The Use of Pre-Existing Exclusionary Zones as Probationary Conditions for Prostitution Offenses: A Call for the Sincere Application of Heightened Scrutiny

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I. INTRODUCTION

In 1832, Chief Justice Marshall, in *Worcester v. Georgia*,[1] unsuccessfully attempted to prevent President Andrew Jackson's removal of Georgia's Native American population in what has subsequently come to be known as the Trail of Tears.[2] Several years before this famously unenforced decision, Marshall wrote a letter to Justice Story:

> It was not until after the adoption of our present government that respect for our own safety permitted us to give full indulgence to those principles of humanity and justice which ought always to govern our conduct towards the aborigines when this course can be pursued without exposing ourselves to the most afflicting calamities. This time however is unquestionably arrived; and every oppression now exercised on a helpless people depending on our magnanimity and justice for the preservation of their existence, impresses a deep stain on the American character. I often think with indignation of our disreputable conduct—as I think it—in the affair of the Creeks of Georgia.[3]

A stain it was, but the Trail of Tears is not the lone blemish of banishment soiling the American character.

In the United States, we banish. For example, in 1637, the General Court of Massachusetts, in the Massachusetts Bay Colony, banished Anne Hutchinson after she propounded her unorthodox views on

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1. Worcester v. Georgia, 31 U.S. 515 (1832).

2. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 113–14 (1984); *see also* Bethany R. Berger, *"Power Over This Unfortunate Race:" Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 1983 (2004).

3. BOBBITT, *supra* note 2, at 118.

personal justification.[4] In 1830, President Andrew Jackson's approval of the Indian Removal Act commenced the Trail of Tears and the brutal banishment of Native Americans living east of the Mississippi that Marshall and the Supreme Court could not stop.[5] Similarly, in 1882, Congress enacted the Chinese Exclusion Act, denying citizenship to all Chinese immigrants.[6] Another example of banishment occurred on February 19, 1942, when President Roosevelt issued Executive Order 9066, empowering General DeWitt to banish people of Japanese descent from the West Coast.[7] These incidents are among the most tragic in a history studded with vagrancy laws, loitering laws, and the unlegislated efforts of countless municipal police officers who, with varying levels of coercion, moved the "unclean" from within their town lines.[8]

Inevitably, decades later, we are contrite.[9] Yet today the tradition of community cleansing through exclusion thrives in Washington State in

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4. Jeffrey A. Brauch, *John Winthrop: Lawyer as Model of Christian Charity*, 11 REGENT U. L. REV. 343, 348–49 (1999).

5. *See* Josephine Johnston, *Resisting a Genetic Identity: The Black Seminoles and Genetic Tests of Ancestry*, 31 J. L. MED. & ETHICS 262, 264 (2003).

6. Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"* 7 J. GENDER RACE & JUST. No. 2, 315, 318 (2003).

7. Eric L. Muller, *Constitutional Conscience*, 83 B.U.L. Rev. 1017, 1021 (2003).

8. For an excellent discussion on the history of vagrancy laws and their function, see Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

9. In 2000, Kevin Gover, Assistant Secretary of the Indian Affairs Department of the Interior, apologizing on behalf of the Bureau of Indian Affairs for its role in the Trail of Tears, promised:

> Never again will this agency stand silent when hate and violence are committed against Indians. Never again will we allow policy to proceed from the assumption that Indians possess less human genius than the other races. Never again will we be complicit in the theft of Indian property. Never again will we appoint false leaders who serve purposes other than those of the tribes. Never again will we allow unflattering and stereotypical images of Indian people to deface the halls of government or lead the American people to shallow and ignorant beliefs about Indians. Never again will we attack your religions, your languages, your rituals, or any of your tribal ways. Never again will we seize your children, nor teach them to be ashamed of who they are. Never again.

Remarks of Kevin Grover, Ass't Sec'y-Indian Affairs Dep't of the Interior at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs, Sept. 8, 2000, *available at* http://www.tahtonka.com/apology.html.

In 1988, President George H. W. Bush wrote a letter of apology to those of Japanese descent who had been forced into internment camps, stating:

> A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our nation's resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II.
>
> In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideas of freedom, equality, and justice. You and your family have our best wishes for the future.

the form of municipal probationary "Stay Out of Areas of Prostitution" ("SOAP") orders. As will be described below, SOAP orders take on several different forms in many of the towns and cities of northwestern Washington, but in each locality where the orders are used, they function in much the same way: An individual arrested for a prostitution-related offense is issued a SOAP order as a probationary condition; the order, typically in force for two years, requires the individual to remain outside those areas of the city deemed to be areas of prostitution, and mere presence in such an area will be considered a probationary violation.[10]

It may seem that SOAP orders are trivial when compared to the types of banishment discussed above, but alarms should go off whenever we begin blithely attaching metaphors of cleansing to human beings and then wash *people* from our communities. Unfortunately, in Washington, this community cleansing project has triggered no widespread alarm. Prostitution has always occupied a contested and ambiguous space within our culture. To truly begin to understand the socio-cultural mechanisms and forces that have allowed individuals living in prostitution to be reduced to the status of pollutants would require a sociological analysis beyond the scope of this Comment. Instead, this Comment focuses only on the legal mechanism of probation that is the medium of this cleansing project.

SOAP orders represent a breakdown in the probationary system. Originally, municipal trial courts were given extraordinary discretion in their construction of probationary conditions on the premise that rehabilitation, the original focus of probation, required individually tailored orders.[11] SOAP orders as contemplated were to be built upon the sentencing court's factual knowledge about the specific defendant appearing before the court.[12] SOAP orders as they have come to be are the antithesis of this dynamic, representing mechanized production-line justice that no longer embraces the goal of individual rehabilitation, and is instead geared toward a project of social engineering that is largely without check. Although this discretion was initially justified by the trial court's particularized knowledge of individual defendants, the deference it has come to command on the appellate level continues despite the total erosion of its theoretical base in the context of SOAP orders.

President George H. W. Bush Apology *available at* http://www.scu.edu/SCU/Programs/Diversity/exhibit2.html (last visited July 10, 2004).

10. DEBRA BOYER ET AL., NORTHWEST RESOURCE ASSOCIATES, SURVIVAL SEX IN KING COUNTY: HELPING WOMEN OUT 5 (1993).

11. For a discussion of the discretion exercised by municipal trial courts in the imposition of probationary conditions, see Part III.A *infra*.

12. *Id.*

In Washington, precedent supports the application of a heightened level of appellate scrutiny to probationary conditions that infringe on fundamental liberties, but this scrutiny is often inconsistently applied and frequently heightened in name alone.[13] This Comment argues that, because the justification for appellate court deference toward the trial courts' creation of probationary conditions has disappeared in the context of SOAP orders, appellate courts faced with such orders should more rigorously examine the trial court decisions. This heightened scrutiny is justified because SOAP orders infringe on the state-recognized right of intrastate travel. Further, based on an examination of the research on the factors that lead to prostitution and keep individuals in the prostitution industry, a more rigorous review will make it evident that SOAP orders rarely accomplish the historic or currently articulated goals of probation: rehabilitation, prevention of future offense, or community safety.

Part II provides background information on the use of SOAP orders in Western Washington, state and federal court decisions calling for heightened scrutiny of probationary orders that infringe on fundamental rights, challenges to SOAP-related probationary orders in other jurisdictions, and constitutional challenges to probationary orders in Washington. Part III discusses the historical roots of probation and argues, for the above reasons, that appellate deference to SOAP orders cannot be justified on these traditional grounds. Part III also presents information on research into the factors that lead individuals into prostitution and argues that due to these factors, in the majority of instances, SOAP orders are incapable of accomplishing the goals of probation.

II. BACKGROUND ON SOAP ORDERS AND APPELLATE REVIEW OF PROBATIONARY CONDITIONS

Before exploring the failure of the probationary system represented by SOAP orders and the general inability of such orders to accomplish the goals of probation, it is necessary to understand both the application of SOAP orders in Washington and the possible avenues of constitutional challenge to probationary conditions that infringe on fundamental rights. Section A outlines the use of SOAP orders in several representative cities, relying principally on Seattle's use of the orders as a model. Section B describes the precedent for heightened review of certain probationary orders and examines the inconsistent nature and rigor of this scrutiny. Section C consists of two parts. First, although SOAP orders have not been challenged at the appellate level in Washington,

13. See Section II.B and cases cited therein.

subpart one of section C examines constitutionally based challenges to various ordinances and probationary conditions that resemble SOAP orders in other states and in federal court. Subpart two of section C examines constitutionally based appellate challenges in Washington courts of probationary conditions that employ pre-existing exclusionary zones that are similar to those used in SOAP orders.

A. SOAP Orders in Washington State

In Washington, as in most states, prostitution is prohibited as a misdemeanor both by state statute[14] and municipal ordinances.[15] The majority of prosecutions for prostitution take place in municipal courts.[16] In Seattle and in several surrounding municipalities, persons who plead guilty to or are convicted for a prostitution violation may receive, as a condition of probation,[17] a SOAP order.[18] SOAP orders require individuals to remain outside predetermined areas of the city upon penalty of arrest. Some municipalities establish the terms of SOAP orders and their areas by ordinance.[19] In other municipalities, such as Seattle, SOAP areas are defined by the city attorney's office and imposed by the municipal court. Additionally, in some cities,[20] the order prohibits the individual's presence twenty-four hours a day for the probationary period, while in other cities, the order may cover only certain times of the day.[21] The size of the coverage area varies by city. As of 2003, Seattle contained five SOAP areas covering 3.2 square miles total, including one encompassing virtually the entire downtown business

14. WASH. REV. CODE § 9A.88.030(3) (2002).

15. *See, e.g.*, SEATTLE, WASH., MUN. CODE § 12A.10.020 (1985).

16. *See, e.g.*, Superior Court 2003 Annual Caseload Report 22, *available at* http://www.courts.wa.gov/caseload/ (last visited July 19, 2004) (indicating that in 2003, Superior Courts in Washington, the courts of general jurisdiction, handled 259 misdemeanor cases); *see also* Courts of Limited Jurisdiction 2003 Annual Caseload Report 24, *available at* http://www.courts.wa.gov/caseload/ (last visited July 19, 2004) (indicating that the District Courts, the courts of limited jurisdiction, handled 50,202 non-traffic misdemeanors).

17. In Washington, municipal courts are empowered to defer or suspend the sentences of those who violate municipal criminal ordinances under either WASH. REV. CODE § 35.20.255 (2002) (for cities over 400,000) or WASH. REV. CODE § 3.50.330 (2002) (all other cities).

