NOTE

Do Judicial "Scarlet Letters" Violate the Cruel and Unusual Punishments Clause of the Eighth Amendment?

"[A] penalty which, in our days, would infer a degree of mocking infamy and ridicule, might then be invested with almost as stern a dignity as the punishment of death itself."[1]

Introduction

In an attempt to reduce escalating correctional facility costs and prison overcrowding as well as find a more effective form of punishment, some trial judges have begun imposing "scarlet letter" probation conditions on convicted defendants. These creative sentences can be effective punishments[2] because they expose individuals involved in "antisocial" conduct to public scrutiny.[3]

In three recently decided cases, *Goldschmitt v. State*,[4] *State v. Kirby*,[5] and *State v. Bateman*,[6] judges imposed scarlet letter probation conditions upon the convicted defendants. After a Florida trial court convicted Arthur Goldschmitt for driving under the influence of alcohol (D.U.I.),[7] the trial judge placed Goldschmitt on probation. As a special condition of the probation, the judge ordered Goldschmitt to place a bumper sticker on his car reading, "CONVICTED D.U.I. — RESTRICTED LICENSE."[8]

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1. N. HAWTHORNE, THE SCARLET LETTER 41 (Norton Critical 2d ed. 1978) (1850).

2. For the purposes of this Note, probation and probation conditions will be treated as forms of punishment. "[I]ncidents of probation emphasize that a probation order is 'an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline.' " Korematsu v. United States, 319 U.S. 432, 435 (1943) (quoting Cooper v. United States, 91 F.2d 195, 199 (5th Cir. 1937)).

3. Punishments "are effective which have the impact of the 'scarlet letter' described by Nathaniel Hawthorne." United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1982), *rev'd*, 741 F.2d 1542 (1984).

4. 490 So. 2d 123 (Fla. Dist. Ct. App. 1986).

5. No. 85-1649 (Or. Cir. Ct. for Lincoln County, March 7, 1986).

6. Nos. C85-08-33209 and C85-10-34220 (Or. Cir. Ct. for Multnomah County, June 17, 1986).

7. *See* FLA. STAT. § 316.193(1) (1987); *infra* notes 124-31 and accompanying text.

8. *Goldschmitt*, 490 So. 2d at 124.

In an Oregon court, Thomas Everitt Kirby pleaded guilty to a charge of first degree burglary.[9] He was placed on probation and was required to place his picture in a local newspaper along with an apology to the public.[10]

In another Oregon court, Richard James Bateman pleaded no contest to charges of first degree sexual abuse.[11] Mr. Bateman received five years probation subject to several conditions, one of which required him to place signs upon the door of his residence and on both doors of any car he may drive reading, "DANGEROUS SEX OFFENDER — NO CHILDREN ALLOWED."[12]

Each of these creative probation conditions breaches the anonymity of a typical probation sentence.[13] Under normal probation conditions, the public may learn of an individual's criminal conduct through newspaper, radio, and television coverage, but his or her criminal record is *not* public information. Because an individual's criminal record is not public information, and because news quickly grows stale, an individual's criminal status often remains unknown or quickly disappears from public awareness.

Judicial scarlet letters, such as Mr. Goldschmitt's bumper sticker, Mr. Kirby's newspaper picture and apology, and Mr. Bateman's signs, not only announce to the general public that the individual has committed a crime, but also announce the crime. Unlike typical probation conditions,[14] a scarlet letter constantly associates the bearer with the crime committed. Thus, these probation conditions expose defendants to the possibility of public persecution. For this and other reasons, scarlet letter punishments raise serious questions of constitutionality under the Eighth Amendment's prohibition against cruel and unusual punishments.[15]

The goals of typical probation conditions are to relieve or avoid institutional overcrowding and stress,[16] as well as to promote rehabilita-

9. *See* OR. REV. STAT. § 164.055 (1987 & 1988 SUPP.); *infra* notes 132-40 and accompanying text.

10. Judgment and Sentencing Order at 2, *Kirby* (No. 85-1649).

11. *See* OR. REV. STAT. § 163.425(1)-(2) (1983); *infra* notes 141-78 and accompanying text.

12. Judgment and Probation Order at 2, *Bateman* (Nos. C85-08-33209 and C85-10-34220).

13. "Typical probation conditions include obedience to the law, restricting access to automobiles, limiting access to certain places or people, and mandatory participation in counseling programs." N. COHEN & J. GOBERT, THE LAW OF PROBATION AND PAROLE 186 (1983).

14. *See supra* note 13.

15. "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" U.S. CONST. amend. VIII (emphasis added).

16. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, JAILS: INTERGOVERNMENTAL DIMENSIONS OF A LOCAL PROBLEM 68 (1984) (Research indicates that "at least

tion.[17] As rehabilitation becomes increasingly unattainable,[18] there has been a shift away from this goal toward other objectives[19] such as retribution, deterrence, and incapacitation.[20]

The judges who sentenced Goldschmitt, Kirby, and Bateman probably imposed scarlet letter probation conditions hoping that shame would deter the defendants from committing similar crimes in the future.[21] A scarlet letter punishment probably also increases public awareness of a convicted defendant's criminal past.

The deterrent effect of shame and increased public awareness has been utilized in the past. Prior to 1776, humiliating devices such as pillories[22] and bilboes[23] were used extensively in the colonies.[24] Although colonial sentences did not order the infliction of pain, pain was often part of the punishment because the public threw stones and other objects at the helpless convicts.[25] These forms of punishment were eventually eliminated when each was found to constitute a form of cruel and unusual punishment.[26]

Like pillories and bilboes, today's judicial scarlet letters are not direct physical punishments. Instead, they are used as a "form of penance and a warning to potential wrongdoers."[27] A scarlet letter also probably increases public awareness of the defendant's criminal activity, thus hampering his or her criminal tendencies. But, because it creates the poten-

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63% of all adults under correctional supervision are serving their sentences under some form of probation.") [hereinafter JAILS].

17. S. SHANE-DUBOW, A. BROWN & E. OLSEN, SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 4 (National Institute of Justice Issues and Practices, 1988).

18. *See infra* notes 43-62 and accompanying text.

19. JAILS, *supra* note 16, at 87-88.

20. *Id.* at 87.

21. "The deterrent, and thus the rehabilitative effect of punishment may be heightened if it 'inflicts disgrace and contumely in a dramatic and spectacular manner.'" Goldschmitt v. State, 490 So. 2d 123, 125 (Fla. Dist. Ct. App. 1986) (quoting United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1982)); *see also* Proceedings at 17-18, *Bateman* (Nos. C85-08-33209 and C85-10-34220).

22. The typical pillory, a device for publicly punishing offenders, consisted of a wooden frame with adjustable boards erected on a post. The offender's head and hands were thrust through holes in the boards and locked into place. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1716 (4th ed. 1976); *see* Hentig, *The Pillory: A Medieval Punishment*, 11 ROCKY MTN. L. REV. 186, 197-98 (1939).

23. A bilbo is a long, heavy bar of iron, having two sliding shackles for the offender's legs. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 215 (4th ed. 1976); *see* Eaton, *Punitive Pain and Humiliation*, 6 J. CRIM. L. & CRIMINOLOGY 894, 897 (1916).

24. A. EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS 142 (1968); Eaton, *supra* note 23, at 897-900; State v. Cannon, 55 Del. 587, 592, 190 A.2d 514, 516 (1963).

25. L. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 3 (1975); Hentig, *supra* note 22, at 197-98.

26. L. BERKSON, *supra* note 25, at 5.

27. *Goldschmitt*, 490 So. 2d at 125 (quoting *William Anderson Co.*, 698 F.2d at 913).

tial for public persecution of defendants, this modern sentencing technique may also be a cruel and unusual punishment.

This Note addresses the question whether modern judicial scarlet letters are cruel and unusual punishment under the Eighth Amendment of the United States Constitution. Part One sketches general sentencing theory, including the background and modern trend of sentencing structures, objectives of incarceration, and modern sentencing theory. Part Two discusses the history of the adoption of the Eighth Amendment. Part Three sets out the Supreme Court's test for unusual punishments in non-capital punishment cases. Finally, this Note analyzes the *Goldschmitt*, *Kirby*, and *Bateman* sentences in light of sentencing theory and eighth amendment jurisprudence. Although each of the three sentences exposes the convict to the risk of public persecution, the author argues that Goldschmitt's and Kirby's sentences are unlikely to subject them to persecution, whereas Bateman's sentence may subject him to severe negative public reaction. Giving weight to this difference, this Note concludes that some judicial scarlet letters are cruel and unusual punishment and some are not.

