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“HAVE YOU BEEN DRINKING TONIGHT MS. PRYNNE?” OHIO’S SCARLET LETTER FOR OVI/DUI OFFENDERS: A VIOLATION OF FIRST AMENDMENT PROTECTION AGAINST COMPELLED SPEECH

WILLIAM LIVINGSTON*

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I. INTRODUCTION

A stranger to the town watched from afar as deputies led a heavy-hearted young woman from the courthouse. A peculiar symbol, bold and scarlet, drew attention from her reddened cheeks as she started to leave the scene. The stranger asked a man in the crowd what the colored symbol meant. “The symbol denotes her guilt,” the man said sardonically. “It is a badge of shame for her crime against decency and the community.”

Perplexed, the stranger wondered if all criminals in the town were doomed to a similar fate. Did thieves have to wear blue? Did murderers have to wear green? “No.” The man said, “This is for her crime only.”

The stranger’s curiosity continued to grow and a sense of injustice rose to the surface as he blurted out, “What could the poor girl have done to deserve this public admonishment?”

“Hester Prynne,” the man said, “was convicted of drinking and driving.”

As the stranger watched Hester drive off, his eyes focused on her bright yellow license plate with the scarlet letters. He asked the man, “How familiar with the young girl are you?”

“I have never spoken to her,” the man said. “Her license plate told me everything I need to know.”

The stigma of the scarlet letter is no mere vestige of Puritan society. It is also reborn in modern criminal statutes. The scarlet “A” for adultery, which Hester Prynne was forced to wear in Nathaniel Hawthorne’s classic novel,¹ has given way to the yellow license plate with scarlet letters Ohio’s legislature requires for OVI offenders. Surprisingly, Ohio’s special license plate has faced little opposition, presumably because of the state’s interest in preserving highway safety. But when a statute forces someone to exhibit a particular message or ideology, First Amendment issues are necessarily raised. This Note will make a simple claim: Ohio’s statute that requires special license plates for OVI offenders compels speech and cannot pass strict scrutiny.

¹ Hawthorne explores the use of shame to punish immorality in Puritan culture. The novel’s heroine, Hester Prynne, is forced to wear the letter “A” on her breast signifying her adultery. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 50 (Bantam Dell 2003) (1850).

Part II will briefly examine the history of scarlet letter punishments. These types of sanctions raise many constitutional concerns; this Note will specifically address First Amendment compelled speech. Different standards of constitutional review for First Amendment violations and probation conditions will also be discussed.

Part III will explain how Ohio's special license plate violates the First Amendment. Because the license plate is a legislative requirement that infringes upon free speech and eliminates judicial sentencing discretion, the state's interest must pass strict scrutiny.² This analysis will confirm that the state's interest is legitimate but not compelling. The special license plate fails to effectively deter and its efforts to identify offenders is counterproductive. The special license plate also fails to meet the goals of Ohio probation: rehabilitation and reformation. Additionally, there are less burdensome and more effective means of meeting the government's valid goals.

Part IV will conclude that these other means should replace the special license plate as a probation condition for OVI offenders.

II. BACKGROUND

A. Scarlet Letter Punishment

Scarlet Letter sanctions force the perpetrator to publicly admit to a crime in an attempt to elicit shame.³ Shame, therefore, is used as a vehicle for compliance with the law. The resort to shaming as a criminal sanction can be traced back hundreds of years.⁴

A recurring feature throughout the history of shaming has been legislative enactments to distinguish people by forcing them to wear a specific color or symbol. In 1233, Pope Gregory IX forced Cathars who were convicted of heresy to wear a yellow cross as a badge of shame.⁵ In England, under the Poor Law Act of 1697, people receiving parish relief were required to wear a badge of blue or red cloth in an open and visible manner as a means to deter others.⁶ In the nineteenth century, prisoners in New York were forced to wear striped uniforms. These uniforms were eventually abolished for having the undesirable effect of shaming prisoners.⁷ In the twentieth century, Nazi concentration camps used color-coded badges of shame to

² See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); see generally *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938). But see, *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (showing that the Court applied intermediate scrutiny to compelled speech but has limited its application to compelled disclosure in the electoral context).

³ DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 48 (1971).

⁴ *Id.*

⁵ EAMON DUFFY, *FAITH OF OUR FATHERS: REFLECTIONS ON CATHOLIC TRADITIONS* 159 (2006).

⁶ Steve Hindle, *Dependency, Shame and Belonging: Branding the Deserving Poor, c. 1550-1750*, 1 *CULTURAL & SOC. HIST.* 5, 13 (2004).

⁷ See JOHN CLARK PRATT, *PUNISHMENT AND CIVILIZATION: PENAL TOLERANCE AND INTOLERANCE IN MODERN SOCIETY* 76 (2006). "The distinctive prison stripes were abolished in 1904. . . . stripes had come to be looked upon as a badge of shame and were a constant humiliation and irritant to many prisoners."

classify prisoners according to the reason for their detention.⁸ Justice Felix Frankfurter, however, has noted:

It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence of scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy . . . history bears testimony that by such disregard are the rights of liberty extinguished, heedlessly, at first, then stealthily, and brazenly in the end.⁹

As history has indicated, certain colors do more than just distinguish the person from the rest of society. Colors carry specific connotations and associations. It is not the colors themselves that have meaning; society has assigned cultural meanings to them. When a statute forces a person to wear a certain color, it forces that person to carry the message the legislature wishes to promulgate.¹⁰ The color compels the person to speak that message.

B. Ohio's Special License Plate

In 1967, Ohio first made special colored license plates available for judges to give to OVI offenders.¹¹ Judges rarely used these special license plates,¹² and so in 2004, Ohio passed legislation that made these plates mandatory for certain offenders.¹³ Under the Ohio Revised Code, if a person has been convicted of a “high-tier” OVI offense or multiple OVI offenses within six years, the driver must have special license plates for the term of the license suspension.¹⁴ Additionally, the code provides that no person operating a motor vehicle displaying special license plates shall knowingly disguise or obscure its color.¹⁵ A person who does so is

⁸ PETER HAYES, LESSONS AND LEGACIES 53 (1991); *see also* Dorthe Seifert, *Between Silence and License: The Representation of the National Socialist Persecution of Homosexuality in Anglo-American Fiction and Film*, 15 HIST. & MEMORY 94, 99 (2003) (explaining that the pink triangle had been the designation for homosexual concentration camp inmates incarcerated under Paragraph 175 of the German Penal Code).

⁹ *Davis v. United States*, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting).

¹⁰ *See generally* *Jacobs v. Clark Cnty. Sch. Dist.*, 373 F. Supp. 2d 1162, 1172 (explaining that wearing of certain clothing can constitute “speech” and implicate the First Amendment); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that requiring a person to have a license plate with a certain motto forces that person to profess that message).

¹¹ Gerri L. Elder, *Ohio Judges Violate DUI Law*, TOTALDUI.COM <http://www.totaldui.com/news/articles/legislation/ohio-dui-law-violations.aspx> (last visited October 5, 2011).

¹² *Id.*

¹³ *See* OHIO REV. CODE ANN. § 4503.231(A) (West 2010).

¹⁴ A “high-tier” OVI offense occurs when a perpetrator’s blood alcohol content is 0.17 or higher. OHIO REV. CODE ANN. § 4511.19(A)(1)(f) (West 2010).

¹⁵ OHIO REV. CODE ANN. § 4503.231(A) (West 2010).

guilty of a misdemeanor.¹⁶ Much like the scarlet letter punishments of the past, these license plates carry a stigma and force the offender to carry an ideological message.¹⁷

C. *The First Amendment and Compelled Speech*

The First Amendment to the Constitution of the United States declares that “Congress shall make no law . . . abridging the freedom of speech.”¹⁸ It “reflects vital attributes of the American character and is the cornerstone of the nation’s liberty.”¹⁹ Liberty is not only protected by the freedom to express speech, it is also protected by the freedom to express nothing at all. The compulsion to speak chips away at the nation’s cornerstone just as the repression of speech may.²⁰

The Supreme Court first addressed compelled speech in 1943. In *West Virginia Bd. of Educ. v. Barnette*,²¹ the state Board of Education adopted a resolution requiring all children in public schools to salute the flag and recite the pledge of allegiance.²² Failure to comply was considered “insubordination” and those students would be expelled.²³ Readmission was denied by statute until the student complied.²⁴ This expulsion, in turn, automatically exposed the child and their parents to criminal prosecution.²⁵

The *Barnettes* brought suit to enjoin the Board of Education from enforcing the requirement.²⁶ They argued that compelling school children to salute the flag and recite the pledge of the allegiance was an unconstitutional infringement on the First Amendment.²⁷ The Court found in favor of the *Barnettes*.²⁸ The Court explained that the right to speak and the right to refrain from speaking were both a part of the First Amendment.²⁹ The Court concluded, “[i]f there is any fixed star in our constitutional

¹⁶ *Id.*

¹⁷ See Phaedra Athena O’Hara Kelly, *The Ideology of Shame: An Analysis of the First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783 (1999). O’Hara Kelly argues that shame is an ideology and is sufficient to raise First Amendment concerns in the context of probation conditions.

