Federal Probation

MARCH 1979

Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts and Printed by Federal Prison Industries, Inc., of the U.S. Department of Justice

VOLUME XXXXIII MARCH 1979 NUMBER 1

This Issue in Brief

Mandatory Sentencing: The Politics of the New Criminal Justice.—New mandatory sentencing policies are winning political support in the 50 states and Congress; however, despite stated goals to equalize sentencing and deter crime, the new laws probably can be expected to aggravate prisoners' grievances and serve as simply another bargaining tool in the criminal justice system, asserts Professor Henry R. Glick of Florida State University. Little empirical research exists on the impact of the new sentencing laws, but available evidence strongly suggests that they will have few beneficial results, he adds. The only major change may be an explicit abandonment of the reform ideal and existing, albeit limited, rehabilitation programs.

The Failure of Correctional Management—Revisited.—In "revisiting" the case of correctional management failure (his first article appeared in 1973), Dr. Alvin W. Cohn appears to be painting a drab, bleak picture. Yet, he maintains, from the time the original paper was written until now, he does believe that there has been some meaningful change. While no one could or should argue that corrections has successfully reformed itself or is being reformed appropriately, there have been some significant changes that suggest a brighter future, especially with regard to the status of management, he concludes.

Rethinking the President's Power of Executive Pardon.—Although only superficially understood by most citizens, the President's power of executive clemency has undergone a protracted evolution in terms of legal scope and constitutional interpretation, according to Professor Christopher C. Joyner of Muhlenberg College. Pronounced an "act of grace" by the Supreme Court in 1833, the pardon power in 1927 was deemed an act intended primarily to enhance public welfare. As such, the President's pardoning authority has become broad and multifaceted, immune from review by court action or congressional restriction. A pardon neither obliterates the record of conviction nor establishes the innocence of a person; it merely forgives the offense.

Team Approach to Presentence.—An interdisciplinary team approach is the trademark of the Seattle Presentence Investigation Unit, reports Chuck Wright, Adult Probation and Parole supervisor for the State of Washington. This collective approach is used when most feasible, and has led to effective improvements in investigation, information gathering, report writing and recommen-

CONTENTS

Probation With a Flair: A Look at Some Out-of-the Ordinary Conditions

BY HARRY JOE JAFFE

Probation Officer, U.S. District Court, Memphis, Tennessee

A WEST VIRGINIA trial court, in suspending execution of a prison term upon a defendant convicted of selling marihuana, placed him on probation subject to the following special conditions: attend church every Sunday, give up drinking, start working at two jobs every day beginning the next day, abide by a 10:00 p.m. curfew, keep away from establishments selling liquor, stay away from college campuses and women's dormitories, get a haircut and become a "16-hour-a-day [working] man for the next five years."[1] The probationer, instructed by the trial court to return that very afternoon to show compliance with the tonsorial directive, immediately went looking for a barbershop. Upon finding all the shops closed, he dashed back to the courthouse and explained his lack of compliance. The judge told him that he had better not only have a haircut but the two jobs as well by the next morning. The following day the probationer—with haircut—returned again to court and told the judge that he had secured the two jobs, one with a building contractor and the other in his father's restaurant. Disapproving these jobs, the trial judge observed that "working on a farm or cutting timber was the proper work for someone who needed 'behavior modification.' "[2] He then ordered the young man to work and to live on a certain farm and specifically designated one of the farm workers as a volunteer probation counselor.

The probationer went to work on this court-designated farm where he regularly fed the judge's cattle, separated them from the neighbor's cows, and repaired and replaced fences "on grazing property leased by the judge."[3] During a visit to the farm by the probation officer, the probationer, explaining that the low farm wages precluded his having enough money to buy food and clothing, desired to return to his former employment as an automobile repairman. The probation officer replied that he would make arrangements for the purchase of food stamps.

After working on the farm for about 2 months, the probationer left and went to his parents' home. He later surrendered to the probation officer, was then arrested, adjudged to have violated the terms of the probation and given the unexecuted prison sentence.

This amalgam of judicial errors was struck down, of course, by the appellate court which mandated the trial court to order the probationer's release from confinement and his reinstatement to supervision. It has been exhumed from the limbo of overruled sentencing judgments, only as an exaggerated example of how judicial discretion in imposing probation conditions runs rampant. Such discretion is not unbridled; conditions of probation must conform with the constitutional rights of the probationer and the statutory limits of the probation statute. As confidential advisor to the court, it is incumbent on the probation officer to help avoid such judicial lapses into irrationality.

A probationer's constitutional rights are restricted only to the extent reasonably necessary to proper supervision. Such limitations imposed as conditions of probation by state and Federal trial courts have substantially affected many areas of a probationer's daily life: where he may reside, what type of job he may hold, what he can speak about and to whom, and how secure his person and property may be from search and seizure. By discussing specific instances of such limitations on a probationer's constitutional rights, I hope that this study will help probation officers recognize those elements of properly drawn conditions that, by passing constitutional muster, withstand judicial scrutiny.

Statutory provisions of Federal law mandate only five explicit conditions:

(1) Payment of a fine

(2) Payment of restitution

(3) Provision of support of persons for whom a defendant is legally responsible

(4) Residence in a local halfway house for all or part of the probationary term, and

[1] *Louk* v. *Haynes*, 223 S.E.2d 780, 784 (W. Va. 1976).
[2] *Id.* 785.
[3] *Id.*

(5) Participation by a defendant drug addict in a community treatment facility.[4]

Congress then imparts to the Federal trial court the discretion to impose other supplemental conditions:

> . . . any court . . . when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may . . . place the defendant on probation for such period and upon such terms as the court deems best.[5]

Most state legislatures have also incorporated into their penal codes similarly worded paragraphs.

Case law interpreting the judge's statutory discretion, however, to impose such ancillary conditions limits that discretionary authority to conditions that are reasonably related to the probationer's rehabilitation and to the protection of the public. Just as constitutional propriety must be observed in the fixing of probationary conditions, so too, must those rehabilitative and protective statutory goals be satisfied.

Though this discretionary authority in the fixing of probation conditions has been a part of the sentencing repertoire of Federal and state courts for many years, it had never been subjected to an analysis readily accessible to the nonlegally trained probation officer until the appearance of Carl H. Imlay and Charles R. Glasheen's "See What Condition Your Conditions Are In" (FEDERAL PROBATION, June 1971). Since its publication, though, trial courts have imposed many other extra-statutory conditions whose judicial significance has been nowhere discussed except in scholastic law journals and other esoteric legal periodicals to which the lay probation officer may have no ready access. So, I have surveyed and collated, in a nonscholarly but I hope handy fashion, several of these later state and Federal cases pertaining to the imposition of some unique conditions of probation. To preserve a sense of historical continuity, I have usually discussed these newer cases in terms of the older ones cited previously by Imlay and Glasheen. Unlike those authors, however, I have excluded from my discussion any special condition whose legitimacy turns on some agonizingly tangled or weighty point of law. But I have included those extra-statutory conditions, whether reasonable and pertinent or ridiculous and illegal, which simply make for an informative commentary on the sentencing discretion of the trial court.