18. BOYER ET AL., *supra* note 10.

19. *See, e.g.*, EVERETT, WASH., MUN. CODE §10.24.210 (2004); BREMERTON, WASH., MUN. CODE § 9.24.072 (1997); CITY OF SEATAC, WASH., MUN. CODE § 8.05.650 (2004).

20. *See id.* §§ 10.24.210; 9.24.072; 8.05.650.

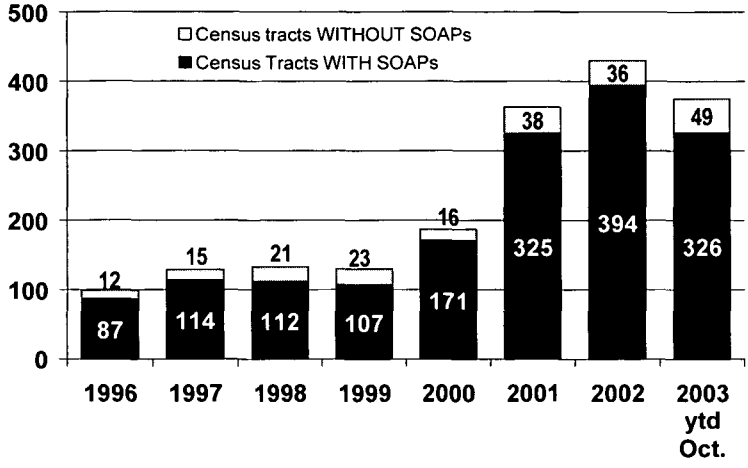
21. Because Seattle's SOAP orders are not created by ordinance, it is possible that individual orders may vary, but most Seattle SOAP orders exclude individuals on either a twenty-four-hour basis or during the nineteen hours between 11 a.m. and 6 a.m. BOYER ET AL., *supra* note 10, at 5. Additionally, given that the City of Seattle Map Department has prepared a GIS map that designates specific SOAP areas, it appears likely that the orders seldom vary in terms of areas covered.

district and City Hall.[22] SOAP orders are generally in force for two years.[23] The following two exhibits show SOAP areas and available crime statistics within the City of Seattle.[24]

Exhibit 1

Prostitution Charges Rise in Seattle;
More Occur in Census Tracts Containing SOAP Areas

Criminal Vice and Prostitution Offenses 1996-2003

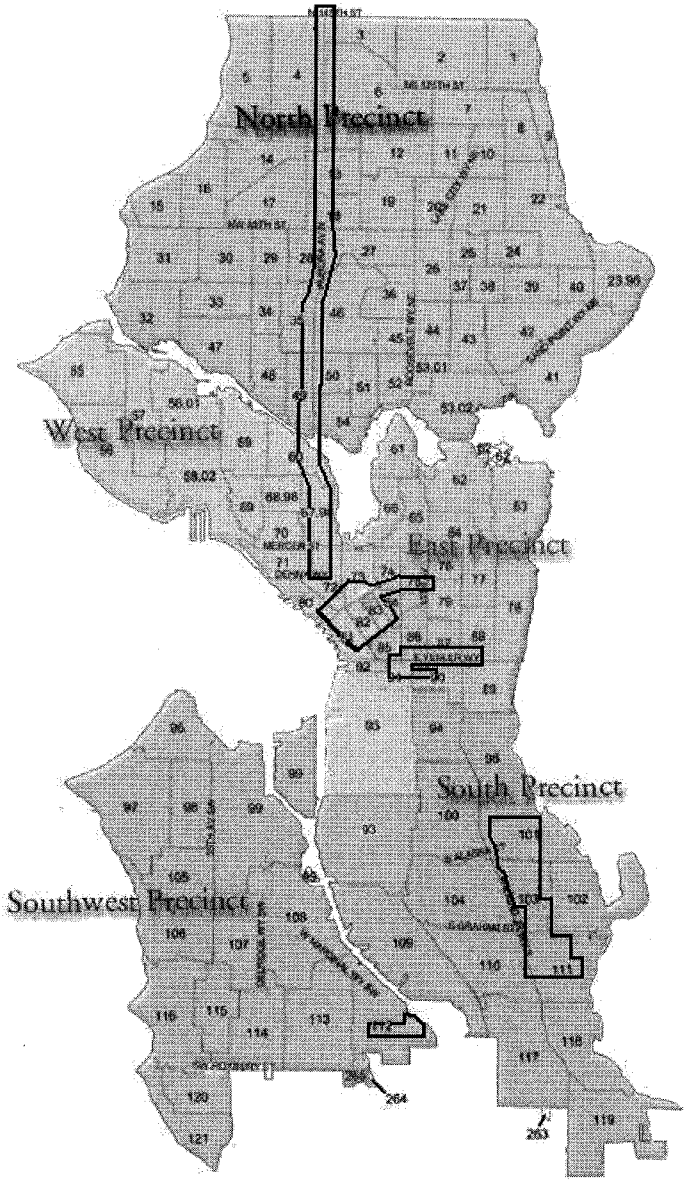


22. Seattle SOAP area information based on a 2003 GIS map prepared by the City of Seattle, on file with the author. The SOAP zones include roughly 1.2 square miles for a two-block wide strip of Aurora Avenue from Denny Way to N.E. 145th Street; 0.4 square miles in the downtown neighborhood for an area from Virginia Street to Columbia Street and from Ninth Avenue to First Avenue; 0.1 square miles in the Pike/Pine corridor from Ninth to Tenth Avenues; 0.3 square miles in the International District for an area from Sixth Avenue to to 21st Avenue S. and from S. Weller Street to E. Fir Street; 1.2 square miles in the Rainer Valley from S. Fontanelle Street to Charlestown Street; and 0.1 square miles in South Seattle for an area from Dallas Avenue S. to S. Donovan Street and from 14th Avenue S. to Sixth Avenue S. *See* Exhibit 2, *infra*.

23. WASH. REV. CODE § 35.20.255 (2001) and WASH. REV. CODE § 3.50.330 (2001) provide for a two-year maximum on probationary conditions for prostitution.

24. City of Seattle Police Department, Crime Data, *at* http://www.cityofseattle.net/police/crime/default.htm (last visited July 10, 2004) (Exhibit 1). Map from: City of Seattle Police Department (1990), Census Tracts by Precinct: *at* http://www.cityofseattle.net/Police/Maps/census.htm (last visited July 10, 2004) (Exhibit 2). The SOAP areas on the map are approximated based on GIS maps produced by the City of Seattle Public Utilities Office, on file with the author. For the most part, the arguments presented in Part III of this comment assume that SOAP orders have been effective in curbing prostitution in the direct areas that they affect. However, the data presented below demonstrates that, despite the longstanding existence of SOAP areas, prostitution arrests remain much higher in the census tracks in which these areas exist than in other census tracks. This raises factual questions about whether SOAP orders do in fact even deter prostitution in their specific areas of application. These questions, however, are difficult to answer because many variables, such as enforcement rate and disposition of police encounters with suspected prostitutes, remain unquantified. Part III of this comment directly addresses the broader question of whether SOAP orders are effective means of achieving the goals of probation.

Exhibit 2
City of Seattle SOAP areas
outlined in black on map



B. Heightened Scrutiny of Probationary Conditions That Infringe on Fundamental Rights

In Washington, probationary conditions imposed after conviction for a misdemeanor offense are not frequently challenged on appeal. Because probation[25] is considered a "matter of grace, privilege, or clemency granted to the deserving, and withheld from the undeserving, as sound official discretion may dictate,"[26] probationary conditions are reviewed under the least rigorous standard[27] and trial courts are very rarely reversed.[28] However, as the discussion below will demonstrate, when probationary conditions infringe on fundamental rights, appellate courts, on both the state and federal level, ostensibly apply a somewhat heightened standard of review. This heightened standard, however, is inconsistently applied and underdeveloped. This section explores the development and application of this review standard in Washington.

Washington's standard of review for probationary conditions that infringe on fundamental rights is based, in part, on *United States v. Consuelo-Gonzalez*.[29] In that case, the Ninth Circuit held that "[c]onditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny" and "that when fundamental rights are curbed it must be done sensitively and with a keen appreciation that the infringement must serve the broad purposes of the Probation Act."[30] *Consuelo-Gonzalez* was initially interpreted as calling for a fairly rigorous three-part test that required an appellate court to evaluate whether (1) the trial court's purpose in imposing the condition was permissible; (2) the condition had substantially greater impact than was necessary to carry out the purpose of the condition; and (3) the condition served a legitimate need of law

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25. In Washington, probation is regulated under separate statutory authorities depending on whether the underlying offense is a misdemeanor or a felony. *See* WASH. REV. CODE §§ 35.20.255; 3.50.330 (2002) (applicable to misdemeanors); 9.94A.505(8) (2002), (applicable to felonies and otherwise known as the Sentencing Reform Act of 1981 ("SRA"). The SRA contains explicit restrictions on the conditions of probation, which, in many cases, require that probationary conditions must be related to the offense. However, the above statutes empowering municipal courts to order probation require only that "probation as in [the court's] opinion is reasonable and necessary under the circumstances of the case." *Id.* § 35.20.255 (2002). In *State v. Wilkerson*, 107 Wash. App. 748, 754–55, 31 P.3d 1194, 1197 (2001), for example, the court held that probationary conditions for misdemeanor violations were not required to be crime related but must only "bear a reasonable relation to the defendant's duty to make restitution or . . . tend to prevent the future commission of crimes."

26. State v. Williams, 97 Wash. App. 257, 263, 983 P.2d 687, 691 (1999).

27. *Id.*

28. *Id.*

29. 521 F.2d 259 (9th Cir. 1975) (en banc), *cited in* State v. Riley, 121 Wash. 2d 22, 37–38, 846 P.2d 1365, 1374 (1993).

30. *Id.* at 265.

enforcement.[31] However, although *Consuelo-Gonzalez* has not been overruled and continues to be cited in cases dealing with probationary conditions that infringe on fundamental rights,[32] its open-ended requirement of "special scrutiny" has lost what teeth it had and has been inconsistently applied, even within the Ninth Circuit.[33]

In Washington, probationary conditions may infringe on fundamental rights so long as they are "sensitively imposed" and are "reasonably necessary to accomplish the essential needs of the state and the public order."[34] As with the *Consuelo-Gonzalez* standard on the federal level, these criteria for assessing "sensitivity" and the "essential needs of the state and public order" are poorly articulated and the standard is applied with inconsistent rigor. Generally, when reviewing probationary orders against constitutional challenges, Washington courts examine the breadth of the restriction in relation to the condition's potential for preventing the defendant from re-offending.[35] Thus, the rigor of the court's review will depend on the particularity with which it is willing to understand the defendant's crime and the related question of the nature of the risk posed by the defendant. The following examples indicate that some courts are willing to justify probationary conditions that infringe on fundamental rights based on generalizations about the type of crime committed, while others reject such generalizations or statistical correlations and require a particularized showing that the condition in question is appropriate for the defendant on which it is imposed.

