

Penal Law Section 65.10: New York Court of Appeals Holds That Probation Condition Requiring "CONVICTED DWI" Sign on License Plate Was Penalty Not Reasonably Related to Probation

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PENAL LAW

Penal Law section 65.10: New York Court of Appeals holds that probation condition requiring "CONVICTED DWI" sign on license plate was penalty not reasonably related to probation

Probation is an alternative to incarceration¹ which aims to rehabilitate criminals so that they will lead law-abiding lives.²

¹ For a historical overview of the use of probation in the United States, see generally PAUL F. CROMWELL & GEORGE G. KILLENGER, COMMUNITY-BASED CORRECTIONS: PROBATION, PAROLE, AND INTERMEDIATE SANCTIONS (3d ed. 1994) (describing procedures, practices, and personnel that constitute probation, parole and other community-based correctional programs); GEORGE G. KILLINGER ET AL., PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM (1976) (outlining legal and social aspects of probation and parole and highlighting them as viable alternatives to incarceration); ALEXANDER B. SMITH & LOUIS BERLIN, INTRODUCTION TO PROBATION AND PAROLE (2d ed. 1979) (providing operational and theoretical approaches to probation and parole).

Probation grew out of the efforts to alleviate the severity of punishment demanded by the English common law. CROMWELL & KILLINGER *supra*. The modern use and practice of probation in the United States is governed by statute. *Id.* at 15. Today, all fifty states and the federal government have enacted probation statutes. *Id.* at 13; see also Jeffrey C. Filcik, *Signs of the Times: Scarlet Letter Probation Conditions*, 37 WASH. U. J. URB & CONTEMP. L. 291, 294 n.11 (1990) (listing probation statutes). In New York, probation is governed by Penal Law § 65.00 which states in pertinent part:

1.(a)...the court may sentence a person to a period of probation upon conviction of any crime if the court, having regard to the nature and circumstances of the crime and to the history, character and condition of the defendant, is of the opinion that:

- (i) Institutional confinement for the term authorized by law of the defendant is or may not be necessary for the protection of the public;
- (ii) the defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision; and
- (iii) such disposition is not inconsistent with the ends of justice.

N.Y. PENAL LAW § 65.00 (McKinney 1987 & Supp. 1996).

² Sentencing is concerned with the prevention of future crimes by helping the defendant learn to live productively within the community. American Bar Association Project on Standards for Criminal Justice: STANDARDS RELATING TO PROBATION 1 (Approved Draft 1970) [hereinafter A.B.A. STANDARDS]. The goal of penal law is to reform criminals and to prevent crime, not to punish out of malice or re-

Although the primary goal of probation is rehabilitation,³ probation conditions may also have punitive and deterrent effects.⁴

venge. CROMWELL & KILLINGER, *supra* note 1, at 11 (quoting JOHN AUGUSTUS, FIRST PROBATION OFFICER 23 (Nat'l Probation Ass'n ed., 1939)). Probation "is a method of offering an offender an opportunity to rehabilitate himself, without institutional confinement, under the supervision of a probation officer and the continuing power of the court to use a more stringent sanction in the event the opportunity is abused." WILLIAM C. DONNINO, PRACTICE COMMENTARIES, N.Y. PENAL LAW ART. 65, 204 (McKinney 1987) (quoting Staff Notes of the Commission on Revision of Penal Law, reprinted in PROPOSED N.Y. PENAL LAW 260 (McKinney's Special Pamphlet 1964)).

"The conditions of probation and of conditional discharge 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." N.Y. PENAL LAW § 65.10(1) (McKinney 1987 & Supp. 1996).

³ See, e.g., *United States v. Sullivan*, 421 F. Supp. 300, 302 (S.D.N.Y. 1976) ("The grant of probation instead of immediate incarceration is intended to allow a defendant an opportunity to rehabilitate himself."); *State v. Turner*, 891 P.2d 317, 321 (Kan. 1995) ("The primary purpose of probation is the successful rehabilitation of the offender."); *Commonwealth v. Power*, 650 N.E.2d 87, 90 (Mass. 1995) ("The primary goal[] of a probationary sentence [is] rehabilitation of the probationer ..."); *State v. Lockwood*, 632 A.2d 655, 659 (Vt. 1993) ("Probation is intended to allow a defendant an opportunity for rehabilitation ...").

⁴ See Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1357-58 (1989). Probation has traditionally been viewed as an alternative to incarceration. Courts granted probation to defendants who were considered to be reformable and the "purpose, justification and goal has been the defendant's rehabilitation." Filcik, *supra* note 1, at 295. N.Y. PENAL LAW § 65.10 states:

1. In general. The conditions of probation ...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.
2. Conditions relating to conduct and rehabilitation. When imposing a sentence of probation ...the court ... may, as a condition of sentence, require that the defendant...
 - (l) satisfy any other conditions reasonably related to his rehabilitation

N.Y. PENAL LAW § 65.10 (McKinney 1987 & Supp. 1996) (emphasis added).

When N.Y. PENAL LAW § 65.10 was enacted in 1965, the prevailing penological theory was that offenders could be "cured" of their criminal tendencies. See *People v. Letterlough*, 86 N.Y.2d 259, 265 n.2, 655 N.E.2d 146, 149 n.2, 631 N.Y.S.2d 105, 108 n.2 (1995). If probation had punitive or deterrent effects, they were incidental to the offender's rehabilitation. *Id.* at 265, 655 N.E.2d at 149, 631 N.Y.S.2d at 109. The most obvious deterrent effect of probation is that it is revocable if the probationer commits another offense or violates the terms of probation. See N.Y. PENAL LAW § 65.00(2) (McKinney 1987 & Supp. 1996).