I. Sentencing Theory

A. Sentencing Structures and Objectives of Incarceration

Each state has its own penal code and related laws that establish sentencing and release policies.[28] State sentencing statutes can be divided into three general categories based on the amount of discretion vested in trial court judges and parole officials: indeterminate, determinate, and mandatory minimum sentence.[29]

Under an indeterminate system, the sentence is set for a range of time (*e.g.*, two to five years) rather than for a specific amount of time (*e.g.*, two years).[30] Under a determinate system, a legislatively deter-

28. *See* Goldschmitt, 490 So. 2d at 125 (quoting *William Anderson Co.*, 698 F.2d at 913).

29. JAILS, *supra* note 16, at 86-87.

30. "This system was called indeterminate because the prisoner's actual time in prison would not be known, or determined, until final release by the parole board. . . .[I]ts primary theoretical rationale was that it permitted sentencing and parole release decisions to be individual, often on the basis of the offender's rehabilitation progress or prospects." R. SINGER, SENTENCING 1 (National Institute of Justice Crime File Study Guide) [hereinafter SENTENCING].

Under an indeterminate system, the judge has a great deal of discretion at sentencing, including power to imprison the defendant, place the defendant on probation, or set conditions on probation. If the judge sentences the defendant to imprisonment, the sentence will be for a range of time rather than for a specified amount of time. The paroling authority is then usually responsible for determining, within limits set by the sentencing judge or by statute, the exact date of release from prison and when correctional jurisdiction will end. JAILS, *supra* note 16, at 87.

The following states have indeterminate sentencing structures: District of Columbia, Kansas, Massachusetts, Nebraska, New Hampshire, Virginia, and West Virginia. *Id.* at 91.

mined length of time effectively sets the maximum sentence that the judge may impose.[31] Under a mandatory minimum sentence system, a statutorily mandated sentence must be imposed in all cases upon conviction.[32]

State legislatures decide which sentencing structure, or combination of structures, the state will follow.[33] "These decisions are framed to a large extent by legislative policy, reflecting the public's views on crime and on the purposes of incarceration."[34] The purposes of incarceration can be sorted generally into four categories: retribution, deterrence, incapacitation, and rehabilitation.[35]

When the object is retribution, the sentence is an end in itself, a punishment for the crime. Retribution stresses fitting the punishment to the crime.[36] The other three categories— deterrence, incapacitation, and rehabilitation—may be characterized as "utilitarian" because all three are designed to reduce or control crime.[37] Deterrence furthers this utilitarian goal by making the sentence severe enough to discourage people from committing the crime.[38] The object of the incapacitation category is to remove "presumptively high-risk individuals" from society, thus preventing them from committing crimes.[39] The object of the rehabilitation category is to correct an individual's criminal behavior to create a useful, functioning member of society.[40]

31. Both the judge's and the paroling authority's discretion is more limited under a determinate system than under an indeterminate system. Actual release and termination dates are influenced by administrative rules allowing reduced terms for good behavior. JAILS, *supra*, note 16, at 87.

The following states have a determinate sentencing structure: California, Colorado, Connecticut, Illinois, Indiana, Maine, Minnesota, New Mexico, and North Carolina. *Id.* at 91.

32. The judge's discretion is most limited under the mandatory minimum sentence system, also called a partially indeterminate system. The court retains power to set the maximum sentence, but it has no authority over the minimum sentence. The paroling authority is responsible for setting the actual term, but probation in lieu of imprisonment is not available, and parole is either not permitted or available only after an unusually long confinement. *Id.* at 87.

The following states have mandatory minimum sentencing structures: Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. *Id.* at 91.

33. *Id.* at 87.

34. *Id.* at 86.

35. *Id.* at 87.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* "Criminologists long accepted the view that an offender's criminal misbehavior could be analogized to a disease, which could be cured if properly treated in a proper institution. Cure became a major goal of both sentencing and incarceration; when released, the of-

B. The Demise of the Rehabilitation Objective

Until 1972, judges in most states had broad discretion to sentence a defendant to probation or incarceration, depending on the offense.[41] In recent years, however, judges' discretion has been widely restricted by the passage of mandatory sentencing laws, habitual offender (recidivist) statutes, and sentencing guidelines.[42]

The restriction of sentencing discretion can be traced to several sources. Prior to 1970, rehabilitation of offenders was the primary objective of most correctional systems.[43] In the first half of the century, most states passed indeterminate sentencing statutes in order to advance this objective. By the mid-1970s, a significant number of state correctional systems had shifted their emphasis from rehabilitation to deterrence, incapacitation, and retribution.[44] This change reflected legislative desires to control criminal offenders more effectively, to minimize differences in time served by prisoners for similar offenses, and to minimize inequities in conditions of release, which were inevitable under an indeterminate sentencing system.[45]

By 1970, rehabilitation programs had become a popular subject for research.[46] The programs were evaluated according to their effects on later offenses or recidivism.[47] Several prominent reviews of this research concluded that there was no evidence that rehabilitation programs

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fender would enjoy a more satisfying, productive, and lawful life; he would not commit additional crimes and everyone's interests would be served." SENTENCING, *supra* note 30, at 1.

41. NATIONAL INSTITUTE OF JUSTICE CRIMINAL JUSTICE RESEARCH, U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE REPORTS, FISCAL YEARS 1980 AND 1981, 41 (1982) [hereinafter CRIMINAL JUSTICE RESEARCH]; SENTENCING, *supra* note 30, at 1.

42. J. PERLSTEIN & D. HENRY, DEALING EFFECTIVELY WITH CROWDED JAILS: A MANUAL FOR JUDGES 21 (National Institute of Justice, 1986) [hereinafter DEALING EFFECTIVELY WITH CROWDED JAILS].

Mandatory sentencing laws *require* prison sentences; the main motivations for such laws are deterrence and incapacitation. JAILS, *supra* note 16, at 88. Some states have also enacted habitual offender (recidivist) statutes, which require mandatory sentences for habitual offenders. *Id.* Sentencing guidelines attempt to standardize sentences primarily on the basis of the crime and the offender's criminal record. SENTENCING, *supra* note 30, at 2.

Mandatory sentencing laws are America's most popular sentencing innovation. M. TONRY, SENTENCING REFORM IMPACTS 25 (National Institute of Justice Issues and Practices, 1987) [hereinafter SENTENCING REFORM IMPACTS]. By 1983, 49 states had adopted such laws for offenses other than murder or drunk driving. Most of the mandatory sentencing laws apply to drug offenses, felonies involving firearms, or felonies committed by persons who have previous felony convictions. *Id.*

43. CRIMINAL JUSTICE RESEARCH, *supra* note 41, at 45.

44. *Id.*; *see* SENTENCING, *supra* note 30, at 2.

45. CRIMINAL JUSTICE RESEARCH, *supra* note 41, at 45; SENTENCING, *supra* note 30 at 2.

46. SENTENCING REFORM IMPACTS, *supra* note 42, at 7.

47. *Id.*

worked.[48] In retrospect, "nothing works" appears to have been too harsh a conclusion.[49] "Both critics and correctional professionals soon abandoned claims that offenders should be incarcerated for rehabilitation, or, as a corollary, that parole boards could make reliable judgments as to whether or when a prisoner was sufficiently rehabilitated to warrant release."[50] This reduced confidence in rehabilitation programs weakened resistance to proposals for change.[51] Legislatures that adopted reforms were probably influenced by 1982 opinion polls showing that the public generally favored a "tough policy" for dealing with crime and lawlessness.[52] The public also felt that laws and courts were too lenient and penalties were not stiff enough.[53] Polls suggest that "the public holds that deterrence and incapacitation rather than rehabilitation . . . are the primary goals of incarceration."[54]

Although about one-fourth of those individuals ordered to pay restitution fail to do so, restitution programs are also popularly endorsed by citizens and criminal justice officials.[55] Even the offenders assigned to community work programs, through which offenders "reimburse" society, tend to believe these programs are "useful and fair."[56]

When policy makers and the public grew disenchanted with rehabilitation, the emphasis of sentencing schemes shifted to retribution, deter-

48. *Id.* A 1975 publication, known as the "Martinson study," D. LIPTON, R. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT, A SURVEY OF TREATMENT EVALUATION STUDIES (1975), was considered by many to be the first comprehensive analysis of research on rehabilitation techniques. The gist of the analysis was that "nothing works." SENTENCING REFORM IMPACTS, *supra* note 42, at 7. The research surveyed indicated that while some forms of rehabilitation were successful, most were not. The researchers concluded that rehabilitation had "not been shown to motivate or equip offenders to discontinue their criminal careers." CRIMINAL JUSTICE RESEARCH, *supra* note 41, at 45.

