

OUR COURTS ARIZONA
The Case of the Scarlet Plate
Constitutionality and Judicial Review

OUR COURTS

Is It Unconstitutional?

The Case of the Scarlet Plate

Topics addressed:

- The Bill of Rights
- Constitutionality and judicial review

Time needed: 30 to 40 minutes minimum

Overview: Participants will review the rights guaranteed in the Bill of Rights and examine some factors to determine if a hypothetical law violates the U.S. Constitution.

Format: This is a fast-paced, multi-dimensional activity that relies on audience participation and small group work. This is more than giving a speech. You are the ringmaster in the audience actively engaging participants.

Preparation: Ask event coordinator to make sure participants have paper and pens for writing. Ideally, each table will have an odd number of persons seated to avoid a tie vote; however, this is not essential. Before presentation, review Scarlet Plate Background Paper to be able to respond to questions posed throughout this exercise. Review Bill of Rights PowerPoint.

Group Size: Ideal for groups of 50 or fewer. However, various group sizes can be accommodated.

Handouts:

- ✓ Mock Statute - A.R.S. § 28-1115
- ✓ Hypothetical scenario
- ✓ Evaluating the law handout

Presentation materials: Bill of Rights PowerPoint. Print out a copy of the PowerPoint (six slides per page) to reference during presentation.

Equipment: Computer and LCD projector. Contact your event coordinator. Bring Web-based materials on a flash drive or have access to the Internet on-site. Materials available on the Our Courts website:
<http://www.azcourts.gov/educationservices/OCA.aspx>

Timing: Three minutes to open including having participants write down rights; five to seven minutes to review Bill of Rights with PowerPoint; five to seven minutes to have participants read hypothetical scenario and statute; 10 minutes for participants to answer questions about scenario (consider assigning specific questions to individual groups); ten minutes to discuss whether hypothetical law is constitutional and debrief.

**30 to 40
minutes
needed**



This activity works best for groups of **50 or fewer**

Handouts:
Scarlet Tag scenario 28-1115

Evaluating the law handout

Ask if you need to bring your **laptop and projector**



Pace yourself!



Opening

Write down the rights: Ask participants to work either in small groups or individually and write down as many rights as they can remember from the Bill of Rights. Remind audience that the Bill of Rights includes the first 10 amendments to the U.S. Constitution. As the group identifies the rights, introduce the key message of this presentation: the Bill of Rights is intended to protect the people from the government, and the courts are responsible for protecting the rights of the people. The courts are not controlled by public opinion or political power. Rather, the court ensures that the government does not unconstitutionally interfere with or erode the rights of the people.

Show Bill of Rights PowerPoint: Using the PowerPoint, engage in a question and answer discussion to review the Bill of Rights. (The PowerPoint contains a question slide and then a corresponding answer slide. Review in advance.)

Judicial Review: Before moving to the hypothetical, remind the participants of the key lesson of this presentation. Specifically, remind participants that the U.S. Constitution is the supreme law of the land. The judicial branch is responsible for determining whether a government action (law, policy or ordinance, etc.) violates the Constitution. This is known as judicial review. For judicial review to take place, a person or entity brings a problem/case to the courts. How are judges different from other elected officials, such as lawmakers? (Note to presenter: Judges make decisions based on the law as applied to the facts and should not make decisions based on public opinion or political motivations.) Next, distribute the Scarlet Plate and facilitate a discussion regarding the constitutionality of the hypothetical state law.

The Scarlet Plate

Hand out Scarlet Plate scenario. Have audience read the scenario then ask what happened. Have people call out the facts. Did the driver do something wrong? Mold and shape the discussion. Make sure all the facts are discussed: What time of night did this happen? Why was the driver stopped? Why did he have this plate? What happened to the driver? Review the hypothetical state law that led to the driver's stop.