"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 which is sought to be served by the sentencing of criminals." A.B.A. STANDARDS, *supra* note 2, at 1. A new model of probation as a sentence in itself developed in response to factors such as the perceived failure of treatment programs to stem recidivism, early release of prisoners mandated by constitutional challenges

Courts and legal commentators disagree about the extent to which rehabilitation, punishment, and deterrence may coexist in judicially-designed probation programs.⁵ Recently, in *People v. Letterlough*,⁶ the New York Court of Appeals held that a probation condition requiring a defendant convicted of driving while intoxicated (hereinafter "DWI") to affix a "CONVICTED DWI" sign on the license plate of any vehicle he drove was a penalty not reasonably related to probation.

Letterlough plead guilty to a felony charge of operating a motor vehicle while under the influence of alcohol.⁷ In a negoti-

to prison overcrowding, and recognition that it was often cheaper for society to maintain offenders in the community than in prison. See Filcik, *supra* note 1, at 296-300. The use of probation as a sentencing tool permits courts to impose conditions that are primarily punitive or deterrent, but a court's authority to impose such non-rehabilitative sanctions, however, may be limited by the language or intent of the probation statute. See *id.* at 299 n.31 (comparing probation statutes throughout the United States).

⁵ Some legal writers reject public notification probation conditions ("scarlet letter provisions") as being unconstitutional under the Eighth Amendment (cruel and unusual punishment), the Fifth Amendment (double jeopardy), Article I, Section 9, Clause 3 and Article I, Section 10, Clause 1 (ex post facto laws), and Fourth, Fifth and Fourteenth Amendments (construed to create right to privacy). See, e.g., Brilliant, *supra* note 4; Michelle Pia Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's Right to Know*, 48A VAND. L. REV. 219 (1995); Toni M. Massaro, *Shame, Culture, and American Criminal Law* 89 MICH. L. REV. 1880 (1991); Jenny A. Montana, Note, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law*, 3 J.L. & POL'Y 569 (1995); Leonore H. Tavill, Note, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613 (1988). These authors discussed penological goals and concluded that, even if scarlet letter provisions passed constitutional challenges, they were unlikely to effectively modify criminal behavior.

Other commentators found that scarlet letter provisions were valid if they were reasonably related to probationary goals. See, e.g., Brian C. Erb, *Creative Probation Conditions: Putting the 'Unusual' Back in 'Cruel and Unusual' After Bateman*, 24 WILLAMETTE L. REV. 1155 (1988); Filcik, *supra* note 1; Recent Legislation, *Criminal Law—Sex Offender Notification Statute*, 108A HARV. L. REV. 787 (1995); Rosalind K. Kelley, Comment, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional?*, 93 DICK. L. REV. 759 (1989); Jaimy M. Levine, Comment, *'Join the Sierra Club!': Imposition of Ideology as a Condition of Probation*, 142 U. PA. L. REV. 1841 (1994).

⁶ 86 N.Y.2d 259, 655 N.E.2d 146, 631 N.Y.S.2d 105 (1995).

⁷ *Id.* at 261, 655 N.E.2d at 147, 631 N.Y.S.2d at 106 (convicted under precursor to N.Y. VEH. & TRAF. LAW § 1192 (2,3) (McKinney 1986 & Supp. 1996)). Letterlough's five previous alcohol related offenses included two guilty pleas of driving while impaired (plea bargains for DWI arrests) and three guilty pleas of DWI. Previous penalties included fines, a 90 day jail term, and suspensions of his driver's license. *Id.* at 270-71, 655 N.E.2d at 152, 631 N.Y.S.2d at 111 (Bellacosa, J., dissenting).

ated plea agreement, he was sentenced to five years probation, a \$500 fine, license revocation, and ordered to obtain treatment for alcohol abuse.⁸ The sentencing court imposed an additional probation condition which required Letterlough to attach fluorescent signs stating "CONVICTED DWI" to the license plate of any vehicle he drove if his license was restored at any time during the probation period.⁹

The Court of Appeals reversed the decision of the Appellate Division, Second Department.¹⁰ Judge Titone, writing for the majority, held that the probation condition was punitive and deterrent, and therefore not "reasonably related to the defendant's rehabilitation."¹¹ The court found that the sign was a punishment that was "outside the authority of the court to impose."¹²

In finding that the probation condition was not reasonably related to rehabilitation, the court stated that "[t]he focus of rehabilitation is primarily on healing the individual."¹³ The court reasoned that Letterlough's conduct was caused by his abuse of alcohol and found that the sign was not a method of treatment of the underlying cause of his drinking and driving.¹⁴ In the court's view, the sign was the equivalent of a "scarlet letter,"¹⁵ a histori-

⁸ *Id.* at 261, 655 N.E.2d at 147, 631 N.Y.S.2d at 106.

⁹ *Id.*

¹⁰ *People v. Letterlough*, 205 A.D.2d 803, 613 N.Y.S.2d 687 (2d Dep't 1994), *rev'd*, 86 N.Y.2d 259, 655 N.E.2d 146, 631 N.Y.S.2d 105 (1995).