In 1981, this conclusion was supported by a special panel of the National Academy of Science. After completing a comprehensive review of rehabilitation theory and related research, the panel concluded that "little systematic, consistent evidence can be found in the research literature to support the concept of rehabilitation." *Id.* at 48.

49. A 1976 statistical study of probation presented to Congress by the Comptroller General of the United States concluded that poor probation results "stem from inadequate treatment services, a lack of dependable information to guide judges in deciding who should be placed on probation, and especially the problem of caseloads which are so high that probation officers are unable to perform their supervisory duties effectively." CRIMINAL JUSTICE RESEARCH UTILIZATION PROGRAM, U.S. DEPARTMENT OF JUSTICE, IMPROVED PROBATION STRATEGIES 4 (1980).

50. *Id.*

51. *Id.*

52. J. LEGGE & L. WEBB, REMOVAL OF JUVENILE OFFENDERS FROM ADULT JAILS: A STUDY OF THE EFFECTS OF LAW AND POLICY DEVELOPMENT, POLICY PERSPECTIVES 2 (1982); JAILS, *supra* note 16, at 88.

53. J. LEGGE & L. WEBB, *supra* note 52, at 230.

54. JAILS, *supra* note 16, at 88.

55. CRIMINAL JUSTICE RESEARCH, *supra* note 41, at 50.

56. *Id.*

rence, and incapacitation. Many states adopted statutory schemes[57] that curtail judicial and administrative discretion in determining the length of sentences.[58] Because judges and paroling authorities are left with less discretion, convicted defendants are "often sentenced more severely than they would be in the absence of . . . mandatory [sentencing and recidivist] law[s]."[59] As a result, the states have experienced a tremendous increase in both prison and jail populations[60] and the resulting costs of new correctional facilities.[61]

C. Modern Sentencing Theory

Notwithstanding the statutory limitations discussed above, trial court judges have a great deal of discretion when sentencing a convicted defendant.[62] Faced with prison systems that are both expensive and chronically overcrowded, judges are exercising their discretion to fashion alternatives to incarceration.[63] Alternative sentences include probation, suspended sentences, fines, community service, restitution to the victim, halfway house placement, or treatment programs such as alcohol rehabilitation.[64] These traditional measures are not always successful. For example, probation of convicted felons, the most common form of correctional supervision program, was closely scrutinized by the Rand Corporation in 1985.[65] The Rand Corporation's researchers conducted studies in two California counties, Los Angeles and Alameda, and found that almost two-thirds of those placed on probation were rearrested. Violent crimes comprised approximately twenty-five percent of the new offenses.[66]

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57. *See supra* note 42.

58. *Id.*; JAILS, *supra* note 16, at 91.

59. SENTENCING REFORM IMPACTS, *supra* note 42, at 26.

60. From 1972 to 1979, prison and jail populations nationwide increased 50%. CRIMINAL JUSTICE RESEARCH, *supra* note 41, at 41. In 1979, the total number of prisoners under the jurisdiction of state and federal correctional authorities was 480,500. During the next five years, it increased to 685,700, representing a 43% increase from 1979 to 1984. In 1985, the national correctional facility population was 113.9% of capacity, with a low of 86.4% in North Dakota and a high of 234% in West Virginia. As a result of this overcrowding, 18,617 prisoners were released early in 1985. BUREAU OF CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1987, at 179 (1987) [hereinafter STATISTICAL ABSTRACT].

61. In 1985, expenditures by state correctional facilities exceeded eight billion dollars. NATIONAL INSTITUTE OF JUSTICE, U.S. DEPARTMENT OF JUSTICE, MAKING CONFINEMENT DECISIONS 1 (1987).

62. DEALING EFFECTIVELY WITH CROWDED JAILS, *supra* note 42, at 21.

63. A. HALL, SYSTEMWIDE STRATEGIES TO ALLEVIATE JAIL CROWDING 4 (National Institute of Justice Research in Brief, 1987).

64. *Id.*

65. J. PETERSILIA, S. TURNER, J. KAHAN & J. PETERSON, GRANTING FELONS PROBATION: PUBLIC RISKS AND ALTERNATIVES (Rand Corporation, 1985).

66. *Id.* at vi.

Nor is restitution an ideal alternative, despite its popularity.[67] In 1981, the National Institute of Justice, through its National Evaluation Program, completed a nationwide assessment of restitution programs. The Institute found that approximately one-fourth of those ordered to pay restitution failed to do so,[68] and that the larger the restitution amount, the less likely the offender was to pay it.[69]

Sentencing judges are in a difficult position. Incarceration adds to prison overpopulation[70] and costs,[71] and traditional sentencing alternatives do not always achieve the desired objectives.[72] Some judges faced with this Hobson's choice have devised creative sentencing alternatives. Creative sentencing raises a constitutional issue: When is a scarlet letter a valid sentencing alternative, and when does it constitute a cruel and unusual punishment in violation of the Eighth Amendment?

II. History of the Eighth Amendment

A. Cruel and Unusual Punishment

During the early colonial years, imprisonment was usually an interim step in the penal process.[73] The defendant was confined while awaiting trial and, if convicted, punishment. With the exception of those who received the death penalty, convicted criminals were released after execution of the penalty.[74]

There is little evidence that any significant number of colonials were ever gibbeted,[75] beheaded, or drawn and quartered.[76] But, whipping,

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> During the 40-month follow-up period of our study, 65 percent of the probationers [studied] were rearrested, 51 percent were reconvicted, 18 percent were convicted of serious violent crimes (homicide, rape, weapons offenses, assault, and robbery), and 34 percent were reincarcerated. Moreover, 75 percent of the official charges filed [against the probationers] involved burglary/theft, robbery, and other violent crimes—the crimes most threatening to public safety.

Id. at vi-vii.

67. *See supra* notes 55-56 and accompanying text.

68. CRIMINAL JUSTICE RESEARCH, *supra* note 41, at 50.

69. *Id.*

70. *See supra* note 60.

71. *See supra* note 61.

72. *See supra* notes 32-40 and accompanying text.

73. R. GOLDFARB & L. SINGER, AFTER CONVICTION 20-21 (1973).

74. *Id.*

75. A gibbet was a gallows, an upright post with an arm projecting from the top, on which convicted defendants were hung in chains and allowed to remain as a warning. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 955 (4th ed. 1976).

76. L. BERKSON, *supra* note 25, at 4; Black, *Torture Under English Law*, 75 U. PA. L. REV. 344, 348 (1927); A. BONFONTI, THE WITCHCRAFT HYSTERIA OF 1692, at 48-53 (1971); State v. Cannon, 55 Del. 587, 593 (1963); Done v. People, 5 Parker's Crim. Rep. 364, 383-84 (N.Y. 1863).

mutilation, and branding[77] were among the punishments used, as well as such humiliating devices as pillories, ducking stools,[78] stocks, and bilboes.[79] Many, if not most, of the sentences were publicly inflicted or designed to alter the offender's physical appearance to indicate status.[80] While physical pain was generally not an intended consequence of most sentences, it often accompanied such punishment.[81]

B. Adoption of the Eighth Amendment

No bill of rights was contained in the document proposed and debated by the Constitutional Convention in 1789.[82] On June 8, 1789, James Madison introduced the first draft of a federal Bill of Rights into the United States House of Representatives.[83] His fourth article included the following provision: "Excessive bail *shall not* be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[84]

When the Eighth Amendment to the United States Constitution was ratified by the states on December 15, 1791,[85] cruel and unusual punishment was prohibited.[86] The Bill of Rights was originally held to apply only to the federal government, not to the states.[87] In 1962, the Supreme Court held that the Eighth Amendment's Cruel and Unusual Clause (the Clause) was fully applicable to the states through the Due Process Clause of the Fourteenth Amendment.[88]

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77. Paine, *Jocular and Infamous Punishments*, 114 LAW TIMES 479 (March 21, 1903); W. ANDREWS, BYGONE PUNISHMENTS (2d ed. 1931); A. EARLE, *supra* note 24, at 140; Thompson, *Early Corporal Punishments*, 6 ILL. L.Q. 37, 43 (1923); Foote v. State, 59 Md. 264, 267 (1883).

78. A ducking stool was a chair into which convicted defendants were tied to be plunged into water. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 698 (4th ed. 1976).

79. *See generally supra* notes 22-25.

80. *Id.*

81. L. BERKSON, *supra* note 25, at 13; Hentig, *supra* note 22, at 197-98.

82. A. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 587-88 (1911).

83. 1 ANNALS OF CONGRESS 434 (J. Gales ed. 1789).