Banishment

Banishment stands as one of the oldest punishments for violators of the penal code. A popular sentence at the time of the Roman Empire, *exilium* often meant, for the convicted, forced deportation to a remote island or relegation to a distant city as a lifelong residence. Later history records ostracism to the American colonies or Australia as a legislatively authorized mode of punishment. The imposition of banishment through the special condition of probation has enjoyed a sense of judicial relish by state courts extending well into the 1960's, despite overwhelming appellate nullification.[6]

The only reported uses of banishment as special conditions of probation by the Federal trial courts occurred in the early 1960's and 1970's.[7] In one instance, an individual convicted of making false statements to the Immigration and Naturalization Service received a suspended sentence "upon the condition that the defendant depart from the United States."[8] In reversing the trial court, the appellate court remarked:

> The condition is equivalent to a "banishment" from this country and from his wife and children, who will presumably remain here. This is either a "cruel and unusual" punishment or a denial of due process of law. Be it one or the other, the condition is unconstitutional.[9]

In another case, a resident alien convicted of supplying false information in an application for a passport was "placed on probation for a period of six (6) months with the special condition that the defendant leave the United States within 60 days hereof."[10] The reviewing court vacated that judgment, too.

[4] 18 U.S.C. §3651.
[5] *Id.*
[6] To illustrate, the Mich. Sup. Ct. struck down the proviso that a probationer "leave the state of Michigan within 30 days and not return for the five year period of probation." *People* v. *Baum*, 251 Mich. 187, 231 N.W. 95 (1930). It observed that this dumping of convicted criminals and the receiving state's actions to repel the "invasions" contravened the fundamental policy of equality and cooperation among states. *Id.* at 188, 231 N.W. at 96. State appellate courts have invalidated conditions dealing with a probationer's presence in nations, states, countries, and even neighborhoods. See *People* v. *Cortez*, 19 Cal. Rptr. 50 (Dist. Ct. App. 1962) (invalidating condition that defendant "leave the United States and [never] return to this country"); *In re Scarborough*, 76 Cal. App.2d 648, 173 P.2d 825 (Dist. Ct. App. 1946) (voiding stipulation that probationer "leave the City of Stockton and San Joaquin County"); *Weigand* v. *Commonwealth*, 397 S.W.2d 780 (Ky. 1965), *cert. denied*, 384 U.S. 976 (1966), (nullifying proviso that probationer "remain out of the country"); *Bird* v. *State*, 231 Md. 432, 190 A.2d 804 (1963) (invalidating condition that defendant "leave and go back to Puerto Rico" and remain there for 10 years); *People* v. *George*, 318 Mich. 329, 28 N.W.2d 86 (1947) (condition that child molester move from neighborhood struck down); *Hoggett* v. *State*, 101 Miss. 271, 57 So. 811 (1912) (violator of prohibition laws ordered to leave and remain away "from Forrest County, Miss." held void); *State* v. *Doughtie*, 237 N.C. 368, 74 S.E.2d 922 (1953) (invalidating condition that probationer leave North Carolina for two years); *Loving* v. *Commonwealth*, 206 Va. 924, 147 S.E.2d 78 (1966), *rev'd on other grounds*, 388 U.S. 1 (1967) (provision ordering defendants convicted of violating miscegenetic marriage law to "leave Caroline County and the State of Virginia at once and do not return" for 25 years ruled impermissible). But see *State* v. *Chesnut*, 11 Utah 2d 142, 356 P.2d 36 (1960) (affirming condition that probationer "remain outside of Sevier County").
[7] Though not providing for banishment as a condition of probation, the Proposed Criminal Code does allow banishment as a condition of parole for an alien prisoner subject to deportation (S.1437, 95th Cong., 2d Sess. §3843 (c) (1978)).
[8] *Dear Wing Jung* v. *United States*, 312 F.2d 73, 75 (9th Cir. 1962).
[9] *Id.* 76.

Vocational and Avocational Restrictions

State and Federal trial courts have frequently imposed special conditions of probation restricting probationers from working at such dissimilar occupations as railroad steward, physician, movie actor, businessman, and lawyer.[11] Other occupational restrictions have banned probationers from holding membership in certain trade associations such as unions. Still other judicially imposed restraints have proscribed defendants from participating in such avocational or recreational pursuits as gambling and playing basketball.

In the late 1940's approximately 130 dining room employees of a railroad company entered *nolo contendere* pleas to conspiracy to embezzle money from dining cars on trains moving in interstate commerce. The Federal trial court placed these defendants on 18 months' probation with the stipulation "that defendant[s] shall not during said period apply for employment as or be employed as a steward or assistant steward on any railroad engaged in interstate commerce."[12] On appeal, the higher court upheld the prohibition by noting that the lower court had the right to prevent these dining car employees from succumbing to "the temptation to continue to cheat their employer . . . ."[13] The appellate court further commented that other employment was available to these defendants, and the restriction did not deprive them of earning a living.[14]

During that same late-1940 period a California pediatrician convicted of committing an indecency upon a 10-year-old girl sought relief in the appellate court from the condition pegged to his 5 years' probation that "he not practice medicine while on probation."[15] Ruling that the proviso constituted no abuse of discretion, the higher court affirmed the occupational restriction.

Approximately a decade passed before the prohibitory condition affecting employment appeared again in the literature. In the late 1950's California's highest court validated a lower court's restriction appended to a 10-year probationary term prohibiting members of a union from holding any union position, receiving remuneration from any union, or participating in any union negotiations.[16] The tribunal observed that these individuals were convicted of conspiracy to commit assault growing out of union related activities and reasoned that the special condition had a direct, cogent, and reasonable relationship to the offense for which the defendants stood convicted. Later in the same decade, a California appellate court upheld the 10-year period of probation imposed on a flim-flam artist subject to his getting out of and staying "out of the automobile business."[17]

The reported judicial record of the 1960's reflects that state and Federal courts not only continued to impose employment restrictions as supplemental conditions of probation but also continued to receive almost unconditional appellate affirmance of such sentencing practices. Again, the common thread to acceptable conditions is that there be a reasonable relationship between the conditions and the offender's crime—thus between the condition and the offender's rehabilitation or the protection of the public. For example, a California court validated the ancillary condition that a probationer "stay out of the motion picture business" upon his conviction of engaging in oral sex with a woman during the production of a film.[18] Another California court endorsed a lower court's restricting an aluminum siding salesman convicted of grand theft and forgery from being employed in a sales position.[19] Similarly, a California Federal court gave a defendant convicted of impersonating an F.B.I. agent a probationary term subject to the proscription that he no longer work in the repossessing business. In upholding the special condition, the higher court observed that the defendant had impersonated a Federal agent in the course of his business as a repossessor of boats and automobiles:

> . . . The occupational activity prohibited in the probation condition is the one in which appellant was engaged when he committed the offense of which he stands convicted . . . . A reasonable if not the best way to prevent recurrent similar offenses is to withdraw from appellant the privilege of engaging in the repossession business where the temptation to impersonate law officers is most likely to occur.[20]