¹¹ *People v. Letterlough*, 86 N.Y.2d 259, 261, 655 N.E.2d 146, 147, 631 N.Y.S.2d 105, 106 (1995). The majority relied on N.Y. PENAL LAW § 65.10(2), which includes a catch-all provision requiring the defendant to "[s]atisfy any other conditions reasonably related to his rehabilitation." *See also* N.Y. PENAL LAW § 65.10(2)(1) (McKinney 1987 & Supp. 1996). The court explained that when § 65.10 was enacted in 1965, the legislators were probably influenced by the penological theory that offenders could be "cured" of their criminal tendencies, and rehabilitation therefore consisted of primarily non-punitive methods. *Letterlough*, 86 N.Y.2d at 265 n.2, 655 N.E.2d at 149 n.2, 631 N.Y.S.2d at 108 n.2.

¹² *Id.* at 261, 655 N.E.2d at 147, 631 N.Y.S.2d at 106.

¹³ *Id.* at 262, 655 N.E.2d at 148, 631 N.Y.S.2d at 107. "Create in me a clean heart, O God; and renew a right spirit within me." *Psalms* 51:10. "[N]o one, not even the scrutinizing officers, could have believed that he was the same person who less than a month before, had stood trembling on the prisoner's stand." PATTERSON SMITH, JOHN AUGUSTUS: FIRST PROBATION OFFICERS 5 (1972) (describing transformation of his first probationer).

¹⁴ *Letterlough*, 86 N.Y.2d at 264, 655 N.E.2d at 148, 631 N.Y.S.2d at 107; *see* *People v. Berkley*, 152 A.D.2d 788, 789, 543 N.Y.S.2d 568, 570 (3d Dep't 1989) (requiring five-time DWI offender to stop drinking alcohol as condition of probation because "consumption of alcohol, in combination with his operation of a motor vehicle, is the sole precipitating factor of his contact with the criminal justice system").

¹⁵ NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (First Vintage Books 1990)

cal stigma whose punitive effects outweighed any rehabilitative effect.¹⁶ The court concluded that the legislature, and not the courts, was empowered to impose criminal penalties.¹⁷ The court noted that the legislature's failure to adopt a bill, which would have authorized the Commissioner of Motor Vehicles to investigate the feasibility of using special license plates to identify former DWI offenders, was evidence of the legislature's disavowal of that solution.¹⁸

(immortalizing red letter "A" that adulteress was required to wear as symbol of her guilt).

¹⁶ *Letterlough*, 86 N.Y.2d 259, 266, 655 N.E.2d 146, 150, 631 N.Y.S.2d 105, 109; see *supra* note 5 (listing law review articles which discuss the history of scarlet letter provisions).

¹⁷ *Id.* at 266-67, 655 N.E.2d at 150, 631 N.Y.S.2d at 109; see *People v. Day*, 73 N.Y.2d 208, 210, 535 N.E.2d 1325, 1327, 538 N.Y.S.2d 785, 786 (indicating that "legislative policy choice governing the exercise of judicial sentencing authority is rooted in the statutory words and definitions").

¹⁸ *Letterlough*, 86 N.Y.2d at 267 n.5, 655 N.E.2d at 150 n.5, 631 N.Y.S.2d at 109 n.5 (referring to proposed legislation Senate Bill 4861 (1983)).

The majority found that New York's adoption of a program which required convicted DWI offenders to install ignition interlock devices, in conjunction with the state's failure to enact the special license plate law, precluded courts from requiring the plates. *Id.* at 268-69, 655 N.E.2d at 151, 631 N.Y.S.2d at 110. In 1988, New York created a pilot ignition interlock device program for Albany, Erie, Nassau, Onondaga, Monroe, Westchester, and Suffolk counties. Interlock devices prevent vehicles from starting if the operator's blood alcohol level, as measured by a breath sample, exceeds the device's calibration level. See Ignition Interlock Device Program, ch. 713, § 1198, 1988 N.Y. VEH. & TRAF. LAWS (McKinney Supp. 1996); see also 1988 N.Y. Laws ch. 713 § 1 (1989). The program allowed DWI offenders who installed the device to obtain restricted licenses. A provision stated that "[n]othing contained herein shall prevent the court from applying any other conditions of probation allowed by law, including treatment for alcohol or drug abuse, restitution and community service." N.Y. VEH. & TRAF. LAW § 1198(3)(e). The Department of Motor Vehicles and Division of Probation and Correction Alternatives were to prepare a report evaluating the effectiveness and impact of the devices as a probation option. *Id.* § 1198(7). One month after *Letterlough* was decided, the legislature extended the pilot program through July 1, 1997, and explicitly permitted its expansion into other counties.

Over half of the states have permanent or pilot programs requiring DWI offenders to install ignition interlock devices in order to obtain restricted driving licenses. See, e.g., ALASKA STAT. § 12.55.102 (Michie 1993); CAL. VEH. CODE § 23246 (West Supp. 1996); COLO. REV. STAT. ANN. § 42-2-126.1 (West Supp. 1995); FLA. STAT. ANN. § 316.1937 (West Supp. 1996); GA. CODE ANN. § 27-2747 (Harrison Supp. 1993); IDAHO CODE § 18-8008 (Michie Supp. 1996); ILL. ANN. STAT. ch. 625, § 5/11-501 (Smith-Hurd Supp. 1996) (pilot program); IND. STAT. ANN. § 9-30-5-10 (Michie Supp. 1996); IOWA CODE ANN. § 321J.4(7) (West Supp 1996); KAN. STAT. ANN. § 8-262 (Supp. 1995); LA. REV. STAT. ANN. § 32:378.2 (West Supp. 1996); MD. CODE ANN., TRANSP. § 27-107 (Michie 1992); MICH. COMP. LAWS ANN. § 257.625(b)(8) (West Supp. 1996); MINN. STAT. ANN. § 171.305 (pilot program) (West Supp. 1996); MO. ANN. STAT. § 577.600 (West Supp. 1996); NEB. REV. STAT. § 60-6, 211.05 (1993);

