notes 43-47 and accompanying text and *infra* Part III.F.1.

421. See Honeyman, *supra* note 191, at 469 n.148 (emphasizing public ignorance of AA's religious nature).

422. See, e.g., *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1074-75 (2d Cir. 1997) (finding probation condition to attend AA meetings violated Establishment Clause); *Griffin v. Coughlin*, 673 N.E.2d 98, 102-03 (N.Y. 1996) (discussing religious nature of AA); Honeyman, *supra* note 191, at 443-48 (discussing AA's emphasis on theism and prayer); Smith, *supra* note 191, at 302-06 (discussing religious character of AA).

423. Honeyman, *supra* note 191, at 441.

explicit references to God or a higher power.<sup>424</sup> In addition, AA meetings generally begin with the recitation of the Serenity Prayer<sup>425</sup> and end with the recitation of the Lord's Prayer, frequently referred to as the "Our Father."<sup>426</sup> While it seems that participation in AA as a condition of probation is required with extraordinary frequency,<sup>427</sup> challenges to the legality of such a condition seem rare indeed. The AA cases highlight the fact that requiring an objection at the time of sentencing in order to preserve appellate rights is simply bad public policy. As a preliminary issue, an offender may not be aware at the time of sentencing of the highly religious nature of AA. More important, however, focusing on an offender's individual objection misses the entire objective of the Establishment Clause: to avoid governmental entanglement with or support for a particular religious viewpoint.

#### *F. Infringements on the Right to Privacy*

With a rather alarming frequency, trial judges have imposed probation conditions that intrude on a defendant's constitutionally protected right to privacy. Prior sections of this Article have explored probation conditions that interfere with a defendant's relationships with his or her spouse<sup>428</sup> and his or

424. *Id.* at 442.

425. *Id.* at 442; Smith, *supra* note 191, at 304. The Serenity Prayer is commonly recited as follows: "God grant me the serenity to accept the things that I cannot change, the courage to change the things I can, and the wisdom to know the difference." Honeymar, *supra* note 191, at 442 n.20.

426. Honeymar, *supra* note 191, at 442; Smith, *supra* note 191, at 304. One common version of The Lord's Prayer is recited as follows:

Our Father in heaven, hallowed be your name, your kingdom come, your will be done on earth as it is in heaven. Give us today our daily bread, and forgive us the wrong we have done as we forgive those who wrong us. Subject us not to the trial but deliver us from the evil one.

Honeymar, *supra* note 191, at 442 n.20 (quoting *Matthew* 6:9-13).

427. See, e.g., Honeymar, *supra* note 191, at 437-38 (describing frequency with which AA is imposed as probation condition on defendants convicted of drunk driving); Smith, *supra* note 191, at 307-08 (documenting fact that "participation in AA has become an integral part of drunk driving sentencing in many jurisdictions" and that, in some jurisdictions, AA participation may be required for every drunk driver). Further evidence of the frequency with which AA is imposed as a probation condition, even in cases that do not involve drunk driving, can be found in the large number of cases in which the condition has been imposed but not challenged on appeal. See, e.g., *People v. Hackler*, 16 Cal. Rptr. 2d 681, 682-87 (Ct. App. 1993) (invalidating another probation condition, but not mentioning requirement that defendant attend three AA meetings per week); *State v. Bouldin*, 717 S.W.2d 584, 586-87 (Tenn. 1986) (invalidating another probation condition, but "applaud[ing] the trial court's resourcefulness" in requiring attendance at weekly AA meetings); see also *Karl v. State*, 770 P.2d 299, 300 (Alaska Ct. App. 1989) (vacating condition requiring attendance at three AA meetings per week, but on grounds that record was inadequate to determine whether defendant was in need of alcohol treatment).

428. For a discussion of the impact of probation conditions that intrude on the marital



her children.<sup>429</sup> Two other common types of conditions that have a serious impact on privacy rights include conditions that restrict the defendant's right to reproductive freedom and conditions that restrict the defendant's right to decide when and to whom he or she may get married. Although the courts have repeatedly demonstrated their reluctance to uphold these sorts of conditions, the frequency with which they appear in published cases and media reports makes it clear that trial judges nonetheless impose such conditions with some regularity. Because there is no reason to believe that conditions of this nature are appealed in any higher percentage than is any other category of constitutionally invasive conditions,<sup>430</sup> one must assume a very high rate of unreported instances of the imposition of these conditions.<sup>431</sup>

### 1. Reproductive Freedom

The cases involving limitations on reproductive freedom generally fall into two categories: those in which the trial judge, as a condition of probation, orders the defendant to use some form of birth control, such as contraceptives, sterilization, or castration, and those in which the trial judge orders the defendant to refrain from becoming pregnant. An early example of the former category can be found in *People v. Blankenship*,<sup>432</sup> a 1936 case in which a California court upheld a probation condition requiring the defendant to undergo surgical sterilization.<sup>433</sup> Much more commonly, however, such conditions have been stricken when challenged on appeal.<sup>434</sup> Despite that fact, a number of recent examples appear in the case law, in scholarly commentaries, and in media accounts.<sup>435</sup>

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relationship thereby implicating the defendant's constitutional right to free association, see *supra* Part III.C.2.

429. For a discussion the impact of probation conditions that seek to regulate the parent-child relationship, see *supra* Part III.D.1.a.

430. See *infra* Part III.F.1 for evidence of the infrequency of appeals in cases involving probation conditions that intrude on reproductive freedom.

431. Two commentators reached the conclusion in 1989 that "[u]ntil appellate courts definitively rule that [imposing birth control as a probation condition is] unconstitutional, judicial excess will continue." Lipton & Campbell, *supra* note 420, at 298. No such definitive ruling has emerged.

432. 61 P.2d 352 (Cal. 1936).

433. *People v. Blankenship*, 61 P.2d 352, 353 (Cal. 1936).

434. See, e.g., Weissman, *supra* note 62, at 383 (noting that appellate courts, "[a]cknowledging the fundamental quality of reproductive interests, . . . deny these conditions"); Bartrum, *supra* note 81, at 1038 (noting, incorrectly at least so far as *Blankenship*, that "no appellate court has upheld the validity of imposing birth control as condition of probation").

435. See, e.g., *People v. Walsh*, 593 N.W.2d 558, 558 (Mich. 1999) (discussing implantation of Norplant contraceptive device as probation condition); *State v. Brown*, 326 S.E.2d 410, 411 (S.C. 1985) (discussing trial judge offering defendants choice of surgical castration or thirty years in prison); Lipton & Campbell, *supra* note 420, at 298 (describing Indiana case in which

*State v. Brown*,<sup>436</sup> a 1985 case out of the Supreme Court of South Carolina, presents a rather stark example of how trial courts attempt to impose such conditions.<sup>437</sup> In that case, three defendants pled guilty to charges stemming from what the court called a "brutal sexual assault."<sup>438</sup> The trial judge imposed a sentence on each defendant of thirty years incarceration, but ordered that each sentence would be suspended and a five year term of probation imposed if the defendant submitted to surgical castration.<sup>439</sup> Although each of the three defendants initially appealed his sentence, by the time the case was heard in the Supreme Court, each defendant was seeking permission to undergo the surgery and obtain the suspended sentence.<sup>440</sup> The court nonetheless vacated the condition, finding it to be cruel and unusual punishment under the South Carolina Constitution,<sup>441</sup> and remanded the case for resentencing. Interestingly, two concurring justices would have simply imposed the thirty year sentences.<sup>442</sup>

While many of the cases in which trial judges have tried to impose mandatory birth control have involved charges of child abuse or of some form of sexual offense, this has not universally been the case. Even within the limited class of cases involving child abuse or sex offenses, very troubling issues of racial and economic discrimination emerge from the imposition of these sorts of conditions. An early study of cases involving the mandatory implantation of the Norplant contraceptive device as a probation condition noted that "courts ha[d] imposed the condition exclusively on lower income and minority women."<sup>443</sup> Several commentators have pointed out the discriminatory fashion in which these sorts of conditions are imposed.<sup>444</sup>

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judge proposed sterilization as condition of imposing more lenient sentence on defendant); Burke, *supra* note 36, at 214-18 (documenting four cases in which implantation of Norplant contraceptive device was imposed as probation condition); Abramson, *supra* note 36 (discussing cases involving court-ordered implantation of Norplant contraceptive device); Curriden, *supra* note 408 (describing Pennsylvania case in which judge offered defendant choice of surgical castration or thirty years in prison); Stephanie B. Goldberg, *No Baby, No Jail: Creative Sentencing Has Gone Overboard, A California Court Rules*, 78 A.B.A. J., Oct. 1992, at 90-92 (discussing cases involving court-ordered implantation of Norplant contraceptive device); Joseph R. Tybor, *Unusually Creative Judges Now Believe Some Punishments Can Fit the Times*, CHI. TRIB., July 3, 1988, at 1 (discussing Arizona case in which judge offered reduced sentence in exchange for sterilization).

436. 326 S.E.2d 410 (S.C. 1985).

