Scarlet Letter Punishment: Yesterday's Outlawed Penalty Is Today's Probation Condition

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Prisons and jails are overused and unsuccessful methods\textsuperscript{1} for solving a progressively increasing crime problem.\textsuperscript{2} Evidence of their failure is abundant. Among other things, they are overcrowded,\textsuperscript{3} accomplish very

\textsuperscript{1} This note discusses the constitutional and criminal law issues of a scarlet letter probation condition and recommends alternative methods to incarceration. While firm opinions have been expressed based on these issues, it is still reasonable to withhold definitive conclusions due to the paucity of written case law.


\textsuperscript{3} See generally Armstrong, Prudent Use of Prison Space: The Sentencing Improvement
little in the way of punishment objectives, and completely lack the monetary support required to make them effective. As such, incarceration can no longer be the primary form of punishment in the United States. Recognizing the urgency of the situation, the judicial system has turned to alternative sentencing as a solution. Today, many judges no longer impose traditional sentences, but are creatively designing alternatives for offenders they deem worthy of such treatment. For practical reasons, the most common alternative form of sentencing has become probation accompanied by certain restrictive conditions.

The use of alternatives has sparked a whole host of new issues. The most significant of these new issues is the determination of who should or should not receive probation and what kind of probation condition can be justified for certain criminals. Desperation, indefinite statutory provisions, and the resulting judicial discretion afforded to those on the bench has led to the imposition of some probation conditions which are

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6 See Armstrong, supra note 3, at 239; Velie, supra note 4.


8 See, e.g., 6 Nat'l L.J. 47 (Feb. 6, 1984) (offender required to stand before church congregation on Sunday and confess crime); 6 Nat'l L.J. 43 (Oct. 10, 1983) (offender required to stop smoking for probation period of two years); 5 Nat'l L.J. 43 (July 18, 1983) (offender required to read a book and write a six page report); 5 Nat'l L.J. 43 (Nov. 1, 1982) (offender required to attend college full time for five years); 4 Nat'l L.J. 55 (May 5, 1982) (offender required to write confessional letter to editor of local paper); 4 Nat'l L.J. 39 (Apr. 12, 1982) (offenders ordered to host a series of happy hours at a geriatric ward of local hospital); 4 Nat'l L.J. 39 (Oct. 5, 1981) (offender ordered to have his mouth washed out with soap after using abusive language to an officer); 4 Nat'l L.J. 39 (Sep. 28, 1981) (offender required to offer sushi meals to senior citizens at half price for three months); 2 Nat'l L.J. 3 (Aug. 25, 1980) (doctor sentenced to heal in India for three years without compensation due to medicaid fraud).


11 Id. at 185.
unnecessarily harsh, unjustified, and possibly unconstitutional. Of particular concern is the growing use of "scarlet letter" probation conditions which require signs to be posted on the offender's property warning the public by announcing the crime committed.

The use of scarlet letter punishment has the potential for turning the hands of time back to an uncivilized era when the treatment of convicted criminals was concerned solely with inflicting physical or mental injury. This is a barbaric and pathetically simplified answer to an extremely complicated problem. Furthermore, it is unjustified against even the most hardened and violent criminals, both constitutionally and theoretically. Yet because of the frustrating and desperate situation of our criminal justice system, such punishment is becoming more frequently rationalized and accepted. If the situation is allowed to continue, it is not unreasonable to expect even more primitive punishments to return to commonplace use.

A. Prison Overcrowding

Now may be the time to become a criminal. The likelihood of being sentenced to prison or jail is decreasing daily. The jail and prison overcrowding crisis, predicted by experts for more than a decade, is upon the United States. Warnings unheeded by state and federal legislatures, administrative authorities, and the general population have resulted in a country clamoring frantically for a solution to a state prison system operating at 110% of its capacity and a federal prison system operating at 124% of its capacity. With the United States boasting a higher imprisonment rate than any country in the world, except the Soviet Union and South Africa, the current prison situation has exceeded statisticians' most extravagant expectations. The situation is
so extreme that a defeatist attitude toward the future use of jails or prisons is quite realistic at this late date. Unfortunately, the origins of this crisis continue, and few can escape the blame.

As crime rates continue to rise, the public, although anxious to see more criminals incarcerated, remains uninterested in funding the construction of new facilities, unsympathetic to overcrowded conditions, and adamant that prisons should not be built in residential districts. New construction is immensely expensive and can dominate a state’s budgetary expenditures. Furthermore, in some states, the cost to taxpayers is up to $35,000 a year just to house an inmate. In order to reflect the public’s “get tough” expectations, with an eye on their re-election prospects, many judges have taken a stronger stand toward crime and are sentencing offenders, whether violent or nonviolent, to jail or prison more frequently, for longer periods, and with more stringent standards for parole. Arrest practices and policies, pre-trial release policies and case processing time frames are also contributory factors. In addition, some state legislatures have passed new mandatory sentencing laws, further
burdening the overworked system.26 Jails have often taken on a social service camouflage and become homes for the mentally retarded, juveniles, and public inebriates.27 Economically difficult times have placed many in jail who may have been able to pay fines in the past but are now without an income or savings.28 As such, the public, state and federal legislatures, and social or administrative agencies shoulder part of the responsibility for the current situation and should remain accountable for potential solutions.

These entities shoulder only part of the blame and the remainder can be attributed to stiffened public attitudes based upon the criminal law premise ingrained in the justice system, that incarceration lowers crime and recidivism rates.29 Casting doubt upon this social policy, recent studies have found little relationship between general inmate populations and total crime rates.30 Accordingly, the use of jails and prisons to protect the general public and eradicate criminal behavior may be a fruitless endeavor. This realization has led many to believe that building new jails and prisons in order to alleviate overcrowding is not the solution but only a band-aid approach to a much deeper problem.31 Closer examination by experts on the theoretical justifications for confinement are exposing an increasing number of discrepancies between those justifications and our system's success in accomplishing them.32

Moreover, the possible overuse of prisons and jails has led to other unforeseen costs for state and federal governments. The recent success of lawsuits based upon cruel and unusual punishment claims has become a huge expense.33 Costs of health care are rising rapidly due to the

26 "At least 46 states have mandatory sentencing laws and 12 states have passed some form of determinate sentencing law, both which frequently result in a longer average time served than indeterminate sentences." Breed, supra note 21, at 11. See also Moss, Fixed Sentencing Proposed, 73 A.B.A. J. 27 (1987).
27 Johnson, supra note 3, at 6.
28 Id.
29 See Cullen, Clark & Wozniak, supra note 23, at 16.
30 David Biles, a criminal law researcher, concludes that there is actually a positive, rather than a negative, relationship between crime and the use of imprisonment. He reasons that this may be due to the fact that higher crime communities feel compelled to respond by incarcerating proportionately high numbers of offenders. Alternatively, imprisonment itself may be criminogenic. As a result, his data clearly refutes the theory that the greater use of imprisonment will reduce crime. Biles, Crime and the Use of Prisons, 43 Fed. Probation 39, 42 (June 1979); see also Sykes, Vito, and McElrath, Jail Populations and Crime Rates: An Exploratory Analysis, 15 J. Pol. Sci. & Admin. 72, 74 (1987) ("There is little relationship between increasing general inmate populations and total crime rates.").
31 See generally Biles, supra note 30, at 43, recognizing that the relationship between imprisonment and crime is much more complex than can be revealed by simple correlations.
32 See Frank, supra note 2, at 7.
33 See generally Call, supra note 20, at 23 ("when correctional facilities become crowded the likelihood of a lawsuit still must be considered substantial and the court's resolution of the dispute cannot be predicted with confidence."); Comment, supra note 3, at 647 (in the
accelerating effect that long-term overcrowding has upon the spread of communicable diseases, heart attacks, and high blood pressure.\textsuperscript{34} Suicide and death rates increase, inmate violence becomes commonplace, and disciplinary control declines under crowded conditions.\textsuperscript{35} Thus, the costs can be counted not only in dollars, but also in lives.

Nevertheless, those interested in attempting to solve a seemingly unsolvable problem have discovered and turned to the last possible route for a justice system which is no longer able or willing to utilize jails and prisons. This route is what has come to be known as sentencing or prison alternatives.

