

3.11: Substantive Law - Community-Based Sentences

In addition to incarceration and monetary sanctions, the defendant may be sentenced to some form of community-based sanction.

Community Shaming

Some judges, seeking alternatives to jail or prison, have imposed creative sentences such as requiring offenders to post billboards, make public apologies, place signs on the door reading, “Dangerous Sex Offender, No children Allowed,” and attach bumper stickers proclaiming their crimes. These sentences are intended to shame or humiliate the offender and satisfy the need for retribution. Shame is part of the restorative justice movement, but for it to be effective it needs to “come from within the offender. ... Shame that is imposed without almost always hardens the offenders against reconciliation and restoration of the damage done” <http://www.critcrim.org/redfeather/journal-pomocrim/vol-8-shaming/scheff.html>

“At the heart of the current discussion of shaming offenders is the assumption that shame is a simple emotion that comes in only two sizes: shame or no shame. But actually, shame is a complex emotion which comes in many shapes, sizes, and degrees of intensity. Legal scholars and judges who treat shame as merely binary are in the position of a skier who makes no distinction between the many kinds of snow. Just as lack of knowledge of types of snow may lead a skier to disaster, so the crude treatment of shame in current discussions could be a catastrophe.” ^[1]

Community Service

Although not necessarily specified in the criminal code, judges frequently sentence offenders to complete community service as a condition of probation. Generally, a probation officer or probation staff member will act as the community service coordinator. His or her job is to link the offender to the positions and verify the hours worked.

Probation

Kerper describes how states began to use probation as a sanction for criminal behavior.

“The authority to grant probation probably grew out of the traditional practice of judges of “suspending sentences.” The judge would simply fail to set a sentence or set the sentence and fail to direct that it be executed. The offender would then be released. If the offender’s subsequent behavior was satisfactory, nothing more would be done. If he had further difficulty with the law, the judge, usually on request of the prosecutor, would revoke his freedom. This time the judge would set a sentence, or reinstate the previous sentence, and the sentence would be executed. The common law authority of a judge to spend a sentence was questionable, but many judges regularly exercised that authority.

Since the defendant released on a suspended sentence was not subject to formal supervisions, judges tended to suspend sentences only in minor cases. In the late 1800s, courts began to experiment with a combination of a suspended sentence and careful supervision that could be applied to more serious offenses. This new procedure, called probation, soon was authorized by statute and provision was made for the appointment of special probation officers.” ^[2]

Probation is one of the most common alternatives to incarceration. Both probation and parole involve supervision of the offender in a community setting rather than in jail or prison. The primary purpose of probation is to rehabilitate the defendant. Thus, the court releases the offender to the supervision of a probation officer who then monitors the offender to ensure that he or she abides by the conditions of probation. With **parole**, the offender is first incarcerated and is later released from prison to supervised control. Under both procedures, offenders who violate the terms of their supervision can be imprisoned to serve the remainder of their sentences.

The Court has said little on probation since 1932 when it announced that probation conditions must serve “the ends of justice and the best interest of both the public and the defendant.” *Burnes v. United States*, 287 U.S. 216 (1932). According to the Ninth Circuit Court of Appeals, “The only factors which the trial judge should consider when deciding whether to grant probation are the appropriateness and attainability of rehabilitation and the need to protect the public by imposing conditions which control the probationer’s activities.” *Higdon v. United States*, 627 F.2d 893 (9th Circ. 1980). The Court has fashioned a two-step process for reviewing conditions of probation: first, it determines whether the conditions are permissible, and, if so, it determines whether there is a reasonable relationship between the conditions imposed and the purpose of probation.

Many states follow California’s standard for testing the reasonableness of probation conditions. This approach holds that probation conditions do not serve the ends of probation and are not valid if (1) the condition of probation has no relationship to the crime of

which the offender was convicted, (2) the condition relates to conduct which is not in itself criminal, or (3) the condition requires or forbids conduct which is not reasonably related to future criminal act. *People v. Dominguez*, 64 Cal. Rptr. 290 (Cal. App. 1967) The court struck down a condition that the “probationer not become pregnant without being married,” saying it was unrelated to her offense or to future criminality.

Courts have invalidated the following probation conditions:

- Requiring the offender to refrain from using or possessing alcoholic beverages when nothing in the record showed any connection between alcohol consumption and the weapons violation of which the probationer had been convicted. *Biller v. State*, 618 So. 2d 734 (Fla 1993).
- Requiring the defendant to submit to a search of herself, her possessions, and any place where she may be with or without a search warrant, on request of a probation officer. (The Court noted that search of a probationer and his or her residence, with or without a warrant, based on reasonable suspicion that probationer violated the terms of probation would be valid.) *Commonwealth v. LaFrance*, 525 N.E. 2d 379 (Mass. 1988).
- Prohibiting custody of children unless it had a clear relationship to the crime of child abuse.
- Prohibiting marriage and pregnancy. *Rodriguez v. State*, 378 So.2d 7 (Fla. App. 1979).
- Prohibiting the defendant from fathering any children during the probation period. *Burchell v. State*, 419 So.2d 358 (Fla. App. 1982).
- Requiring the defendant to maintain a short haircut. *Inman v. State*, 183 S.E.2d 413 (GA. App. 1971)(the court found this condition was an unconstitutional invasion of the right to self-expression).