Judge Bellacosa's dissent rejected the majority's narrow interpretation of rehabilitation. He concluded that probation conditions which had deterrent and punitive effects might nevertheless meet statutory criteria for rehabilitation.¹⁹ The dissent further emphasized that the criminal conduct was *operating* a motor vehicle while under the influence of alcohol.²⁰ Letterlough's consumption of alcohol, which the majority focused on, was simply not a criminal offense.²¹ Additionally, the dissent argued that the sign would reinforce the message that drinking and driving is criminal.²² This reinforcement was consistent with the legislature's mandate to "insure that the defendant will lead a law-abiding life or to assist him to do so."²³

N.C. GEN. STAT. § 20-179.3 (Michie 1995); N.D. CENT. CODE § 39-06.1-11 (Michie Butterworth Supp. 1995); OHIO REV. CODE ANN. § 2951.02(G)(1) (Anderson 1995); OR. REV. STAT. § 813.600 (1993); R.I. GEN. LAWS § 31-27-2(D)(2) (Michie Supp. 1995); TENN. CODE ANN. § 55-10-412 (Michie 1995); TEX. CODE CRIM. PROC. ANN. art. 42.12(13)(i) (Vernon Supp. 1996); UTAH CODE ANN. § 41-6-44.7 (Michie Butterworth 1995); VA. CODE ANN. § 46.2-360(2) (Michie Supp. 1995); WASH. REV. CODE ANN. § 46.20.720 (West Supp. 1996); W. VA. CODE § 17C-5A-3a (Michie Butterworth Supp. 1995); WIS. STAT. ANN. § 346.65 (West 1995).

Very few states have statutory requirements for special license plates, which permit persons whose licenses have been revoked to obtain limited driving privileges. See MINN. STAT. ANN. § 168.041(6) (West 1986 & Supp. 1996); OHIO REV. CODE ANN. § 4503.231 (Baldwin 1994). Governor Weld of Massachusetts submitted several proposals requiring convicted DWI offenders to carry distinctive symbols on their licenses and license plates. No legislation was enacted. See Peter J. Howe, *Drunken Driving Charges Decline*, BOSTON GLOBE, Sept. 27, 1992, at 33; Editorial, *We Need More Against DWI*, BOSTON HERALD, Dec. 11, 1995, at 24.

¹⁹ Letterlough, 86 N.Y.2d at 272-73, 655 N.E.2d at 153, 631 N.Y.S.2d at 112 ("Rehabilitation and punishment are not mutually exclusive goals or concepts in these circumstances, either under the governing statute or under progressive penological theory and practice."). *Id.* at 270, 655 N.E.2d at 152, 631 N.Y.S.2d at 111 (Bellacosa, J., dissenting). An "inclusive theory of punishment" blends elements of prevention (specific deterrence), incapacitation, rehabilitation, general deterrence, education and retribution to achieve penological goals. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 22-7 (2d ed. 1986) (quoting J. Hall, GENERAL PRINCIPLES OF CRIMINAL LAW 308 (2d ed. 1960)).

The judges' contrasting views of the court's authority under N.Y. PENAL LAW § 65.10 illustrate the tension between permitting courts discretion to fashion sentences which account for the idiosyncracies of the offender and utilizing uniform sentencing guidelines to avoid arbitrary or capricious sentences. See *id.*

²⁰ See Letterlough, 86 N.Y.2d at 273, 655 N.E.2d at 154, 631 N.Y.S.2d at 113.

²¹ *Id.* at 273, 655 N.E.2d at 154, 631 N.Y.S.2d at 113 ("The Penal Law does not criminalize drinking; nor is it a crime to have a drinking problem.").

²² *Id.* at 274, 655 N.E.2d at 154, 631 N.Y.S.2d at 113.

²³ *Id.* (quoting N.Y. PENAL LAW § 65.10(1)). Judicially-imposed DWI notification provisions have been upheld in a few Southern states. See Lindsay v. State, 606 So. 2d 652 (Fla. Dist. Ct. App. 1992), review denied, 618 So. 2d 209 (Fla. 1993) (newspaper advertisement); Ballenger v. State, 436 S.E.2d 793 (Ga. Ct. App. 1993)

(fluorescent bracelet); *Goldschmitt v. Florida*, 490 So. 2d 123 (Fla. Dist. Ct. App.), *review denied*, 496 So. 2d 142 (Fla. 1986) (bumper sticker); *see also Drunk Driver Must Buy Ad to Publicize Crime*, S. F. CHRON., Nov. 3, 1992, at A11 (stating California court upheld newspaper advertisement with photograph of DWI offender and indicating hundreds of photos of DWI offenders had been published); Nicole Foy, *DWI Car Stickers Cited as Deterrent to Driving Drunk*, SAN ANTONIO EXPRESS-NEWS, Sept. 23, 1995 (profiling new judicially-created program making DWI offenders place bright yellow bumper stickers with "Driving While Intoxicated" legend on cars); Henry J. Reske, *Scarlet Letter Sentences*, A.B.A. J., Jan. 1996, at 16. The program is in force in one Texas county; another county has a similar program. Judge Crouch stated, "There were challenges reprinted in PROPOSED NEW YORK PENAL LAW 266 (McKinney's Special Pamphlet 1964) "The discretionary conditions set forth in [§ 65.10(2)] are by and large the same as those ... recommended in the Model Penal Code (P.O.D., § 301.1)." *Id.* at 267.