B. Alternatives to Incarceration

Fueled by the knowledge of the many shortcomings of the prison system, judges are implementing and commentators are singing the high praises of alternative sentences. Based upon the discretionary language of the Federal Probation Act\textsuperscript{36} and similar state statutes,\textsuperscript{37} the courts have found the authority to creatively sentence an offender. Moreover, prominent legal organizations have recommended a statutory preference for sentences which do not involve incarceration.\textsuperscript{38} These alternative sentences are usually affixed as a condition of a probationary term, as a requirement of a suspended sentence, or as a term of a conditional discharge from prison.\textsuperscript{39}

The need for alternatives and the discretion awarded judges in sentencing procedures have sparked a proliferation of different types of alternative sentences.\textsuperscript{40} Proponents of these alternatives claim that they

\begin{itemize}
    \item \textsuperscript{35} U.S. DEP’T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, THE EFFECT OF PRISON CROWDING ON INMATE BEHAVIOR 1 (1980).
    \item \textsuperscript{36} 18 U.S.C. § 3651 (1982) provides in pertinent part: "Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best." (emphasis added).
    \item \textsuperscript{38} See sources cited infra note 141.
    \item \textsuperscript{39} COHEN & GORETT, supra note 10, at 33.
    \item \textsuperscript{40} The most popular conditions of probation are community service, restitution, and the payment of fines. House arrest or home detention monitored through electronic devices is
\end{itemize}
are “cheaper than prison terms, ease overcrowding in jails, and provide a middle ground between the two extremes of incarceration and straight probation.” Recognition that many offenders will receive parole entailing minimal supervision after only a short imprisonment further justifies prison alternatives. It is also claimed that this sentencing is more responsive to an offender’s rehabilitative needs and much less disruptive for an individual than jail. Moreover, alternatives are more conducive to the punishment of those difficult to penalize, such as corporations.

However, opponents propose that the use of alternatives exemplifies judicial leniency towards those who should receive their just desserts. This leniency, they fear, could lead to abuse of alternatives resulting in the release of violent criminals, further jeopardizing the public. Opponents are afraid that with the surge of alternative sentencing will come the demise of a necessary prison system. Warning that there will always be the need to lock away some of the more dangerous offenders, opponents feel this trend could eliminate prison even as an “alternative.”

also becoming commonplace. In addition, different forms of shock probation have appeared in sentencing orders. The utilization of anti-drug and anti-alcohol programs, along with an agreement to submit to periodic urinalysis or blood tests, has allowed many addicts to avoid jail stays. Halfway houses and work release plans have also prospered. Furthermore, requirements that the offender obey the law, submit to searches, get an education, and/or hold a full-time job in order to support his family are used frequently. See Cohen & Gobert, supra note 10, at 218-343. Judges will often combine these alternatives to tailor the sentence more closely to the needs of the criminal and the community. To assist the defense attorney and ultimately the judge in arriving at a well-tailored alternative sentence, many organizations, most notably the National Center on Institutions and Alternatives, have arisen and provide “client specific plans” for requesting defendants. Indeed, the responsibility for the success of alternative sentences lies not only with the judges but also with counsel, probation departments, prison staff, and police. See Middleton, Sentencing: The Alternatives, 6 Nat’l L.J. 1 (Apr. 23, 1984); Ranii, Helping Attorneys Empty the Jails, 4 Nat’l L.J. 1 (Nov. 23, 1981); Sweeney, A Sentencing Alternative Without Bars, 93 L.A. Daily J. 21 (Oct. 16, 1980).


Id.

Id.


See, e.g., Cohen & Gobert, supra note 10, at 5.

As a result, many suggest defraying the costs of imprisonment by requiring the convict to partially pay for his incarceration.\(^{48}\) Nevertheless, with the realization that the alternative trend is a path well laid, opponents caution that the alternatives should at least be structured as scientifically as possible, avoiding orders for menial or demeaning tasks.\(^{49}\)

Recent press has brought to light a host of probationary conditions which, although creative, seem to get exceedingly close to abuse of discretion. It is often difficult to distinguish those sentences which are merely unique with legitimate objectives from those which are abusive and have few redeeming qualities. To make a distinction between legitimate and illegitimate probation conditions requires a complete review of the law of probation, with a necessary emphasis upon the possible constitutional and criminal law issues. Of particular interest is the propriety of scarlet letter conditions.

C. Probation

The meaning of the term probation is difficult to define due to its constantly changing usage.\(^{50}\) One way to create consistency in the definition of probation is to define it by its elements. There are three...

\(^{48}\) See generally id.

\(^{49}\) The task should be "a needed service, rather than something invented merely for the sake of punishing the offenders." 6 Nat'l. L.J. 12 (Apr. 23, 1984).

\(^{50}\) Probation has been defined as "a sanction imposed by a court as punishment for a criminal offense." Cohen & Gobert, supra note 10, at 4. Additionally, the word has been used "interchangeably to mean a legal disposition, a measure of leniency, a punitive measure, an administrative process, and a treatment method . . . not to mention a sub-system of corrections." Gray, Probation: An Exploration in Meaning, 50 Fed. Probation 26 (Dec. 1986).

Modern day probation has its roots in the 18th and 19th centuries. The 18th century's harsh hand toward punishment due to prevailing religious and ethical beliefs softened by the middle of the century with the beginnings of social science and the rejection of certain aspects of religious dogma. This reformation continued through the 19th century with its serious criticism of criminal punishment and its retributive focus from a humanitarian and utilitarian perspective. Significant efforts were made to attract attention to the cruelty of corporal punishment, focusing mainly upon rehabilitative possibilities.

State adoption of probation began in 1841 with a Massachusetts shoemaker, John Augustus, who regularly volunteered to assist in the rehabilitation of drunkards. This informal practice led to his involvement in more structured programs of several thousand adult and juvenile offenders. As a result of the efforts of Augustus and others who joined him, the Massachusetts legislature established positions for full-time, salaried probation officers. By 1867, probation was authorized in all states.

The practice of probation was mimicked by the federal courts although they were much slower in adopting legislation authorizing such sanctions. In 1916, the United States Supreme Court in the case of Ex parte United States, 242 U.S. 27 (1916), recognized that Congress could, if it so desired, enact a law authorizing probation. Nonetheless, it took nine years for Congress to enact the first federal probation law. Finally, the year 1925 saw legislation establishing a probation system similar to that in existence today. Cohen & Gobert, supra note 10, at 6-8.
characteristic elements of probation: (1) release of the offender into the community (2) with certain conditions imposed upon him (3) under the supervision of the probation department. Generally, it is given in lieu of a prison sentence. In practice, the judge, in accordance with a federal or state statute, can suspend the execution of a traditional prison sentence as long as the probation conditions are fulfilled. Should the probationer breach an imposed condition, he may be incarcerated following a judicial revocation proceeding.

Basically, there are three types of probation statutes, each of which gives the sentencing judge significant latitude in determining and imposing conditions. The first group is the most liberal, authorizing the court to impose appropriate probation or parole conditions without suggesting any specific conditions. The second category of probation statutes is more specific, dictating a few mandatory conditions and authorizing the decisionmaker to impose others as appropriate. The third and most popular type of statute lists many specific conditions a court may impose if it so desires. Much discretion is afforded the decisionmaker under this popular statute, enhanced frequently by a catch-all phrase which authorizes the imposition of other reasonable conditions. With a specific list available to the judge, some degree of uniformity can be ensured in the system while maintaining flexibility. For the purpose of further analysis, it will be assumed that either the first or the third category of statutes prevails since they most accurately reflect the majority of both state and federal laws today.

D. Probation Conditions

The awarding of probation is not a right but an allowance of grace, and the sentencing judge is afforded the widest latitude in the imposition
of conditions. However, "[a]s wide as a court's discretion is . . . it must never be forgotten that it is a sound discretion that must be exercised. A court must not make a decision 'characterized by capriciousness or arbitrariness or by a failure to conduct an adequate investigation into the facts.'" Thus, the well settled rule is that probation conditions must have a reasonable relationship to both the rehabilitative treatment of the accused and the protection of the public.