Washington courts appear most willing to apply a searching level of review in cases where probationary orders infringe on the fundamental rights of parents to control the care and custody of their children.[36] For

31. *See* Higdon v. United States, 627 F.2d 893, 897 (9th Cir. 1980).

32. United States v. Loy, 237 F.3d 251, 259 (3d Cir. 2001); United States v. Bahe, 201 F.3d 1124, 1128 (9th Cir. 2000).

33. *Compare* United States v. Fukushima, No. 90-10219, 1991 WL 80343, at *3 (9th Cir. 1991) (citing *Consuelo-Gonzalez* for the principle that probationary conditions that infringe on fundamental rights must be "carefully reviewed.") *with Bahe*, 201 F.3d at 1127–28 (citing *Consuelo-Gonzalez* for the principle that a probationary condition that infringes on a fundamental right need only be "reasonably said to contribute significantly both to the rehabilitation of the convicted person and to the protection of the public.") *and* United States v. Holloway, 740 F.2d 1373, 1383 (6th Cir. 1984) (citing *Consuelo-Gonzalez* for the principle that a probationary condition that infringes on otherwise inviolable constitutional rights must in fact "serve the dual objectives of rehabilitation and public safety").

34. State v. Riley, 121 Wash. 2d 22, 37–38, 846 P.2d 1365, 1374 (1993).

35. *See, e.g., id.*

36. Although an examination of the cases dealing with probationary orders that infringe on fundamental rights appears to demonstrate that the rigor of the review depends, to some degree, on the relative weight the court assigns to the fundamental right infringed upon, the courts themselves generally do not acknowledge this. For example, in *State v. McBride*, 74 Wash. App. 460, 465, 873

example, in *State v. Letourneau,*[37] a teacher pleaded guilty to two counts of second degree child rape of one of her students.[38] As a condition of her release, the trial court required the defendant to have no unsupervised contact with children, including her own.[39] The court held that "limitations on fundamental rights during community custody terms that help prevent the criminal from further criminal conduct for the duration of his or her sentence are constitutional . . . [so long as] such limitations [are] reasonably necessary to accomplish the essential needs of the state."[40] Although evidence indicated that one evaluator believed that the defendant posed a risk to her children,[41] and the court conceded that individuals who sexually abuse unrelated children often "later offend against their own children,"[42] the court nonetheless held that for such a restriction to be valid, the state must supply specific and individualized evidence that the particular defendant in question posed a risk to her children. Generalizations based on the nature of the crime were an "insufficient basis for State interference with fundamental parenting rights."[43] Thus, in *Letourneau,* the court defined the defendant's crime very narrowly and differentiated the risk posed by the defendant based on the age of the children in question and their relationship with the defendant.[44] Because of this, the probation conditions appeared to the court as too broad to accomplish the concededly compelling state interest in the protection of children from sexual predators.[45] Courts have rejected such generalizations as the basis for probationary conditions in other situations as well.[46]

In other situations, courts engage in a much less particularized examination of the defendant's crime and risk of re-offense and uphold

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P.2d 589, 593 (1994), the court held that whether a probationary statute infringes on speech or expressive rights or the acknowledged fundamental right to intrastate travel was immaterial for the purposes of review.

37. 100 Wash. App. 424, 997 P.2d 436 (2000).

38. *Id.* at 426, 997 P.2d at 438.

39. *Id.* at 430, 997 P.2d at 440.

40. *Id.* at 438, 997 P.2d at 444.

41. *Id.* at 439–40, 997 P.2d at 445.

42. *Id.*

43. *Id.*

44. *See id.*

45. *Id.*

46. *See generally* State v. Ancira, 107 Wash. App. 650, 654, 27 P.3d 1246, 1248 (2001) (holding that the defendant's violation of a domestic violence no-contact order issued to protect the defendant's wife did not justify a probationary condition that prevented the defendant from seeing his children) *and* State v. Riles, 135 Wash. 2d 326, 353, 957 P.2d 655, 668 (1998) (holding that a probationary condition that the defendant, who was convicted of raping a nineteen year old, have no contact with minors could not be justified on the basis that the victim's youthful appearance may have influenced the defendant's choice of her as a victim).

more broadly sweeping probationary conditions that infringe on fundamental rights. For example, in *State v. Riley*, the defendant was convicted of computer trespass and possession of a stolen access device for use in his home computer to obtain long distance telephone access codes.[47] In addition to prohibiting him from owning a home computer, the court prohibited the defendant from associating with computer "hackers" and communicating on computer bulletin boards.[48] The defendant challenged the latter two conditions on the basis that they unduly interfered with his fundamental right of association.[49] Whereas in *Letourneau* the court required a particularized showing that the restrictions interfering with the defendant's rights were linked with the particular defendant's criminal proclivities, thus rejecting a generalized or statistical correlation,[50] the court in *Riley* did not establish or require any specific or individualized link between computer "hackers," computer bulletin boards, and the defendant's particular crime. Instead, the court simply concluded that the conditions would help prevent the defendant from reoffending, with little supporting reasoning for its holding.[51]

C. Constitutionally Based Challenges to Probationary Orders That Infringe on the Right of Intrastate Travel

As described in the previous section, fundamental rights-based challenges to probationary conditions imposed as a result of misdemeanor conviction pose the greatest likelihood of triggering meaningful review. Although SOAP orders infringe on First Amendment rights of association,[52] Washington courts, like several other state courts and federal appellate courts, have recognized that the federal constitution protects a fundamental right of intrastate travel.[53] Because SOAP orders more directly affect the right to travel than the right to association and because SOAP orders have been successfully challenged on this basis in other jurisdictions,[54] a challenge based on the infringement of the right to travel is the most likely avenue of success. This section describes

47. State v. Riley, 121 Wash. 2d 22, 25, 846 P.2d 1365, 1367 (1993).

48. *Id.* at 27, 846 P.2d at 1368.

49. *Id.* at 38–39, 846 P.2d at 1374.

50. State v. Letourneau, 100 Wash. App. 424, 442, 997 P.2d 436, 446 (2000).

51. *Riley*, 121 Wash. 2d at 38, 846 P.2d at 1374.

52. Sandra L. Moser, *Anti-Prostitution Zones: Justification for Abolition*, 91 J. CRIM. L. & CRIMINOLOGY 1101, 1111 (2001) (discussing First Amendment implications of SOAP orders).

53. Eggert v. Seattle, 81 Wash. 2d 840, 842, 505 P.2d 801, 803–04 (1973) (holding that the First Amendment of the federal constitution protects intrastate travel).

54. *See, e.g.*, Johnson v. City of Cincinnati, 310 F.3d 484 (6th Cir. 2002), discussed *infra*, notes 74–90.

challenges to SOAP orders and related probationary orders on the basis of the right of intrastate travel. Subpart one describes cases from other jurisdictions that have examined SOAP-like probationary orders, ordinances, and injunctions. Subpart two discusses several analogous Washington cases that have dealt with probationary restrictions that infringe on the right of intrastate travel.

1. Constitutionally Based Challenges to Restrictions on Intrastate Travel in the Context of Prostitution in Jurisdictions Other Than Washington

Because of the rarity of appellate cases dealing with misdemeanant probationary orders, it is difficult to develop a clear picture of how different state courts would approach the use of pre-existing exclusionary zones in probation conditions. Several state courts have addressed the use of probationary conditions that require defendants to remain outside particular areas,[55] but in general the orders have been ostensibly created for the specific defendant at bar.

In the specific area of prostitution, a number of state courts have upheld as constitutional the use of exclusionary conditions that do not employ pre-existing zones in a probation order. In Alaska and Illinois, for example, such orders may be used where the area is defined with specificity, the area is limited and not unnecessarily broad, and the order allows "for access to the area for legitimate purposes and at reasonable times, when the need for such access exists."[56] Similarly, the Supreme Court of Hawaii has upheld the exclusionary conditions of a probationary order for a prostitution violation where the exclusion was limited to nighttime hours.[57] Courts in other states have permitted a more complete exclusion.[58]

In re White[59] was one of the earliest challenges to the use of pre-existing exclusionary zones as probationary conditions for prostitution violations. In this California case, the defendant pleaded guilty to soliciting an act of prostitution.[60] As part of her probation, she was

55. For a detailed discussion of such cases, *see* Michael George Smith, *The Propriety and Usefulness of Geographical Restriction Imposed as Conditions of Probation*, 47 BAYLOR L. REV. 571 (1995); *see also* Carroll J. Miller, Annotation, *Propriety of Conditioning Probation on Defendant's Not Entering Specified Geographical Area*, 28 A.L.R. 4th 725 (2004).

56. Oyoghok v. Municipality of Anchorage, 641 P.2d 1267, 1270 n.4 (Alaska App. 1982); *see also* People v. Pickens, 542 N.E.2d 1253, 1257 (Ill. App. 1989).

57. State v. Stanford, 900 P.2d 157, 161 (Haw. 1995).

58. *See, e.g.*, State v. Morgan, 389 So.2d 364, 366–67 (La. 1980) (probationary condition prohibiting the defendant from entering the French Quarter of New Orleans was upheld because it was based upon the theory that the defendant's rehabilitation would best be served by removing her from an area frequented by prostitutes).

59. 158 Cal. Rptr. 562 (Cal. Ct. App. 1979).

60. *Id.* at 563.

required, for a two-year period, to remain outside three pre-established "map areas" in which high rates of prostitution took place.[61] Although the defendant challenged the condition both as an undue infringement on her First Amendment rights and on her right to intrastate travel protected by the Fourteenth Amendment, the appellate court focused primarily on the latter right.[62] The court acknowledged that trial courts have wide discretion to create probationary conditions that "foster rehabilitation" and "protect the public," but held that "[w]here a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn; to the extent it is overbroad, it is not reasonably related to the compelling state interest in reformation and rehabilitation."[63] The court went on to find that the condition was overly broad, reasoning, in part, that there are "innumerable situations in which a probationer could be in the map area which are unrelated to prostitution. . . . City buses, the Greyhound Bus and taxicabs pass through the various map areas. . . . . [B]eing engaged in a passive activity such as being a mere passenger in public transportation or private transportation would be a violation of the condition."[64] Finally, the court found that while the condition "may be related to future criminal conduct," it would only prevent the defendant from committing such conduct in a "map area" and would have the overall effect of simply "mov[ing] solicitors to other areas."[65] The condition was therefore held unfit for the purpose of the defendant's rehabilitation or the protection of the public.[66] Holding that "[p]articularized conditions of probation should be directed toward rehabilitation rather than reliance upon some general condition which utilizes a mechanized mass treatment approach," the court observed that geographic restrictions that were much more specific and limited as to time and location might be valid.[67]

This case recognizes three important bases of challenge to exclusionary orders: First, unlike probationary conditions that aim directly at criminal conduct, exclusionary orders prevent recipients from engaging in even the most innocent of conduct within the targeted areas. Second, exclusionary orders, perhaps because they fail to address the causes of criminal conduct, have the likely effect of pushing this conduct into other areas. Third, the use of pre-existing exclusionary zones departs

61. *Id.* at 563–64.

