CONSTITUTIONAL LAW — FIRST AMENDMENT — WASHINGTON COURT OF APPEALS UPHOLDS APOLOGY REQUIREMENT OF JUVENILE'S SENTENCE. — *State v. KH–H*, 353 P.3d 661 (Wash. Ct. App. 2015).

Apologies serve many purposes: they may express remorse, effect reflection on the offense by an offender, offer some sense of healing to a victim, or humble the proud. For all of these reasons, many courts use apologies as a penal tool and require convicted defendants to offer an apology for their actions.[1] Recently, in *State v. KH–H*,[2] the Washington Court of Appeals, Division II, held that requiring a juvenile to write a letter of apology did not violate his First Amendment rights. The court's focus on a reasonably related rehabilitative purpose gave short shrift to the question of compelled speech, with the court justifying its action under the doctrine of reduced scrutiny in cases involving convicted defendants. But to compel one to aver what he does not himself believe is the greatest violation of the freedom of speech,[3] and the traditional justifications for a convicted-defendant exception to the compelled speech doctrine rely on unsubstantiated applications of criminal punishment theory and constitutional law. As a result, a higher level of scrutiny should be imposed on probation conditions implicating the core right against compelled speech — and forced apologies would likely fail under this inquiry. Washington missed a rare opportunity to engage a serious threat to First Amendment freedom.

K.H.-H. and C.R. were teenage students who attended the same high school.[4] On October 1, 2012, K.H.-H. and C.R. went to C.R.'s house following school.[5] The two were sitting on C.R.'s bed when K.H.-H. began to kiss her on the face and neck.[6] She told him to "chill it or to back off."[7] Apparently undeterred, K.H.-H. pushed C.R. onto her back and straddled her, then began biting her neck.[8] C.R. protested again, pushing at him and telling him to "'stop,' to get off her, and

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[1] *See, e.g.*, Kimball Perry, *Judge: Jail or Facebook Apology*, CIN. ENQUIRER (Feb. 22, 2012), http://archive.cincinnati.com/article/20120222/NEWS/302220184/Judge-Jail-Facebook-apology [http://perma.cc/DA38-697D]. A classical apology, in the sense of an explanation or justification (such as Socrates' defense in Plato's *Apology*), is not sufficient. Courts desire an expression of fault and regret.

[2] 353 P.3d 661 (Wash. Ct. App. 2015).

[3] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) ("It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.").

[4] *See KH–H*, 353 P.3d at 663.

[5] *Id.*

[6] *Id.*

[7] *Id.* (quoting Report of Proceedings at 29).

[8] *Id.* at 664.

that it hurt."[9] K.H.-H. put his hand under C.R.'s shirt and bra in an attempt to touch her breasts and "reached into and 'tr[ied] to undo [her] pants.'"[10] C.R. grabbed her cell phone and threatened to call her father, prompting K.H.-H. to leave the house.[11] C.R. noticed that her neck had been bruised from the bites, and showed the marks to her friend, J.S.[12] J.S., after confronting K.H.-H. about the incident, informed a school official.[13]

K.H.-H. was charged with two counts of fourth-degree assault with sexual motivation: one for the incident with C.R. and another for an incident involving a different girl.[14] He was found guilty in juvenile court with regard to the former incident and not guilty with regard to the latter.[15] At the disposition hearing, the State requested that the court order K.H.-H. to address to C.R. "a sincere written letter of apology . . . mean[ing] an admission that he did what he was accused of what he's doing [sic] and [is] sorry he put her in that position."[16] K.H.-H.'s counsel objected to the condition, contending that K.H.-H. maintained the right to control his speech.[17] The court sentenced K.H.-H. to three months of community supervision and ordered that he "write a letter of apology to [C.R.] that is approved by the Probation Officer and the State."[18] K.H.-H. appealed his conviction and sentence, arguing that the State presented insufficient evidence that he assaulted C.R. with sexual motivation and that the apology condition of his sentence violated his rights under the First Amendment of the Federal Constitution and article I, section 5 of the Washington Constitution.[19]

The Washington Court of Appeals, Division II, affirmed.[20] Writing for the panel, Judge Worswick[21] observed that the unchallenged findings of fact were sufficient to support a finding of guilt.[22] The trial court found that K.H.-H. touched C.R. without her consent and that the kisses, bites, and gropes were "harmful and offensive contacts" that

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[9] *Id.* at 663 (quoting Report of Proceedings at 35). During an initial interview, C.R. stated that she "had not [told him to stop], but she had tried to push [K.H.-H.] away." *Id.* (quoting Clerk's Papers at 13–14). At trial, C.R. testified that she had told K.H.-H. to stop, and the trial court found her to be a "credible witness." *Id.* (quoting Clerk's Papers at 20).