437. *State v. Brown*, 326 S.E. 410, 411 (S.C. 1985) (discussing trial judge offer of probation in exchange for castration).

438. *Id.* at 411.

439. *Id.*

440. *Id.*

441. *Id.* at 412 (citing S.C. CONST. art. I, § 15).

442. *Id.* (Ness, J., concurring).

443. Burke, *supra* note 36, at 242.

444. See, e.g., Stephanie Denmark, *Forcing Norplant on Poor Is Play to Control Women's*

When one considers the cases in which the probation condition simply orders the defendant not to become pregnant, a significant number of these cases involve neither child abuse nor sex offenses, and the imposition of the trial judge's personal morality or discriminatory attitudes becomes all that much clearer. In *State v. Norman*,<sup>445</sup> for example, a Louisiana trial judge imposed a probation condition on a woman who had been convicted of forgery that she "not give birth to any children outside of wedlock."<sup>446</sup> In imposing the condition on the twenty year old mother of two illegitimate children, the trial judge had "characterized giving birth to illegitimate children as an indication of 'irresponsible thinking.'"<sup>447</sup> The appellate court vacated the condition, highlighting the fact that there had been "no indication of record that [the] defendant's participation in the instant crime was in any way related to the responsibilities of caring for her children."<sup>448</sup>

Similarly, in *People v. Dominguez*,<sup>449</sup> a trial judge in California imposed the following conditions of probation on a woman who had been convicted of robbery: "[Y]ou are not to live with any man to whom you are not married and you are not to become pregnant until after you become married."<sup>450</sup> As in *Norman*, the defendant was an indigent mother of two illegitimate children.<sup>451</sup> The fact that the defendant had been receiving assistance from the Bureau of Public Assistance apparently prompted both the probation conditions and a morality lecture from the trial judge: "If you insist on this kind of conduct you can at least consider the other people in society who are taking care of your children. You have had too many that some others are taking care of other than you and the father."<sup>452</sup> The defendant appeared before the same judge some seventeen months later on an allegation that she had violated the probation conditions by becoming pregnant.<sup>453</sup> Although the uncontro-

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*Bodies*, L.A. DAILY J., Nov. 5, 1991, at 6; Ellen Goodman, *An Old Fix In a New Form*, BOSTON GLOBE, Feb. 17, 1991, at 79. Also, an article that appeared in the ABA Journal in 1992 included several quotations on this subject from Simon Heller, a senior staff attorney with the Center for Reproductive Law and Policy. See Goldberg, *supra* note 435, at 90-92. Mr. Heller asserted that sentences infringing on reproductive rights involved instances of gender, race and class bias, asking rhetorically: "Have you ever heard of these punishments being applied to a wealthy woman? Or to a man?" *Id.* at 90. Heller maintained that such sentences are imposed as "a way to stop undesirable, low-income people from reproducing." *Id.* at 90-92.

445. 484 So. 2d 952 (La. Ct. App. 1986).

446. *State v. Norman*, 484 So. 2d 952, 953 (La. Ct. App. 1986).

447. *Id.*

448. *Id.*

449. 64 Cal. Rptr. 290 (Ct. App. 1967).

450. *People v. Dominguez*, 64 Cal. Rptr. 290, 292 (Ct. App. 1967).

451. *Id.*

452. *Id.*

453. *Id.*

verted evidence suggested that the defendant was a good mother and that she had become pregnant only due to a contraceptive failure, the trial judge found her to be in violation of probation and ordered her immediate incarceration.<sup>454</sup> With little apparent understanding of the bitter irony of his remarks, the trial judge sent the mother off to jail, accusing her of being "irresponsible" because she was "foisting obligations upon others" to care for her children.<sup>455</sup>

The court of appeal vacated the probation condition that she not become pregnant while unmarried and reversed the orders revoking probation and executing the judgment.<sup>456</sup> In doing so, the court made a number of telling observations with respect to the relevant legal standards:

Appellant's future pregnancy was unrelated to robbery. Becoming pregnant while unmarried is a misfortune, not a crime. Appellant's future pregnancy had no reasonable relationship to future criminality. It is certainly not pragmatically demonstrable that unmarried, pregnant women are disposed to commit crimes. There is no rational basis to believe that poor, unmarried women tend to commit crimes upon becoming pregnant. Contraceptive failure is not an indicium of criminality.<sup>457</sup>

The appellate court noted that the trial court's obvious motivation, which it found was "[b]oth implicit and explicit in th[e] record," was "to prevent the appellant from producing offspring who might become public charges."<sup>458</sup> But the appellate court concluded that a trial court "cannot use its awesome power in imposing conditions of probation to vindicate the public interest in reducing the welfare rolls by applying unreasonable conditions of probation."<sup>459</sup> This decision was rendered almost fourteen months after the trial judge ordered the defendant's summary incarceration.<sup>460</sup>

These cases do not stand in isolation, but rather they are part of a larger body of cases that includes other orders not to get pregnant while unmarried<sup>461</sup> and orders not to have sexual intercourse with anyone other than a lawfully married spouse.<sup>462</sup> While the injection of the defendant's marital status into

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454. *Id.* at 292-93. Defense counsel's motion for a one week stay of execution so that the defendant could explain the situation to her children and make suitable arrangements for their care was denied. *Id.* at 293.

455. *Id.* at 292.

456. *Id.* at 294.

457. *Id.* at 293.

458. *Id.* at 294.

459. *Id.*

460. *Id.* at 290-91.

461. *See, e.g.,* Thomas v. State, 519 So. 2d 1113, 1114 (Fla. Dist. Ct. App. 1988) (reviewing trial court imposition of probation condition that defendant not become pregnant during probation term unless she became married).

462. *See, e.g.,* Wiggins v. State, 386 So. 2d 46, 47 (Fla. Dist. Ct. App. 1980) (reviewing probation condition prohibiting sexual intercourse with individual other than spouse).

these probation conditions makes the role of the trial judge's personal morality that much more obvious, the issue also lurks in the numerous cases in which the probation condition bars any pregnancy at all.<sup>463</sup> In a 1992 decision, *People v. Zaring*,<sup>464</sup> the California Court of Appeal addressed this issue head on, reversing a condition that the defendant not get pregnant and publicly chastising the trial judge for "the apparent imposition of personal social values in the sentencing decision."<sup>465</sup> Much like the trial judge in *Dominguez*, the trial judge in *Zaring* had given a lecture on morality to the defendant, a thirty year old mother of five who had been convicted of possessing and using heroin.<sup>466</sup> And much like the appellate decision in *Dominguez*, the appellate decision for the defendant in *Zaring* came rather late in the game, as she had completed her sentence by the time the appeal was decided.<sup>467</sup>

## 2. Marital Freedom

A number of trial courts have imposed conditions that significantly interfere with the defendant's right to marry. In *State v. Allen*,<sup>468</sup> the Court of Appeals of Oregon upheld a condition that the defendant, who had been convicted of obtaining money under false pretenses, "not enter into any marriage contract unless specifically authorized by Order of th[e] court."<sup>469</sup> The court upheld the condition, noting that the trial judge was apparently concerned for the defendant about the negative influence of the defendant's fiancé, who had a significant criminal history.<sup>470</sup> Of course, there was no indication that any evidence had been introduced, expert or otherwise, to that effect.

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463. Based on a survey of the case law, the total prohibition of pregnancy, whether within or outside of marriage, appears to be a rather common probation condition. See, e.g., *People v. Zaring*, 10 Cal. Rptr. 2d 263, 265 (Ct. App. 1992) (reviewing trial court's imposition of prohibition on becoming pregnant as condition of probation); *People v. Pointer*, 199 Cal. Rptr. 357, 359 (Ct. App. 1984) (same); *Rodriguez v. State*, 378 So. 2d 7, 8 (Fla. Dist. Ct. App. 1979) (same); *State v. Mosburg*, 768 P.2d 313, 314 (Kan. Ct. App. 1989) (same); *State v. Livingston*, 372 N.E.2d 1335, 1336 (Ohio Ct. App. 1976) (same). In *Howland v. State*, 420 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982), the trial court imposed a probation condition on a male defendant convicted of negligent child abuse that precluded him from "fathering any other children while on probation." The appellate court vacated the condition, finding that it did not "reasonably relate to the crime of child abuse" because any future abuse could result only from custody of or contact with a minor child, both of which were prohibited by other probation conditions. *Id.* at 919-20.

464. 10 Cal. Rptr. 2d 263 (Ct. App. 1992).

465. *People v. Zaring*, 10 Cal. Rptr. 2d 263, 270 (Ct. App. 1992).

466. *Id.* at 265, 270.

467. *Id.* at 271.

468. 506 P.2d 528 (Or. 1973).

469. *State v. Allen*, 506 P.2d 528, 529 (Or. 1973).

