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ANTI-PROSTITUTION ZONES: JUSTIFICATIONS FOR ABOLITION

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Three small Florida towns—Hollywood, Dania Beach and Hallandale Beach—are banding together to rid themselves of prostitutes.¹ On the table, for the second time in two years, is a proposal that would declare the cities' respective segments of Federal Highway "prostitution-free zones."² Under the proposed mapping program, repeat offenders are targeted by law enforcement, arrested, prosecuted, and forced to steer clear of the so-called zones as a condition of probation.³ Following the imposition of such a condition, mere presence in a prostitution-free zone constitutes a probation violation and warrants immediate arrest.⁴

The proposal is not the first of its kind in Florida. In 1995, Fort Lauderdale was the first to act against prostitutes by creating SOAP (Stay Out of Areas of Prostitution).⁵ Sarasota followed suit in late 1998 with the establishment of "Prostitution Exclusion Zones."⁶ The Hollywood-Dania Beach scheme comes on the heels of Miami Beach's recent action designating eighteen blocks of South Beach a "hooker-free zone."⁷

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¹ See Thomas Monnay, *Three Towns Want Prostitution Barrier; Mapping Project Would Focus on Repeat Offenders*, SUN-SENTINEL (Broward Metro ed.), Sept. 15, 2000, at 1B.

² *Id.*

³ *Id.*

⁴ See *id.*

⁵ Robin Benedick, *Lauderdale Wants Soap to Clean Prostitution Zones*, SUN-SENTINEL, Nov. 8, 1995, at 1B.

⁶ Tom Spalding, *New Zone May Only Relocate Crime*, SARASOTA HERALD-TRIBUNE, Dec. 15, 1998, at 1B.

⁷ James Gordon Meek, *Miami Beach Declares Hooker-Free Zone*, APBnews.com, Aug. 7, 2000, available at <http://www.apbnews.com.html>.

Local officials in Florida claim that prostitution has become a serious threat to the "family-friendly" environment their cities seek to promote.⁸ Proponents of anti-prostitution zones in the Hollywood-Dania area believe barring prostitutes from the Federal Highway corridor will draw new businesses to their region.⁹

This Comment argues that attracting tourism and new industry, however, should not and cannot be achieved at the expense of legal rights. This Comment advocates the abolition of anti-prostitution zones and is presented in four parts. Part I examines the history of probation and its rehabilitative roots. It also discusses the philosophical shift away from the traditional rehabilitative purpose of sentencing, and the recent increase in the use of probationary conditions as punitive measures by the courts in sentencing proceedings.

Part II explores the legal challenges confronting anti-prostitution zones. Such zones violate individual constitutional rights. Moreover, conditions of probation limiting the geographic mobility of prostitution offenders are not reasonably related to the legislative intent of rehabilitation.

Part III analyzes Lisa Ann Dietz's recent challenge to Sarasota's "Prostitution Exclusion Zone" and the inadequacy of the opinion issued by Sarasota's Twelfth Judicial Circuit in response to that challenge.

Finally, Part IV discusses the degree to which communities ignore the rehabilitative ideal when it comes to prostitution, as evidenced by the extraordinary resources they divert to combat and punish prostitutes. Unwilling to pay heed to feminist arguments decrying the criminalization of prostitution, such communities ultimately must reallocate resources for rehabilitation.

I. THE ROOTS AND EVOLUTION OF PROBATION: AN OUTGROWTH OF THE REHABILITATIVE IDEAL

In 1878, Massachusetts became the first state to enact a probation statute.¹⁰ Today, all fifty states,¹¹ and the federal govern-

⁸ *Id.*

⁹ See Monnay, *supra* note 1, at 1B.

¹⁰ See *U.S. v. Stine*, 646 F.2d 839, 841 (3d Cir. 1981); Frank W. Grinnell, *The Common Law History of Probation*, in *POLICE, PRISON, AND PUNISHMENT* 303, 316 (Kermit L. Hall ed., 1987).

ment,¹² have probation statutes of their own. Courts possess no inherent authority to place individuals on probation. Their authority is derived solely from statutes.¹³

Because probation is a statutory device, discerning the purposes of probation requires an examination of the legislative intent behind the statutes themselves. This is the task with which appellate courts across the country are faced when deciding whether to uphold conditions of probation. Thus, how a court characterizes the purpose of its state's probation statute is of paramount importance to the offender who stands before it.

Historically, courts used probation to fulfill the dual purposes of (1) offender rehabilitation and (2) protection of the community from future criminal conduct.¹⁴ An examination of the historical roots of probation lends support to this interpretation. Probation's history, encompassing both its antecedents in English common law as well as its origins in the United States, exposes an institution preoccupied with the notion of offender rehabilitation and individualized justice.¹⁵

In early English common law, judges employed a number of practices including "benefit of clergy,"¹⁶ "judicial reprieve,"¹⁷ and "recognizance."¹⁸ These equitable principles were the forerun-

¹¹ NEIL P. COHEN & JAMES GOBERT, *THE LAW OF PROBATION AND PAROLE* § 1.02, at 7 (1983).

¹² 18 U.S.C. §§ 3551-56 (1988 & Supp. V 1993).

¹³ See COHEN & GOBERT, *supra* note 11, § 2.03, at 34. *But see* TEX. CONST. art IV, § 11a (authorizing courts to grant probation).

¹⁴ See Michael George Smith, *The Propriety and Usefulness of Geographical Restrictions Imposed as Conditions of Probation*, 47 BAYLOR L. REV. 571, 574 (1995).

¹⁵ See Sharon M. Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 936 (1994).

¹⁶ Operating under the theory that only church courts enjoyed jurisdiction over ecclesiastics, the benefit of clergy exempted ecclesiastics from the King's criminal courts. *Id.* at 936 n.9 (citing LEONA C. GABEL, *BENEFIT OF CLERGY IN THE LATER MIDDLE AGES* (Smith College Studies in History, Vol. 14, Nos. 1-4, Oct. 1928-July 1929)).

¹⁷ Bunzel, *supra* note 15, at 936 n.10 (citing CHARLES LIONEL CHUTE & MARJORIE BELL, *CRIME, COURTS AND PROBATION* 16 (1956) ("Through judicial reprieve, a judge temporarily suspended either the imposition or execution of a criminal sentence. This practice allowed judges to modify the severity of the law in individual cases at their discretion. Judicial reprieve was a precursor to the practice of suspension of sentence, which was brought to the colonies from England, and remained in effect until the enactment of probation laws."))

¹⁸ Bunzel, *supra* note 15, at 936 n.11 (citing United Nations, Dep't of Social Affairs, *The Legal Origins of Probation, excerpted in PROBATION, PAROLE AND COMMUNITY CORRECTIONS* 81, 82 (Robert M. Carter & Leslie T. Wilkins eds., 2d ed. 1976)) (noting that recognizance, developed in fourteenth century England, allowed a defendant

ners of probation, affording judges wide latitude and discretion in their dealings with individual offenders.

