The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions

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COMMENT

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INTRODUCTION

There is a crisis in our criminal justice system. Although statistics indicate that crime rates are down in the country as a whole, the American people, fed daily reports of local murders and rapes and criminals getting "off" on "technicalities," perceive crime as a major threat to their security. Expressing dissatisfaction with the criminal courts and law enforcement in general, the American people have insisted that the nation as a whole get tougher on crime.

Politicians, who are quick to pick up on the public's dissatisfaction, have fed the frenzy. Looking for a quick fix, they have implemented mandatory sentencing statutes, especially for

1. See Sara Sun Beale, What's Law Got to Do with It? The Political, Social, Psychological, and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law, 1 BUFF. CRIM. L. REV. 23, 44 (1997) (noting that rates of major crimes, including murder, rape, robbery, aggressive assault, burglary, larceny, and auto theft, dropped 21% between 1975 and 1994); Neil A. Lewis, Crime Rates Decline; Outrage Hasn't, N.Y. TIMES, Dec. 8, 1993, at B6 (reporting that the FBI's 1993 semiannual statistics showed that crime dropped 5% in the first six months of the year as compared to the same period the year before, and that the rate of violent crime dropped 3%).


5. See generally Benekos & Merlo, supra note 3, at 3 (discussing how the new mandatory life imprisonment statutes for third-time felons is a product of political manipulation of fear of crime); Chernoff et al., supra note 4, at 527 (discussing the role politics plays in the "war against crime"); Michael G. Turner et al., "Three Strikes and You're Out" Legislation: A National Assessment, FED. PROBATION, Sept. 1995, at 16, 19 (discussing how political maneuvering is the main impetus of "three-strikes" legislation).

6. For some examples at the federal level, see 18 U.S.C. § 924(c)(1) (1994) (requiring, after a second conviction, a mandatory 20 year sentence for using a weapon during violent or drug related crime); 21 U.S.C. § 844(a) (1994) (requiring a mandatory five year sentence for possession of five grams of crack-cocaine). For some examples at the state level, see CAL. PENAL CODE § 1192.7 (West 1998) ("three-strikes" legislation); GA. CODE ANN. § 17-10-6.1 (1997) (requiring mandatory minimum sentence of 10 years
For armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, or aggravated sexual battery convictions; N.C. GEN. STAT. §§ 15A-1340.10-.23 (Supp. 1996) (explaining the process of structured sentencing whereby a defendant is categorized according to his offense and his criminal history, and imposing minimum and maximum sentences for each particular category). For an argument against mandatory minimum sentences, see generally Henry Scott Wallace, Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde, FED. PROBATION, Sept. 1993, at 9.


13. See id. at 1886-89.

14. The term “scarlet letter” is based on Nathaniel Hawthorne's novel The Scarlet Letter, in which Hester Pryne, the heroine, is forced to wear a scarlet “A” on her dress, proclaiming her an adulteress. See NATHANIEL HAWTHORNE, THE SCARLET LETTER 58 (Chatham River Press 1984) (1850). It is not clear who first applied the term to shaming
stickers on their cars, or post signs in their yards proclaiming their guilt.\textsuperscript{15} Other conditions force probationers to publish apologies in local newspapers.\textsuperscript{16} The effects of these conditions, both on the probationers and on society at large, remain unclear.\textsuperscript{17} Also unclear is whether such scarlet-letter probation conditions are even constitutional. Courts have been unwilling to define the constitutional rights of probationers and to analyze the constitutionality of scarlet-letter probation conditions.\textsuperscript{18}

Scarlet-letter probation conditions are interesting not only because they are unusual but also because they illustrate some of the problems and inconsistencies of probation law.\textsuperscript{19} This Comment, therefore, not only analyzes the validity of scarlet-letter probation conditions under current law, but also gleams some insight into how to improve this area of the law. Part I looks at cases in which scarlet-letter probation conditions have been challenged in the state courts, both successfully and unsuccessfully.\textsuperscript{20} It discusses various analyses of these conditions, noting the courts' assumptions and different standards of review.\textsuperscript{21} Part II examines the idea of shaming as

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\textsuperscript{15} See, e.g., People v. Hackler, 16 Cal. Rptr. 2d 681, 682 (Ct. App. 1993) (reviewing trial court's requirement that defendant wear a T-shirt proclaiming he was on felony probation for theft); State v. Burdin, 924 S.W.2d 82, 84 (Tenn. 1996) (reviewing trial court's decision to order the defendant to display a sign in his front yard proclaiming himself a child molester).

\textsuperscript{16} For a discussion of various scarlet-letter conditions, see infra notes 45-174, 331-40 and accompanying text.

\textsuperscript{17} See People v. Johnson, 528 N.E.2d 1360, 1362 (Ill. App. Ct. 1988) (noting that the court could not determine the psychological effects on the defendant of a forced public apology); Burdin, 924 S.W.2d at 87 (noting that the effects of a scarlet-letter probation condition are "unforeseen and unpredictable"). For a discussion of these cases, see infra notes 116-23 and accompanying text (discussing Johnson) and infra notes 165-74 and accompanying text (discussing Burdin).

\textsuperscript{18} Until recently the courts have been unwilling to hear challenges to probation conditions. See infra notes 290, 483-500 and accompanying text. Even today, not all courts consider a probationer's constitutional rights when analyzing the legality of a probation condition. See, e.g., infra notes 536-43 and accompanying text.

\textsuperscript{19} It is unclear why judges are now more likely to use shaming penalties. Perhaps it is general frustration with probation as a method of rehabilitation that has led judges to create these new shaming conditions. See infra notes 509-30 and accompanying text (discussing problems with probation as rehabilitation and the trend toward viewing probation as punishment).

\textsuperscript{20} See infra notes 37-177 and accompanying text.

\textsuperscript{21} See infra notes 45-174 and accompanying text.
punishment, discussing the Supreme Court's current definition of punishment as well as its standards for what constitutes cruel and unusual punishment. Applying these standards to scarlet-letter probation conditions, this Comment argues that such conditions do not violate the Eighth Amendment.

Because scarlet-letter probation conditions compel probationers to "speak" of their convictions, Part III reviews the development of the First Amendment right not to speak, concluding that current law forbids both compelled beliefs and facts. Part IV discusses probation law, examining older theories of probation that courts used to justify their refusal to review probation conditions, and then analyzing how the primary purposes of probation are now changing. Part IV then addresses both old and new standards for reviewing probation conditions, dividing the different tests into three main categories.

Part V addresses the problem with current standards for reviewing the constitutionality of probation conditions: They do not adequately protect the probationer's constitutional liberties. The Comment proposes a standard that requires the trial courts to explain their reasons for imposing special probation conditions and that requires reviewing courts to consider the probationer's liberty interest in their analysis of probation conditions. This standard, however, does not adequately allow appellate courts to review scarlet-letter probation conditions because of the difficulties in narrowly tailoring compelled speech.

Part V thus speaks to the question of how to analyze a compelled speech challenge to scarlet-letter probation conditions. It argues that such conditions are ideological messages and perhaps should be struck down for this reason. Because courts probably will not embrace this line of reasoning, however, the Comment considers three approaches for ensuring that a scarlet-letter probation

22. See infra notes 178-287 and accompanying text.
23. See infra notes 288-359 and accompanying text.
24. See infra notes 360-472 and accompanying text.
25. See infra notes 473-567 and accompanying text.
26. See infra notes 483-500 and accompanying text.
27. See infra notes 501-30 and accompanying text.
28. See infra notes 531-67 and accompanying text.
29. See infra notes 568-93 and accompanying text.
30. See infra notes 594-604 and accompanying text.
31. See infra note 605 and accompanying text.
32. See infra notes 605-31 and accompanying text.
33. See infra notes 607-18 and accompanying text.
condition is as narrowly tailored as possible. The Comment concludes that the proper approach is to require appellate courts to scrutinize carefully a scarlet-letter probation condition that is extremely long in duration, that might endanger the defendant’s safety, or that contains content that states more than bare facts. Such a test allows for flexibility in designing probation conditions, but still affords probationers adequate constitutional protection.

I. STATE COURT CHALLENGES TO SCARLET-LETTER PROBATION CONDITIONS

As scarlet-letter probation conditions have become more common, so too have challenges to them at the appellate level become commonplace. So far, only six state courts—California, Florida, Georgia, Illinois, New York, and Tennessee—have ruled on the legality of these conditions, and only three have considered the constitutionality of the measures. Looking at these cases in turn, this Part will explore the different analyses courts have employed when considering the validity of these provisions. As will be seen, some courts have invalidated scarlet-letter conditions, though only one has done so on constitutional grounds.

A. California

In People v. McDowell, a defendant convicted of his third shoplifting offense challenged a probation condition requiring him not to leave his house unless he was wearing tap shoes. Defendant

34. See infra notes 621-31 and accompanying text.
35. See infra notes 630-31 and accompanying text.
36. See infra notes 630-31 and accompanying text.
37. See infra notes 45-76 and accompanying text.
38. See infra notes 77-103 and accompanying text.
39. See infra notes 104-15 and accompanying text.
40. See infra notes 116-35 and accompanying text.
41. See infra notes 136-47 and accompanying text.
42. See infra notes 165-74 and accompanying text.
43. Although a challenge to a scarlet-letter probation condition has come before the Oregon Court of Appeals, the court ruled that the issue was not within its scope of review. See State v. Bateman, 771 P.2d 314, 318-19 (Or. Ct. App. 1989) (en banc); infra notes 160-64 and accompanying text. North Carolina is currently considering a challenge. See State v. Mewborn, No. COA98-28 (N.C. Ct. App. filed Feb. 28, 1998); infra notes 148-59 and accompanying text.
44. See People v. Hackler, 16 Cal. Rptr. 2d 681, 686-87 (Ct. App. 1993); infra notes 57-76 and accompanying text.
45. 130 Cal. Rptr. 839 (Ct. App. 1976), overruled on other grounds by People v. Welch, 851 P.2d 802, 808 (Cal. 1993).
46. See id. at 843.
argued that the condition was a form of cruel and unusual punishment, and therefore unconstitutional, because it was "tantamount" to having a sign around his neck stating, "I am a thief." 47

The California Court of Appeal decided that this argument was unconvincing, noting that the defendant had offered no support for his supposition that wearing tap shoes would notify the public that he was a purse-snatcher. 48 The court maintained that "[m]erely because a condition is out of the ordinary does not make it constitutionally unreasonable." 49 It determined that the probation condition was related to the defendant's crime, to his rehabilitation, and to the safety of the public. 50 It also decided that the condition would deter the defendant from snatching a purse in the future by reminding him that he was on probation. 51 Nevertheless, the court of appeal remanded the case to the trial court because the probation condition was too imprecise. 52 In an unusual analysis, the court wondered whether the condition meant that the defendant had to wear the tap shoes only while leaving the house—rendering the condition ineffective—or whether he had to wear them at all times while out of the house—meaning that he could not participate in any athletic activities. 53

Although commentators typically cite McDowell when discussing scarlet-letter probation condition cases, 54 the case differs from other cases in that the admission of guilt in McDowell was not in writing. 55 Because the average person probably would not not

47. Id.
48. See id.
49. Id.
50. See id.
51. See id.
52. See id.
53. See id.
55. Compare McDowell, 130 Cal. Rptr. at 843 (requiring the defendant to wear tap shoes as a probation condition), with Goldschmitt v. State, 490 So. 2d 123, 124 (Fla. Dist. Ct. App. 1986) (requiring the defendant to place a bumper sticker on his car as a probation condition), People v. Johnson, 528 N.E.2d 1360, 1361 (Ill. App. Ct. 1988) (requiring as a condition of probation that the defendant place an advertisement in a newspaper with her mug shot and an apology), and State v. Bateman, 771 P.2d 314, 316 (Or. Ct. App. 1989) (en banc) (requiring the defendant to post a sign in his yard as a condition of probation).
presume that a person wearing tap shoes is a convicted thief, this probation condition is arguably not a scarlet-letter condition at all. The McDowell court did not address the legality of a probation condition that explicitly proclaims a defendant’s guilt.

Seventeen years later, though, the California Court of Appeal addressed this issue. In People v. Hackler, the defendant was convicted of petty theft when he and another man stole two twelve-packs of beer from a store. As a condition of his probation, Hackler was required to wear a T-shirt whenever he left his home that stated on the front: “My record plus two six-packs equals four years,” and on the back, “I am on felony probation for theft.” He was also required to report to the court daily until he found work. Hackler challenged the probation condition on the grounds that it was “vague, overbroad, and not reasonably related to the goal of rehabilitation.”

The California Court of Appeal considered both the state probation statutes and the state constitution in its analysis of the legality of the T-shirt probation condition. The court first noted that trial courts have broad discretion in creating reasonable probation conditions that promote rehabilitation or protect public safety. This discretion, however, “is not boundless,” but is limited by both the California Penal Code and Constitution. If a probation condition forces the defendant to waive his constitutional rights, then that condition must be “narrowly drawn.”

56. See McDowell, 130 Cal. Rptr. at 843.
57. 16 Cal. Rptr. 2d 681 (Ct. App. 1993).
58. See id. at 682.
59. Id. Evidently the trial court mistakenly thought that the defendant had only stolen two six-packs, not two twelve-packs. See id. at 682 n.2.
60. See id. at 682.
61. Id. at 683.
62. See id. at 686-87.
63. See id. at 686 (citing In re Bushman, 463 P.2d 727, 732 (Cal. 1970)).
64. Id. (quoting People v. Burden, 253 Cal. Rptr. 130, 130 (Ct. App. 1988) (quoting People v. Keller, 143 Cal. Rptr. 184, 187 (Ct. App. 1978))). The opinion did not mention whether the challenge was made under the California State Constitution or the United States Constitution.
65. The U.S. Supreme Court has never spoken on the exact scope of probationers’ constitutional rights. The Tenth Circuit has described a probationer’s rights as less than that of the ordinary citizen: “[The probationer] forfeits much of his freedom of action and even freedom of expression to the extent necessary to successful rehabilitation and protection of the public programs.” Porth v. Templar, 453 F.2d 330, 334 (10th Cir. 1971).
66. See infra notes 531-67 and accompanying text (discussing various standards for analyzing legality of probation conditions). This Comment considers only First and Eighth Amendment challenges to certain probation conditions; a discussion of all the possible constitutional challenges to probation
condition is overbroad, "it is not reasonably related to [the] compelling state interest" and is therefore unconstitutional. Because the condition infringed on Hackler's right to privacy under the California Constitution, the condition had to meet the "narrowly drawn" standard.

The primary concern of the court of appeal was that the trial court's true intention was not to rehabilitate but to humiliate the defendant, as evidenced by the trial judge's description of the probation order as "going back ... to the era of stocks," and the judge's statement that the defendant "would 'become a Hester Prin [sic]." The court also was concerned that the scarlet letter made it difficult, if not impossible, for Hackler to meet another condition of probation—obtaining steady employment.

The court of appeal then reviewed McDowell, determining that in Hackler's case "the court below did precisely what the McDowell court hinted was impermissible: it literally hung a sign around Hackler's neck publicly identifying him as a thief." Although the court of appeal stated that the probation condition had some connection with Hackler's future criminality, it believed that relationship "so incidental" as to be unreasonable. Although the condition arguably would have made it more difficult for Hackler to

66. See Hackler, 16 Cal. Rptr. 2d at 686. It is easier to discuss what kinds of speech are not protected under the First Amendment than it is to discuss what kinds of speech are protected. In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the Supreme Court listed several categories of speech that are not protected under the Constitution—"the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words." Id. at 572. This categorical approach, however, has "largely been discredited and abandoned." RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 3.04[2][a] at 3-101 (3d ed. 1994). Obscenity is the one class of speech for which the Court still reduces First Amendment protection on the basis of subject matter alone. See id. § 3.04[2][b], at 3-102. The "default" standard that the Court will apply when analyzing a content-based regulation of speech is strict scrutiny, see id. § 3.03[1][a], at 3-82, though for certain kinds of speech the Court has devised different tests for content-based regulation, see id. § 3.03[1][b]-[c] at 3-82 to 3-83. The government always must be viewpoint neutral in its regulation of speech. See id. § 3.03[2][a][ii] at 3-85.

67. Hackler, 16 Cal. Rptr. 2d at 686 (quoting Burden, 253 Cal. Rptr. at 130-31 (quoting People v. Mason, 488 P.2d 630, 635 (Cal. 1971) (Peters, J., dissenting))).

68. See CAL. CONST. art. I, § 1.

69. See Hackler, 16 Cal. Rptr. 2d at 686; see also Burden, 253 Cal. Rptr. at 130-31 (discussing the "narrowly drawn" standard).

70. Hackler, 16 Cal. Rptr. 2d at 686 (quoting the trial court).

71. See id. at 686-87.

72. See supra notes 45-56 and accompanying text (discussing McDowell).

73. Hackler, 16 Cal. Rptr. 2d at 687.

74. See id.
shoplift, the court declared the conditions overbroad because Hackler would have to wear the shirt not only at times when he might shoplift, but also at any time he left his place of residence. The court was concerned that wearing the T-shirt would interfere with noncriminal activities.

B. Florida

On two occasions, the Florida District Court of Appeal has affirmed scarlet-letter probation conditions. In Goldschmitt v. State, the defendant appealed a probation condition requiring him to place on his automobile a bumper sticker that read “CONVICTED DUI—RESTRICTED LICENSE.” The court first considered Goldschmitt’s argument that the probation condition constituted a new, judicially-created punishment. The court, however, was wary to hold that a trial court could not create a special probation condition any time it wished (assuming the special condition is lawful otherwise). The court held that a condition is lawful if it is somehow related to the “nature” of the convicted offense and has “some reasonable rehabilitative basis.”

The court of appeal then considered Goldschmitt’s argument that the bumper sticker constituted compelled speech in violation of the First Amendment. The court compared Goldschmitt’s case to Wooley v. Maynard, in which a Jehovah’s Witness successfully challenged a New Hampshire statute that forced him to bear the state motto “Live Free or Die” on his license plate. The court, however, distinguished the license plate in Wooley from Goldschmitt’s bumper

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75. See id.
76. See id.
79. Id. at 124.
80. See id. at 125.
81. See id. at 125 n.3; see also Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979) (applying the reasonably related test). The Florida District Court of Appeal in Goldschmitt discussed the rehabilitative branch of this requirement when it analyzed the Eighth Amendment issues, see Goldschmitt, 490 So. 2d at 125-26, but seemed to assume that the bumper sticker was sufficiently related to the offense charged. The Rodriguez standard is based on a standard once applied by California state courts, the Dominguez-Lent test. See infra notes 541-44 and accompanying text (discussing the Dominguez-Lent test).
82. See Goldschmitt, 490 So. 2d at 125.
83. 430 U.S. 705 (1977). For a more detailed discussion of the First Amendment compelled speech cases, see infra notes 364-472 and accompanying text.
84. See Wooley, 430 U.S. at 707.
sticker because in *Wooley*, the issue was whether the state's interest in advertising its state motto overrode the defendant's objections that criminal penalties could be imposed for defacing the license plate, while in *Goldschmitt*, the criminal behavior already had been committed prior to the requirement that the defendant advertise the message. Moreover, the bumper sticker was not an ideological message like the state motto in *Wooley*; instead, it served as a kind of penance for the defendant and as a warning to others.

*Goldschmitt*'s Eighth Amendment argument fared no better. The court of appeal first noted that the "mere requirement" of displaying a scarlet letter did not necessarily offend the Constitution. Although the court expressed some concern that new and innovative probation conditions might reach such extremes that they could violate the U.S. Constitution, the court did not believe that the bumper sticker was "sufficiently humiliating" to implicate constitutional concerns.

Notably, the court of appeal in *Goldschmitt* never really questioned whether the bumper sticker was truly rehabilitative. Unable to state that a finding of potential rehabilitative effect was "utterly without foundation," the court of appeal felt it was constrained to hold that it could not substitute its judgment for that of the lower court. Yet the court of appeal itself seemed to agree with the lower court when it stated that "[t]he deterrent, and thus the rehabilitative, effect of punishment may be heightened if it 'inflicts disgrace and contumely in a dramatic and spectacular manner.'" Furthermore, this statement and the court's description of the bumper sticker as a kind of penance suggest that it was not distinguishing between rehabilitative and punitive objectives.

In *Lindsay v. State*, the Florida District Court of Appeal put to rest the argument that a condition which is primarily punitive in purpose cannot be rehabilitative. Probationer Lindsay challenged

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85. See *Goldschmitt*, 490 So. 2d at 125.
86. See id. This analysis of *Wooley* may no longer be persuasive, for in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), the Supreme Court held that a state cannot compel speech even if that speech is not ideological. See id. at 797-98. For further discussion of *Riley*, see infra notes 427-45 and accompanying text.
87. See *Goldschmitt*, 490 So. 2d at 125.
88. See id. at 126.
89. Id.
90. Id. at 125 (quoting United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1982)).
91. See id.
93. See id. at 656.
on constitutional grounds a condition requiring him to place and pay for a newspaper advertisement containing his mug shot and the caption “DUI—Convicted.” The court first looked to the applicable state probation statutes, specifically the statutory section that allowed the trial court to devise probation conditions not otherwise listed in the statute. The court interpreted this language to mean that trial courts have “breathtaking” discretion to design probation conditions.

The court of appeal then rejected Lindsay’s claim that the advertisement was not rehabilitative in its effect: “Rehabilitation and punishment are not mutually exclusive ideas. They can co-exist in any single, particular consequence of a conviction without robbing one another of effect.” Although the court insisted that a condition of probation could be both punitive and rehabilitative, it never actually discussed whether this particular condition was in fact rehabilitative. Instead, it seemed to assume that whatever was punitive was also rehabilitative, and the court therefore held the probation condition valid. The court then briefly addressed the

94. Id. at 653.
95. See id. at 654-55; see also Fla. Stat. Ann. § 948.03(6) (West Supp. 1998) (providing the current version of the statute cited in Lindsay). The subsection states in part: “The enumeration of specific kinds of terms and conditions shall not prevent the court from adding thereto such other or others as it considers proper.” Fla. Stat. Ann. § 948.03(6).
96. See Lindsay, 606 So. 2d at 655. Florida’s probation statutes do not have a general purpose of rehabilitation and give the trial court wide latitude in fixing probation conditions. See Fla. Stat. Ann. § 948.03. Subsection 948.03(1) lists regular conditions of probation, including the requirement that the probationer must “[w]ork faithfully at suitable employment insofar as may be possible.” Id. § 948.03(1)(c). One method of attacking the legality of a scarlet-letter probation condition is to argue that the condition makes it impossible for the probationer to fulfill her other probation conditions. See infra notes 536-37 and accompanying text. The defendant in Lindsay argued that the advertisement “unreasonably interfere[d] with his right to pursue employment.” Lindsay, 606 So. 2d at 655. The court seemed to view the argument as a constitutional right to work claim. See id. at 656. The court did not address any possible conflicts with the statutory probation condition that Lindsay be employed, perhaps because the statute only required work “insofar as may be possible.” Fla. Stat. Ann. § 948.03(1)(c) (West 1996).
97. Lindsay, 606 So. 2d at 656. The court of appeal seems to have relied on the Rodriguez test to determine the validity of the probation condition. See Rodriguez v. State, 378 So. 2d 7, 9-10 (Fla. Dist. Ct. App. 1979) (holding that probation conditions may infringe upon First Amendment rights).
98. For this assertion, the court relied on the probation statute, which allowed a period of incarceration to be imposed as a condition of probation. See Lindsay, 606 So. 2d at 656 (citing Fla. Stat. Ann. § 948.03(5) (1991) (current version at Fla. Stat. Ann. § 948.03(6) (West 1996))). However, the court still seemed to accept that the primary purpose of probation is rehabilitation. See id. at 655.
99. See id. at 658. The court of appeal also determined that the advertisement was
constitutional rights allegedly infringed upon by the probation condition. Relying partly on *Goldschmitt* and *Rodriguez v. State*, the court decided that "the fact that a valid condition of probation burdens constitutional rights is no basis by itself to set it aside."  