Though maybe not a true occupational restric-

[10] *United States* v. *Martin*, 467 F.2d 1366, 1367 n.2 (7th Cir. 1972).
[11] See generally *Propriety, As Condition of Probation Granted Pursuant to 18 USCS §3651 or Similar Predecessor Statute, of Requiring Defendant to Give Up Profession or Occupation*, Annot., 35 A.L.R. Fed. 631 (1977).
[12] *Stone* v. *United States*, 153 F.2d 331, 332 (9th Cir. 1946).
[13] *Id.* 333.
[14] *Id.*
[15] *People* v. *Frank*, 211 P.2d 350, 350 (Cal. Dist. Ct. App. 1949).
[16] *People* v. *Ondo*, 50 Cal.2d 75, 103 323 P.2d 397, 412-13 (1958), *cert. denied*, 357 U.S. 907 (1958). *Cf. Haffa* v. *Szabo*, 378 F. Supp. 1221 (D.D.C. 1974) (Restriction attached to Presidential Pardon prohibiting former union leader from participating in union management upheld).
[17] *People* v. *Caruso*, 174 Cal. App.2d 624, 633, 345 P.2d 282, 287 (Dist. Ct. App. 1959).
[18] *People* v. *Bowley*, 40 Cal. Rptr. 859, 860 (Dist. Ct. App. 1964).
[19] *People* v. *Brewin*, 53 Cal. Rptr. 687, 692 (Dist. Ct. App. 1966).
[20] *Whaley* v. *United States*, 324 F.2d 356, 359 (9th Cir. 1963), *cert. denied*, 376 U.S. 911 (1964).

tion, several professional gamblers convicted in the early 1960's of evading Federal gambling taxes sought unsuccessfully a reversal of a special condition that they give up gambling.[21] In affirming that prohibition, the appellate court remarked:

> . . . Professional gambling got these defendants into trouble. It seems a fair exercise of judicial discretion therefore for the district court to proscribe gambling.[22]

As recently as mid-1976, another Federal appellate court approved a supplemental condition imposed on a violator of the income tax laws that "he not frequent any racetrack or other type of gambling establishment, and that he not place any bets of any kind."[23] In this case, the defendant, a handicapper and tout, committed income tax fraud in connection with this occupation.

Then, for example, there is the case of the college student who, while attending school on an athletic scholarship, received 5 years' probation for breaking and entering. Tagged to his order of probation was the extra-statutory condition that he play "no varsity or professional basketball during probation . . . ."[24] The appellate court, in concurring with the probationer's contention that no reasonable connection existed between the condition and the crime, struck down that condition:

> The trial judge stated no reason for the restriction, nor have the people explained how this restriction might be related to the defendant's rehabilitation . . . as it appears that the restriction is more likely to impede rehabilitation than promote it, we conclude that it is not a "lawful provision" within the meaning of the statute.[25]

As trial courts in the 1970's searched for more alternatives to the traditional ways of sentencing, they found what they were looking for in the guise of the special condition. A multinational oil company, having pled guilty to discharging refuse from one of its dock facilities into navigable waters, received 6 months' probation with the added requirement that the corporation:

> . . . (1) set up and complete a program within 45 days to handle oil spillage into the soil and/or stream; (2) in the event condition No. 1 is not complied with, the court will appoint a Special Probation Officer with powers of a Trustee under supervision of the court.[26]

Although the Seventh Circuit found the specific terms of the probation to be unreasonable and in excess of the court's authority, the importance of the case is, that for the first time, a corporation was held to be a proper subject of conditions of probation under the Federal Probation Act.[27]

Not long afterward, a corporate defendant convicted of sending obscene material through the mail received probation provided that it "not engage in the distribution of pornographic material."[28] Ruling that the special proviso was well within the discretion of the trial court, the higher court noted:

> It must be manifest to all that the intent of the district court in granting any probationary term at all was to rehabilitate the Corporation's activities and to protect the public from future commissions of crime by the Corporation in the field of unlawful obscene printed media. It would be difficult to imagine a more reasonable relationship between the condition and (a) the treatment of the Corporation in allowing it to return to the street and distribute printed media, except for dirty pictures, likened to a restraint of association with former confederates in crime or other groups likely to lead to crime on the part of the Corporation; and (b) protection of the public from future crime on the part of the Corporation.[29]

With increased emphasis being placed in the last few years on protecting the public from consumer fraud, the special condition of probation has become a potent weapon against this variety of criminal defendant. A Californian, for example, convicted of grand theft growing out of a scheme involving the sale of shoddy heating equipment was placed on probation with the condition that he no longer "engage in the furnance or heating business either directly or indirectly."[30] In its memorandum of affirmance, the appellate court commented:

> In applying these principles to the facts of the case at bench we conclude that, in depriving defendant from engaging in the furnace or heating business as a condition of probation, the trial court did not abuse its discretion. As pointed out by the People the jury found defendant guilty of a crime practiced by him in the course of his business by misrepresenting facts to his customers for the purpose of material gain. The condition complained of appears reasonably related to the crime of which he stands convicted, and aimed at the deterring of further criminal activity in an effort to foster rehabilitation and to protect public safety.[31]

Likewise, a North Carolinian convicted of obtaining money under false pretense received probation upon his abstaining "from engaging in the trade

[21] *Barnhill* v. *United States*, 279 F.2d 105, 106 n.2 (5th Cir. 1960), *cert. denied*, 364 U.S. 824 (1960).
[22] *Id.* 106-07.
[23] *United States* v. *Bishop*, 537 F.2d 1184, 1185 (4th Cir. 1976).
[24] *People* v. *Higgins*, 22 Mich. App. 479, 481, 177 N.W.2d 716, 717 (1970) (Danhof, J., dissenting).
[25] *Id.* at 482, 177 N.W.2d at 718.
[26] *United States* v. *Atlantic Richfield Company*, 465 F.2d 58, 59 (7th Cir. 1972).
[27] *Id.* 61.
[28] *United States* v. *Nu-Triumph, Inc.*, 500 F.2d 594, 594 (9th Cir. 1974).
[29] *Id.* 596.
[30] *People* v. *Keefer*, 35 Cal. App.3d 156, 168, 110 Cal. Rptr. 597, 605 (Ct. App. 1973).
[31] *Id.* at 169, 110 Cal. Rptr. at 606.

of Building Contractor and limit himself to employment with others."[32]

Even the police officer has been prohibited from continuing in his field. A Puerto Rico policeman, found guilty by a Federal court jury in mid-1977 of a civil rights violation arising from his beating a citizen at the San Juan International Airport, was placed on 2 years' probation with the condition that he resign from the police department during the probationary period.[33] On appeal, counsel contended "that this sentence constitutes an abuse of discretion, is cruel and unusual punishment and imposes unnecessary economic hardship upon his family since his only skills are in law enforcement."[34] Brushing aside these contentions, though, the higher court implied that the forced resignation of a police officer convicted of such a law violation uniquely blended those statutory goals of probation: rehabilitation of the convicted and protection of the public. By no longer working as a policeman, the defendant would be less likely to find himself in similar stressful situations (rehabilitation) that could lead him to hit a citizen with his nightstick (protection).