¹⁸ U.S. CONST. amend. I.

¹⁹ KERMIT L. HALL, *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 536 (Kermit L. Hall et al. 2nd ed. 2005).

²⁰ See generally *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781 (1988) (holding that for purposes of the First Amendment the right to speak and the right not to speak will be treated the same).

²¹ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²² *Id.* at 628.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 629.

²⁶ *Id.* at 630.

²⁷ *Id.*

²⁸ *Id.* at 640.

²⁹ *Id.* at 633-34.

constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”³⁰

Compelled speech law continued to evolve, and in 1969, the Court decided *Wooley v. Maynard*.³¹ The case resulted from a New Hampshire statute that required all noncommercial vehicles to bear license plates with the state motto, “Live Free or Die.”³² Much like the current Ohio statute, New Hampshire’s statute provided that anyone who knowingly obscured the figures or letters on a license plate would be guilty of a misdemeanor.³³

Maynard was a Jehovah’s Witness and considered the New Hampshire State motto to be repugnant to his beliefs.³⁴ He attempted to obstruct the motto and was cited for violating the statute on three separate occasions.³⁵ Maynard argued that the license plate was a violation of his First Amendment rights and forced him to proclaim an ideological message on his car.³⁶ The Court agreed with Maynard. It held that by requiring the vehicles to bear that motto, every driver was forced to carry the message of the license plate.³⁷ The New Hampshire statute, therefore, compelled speech.³⁸

D. Standards of Review

In *United States v. Carolene Prods. Co.*, the Supreme Court first introduced the notion that different standards of review should be applied to certain constitutional issues.³⁹ To the particular issue of the case, the Court applied minimal scrutiny,⁴⁰ more commonly known as rational basis review. It also recognized, however, that other circumstances will inevitably require a heightened standard.⁴¹ In what is considered by many to be the most significant footnote in constitutional law,⁴² the

³⁰ *Id.* at 642.

³¹ *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 708.

³⁵ *Id.* at 709.

³⁶ *Id.*

³⁷ *Id.* at 715.

³⁸ *Id.*

³⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938).

⁴⁰ *Id.* at 152 (“[R]egulatory legislation . . . is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”).

⁴¹ *Id.* at 153.

⁴² See Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982). There has been considerable debate over who is the true author of the footnote. It is now recognized that the original draft was not fact written by Justice Stone, the author of the opinion. Instead, Justice Stone’s clerk, Louis Lusky, penned the initial draft.

Court outlined a higher level of scrutiny that would become known as strict scrutiny.⁴³ Most notably, the Court stated that there would be a heightened standard when “*legislation* appears on its face to be within a specific prohibition of the Constitution, such as those of the *first ten Amendments* . . .”⁴⁴

1. Strict Scrutiny

When a law infringes upon the First Amendment, it must pass the heightened standard of strict scrutiny to be upheld.⁴⁵ Under strict scrutiny, a law is unconstitutional unless the state can justify it by a compelling state interest.⁴⁶ The law must also be narrowly tailored and be the least restrictive means of achieving the compelling interest.⁴⁷ Furthermore, in the context of compelled speech, the law must be the least “speech restrictive” means.⁴⁸ In other words, there must be no less burdensome means on speech the state can use in attempting to achieve its interest.⁴⁹

Accordingly in *Wooley*, New Hampshire’s interest had to pass strict scrutiny.⁵⁰ The Court held that making vehicles more identifiable to law enforcement and promoting state pride did not pass constitutional muster.⁵¹ There were other ways for the government to achieve its interest that would not require the citizen to be a courier of an ideological message.⁵² The Court concluded, “even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”⁵³

Lusky commented on the authorship of the footnote in his book. The book includes facsimiles of the original drafts, the first draft belonging to Lusky. It seems that Stone edited the second draft and made subsequent changes. Justice Stone was obviously very involved in the footnote but the original draft belongs to Lusky. LOUIS LUSKY, *OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA*, 119-26 (1993).

⁴³ *Carolene*, 304 U.S. at 153; *see also* 16A AM. JUR. 2D *Const. L.* § 403 (2010).

⁴⁴ *Carolene*, 304 U.S. at 153 (emphasis added).

⁴⁵ A fundamental right for the purposes of strict scrutiny is one that is guaranteed by a State or Federal Constitution. *See* 16A AM. JUR. 2D *Const. L.* § 403, *supra* note 43.

⁴⁶ *See id.*; *see, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

⁴⁷ *See* 16A AM. JUR. 2D *Const. L.* § 403, *supra* note 43. Narrowly tailored means that the law is as specific as it possibly can be to serve the given purpose. If a different law would do the same thing and impinge less on constitutional rights, the law will not pass the strict burden imposed by this standard.

⁴⁸ *Wooley*, 430 U.S. at 716.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 717. *See also* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 638 (1943) (explaining that that forcing students to salute the flag, and threatening them with expulsion if they chose not to, was a not a permissible way to foster national unity).

⁵³ *Wooley*, 430 U.S. at 716.

2. Rational Basis Review

Rational basis review tests whether a governmental action is a reasonable means to an end that may be legitimately pursued by the government.⁵⁴ This standard of review requires that the governmental action be rationally related to a legitimate government interest.⁵⁵ In dealing with the constitutionality of criminal probation conditions, courts usually engage in rational basis review.⁵⁶ In this analysis, if the probation condition reasonably relates to legitimate purposes of probation, it is upheld.⁵⁷ In these cases, courts focus on the particular sanction's relationship to probation and often overlook the individual's rights.⁵⁸

These courts examine judicially crafted conditions, however, as opposed to statutory requirements.⁵⁹ At least one Ohio court has gone so far as to recognize that the focus must be on the protection of the fundamental right, not the reasonableness of the probation.⁶⁰ But when a statute implicates a fundamental right, even if the infringement emanates from a probation condition, strict scrutiny should be applied.⁶¹

⁵⁴ See 16A AM. JUR. 2D *Const. L.* § 403, *supra* note 43.

⁵⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938).

⁵⁶ See 21A AM. JUR. 2D *Crim. L.* § 849 (2010).

⁵⁷ *Id.*

⁵⁸ See *Goldschmitt v. State*, 490 So. 2d 123, 126 (Fla. Dist. Ct. App. 1986) (upholding a probation condition requiring a DUI offender have a "Convicted DUI" bumper sticker on his car because it was reasonably related to probation); *Ballenger v. State*, 436 S.E.2d 793, 799 (Ga. Ct. App. 1993) (upholding a requirement that a convicted DUI felon to wear a fluorescent pink plastic bracelet bearing the words "DUI Convict."); *But see People v. Hackler*, 16 Cal. Rptr. 2d 681, 687 (Cal. Ct. App. 1993) (reversing a trial court order that forced a person convicted of shop lifting beer from wearing a tee shirt at all times announcing his crime and conviction).

⁵⁹ See *Goldschmitt*, 490 So. 2d at 126; *Ballenger*, 436 S.E.2d at 799; *Hackler*, 16 Cal. Rptr. 2d at 687; *Lindsey v. State*, 606 So. 2d 652 (Fla. Dist. Ct. App. 1992) (reviewing a judicially crafted probation condition requiring the offender to place and pay for a newspaper advertisement containing his mug shot and the caption "DUI—Convicted"); *People v. Johnson*, 528 N.E.2d 1360 (Ill. App. Ct. 1998) (reviewing a probation condition requiring the offender to place an advertisement in a newspaper that included her mug shot and an apology for her crime.)

⁶⁰ *In re Miller*, 611 N.E.2d 452, 453 (Ohio Ct. App. 1992) (holding that the state failed to demonstrate any compelling state interest in the probation condition at issue that the defendant could not dress in woman's clothing or go certain places could justify limiting First Amendment freedoms). "The rights foreclosed by the trial court are fundamental rights and should not be encroached upon through the conditions imposed herein." *Id.*

⁶¹ See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 (1938); see 16A AM. JUR. 2D *Const L.* § 403 *supra* note 43.

III. Discussion

A. Ohio's Statute Compels Speech

The statute must be shown to violate free speech before it can be scrutinized.⁶² The Supreme Court has held that in determining whether nonverbal communication is sufficient to implicate the First Amendment, there must be intent to convey a message and that message must be likely to be understood.⁶³ The nature of the activity in combination with the factual context and environment can be used to determine whether communication is such that it requires protection.⁶⁴ Ohio's Scarlet Letter Statute fits such a bill.