Probation is a manifestation of the penal philosophy of rehabilitation. The rehabilitative ideal embodies the notion that the primary function of the penal system is to change not only convicted offenders' behavior, but their outlook and character, as well.¹⁹ In doing so, society is able to promote offenders' interests and its own defense against unwanted conduct at the same time.²⁰ Stated more simply, rehabilitation is "the opposite of punishment."²¹

Perhaps the most significant and most prevalent expressions of this rehabilitative ideal in the United States was the materialization of indeterminate sentencing.²² Emerging in 1870,²³ the notion of indeterminate sentencing reflected the historic and "almost infinite" power of judges to exercise discretion in devising individual sentences.²⁴ Under the concept, the sentence the court imposed upon the offender at conviction did not determine the true length of his sentence. Rather, the offender's progress toward rehabilitation during incarceration controlled, and judges were empowered to adjust sentences accordingly.²⁵ By the early twentieth century, rehabilitative reformers, who believed that determinate sentencing was antithetical to the rehabilitative ideal, succeeded in establishing the concept of indeterminate sentencing as the norm in the United States.²⁶

Essential to the concept of indeterminate sentencing was judicial discretion. And, this discretion was to be used to serve the rehabilitative ideal. Indeterminate sentencing and the ac-

convicted of a minor offense to "make assurances to the public" of his good future behavior).

¹⁹ NEIL COHEN, 1 *THE LAW OF PROBATION AND PAROLE* § 7:3, at 7-7 (2d ed. 2000).

²⁰ FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 2 (1981).

²¹ See Bunzel, *supra* note 15, at 937 (quoting Willard Gaylin & David Rothman, *Introduction* to ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* xxix (1976)).

²² Marvin Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 29 (1972).

²³ Marvin Zalman, *The Rise and Fall of Indeterminate Sentencing*, 24 WAYNE L. REV. 45, 48 (1977).

²⁴ Charles J. Ogeltree, *The Death of Discretion: Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1941 (1988).

²⁵ See *id.*

²⁶ See Bunzel, *supra* note 15, at 937 n.18 (citing as authority MODEL PENAL CODE §§ 6.06, 4.02(1)(a) (1962) (mandating that all felony convicts receive indeterminate sentences and allowing the Board of Parole to use its discretion in determining the term of imprisonment)).

companying judicial discretion, however, were only one expression of the rehabilitative ideal. It was out of this same ideal that probation emerged and grew.²⁷ Indeed, a "quest for rehabilitation of offenders and a focus on individualized sentences formed the core of the probation movement in America."²⁸

In 1841, John Augustus, known as the "Father of Probation," introduced America to the formal concept of probation.²⁹ During that year, Augustus encountered a man about to be sentenced and finding the man "not yet past all hope of reformation," bailed him out and procured the man a reduced sentence.³⁰ Over the next eighteen years, in lieu of incarceration, judges released over two thousand offenders to Augustus' custody.³¹

In 1880, two years after statutorily enacting the nation's first probation law, the Massachusetts legislature approved the nation's first law directing states to hire probation officers.³² The law stated that officers must "carefully inquire into the character and offence of every person arrested for crime . . . with a view to ascertaining whether the accused may reasonably be expected to reform without punishment."³³ To function effectively, the rehabilitation model of the early twentieth century required both probation officers and sentencing judges to acquire detailed information about offenders. This information was then used to structure individualized sentences.³⁴ As the Supreme Court noted in *Williams v. New York*, "Highly relevant—if not essential—to selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."³⁵ The *Williams* Court no

²⁷ See Bunzel, *supra* note 15, at 938.

²⁸ *Id.*

²⁹ See COHEN, *supra* note 19, §§ 1:2-1:4, at 1-17.

³⁰ See Bunzel, *supra* note 15, at 938 (quoting JOHN AUGUSTUS, *A Report of the Labors of John Augustus for the Last Ten Years*, in AID OF THE UNFORTUNATE 5 (Boston, Wright & Hasty 1852), reprinted as JOHN AUGUSTUS, FIRST PROBATION OFFICER (Nat'l Probation Ass'n 1939)).

³¹ See Bunzel, *supra* note 15, at 938 n.27 (citing DEAN CHAMPION, FELONY PROBATION 2 (1988)).

³² Bunzel, *supra* note 15, at 934.

³³ *Id.* at 939 n.29 (citing the Act of Mar. 22, 1880, ch. 129, 1880 Mass. Acts 87).

³⁴ *Id.* at 940.

³⁵ 337 U.S. 241, 247 (1949).

longer recognized retribution as "the dominant objective of the criminal law."³⁶

The rehabilitation model upon which the probation movement was based began to undergo attacks beginning in the late 1970s and continuing on into the 1980s.³⁷ Contributing to the backlash was the publication of social science studies that concluded incarceration did nothing to rehabilitate offenders. Additional factors included the growing public perception that the rehabilitative ideal was too lenient, and a massive increase in the crime rate.³⁸ Increased support for a model of punishment based on retribution and incapacitation emerged. The influences of such a model are evident in recent American history. Since *Williams*, the United States commenced what now seems a relentless "War on Drugs," imposed huge increases in prison terms through the use of the "three-strikes" laws, and approached capital punishment with newfound gusto.³⁹ In short, retribution has been resurrected as the dominant objective of criminal law with respect to incarcerated offenders while "[t]herapy, reform and rehabilitation [of the incarcerated] have fallen into discredit and disrepute."⁴⁰

The Sentencing Reform Act of 1984,⁴¹ mandating the replacement of previously judge-determined, individualized sentences with sentences uniform and proportional in nature, directly reflects this outlook.⁴² Congress ordered the Commission on Sentencing to ensure that the Federal sentencing practices and policies carry out the "four purposes of sentencing": rehabilitation, retribution, incapacitation and deterrence.⁴³ The result was the effective eradication of the very concept of indeterminate sentencing.⁴⁴ Notwithstanding the introduction of uniformity in sentencing, and the resultant usurpation of judi-

³⁶ *Id.* at 248.

³⁷ See Bunzel, *supra* note 15, at 946-47.

³⁸ *Id.*

³⁹ Symposium, *The Future of Punishment*, 46 UCLA L. REV. 1719, 1721-23 (1999).

⁴⁰ *Id.* at 1720.

⁴¹ 18 U.S.C.A. § 3551 (1984).

⁴² Frank O. Bowman, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 335 (2000).

⁴³ S. REP. NO. 98-225, at 161, *reprinted in* 1984 U.S.C.A.N. 3182, 3344.

⁴⁴ See Bunzel, *supra* note 15, at 937 n.18 (citing as an example CAL. PENAL CODE §§ 1168, 3020 (West 1970) (amended in 1984 to replace indeterminate sentencing system with determinate one)).

cial discretion, Congress still instructed sentencing judges to "consider" all four goals before imposing a particular sentence.⁴⁵ Rehabilitation and retribution, however, are fundamentally inconsistent concepts.⁴⁶ Determinate sentencing is just as antithetical to the rehabilitative ideal today as it was during the early twentieth century.⁴⁷ Ultimately, promotion of one purpose at the expense of the other becomes inevitable.⁴⁸ Notwithstanding Congress' assertions to the contrary, the Guidelines do not assign equal weight to the four sentencing goals. Evident in the Sentencing Reform Act, in its legislative history and in the Guidelines themselves, is a preference for just desserts and a disfavored view of rehabilitation.⁴⁹ The Senate itself even acknowledged that, "in light of current knowledge . . . 'imprisonment is not an appropriate means of promoting correction and rehabilitation.'⁵⁰ Rather, it is a means of effecting punishment. For the incarcerated, then, rehabilitation was out, and retribution was in.