84. *Id.* (emphasis added). On June 12, 1776, the Virginia Declaration of Rights was adopted. Article nine of the Declaration stated, "Excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This sentence was taken from the English Declaration of Rights of 1688, but its principle can be traced back to 1215 and the Magna Carta. The language Madison chose was very similar to the language in the English Bill of Rights and the Virginia Declaration of Rights, but he made an important change in the wording of his clause. Madison's decision to use the imperative "shall" instead of the flaccid "ought" implies that he believed the prohibition against cruel and unusual punishment was so fundamental that it required stronger wording than had been used in the previous documents.

85. T. CALVERT, 2 THE CONSTITUTION AND THE COURTS 341 n.1 (1924).

86. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend VIII.

87. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688 n.1 (1988).

88. Robinson v. California, 370 U.S. 660 (1962).

While the Eighth Amendment precluded many colonial forms of punishment, it did not immediately abolish all of them. For example, it was not until 1839 that Congress finally abolished the penalties of whipping and standing pillory.[89]

C. Interpretation of the Cruel and Unusual Clause

The Supreme Court has held that the language of the Clause manifests "an intention to limit the power of those entrusted with the criminal law function of government,"[90] and that the Clause was designed to "protect those convicted of crimes."[91] Justice Brennan, concurring in *Furman v. Georgia*,[92] interpreted the Clause to require "[t]he State, even as it punishes, [to] treat its members with respect for their intrinsic worth as human beings."[93] In the same opinion, Brennan also stated, "[t]he fundamental premise of the clause [is] that even the vilest criminal remains a human being possessed of common human dignity."[94]

If courts had merely to measure challenged punishments against those punishments that have long been condemned, their analytical work would be relatively simple.[95] But this "narrow and unwarranted view of the Clause . . . was left behind with the 19th century."[96] When analyzing an allegedly cruel and unusual punishment under the Clause, a court must look to "the evolving standards of decency that mark the progress of a maturing society."[97]

D. Judicial Analysis Under the Eighth Amendment

In non-capital punishment cases, the Supreme Court has generally interpreted the Clause as forbidding either the unnecessary and wanton infliction of pain[98] or sentences grossly disproportionate to the severity of the crime committed.[99]

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89. Act of Feb. 28, 1839, ch. 36, 5 Stat. 321-22 (codified at 18 U.S.C. § 3564 (1982)) (repealed 1986).

90. Whitley v. Albers, 475 U.S. 312, 318 (1986) (quoting Ingraham v. Wright, 430 U.S. 651, 664 (1977)).

91. *Ingraham*, 430 U.S. at 644 n.40.

92. 408 U.S. 238, 257 (1972).

93. *Id.* at 270 (Brennan, J., concurring).

94. *Id.* at 273.

95. *Id.* at 269.

96. *Id.*

97. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

98. Furman v. Georgia, 408 U.S. 238, 392-93 (Burger, C.J., dissenting); *see* Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879); Weems v. United States, 217 U.S. 349, 381 (1910); Whitley v. Albers, 475 U.S. 312, 319 (1986).

99. Solem v. Helm, 463 U.S. 277, 284 (1983); *Gregg*, 428 U.S. at 173; *Trop*, 356 U.S. at 100; *Weems*, 217 U.S. at 367.

1. Unnecessary and Wanton Infliction of Pain

Justice Field, dissenting in *O'Neil v. Vermont*,[100] stated that barbaric punishments include "punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like," noting specifically that these were accompanied by "acute pain and suffering."[101] Nonetheless, these forms of punishment have been condemned for reasons beyond the simple condemnation of physical pain and suffering.[102] As the Court wrote, "The true significance of these punishments is that they treat members of the human race as nonhumans."[103]

As noted in *Furman v. Georgia*,[104] the Framers of the Eighth Amendment recognized that a punishment may be cruel and unusual although it does not inflict bodily pain or mutilation. Even if a punishment involves no " 'physical mistreatment, no primitive torture,' severe *mental pain* may be inherent in the infliction of [the punishment]."[105]

The Court considered the issue of cruel and unusual punishment and mental pain in *Weems v. United States*.[106] The defendant was convicted of falsifying a public document and sentenced to fifteen years imprisonment with hard labor in chains and permanent deprivation of his civil liberties.[107] The Supreme Court held that Mr. Weems' punishment violated the Clause because of the physical and mental pain inflicted. "His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate . . . ."[108]

The defendant in *Trop v. Dulles*[109] was convicted of desertion after an unauthorized leave from his military unit for less than a day. The trial court sentenced Mr. Trop to involuntary exile.[110] In a plurality decision, the Supreme Court held Trop's punishment was cruel and unusual under the Clause:

> This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-

100. 144 U.S. 323, 339 (1892).

101. *Id.* at 339 (Field, J., dissenting); *see also* Hobbs v. State, 133 Ind. 404, 409, 32 N.E. 1019, 1021 (1893) (Supreme Court of Indiana held Clause contemplates punishments such as whipping, pillorying, burning at the stake, and breaking on the wheel).

102. *Furman*, 408 U.S. at 272 (1972) (Brennan, J., concurring).

103. *Id.* at 272-73.

104. *Id.* at 271; *see* Weems v. United States, 217 U.S. 349, 372 (1910).

105. *Furman*, 408 U.S. at 271 (Brennan, J., concurring) (emphasis added); *see Weems*, 217 U.S. at 366.

106. 217 U.S. 349 (1910).

107. *Id.* at 358.

108. *Id.* at 366.

109. 356 U.S. 86 (1958).

110. *Id.* at 107.

> increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him . . . [Mr. Trop] may be subject to banishment, a fate universally decried by civilized people.[111]

As it had in *Weems*, the Court found that the mental pain associated with the sentence made the sentence unconstitutional.

2. *Sentence Disproportionate to Crime*

The Supreme Court adopted a test for proportionality of sentences in *Coker v. Georgia*,[112] but the Court's holdings in *Rummel v. Estelle*[113] and *Hutto v. Davis*[114] restricted application of the test to death penalty cases.[115] In *Solem v. Helm*,[116] the Court liberalized its approach, allowing application of the proportionality test to noncapital cases and setting forth an objective test for cruel and unusual punishment.[117]

Despite its liberalizing tone, *Solem* did not overrule *Rummel*.[118] However, lower courts are reluctant to apply the *Solem* proportionality test unless the sentence is for life without the possibility of parole. Because many courts are reluctant to use the *Solem* proportionality test, analysis of the constitutionality of scarlet letter probation conditions may be limited to the unnecessary and wanton infliction of pain test.[119]

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111. *Id.* at 102.

112. 433 U.S. 584, 592 (1977).

113. 445 U.S. 263 (1980).

114. 454 U.S. 370 (1982).

115. Note, Solem v. Helm: *The Supreme Court Extends the Proportionality Requirement to Sentences of Imprisonment*, 1984 WIS. L. REV. 1401, 1408.

116. 463 U.S. 277 (1983).

117. Note, *supra* note 115, at 1408.

118. *Solem*, 463 U.S. at 288 n.13.

119. Mackey, *Rationality versus Proportionality: Reconsidering the Constitutional Limits on Criminal Sanctions*, 51 TENN. L. REV. 623, 633-34 (1984) ("In the short time since [*Solem*] was decided, federal and state courts have shown a notable reluctance to recognize proportionality claims. In fact, the treatment of [*Solem*] by later cases suggests that proportionality review may be limited to life sentences without the possibility of parole."); Baker v. Huntsville, 516 So. 2d 927, 931 (Ala. Crim. App. 1987) (*Solem* proportionality analysis only applies to sentences of life imprisonment without parole.); *see also* Project, *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987* 76 GEO. L.J. 521, 1112 (1988) ("Some of the circuit courts specifically limit an extensive proportionality review to sentences of life without the possibility of parole. Others have virtually disregarded the *Solem* proportionality principle."). *But see* Oakley v. State, 715 P.2d 1374, 1379 (Wyo. 1986) (dictum) ("[I]n cases where the mode of punishment is unusual" court will "engage in a lengthy analysis under all three of the *Solem* criteria."); United States v. Butler, 817 F.2d 1404, 1415 (9th Cir. 1987) (prima facie case of excessive forfeiture under Racketeer Influenced and Corrupt Organization Act (RICO) requires sentencing court to do *Solem* proportionality analysis); Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 210-11 (1986-1987) (*Solem* "effectively wrote *Rummel* out of the body of eighth amendment case law. The Court reaffirmed that the Clause indeed forbids the infliction of any punishment, capital or otherwise, that is not commensurate with the gravity of the offense.").