The *Staff Notes* are ambiguous in that they encompass both the majority's conclusion that only rehabilitative methods lead to rehabilitative goals and the dissent's argument that deterrent or punitive methods may be permissible to achieve rehabilitative goals.

²³ *See, e.g., Commonwealth v. Power*, 650 N.E.2d 87 (Mass. 1995), *cert. denied*, *Power v. Massachusetts*, __ U.S. __, 116 S.Ct. 697 (1996) (finding First Amendment rights not violated by condition precluding probationer from profiting from sale of her story); *State v. Turner*, 891 P.2d 1000 (Kan. 1995), *cert. denied*, 516 U.S. 1161 (1995) (finding only criteria is that it must be consistent." Foy, *supra* (quoting County Court-at-Law No. 8 Judge Karen Crouch).

New Yorkers are very concerned about drunk driving, and New York's interlock program and the *Letterlough* decisions were the subjects of legislative debate and various newspaper articles. *See, e.g., Memorandum of Assemblyman Graber, reprinted in 1988 N.Y. LEGIS. ANN. 288; Court Says Judge's 'Scarlet Letter' Requirement Not Legal*, ASSOCIATED PRESS, June 13, 1995; Evan Davis, *Dissents, DWI and Taxing Catalog Sales*, N.Y. L.J., July 13, 1995, at 3 (concluding Court's disagreement over DWI sign shows conflict over meaning of rehabilitation in "context of antisocial conduct caused by addiction"); Beth J. Harpaz, *'Scarlet Letter' License Plate for Convicted Driver*, ASSOCIATED PRESS, July 7, 1994, available in 1994 WL 10127461 (indicating that judge required DWI sign in five to ten previous cases); David N. Kelley, *Safety; How Do We Keep Drunk Drivers Off the Road? Cars Are Lethal Weapons When A Drunk Is Behind The Wheel*, NEWSDAY, May 15, 1994, at A35 (member of Mothers Against Drunk Driving describing educational and punitive strategies); Thomas F. Liotti, *'Scarlet Letter' Sentence Criticized*, N.Y.L.J., July 20, 1994, at 2 (President of N.Y.S. Ass'n of Criminal Defense Lawyers criticizing 2d Dep't decision with rationale used by Court of Appeals majority); Shirley E. Perlman, *Undercover Sting Drives Home the Point*, NEWSDAY, June 3, 1994, at A30 (noting that 12 of 20 probationers caught driving without licenses had their licenses revoked for DWI); Hon. Ira J. Raab, *Viewpoints: Judge Has the Right Idea*, NEWSDAY, Aug. 9, 1995, at A34 (Governor of N.Y. District of Am. Judges Ass'n supporting use of DWI sign and stating "Public service, restitution, house arrest, electronic leg bracelets and diversionary medication were innovative rehabilitation and deterrent ideas before the Legislature wrote them into law"); *Summary of Actions in New York Legislature's 1988 Session*, N.Y. TIMES, Dec. 26, 1988, at 38; Michele Salcedo, *Testing DWI Ignition Lock*, NEWSDAY, Jan. 1, 1994, at 13 (indicating that five years elapsed from time pilot program was authorized until interlock devices meeting N.Y.S. Health Dep't standards were developed); *Viewpoints: Worth a Try*, NEWSDAY, July 14, 1994, at A32 (supporting 2d Dep't decision).

It is submitted that the *Letterlough* majority's narrow interpretation of Penal Law section 65.10 unnecessarily restricts trial judges' ability to use creative sentencing to help offenders become law-abiding members of the community.²⁴ Generally, courts have held that probation conditions which are reasonably related to the goals of sentencing and probation are not unconstitutional per se, even when they restrict a probationer's fundamental rights, provided the conditions do not exceed punishment limits provided by statute.²⁵ It is asserted that a valid goal of sentencing and probation is simply to keep the defendant from returning to jail, whether the goal is achieved through the internal restraint of rehabilitation, or the external restraints of deterrence or punishment.²⁶ As a result, probationers, because of their status as convicted criminals, may be subject to conditions that would be declared unconstitutional if applied to persons who had not been convicted of a crime.²⁷

²⁴ "The list of conditions is not intended to be exhaustive of the permissible conditions and, obviously, no legislative specification could enumerate all of the reasonable measures that may be appropriate in dealing with the problems involved in the rehabilitation of individual offenders." Staff Notes of the Commission on Revision of the Penal Law, *reprinted in* PROPOSED NEW YORK PENAL LAW 266 (McKinney's Special Pamphlet 1964) "The discretionary conditions set forth in [§ 65.10(2)] are by and large the same as those ... recommended in the Model Penal Code (P.O.D., § 301.1)." *Id.* at 267.

The *Staff Notes* are ambiguous in that they encompass both the majority's conclusion that only rehabilitative methods lead to rehabilitative goals and the dissent's argument that deterrent or punitive methods may be permissible to achieve rehabilitative goals.