According to the leading federal case of United States v. Consuelo-Gonzalez, to determine whether a reasonable relationship exists consideration must be given to the purposes sought to be served by probation, the extent to which full constitutional guarantees available to those not under probation should be accorded probationers, and the legitimate needs of law enforcement. Using the same factors, the later federal case of Higdon v. United States modified the Consuelo-Gonzalez test by applying it in a two step process. First, an examination is made of the purposes for which the judge imposed the conditions. If those purposes are permissible, the second step is to determine if a reasonable relationship exists between the conditions and the purposes. At this point, a review is made of the conditions' impact on the probationer's rights and the extent to which the conditions serve the legitimate needs of law enforcement. Worded slightly differently, a state court in People v. Dominguez articulated its version of the test as:

A condition of probation which (1) has no relation 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 does not serve the statutory ends of probation and is invalid.

Furthermore, the reasonableness limitation encompasses the concept that conditions must be such that the probationer is able to comply with them. Of course, if the conditions are successful under the test, yet the defendant considers them more harsh than the traditional sentence the

58 United States v. Chapel, 428 F.2d 472, 474 (9th Cir. 1970).
60 As such, probation conditions can be divided into two groups: those aimed at reform and those aimed at control. COHEN & GORIASt, supra note 10, at 186.
61 521 F.2d 259 (9th Cir. 1975).
62 627 F.2d 893 (9th Cir. 1980).
63 256 Cal. App. 2d 623, 64 Cal. Rptr. 290 (1967).
64 Id. at 627, 64 Cal. Rptr. at 293.
65 Based on this rationale, a requirement that an alcoholic refrain from drinking was invalidated. Sweeney v. United States, 353 F.2d 10 (7th Cir. 1965).
court could otherwise impose, he has the right to refuse probation and undergo the sentence.\textsuperscript{66}

To begin, the primary purpose of probation under both state and federal law is to rehabilitate the offender.\textsuperscript{67} According to the \textit{Higdon} court, "the only factors which the trial judge should consider when deciding whether to grant probation are the appropriateness and attainability of rehabilitation and the need to protect the public by imposing conditions which control the probationer's activities."\textsuperscript{68} Neither punishment nor the use of probation to circumvent statutory sentencing limits may be primary purposes.\textsuperscript{69} Although a seemingly restrictive rule, uncertainty as to how rehabilitation is accomplished necessarily renders it quite flexible.

Secondly, it is recognized that even though probationers are subject to constitutional limitations from which ordinary persons are free, these limitations should be narrowly drawn to achieve a permissible objective without unnecessarily restricting the probationer's otherwise lawful activities.\textsuperscript{70} It is impermissible for the impact of the condition to be needlessly harsh.\textsuperscript{71} The court in \textit{Consuelo-Gonzalez} found that with respect to a case brought under the Federal Probation Act:

Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to \textit{special scrutiny} to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety. But this is not to say that there is any presumption, however weak, that such limitations are impermissible. Rather, it is necessary to recognize that when fundamental rights are curbed it must be done sensitively and with a keen appreciation that the infringement must serve the broad purposes of the Probation Act.\textsuperscript{72}

\textsuperscript{66} See, \textit{e.g.}, State v. Davis, 119 Ariz. 140, 579 P.2d 1110 (1978).
\textsuperscript{67} The theme that rehabilitation underlies probation is mirrored not only in the probation systems established under state law, but also in the Model Penal Code which expressly recognizes rehabilitation by authorizing the imposition of any conditions of probation reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience.
\textsuperscript{68} 627 F.2d 893, 897 (9th Cir. 1980).
\textsuperscript{69} \textit{Id.} at 898.
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975) (emphasis added). The court cautioned that it expressed no opinion regarding the extent to which states may infringe upon a probationer's constitutional rights but given the great similarity between federal and state statutes in this area and the reliance by state courts upon this case, the view here may be considered universal. \textit{Id.} at 266.
Of final interest to the reviewing court is the manner in which the condition enhances law enforcement.\textsuperscript{73} Conditions which serve to protect the public from recidivism by the probationer or to deter others through example are not considered contrary to the statute as long as they substantially serve the purpose of rehabilitation.\textsuperscript{74}

\textbf{E. The Scarlet Letter Condition}

A scarlet letter condition of probation is one in which the probationer is required to attach a warning upon his or another's property which sends a message to the public that he has been convicted of a crime.\textsuperscript{75} For instance, on May 20, 1987, Richard J. Bateman, a twice-convicted child molester, was required as a condition of a five year probation, again for child molestation, to place upon the door of his residence and on both doors of any vehicle he may operate, in three inch letters, "DANGEROUS SEX OFFENDER—NO CHILDREN ALLOWED."\textsuperscript{76} To determine the propriety of this special probation condition under the Consuelo-Gonzalez test, it will be necessary to examine thoroughly both its constitutional and criminal law ramifications.

\section*{II. CONSTITUTIONAL ISSUES}

Significantly, there have been few constitutional challenges to probation conditions. As a consequence, the law in this area is sparse. The 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. The challenges are few particularly in the area of scarlet letter conditions due to the rarity of their imposition. Nevertheless, with the current state of

\textsuperscript{73} Id. at 266-67.
\textsuperscript{74} Id. at 267.
\textsuperscript{75} The phrase 'scarlet letter' is derived from Nathaniel Hawthorne's classic of American literature, \textit{The Scarlet Letter} (1850).
\textsuperscript{76} Richard Bateman pled no contest on November 22, 1985, to one count of sexual abuse in the first degree. A second count of sexual abuse was dismissed. On May 20, 1987, the trial court suspended imposition of the sentence and placed Bateman on probation for a period of five years. In addition to the scarlet letter condition, the other conditions of his probation were (1) that he be incarcerated in the Multnomah County Jail for a period of one year and participate in and successfully complete a 30-day residential alcohol treatment program; (2) that he maintain full-time employment; (3) that he abstain from the use of any alcoholic beverages and prescription drugs/narcotics without notification from his doctor to defendant's probation officer; (4) that he participate in any sexual offender treatment program as directed by his probation officer; (5) that he submit to polygraph examination at his expense; (6) that he submit to random breath testing and/or urinalysis testing; (7) that he not return within ten blocks of his address; (8) that he have no contact with minors; and (10) that he be banned from parks, playgrounds, the zoo, school grounds or any place where children normally congregate. Judgment and Probation Order at 1-2, Oregon v. Bateman, No. A44654 (Or. Ct. App. June 15, 1987).
prisons and the attitudes of both the public and those within the criminal justice system, this type of restriction has the potential to be imposed with greater frequency.

Due possibly to the weakness of state constitutions, a preference for a federal forum, or tactical considerations, most challenges to probation conditions have been grounded in the Bill of Rights and the fourteenth amendment of the Constitution, depending upon whether there has been federal or state action. As such, the focus of this analysis will be upon those amendments which may reach and somehow affect the propriety of a scarlet letter condition.

Initially, it is necessary to explore the status of a probationer's constitutional rights. As referred to earlier, the rights of probationers are limited by conditions of probation which are desirable for purposes of rehabilitation. If probation conditions diminish constitutionally protected rights, they are tested by their necessity for making probation effective. Accordingly, it is recognized that "a probationer retains all civil liberties except those which are taken away as conditions of probation." Under this lenient standard, unless the terms of probation needlessly or viciously violate a constitutional right, they will most likely be upheld. Still, an unquestionable restriction upon an otherwise inviolable constitutional right will be subject to special scrutiny and require an explanation of why a lesser invasion was inappropriate. Thus, even if an abridgement is found, the analysis continues as to whether the condition fulfills the Consuelo-Gonzalez and Dominguez tests. The immediate discussion is limited to the constitutional aspect of the tests and the effect of scarlet letter punishment. The next section will examine the criminal law justifications for such a sanction.

A. Freedom of Speech

The first amendment to the United States Constitution guarantees freedom of speech. The United States Supreme Court has repeatedly found that the right of freedom of thought protected by the first amend-

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77 See COHEN & GOYAET, supra note 10, at 212-17.
80 State v. Culbertson, 29 Or. App. 363, 369, 563 P.2d 1224, 1229 (1977). See also Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945) (a probationer "retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.").
81 United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975).
82 See supra text accompanying notes 61-63.
83 U.S. CONST. amend. I provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
moment includes both the right to speak freely and the right to refrain from speaking at all. Early decisions, however, showed little inclination to extend this protection to probationers. By contrast, recent decisions have been much more sympathetic.