Hand out copies of Scarlet Plate hypothetical state law (Section 28-1115): The hypothetical law would require drivers convicted of a DUI offense to have a scarlet license plate. Also distribute the handout on evaluating the law. Allow time for participants to read and highlight important elements of the hypothetical state law. Ask the following questions while walking around the room. Have participants share their thoughts with the full group.

1. What is the problem this law is trying to solve and what is the purpose of the law?
2. Is the law fair? Is the law practical and reasonable? Why or why not? Does it discriminate unjustly against any group or person?
3. Is the law necessary or are there better ways to accomplish the same purpose? Is it worth the cost and effort of enforcement? Is it enforceable? Is it easily understood and possible to follow?

4. What are the strengths and weaknesses of the law?
5. Is the law constitutional? Why or why not? What rights are affected?

Put individuals into small groups and ask each small group to come to a consensus on the decision using the following question.

Debriefing

Let the audience know that similar legislation was proposed in other states and Ohio now has similar legislation, although that legislation does not include the probable cause section. (Note: Please see “Drivers Seeing Red” in background paper.) In 1986, the 2nd District Court of Appeals in Ohio ruled it was not cruel or unusual and did not infringe on the First Amendment to require a DUI offender to place a bumper sticker on his vehicle that read: “CONVICTED DUI—RESTRICTED LICENSE.”

This exercise was developed by Annette Boyd Pitts, executive director of the Florida Law Related Education Association, Inc. Permission is granted to Judicial Officers and designees of the Our Courts Committee to use for educational purposes, and such permission has been expressly granted for use by Our Courts Arizona.

INSERT POWERPOINT

The Case of the Scarlet Plate: A Hypothetical Case Scenario

A police officer pulled over Ross Landry who was driving home from work, because Landry's car displayed a court-ordered, red DUI license plate. According to section 28-1115 of the Arizona Revised Statutes* (see attached), enacted in 2013, law enforcement may stop vehicles displaying a DUI plate without reasonable suspicion or probable cause (that is, without a good reason to believe the person is violating a law). Mr. Landry was not violating any traffic laws when he was stopped.

The officer asked Mr. Landry to step out of his car after observing what he thought was an open wine bottle in a bag on the passenger seat. Mr. Landry explained that he had just purchased the wine for home consumption and that it had not been opened. The officer determined that the bottle was indeed unopened. Mr. Landry then told the officer that he had to leave to get home in time to watch his children while his wife went to work. An argument arose between Mr. Landry and the officer, and the officer eventually arrested Mr. Landry for disorderly conduct.

Mr. Landry was convicted of disorderly conduct in the trial court and appealed. On appeal, Mr. Landry contended that the stop made pursuant to section 28-1115 was unconstitutional. Specifically, he argued that because the statute allows law enforcement to stop anyone with a DUI plate without reasonable suspicion or probable cause, it violates his right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the United States Constitution. Mr. Landry also challenged the statute on other grounds.

(*This is a fictitious Arizona law. It is not on the books.)

Scarlet Plate Scenario
A.R.S. § 28-1115*

- (1) MVD shall create a red DUI license plate that must be displayed on any vehicle that is operated by a person who has been convicted of a DUI offense within the past 12 months.
- (2) The plate shall be a bright red color that is easily distinguishable from other license plates issued in this state. The word "Arizona " must appear at the top of the plate and the first three letters in the alphanumeric numbering system used on the plate must be "DUI".
- (3) In addition to the other license plate fees and charges collected, an annual surcharge of \$20 shall be collected for each DUI plate. The proceeds from the surcharge shall be deposited into the Autism Medical Research and Treatment Fund.
- (4) A law enforcement officer may stop any vehicle that bears a DUI plate without reasonable suspicion or probable cause.

(*This is a fictitious Arizona law. It is not on the books.)

Handout: Evaluating laws

QUESTIONS	ANSWERS
1. What is the problem this law is trying to solve and what is the purpose of the law?	
2. Is the law fair? Is the law practical and reasonable? Why or why not? Does it discriminate unjustly against any group or person?	
3. Is the law necessary or are there better ways to accomplish the same purpose? Is it worth the cost and effort of enforcement? Is it enforceable? Is it easily understood and possible to follow?	
4. What are the law's strengths and weaknesses?	
5. Is the law unconstitutional? Why or why not? Cite specific provisions of the U.S. Constitution that might come into play.	