470. *Id.*

On the appellate level, *Allen* seems to be an exception to the general rule that courts will strike probation conditions that intrude on a defendant's right to marry whomever and whenever the defendant so desires. Thus, other appellate courts have duly recognized the privacy issues at stake, striking conditions that require a defendant to obtain court permission before marriage,<sup>471</sup> that require a defendant to make his or her children legitimate,<sup>472</sup> and that preclude a defendant from living with a member of the opposite sex to whom the defendant is not married.<sup>473</sup> Of course, those rulings do not prevent trial court judges from continuing to impose such conditions on a regular basis. Indeed, a recent media account involving Ted Poe, a Houston trial judge, suggested that he has a practice of sentencing men who are single and have illegitimate children to "marry the mother or file the papers necessary to pay child support."<sup>474</sup> This sentencing practice seems to combine two of the recurring forms of abuses that this article has endeavored to document: the use of probation conditions to impose the trial judge's private morality, and the use of probation conditions to circumvent established legal procedures in order to resolve legal issues that are either entirely unrelated to or only tangentially related to the underlying criminal behavior.

#### *G. Infringements on the Right to Be Free from Unreasonable Searches and Seizures*

Perhaps more than any other individual right articulated in the Bill of Rights, the Fourth Amendment right to be free from unreasonable searches and seizures seems to have fallen almost completely off the face of the legal map for defendants placed on probation. Courts across the country have upheld probation conditions that require a probationer to submit to unrestricted warrantless searches not only by his or her probation officer, but also by any law enforcement officer at any time of day or night.<sup>475</sup> While this sort

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471. See, e.g., *Rodriguez v. State*, 378 So. 2d 7, 10 (Fla. Dist. Ct. App. 1979) (invalidating condition that defendant not marry without court permission as not reasonably related to future criminality). In *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967), such a condition was imposed but not reviewed on appeal.

472. *Michalow v. State*, 362 So. 2d 456, 457 (Fla. Dist. Ct. App. 1978) (finding trial court condition that defendant make his child legitimate within one year was beyond that court's authority).

473. See, e.g., *Mays v. State*, 349 So. 2d 792, 794 (Fla. Dist. Ct. App. 1977) (stating that condition prohibiting defendant from living with member of opposite sex until married was overbroad); *State v. Goins*, No. 03C01-9704-CR-00154, 1998 WL 597047, at \*5 (Tenn. Crim. App. Sept. 10, 1998) (same).

474. Koch, *supra* note 38.

475. See, e.g., *United States v. Sharp*, 931 F.2d 1310, 1311 (8th Cir. 1991) (upholding condition subjecting defendant to unrestricted warrantless searches); *Owens v. Kelley*, 681 F.2d 1362, 1366 (11th Cir. 1982) (same); *State v. Montgomery*, 566 P.2d 1329, 1331 (Ariz. 1977)

of condition is most commonly imposed on defendants convicted of narcotics offenses, it is not difficult to find cases in which trial judges have imposed it on various other offenders.<sup>476</sup>

In some instances, a trial court's complete disregard for the defendant's Fourth Amendment rights can be rather startling. Criminal Court Judge Joe Brown of Memphis, Tennessee, frequently imposes an unusual probation condition on those convicted of burglary: the probationer must allow the victim of his or her burglary to enter his or her home at any time of day or night (with a police escort) and take an item of comparable value to that which was stolen.<sup>477</sup> In essence, the probationer must completely abandon any expectation of privacy within his or her home, at least until such time as the victim has entered the home and removed the property. Judge Brown has been rewarded with national media attention, much of it favorable, for the imposition of this condition.<sup>478</sup> An editorial in the *Chicago Tribune* praised Judge Brown's approach, citing it as "encouraging evidence that more judges are going less by the book and more by the unconventional."<sup>479</sup> The editorial suggested that the probation condition sent "a lasting message" to the offenders.<sup>480</sup> While that much is undoubtedly true, it is unclear whether the lasting message involved any positive lesson on the rule of law or on the sanctity of the home. Giving the victim of a crime license to commit the same "crime" as that committed by the offender, thereby victimizing not only the original

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(same); *People v. Richards*, 256 N.W.2d 793, 795 (Mich. Ct. App. 1977) (same); *People v. Santos*, 298 N.Y.S.2d 526, 528 (App. Div. 1969) (same); *Himmage v. State*, 496 P.2d 763, 766 (Nev. 1972) (same); *State v. Mitchell*, 207 S.E.2d 263, 264 (N.C. Ct. App. 1974) (same); *State v. Schlosser*, 202 N.W.2d 136, 139 (N.D. 1972) (same).

476. See, e.g., *People v. Welch*, 851 P.2d 802, 804 (Cal. 1993) (reviewing unrestricted warrantless search condition imposed on defendant convicted of welfare fraud); *People v. Bauer*, 260 Cal. Rptr. 62, 63 (Ct. App. 1989) (reviewing condition imposed on defendant convicted of false imprisonment and simple assault); *People v. Oaxaca*, 114 Cal. Rptr. 178, 179 (Ct. App. 1974) (reviewing condition imposed on defendant convicted of solicitation for prostitution). In some instances, these conditions have been stricken as not reasonably related to the underlying offense. See, e.g., *United States v. Stoural*, 990 F.2d 372, 372 (8th Cir. 1993) (reviewing condition imposed on defendant convicted of conversion of collateral); *People v. Keller*, 143 Cal. Rptr. 184, 186 (Ct. App. 1978) (reviewing condition imposed on defendant convicted of theft of forty-nine cent ball point pen).

477. See Garvey, *supra* note 63, at 788 (discussing Judge Brown's unusual probation conditions); Abramson, *supra* note 36 (same); Alter & Wingert, *supra* note 247, at 20 (same); Curriden, *supra* note 408 (same); Editorial, *Making the Punishment Fit the Crime*, CHL TRIB., May 28, 1992, at 24 (same); *Judge Devises Instructional Penalties*, N.Y. TIMES, Feb. 26, 1993, at B16 (same).

478. Judge Brown's imposition of this probation condition has been described in *Newsweek Magazine*, the *New York Times*, the *Atlanta Constitution*, and the *Chicago Tribune*. See *supra* note 477 (listing sources describing Judge Brown's imposition of probation condition).

479. Editorial, *supra* note 477.

480. *Id.*

offender but also anyone who happens to live with the offender, seems an odd and particularly ineffectual way to teach about the sanctity of the home.<sup>481</sup> Indeed, on one occasion, a victim took a photograph of the offender's deceased girlfriend and, with the offender in tears, burned the photograph as the offender watched.<sup>482</sup> One commentator noted that the sentence in that case taught nothing but "a lesson in callousness."<sup>483</sup>

#### *H. Infringements on the Right to Basic Human Dignity*

Over the past decade or so, an extremely disturbing trend has emerged in the imposition of probation conditions. With ever increasing frequency, judges are turning to the imposition of probation conditions that are intended to shame, degrade, or humiliate the offender.<sup>484</sup> Because many of these sentences are not challenged on appeal, some of the more striking examples can be found only in media accounts. These accounts include descriptions of one offender convicted of spousal abuse ordered to allow his ex-wife to spit in his face<sup>485</sup> and others convicted of various offenses ordered to shovel horse manure in police stables.<sup>486</sup> Perhaps the most common shaming condition requires the offender to publicize either the facts of the case or his or her status as a convicted criminal through the use of a wide variety of media, including wearing a T-shirt, bracelet, or placard; making a speech in front of the courthouse; placing an advertisement in a newspaper; or posting a sign on one's property.<sup>487</sup> Apparently born out of frustration with the inability of standard sentences to deter crime or reduce recidivism, judges have been reduced to imposing these sorts of conditions on the basis of little more than sheer speculation and pop-psychology. Indeed, while experts have consis-

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481. Professor Stephen P. Garvey, an advocate of shaming punishments that are designed to educate rather than to shame the defendant, has reached a similar conclusion about this probation condition. Garvey, *supra* note 63, at 788.

482. *Id.* at 788 & n.255.

483. *Id.* at 788.

484. See *supra* note 247 (citing sources reporting increasing popularity of shaming punishments).

485. See Garvey, *supra* note 63, at 787 & n.253 (citing Steven Greenhut, *Gimmicky Judges' 'Shame' Sanctions Unlikely to Curb Crime*, MILWAUKEE J. SENTINEL, Apr. 13, 1997, at A11); Kahan, *supra* note 247, at 634 n.169 (citing Editorial, *Punishment: Judges Need More Creative Ways to Handle Non-Violent Criminals*, CINCINNATI ENQUIRER, June 2, 1994, at A10).

486. See Garvey, *supra* note 63, at 791 & nn.268, 269 (citing Elizabeth Levitan Spaid, *Humiliation Comes Back as a Criminal Justice Tool*, CHRISTIAN SCI. MONITOR, Dec. 17, 1996, at 1; *Maryland Stable Duty Sentence*, WASH. POST, Aug. 10, 1989, at D5); Reske, *supra* note 40, at 16 (describing case in which court imposed stable-mucking punishment on defendant who stole Clayton Moore's "Lone Ranger" revolvers).