It may be argued that by requiring a probationer to place signs on the doors of his home and vehicle, he is compelled on a daily basis to announce to the rest of the world that he is a dangerous sex offender. It is as if he is required twenty-four hours a day to stand at an open air podium and declare to the public that he is a sexual deviant—a catharsis which may have little cleansing effect. As a result of this requirement, his right to freedom of speech, or in this case the right to refrain from speaking, is surely abridged.

Nonetheless, the only court considering this specific argument has found it untenable. In Goldschmitt v. Florida, the appellant argued that the trial court had infringed upon his first amendment rights by forcing him to broadcast an ideological message via a bumper sticker reading “CONVICTED D.U.I.—RESTRICTED LICENSE.” The court rejected this contention, finding that the message was far from ideological, that it was legitimate as a form of penance and a warning to other potential wrongdoers. Clearly, to be successful, the appellant has the onerous burden of proving that the condition is so unnecessarily restrictive that he is deprived completely of his right of expression, or, as in the Bateman case, his right not to express.

Although this may be true, an argument can be made that these house and car signs are much more burdensome on the offender than a bumper sticker. First, they are exceedingly larger and more visible to the public. Second, they are attached to more than a mere car bumper. Third, they contain an extremely inflammatory and stigmatizing message. These distinctions illuminate the undue harshness of the condition.

B. Freedom of Association

The first amendment does not explicitly mention freedom of association; however, the United States Supreme Court has recognized this freedom derived by implication from the explicitly stated rights of speech, press, assembly, and petition. The freedom of association is limited in scope and covers only the “right to join with others to pursue goals

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86 See Porth v. Templar, 453 F.2d 330 (10th Cir. 1971); In re Mannino, 14 Cal. App. 3d 953, 92 Cal. Rptr. 880 (1971).
88 Id.
89 Id. at 125.
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independently protected by the first amendment" such as political advocacy, literary expression, and religious worship. Furthermore, as noted earlier, the standard of review is not as rigid for a probationer whose constitutional expectations are lowered. It seems, as with freedom of speech, that the associational rights of a probationer are abridged only by severe and unnecessary infringements. However, a trend of success is developing for many probationers challenging such conditions on this ground.

Even with this lowered expectation, a scarlet letter punishment can still be said to infringe upon the freedom of association to such an extent as to completely eradicate any residual fragments which remain of this right. Requiring signs on the probationer's front door and car doors seriously limits any possible associations he may desire. For instance, the probationer may want to join a religious group in order to improve his ethical and moral standards; yet, it is difficult, if not impossible, to do so if he has to drive to a place of worship with sex offender warnings on his car. Furthermore, he cannot possibly invite religious members to his home because of the sign on his front door. This problem has ramifications which reach not only his religious affiliations but also into all other potential relationships having constitutional protection. It may be argued that the probationer need not drive, but can alternatively walk, ride in another's vehicle, or take public transportation in order to facilitate his freedom of association. However, it is obvious that this solution is weak since there will be situations in which none of these three alternatives is available. Hence, a substantial interference with this constitutional right is apparent, deserving of strong scrutiny from the reviewing court.

92 Strict scrutiny is the standard usually applied when government interference with freedom of association is apparent. The test involves an examination of whether the governmental interest is compelling and cannot be achieved through means less restrictive. See NAACP v. Alabama, 357 U.S. 449 (1958).
94 Id.
95 Yet, above this enthusiasm it should be remembered that courts will reach to find the intrusion insubstantial, halting the analysis early on. See, e.g., United States v. Albanese, 554 F.2d 543, 545-47 (2d Cir. 1977) (condition that probationer associate only with law-abiding citizens upheld); Malone v. United States, 502 F.2d 554, 556 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975) (probation including prohibition from participating in the American Irish Republican movement upheld); Porth v. Templar, 453 F.2d 330, 334 (10th Cir. 1971) (condition prohibiting probationer from activity urging violation of tax laws would be valid). If the intrusion is found excessively harsh, further analysis is necessary to determine if it can be justified under reasonable relationship considerations. For example, in Rodriguez v. State, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979), a requirement that a convicted child abuser not associate with children was upheld; however, a further restriction prohibiting marriage and pregnancy to avoid any possible future child contact was struck down. Clearly, the means do not always justify the ends.
C. Right to Privacy

Hinged upon the Constitution's fifth and fourteenth amendments' due process clauses is protection of the right to privacy. Since the Supreme Court is reluctant to find new fundamental rights and since there is no known fundamental right for a probationer not to be required to display his record, the restriction need only be rationally related to a legitimate governmental end. The possibility of striking down the condition is slim since the right of privacy has been extended only to limited types of conditions. In combination, this makes for little privacy protection. Moreover, the argument is not strengthened by the fact that a probationer's record is already public information.

Yet, however minimal the privacy right may be, it can be argued that the scarlet letter probation condition is not drawn sufficiently narrow, affecting more of Bateman's life and privacy interests than necessary. If it can be proven that the condition substantially infringes upon family life and personal relations, the reviewing court may apply strict scrutiny, requiring the government to show that its means are necessary and that it has a compelling interest. By requiring signs prohibiting children, the court has, in effect, barred this probationer for the next five years from getting married and having children or from having young relatives visit his home. As such, the condition may be said to unnecessarily infringe upon an area protected by the right to privacy.

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96 U.S. CONST. amend. V provides in pertinent part: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

97 U.S. CONST. amend. XIV provides in pertinent part: "[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

99 Cf. Paul v. Davis, 424 U.S. 693 (1976) (plaintiff's interest in reputation, by itself, was not a constitutionally protected liberty or property interest).
101 See, e.g., COHEN & GOBERT, supra note 10, at 254-55 (right of privacy extended to nonassociation conditions).
102 Cf. Zablocki v. Redhail, 434 U.S. 374 (1978) (the right to marry is viewed by the Supreme Court as fundamental; substantial interferences with that right will, therefore, not be sustained merely because they are rational).
D. Right to Work

Both under the federal and state Constitution's due process clauses, a person has a right to work in his chosen field of occupation.104 This right is not absolute and, once again, a probationer has a lowered expectancy of it. With a scarlet letter probation condition requiring such inflammatory warning signs on the probationer's car doors, a convict will have a difficult, if not impossible, task in finding or retaining employment. Few employers are willing to hire convicts due to their fear of the convict himself and the possible loss of business. Furthermore, the probationer may be in a specialized field of work which requires him to report to different locations and transport many tools with him, thus, a vehicle is imperative to his work. As a result, this interference with his right to work may be substantial enough to warrant invalidating the car signs.

E. The Taking Clause

Governments, both state and federal, have the right to take private property for public use provided that just compensation is paid.105 Two issues are important to the taking analysis: (1) whether there is a public use and (2) whether there is a taking or merely a regulation.

By placing a warning sign on the front door of a private residence and both doors of a car, it may be argued that the government has taken this property for public use. The Supreme Court has construed the requirement of public use quite broadly. In a recent case, it stated that "[t]he 'public' use requirement is... coterminous with the scope of a sovereign's police powers."106 So long as the government's use of its eminent domain power is rationally related to a conceivable public purpose, the public use requirement is satisfied.107 The governmental action need only further the community's general welfare.108 The signs are posted to warn the community; in other words, for their protection. Parents are supposed to caution their children to stay away in order to avoid further child molestation. Therefore, the signs embody a legitimate public purpose.