Probation, as a manifestation of the rehabilitative ideal, has also undergone erosion. Not to the point of "discredit and disrepute" that currently characterizes the idea of rehabilitating an incarcerated offender, however. The retributivist notions of the 1970s and 1980s led to an inevitable population explosion in our prison systems.⁵¹ Likewise, the probation population has also grown by an average of three percent every year since 1990.⁵² This growth, and the burgeoning caseload accompanying it, has become increasingly difficult for correction agencies to handle.⁵³ A 1985 study for the National Institute of Justice

⁴⁵ 18 U.S.C. § 3553(a) (2) (1988) (purposes encompass rehabilitation, deterrence, incapacitation and retribution).

⁴⁶ See Bunzel, *supra* note 15, at 951 n.103 (citing Robinson, *infra* note 48, at 20).

⁴⁷ *Id.*

⁴⁸ See Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 20 (1987).

⁴⁹ See Bunzel, *supra* note 15, at 951.

⁵⁰ S. REP. NO. 98-225, *supra* note 43, at 76 (quoting proposed 18 U.S.C. § 3582 (a)).

⁵¹ In 1970, there were less than 200,000 inmates in state and federal prison systems combined. As of June 30, 1998, that figure had risen to 1,277,866. This rise is in the face of a decrease in the levels of both property and violent crime. *Id.*

⁵² *Developments in the Law—Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1946 n.9 (1998) (citing THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF ADULTS ON PROBATION, 1995 at 1 (1997)).

⁵³ *Id.* at 1946 n.10 (citing RANDALL GUYNES, U.S. DEP'T OF JUSTICE, DIFFICULT CLIENTS, LARGE CASELOADS PLAGUE PROBATION, PAROLE AGENCIES 4 (1988)).

concluded that the criminal justice system needed an “intermediate form of punishment for those offenders who are too anti-social for the relative freedom that probation now offers, but not so seriously criminal as to require imprisonment.”⁵⁴ Courts and legislatures have responded to these mounting difficulties by creating sentencing alternatives. Theoretically, these alternatives are tailored to meet the needs of individual offenders, and often take the form of probation conditions.⁵⁵ Historically, the use of individualized sentencing served as an expression of the rehabilitative ideal, rather than “an intermediate form of punishment.”⁵⁶

Typically, a court will grant probation subject to a list of standard conditions.⁵⁷ The court may then go on to impose additional conditions pursuant to a clause nearly ubiquitous in federal⁵⁸ and state probation statutes.⁵⁹ Exercising their statutory discretion, judges all over the United States selectively impose conditions of probation on nonviolent offenders.⁶⁰ Arguably, the escalating use of such conditions signals an unwillingness to abandon probation’s traditional rehabilitative ideal. There are cases where courts do impose these inventive sentences in an individualized manner, adhering to the traditional rehabilitative ideal.⁶¹ Examples of such probation condi-

⁵⁴ *Id.* at 1946 n.12 (citing JOAN PETERSILLA ET AL., GRANTING FELONS PROBATION: PUBLIC RISKS AND ALTERNATIVES ix (1985)).

⁵⁵ *Id.* at 1947 n.20.

⁵⁶ *Id.* at 1946.

⁵⁷ See, e.g., FLA. STAT. ch. 948.03 (2000). Florida’s statute provides a list of probation conditions that need not be orally announced at sentencing—and are thus considered standard—including regular meetings with probation officers and a prohibition on carrying a firearm.

⁵⁸ See *Developments in the Law—Alternatives to Incarceration*, *supra* note 52, at 1947 n.22 (citing 18 U.S.C. §§ 3553 (a), 3563 (b) (1994)).

⁵⁹ See, e.g., FLA. STAT. ch. 948.03 (6) (2000) (“The enumeration of specific kinds of terms and conditions shall not prevent the court from adding thereto such other or others as it considers proper.”).

⁶⁰ See *Developments in the Law—Alternatives to Incarceration*, *supra* note 52, at 1949 n.41 (citing Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1882 (1991)).

⁶¹ See *infra* notes 62-64.

tions include psychiatric treatment,⁶² alcohol rehabilitation,⁶³ and community service.⁶⁴

Too many courts, however, welcome the discretion but ignore the rehabilitative goal of probation.⁶⁵ In response to the public's disappointment with traditional punishments and overcrowded prisons, some judges have gone to new lengths to make the punishment fit the crime.⁶⁶ Probation, however, has never been about punishment.⁶⁷ Assuming judges find themselves constrained by the tension between punitive and rehabilitative measures, awkward attempts to characterize punitive probation conditions as "rehabilitative" must fail. Statutes⁶⁸, judicial opinions⁶⁹ and the origins of probation itself⁷⁰ recognize rehabilitation as the primary goal of probation. In exercising the discretion afforded them by open-ended probation statutes, courts must adhere to the rehabilitative ideal embodied by probation.

II. LEGAL CHALLENGES

Probationers do not enjoy the absolute liberty to which every citizen is entitled. They enjoy, instead, a conditional liberty dependent on the observance of special probation restric-

⁶² See *People v. Meyer*, 680 N.E.2d 315, 317 (Ill. 1997).

⁶³ See *People v. Letterlough*, 655 N.E.2d 146, 147 (N.Y. 1995).

⁶⁴ See, e.g., TENN. CODE ANN. 40-35-303 (d)(3) (1997) (allowing courts to require community service of offenders).

⁶⁵ See Jon A. Brilliant, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1369 (1989).

⁶⁶ *Id.* at 1369-70.

⁶⁷ See COHEN, *supra* note 19, § 7:4, at 7-8.

⁶⁸ See, e.g., ARK. STAT. ANN. § 5-4-303(A) (1989) ("assist the defendant in leading a law-abiding life"); CONN. GEN. STAT. ANN. § 53A-30(A)(9) (West 1989) ("any conditions reasonably related to his rehabilitation"); ME. REV. STAT. ANN. Tit. 17A § 31-20-6(F) (1989) ("reasonably related to . . . rehabilitation"); *Developments in the Law—Alternatives to Incarceration*, *supra* note 52, at 1956 n.114 (quoting FLA. STAT. ch. 921.187(1) (1997) (permitting judges to impose conditions so as "to best serve the needs of society . . . and to provide the opportunity for rehabilitation," and IOWA CODE ANN § 907.7 (1987) ("The purposes of probation are to provide the maximum opportunity for the rehabilitation of the defendant"))).

⁶⁹ See, e.g., *Higdon v. United States*, 627 F.2d 893, 897 (9th Cir. 1980) ("primary purpose of probation is to rehabilitate the offender").

⁷⁰ See generally *Bunzel*, *supra* note 15 (arguing that the practice of probation in America grew out of a quest to rehabilitate offenders).

tions.⁷¹ Judges are often afforded wide latitude in imposing these restrictions or conditions.⁷² Regardless of these limitations upon liberty, convicted offenders continue to launch an array of legal challenges to the use of judge-made probation conditions.⁷³

Historically, probation conditions have managed to escape constitutional scrutiny in one of two ways. First, under an "act of grace" theory, probation is the more lenient alternative to incarceration and thus, probationers will not be heard to complain about a voluntary act of clemency by the court.⁷⁴ In 1973, however, the Supreme Court explicitly rejected this theory.⁷⁵ Second, under the "contract" or "covenant" theory, courts reason that the offender waives constitutional rights in exchange for exemption from incarceration.⁷⁶ In passing the Sentencing Reform Act of 1984, however, Congress declared that probation was a sentence in and of itself, effectively rejecting both the "contract" and "act of grace" theories.⁷⁷ Nevertheless, courts continue to rely upon both theories.⁷⁸ Their reliance makes it difficult for offenders to argue that invalid probation conditions violate individual constitutional rights.⁷⁹ Well-founded arguments do exist, however, and must be asserted to prevent courts from imposing probation conditions that do not pass constitutional muster.