487. See Kahan, *supra* note 247, at 631-34 (describing punishments); Massaro, *supra* note 93, at 1886-88 (discussing sign sanctions).



tently pointed out the absence of empirical data on the efficacy of shaming punishments, they are decidedly split on whether such punishments can be useful or effective at all and on whether such punishments may be more harmful than useful.<sup>488</sup>

Case law concerning the imposition of such sanctions is sparse, largely because the vast majority of probation conditions evade appellate review.<sup>489</sup> Nonetheless, the few cases on point reveal not only the arbitrary and episodic manner in which such conditions are imposed,<sup>490</sup> but also the arbitrary and episodic way in which appellate courts have viewed them. The most common category of shaming probation conditions to face appellate scrutiny involves conditions that require the defendant to publicize his or her offense. In *Ballenger v. State*,<sup>491</sup> for example, the Court of Appeals of Georgia upheld a probation condition imposed upon a convicted drunk driver that required him to "wear a flourescent pink plastic bracelet imprinted with the words 'D.U.I. CONVICT' until further order of the court."<sup>492</sup> In reaching its decision, the court highlighted the trial court's broad discretion to impose any probation condition it deemed reasonably related to the defendant's rehabilitation or to the protection of society.<sup>493</sup> The court then summarized its complete deference to the trial court's discretion in the following terms:

Being jurists rather than psychologists, we cannot say that the stigmatizing effect of wearing the bracelet may not have a rehabilitative, deterrent effect on [the defendant]. . . . It may also serve the second purpose, that of protecting society, in the event someone notices the bracelet and chooses not to ride with [the defendant] or refuses to allow him to drive. . . . [W]e do not find the trial court's assessment that this condition has rehabilitative value to be so totally without basis that we will interfere with its broad discretion in matters of conditions of probation.<sup>494</sup>

A cogent dissent took a rather different view of the case, concluding that the bracelet condition did not serve "any legitimate purpose of probation."<sup>495</sup>

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488. See *supra* notes 248-49 and accompanying text (stating that shaming punishments are ineffective or counterproductive).

489. See *supra* Part II.A (discussing several circumstances under which probation conditions are not reviewed).

490. See Massaro, *supra* note 93, at 1940 (concluding that modern shaming punishments are "episodic, almost whimsical bursts of judicial, legislative, or prosecutorial inspiration"); Abramson, *supra* note 36 (describing the imposition of shaming and other "creative" sentences as "haphazard, even whimsical at times").

491. 436 S.E.2d 793 (Ga. Ct. App. 1993).

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

493. *Id.*

494. *Id.* at 794-95.

495. *Id.* at 795 (Blackburn, J., dissenting).

Asserting that "the clear purpose" of the condition "was simply to punish [the defendant] by humiliation," the dissent reasoned that the state legislature, not an individual judge, should determine whether or not such a punishment is authorized by law.<sup>496</sup> Moreover, the dissenting judge expressed his concern that, rather than serving a rehabilitative purpose, the "imposition of unreasonable conditions of probation may instill a sense of disrespect for the criminal justice system."<sup>497</sup>

Two Florida courts have rendered opinions that closely resemble the majority opinion in *Ballenger*, granting extraordinary deference to a trial judge's speculation about the potential rehabilitative impact of a condition requiring the defendant to publicize his conviction. In *Goldschmitt v. State*,<sup>498</sup> the district court of appeal upheld a probation condition requiring a drunk driver to affix a bumper sticker to his car reading "CONVICTED D.U.I. - RESTRICTED LICENSE."<sup>499</sup> The court upheld the condition because it was "unable to state as a matter of law" that the "lower court's belief that such a sticker is 'rehabilitative' [was] so utterly without foundation" that the appellate court was "empowered to substitute [its] judgment" for that of the trial court.<sup>500</sup> Several years later, in *Lindsay v. State*,<sup>501</sup> another Florida court upheld a probation condition that required a convicted drunk driver to publicize the fact of his conviction by placing an advertisement containing his "mug shot" and the caption "DUI - Convicted" in a local newspaper.<sup>502</sup> The *Lindsay* court quoted extensively from *Goldschmitt*, repeating the extraordinarily deferential language quoted above.<sup>503</sup> But the *Lindsay* court added another piece to the deferential appellate picture; while the court was apparently content to rely on the trial court's unguided speculation, it noted on more than one occasion that the defendant "did not adduce any evidence" to suggest that the publication would *not* serve a rehabilitative or deterrent purpose.<sup>504</sup>

The *Ballenger* court's explicit recognition of its lack of psychological expertise, a trait that was presumably shared by the trial judge who imposed each of the conditions described above, suggests that the court had no significant concern about the actual consequences of the condition as applied to the defendant. By inference, the same can clearly be said of the *Goldschmitt* and *Lindsay* courts. None of these courts required expert psycho-

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496. *Id.* at 796 (Blackburn, J., dissenting).

497. *Id.*

498. 490 So. 2d 123 (Fla. Dist. Ct. App. 1986).

499. *Goldschmitt v. State*, 490 So. 2d 123, 124 (Fla. Dist. Ct. App. 1986).

500. *Id.* at 126.

501. 606 So. 2d 652 (Fla. Dist. Ct. App. 1992).

502. *Lindsay v. State*, 606 So. 2d 652, 653 (Fla. Dist. Ct. App. 1992).

503. *Id.* at 657 (quoting *Goldschmitt*, 490 So. 2d at 126).

504. *Id.* at 657, 658.

logical testimony of any kind, content to engage in rank speculation coupled with complete deference with an untrained trial judge. One could just as easily speculate that this sort of condition would have a counter-productive impact on the defendant's rehabilitation. To use *Ballenger* as an example, it is not hard to imagine that having to wear such a bracelet at all times might effectively prevent the defendant from obtaining or keeping any gainful employment, might destroy the defendant's ability to lead a healthy social life, or might launch the defendant into a seriously detrimental psychological state, perhaps including clinical depression.<sup>505</sup> Another Georgia case provides an interesting but tragic case in point: A convicted drunk driver who was forced to publicize the fact of his conviction, in that case by means of the local newspaper, committed suicide when his mother expressed her disappointment in learning of his conviction.<sup>506</sup> While suicide is certainly not a common response to public shaming, the Georgia case is not the only suicide case on record,<sup>507</sup> and shaming carries with it a number of other potentially destructive consequences.<sup>508</sup>

If a court were inclined to look for expert testimony on the impact of shaming or humiliation as a condition of probation, it would find any number of experts prepared to point out not only that the efficacy of such conditions is almost totally untested, but also that such conditions can lead to unpredictable and undesirable results.<sup>509</sup> A number of commentators have argued that the notion that shaming can have a deterrent effect on the offender defies current psychological knowledge, particularly when no effort is made to reintegrate the shamed offender back into society.<sup>510</sup> Having deprived the offender of whatever status he or she may have enjoyed in the local community, it is argued that the offender's incentive to conform to societal norms has been minimized or even eliminated.<sup>511</sup> There is also evidence to suggest that the mere labeling of an offender as deviant can actually lead to further deviant

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505. See Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 655 (1997) (noting that "emotional impact [of shaming] may range from none, to mild discomfort, to a profound and complete loss of self that inspires a desire to die").

506. See Book, *supra* note 247, at 684-85 (suggesting judges evaluate each offender's suitability as shame candidate); Ann Woolner, *When the Sentence Is a Shame*, AM. LAW., Nov. 1997, at 34, 35 (contrasting effects of publication in small towns versus large cities).

507. See Persons, *supra* note 249, at 1527 (documenting case in which shaming apparently resulted in suicide).

508. See *infra* notes 515-19 (discussing additional consequences of shaming).

509. See *supra* notes 248-49 (citing works that discuss problems with shaming).

510. See, e.g., Massaro, *supra* note 93, at 1884 (recognizing lack of federal or state programs to reintegrate or forgive offenders); Litowitz, *supra* note 247, at 55-57 (stating that offenders often lack value system or aspirations that might make shaming effective).

511. See, e.g., Massaro, *supra* note 93, at 1919.

behavior.<sup>512</sup> For the violent offender, the shaming punishment can induce anger or rage, resulting in further violent and antisocial behavior.<sup>513</sup> The experts seem to agree that determining the potential impact of a shaming penalty on a particular offender is beyond the expertise of most trial judges.<sup>514</sup>

A related set of problems created by probation conditions that are designed to shame the offender stem from the impact of those conditions on people other than the offender. The harshness of the shaming punishment often spreads beyond the intended target, a problem that the experts call "spillover," so that innocent family members, friends and neighbors suffer a negative impact from the sentence.<sup>515</sup> In addition, some commentators have expressed concerns about placing the power of punishment into the hands of the public, not only because it can encourage vigilantism and other forms of criminal behavior on the part of the public, but also because it delegates an important state function to the whim of the masses.<sup>516</sup> Professor James Q. Whitman, a proponent of this latter view, has noted that after the state imposes a sanction involving public shaming, "[t]here is no way to predict or control the way in which the public will deal with him, no rhyme or limit to the terms the public may impose."<sup>517</sup> He has warned of the dangers of "official action that plays on the irrational urges of the public,"<sup>518</sup> and has concluded that "[t]he chief evil in public humiliation sanctions is that they involve an ugly, and politically dangerous, complicity between the state and the crowd."<sup>519</sup>

These sorts of concerns about conditions of probation designed to shame a defendant have received attention in some of the few appellate courts that

512. See, e.g., Garvey, *supra* note 63, at 752; Massaro, *supra* note 93, at 1919-20.

513. See, e.g., Book, *supra* note 247, at 683-84 (asserting that risk to public might be too great to impose shaming of violent offenders); Abramson, *supra* note 36 (expressing psychologists' view that shaming could fuel rage and resentment); Litowitz, *supra* note 247, at 55 (asserting that violent offenders would respond with "reactive emotions like anger, frustration, and rage rather than complex emotions like shame"). One recent media account suggested that the shaming of a man convicted of rape contributed to his subsequent commission of a first-degree murder. June Arney, *Shame and Punishment*, VIRGINIAN PILOT-STAR, Mar. 2, 1997, at J1.