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104 Reference to the right to work in this section is separate and apart from state and federal legislation regarding the right to work involving union coercion. See, e.g., 29 U.S.C. § 164(b) (1982); Ga. Code Ann. § 34-6-6 (1982). Interference with the right to work under the fourteenth amendment is subject to minimal scrutiny by the court. See supra note 97; see also Nebbia v. New York, 291 U.S. 502 (1934). If the probation order demands full-time employment, it cannot rationally require scarlet letter signs. The two requirements are incompatible and, thus, irrational.
105 The fifth and fourteenth amendments limit the federal and state governments' power of eminent domain. See U.S. Const. amend. V and U.S. Const. amend XIV.
107 Id.
Assuming that there is a public purpose, the next issue to be considered is whether the signs are merely regulatory, requiring no compensation or a taking requiring compensation. Since the warnings are posted for only five years, there is no permanent physical occupation and, hence, no per se taking. However, there may be such a drastic reduction in the value of the owner’s property that a taking can still be found. By requiring a lessee-probationer to post the signs on his residence, the court may be causing a significant diminution in the value of the landlord’s property. Furthermore, neighboring properties will decrease in value, especially if the probationer desires to live in a family-oriented area. Thus, the government may be subject to lawsuits and required to pay for the public use of property because of this scarlet letter probation condition.

F. Vagueness

Where the conditions of probation are not clearly specified, the probationer may encounter difficulty in obeying them despite a good faith desire to do so. Since virtually no statute provides for a standard to be used in construing probation conditions, courts have taken a somewhat informal approach, “asking only whether common English usage would include the questionable conduct within the category of acts proscribed by the vague condition.”

The ramifications of a vague condition are not only of statutory, but also of constitutional proportions. Analogizing to statutes defining crimes, probationers have argued that the fifth and fourteenth amendments require that a condition of probation be stated with sufficient clarity to inform a person of ordinary intelligence of the conduct which is prohibited. Courts have declared that these amendments govern the required clarity but they do not agree upon the appropriate test to determine failure of the imposed condition due to vagueness.

110 See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (“While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).
111 “Indeed, some conditions are intentionally left vague to give probation authorities greater flexibility.” Cohen & Gobert, supra note 10, at 196.
112 Id.; see State v. Boggs, 16 N.C. App. 403, 192 S.E.2d 29 (1972). Another view is that since a probation “order involves the administration of criminal justice, the rule requiring penal statutes to be strictly construed is applicable.” Cohen & Gobert, supra note 10, at 196; see, e.g., Gaddis v. United States, 280 F.2d 334 (6th Cir. 1960); In re Osslo, 51 Cal. 2d 371, 334 P.2d 1 (1958); People v. Sutton, 322 Mich. 104, 33 N.W.2d 681 (1948).
A scarlet letter condition requiring that the offender “place upon his door of residence, in three-inch lettering, DANGEROUS SEX OFFENDER—NO CHILDREN ALLOWED”) and “on any vehicle he may operate he place signs on both doors that read DANGEROUS SEX OFFENDER—NO CHILDREN ALLOWED” may be challenged as unconstitutionally vague. First, the probationer may have more than one residence. If this is the case, must he place signs upon all of his front doors? Second, what size lettering is needed for the signs on the vehicle doors and on how many doors must he post it if the car is a four-door? Third, what does “any vehicle he may operate” include? If he is required on the job to use a forklift, is this a vehicle within the meaning of the condition? These questions are not really trivial when one considers their ramifications on the probationer’s life. For instance, an employer who gives him a job on a construction site will not be pleased when he places sex offender signs on the doors of his machinery.

G. Cruel and Unusual Punishment

The eighth amendment to the United States Constitution contains a prohibition against cruel and unusual punishment. Derived from the English Bill of Rights, the American drafters who adopted the phrase were primarily concerned with banning torture and barbarous methods of punishment. Since its adoption, the prohibition has been liberalized and broadened. Given its expansion, a convincing argument may be


Whether the condition will be found unconstitutionally vague depends not only upon the test used, but also upon the light in which it is being viewed. Since the question of clarity does not usually arise until after the condition has been violated, courts tend to deal with whether the alleged violation falls within the condition rather than whether the condition is unconstitutionally vague in the abstract. Although courts are becoming more receptive to vagueness challenges, they are still reluctant to invalidate the vague condition, especially those challenged as abstractly vague. The reluctance in this area may reflect a general judicial disinclination to adjudicate issues when a case or controversy has not yet arisen. On the other hand, courts often frown upon probationers who fail to obtain a judicial interpretation of a vague condition. Cohen & Gobert, supra note 10, at 198-99.

116 Id.
117 U.S. Const. amend. VIII provides that: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
119 In 1910, the Supreme Court, in Weems v. United States, 217 U.S. 349, 367 (1910), held that punishment for a crime should be proportional to the offense. Fifty years later, the interpretation of the eighth amendment was further broadened by the holding of Trop v.
made that requiring the posting of signs constitutes cruel and unusual punishment.

The first hurdle to overcome in order to successfully challenge the scarlet letter condition is the argument that probation is not in fact punishment within the meaning of the cruel and unusual punishment clause. It may be argued that probation has historically been considered an act of grace whereby the convict is allowed to avoid punishment as long as he adheres to its conditions. If he finds these conditions too harsh, he may either elect to take the traditional sentence or disobey the conditions causing imposition of the sentence. Thus, the most severe punishment facing a defaulting probationer is the revocation of probation and the imposition of the original sentence. Since the convict in this sexual abuse case faced five years prison and a $100,000 fine, which would certainly pass constitutional muster, it can be argued that the voluntary probation term is substantially less severe and, therefore, also constitutional.

However, if probation is not punishment, what is it? It is undeniably a reaction by the criminal justice system to a breach of the law which contains all or some of the elements of punishment. Also, as explained earlier, it is considered an alternative sentence. Although technically voluntary, for many convicts there is little choice but to take the probation and its conditions given the state of prisons and the attendant risks, especially when a child molester is incarcerated. In effect, prison means harassment, possible infliction of physical and mental pain and disease, or even death. As such, it may be erroneous and unfair to

...
characterize the choice of a convict as voluntary and, therefore, not punishment. In support, there are many recent cases which consider conditions of probation under contentions that they are unnecessarily harsh or cruel and unusual punishment.\footnote{125}

Although recognizing that probationers are entitled to some protection from cruel and unusual punishment, court decisions are extremely inconsistent in their application of this prohibition, upholding seemingly extreme conditions and striking down somewhat less intrusive ones.\footnote{126}

Unfortunately, the rare time an appellate court has examined a scarlet letter punishment for an eighth amendment violation, it upheld the trial court's decision imposing a bumper sticker warning on a drunk driving offender's car as a condition of probation. The court in the recent case of Goldschmitt \textit{v. Florida}\footnote{127} held that "the differences between the degrad-
ing physical rigors of the pillory and a small strip of colorful adhesive far outweigh the similarities. The mere requirement that a defendant display a 'scarlet letter' as part of his punishment is not necessarily offensive to the Constitution."\textsuperscript{128} It was just a reminder that the offender's conduct was legally and socially wrong.\textsuperscript{129} In the final analysis, the court found itself unable to hold the bumper sticker sufficiently humiliating to trigger constitutional objections.\textsuperscript{130} However, it did recognize that "such innovative dispositions can be carried to extremes which might offend constitutional standards."\textsuperscript{131}

With this caveat, there remains an argument that warning signs of a dangerous sex offender are cruel and unusual punishment because of their extremely humiliating impact. Not only must the sign be large enough to accommodate three-inch letters, but it also contains a strong message and must be posted on a residence and a car. Any sense of dignity the probationer may retain is completely erased. According to Justice Brennan, "even the vilest criminal remains a human being possessed of common human dignity."\textsuperscript{132} Thus, many Supreme Court cases recognize that a punishment which is so harsh as to be morally unacceptable to reasonable men\textsuperscript{133} and severely degrade human dignity\textsuperscript{134} is prohibited by the eighth amendment. This proscription includes both mental and physical pain.\textsuperscript{135}

### III. CRIMINAL LAW ISSUES

According to the \textit{Consuelo-Gonzalez} test, the assessment of a probation condition does not cease after a discovery of a constitutional infringement.\textsuperscript{136} Further analysis of its criminal law justifications is necessary. In order to fully understand these issues, it is important to begin this discussion by examining who is receiving probation and what criteria are used to best make the determination.\textsuperscript{137} A review of scientific studies on probation success, especially with sex offenders, is critical to this discussion. Nevertheless, the heart of the analysis is an evaluation of papers' in the vicinity of Westminster Hall like a sandwich-man's sign describing the culprit's transgressions." \textit{Id.} However, this case was overruled by United States \textit{v. Missouri Valley Constr. Co.}, 741 F.2d 1542 (8th Cir. 1984).