62. *Id.* at 564, 566.

63. *Id.* at 565.

64. *Id.* at 566.

65. *Id.*

66. *Id.* (holding that the condition was so sweeping and punitive that it was unrelated to the defendant's rehabilitation).

67. *Id.* at 568.

from the traditional, individualistic focus of probation, employing a "mechanized" approach.

Approaching the issue from a slightly different direction, the City of New York[68] sought to enjoin certain individuals, whom the city planned to demonstrate were prostitutes, from being in public in a particular predefined neighborhood during the hours of 11:00 p.m. and 7:00 a.m.[69] The court first noted that New York City recognized that both the federal constitution, through the Fourteenth Amendment, and the state constitution protected a fundamental right to intrastate travel.[70] Accordingly, the court held that the injunction could only be granted if it burdened the defendant's constitutional liberties no more than was necessary to serve the governmental interests involved.[71] Ultimately, the court denied the injunction with the following:

> [The] City seeks to prohibit all activity by the defendants in the Queens Plaza area: good, bad or indifferent, lawful or unlawful, innocent or guilty. The City seeks to proscribe the defendants' presence in the area, when it is their activities of which it complains. It thus restricts the defendants' liberties far more than is necessary to prohibit the illegal activity.[72]

Although the *White* court noted that exclusions more restricted in time and place might pass muster,[73] the *Andrews* court rejected a strictly nighttime exclusion involving a fairly small area, demonstrating that even a narrow exclusion may unconstitutionally restrict the right to travel because it prevents not only illegal activity in the area but also prevents targeted individuals from engaging in innocent activities in those areas.

Although SOAP-type orders have not been challenged on the federal level, the Sixth Circuit Court of Appeals recently addressed a closely analogous situation in *Johnson v. City of Cincinnati*.[74] In that case, the City of Cincinnati, in order to "to enhance the quality of life and protect the health, safety, and welfare of persons in neighborhoods with a significantly higher incidence of conduct associated with drug abuse than other areas of the City," enacted an ordinance[75] that prohibited those

68. City of New York v. Andrews, 719 N.Y.S.2d 442 (N.Y. Sup. Ct. 2000).

69. *Id.* at 445.

70. *Id.* at 451–52.

71. *Id.* at 453.

72. *Id.*

73 *See supra* notes 59–67 and accompanying text.

74. 310 F.3d 484 (6th Cir. 2002).

75. Although not actually a probationary order, the Cincinnati drug exclusion zone ordinance mirrors the purpose and approach of SOAP orders by excluding defendants from pre-established exclusionary zones. *Id.* at 487. In theory, the Cincinnati ordinance actually provides greater protection for defendants charged with violating it because it requires new charges to be filed,

arrested for certain drug-related offenses from entering an area of the city called Over the Rhine for ninety days and extended this exclusion for twelve months for those who were eventually convicted.[76]

Johnson, who was arrested for a marijuana trafficking offense in Over the Rhine, and Au France, who was arrested for possession of drug paraphernalia, brought suit against the City of Cincinnati in federal district court, alleging that the ordinance unconstitutionally infringed on their First Amendment rights of association and speech and unconstitutionally infringed on their fundamental liberty interest in intrastate travel under the Due Process Clause of the Fourteenth Amendment.[77] Although the United States Supreme Court has not decided whether the Constitution protects a fundamental the right of intrastate travel, the Sixth Circuit Court of Appeals found that right of intrastate travel was protected by the Fourteenth Amendment.[78] The court further found that the Cincinnati ordinance substantially infringed on this right and should, therefore, be strictly scrutinized.[79] In so deciding, the court rejected the City's argument that the ordinance should be subjected to only intermediate scrutiny as a time, place, and manner regulation.[80] The court held that while a less severe restriction of localized travel might call for only intermediate scrutiny, the ordinance's broad prohibition against entering the specific area, regardless of the time or manner of access, required strict scrutiny.[81]

Applying strict scrutiny, the *Johnson* court conceded that the City's interest in reducing drug abuse, drug-related crime, and protecting the health and safety of its citizens was compelling.[82] However, the court found that the ordinance was not narrowly tailored to achieve these goals.[83] The court held that determining whether the ordinance was sufficiently narrow required the court to "(1) assess whether the Ordinance implicates an individual's interest in localized travel with specific reference to the precise nature of the infringement and (2) determine whether the Ordinance is the least restrictive means to

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guaranteeing the defendant the full range of constitutional protections that attach to the criminal trial process. The violation of a probationary order, however, leads to a revocation hearing, a process to which substantially fewer protections adhere.

76. *Id.* at 487.

77. *Id.* at 489.

78. *Id.* at 498.

79. *Id.* at 502.

80. *Id.* The city based its argument on the holding in *Lutz v. City of York*, 899 F.2d 255 (3rd Cir. 1990), in which the court upheld the City of York's anti-cruising ordinance after applying an intermediate level of scrutiny based on a First Amendment time, place, and manner analysis.

81. *Id.* at 502.

82. *Id.*

83. *Id.* at 503.

accomplish the City's goal."[84] The court defined the right of localized travel as one of access and found that "[b]y blocking affected individuals' access to an entire metropolitan neighborhood of 10,000 people, the Ordinance therefore plainly infringe[d] on the right to localized travel through the public spaces and roadways of Over the Rhine."[85]

Based on the above standards, the court held that the city had failed to carry the burden of demonstrating that the ordinance was the least restrictive means possible.[86] The court identified problems with the ordinance. First, although the court credited the "general evidence" that individuals arrested in Over the Rhine tended to re-offend, the court held that "[t]he broad sweep of the ordinance [is] compounded by the fact that the ordinance mete[d] out exclusion without any particularized finding that a person is likely to engage in recidivist drug activity in Over the Rhine."[87] Second, the court held that the ordinance presented "constitutional tailoring problems" because it excluded individuals from the area "without regard for their reason for travel in the neighborhood," thus prohibiting a wide range of innocent and socially beneficial conduct such as social and family contacts, seeking food and shelter, and obtaining social services.[88] Third, the court acknowledged that the city had demonstrated the difficulty of enforcing drug laws in the area but found that without "some detail on the 'use of foot patrols, bicycle patrols, and use of the District One Criminal Apprehension Team' . . . such evidence does not demonstrate the ineffectiveness of other law enforcement operations."[89] Finally, the court held that a particular individual's ability to get a variance under the ordinance did not save the ordinance from being unconstitutional because, "[i]n allowing individuals to seek variances if they live or work or seek social services in Over the Rhine, the Ordinance effectively preserves the right to travel locally through public spaces and roadways for some individuals."[90]

The cases examined in this subpart demonstrate that the infringement on the right to intrastate travel posed by pre-existing exclusionary zones has been held to serve as a sufficient basis to subject such restrictions to a heightened form of scrutiny. Furthermore, these cases illustrate four bases upon which this scrutiny may then lead to the invalidation of such conditions: (1) the condition's indiscriminate

84. *Id.*
85. *Id.*
86. *Id.* at 504.
87. *Id.* at 503.
88. *Id.*
89. *Id.* at 504.
90. *Id.* at 505.

prohibition against legal and illegal activity in the described area,[91] (2) the ability to help prevent re-offense only in the described area,[92] (3) the risk of simply moving prostitution activity to some other area,[93] and (4) the mass-produced, de-individualized approach to probation.[94]

2. Challenges to the Use of Pre-Existing Exclusionary Zones in Probationary Orders in Washington State

No appellate court in Washington has directly addressed the constitutionality of a SOAP order. However, Washington courts consistently uphold the use of pre-existing exclusionary zones in the context of drug use and trafficking.

Although SOAP orders and ordinances in Washington have been used largely on the municipal level, the Washington State Legislature has enacted a "Protected Against Drug Trafficking Area"[95] ("PADT") statute that empowers courts to enter an off-limits order against a "known drug trafficker,"[96] prohibiting the individual from entering the PADT area[97] for up to one year.[98] The orders may be issued pursuant to an application for injunctive relief or as part of a criminal proceeding.[99]

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91. *In re* White, 158 Cal. Rptr. 562, 566 (Cal. Ct. App. 1979); City of New York v. Andrews, 719 N.Y.S.2d 442, 453 (N.Y. Sup. Ct. 2000); Johnson v. City of Cincinnati, 310 F.3d 484, 503 (6th Cir. 2002).

92. *White*, 158 Cal. Rptr. at 566.

93. *Id.*

94. *Id.* at 568.

95. WASH. REV. CODE §§ 10.66.005–.900 (2002).

96. A known drug trafficker is defined as the following:

> [A]ny person who has been convicted of a drug offense in this state, another state, or federal court who subsequently has been arrested for a drug offense in this state. For purposes of this definition, 'drug offense' means a felony violation of chapter 69.50 or 69.52 RCW or equivalent law in another jurisdiction that involves the manufacture, distribution, or possession with intent to manufacture or distribute, of a controlled substance or imitation controlled substance.

Id. § 10.66.010(3) (2002).

97. A PADT area is defined as the following:

> [A]ny specifically described area, public or private, contained in an off-limits order. The perimeters of a PADT area shall be defined using street names and numbers and shall include all real property contained therein, where drug sales, possession of drugs, pedestrian or vehicular traffic attendant to drug activity, or other activity associated with drug offenses confirms a pattern associated with drug trafficking. The area may include the full width of streets, alleys and sidewalks on the perimeter, common areas, planting strips, parks and parking areas within the area described using the streets as boundaries.

Id. § 10.66.010(5).

98. *Id.* §10.66.020 (2002).

99. An off-limits order may be issued as part of a civil action, a nuisance abatement action, an eviction action, as a condition of pretrial release, or as a condition of sentencing in a criminal proceeding. *Id.* § 10.66.020.