514. See, e.g., Garvey, *supra* note 63, at 748 (stating that "judges will have a tough time" deciding when to impose shame sentences); Massaro, *supra* note 93, at 1917-18 (introducing five reasons why judges lack expertise to impose shame penalties).

515. See, e.g., Garvey, *supra* note 63, at 749 n.78 (presenting spillover theory); Kahan, *supra* note 247, at 643 n.215 (asserting that shame sentences "are likely to have a spillover effect, stigmatizing not just offenders but their family members and friends"); Massaro, *supra* note 93, at 1932 n.250, 1938 (discussing possible effects of shaming on neighbors and spouses).

516. See, e.g., James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1087-89 (1998) (contrasting effects of statist and liberal traditions of government control of crowds).

517. *Id.* at 1090-91.

518. *Id.* at 1091.

519. *Id.* at 1059.

have heard challenges. Several courts have stricken humiliation conditions, most commonly on the grounds that such a radical departure from traditional probation conditions should be left in the hands of the legislature, not in the hands of an individual trial judge. In *State v. Burdin*,<sup>520</sup> for example, the Supreme Court of Tennessee struck down a probation condition that required a man convicted of sexual battery to post a large sign in the front yard of his suburban home reading: "Warning, all children. Wayne Burdin is an admitted and convicted child molester. Parents beware."<sup>521</sup> In reaching its conclusion, the court summarized its concerns as follows:

The consequences of imposing such a condition without the normal safeguards of legislative study and debate are uncertain. Posting the sign in the defendant's yard would dramatically affect persons other than the defendant and those charged with his supervision. In addition to being novel and somewhat bizarre, compliance with the condition would have consequences in the community, perhaps beneficial, perhaps detrimental, but in any event unforeseen and unpredictable. Though innovative techniques of probation are encouraged to promote the rehabilitation of offenders and the prevention of recidivism, this legislative grant of authority may not be used to usurp the legislative role of defining the nature of punishment which may be imposed.<sup>522</sup>

The court of criminal appeals had also stricken the probation condition in *Burdin*, but it did so with a somewhat different articulation of concerns.<sup>523</sup> That court highlighted what it called "the danger inherent in endorsing government-directed branding," noting that "[h]istory is replete with examples of tragic results."<sup>524</sup> Moreover, the court questioned the purported rehabilitative value of the condition, pointing out that "no consideration was given to the detrimental effect that undermining character and self-esteem has on the rehabilitation effort."<sup>525</sup> Lastly, the court noted its concern with the spillover effect of such a sign, imagining what might happen if the defendant "relocated to a multi-story apartment building, a hotel, or a homeless shelter."<sup>526</sup>

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520. 924 S.W.2d 82 (Tenn. 1996).

521. *State v. Burdin*, 924 S.W.2d 82, 84 (Tenn. 1996).

522. *Id.* at 87.

523. See *State v. Burdin*, No. 02C01-9306-CR-00121, 1994 WL 716262, at \*5 (Tenn. Crim. App. Dec. 28, 1994).

524. *Id.* at \*4. In fact, the trial judge who imposed the condition seemed to anticipate and arguably even encourage the possibility of vigilantism in the case, warning the defendant in open court about the parents of his child victims. *Id.* at \*2. The judge suggested that "one of these daddy's [sic] is going to get hold of [the defendant] one of these days and he's going to stop breathing. And that daddy might get probation in my courtroom." *Id.*

525. *Id.* at \*5.

526. *Id.* at \*5 n.2.

Relying heavily on the Supreme Court of Tennessee's opinion in *Burdin*, the Supreme Court of Illinois in *People v. Meyer*<sup>527</sup> vacated a probation condition that required a man convicted of aggravated battery to post a large sign at each entrance to his property reading "Warning! A Violent Felon lives here. Enter at your own risk!"<sup>528</sup> In concluding that the condition was a "drastic departure from traditional sentencing concepts" that was "not contemplated by" the state's sentencing code, the court emphasized that "[t]he authority to define and fix punishment is a matter for the legislature."<sup>529</sup> Much like the *Burdin* court, the court in *Meyer* focused much of its attention on the dangers of imposing "unconventional conditions of supervision" that "may have unknown consequences."<sup>530</sup> In particular, the court highlighted the lack of expertise, on both the trial court and the appellate court level, to "determine the psychological or psychiatric effect of the publication" on the defendant.<sup>531</sup>

The New York Court of Appeals went one step further in *People v. Letterlough*,<sup>532</sup> in which it invalidated a probation condition that required a convicted drunk driver to attach a sign to his license plate that said "CONVICTED DWI" in fluorescent block letters.<sup>533</sup> Noting that the only permissible purpose of probation was the rehabilitation of the offender, the court affirmatively concluded that the "punitive and deterrent nature of the disputed 'scarlet letter' component of the probationary conditions . . . overshadow[ed] any possible rehabilitative potential that it may [have] generate[d]."<sup>534</sup> In the end, however, the court rested its decision on its view that, by imposing the condition, "the trial court invaded the legislative domain."<sup>535</sup> Citing statutes

527. 680 N.E.2d 315 (Ill. 1997).

528. *People v. Meyer*, 680 N.E.2d 315, 316 (Ill. 1997).

529. *Id.* at 320.

530. *Id.* at 319.

531. *Id.* (quoting *People v. Johnson*, 528 N.E.2d 1360, 1362 (Ill. Ct. App. 1988)). Somewhat ironically, this acknowledged lack of expertise did not stop the *Meyer* court from being "persuaded by [the] defendant's contention that the sign, in fact, may hamper the goal of rehabilitation." *Id.* at 318.

532. 655 N.E.2d 146 (N.Y. 1995).

533. *People v. Letterlough*, 655 N.E.2d 146, 147 (N.Y. 1995).

534. *Id.* at 150. The California Court of Appeal reached a similar conclusion in *People v. Hackler*, 16 Cal. Rptr. 2d 681 (Ct. App. 1993), in which the court invalidated a probation condition imposed on a man convicted of shoplifting a small quantity of beer from a supermarket. *Id.* at 682. The court ordered the offender, who had a prior criminal record, to wear a T-shirt whenever he was outside his home that read "[m]y record plus two six-packs equals four years" on the front and "I am on felony probation for theft" on the back. *Id.* The court concluded that the trial judge's "true intent was to brand [the defendant] and expose him to public ridicule and humiliation, rather than to facilitate his rehabilitation." *Id.* at 686.

535. *Letterlough*, 655 N.E.2d at 150.

from other jurisdictions that explicitly authorize the imposition of a special license plate condition, the court concluded that "the public disclosure of a probationer's conviction as a method of providing deterrence and warning to the public is a reasonable policy choice that can be made after testing through the deliberative process of a legislative body."<sup>536</sup> The aftermath of the court's decision in *Letterlough* has two interesting features. In the legislative realm, the New York State Legislature amended the probation statute to provide trial judges with even broader discretion, eliminating the limitation that probation conditions must be designed to rehabilitate the offender.<sup>537</sup> In the judicial realm, the trial judge responsible for the condition has continued to impose it in cases in which the defendant "consents," thereby insulating the imposition of the condition from appellate review.<sup>538</sup>

### *I. Infringements on the Right to Freedom of Thought*

It is not particularly unusual to find cases in which judges have imposed probation conditions that are clearly designed to indoctrinate an offender into or out of a particular mode of thought. While the goals that these judges have in mind might be considered lofty and admirable by most of us, the broader concept of using probation conditions in this fashion raises the ugly specter of governmental thought control.

Most of the cases involving a judicial effort at thought control, but certainly not all such cases, involve offenders who hold discriminatory, hateful, or otherwise offensive beliefs and an effort on the part of a judge to "correct" those beliefs. In some cases, the attempt to exert thought control is exercised somewhat subtly, primarily by preventing the offender from associating with others who share the offender's viewpoint. *United States v. Showalter*,<sup>539</sup> in which the trial court prohibited the offender from associating with "skinheads" or with anyone involved with any neo-Nazi organization, provides an example of this type of case.<sup>540</sup> Although the defendant had been

536. *Id.* (citing IOWA CODE § 321J.4 (Supp. 1999); MINN. STAT. § 168.041(6)(a) (Supp. 1999); OHIO REV. CODE ANN. § 4503.231 (West 1995)).