\textsuperscript{128} \textit{Id.} at 125.

\textsuperscript{129} \textit{Id.} at 126.

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Furman v. Georgia}, 408 U.S. 238, 273 (1972).

\textsuperscript{133} \textit{Weems v. United States}, 217 U.S. 349 (1910).

\textsuperscript{134} \textit{Furman}, 408 U.S. at 270-71.


\textsuperscript{136} \textit{See supra} note 61 and accompanying text.

\textsuperscript{137} \textit{See infra} notes 139-76 and accompanying text.
the justifications for the use of a scarlet letter probation condition. As discussed earlier, a probation condition must fulfill some key objectives to be valid. Thus, an indepth analysis is required of whether a scarlet letter condition can accomplish such goals as rehabilitation and protection of the public.

A. Eligibility

Since probation is statutory, the legislature will often restrict the class of defendants who are eligible. The factors most frequently taken into account are the nature of the offense committed, the manner in which the offense was committed, the nature of the offender, or the nature of the victim. However, some statutes do not specify any limitation on eligibility, leaving the matter to the judge's discretion. Of course, there are constitutional and statutory limitations upon this discretion, but "[b]y making probation a possible sentence, the legislature has directed courts to consider probation as a possible sanction."

In choosing the alternative, the courts under most statutes tend to apply a factor approach which examines a host of variables. Since these variables are numerous, only those relating more closely to the situation at hand will be considered. Given that rehabilitation is a primary goal of probation, the most crucial element to be weighed is the defendant's attitude towards the crime and rehabilitation. This can be at least

138 See infra notes 176-93 and accompanying text.
139 COHEN & GOBERT, supra note 10, at 35-64. Statutes taking into account the nature of the offense restrict probation based upon either the possible penalty or the particular crime. Exemplifying laws considering the manner of the crime are those which mandate a sentence when a handgun is used or when serious injury has resulted. With regard to the characteristics of the offender, statutes often specify eligibility in terms of whether the defendant has a prior conviction, a previous probation term, or certain personal characteristics. Lastly, the legislature may have taken into consideration the vulnerability of the victim based upon mental or physical incapacities due to age or retardation. Id.
141 COHEN & GOBERT, supra note 10, at 41. As a result, "[a] court's failure to do so may be reviewed as an abuse of discretion and reversible error", especially since defendants have a "right to have the court consider all available alternatives." Id. United States v. Hayward, 471 F.2d 388 (7th Cir. 1972); Sanchez v. State, 592 P.2d 1130 (Wyo. 1979). Furthermore, some authorities mandate that the judge choose the least restrictive alternative available to him under the statute. COHEN & GOBERT, supra note 10, at 43. See A.B.A. PROJECT ON STANDARDS FOR CRIM. JUST., Standards Relating to Sentencing Alternatives and Procedures § 2.2 (Approved Draft 1968); NAT'L ADVIS. COMMISSION ON CRIM. JUST. STANDARDS AND GOALS, Corrections, Standard 5.2 (1973); MODEL SENTENCING AND CORRECTIONS ACT § 3-102(3) (1979); MODEL PENAL CODE § 7.01(1) (Proposed Official Draft 1962).
142 United States v. Consuelo-Gonzalez, 521 F.2d 259, 264 (9th Cir. 1975).
partially determined through his ability to feel remorse, to admit responsibility, or to be truthful.\textsuperscript{144} The defendant's dangerousness is also a relevant factor.\textsuperscript{145} Incarceration may be the only appropriate sanction for those offenders who seriously threaten the public and are likely to repeat the offense. However, many commentators have questioned the court's ability to accurately predict future criminality.\textsuperscript{146} This leads to another important indicator, the defendant's prior criminal record.\textsuperscript{147} Most theories of punishment weigh heavily the past criminal record when determining if rehabilitation, deterrence, retribution, or incapacitation will be effectively accomplished through probation. Prior criminal acts are considered reliable indicators of future behavior.\textsuperscript{148}

In most cases, the defendant's medical condition is not a factor taken into account; however, a sex offender's medical condition and the assistance he could receive on probation as opposed to jail should probably be appraised by the sentencing court.\textsuperscript{149} Judges often consider the defendant’s use of alcohol and its relation to the crime, but the effect of this factor in sentencing hearings is not clear.\textsuperscript{150} Some studies show a significant correlation between a probationer's recidivism and chemical abuse, while others find no such relationship.\textsuperscript{151} The need for deterrence in the case of a sex offender is an especially pertinent consideration. Naturally, the assumption is that he needs to be incarcerated. However, some particularly well designed probation conditions may have a sufficiently onerous effect on the probationer to be an effective deterrent.

Of course, the nature and seriousness of the offense are often reviewed by the court.\textsuperscript{152} Minor offenses tend to receive probation more frequently, although there is an increasing percentage of felons being conditionally released.\textsuperscript{153} The legitimacy of using the seriousness of the crime has been challenged by those who believe rehabilitation and recidivism are not linked to this factor.\textsuperscript{154} Yet, the factor's use may be justified by the other objectives of punishment.


\textsuperscript{144} Cohen & Gobert, \textit{supra} note 10, at 46-48.
\textsuperscript{145} \textit{Id.} at 52.
\textsuperscript{146} \textit{Id.} In fact, the Model Sentencing & Corrections Act § 3-102(6) (1979) forbids the use of predictions unless based upon prior criminal acts.
\textsuperscript{147} Cohen & Gobert, \textit{supra} note 10, at 53-54.
\textsuperscript{148} See R. Hood & R. Sparks, Key Issues in Criminology 180 (1970).
\textsuperscript{149} Cohen & Gobert, \textit{supra} note 10, at 55-58.
\textsuperscript{150} \textit{Id.} at 58.
\textsuperscript{151} \textit{Id.; see Nat'l Inst. of Law Enf. & Cim. Just., Critical Issues in Adult Probation 37 (1979)}.
\textsuperscript{152} Cohen & Gobert, \textit{supra} note 10, at 61.
\textsuperscript{153} \textit{See infra} note 158 and accompanying text.
\textsuperscript{154} R. Hood & R. Sparks, \textit{supra} note 148, at 180-81.
The need for public protection is often cited as justification for the selection of incarceration over probation. 155 Although the public may be safer while the offender is imprisoned, there are problems with using incarceration in this way. First, it is difficult to predict who is actually dangerous to society. 156 Second, with the overcrowded status of prisons and lack of funds, the protection will be short-lived. The offender will receive parole or release quickly and it is unlikely that he has been provided with or has had the chance to profit from a rehabilitation program. 157 Third, the public can be effectively protected by the many conditions which may be placed on the probationer's action.

B. Felony Probation

Due to the fact that many states are operating under a liberal statute devoid of guidance, offenders who would be considered ineligible under other statutes are frequently receiving probation. These liberal statutes, along with the overcrowded penal system and the disillusionment at the supposed advantages of prison, have led to a huge increase in the use of probation for felons. 158 By contrast, probation was originally intended for offenders who posed little threat to society and were believed to be capable of rehabilitation. 159 This situation raises serious issues as to whether the structure of the current probation system can accommodate serious offenders given its original intent and supervisory set-up. Of specific concern to this Note is whether it is sensible and appropriate to put a child molester on probation. 160

155 COHEN & GOBERT, supra note 10, at 62.
156 Id. See infra text accompanying notes 158–75. See also Forst, Selective Incapacitation: An Idea Whose Time Has Come, 47 Fed. Probation 19, 21 (Sept. 1983).
157 Cf. Heijder, Can We Cope With Alternatives?, 26 Crime & Delinq. 1 (Jan. 1980) (the author suggests that one solution is to shorten all prison sentences considerably).
159 Id.
160 Based on analysis of recidivism rates, the Rand Corporation study concluded that "felony probation presents a serious threat to public safety." Id. at 57. Only 35% of the felony probationers in the study's sample managed to remain on the "straight and narrow." Id. In other words, "65% . . . were rearrested and 53% had official charges filed against them." Id. Of these charges, 75% involved violent crimes. Id. Further, it took violent offenders a median time of only eight months to re-offend. Id. at 58. Fortunately, a more recent study done by Gennaro F. Vito, Ph.D. at the University of Louisville describes a brighter future for felony probation, finding a rearrest rate of approximately 22% and that most repeat offenses were not of the violent type. Vito, Felony Probation and Recidivism: Replication and Response, 50 Fed. Probation 17, 21-22 (Dec. 1986). The disparity in recidivism findings is not unusual and the results should not be relied upon blindly.