The problem with the analysis of the court of appeal in *Lindsay* is that there is no actual analysis of whether the advertisement served a rehabilitative purpose; instead, the court assumed that what was punitive was also rehabilitative. It is difficult to imagine a probation condition that would be declared invalid under this ruling. The appellate court deferred to the trial court's finding that the probation condition was reasonably related to the defendant's crime, thus satisfying the first prong of the *Rodriguez* test. If an appellate court is willing to defer completely to the trial court as to whether the *Rodriguez* test is met, then it is not clear that the test is particularly useful.

**C. Georgia**

In *Ballenger v. State*, the Georgia Court of Appeals upheld a scarlet-letter probation condition requiring a convicted DUI felon to wear a fluorescent pink plastic bracelet bearing the words "DUI CONVICT." The defendant argued that the condition violated his equal protection rights and constituted cruel and unusual punishment because it fell outside statutory limits. Unconvinced by this argument, the court of appeals held that Georgia case law conferred broad authority on the trial court to design probation conditions, despite the absence of a catch-all provision in the Georgia probation

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reasonably related to the defendant's criminal conduct. *See id.* at 657. The court of appeal deferred to the trial court because "[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. As in all such matters, the trial judge decides the factual basis for the condition." *Id.*

100. 378 So. 2d 7 (1979).

101. *Lindsay*, 606 So. 2d at 657; *see* *Goldschmitt v. State*, 490 So. 2d 123, 126 (Fla. Dist. Ct. App. 1986); *Rodriguez*, 378 So. 2d at 9-10.

102. It should be noted that the court of appeals was responding directly to the defendant's argument that a probation condition that is punitive could not also be rehabilitative. *See Lindsay*, 606 So. 2d at 656. Although the court may have had a point that what is punitive may also be rehabilitative, the court seemed to take this point further, asserting that what is punitive also *must* be rehabilitative. *See id.* at 657 ("There is an inherent irony that the stronger [the defendant] makes the case for humiliation and ridicule, the more he tacitly concedes that it is reasonably appropriate to its penal ends.").

103. *See id.*


105. *Id.* at 794.

106. *See id.*
statute permitting the trial court to create its own conditions.\textsuperscript{107} The court noted further that the two goals of probation are rehabilitation and protection of society.\textsuperscript{108} Yet the court chose to defer to the trial court's decision that the fluorescent bracelet requirement would accomplish these purposes, stating: "Being jurists rather than psychologists, we cannot say that the stigmatizing effect of wearing the bracelet may not have a rehabilitative, deterrent effect on Ballenger."\textsuperscript{109}

In dissent, Judge Blackburn argued that the fluorescent bracelet did not serve a legitimate probation purpose because the purpose of the condition was to humiliate the probationer.\textsuperscript{110} Although he admitted that some courts had accepted the theory that scarlet-letter probation conditions serve rehabilitative ends, for Judge Blackburn a probation condition designed to humiliate the defendant goes beyond the trial court's authority.\textsuperscript{111} He argued that "the role of prescribing punishment ... lies with the legislature and a rationale of rehabilitation may not be used to vest such authority in the judiciary."\textsuperscript{112}

The definition of "rehabilitation" seemed to be the true point of contention between the majority and the dissent. The majority used "rehabilitative" and "deterrent" almost interchangeably, and in its suggestion that the "stigmatizing effects" of the bracelet, that is, the punitive effects, could lead to rehabilitation,\textsuperscript{113} one sees a blurring of the distinctions between rehabilitation and punishment. The dissent, on the other hand, distinguished between an intent to punish and humiliate and an intent to rehabilitate.\textsuperscript{114} As discussed later, this case illustrates the current debate concerning the purposes of probation and whether a punishment may have rehabilitative effects.\textsuperscript{115}

\textsuperscript{107} See id.
\textsuperscript{109} Id. at 794-95. The court emphasized the trial court's broad discretion in creating probation conditions. See id. at 794. Apparently, the possible stigmatizing effects of the bracelet did not trouble the court. See id. at 795 ("Balancing the possible beneficial purpose of this condition of probation, we do not find as a matter of law that the possible embarrassment of being required to wear the bracelet constitutes an unreasonable infringement on Ballenger's constitutional rights.").
\textsuperscript{110} See id. at 795-96 (Blackburn, J., dissenting) ("[T]he clear purpose of requiring Ballenger to wear a fluorescent pink bracelet proclaiming him to be a DUI convict was simply to punish him by humiliation.").
\textsuperscript{111} See id. at 796 (Blackburn, J., dissenting).
\textsuperscript{112} Id. (Blackburn, J., dissenting).
\textsuperscript{113} See id. at 794-95.
\textsuperscript{114} See id. at 795-96 (Blackburn, J., dissenting).
\textsuperscript{115} A short discussion of the punishment/rehabilitation debate seems in order.
D. Illinois

In People v. Johnson, the defendant, who was convicted of driving under the influence of alcohol, challenged the propriety of a probation condition requiring her to place an advertisement in a newspaper that included her mug shot and an apology for her crime. The Illinois appellate court looked to the applicable probation statute, which included a catch-all provision that allowed the court to devise its own probation conditions as long as they were reasonably related either to the offense or to the defendant’s rehabilitation. The court concluded that the permitted conditions did not refer to general deterrence, nor did they suggest exposing a defendant to ridicule. The court decided that the state legislature

Traditionally, rehabilitation or reformation has been seen as one of the several purposes of punishment. See IGOR PRIMORATZ, JUSTIFYING LEGAL PUNITION 11 (1989) (listing theories underlying the utilitarian view of punishment). At least one commentator, however, has urged that rehabilitation and reformation are two different concepts: the former relates to altering a criminal’s behavior “by non-punitive means”; the latter relates to altering a criminal’s behavior through punishment. JACK P. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE 72 (1979). It is not clear, though, that probation conditions can be classified either as rehabilitative or punitive because in actuality most conditions contain both elements. See infra notes 514-19 and accompanying text (discussing punitive elements in probation conditions).

It does not appear that incarceration as a method of punishment furthers the reformation of the criminal. See GIBBS, supra, at 74, 77; HEINRICH OPPENHEIMER, THE RATIONALES OF PUNISHMENT 252 (1975). Gibbs also suggests that “[r]ehabilitation is difficult in a punitive context, and custody is perceived by offenders as punitive under the best of conditions.” GIBBS, supra, at 76. As probation becomes more punitive, see infra notes 514-26 (discussing this trend), the debate can be formulated in two different ways: (1) whether punitive probation conditions reform criminals; and (2) whether punitive probation conditions have enough punitive elements in them that they are not truly rehabilitative at all. The courts in State v. Burdin, 924 S.W.2d 82 (Tenn. 1996), and People v. Letterlough, 655 N.E.2d 146 (N.Y. 1995), take this second approach. See infra notes 165-74 and accompanying text (discussing Burdin); infra notes 136-47 and accompanying text (discussing Letterlough). The Florida District Court of Appeal, however, takes the first approach, though it seems to assume that a punitive probation is rehabilitative. See supra notes 77-103 and accompanying text (discussing Goldschmitt and Lindsay). This Comment addresses the broader question of whether punitive probation conditions reform or rehabilitate criminals. For an argument that alternative methods of punishment can reform criminals, see GIBBS, supra, at 77-78. For an argument that all forms of punishment fail to reform, see OPPENHEIMER, supra, at 251-54.

117. See id. at 1361.
118. See id. at 1361-62. The court stated that it “may in addition to other reasonable conditions relating to the nature of the offense or the rehabilitation of the defendant as determined for each defendant in the proper discretion of the court require that the person [fulfill certain specified conditions of supervision listed in the statute].” Id. (quoting 38 ILL. COMP. STAT. ANN. 5/5-6-3.1(c) (West 1987) (current version at 730 ILL. COMP. STAT. ANN. 5/5-6-3.1(c) (West 1997 & Supp. 1998))
119. See id. at 1362.
intended probation conditions to help the defendant rehabilitate and avoid future criminal behavior, and it concluded that the advertisement exceeded these bounds because of its potential for subjecting the defendant to public ridicule. The court also expressed concern about the possible effects of the newspaper advertisement on the defendant: “Neither the trial court nor this court, without professional assistance, can determine the psychological or psychiatric effect of the publication. An adverse effect upon the defendant would certainly be inconsistent with rehabilitation and with the statutory provision allowing the court to require psychological or psychiatric treatment.” For these reasons, the court eliminated the newspaper advertisement condition of probation.

In the most recent scarlet-letter case in Illinois, a defendant convicted of aggravated battery was forced to erect a large sign at all entrances to his family farm stating “Warning! A Violent Felon lives here. Enter at your own risk!” Analyzing whether the trial court had the authority to order the erection of the signs, the Illinois Supreme Court looked to the Illinois Code of Corrections, which allows the trial court to devise its own probation conditions. To decide whether erecting the signs was a reasonable condition, the court looked to the purpose of probation: “to benefit society by restoring a defendant to useful citizenship, rather than allowing a defendant to become a burden as an habitual offender.” The court noted that probation conditions contain both rehabilitative and punitive elements. The court added, however, that the fact that a probation condition may serve as punishment does not mean that it is reasonable under the statute.

120. See id.
121. See id.
122. Id.
123. See id. The concurrence agreed that the newspaper advertisement went beyond the statutory limits, but did not share the majority’s concern over the possible negative side-effects of the advertisement. See id. at 1362-63 (Green, J., specially concurring).
125. See id. (noting that Illinois law provides trial courts with a listing of permissible probation conditions “in addition to other reasonable conditions relating to the nature of the offense or the rehabilitation of the defendant as determined for each defendant in the proper discretion of the [c]ourt” (quoting 730 ILL. COMP. STAT. § 5/5-6-3(b) (West 1994)(current version at 730 ILL. COMP. STAT. § 5/5-6-3(b) (West 1997 & Supp. 1998))).
126. Id. at 318.
127. See id.
128. See id. (“Although the sign may foster the goals of probation to the extent that it punishes the defendant and protects the public, furtherance of these two goals alone does not render the condition reasonable.”).
The court then discussed several problems with the required signs. First, the court was concerned with "unpredictable or unintended" consequences of posting such a sign that would not be consistent with probation's rehabilitative function. Second, the court was concerned that the probation condition might serve to humiliate or ridicule the defendant publicly because it formally announced the defendant's offense. The court pointed out that shame was not the purpose of the statute's enumerated probation conditions, and that the purpose of the signs was primarily to punish. The court noted that the legislature, not the judiciary, had the authority to "define and fix punishment." The court's final concern was that the signs would have an "adverse effect" on the innocent people who lived with defendant, including the defendant's wife and his elderly mother. For these reasons, the court held that in forcing the defendant to post the signs, the trial court exceeded its authority and abused its discretion.

E. New York

New York's highest court has been unwilling to uphold a scarlet-letter probation condition. In People v. Letterlough, the court struck down a probation condition that forced a repeat DWI offender to place a fluorescent sign on his bumper saying "Convicted DWI" because the condition was not reasonably related to the defendant's rehabilitation and because the imposition of the condition was outside the trial court's authority. The court first looked to the appropriate probation provision of the New York Penal Code, which states that a court has discretion to create a probation condition that...
is "reasonably necessary" to the defendant's rehabilitation.\textsuperscript{138} Besides a list of general probation conditions, the current New York Penal Code also provides a catch-all provision allowing the trial court to fashion its own probation conditions so long as they are "'reasonably related to [defendant's] rehabilitation.'"\textsuperscript{139}

Looking to the legislative intent of the statute, the court noted that "[d]espite the inherent overlap and the difficulty in drawing lines between rehabilitative and punitive or deterrent sanctions, the Legislature did not mention punishment or deterrence as goals to be obtained through the imposition of probationary conditions."\textsuperscript{140} Because the statute focused only on rehabilitation, the court concluded that the statute only authorized conditions that were "fundamentally 'rehabilitative' in the sense of that word that distinguishes it from the societal goals of punishment or deterrence."\textsuperscript{141} More serious sanctions, such as imprisonment, better serve the goals of punishment and deterrence and are reserved for those convicted of more serious crimes.\textsuperscript{142}

The problem with the fluorescent sign, the court decided, was that its primary purpose was not to rehabilitate but to warn society against the defendant.\textsuperscript{143} The court determined not only that the probation condition was so punitive and deterrent in its effect as to "overshadow" any possible rehabilitative effects but also that the probation condition might even negate the other more therapeutic probation conditions.\textsuperscript{144} The court concluded that the decision to authorize such probation conditions was best left for the legislature.\textsuperscript{145}

The New York Court of Appeals relied on the traditional

\textsuperscript{138} See id. at 148. The court noted that a probation condition "'shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.'" Id. (quoting N.Y. PENAL LAW § 65.10(1) (McKinney 1987)).

\textsuperscript{139} N.Y. PENAL LAW § 65.10(2)(l) (McKinney 1998).

\textsuperscript{140} Letterlough, 655 N.E.2d at 149.

\textsuperscript{141} Id.

\textsuperscript{142} See id.

\textsuperscript{143} See id.

\textsuperscript{144} See id. at 150.

\textsuperscript{145} See id. The court stated that probation conditions require "[s]tate-wide uniformity and the kind of policy choices that only an elected Legislature can make." Id. The court did not address any constitutional questions. The defendant's counsel argued at trial that the sign violated both the state and federal constitutions, see id. at 147, and it seems likely that these same issues were raised on appeal. Because the court determined that the fluorescent sign violated New York's probation statute, it did not reach the constitutional dimensions of the case.
distinction between punishment and rehabilitation in its analysis, though it did note that drawing a line between the two is often difficult. Yet as the dissent was quick to point out, the creation of such distinct categories is itself problematic: "The sentencing environment does not abide a theoretical purity that would cabin 'punishment' and 'rehabilitation' into such discrete, mutually exclusive universes . . . . [O]ne could hardly imagine the actuality of a purely rehabilitative condition, no less countenance a legal principle that would require such unattainable segregation."

F. North Carolina

The North Carolina Court of Appeals is now considering its first scarlet-letter probation case. In State v. Mewborn, the defendant is challenging a probation condition that forces him to wear each day either a black sweatshirt or a black T-shirt with blaze orange printing that reads "Convicted Dope Dealer" if he chooses to live in the state. The defendant is arguing that the condition violates a North Carolina statute that gives the trial court general power to impose probation conditions as long as the conditions "are reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." The defendant claims that the condition is not reasonably related to rehabilitation or to insuring that he lead a law-abiding life. The condition makes it impossible, the defendant maintains, for him to stay gainfully employed, another required condition, and the "choice" of whether to wear the T-shirt and remain in the state or to leave the state amounts to de facto banishment. The defendant also is alleging that the condition

146. See id. at 149. For a discussion of this distinction, see 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.5, at 31, 33 (1986).
149. Defendant-Appellant's Brief at 2, Mewborn (No. COA98-28).
151. See Defendant-Appellant's Brief at 7, Mewborn (No. COA98-28).
152. See N.C. GEN. STAT. § 15A-1343(b)(7) (requiring as a general condition of probation that the defendant remain gainfully employed).
violates the Eighth Amendment as a cruel and unusual punishment\textsuperscript{154} and that it violates the First Amendment because it is forcing him to speak.\textsuperscript{155}

The State's argument is that the probation condition is reasonably related to the defendant's rehabilitation because the condition will remind him that he is being punished for his crime and will force him to assume the full consequences of his actions.\textsuperscript{156} The defendant will come to know the true implications of what he has done and will be less likely to commit future crimes.\textsuperscript{157} Furthermore, the State maintains that the condition does not amount to cruel and unusual punishment.\textsuperscript{158} Finally, the State argues that the condition is not a violation of the defendant's First Amendment free speech right because the defendant "still has the right to say anything protected by the First Amendment."\textsuperscript{159}

G. Oregon

A famous scarlet-letter probation condition occurred in Oregon, where, as a condition of probation, a man convicted of sexual abuse was forced to post a sign on his home and one on his automobile for five years that read "Dangerous Sex Offender."\textsuperscript{160} He challenged the probation condition, but the Oregon Court of Appeals held that the case was moot\textsuperscript{161} because his probation was revoked after he filed his
appeal. In his appeal of the probation revocation, the defendant argued that the revocation was invalid because it was based on his having violated an unlawful probation condition; because the revocation was invalid, any sentence imposed automatically exceeded the maximum allowed by law. The court of appeals, however, determined that it had the authority to decide only whether the length of the sentence itself was lawful and that the defendant’s claims were beyond its scope of review. Consequently, the legality of the probation condition was never resolved.

H. Tennessee

In State v. Burdin, a convicted child molester challenged a probation condition requiring him to post a sign in his yard for six months that stated: “Warning, all children. Wayne Burdin is an admitted and convicted child molester. Parents beware.” Tennessee’s probation statute, like that of New York, has the primary purpose of rehabilitation. The probation statute has a catch-all provision, requiring a probationer to meet any other conditions that reasonably relate to his sentence and that do not unduly restrict his liberty. The court in Burdin rejected the State’s argument that the primary purpose of probation was no longer rehabilitation, maintaining that the catch-all provision did not grant the trial court “unfettered authority” to create punishments that go “beyond the bounds of traditional notions of rehabilitation.” Thus, the court struck down the probation condition on statutory grounds.

162. See Bateman, 771 P.2d at 316. His probation was revoked because he had violated his probation conditions, including the requirement that he post the sign, and he was incarcerated. See id.
163. See id. at 318.
164. See id. at 318-19.
165. 924 S.W.2d 82 (Tenn. 1996).
166. Id. at 84.
168. See id. at 85 (noting that the probationer must “[s]atisfy any other conditions reasonably related to the purpose of the offender’s sentence and not unduly restrictive of the offender’s liberty, or incompatible with the offender’s freedom of conscience, or otherwise prohibited by this chapter”) (quoting TENN. CODE ANN. § 40-35-303(d)(9) (Supp. 1995)).
169. See id. at 86.
170. Id. at 87.
171. The defendant also challenged the probation condition on Eighth Amendment grounds. See id. at 84. The court, however, refused to rule on the constitutional issue because it had already declared the probation condition invalid under the probation
Although the court insisted that the purpose of probation was primarily to rehabilitate, it made no attempt to analyze whether the sign at issue actually had a rehabilitative purpose.\(^{172}\) Indeed, the court's main concern with the probation condition was that its effects were uncertain because of the lack of "normal safeguards of legislative study and debate."\(^{173}\) The court noted: "Posting the sign in the defendant's yard would dramatically affect persons other than the defendant and those charged with his supervision .... [C]ompliance with the condition would have consequences in the community, perhaps beneficial, perhaps detrimental, but in any event unforeseen and unpredictable."\(^{174}\)

As these cases illustrate, there is some conflict concerning the validity of scarlet-letter probation conditions. The most successful arguments against scarlet-letter probation conditions seem to rely on state probation statutes rather than the Constitution. Yet such conditions do raise constitutional concerns. The conditions' similarities to colonial shaming penalties\(^{175}\) implicate the Eighth Amendment's Cruel and Unusual Punishment Clause.\(^{176}\) Furthermore, such conditions allow judges to compel probationers to "speak" publicly of their own convictions, which raises First Amendment concerns.\(^{177}\) Parts II and III provide background on these constitutional issues.

**II. SCARLET-LETTER PROBATION CONDITIONS AS PUNISHMENT: EIGHTH AMENDMENT CONCERNS**

Courts have been reluctant to apply the Eighth Amendment to probation conditions.\(^{178}\) Yet for jurisdictions that consider probation

\(^{172}\) That the court did not analyze whether the sign had a rehabilitative purpose may have been due to the State's tactics in this case. Apparently, the State did not argue that the sign had a rehabilitative purpose, but instead argued that the statute no longer required a rehabilitative purpose, relying heavily on *Goldschmitt* and *Lindsay*. See *id.* at 85-86; see also *supra* notes 77-103 and accompanying text (discussing *Goldschmitt* and *Lindsay*).

\(^{173}\) *Burdin*, 924 S.W.2d at 87.

\(^{174}\) *Id.*

\(^{175}\) See *infra* notes 186-99, 224 and accompanying text (discussing shaming as a punishment).

\(^{176}\) See U.S. CONST. amend. VIII.

\(^{177}\) See U.S. CONST. amend. I. Of course, one response to this is that probationers do not have a First Amendment right to be silent. For a discussion of the standards used to determine a probationer's constitutional rights, see *infra* notes 544-61 and accompanying text.

\(^{178}\) See *infra* notes 290, 493 and accompanying text.
a sentence, probation is clearly a punishment. Even in jurisdictions where the primary purpose of probation is still rehabilitation, some probation conditions contain punitive elements that invoke Eighth Amendment concerns. This Part considers shaming as a punishment, looking at conflicting theories concerning whether shaming in American society can serve the ends of punishment. This Part also discusses the Supreme Court’s definition of punishment and its test for determining cruel and unusual punishments. Finally, the discussion turns to an Eighth Amendment analysis of scarlet-letter probation conditions. It argues that scarlet-letter probation conditions are essentially punitive in nature and then analyzes whether such conditions constitute “cruel and unusual” punishment under the Eighth Amendment. This Part concludes that scarlet-letter probation conditions probably will survive Eighth Amendment scrutiny.

A. Shaming Penalties in Colonial America

Shaming penalties or scarlet-letter conditions have their precursors in colonial America. Early colonists employed a wide range of shaming devices. Besides the infamous stocks and pillories, where criminals often had to bear signs listing their offenses, penalties included forced public apologies, stigmatizing labels, the bilbo, the ducking stool, and public whippings.