The PADT statute was challenged in *State v. McBride*.[100] The defendant in that case was convicted of delivering a controlled substance and was sentenced to twenty-nine months confinement, followed by one year of community placement.[101] One condition of the community placement was that the defendant comply with an off-limits order prohibiting him from entering the PADT of Spokane, where he had been convicted.[102] McBride challenged the statute as being both over broad[103] and not rationally related to his crime.[104] As mentioned above, the Washington Supreme Court has held that the right to intrastate travel is protected by the First Amendment of the federal constitution.[105] McBride argued that the statute, by restricting the right to intrastate travel and the right to move about freely, substantially infringed on protected conduct.[106] The court rejected this argument, reasoning that the statute applied only to known drug traffickers and restricted such persons' constitutional rights to only a limited extent because it applied only to areas that were identified as having a pattern associated with drug trafficking, and limited individuals' right to enter only the area in which they were convicted.[107]

McBride also challenged the statute on the grounds that, as applied to him, it was an unconstitutional limitation on his right to travel.[108] In rejecting this challenge, the court simply concluded that "reasonable restrictions on travel during community supervision do not violate a person's constitutional right to travel."[109] Although the court does not expand on its reasons for finding the restriction reasonable, the court did, when addressing whether the restriction was rationally related to McBride's crime,[110] rely in part on the conclusory theory that "[p]rohibiting Mr. McBride from returning to the area where his crime was committed is . . . rationally related to the crime."[111]

Although the court in *McBride* appeared to justify the use of a pre-existing exclusionary zone on the PADT statute's narrow application to known drug traffickers and its limit of excluding offenders only from the

100. 74 Wash. App. 460, 873 P.2d 589 (1994).

101. *Id.* at 463, 873 P.2d at 592.

102. *Id.*

103. *Id.*

104. *Id.* at 466, 873 P.2d at 593.

105. *Id.* at 465 n.1, 873 P.2d at 593 n.1.

106. *Id.* at 464–65, 873 P.2d at 592–93.

107. *Id.* at 465, 873 P.2d at 593.

108. *Id.* at 466, 873 P.2d at 593.

109. *Id.* at 467, 873 P.2d at 594.

110. The court may impose and enforce crime-related prohibitions under the SRA. WASH. REV. CODE 9.94A.505(8) (2002).

111. State v. McBride, 74 Wash. App. 460, 466, 873 P.2d 589, 593 (1994).

area in which they were convicted, subsequent cases have demonstrated the courts' willingness to allow more expansive exclusions to be imposed on those without prior convictions. For example, in *State v. White*,[112] a criminal defendant was convicted of possession of cocaine with intent to deliver.[113] As part of his community placement following incarceration, the court ordered him to remain outside of all areas designated by the Seattle Police as "Stay Out of Drug Areas" ("SODA").[114] Rather than challenge the order on constitutional grounds, White argued that the sentencing court exceeded its authority in imposing the exclusionary condition because he had no prior drug convictions, thereby rendering the PADT statute inapplicable.[115] The court rejected this argument, finding that the community placement statute provided that the court may order that the offender "remain within, or outside of, a specified geographical boundary[.]"[116] As in *McBride*, the *White* court did not recognize any distinction between an exclusionary order tailored to the specific defendant before it and the use of a pre-existing exclusionary zone. Both SODA areas and SOAP areas are defined by municipalities, and neither has been subjected to a constitutional challenge to their use in a probationary order.

White is the closest we have to a constitutional challenge to SODA orders, and the brevity with which the court upheld the order suggests that SOAP orders are not likely to trigger a more searching review. Because neither the *White* nor the *McBride* court gave substantial weight to the condition's indiscriminate prohibition against legal and illegal activity in the described area,[117] or the fact that the conditions prevent re-offense only in the described area,[118] or the risk of simply moving the offending activity to some other area,[119] or the mass-produced, de-individualized approach to probation,[120] these cases suggest that challenging SOAP orders in Washington will be an uphill struggle.

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112. 76 Wash. App. 801, 888 P.2d 169 (1995).

113. *Id.* at 803, 888 P.2d at 170.

114. *Id.* at 810, 888 P.2d at 174.

115. *Id.*

116. *Id.* at 811, 888 P.2d at 175. White was sentenced under WASH. REV. CODE § 9.94A.120 (1990). *Id.* at 811 n.9, 888 P.2d at 174 n.9.

117. *In re* White, 158 Cal. Rptr. 562, 566 (Cal. Ct. App. 1979); City of New York v. Andrews, 719 N.Y.S.2d 442, 453 (N.Y. Sup. Ct. 2000); Johnson v. City of Cincinnati, 310 F.3d 484, 503 (6th Cir. 2002).

118. *In re* White, 158 Cal. Rptr. at 566.

119. *Id.*

120. *Id.* at 568.

III. SOAP ORDERS: A BREAKDOWN IN THE PROBATIONARY SYSTEM AND A FAILURE TO ACCOMPLISH THE GOALS OF PROBATION

The judicial machinery is in place that is required for a heightened appellate review of probationary orders that infringe on fundamental constitutional rights. Moreover, *Letourneau* demonstrates that, at times, this review will consist of a fairly rigorous examination of whether the crimes and characteristics of individual probationers merit the conditions in question. However, *Riley* and *McBride* indicate that this review can sometimes be cursory, leading to the justification of conditions based on broad generalizations about the defendant and the nature of the defendant's crime. Finally, the cases described above demonstrate that infringement on the right to intrastate travel has been held to serve as a sufficient basis to use heightened scrutiny when examiing probationary conditions that are based on pre-existing exclusionary zones.

Although the above cases establish persuasive precedent for a facial challenge to SOAP orders, Washington courts, as described in the previous section, have demonstrated a sympathetic attitude toward geographic restrictions. Therefore, as described in the introduction, the purpose of this paper is two-fold: First, it seeks to discourage the use of SOAP orders on the district court level; second, it encourages Washington appellate courts to apply strict scrutiny, as in *Letourneau*, to determine whether the use of a SOAP order is appropriate in individual cases. This section argues that the traditional justifications for appellate court deference to trial courts' creation of probationary conditions are not present in the context of SOAP orders. It argues that, according to research into the factors that lead individuals into prostitution and trap them within the industry, if appellate courts closely examine SOAP orders, the courts will find that, in the majority of cases, SOAP orders do not accomplish the historic or currently articulated goals of probation. Section A briefly examines the historical purposes of probation, both generally and in Washington. Section A further suggests that probation has become detached from its original goal of rehabilitation, and that it was this goal that initially justified and restrained the immense discretion allowed to the trial courts. In the absence of the justifying and restraining goal of rehabilitation, probationary conditions, particularly as applied to prostitution, no longer deserve the deference they have traditionally commanded. Section B argues that a close examination of the roots of prostitution and the likely effect of SOAP orders on individual prostitutes demonstrates that the orders will be inappropriate in the vast majority of cases, further justifying heightened scrutiny.

A. History of Probation: Appellate Deference to SOAP Orders Is Not Justified by the Theoretical Basis of Trial Court Discretion in the Creation of Probation Conditions

Probation has its roots in Massachusetts, arising from the now familiar story of John Augustus, a shoemaker who, in 1841, began bailing individuals out of jail who had been arrested for public drunkenness and rehabilitating them.[121] His success in this endeavor eventually led Massachusetts to institute a formal probationary system.[122] From there, the use of probation quickly spread throughout the country.[123] The public's increasing chagrin with the retributivist focus of the criminal law and an increasing belief that some offenders could be rehabilitated and made productive members of society fueled the rapid spread of probation.[124] This early focus on rehabilitation was carried into the twentieth century and is captured by Chief Justice Taft who wrote that the purpose of probation was to give:

> [Y]oung and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. . . . If the case was a proper one, great good could be done in stopping punishment by putting the new criminal on probation. The avoidance of imprisonment at time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. Probation was not sought to shorten the term. Probation is the attempted saving of a man who has taken one wrong step, and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence.[125]

This spirit of rehabilitation infused Washington's application of probation through the 1970s and into the early 1980s.[126]

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121. NEIL P. COHEN & JAMES J. GOBERT, THE LAW OF PROBATION AND PAROLE 7 (1983).

122. *Id.*

123. *Id.*

124. *Id.*

125. United States v. Murray, 275 U.S. 347, 357–58 (1928).

126. *See* State v. Barr, 99 Wash. 2d 75, 79, 658 P.2d 1247, 1249 (1983) (en banc) (holding that the purpose of restitution as a probationary condition is primarily rehabilitative); State v. Kuhn, 81 Wash. 2d 648, 503 P.2d 1061 (1972) (en banc) in which the court opined the following:

> [T]he nature and purpose of probation has been well established by this court . . . The granting of a deferred sentence and probation, following a plea or verdict of guilty, is a rehabilitative measure, and as such is not a "matter of right but is a matter of grace, privilege, or clemency granted to the deserving and withheld from the undeserving," within the sound discretion of the trial judge.

Id. at 650, 503 P.2d at 1062 (citations omitted). State v. Hall, 35 Wash. App. 302, 307, 666 P.2d 930, 933 (1983) (holding that "[a]n important goal of sentencing is to provide an opportunity for rehabilitation of the defendant so that he or she can resume a productive role in the community. Probation is a means by which judges may provide defendants with this opportunity.").

Because the purpose of probation was understood to be rehabilitation, the process of imposing conditions was premised on the court coming to understand the particular needs of the individual in each case and shaping the conditions accordingly.[127] Reflecting this concern, the National Advisory Commission on Corrections Standards wrote, "[i]n too many cases, courts mechanically adopt standard conditions for all probationers. Conditions should be tailored to fit the needs of the offenders and society, and no conditions should be imposed unless necessary for these purposes."[128]

Because probationary conditions were to be tailored to individuals, statutes authorizing courts to impose probation did not generally require or direct the court to impose any particular conditions.[129] A judge was expected to come to know and understand the defendant in a particular case and create conditions suited particularly to that individual's needs.[130] Moreover, the goal of rehabilitation dictated that courts be empowered to impose conditions for sufficient periods to allow for meaningful change. Even if a public drunkenness statute authorized a court to impose a prison sentence of only a matter of months, a probationary statute might allow for the imposition of conditions lasting longer than a year as, after all, no one could expect an alcoholic to give up drinking in ninety days.

Probationary statutes imposing length restrictions led Charles Chute, the Executive Director of the National Probation and Parole Association, to complain in 1974, that "unfortunately, some states attempt to limit the maximum term of probation to one year, or even less. The best laws leave the matter of the term as well as all other conditions of probation to be decided by the judge on the basis of individual needs."[131] Thus, trial courts were afforded enormous discretion in shaping probation conditions and appellate courts gave a great deal of deference to trial courts' decisions on these matters. The trial judge was expected to come to know the needs of the defendant in question and decided whether he or she was deserving or undeserving.[132] Further, because the purpose of the conditions was rehabilitation, courts were

127. *See* COHEN & GOBERT, *supra* note 121, at 46.