Drawing from the Court's decision in *Wooley*,⁶⁵ the state's requirement of the license plate shows the requisite intent to convey a message. In *Wooley*, the license plate had actual words,⁶⁶ yet the idea is no different in this instance. As discussed earlier, colors have profound connotations and societal meanings.⁶⁷ The bright yellow license plate with scarlet letters is meant to make people aware that the driver has an OVI conviction. The state's lack of subtlety is emphasized through the brazen license plate. Its message is obviously understood; otherwise its purpose would be thwarted.⁶⁸

A critic might argue that license plates can be distinguished from being forced to adorn certain clothing because a person is not forced to drive a car all day. Courts have recognized, however, that while driving a vehicle is not a fundamental right, it has become a basic reality of everyday life.⁶⁹ The necessity to give driving

⁶² Once it is to be determined that such person's interest implicate First Amendment protections, it must also be "determine[d] whether the state's countervailing interest is sufficiently compelling to justify requiring the persons to display the motto on their license plates." *Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

⁶³ *Spence v. Washington*, 418 U.S. 405, 411 (1974).

⁶⁴ *United States v. O'Brien*, 391 U.S. 367, 376 (1968). "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." However, the nature and circumstances can be used to identify what constituted protected speech.

⁶⁵ *Wooley*, 430 U.S. at 717.

⁶⁶ *Id.* at 707. New Hampshire required all noncommercial vehicles to bear license plates with the state motto "Live Free or Die."

⁶⁷ *See supra* Part II.A. *See also* *Stromberg v. California*, 283 U.S. 359, 364 (holding that the display of a red flag as a symbol of opposition to government was protected by the First Amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). "The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design."

⁶⁸ *See infra* Part III.C. The special license plate purports to make other members of society aware of the license plate as well as make the offender more easily identifiable to law enforcement.

⁶⁹ *Dep't. of Transp., Bureau of Traffic Safety v. Slater*, 462 A.2d 870, 875 (Pa. Com. Pl. 1983) "It is hard to accept the continued characterization of a license to drive as a privilege. No one will deny that we have reached a time in our modern way of life when the motor vehicle has clearly become a necessity to many people." However even with this realization

privileges for people with suspended licenses itself recognizes this. Additionally, *Wooley* held that by requiring the vehicle to bear a motto, every driver was forced to carry the message of the license plate.⁷⁰ First Amendment protection is tied to the individual, not the form or duration of intrusion.

1. *Goldschmitt v. State*

At least one court has disagreed that a manifestation of a DUI conviction on a car is a form of communication. That court, however, failed to apply precedent correctly. In *Goldschmitt v. State*, the Florida Court of Appeals held that a judicially imposed “Convicted DUI” bumper sticker is not an ideological message and therefore did not infringe upon the individual’s First Amendment rights.⁷¹ The *Goldschmitt* court distinguished *Wooley*, on the grounds that the bumper sticker was not an ideological message but rather a form of penance and served as a warning to others.⁷² It is not apparent why the court would find that either a penance or a warning could not be considered speech.⁷³ Moreover, it ignored whether the bumper sticker intended to communicate a message or whether the message would be understood.⁷⁴

Additionally, the *Goldschmitt* Court classified the issue in *Wooley* as “whether New Hampshire’s interest in broadcasting its state motto sufficiently overrode the defendant’s objection to the motto that criminal penalties could be imposed for the defacing of the tag.”⁷⁵ To begin, the *Wooley* Court applied strict scrutiny and under this analysis there is no actual balancing of competing interests.⁷⁶ Perhaps most importantly, the *Wooley* Court stated that the case did not present an issue of symbolic speech where Maynard was attempting to establish a right to deface the license plate. Instead, it was a case of compelled speech.⁷⁷ Maynard sought the right to drive without having to display the motto on the license plate, not the right to deface it. This becomes clear when looking at Maynard’s prayer for relief in the

the court’s holding was that driving is a privilege because although it may be a prerequisite to employment, the United States Supreme Court has stated employment is not a fundamental right.

⁷⁰ *Wooley*, 430 U.S. at 715.

⁷¹ *Goldschmitt v. State*, 490 So. 2d 123, 125 (Fla. Dist. Ct. App. 1986).

⁷² *Id.*

⁷³ In one of the most famous axioms concerning the First Amendment, Justice Holmes stated, “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” *Schenck v. United States*, 249 U.S. 47, 52 (1919). While in this example the warning is not protected, it is clear that it constitutes speech.

⁷⁴ See *Spence v. Washington*, 418 U.S. 405, 417 (1964) (pointing out that “[v]irtually any law enacted by a state, when viewed with sufficient ingenuity, could be thought to interfere with some citizen’s preferred means of expression”).

⁷⁵ *Goldschmitt*, 490 So. 2d at 125.

⁷⁶ *Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

⁷⁷ *Id.* (citing the individual’s “right to avoid becoming the courier for the state’s message”).

District Court. Maynard asked for a license plate that did not have the motto, and did not seek the right to cover the license plate motto.⁷⁸ This undermines the very premise of the *Goldschmitt* Court.

2. What is the Special License Plate's Message?

The Supreme Court has noted that while scarlet letter probation conditions may implicate the First Amendment, they are "less embarrassing and onerous" than the maximum jail sentence.⁷⁹ Nevertheless, the First Amendment should not be haphazardly infringed upon because courts find such infringement less cumbersome than the penitentiary.

Moreover, empirical research has begun to show that people with these license plates are forced to carry a message more burdensome than a simple admission of guilt. In recent studies, researchers concluded that repeat DUI offenders might have reasoning deficits.⁸⁰ Under the Ohio Statute, repeat DUI offenders are most commonly burdened with the restricted license plates.⁸¹ In one study, researchers found that second-time DUI offenders have a poorer performance on the Iowa Gambling Test⁸² ("IGT") than their matched counterparts.⁸³ The IGT test is a series of psychological tests to simulate real life decision-making.⁸⁴ In another study, researchers concluded that second-time DUI offenders suffer from cognitive impulsiveness, which involves associating negative experiences with possible negative consequences.⁸⁵ In other words, "There are brain reasons for why people make poor choices regarding DUI."⁸⁶

Another report confirmed that DUI offenders have personality and attitude differences when compared to all other drivers.⁸⁷ Offenders are frequently more

⁷⁸ *Id.* at 713 n. 10.

⁷⁹ *Blanton v. Las Vegas*, 489 U.S. 538, 544 (1989). The Supreme Court also noted that the probation condition did not describe when and where the clothing must be worn.

⁸⁰ Robert Preidt, *Repeat DUI Offenders Have Reasoning Deficits: Study*, BLOOMBERG BUSINESSWEEK, Sep. 8, 2010, <http://www.businessweek.com/lifestyle/content/healthday/642825.html>.

⁸¹ OHIO REV. CODE ANN. §§ 4510.13(A)(7) and 4511.19(G)(1)(b), (c), (d), (e) (West 2010) (requiring special license plates only for repeat offenders, unless blood alcohol level at first offense is .17% or more).

⁸² The Iowa gambling task (IGT) tests the impairment of decision-making processes, especially adaptive sensitivity to future consequences. See Antoine Bechara *et al.*, *Emotion, Decision-Making, and the Orbitofrontal Cortex*, 10 CEREBRAL CORTEX 295, 297 (2000).

⁸³ Preidt, *supra* note 80.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ RALPH K. JONES & JOHN H. LACEY, MID-AM. RESEARCH INST OF NEW ENGLAND, STATE OF KNOWLEDGE OF ALCOHOL-IMPAIRED DRIVING: RESEARCH ON REPEAT DWI OFFENDERS 18 (U.S. Dept. of Trans., Nat'l Highway Traffic Safety Admin. Feb. 2000), available at <http://ntl.bts.gov/lib/7000/7900/7901/dwioffend.pdf>.

aggressive and hostile.⁸⁸ They are considered to be sensation-seekers and have relatively low levels of responsible values and parental compatibility.⁸⁹

Furthermore, many offenders share the same demographics. Repeat offenders are typically male and are usually under the age of forty.⁹⁰ They are most commonly white, have low income, and are unmarried.⁹¹ Most of these offenders are not educated past high school and are employed in blue-collar occupations.⁹² Many of these offenders have alcohol problems and commonly suffer from alcohol addiction.⁹³

At its least intrusive, the statute forces offenders to publicly admit they committed a crime. At its most bullish, the statute forces people to communicate personal aspects of their lives. The Court's duty is to interpret the Constitution, not to apply a balancing test of abasement. If it continues with such an analysis, these studies will begin to weigh heavily. The sandbags of justice will tilt such a scale in favor of the individual.

B. Ohio's Statute Must Pass Strict Scrutiny

As discussed earlier, legislation that infringes upon the First Amendment must pass strict scrutiny.⁹⁴ In the alternative, probation conditions are generally scrutinized using rational basis review.⁹⁵ At first glance, the special license plate seems to present somewhat of a legal hybrid as it is both a probation condition and legislation. After a closer examination, however, the answer of what level of scrutiny to apply becomes clear.