In the mid-1970's there was, however, a significant reversal of a lower Federal court which had applied a special condition affecting employment. An attorney convicted of filing a false income tax return was granted probation with the condition that he "resign from the Bar."[35] In refusing to uphold this proviso, the appellate court tendered several comments. First, the court felt that "before any defendant is required to give up his job, or trade or profession, he should be given a meaningful opportunity to demonstrate why such a condition might be inappropriate.[36] Secondly, the higher court mandated that the defendant's forced resignation from the bar usurped the attorney's procedural rights to appear before the state disciplinary committee:

> . . . we have before us a severe additional sanction that deprives a defendant of his livelihood (in this case, presumably for well past the 18-month period of probation, if not for life). There is also an issue as to whether protection of the public requires imposition of this extreme sanction, and we have some doubts over the power of a sentencing judge to impose such a condition. Given the availability of alternative and well-defined procedures for expulsion from the bar, which would have accorded appellant procedural rights here denied him, we hold, in the exercise of our supervisory power, that this particular condition of probation was improper.[37]

Based on the same reasoning, a subsequent decision handed down by another appellate court voided a condition imposed upon an attorney convicted by a Tennessee Federal jury of bankruptcy fraud requiring that he "should surrender his license to practice law."[38]

Restrictions of Speech and Assembly

The constitutional guarantees of freedom of expression and assembly stand preeminently as rights generally inviolable by judicial decree. Only in those circumstances where a group's exhortations or assembly has been deemed to precipitate riot, panic, or public discord have the courts intruded; and, when such judicial incursion has taken place, it has usually been through a civil, not a criminal application of jurisdiction. The injunctive power of the court, for example, in the form of a temporary restraining order, is the best known exercise of this jurisdiction. But in addition to civil enforcement, an examination of the judicial record reveals that a significant number of courts, acting exclusively within the purview of the criminal law, have affected the exercise of free speech, assembly, and association through the use of unusual conditions.

As early as 1932, a higher Georgia court upheld a condition of probation imposed on a violator of the prohibition laws stipulating that he was "to make no remarks against the sheriff of Dooly county or any other witness that testified against him."[39] A year later a New York appellate body sustained a sentencing judge's imposition of a previously unexecuted term of imprisonment on a sodomite for his having breached a special proviso of his probation that prohibited him " 'from associating with young boys in any manner whatsoever.' "[40] The higher court remarked that the special restriction was "reasonable, proper, wise, not burdensome, and could easily have been obeyed."[41]

Though petty and lacking in judicial significance at the time of affirmance, these cases assumed a kind of precedental status during the 1960's when some courts took these kinds of con-

[32] *State* v. *Simpson*, 212 S.E.2d 566, 568 (N.C. Ct. App. 1975).
[33] *United States* v. *Villarin Gerena*, 553 F.2d 723, 726 (1st Cir. 1977).
[34] *Id.* 727.
[35] *United States* v. *Pastore*, 537 F.2d 675, 677 (2d Cir. 1976). See generally Steinberg and Koneck, *Federalism, the Tenth Amendment and the Legal Profession: The Power of a Federal Judge to Restrain a Convicted Attorney, as a Condition of Probation, from Practicing in the State Courts*, 56 Neb. L.R. 783 (1977).
[36] *Id.* 682.
[37] *Id.* 683.
[38] *United States* v. *Polk*, 556 F.2d 803, 804 (6th Cir. 1977).
[39] *Morris* v. *State*, 44 Ga. App. 765, 765-66, 162 S.E. 879, 879 (Ct. App. 1932).
[40] *People* v. *Brophy*, 147 Misc. 254, 255, 263 N.Y.S. 571, 572 (Sup. Ct. 1933).
[41] *Id.* at 256, 263 N.Y.S. at 574.

ditions and transformed them into muzzles of social and political protest. In the late 1960's, political demonstrations advocating an end to this country's involvement in Vietnam increased. Many participants were arrested and given institutional sentences; others received probation with some unparalleled special conditions affecting the exercise of First Amendment rights.

In late 1967, a California coed was placed on 3 years' probation for an assault on a police officer which occurred during an on-campus demonstration. As a condition of her probation, the court ordered "that she not take an active or official part in any other demonstrations of this kind . . . ."[42] Three months later she was arrested for participating in a peaceful student protest at the university's placement office. A probation revocation hearing was held at which testimony developed that the probationer had blown up some balloons the demonstrators were carrying. Adjudging her to be in violation of her probation, the sentencing judge revoked the probation based upon her transgressing the proscription against taking part in demonstrations:

> It isn't the blowing up of a balloon. A child blows up a balloon, but that isn't what you were doing. You were taking part in an activity which I told you not to take part. I told you you could not take any active part in any of these demonstrations.[43]

The probationer appealed the revocation, challenging the condition on numerous grounds: It had no relationship to the original offense; it was vague; it restricted conduct which, in itself, had no bearing on future criminality, and it was violative of her First Amendment rights. In affirming the revocation, however, the higher court rejected these contentions point by point: the special condition did, indeed, validly relate to the original offense; the sentencing court had meticulously explained at disposition what activities the ban prohibited; otherwise legal activities may be proscribed should those lawful activities lead a defendant again to commit a law violation, and the size, the purpose, and the temperament of a protest rally may be taken into account by a trial court in its decision to impose as a condition of probation the circumscription of a defendant's First Amendment rights.[44]

Not too long afterward, a Texan convicted of unauthorized wearing of an Army uniform during a demonstration outside an induction center received probation with the special condition that "he forego any association whatever with the Students for Democratic Society Organization" and that he discontinue his "association with the members of the Humanists group . . . ."[45] Arguing on appeal, as did the previous defendant, that such conditions illegally infringed on constitutional rights to free assembly and association, this defendant, too, lost his appeal when the reviewing court found no deprivation of rights.[46]

A contrary decision, though, was handed down by a California appellate court in another case involving a political activist. In late 1969, a defendant who had been heavily engaged in antidraft activity sought relief in the appellate court on the ground that numerous special conditions tagged to his probationary term trampled on his First Amendment rights.[47] In agreeing with the defendant the higher court noted in a prickly worded reversal opinion that the sentencing judge had exceeded his authority in imposing such unreasonable conditions:

> "Putting the gag" on the convicted probationer, insofar as it is not directly related to a past criminal abuse of the privilege of freedom of speech itself, or to the prospect of future criminality, does not serve to further "the end that justice may be done, that amends may be made to society for the breach of the law, nor does it provide generally and specifically for the reformation and rehabilitation of the probationer."[48]

The late 1960's and early 1970's also witnessed the emergence of the "tax protestors," a small but vociferous group who refused to pay Federal income taxes or to file returns because of various ideological and philosophical beliefs. Some of these dissenters, for example, refused to meet their Federal tax obligations because of disagreement with certain governmental domestic or foreign policies, others because they found fault with the taxing or monetary system itself. Though most such instances of noncompliance were litigated civilly, a few culminated in criminal prosecution. One such vocal critic, after having been convicted of a tax law violation, was placed on probation subject to the special provision "that he abstain from circulating or distributing by mail or other means any tracts, materials or other information questioning the constitutionality of the Federal Reserve System and the Federal Income Tax Laws, and that he likewise abstain from speaking or writing activities calling into question the constitutionality of the Federal Reserve System and the Federal Income Tax Laws."[49] The appellate court ruled that though the trial court could legitimately prohibit the probationer from encouraging others to violate the tax laws, it could not broadly ban the probationer's right to question the constitutionality of the tax laws:

> To muzzle the appellant to this extent is on its face a violation of his First Amendment freedom of expression. This is not to say that one on probation has the rights of citizens who are not on probation. He 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 . . . and we hold the instant condition invalid only to the extent that it prohibits the expression of opinions as to invalidity or unconstitutionality of the laws in question. Insofar as it prohibits public speeches designed to urge or encourage others to violate the laws, the condition is valid.[50]

Besides the war and the tax protestors, that volatile period saw the development of a coterie expressing strong dissatisfaction with this country's foreign policy toward certain national independence movements, such as those citizens who held strong allegiance with the separatists in Northern Ireland. One such supporter of that cause, upon his conviction of running firearms to the Irish Republic, received 2 years' probation with the following special conditions:

> 3. That he not participate in any American Irish Republican movement;
> 4. That he belong to no Irish organizations, cultural or otherwise;
> 5. That he not belong or participate in any Irish Catholic organizations or groups;
> 6. That he not visit any Irish pubs;
> 7. That he accept no employment that directly or indirectly associates him with any Irish organization or movement;[51]

Responding to the defendant's challenge to these conditions the appellate court offered him no relief:

> If the trial Judge could only prohibit active association with a group having an illegal purpose then the Court would be in effect, restricted to the standard condition that the probationer obey the law. It does not appear such limitation was intended. Here the crime stemmed from high emotional involvement with Irish Republic sympathizers.
> There is reasonable nexus between the probation conditions and the goals of probation.[52]

Prior to *Malone*, the only other reported instance of approval by a Federal court of probation conditioned on a defendant's disassociating himself from certain groups or classes occurred in the early 1970's with the affirmation of the special condition imposed on a distributor of pornographic films which required that "he not associate with any known homosexuals."[53] More recently, a Louisianian, convicted for sexually molesting his daughter, unsuccessfully petitioned the reviewing court to remove the added conditions that not only prohibited him from communicating with any of his children except through the state welfare office but also forbade him from having any of his children live with him until they had reached their eighteenth birthday.[54]

No survey of case law relating to the circumscription of First Amendment rights would be complete without touching upon the general, though nevertheless, extra-statutory condition that a probationer "associate only with law-abiding persons."[55] Though the controlling case centers on a Federal parolee, the substance of the Supreme Court's holding applies to probationers as well.

A Federal appellate court upheld the United States Board of Parole's revocation of parole on the sole basis that the parolee worked at an establishment that employed other ex-convicts, in violation of a prohibition against associating with other felons. The Supreme Court reversed the appellate court's affirmation of the revocation, however, finding any such association was incidental to the parolee's lawful employment.[56] In other words, the proscribed association resulted from the employer's hiring more than one person

---

[42] *People* v. *King*, 73 Cal. Rptr. 440 443 (Ct. App. 1968), *cert. denied*, 396 U.S. 1028 (1970).
[43] *Id.* 448 n.8.
[44] See generally *Propriety of Conditioning Probation or Suspended Sentence on Defendant's Refraining from Political Activity, Protest, or The Like*, Annot., 45 A.L.R.3d 1022 (1972).
[45] *United States* v. *Smith*, 414 F.2d 630, 636 (5th Cir. 1969), *rev'd on other grounds*, 396 U.S. 58 (1970).
[46] *But cf. Sobell* v. *Reed*, 327 F. Supp. 1294 (S.D. N.Y. 1971) (striking United States Parole Board's decision limiting parolee's First Amendment rights to demonstrate in peace parade and to speak out on prison conditions).
[47] *In re Mannino*, 14 Cal. App.3d 953, 92 Cal. Rptr. 880 (Ct. App. 1971) (Elkington, J., dissenting). The conditions, numbered as in the original order read as follows:
[3.] He shall, during the period of probation, not become a member either actively or passively, of any political or other organization, either on or off campus that participates in or advocates any form of protest or change in existing conditions, except that he may become a member of the authorized student body organization on the campus where he is currently enrolled provided that he shall not participate in any activity of the student body organization, advocating any form of protest or change in existing condition. He shall, during the period of probation, not contribute any newspaper articles or other writings to any publication, official or unofficial, of any college, high school, junior high school, campus or other publication, nor shall he be an editor of, advisor to, or otherwise participate in any campus or off campus publication; nor shall probationer use a fictitious name or the identity of another person for the purpose of doing any of the foregoing. He shall not, during the period of probation, speak for any organization or any college, high school, or junior high school campus where he is not currently enrolled except for official courses, or other purpose specifically authorized by the school that he is attending.
[5.] He shall not participate in, actively or passively, nor shall he be an advisor to any on-campus or off-campus demonstration for any purpose whatsoever.
[48] *Id.* at 966-67, Cal. Rptr. at 888.
[49] *Porth* v. *Templar*, 453 F.2d 330, 332 n.1 (10th Cir. 1971).
[50] *Id.* 334.
[51] *Malone* v. *United States*, 502 F.2d 554, 555 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975).
[52] *Id.* 556. The holding of the reviewing court seems extreme. It virtually upholds a nonfraternization ban on the Irish; moreover, had some of the conditions been challenged in a revocation proceeding, they might have been found defective (e.g., what is an Irish organization or an Irish pub?).
[53] *United States* v. *Kohlberg*, 472 F.2d 1189, 1190 (9th Cir. 1973).
[54] *State* v. *Credeur*, 328 So.2d 59, 64 (La. 1976).
[55] Probation Form No. 7, United States District Court, Conditions of Probation, Condition No. 2.
[56] *Arciniega* v. *Freeman, U.S. Marshal*, 404 U.S. 4 (1971).

with a criminal record—a situation beyond the parolee's control.

The court apparently construed "association" to mean "non-business" or that degree of association going beyond the incidental contact of coworkers in the course of employment. And it is precisely that type of definitional semantics that serves to explain an appellate court's ruling in the following case.

In mid-1972 a Federal defendant received probation with the customary prohibition against associating with the criminal element. Surveillance by the FBI and probation officials revealed that from 1973 to 1976 the probationer had been seen on many occasions with known felons and law violators. The probation was revoked, and the defendant given a lengthy prison term. He appealed, asserting that the phrase "associate only with law-abiding persons" was vague as well as violative of his right to freedom of association. The appellate court ruled that, unlike in the previous case of *Arciniega*, these were not casual, incidental, or by-the-way associations. Rather, the probationer intentionally sought to associate with desperadoes and lawbreakers. The reviewing court, in upholding the constitutionality of the condition, noted that its rehabilitative function served to take the probationer out from the criminal underworld, while the protective goal of the condition was to prohibit future criminality by banning criminal collusion.[57]

Search and Seizure

Decisional law provides no clear guide to the propriety of granting probation pursuant to a waiver of Fourth Amendment rights.[58] The general proposition holds, however, that a warrantless search as a condition of probation is permissible, provided it is reasonably related to the offense and serves as a facilitative, supervisory tool for the probation officer in helping him to protect the community by rehabilitating the convicted.