537. *See Alternatives to Incarceration*, *supra* note 25, at 1978 (linking this development to holding in *People v. McNair*, 655 N.E.2d 167 (N.Y. 1996) as well as to *Letterlough*).

538. Kahan, *supra* note 247, at 632-33 n.163 (citing Maureen Fan, *Driver Asks for DWI Tag Penalty*, *NEWSDAY*, June 29, 1995, at A4); *see supra* notes 48-58 and accompanying text (providing commentary on contract and waiver theories).

539. 933 F.2d 573 (7th Cir. 1991).

540. *United States v. Showalter*, 933 F.2d 573, 574 (7th Cir. 1991). Along similar lines, in *Land v. State*, 426 S.E.2d 370, 374 (Ga. 1993), an offender was prohibited from participating in Ku Klux Klan activities. In a more shocking example of the use of associational restrictions to enforce one view of morality, the Ninth Circuit in *United States v. Kohlberg*, 472 F.2d 1189, 1190 (9th Cir. 1973), upheld a probation condition that prohibited the offender from associating with "known homosexuals."

convicted solely of possession of an unregistered firearm, the trial judge was clearly trying to address the offender's political and moral viewpoints. In fact, the trial judge reprimanded the offender in open court for "writing a letter espousing his white supremacist views to a newspaper" in the period between his plea and his sentencing.<sup>541</sup> Loathsome as those views may be, it is hard to justify the judge's reprimand over their mere expression in print. But rather than express any concern about the appropriateness of such a reprimand, the Seventh Circuit upheld the conditions and described the reprimand only to highlight "the importance of specificity in formulating conditions of supervised release."<sup>542</sup>

Even more troubling are those cases in which the trial judge explicitly engages in moral or political "education." A common variant on this theme involves cases in which the offender is forced to associate with people or groups that hold a "more enlightened" viewpoint. One example stems from a 1991 incident in which an offender threw a can of beer at New York City Mayor David N. Dinkins as he marched with a group of gay participants in the city's Saint Patrick's Day Parade.<sup>543</sup> Although the offender denied that he threw the can for discriminatory reasons, he was sentenced to serve forty hours of community service in the Mayor's Office for the Lesbian and Gay Community.<sup>544</sup> The Mayor praised the sentence as a "learning experience" for the offender,<sup>545</sup> thereby explicitly recognizing the effort to "educate" the offender with respect to his views about homosexuality.

Along similar lines, a federal judge in Los Angeles ordered fourteen members of the "Fourth Reich Skinheads" to participate in a three day program explicitly designed to "educate" and "enlighten" the offenders.<sup>546</sup> Specifically, the offenders were ordered to meet with an African American federal district court judge, with a prominent local preacher, with a group of Jewish university students, and with two survivors of the Nazi death camps.<sup>547</sup> In each of these two cases, the trial judges presumably had only the best intentions in mind. But one need only invert the characters in the fact patterns to see just how frightening a precedent these sorts of sentences can establish;

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541. *Showalter*, 933 F.2d at 574.

542. *Id.* at 574 n.1.

543. See Ronald Sullivan, *Beer-Flinger Sent to a Fitting Cooler: Gay-Rights Office*, N.Y. TIMES, May 22, 1991, at B1.

544. *Id.*

545. *Id.*

546. Jim Newton, *Skinheads Get Crash Course in Tolerance*, STAR TRIB., Jan. 1, 1994, at 5A; see also Garvey, *supra* note 63, at 786 (discussing Newton article).

547. Garvey, *supra* note 63, at 786; Newton, *supra* note 546. The offenders were also required to tour a local jail, view the film "Schindler's List," and tour the Simon Weisenthal Center's Museum of Tolerance. *Id.*



imagine a judge who finds homosexuality to be morally offensive ordering a gay offender to be "educated" or "enlightened" at the hands of virulently anti-gay spokespersons,<sup>548</sup> or imagine a racist or anti-Semitic judge ordering an offender to be "educated" or "enlightened" at the hands of avowed white supremacists or neo-Nazis. The negative potential is obvious.

The cases cited above do not appear to be isolated anomalies; rather, there seem to be good number of instances in which trial judges have used their power to impose a certain view of morality upon offenders. An earlier section of this Article discussed the obvious imposition of judicial morality in cases involving reproductive or marital freedom.<sup>549</sup> Cases documented in various media reports include trial courts ordering offenders to view films such as "Mississippi Burning"<sup>550</sup> or "Boyz N the Hood,"<sup>551</sup> ordering offenders to read about and pass a quiz about the Holocaust,<sup>552</sup> and ordering environmental offenders to attend Sierra Club meetings.<sup>553</sup> In one published court opinion, the Court of Appeals of Georgia upheld the imposition of probation conditions that required a drunk driver to complete the "written requirements for Boy Scout merit badges on the subjects of traffic safety, law, and citizenship in the community."<sup>554</sup> In another published court opinion, a federal district court judge explicitly indicated that he imposed an unusual set of probation conditions "in the hope that [the offender would] . . . learn humility, compassion, generosity, honesty, and, above all, a sense of respect for the law."<sup>555</sup> While it may be difficult to contest the praiseworthiness of each of those attributes, it is far less difficult to raise concerns about allowing an individual trial judge to be the arbiter of praiseworthy attributes. While the federal probation statutes arguably authorize a trial court to try to educate an offender about *obeying* the law, one is quite hard pressed to find anything authorizing a trial court to inculcate values such as humility, compassion, generosity, honesty, or even respect for the law.

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548. Indeed, *United States v. Kohlberg*, 472 F.2d 1189 (9th Cir. 1973), discussed in detail *supra* notes 290-94 and accompanying text, makes it clear that anti-gay bias has by no means been eliminated from the federal judiciary, even at very high levels.

549. See *supra* Part III.F.2 (discussing intrusion of judicial morality into marital freedom).

550. See Abramson, *supra* note 36 (describing this condition, imposed upon man who rammed his truck into car driven by interracial couple, as "pure gimmick").

551. See *Judge Orders Victim of Theft to Steal From Thief*, ST. PETERSBURG TIMES, Oct. 3, 1991, at 7A (stating offender ordered to watch "Boyz N the Hood" or spend three weekends in jail).

552. *Michener Offers to Teach Vandals About Holocaust*, CHI. TRIB., June 7, 1990, at C24.

553. Felsenthal, *supra* note 32.

554. *Mangiapan v. State*, 344 S.E.2d 756, 757 (Ga. Ct. App. 1986).

555. *United States v. Posner*, 694 F. Supp. 881, 884 (S.D. Fla. 1988).

#### *IV. A Proposed Response*

The preceding sections of this Article should make readily apparent both the potential for and the actuality of the widespread abuse of the power of sentencing. Now on to the more complicated task of proposing some potential solutions. Many of these solutions have been proposed in some form in the past, although never in this sort of comprehensive fashion. Nonetheless, the beginnings of a solution to the most pervasive aspects of the problems described above do not involve any particularly radical new legal concepts or departures from otherwise accepted legal practices, but rather involve the application of widely recognized legal doctrine in a somewhat different setting.

##### *A. Eliminating Barriers to Substantive Appellate Review*

First and perhaps most important, appellate courts must establish their willingness to review and supervise the sentencing practices of individual trial judges. While most appellate courts have a well established history of almost complete deference to those sentencing practices, that history has begun to change in the face of complex and multi-factored sentencing guidelines. The federal court system clearly provides the best example, as the circuit courts have become inundated with cases in which the parties dispute the proper application of the sentencing guidelines. Thus, the concept of engaging in substantive appellate review of trial court sentences should not be completely foreign to most appellate courts.

As discussed in Part II of this Article, several significant barriers interfere with the possibility of substantive appellate review, the most important of which is the fact that probationary sentences are rarely appealed.<sup>556</sup> This fact appears unlikely to change dramatically, regardless of any changes in the rules applied to such appeals. The emotional and economic costs connected with pursuing an appeal are not likely to be affected, and it is predictable that an extremely high percentage of those defendants sentenced to probation would continue to decide not to pursue an appeal challenging the conditions of their probation. In some sense this is precisely as it should be, as one can assume that the substantial majority of cases involve the imposition of relatively standard and inoffensive probation conditions. Nonetheless, to the extent that pursuing a legitimate appellate challenge of the validity of probation conditions is inhibited by appellate procedures and prior rulings, those obstacles must change.