The scarlet letter is a condition of probation, but it is not a product of judicial innovation. The statute makes the special license plate a condition for all its offenders and forces the judge to acquiesce.⁹⁶ Therefore, the nature of the special license requirement plate is legislative. As the Court discussed in *Carolene*,⁹⁷ because this *legislation* is in conflict with the First Amendment, it must pass strict scrutiny.⁹⁸ The compulsion of one offender to speak is but a whisper to the thunderous roar of every offender. Such amplification distorts the tranquility of society and drowns out the chiming bells of civil liberty.

Interestingly, even *Goldschmitt* supports this proposition. In that case, the court seemed skeptical of legislative required scarlet letter punishments. It also admitted

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *supra* notes 43-46 and accompanying text.

⁹⁵ See *supra* notes 56-61 and accompanying text.

⁹⁶ OHIO REV. CODE ANN. § 4503.231(A) (West 2010).

⁹⁷ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n. 10 (1938).

⁹⁸ See *id.* (when legislation violates one of the provisions of the Bill of Rights, it is subject to a heightened standard of review). See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

that if the condition were imposed against all offenders it would be examined more rigorously.⁹⁹

We would be quicker to accept his argument if we could be persuaded that any of the judges felt duty bound by local custom or rule to require the sticker despite their personal desire to the contrary. However, this obviously is not the case since half the local judiciary disdain the use of the sticker. While we are skeptical of special probation conditions imposed across-the-board, as opposed to being tailored to the needs and circumstances of the individual probationer, we cannot say that a judge may not impose a special condition of probation any time he or she chooses if that special condition otherwise is lawful.

Some commentators have argued that all probation conditions that compel speech or force an ideology should have to pass strict scrutiny.¹⁰⁰ This Note does not go so far. Rather, this Note suggests that when a statute compels speech it must pass strict scrutiny regardless of the nature of its aim. This keeps precedent intact, and respects the role of judicial discretion in sentencing.

A critic might argue that the Ohio statute does not necessarily violate the First Amendment on its face but is only a collateral consequence of probation. Still yet, this does not necessitate rational basis review. One Supreme Court case, in particular, indicated the dangers of engaging in rationale basis review when a state statute implicates an individual's First Amendment rights. In *Beauharnais v. Illinois*, the petitioner was convicted under a criminal libel statute.¹⁰¹ Instead of determining whether the statute violated the First Amendment, the Court applied rational basis review under a Fourteenth Amendment analysis.¹⁰²

In dissent, Justice Black severely criticized the Court. Justice Black stated that the First Amendment enjoys greater protection than other civil liberties and argued that the majority's holding "degraded the First Amendment freedoms to the rational basis level [. . .] leav[ing] the rights of assembly, petition, speech and press almost completely at the mercy of state legislative, executive and judicial agencies."¹⁰³ The *Beauharnais* decision has been widely criticized¹⁰⁴ and is no longer considered to be the Court's view on the First Amendment.¹⁰⁵

⁹⁹ *Goldschmitt v. State*, 490 So. 2d 123, 125 (Fla. Dist. Ct. App. 1986).

¹⁰⁰ Jaimy M. Levine, "Join the Sierra Club!": *Imposition of Ideology as a Condition of Probation*, 142 U. PA. L. REV. 1841, 1888-89 (1994). Levine argues that an ideology-related condition of probation should be imposed only when it can pass strict scrutiny.

¹⁰¹ *Beauharnais v. Illinois*, 343 U.S. 250, 252 (1951).

¹⁰² *Id.* at 262 (holding that criminal libel legislation for the sake of public safety must be upheld "provided it is not unrelated to the problem and not forbidden by some explicit limitation to the State's power").

¹⁰³ *Id.* at 269-270 (Black, J., dissenting).

¹⁰⁴ See e.g., *United States v. Handler*, 383 F. Supp. 1267 (1974). ("While the Supreme Court in *Beauharnais v. Illinois* in a 5-4 decision upheld a state's power to punish group libel, this Court agrees with the *Tollett* court that 'a strong argument may be made that there remains little constitutional vitality to criminal libel law.'" (internal citation omitted) (citing *Tollett v. United States*, 485 F.2d 1087, 1094 (8th Cir. 1973) (holding that a statute that punished defamatory words written on the outside of envelopes or on postcards violated the

It is ironic that the right to speak would have lip service paid to it, yet that is what rational basis review would allow for.¹⁰⁶ Nearly any infringement of an individual's right to freedom of speech would be permitted as long as a reasonable person could find it relates to the goals of probation. Such a low standard tells those on probation that they basically have no liberty under the First Amendment at all.¹⁰⁷

The First Amendment is not a hollow protection but a constitutional fortress able to withstand the siege of free speech. The Fourteenth Amendment no longer acts as a Trojan horse for rational basis to breach these walls.¹⁰⁸ While rational basis is a valid exercise of review of judicially-crafted probation conditions, it is improper to apply to it a First Amendment statutory violation. Here, the statute eliminates judicial discretion and infringes upon a fundamental right. Therefore, the Ohio statute must pass strict scrutiny, not merely rational basis review.

C. *Ohio's Interest is Legitimate but Not Compelling*

Probation conditions are circumscribed by constitutional considerations. Therefore, the state's interest in the particular condition must adhere to the Constitution and be in furtherance of legitimate interests. Under strict scrutiny, these interests must be more than just legitimate; they must be compelling.

The state's interest can be broadly defined as highway safety. Through a more narrow lens, the statute attempts to meet the traditional goal of scarlet letter punishment; deterrence.¹⁰⁹ The statute also purports to make offenders more easily identifiable to law enforcement.¹¹⁰ Additionally, the special license plate is a probation condition and therefore must attempt to meet the goals of probation. Under Ohio law, those goals are rehabilitation and reformation.¹¹¹

First Amendment because it failed to pass strict scrutiny))). For further discussion, *see* Kelly, *supra* note 17, at 851-54.

¹⁰⁵ *See e.g.*, *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 174 n. 5 (D.C. Cir. 1968) (Wright, J., concurring) (noting that "it is now doubtful that the [*Beauharnais*] decision still represents the views of the Court"); *see also* Kelly, *supra* note 17, at 851-54.

¹⁰⁶ Applying rational basis review to the First Amendment leaves "the rights of assembly, petition, speech and press almost completely at the mercy of state legislative, executive and judicial agencies." *Beauharnais*, 343 U.S. at 269-70 (Black, J., dissenting).

¹⁰⁷ Probationers have "conditional liberty." *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)). They retain a higher degree of liberty than those who are incarcerated but are still afforded basic constitutional rights.

¹⁰⁸ In Homer's epic, Odysseus presented a wooden horse as a gift to the Trojans. Inside the horse, Greek soldiers hid waiting to enter the city. Once inside the city walls, the soldiers opened the gates for the rest of the army, who conquered the city of Troy. HOMER (attr.), *THE ODYSSEY* 8.552-584 (Bernard Knox ed., Robert Fagles trans., Penguin 2006).

¹⁰⁹ Scarlet letter punishments in the colonial era were meant primarily to deter, not to rehabilitate criminals. Due to their theology, those in favor of the punishments "placed little faith in the possibility of reform." ROTHMAN, *supra* note 3, at 52-53.

¹¹⁰ Bob Dyer, *Dyer Streets: DUI plates are another Ohio Flop*, AKRON BEACON J., (June 19, 2009, 2:30 AM), <http://www.ohio.com/news/48584482.html>.

¹¹¹ *See* OHIO REV. CODE ANN. § 2951.02(C)(1) (West 2010); *see also* *Ohio v. Livingston*, 372 N.E.2d 1335, 1336 (Ohio Ct. App. 1976) (explaining a condition of probation must be related to the future criminality of the offender).

1. The Special License Plates Fail to Deter.

Ohio attempts to deter drunk driving through shame. The special license plate, like most scarlet letter punishments, is meant to act as both a specific and general deterrence.¹¹² Specific deterrence is aimed to prevent the particular offender from repeating his crime.¹¹³ General deterrence is meant to discourage other citizens from ever committing the offense.¹¹⁴ In theory, the license plates will prevent drinking and driving by both the offender and would-be offenders through the element of shame.

a. Scarlet Letter Punishments Are No Longer Effective

In the past, scarlet letter punishments were thought to have served effectively as a deterrent because people lived in cohesive communities where public opinion was a relevant factor in obeying law.¹¹⁵ Today, communities are larger and much more diverse.¹¹⁶ In the public sphere, diversity does not necessarily breed apathy, but it is a spawning ground for different concepts of crime and justice.