²⁵ *See, e.g.*, *Commonwealth v. Power*, 650 N.E.2d 87 (Mass. 1995), *cert. denied*, *Power v. Massachusetts*, ___ U.S. ___, 116 S.Ct. 697 (1996) (finding First Amendment rights not violated by condition precluding probationer from profiting from sale of her story); *State v. Turner*, 891 P.2d 317, 323 (Kan. 1995) (holding exclusionary rule does not apply to probation revocation hearings); *State v. Blanchard*, 889 P.2d 1180, 1184 (Mont. 1995) (requiring defendant to make restitution for offenses he admitted but was not convicted of).

²⁶ Probationary goals will be met just as well if a non-repentant offender continues to have bad thoughts, provided the offender no longer commits criminal acts. Part of the appeal of the ignition interlock system is that it works independently from the offender's actual rehabilitation; it is an effective restraint even if the probationer attempts to drink and drive. *See supra* note 18.

²⁷ *See* *Young v. State*, 692 S.W.2d 752, 755 (Ark. 1985), *cert. denied*, 474 U.S. 1070 (1986) (stating "a condition of a probation or suspension is not necessarily invalid simply because it restricts probationer's ability to exercise constitutionally protected rights"). Traditionally, the standard of review of a probation condition has been whether or not it was reasonably related to the crime committed or to future criminality. *See* *State v. Macy*, 403 N.W.2d 743, 745 (S.D. 1987) ("The test is one of reasonableness."); *In re White*, 158 Cal. Rptr. 562, 565 (Cal. Ct. App. 1979)

A valid goal of rehabilitation is to motivate the offender to comply with the minimal standards of acceptable community conduct, as prescribed by the penal code, and not to hold the offender to the court's standard of morally correct behavior or "goodness."²⁸ As the dissent indicated, the *Letterlough* majority would permit a total ban on driving and would compel Letterlough to attend an alcohol abuse program, presumably to control his drinking.²⁹ The majority found that a condition designed to deter non-criminal consumption of alcohol was permissible as rehabilitative,³⁰ while a condition aimed at deterring criminal behavior—drinking and driving—was impermissible because of its non-rehabilitative nature.³¹

Penal Law section 65.10 gives sentencing courts discretion to adopt measures that have a substantial punitive component.³²

(forbidding conduct not reasonably related to future criminality); *Young*, 692 S.W.2d at 755 (stating probation conditions must be reasonably related to the crime committed or future criminality).

To assist in determining the constitutional validity of a probation condition, the Ninth Circuit formulated a test, since adopted by various other courts, which considers the following three factors: (1) the purpose to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement. *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979). Recently, courts have been willing to uphold conditions restricting a probationer's freedom from searches without a warrant, freedom of speech, right to earn a living in their chosen field, and right to hold political office. *Filcik*, *supra* note 1, at 309.

²⁸ See LAFAVRE & SCOTT, *supra* note 19, at 22 (declaring that criminal law aims more to achieve minimum standard of conduct than to bring about ideal conduct). Although immorality and criminality are related, they are not synonymous. *Id.* at 11. Additionally, while the penal law seeks to proscribe conduct which is unjustifiable to virtually everyone because it inexcusably causes or threatens substantial harm to individual or public interests, N.Y. PENAL LAW §1.05(1) (McKinney 1987), there are numerous moral issues on which the public is sharply divided, such as the sale of intoxicating liquor. LAFAVRE & SCOTT, *supra* note 19, at 11. *But see* *People ex rel. Fusco v. Ryan*, 124 N.Y.S.2d 541, 543 (Sup. Ct. Bronx County 1953) (stating that for rehabilitation to fit needs of offender, extent to which prisoner has responded to efforts made to improve his moral condition must be determined); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1117 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975) (finding original purpose of reformatory sentence was to provide moral guidance, education, and vocational training); *People v. Vancol*, 166 Misc. 2d 93, 96, 631 N.Y.S.2d 996, 998 (J. Ct. 1995) (articulating that goal of criminal law, to prevent harm to health, safety, morals, and welfare of society, is accomplished by rehabilitating those who would do harm to others).

²⁹ *People v. Letterlough*, 86 N.Y.2d 259, 266, 655 N.E.2d 146, 152, 631 N.Y.S.2d 105, 108 (1995).

³⁰ *Id.* at 266, 655 N.E.2d at 149, 631 N.Y.S.2d at 108.

³¹ *Id.* at 266, 655 N.E.2d at 150, 631 N.Y.S.2d at 109.

³² N.Y. PENAL LAW § 65.10(1) (McKinney 1987) ("The conditions of proba-

The court may require that the defendant avoid vicious or injurious habits,³³ place restrictions on his freedom of association,³⁴ and confine him for mandatory medical or psychiatric treatment.³⁵ The provision of the statute which requires the defendant to "[s]atisfy any other conditions reasonably related to his rehabilitation"³⁶ should not be read so narrowly as to preclude the court from imposing other conditions which have punitive or deterrent effects, provided they are reasonably related to rehabilitative goals.³⁷

Some commentators have rejected "scarlet letter" conditions

tion...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.".

³³ N.Y. PENAL LAW § 65.10(2)(a); see *People v. Berkley*, 152 A.D.2d 788, 789, 543 N.Y.S.2d 568, 570 (3d Dep't 1989) (requiring probationer to refrain from consumption of alcohol).