Giving some credibility to the recidivism rates and recognizing the lack of funding for probation programs, it should be realized that there is a severe crisis facing society—a
Society's intolerance of deviant sexual behavior led to the belief that sexual deviants must be institutionalized to protect the community. Recent studies, however, indicate that sexual deviance may result from a combination of biological and mental disorders. This discovery draws into question the effectiveness of imprisoning such offenders. In light of the evidence suggesting that prison neither deters nor rehabilitates mentally disturbed sex offenders, legal authorities have been forced to consider alternatives such as probation with psychiatric therapy as a condition.

As with most statistical studies, there is little agreement among experts on whether sex offenders are serious recidivists. Early research suggested that sex offenders did not have a tendency to repeat their crimes. However, there has been some doubt about the methodology of these studies due to the fact that it is difficult not only to detect sexual offenses but also to prosecute them. Turning to a recent study by Romero and Williams, it was found that of 231 men on intensive probation supervision, some with psychiatric therapy and some without, only 26 (11.3%) were rearrested for another sex offense. Interestingly, pedophiles had the lowest recidivism rate of 6.2%. The most important aspect of the study was the finding that group psychotherapy had an insignificant effect on recidivism. This may indicate that probation is not in itself a faulty concept but that the mode of treatment for sex offenders may be to blame. However, in conflict with these research findings, Freeman-Longo and Wall estimate recidivism rates for untreated sex offenders to be between 35% and 80%. Given the state of uncertainty in this area, the success of felony probation for sex offenders is best characterized as having limited potential.

Further, in examining and understanding the potential for recidivism failing prison system and a potentially unsuccessful probation system. The Rand study suggests that the system lacks a spectrum of sanctions to match the spectrum of criminality. Both studies recommend intensive surveillance programs as an option restrictive enough to ensure public safety.

162 Id.
164 Id.
165 Id.
166 Id. at 60.
167 Id.
170 Id.
of pedophiles, it is essential to review the prominent causal theories and prospects for rehabilitation. Many theories have been advanced in this area, most identifying one or two mechanisms in order to explain the phenomenon of sexual deviance.\(^{171}\) The consensus seems to be that the offenders themselves were victims of sexual abuse and trauma at one time in their lives, somehow causing them to perpetuate such behavior.\(^{172}\) Moreover, existence of prior offenses in a child molester's history is found to be the strongest indication of the likelihood of re-offense.\(^{173}\)

Out of these theories and discoveries comes a common and uneasy conclusion—there is no cure. Sexually deviant behavior is deeply ingrained and most offenders need extensive treatment.\(^{174}\) Thus, it is extremely difficult to know what really is the best way to deal with sex offenders and whether or not society should take the chance of putting them back on the street.

Society, however much it desires, cannot put a child molester in a jail and throw away the key. The sentencing structure, the crowded state of prisons, and the lack of funding causes an attenuation of prison terms and a decrease in the number of rehabilitative prison programs, thereby putting untreated offenders back on the streets in a short period of time. Furthermore, some studies have suggested that "for many offenders, probation is likely to be at least as effective in preventing recidivism as an institutional sentence."\(^{175}\) In short, the risks of both imprisonment and probation are significant.

C. Rehabilitation

Whether warnings required on the front door of a residence and on both car doors exclaiming "DANGEROUS SEX OFFENDER—NO CHILDREN ALLOWED" have any positive effect on the risk of recidivism is arguable. As stated earlier, the primary purpose of the majority of probation statutes is rehabilitation. Accordingly, the Consuelo-Gonzalez test requires that a probation condition must be reasonably related and


\(^{172}\) Id. at 102-04. Other theories identify as characteristic an unusual pattern of sexual arousal toward children, a blocking of social and heterosexual relationships and that alcohol is a disinhibiting factor. Id. at 117-18. Offenders are often found to have similar personalities, developmental trauma, and psychological deficits. Brief for Appellee at 53, Oregon v. Bateman, No. A44854 (Or. Ct. App. Nov. 1987).

\(^{173}\) S. Araji & D. Finkelhor, supra note 171, at 130-42.

\(^{174}\) Freeman-Longo & Wall, supra note 169, at 60. These researchers have found that imprisonment or probation alone are not enough. They recommend an extensive inpatient and outpatient program focusing upon "relapse prevention" by changing thought and behavior patterns. Yet, they admit to a 50% drop-out rate and a 15% after-treatment recidivism rate. Id.

\(^{175}\) R. Hood & R. Sparks, supra note 148, at 186.
contribute significantly to both the rehabilitation of the accused and the protection of the public. ¹⁷⁶ Thus, to be valid, the scarlet letter condition must aid in rehabilitating the offender, protect the public, and avoid unnecessarily diminishing a constitutionally guaranteed right. ¹⁷⁷ If it can be proven that the condition is narrowly tailored and has a rehabilitative and protective effect, it will be upheld by a reviewing court.

To decide if there is a rehabilitative purpose to the condition, it is necessary to know how the courts define rehabilitation. Unfortunately, there is no established definition among them, the result of which is a very vague standard. ¹⁷⁸ For this reason, few conditions are struck down on rehabilitation grounds. Furthermore, only a few courts have articulated any rehabilitative-related limitations on probation conditions. ¹⁷⁹

There are three emerging methods of rehabilitation used most often by the courts. They focus either upon "the offender's mental processes, physical activity, or social situation."¹⁸⁰ The first type is designed to assist the offender in reforming the thinking patterns which engendered the criminal behavior.¹⁸¹ The use of psychological counseling is the favored means, especially for an offender whose crime was prompted by mental health problems. The second method concentrates more closely upon the physical activity involved in the crime.¹⁸² For instance, drunk drivers may be ordered to refrain from drinking. The third technique attempts to achieve rehabilitation by manipulating or eliminating the

¹⁷⁶ United States v. Consuelo-Gonzalez, 521 F.2d 259, 264 (9th Cir. 1975).

¹⁷⁷ Id.

¹⁷⁸ Some courts find that rehabilitation is accomplished by any condition which sufficiently reforms the offender so that he will not repeat the crime. Russell v. State, 342 So. 2d 96 (Fla. Dist. Ct. App. 1977). The ABA agrees with this approach stating that "conditions imposed by the court should be designed to assist the probationer in leading a law-abiding life." Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979) (quoting INST. JUD. ADMIN., Standards Relating to Probation, § 3.2(b) (1970)). Other courts seemingly require more from a condition by defining rehabilitation as "the process of restoring an individual (as a convict, mental patient or disaster victim) to a useful and constructive place in society through some form of vocational, correctional, or therapeutic retraining or through relief, financial aid, or other reconstructive measure." State v. Muggins, 192 Neb. 415, 420, 222 N.W.2d 289, 292 (1974). From these definitions it is easy to see how virtually any probation condition can be justified.

¹⁷⁹ In striking down a curfew condition, the Supreme Court of Louisiana found that "a condition so harsh that the probationer is destined for failure" serves no purpose. State v. Carey, 392 So. 2d 443 (La. 1981). The Fifth Circuit requires that probation conditions must be "tailored to meet the special problems of particular offenders." Note, Judicial Review of Probation Conditions, 67 COLUM. L. REV. 181, 187 (1967). Lastly, the leading California case articulates the necessity that the condition be related to the crime, the criminal conduct, and future criminality. People v. Dominguez, 256 Cal. App. 2d 623, 64 Cal. Rptr. 290 (1967).

¹⁸⁰ COHEN & GOSERT, supra note 10, at 183.

¹⁸¹ Id.

¹⁸² Id.
social situation which was thought to prompt the criminal activity. As with the first method, these conditions appear targeted at the origins of the criminal activity and not just the activity itself. Limits on the offender's physical location and association with persons likely to encourage crimes are the most frequent examples of this technique.