Scarlet Plate Background

What is the hypothetical law and the purpose of the law?

State government has required that any person convicted of a DUI offense within the past 12 months must display a special red plate on his or her vehicle to indicate the conviction. Police do not need reasonable suspicion or probable cause to stop vehicles with these plates. The purpose of the law is to reduce the number of people driving under the influence by making it easier to identify and stop past DUI offenders, in turn deterring both initial and repeat offenders.

Is government involved with this policy?

Yes.

Why?

Government is involved because it is an Arizona law enacted by the state legislature.

What level of government is involved?

State government.

What rights may be violated by this policy?

- Right to be free from cruel and unusual punishment
- Right to be free from unreasonable searches and seizures
- Right to privacy
- Freedom of expression

Where are these rights located in the U.S. Constitution?

Cruel and unusual punishment is referred to in the 8th Amendment. Unreasonable searches and seizures is referred to in the 4th Amendment. Freedom of Expression is a 1st Amendment right. Privacy is an implied right (a penumbra) of the 1st, 3rd, 4th and 9th amendments.

Review articles at the end of this backgrounder relating to similar issues:

- “Drivers Seeing Red: DUI License Plates” www.alcoholalert.com
- “DUI License Plates—A Shameful Trend” www.duianswer.com

Controversial requirement

Requiring special license plates for DUI offenders is controversial. Critics complain of the potential privacy issues and the possible unconstitutional treatment of people. This also creates issues for family members and friends when they drive the car with the license plate. It will be assumed that they are the drunk driver and they will be labeled for it. Some believe the plates will not even be effective. These license plates have been called the new Scarlet Letter. The attempt is to use shame to deter people. This creates the possibility that police officers may just stop a motorist for no reason other than that the car has the plate. The plate alone would substitute for reasonable suspicion or probable cause, and past convictions should not be considered probable cause to believe that a new offense is being or will be committed.

Are there any court rulings relating to this policy or a similar policy?

Yes, there is a 1986 case from the Florida District Court of Appeals called *Goldschmitt v. State* (full citation: *Goldschmitt v. State*, 490 So. 2d 123, 125 (Fla. Dist. Ct. App. 1986)). In that case, the court addressed the constitutionality of a DUI offender being required to place a bumper sticker on his vehicle that read “CONVICTED DUI—RESTRICTED LICENSE.” The court rejected the claim that this

infringed upon the First Amendment. The court also concluded that the bumper sticker was not cruel and unusual punishment. The issue of probable cause was not addressed in that specific case.

Articles

Drivers Seeing Red: DUI License Plates

www.alcoholalert.com

Like the figurative scarlet letter for adulterers, California drunk drivers will have scarlet license plates if a state lawmaker gets his way. Assemblyman Ray Haynes, R-Murrieta, is proposing a law that would force those convicted of driving under the influence to replace their regular plates with red ones that would remain on the car for two years at least.

Specifically, the proposal would require persons convicted of two or more DUI offenses within a ten-year period to surrender the regular plates for all cars registered in his or her name and pay \$250 for a new red license plate for each vehicle. The person must keep the plates on his or her car for two years or the entire period of probation, whichever is longer.

During that time, the person would be prohibited from driving other vehicles, with company vehicles excepted.

The assemblyman believes that the scarlet plate would serve two purposes: it would alert other drivers to watch out for the car, especially if it's around closing time near a bar; and it would shame drivers out of driving drunk again.

He thinks extreme measures are necessary because none of the DUI laws currently in place seem to have had any effect on DUI-related fatalities in California. Nearly a decade ago, about 30% of automobile fatalities involved alcohol; now that percentage is up by six points.