179. See infra notes 520-21 and accompanying text.
180. See infra note 508 and accompanying text.
181. See infra notes 513-19 and accompanying text.
182. See infra notes 225-87 and accompanying text.
183. See infra notes 288-323 and accompanying text.
184. See infra notes 324-59 and accompanying text.
185. See infra note 359 and accompanying text.
187. For a list of these devices, see Massaro, supra note 12, at 1912-14.
188. See id. at 1913. One student commentator has noted that “[t]he stocks and pillory inflicted primarily psychological rather than physical punishment.” Brilliant, supra note 54, at 1361.
189. This practice was documented in seventeenth century Virginia and was practiced by both the church and the state. See Massaro, supra note 12, at 1913. An “offender” was forced to confess her sin publicly to the congregation, sometimes while wearing a white cloth, and beg for forgiveness. See id.
190. One example is the “A” that Hester Pryne was forced to wear in The Scarlet Letter. See HAWTHORNE, supra note 14, at 58. Branding, a form of permanent labeling, also was practiced. See Massaro, supra note 12, at 1913.
191. The bilbo was an iron bar that had two sliding shackles that locked together a
Yet it was the particular cultural context of the colonies that made these shaming punishments effective. As one commentator has written: "The colonial shaming practices can only be understood in light of the community's religious beliefs, childrearing techniques, and other culture-specific features." Because of the small size and isolation of the communities, there was a peculiar intimacy among individuals within each community. The criminal in the pillory could be one's next door neighbor. Furthermore, there was considerable interdependence within a small, sometimes struggling colony; therefore, the fear of losing face in the community was increased. In the New England colonies, the Puritan method of child-rearing, with its emphasis on strict obedience to parental authority, also increased the individual's sensitivity to shame and public exposure.

These shaming punishments lost popularity during the early
nineteenth century, though commentators offer different reasons why this occurred. One argument is that both humanitarian and practical concerns led to a preference for incarceration over public spectacles. An opposing argument maintains that the preference for imprisonment over shaming penalties at that time stemmed from the belief that the shaming penalties had lost their power to shame.

One student commentator has stated that shaming penalties disappeared when America became more populous and more urban and "universal community norms disappeared." Regardless of which theory is espoused, shaming declined in use as a punishment.

Today, shaming punishments are gaining in popularity again, yet modern America is a far cry from the small, close-knit colony communities. One commentator has proposed five conditions that must be satisfied in order for shaming penalties to be effective.

First, the offender must belong to an identifiable group, like a religious or ethnic community; Second, the form of the shaming penalty must be sufficient to compromise the offender's social standing in this group; Third, the punishment must be communicated to the offender's community, and the community.

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200. See Massaro, supra note 12, at 1929. At that time, rehabilitation came to be viewed as a proper goal of punishment, so the fact that shaming penalties declined in popularity suggests that people did not believe that shaming penalties could serve this function. See id.


204. See id. at 1883 (summarizing the five conditions). Professor Kahan, in contrast, offers three conditions for successful shaming penalties: (1) The punishment must be imposed by "an agent invested with the moral authority of the community"; (2) the punishment must send a message that the offender's conduct is wrong; and (3) the punishment must "ritualistically" separate the offender from the community. Kahan, supra note 201, at 636 (citing Harold Garfinkel, Conditions of Successful Degradation Ceremonies, 61 AM. J. SOC. 420, 422-23 (1956)). One problem with applying this definition to modern shaming conditions is that many communities do not view the police as moral agents, but instead view them with suspicion and hostility. See Massaro, supra note 12, at 1922. Also, because there is no method for reintegrating the offender into society, the separation of the offender from society might be more than a ritualistic one. See id. at 1924.

205. See Massaro, supra note 12, at 1883, 1901-02, 1916-17; see also Stephen P. Garvey, Can Shaming Punishments Educate?, 65 U. CHI. L. REV. 733, 748 (1998) ("Shame depends on an offender[']s having attachments to others in whose eyes he or she can, as a result of these attachments, suffer shame." (footnote omitted)).

206. See Massaro, supra note 12, at 1883, 1902, 1916. Professor Massaro writes that if the individual "must depend greatly on the group for social, economic, or political support, or cannot leave the group easily, then a social sanction will have a tremendous impact." Id. at 1916.
must in fact withdraw or shun him. Fourth, the offender must actually fear being shunned. Finally, there must be some method for regaining social status by bringing the offender back into her community, unless the offense is so grave that the offender must be permanently shunned.

Some problems immediately arise when employing scarlet-letter probation conditions in modern American society. First, although all individuals are classifiable according to some group (for example, class, race, or national origin), not all Americans are members of a close-knit community to which they feel they belong. As one commentator argues, "[r]esidential and occupational mobility, coupled with a generally eroded sense of community, can undermine the effectiveness of stigma punishments, even for the social groups traditionally most sensitive to stigma." Second, a judge who imposes scarlet-letter probation conditions must be sensitive to the standards and morals of the offender's community in order to ensure both that the community finds the offense worthy of punishment and that the punishment will have the desired shunning effect. This may require a busy judge to be part anthropologist, part psychologist. Finally, and most importantly, our culture's emphasis on individualism may mean that we do not have the strong social cohesiveness necessary for reintegration of the offender, nor do our

207. See id. at 1883, 1903. Professor Massaro also discusses how the lack of a moral consensus in American society may make it difficult for the government to create widespread attempts to shame criminals. See id. at 1923.

208. See Garvey, supra note 205, at 748; Massaro, supra note 12, at 1883, 1916, 1923.

209. See Massaro, supra note 12, at 1883, 1924, 1928.

210. See id. at 1922-23. Professor Kahan, however, states:

211. Massaro, supra note 201, at 642.

212. See Massaro, supra note 12, at 1918, 1920, 1923-24; see also Garvey, supra note 205 at 748 (noting that if shaming penalties depend on the offender feeling shame, judges will have difficulty determining which offenders can be shamed and which cannot, and will likely be wrong in some instances).

213. See Massaro, supra note 12, at 1924-28; Persons, supra note 186, at 1539-40. For many Americans, the criminal is an irredeemable deviant who must be locked away, not a fellow citizen capable of rehabilitation. See Massaro, supra note 12, at 1926-27. But see Kenneth Shuster, Halacha as a Model for American Penal Practice: A Comparison of Halachic and American Punishment Methods, 19 NOVA L. REV. 965, 1004 (1995) (finding that this criticism of shaming penalties is "infirm since ... the criminal need not be outside society to be embarrassed by his or her conduct"). Shuster, however, seems to
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criminal courts have a procedure for him to regain his lost status. Without this reintegration, a scarlet-letter probation condition may be no more than "a retributive spectacle."

While some might find retribution a sufficient reason to justify imposing such conditions, some concerns remain. First, from an ethical perspective, it is alarming that modern American courts impose conditions that are reminiscent of colonial shaming penalties, especially if the probation conditions offer no hope of reintegrating the offenders into society. Ethical considerations aside, however, there is still the question of whether the conditions will effectively punish offenders. Ironically, the individuals most capable of being shamed are those who are strongly socialized, yet these individuals are the least likely to commit a crime. Another problem is that members of certain subcultures may not feel shame from certain punishments.

miss Massaro's point that the shaming penalty itself may irreparably sever the criminal's ties with the community. See Massaro, supra note 12, at 1928. Shuster admits that for shaming penalties to work, the criminal must feel part of the social "family" and that Americans must not view the criminal as an outsider. See Shuster, supra, at 1004. Yet, as Professor Massaro points out, many Americans see criminals as outsiders. See Massaro, supra note 12, at 1926-27.

214. See Massaro, supra note 12, at 1919.
215. Id. at 1884; cf. Lisa Anne Smith, The Moral Reform Theory of Punishment, 37 ARIZ. L. REV. 197, 206 (1995) (analogizing shaming punishments "to making one who fails his lessons sit in the corner in a dunce-cap"). Professor Kahan, however, argues that shaming penalties fulfill the three different mechanisms necessary for deterrence: (1) preference adaptation, in which the punishment sends a message to the offender that the behavior is contrary to society's norms; (2) belief-dependent dispositions, in which the punishment reinforces already-existing propensities to follow the law; and (3) goodwill, in which the punishment causes the surrounding community to feel that the law accords with its moral values. See Kahan, supra note 201, at 638-40; see also Shuster, supra note 213, at 1004-05 (arguing that even excessive shaming penalties are valuable because they enable the public to protect itself from offenders); cf. Persons, supra note 186, at 1535 ("[M]odern-day shame punishments denounce conduct outside shared moral norms.").
216. Cf. Kahan, supra note 201, at 645 ("[E]ven if we assume that shaming penalties are uniquely and irreparably stigmatizing, the critics have failed to demonstrate that they are self-defeating."); Persons, supra note 186, at 1535 ("Shame punishments allow courts and communities dissatisfied with existing modes of punishment to strike back.").
217. See Kahan, supra note 201, at 637 (arguing that shaming practices can be "effective and just"). But see Massaro, supra note 12, at 1884 (arguing that public shaming will not be an effective punishment and generally will not serve to deter crime; Donna DiGiovanni, Comment, The Bumper Sticker: The Innovation That Failed, 22 NEW ENG. L. REV. 643, 670 (1988) (concluding that bumper sticker shaming conditions fail to meet "any of the acceptable goals of punishment fully").
218. See Massaro, supra note 12, at 1918.
219. See Garvey, supra note 205, at 749; Kahan, supra note 201, at 636; Massaro, supra note 12, at 1923. This problem occurs within juvenile delinquent subcultures, where a gang member may receive greater respect from his peers for being incarcerated. See FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN
Even if there are social norms that all Americans can agree upon, some individuals will be willing to defy these norms and may not be affected by shaming penalties.\textsuperscript{220} The rich, by virtue of their wealth, are able to defy social norms, and the poor may have nothing to lose in defying them.\textsuperscript{221} It is the middle-class, more so than the rich and the poor, that may be most susceptible to shaming penalties, because its members are in constant fear of losing social status and slipping into a lower class.\textsuperscript{222} Yet even many middle-class offenders may be impervious to shaming punishments because of the opportunity to move to a new community and because of the general lack of a sense of community.\textsuperscript{223}

B. The Supreme Court's Definition of Cruel and Unusual Punishment

Historically, shaming an offender was a form of punishment, and though commentators disagree as to the effectiveness of shaming criminals in modern America, they do seem to agree that the new shaming techniques are a form of punishment as well.\textsuperscript{224} To

\textsuperscript{220} See Kahan, supra note 201, at 636. Professor Kahan notes, however, that even if an offender is not disgraced by the punishment, it can still serve as a symbol of the community's disapproval; in fact, if the community perceives the offender as not shamed, this perception may reinforce its condemnation of him. See id. at 636-37.

\textsuperscript{221} See Massaro, supra note 12, at 1916-17. Professor Kahan finds this argument plausible as applied to the poor, but thinks that it merely means judges should be selective about the use of shaming. See Kahan, supra note 201, at 644.

\textsuperscript{222} See Massaro, supra note 12, at 1933-34. Professor Massaro notes that the middle-class is "precariously balanced" because its members have not achieved, and probably will never achieve, the "immunity" from shunning that great wealth or social standing afford. Id. at 1934. Yet being demoted to a lower class is "always a distinct possibility" because middle-class status "hinges on steady income and observation of middle-class rules of behavior." Id. If bad luck occurs and there is a "[l]oss of one's job, major illness, divorce, or notorious violation of middle-class norms," a member of the middle-class may slide into a lower class. Id.

\textsuperscript{223} See Kahan, supra note 201, at 642 (noting "[t]he breakdown of pervasive community ties at the outset of the industrial revolution"); Massaro, supra note 12, at 1935 (noting the "generally eroded sense of community"). Professor Massaro finds that shaming penalties work best "within relatively bounded, close-knit communities, whose members 'don't mind their own business' and who rely on each other." Massaro, supra note 12, at 1916 (quoting JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 8 (1989)). Professor Massaro believes that "[p]opulation increases and geographical expanse confound...efforts" to reestablish the tradition of shaming. Id. at 1922.

\textsuperscript{224} See Filcik, supra note 54, at 323 (concluding that scarlet-letter probation conditions "reflect the seriousness of the offense, promote respect for the law, and provide just punishment"); Massaro, supra note 12, at 1886 (describing shaming techniques as "penalties" that are "one strand of a larger movement to expand the sentencer's arsenal of penalties"); Brilliant, supra note 54, at 1360 (arguing that "[a]
determine if scarlet-letter probation conditions amount to unconstitutional punishment under the Eighth Amendment, however, one must consider how the Supreme Court analyzes whether a condition is a punishment.

The Supreme Court has never devised a test for what constitutes a punishment under the Cruel and Unusual Punishment Clause of the Eighth Amendment. It has, however, offered conflicting tests for determining what constitutes a punishment in other types of cases. One analysis the Court has employed is found in *Kennedy v. Mendoza-Martinez,* in which the Court held that statutes which divest draft dodgers of citizenship are unconstitutional because, although punitive, they do not afford the procedural safeguards guaranteed by the Fifth and Sixth Amendments. In determining whether the statutes were punitive, the Court looked at several factors, including “whether the sanction involve[d] an affirmative disability or restraint, whether it ha[d] historically been regarded as a punishment, . . . [and] whether its operation [would] promote the traditional aims of punishment—retribution and deterrence.” In *Hudson v. United States,* the Supreme Court made it clear that the *Mendoza-Martinez* factors “provide useful guideposts” in

survey of scarlet-letter type probation conditions suggests that the premise that probation is ‘punishment’ holds credence”).

227. *Mendoza-Martinez,* 372 U.S. at 168. Other factors the Court listed include “whether it comes into play only on a finding of scienter, . . . whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.” *Id.* at 168-69. The Court went on to say that these factors “may often point in differing directions.” *Id.* at 169.

228. 118 S. Ct. 488 (1997) (holding that statutes under which the Office of Comptroller of Currency imposed monetary penalties and debarred bank officers did not give rise to a Double Jeopardy Clause violation).

229. Before *Hudson,* the Court had employed only one of the *Mendoza-Martinez* factors in its double jeopardy analysis: whether the sanction appeared excessive in relation to its purpose. See *United States v. Halper,* 490 U.S. 435, 448 (1989), overruled by *Hudson,* 118 S. Ct. 488 (1997); see also *Mendoza-Martinez,* 372 U.S. at 168-69 (listing factors to consider when determining whether a sanction is punitive). The Court held in *Halper* that a defendant who “already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.” *Halper,* 490 U.S. at 448-49. In *Hudson,* the Court noted that *Halper* deviated from “longstanding double jeopardy principles” in two ways: by bypassing whether the sanction in question was criminal and by assessing the character of the sanction actually imposed, rather than assessing the statute that authorized the sanction. *Hudson,* 118 S. Ct. at 494. The *Hudson* Court recognized as problematic the fact that *Halper* elevated a single *Mendoza-Martinez* factor over others, while *Mendoza-Martinez* emphasized no one single factor. See *id.*
determining whether a legislatively created penalty constitutes a
criminal punishment for purposes of the Double Jeopardy Clause.230

It is unclear, however, whether the Mendoza-Martinez factors
apply to the Eighth Amendment’s Cruel and Unusual Punishment
Clause.231 The Court held in Austin v. United States232 that the
Mendoza-Martinez factors do not apply to the Excessive Fines
Clause.233 In its analysis of a civil forfeiture, the Court stated, “the
question is not ... whether forfeiture ... is civil or criminal, but
rather whether it is punishment.”234 The Court believed the
government’s reliance on Mendoza-Martinez was “misplaced.”235
Ironically, as one commentator has pointed out, the Austin Court in
fact relied on four of the seven Mendoza-Martinez factors.236 What
this reliance suggests is that the test still has relevancy in determining
whether a probation condition is a punishment. The problem is that
the Court applies different standards of what constitutes punishment
according to different constitutional concerns.237

231. See U.S. CONST. amend. VIII.
233. See id. at 622; see also U.S. CONST. amend. VIII (“Excessive bail shall not be
required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).
234. Austin, 509 U.S. at 610.
235. See id. at 610 n.6.
236. See Carol S. Steiker, Punishment and Procedure: Punishment Theory and the
Criminal-Civil Procedural Divide, 85 GEO. L.J. 775, 798 (1997) (citing Austin, 509 U.S. at
618-20). Professor Steiker notes four factors: “relying on the historical understanding of
forfeitures as punishment, the focus on the culpability of the owner in the forfeiture
statutes, the direct connection of the civil forfeiture to the commission of a criminal
offense, and the emphasis on the deterrent effect of forfeitures in the legislative history.”
Id. at 798-99 & n.132 (citing Austin, 509 U.S. at 618-20).
237. See Steiker, supra note 236, at 798. Professor Steiker finds it “[m]ost perplexing
that “the Court held within the space of three years that, while civil forfeitures can be so
‘punitive’ so as to implicate the Eighth Amendment’s proscription against excessive fines,
they cannot be so punitive so as to implicate the Fifth Amendment’s prohibition of double
jeopardy.” Id. (citing United States v. Ursery, 518 U.S. 267, 278 (1996); Austin, 509 U.S.
at 618).

To complicate matters further, there also is confusion as to whether the Cruel and
Unusual Punishment Clause applies to civil matters. In Ingraham v. Wright, 430 U.S. 651
(1977), the Court held that cruel and unusual punishment scrutiny does not apply to
disciplinary corporal punishment in schools, stating that “Eighth Amendment scrutiny is
appropriate only after the State has complied with the constitutional guarantees
traditionally associated with criminal prosecutions.” Id. at 671 n.40; see also Browning-
Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages in
a civil suit between two private parties).

Clearly, the Court’s statement in Ingraham is contrary to the holding in Austin that in
rem civil forfeitures are subject to the Excessive Fines Clause. See Austin, 509 U.S. at
622. Furthermore, the Austin Court suggested that the Eighth Amendment as a whole is
Just as the Court has never defined what constitutes punishment for Eighth Amendment purposes, so also it has never defined precisely what constitutes a cruel and unusual punishment. In analyzing whether a punishment is cruel and unusual, the Court has looked to the Framers' intent to determine what kinds of punishments were considered cruel and unusual at the time of the adoption of the Bill of Rights. Early cases focused on acts of tyranny by the English monarchies as illustrative of what the Clause was meant to prohibit. For example, cruel and unusual implied "something inhuman and barbarous," involving "torture or a lingering death."

not tied to criminal matters, because it recognized no such limitation in either the text or the history of the Amendment. See id. at 608-09. The Court noted in Austin that "[a]fter deciding to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to criminal proceedings, the Framers turned their attention to the Eighth Amendment. There were no proposals to limit that Amendment to criminal proceedings . . . ." Id. (quoting Browning-Ferris Indus., 492 U.S. at 294). Although the Austin Court relied on Halper for the notion that "punishment . . . cuts across the division between the civil and the criminal law," Austin, 509 U.S. at 610 (quoting United States v. Halper, 490 U.S. 435, 447-48 (1989)), this notion is still sound law. See Hudson v. United States, 118 S. Ct. 488, 495 (1997) ("The Eighth Amendment protects against excessive civil fines, including forfeitures." (citing Alexander v. United States, 509 U.S. 544, 554-55 (1993); Austin, 509 U.S. at 608)). Interestingly, Alexander concerned a criminal forfeiture, not a civil one. See Alexander, 509 U.S. at 559 n.4. In any event, probation conditions clearly meet the threshold requirement of Ingraham, as they arise from criminal prosecutions. See Ingraham, 430 U.S. at 671 n.40.

The Court also had occasion to discuss a definition of punishment for Eighth Amendment purposes in Wilson v. Seiter, 501 U.S. 294 (1991). In Wilson, the Court held that prisoners claiming cruel and unusual punishment must show at least deliberate indifference by prison officials. See id. at 303. The Court quoted Judge Posner: "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century." Id. at 300 (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985)).

238. See Weems v. United States, 217 U.S. 349, 368 (1910) (holding that 12 years of labor in irons for the crime of falsifying public records was both cruel—because of its excessiveness—and unusual and noting that "[w]hat constitutes a cruel and unusual punishment has never been exactly decided").

239. See Ford v. Wainwright, 477 U.S. 399, 405-06 (1986). The Ford Court held that the Eighth Amendment prohibited a state from executing a person who has become legally insane after conviction. See id. at 410.

240. See Weems, 217 U.S. at 368. A short review of the history of the Eighth Amendment is helpful. The text of the Amendment was taken almost verbatim from the Virginia Declaration of Rights of 1776, which was derived from the English Bill of Rights of 1689. See Ingraham, 430 U.S. at 664 (discussing the history of the Eighth Amendment). The English version was designed to limit the excesses of English judges under the reign of King James II. See id. It was created in reaction to either the "Bloody Assize," which were trials of treason conducted by Chief Justice Jeffreys after the rebellion of the Duke of Monmouth, or the prosecution of Titus Oates for perjury. See id.

241. In re Kemmler, 136 U.S. 436, 447 (1890); see also Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (noting that torture would be considered cruel and unusual). In Kemmler, the
As early as 1910, however, the Court began to question whether the Framers really intended that the clause be applied so narrowly. In *Weems v. United States*, the Court reasoned that the Framers must have known there were cruelties besides those involving pain or mutilation, because they realized that the legislature had the power both to criminalize behavior and to fix the terms of imprisonment. Also, the Framers generally feared that those in power might become cruel. The Court decided, therefore, that the Eighth Amendment must have a broader application than merely outlawing torture. The Court stated that although legislation is enacted “from an experience of evils,” it should not necessarily be confined to the type of evil that the legislation was originally intended to combat. Because times change, “a principle to be vital must be capable of wider application than the mischief which gave it birth,” and the Court believed this principal to be especially true for constitutions.

Yet if the death penalty is not cruel and unusual punishment, one wonders about the actual breadth of the Eighth Amendment. Chief Justice Warren in *Trop v. Dulles* made it clear that the death penalty was not an exemplary constitutional punishment. The Chief Justice spoke eloquently of the purpose of the Eighth Amendment, stating that the “basic concept underlying the Eighth Amendment is nothing less than the dignity of man,” and that the Amendment ensures that the government wields its power to punish only within the bounds of “civilized standards.” He explained that traditional punishments such as fines, incarceration, and even execution could be imposed, but that punishments beyond the scope

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243. See id. at 372-73.
244. See id. at 373.
245. See id.
246. Id.
247. Id.
249. 356 U.S. 86 (1958). The Court held in this case that the Eighth Amendment forbids the use of denationalization as a punishment. See id. at 101.
250. See id. at 99 (“[L]et us put to one side the death penalty as an index of the constitutional limit on punishment . . . . [T]he existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.”).
251. Id. at 100.
of the traditional were "constitutionally suspect."\textsuperscript{252} The meaning of the Eighth Amendment is not static, but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{253}

The case that best illustrates the method employed by the Court in analyzing these "evolving standards" is \textit{Gregg v. Georgia}.\textsuperscript{254} In determining the Eighth Amendment's application, Justice Stewart stated that society's "contemporary values" concerning a particular punishment should be assessed, but instead of relying on the Court's subjective decision as to the nature of these values, the Court must instead look to "objective indicia" that will illustrate current public attitudes towards the offense.\textsuperscript{255} In determining "contemporary values," Justice Stewart wrote that the Court should look to state statutes.\textsuperscript{256} Also, the jury, because of its direct involvement in the case, is another objective indicia.\textsuperscript{257} These standards alone, however, cannot be conclusive, for "[a] penalty must also accord with 'the dignity of man.'"\textsuperscript{258} At the least, Justice Stewart stated, "the punishment must not be 'excessive.'"\textsuperscript{259}

Justice Stewart then explained the two-part test for determining whether a punishment is excessive when analyzing it in the abstract: (1) whether the punishment involves the "unnecessary and wanton infliction of pain"; and (2) whether the punishment is "grossly out of proportion to the severity of the crime."\textsuperscript{260} Though courts play a limited role and occasionally must defer to the legislature, judges do have an important role to play because the purpose of the Eighth

\textsuperscript{252} See id.