At first glance, the scarlet letter probation condition seems to fall within the third method; however, further examination proves that it is quite different. As with most of these types of conditions, its aim is to keep the offender away from a situation which may tempt him into committing the same or similar crimes. The difference lies with the fact that unlike most disassociation cases, the offender is not merely someone who made a bad decision but someone who is psychologically deviant; those who he must avoid are to be regarded not as troublemakers but as innocent victims. As such, the condition's primary concern is not with the probationer's rehabilitation but with protection of children and punishment of the offender. Thus, the condition treats the symptoms rather than the causes.

Although it is clear that curing a repeat sex offender is a difficult, if not impossible task, the use of warnings can hardly be characterized as an effort to reform his behavior. The root of a child molester's problems are psychological and recidivism is highly possible. In order to halt the criminal behavior, it is critical to treat him in a medical setting. A more logical, scientific and narrowly-tailored approach would be to place him in an intensive probation supervision program requiring fulltime therapy. If the end to be reached is to create a law-abiding citizen, scarlet letter conditions are not the appropriate means.

Furthermore, the third method is traditionally used to make it easier on the probationer to live a normal lifestyle encouraging healthy activities such as a career and respectable friendships. A dangerous sex offender warning requirement can hardly be said to accomplish this objective. Employment, housing and friends will be extremely difficult to acquire and maintain. A normal lifestyle is impossible with signs to constantly warn the general public and the offender that he is far from the average human being. The task of learning how to live decently and harmoniously in society will become frustrating and even psychologically harmful. Such a condition may backfire and actually encourage the deviant behavior due to a child molester's low tolerance for stress. Given its harshness, he is destined for failure and compliance then becomes the sole aim. Even though the court in Goldschmitt found it healthy for a

183 Id.

184 For an excellent explanation and evaluation of intensive supervision programs across the country, see Byrne, The Control Controversy: A Preliminary Examination of Intensive Probation Supervision Programs in the United States, 50 Fed. Probation 4 (June 1986).

convicted drunk driver to be constantly reminded through a bumper sticker that his behavior was legally and socially wrong, they were dealing with a relatively healthy person capable of understanding right from wrong. In addition, the bumper sticker is unlikely to have an effect upon any major aspects of the offender's life given the general empathetic attitude of society toward drinking and driving. Hence, the cases are easily distinguished and it is not difficult to recognize the risks of a scarlet letter condition in such a volatile situation as the one at hand.

D. Protection

If this probation condition cannot be justified upon rehabilitative grounds, it is unlikely to withstand review, even if it can be said to protect the public. A rehabilitative effect should intrinsically discourage the child molester's tendencies and in this way the rehabilitative and protective objectives become linked. If the condition does not rehabilitate, it will have little chance at assisting the accused in making the correct decision when faced with a threatening situation. His compulsive behavior remains unchanged and the warning signs will not be enough to curtail him.

Assuming arguendo that the condition has some rehabilitative attributes, the next step is to determine whether it really results in protection of children. If all parents were diligent enough to teach their children to stay away from over-friendly men and houses and cars with sex offender signs on them, it could be said to accomplish its goal. However, all parents do not take the time to educate their children. Furthermore, children who cannot yet read will be unable to distinguish between what is and is not a warning sign; for instance, many cars have advertising signs on their doors. Parents cannot accompany their children and protect them at all times. Nor do many children follow or understand all instructions they are given so that even if they are aware of the danger or are able to read, we cannot be sure they will be protected. Child molesters are creative and able to design innovative methods to lure children into their net. In this situation, if he is determined, all he need do is walk down the street and become anonymous. Furthermore, if there is any protective element to the probation condition, it is extinguished when the probation term ends. Thus, the condition fails the protective part of the test. The test should have been tailored more closely to those it was trying to protect. Since children are so vulnerable and an untreated child molester so dangerous, the only solution would be to professionally educate the children and enroll the offender in an intensive probation supervision program so that he may be monitored at all times while receiving rehabilitative therapy.
E. Punishment

The condition of probation requiring signs to be posted on the convict's door is reflective of the exposure type of punishments condemned many years ago. These punishments include such things as simple exposure, the pillory and branding. The main purpose of these punishments was to identify and humiliate the offender so that he would always carry with him a badge of shame. Likening the punishments to amputations, one commentator has described them as exemplary and reflective. The foremost justifications for such reflective punishments are deterrence, protection of the public, and vengeance. Most important is the recognition that "rehabilitation and reform seem[] to be contradicted by the penalty itself. Rehabilitation, making a man whole, is literally foreclosed by the punishment." The scarlet letter condition of probation is easily identified with the described punishments. Accordingly, its purpose is also to punish by humiliation and degradation. The progression away from the underpinnings of such punishments exemplifies society's distaste with humiliation as a sole justification. Society has for centuries regarded this attitude toward punishment as uncivilized. Yet, today we are faced with a probation condition which is indistinguishable in both form and motive from those primitive punishments we have proscribed. Maybe the Indiana Supreme Court was wrong in 1893 when it declared that the phrase "cruel and unusual" was a prohibition intended to forbid excesses which "were of a time far from which our civilization has grown."

From an historical perspective, it is apparent that the scarlet letter condition has a purposeful and deep punitive effect. However, courts have

186 In cases of simple exposure, offenders were often shown to the town with an object reflecting their crime. The most common object used was a notice attached to the prisoner's breast with the offense for which he was punished written on it. A pillory was a miniscaffold attached to the wall of the town hall. It allowed the offender to be exposed to the public so that they may participate in the punishment by throwing rotten fruit, mud, or dung at him. An extremely severe punishment was that of branding which stigmatized its bearer as a person who had once mounted a scaffold. Branding began by marking or scaring someone on an exposed area such as the face or shoulder but gradually changed to less visible marks on the ear or ball of the thumb. Interestingly, "[t]he gradual change from more visible marks to less visible ones implies a slight increase or revulsion towards this penalty, because the result of branding was made less public." P. SPIERENBURG, THE SPECTACLE OF SUFFERING 69-70 (1984).

187 Id.


189 Id.

190 Id. at 52.

found that, as a primary purpose of a condition, a punitive effect is impermissible.\textsuperscript{192} After concluding in the past analysis that this condition is neither rehabilitative nor protective, it is difficult to rationalize that its primary purpose is anything but punitive.\textsuperscript{193} The imposition of such a condition is something that the desperate situation of the prison system cannot justify.

IV. CONCLUSION

A scarlet letter probation condition fails in both the constitutional and criminal law areas. It sufficiently abridges some of the probationer's constitutional rights, at the least to subject it to special scrutiny, if not to completely invalidate it. Further, the probation condition by its nature neither rehabilitates the offender nor protects the public. A child molester is not merely a criminal who knows that he is doing wrong, he is a mentally ill sex offender. As such, the requirement for signs on his doors has no rehabilitative benefit. In fact, it may achieve just the opposite, pushing the offender further into a criminal lifestyle. In addition, protection of the public is a worthy but illogical objective, since the victims are innocent children not knowledgeable adults, the signs are temporary, and the molester can still become anonymous.

The scarlet letter punishment has not been used for many years due to its humiliating nature. Since the motivation for its use today as a probation condition is identical, the condition is impermissible. Furthermore, the overcrowded state of prisons cannot be the sole ground for its justification. If this were so, any tortuous penalty would be allowable.

However, the solution in a case like Mr. Bateman's is difficult to formulate. Under the current state of knowledge, sex offenders should be given the potential benefits of scientifically-tailored programs and intensively monitored supervision in a hospital-type setting. In the long-term and on a broader basis, society, the justice system, and the legislatures are going to have to explore, with greater enthusiasm, legitimate alternatives to incarceration which may be utilized so that prison space can be reserved for violent criminals. If this message is not received and effectively responded to, significant erosion of our criminal justice system is inevitable.

LEONORE H. TAVILL


\textsuperscript{193} The trial record is reflective of the punitive motivation of the judge in imposing the sentence. Speaking of child molesters, the court stated: "It is my feeling that we should probably dye them green, or something. . . ." Record at 15-18, Bateman (No. C 85-10-34220).