128. GEORGE G. KILLINGER ET AL., PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM 81–82 (1976).

129. *See id.* at 39–40 (describing recommendations that "statutes refrain from making specific conditions for probation, leaving the matter open for the exercise by the judge of his best judgment based upon the most up to date information about the defendant and about the treatment facilities and programs available. . . .").

130. *Id.* at 40.

131. Charles L. Chute, *The Development of Probation in the United States*, *in* PROBATION AND CRIMINAL JUSTICE 234 (Sheldon Glueck ed., 1974).

132. *See* State v. Shannon, 60 Wash. 2d 883, 888, 376 P.2d 646, 649 (1962).

permitted to impose them for periods of time much longer than would be justified if a jail sentence had been imposed.

The rehabilitative rationale for criminal justice declined enormously in popularity in the 1980s and 1990s.[133] Politicians around the country began running for public office based on promises to "get tough on crime," and the retributivist rationale of criminal justice ascended to renewed popularity.[134] One commentator has written, "[i]t seems clear that the public has largely lost faith in the rehabilitative ideal as a foundation for any penal system, adult or juvenile."[135] Whereas the rehabilitative concept of criminal justice entailed a focus on individuals, the new retributivist order brought with it suspicion of judges' leniency and disparate sentences handed down for similar offenses.[136] Based on this suspicion, legislatures, both on the national and state levels, began enacting mandatory minimum sentencing laws, which established punishments based largely on the offense committed rather than on the offender.[137]

This evolution away from rehabilitation as a theoretical basis for criminal sanction also took place in Washington and can be observed through both the legislature's and the courts' changing attitudes toward probation. At the felony level, under Washington's Sentencing Reform Act ("SRA"), which makes a period of community placement a requirement,[138] the Washington Supreme Court has declared that the purpose of this community placement is "primarily to further the *punitive*

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133. *See generally* Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447 (2003); *see also* Theresa A. Hughes, *Juvenile Delinquent Rehabilitation: Placement of Juveniles Beyond Their Communities as a Detriment to Inner City Youths*, 36 NEW ENG. L. REV. 153, 161 (2001).

134. Feld, *supra* note 133, at 1451, 1502 (discussing determinate sentencing, elimination of parole boards, and a general "conservative backlash" and "get tough" on crime approach to criminal justice); *see also* TODD R. CLEAR & GEORGE F. COLE, AMERICAN CORRECTIONS 420–28 (5th ed. 2000) (attributing a doubling in the size of prison populations since the 1980s to "get tough on crime policies").

135. Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 65 (1999).

136. Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1852–53 (1994).

137. Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Crime*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 389, 390 (1996).

> [These] statutes purport to be an accurate reflection of an offender's culpability, yet they base punishment almost solely upon a consideration of the nature of the crime committed. Therefore, a sentence based on the defendant's actual culpability is the exception and not the rule in a system of harsh sentences targeted at mid to high level participants in a crime.

Id.

138. WASH. REV. CODE § 9.94A.700 (2002).

purposes of deterrence and protection."[139] Similarly, discussion of rehabilitation as a judicial justification for a probationary condition imposed as a result of a misdemeanor violation has all but disappeared. For example, in *State v. Swanson,*[140] the court simply left "rehabilitation" out of the familiar justification for probationary conditions:

> Probation outside the SRA is not a matter of right but a matter of grace, privilege, or clemency granted to the deserving, and withheld from the undeserving, as sound official discretion may dictate. In this older version of probation, which remains applicable to misdemeants, a court may impose probationary conditions that bear a reasonable relation to the defendant's duty to make restitution or that tend to prevent the future commission of crimes.[141]

At the same time that the criminal justice system was discarding the individualism of rehabilitation and swinging toward the retributivist philosophy of mandatory minimum sentences, America's perceptions of prostitution were in flux. In the nineteenth and early twentieth centuries, prostitution was understood as a crime against morality, and prostitutes were described as "fallen women."[142] In the latter part of the twentieth century, however, prostitution came to be understood not from the individual prostitute's perspective, but instead as a quality-of-life crime inflicted on the residents of the neighborhoods in which prostitution took place.[143] Concerns regarding children, neighborhood decay, and property values became the most common complaints associated with street-level prostitution and, accordingly, nationwide law-enforcement policy evolved from intervention toward containment and the occasional crackdown, or "sweep-up" projects.[144] The shifting understanding of prostitution has created interesting problems for law enforcement and the judicial system. A superior court judge in San Francisco writes the following:

> The victim-perpetrator status of the defendant is only one of numerous contradictions. Everyone touched by the problem—

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139. State v. Ross, 129 Wash. 2d 279, 286, 916 P.2d 405, 409 (1996) (en banc) (emphasis added); *see also* State v. Slemmer, 48 Wash. App. 48, 59–60, 738 P.d 281, 288 (1987) (no longer describing restitution as rehabilitative but holding instead that "[t]he objectives of allowing restitution as an alternative to imprisonment are to provide reparation to the victims of crime and to prevent future offenses").

140. 116 Wash. App. 67, 77, 65 P.3d 343, 348 (2003).

141. *Id.* at 77, 65 P.3d at 348 (internal quotation marks omitted); *see also, e.g.,* State v. Williams, 97 Wash. App. 257, 263, 983 P.2d 687, 691 (1999) (holding same).

142. Ronald Weitzer, *Prostitution Control in America: Rethinking Public Policy*, 32 CRIME, LAW & SOC. CHANGE 83, 84 (1999).

143. *Id.* at 85.

144. *Id.*

> homeowners, merchants, law enforcement officers, judicial staff, and even the sex worker—operates in an environment of conflicting attitudes. Consider the homeowner who wants the street worker off his or her block but will rarely vote to convict when serving on a jury.[145]

This, then, is the history of the SOAP order. The SOAP order's wide geographic breadth and long two-year term arose out of an unbounded probationary statute designed to give judges who have come to know the individual needs of particular offenders the discretion to impose conditions that will address divergent idiosyncrasies. Current SOAP orders' mechanized, one-size-fits-all application of pre-existing exclusionary zones to all those found guilty of a prostitution offense reflects the de-individualizing force of the philosophical swing away from rehabilitation and toward retributive criminal justice policies. The SOAP order's cleansing objective reflects an understanding of prostitution that is no longer tied to a moralistic and individualized focus on particular prostitutes as "fallen women" and instead focuses on community quality of life. Finally, the SOAP order's ease of enforcement—a probation violation rather than a new offense which must be put before a jury that is often unwilling to convict the individual face of the problem they simultaneously want to be rid of—bypasses society's uneasy and ambivalent understanding of prostitution.

This history reveals that the traditional justification for appellate deference to trial courts' probationary conditions simply does not apply to SOAP orders. No judge has come to know the individual subjects of SOAP orders, assessed the probationer's needs, and carefully shaped the conditions accordingly. Instead, SOAP orders reflect an assembly line approach that focuses, if at all, solely on the various communities who managed to complain loudly enough and long enough to have themselves declared areas of prostitution.[146] Whereas appellate courts could once be confident that the enormous discretion exercised by trial courts in shaping probationary conditions was restrained by personal knowledge of the offender and a sincere desire to facilitate rehabilitation, SOAP orders represent a goal that stands outside this traditional area of judicial

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145. Kay Tsenin, *One Judicial Perspective on the Sex Trade*, *in* RESEARCH ON WOMEN AND GIRLS IN THE JUSTICE SYSTEM: PLENARY PAPERS OF THE 1999 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION - ENHANCING POLICY AND PRACTICE THROUGH RESEARCH, Vol. 3, No. 17 (Dept. of Justice, Office of Justice Programs, National Institute of Justice Research Forum, 2000) *available at* http://www.ncjrs.org/pdffiles1/nij/180973.pdf (last visited July 17, 2004).

146. Although it is possible for trial courts to shape SOAP orders to the particular defendant before them, the availability from the city map office of a map, *supra* note 21, depicting city wide SOAP areas, although in no way conclusive proof, tends to militate against the belief that judges frequently, if ever, individualize SOAP orders.

competence: social engineering carried out through the pseudo *ad hoc* creation of zoning ordinances, generally a legislative function not typically entrusted to the courts. A trial judge is unlikely to have any means of assessing the effect of such orders on overall rates of prostitution, neighborhood safety, or the individual offender before the judge. For these reasons, the traditional justification for appellate deference to probationary conditions in the form of SOAP orders has evaporated. Thus, when SOAP orders are challenged on appeal, there is no reason for the court to grant deference to the trial court judge. Instead, because the orders infringe on the fundamental constitutional right of intrastate travel, appellate courts should apply the heightened scrutiny these orders justly deserve.

B. SOAP Orders Are Unlikely to Accomplish the Goals of Probation

The previous section demonstrated that appellate deference to the imposition of SOAP orders as part of probation is no longer justified by the traditional rationale of individual rehabilitation. For this reason, appellate courts should apply heightened scrutiny, required by probationary conditions that infringe on fundamental rights, to SOAP orders. This section examines what courts are likely to find when they examine SOAP orders, and argues that, because SOAP orders are unlikely to advance any of the traditional or contemporary goals of probation, they should neither be imposed by trial courts nor upheld by appellate courts in most cases.

In Washington, the most commonly articulated goals of probation for misdemeanor violations are the prevention of re-offense and the making of restitution.[147] However, restitution is not generally applicable to prostitution offenses. The prevention of future offenses can be broken down into two subgoals: keeping the specific defendant before the court from re-offending, and promoting community safety through the proper application of probation conditions.[148] Subpart one of this section argues that a clear understanding of the causes that both lead individuals into prostitution and keep them there reveals that geographic exclusion from particular sections of a city is highly unlikely to deter the majority of such individuals from re-offending. Subpart two argues that, while SOAP orders may reduce prostitution in a particular neighborhood, the orders, because they drive prostitution underground and away from social services, will likely lead to an increase in danger to the overall

147. *See* State v. Swanson, 116 Wash. App. 67, 77, 65 P.3d 343, 348 (2003); State v. Williams, 97 Wash. App. 257, 263, 983 P.2d 687, 691 (1999).

148. COHEN & GOBERT, *supra* note 121, at 182–84.

community in the form of greater rates of disease and an increase in violent crime against prostitutes.

1. SOAP Orders Unlikely to Prevent Re-Offense

In order to assess whether excluding a person convicted of prostitution from the areas of a city in which a significant amount of prostitution activity occurs will make it less likely that that individual will re-offend, it is necessary to explore the reasons why individuals enter the sex trade in the first place.