⁷¹ See *Rowe v. Lamb*, 130 F.3d 812 (8th Cir. 1997), *reh'g denied*, 1998 U.S. App. LEXIS 713 (1998).

⁷² See *United States v. Chapel*, 428 F.2d 472, 474 (9th Cir. 1970) (explaining that judges are granted broad discretion when imposing probation conditions); *State v. Morgan*, 389 So. 2d 364 (La. 1980) (holding that trial judge enjoys wide latitude in imposing conditions including banishment from French Quarter); *State v. Giraud*, 412 P.2d 104, 105 (Wash. 1966) (sentencing judge has total discretion to grant or withhold probation).

⁷³ See *infra* notes 81-82 and accompanying text.

⁷⁴ Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 188-91 (1967).

⁷⁵ See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973).

⁷⁶ See *United States v. Ross*, 9 F.3d 1182, 1191 (7th Cir. 1993); *Judicial Review of Probation Conditions*, *supra* note 74, 191-93.

⁷⁷ 18 U.S.C. §§ 3551-59, 3561-66, 3571-74, 3581-86 (1994).

⁷⁸ See, e.g., *Ross*, 9 F.3d at 1191 (relying on contract theory of probation); *State v. Kohlman*, 854 P.2d 318, 319 (Kan. Ct. App. 1993) (relying on the act of grace theory of probation).

⁷⁹ *Id.*

There are two strains of legal challenges confronting anti-prostitution zones: one, arguments that such zones violate individual constitutional rights; two, probation conditions limiting the geographic mobility of prostitution offenders are not reasonably related to the purposes of criminal sentencing. The zones do not withstand either challenge. First, compelling offenders to stay out of anti-prostitution zones is de facto banishment. As such, the statutes unconstitutionally preempt both the individual's and the community's rights to freedom both of speech and association. Second, current state and federal statutes, as well as case law, stress that conditions of probation that do not serve rehabilitative ends are beyond the scope of judicial authority.⁸⁰ Probationary conditions forcing prostitution offenders to stay out of designated zones fail to fulfill the traditional purposes of probation. Despite the philosophical decline of the rehabilitative ideal in recent decades with respect to incarceration, it is this goal by which to measure anti-prostitution zones and conditions of probation.

A. ANTI-PROSTITUTION ZONES CANNOT WITHSTAND INDIVIDUAL CONSTITUTIONAL RIGHTS CHALLENGES

Florida's anti-prostitution zones violate a probationer's individual constitutional rights. Compelling offenders to stay out of designated zones is de facto banishment, albeit intrastate, and implicates an offender's right to freedom of association guaranteed by the constitutional right to speech, and to petition the government and assemble peacefully under the First Amendment.⁸¹

⁸⁰ See *State v. Brown*, 326 S.E.2d 410, 411 (S.C. 1985) (judges are granted wide, but not unlimited, discretion when imposing conditions of probation and they cannot impose conditions that are illegal and void as against public policy); *People v. Keller*, 143 Cal. Rptr. 184 (Cal. Ct. App. 1978) (court's discretion to impose conditions of probation is constrained not only by terms of the statute granting the court that authority, but by constitutional safeguards); *supra* notes 34 and 35.

⁸¹ U.S. CONST. amend. I. Other arguments have been posited against the use of banishment—e.g., banishment constitutes a form of cruel and unusual punishment, see *People v. O.*, 321 N.Y.S.2d 518 (N.Y. 1971), it violates one's right to travel, see *United States v. Tortora*, 994 F.2d 79 (2d Cir. 1993), and it violates the Supremacy Clause, see *State v. Camargo*, 537 P.2d 920 (Ariz. 1975). An in-depth discussion of these claims is beyond the scope of this article.

At least fifteen states have express constitutional provisions barring banishment of individuals *from their state*.⁸² Absent such an express provision, some courts are forced to rely upon public policy considerations to strike down sentences incorporating provisions that banish offenders from a particular state.⁸³ Whether relying upon constitutional authority or considerations grounded in public policy, the vast majority of both federal and state courts support the proposition that interstate banishment is *per se* illegal.⁸⁴ These courts do little, however, to fully explain the rationale behind their decisions. Courts frequently cite both *People v. Baum*⁸⁵ and *Dear Wing Jung v. United States*⁸⁶ in support of finding interstate banishment *per se* illegal. Neither decision, it has been argued, provides adequate constitutional analysis preceding the rejection of banishment as unlawful.⁸⁷ Despite the lack of in-depth analysis, the rules of both cases have been followed by the majority of courts, and banishment (from the state or nation) has been summarily struck down as illegal.⁸⁸

In contrast, decisions regarding the use of intrastate banishment—the issue implicated by anti-prostitution zones—are not characterized by such a high degree of uniformity.⁸⁹ Not surprisingly, such decisions are similar to those concerning interstate banishment in that they fail to provide a sufficient discussion of the issues.

⁸² See ALA. CONST. art.1, § 30; ARK. CONST. art.2, § 21; GA. CONST. art.1, § 1, para. 21; ILL. CONST. art.1, § 11; KAN. CONST. § 12 (amended 1972); MD. CONST. art. XXIV; MASS. CONST. part1, art. XII; NEB. CONST. art.1, § 15; NH. CONST. part1, art. XIV; N.C. CONST. art.1, § 19; OHIO CONST. art.1, § 12; OKLA. CONST. art. II, § 29; TENN. CONST. art. 1, § 8; TEX. CONST. art.1, § 20; VT. CONST. ch. I, art. XXI; W. VA. CONST. art. III, § 5.

⁸³ See, e.g., *Minnesota ex rel Halverson v. Young*, 154 N.W.2d 699 (1967) (finding banishment as a probation condition contrary to the underlying policy of the probation law, which is to rehabilitate offenders without compromising public safety).

⁸⁴ William Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 466 n.77 (1998).

⁸⁵ 251 Mich. 187 (Mich. 1930).

⁸⁶ 312 F.2d 73 (9th Cir. 1962).

⁸⁷ See Snider, *supra* note 84, at 468.

⁸⁸ *Id.* at 467.

⁸⁹ Compare *In Re White*, 97 Cal. App. 3d 141 (Cal. Ct. App. 1979) (probationary condition prohibiting defendant from entering specified areas of the city unreasonable and unconstitutional), with *State v. Morgan*, 389 So. 2d 364, 364 (La. 1980) (upholding defendant's banishment from the French Quarter).

Notwithstanding the courts' lack of analysis and consensus, intrastate banishment violates an individual's constitutional rights. Banishment from a geographical area unconstitutionally deprives individuals of the means and the right to affect the political process.⁹⁰ Intrastate banishment comes in a variety of shapes and sizes. It can range from banishing someone from a designated area within a county, like one of Florida's mapped anti-prostitution zones, to banishing someone from all but one county in the state.⁹¹ Though the means of implementation vary, the purpose underlying all forms of banishment is to remove an individual from a particular geographic area. This removal, however, impermissibly interferes with citizens' rights to associate for a political purpose.⁹² The speech that flows from such association is "indispensable to the discovery and spread of political truth."⁹³ And it is this brand of speech that the Supreme Court said the "framers of the Bill of Rights were most anxious to protect."⁹⁴

Again, probationers do not enjoy absolute liberty.⁹⁵ Conditions of probation are, with some standard exceptions, discretionary.⁹⁶ Consequently, it is not uncommon for probationary sentences to contain language prohibiting released offenders from associating with known criminals.⁹⁷ It is not difficult to discern the legitimate penological purpose of such a condition. Furthermore, this condition is sufficiently tailored to meet such a purpose. This sort of non-association condition targets a specific subgroup of individuals: It does not function to banish one from all associations within an entire geographic area. Anti-prostitution zones do function to bar convicted prostitutes from all associations within a designated region. Regardless of

⁹⁰ See Snider, *supra* note 84, at 495.