3. Judicial Review of Legislatively Mandated Sentences

Courts should be reluctant to "review *legislatively* mandated terms of imprisonment,"[120] and "successful challenges to the proportionality of particular sentences should be exceedingly rare."[121] The Supreme Court is extremely reluctant to question the appropriateness of criminal sentences.[122]

"On the breast of her gown, in fine red cloth, surrounded with an elaborate embroidery and fantastic flourishes of gold thread, appeared the letter A."[123]

III. Application

A. *Goldschmitt v. State:*[124] "CONVICTED D.U.I. — RESTRICTED LICENSE"

Arthur Goldschmitt was arrested for driving under the influence of alcohol.[125] He was convicted and, because he was a first-time D.U.I. offender, was placed on probation.[126] A special condition of his probation required him to place a bumper sticker on his car reading, "CONVICTED D.U.I. — RESTRICTED LICENSE."[127]

Mr. Goldschmitt appealed the bumper sticker probation condition. Comparing the bumper sticker to the pillory, he argued that the bumper sticker was cruel and unusual punishment and, therefore, violated the Clause. The Florida Court of Appeals, unpersuaded by Mr. Goldschmitt's argument, affirmed the sentence.[128]

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120. Rummel v. Estelle, 445 U.S. 263, 274 (1980) (emphasis added).

121. Hutto v. Davis, 454 U.S. 370, 383 (quoting *Rummel*, 445 U.S. at 272).

122. *See, e.g., Rummel*, 445 U.S. 263. Rummel was sentenced to mandatory life imprisonment under Texas' habitual criminal statute. Rummel had been convicted of three felonies: obtaining $120.75 by false pretenses, fraudulently using a credit card to obtain $80.00 worth of goods, and passing a $28.36 forged check. The Supreme Court, in a five-to-four decision, held that the mandatory life sentence was not cruel and unusual punishment. *See also* Hutto v. Davis, 454 U.S. 370. Davis, convicted for distributing marijuana and possession with intent to distribute, was fined $20,000 and sentenced to 40 years in prison. The Supreme Court held that the sentence was not cruel and unusual.

123. N. HAWTHORNE, *supra* note 1, at 43.

124. 490 So. 2d 124 (Fla. Dist. Ct. App. 1986).

125. *Id.* at 124.

126. *Id.*

127. *Id.*

128. *Id.* at 125-26.

1. Eighth Amendment Analysis of Goldschmitt's Punishment

The Florida Court of Appeals stated that the differences between the degrading physical rigors of the pillory and the unwanted publicity of the bumper sticker far outweighed the similarities between the two punishments.[129] The court stated that this scarlet letter probation condition did not offend the Constitution, and held that "[t]he deterrent, and thus the rehabilitative effect of punishment may be heightened if it 'inflicts disgrace and contumely in a dramatic and spectacular manner.' "[130] But, even as it affirmed Goldschmitt's scarlet letter probation condition, the appellate court recognized that such a creative probation condition could offend constitutional standards.[131]

Implicit in the Florida appellate court's dictum is a recognition that a cruel and unusual punishment argument could prevail in certain circumstances. Thus, had Mr. Goldschmitt presented evidence showing that he was physically or mentally injured by the probation condition, the court might have looked more favorably on his pillory analogy argument and ruled in his favor. Because he did not present adequate evidence to support his argument, the court correctly concluded that his bumper sticker probation condition did not involve an unnecessary and wanton infliction of mental or physical pain, and was therefore not cruel and unusual punishment.

B. *State v. Kirby*:[132] "I apologize. . . ."[133]

Thomas Everett Kirby pleaded guilty to first degree burglary.[134] Mr. Kirby was placed on probation with the Oregon Corrections Division for thirty months.[135] One of the conditions of his probation required him to publish, at his own expense, an advertisement known as a "Criminal's Apology," in the Newport News-Times.[136] On April 30, 1986, Mr. Kirby's picture and self-written apology appeared in the paper.[137]

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129. *Id.* at 125.

130. *Id.* at 125 (quoting United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1983)).

131. *Id.* at 126.

132. No. 85-1649 (Or. Cir. Ct. for Lincoln County 1986).

133. Judgment and Sentencing Order, *Kirby*, No. 85-1649 (Or. Cir Ct. for Lincoln County, March 7, 1986).

134. Petition to Enter Plea of Guilty, *Kirby*, No. 85-1649 (March 2, 1986).

135. Judgment and Sentencing Order, *Kirby* at 1. Mr. Kirby was also required as part of his probation to perform 80 hours of community service and to pay a fine.

136. *Id.* at 2.

137. *See* Newport News-Times, April 30, 1986, at A2. In addition to the photograph and the apology, the ad, entitled "CRIMINAL'S APOLOGY," contained a summary of the facts under which Kirby was convicted, his sentence, his prior criminal record, and his address. Also included was a section entitled "CRIME STOPPERS TIP":

> As the jails and penitentiaries fill up and criminals remain in the community, be aware of which of your neighbors pose a threat to you and your family. Don't hesti-

To alleviate prison overcrowding and use county jail cells more efficiently,[138] Newport, Oregon has enacted a program that requires certain convicted criminals to make public apologies in lieu of incarceration.[139] Local law enforcement officials consider the program successful because it has raised defendants' awareness of their personal conduct and the public's awareness of criminal activity.[140]

1. Eighth Amendment Analysis of Kirby's Sentence

Publicity effects of the Criminal's Apology are essentially the same as those of a news story on the individual's criminal conduct. News coverage of an individual's criminal conduct has not yet resulted in a successful cruel and unusual punishment challenge. Therefore the Criminal's Apology probably does not inflict the degree of physical or mental pain needed to find that a punishment is unnecessary and wanton.

Nevertheless, this public apology probation condition could offend constitutional standards. As the *Goldschmitt* dictum indicated,[141] under different circumstances Kirby might have prevailed with a cruel and unusual punishment argument. For instance, if he had presented evidence to the court showing that he was physically or mentally abused as a result of his Criminal's Apology, Kirby would strengthen his cruel and unusual punishment argument and the court could rule in his favor.

C. *State v. Bateman:*[142] "DANGEROUS SEX OFFENDER — NO CHILDREN ALLOWED"

In October of 1985, two indictments for first degree sexual abuse[143] were filed against Richard James Bateman in Multnomah County, Oregon for sexual abuse of a five-year-old girl and a six-year-old boy. Both children were neighbors of Mr. Bateman. He pleaded no contest to the charges in both cases.[144] This was not the first time Mr. Bateman was accused and convicted of sexual abuse.[145] When he appeared for sen-

tate [sic] to call a person's probation officer or the police if you observe any suspicious activity on their [sic] part. Be aware of who has been convicted of crimes and who may be committing crimes in your neighborhood.

138. Letter from Ulys J. Stapleton, District Attorney, Lincoln County, Oregon, to Gregory M. Brown (Jan. 5, 1988) (discussing public criminal apologies).

139. *Id.*

140. *Id.* This program is authorized by OR. REV. STAT. § 137.540(2) (1988 Supp.) ("In addition to the general conditions, the court may impose special conditions of probation for the protection of the public or reformation of the offender, or both. . . .").

141. *Goldschmitt*, 490 So. 2d at 126; *see supra* text following note 131.

142. State v. Bateman, Nos. C85-08-33209 and C85-10-34220 (Or. Cir. Ct. for Multnomah County, Oct. 11, 1985).

143. OR. REV. STAT. § 163.425 (1)-(2) (1983).

144. Appellant's Brief at 2, State v. Bateman, No. A44854 (Or. Ct. App., Nov. 1987).

145. On August 27, 1978, Mr. Bateman was accused of sexually abusing a neighbor's six-year-old girl. After an investigation into this occurrence, the victim's parents told the district attorney that they did not wish to proceed with the case because they feared that their daugh-

tencing,[146] Bateman faced a maximum of five years imprisonment and a $100,000 fine for each conviction.[147] However, the court suspended the prison sentences and placed Bateman on five years formal supervised probation under the Corrections Division of the State of Oregon.[148]

Among the conditions of Mr. Bateman's probation were the requirements that he report as often as directed to the Corrections Division, and not violate any laws.[149] The court also specified eleven special probation conditions, including the following:

> (9) that he place upon his door of residence, in three (3) inch lettering, DANGEROUS SEX OFFENDER — NO CHILDREN ALLOWED, . . . and
>
> (11) that on any vehicle he may operate he place signs on both doors that read DANGEROUS SEX OFFENDER — NO CHILDREN ALLOWED.[150]

Mr. Bateman has filed an appeal with the Oregon Court of Appeals,

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ter would be further traumatized. *See* Respondent's Brief at 5, State v. Bateman, No. A44854 (Or. Ct. App., Dec. 17, 1987).