Four California cases, two state and two Federal, serve as touchstones. On the one hand, the California Supreme Court upheld the placement of a narcotics offender on probation with the requirement that he "submit his person, place of residence, vehicle, to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer."[59] Controlled substances, so the court said, are easily concealed and transported; thus, an unexpected search may be necessary to determine whether the probationer is complying with the terms of the probation. On the other hand, a lower-division California appellate body struck down a similarly worded provision tacked on to the probation of a defendant convicted of stealing a 49 cent ballpoint pen. Finding no relationship whatsoever between the petty offense and the necessity for such an infringement upon the defendant's Fourth Amedment rights, the reviewing authority excoriated the trial court by comparing the imposition of such a condition to "the use of a Mack truck to crush a gnat."[60]

At the Federal level, in late 1971 a heroin dealer received probation with the special condition "that she submit to search of her person or property at any time when requested by a law-enforcement officer . . . ."[61] Approximately one year later, Federal drug agents received a tip that the probationer was regularly selling narcotics. Agents and local officers—unaccompanied by a probation officer—then conducted a search of her residence, finding a quantity of heroin. The trial court, at a hearing to suppress the evidence of the search by challenging the validity of the special condition, denied the motion. Tried and convicted, she appealed.

The appellate court, in reversing the lower court, struck down the search proviso by observing that the bilateral nature of the Federal Probation Act must be taken into account in the setting of probation conditions: protection of the public *and* rehabilitation of the offender. A condition authorizing a purely constabulary or investigatorial search—sans supervising probation officer—focused unilaterally on the protective, to the exclusion of the rehabilitative. And that kind of search cannot withstand judicial scrutiny. To elucidate this holding, the higher court suggested a linguistic model for the drafting of future orders:

[57] *United States* v. *Albanese*, 554 F.2d 543 (2d Cir. 1977).
[58] See generally *Validity of Requirement That, As Condition of Probation, Defendant Submit to Warrantless Searches*, Annot., 79 A.L.R.3d 1083 (1977); *Fourth Amendment Limitations on Probation and Parole Supervision*, 1976 Duke L.J. 711; *Search and Seizure Rights of Parolees and Probationers in the Ninth Circuit*, 44 Fordham L.Rev. 617 (1975); *Submission to Search and Seizure: Is It A Valid Condition of Probation?* 2 U.W.L.A. L. Rev. 120 (1970); *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. Pitt. L. Rev. 167 (1969).
[59] *People* v. *Mason*, 5 Cal. 3d 759, 762, 97 Cal. Rptr. 302, 303 (Cal. 1971) (Peters and Tobriner, J.'s, dissenting). The only other state supreme courts to have upheld warrantless searches as conditions of probation have been Arizona and North Dakota. See *State* v. *Montgomery*, 115 Ariz. 583, 566 P.2d 1329 (1977) (Holohan, J., dissenting); *State* v. *Schlosser*, 202 N.W.2d 136 (N.D. 1972).
[60] *People* v. *Keller*, 143 Cal. Rptr. 184, 193 (Ct. App. 1978).
[61] *United States* v. *Consuelo-Gonzales*, 521 F.2d 259, 261 n.1 (9th Cir. 1975).

> That she submit to search of her person or property conducted in a reasonable manner and at a reasonable time by a probation officer.[62]

The other Federal case concerns another California narcotics violator placed on probation in the mid-1970's with the requisite that he "shall submit to search of his person, home, or vehicle at any time of the day or night by any law enforcement or other authorized officer without their need for a search warrant . . . ."[63] During the supervision period, the probation officer had received tips about the probationer's distributing amphetamines. The probation officer telephoned local narcotics officers and requested their assistance in searching the probationer's residence for contraband. Two drug agents met two probation officers at the probationer's residence. After a search by the agents, weapons and a small amount of marihuana were discovered. The defendant, convicted of felon in possession of firearms and simple possession of marihuana, brought an appeal in which he attacked the legality of the warrantless search.

The reviewing court held that this search, unlike the one at issue in *Consuelo-Gonzalez*, fully comported with the intent of the Federal Probation Act: a search initiated by the supervising probation officer, not by the police. The drug agents were present only to facilitate the search. That kind of search, so the appellate court reasoned, properly related to the bilateral responsibility of the probation officer: protection and rehabilitation.[64] By the way, I believe that the best practice is for the fruits of any search by a probation officer to be used for probation revocation purposes rather than a new prosecution, regardless of whether a law enforcement officer assists in the search.

Miscellaneous Conditions

Production of testimony.—Federal and state appellate courts have legitimatized the placing of defendants on probation with the stipulation that they testify before investigative bodies such as grand juries. A St. Louis resident, for example, having been convicted in the mid-1950's of a Federal narcotics violation, was granted a probationary term with the special condition that he appear before a grand jury and disclose the source of his narcotics purchases.[65] Claiming that his testimony would place his family and himself in jeopardy, the probationer refused to be responsive at the next session of the grand jury. Brought before the sentencing judge, the probationer was ordered to testify. Again, he refused. The government then petitioned the court to revoke the probation "on the ground that his conduct was inconsistent with the good conduct required by the terms of probation."[66] After a hearing, the trial judge revoked the probation and handed down a 15-year prison term subsequently upheld by the appellate court:

> We also think there can be no doubt that, aside from the written conditions of probation, there is an implied condition that the probationer will follow the reasonable directions and orders of both the probation officer and the District Judge. In the instant case, the appellant's refusal to follow the court's direction that he disclose to the grand jury the source of his heroin was a sufficient ground for the revocation of probation . . . .[67]

Approximately 4 years later, a Massachusetts Federal judge placed on probation a businessman convicted of income tax evasion. The trial court thought that the probationer could identify several corrupt public officials whose names had surfaced at the trial but who, so far, had managed to insulate themselves from complicity. Based on this premise, the trial court added the following special condition:

> . . . that the defendant, to the satisfaction of the United States District Court, give full, candid testimony to any national, state, or local prosecutor, grand jury, petit jury, legislative body, legislative committee, or authorized public agency of inquiry concerning any matter directly or indirectly relevant to those matters covered in the trial of this indictment.[68]

After having imposed this condition, the trial court observed that "having considered this very, very serious issue of conscience, I concluded that to require a convict on probation to testify about his fellow wrongdoers was justified because of the nature of the crime, its magnitude, and the difficulty of other means of discovery."[69]

The latest reported case of granting probation contingent on a probationer's giving testimony occurred in the early 1970's. A Montana judge imposed a suspended sentence with the requirement that the probationer testify at the trial of a narcotics dealer. When called to testify, the probationer could not remember certain events and dates, frequently invoked the Fifth Amendment,