⁹¹ See *State v. Collett*, 208 S.E.2d 472, 474 (Ga. 1974).

⁹² See generally *United States v. Lowe*, 654 F.2d 562 (1981) (acknowledging that condition of probation barring defendants from going within 250 feet of military base interfered with defendants' exercise of First Amendment rights, both of free speech and of association).

⁹³ See *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927)).

⁹⁴ *League of Women Voters*, 468 U.S. at 383.

⁹⁵ See *supra* note 71.

⁹⁶ See Massaro, *supra* note 60.

⁹⁷ See, e.g., *United States v. Adderly*, 529 F.2d 1182 (5th Cir. 1976) (upholding probation revocation due to probationer's violation of condition that he only associate with law-abiding persons).

whether the region is known as a hotbed of sexual solicitation, the banned associations may be considered political in nature. Consequently, these associations deserve constitutional protection.

One commentator, Garth Snider, urges that all crimes are political in nature:⁹⁸

When the political state power expresses its ideology, or value system, through the regulations of the criminal code, it determines the 'norms of action' (*norma agendi*) and, at the same time, authorizes the executive organs of the state to apply penal sanctions in order to enforce the observance of these norms or, in other words, the acceptance of the value system.⁹⁹

In short, Snider argues, criminal codes that mandate and sanction the prosecution of prostitutes are merely a manifestation of lawmakers' moral codes.¹⁰⁰ Accordingly, no matter how marginal the crime, questioning the prohibition of the act is a manner of political protest.¹⁰¹ Snider offers sodomy as an example. According to Snider, the issue of sodomy itself is inherently political because a select group of individuals, homosexuals, are singled out most frequently under the laws forbidding it.¹⁰² Under this analysis, "the perpetrator of an act of sodomy could rightly be considered a political criminal."¹⁰³ The same is true for women targeted by prostitution laws.

Although the statutes prohibiting prostitution are gender-neutral, women are disparately impacted by the enforcement of such statutes.¹⁰⁴ Despite the fact that there are almost as many males who engage in prostitution as there are females,¹⁰⁵ women account for ninety percent of prostitution arrests.¹⁰⁶ Moreover, women cannot engage in prostitution at all without a customer, the "john." In some states, statutes have no provisions relating

⁹⁸ See Snider, *supra* note 84, at 499-507.

⁹⁹ *Id.* at 500 (quoting STEPHEN SCHAFFER, *THE POLITICAL CRIMINAL: THE PROBLEM OF MORALITY AND CRIME* 21 (1974)).

¹⁰⁰ See Snider, *supra* note 84, at 500-01.

¹⁰¹ *Id.*

¹⁰² *Id.* (quoting SCHAFFER, *supra* note 99, at 21).

¹⁰³ *Id.*

¹⁰⁴ See *infra* note 107.

¹⁰⁵ R. BARRI FLOWERS, *THE VICTIMIZATION AND EXPLOITATION OF WOMEN AND CHILDREN* 173 (1994).

¹⁰⁶ Deborah L Rhode, *Who is the Criminal?*, *NAT'L L.J.*, Sept. 25, 1995, at A22.

to the punishment of those who patronize prostitutes.¹⁰⁷ Arrest, prosecution and conviction are reserved only for prostitution, not solicitation.¹⁰⁸ Even the Model Penal Code ("MPC") exemplifies this inequality. The MPC would punish both female prostitutes and their customers, but the penalties for prostitutes are harsher.¹⁰⁹ According to a recent Boston study, 263 women were arraigned in Boston on prostitution charges in 1990.¹¹⁰ Notwithstanding the law's equal application to both prostitutes and their customers, incredibly, there was not a single customer arraigned in Boston courts that year.¹¹¹ Like the homosexuals in Snider's example, women are targeted for enforcement.

Alone, this singling out of women arguably politicizes prostitution. The characterization of prostitution by some women as freedom of choice, however, increases the politicization of prostitution. Despite the general agreement among feminists that prostitution should be decriminalized, the debate over legalization persists.¹¹² Speaking at a symposium entitled "Economic Justice for Sex Workers," activist Norma Jean Almodovar stated, "the current enforcement of prostitution laws goes well beyond any justifiable prevention of inappropriate public activity which would concern society."¹¹³ At issue for Almodovar is the codification of a set of values and preferences that obviate a woman's right to do with her body what she chooses.¹¹⁴ Among feminists, there is an emerging understanding that laws against prostitution prevent women from determining their own sexuality.¹¹⁵ The vigorous objection to the criminalization of prostitution

¹⁰⁷ Julie Lefler, Comment, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 17 (1999).

¹⁰⁸ *Id.*

¹⁰⁹ See MODEL PENAL CODE § 251.2 (1995).

¹¹⁰ Minouche Kandel, *Whores in Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990*, 4 YALE J.L. & FEMINISM 329, 333 (1992).

¹¹¹ *Id.*

¹¹² See Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 451 (1998). The American Civil Liberties Union (ACLU) and the National Organization for Women (NOW) have both formally endorsed decriminalization. See *id.*

¹¹³ See Norma Jean Almodovar, *For Their Own Good: The Role of the Prostitution Laws as Enforced by Cops, Politicians and Judges*, 10 HASTINGS WOMEN'S L.J. 119, 128 (1999).

¹¹⁴ See *id.*

¹¹⁵ Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 184 (Alexander and Frederique Delacoste eds., 1987).

only strengthens the characterization of female prostitution offenders as political criminals.¹¹⁶ As political criminals who are barred from entering anti-prostitution zones, offenders are being denied their constitutional right to associate, to protest the criminalization of the exchange of money for sexual acts they choose to perform.¹¹⁷

Besides implicating the constitutional right of freedom of association, banishment fails to posit a realistic solution to the problems of crime. Relocation, rather than rehabilitation, of the offender is realized. The dumping of one community's criminals onto another is at the heart of state constitutional provisions forbidding the banishment of offenders.¹¹⁸ Such a policy merely removes the criminal element and the attendant source of crime from one community and forces it upon another.¹¹⁹ An Alaska case striking down a condition of probation requiring a drug dealer to stay out of a specified 45-block area highlights the problem.¹²⁰ The Alaska Court of Appeals took judicial notice that drug sales could be made anywhere in the city.¹²¹ Consequently, the court reasoned, it was irrelevant that the prescribed area was characterized by significant drug activity.

Like the sale of narcotics, the selling of sex is not location-specific. Florida cities have mapped out areas that are heavily concentrated with streetwalkers. Barring a prostitute from such a designated area, however, does nothing to further her reha-

¹¹⁶ Prostitutes voluntarily engaging in the exchange of money for sex are political objectors to the codification of moral opposition to such an exchange.

¹¹⁷ In no way does this argument seek to gloss over the uglier aspects of prostitution or to ignore the fact that there are women forced into the trade, and women forced by pimps or simple economics to remain in the trade. The criminalization of pimping and pandering in this country, however, makes no distinction between a coercive relationship and one that is voluntary. See Alexander, *supra* note 115, at 196-97. Nor does this argument assert that every woman who has prostituted herself has done so with a political purpose. Rather, it is an acknowledgement of the desire on the part of some prostitutes to exercise the right to choose for themselves what they will do with their bodies.