On the evening of March 3, 1979, Mr. Bateman kidnapped and sexually abused a nine-year-old girl. Bateman and the child's mother had become casually acquainted through her work at a local store. When the child's mother had car trouble, Bateman towed the car to her apartment. The victim rode with Mr. Bateman. He molested the child in the car, and again later at his home. He returned the child to her mother at approximately 8:00 a.m. the next morning. State v. Bateman, 48 Or. App. 357, 360, 616 P.2d 1206, 1208 (1980). A jury convicted Bateman of kidnapping in the second degree, OR. REV. STAT. § 163.225 (1971), sodomy in the first degree, OR. REV. STAT. § 163.405, and sexual abuse in the first degree, OR. REV. STAT. § 163.425 (1971). State v. Bateman, 48 Or. App. at 359, 616 P.2d at 1207 (1980).

On December 15, 1980, Mr. Bateman was sentenced to prison for the crimes he committed on March 3, 1979. Respondent's Brief at 9, *Bateman* (No. A44854). The court imposed a five-year prison sentence for sexual abuse in the first degree, a seven-year prison sentence for kidnapping in the second degree, and a seven-year prison sentence for sodomy in the first degree. The sentencing order stated that the sentences were to be served concurrently.

While he was in prison, Mr. Bateman did not enter the prison's sex offender program because he "did not think that he needed treatment." Respondent's Brief at 7. He was paroled on August 15, 1983, and one year later he was discharged from parole.

146. Sentencing Proceedings, State v. Bateman, Nos. C85-08-33209 and C85-10-34220 (Or. Cir. Ct. for Multnomah County, May 20, 1987). At his sentencing hearing, Mr. Bateman stipulated that he met the criteria of OR. REV. STAT. § 426.675(2) (1977), and the court then declared him to be a sexually dangerous offender under OR. REV. STAT. § 426.675(3) (1977).

147. OR. REV. STAT. § 161.605(3).

148. Judgment and Probation Order at 1, State v. Bateman, Nos. C85-08-33209 and C85-10-34220 (Or. Cir. Ct. for Multnomah County, June 15, 1987).

149. *Id.*

150. *Id.* at 2. The other conditions were:

> (1) that he be incarcerated in the Multnomah County Jail for a period of one year and that he participate in and successfully complete a thirty (30) day residential alcohol treatment program, and upon the completion of said program, the court will entertain a motion for passes for employment purposes only,
>
> (2) that he maintain full-time employment,
>
> (3) that he abstain from the use of any alcoholic beverages, and further, any prescription drugs/narcotics without prior notification from doctor to defendant's probation officer,

alleging error in the imposition of the above conditions.[151] Briefs have been filed with the Oregon Court of Appeals and oral argument was held in December 1987.[152]

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(4) that he participate in any sexual offender treatment program as directed by his probation officer and upon this court's approval,
(5) that he submit to polygraph examination, at his expense, as directed by his probation officer,
(6) that he submit to random breath testing and/or urinalysis testing upon the request of his probation officer,
(7) that he not return within ten (10) blocks of 11300 Northeast Morris Street,
(8) that he have *NO* contact with minors, . . .
(10) that he be banned from parks, playgrounds, the zoo, school grounds or any place where children primarily congregate. . . .

Id. at 1-2.

151. Appellant's Brief at 3, State v. Bateman, No. A44854 (Or. Ct. App., Nov. 1987).

152. *Defendant-Appellant's Argument*

Article I, section 16 of the Oregon Constitution and the Eighth Amendment of the U.S. Constitution prohibit cruel and unusual punishment. From this initial premise, Mr. Bateman presents case law and arguments which he feels lead to a ruling in his favor. *Id.* at 26.

Relying on the holdings of *Weems* and *Trop*, Mr. Bateman contends that the United States Supreme Court has found that the Clause prohibits mental as well as physical suffering. *Id.* at 22. Bateman points out that in *Trop,* the Court held that the punishment of involuntary expatriation "was a 'punishment more primitive than torture' because it necessarily involves a denial by society of the individual's existence as a member of the human community." *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

Mr. Bateman contends that the probation conditions at issue will reduce his social status to that of a "nonhuman." *Id.* He takes the position that the signs "will only serve to incite the public." *Id.* According to Mr. Bateman, if he is required to follow the probation condition, no one will want him as a neighbor, no employer will hire him for fear of hurting his or her business, and, finally, others may avoid him, fearing the implication of associating with him. *Id.* at 22-23. "[Mr. Bateman] will be at best shunned from society and at worst subjected to physical harassment and abuse." *Id.* at 23. Therefore, the punishment would offend "the fundamental premise of the [Clause] that even the vilest criminal remains a human being possessed of common human dignity." *Id.* (quoting Furman v. Georgia, 408 U.S. 238, 273 (1972)).

Mr. Bateman cites the analysis presented in *Furman* to support his cruel and unusual punishment argument. *Id.* In his *Furman* concurrence, Justice Brennan set forth four factors to consider when determining whether a challenged punishment is unconstitutional under the clause:

(1) a "punishment must not be so severe as to be degrading to the dignity of human beings,"
(2) a severe punishment must not be inflicted arbitrarily,
(3) a severe punishment must not be unacceptable to contemporary society, and
(4) a severe punishment must not be excessive, that is, unnecessary because "it is nothing more than the pointless infliction of suffering" and "there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted."

Furman, 408 U.S. at 279 (Brennan, J., concurring). Mr. Bateman contends that the special probation conditions at issue fail under each of the four factors. Appellant's Brief at 24, *Bateman* (No. A44854).

Bateman's probation conditions fail under the first factor because, as previously discussed, under these conditions he would be treated as a nonhuman. The conditions are arbitrary, and therefore do not meet the second factor, because: (1) the record does not show that the signs will further protect children or assist Mr. Bateman in re-integrating himself into society; and

On February 10, 1988, the trial court judge sentenced Mr. Bateman to ten years in prison for failing to display a sign on his house, in viola-

(2) the probation requirement has not been imposed upon other sex offenders and is thus unique to Mr. Bateman among sex offenders in Oregon. Mr. Bateman sets forth two arguments to show the probation requirements don't meet the third factor. First, "rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity." *Id.* at 23-24 (quoting *Furman*, 408 U.S. at 277) (Brennan, J., concurring)). Second, the conditions are not acceptable to contemporary society, because the purpose of Oregon's penal laws is reformation, not retribution. Finally, the special conditions fail the fourth factor, because Mr. Bateman's other probation conditions make these special conditions unnecessary. *Id.* at 24.

Mr. Bateman's defense relies on the holdings of *Weems* and *Trop* and Brennan's *Furman* concurrence. He did not present a proportionality argument.

Plaintiff-Respondent's Argument

The State points out that the Supreme Court is extremely reluctant to question the appropriateness of criminal statutes. *Id.* at 32. To support this argument, the State cites the *Solem* and *Weems* cases. *Id.* The State also points out that the *Trop* decision was a plurality opinion and argues that "[e]ven when faced with such a rare and severe penalty imposed for a relatively minor violation, only four members of the Court found the punishment unconstitutionally cruel and unusual." *Id.* at 33. According to the State, the Supreme Court is only concerned with the "imposition of *extreme* punishments—death, unnecessary and wanton infliction of pain, unusually extensive incarceration, [and] involuntary expatriation—that are grossly disproportionate in fact to the offense committed." *Id.* at 34 (emphasis in original). To preclude the probation conditions at issue would "trivialize" the Clause. *Id.*

The State also points out that Mr. Bateman was unable to cite any case in which a probation condition was found to be in violation of the Clause, or was seriously analyzed under the Clause. *Id.* at 34-35. The State relies on the *McDowell* and *Goldschmitt* cases to support its position "that a probation condition, notwithstanding that it requires the probationer to self-disclose his crime publicly, is not unconstitutionally cruel and unusual . . . ." *Id.* at 37.

In response to Mr. Bateman's analogy of his sentence to the pillory, the State argues that even if this "pillory sentence" was assumed to be cruel and unusual punishment under the Clause, Mr. Bateman has not been sentenced involuntarily to the pillory. *Id.* at 28-29. Mr. Bateman can avoid imprisonment by "*voluntarily*" posting the signs. *Id.* at 29 (emphasis in original). From this, the State argues that while he has no right to declare probation or to dictate its terms, Mr. Bateman holds the power to refuse to comply with the special probation conditions. *Id.* at 27-28. If he refuses to comply or fails to comply with the probation conditions, Mr. Bateman is subject only to the revocation of the probation and imposition of the original sentence. *Id.* at 28.