As noted earlier, one of the more obvious and pervasive barriers to the filing of an appeal is the offender's fear, often well justified, that a "success-

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556. See *supra* Part II.A (discussing barriers to appellate review).

ful" legal challenge to a probation condition will result in the court's vacating the plea or remanding the case for resentencing, opening up the possibility of incarceration.<sup>557</sup> If such a result is possible, even the clearest and most flagrant judicial abuses will generally evade challenge on appeal. It is the rare defendant indeed who will risk incarceration in order to avoid compliance with any non-jail condition, no matter how inappropriate, onerous, or constitutionally intrusive. Courts must universally announce and follow the rule set forth in *Fiore v. United States*,<sup>558</sup> in which the Second Circuit explicitly refused to remand a case for resentencing after it invalidated a challenged probation condition.<sup>559</sup> The court in that case correctly observed that forcing an offender to take "a gamble" in order to raise a valid claim would clearly "chill" the valid assertion of important rights.<sup>560</sup> The appropriate appellate rule would simply treat probation conditions as severable from the remainder of the sentence.

Having eliminated the most obvious disincentive to the filing of an appeal, the courts must then abandon in their entirety the different variations on the theme that an offender has waived his or her right to substantive appellate review by accepting the imposition of the sentence. The old workhorses that by all rights should have been abandoned years ago – that probation is an "act of grace" or that a defendant who has accepted a probationary sentence has entered some form of contractual agreement<sup>561</sup> – must be explicitly and finally rejected. This is no radical concept of appellate practice, as the United States Supreme Court has expressed its disdain for these doctrines on several occasions.<sup>562</sup> The description of a probationary sentence as an "act of grace" can no longer be justified under any fair view of the current criminal justice system; indeed, in many settings, a probationary sentence is the norm rather than some sort of lenient anomaly.<sup>563</sup> Further, the description of a probationary sentence as some form of contractual offer and acceptance defies any common sense notion of the actual legal setting in which the criminal sentence occurs. One can hardly imagine a setting in which the bargaining position of the two parties is less equal or in which the element of coercion plays a stronger role.

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557. See *supra* notes 32-36 and accompanying text (stating offender's fear of incarceration is often justifiable).

558. 696 F.2d 205 (2d Cir. 1982).

559. *Fiore v. United States*, 696 F.2d 205, 211 (2d Cir. 1982).

560. *Id.* at 211.

561. For a discussion of these legal doctrines, see *supra* Part II.A.2 & 3.

562. See *supra* notes 50, 76 and accompanying text (discussing Supreme Court cases rejecting "act of grace" and contract theories in probation conditions).

563. See *supra* notes 20-23 and accompanying text (showing widespread use of probation).

The more popular waiver rule in today's cases suggests that the absence of a specific objection to a particular probation condition precludes substantive appellate review of that condition. This sort of rule has its most obvious application in cases that are resolved by a negotiated plea agreement, but it has also been widely applied in post-trial sentence cases.<sup>564</sup> While the object-or-waive rule appears to originate largely from appellate rules applied to evidentiary issues, the primary rationale offered in support of such a rule does not apply in any compelling way to criminal sentencing. In the evidentiary setting, the objection requirement generally is justified by the need for the trial judge to be alerted to the legal issue and provided with an opportunity to rule.<sup>565</sup> In the criminal sentencing setting, there is rarely, if ever, an analogous need to highlight for the trial judge the various ways in which he or she may be infringing on the rights of the accused; the trial judge is normally fully aware of those rights, particularly when they are of constitutional magnitude.

To the extent that the object-or-waive rule is justified in terms of judicial economy, far stronger policy concerns should prevail when the legitimacy of a trial judge's use of the enormous power of the criminal justice system is at stake. It is the public at large, not just the individual offender, who has the greater stake in assuring that the power of the system is not amenable to individual and idiosyncratic abuse. Indeed, the notion that an individual offender can, by his or her consent or acquiescence, make legitimate an otherwise illegitimate criminal sentence, flies in the face of some of our most deeply held notions of fairness and justice. When one considers the disincentives that generally prevent an individual offender from objecting to any non-jail conditions,<sup>566</sup> the importance of a rule that automatically preserves the right of a probationer to appellate review of probation conditions becomes even clearer. It is not difficult to envision such a rule in practice. One need do little more than treat any challenged condition as though it were "plain error,"<sup>567</sup> thereby obviating the need for preservation below.

### *B. Making Substantive Appellate Review Truly Substantive*

The best way for an appellate court to discourage the filing of an appeal on a particular issue is to relegate its review of that issue to the legal waste bin

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564. See *supra* Part II.A.2 (discussing waiver rule).

565. See, e.g., ROGER C. PARK ET AL., EVIDENCE LAW § 2.03 (1998) (stating that objection gives judge opportunity to correct error).

566. See *supra* notes 32-36 and accompanying text (describing disincentive of fear of incarceration).

567. See, e.g., FED. R. CRIM. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); FED. R. EVID. 103(d) (providing that court may "tak[e] notice of plain error affecting substantial rights although they were not brought to the attention of the court").

of "abuse of discretion" review. Nothing sends a clearer message to a litigant that the court has little or no interest in reviewing an issue or that his or her appeal has virtually no chance of success.<sup>568</sup> Sadly, this standard of review is the state of the law as regards legal challenges to probation conditions. If the appellate courts are to take seriously their role as guardians of the use and abuse of the enormous power of judicial sentencing, they must abandon the abuse of discretion standard and begin to conduct truly substantive appellate review.

The first step in such a process would be to require that the imposition of any probation condition be based upon explicit findings of fact, made on the record and supported by evidence found in the record. In addition, the imposition of any probation condition must be justified by the articulation of a particular reason or set of reasons. Requiring the creation of such a record would make judicial reliance on pop-psychology much more difficult, suggesting that the judge must enlist some expert testimony before speculating on how a particular condition might affect a particular offender. The imposition of conditions for illegitimate purposes would also be easier to identify and to regulate under this sort of regimen. Indeed, it would seem difficult to argue against the making of such a record in an area in which judges have historically enjoyed virtually unfettered discretion.<sup>569</sup>

Operating on the basis of such a record, an appellate court could engage in something approaching a *de novo* review on the law. Certainly, deference to the trial judge's fact-finding would continue to be the appropriate mode of review, so long as those facts are supported by sufficient credible evidence in the record. But working from an established set of facts, the appellate court is just as able as the trial court to balance the rights of the individual offender against the articulated purpose of any given condition. As in most areas of law, significant appellate guidance over time would provide both a structure and a set of guidelines for trial judges to follow, allowing for greater uniformity in sentencing and eliminating many of the idiosyncratic or eccentric abuses of judicial discretion.

Most important, probation conditions that intrude on an offender's fundamental or constitutionally protected rights must be subjected to strict scrutiny upon appellate review. This proposal, which would require a court to find that the condition is the least restrictive alternative available to meet a legitimate

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568. See David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 466-69 (1999) (discussing review of judicial factfinding of witness credibility).

569. Several other commentators have proposed requiring judges to articulate on the record the justifications for a particular probation condition. See, e.g., Weissman, *supra* note 62, at 391 (stating tribunal should specify purpose of conditions); *Alternatives to Incarceration*, *supra* note 25, at 1967 (stating judges should openly explain goals of innovative probation conditions).

specified objective, is neither legally novel nor difficult to imagine in practice. A number of jurisdictions purportedly impose such a standard today in the context of reviewing probation conditions.<sup>570</sup> Some critics have argued that the application of such a standard to the review of probation conditions places too many limitations on judicial sentencing practices, treating the offender as though he or she is entitled to precisely the same level of constitutional protection as one who has not been convicted of a crime.<sup>571</sup> This criticism is off target because it fails to recognize that the state has far more latitude in determining what would qualify as legitimate objectives when dealing with a convicted criminal than it would if it sought to apply a restrictive condition in another setting. A less rigorous standard of review displays an insufficient level of respect for the continuing constitutional rights of offenders. Any hope that an offender might be rehabilitated or have some respect for the criminal justice system in the future would seem to follow more naturally from the imposition of a sentence that respects the rights and dignity of the offender than from the imposition of a sentence that shows a disregard for those vital issues.<sup>572</sup>

### C. Reducing the Permissible Range of Judicial Innovation

The best approach to reducing or eliminating "creative" or "innovative" sentencing is to establish a rule, as several courts have, that a probation condition that is not within the realm of commonly accepted sentences in the jurisdiction is not a statutorily authorized sentence. These courts have reasoned that sentences that deviate from clearly established norms constitute judicial legislation, and that it is up to a legislature, not an individual judge, to determine the appropriate range of sentences available for a particular offense.<sup>573</sup> While one may ordinarily think of the legislative role simply in terms of establishing minimum and maximum periods of incarceration, this view is not

570. See *supra* note 143 and accompanying text (discussing jurisdictions that claim to take more serious look at conditions that infringe on constitutional rights).

571. See, e.g., Bartum, *supra* note 81, at 1045 (arguing such standard ignores probationers' diminished liberty interests).

572. Several courts have expressed the concern that the imposition of unreasonable or arbitrary probation conditions can undermine the rehabilitative process by eroding the probationer's respect for the criminal justice system. For example, in *Inman v. State*, 183 S.E.2d 413, 413-14 (Ga. Ct. App. 1971), the court vacated a probation condition that required the probationer to maintain "a short haircut." The court noted that, "[w]hile few young men would choose to serve a sentence rather than cut their hair, even fewer would finish with a sense of respect for criminal justice." *Id.* at 416.