[62] *Id.* 263.
[63] *United States* v. *Gordon*, 540 F.2d 452, 452 (9th Cir. 1976).
[64] Though *Consuelo-Gonzales* set the linguistic model for future orders, the court held that it did not invalidate prior, broader orders which were narrowly and properly exercised.
[65] *Kaplan* v. *United States*, 234 F.2d 345, 346 (8th Cir. 1956). This condition was merely recited by the trial judge at the sentencing hearing, never appearing in the written order on probation.
[66] *Id.*
[67] *Id.* 349.
[68] *United States* v. *Worcester*, 190 F. Supp. 548, 553 (D. Mass. 1960).
[69] *Id.* 568.

and generally refused to be cooperative. The sentencing judge revoked the probation and levied a 15-year prison term that was subsequently affirmed by that state's highest court.[70]

Donations of money.—Having entered *nolo contendere* pleas in mid-1975 of violating Federal law by conspiring to fix retail liquor prices, a consortium of New Mexican retailers received probation with the proviso that they "pay certain sums as restitution and reparations to the Curry-Roosevelt County Council on Alcoholism, Inc."[71] As a result, this nonprofit community agency would have received $233,500. The defendants appealed this requirement of probation, and the higher court overturned the trial judge's imposition of the condition by ruling that the Federal Probation Act makes no provision for the payment of any community reparations. The reviewing court pointed out that the restitution clause of that act specifically restricts the payment of restitution solely "to aggrieved parties for actual damages or loss caused by the offense for which conviction was had."[72] And, in the appellate court's opinion, neither the alcoholism center nor its clients suffered a $233,500 loss.

Performance of community-service work.—At the time of the Vietnam conflict, those Federal judges who granted probation to Selective Service Act violators often appended to the standard conditions the special requirement mandating that these probationers perform volunteer work at some eleemosynary or public institution. Besides the more routine performance of gratis work at hospitals or libraries, one New York Federal judge who gave probation to a rock musician convicted of draft evasion ordered that "the defendant and his musical group travel to various prisons and entertain inmates at their own expense."[73] With the end of the war in southeast Asia, however, the performance of public service work faded, too.

But in late 1974 and in early 1975, two state courts and one Federal court resurrected this sentencing alternative.[74] On the one hand, a Georgia juvenile judge placed on probation a youngster who had been found guilty of starting a fire in a school restroom trash can. As a requisite of that probation, the defendant would have to "contribute 100 hours to [the] Parks and Recreation Department of DeKalb County."[75] Appealing on the ground that the mandatory performance of civic work under an order of probation amounted to involuntary servitude, the minor obtained no appellate relief. Holding that the special condition did not constitute peonage or slave labor in violation of the 13th amendment, the reviewing authority affirmed the judgment of the lower court:

> . . . useful services for the public good are in the pattern of probation, which is a specialized tool and is helpful towards achieving the statute's pervading purpose of producing a good citizen adult.[76]

On the other hand, a New York state judge placed on probation a defendant convicted of bribery. Apparently, at the sentencing, the defendant volunteered to perform charity work as a condition of the probation, and the trial court, acceding to the request, incorporated into the written order that the probationer would perform "volunteer services for the Tay-Sachs and Allied Diseases Foundation."[77] Though the appellate court affirmed the conviction, the higher tribunal, on its own motion, deleted the special condition with the observation that "there is no authority in law for mandating such service as a condition of probation [New York State Penal Code citation omitted]."[78] The court noted, though, that the probationer's voluntary participation "would undoubtedly inure to his benefit vis-à-vis his conduct evaluation by the Probation Department."[79]

At about the same time, an Arizona Federal judge ordered five dairy executives convicted of price fixing "to serve the poor in charity dining halls in lieu of prison" and required their corporations "to contribute milk to charity in lieu of fines."[80] The performance of the gratis work was merely "suggested" by the trial court, not mandated by probation. The judge advised the defendants, however, that a final sentencing decision would be deferred for 6 months and that the court would consider their charity work to be a mitigating circumstance when they reappeared 6 months later. Also, a California Federal court required convicted meat packing companies to train ex-offenders in meat cutting techniques.

At the Federal level, the performance of free community-service work as a condition of probation has received the imprimatur of an appellate

[70] *State* v. *Linz*, 162 Mont. 102, 509 P.2d 13 (1973).
[71] *United States* v. *Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389, 1390 (10th Cir. 1976).
[72] 18 U.S.C. §3651.
[73] *United States* v. *Woodward*, No. Cr-1975-113 (W.D.N.Y., filed August 18, 1975) (order on probation).
[74] See generally Time, September 2, 1974, "Creative Punishment," 78-79.
[75] *M.J.W.* v. *State*, 133 Ga. App. 350, 351 (Ct. App. 1974).
[76] *Id.* 352.
[77] *People* v. *Mandell*, 377 N.Y.S.2d 563, 564 (App. Div.2d 1975).
[78] *Id.*
[79] *Id.*
[80] *White-Collar Justice: A BNA Special Report on White-Collar Crime*, 44 U.S.L.W., pt. II, at 10, (April 13, 1976).

court. In this precedental case, a defendant convicted in mid-1976 of making false statements to the Department of Housing and Urban Development was placed on probation by a Tennessee Federal court with the condition that she perform 8 hours weekly of public service work. She refused. The suspended commitment was subsequently revoked, and a jail term was imposed. In her brief to the appeals court, the probationer asserted that the condition had neither a reformative nor a rehabilitative purpose and, for that reason, failed to comport with the Federal Probation Act. The higher court, however, ruled that the trial court did not commit an abuse of discretion by revoking the probation for noncompliance with the special condition.[81]

Speeches and essays of contrition.—Having been convicted in late 1974 of income tax fraud, a California businessman received probation with the supplemental provision that he speak to various groups about the hazards of tax cheating:

> It is a special condition of probation that the defendant speak before fifteen (15) organizations, at least six (6) of which shall be dealer organizations of retail gasoline station operators. The other speeches can be before other business, civic or other groups. At these meetings the Court expects the defendant to explain how he got himself in this situation, the consequences that this has brought to him and his family and the concerns that others should have when filing false income tax returns. The defendant shall, through the Probation Officer, of this Court, write the Court after each speech giving the name of the group to whom he spoke, the number of persons in attendance, what he spoke about and what the reaction of the group was.[82]

The California Federal judge who imposed that condition of probation also required defendants convicted in 1974 of price fixing in the paper label industry to "make an oral presentation before twelve (12) business, civic or other groups about the circumstances of this case and his participation herein" and "submit a written report to the Court giving details of each such appearance, the composition of the group, the import of the presentation and the response thereto."[83]

Besides those linguistic requirements, probationers have also been required to write expository essays. Take, for example, the two Washington, D.C., police officers who were placed on probation for filing false reports about the beating of a prisoner. As a condition of probation, they were ordered to compose an essay discussing "those reasons why the Police Department should be entitled to the respect of the citizenry just as the citizenry is entitled to the respect of the Police Department."[84] Having received the finished compositions, the trial judge approved one of the officer's works but rejected the essay submitted by the other officer with the comment that "it looked as if he had not worked on it more than one-half hour the night before."[85] The judge then revoked that officer's probation and sentenced him to serve 60 days or to pay a $150 fine. The officer appealed. Because the law, so the appellate court ruled, sets forth no objective linguistic standards for the evaluation of compositions, the trial judge's application of such subjective criteria resting in his mind alone to evaluate the acceptability of essays constituted an abuse of discretion; therefore, the higher court held void the lower court's sentence and remanded the case to the trial court for dismissal of the information.[86]

Sexual privacy.—Sterilization generally remains unavailable as a condition of probation. As the Supreme Court has recognized, there is a right to privacy in the area of family planning and marriage.[87] It is for this reason that stipulations of probation which infringe on these basic rights may be viewed as an abuse of discretion. Nevertheless, the judicial record reflects two grants of probation contingent upon sterilization.