Upon his conviction, Mr. Bateman could have received a "straight time" sentence of up to ten years' imprisonment and a $200,000 fine. OR. REV. STAT. § § 161.605(3) (1971), 161.625(1) (1981). Although he did not challenge this potential sentence, the State argues that the sentence would pass constitutional muster if challenged, particularly because of his prior record. Respondent's Brief, at 27. The State then argues that the five-year special probation conditions are a less severe infringement of Mr. Bateman's liberty than ten years of imprisonment, and since the latter punishment would not be unconstitutional, neither would the former. *Id.*

The State also contends that the special probation conditions are not cruel and unusual punishment because Bateman chose probation rather than risk imposition of a straight sentence of up to ten years. *Id.* at 27-28. The State claims it is a fair assumption that if compliance with the conditions were in fact more onerous upon Mr. Bateman than the straight time

tion of his ninth special probation condition.[153] On December 14, 1988, the Oregon Court of Appeals dismissed Bateman's appeal as moot, because the trial court revoked his probation after he filed the appeal.[154] Bateman has filed a second appeal but no decision has been rendered.[155]

Mr. Bateman contends that the special probation conditions that require him to place signs reading, "DANGEROUS SEX OFFENDER — NO CHILDREN ALLOWED" on the doors of his residence and vehicle are invalid because they constitute cruel and unusual punishment.[156] He argues that he will be exposed to public humiliation and abuse as a direct result of the signs.[157]

Mr. Bateman contends that the purpose of the signs is retribution, rather than the ostensible purposes of probation, reformation, and rehabilitation. Also, he argues, the signs will not assist him in reforming himself and re-integrating himself into society. Instead, "[t]hey inform him and the public that he does not deserve to be treated as a human being."[158] This probation condition hinders the real purposes for probation. Therefore, the special probation conditions at issue should be held invalid.[159]

The State contends that the special probation conditions at issue are not cruel and unusual punishment under the Eighth Amendment.[160] The State argues that the conditions challenged are "substantially less punishment,"[161] both quantitatively and qualitatively, than Mr. Bateman could have received for his crimes under the applicable sentencing statutes.[162] The State believes that the probation conditions are "ultimately optional,"[163] and that any adverse consequences Bateman might suffer, such as extreme difficulty in finding a place to live or employment, are "completely speculative."[164] Finally, the State argues that the probation conditions do not even approach, in concept or effect, the extreme penal-

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and fine sentence, he would then simply refuse to comply with the conditions and thereby risk imposition of the straight time and fine as the less onerous alternative. *Id.* at 28.

Finally, the State dismisses Mr. Bateman's concerns about the public's reaction to the signs as "completely speculative." *Id.* at 47. If "collateral consequences" should arise, Mr. Bateman "may seek modification of the [probation] condition[s]." *Id.* at 48.

153. L.A. Times, Feb. 11, 1988, Part I, at 2, col. 5.

154. State v. Bateman, 94 Or. App. 449 (1988).

155. Telephone interview with Diane L. Alessi, Deputy Public Defender, Salem, Or. (Jan. 20, 1989).

156. Appellant's Brief at 3-4, *Bateman* (No. A44854).

157. *Id.* at 4.

158. *Id.*

159. *Id.*

160. Respondent's Brief at 1, *Bateman* (No. A44854).

161. *Id.* at 31.

162. *Id.*

163. *Id.* at 37.

164. *Id.* at 47.

ties that have troubled the Supreme Court under the Clause.[165] Therefore, according to the State, the probation conditions at issue are not cruel and unusual punishment under the Clause.[166]

"Thus the young and pure would be taught to look at her, with the scarlet letter flaming on her breast . . . as the figure, the body, the reality of sin."[167]

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1. Eighth Amendment Analysis of Bateman's Sentence

Imposition of Mr. Bateman's challenged probation conditions could result in his banishment from society. The Supreme Court has held that such punishment is unconstitutional under the Eighth Amendment. In *Trop v. Dulles*, the imposition of involuntary exile upon Mr. Trop and the consequent uncertainty and anxiety he would suffer made the punishment in *Trop v. Dulles* unconstitutional.[168] The *Trop* Court felt that exiling Mr. Trop would subject him to "a fate of ever-increasing fears and distress," never knowing "what discriminations may be established against him."[169] He might be subject to "banishment, a fate universally decried by civilized people."[170] In his *Trop* concurrence, Justice Brennan added:

> [I]t can be supposed that the consequences of greatest weight in terms of ultimate impact on the petitioner, are unknown and unknowable. Indeed, in truth, he *may* live out his life with but minor inconvenience. [However], [t]he uncertainty, and the constant psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.[171]

Society despises child molesters; therefore, Mr. Bateman, like Mr. Trop, could be banished from society if he is required to display the signs.[172] Mr. Bateman will probably have a difficult time finding a place to live and work.[173] In addition, public reaction from those who associ-

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165. *Id.* at 37.

166. *Id.*

167. N. HAWTHORNE, *supra* note 1, at 60-61.

168. Trop v. Dulles, 356 U.S. 86, 102-03 (1958); *see supra* text accompanying notes 109-11.

169. *Trop*, 356 U.S. at 102.

170. *Id.*

171. *Id.* at 110 (Brennan, J. concurring) (emphasis added) (footnote omitted).

172. *See supra* note 152 and accompanying text.

173. *Id.* When Mr. Bateman was arrested for violating his ninth special probation condition, mandating that he display a sign on his home, he was working under a fictitious name as a drywall installer. His former employer stated that he would not have hired Bateman had he known his true identity. Lerten, U.P.I., Feb. 7, 1988 (NEXIS).

ate the signs with him will add to the psychological hurt caused by the signs directly. Mr. Bateman will be put in an uncertain position, not knowing what discriminations will be directed at him. Given the crime he committed and the public's opinion about such crimes, Mr. Bateman could be subject to a more severe public reaction than the reaction Mr. Trop would have experienced had his sentence been upheld.

The force of public reaction to a perceived stigma was painfully illustrated in another context. In Arcadia, Florida, Clifford Ray obtained a court order allowing his three hemophilic sons, who had all tested positive for AIDS antibodies, to enroll in school.[174] Public reaction to the court order and the boys' presence was startling. Five hundred people showed up for a "Citizens Against AIDS" rally; almost half of the school's students boycotted the first day of class; bomb threats at the school forced the children out of classes three times in one week; and an arsonist's fire gutted the Ray's home.[175]

The AIDS virus is not spread through casual contact, like that which occurs among children at school.[176] The virus is most often spread through sexual contact, sharing of contaminated needles by intravenous drug users, contaminated blood products, or from an infected mother to her child during pregnancy.[177] The Ray boys could not spread the AIDS virus to other students by being in the same classroom with them, yet some members of the public reacted violently. One explanation for this severe reaction is that parents perceived the AIDS virus as a threat to their children.

The public can also easily perceive Mr. Bateman as a threat to children. Bateman has proven himself an active threat to children; his criminal behavior, his failure to enroll in a sex therapy group, and his own admissions support this conclusion. Once he is identified by the signs on his house and car, there is a good chance that Mr. Bateman will receive reactions similar to, or worse than, those received by the Ray family. Forcing Mr. Bateman to comply with the conditions at issue will provide each member of society with the opportunity to persecute him. This persecution cannot be allowed. The state, not the general public, must deal with violations of law. Mr. Bateman should not be put in this vulnerable position merely for the sake of reducing Oregon's prison population.

174. Monmaniu, *No Escaping the Dilemma of Kids with AIDS in School*, Newsweek, Sept. 7, 1987, at 52, col. 1.

175. *Id.*

176. *Id.*; *see also* Clark, Cosnell, Witherspoon, Hager & Coppola, *AIDS*, Newsweek, Aug. 12, 1985, at 20-27 (AIDS cannot be spread through casual contact).

177. 103 U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH REPORTS 96-97 (1988).