573. See, e.g., *People v. Meyer*, 680 N.E.2d 315, 320 (Ill. 1997) (stating that authority to define punishment is for legislature); *People v. Letterlough*, 655 N.E.2d 146, 151 (N.Y. 1995) (same); *State v. Burdin*, 924 S.W.2d 82, 87 (Tenn. 1996) (same); see also *Ballenger v. State*, 436 S.E.2d 793, 796 (Ga. Ct. App. 1993) (Blackburn, J., dissenting) (same).

accurate. Indeed, it is important to remember that a trial court's authority to impose probation is at the discretion of the legislature,<sup>574</sup> which could revoke the jurisdiction's probation statute in its entirety. In fact, it is not extraordinary to find state statutes that expressly authorize special probation conditions under particular facts and circumstances. For example, a number of state legislatures have explicitly expanded the menu of sentencing options available to trial judges in the area of drunk driving.<sup>575</sup> Thus, the enforcement of a rule that restricts sentencing innovation to the legislative realm is not difficult to imagine, not only because it has been followed by a number of jurisdictions, but also because it is far more consistent with the strong national trend toward uniformity in sentencing.

Critics of this kind of limitation on judicial creativity have raised two primary concerns. First, they have maintained that any limitations on creativity will reduce the effectiveness of criminal sentencing practices because judges are prevented from making the sentence fit the individual.<sup>576</sup> This claim is premised on the notion that sentences are currently individualized in a fashion that is rational, conceptually coherent, and founded on legitimate evidentiary fact finding. Further, this claim presumes that current sentencing practices have some established level of effectiveness. In fact, there does not appear to be any evidence supporting either of these premises. Second, the critics have maintained that, in the absence of viable creative alternatives, judges will be more likely to resort to incarceration when some lesser alternative might serve the same correctional ends.<sup>577</sup> This claim is premised on the notion that so-called "alternative sanctions" generally are imposed in lieu of what would otherwise have been a jail sentence. In fact, the evidence seems to suggest the opposite, indicating that alternative sanctions are almost univer-

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574. See *supra* text accompanying note 553 (stating that legislatures define appropriate sentences).

575. See, e.g., IOWA CODE § 321J.4 (Supp. 1999) (authorizing sentence requiring use of ignition interlock device for drunk drivers); MINN. STAT. § 168.041(6)(a) (Supp. 1999) (authorizing use of distinct license plates for drunk drivers); NEV. REV. STAT. § 484.3792(1)(a)(2) (1999) (authorizing sentence to perform community service while "dressed in distinctive garb" that identifies the defendant as a drunk driver); OHIO REV. CODE ANN. § 4503.231 (West 1999) (authorizing use of distinct license plates for drunk drivers). Other states have considered and rejected similar legislative initiatives. In New York, for example, the legislature in 1983 rejected a proposal to investigate the use of special license plates for convicted drunk drivers. *People v. Letterlough*, 655 N.E.2d 146, 150 n.5 (N.Y. 1995).

576. See, e.g., Connally, *supra* note 220, at 532 (arguing for "a minimum of legislative interference" under theory that allowing court to individualize probation conditions "mak[es] the most of the probation and thereby enhanc[es] its effect").

577. See, e.g., Dana Wordes, *Penal Law*, 70 ST. JOHN'S L. REV. 421, 433 (1996) (arguing that "discouraging judicial creativity" could encourage courts to incarcerate when non-jail conditions might be appropriate).

sally imposed on those who would not have been incarcerated in any case and have little or no impact on those who the courts will continue to incarcerate.<sup>578</sup> This phenomenon is known in the field as "net-widening."<sup>579</sup>

Leaving innovative sentencing concepts in the legislative domain has several distinct advantages. In many instances, the imposition of an innovative sentence involves the striking of a balance between several competing issues of public policy. Such policy balancing is more properly conducted in the legislature, which has been elected to decide such issues, than by an individual judge in an individual case. The wisdom or potential efficacy of an innovative or new sentencing concept can be subjected to legislative study and debate prior to its adoption on a broader scale. Having adopted such a concept, the legislature can then commission studies to evaluate how such conditions are imposed in practice and to evaluate their potential effectiveness.<sup>580</sup> Adoption of permissible sentences through the legislative process reduces the possibility that individual trial judges will respond inappropriately to public pressure and places constraints on the ability of trial judges to act upon their personal biases and prejudices, personal morality, or pop-psychological theories. In turn, the public's perception of the system as essentially fair, just, and even-handed would undoubtedly be enhanced by the elimination of quirky, eccentric, and idiosyncratic sentencing practices.

#### V. Conclusion

Trial judges in the United States enjoy vast and almost completely unfettered discretion in imposing probation conditions on criminal defendants. While state and federal legislatures have significantly reduced judicial sentencing discretion by imposing mandatory minimum sentences, purportedly in the name of enforcing some uniformity and predictability in sentencing, they have not taken any steps to reduce broad disparities in the imposition of probation conditions. As a consequence, many trial judges have taken full advantage of the opportunity to impose probation conditions that significantly infringe upon the offender's constitutional or basic human rights. Much like

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578. See, e.g., Kahan, *supra* note 247, at 625 & n.135 (stating alternative sanctions do not substitute for imprisonment); Doris Layton Mackenzie & Claire Souryal, *A "Machiavellian" Perspective on the Development of Boot Camp Prisons: A Debate*, 2 U. CHI L. SCH. ROUNDTABLE 435, 438 (1995) (stating alternative sanctions are not for those who would have been incarcerated); Michael Tonry, *Intermediate Sanctions in Sentencing Reform*, 2 U. CHI L. SCH. ROUNDTABLE 391, 397 (1995) (asserting alternative sanction program rarely achieves goals of diverting offenders from prison).

579. See *supra* note 578 (listing supporting authority).

580. At least one commentator recently has suggested the opposite approach, allowing judicial innovation to lead to and inform legislative study and debate. See *Alternatives to Incarceration*, *supra* note 25, at 1977-80 (stating expertise of trial courts makes them best suited to lead).



the state and federal legislatures, the appellate courts have abdicated their responsibility to protect probationers from trial judges who have abused their judicial power, creating a system in which judges are free to impose their own values or morality on a probationer or to follow their intuitive best guess about the effectiveness of a particular probation condition.

These problems are not obscure or isolated in nature. With several million Americans under some form of probationary supervision at any given time,<sup>581</sup> one can only hazard a guess at how many have been ordered to comply with inappropriate or constitutionally invasive conditions. In order to highlight the severity and nature of the problems, this Article has engaged in an extended analysis of the types of abuses that currently exist and some of the many problems that they both create and perpetuate.<sup>582</sup> The long list includes the violation of virtually every conceivable constitutional right, including the rights to freedom of speech, association, and religion, and the violation of rights that are best described as basic human rights, such as the right to dignity and the right to freedom of thought.<sup>583</sup>

This Article has proposed several steps that should be taken in order to address these judicial abuses of power.<sup>584</sup> First, the appellate courts need to create rules that both support and encourage probationers to seek appellate review of potentially offensive or inappropriate probation conditions. As things stand today, there are significant, often insurmountable, barriers that interfere with the ability or willingness of a probationer to file an appeal. Those barriers must be reduced if an appellate court is to play any role in supervising a trial court's exercise of its sentencing discretion.

Second, the appellate courts must abandon the incredibly deferential abuse of discretion standard, engaging in a substantive review on the merits of the appropriateness of a particular probation condition. In order to conduct a substantive review, the appellate courts must insist that sentencing decisions be articulated and justified on the record and that the courts making the decisions acted in reliance on evidence obtained in the proceeding below. When a probation condition intrudes upon constitutional rights, the court should apply a strict scrutiny analysis.

Third, the ability of an individual sentencing judge to experiment with innovative sentences must be significantly curtailed. Appellate courts should reject probation conditions that fall outside of well established norms within the jurisdiction, leaving the task of creating new or innovative sentencing

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581. See *supra* notes 21-23 and accompanying text (documenting number of Americans on probation).

582. See *supra* Part III (describing "parade of horrors").

583. See *supra* Part III (describing "parade of horrors").

584. See *supra* Part IV (elaborating proposals to remedy problems).

concepts to the legislature. Through that sort of regime, the vast opportunities for the biases, prejudices, personal morality, or pop-psychology of an individual judge can be reduced significantly.

In the end, we as a society have a significant interest in the fair and just operation of the criminal justice system. When the system allows an individual judge to impose his or her personal morality on a criminal defendant, when the system allows an individual judge to practice psychology on a criminal defendant with neither a degree nor any expert advice, when the system allows an individual judge to act on his or her personal biases, stereotypes, and prejudices, we have all been injured. We can no longer close our eyes to the pervasive judicial abuse of the power of sentencing, and we must insist that our courts and our legislatures no longer abdicate their vital roles as protectors of the rule of law.