The first reference concerns a California defendant who, having pled guilty in the early 1930's to statutory rape, was granted probation—provided "within ten days from the date of the order suspending execution of sentence the defendant should submit to an operation for sterilization."[88] The defendant failed to comply, probation was revoked, and an institutional sentence was imposed. Though in the 1970's such a condition would surely be ruled improper, the higher court did, in fact, sustain its validity.[89] The second citation occurred approximately 30 years later. A California female was found guilty of a misdemeanor by being present in a room where narcotics had been found. The presentence report

[81] *United States* v. *Saulsberry*, *aff'd mem.*, No. 77-1082 (6th Cir. June 24, 1977). The proposed Criminal Code provides that a probationer may be required to "work in community service as directed by the court" (S.1437, 95th Cong., 2d Sess. §2103 (1978)). See also Brown, *Community Service as a Condition of Probation*, 41 FEDERAL PROBATION 7 (1977).
[82] *United States* v. *White*, No. Cr-74-436-CBR (N.D. Cal., filed Nov. 22, 1974) (order on probation). For failing to comply, the probation was revoked. See Ganz, "Tax Evader Quips His Way to Prison," L.A. Times, Aug. 2, 1976, at 3, col. 3.
[83] *United States* v. *Blankenheim*, No. Cr-74-182-CBR (N.D. Cal., filed Nov. 1, 1974) (order on probation). See generally Renfrew, *The Paper Label Sentences: An Evaluation* and Baker, et al., *The Paper Label Sentences: Critiques*, 86 Yale L.J. 590 and 619 (1977).
[84] *Butler* v. *Dist. of Columbia*, 346 F.2d 798, 798-99 (D.C. Cir. 1965).
[85] *Id.* 799.
[86] *Id.*
[87] *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (invalidating state's Habitual Criminal Sterilization Act as unlawful infringement upon fundamental societal rights of marriage and family).
[88] *People* v. *Blankenship*, 16 Cal. App.2d 606, 608, 61 P.2d 352, 352 (Dist. Ct. App. 1936).
[89] *Id.* at 610, 61 P.2d at 354.

revealed that she had been living with a man to whom she was not married and had been receiving welfare payments for the maintenance of their illegitimate child. The sentencing court placed her on probation with the condition that she undergo sterilization.[90] She refused. The trial judge then held her to be in violation of the probation and imposed a 3-month jail term, later voided by a higher court.

Superior courts have looked upon other invasions of sexual privacy with great disapprobation, too. For example, in the 1960's a California trial court ordered as a condition of probation that the defendant submit to sterilization or not become pregnant without being married. The appeals court nullified that provision, commenting that the twenty year-old's future pregnancy was related neither to her conviction of second-degree robbery nor to her commission of future crimes.[91] Likewise, an Ohio superior court, though conceding that the special condition might bear tangentially to the offense, voided the extra-statutory provision imposed on a child abuser that "she not have another child during the 5-year probationary period."[92]

Suspension of Fifth Amendment Protections.—In the early 1970's a Federal probationer refused to submit monthly supervision reports on the ground that these reports constituted self-incrimination. At the revocation hearing, counsel argued further that the condition of probation requiring the probationer to report at such times and places as the probation officer directed carried the exclusive connotation of "appearing" at certain times and places, not the submission of signed, written "reports."[93] The local court rejected any such claim of privilege, noting that it is necessary to proper supervision that probationers "supply [written] accounts of their major activities, including their means of earning a living."[94]

Similarly, another Federal probationer convicted of concealing assets in order to defeat the collection of a quarter-million dollar wagering excise tax challenged as self-inculpatory the requisite to "testify under oath before a representative of the United States Attorney's Office . . . on all questions as to his financial condition relating to amounts and locations of all assets."[95]

The probationer refused, and the probation was revoked. Declaring on appeal that the disclosure condition compelled the probationer to give possible self-inculpatory statements in violation of constitutional rights, the appellant lost the appeal when the higher court found that that condition well related to the offense. The condition would, so the appellate court held, dissuade the probationer from violating the law because the disclosure mandate would help the local court swiftly detect any further attempts at concealing assets and, therefore, met the bilateral requirements of rehabilitation and protection.

Denial of unemployment benefits.—A superior Florida court held void the restriction that the probationer would "draw no unemployment compensation while on probation."[96]

Dress restrictions.—As a condition of probation, a recidivistic purse snatcher was required to "wear leather shoes with metal taps on the heels and toes anytime he leaves the house."[97] In its memorandum of affirmance, the appellate court observed:

> The concept of the condition imposed by the court bears a direct relationship to appellant's budding career as a purse snatcher. During the course of the crime of which appellant was convicted in the instant case, he was wearing tennis shoes. This type of footwear helped him to approach his victim silently and facilitated his two successful efforts to outrun the pursuing officers who were trying to apprehend him . . . . Compliance with that term of probation should foster rehabilitation and promote the public safety.[98]

Conclusion

Probation affords the sentencing court the opportunity to fashion a disposition to fit a variety of offenders. It is a sentencing alternative constrained by those constitutional limitations of reasonableness and propriety as well as guided by those protective and rehabilitative statutory goals. In that regard, the probation officer should understand in the fixing of probationary conditions this nexus between the discretionary latitude of statutory law and the bounds placed upon that discretion by case law. For it is only by displaying such awareness can the probation officer execute the advisory role to the court in a competent and professional manner.

[90] *In re Hernandez*, No. 76757 (Cal. Superior Ct. June 8, 1966).
[91] *People* v. *Dominquez*, 256 Cal. App.2d 623, 64 Cal. Rptr. 290 (Ct. App. 1967).
[92] *State* v. *Livingston*, 372 N.E.2d 1335, 1336 (Ohio Ct. App. 1976).
[93] Probation Form No. 7, United States District Court, Conditions of Probation, Condition No. 7: "You shall report to the probation officer as directed."
[94] *United States* v. *Manfredonia*, 341 F. Supp. 790, 794 (S.D. N.Y. 1972), *aff'd per curiam*, 459 F.2d 1392 (2d Cir.), *cert. denied*, 409 U.S. 851 (1972).
[95] *United States* v. *Pierce*, 561 F.2d 735, 738, (9th Cir. 1977) (Hufstedler, J., dissenting).
[96] *Bownes* v. *State*, 345 So.2d 787, 788 (Fla. Dist. Ct. App. 1977).
[97] *People* v. *McDowell*, 59 Cal. App.3d 807, 812, 130 Cal. Rptr. 839, 843 (Ct. App. 1976). The higher court suggested that the order on probation be made less ambiguous.
[98] *Id.* at 813, Cal. Rptr. at 843.

END