\textsuperscript{253} Id. at 101.

\textsuperscript{254} 428 U.S. 153, 173 (1976) (plurality opinion) (holding that the death penalty for the crime of murder is not a per se violation of the Eighth and Fourteenth Amendments). Although it was a plurality opinion, the analysis in \textit{Gregg} has been adopted by a majority of the Court. \textit{See Stanford v. Kentucky}, 492 U.S. 361, 370-73 (1989) (plurality opinion); \textit{McCleskey v. Kemp}, 481 U.S. 279, 300 (1987). The \textit{McCleskey} Court held that Georgia's capital punishment statute violated neither the Equal Protection Clause of the Fourteenth Amendment nor the Eighth Amendment's Cruel and Unusual Punishment Clause. \textit{See McCleskey}, 481 U.S. at 319-20; \textit{see also GA. CODE ANN. § 17-10-30 to17-10-44} (1997) (providing the current version of Georgia's capital punishment statute). For further discussion of \textit{Stanford}, see infra notes 279-87 and accompanying text.

\textsuperscript{255} \textit{Gregg}, 428 U.S. at 173 (plurality opinion).

\textsuperscript{256} See id. at 176 (plurality opinion).

\textsuperscript{257} See id. at 181 (plurality opinion).

\textsuperscript{258} Id. at 173 (plurality opinion) (quoting \textit{Trop v. Dulles}, 356 U.S. 86, 100 (1958)).

\textsuperscript{259} Id. (plurality opinion).

\textsuperscript{260} Id. (plurality opinion) (citations omitted). By "abstract," Justice Stewart meant that a court would not be looking at the particular circumstances of the case, but would be analyzing the punishment as applied in all cases. \textit{See id.} (plurality opinion).
Amendment is to limit the legislature’s power. When analyzing a legislatively created punishment, Justice Stewart pointed out that the Court would presume the punishment was valid and that it would not require the legislature to select the least severe punishment “so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.” Those challenging the punishment would have a great burden, “in part because the constitutional test is intertwined with an assessment of contemporary standards,” and the Court would greatly defer to the legislature about the nature of those standards.

In determining the first branch of the “excessiveness” test, Justice Stewart stated that the Court would invalidate a punishment if it determined that it did not fulfill a penological end such as deterrence. Yet Justice Stewart stressed that the Court would not invalidate a punishment merely because it decided that a less severe punishment adequately served the penological end. Furthermore, Justice Stewart noted that retribution as a penological end was not “inconsistent with our respect for the dignity of men.” Nonetheless, he still analyzed whether or not the death penalty had a deterrent effect. Because the evidence was conflicting, Justice Stewart concluded that given the death penalty’s “social utility as a sanction,” it was not unconstitutional. If retribution alone is a valid purpose of punishment, however, it is unclear what punishment would not fulfill a retributive end, no matter how harsh the penalty seemed.

The Court in Gregg concluded that the death penalty was not disproportional to the crime of murder, but did not actually explain

261. See id. at 174 (plurality opinion).
262. Id. at 175 (plurality opinion).
263. Id. (plurality opinion).
264. See id. at 183 (plurality opinion).
265. See id. at 182-83 (plurality opinion); see also Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (explaining the excessiveness test). The Court held in Coker that the death sentence is a disproportionate punishment for rape and is therefore violative of the Eighth Amendment. See Coker, 433 U.S. at 592 (plurality opinion).
266. Gregg, 428 U.S. at 183 (plurality opinion).
267. See id. at 184-87 (plurality opinion).
268. Id. at 187 (plurality opinion).
269. For example, torture can obviously serve a retributive end, yet such a punishment is considered cruel and unusual. See In re Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 136 (1878); supra note 241 and accompanying text. Torture would probably fail the proportionality branch of the test, however.
270. The Court’s analysis of this point was not particularly probing. It stressed that death as punishment is “unique in its severity and irrevocability.” Gregg, 428 U.S. at 187 (plurality opinion) (citing Furman v. Georgia, 408 U.S. 238, 286-91 (1972) (Brennan, J.,
how the lower courts should analyze the proportionality branch of the "excessiveness" test. In *Solem v. Helm*, however, the Court explained this analysis more thoroughly. First, the Court stressed that although the reviewing court should give great deference both to the legislature and the trial court, "no penalty is per se constitutional." The Court admitted that even under this analysis, challenging the proportionality of a sentence other than the death penalty would rarely be successful. The Court would first examine "the gravity of the offense and the harshness of the penalty." Second, it would compare other criminals' sentences in that same jurisdiction, and "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." Third, it would examine what kinds of sentences were imposed in other jurisdictions for the same crime.

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271. *See id.* (plurality opinion).

272. 463 U.S. 277 (1983) (holding that life imprisonment without possibility of parole is significantly disproportionate to the crime of writing a bad check even when the defendant has a prior record of six felony convictions). Although citator services list *Solem* as overruled by *Harmelin v. Michigan*, 501 U.S. 957 (1991), it is not clear that this is the case. Justice Scalia, who wrote the majority opinion in *Harmelin*, did not gain a majority vote for his assertion that *Solem* was decided incorrectly because the Eighth Amendment has no proportionality requirement. *See id.* at 965 (opinion of Scalia, J.). In fact, Justice Scalia only received the support of Chief Justice Rehnquist on this issue. *See id.* at 957 (opinion of Scalia, J.).

Justice Kennedy, who was joined in his concurring opinion by Justices O'Connor and Souter, cited *Solem* extensively. *See id.* at 996-1006 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy seemed to alter the three part *Solem* test, however, stating the second and third prongs of the test need not be considered unless a comparison of the defendant's crime and his sentence "give[s] rise to an inference of gross disproportionality." *Id.* at 1005 (Kennedy, J., concurring in part and concurring in the judgment); *see also id.* at 1009 (White, J., dissenting) (disputing Scalia's assertion that the Eighth Amendment does not contain proportionality language); *id.* at 1028 (Marshall, J., dissenting) (same). What is not clear is which method the Court will employ to determine proportionality. Thus, this Comment employs the *Solem* three-part analysis because it is the last analysis that a majority of the Court embraced.


274. *Id.* at 290.

275. *See id.* at 289-90.

276. *Id.* at 290.

277. *Id.* at 291.

278. *See id.* at 291-92.
The Greggs “contemporary values” analysis was followed by a majority of the Court in Stanford v. Kentucky. In conducting this analysis, Justice Scalia, speaking for a plurality, refused to rely on public opinion polls or the opinions of interest groups in determining modern American society’s ideas of decency. Furthermore, again speaking for a plurality, Justice Scalia refused to engage in the Greggs Court’s proportionality analysis. Justice Brennan argued in his dissent that both the views of respected organizations and the legislation of other countries are useful in determining contemporary standards. He also disagreed with Justice Scalia’s refusal to conduct the Greggs excessive punishment test, noting that a majority of the Court still embraced this analysis.

C. Applying the Mendoza-Martinez Factors and an Eighth Amendment Analysis to Scarlet-Letter Probation Conditions

Although the scarlet-letter probation conditions discussed earlier were judicial and not legislative creations, the Greggs analysis might apply to determine whether the conditions constitute “cruel and unusual punishment.” First, however, it is necessary to apply the Mendoza-Martinez factors to scarlet-letter probation conditions to determine whether they constitute punishments. Relying on the

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279. See supra notes 255-59 and accompanying text.
280. 492 U.S. 361, 369-73 (1989) (conducting Greggs’s “objective indicia” analysis). The Court in Stanford held that the state may constitutionally impose the death penalty on a person 16 or 17 years old. See id. at 380 (plurality opinion); id. at 381 (O’Connor, J., concurring in part and concurring in the judgment). The dissent also conducted a “contemporary values” analysis, but reached a different result. See id. at 383-89 (Brennan, J., dissenting). The decision was split, with four justices dissenting, see id. at 382 (Brennan, J., dissenting), and Justice O’Connor concurring in part and concurring in the judgment, see id. at 380 (O’Connor, J., concurring in part and concurring in the judgment).
281. See id. at 364. Justice O’Connor did not join this part of Justice Scalia’s opinion, see id., though she did not specifically criticize Justice Scalia’s refusal to rely on evidence of public opinion polls and the views of interest groups. See id. at 377 (plurality opinion); id. at 382 (O’Connor, J., concurring in part and concurring in the judgment) (discussing her reasons for not joining all of Justice Scalia’s opinion).
282. See id. at 377 (plurality opinion).
283. See id. at 369.
284. Justice O’Connor did not join Justice Scalia’s opinion in this part, arguing instead that the Court “does have a constitutional obligation to conduct proportionality analysis.” Id. at 382 (O’Connor, J., concurring in part and concurring in the judgment).
285. See id. at 379-80 (plurality opinion).
286. See id. at 388-90 (Brennan, J., dissenting).
287. See id. at 391-94 (Brennan, J., dissenting).
earlier conclusion that shaming can be a form of punishment,\textsuperscript{289} the obvious answer would be “yes.” Given the courts’ traditional reluctance to analyze probation conditions under the Cruel and Unusual Punishment Clause,\textsuperscript{290} however, it is necessary to explore this question further.

The Supreme Court has never devised a test to determine whether a probation condition constitutes punishment for Eighth Amendment purposes,\textsuperscript{291} but the \textit{Mendoza-Martinez} factors may be useful to the inquiry.\textsuperscript{292} The first factor, whether the condition involves a disability or restraint,\textsuperscript{293} is met by all the scarlet-letter probation conditions discussed so far. A defendant who cannot drive her car without an incriminating bumper-sticker has had a restraint placed on her driving.\textsuperscript{294} Similarly, a defendant who cannot leave his house without a T-shirt designating him a thief is also restrained.\textsuperscript{295} Having to post a sign in one’s yard proclaiming one as a sex offender\textsuperscript{296} is disabling in that it prevents the person from normal social interaction. Also, a public apology is disabling in that it harms the probationer’s social standing.\textsuperscript{297}

Relying on the colonists’ use of shaming penalties such as the pillory as a way of punishing deviant behavior,\textsuperscript{298} scarlet-letter probation conditions meet the second \textit{Mendoza-Martinez} factor:

\textsuperscript{289} See \textit{supra} note 224 and accompanying text.

\textsuperscript{290} See, e.g., \textit{Springer v. United States}, 148 F.2d 411, 415 (9th Cir. 1945) (“The conditions of probation are not punitive in character and the question of whether or not the terms are cruel and unusual and thus violative of the Constitution of the United States does not arise for the reason that the Constitution applies only to punishment.”); \textit{State v. Macy}, 403 N.W.2d 743, 745 (S.D. 1987) (holding that because probation is not a sentence but a sentence alternative, the Eighth Amendment does not apply).

\textsuperscript{291} See \textit{supra} notes 238-87 and accompanying text (discussing the Supreme Court’s cruel and unusual punishment jurisprudence).

\textsuperscript{292} See \textit{Mendoza-Martinez}, 372 U.S. at 168-69.

\textsuperscript{293} See \textit{id.} at 168.


\textsuperscript{295} See, e.g., \textit{People v. Hackler}, 16 Cal. Rptr. 2d 681, 682 (Ct. App. 1993) (T-shirt stating that the defendant was on probation for theft).


\textsuperscript{298} See \textit{supra} notes 186-99 and accompanying text.
Historically, they have been viewed as punishment. Obviously, any scarlet-letter probation condition also meets the fifth factor—"whether the behavior to which it applies is already a crime"—as all of the probation conditions are the result of criminal prosecutions.

Another important factor is whether the purpose of the condition meets the two traditional goals of punishment—retribution and deterrence. There seems to be an element of retribution present in a shaming condition. One reason to impose a condition, the purpose of which is to shame or humiliate the defendant, is that it seeks to cause the defendant emotional harm. People who see a probationer forced to advertise her own guilt may feel vindicated by this.

Another primary reason given to justify scarlet-letter probation conditions is that they will deter crime, either by making it difficult

300. Id.
301. See id. at 168. The Supreme Court indicated that these are the two goals considered in the Mendoza-Martinez test. See id. Whether or not rehabilitation is truly a purpose of punishment remains a controversy. See Massaro, supra note 12, at 1893-95 (discussing the debate about whether a punishment can serve a rehabilitative purpose and noting some problems with assessing rehabilitation). For a discussion of the differing viewpoints about whether punishment can rehabilitate, see supra note 115. In the analysis of the Mendoza-Martinez factors that are applicable to scarlet-letter probation conditions, only retribution and deterrence will be considered purposes of probation; rehabilitation will be offered as an alternative purpose.
302. According to retributivist theory, punishment "is an evil the offender has deserved by his offense, an evil by which the state or society . . . pays him back for what he has done." PRIMORATZ, supra note 115, at 12. Under such a theory the difference between "justified and unjustified punishment" is the difference between whether the person being punished is guilty or innocent. Id. at 24. Therefore, under this theory any punishment of a guilty person would fulfill a retributivist goal.
303. See, e.g., People v. Hackler, 16 Cal. Rptr. 2d 681, 686 (Ct. App. 1993) (expressing concern that the trial court's reason for imposing the scarlet-letter probation condition was to humiliate the defendant); Ballenger v. State, 436 S.E.2d 793, 796 (Ga. Ct. App. 1993) (Blackburn, J., dissenting) (arguing that the trial court's reason for imposing the scarlet-letter condition was merely to humiliate the defendant); People v. Meyer, 680 N.E.2d 315, 320 (Ill. 1997) (holding that a scarlet-letter probation condition contained "a strong element of public humiliation or ridicule"); Kahan, supra note 201, at 631-32 ("Penalties [that shame] attempt to magnify the humiliation inherent in conviction by communicating the offender's status to a wider audience."); Massaro, supra note 12, at 1886 ("[T]he shaming sanctions are explicitly designed to make a public spectacle of the offender's conviction and punishment, and to trigger a negative, downward change in the offender's self-concept.").
304. See Persons, supra note 186, at 1535 ("Shame punishments allow courts and communities dissatisfied with existing modes of punishment to strike back.").
305. See Ficlik, supra note 54, at 322-23 (concluding that scarlet-letter probation conditions serve as useful deterrents); Kahan, supra note 201, at 638-41 (concluding that shaming conditions will serve as deterrents). But see Massaro, supra note 12, at 1918-28 (discussing the effects of shaming in modern America and concluding that American
or impossible for the probationer to commit another crime\textsuperscript{306} or by serving as a constant reminder to the probationer that he already has been caught by the law and should refrain from future illegal conduct.\textsuperscript{307} For example, a sign warning children and adults that the defendant is a sex offender\textsuperscript{308} may make it more difficult for the defendant to commit future sexual offenses, and a probationer wearing a T-shirt proclaiming him a thief\textsuperscript{309} may find himself carefully scrutinized whenever he enters a store. A defendant with a "DWI Convict" bumper sticker\textsuperscript{310} may be afraid to drink and drive because the police will be more likely to watch his driving, or the bumper sticker may remind the defendant that drinking and driving has severe legal consequences.

An alternative purpose for imposing scarlet-letter probation conditions, however, could be rehabilitation,\textsuperscript{311} which would suggest society lacks a moral consensus necessary for shaming conditions to be effective for rehabilitation and deterrence; DiGiovanni, supra note 217, at 662-65 (concluding that special bumper stickers for DWI offenders will not deter the crime); cf. Persons, supra note 186, at 1541-45 (concluding that publicizing a defendant's prostitution solicitation might serve as a general deterrence, though this has not yet been proven, but that such a shaming device would not specifically deter that particular defendant from committing the crime).

\textsuperscript{306} See Meyer, 680 N.E.2d at 315-17 (reasoning that imposing a scarlet-letter probation condition would "protect society"); People v. Letterlough, 655 N.E.2d 146, 149 (N.Y. 1995) (determining that the primary purpose of a scarlet-letter condition was to warn the public about the defendant); Shuster, supra note 213, at 1005 ("[T]hrough shaming the criminal, society is made aware of the criminal's propensities, and is thus in a better position to either avoid his or her company or to judge for itself whether he or she poses a danger to the community.").

\textsuperscript{307} See, e.g., People v. McDowell, 130 Cal. Rptr. 839, 843 (Ct. App. 1976) (stating that forcing the defendant to wear tap shoes would remind him that he was on probation and would reduce his temptation to snatch someone’s purse); cf. Smith, supra note 215, at 206 (concluding that at least some shaming penalties may serve to force a probationer to realize the wrongfulness of her crime).


\textsuperscript{309} See, e.g., People v. Hackler, 16 Cal. Rptr. 2d 681, 682 (Ct. App. 1993).


\textsuperscript{311} See Filcik, supra note 54, at 322-23 (concluding that scarlet-letter probation conditions serve a rehabilitative purpose because they are constant reminders to the defendant both of his guilt and that society does not tolerate his behavior); cf. Smith, supra note 213, at 206 (suggesting that penalties that inspire shame based on the probationer's sense of wrongdoing are permissible, but that conditions that have as their purpose shaming the probationer herself are improper because they do not serve to reform her). But see Massaro, supra note 12, at 1921-28 (concluding that shaming penalties will not serve a rehabilitative purpose in our society because there is currently no method for reintegrating the shamed offender back into society); Brilliant, supra note 54, at 1378-80 (noting that scarlet-letter probation conditions that involve a great deal of public humiliation are “far removed, and indeed almost antithetical to” the goal of rehabilitation); DiGiovanni, supra note 217, at 665-68 (concluding that special bumper stickers for DWI convicts would not serve a rehabilitative purpose); Persons, supra note 186, at 1541-45 (concluding that publicizing a defendant's prostitution solicitation might serve as a general deterrence, though this has not yet been proven, but that such a shaming device would not specifically deter that particular defendant from committing the crime).
that such conditions are not simply punitive in purpose. By reminding the defendant of her guilt and that society does not approve of such behavior, a probation condition may cause the defendant to repent. A few courts have upheld scarlet-letter conditions on the belief that such conditions may serve a rehabilitative purpose; others have flatly rejected this argument. Even assuming that the purpose of a scarlet-letter probation condition is primarily to rehabilitate, the condition may be excessive in relation to that purpose, which is another Mendoza-Martinez factor to be considered. Other conditions might better serve the goal of rehabilitation without being so harsh, such as psychiatric treatment, an alcohol rehabilitation program, or community service.

One problem arises from this discussion about the purposes of scarlet-letter probation conditions: the problem of distinguishing purpose from effects. Although one can look to the analyses of commentators and courts to determine the purposes of scarlet-letter probation conditions, the actual consequences of the conditions are

186, at 1538-40 (concluding that shaming penalties for prostitute solicitors would not rehabilitate them).

312. See Lindsay v. State, 606 So. 2d 652, 657 (Fla. Dist. Ct. App. 1992) (assuming, without explaining why, that a scarlet-letter probation condition served a rehabilitative purpose); Goldschmitt, 490 So. 2d at 126 (deciding that the trial court's belief that a scarlet-letter probation condition served a rehabilitative purpose was not "utterly without foundation"); Ballenger v. State, 436 S.E.2d 793, 794-95 (Ga. Ct. App. 1993) (refusing to question the trial court's assessment that a scarlet-letter condition served a rehabilitative purpose).

313. See Hackler, 16 Cal. Rptr. 2d at 686 (stating that the trial court's true purpose in imposing a scarlet-letter probation condition was not to rehabilitate, but to humiliate the defendant); People v. Johnson, 528 N.E.2d 1360, 1362 (Ill. App. Ct. 1988) (expressing concern that a public apology could have disastrous psychological effects on the defendant and would work against rehabilitation); People v. Letterlough, 655 N.E.2d 146, 150 (N.Y. 1995) (noting that the punitive nature of a scarlet-letter condition outweighed its possible rehabilitative potential).

314. See, e.g., People v. Meyer, 680 N.E.2d 315, 320 (Ill. 1997) (striking down a scarlet-letter probation condition because of the possible unpredictable consequences of imposing the condition and because of the public humiliation inherent in the condition, but admitting that probation conditions served both rehabilitative and punitive purposes).


317. See, e.g., Letterlough, 655 N.E.2d at 147.


319. See supra notes 45-174 and accompanying text (discussing courts' approaches to scarlet-letter probation conditions); supra notes 203-23 and accompanying text (discussing commentators' views on scarlet-letter probation conditions).
The deterrent and rehabilitative effects of these conditions remain to be proven. Even the retributive result of such conditions is unclear. For example, a sign proclaiming a person a violent felon may well humiliate one defendant; on the other hand, the same sign could be a symbol of pride to another defendant.

Despite uncertainty as to the true effects of scarlet-letter probation conditions, balancing all of the Mendoza-Martinez factors arguably leads to the conclusion that such probation conditions are indeed punitive, which in turn triggers the Eighth Amendment's guarantee that the punitive condition will not be cruel and unusual. To determine whether or not scarlet-letter conditions are cruel and unusual, one must look to the "dignity of man" standard in Trop v. Dulles to ascertain the "evolving standards of decency that mark the progress of a maturing society."

Chief Justice Warren may have been optimistic in his assumption that such standards are evolving. As far as shaming penalties go, the standards seem to have regressed, or at least are coming back full-circle. Although shaming penalties were generally disavowed in the nineteenth century, public opinion now seems to embrace their

320. See State v. Burdin, 924 S.W.2d 82, 87 (Tenn. 1996) ("[C]ompliance with the [scarlet-letter probation] condition would have consequences in the community, perhaps beneficial, perhaps detrimental, but in any event unforeseen and unpredictable.").