¹¹⁸ See *People v. Baum*, 251 Mich. 187, 188 (Mich. 1930) (stating that banishment would allow one state to dump its criminals on another state); COHEN, *supra* note 19, § 10:10, at 10-18 (dumping may tend to cause tension among varying jurisdictions and possibly invite retaliation).

¹¹⁹ See Snider, *supra* note 84, at 458.

¹²⁰ See *Jones v. State*, 727 P.2d 6 (Alaska App. 1986).

¹²¹ *Id.*

bilitation and certainly does not prevent her from continuing to accept solicitations. One Sarasota prostitute explained to a reporter that being barred from a zone might hurt business temporarily, but she knows she can find customers along North Washington Boulevard, an area that was not mapped for exclusion.¹²² Even Sarasota Police Sgt. J.W. Carr acknowledged that “[c]rime is nothing but displacement.”¹²³ The displacement and relocation of prostitution offenders resulting from banishment belies the rehabilitative goal of probation and thereby subverts the purposes of criminal sentencing to which judges must adhere.

B. “REASONABLE RELATION”

Probation conditions limiting the geographic mobility of convicted prostitutes are not reasonably related to the purposes of probation statutes. The Federal Sentencing Guidelines mandate that a probation condition must be reasonably related to the purposes of sentencing. Furthermore, such a condition may “only involve such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing.”¹²⁴ Federal courts must adhere to this standard.¹²⁵ Most state courts abide, depending upon the avowed “purposes of sentencing” designated by a state.¹²⁶ Whether one looks to the legislature or judiciary, it is evident that rehabilitation must be the primary goal of probation.¹²⁷

Present state and federal statutes stress that non-rehabilitative conditions of probation are beyond the scope of judicial authority.¹²⁸ Florida courts are among those directed by

¹²² See Spalding, *supra* note 6 (“They’ll have certain zones. I[’ll] have to work beyond that zone.”).

¹²³ *Id.*

¹²⁴ 18 U.S.C.A. app. 5B1.3(b) (2001).

¹²⁵ See *United States v. Turner*, 44 F.3d 900, 903 (10th Cir. 1995); *United States v. Bortels*, 962 F.2d 558, 560 (6th Cir. 1992); *United States v. Showalter*, 933 F.2d 573, 575-76 (7th Cir. 1991); *Fiore v. United States*, 696 F.2d 205, 208 (2d Cir. 1982); *Owens v. Kelly*, 681 F.2d 1362, 1366 (11th Cir. 1982); *United States v. Tonroy*, 605 F.2d 144, 150 (5th Cir. 1979); *Malone v. United States*, 502 F.2d 554, 556-57 (9th Cir. 1974).

¹²⁶ *State v. Pieger*, 692 A.2d 1273, 1277 (Conn. 1997); *People v. Pickens*, 542 N.E.2d 1253, 1256-57 (Ill. App. Ct. 1989).

¹²⁷ See *infra* notes 129-131.

¹²⁸ See *State v. Brown*, 326 S.E.2d 410, 411 (S.C. 1985) (quoting 24 C.J.S. *Criminal Law* § 1618 (8) (1961) (judges “are allowed a wide, but not unlimited, discretion in

both state statutory and case law to require that probation conditions serve the purpose of offender rehabilitation.¹²⁹ In addition, courts have repeatedly emphasized that while sentencing judges have discretion to impose conditions of probation, their discretion is not without limit. Whether the condition is reasonable and appropriate is determined by how well it rehabilitates an offender while protecting the state from dangerous offenders.¹³⁰

In *United States v. Consuleo-Gonzalez*, the Ninth Circuit articulated a three-part test to determine whether a condition implicating a constitutional right bears a "reasonable relationship" to the purposes of the federal probation statute.¹³¹ First, the condition must serve the purposes of probation. Second, the court must consider the extent to which probationers should enjoy full constitutional rights. Third, the court must take into account the legitimate needs of law enforcement.¹³² More recently, in *United States v. Terrigno*, the Ninth Circuit opined that the "twin goals of probation" are "rehabilitation and protection of the public."¹³³ The Eighth Circuit subsequently agreed with the Ninth Circuit. In *United States v. Schoenrock*, Eighth Circuit declared that, even where preferred rights are affected, the test for validity of probation conditions is "whether the conditions are primarily designed to meet the ends of rehabilitation and protection of the public."¹³⁴

The Alaska Appellate Court also emphasized the rehabilitative goal of probation in striking down a condition of probation requiring the defendant to obtain written court permission be-

imposing conditions of suspension of sentence or probation and they cannot impose conditions that are illegal and void as against public policy"); *People v. Keller*, 76 Cal. App. 3d 827 (Cal. Ct. App. 1978) (court's discretion to impose conditions of probation as granted by statute is circumscribed not only by terms of statute, but by constitutional safeguards); *supra* notes 34 and 35.

¹²⁹ See FLA. STAT. ch. 921.187(1) (1997); *Grubbs v. State*, 373 So. 2d 905, 909 (Fla. 1979) (a condition of probation "must be reasonably related to the offense committed" and provide a standard of conduct essential to the rehabilitation of the offender).

¹³⁰ See *State v. Beiersdorf*, 561 N.W.2d 749 (Wis. Ct. App. 1997); *State v. Berrocales*, 681 A.2d 95 (N.H. 1996).

¹³¹ *United States v. Consuleo-Gonzalez*, 521 F.2d 259, 262 (9th Cir. 1975).

¹³² See *id.*

¹³³ 838 F.2d 371, 374 (9th Cir. 1988).

¹³⁴ *United States v. Schoenrock*, 868 F.2d 289, 291 (8th Cir. 1989) (quoting *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988)).

fore entering the village where the offense occurred.¹³⁵ The court reasoned that such a condition was unnecessarily severe and restrictive because it bore no reasonable relationship to the offender's rehabilitation.¹³⁶ More recently, the Supreme Court of Arkansas confirmed that the underlying purpose of probation was the rehabilitation of the offender.¹³⁷ Invalidating a condition of probation banishing the defendant from the state, the court found the condition "repugnant to the underlying policy of the probation law, which is to rehabilitate offenders without compromising public safety."¹³⁸

Thus, both history and contemporary case law establishes rehabilitation as the purpose of probation. Yet, those who seek to defend the validity of anti-prostitution zones fail to invoke rehabilitation as a legitimate purpose of such zones. Prostitutes allegedly threaten the "family-friendly" environment in Miami.¹³⁹ South Beach designated a hooker-free zone in an effort to keep prostitutes away from "the district known for its ritzy hotels and nightclubs."¹⁴⁰ Sarasota business owners lament that it is "a horrible bother [to have] prostitutes . . . on my corner."¹⁴¹ In Dania Beach, officials claim prostitutes' presence "discourages businesses from locating on the Federal Highway."¹⁴² One citizen declared, "I don't care if you send them to another state—as long as we don't have them." Miami residents say anti-prostitution zones are "good if it's the only way we can get rid of [prostitutes]."¹⁴³ The "Not In My Backyard" attitude of Floridians ignores the rehabilitative ideal conditions of probation must embody. Both Florida citizens and courts brush aside concern for offenders' individual constitutional rights.

As one court has noted:

[T]he value to the public [of ridding itself of offenders] does not manifestly outweigh any impairment of [offender's] constitutional rights of freedom of travel, speech, [and] association Simply causing [of-

¹³⁵ See *Edison v. State*, 709 P.2d 510 (1985).