³⁴ N.Y. PENAL LAW § 65.10(2)(b) (McKinney 1987 & Supp. 1996) ("[T]he court shall ... require that the defendant refrain from frequenting unlawful or disreputable places or consorting with disreputable persons."); see, e.g., *People v. Howland*, 145 A.D.2d 866, 867, 536 N.Y.S.2d 191, 192 (3d Dep't 1988) (restricting probationer's right to associate with husband without court's permission); *People v. Johnson*, 118 Misc. 2d 983, 986, 462 N.Y.S.2d 549, 551 (Crim. Ct. Queens County 1983) (restricting probationer from frequenting store which sells obscene films).

³⁵ N.Y. PENAL LAW § 65.10(2)(d); see, e.g., *People v. Robinson*, 85 Misc. 2d 815, 816, 380 N.Y.S.2d 543, 544 (Nassau County Ct. 1976) (requiring in-patient treatment at secure drug abuse facility for period not to exceed one year); *People v. Buckley*, 70 A.D.2d 772, 772, 417 N.Y.S.2d 352, 353 (4th Dep't 1979) (requiring defendant receive psychiatric counseling from licensed psychiatrist).

³⁶ N.Y. PENAL LAW § 65.10(2)(l) (McKinney 1987 & Supp. 1996).

³⁷ See A.B.A. STANDARDS, *supra* note 2, at 46 ("Probation conditions prove themselves to be of the greatest utility when they are designed to meet the particular needs of individual cases ... [A] policy of fixing by legislative act terms to meet all cases which may conceivably arise will prove to be impractical, inadequate, and often injurious."); see also Brilliant, *supra* note 4, at 1378-79. Brilliant, in his article, proffers that courts should accept the fact that although certain probation conditions contain punitive elements, their goal of rehabilitation still may be met. *Id.* He states:

[O]ne of the aims of rehabilitation [is] specific deterrence ... [R]equiring a drunk driver to place a bumper sticker on her car ... also serves the goal of rehabilitation. Every time the driver gets into her car, the bumper sticker will remind her of the criminal conviction, and she will give notice to everyone who reads her bumper of that conviction ... [S]he may choose not to drive in order to avoid subjecting herself to humiliation or embarrassment. This result would be ideally rehabilitative since it completely deters the probationer from driving ... [I]f she chooses to drive, the bumper sticker may remind her constantly of her offense, reinforce the gravity of her offense, and encourage her to refrain from drunk driving ... [T]he punitive aspect does not outweigh the strong rehabilitative or deterrent effects of the condition.

Id. at 1379 (footnote omitted).

as unconstitutional punishments,³⁸ or have contended that public notification is an ineffectual tool for curbing criminal behavior.³⁹ Others, applying a reasonableness test, have found scarlet letter provisions valid when they are reasonably related to probationary goals.⁴⁰ Some assert that when courts evaluate scarlet letter

³⁸ See Tavill, *supra* note 5, at 624-34 (concluding scarlet letter conditions of probation may be unconstitutional when applied because they violate probationer's freedom of speech, freedom of association, right to privacy, right to work, or because they are cruel and unusual infliction of punishment); Erb, *supra* note 5, at 1166 ("it would appear likely that the requirement that [probationer] post warning signs ... as well as any similar unusual protection term, will be found valid..."); James C. Weissman, *Constitutional Primer on Modern Probation Condition*, 8 NEW ENG. J. ON PRISON LAW 367, 373 (1982) ("Probation terms may jeopardize unlimited exercise of basic constitutional liberties including fourth amendment freedom from unreasonable search and seizure; first amendment freedoms of expression, association, and religion; fifth amendment privilege against self-incrimination; and other protected interests."). *But cf.* Brilliant, *supra* note 4, at 1373-78 (discussing limitations on judicial discretion to impose conditions of probation which makes independent constitutional analysis impossible).

³⁹ See Massaro, *supra* note 5, at 1920 ("With some crimes, there is little doubt that some offenders feel sincere shame, but do not stop their behavior."); Tavill, *supra* note 5, at 644 (stating that scarlet letter probation condition neither protects public nor rehabilitates offender). *But see* Kelley, *supra* note 5, at 788 (concluding that scarlet letter probation conditions help offender to reform, keep criminal from repeating offense by placing society and police on defense).

Discussing the merits of alternatives to incarceration, the President's Commission on Law Enforcement stated that reintegrating the offender into the community is essential and that "a key element in this strategy is to deal with problems in their social context, which means ... avoiding as much as possible the isolating and labeling effects of commitment to an institution." A.B.A. STANDARDS, *supra* note 2, at 22-23 (quoting THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 28 (1967)). It is suggested that a sign which makes a DWI conviction a matter of public record and a matter of public knowledge, may be at least as "labeling" as a prison term, which would probably receive far less publicity than a DWI sign would generate.

⁴⁰ CROMWELL, *supra* note 1, at 79 ("[C]onditions must be reasonably related to the offender's needs and the protection of society and not arbitrary, capricious, or beyond the ability of the offender to satisfy."); A.B.A. STANDARDS FOR CRIMINAL JUSTICE §18-2.3(e)(iii)(2d ed. 1980) (articulating that conditions should be reasonably related to purpose of sentencing, including goal of rehabilitation); Catherine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender*, 9 BERKELEY WOMEN'S L.J. 9, 40 (1994) ("Conditions of probation must be reasonable and must be directed toward the goals of public safety."); Richard S. Gruner, *Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines*, 71 WASH. U. L.Q. 261, 301 (1993) (declaring that probation conditions must bear reasonable relationship to sentencing goals, including rehabilitation, general deterrence, specific deterrence, and punishment). *But see* Levine, *supra*, note 5 at 1862 ("The reasonableness standard requires that the probation condition be not merely reasonably related to the purpose of probation, but that the condition be reasonable.")