321. See Kahan, supra note 201, at 638 (admitting that there have been no empirical studies to prove the deterrent effects of shaming penalties); Persons, supra note 186, at 1542 (noting that no evaluation has been done to analyze the deterrent effect of shaming conditions). Persons finds that although some cities that publicize the convictions of people who solicit prostitutes have noted a drop in arrests for this crime, some cities that use these same shaming penalties have not noticed a deterrent effect. See id. at 1542-43 nn.92 & 95. Although no actual studies were done, Judge Titus, who began the bumper sticker program in Florida, claims that drunk driving incidents decreased by 33% in Sarasota County, Florida, after the program began. See Massaro, supra note 12, at 1887. Determining whether a scarlet-letter probation condition serves a rehabilitative purpose is difficult to determine, because it is extremely difficult, if not impossible, to quantify the rehabilitation of a person. See id. at 1894-95. Professor Garvey argues that shaming penalties can specifically deter, but he questions their rehabilitative power. See Garvey, supra note 205, at 151.

322. See supra notes 211, 217-21 and accompanying text.

323. The Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), noted that the factors "may often point in differing directions," so the suggestion seems to be that this is a balancing test. Id. at 169.

324. See U.S. CONST. amend. VIII.


327. See id.; supra text accompanying note 253.

328. See supra notes 200-02 and accompanying text.
Because a plurality of the Court refused to rely on public opinion polls in *Stanford v. Kentucky*, however, it is wise to look to another indication of the acceptance of scarlet-letter probation conditions: legislative endorsement of such conditions.

While scarlet-letter probation conditions have not been widely adopted by state legislatures, many have been created by trial courts that are given discretion by their legislatures to devise special probation conditions. The examples already offered in the cases challenging scarlet-letter probation conditions are by no means exhaustive. For example, in South Carolina, a man was ordered to sit outside a courthouse for ten days with a sign reading "I am a Drunk Driver." In Miami, Florida, Boston, Massachusetts, and Canton, Ohio, the names of convicted "johns" are broadcast on cable television. The city of Kent, Washington, broadcasts on television the names of convicted "johns" and drug offenders. Some Texas judges require drunk drivers to attach bumper stickers to their cars. A New Hampshire defendant was ordered to publicize his conviction for sexually assaulting a minor. A thief in Oregon was also ordered...
to publicize his conviction. These examples suggest that the use of scarlet-letter probation conditions is widespread. Given the general "get tough on crime" sentiment of the times it seems unlikely that any of these conditions would be viewed by a court as against contemporary standards of decency, especially because it appears that such conditions are gaining in popularity.

That is not the end of the analysis, however. There is still the separate question of whether scarlet-letter probation conditions are excessive in their severity. The test for excessiveness is whether the punishment involves "the unnecessary and wanton infliction of pain," and whether the punishment is "grossly out of proportion to the severity of the crime." For the first branch of the test, one must look to see if the punishment fulfills a proper penological end. It is important to remember, however, that the Court will not invalidate a punishment merely because it finds that a less severe punishment would fulfill the penological end. Although it is unclear whether scarlet-letter probation conditions have deterrent or rehabilitative effects, they do seem retributive. Because the Supreme Court has stated that retribution is a valid goal of punishment, scarlet-letter probation conditions would seem to pass the first branch of the test for excessive punishment.

For the second branch of the excessiveness analysis, the proportionality test, perhaps an Eighth Amendment challenge

341. See supra notes 1-12 and accompanying text (discussing the American public's dissatisfaction with the criminal justice system and the trend toward harsher penalties).
342. See Kahan, supra note 201, at 635 (noting the "growing popularity of shaming penalties").
344. Id. (plurality opinion).
345. See id. at 183 (plurality opinion).
346. See id. at 182-83 (plurality opinion).
347. See supra notes 305-13 and accompanying text (discussing possible deterrent and rehabilitative effects of scarlet-letter probation conditions).
348. See supra notes 302-04 and accompanying text (discussing the retributive nature of scarlet-letter probation conditions).
349. See Gregg, 428 U.S. at 183 (plurality opinion).
350. The Court in Gregg declined to hold the death penalty unconstitutional because it served a retributive purpose, although there was conflicting evidence of the death penalty's deterrent effects. See id. at 183-87 (plurality opinion). That the Court would find a scarlet-letter probation condition unconstitutional because its deterrent effects were unproven seems rather unlikely. Because the Court has stated that retribution is a valid penological goal, see id. at 183 (plurality opinion), it is hard to imagine a punishment that would fail the first branch of the test for excessiveness.
351. See id. at 173 (plurality opinion); supra notes 270-78 and accompanying text. It is
could succeed if a probationer could show that, in a particular jurisdiction, more serious crimes received less severe probation sentences—sentences that did not include shaming penalties. Another way of challenging a condition might be to prove that in other jurisdictions defendants convicted of the same crime did not receive scarlet-letter probation conditions. This argument might have more success in jurisdictions where the probation statutes limit the sentencing court’s discretion to create probation conditions, because in such jurisdictions, imposition of scarlet-letter probation conditions constitutes “judicial legislation.” Proportionality challenges to scarlet-letter probation conditions, however, face same tough obstacles. First, the Court has stated expressly that proportionality challenges which do not involve the death penalty rarely will be successful. Second, the current Court, though it probably still would find some kind of proportionality requirement in the Eighth Amendment, would likely require only a very rough proportionality between the crime and the punishment. Given the reluctance of the courts in the past to hear Eighth Amendment challenges to probation conditions, it seems doubtful that the Supreme Court would hold a scarlet-letter probation condition unconstitutional under the proportionality test.

Wise to distinguish between different kinds of scarlet-letter probation conditions, as the underlying conviction to which they are attached varies as does the severity of the punishment inflicted. For example, a probation condition requiring a defendant to publish an apology for driving while intoxicated is probably less severe in its consequences than a probation condition requiring a convicted sex offender to post a sign in front of his house for five years that warns the public of his dangerousness. However, one could easily argue that a sexual offense is a more serious crime than driving while intoxicated. Compare, e.g., N.C. GEN. STAT. § 14-202.1(b) (1993) (noting that taking indecent liberties with a child is a Class F felony), with N.C. GEN. STAT. § 20-138.1(d) (1993) (noting that driving while impaired is a misdemeanor).

352. See Solem, 463 U.S. at 291.
353. See id. at 291-92.
355. See Brilliant, supra note 54, at 1362; see, e.g., People v. Letterlough, 655 N.E.2d 146, 150 (N.Y. 1995); State v. Burdin, 924 S.W.2d 82, 87 (Tenn. 1996).
356. See Solem, 463 U.S. at 289.
357. See supra note 272.
358. See supra note 290 and accompanying text.
359. If a probationer could have been incarcerated, the Court may be unwilling to hold unconstitutional a scarlet-letter probation imposed by a trial court. The Court may assume that the probation condition is less harsh than imprisonment. See Kahan, supra note 201, at 640-41 (noting that incarceration is a harsher penalty than shaming conditions). But see Persons, supra note 186, at 1540 (arguing that incarceration may over time be less harsh than shaming penalties because the defendant will one day be released from prison but perpetually will have a lowered “self-perception” from the shaming...
III. SCARLET-LETTER PROBATION CONDITIONS AS COMPELLED SPEECH

Even if scarlet-letter probation conditions do not violate the Eighth Amendment, they still raise First Amendment concerns because they involve compelled speech. While the First Amendment is usually cited for protecting citizens' right to speak without governmental restraint, a particular line of First Amendment cases also has held that the government may not compel its citizens to speak. In order to understand the current law on compelled speech, it is helpful to review the major cases in this area. The applicability of the compelled speech doctrine—also called the "negative free speech right"—to compelled facts is the newest application of the doctrine. Because a scarlet-letter probation condition compels a probationer to "speak" the fact of her own conviction, this section will focus on whether this application of the doctrine would be accepted by the Supreme Court today.

The first case involving compelled speech, West Virginia State Board of Education v. Barnette, involved a West Virginia statute requiring all teachers and pupils to salute and pledge allegiance to the American flag. The statute regarded any refusal to salute the flag "'as an act of insubordination, and [would] be dealt with accordingly.'" The case arose when children who refused to salute the flag for religious reasons were expelled from school. The Court

punishment). This argument, however, is not particularly convincing.

360. U.S. CONST. amend. I.
361. The compelled speech cases include those dealing with commercial speech; however, commercial speech cases are beyond the scope of this Comment. Some of these cases include: Glickman v. Wileman Bros. & Elliot, 117 S. Ct. 2130 (1997); Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986) (plurality opinion); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).
362. See infra notes 427-45 and accompanying text.
363. But see infra notes 611-15 and accompanying text (arguing that scarlet-letter probation conditions do more than just compel facts).
364. 319 U.S. 624 (1943). Although concurring separately, Justices Black and Douglas agreed "substantially" with the majority opinion. See id. at 643 (Black & Douglas, JJ., concurring). Justice Murphy joined with the majority opinion in his concurrence. See id. at 644 (Murphy, J., concurring).
365. Id. at 626 (quoting W. VA. CODE § 1734 (Supp. 1941)). The legislation resulted from the Court's decision in Minersville School District v. Gobitis, 310 U.S. 586, 600 (1940), overruled by Barnette, 319 U.S. at 642, which held that there is no constitutionally granted immunity for school children who for religious reasons will not salute the American flag. According to the Court in Barnette, the Gobitis decision "assumed ... that power exists in the State to impose the flag salute discipline upon school children in general," and the Court "only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule." Barnette, 319 U.S. at 635.
366. As in Gobitis, the plaintiffs challenging the requirement were Jehovah's
first noted that "[t]he freedom asserted by these [students] does not bring them into collision with rights asserted by any other individual .... The sole conflict is between authority and rights of the individual." The Court determined that the statute infringed upon the students' First Amendment freedom of expression. After noting that forcing an individual to pledge allegiance to the flag coerces her to affirm a particular belief, the Court stated that the Constitution allowed censorship only when an expression amounted to a clear and present danger. Forcing someone to affirm a belief, however, "could be commanded only on even more immediate and urgent grounds than silence." In this case, the State did not allege that a refusal to salute the flag created a clear and present danger. Nor did the Court accept the argument that such matters were best left to the state legislatures responding that the Bill of Rights exists in order to place certain subjects out of the reach of governmental officials.

The Court indicated that to rule any other way would be illogical. It noted that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." While the majority opinion clearly seemed to limit the holding to matters of opinion, theology, and ideology, Justice Murphy expressed a willingness to

Witnesses, whose religious beliefs forbade them from giving allegiance to "'any graven image.'" Barnette, 319 U.S. at 629 (quoting Exodus 20:4-5).

367. Id. at 630. 368. See id. at 642. 369. See id. at 633 ("[C]ompulsory flag salute and pledge requires affirmation of a belief and an attitude of mind."). 370. See id.

371. Id. 372. See id. at 634.

373. This argument was one of the rationales behind the decision in Gobitis. See Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 597-98, 600 (1940), overruled by Barnette, 319 U.S. at 642 (1943). Essentially, the Court in Barnette evaluated the arguments in Gobitis and refuted them. See Barnette, 319 U.S. at 635-42. The Barnette Court also rejected the argument that interfering with a local school board "'would in effect make [the Court] the school board for the country.'" Id. at 637 (quoting Gobitis, 310 U.S. at 598).

374. See Barnette, 319 U.S. at 638 ("The very purpose of a Bill of Rights was to place [certain subjects] beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). 375. Id. at 634.

376. See id. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or
further expand this holding. In his concurrence he wrote: "The right of freedom of thought . . . includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society."\(^{377}\) Probably because of the controversial nature of this ruling, however, the Court did not speak again on compelled speech for thirty-four years.\(^{378}\)

The issue in the next important case, *Miami Herald Publishing Co. v. Tornillo*,\(^{379}\) was whether a state statute that required newspapers to give political candidates equal space to reply to criticism violated the newspaper's First Amendment right to free speech.\(^{380}\) The Florida Supreme Court had held that the statute "'enhanced,' " and did not limit, free speech because it increased "'the free flow of information to the public.' "\(^{381}\) Though he admitted that this argument was valid, Chief Justice Burger, speaking for the Court, expressed concern that right-of-access statutes may amount to "governmental coercion."\(^{382}\) In reviewing prior case law, Chief Justice Burger noted that the Court previously had stressed the importance of a press free from governmental interference\(^{383}\) and had "expressed sensitivity" about whether a governmental requirement or restriction actually forced a newspaper to publish something it would not have published otherwise, because such compulsion was unconstitutional.\(^{384}\) Consequently, the Court held the statute unconstitutional.\(^{385}\) *Barnette* was not cited, though Justice Rehnquist would later describe *Tornillo* as a case in which the Court applied a "negative" First Amendment right to newspapers rather than

\(^{377}\) *Id.* at 645 (Murphy, J., concurring). Justice Murphy offered the example of a court compelling someone to give testimony as one example of when the government may legitimately require a citizen to speak. *See id.* (Murphy, J., concurring).

\(^{378}\) *See* *Wooley v. Maynard*, 430 U.S. 705 (1977). For a more detailed discussion of this case, see *infra* notes 388-403 and accompanying text.

\(^{379}\) 418 U.S. 241 (1974). Although this case is not actually a compelled speech case, it is noteworthy because the Court later treated it as one. *See*, e.g., *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 797 (1988); *Wooley*, 430 U.S. at 714.

\(^{380}\) *See Tornillo*, 418 U.S. at 243.

\(^{381}\) *Id.* at 245 (quoting *Tornillo v. Miami Herald Publ'g Co.*, 287 So. 2d 78, 82 (Fla. 1973)).

\(^{382}\) *Id.* at 254.

\(^{383}\) *See id.* at 257 ("Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.' " (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964))).

\(^{384}\) *See id.* at 256.

\(^{385}\) *See id.* at 258.
individuals only.\footnote{See Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 26-27 (1986) (Rehnquist, J., dissenting).} Justice Brennan would later note that the holding in \textit{Tornillo} "did not rely on the fact that Florida restrained the press, and has been applied to cases involving expression generally."\footnote{Riley v. National Fed'n of the Blind, 487 U.S. 781, 797 (1988).} Soon after \textit{Tornillo}, the Supreme Court again addressed the issue of compelled speech in \textit{Wooley v. Maynard}.\footnote{430 U.S. 705 (1977).} Petitioners\footnote{As in \textit{Barnette}, the challengers to the statute were Jehovah's Witnesses. See \textit{Wooley}, 430 U.S. at 707; West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943).} challenged a New Hampshire statute requiring all noncommercial license plates to bear the state motto "Live Free or Die."\footnote{Wooley, 430 U.S. at 707.} The issue, as described by the Court, was whether a state could force an individual to disseminate an ideological message on her private property with the purpose of having the message read by the public.\footnote{See id. at 713.}

The Court began its analysis of the statute's constitutionality by citing Justice Murphy's concurrence in \textit{Barnette}, stating that the First Amendment includes "both the right to speak freely and the right to refrain from speaking at all."\footnote{Id. at 714 (citing \textit{Barnette}, 319 U.S. at 645 (Murphy, J., concurring)). The Court claimed to be citing to both the majority opinion and Justice Murphy's concurrence, but the language is identical to Justice Murphy's statement. See \textit{Barnette}, 319 U.S. at 645 (Murphy, J., concurring) (noting that the rights under the First Amendment include "both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society").} The Court continued in this vein: "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"\footnote{Wooley, 430 U.S. at 714 (quoting \textit{Barnette}, 319 U.S. at 637). These ideas are illustrated, the Court noted, in \textit{Tornillo}. See id. (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).} In comparing the statute in \textit{Wooley} to the statute in \textit{Barnette}, the Court admitted that compelling someone to salute the flag affirmatively infringed personal freedoms more than forcing someone to bear the state motto on a license plate, which is a more passive act.\footnote{See id. at 715.} The difference, however, was "essentially one of
degree.”395 “Here, as in Barnette,” the Court wrote, “we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”396 Recognizing an infringement on petitioner’s First Amendment rights to free speech, the Court then employed a strict scrutiny test,397 which the State failed.398

In dissent, Justice Rehnquist suggested that he agreed with the holding in Barnette but believed that the majority incorrectly assumed that the license plate constituted speech.399 “The issue,” he wrote, “unconfronted by the Court, is whether appellees, in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views.”400 He believed that “for First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually ‘asserting as true’ the message.”401

In Wooley, the Court expanded the holding in Barnette. The difference between being forced to salute the flag and being forced to drive around with the state motto on one’s license plate may be “one of degree,”402 but the Court seemed to stretch Barnette to include the passive endorsement of a state-sanctioned message. Clearly, the

395. Id.
396. Id.
397. If the government engages in content-based regulation of speech, the Supreme Court will analyze the regulation under a strict scrutiny test. See, e.g., Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 123 (1991) (holding a Son of Sam statute unconstitutional because though the state’s interest in compensating victims from the fruits of crime is compelling, the law was not narrowly tailored to advance that purpose); Boos v. Barry, 485 U.S. 312, 323, 334 (1988) (holding that a statutory provision which prohibited the display of signs criticizing foreign governments within 500 feet of an embassy violated the First Amendment).
398. See Wooley, 430 U.S. at 715-17. The State offered two justifications for the state motto: (1) that it enabled law-enforcement officers to determine whether passenger vehicles were carrying the correct plates; and (2) that the State wanted to communicate an ideological message about its history. See id. at 716-17. The Court determined that the first justification did not warrant stifling individual liberties when a more narrow means could be achieved and that the State’s interest in disseminating an ideology could never outweigh the individual’s First Amendment right of free speech. See id.
399. See id. at 720-21 (Rehnquist, J., dissenting) (discussing the differences between the present case and Barnette but never questioning Barnette’s holding). Justice Rehnquist also joined part of Justice White’s dissent on procedural grounds. See id. (Rehnquist, J., dissenting); id. at 717-19 (White, J., dissenting in part).
400. Id. at 720-21 (Rehnquist, J., dissenting).
401. Id. at 721 (Rehnquist, J., dissenting).
402. Id. at 715.
focus in Wooley was still on ideological compelled speech.\footnote{3}

In \textit{Abood v. Detroit Board of Education},\footnote{4} the petitioners challenged Michigan legislation permitting a union and a local government employer to form an "agency shop" arrangement, which forced each employee who was represented by a union, regardless of whether he was a member, to pay to the union as a condition of employment a service fee that was equal to the amount of union dues.\footnote{5} In analyzing the constitutionality of the legislation, the Court cited \textit{Buckley v. Valeo}\footnote{6} for the proposition that contributions to an organization whose purpose is to spread a political message are protected by the First Amendment.\footnote{7} The Court then stated that citizens have a First Amendment right not to contribute to an organization as well: "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights."\footnote{8} The Court stressed that the First Amendment forbids the State to coerce an individual's beliefs.\footnote{9} Again, the Court appeared willing to expand the scope of the meaning of compelled speech, this time to political contributions.\footnote{10}

The next compelled speech case, \textit{Harper & Row Publishers, Inc. v. Nation Enterprises},\footnote{11} involved an analysis of the applicability of the Copyright Revision Act of 1976.\footnote{12} In March of 1979, \textit{The Nation} magazine had published an unauthorized manuscript of \textit{A Time to Heal: The Autobiography of Gerald R. Ford}.\footnote{13} \textit{Time} magazine had already agreed to purchase exclusive rights to the manuscript but canceled its agreement after \textit{The Nation} published the article.\footnote{14} Harper & Row, the copyright holders of the manuscript, sued Nation

\footnotesize{403. \textit{See id.} at 717 ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").}

\footnotesize{404. 431 U.S. 209 (1977).}

\footnotesize{405. \textit{See id.} at 211.}

\footnotesize{406. 424 U.S. 1 (1976) (per curiam).}

\footnotesize{407. \textit{See Abood}, 431 U.S. at 234 (citing \textit{Buckley}, 424 U.S. at 22-23 (per curiam)).}

\footnotesize{408. \textit{Id.}}

\footnotesize{409. \textit{See id.} at 234-35.}

\footnotesize{410. For two related cases, see \textit{Elrod v. Burns}, 427 U.S. 347, 372-73 (1976) (holding that the state may not condition employment on the employee's association with a particular political party), and \textit{Torcaso v. Watkins}, 367 U.S. 488, 496 (1961) (holding that the state may not condition employment on the employee's affirming a belief in God).}

\footnotesize{411. 471 U.S. 539 (1985).}


\footnotesize{413. \textit{Harper & Row}, 471 U.S. at 542.}

\footnotesize{414. \textit{See id.}}
Enterprises for copyright infringement.\textsuperscript{415} The Second Circuit, in a split decision, reversed a ruling for the plaintiffs, finding that \textit{The Nation}'s act constituted a "fair use" under the copyright act.\textsuperscript{416} Although the court admitted that part of \textit{The Nation}'s article constituted expression protected by copyright,\textsuperscript{417} it noted that the "purpose of the article was essentially factual in nature" and that the part of the article that was protected expression was "insubstantial" compared to the entire piece.\textsuperscript{418} The Second Circuit maintained that the "copyright attaches to expression, not facts or ideas."\textsuperscript{419}

The Supreme Court reversed the Second Circuit's decision.\textsuperscript{420} It determined that such a broad definition of "fair use" would "effectively destroy an expectation of copyright protection in the work of a public figure."\textsuperscript{421} Although the Supreme Court agreed with the Second Circuit that the information in \textit{The Nation}'s article was newsworthy and that such information should be made available to the public, "[t]he fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression prior to publication."\textsuperscript{422}

As part of its justification for reversing the Second Circuit, the Supreme Court cited \textit{Wooley}.\textsuperscript{423} Though the right to "refrain from speaking" would not "sanction abuse of the copyright owner's monopoly as an instrument to suppress facts,"\textsuperscript{424} the Court asserted that "[t]here is necessarily, and within suitably defined areas, a ... freedom not to speak publicly, one which serves the same ultimate ends as freedom of speech in its affirmative aspect."\textsuperscript{425} By describing the copyright laws' protection of individual expression as synonymous with the protection afforded the petitioners in \textit{Wooley},\textsuperscript{426}

\begin{itemize}
\item \textsuperscript{415} \textit{See id.} at 544-46.
\item \textsuperscript{416} \textit{See id.} at 544-45.
\item \textsuperscript{417} The copyrighted material included part of a conversation between President Ford and Henry Kissinger and some of Ford's impressions about Nixon. \textit{See id.} at 545.
\item \textsuperscript{418} \textit{Id.}
\item \textsuperscript{419} \textit{Id.} at 544.
\item \textsuperscript{420} \textit{See id.} at 542.
\item \textsuperscript{421} \textit{Id.} at 557.
\item \textsuperscript{422} \textit{Id.}
\item \textsuperscript{423} \textit{See id.} at 559 ("[F]reedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.' " (quoting \textit{Wooley} v. \textit{Maynard}, 430 U.S. 705, 714 (1977))).
\item \textsuperscript{424} \textit{Id.}
\item \textsuperscript{425} \textit{Id.} (quoting \textit{Estate of Hemingway} v. \textit{Random House, Inc.}, 244 N.E.2d 250, 255 (N.Y. 1968)).
\item \textsuperscript{426} \textit{See Wooley}, 430 U.S. at 714.
\end{itemize}
the Court suggested that the compelled speech doctrine has general applicability to other branches of First Amendment law.