¹³⁶ See *id.* at 512.

¹³⁷ See *Reeves v. State of Arkansas*, 5 S.W.3d 41 (Ark. 1999).

¹³⁸ *Id.* at 45 (quoting *State v. Young*, 154 N.W.2d 699, 702 (Minn. 1967)).

¹³⁹ See *Meek*, *supra* note 7.

¹⁴⁰ *Id.*

¹⁴¹ See *Spalding*, *supra* note 6.

¹⁴² See *Monnay*, *supra* note 1.

¹⁴³ See *Meek*, *supra* note 7.

fender] to move from one geographical location to another is of minimal value to the public when compared with the infringement of [offender's] basic constitutional rights.¹⁴⁴

While the public may champion the imposition of probation conditions requiring prostitution offenders to stay away from their neighborhoods, or away from "ritzy hotels," this requirement does nothing to further the rehabilitation of the offender herself.

As discussed above, keeping prostitutes out of a specified area achieves the goal of relocation, not rehabilitation. Women carry with them wherever they go the means to commit the crime of prostitution. It is paternalistic to suggest that the admonition of a judge to "Stay away!" will foster the rehabilitation of women engaged in the sale of sex. A discussion of the myriad paths that lead women to sell their bodies is beyond the scope of this article. It is well established, however, that for some, it is a path characterized by oppression and abuse.¹⁴⁵ For others, it is a conscious choice, believed by some to be an act of empowerment.¹⁴⁶ In either case, the effectiveness of rehabilitation may be questionable. But uncertainty regarding the proper means of rehabilitation does not relieve courts from making an effort. Rehabilitation reigns as the longstanding goal of probation, and anti-prostitution zones fail to promote that goal.

III. CHALLENGING SARASOTA'S PROSTITUTION-EXCLUSION ZONE: DIETZ V. STATE OF FLORIDA

In support of the proposition that courts have revealed a disconcerting penchant to redefine visibly punitive probation conditions as rehabilitative, simply because their state statute allows the imposition of rehabilitative conditions but does not allow punitive conditions,¹⁴⁷ one student Commentator offers the Florida case of *Villery v. Florida Parole and Probation Commission*.¹⁴⁸ In *Villery*, the Florida Supreme Court declared that a probation condition served the interests of both retribution and rehabili-

¹⁴⁴ *People v. Beach*, 147 Cal. App. 3d 612 (Cal. Ct. App. 1983).

¹⁴⁵ See generally CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 5 (1987) (arguing that economic reality, physical force, and sexual abuse leads women into prostitution).

¹⁴⁶ See Almodovar, *supra* note 113.

¹⁴⁷ See Brilliant, *supra* note 65, at 1372.

¹⁴⁸ *Villery v. Florida Parole and Probation Comm'n*, 396 So. 2d 1107 (Fla. 1980).

tation.¹⁴⁹ Characterization of a punitive condition as rehabilitative in order to stay within the contours of the probation statute, however, does not make it so.

Last year, another Florida court made a similar attempt to redefine a punitive probation condition as rehabilitative. In 2000, the Florida Court of Appeals affirmed prostitute Lisa Ann Dietz's banishment from Sarasota's "Prostitution Exclusion Zone."¹⁵⁰ On appeal, Dietz raised several points. First, she challenged the reasonableness of the probation condition as it related to the rehabilitative purpose of probation. Second, she maintained that the conditions violated her individual constitutional rights.

Writing for Florida's Twelfth Judicial Circuit, Judge Dakan dismissed Dietz's first argument. While he conceded that Dietz was fundamentally correct in her assertions regarding the rehabilitative goal of probation,¹⁵¹ he ruled that rehabilitation and punishment are not mutually exclusive ideas.¹⁵² It was hard to imagine, Judge Dakan contended, a condition of probation devoid of *some* punitive aspect.¹⁵³

Purporting to employ a reasonable relation test, Judge Dakan concluded that the 'Prostitution Exclusion Zone' condition was reasonably related to both rehabilitation and the deterrence of future criminal conduct.¹⁵⁴ Judge Dakan did nothing more than assert his conclusion without providing any meaningful analysis. He went on to write that the record supported the existence of such a rational relationship between the exclusion zone and the deterrence of future criminality.¹⁵⁵ Again, however, he failed to reveal *how* the record supported the inference of such a reasonable relationship. Judge Dakan blatantly ignored his own presumption—that probation's fundamental purpose is to rehabilitate offenders. In doing so, he nullified the usefulness of the reasonable relationship test, as well. The test itself concerns the relationship between the means and the

¹⁴⁹ *See id.* at 1110.

¹⁵⁰ Dietz v. State of Florida, No. 99-0566-CA-01, slip op. 1, 3 (Fla. L. Weekly Supp. Dec. 3, 1999).

¹⁵¹ *Id.* at slip op. 2.

¹⁵² *Id.* at slip op. 2 (citing Lindsay v. State, 606 So. 2d 652, 656 (Fla. 4th DCA 1992)).

¹⁵³ *Id.* at slip op. 2.

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

end. Judge Dakan himself conceded that where probation is concerned, rehabilitation is the end. At issue in Lisa Ann Dietz's case were the means – Prostitution Exclusion Zones. Despite concluding that the "Prostitution Exclusion Zone" was reasonably related to *both* deterrence *and* rehabilitation,¹⁵⁶ Judge Dakan utterly failed to demonstrate the existence of that relationship.

Judge Dakan next responded to Dietz's constitutional challenges. In holding that the exclusion was not overly broad to accomplish the goal of rehabilitation,¹⁵⁷ the court cited a single case, *Martinez v. State*.¹⁵⁸ The court's reliance upon that case is misplaced. The *Martinez* court found invalid a probationary condition that required an offender to remain outside the United States for the duration of his probation.¹⁵⁹ As discussed in Part II of this Comment, such a form of banishment has been uniformly struck down as impermissible.¹⁶⁰ Clearly, a condition barring Dietz from the "Prostitution Exclusion Zone" does not overreach to the same extent as one compelling emigration. In addition, no justification was provided in support of the underlying assumption that the condition imposed upon Dietz was narrowly tailored.

Finally, Judge Dakan analogized the case before him to *United States v. Cothran*.¹⁶¹ He declared the two cases "remarkably similar,"¹⁶² despite the fact that *Cothran* involved a drug dealer and *Dietz* a prostitute. In *Cothran*, the Eleventh Circuit acknowledged that conditions of probation must fulfill the goal of rehabilitation¹⁶³ by the measure of a reasonable relationship test.¹⁶⁴ Utilizing that test, the Eleventh Circuit affirmed the validity of a

¹⁵⁶ *See id.*

¹⁵⁷ *See id.* Apparently, rehabilitation was restored its "goal" status in the second half of the opinion; however, there is still no mention of how anti-prostitution zones actually foster such a goal.

¹⁵⁸ *See Martinez v. State*, 627 So. 2d 542 (Fla. 2d DCA 1993).

¹⁵⁹ *See id.*

¹⁶⁰ *See supra* note 84.

¹⁶¹ 855 F.2d 749 (11th Cir. 1988).

¹⁶² *Dietz v. State of Florida*, No. 99-0566-CA-01, slip op. 1, 2 (Fla. L. Weekly Supp. Dec. 3, 1999).