For instance, during the Vietnam War, a draft dodger's peers might consider him a hero, not a criminal. Inner city high school students might applaud a teenager for stealing a car, not condemn him.¹¹⁷ Bernie Goetz and the 1984 New York City subway shootings provide a concrete and striking example of this concept.¹¹⁸ Modern society's varied attitudes make it impossible for punishments to elicit shame from all offenders. To be sure, some offenders could potentially respond to shame but this is certainly not an all-encompassing principle. For the most part, deterrence can no longer be achieved through scarlet letter conditions given the variance in values and public opinion.¹¹⁹

Some argue that even though there is an absence of optimal conditions for shame in America, it is still an effective means to achieve deterrence when coupled with regular sanctions.¹²⁰ This argument is problematic for a number of reasons. To

¹¹² JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 34-36 (5th ed. 2009).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ ROTHMAN, *supra* note 3, at 52.

¹¹⁶ Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, N.Y. TIMES, Jan. 16, 1997, available at <http://www.nytimes.com/1997/01/16/us/crime-and-punishment-shame-gains-popularity.html>.

¹¹⁷ These examples appear in Hoffman's article. Hoffman, *supra* note 116.

¹¹⁸ IN AN ACT OF VIGILANTE JUSTICE, GOETZ SHOT A GROUP OF TEEN-AGERS HE BELIEVED WERE GOING TO ROB HIM. HE RECEIVED AN OUT POURING OF SUPPORT AFTER HIS ACTIONS. SOME OFFERED TO PAY HIS LEGAL FEES AND BELIEVED HE SHOULD RUN FOR MAYOR. SUZANNE DALEY, *MAN TELLS POLICE HE SHOT YOUTHS IN SUBWAY TRAIN*, N.Y. TIMES, JAN. 1, 1985, AVAILABLE AT [HTTP://WWW.NYTIMES.COM/1985/01/01/NYREGION/MAN-TELLS-POLICE-HE-SHOT-YOUTHS-IN-SUBWAY-TRAIN.HTML](http://www.nytimes.com/1985/01/01/nyregion/man-tells-police-he-shot-youths-in-subway-train.html).

¹¹⁹ Hoffman, *supra* note 116.

¹²⁰ See J. BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* 86 (Cambridge Univ. Press 1989) (arguing that shame can reduce crime more effectively than punishment alone).

begin, it implies that regular punishments and probation conditions are insufficient by themselves. If this concept was thought to be effective there is no reason for it to only apply to drinking and driving. Taking this to its logical end, all punishments should be coupled with shaming. This is obviously undesirable and nonsensical in modern society.

Next, this argument essentially permits the destruction of the Bill of Rights to accomplish deterrence. Drawing a line between what is permissible shame and what is a violation of the First Amendment as well as the right to privacy would lead to confusion in criminal law and tyranny in an otherwise free society. Those on probation have restricted freedom, but they do not forfeit all freedom.¹²¹

b. Special License Plates Lead to Unjust Results

The special license plates fail to deter because they inevitably lead to unequal and unfair results. The sanction can be applied to someone who did not even commit an offense.¹²² The *Goldschmitt* court explained that it upheld the “CONVICTED DUI” bumper sticker sanction because innocent persons would not be punished by it.¹²³ The bumper sticker contained a Velcro strip that enabled the message to be removed for persons who might drive the vehicle other than the offender.¹²⁴

Unlike the probation condition in *Goldschmitt*, the special license plate required under Ohio law cannot be removed or obstructed.¹²⁵ In a one-car family, each member of the family is forced to drive with the special license plate.¹²⁶ The sanction may force people to confess to a crime they have not committed. A law that brands a person as criminal without violating the law will not accomplish deterrence; it will only lead to dismay with the present system of injustice.

A critic might argue that the fact that family members may have to bear some of the brunt of the sentence is a harsh collateral consequence of the crime and, in that sense, does act as an effective deterrent. It is irrational, however, to subject the innocent to probation conditions of the guilty. By the same token, the diffusion of the punishment can also carry with it a diffusion of accountability. For the offender to be deterred, he must be held accountable, not others.

c. Special License Plates Fail Due to Lack of Enforcement

The special license plates are an ineffective means of deterrence because they are not properly enforced or respected by the courts. Some judges often refuse to order the plates because they personally believe that they are ineffective.¹²⁷ Also, many

¹²¹ *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

¹²² OHIO REV. CODE ANN. § 4503.231(A) (West 2010). *See also Goldschmitt v. Florida*, 490 So. 2d. 123, 126 (Fla. Dist. Ct. App. 1986).

¹²³ *Goldschmitt*, 490 So. 2d at 126.

¹²⁴ *Id.*

¹²⁵ OHIO REV. CODE ANN. § 4503.231(A) (West 2010).

¹²⁶ *Id.*

¹²⁷ Elder, *supra* note 11. Dayton, Ohio Municipal Judge John S. Pickrel stated that he “doesn’t think the DUI license plates are very effective, so he doesn’t order them very often.” He also said “discretion is necessary to protect the innocent.”

first time offenders who are guilty of a high-tier OVI are able to circumvent the punishment by pleading no contest. Fairfield, Ohio Municipal Judge Joyce Campbell explained, “They are not acknowledging that it’s a 0.17 (blood alcohol content), but they are acknowledging that they were driving under the influence . . . That happens quite a bit.”¹²⁸ Others are able to delay their hearing so that by the time they are sentenced the license suspension will have been served.¹²⁹

David Diroll, the Ohio Criminal Sentencing Commission’s executive director, maintains that the law still has an effect because it makes defendants more likely to accept plea deals that they otherwise might not want to take.¹³⁰ But by minimizing the effect, the special license plate loses its purpose. Deterrence is sacrificed to leverage guilt. It seems ironic if not plain contradictory that an interest in deterring the crime would result in securing more convictions. In settling for the special license plate as a bargaining chip in plea negotiations, the justification for the condition becomes meaningless.

2. The Attempt to Identify Offenders is Counterproductive

Theoretically, a bright yellow license plate would make it easier for law enforcement to find the vehicle on the road and make sure that the driver is following the law. One argument against this proposition is that it completely rebuts the presumption of innocence. Moreover, law enforcement will be prone to investigate vehicles with the special license plate even though the driver may be following the laws of the road. In doing so, police could neglect to investigate other drivers who are actually breaking the law.

Interestingly, these license plates may be resulting in unfair treatment of visitors from other states. The Ohio restricted license plate has a yellow backdrop.¹³¹ New York’s “Empire Gold” plate,¹³² Alaska’s “The Last Frontier” plate,¹³³ and Oregon’s “Amateur Ham Radio” license plate,¹³⁴ all have this yellow background. These license plates all look similar and, especially at night, are hard to tell apart. A New York driver described her concern over the similarities as follows, “I became very self-conscious of this license plate while I drove back to New York, and breathed a sigh of relief when I crossed the PA state line!”¹³⁵ Both law enforcement and other drivers on the road might unfairly prejudice drivers from other states with yellow

¹²⁸ Sheila McLaughlin, *Driving Without Shame*, CINCINNATI ENQUIRER, Feb. 27, 2005, at A1.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ § 4503.231(A).

¹³² NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, <http://www.nydmv.state.ny.us/cplates.htm> (last visited Nov. 26, 2010).

¹³³ ALASKA DEPARTMENT OF ADMINISTRATION: DIVISION OF MOTOR VEHICLES, <http://doa.alaska.gov/dmv/plates/index.html> (last visited Nov. 26, 2010).

¹³⁴ OREGON DMV, <http://www.oregon.gov/ODOT/DMV/vehicle/platerregular.html> (last visited Nov. 26, 2010).

¹³⁵ *Your Comments: NY’s new License Plates Resemble Ohio’s Drunk-Driver Plates*, THE POST STANDARD (Syracuse), July 19, 2010, <http://www.syracuse.com/news/index.ssf/2010/07/your-comments-nys-new-license.html>.

license plates. This discrimination creates a climate of paranoia and concern that should not be borne by people operating motor vehicles.

3. The Special License Plates Do Not Rehabilitate Offenders.

Although a condition may attempt to protect the community through the punishment of the offender, this does not by itself justify the condition.¹³⁶ Under Ohio law, probation conditions must aim to rehabilitate the offender.¹³⁷ Therefore, the special license plate must be in furtherance of restoring the probationer to a law-abiding life and to becoming a productive member of society.

a. Scarlet Letter Punishments Were Never Meant to Rehabilitate

In Puritan society, scarlet letter punishments were aimed at the suppression of immorality, not the betterment of the individual.¹³⁸ Puritan law focused on the criminal as being an inherent sinner who could not be redeemed through society.¹³⁹ Modern criminal law emanated from Puritan law, but now focuses on the criminal as being a threat to society.¹⁴⁰ This evolution of the law ultimately led to including rehabilitation as a fundamental goal.¹⁴¹ The special license plates are a regression from this modern concept. The license plates do not help re-assimilate the offender back into society. In contrast, they attempt to ostracize the offender.