For example, a "CONVICTED DWI" sign is uniquely related to the crime com-

conditions, they should distinguish between offenders whose conduct arouses near-universal hatred and revulsion, such as sexual predators, and offenders who may inspire sympathy or empathy, such as drunk drivers.⁴¹ When the offending conduct is not viewed as particularly shameful, the stigma accompanying a scarlet letter condition may be potentially less humiliating, yet the public notification may result in the achievement of traditional probationary goals.⁴² Ultimately, however, requiring Let-

mitted, and arguably the knowledge that the police can easily identify his car may make a probationer refrain from drinking if he drives. The *Letterlough* majority found that the public punishment was not reasonably related to rehabilitation. *People v. Letterlough*, 86 N.Y.2d 259, 655 N.E.2d 146, 150, 631 N.Y.S.2d 105 (1995).

⁴¹ Tavill, *supra* note 5, at 641-42. Tavill contrasted sex offender notification provisions with the DWI notification required in *Goldschmitt v. Florida*, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986). *Id.* She concluded that a "CONVICED DWI" bumper sticker "is unlikely to have an effect upon any major aspects of the offender's life given the general empathetic attitude of society toward drinking and driving." *Id.* at 642. In contrast, a sex offender notification requirement may actually encourage the deviant behavior because of the stress placed on the offender. *Id.* at 641; *cf.* *People v. Carolyn S.*, 92 Misc. 2d 674, 678, 401 N.Y.S.2d 141, 144 (Mount Vernon City Ct. 1977) (stating that when prescribing length of periods of probation, penal code distinguishes between probation term for petty and serious crimes). *But see Kelley, supra* note 5, at 784-5 (asserting scarlet letter conditions are effective in preventing both child molestation and drunk driving).

In his article, Brilliant distinguished between two types of probation conditions for the same offense: 1) requiring a "CONVICED DWI" bumper sticker and; 2) ordering offender to publish his picture and an apology in a newspaper. Brilliant, *supra* note 4, at 1379-80. He considered the bumper sticker less stigmatic because the offender could avoid humiliation by not driving, whereas the advertisement was mandatory. *Id.* Although this may be true in theory, in reality few people who have personal contact with an offender are likely to see or remember a newspaper ad, while a bumper sticker may broadcast the conviction long after the offender has ceased to engage in criminal conduct.

Both empathy and hypocrisy shape public attitudes toward drinking and driving, and it may be futile to try to predict whether Letterlough will be encouraged to stay sober or ridiculed and "driven to drink." The sign may cause Letterlough's neighbors and associates, who also drink and drive, to distinguish his behavior from their own solely on the basis of his conviction.

⁴² See Brilliant, *supra* note 4, at 1379 (finding that although the bumper sticker potentially subjects the defendant to humiliation, punitive aspect does not outweigh strong rehabilitative or deterrent effects of condition). Arguably, different probation conditions concerning the same less shameful offense might also have varying effects. *Id.* at 1379-80. Requiring Letterlough to place a non-stigmatizing sign on his car might be more effective in achieving probationary goals and less punitive in nature than the requirement that he advertise his conviction. Brilliant, *supra* note 4, 1379-80. Such a sign would remind Letterlough of his conviction, notify police of his "CONVICED DWI" status, and put him under heightened police scrutiny, without branding him as a drunkard to his neighbors and associates. *Id.* In contrast, an advertisement only accomplishes probationary goals if the offender refrains from the act to avoid the condition being imposed again. *Id.*

terlough to affix a "CONVICTED DWI" sign was held to be punitive and not reasonably related to probationary goals because it exposed him to heightened public scrutiny and disapproval whether or not he actually refrained from drinking and driving.⁴³

The *Letterlough* holding should be construed narrowly so as to prohibit only those probation conditions which stigmatize the probationer. An expansive reading could have the effect of discouraging judicial creativity and encouraging courts to instead incarcerate offenders when the "permissible" probation conditions enumerated in Penal Law section 65.10 do not seem to fit the particular defendant's circumstances. By including a reasonableness standard,⁴⁴ the legislature intended to give the courts discretion to experiment with personalized probation conditions that may be effective when applied to each individual defendant. The courts, therefore, should not be confined to rigidly prescribed rules of probation developed for the typical defendant, which may not adequately address the rehabilitative needs of the actual defendant being sentenced.

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⁴³ *Letterlough*, 86 N.Y.2d at 265-66, 655 N.E.2d at 150, 631 N.Y.S.2d at 108. In fact, the punitive aspects of the sign become more obvious if its effect as a specific deterrent is analyzed. If *Letterlough* ceases to drink and drive, and the sign is no longer necessary to remind him or warn the public, its only consequence would be to humiliate him. Conversely, if he continues to drink and drive, and the sign is ineffectual as a deterrent, the appropriate public safety measure would be to revoke his license instead of merely advertising to the public that his driving presents a potential hazard.

Brilliant suggests that shaming a DWI offender into not driving at all is not "ideally rehabilitative" but rather a circuitous way to achieve a result that can be reached directly through revocation of the offender's license. See *Brilliant*, *supra* note 4, at 1379.

⁴⁴ N.Y. PENAL LAW §65.10 (2)(1) (McKinney 1987).