2. Issues Raised by the State

In its case against Mr. Bateman, the State correctly argued that the United States Supreme Court resists reviewing the appropriateness of criminal sentences: "Reviewing courts, of course should grant substantial deference to the broad authority that [state] *legislatures* necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals."[178] Notwithstanding this broad discretion, however, the *Solem* Court provided a *caveat* aimed at overzealous sentencing authorities: "no penalty is per se constitutional."[179]

In each of the cases cited by the state in support of this point, the challenged sentence was *legislatively* mandated,[180] not an exercise of the court's discretion. In *Bateman*, Judge Baker exercised her legislatively mandated discretion to "impose special conditions of probation for the protection of the public or reformation of the offender, or both." [181] There is an important distinction between legislatively mandated sentences and those arising from a judge's discretion. As pointed out by Justice Frankfurter,

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. . . . History teaches that the independence of the judiciary is jeopardized when courts become controlled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.[182]

Judge Baker may have acted on her feelings and those of the public

178. Solem v. Helm, 463 U.S. 277, 290 (1983) (emphasis added).

179. *Id.*

180. *Solem*, 463 U.S. 277 ("Class 1 felony: life imprisonment in the state penitentiary [without parole]," S.D. CODIFIED LAWS ANN. 22-6-1(6), (7) (Supp. 1982)); Weems v. United States, 217 U.S. 349 (1910) ("The penalties of *cadena temporal* and a fine from 1,250 and 12,500 pesetas shall be imposed on a public official who, taking advantage of his authority, shall commit a falsification," CODIGO PENAL [C. PENAL] ch. 4, § 1, art. 300 (Spain); "The punishment of *cadena temporal* is from twelve years and one day to twenty years," *Id.* at arts. 28, 96; "[T]hey shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution," *Id.* at arts. 105, 106); Robinson v. California, 370 U.S. 680 (1962) ("No person shall use, or be under the influence of, or be addicted to the use of narcotics. . . . Any person convicted of violating a provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail," CAL. HEALTH & SAFETY CODE § 11721 (West 1963), *repealed by* ch. 1407, § 2, 1972 Cal. Stat. 2987); Trop v. Dulles, 356 U.S. 86 (1958) ("[A] person who is a national of the United States whether by birth or naturalization, shall lose his nationality by . . . deserting the military, air, or naval forces of the United States in the time of war. . . ." 8 U.S.C. § 1481(a)(8) (1952) (repealed 1978)).

181. OR. REV. STAT. § 137.540(2) (1983).

182. Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring on affirmation of judgment).

when she imposed the ninth and eleventh special probation conditions[183] on Mr. Bateman. These special conditions were proposed by the mother of one of the victims.[184] No evidentiary hearings were held, nor was testimony given concerning the possible consequences associated with such unusual probation conditions.

The State also argued that the special probation conditions are voluntary, in that Mr. Bateman could choose imprisonment at any time by refusing to follow the conditions of his probation. A similar argument was presented to the South Carolina Supreme Court in *State v. Brown*,[185] and summarily dismissed. In *Brown*, the defendants were convicted of first-degree sexual assault[186] arising from a brutal rape.[187] The trial court judge gave each defendant a choice between the maximum sentence of thirty years of imprisonment, or five years of probation, provided the defendant voluntarily agreed to be surgically castrated.[188]

The Supreme Court of South Carolina held that trial court judges are "allowed a wide, but not unlimited, discretion in imposing conditions of suspension or probation and they cannot impose conditions which are illegal and void as against public policy."[189] For support, the court cited a case in which the trial court judge did not have the authority to impose banishment from South Carolina as a condition of probation, even though the defendant agreed to the sentence, because such a condition violated public policy.[190] The public policy of South Carolina is derived by implication from the established law of the state, as found in its Constitution, statutes, and judicial decisions.[191] The South Carolina Constitution prohibits cruel and unusual punishment; castration, a form of mutilation, is prohibited.[192] Accordingly, the South Carolina Supreme Court remanded for resentencing.[193]

The respondent presents a vulnerable argument when it relies on *People v. McDowell*[194] and *Goldschmitt v. State*[195] in support of its position in the *Bateman* case. Granted, the courts in those cases did not accept the cruel and unusual punishment arguments, but both cases are

183. *See supra* text accompanying note 150.

184. Proceedings at 17, *Bateman* (Nos. C85-08-33209 and C85-10-34220).

185. 284 S.C. 407, 326 S.E.2d 410 (1985).

186. S.C. CODE ANN. § 16-3-652 (Supp. 1983).

187. 284 S.C. at 409, 326 S.E.2d at 411.

188. *Id.*

189. *Id.* at 410, 326 S.E.2d at 411.

190. Henry v. State, 276 S.C. 515, 280 S.E.2d 536 (1981).

191. *Brown*, 284 S.C. at 410, 326 S.E.2d at 412 (citing Batchelor v. American Health Ins. Co., 234 S.C. 103, 107 S.E.2d 36 (1959)).

192. *Id.*

193. *Id.*

194. 59 Cal. App. 3d 807, 130 Cal. Rptr. 839 (1976) (Defendant convicted of purse snatching; sentence provided that he had to wear leather soled shoes with metal taps at the toe and heel whenever he left his house).

195. 490 So. 2d 123 (Fla. Dist. Ct. App. 1986); *see supra* text accompanying notes 124-31.

distinguishable from Mr. Bateman's case. McDowell argued that the requirement that he wear "tap shoes" was tantamount "to hanging a sign around [his] neck that says, 'I'm a thief.' "[196] The court noted that few people would think that someone wearing tap shoes is a thief.[197] In stark contrast, the location, size, and content of Mr. Bateman's signs will send a clear message to the public that he is a child molester.

Mr. Goldschmitt's bumper sticker also sends a clear message to those who read it that Mr. Goldschmitt was convicted of driving under the influence of alcohol. But, despite the public sentiment against drinking and driving, the public's reaction to Mr. Goldschmitt's bumper sticker is unlikely to be as volatile as its reaction to Mr. Bateman's signs.

If the Oregon Court of Appeals affirms Mr. Bateman's special probation conditions, there may well be another appeal, for if the conditions are approved, Mr. Bateman will find himself like Hester Prynne on trial today, tomorrow, and each day he lives under these probation conditions.

IV. Standard for Judicial Review of Scarlet Letter Sentences

When reviewing the constitutionality of a scarlet letter sentence to determine if it violates the Clause, a court should do a two-step analysis. First, the court should determine the potential public reaction to the crime committed. Second, the court should look at the particular sentence to determine the possibility and duration of public persecution.

A scarlet letter sentence, by definition, apprises the public of a convicted defendant's criminal conduct and thus exposes the individual to possible persecution by members of the public. A person convicted of jaywalking who is given a scarlet letter sentence will probably be exposed to little or no mental or physical abuse by the public. Whereas, a person convicted of sexual abuse who is given a scarlet letter sentence will probably be exposed to substantial mental or physical abuse by the public. The court must determine how the public is likely to react. If the nature of the crime and the public's knowledge of its commission expose the convicted defendant to little or no public persecution, then the sentence should be found to be constitutional. However, if the individual is exposed to substantial public persecution, then the court should find the sentence to be an unconstitutional violation of the Clause.

In conjunction with the first step of the analysis, the court should look to the particular sentence in order to determine the possibility and duration of the persecution. Publishing an apology in a newspaper probably creates less public persecution than posting the same apology on one's car door. A newspaper scarlet letter may not be seen by those who read the paper, could be forgotten by those who do read it, and even

196. *McDowell*, 59 Cal. App. 3d at 812, 130 Cal. Rptr. at 842.
197. *Id.*

those who read it and remember it may not associate it with the individual. Therefore, the possibility of public persecution is reduced. When the scarlet letter appears on the individuals's car door, however, people will probably see it. Because it is unusual, people are likely to remember it. Finally, those who see the individual in his or her car will associate that individual with the signs. Therefore, the possibility of public persecution is greater in this latter situation simply because of the type of scarlet letter imposed.

Conclusion

Current sentencing attitudes have led to an unacceptable increase in prison populations and operating costs. But these problems need well-thought-out, constitutional solutions. In response to prison overcrowding, some judges have devised creative sentences, including scarlet letter probation conditions. While these sentences address prison overpopulation and operating cost problems, they create a new problem: the possibility of infringing on defendants' eighth amendment rights.

The Eighth Amendment protects convicted individuals from cruel and unusual punishments. The court would probably use the judicially created unnecessary and wanton infliction of pain test to determine the constitutionality of a non-capital, non-incarceration sentence. When applying the test to a scarlet letter sentence, the court should do a two-step analysis. First, the court should determine the potential public reaction to the crime committed. Second, the court should look at the particular sentence to determine the possibility and duration of public persecution.

Trial courts are responsible for determining a convicted criminal's sentence. Scarlet letter sentences risk putting the judicial function into the hands of the general public because one of the goals of a scarlet letter sentence is to increase public awareness of the identity of criminals. Appellate courts should hold such sentences unconstitutional when the particular scarlet letter sentence will expose the convicted individual to public persecution.

"Hester Prynne's term of confinement was now at an end. . . . To-morrow would bring its own trial with it; so would the next day, and so would the next; each its own trial."[198]

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198. N. HAWTHORNE, *supra* note 1, at 60.

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