Two researchers conducted a study in the San Francisco Bay Area in which two hundred juvenile and adult, current and former, female street prostitutes participated as subjects.[149] When asked why they had entered prostitution, most cited an immediate need for money; more than three-quarters of them reported having no other options.[150] Furthermore, more than 90 percent of the women who came from poor backgrounds, and almost all of the juveniles, felt they had no other options.[151]

Additionally, a desperate need for money appears to be only the final push in what is a lifetime of preparation for the industry. Sixty percent reported being sexually exploited as juveniles, with 70 percent of those reporting juvenile sexual abuse also reported repeated abuse by the same person; and 62 percent reported having been beaten while growing up.[152] More than 50 percent of those interviewed reported alcohol abuse, and 92 percent reported drug use in the homes from which they had fled.[153] The authors also reported that the average age at which the individuals entered prostitution was 16.1 years old, and that by age 16.9 they were working regularly as prostitutes.[154] The eight months difference revealed, according to the authors, "a reluctant entrance into the street life."[155]

Sixty-eight percent of the subjects reported suffering from psychological and emotional problems prior to entering prostitution.[156] The authors additionally identified the lack of a social support system as contributing to the isolation that eventually led the subjects into "a life of

149. Mimi H. Silbert & Ayala M. Pines, *Entrance Into Prostitution*, 13 YOUTH & SOCIETY 471 (1982). There are numerous studies of prostitution that describe factors similar to those that were presented by Silbert and Pines. In each study, the percentage and categories vary somewhat. This study was chosen because it is fairly representative of the average results, and because the article presents a comparison between the authors' data and data derived by other studies.

150. *Id.* at 486.

151. *Id.*

152. *Id.* at 478–480.

153. *Id.* at 478.

154. *Id.* at 483.

155. *Id.*

156. *Id.* at 485.

crime, drug addiction, and self identification as a prostitute."[157] Summarizing these and other results, the authors state the following:

> In general, the present study identified two patterns in the process of entering prostitution. The more prevalent pattern involved white juveniles, from above average economic backgrounds, with severely disturbed patterns of growth, punctuated by physical, emotional, and sexual abuse at home. The young women generating this particular pattern ran away from home to escape molestation; and because of their young age, history of abuse, loneliness, poverty on the street, and inexperience, started working for a pimp (generally they were overtly recruited by a pimp or by a woman working for a pimp). Once on the street, they continued to show an even higher degree of victimization.
>
> The second, less prevalent pattern, involved minority women coming from low socioeconomic backgrounds where crime, drug abuse, and prostitution were prevalent. They start prostitution primarily because of economic pressure in the home.[158]

One possible rationale for the use of pre-existing exclusionary zones in probationary orders is that by severing the individual from friends and social environments, the likelihood that the individual will re-offend will decrease.[159] The above study demonstrates that this rationale is largely inapplicable to the context of prostitution. Few women who enter prostitution are lured into the life by the friends and social connections in their home environment. Instead, most enter prostitution only after fleeing abuse in their home environment where they had little or no social network. Moreover, these women enter prostitution only because they feel they have no other options, are desperate for money, and have been trained to understand themselves as victims of aggression and abuse. Prostitution, unlike a drug addiction, is not a habit to be broken, but a desperate way to obtain money when no other path seems available.

Additionally, the Pines and Silbert study demonstrates that women in prostitution have virtually no other means of self-support and leads to the conclusion that exclusion will, if effective at all, only repeat the alienation that initially led women into prostitution and drive them into

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157. *Id.* at 495–496.

158. *Id.* at 491–92.

159. *See* United States v. Sicher, 239 F.3d 289, 289 (3d Cir. 2000) (holding that a supervised release order was reasonable, under which the individual was required to obtain permission from her probation officer before entering two counties in Pennsylvania, because there was ample evidence that if the individual returned to the area in which she grew up, she was highly likely to re-enter her old life of crime).

the same work in some other form or location. In other words, fleeing to a new city and beginning work as a prostitute is not a novel dynamic for many of these individuals. Because the women in the survey fled their homes prior to turning eighteen and were working regularly as prostitutes before the age of seventeen,[160] it is reasonable to conclude that the vast majority of the individuals who enter prostitution lack a high school diploma or any legitimate work experience.[161] Therefore, excluding them from a particular area will not cause them to seek other forms of employment because they lack the skills or knowledge required for virtually any job other than prostitution. In addition, the severe psychological problems that young prostitutes face make it difficult for them to function in a mainstream workplace.

Additionally, the Silbert and Pines study also points to the absence of a social support network as one factor leading individuals who have entered prostitution to flee their homes in the first place.[162] A SOAP order may serve to again sever the individual from what social support network he or she has managed to build and will only cause him or her to run away again, repeating the cycle of alienation and vulnerability. Thus, it is difficult to believe that exclusion from a particular geographical area will do anything other than cause individuals in prostitution to relocate to a different area, city, or state, as they did when they first entered. Therefore, SOAP orders accomplish no more than a deepening of the individual's problems and merely transfer the larger social problem of prostitution to other jurisdictions.[163]

Before concluding that SOAP orders do nothing to prevent re-offense, it is helpful to examine the forces that hold individuals in the prostitution industry. Eighty to ninety percent of prostitutes are controlled by pimps.[164] "Pimp-procured prostitutes" is one of several subgroups that have been found to be likely to experience "Stockholm Syndrome,"[165]a process by which a hostage comes to bond and identify with her captor and his perspective on the world.[166] Potential

160. *See* Silbert & Pines, *supra* note 149, at 483.

161. *Id.* at 484–85 (finding that "only 19% [of the prostitutes surveyed] were attending school at the time of their first prostitution involvement: 81% were not in school, despite the fact that 78% of them were of school age at the time. Only 14% were employed when they started prostitution.").

162. SILBERT & PINES, *supra* note 149, at 495–97.

163. *See* Weitzer, *supra* note 142, at 84 ("At best, [prostitution] is *contained* within a particular area where prostitutes are occasionally subject to the revolving door of arrest, fines, brief jail time, and release or *displaced* into another locale. . . .") (emphasis in original).

164. *See generally* Susan Kay Hunter, *Prostitution Is Cruelty and Abuse to Women and Children*, 1 MICH. J. GENDER & L. 91, 100 (1993) (symposium on prostitution).

165. DEE L. R. GRAHAM, LOVING TO SURVIVE: SEXUAL TERROR, MEN'S VIOLENCE, AND WOMEN'S LIVES 30–61 (1994) (synthesizing the literature on the Stockholm Syndrome).

166. *Id.* at 136.

manifestations of this syndrome include a denial of the captor's violence against her and a focus on the captor's positive side, feeling closer to and desiring to be closer to the captor than to persons with whom she has an empowering relationship, taking on the captor's perspective as her own, and finding it psychologically and emotionally difficult or impossible to physically leave or emotionally detach from the captor, particularly if the captor does not want her to leave.[167] Both pimps and batterers use "social isolation, minimization and denial, threats, intimidation, verbal and sexual abuse, [an] attitude of ownership, and extreme physical violence to control women."[168] "Street based sex workers living in poverty tend to experience homelessness and incarceration, and rely on prostitution as their major source of income."[169]

> Being homeless significantly increased the risk of being abused by commercial partners. Respondents who had been incarcerated during the past year were more likely to be physically abused by commercial partners than those who had not. . . . If sex work was the major source of income, the woman was more likely to be physically . . . and sexually . . . abused by commercial partners than her counterparts.[170]

Indeed, "partner violence and substance abuse are reciprocal in nature . . . substance abuse increases the risk for future physical and sexual assault[, which] increases the risk of subsequent substance abuse."[171]

It is clear that many individuals working in the prostitution industry are locked in a cycle of drug dependency and violence, at both the hands of their customers and their pimps. The extreme mental trauma produced by this cycle, in tandem with the psychological manipulations of pimps, leads to the development of Stockholm Syndrome, making individuals within the industry psychologically and emotionally dependent on the very individuals who enact, facilitate, and perpetuate their torture. Given this dynamic, it is almost impossible to imagine that excluding these individuals from geographical areas within a particular city will help

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167. *Id.* at 44.

168. Melissa Farley & Vanessa Kelly, *Prostitution: A Critical Review of the Medical and Social Sciences Research*, 11 WOMEN & CRIM. JUST., No. 4, 29, 45 (2000).

169. Nabila El-Bassel et al., *Correlates of Partner Violence Among Female Street-Based Sex Workers: Substance Abuse, History of Childhood Abuse, and HIV Risks*, 15 AIDS PATIENT CARE AND STDS 41, 49 (2001).

170. *Id.* at 46–47.

171. *Id.* at 42 (quoting Dean G. Kilpatrick et al., *A 2-Year Longitudinal Analysis of the Relationships Between Violent Assault and Substance Use in Women*, 65 J. CONSULT. CLINICAL PSYCHOL. 834, 841 (1997) (supporting a vicious cycle hypothesis for illicit drug use among women who had also been assaulted)).

them to avoid re-offending. Pimps, who through violence and emotional and psychological manipulation enslave the women who work for them, will not simply allow these individuals to pick up and begin a new life because of a municipal probationary order.

Even ignoring the power of pimps to hold individuals within prostitution, prostitutes are impoverished, often homeless, and dependent on the sex trade for income. These are not individuals who have carefully selected a career and life style by thoughtfully weighing the pros and cons of the various options from a long list of possible choices. Instead, prostitution is the final alternative, a desperate non-choice, and a trap. A SOAP order will not cause the vast majority of these individuals to make a different choice and pursue a new life because, simply, there is no other choice for them, and SOAP orders do nothing to create new opportunities. Even if we were to briefly entertain the naive fantasy that all, or even most, individuals choose to remain prostitutes because they find it a viable career and are capable, at any given moment, of selecting a new life, it is not rational to believe that individuals who have been driven from the industry by often brutal, ongoing physical and sexual assault will seek new lives and legitimate employment as a result of being excluded from certain city blocks.

Before finally concluding that pre-existing exclusionary zones fail the requirement of being reasonably necessary to help individuals engaged in prostitution avoid re-offending, it is helpful to understand the needs of individuals working as prostitutes when they seek escape. Dr. Boyer's report[172] asserts the following:

> [W]orking in the sex industry is not having a job you can just walk away from. It is more than work, it is a lifestyle of endurance; finding the next place you can numb the pain for awhile. All of the women [who were interviewed for the report] had tried many times to find a way out of sex industry work but were always "thrown back."[173]

Existing services are not geared toward helping women in the sex industry address problems with sexual trauma.[174] Additionally, women attempting to escape the industry are confronted with a lack of long-term solutions to their housing needs, a lack of availability of health care, an inability to obtain treatment for substance abuse, and an inability to secure counseling.[175] Unfortunately, conventional services such as

172. BOYER ET AL., *supra* note 10. Dr. Boyer's findings are not unique but are focused upon because of their geographical relevance.