Some believe the revival of shaming is necessary because rehabilitation is not realistic.¹⁴² Yet, frustration with a system is not a reason for abandonment of a virtue. Furthermore, some of the most passionate anti-DUI organizations argue that special license plates should not be applied to offenders because it only serves to punish and does not improve highway safety. According to Katherine Kovacich, regional administrator for MADD in the Pacific Northwest, Mothers Against Drunk Driving “is not into shunning” convicted DUI offenders and opposes the special license plates and supports the use of interlocks.¹⁴³ The special license plates do nothing to rehabilitate the offender but are only an added punishment.

¹³⁶ *People v. Meyer*, 680 N.E.2d 315, 318 (Ill. 1997).

¹³⁷ *Ohio v. Livingston*, 372 N.E.2d 1335, 1336 (Ohio Ct. App. 1976) (explaining a condition of probation must be related to the future criminality of the offender).

¹³⁸ William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 461 (1967).

¹³⁹ *Id.* at 466.

¹⁴⁰ *Id.* at 462.

¹⁴¹ *Id.* at 460-61; *see also* 18 U.S.C.A. § 3582(a) (West 2010) (Sentencing judges shall make imprisonment decisions “recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”).

¹⁴² *See* Tony M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1884 (1991); *see also* O’Hara Kelly, *supra* note 17, at 783-84 (“Politicians, who are quick to pick up on the public’s dissatisfaction, have fed the frenzy. Looking for a quick fix they have implanted mandatory sentencing statutes . . . In this changing political climate, judges also are showing their exasperation with the criminal justice system. Some trial courts are creating ‘shaming’ probation conditions.”).

¹⁴³ *In-Car Breathalyzers*, MOTHERS AGAINST DRUNK DRIVING (MADD), <http://www.madd.org/drun-driving/campaign/ignition-interlock.html> (last visited Nov. 16, 2010).

Many argue that the fact the special license plate is punitive does not disqualify it as legitimate. In fact, many courts have held that “rehabilitation and punishment are not mutually exclusive ideas.”¹⁴⁴ A probation condition that is meant to serve a rehabilitative purpose can also collaterally serve a punitive purpose. These courts, however, fall victim to a conceptually similar problem; rehabilitation and punishment are not mutually *inclusive*. Courts are quick to find the condition as punitive and conclude that it is also rehabilitative.¹⁴⁵ While it is true that some conditions could be rehabilitative and punitive, Ohio’s special license plate achieves the latter at the expense of the former.

b. The Sanction is Overbroad and Will Have Unintended Consequences

The elimination of judicial discretion in administering the special license plates plays a large role in the condition’s failure to rehabilitate offenders. The scarlet letter sanction is meant to subject the individual to ridicule within the community. A playground mentality applied to a probation condition is problematic because it is too hard to predict how the condition will affect the offender.¹⁴⁶ For instance, in *People v. Meyer*,¹⁴⁷ the defendant was convicted of aggravated assault. As a condition of his probation he was forced to maintain a sign outside of his house that read: “Warning! A Violent Felon lives here Enter at your own Risk.”¹⁴⁸ On appeal, the court found that the probation condition was unreasonable because there could be unintended and undesirable consequences.¹⁴⁹ It should be noted that the defendant suffered from depression and other stresses.¹⁵⁰ A psychiatrist testified that the defendant would likely perceive behavior as threatening that the average person would not.¹⁵¹ In a case such as this, evidence of this nature could be used to mitigate the sentence. If the punishment were a legislative requirement, however, individual circumstances would not be taken into account.

June Tangney, a professor of psychology at George Mason University, has studied over 10,000 people to distinguish feelings of shame and guilt.¹⁵² She has

¹⁴⁴ See O’Hara Kelly, *supra* note 17, at 793-94.

¹⁴⁵ *Lindsay v. State*, 606 So. 2d 652, 657 (Fla. Dist. Ct. App. 1992). The *Lindsay* court deferred to the trial court’s judgment when it held that a condition requiring a DUI offender to pay for a newspaper advertisement containing his mug shot was punitive as well as rehabilitative. See also *Goldschmitt v. State*, 490 So. 2d 123, 125 (Fla. Dist. Ct. App. 1986). The *Goldschmitt* court stated it was unable to say that the condition was without any sufficient foundation to be considered rehabilitative but did not engage in any real analysis. See O’Hara Kelly, *supra* note 17, at 793-95 for further discussion.

¹⁴⁶ Hoffman, *supra* note 116 (quoting Professor Massaro).

¹⁴⁷ *People v. Meyer*, 680 N.E.2d 315, 316 (Ill. 1997).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 320. See also *Tennessee v. Burdin*, 924 S.W.2d 82, 87 (Tenn. 1996) (holding that a shaming sign was unreasonable because compliance with the condition would have consequences that would be unforeseen and unpredictable).

¹⁵⁰ *Meyer*, 689 N.E.2d at 316.

¹⁵¹ *Id.*

¹⁵² Hoffman, *supra* note 116.

concluded that guilt can lead to reformation, but feelings of shame can have the opposite effect.¹⁵³ Particularly, when shaming penalties are crudely applied, they have potential to backfire.¹⁵⁴ People who are meant to feel shame and be deterred might blame others and react poorly.¹⁵⁵ The special license plate is a shaming penalty that is mandated across the board for all offenders. A sanction that could create such adverse effects is ineffective in terms of rehabilitation and ridiculous in terms of practicality.

As a practical matter, the special license plate could adversely affect the offender's ability to engage in activities having no possible relationship to future criminality. The stigma of the license plate could affect job prospects, social relationships, and general public opinion. In this sense, the probation condition is entirely too broad. When a probation condition requires the waiver of constitutional rights, it becomes more important that it be narrowly drawn.¹⁵⁶ In reality, there is no way for a public admonishment to be narrowly applied to a specific offense. Any aim at rehabilitation is defeated because the offender becomes the target of rebuke.

A more abstract approach can also be taken to emphasize the unintended consequences of the special license plate. The special license plate obstructs freedom of speech and expression into the marketplace of ideas, resulting in harm to both the individual and society. The marketplace of ideas theory holds that the free trade of ideas is the best test of truth as well as the wisdom of policy making.¹⁵⁷ This theory was prominent in the writings of John Stuart Mill.¹⁵⁸ Mill believed that man is a rational being and is capable of distinguishing good choices from bad choices.¹⁵⁹ In order to be able to exercise this reason correctly, however, the individual must have unlimited access to the ideas of his fellow man in a "free and open encounter."¹⁶⁰ In this concept, transparent public discourse is also inimical to democratic government.¹⁶¹ The special license plate serves to silence the probationer's true voice in the public arena. As a result, it chills the free flow of expression into the market place of ideas and fails the test of truth. As Justice Holmes stated in his dissent in *Abrams v. United States*:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundation of their own conduct that the ultimate good desired is better reached by free

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *People v. Garcia*, 23 Cal. Rptr. 2d 340, 342 (Cal Ct. App. 1993).

¹⁵⁷ *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

¹⁵⁸ Jill Gordon, *John Stuart Mill and the "Marketplace of Ideas,"* 23 SOC. THEORY & PRAC. 235, 236 (1997).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See id.* *See also Whitney v. California*, 274 U.S. 357, 375 (Brandeis, J. concurring). "The greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."

trade in ideas . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.¹⁶²

Furthermore, it is always important to be mindful of trends in the law and the impact of sentences. The effects of progressive as well as regressive decisions and legislation are rarely felt in a vacuum. The fabric of the law of tomorrow is weaved on today's legislative and judicial loom.

In *People v. Johnson*, the defendant pleaded guilty to driving under the influence of alcohol.¹⁶³ She was placed on probation provided that she would make a public apology in the newspaper alongside her booking picture.¹⁶⁴ On appeal, the district court held that the condition was adverse to rehabilitation and vacated the order. Judge Green filed a concurring opinion that read, "to uphold the condition imposed here would encourage other courts to impose other unusual, dramatic conditions, and the proliferation of these types of conditions would cause problems of a greater magnitude than their propensity to rehabilitate."¹⁶⁵ The impact of Ohio's special license plate is not a victory for alternative sentencing but sends a message throughout the law that rehabilitation can be replaced with the pillory.

D. The Ignition Interlock is a Less Burdensome Alternative.

The state must show that there are no less burdensome means to achieve its end.¹⁶⁶ In fact, the state has the burden of showing that its interest is being accomplished by the least "speech restrictive" means.¹⁶⁷ The ignition interlock ("interlock") is an alternative that accomplishes the state's interest in safety while keeping the First Amendment intact.