In Riley v. National Federation of the Blind, the Court first applied the compelled speech doctrine to "compelled facts." The North Carolina Charitable Solicitations Act required that professional fundraisers disclose to potential donors "the average percentage of gross receipts actually turned over to charities by fundraisers for all charitable solicitations conducted in North Carolina within the previous 12 months." Petitioners, composed of various charitable organizations and professional fundraisers, challenged the statute as an infringement on their First Amendment freedom of speech. The State of North Carolina argued that the required disclosure constituted commercial speech and therefore was not entitled to full First Amendment protection; that because compelled speech is different than compelled silence the Court should apply a more deferential test in determining the statute's constitutionality; and that prior compelled speech cases were distinguishable because they "involved compelled statements of opinion" rather than "compelled statements of 'facts.'"

Justice Brennan, speaking for the Court, first noted that the Act was a content-based regulation of speech because the content of speech is altered when the government forces a person to speak. He rejected the State's argument that the required disclosures constituted commercial speech, point out that even if the disclosure was commercial speech, it was "inextricably intertwined with otherwise fully protected speech," thus making an endeavor to apply different tests "both artificial and impractical." Turning to the compelled speech issue, Justice Brennan refused to apply a more

428. See id. at 797-98.
430. Riley, 487 U.S. at 786.
431. See id. at 787. The petitioners actually challenged three sections of the Act: § 131C-17.2, a fee requirement; § 131C-16.1, the disclosure requirement; and § 131C-6, a licensing requirement. See Riley, 487 U.S. at 785-86 nn.2-4.
432. See id. at 795. The state could not argue that charitable solicitations were themselves commercial speech, as the Court in Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), held that "charitable solicitations ... have not been dealt with as 'purely commercial speech.'" Riley, 487 U.S. at 788 (quoting Schaumburg, 444 U.S. at 632).
433. See Riley, 487 U.S. at 796.
434. Id. at 797.
435. See id. at 795.
436. Id. at 796.
deferential standard than strict scrutiny, stating that although there is some difference between compelled speech and compelled silence, this "difference is without constitutional significance" because freedom of speech comprises "the decision of both what to say and what not to say." Tornillo, Justice Brennan noted, established "[t]he constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression."

Justice Brennan did not accept that Riley was distinguishable from Tornillo in that the charitable solicitation statute involved compelled facts rather than compelled opinion. He then analyzed the statute under the strict scrutiny test, determining both that the State did not offer a compelling interest and that the statute was unduly burdensome and not narrowly tailored.

Three justices, all of whom still sit on the Court, dissented. Justice Stevens joined the Court's opinion that the state could not compel statements of fact but disagreed with the Court about the constitutionality of another provision of the statute. Chief Justice Rehnquist, with Justice O'Connor joining, believed that these particular charitable solicitations constituted commercial speech. Even if a strict scrutiny test was applicable, however, the Chief Justice believed that the State had met its burden. Neither the dissenting opinions nor the concurring opinion by Justice Scalia

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437. The Court will usually apply strict scrutiny to a statute that infringes upon a citizen's right to free speech. See supra note 397 and accompanying text (discussing the Court's standard of review in free speech cases).
439. Id. at 797 (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974)).
440. See id. at 797-98. Justice Brennan maintained that "either form of compulsion burdens protected speech." Id. He cited to all of the compelled speech cases discussed previously in this section. See id. at 797.
441. See id. at 798.
442. See id. at 804 (Stevens, J., concurring in part and dissenting in part). North Carolina General Statutes Section 131C-6 (1986) required professional fundraisers to get a license before they could solicit funds. See N.C. GEN. STAT. § 131C-6 (1986), repealed by Act of July 15, 1994, ch. 759, § 1, 1994 N.C. Sess. Laws 629, 629; Riley, 487 U.S. at 786 n.4. A licensing statute must allow the licensee to take the licensor to court if no license is granted within a specific time period. See Riley, 487 U.S. at 802 (citing Freedman v. Maryland, 380 U.S. 51, 59 (1965)). The Court in Riley struck down the statute as unconstitutional because it allowed "a delay without limit." Id. However, Justice Stevens would have held the licensing statute constitutional because it did not impose a significant burden on the fundraisers' ability to speak and there was no evidence that the state would be slow to process the licensing applications. See id. at 804 (Stevens, J., concurring in part and dissenting in part).
444. See id. at 808 (Rehnquist, C.J., dissenting).
445. See id. at 803-04 (Scalia, J., concurring in part and concurring in the judgment).
challenged the applicability of the compelled speech doctrine to compelled facts.

_Hurley v. Irish-American Gay, Lesbian and Bisexual Group_446 involved an annual parade through Boston, which the South Boston Allied War Veterans Council ("the Council") had organized and conducted for fifty years.447 In 1992, the Irish-American Gay, Lesbian and Bisexual Group ("GLIB") formed for the purpose of marching in the parade and to show the public that gays and lesbians were part of the Irish community.448 The Council denied the organization's application to march in the parade, but GLIB obtained a court order forcing the Council to include it.449 After the Council refused again in 1993, GLIB sued the Council, claiming that the Council had violated the state and federal constitutions as well as the state public accommodations law, which prohibited discrimination on the basis of sexual orientation in any public place.450 The case eventually made its way to the Supreme Judicial Court of Massachusetts, which affirmed a holding for GLIB.451

The Council appealed to the Supreme Court, claiming that by forcing it to include a group expressing a message that the Council did not wish to express, the State of Massachusetts was infringing upon the Council members' First Amendment rights.452 Justice Souter, speaking for the Court, noted that the public accommodations statute did not, "on its face, target speech or discriminate on the basis of its content."453 He then pointed out that the statute in this situation "ha[d] been applied in a peculiar way," for the Council did not seek to exclude individual gays and lesbians but rather GLIB as an organization.454

Justice Souter considered the parade an expressive activity: "[T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."455 Consequently, the Court applied a compelled speech analysis,

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447. See id. at 560.
448. See id. at 561.
449. See id.
450. See id. (quoting MASS. GEN. LAWS ch. 272, § 98 (1992)).
451. See id. at 563.
452. See id. at 559.
453. Id. at 572.
454. Id.
455. Id. at 574.
holding that the state courts' application of the permissive accommodations statute to the Council's decisions about what organizations to include violated the First Amendment. Justice Souter concisely summarized the compelled speech doctrine and its general applicability: "'Since all speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" This rule "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." Not only the press, but corporations and individuals, including publishers, have the right to speak and to be silent. The aim of the rule is to protect choices concerning content that some might consider wrong. An unanimous Court accepted this description of the First Amendment right to be silent.

Case law indicates that the compelled speech doctrine is firmly entrenched in First Amendment jurisprudence as applied to statements of opinion and belief as well as to statements of fact. The only time a court has applied the compelled speech analysis to a scarlet-letter probation condition, however, occurred in *Goldschmitt v. State,* which was decided prior to the Supreme Court's decision in *Riley* that the government cannot compel facts. Therefore, it must be determined whether the compelled speech doctrine is applicable to such conditions.

456. See id. at 559, 573-75.
457. Id. at 573 (quoting Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 11, 16 (1986) (plurality opinion) (citation omitted)).
458. Id. at 574.
459. See id. For his supposition that the First Amendment applies "equally to statements of fact," id. at 573, Justice Souter cited *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995), which held that a state may not make it illegal to publish or disseminate an anonymous political message, see *McIntyre,* 514 U.S. at 341-42. However, this case did not rely on a compelled speech rationale.
460. See *Hurley,* 515 U.S. at 574 (noting that the purpose of the rule is "to shield just those choices of content that in someone's eyes are misguided, or even hurtful").
461. See id. at 559.
464. This inquiry admittedly begs the question of whether or not courts will apply a First Amendment compelled speech analysis to a probation condition; however, this Comment considers the problem of challenging probation conditions on constitutional grounds and some of the standards that courts have devised to test the validity of probation conditions in the next section. See infra notes 473-567 and accompanying text. Several examples illustrate some of the problems in applying these standards to a
If a state forces a person to post a sign or put a bumper sticker on her car, stating an idea that the person does not wish to convey, Wooley suggests that this action is compelled speech. Even if what is being compelled are facts, the Court held in Riley that this also raises First Amendment concerns. Some scarlet-letter probation conditions compel probationers to convey the facts of their own convictions. When a state compels a person to print an apology in the newspaper, it compels a person to express the belief that what the person did was wrong. Signs proclaiming a person "dangerous" or warning others against entering the person's property at the very least force the person to convey facts. The question is not whether the states compel speech in these cases, but whether the Constitution grants them the power to do so. Put differently, the question is, "To what extent do probationers have a First Amendment right to refuse to speak?" To begin to answer this question, it is necessary to explore the sometimes confusing terrain of probation law.

compelled speech case. See infra notes 571-93 and accompanying text.


466. See Riley, 487 U.S. at 797-98.

467. See, e.g., People v. Hackler, 16 Cal. Rptr. 2d 681, 683 (Ct. App. 1993); Goldschmitt, 492 So. 2d at 124; Ballenger v. State, 436 S.E.2d 793, 794 (Ga. Ct. App. 1993). For a discussion of these cases, see supra notes 57-76 and accompanying text (discussing Hackler); supra notes 78-91 and accompanying text (discussing Goldschmitt); supra notes 104-15 and accompanying text (discussing Ballenger).


469. See, e.g., State v. Bateman, 771 P.2d 314, 316 (Or. Ct. App. 1989) (en banc) (refusing to rule on the validity of a probation condition that forced defendant to post a sign that he was “dangerous”); supra notes 160-64 and accompanying text (discussing Bateman).

470. See, e.g., People v. Meyer, 680 N.E.2d 315, 316 (Ill. 1997) (invalidating a probation condition forcing the defendant to post a sign warning others of his violent nature); State v. Burdin, 924 S.W.2d 82, 84 (Tenn. 1996) (invalidating condition requiring the defendant to post a sign warning children to stay away); supra notes 124-35 and accompanying text (discussing Meyer); supra notes 165-74 and accompanying text (discussing Burdin).

471. If the court has made findings that these people are dangerous, then such signs could be compelling facts, but by forcing a person to call himself “dangerous,” the court may also be compelling opinions.

472. For a discussion of possible approaches that courts should take when analyzing whether scarlet-letter probation conditions violate the First Amendment, see infra notes 621-31 and accompanying text. For an argument that all scarlet-letter probation conditions compel an ideological message, see infra notes 611-15 and accompanying text.
IV. THE CHANGING FACE OF PROBATION LAW: SHIFTING THEORIES, SHIFTING STANDARDS

Probationers traditionally have had a difficult time challenging probation conditions because the courts have created various theories to justify denying probationers' constitutional challenges. Although some of these theories have fallen into disuse, their effects on our criminal system persist and help to explain the unusual deference that appellate courts still show to the trial courts when reviewing the validity of probation conditions. Moreover, the purposes of probation are changing, as probation is increasingly viewed as an alternative method of punishment rather than as a method of rehabilitation. As this occurs, the standards for reviewing the constitutionality of probation conditions, some of which have been tied to the idea of probation as rehabilitation, change as well. The result is a chaotic hodgepodge of different standards for testing the constitutionality of probation conditions and systems that put probationers between the metaphorical rock and a hard place. These systems dole out punishment but maintain a peculiar unwillingness to review the constitutionality of the punishment.

To make sense of the current situation, this Part first considers the older theories of probation that justified limiting constitutional challenges, and how and why these theories have fallen into disrepute. This Part then looks to the traditional purpose of probation—rehabilitation—and examines the trend toward viewing probation as a punitive sentence. Finally, this Part discusses the various tests that have developed for reviewing the constitutionality of probation conditions, concluding with an overview of the new federal standards for reviewing probation conditions.

473. See infra notes 484-500 and accompanying text.
474. See infra notes 490-91, 499 and accompanying text (discussing how theories of probation as an "act of grace" or a contract are no longer widely accepted).
475. See infra notes 492-93, 500 and accompanying text.
476. See infra notes 501-30 and accompanying text.
477. See infra notes 527-30, 562-66 and accompanying text.
478. See infra notes 531-67 and accompanying text.
479. See infra notes 483-500 and accompanying text.
480. See infra notes 501-30 and accompanying text.
481. See infra notes 531-67 and accompanying text.
482. See infra notes 562-66 and accompanying text.
A. Traditional Justifications for Not Allowing Probationers to Challenge Their Conditions

The United States Supreme Court invoked the "act of grace" doctrine in *Escoe v. Zerbst*\(^\text{483}\) as a justification for not requiring a hearing to revoke a defendant's probation.\(^\text{484}\) This theory was later used by courts to justify not allowing probationers to challenge their probation conditions.\(^\text{485}\) The idea behind the "act of grace" theory was that because the probationer could have been incarcerated, he should not be heard to complain about the more lenient probation condition.\(^\text{486}\) Probation was a privilege, not a right; therefore, one's constitutional rights as a probationer were not rights at all but merely privileges that a trial court could take away.\(^\text{487}\) One student commentator has noted that under the act of grace theory, "should [the judge] decide to offer the offender [probation], 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."\(^\text{488}\) The act of grace theory "den[ies] the existence of constitutional limitations upon the conditions which may be attached to the government's grant of a privilege."\(^\text{489}\) Because of a series of later Supreme Court decisions,\(^\text{490}\) the act of grace theory has

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483. 295 U.S. 490 (1934).
484. See id. at 492-93 ("Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose."); see also Burns v. United States, 287 U.S. 216, 220 (1932) ("[Probation] is a matter of favor, not of contract."). The Court in *Burns* held that revocation of probation need not be preceded by specific charges and a formal hearing. See *Burns*, 287 U.S. at 221.
486. See *Judicial Review*, supra note 485, at 189.
487. See id. at 190.
488. Id. at 189.
489. Id. at 190.
490. See, e.g., Gagnon v. Scarpelli, 411 U.S. 778, 782 n.4 (1973) ("It is clear . . . that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst* that probation is an 'act of grace.' " (citation omitted)); see also Morrisey v. Brewer, 408 U.S. 471, 482 (1971) (holding that the liberty of a parolee is within the protection of the Fourteenth Amendment); *Mempa v. Rhay*, 389 U.S. 128, 136 (1967) (holding that an indigent defendant is entitled to counsel when sentencing occurs after revocation of probation).
fallen into disfavor.\textsuperscript{491} Effects of the theory linger,\textsuperscript{492} however, most notably in the courts' reluctance to apply the Eighth Amendment to probation conditions.\textsuperscript{493}

Another theory used to justify not reviewing probation conditions is that probation is a covenant between the probationer and the court in which the court agrees not to imprison the probationer if she will abide by certain conditions.\textsuperscript{494} Under this theory, a probationer waives her constitutional rights in exchange for exemption from incarceration.\textsuperscript{495} A defendant may only appeal if she refuses the probation conditions and is sentenced to jail.\textsuperscript{496}

One obvious problem with the covenant theory is that the defendant, who faces prison if she does not agree to the probation conditions, is hardly in an equal bargaining position with the trial court.\textsuperscript{497} One commentator has noted that "[i]f probation were to be treated as a contract, many probation conditions would be

\textsuperscript{491} See, e.g., MODEL PENAL CODE § 7.01 cmt. at 225 (1985) (describing the "act of grace" theory as "out of date and unrealistic"); GEORGE G. KILLINGER & PAUL F. CROMWELL, JR., CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT 157-58 (1974) ("[P]robation is a good bit more than [a] 'matter of grace' .... Probation is an affirmative correctional tool, a tool which is used not because it is of maximum benefit to the defendant ... but because it is of maximum benefit to the society ...."); Ballard, supra note 485, at 168 (noting that the act of grace theory "has been largely rejected by the judiciary"); Hurwitz, supra note 11, at 792-93 (noting that "[b]oth the act of grace and waiver ... theories have been largely undermined by a series of Supreme Court decisions ... that include parole and probation revocation hearings within the coverage of the due process clause"); Judicial Review, supra note 485, at 190, 202 (noting the decline of the act of grace theory).

\textsuperscript{492} See United States v. Pastore, 537 F.2d 675, 679 (2d Cir. 1976) (noting "the general unwillingness of appellate courts until recently to entertain challenges to the validity of [probation] conditions"); Bruce D. Greenberg, Comment, Probation Conditions and the First Amendment: When Reasonableness Is Not Enough, 17 COLUM. J.L. & SOC. PROBS. 45, 56 (1981); Hurwitz, supra note 11, at 793 & nn.146-48. The Second Circuit held in Pastore that a probation condition requiring the defendant to resign from the bar was improper, given that alternative well-defined procedures existed which would give him procedural rights denied by the condition. See Pastore, 537 F.2d at 683.

\textsuperscript{493} According to one student commentator, the State of Oregon in its brief for State v. Bateman, 771 P.2d 314 (Or. Ct. App. 1989) (en banc), argued that probation is generally not considered punishment but is an "act of grace"; therefore, the Eighth Amendment is inapplicable. See Brilliant, supra note 54, at 1366. For a discussion of Bateman, see supra notes 160-64 and accompanying text. For a more in-depth discussion of the applicability of the Eighth Amendment to probation conditions, see Brilliant, supra note 54, at 1372, 1380-84; supra notes 288-359 and accompanying text.

\textsuperscript{494} See Judicial Review, supra note 485, at 191-93; Koshy, supra note 485, at 466.

\textsuperscript{495} See Hurwitz, supra note 11, at 792.

\textsuperscript{496} See id.; Judicial Review, supra note 485, at 191.

unenforceable under the established rules of contract law."\textsuperscript{498} For this reason, this theory also has fallen into disrepute,\textsuperscript{499} though it, too, remains influential.\textsuperscript{500}

**B. The Changing Purposes of Probation: From Rehabilitation to Punishment**

Although one of the traditional goals of incarceration was rehabilitation,\textsuperscript{501} commentators in the 1960s and 1970s realized that imprisonment did not serve to rehabilitate but actually had the opposite effect.\textsuperscript{502} With prison overcrowding\textsuperscript{503} and a general trend in criminal law towards reformation,\textsuperscript{504} probation was viewed as a viable method for rehabilitation of criminals.\textsuperscript{505} In part because probation

\textsuperscript{498} Judicial Review, supra note 485, at 192.

\textsuperscript{499} See Hahn v. Burke, 430 F.2d 100, 104 (7th Cir. 1970) ("Probation is in fact not a contract. The probationer does not enter into the agreement on an equal status with the state."); Greenberg, supra note 492, at 59. Also, in United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975) (en banc), the Ninth Circuit explained that the Supreme Court rejected the contract theory as applied to parole in Morrissey v. Brewer, 408 U.S. 471, 487-90 (1972). See Consuelo-Gonzalez, 521 F.2d at 265 n.15. The Ninth Circuit added: "We feel that the custody and contract theories are equally inappropriate when applied in the probation setting." Id. For a discussion of Consuelo-Gonzalez, see infra notes 546-52 and accompanying text.

\textsuperscript{500} See Hurwitz, supra note 11, at 793; Koshy, supra note 485, at 467-68; Robert C. Little, Comment, Rights of Maryland Probationers: A Primer for the Practitioner, 11 U. BALT. L. REV. 272, 274 n.14 (1982).

\textsuperscript{501} See LOUIS P. CARNEY, PROBATION AND PAROLE: LEGAL AND SOCIAL DIMENSIONS 85 (1977) ("Rehabilitation is probably the most overworked word in the correctional lexicon. It is also the least understood and the most misused.").

\textsuperscript{502} See id. ("The evidence is overwhelming that prisons do not and cannot rehabilitate."); KILLINGER & CROMWELL, supra note 491, at 168 (noting the "debilitating effects [of incarceration] on inmates, who have great difficulty in reintegrating themselves into the community"); see also Brilliant, supra note 54, at 1357-58 (noting that "both commentators and the United States Sentencing Commission have rejected the notion that in our modern day the purpose of punishment is rehabilitation").

\textsuperscript{503} See James C. Weissman, Constitutional Primer on Modern Probation Conditions, 8 NEW ENG. J. ON PRISON L. 367, 369 (1982).

\textsuperscript{504} See, e.g., HARRY E. ALLEN ET AL., PROBATION AND PAROLE IN AMERICA 36 (1985) (noting the beginnings of the reformist movement in America during the last decade of the eighteenth century and the blossoming of the movement after the Civil War); cf. CARNEY, supra note 501, at 84-85 (noting that "the recovery of human dignity" is "not enhanced by such treatment" as "[b]rutal physical punishments and long periods of imprisonment").

\textsuperscript{505} See State v. Simpson, 25 N.C. App. 176, 179, 212 S.E.2d 566, 569 (1975). The Simpson court noted that "[t]he primary purpose of a suspended sentence is to further the reform of the defendant." Id. (citing State v. Smith, 233 N.C. 68, 70, 62 S.E.2d 495, 496 (1950)); see also MODEL PENAL CODE § 7.01 cmt. at 225 (1985) ("[I]t is better to maintain the offender in the environment in which he must eventually learn to live rather than to place him in one that contains all of the artificial, and potentially harmful, factors of imprisonment."); CARNEY, supra note 501, at 84-86 (discussing the probative potential
was much less expensive than incarceration, probation became the norm rather than the exception. Many probation statutes still state that the purpose of probation is to rehabilitate the offender so that he can lead a law-abiding life.

KILLINGER & CROMWELL, supra note 491, at 157 (noting probation’s promise to enable the offender to “learn how to live successfully in the general community”); SOL RUBIN, THE LAW OF CRIMINAL CORRECTION 205 (2d ed. 1973) (“Probation is a disposition that allows the convicted offender to remain free in the community while supervised by a person who attempts to help him lead a law-abiding life.”); Weissman, supra note 503, at 368-69 (noting that “[p]robation . . . functions as the prototypical alternative to incarceration for nonviolent, repetitive conduct”); Brilliant, supra note 54, at 1368-70 (noting the rehabilitative purpose of probation).

The American Bar Association Standards Relating to Probation suggest several reasons why probation is desirable:

(i) [I]t maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of the law;
(ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts;
(iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community;
(iv) it greatly reduces the financial costs to the public treasury of an effective correctional system;
(v) it minimizes the impact of the conviction upon innocent dependents of the offender.

A.B.A., PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 1.2 (1970) [hereinafter A.B.A. STANDARDS].

See CARNEY, supra note 501, at 128 (noting that it is estimated that to place an offender on probation costs about one-tenth as much as it does to incarcerate him).

The Model Penal Code states:

The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless . . .

(a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
(c) a lesser sentence will depreciate the seriousness of the defendant’s crime.