Not surprisingly, the bill is quite controversial. Critics complain of the potential cost as well as privacy issues and unjust, and possibly unconstitutional, treatment of people who may have made one small mistake or no mistake at all.

In single car households, a car with red license plates may have to be driven by people who were not convicted of drunk driving, causing them to be unfairly labeled something they are not. Some critics are even concerned that repeat offenders with serious alcohol problems will just find other cars to drive.

Additionally, the plates may not even work. Ohio has had a similar policy in effect for several years, adopting yellow plates for DUI offenders in the 1990s. It is not yet known if the plates have had their intended consequences. Ohio public officials say they have been generating debate, however.

DUI License Plates—A Shameful Trend

Several State legislatures—including those of Ohio, Iowa, Minnesota and Oregon—have added a new, imaginative punishment for those convicted of DUI...Special, brightly colored license plates.^[1] This new “scarlet letter”—as many have called it—is in addition to the already-long list of punishments that offenders are subjected to: jail time, steep fines, higher insurance rates, a suspended license, mandatory drug and alcohol counseling, and others.

The apparent rationale is that shame is a powerful deterrent. It would also give other motorists the opportunity to steer clear of the vehicle that bears the visually striking plates.

The assumption seems to [be] that those with a DUI in their past are usually, if not always, drunk whenever they get behind the wheel. So, naturally, they should be given the widest possible berth.

If you take a moment to imagine the kinds of occurrences that DUI would yield, we end up with a pretty frightening picture.

Carrying a DUI plate would surely prompt snap judgments and angry, disapproving looks from other motorists. The non-judgment person might still be irresistibly compelled to stare, if only to see what someone convicted of DUI looks like. These are behaviors, as we all know, that everyone is prone to. However, who's to say that the person driving the car was the same person who was convicted of DUI? Imagine a family, in which the husband was recently convicted of DUI, that shares one car. Imagine, further, that the wife now has to take the kids to school in car with the incriminating, bright yellow plates.

A paranoid and overcautious driver, upon seeing the plates on another car, would be inclined to get as far away from the car as possible—effectively assuming, again, that a past offense means a perpetually drunk driver. This kind of response, if anything, would cause accidents and disrupt the flow of traffic.

Police officers—who are human, after all—couldn't help but be far more likely to pull someone over if the car bore the fluorescent plates. Past DUI convictions do not, and should not, constitute probable cause.

The point is that, when we actually think about the real, everyday effects that DUI license plates would have, we realize that...well, we realize that supporters of the idea didn't really think about the real,

¹ See Ohio Rev. Code. Ann. § 4503.231 (requiring bright yellow license plates with red numbers for certain DUI convictions); Minn. Stat. § 168.041 (requiring drivers who have been convicted of two or more DUIs within a ten-year period to display special white license plates with blue or black text). Oregon and Iowa have both discontinued their use of special license plates for DUI offenders since the publication of this article. In addition, Georgia requires a special DUI license plate in certain circumstances. Ga. Code Ann. § 40-2-136. Notably, however, none of the states that issue special DUI license plates allow the presence of the plate alone to constitute probable cause. See *id.*; *State v. Henning*, 666 N.W.2d 379, 385 (Minn. 2003); Jennifer P. Weiler & Kevin P. Weiler Sr., *Limited Driving Privileges—Restricted Plates*, in Baldwin's Ohio Handbook Series Driving Under the Influence Law § 14:29 (2014).

everyday effects they would have. They were just thinking that DUI is bad, so harsher penalties must be good.

In principle, the idea is cruel, unfair, excessive and extremely problematic. In practice, it would be far worse.

Surely, MADD—Mother's Against Drunk Driving, the nation's most passionate anti-DUI crusaders—would strongly support the idea of special DUI plates.

No[t] so.

According to Katherine Kovacich, regional administrator for MADD in the Pacific Northwest, Mothers Against Drunk Driving "is not into shunning" convicted DUI offenders.

It's a strange world we live in when those who are convicted of DUI are forced to endure the type of shame-based punishments that we otherwise reserve for sex offenders.