Courts have upheld the following conditions:

- Prohibiting offenders convicted of child pornography from having access to the internet, possessing a computer, and requiring the offender to submit to polygraph testing. See, *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003), *United States v. Rearden*, 349 F.3d 608 (9th Cir. 2003), *State v. Ehli*, 681 N.W. 2d 808 (N.D. 2004), *People v. Harrison*, 134 Cal.App.4th 637 (2005).
- Prohibiting the probationer from fathering any additional children unless he could demonstrate he had the financial ability to support them, and that he was supporting the nine children he had fathered. *State v. Oakley*, 629 N.W. 2d 200 (Wis. 2001).
- Requiring probationers to pay all fees, fines, and restitution, refrain from contacting the victim, undergo treatment for substance abuse, participate in alternatives to violence classes, stay in school, not leave the state without permission, abstain from alcohol, not drive. These conditions that apply to all probationers are referred to as “general conditions of probation.”

Many jurisdictions authorize **split probation** and allow the judge to sentence the offender to a short period of jail as a condition of probation. In some cases, the offender will serve his jail time before he returns to the community under probation supervision. In others, he will be released first and serve his time on weekends. The federal system uses a similar procedure involving a more substantial jail sentence. The judges impose a **split sentence** under which the probationer is imprisoned for a period up to six-month and then is released on probation.

Link to alternative sentencing for federal system

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf

Parole and Post-Prison Supervision

Because most states now use determinate sentencing, the use of parole is dwindling and is being replaced by post-prison supervision of offenders after their incarceration. However, for offenders sentenced in the 1970s and 1980s under indeterminate sentencing schemes, parole continues to be very real hope, even if an unlikely possibility.

Charles Manson Exercise

Consider the case of notorious California killer Charles Manson who died in state custody in November 2017 at the age of 83. Manson was found guilty in 1969 of the murder of five people. He was sentenced to death, but his sentence was converted in

1977 to “life with the possibility of parole” after the California Supreme Court invalidated its state death penalty statute. Manson applied for parole for the twentieth time in 2012, he was 78 years old at the time. Under a change in parole release law, the next time Manson would have been eligible for parole was in 2027. The board noted that if he were to complete programs designed to help deal with some of his issues, then he could petition for release sooner. Listen to the hearing at <http://abcnews.go.com/US/charles-manson-denied-parole-dangerous-man/story?id=16111128>.

“[T]he states which have adopted determinate sentencing structures have either eliminated or drastically restricted parole. In states with indeterminate sentencing, however, parole remains an essential element of the sentencing structure. Parole involves the release of the prisoner subject to conditions similar to those imposed on the probationer. Parole may be granted by the responsible state agency (usually called a parole board) after the prisoner has served his minimum sentence. The parole board usually has several members, who are either interested citizens appointed by the governor or corrections department personnel selected by the head of that department. Frequently the board will be assisted by special hearing officers who hold hearings and make recommendations to the board. Most parole boards automatically schedule hearings for every inmate as soon as he becomes eligible for parole. If he is not released at that point, subsequent hearings will be scheduled at regular intervals.” ^[3]

The procedures of parole hearings vary from state to state. Indeed, not all states regularly hold hearings. A few prefer simply to review the files in the case, permitting the prisoner to submit a statement on his own behalf. Ordinarily, hearings are rather informal affairs held before a hearing officer or one or more board members. The prisoner will be informed of the material in their parole file, which relates primarily to their offense, their prior criminal record, and their performance in prison. The prisoner also will be given the opportunity to state their own case for parole and to ask any questions about the parole process. In almost half of the states, they may be assisted by an attorney, and several states will appoint an attorney upon request of an indigent prisoner. The remaining states prohibit representation by an attorney on the ground that it interferes with the board’s evaluation of the prisoner’s statements and demeanor at the hearing. Shortly after the hearing, most boards will provide the prisoner with a written explanation of its decision. If the prisoner is not released on parole, they must be released after they have served their full sentence.

Parolees are subject to a variety of conditions that are similar to probation conditions. They must contact, or “report to”, their parole officers on a regular basis and attend regular meetings. They may be released to halfway houses, residential treatment programs, or daytime work-release programs at the beginning of their parole in order to prepare for return into the community.

Even when states sentencing schemes utilize parole, not all inmates are eligible for parole. In some states, prisoners forfeit their eligibility for parole if they attempt to escape or if they engage in certain violent acts. Also, many states have **true life sentences** or sentences where the offender is not eligible for parole, and persons convicted of first-degree murder are frequently sentenced to life without the possibility of parole.

Post-prison supervision stems from determinate sentencing schemes that states adopted beginning in the 1980s. Post-prison supervision boards are now often combined with parole boards, and they perform a similar function. Offenders do not apply for post-prison supervision since release is automatically given when the determinate sentence has been served. Generally, how long a person will be on post-prison supervision is set out in state sentencing guidelines. A post-prison supervision board will monitor whether the offender is abiding by the conditions of release while living in the community. If an offender violates conditions of release during post-prison supervision, he or she is entitled to a revocation hearing with the same due process protections given to parolees, i.e: notice, opportunity to challenge government’s evidence, and the right to assistance of counsel.

1. <http://www.critcrim.org/redfeather/journal-pomocrim/vol-8-shaming/scheff.html> ↩

2. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 339). West Publishing Company. ↩

3. O’Leary, V., & Hanrahan, K. (1977). Law and practice in parole proceedings: A national survey. *Crim. L. Bull.*, 13, 181-197.. ↩

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