MODEL PENAL CODE § 7.01(1) (1985). The Commentary to the code notes that on September 1, 1976, “there were nearly one million . . . adults on probation.” Id. cmt. at 227 n.16 (quoting U.S. DEP’T OF JUSTICE, LEAA STATE AND LOCAL PROBATION AND PAROLE SYSTEMS 1 (1978)). The ABA Standards state that “[t]he legislature should authorize the sentencing court in every case to impose a sentence of probation. Exceptions to this principle are not favored and, if made, should be limited to the most serious offenses.” A.B.A. STANDARDS, supra note 505, at § 1.1(a).

This view of probation, however, is not without its problems. First, because of a lack of funding and support staff, probation as a method of rehabilitation has not been nearly as effective as commentators had hoped. Probationers are often released into the same environment that encouraged their deviancy in the first place and may not receive the support and guidance necessary to keep them from committing future crimes.

A second problem has been that treating probation as a method of rehabilitation perpetuates the idea that probation is an act of leniency, which ties into the "act of grace" argument. Thus a court with this mind-set might be less likely to consider a challenge to probation conditions. For example, courts will not entertain Eighth Amendment challenges to probation conditions because, in their view, these conditions do not constitute punishment. One student commentator has noted that "[a] fundamental flaw in both scholarly and judicial evaluations of probation conditions is the accepted premise: It's probation, therefore it's not punishment." Probation, even when rehabilitation is its main goal, is not entirely devoid of punitive elements.


Even in the 1970s, when it was still generally recognized that probation had rehabilitative potential, commentators argued that probation was not living up to this potential. See, e.g., CARNEY, supra note 501, at 126; KILLINGER & CROMWELL, supra note 491, at 158, 168-69.

See KILLINGER & CROMWELL, supra note 491, at 158, 168-69.

See Higdon v. United States, 627 F.2d 893, 898 (9th Cir. 1980) ("Punishment of an offender may not be the primary purpose of the judge's imposition of probation. Nor may probation conditions be the vehicle for circumvention of statutory sentencing limits.") (citing United States v. Consuelo-Gonzalez, 521 F.2d 259, 266 (9th Cir. 1975) (en banc)). The Higdon court held impermissible a probation condition requiring that the defendant forfeit all assets, including his home, to the government and agree to work for charity for three years without pay because it was not reasonably related to rehabilitation or to protection of the public. See id. at 890-900.

See Springer v. United States, 148 F.2d 411, 415 (9th Cir. 1945) ("The conditions of probation are not punitive in character and the question of whether or not the terms are cruel and unusual and thus violative of the Constitution of the United States does not arise for the reason that the Constitution applies only to punishment."); State v. Macy, 403 N.W.2d 743, 745 (S.D. 1987) (holding that because probation is not a sentence but a sentence alternative, the Eighth Amendment does not apply); Koshy, supra note 485, at 168-69. Koshy distinguishes the "act of grace" theory from the argument that probation is not punishment. See Koshy, supra note 485, at 168-69. However, though they are two separate arguments, the "act of grace" theory sets the stage for a general unwillingness to apply constitutional limitations to probation conditions.

See id. at 1358; see also Higdon, 627 F.2d at 898 n.8. ("We recognize ... that
brief period of incarceration, even while purporting to achieve rehabilitation as their purpose.\footnote{515} Moreover, most probation statutes require some kind of restitution,\footnote{516} either monetary\footnote{517} or from community service.\footnote{518} Perhaps instead of categorizing a condition as either punitive or rehabilitative, courts should recognize that both elements may be present.\footnote{519}

A growing number of states,\footnote{520} as well as the federal government,\footnote{521} now consider probation a sentence, not an alternative

probation conditions may have an \textit{incidental} punitive effect, in that any restriction of liberty is in a sense a ‘punishment.’\footnote{515}; \textit{In re} Buehrer, 236 A.2d 592, 596 (N.J. 1967) (“Probation has an inherent sting, and restrictions upon the freedom of the probationer are realistically punitive in quality.”). Courts are divided on this issue. \textit{Compare} Springer, 148 F.2d at 415 (“The conditions of probation are not punitive in character.”), \textit{with} Scheidt v. Meredith, 307 F. Supp. 63, 66 (D. Colo. 1970) (stating that probation contains some punitive elements).

Also, although incarceration may not lead to rehabilitation, some commentators and courts still believe that other forms of punishment may rehabilitate or reform. See, e.g., United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1983); Goldschmitt v. State, 490 So. 2d 63, 66 (Fla. Dist. Ct. App. 1986); Ballenger v. State, 436 S.E.2d 793, 794-95 (Ga. Ct. App. 1993); \textit{Gibbs, supra} note 115, at 77-78; \textit{see also} Paul H. Robinson & John M. Darley, \textit{The Utility of Desert}, 91 Nw. U. L. Rev. 453, 491 (1997) (arguing that a judge may “select a sanctioning method that will maximize rehabilitation” once the judge has ensured “that the total amount of punishment is the amount deserved”); Lisa E. Cowart, Comment, \textit{Legislative Prerogative vs. Judicial Discretion: California’s Three Strikes Law Takes a Hit}, 47 DePaul L. Rev. 615, 651-53 (1998) (noting rehabilitative potential for drug reporting centers and adult boot camps, two forms of alternative sentencing); cf. \textit{Alternative Punishments, supra} note 147, at 1969 (arguing that sentencing alternatives like shaming “promise to infuse new life into an otherwise stagnant criminal law”). Such an analysis is contrary to Brilliant’s view, for though he admits that probation conditions have punitive elements, he contrasts punitive conditions with rehabilitative conditions, suggesting that the two are distinct. See Brilliant, \textit{supra} note 54, at 1358-59.

\footnote{515} See NEIL B. COHEN & JAMES J. GOBERT, \textit{THE LAW OF PROBATION AND PAROLE} 4 (1983); Best & Birzon, \textit{supra} note 497, at 60.

\footnote{516} See, e.g., N.C. GEN. STAT. § 15A-1343(b)(9) (Supp. 1995); A.B.A. STANDARDS, \textit{supra} note 505, § 3.2(c)(viii); Best & Birzon, \textit{supra} note 497, at 59-60.


\footnote{518} See, e.g., TENN. CODE ANN. § 40-35-303(d)(3); Weissman, \textit{supra} note 503, at 390.

\footnote{519} See Brilliant, \textit{supra} note 54, at 1372. If a particular probation condition has both punitive and rehabilitative elements, there is no reason why a court could not simultaneously consider both a statutorily-based challenge to the condition on the basis that it does not meet the rehabilitative purpose of probation and an Eighth Amendment challenge that the condition constitutes cruel and unusual punishment.


Implicit in this change is the recognition that like any punishment, probation must meet the statutory purposes of sentencing. Although rehabilitation may still be a goal of probation in these jurisdictions, the emphasis is now on punishment. As one commentator has stated: "If courts use probation as a sentence, its function must expand to include retribution and deterrence as well as its traditional goals of rehabilitation and public protection."

How this shift in thinking will affect the analysis of probation conditions by state courts remains to be seen. Theoretically, this shift should end all vestiges of the "act of grace" and "waiver" theories of probation. Certainly, a probationer should be able to challenge a probation sentence under the Eighth Amendment because probation is now designated a form of punishment in these jurisdictions. The standards for determining the legality of probation conditions by state courts remains to be seen.
probation conditions, however, likely will undergo some changes.\textsuperscript{330}

\section*{C. Standards for Challenging the Legality of Probation Conditions}

Legislatures have given trial courts great latitude in tailoring probation conditions, but the courts' power has not been absolute since the conditions must fulfill certain standards.\textsuperscript{331} The standards have varied from jurisdiction to jurisdiction\textsuperscript{332} and commentary on the subject varies in the way that it describes the standards.\textsuperscript{333} The standards, most of which involve some kind of reasonableness requirement, come from the probation statutes in a particular jurisdiction or from case law.\textsuperscript{334}

There are three basic categories of standards. The first category merely requires that the probation condition be reasonable.\textsuperscript{335}

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\textsuperscript{330} This Comment proposes a standard for analyzing the legality of probation conditions. See infra notes 598-604 and accompanying text.

\textsuperscript{331} See infra notes 533-67 and accompanying text (discussing various standards that state and federal courts employ when analyzing challenges to probation conditions).

\textsuperscript{332} The standard sometimes varies within one jurisdiction. Compare Gilliam v. Los Angeles Mun. Court, 159 Cal. Rptr. 74, 77 (Ct. App. 1979) (noting that what is important is not whether the probation condition infringes upon constitutional rights but whether the condition meets the reasonable-relations test), with In re White, 158 Cal. Rptr. 562, 566 (Ct. App. 1979) (noting that the trial courts' authority to create probation conditions is "further circumscribed by constitutional safeguards"). It appears now that the "constitutional safeguards" standard has been accepted. See People v. Hackler, 16 Cal. Rptr. 2d 681, 686 (Ct. App. 1993); supra notes 51-76 and accompanying text (discussing Hackler).

\textsuperscript{333} See Filcik, supra note 54, at 308-09 (describing the reasonableness test as applying even when there are constitutional issues); Ginzberg, supra note 11, at 990-92 (describing the reasonableness test as including both a reasonably related prong and a constitutionality prong); Hurwitz, supra note 11, at 799 (describing the analysis used to review probation conditions as a "balancing process"); James H. Taylor, Note, Court-Ordered Contraception: Norplant as a Probation Condition in Child Abuse, 44 FLA. L. REV. 379, 397-400 (1992) (discussing how courts employ both a reasonableness requirement and a constitutional limits requirement).

\textsuperscript{334} Some of the standards discussed in this Part have not been replaced. The state court standards, unless the citation states otherwise, are still valid. The federal court standards have been replaced by 18 U.S.C. § 3563 (1994).

\textsuperscript{335} See United States v. Pastore, 537 F.2d 675, 683 (2d Cir. 1976) (holding that a probation condition requiring an attorney not to practice law was "improper"); Sweeney v. United States, 353 F.2d 10, 11 (7th Cir. 1965) (holding as unreasonable a probation condition that a chronic alcoholic refrain from drinking); State v. Brown, 326 S.E.2d 410, 411 (S.C. 1985) (noting that judges cannot impose an illegal condition or a condition that is void as against public policy and holding that castration as a condition of probation is illegal); State v. Macy, 403 N.W.2d 743, 744 (S.D. 1987) (stating that "[t]he test is one of reasonableness"); State v. Barklind, 532 P.2d 633, 637 (Wash. Ct. App. 1975) ("R[easonableness] is the test of the propriety of a condition of probation.") (citing State v. Langford, 529 P.2d 839, 840 (Wash. Ct. App. 1974))). The court in Barklind held that a probation condition requiring the defendant to pay the county a fee as partial reimbursement for his court-appointed lawyer was reasonable because it was reasonable
Probation conditions may be voided if they are impossible to follow, excessive, vague, or illegal.

The second category of standards focuses on whether the probation condition is reasonably related to rehabilitation. The
Dominguez-Lent test has been widely cited. The test states that a condition of probation is not reasonably related to rehabilitation and is therefore invalid if it: "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not of itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." This standard does not consider the extent to which the probation condition infringes upon a probationer's constitutional rights. One court has even gone so far as to state: "In evaluating the validity of a condition of probation the issue is not the impact of the condition on the defendant's constitutional rights but its ability to meet the Dominguez-Lent standard." Some courts, however, have read a constitutional requirement into the Dominguez-Lent standard.

rehabilitation of a defendant and should not be unduly restrictive of his liberties or so vague or ambiguous as to give no real guidance" (citing A.B.A. STANDARDS, supra note 505, at § 3.2(B)) (holding that a probation condition that forbade the defendant from having another child during a five-year period was a violation of the defendant's right to privacy and an abuse of the trial court's discretion).

541. See People v. Lent, 541 P.2d 545, 548 (Cal. 1975); People v. Dominguez, 64 Cal. Rptr. 290, 293-94 (Ct. App. 1967).

542. Dominguez, 64 Cal. Rptr. at 293 (cited with approval in Lent, 541 P.2d at 548); see also Rodriguez, 378 So. 2d at 9 (applying the Dominguez-Lent standard); Livingston, 372 N.E.2d at 1337 (same); COHEN & GOBERT, supra note 515, at 209 (citing the Dominguez-Lent test). The court in Dominguez held that a probation condition requiring a defendant convicted of robbery not to become pregnant while unmarried was invalid because pregnancy is unrelated to robbery. See Dominguez, 64 Cal. Rptr. at 293.

The California Supreme Court endorsed a slight variation of the Dominguez-Lent standard for a short time. In People v. Mason, 488 P.2d 630 (Cal. 1971) (en banc), the court stated that a probation condition would be considered invalid if it: "(1) has no relationship to the crime of which the defendant is convicted; (2) relates to conduct that is not itself criminal; or (3) requires or forbids conduct that is not reasonably related to future criminality." Id. at 632; see also In re Bushman, 463 P.2d 727, 733 (Cal. 1970) (applying this standard for the first time); In re Mannino, 92 Cal. Rptr. 880, 883 n.4 (Ct. App. 1971) (applying the Bushman standard). However, in Lent, the California Supreme Court corrected the phrasing in Mason: "In paraphrasing the foregoing quotation from Dominguez ... we inadvertently stated the test in the disjunctive rather than the conjunctive . . . To this extent, Bushman and Mason are disapproved." Lent, 541 P.2d at 548 n.1.

543. Gilliam v. Los Angeles Mun. Court, 159 Cal. Rptr. 74, 77 (Ct. App. 1979). But see In re White, 158 Cal. Rptr. 562, 565 (Ct. App. 1979) ("[T]he discretion to impose conditions of probation . . . is further circumscribed by constitutional safeguards. Human liberty is involved. A probationer has the right to enjoy a significant degree of privacy, or liberty, under the Fourth, Fifth and Fourteenth Amendments to the federal Constitution." (citing People v. Keller, 143 Cal. Rptr. 184, 187 (Ct. App. 1978))).

The California Court of Appeal, however, has revised its test and now takes constitutional issues into consideration. For a discussion of People v. Beach, 195 Cal. Rptr. 381 (Ct. App. 1983), which applies this revised test, see infra notes 558-60 and accompanying text.

544. For example, the court in Livingston noted: "[T]he trial court is not free to
The third category of standards takes into account the extent to which probation conditions infringe upon constitutional rights. The most common of these tests was adopted by the Ninth Circuit in *United States v. Consuelo-Gonzalez.* The Ninth Circuit determined that conditions impinging upon constitutional rights are properly subject to strict scrutiny in order to ensure that they truly serve to rehabilitate and protect the public. The actual test, described as a "two-step process," was best explained by the Ninth Circuit in *Higdon v. United States.* The court first must consider the reasons why the trial court imposed the conditions, and then, if these reasons are permissible, the court must determine whether the conditions are reasonably related to these reasons. In the second step, the court considers "the impact which the conditions have on the probationer's rights. If the impact is substantially greater than is necessary to carry out the purposes, the conditions are impermissible." This standard, as the *Consuelo-Gonzalez* court pointed out, is flexible. Also, the Ninth Circuit has emphasized that the standard does not create a presumption against constitutional limitations: "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 [probation's] broad purposes."

The Tenth Circuit applied a kind of "narrowly tailored" means

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545. California courts seem to be at the forefront of developing standards for analyzing probation conditions, both at the federal and state levels. See, e.g., *United States v. Consuelo-Gonzalez,* 521 F.2d 259, 264 (9th Cir. 1975) (en banc); *Dominguez,* 159 Cal. Rptr. at 77.

546. 521 F.2d 259 (9th Cir. 1975) (en banc) (holding that a search of a probationer that is not otherwise in compliance with the Fourth Amendment must be conducted by or under the immediate personal supervision of a probation officer).

547. See id. at 265 ("Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety.").

548. 627 F.2d 893 (9th Cir. 1980).

549. See id. at 897 (citing *Consuelo-Gonzalez,* 521 F.2d at 263-64).

550. Id. Another factor considered is "the extent to which conditions serve legitimate needs of law enforcement." Id. at 897 n.7. The importance of the law enforcement factor seems primarily tied to search and seizure conditions. See id. The Fifth Circuit also has adopted the *Higdon* test. See *United States v. Tonry,* 605 F.2d 144, 150 (5th Cir. 1979).

551. See *Consuelo-Gonzalez,* 521 F.2d at 264 (noting that flexibility is desired because of courts' "uncertainty about how rehabilitation is to be accomplished").

552. Id. at 265.
test in *Porth v. Templar* when it reviewed the constitutionality of probation conditions that forbade a defendant from speaking, writing, or handing out pamphlets in which he questioned the constitutionality of the Federal Reserve System and the federal income tax laws. The Tenth Circuit held that these probation conditions violated the defendant’s constitutional rights because they prohibited conduct that was not per se harmful. Yet the court did note that probationers do not have the same freedoms as ordinary citizens: “[The probationer] forfeits much of his freedom of action and even freedom of expression to the extent necessary to successful rehabilitation and protection of the public.” The court held the probation condition “invalid only to the extent that it prohibits the expression of opinions as to invalidity or unconstitutionality of the laws in question.”

A new standard applied by the California Court of Appeal also analyzes the extent to which a probation condition violates a probationer’s rights. The court in *People v. Beach* analyzed a probation condition according to three criteria: (1) whether the condition is reasonably related to the intent of the probation statute; (2) whether “the value to the public of the imposition of this condition manifestly outweighs any impairment of constitutional rights”; and (3) whether there are any possible alternatives that infringe less upon the probationer’s constitutional rights which could be narrowly drawn to correspond more precisely to the purposes of the condition. Other state courts also have considered a probationer’s constitutional rights, though not with such a well-defined test.

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553. 453 F.2d 330 (10th Cir. 1971).
554. See id. at 331.
555. See id. at 334 (“When the condition is examined in the abstract, namely speaking or writing about the constitutionality of the laws in question, it appears to prohibit conduct which is not per se harmful.”).
556. Id.
557. Id.
559. The California Penal Code allows a trial court to impose reasonable conditions that are “fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer.” CAL. PENAL CODE § 1203.1(j) (West 1998).
560. See *Beach*, 195 Cal. Rptr. at 387 (citing *In re White*, 158 Cal. Rptr. 562, 568 (Ct. App. 1979)).
The Federal Sentencing Guidelines\textsuperscript{562} mandate the standard that federal appellate courts must now apply when reviewing a sentence of probation, which assures uniformity within the federal courts. The probation condition must be reasonably related to the crime, both in its nature and in its circumstances, and must be reasonably related to the defendant's characteristics and history.\textsuperscript{563} Also, the probation condition must be reasonably related to the purposes of sentencing,\textsuperscript{564} and it must "involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing."\textsuperscript{565} Although the statute does not list rehabilitation as one of the purposes of a probation sentence, the Ninth Circuit now appears to apply a "reasonably related to rehabilitation and protection of the public" test.\textsuperscript{566}

These standards are all tied to some type of reasonableness requirement.\textsuperscript{567} Some of the tests require a consideration of the probationer's constitutional rights, but some do not. Part V considers the problems involved in basing a probationer's liberty interests on a reasonableness standard and attempts to formulate a better standard.

V. DETERMINING A PROBATION STANDARD FOR SCARLET-LETTER PROBATION CONDITIONS

A. Current Probation Standards—The Need for Adequate Protection of a Probationer's First Amendment Right to Free Speech

It is not clear whether a reasonably related test alone can protect a probationer's First Amendment right to free speech. An older free


\textsuperscript{564} The purposes of sentencing under the Federal Guidelines are "promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant." 18 U.S.C.A. § 5B1.1, Introductory Commentary. Rehabilitation is not a listed purpose. See id.

\textsuperscript{565} 18 U.S.C.A. app. § 5B1.3(b).

\textsuperscript{566} United States v. Bolinger, 940 F.2d 478, 480 (9th Cir. 1991).

\textsuperscript{567} See supra notes 531-66 and accompanying text.
speech case, *Beauharnais v. Illinois*, 568 illustrates the dangers of employing a rational review test where the state is abridging a citizen's free speech. In this case, petitioner handed out lithographs depicting African-Americans as immoral criminals and demanding that the city of Chicago halt their "further encroachment, harassment, and invasion" on white people's "property, neighborhoods and persons." 569 He was convicted under a criminal libel statute. 570 Rather than analyzing whether the statute violated the petitioner's First Amendment rights of free speech, the Supreme Court employed a Fourteenth Amendment rational-basis review of the statute. 571 The Court determined that the statute was reasonable 572 and noted that "it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power." 573

In a scathing dissent, Justice Black argued that the majority's holding "degrade[d] First Amendment freedoms to the 'rational basis' level," leaving "the rights of assembly, petition, speech and press almost completely at the mercy of state legislative, executive, and judicial agencies." 574 According to Justice Black, the majority's holding contradicted the language in *Barnette* that "'distinguish[ed] between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake.'" 575 *Beauharnais* has been widely criticized, and although it has never been overruled, it is no longer regarded as good law. 576 One problem

568. 343 U.S. 250 (1952).
569. *Id.* at 252.
570. *See id.* at 257.
571. *See id.* at 258 ("The precise question ... is whether the protection of 'liberty' in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels.").
572. *See id.*
573. *Id.* at 262.
574. *Id.* at 269-70 (Black, J., dissenting).
575. *Id.* at 269 (Black, J., dissenting) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)). The Court in *Barnette* noted that "'[t]he right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting.' *Barnette*, 319 U.S. at 639. However, "freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds." *Id.*
576. *See, e.g.,* Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978) (holding in part that an ordinance which prohibited the dissemination of materials prompting hatred toward other persons on the basis of their heritage was unconstitutional); *Tollett v. United States*,
with analyzing the First Amendment under either a reasonableness or a reasonably related test is that such tests allow virtually any infringement on a person's freedom of speech, no matter how broad the infringement, as long as some reasonable person could find that it relates to the goals of probation. Such tests may merely pay lip-service to the idea that probationers have liberty interests.

While it is true that the new federal test requires courts to choose a probation condition that is the least restrictive of a probationer's liberty interests, it is not clear whether the appellate courts carefully scrutinize probation conditions that have not been narrowly tailored. For example, the Seventh Circuit in *United States v. Showalter* upheld a probation condition that required the defendant, convicted of possession of an unregistered firearm, to "avoid associating with other skinheads and neo-Nazis," despite the

485 F.2d 1087, 1093-94 (8th Cir. 1973) (holding in part that a statute which punished defamatory words written on the outside of envelopes or on postcards violated the First Amendment because protecting unwilling viewers from such offensive materials was not a compelling governmental interest); Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (Wright, J., concurring) (noting that "it is now doubtful that the [Beauharnais] decision still represents the views of the Court"). The court in *B'nai B'rith* held that there was substantial evidence to support the FCC's choice to renew a broadcasting license when the evidence tended to show that the broadcasting company offered the Anti-Defamation League free equal time in order to respond to a commentator's paid broadcasts when he allegedly made anti-Semitic remarks. See *B'nai B'rith*, 403 F.2d at 170.