The interlock is a device that checks the driver's blood alcohol content before the ignition of the automobile will start.¹⁶⁸ The driver must blow into the device and is prevented from starting the car if the device detects blood alcohol content above .02.¹⁶⁹ Most notably, the interlock does not force the offender to be a courier of any message. Other states are starting to incorporate interlock devices into their laws

¹⁶² *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

¹⁶³ *People v. Johnson*, 528 N.E.2d 1360, 1360-61 (Ill. App. Ct. 1988).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1363 (Green, P.J. specially concurring). *See also* *People v. Meyer*, 680 N.E.2d 315, 319 (Ill. 1997).

¹⁶⁶ *Wooley v. Maynard*, 430 U.S. 705, 716-17 (1977). "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

¹⁶⁷ *Id.* at 716.

¹⁶⁸ *Ignition Interlock Device*, IGNITIONINTERLOCKDEVICE.ORG, <http://www.ignitioninterlockdevice.org> (last visited Dec. 12, 2010).

¹⁶⁹ *Id.*

because of these advantages.¹⁷⁰ Many of these states are going as far as making the device mandatory for all drinking and driving offenses.¹⁷¹ Because of these trends, the interlock is often considered “the future of highway safety.”¹⁷²

In Ohio, the interlock device is required for a second offense within six years and subsequent offenses.¹⁷³ It follows that in many cases, the interlock and the special license requirement often overlap.¹⁷⁴ In these instances, the special license plate serves only as an added punishment and should not be used. Unlike the special license plates, the inter-lock device is not required for first time offenders convicted of a “high-tier” OVI.¹⁷⁵ In these instances, the interlock should, and constitutional considerations demand that, it replace the special license plate.

1. The Effectiveness of the Interlock

When the state’s interest is legitimate, it becomes important that alternatives be effective. The state’s interest in safety should not be thrown out along with the unconstitutional bath water. A discussion of the merits of the device as an alternative can again begin with deterrence.

a. Deterrence

The interlock is in and of itself a deterrent.¹⁷⁶ It prevents the drinker from becoming a driver. The special license plates are argued to serve as a deterrent because they humiliate people into not drinking and driving. Unfortunately, humiliation will not always correlate to wise decision-making.¹⁷⁷ The interlock does not depend on emotion but relies on efficiency. Technology is indifferent to circumstance and not subject to caprice. It follows that the interlock is a more effective deterrent than the special license plates.

A critic might argue that the special license plate is more effective because the shaming element of the license plate prevents an individual from choosing to drink

¹⁷⁰ Only three states currently do not use ignition interlock devices at all for DUI offenders: Alabama, South Dakota, and Vermont. *State Ignition Interlock Laws*, NAT’L CONFERENCE STATE LEGISLATURES, <http://www.ncsl.org/?tabid=13558> (last updated Oct. 2010).

¹⁷¹ Currently, eleven states require interlock devices for all offenders and seven others require them for repeat offenders or those convicted of a “high tier” DUI. Anne Teigen & Melissa Savage, *Last Call: Lawmakers Hope New Technology Could Mean the End to Drunken Driving*, NAT’L CONFERENCE STATE LEGISLATURES, (Dec. 2009), <http://www.ncsl.org/?tabid=19170>. See also H.B. 78, 128th Gen. Assem., Reg. Sess. (Ohio 2009). An amendment to make the ignition interlock mandatory for all OVI offenses has been proposed in Ohio but has never become law.

¹⁷² See Joseph Marutollo, *No Second Chances: Leandra’s Law and Mandatory Alcohol Ignition Interlocks for First-Time Drunk Driving Offenders*, 30 PACE L. REV. 1090, 1107 (2010).

¹⁷³ OHIO REV. CODE ANN. § 4510.13(A)(5)(d)(i) (West 2010); OHIO REV. CODE ANN. § 4511.191(C)(1)(c).

¹⁷⁴ *Id.*

¹⁷⁵ See OHIO REV. CODE ANN. § 4503.231(A) (West 2010).

¹⁷⁶ See *Ignition Interlock Device*, *supra* note 168.

¹⁷⁷ See *supra* Part III.C.1.

and drive after the probation sentence is over. On the contrary, studies have shown that interlocks are more effective than special license plates at reducing recidivism. According to a recent national study, the interlock has led to a 40-95% reduction in conviction rates of people who were previously arrested for DUI.¹⁷⁸ Studies closer to home have also indicated promising results. An Ohio study found that “recidivism rates were three times higher for offenders who received a license suspension compared with offenders placed in an interlock group.”¹⁷⁹ After thirty months, only 1.5% of the Ohio interlock subjects were rearrested compared to 16.1% of the non-interlock group.¹⁸⁰

As previously discussed, one of the reasons special license plates fail to deter is because they are implemented into diverse communities in which a person’s public opinion is not as dominant as in a close-knit society.¹⁸¹ Although the device is not considered nor meant to be punitive, the interlock might solve this problem.¹⁸² Presumably, a passenger in another’s car has a more intimate relationship with the driver than the rest of society. If the driver was going to be “shamed” into compliance with the law, it is likely that having to use the interlock device to start the car in the presence of a passenger would better serve that purpose. The restricted license plate would not necessarily cause the same embarrassment in front of a passenger, because it is not a constant presence within the car.

b. Identification

Identifying the former offender is, for the most part, no longer necessary with the interlock. Presumably, if the car is on the road, the driver will not be under the influence of alcohol.¹⁸³ The interlock, however, has taken additional measures to prevent people from attempting to circumvent the probation condition. The interlock requires “running retests” which require the driver to breathe into the device at regular intervals.¹⁸⁴ Such tests prevent the driver from having a sober person start the car. If a driver does fail one of these retests the vehicle’s horn will honk and/or the lights will begin to flash to alert law enforcement.¹⁸⁵ The device must also be

¹⁷⁸ Paul R. Marques et al., *Alcohol Ignition Interlock Devices I: Position Paper*, Prepared for: INT’L COUNCIL ON ALCOHOL, DRUGS & TRAFFIC SAFETY, 10 (2001), <http://www.icadts.org/reports/Alcohol/InterlockReport.pdf>.

¹⁷⁹ Andrew Fulkerson, *The Ignition Interlock System: An Evidentiary Tool Becomes a Sentencing Element*, AM. J. DRUG & ALCOHOL ABUSE, Winter 2003, at 21.

¹⁸⁰ *Id.*

¹⁸¹ See *infra* Part II.A.; Hoffman, *supra* note 116.

¹⁸² W.J. Rauch, E.M. Ahlin & M.M. Berlin, *Do Legal Barriers Favor an Administrative Ignition Interlock License Restriction Program or a Judicial Program? A Legal Review Update*, 7th Annual International Ignition Interlock Symposium (Oct. 22-26, 2006), <http://www.pire.org/interlocksymposium/papers/LegalReviewRauch.pdf>.

¹⁸³ See Ignition Interlock Device, *supra* note 168.

¹⁸⁴ Andrew Fulkerson, *Blow and Go: The Breath-Analyzed Ignition Interlock Device as a Technological Response to DWI*, 29 AM. J. DRUG & ALCOHOL ABUSE 219, 223 (2003).

¹⁸⁵ *Id.*

reset by the interlock company, which can lead to further sanctions.¹⁸⁶ These measures most assuredly identify drunken drivers better than playing a game of “go-fish” with yellow license plates. The interlock, however, is not intended to create an outcast. Rather, the interlock intends to create a driver that complies with the laws of the road.

c. Rehabilitation

At first glance, it may seem that the interlock is designed as a preventive measure rather than a rehabilitative construct. The interlock, however, works to successfully integrate an OVI offender back into society while forcing him to obey the laws while driving. Research from Westat’s Center for Studies on Alcohol, Substance Abuse indicates that many first-time offenders arrested for drinking and driving have driven while intoxicated more than eighty-seven times before their first arrest.¹⁸⁷ Such behavior is characterized as “learning to drink and drive.”¹⁸⁸

The interlock forces the offender to break such behavioral habits by learning to drink without driving. If the offender drives, there is no way to drive back after drinking. The interlock serves to make the OVI offenders independent of their vehicles after drinking and get in law conforming patterns of using alternate forms of transportation.

2. Burdens of the Interlock

Potential alternatives must, of course, be less burdensome than the state’s means. The cost of the device is argued to be a burden that many are unable or unwilling to carry. Additionally, statutes that require the interlock can have their own constitutional problems. If the interlock removes the special license plate for certain offenses, or even becomes mandatory for all OVI offenses, these burdens have potential to become exacerbated.

a. Cost of the Interlock

The most common criticism of the interlock is that it is too costly and many offenders will not be able to afford to install it. Additionally, many feel that state penalties and profit have long been pals. It is no surprise then, that some argue that the interlock is yet another example of pork-barrel spending.¹⁸⁹

¹⁸⁶ If the court receives notice that the device prevented the offender from starting the motor vehicle because device indicated the presence of alcohol in the offender’s breath the court may increase the period of suspension or revoke the offender’s driving privileges altogether. OHIO REV. CODE ANN. § 4510.13(A)(10) (West 2010). In addition, if a driver is able to tamper with the device and start his car, this gives an officer probable cause to arrest a driver for DUI. *City of Akron v. Kirby*, 681 N.E.2d 444, 451-452 (Ohio App. 1996).