¹⁶³ *Cothran*, 855 F.2d at 751; *see also* *Owens v. Kelley*, 681 F.2d 1362, 1367 (11th Cir. 1982) ("[L]imitations are permitted because probationers have been convicted of crimes and have thereby given the state a compelling interest in limiting their liberty in order to effectuate their rehabilitation and to protect society.")

¹⁶⁴ *Cothran*, 855 F.2d at 751 (citing 18 U.S.C. § 3651 (2001)).

probation requirement barring Mr. Cothran from Fulton County, Georgia, for the duration of his probation.¹⁶⁵ Cothran's temporary exclusion from Fulton County was reasonably related to the purpose of probation, the court reasoned, because the exclusion would be combined with his mandatory residence at a distant community treatment center. The court argued that coupling such conditions afforded the defendant a "unique opportunity to start anew and break free" of the environment and influences that first led him to pander drugs.¹⁶⁶

In Lisa Ann Dietz's case, there was no mandatory residence at a treatment center where, like Mr. Cothran, she would undergo actual physical rehabilitation. In Dietz's case, there was no "unique opportunity to start anew and break free of the environment and the familiar influences" which encouraged her to prostitute in the first place.¹⁶⁷ Often, it is a pimp, or a desperate economic situation,¹⁶⁸ that leads women to prostitution—banishing them does nothing to remedy those circumstances. Indeed, Lisa Ann Dietz actually told the court that she uses her body for the sole purpose of supporting her crack cocaine habit,¹⁶⁹ a fact disregarded by Judge Dakan. Instead, he upheld a condition barring Lisa Ann Dietz from an area of the city where myriad social services and rehabilitative facilities are located. In affirming the condition of probation barring Dietz from the "Prostitution Exclusion Zone," the court failed to amply address Dietz's challenges, failed to fulfill the rehabilitative ideal embodied by probation and failed Ms. Dietz herself.

IV. REHABILITATION DEMANDS A REVISION OF VALUES AND THE REALLOCATION OF RESOURCES

Both historical inquiry and statutory language reveal that the purpose of probation is to rehabilitate the offender.¹⁷⁰ Likewise, sound public policy demands that conditions of probation serve a rehabilitative purpose. Prostitution Exclusion Zones like those implemented locally in Florida demonstrate a

¹⁶⁵ See *id.* at 752.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See FLOWERS, *supra* note 105.

¹⁶⁹ See Jose Luis Jimenez, *Woman Challenges Prostitution Zone*, SARASOTA HERALD-TRIBUNE, Dec. 16, 1998, at 1B.

¹⁷⁰ See COHEN, *supra* note 19, § 7:3, at 7-6; *supra* note 129.

complete lack of commitment to the rehabilitative ideal. Instead, they expose allegiance to a system that criminalizes the exchange of sex for money. That dedication necessarily promotes a retributive justice over a rehabilitative ideal in dealing with prostitutes.

Florida is not alone in its commitment, either. As it stands, the United States continues to devote substantial public resources to the application of criminal sanctions to those who offer sex for money.¹⁷¹ State governments spend millions of dollars and thousands of hours attempting to curb prostitution.¹⁷² One study estimates that in 1985, America's largest cities each spent approximately twelve million dollars in their attempts to enforce prostitution laws; this was considered to be an underestimate.¹⁷³ Half of these cities spent more on enforcement than they did on education or public welfare, and five spent more than on hospitals and health care combined.¹⁷⁴ Along with the countless hours and dollars spent, the creation and implementation of anti-prostitution zones reveals a society dedicated to ridding itself of, or at least displacing, prostitutes. One Dania beach official even describes the use of the exclusion zones as "another weapon in the cities' anti-prostitution arsenal."¹⁷⁵

Feminist legal scholars have taken the lead in challenging the need for an "anti-prostitution arsenal" and in examining the myriad attitudes Americans have toward prostitution. Prostitution is both a difficult and divisive issue for feminists.¹⁷⁶ Some champion legalization and the accompanying regulation,¹⁷⁷ while others vehemently oppose a step that serves to lend support to the commercial sex trade.¹⁷⁸ Whether in favor of legalization or not, however, the vast majority of feminist scholars do

¹⁷¹ See Julie Pearl, *The Highest Paying Customers: America's Cities and the Cost of Prostitution Control*, 38 HASTINGS L.J. 769, 769-70 (1987).

¹⁷² See Rhode, *supra* note 106, at A22.

¹⁷³ *Street Cleaning: AIDS has Strengthened the Case for Legalised Brothels*, ECONOMIST, Sept. 7, 1991, at 28-29.

¹⁷⁴ INE VANWESENBECK, PROSTITUTES' WELL-BEING AND RISK 2, 3 (1994).

¹⁷⁵ See Monnay, *supra* note 1.

¹⁷⁶ See Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 534 (2000).

¹⁷⁷ See generally Almodovar, *supra* note 113.

¹⁷⁸ See generally KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 107 (1979) (arguing prostitution promotes abuse and must remain illegal).

agree that the criminalization of prostitution serves no legitimate purpose.¹⁷⁹ Despite the consensus among feminist legal scholars, communities like those in Florida are determined to employ liberty-restricting measures to combat prostitution rather than invest in rehabilitation.¹⁸⁰ If we are to ignore the feminist voice and remain a society committed to criminalization, then we also must remain committed to offender rehabilitation. The extraordinary amount of resources communities pour into superior law enforcement not only subverts the feminist goal of decriminalization but the overarching rehabilitative goal of probation, as well.

V. CONCLUSION

Abolishing probation conditions that restrict a convicted prostitute's geographic mobility is warranted. Such conditions ignore the rehabilitative ideal historically embodied by probation.¹⁸¹ Likewise, they disregard the multitude of statutory and case law directives mandating recognition of rehabilitation as the primary purpose of probation.¹⁸² The zones violate individual constitutional rights by preventing convicted offenders' freedom of association.¹⁸³ Moreover, anti-prostitution zones are not reasonably related to the purpose of probation.¹⁸⁴ As implemented in Florida, conditions of probation barring offenders from exclusion zones facilitate relocation, not rehabilitation.

Judge Dakan's inadequate opinion affirming the imposition of an anti-prostitution zone in Sarasota reveals a failure to consider the aforementioned issues.¹⁸⁵ Despite acknowledging that the fundamental purpose of probation is rehabilitation, Judge Dakan embraced a punitive condition of probation especially inappropriate for an offender convicted of prostitution.¹⁸⁵ The implementation of anti-prostitution zones and the Florida court's decision to uphold such zones in the face of constitu-

¹⁷⁹ See DeCou, *supra* note 112.

¹⁸⁰ See Spalding, *supra* note 6.

¹⁸¹ See COHEN, *supra* note 19, § 7:3, at 7-6.

¹⁸² See *supra* notes 68, 69.

¹⁸³ See *supra* notes 98-100.

¹⁸⁴ See *supra* notes 124-26, 129.

¹⁸⁵ Dietz v. State of Florida, No. 99-0566-CA-01, slip op. 1, 2 (Fla. L. Weekly Supp. Dec. 3, 1999).

¹⁸⁵ *Id.*

tional challenges reveals a society committed not to rehabilitation, but to punishment.¹⁸⁷ The incredible amount of resources targeted at enforcing prostitution laws must be reallocated to rehabilitate offenders. Since its inception, probation has embodied the rehabilitative ideal.¹⁸⁸ To serve that ideal and to protect offenders' individual constitutional rights, anti-prostitution zones must be abolished.

¹⁸⁷ See *supra* notes 171-75.

¹⁸⁸ See *supra* note 181.