577. Another problem is that courts often employ the reasonably related test where the defendant has been incarcerated. See, e.g., Bazzetta v. McGinnis, 124 F.2d 774, 780 (6th Cir. 1997) (applying the reasonably related test to a prison regulation concerning contact visits); Goodwin v. Turner, 908 F.2d 1395, 1396 (8th Cir. 1990) (applying the test to the right to procreate). To give probationers only those constitutional rights prisoners have is unfair because the whole idea behind probation is that it is a less severe punishment than incarceration. The rebuttal to this assertion is that probationers obviously have a less punitive sentence than prisoners because they are not in prison and that the state may fairly infringe upon their constitutional liberties as much as it can infringe upon the liberty interests of prisoners.

This argument sounds like the old "act of grace" rationale, however. See *supra* notes 483-93 and accompanying text. Furthermore, the state has a greater interest in infringing upon a prisoner's constitutional rights because of prison security concerns. See Koshy, *supra* note 485, at 464-66. Whatever the precise scope of a probationer's constitutional rights, it seems logical that the measure of her rights should be somewhere between that of a prisoner and that of a regular citizen.

"House arrests" are not included in this discussion of probation because they seem to be a kind of hybrid between incarceration and probation and therefore deserve their own discussion. For an interesting commentary on the constitutional questions raised by house arrest, see generally Hurwitz, *supra* note 11.

578. See 18 U.S.C. § 3563(b) (1994) (stating that a probation condition must "involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes [of the sentencing provisions]").

579. 933 F.2d 573 (7th Cir. 1991).
defendant's arguments that the condition was unclear and not specific.\textsuperscript{580} The district court judge placed a similar condition on the defendant between the time of his guilty plea and his sentencing hearing and reprimanded the defendant at the hearing for writing a letter to a newspaper that espoused his "white supremacist views."\textsuperscript{581} The defendant replied that he thought the condition prohibited him from associating with his skinhead friends but that he had not thought that it prohibited offering an "opinion to a newspaper."\textsuperscript{582}

The Seventh Circuit noted that "[a]lthough the district court seemed to think the conditions placed on [the defendant] prior to sentencing should have at least discouraged him from writing controversial letters to newspapers, there is nothing to that effect in the [probation] conditions .... This incident illustrates the importance of specificity in formulating [probation] conditions."\textsuperscript{583} Despite this admonition to the district court, however, the Seventh Circuit held that the condition provided sufficiently clear notice as to which of the defendant's associational activities were restricted,\textsuperscript{584} and the court used the defendant's reply to prove that he understood the probation condition.\textsuperscript{585} Certainly, this incident might illustrate that the terms "neo-Nazis" and "skinheads" were specific enough that the defendant knew with whom he was not to associate, but how was the defendant to know whether he could express his views to a newspaper without violating his probation condition? The Seventh Circuit implied that the defendant should have known that he could do so from the fact that the probation condition was silent about his right to speak.\textsuperscript{586} Yet because the district court had reprimanded him for exercising his free speech rights under a similar condition,\textsuperscript{587} he could have concluded that he was not allowed this right.

The point is not that the defendant in this case should have been allowed to associate with skinheads, for the district court probably rightly believed that the defendant's ties with white supremacist groups would only lead him back into trouble. The Seventh Circuit

\textsuperscript{580} Id. It should be noted that Showalter showed a propensity to violence, refusing to leave his apartment after being evicted and brandishing his weapon. See id. at 574. When he refused to answer police officers' requests for him to come outside and drop his weapon, they were forced to break in and arrest him. See id.

\textsuperscript{581} Id.

\textsuperscript{582} Id. at 575.

\textsuperscript{583} Id. at 574 n.1.

\textsuperscript{584} See id.

\textsuperscript{585} See id. at 574-75.

\textsuperscript{586} See id. at 574-75.

\textsuperscript{587} See id. at 574.
should have clearly stated, though, that this probation condition did not prohibit the defendant from expressing his opinions in the newspaper. The probation condition, as construed by the district court, broadly and unnecessarily chilled his rights to share his political viewpoints.

A requirement that the trial court offer specific reasons why it is imposing a special condition of probation that infringes on a constitutional liberty is necessary in order for appellate courts to be able to review probation conditions adequately. A fairly recent federal case illustrates this need. In *United States v. Bolinger*, a defendant was convicted for possession of a firearm. One condition of his supervised release was a prohibition against his involvement in any motorcycle club activities, including "the Dirty Dozen," of which he was evidently a member. The defendant argued that this condition was an impermissible infringement on his First Amendment right to freedom of association. In reviewing this condition, the Ninth Circuit recognized a theoretical justification for the trial court's broad prohibition, noting that the trial court could have concluded that the defendant was more likely to return to his former criminal activities if he renewed his earlier associations. The Ninth Circuit is correct that the district court could have concluded this; however, the district court also could have imposed an unnecessarily broad prohibition. This uncertainty illustrates a problem with the reasonableness test: The reviewing court not only will give great deference to the lower court's findings but also will rely on any reasonable justification that it can identify to justify the condition.

It is not the argument of this Comment that probationers have the same constitutional freedoms as ordinary citizens. Even First Amendment rights of association and free speech should be curtailed

588. 940 F.2d 478 (9th Cir. 1991).
589. See id. at 479.
590. See id. at 480.
591. See id.
592. See id. The court noted that “[p]robation conditions may seek to prevent reversion into a former crime-inducing lifestyle by barring contact with old haunts and associates.” *Id.*
593. This issue may occur in another situation in which appellate courts adopt a reasonably related test: when analyzing a non-suspect classification statute under the Fourteenth Amendment's Equal Protection Clause. See, for example, *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980), in which the Court maintained that it has never insisted that a legislative body articulate its reasons for enacting the statute, and then put forth a theoretical justification for the statute's means. *See id.* at 179.
in some instances. For example, to allow a defendant convicted of tax evasion to advocate this behavior or to associate with groups advocating this behavior would clearly negate the rehabilitative and deterrent effects of probation.\textsuperscript{594} As the Tenth Circuit in \textit{Porth v. Templar}\textsuperscript{595} concluded, however, not to allow such a probationer to protest the constitutionality of the tax laws at all is to infringe unnecessarily upon his right to free speech.\textsuperscript{596} Such broad prohibitions, if upheld, could conceivably turn probation conditions into instruments by which the government can silence extremist viewpoints. A relatively minor curtailment of a probationer's First Amendment freedom of speech, however, would be reasonable.\textsuperscript{597}

Furthermore, any test used to review the constitutionality of probation conditions must allow for significant discretion. Although courts may want to sketch the limits of the constitutionality of probation conditions, per se rules might hinder the trial courts' ability to tailor probation conditions for each individual probationer. Yet courts should seriously consider the extent to which probation conditions infringe on constitutional liberties and should be certain that such conditions are as narrowly tailored as possible.

The test adopted by the California Court of Appeal in \textit{People v. Beach}\textsuperscript{598} requires courts to consider the probationer's constitutional rights while still allowing flexibility.\textsuperscript{599} The first consideration under this test is whether the probation condition reasonably relates to the purpose of probation, regardless of whether that purpose is rehabilitation, deterrence, or some other reason that the legislature considers a valid purpose.\textsuperscript{600} This consideration is common in probation standards,\textsuperscript{601} but the \textit{Beach} test does not stop there. It also considers whether the value to the public "manifestly outweigh[es]" the curtailment of the probationer's constitutional liberty.\textsuperscript{602} Such a standard allows the reviewing court to balance the probationer's liberty interests against the value, if any, that society will reap from

\textsuperscript{594} See United States v. Schiff, 876 F.2d 272, 276 (2d Cir. 1989); United States v. Lawson, 670 F.2d 923, 929-30 (10th Cir. 1982).
\textsuperscript{595} 453 F.2d 330 (10th Cir. 1971).
\textsuperscript{596} See id. at 334.
\textsuperscript{597} See id. ("[The probationer] forfeits much of his freedom of action and even freedom of expression to the extent necessary to successful rehabilitation and protection of the public programs.").
\textsuperscript{598} 195 Cal. Rptr. 381 (Ct. App. 1983).
\textsuperscript{599} See id. at 387 (citing \textit{In re White}, 158 Cal. Rptr. 562, 568 (Ct. App. 1979)).
\textsuperscript{600} See id.
\textsuperscript{601} See supra notes 540-44 and accompanying text (discussing the reasonably related test).
\textsuperscript{602} Beach, 195 Cal. Rptr. at 387.
the infringement of the liberty. Finally, the test requires the court to ask whether there is an alternative probation condition that will be "less subversive of the constitutional right" and that will more closely "correlate" with the legislatively dictated purposes of probation. If the trial court is required to offer reasons for imposing the condition, the reviewing court may better ensure that the probation condition is as narrowly tailored as possible.

Another requirement not included in the Beach test but incorporated into the older Dominguez-Lent test is whether the probation condition reasonably relates to the probationer's offense. Such a requirement easily could be incorporated into the Beach standard and would further ensure that the trial court carefully tailors probation conditions to meet both society's and the individual probationer's needs. This revised Beach test still does not give probationers the same constitutional rights as ordinary citizens: A trial court is free to curtail a probationer's liberty interests, as long as it offers a valid reason for the curtailment and does not restrict activity that has nothing to do with the probationer's crime or with the goals of probation.

B. Devising a First Amendment Compelled-Speech Standard for Scarlet-Letter Probation Conditions

Even the revised Beach standard is not fully effective in analyzing whether a scarlet-letter probation condition constitutes compelled speech in violation of the First Amendment. The problem is this: How does one narrowly tailor compelled speech? A trial court can narrowly tailor an infringement on a probationer's freedom to speak, for instance, by allowing the probationer to speak against the legality of a law but prohibiting the probationer from advocating non-compliance with that law. In a fundamental sense, though, compelling speech admits to no gradations—one is either forced to speak something or is not.

Perhaps the government should never be able to compel one of

603. Id.
604. See People v. Dominguez, 64 Cal. Rptr. 290, 293 (Ct. App. 1967).
605. For a review of the compelled speech cases, see supra notes 364-461 and accompanying text.
606. See. Porth v. Templar, 453 F.2d 330, 334 (10th Cir. 1971) (holding that a probation condition could restrict the probationer's ability to advocate noncompliance of the tax laws, but that it could not restrict his ability to argue that the tax laws are unconstitutional). For further discussion of Porth, see supra notes 553-57 and accompanying text.
its citizens to speak, for there is something particularly invidious about the state wielding its power over the individual in this manner. As a practical matter, however, the government forces citizens to speak facts about themselves all of the time: when registering for the draft, when filling out tax forms, and when being called into court as witnesses. There is certainly a difference, however, between the government forcing all of its citizens to fill out tax forms and forcing one defendant to advertise her own conviction. The former is essential, whether for the smooth running of the government, for the protection of the nation, or for the efficiency of our criminal justice system, while the government cannot claim quite as compelling an interest in the latter.

It may be permissible to force a probationer merely to speak facts, but not to speak an ideological message. Yet scarlet-letter probation conditions compel more than facts. The context of this forced speech is important. If these facts serve to humiliate a probationer or to make him the object of ridicule, then the Goldschmitt court was wrong in its conclusion that the scarlet-letter probation in that case was not an ideological method. If scarlet-letter probation conditions involved merely "facts," they would not be shaming penalties, and they probably would not be employed. In compelling a defendant to speak of his own conviction to the world at large, the state is forcing him to convey a message: the ideology of shame.

Wrapped up in this message are many "sub-messages." The first, and most powerful, is that the defendant has done something morally wrong and deserves to be punished. Within this message


608. See 50 U.S.C. app. § 462(a) (1994) (making it a criminal offense to evade or refuse the draft, punishable "by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment").

609. See, e.g., 26 U.S.C. § 7206(4) (1994) (making it a crime to conceal any goods or commodities with the intent to evade tax collection).

610. See, e.g., FED. R. Civ. P. 45(e) ("Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.").

611. This distinction was the conclusion of the Florida District Court of Appeal in Goldschmitt v. State, 490 So. 2d 123, 125-26 (Fla. Dist. Ct. App. 1986).

612. See id.

613. See Kahan, supra note 201, at 636 (noting that one of the requirements of a successful shaming condition is that it sends a message that the offender's conduct is wrong); Persons, supra note 186, at 1535 (arguing that shaming punishments send a
are two other messages: that there is a moral code in which our society believes, and that the criminal laws reflect this code. Also, the defendant is forced to acknowledge the authority of the government both to enforce the laws and to force him to speak against his own self-interest. Such a probation condition may actually strengthen the government's authority because it reminds other citizens that the government could compel them similarly. In other words, scarlet-letter probation conditions impart the fact of their own legality to the world at large.

Because of the powerful messages conveyed in a scarlet-letter probation condition, perhaps there should be a blanket prohibition against this kind of compelled speech. Justice Jackson noted in *Barnette* that "[i]t would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." Although a state may enforce its laws, when it coerces a probationer to advertise unwillingly its authority over her, this seems contrary to a basic tenet of the First Amendment: the right of citizens to disagree with the State. As Justice Jackson eloquently put it, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

Given the language in *Riley v. National Federation of the Blind*—that for First Amendment purposes, the Court will treat the right to speak and the right not to speak the same—it seems unlikely that courts will find that the right not to speak is more fundamental than the right to speak. Because courts can limit probationers' freedom to speak, courts theoretically can compel

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614. *See* Persons, *supra* note 186, at 1535 (noting that there are "shared moral norms"). For an argument doubting the existence of such norms, see Massaro, *supra* note 12, at 1922-23.

615. *See* Kahan, *supra* note 201, at 639-40 (arguing that shaming penalties cause the surrounding community to believe that the law accords with its moral values).


617. *See id.* at 642.

618. *Id.* (emphasis added).


620. *See id.* at 796-97.

621. *See, e.g., United States v. Lawson*, 670 F.2d 923, 929-30 (10th Cir. 1982) (holding valid a probation condition that did not allow the defendant to advocate noncompliance with tax laws); *United States v. Smith*, 618 F.2d 280, 282 (5th Cir. 1980) (holding that, where defendant was convicted of violating tax laws, a probation condition requiring him to "refrain from making any statements to others advocating any disobedience of any local state or federal law" was overbroad, but curing the condition by substituting "the
probationers to advertise their own convictions. That is not to say, however, that all scarlet-letter probation conditions are constitutional: Courts must devise a way of narrowing compelled speech. Three approaches will be considered, though each is in some way problematic.

One way of narrowly tailoring compelled speech might be to analyze the degree to which a scarlet-letter probation condition causes the defendant to feel shamed. Conditions that severely shame a defendant would be constitutionally suspect. Such a test would allow appellate courts to invalidate scarlet-letter probation conditions that were extremely harsh. A subjective test focusing on the defendant’s feelings, however, is flawed for a number of reasons. Humiliation is a subjective experience and depends on cultural and familial backgrounds, as well as general psychological makeup. A subjective test that focuses on the degree to which the scarlet-letter probation condition will degrade or ridicule the defendant potentially treats differently two defendants who have committed the same offense and who have been given the same scarlet-letter probation condition.

One solution to this problem would be to create a more objective test that asks whether a reasonable person would consider the particular scarlet-letter probation condition severely humiliating and shameful. Determining what a reasonable person considers shameful is difficult, if not impossible, however, in a society as diverse as ours. Judges might ultimately impose their own notion of what is shameful. Furthermore, all punishments potentially shame offenders as a secondary effect. The difference between scarlet-letter probation conditions and other forms of punishment, such as incarceration or fines, is that the primary purpose of scarlet-letter probation conditions is to shame the defendant publicly. As

Internal Revenue Code” for the phrase “any local, state, or federal law”).

622. See supra notes 203-23 and accompanying text.
623. Here is an example: Two defendants are convicted for driving while intoxicated. One is a college student; the other is a rabbi. Both are required as conditions of their probation to publish apologies and their pictures in the local newspaper. The rabbi stands to lose a lot more than the college student if forced to publish the apology, yet should a court affirm the student’s condition but hold the rabbi’s condition unconstitutional? The unfairness of such a situation seems obvious. For a discussion of the need to tailor scarlet-letter probation conditions to the individual defendant, see supra note 212 and accompanying text.
624. See Massaro, supra note 12, at 1922-23; supra note 210 and accompanying text.
625. See Massaro, supra note 12, at 1924.
626. See Kahan, supra note 201, at 641.
627. See People v. Hackler, 16 Cal. Rptr. 2d 681, 686 (Ct. App. 1993); People v. Meyer,
such, scarlet-letter probation conditions have the potential not only to shame the offender, but to separate the offender from the community. The problem, in other words, is not the evocation of shame per se but the intent to cause shame and the degree to which shame is evoked.

Of course, the main difficulty with analyzing the degree to which a probation condition shames the defendant is that such an analysis has no roots in the First Amendment. This analysis looks to the content of the scarlet-letter probation condition only insofar as it relates to the defendant's reaction to it. Traditionally, a First Amendment analysis focuses on the message itself, not the speaker of the message. Any workable test, therefore, must focus on the probation condition itself. One possible analysis that does focus on the scarlet-letter probation condition narrows the compelled speech by shortening the time frame within which the defendant is forced to speak. Under this analysis, compelled speech that lasts longer than a certain period of time is prohibited. For example, according to this analysis, a public apology in a local newspaper, which arguably lasts only for the day that the apology is published, is more narrowly tailored than forcing a defendant to post a sign in his yard. The primary advantage of this test is that it gives trial courts a bright-line test with which to work.

One problem with this kind of analysis is determining what is constitutionally a proper time frame. The dilemma is compounded by the fact that different offenses may warrant longer time periods. Should courts have to set time limits for each kind of offense? This requirement seems unworkable. Furthermore, bright-line tests limit the trial courts' flexibility—which is necessary to tailor probation conditions for each defendant. Another major difficulty is that the duration of the compelled speech may not indicate the amount of humiliation or harm done to the defendant. For example, a defendant who lives miles away from her nearest neighbor will not be particularly harmed by having to post a sign in her yard, while a


628. See Garvey, supra note 205, at 749. Indeed, one purpose for imposing a scarlet-letter probation condition seems to be to warn the public about the offender. See, e.g., People v. Letterlough, 655 N.E.2d 146, 147 (N.Y. 1995) (where the trial court required the defendant to place a fluorescent sign on his car about his DWI conviction in order to warn the public); State v. Burdin, 924 S.W.2d 82, 84 (Tenn. 1996) (where the trial court required the probationer to post a sign in his yard warning children and parents about the probationer's conviction for child molestation).

defendant who lives in a small town may lose significant social and perhaps economic standing by having to publish an apology in a local newspaper. Yet a time frame analysis states that the first condition is unconstitutionally compelled speech, while the second is narrowly drawn enough to pass scrutiny.

The best approach avoids these problems by focusing on several factors. Under this analysis, a scarlet-letter probation condition that is extremely long in duration, that might endanger the defendant's safety, or that has content that states more than bare facts, is constitutionally suspect. One advantage of this test is that it focuses on the specific scarlet-letter probation condition but does not focus on the subjective reaction of the individual defendant. The duration of a scarlet-letter probation condition is relevant to a First Amendment analysis because that is the length of time that the state is compelling a defendant to speak. The scarlet-letter probation condition's potential to cause physical harm to the defendant and the degree to which the probation condition compels more than bare facts are both relevant to a First Amendment analysis because they both relate to the content of the compelled speech. This analysis avoids bright-line determinations and gives trial courts greater flexibility. The negative aspect of the test is that it will be difficult for the trial courts to know when they are unconstitutionally compelling speech. Still, by considering these three criteria in shaping scarlet-letter probation conditions, trial courts will have more guidance than they do at present.

CONCLUSION

Scarlet-letter probation conditions spark public interest because they are court-created public spectacles that allow both courts and

630. Scarlet-letter probation conditions imposed for particularly heinous crimes, such as sexual offenses, might provoke vigilante justice and outbreaks of violence. Persons angry that the defendant was not incarcerated may decide to take matters into their own hands. See, e.g., Booth Gunter, Sounding the Alarms on Sexual Predators, TAMPA TRIB., Mar. 2, 1997, at 1-Nation/World, available in 1997 WL 7037377 (noting that the identification of a sexual predator "can lead to violence" and offering an example from Trenton, New Jersey, where two men broke into the home of a suspected sexual predator and beat up the wrong person); Ted Roelofs, Neighbors Right to Self-Protection or Vigilantes?, GRAND RAPIDS PRESS, Apr. 9, 1995, at A1, available in 1995 WL 3014948 (relating that when residents in Lynnwood, Washington, learned that a child rapist was being released from prison, someone burned down his house hours before he was to be released, forcing him to leave the state).

the public to vent their frustration at a criminal justice system they perceive to be inadequate. While such conditions are reminiscent of colonial shaming penalties, unlike such penalties, they do not occur in a culture that is close-knit and interdependent. For this reason, their effects may be nothing more than retributive. Although scarlet-letter probation conditions are clearly punishments and are arguably cruel, such conditions probably will not violate the Eighth Amendment's Cruel and Unusual Punishment Clause. Such conditions, however, do raise First Amendment concerns because they compel the probationers to "speak" their own shame.

The problem in challenging a scarlet-letter probation condition is that courts traditionally have been unwilling to review the legality of probation conditions. Even though courts now claim that probationers have constitutional rights, with some exceptions, they are reluctant to define these rights or to find a probation condition invalid. The resulting standards for reviewing probation conditions often fail to protect the probationer's rights adequately.

It is difficult to argue that present-day probation is an "act of grace." In fact, probation conditions are becoming harsher and more punitive. The need for adequate standards of review, therefore, is even more serious. Although the state has a valid interest in punishing criminals, it may not use this justification to sweep away constitutional rights. As Justice Jackson wrote fifty-five years ago, "validity of the asserted power to force an American citizen publicly to profess any statement of belief ... presents questions of power that must be considered independently of any

632. See supra notes 2-19 and accompanying text.
633. See supra notes 210-11 and accompanying text.
634. See supra note 215 and accompanying text.
635. See supra notes 288-359 and accompanying text.
636. See supra notes 465-71, 611-15 and accompanying text.
637. See supra notes 483-504 and accompanying text.
638. See, e.g., Gagnon v. Scarpelli, 411 U.S. 778, 782 n.4 (1973) (holding that a probationer is entitled to preliminary and final revocation hearings); Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (holding that the liberty of a parolee is within the protection of the Fourteenth Amendment); Mempa v. Rhay, 389 U.S. 128, 137 (1967) (holding that an indigent defendant is entitled to counsel when sentencing occurs after revocation of probation); United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975) (en banc) ("Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety.").
639. See supra notes 531-67 and accompanying text.
640. See supra notes 568-87 and accompanying text.
641. For a discussion of this doctrine, see supra notes 483-93 and accompanying text.
642. See supra notes 11-12, 520-26 and accompanying text.
idea we may have as to the utility of the ceremony in question.\textsuperscript{643}

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\textsuperscript{643} West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943).