¹⁸⁷ See Janet Dewey-Kollen & Angela Downes, *Shattering Misconceptions About First-Time Drunk Driving Offenders*, 42 PROSECUTOR 14, 14 (2008).

¹⁸⁸ *Id.*

¹⁸⁹ After calculating the monthly fees, about \$27 million a year is going to a half-dozen private companies authorized to install the instruments in Illinois where first-time offenders are mandated or induced to have the interlock device. *What if Interlocks Were Installed in Every Car?*, INTERLOCK FACTS (Feb. 8, 2009), <http://interlockfacts.com/news-item.cfm?id=430>.

Currently, there is an installation fee between forty and sixty-five dollars for the device.¹⁹⁰ Once installed, the device is leased on a monthly basis at a cost of sixty to seventy dollars.¹⁹¹ It is true that the cost of the interlock is greater than the special license plate.¹⁹² Dignity, however, may be regarded as a more precious commodity than the bank account. As a practical matter, Ohio has created a plan to help with the cost.¹⁹³

Ohio has created a special court project fund for indigent drivers.¹⁹⁴ Under this plan, OVI offenders will be charged an additional two dollars and fifty cents in court costs to be deposited into the fund for indigent offenders.¹⁹⁵ Each manufacturer of the device must also pay a fee of five percent of its net profit to the fund.¹⁹⁶ Manufacturers must participate in this program to receive a license to register the devices. This is clearly not an example of the rich getting richer while the poor get poorer. Instead, this is progressive legislation to cure an epidemic in society. The profit is not exclusive to the companies.

When a mandatory interlock statute was proposed in Ohio, the legislature discussed the possible consequences of making the interlock mandatory for all OVI offenses. The fiscal staff was unable to determine the effect a requirement for all OVI offenses would have.¹⁹⁷ It is too difficult to estimate how many potential offenders would be considered indigent.¹⁹⁸ One possible solution is to limit the use of the interlock to all instances in which the special license plate is used. If the fund proves insufficient, Ohio could simply require that the offender is responsible for all costs as many other states have done with little legal opposition.¹⁹⁹

b. Constitutional Considerations

Most courts have found the use of the interlock and statutes requiring it to be constitutional.²⁰⁰ A Pennsylvania statute, however, has proven that interlock statutes

¹⁹⁰ H.B. 78, 128th Gen. Assem., Reg. Sess. (Ohio 2009) Fiscal Note (May 13, 2009).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ OHIO REV. CODE ANN. § 4510.45(B) and (C) (West 2010).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ H.B. 78, 128th Gen. Assem., Reg. Sess. (Ohio 2009) Fiscal Note (May 13, 2009).

¹⁹⁸ *Id.*

¹⁹⁹ Under Pennsylvania law, the individual required to have the interlock will bear all the costs under this statute. If an individual cannot afford the interlock device offenders must serve an additional year suspension. Individuals, whose income is below 200% of the poverty level, may apply for a hardship exemption. The hardship exemption still requires the individual to have the interlock installed in one vehicle. Individuals who own no vehicle will be able to comply with the requirement by having an ignition interlock vendor certify that they own no vehicles and apply for the interlock license. 75 PA. CONS. STAT. ANN. § 3805 (West, 2010). New York also has a mandatory interlock law for first a time offender, which requires the offender to bear the entire cost. N.Y. VEH. & TRAF. LAW § 1193(1)(c) (McKinney 2010).

²⁰⁰ Rauch et al., *supra* note 182.

are not impervious to constitutional problems. For a second or subsequent offense, the statute mandated that interlock devices be installed on each motor vehicle owned by the offender.²⁰¹ Additionally, the statute required that the court must certify that the device has been installed before driving privileges could be reinstated.²⁰²

In *Commonwealth v. Mockaitis*, the defendant was convicted of his second DUI offense.²⁰³ The defendant appealed the installation of the interlock and argued that it violated the separation of powers doctrine.²⁰⁴ The statute required the court to certify the installation of the interlock, a function reserved to an executive authority.²⁰⁵ The Pennsylvania Supreme Court agreed that the statute, as written, violated the separation of powers.²⁰⁶

Ohio has removed such a potential constitutional violation through careful statutory construction. Under Ohio law, the Department of Public Safety has the responsibility to check and approve the certification of the interlock rather than the judiciary.²⁰⁷ Because the court orders the device and an executive agency has responsibility to approve certification, there is no violation of the separation of powers.

The same Pennsylvania statute was challenged on grounds of the Equal Protection clause of the 14th Amendment.²⁰⁸ In *Lebanon Cnty. v. Riggs*,²⁰⁹ the defendant argued that the statutory requirement, that he install an interlock on *all vehicles he owned*, created an unequal class of drivers. The court agreed that the statute was unconstitutional as it treated drivers who owned vehicles differently from drivers who leased or borrowed vehicles.²¹⁰

Ohio's law, however, is not vulnerable to an Equal Protection Clause argument. Ohio's statute states that "no vehicle that may be operated pursuant to an immobilization waiver" can be driven without the interlock.²¹¹ Ohio's law is based on the use of the vehicle not the premise of ownership. It follows that no class of drivers will be treated differently.

²⁰¹ 42 PA. CONS. STAT. ANN. § 7002(b) (West 2002) (repealed 2003).

²⁰² *Id.*

²⁰³ *Pennsylvania v. Mockaitis*, 834 A.2d 488, 492 (Pa. 2003).

²⁰⁴ *Id.* Separation of powers is the political doctrine stemming from the United States Constitution, according to which the legislative, executive, and judicial branches of the United States government are kept distinct in order to prevent abuse of power. *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 499.

²⁰⁷ The manufacturer of the device must submit to the department of public safety a certificate from an independent testing laboratory indicating that the device meets or exceeds the standards of the national highway traffic safety administration. OHIO REV. CODE ANN. § 4510.43(A)(1)-(2) (West 2010).

²⁰⁸ *Lebanon Cnty. v. Riggs*, 53 Pa. D. & C.4th 309, 310 (Pa. Com. Pl. 2001).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 318.

²¹¹ OHIO REV. CODE ANN. § 4510.43 (A)(1)-(2) (West 2010).

Courts have generally been favorable to interlock programs because they protect the safety of the public.²¹² As long as statutes are written carefully they have been upheld.²¹³ Ohio's statute carefully protects the coequal branches of government and does not discriminate against any particular class of drivers. There are no constitutional obstacles that can prevent the interlock from being less burdensome than Ohio's special license plate requirement.

Those who still argue in favor of Ohio's Scarlet Letter Statute are willing to sacrifice the liberty of the First Amendment for peace of mind while driving on the highway. The inherent problem with this argument is that special license plates do not effectively increase safety. Even if evidence exists that shows special license plates slightly increase safety, the bright license plate pales in comparison to what the interlock device is capable of.

It is important to remember that the right to speak or the right to remain silent is not forfeited with an OVI/DUI conviction. Some may not be interested in protecting the First Amendment rights of those who put others in danger, but that interest must be compelling. Here, Ohio's interest fails to meet such a standard. There is, however, another option. The interlock is an alternative to special license plates that those in favor of safety as well as proponents of liberty should demand.

IV. CONCLUSION

The interlock is considered to be the future of highway safety.²¹⁴ Ohio should look to the future in its legislation rather than turning to past injustices of the scarlet letter. Today there are legal protections that were unknown to Puritan culture. The weight of Ohio's Scarlet Letter Statute can be lifted by the guaranteed liberties in the Constitution. The First Amendment protects the right of OVI offenders to refrain from carrying the message of the special license plate. Ohio's statute that requires special license plates for OVI offenders violates the First Amendment and cannot pass strict scrutiny. The interlock must replace the special license plate as a probation condition for OVI offenses. Ohio's Scarlet Letter Statute can then be removed.

But there lay the embroidered letter, glittering like a lost jewel, which some ill-fated wanderer might pick up, and thenceforth be haunted by strange phantoms of guilt, sinkings of the heart, and unaccountable misfortune. The stigma gone, Hester heaved a long, deep sigh, in which the burden of shame and anguish departed from her spirit. O exquisite relief! She had not known the weight, until she felt the freedom!

-Hester Prynne, after the removal of her scarlet letter.²¹⁵

²¹² Rauch et al., *supra* note 182.

²¹³ *Id.*

²¹⁴ *See supra* Part III.D.

²¹⁵ NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 182 (BANTAM DELL 2003) (1850).