173. *Id.* at 15.

174. *Id.* at 16.

175. *Id.* at 18–20.

employment training and skills development are ineffective in helping women within the sex industry develop alternatives.[176] These services failed for this group for the following reasons:

> [M]ost of [the] women had been on the street or in other forms of sex industry work since their early teens. Their skills are far more limited than others using these programs; they did not have the prerequisite skills to function in these program . . . [and] they had not achieved enough stability including securing of daily basic needs, to be able to succeed in these programs.[177]

Finally, the effect SOAP orders had on these women's ability to form new lives is significant as the bulk of services for basic survival, as well as long-term resources needed by prostitutes, are located in SOAP areas.[178] Moreover, the ineffectiveness of SOAP orders in driving individuals out of prostitution is evidenced by the commonly cited recidivism rate of eighty percent for cities similar in size to Seattle.[179] Also, as shown in Exhibit 2, the number of prostitution charges in Seattle has steadily risen over the past seven years, particularly in census tracts containing SOAP areas.[180]

SOAP orders not only fail to take even a step toward meeting the needs of individuals working in the prostitution industry who actually wish to escape, but appear to frustrate this objective. Also, as shown in Exhibit 2, SOAP orders bisect the city, creating islands of exclusion that prevent individuals within the industry from availing themselves of the scant resources that purportedly exist to assist them, and tend to separate individuals from whatever social support networks they have managed to create, thereby frustrating their attempts to lead normal lives.[181] Because SOAP orders do nothing to attend to the needs of those who wish to escape the sex-work industry, their likely effect is simply to drive women into other urban communities. Rather than pushing individuals out of the industry, this forced transplantation simply replays the dislocation that originally led such desperate and poor people to enter the sex-work industry in the first place.

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176. *Id.* at 18.

177. *Id.*

178. *Id.* at 26.

179. SEATTLE WOMEN'S COMM'N, PROJECT TO ADDRESS AND THE LEGAL, POLITICAL, AND SERVICE BARRIERS FACING WOMEN IN THE SEX INDUSTRY, A REPORT TO MAYOR OF SEATTLE, NORMAN B. RICE AND THE SEATTLE CITY COUNCIL 6 (July 1995) (report based in part on the Boyer study).

180. City of Seattle Police Department, Crime Data *available at* http://www.cityofseattle.net/police/crime/stats.htm (last visited July 18, 2004).

181. BOYER ET AL., *supra* note 10, at 5, 9.

2. SOAP Orders Negatively Impact Public Safety, Driving Prostitution Further Underground, Making Access by Law Enforcement, Health Care Workers, and Other Social Services More Difficult

Just as SOAP orders provide little incentive for individuals convicted of prostitution to get out of the sex-work industry, these orders also fail to promote public order or safety on any large scale. But, before analyzing the likely effects of SOAP orders on public safety, it is necessary to formulate what, exactly, constitutes the "danger" of prostitution. Case law in Washington provides evidence that the individual act of prostitution is not considered to be a threat to public safety. For example, in *State v. WS*,[182] a juvenile was found guilty of offering and agreeing to an act of prostitution.[183] The defendant appealed on the ground that the trial court erred in denying her motion to remand the case to diversion.[184] The appellate court found that the prosecutor's office handling the case had adopted a policy that all juvenile cases of prostitution were inappropriate for diversion.[185] The appellate court reversed the trial court's denial, stating that the legislative intent of the diversion statute was the following:

> [P]rovide for the handling of juvenile offenders by communities whenever consistent with public safety . . . [and] [p]rostitution as charged in this case, is an illegal act that involves 'no threat of or instance of actual physical harm.' Thus, the crime with which WS was charged was viewed by the Legislature as such a minor offense that it could be dismissed without even the necessity for a diversionary agreement.[186]

The court's opinion in *State v. WS* demonstrates that neither that court nor the Washington Legislature understand the act of prostitution to present an immediate threat of physical danger to the community. In defining the danger posed by prostitution we must then look elsewhere. Perhaps the real harm of prostitution has more to do with the impact that prostitution can have on our society's quality of life.

> In decades past, solicitation was considered a victimless crime. In the 1990s, it was transformed into a quality-of-life crime (that is, a crime that is not wrong in itself but that interferes with the quality of life of other people—merchants, tourists, and neighbors). In reality, no matter how supportive people may be of sex workers,

182. 40 Wash. App. 835, 700 P.2d 1192 (1985).
183. *Id.* at 836–37, 700 P.2d at 1194.
184. *Id.* at 837, 700 P.2d at 1194.
185. *Id.*
186. *Id.* at 837, 700 P.2d at 1194 (emphasis in original).

> they do not want to witness solicitation in front of their homes, on their street corners, or in front of their neighborhood restaurants.[187]

From the beginning, then, we needed look no further than the name of the orders themselves: SOAP. Their purpose lies solely in cleansing neighborhoods of pollutants which, in this case, happen to be people. Driving this point home, the Washington Legislature in 1991 passed a bill directing the superintendent of public instruction to include a "social hazard" category in the "hazardous walking conditions" definition applicable to public schools that included, among other things, areas with unacceptable levels of prostitution and toxic waste dumps.[188] These sources focus on the "dangerousness" of prostitution and reveal that prostitution is imagined as less of a physical danger and more of an unpleasantness, something we would simply prefer not to see. On one level, it might be argued that this constitutes a fairly slim justification for criminalization in the first place, but it also demonstrates that our treatment of prostitution has little to do with the individual prostitutes. Instead, it reaffirms that our goal in applying SOAP orders is not rehabilitation or even specific deterrence. Instead, the goal of SOAP orders is to push prostitutes out of certain neighborhoods or jurisdictions into unseen corners of our larger community. While it may be that SOAP orders accomplish these goals—though the statistics presented in Part II might indicate otherwise—it forces us to question what effect this under-the-rug policy has on our community.

In answering this question, it is helpful to examine three potential, but less frequently considered dangers of prostitution: disease, drug use, and violent crime against prostitutes. Experts who study prostitution know that as prostitution is pushed underground, disease rates and violence against prostitutes increase while drug use continues undeterred.

In her study on prostitution in the Seattle area, Dr. Boyer estimates that only ten to twenty percent of prostitution takes place on the street.[189] The vast majority of those working in prostitution operate out of bars, cafes, hotels, escort services, massage parlors, advertisements, exotic dancing clubs, and private homes.[190] The women interviewed by Dr. Boyer believed that as street prostitution becomes more dangerous or less profitable, individuals working in prostitution have moved into other

187. Tsenin, *supra* note 145, at 18.

188. S. B. 5114, § 5, 52d Leg. (Wash. 1991) (enacted). The provisions of this bill were never codified, apparently because the bill was not funded. *See id.* § 6 (providing that the act shall be null and void should specific funding not be provided by June 30, 1991).

189. BOYER ET AL., *supra* note 10 at 9.

190. *Id.*

venues of the sex-work industry.[191] Dr. Boyer found that "it is common for them to develop lists of regular clients they can trust or to work for escort services" or try to get jobs in the exotic dancing industry.[192] Similarly, Catrine Donegan, analyzing prostitution in London, found the following:

> [A]ttempts to eradicate the sex industry have failed. As long as there is a demand, the service will remain and attempts to curb it will only drive commercial sex underground in a way that obstructs attempts to promote safe sex and bring about health behavior changes . . . neither the threat of disease nor stigma, abuse or imprisonment have deterred women from working as prostitutes.[193]

Assessing that demand, an assistant deputy superintendent for the Hampden County Sheriff's Department in Springfield, Massachusetts, asserted that studies showed that there are ten customers for every prostitute.[194] DeCou also asserts the following:

> [P]rostitutes have become isolated in the community due to criminalization. In light of social stigma and financial factors, it is extremely difficult for prostitutes to find and hold legitimate employment. Thus, many are forced underground and into association with pimps and other criminal activity, particularly the illegal use, sale and trade of drugs for sex.[195]

Indeed, unless society provides meaningful services to individuals within the sex industry, arrest and conviction of prostitutes virtually guarantees recidivism and does little to change or eliminate prostitution.[196]

These studies make it clear that SOAP orders, despite their ineffectiveness, are not likely to end anytime soon.[197] Moreover, it appears that as the prostitution industry is driven further underground, it may come to pose an even greater risk to public safety, order, and health because individuals who are driven underground are generally discouraged from seeking medical advice.[198] In addition, "[w]ith the threat of arrest . . . prostitutes are isolated from necessary health and

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191. *Id.* at 11.

192. *Id.* at 9.

193. Catrine Donegan, *Prostitutes Can Help Prevent the Transmission of HIV*, 92 NURSING TIMES, June 1996, No. 26, 38.

194. Kate Decou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 428 (1998).

195. *Id.* at 445 (internal citations omitted).

196. Tsenin, *supra* note 145, at 16–17.

197. *See supra* note 24 and accompanying Exhibit 1.

198. Donegan, *supra* note 193, at 38.

social services which could protect [them] and others from diseases and illnesses."[199]

As the preceding sections demonstrate, SOAP orders are likely to be inadequate in meeting the stated purposes of probation, specific deterrence, community protection, and rehabilitation stripped of their undeserved appellate deference. SOAP orders thus cannot justify their resulting infringement on the fundamental right of intrastate travel.

IV. CONCLUSION

History has left many stains on our "American character," and the "oppression now exercised on a helpless people depending on our magnanimity and justice for the preservation of their existence"[200] from SOAP orders is yet another. Perhaps in 50 or 100 years we will regret considering human beings as pollutants. Perhaps there will be a public apology, or perhaps this group will remain forever powerless, without a lobby to coerce another speech about how *this* must never happen again. However, should that day of contrition arrive, we will likely realize that prostitution, in the vast majority of cases, is not a career choice or a habit to be broken. For many individuals, prostitution is a prison perpetuated by violence and alienation. If we truly want to facilitate individuals' escape from this prison, a great deal more thought and planning is required than what has gone into the cleansing project of SOAP orders. In the meantime, we must refuse to allow those meager protections that are in place to be bypassed. SOAP orders are a perversion of a probationary system built on the ideal of individual rehabilitation; they represent an unchecked project of social engineering and community cleansing.

The machinery is in place for appellate courts to genuinely analyze these orders and to discover whether, in any particular case, they are reasonably likely to accomplish the goals of probation. This increased scrutiny in turn will require municipal courts to consider the needs and characteristics of the individuals before them, to apply the ingenuity and discretion for which the probation system was designed, and to stir those courts from the rote, mechanized, industrial line of justice represented by SOAP orders.

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199. Decou, *supra* note 194, at 427.

200. BOBBITT, *supra* note 2, at 118 (1984).