[10] *Id.* (alterations in original) (quoting Report of Proceedings at 32–33).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* (alterations and omission in original) (quoting Report of Proceedings at 149).

[17] *Id.*

[18] *Id.* (quoting Clerk's Papers at 42).

[19] *Id.* at 663, 665.

[20] *Id.* at 667.

[21] Judge Worswick was joined by Judge Sutton.

[22] *See KH–H*, 353 P.3d at 664–65.

satisfied the requirements of an assault with sexual motivation.[23] The court dismissed K.H.-H.'s "mixed messages" defense,[24] whereby he argued that the trial court omitted facts tending to show that C.R. did not verbally protest and "liked [K.H.-H.], felt attracted to him, and had previously . . . h[eld] hands and hugg[ed him]."[25] Judge Worswick declared that the evaluation of facts was the province of the factfinder, and that the appellate court would not "reevaluate the persuasiveness of the evidence and the credibility of . . . testimony."[26] Turning to the compelled speech claim, Judge Worswick rested the majority's analysis on the Ninth Circuit's reasoning in *United States v. Clark*.[27] The *Clark* court held that a forced public apology was constitutional if imposed "for permissible purposes, and . . . reasonably related to [those] purposes."[28] Judge Worswick found that the trial judge had ordered a public apology for the permissible purpose of rehabilitation and that the apology was reasonably related to that purpose, as "the juvenile court noted its concern that [K.H.-H.] would again offend based on his pattern of being disrespectful to women."[29] The Washington constitutional defense was unavailing because article I, section 5 had never been used to protect against compelled speech, and K.H.-H. failed to present reasons that the Washington Constitution should be broader than the Federal Constitution.[30]

Acting Chief Judge Bjorgen dissented in part. While he agreed with the panel that there was enough evidence to support a finding of guilt, he believed that the compelled letter of apology "offend[ed] the First Amendment."[31] He cited the Supreme Court's rulings in *West Virginia State Board of Education v. Barnette*[32] and *Wooley v. Maynard*[33] for the proposition that "at the least . . . the State may compel speech only if necessary to prevent a grave and imminent danger."[34] He decried the majority's use of "a presumed rational basis" test, concluding that "[t]he First Amendment requires more from us."[35] Instead, Acting Chief Judge Bjorgen argued that speech could be compelled only if the standards of *Barnette* were met — that is, if the

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[23] *Id.* at 664.
[24] *Id.* at 665.
[25] *Id.* at 665 n.1.
[26] *Id.* at 665.
[27] 918 F.2d 843 (9th Cir. 1990), *overruled on other grounds by* United States v. Keys, 133 F.3d 1282 (9th Cir.) (en banc), *amended by* 143 F.3d 479 (9th Cir. 1998) *and* 153 F.3d 925 (9th Cir. 1998).
[28] *Id.* at 848 (quoting United States v. Terrigno, 838 F.2d 371, 374 (9th Cir. 1988)).
[29] *KH–H*, 353 P.3d at 666.
[30] *Id.* at 666–67.
[31] *Id.* at 667 (Bjorgen, A.C.J., dissenting in part).
[32] 319 U.S. 624 (1943) (striking down a regulation requiring flag salutes by schoolchildren).
[33] 430 U.S. 705 (1977) (striking down a requirement to display a state motto on license plates).
[34] *KH–H*, 353 P.3d at 668 (Bjorgen, A.C.J., dissenting in part).
[35] *Id.*

apology were "necessary to prevent a grave and imminent danger."[36] In this case, he found that "[t]he State's showing [did] not remotely approach those standards."[37]

At first blush, the question at the heart of this case appears inane: A juvenile, convicted of an odious offense, faces no jail time and must merely apologize to begin to put the incident behind him. And yet he claims that his "freedom of speech" means that he need not say that he is sorry. But the principle at stake becomes clearer if the circumstances are changed slightly. Imagine, for example, that a juvenile is convicted of trespassing after refusing to move from a "Whites Only" section of a restaurant and told that he will serve jail time unless he sends a letter to the owner admitting fault and apologizing for the inconvenience.[38] The implications manifest as much more dire indeed. Requiring an apology compels the juvenile to make a statement of belief that what he did was wrong and a statement of sentiment that he regrets what he did. Such an extraction should require far more than the good intentions of the sentencing judge.

Because a required apology involves making an offender say something he does not want to say, it implicates the Supreme Court's compelled speech doctrine. This doctrine has generally held that the State cannot force its citizens to speak messages that they do not wish to deliver.[39] Its strong, broad interdiction of coercing speech has been watered down by courts in the context of prison and probation, where constitutional rights are weakened. The justifications for reducing First Amendment rights[40] in the context of compelled apologies, how-

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[36] *Id.*

[37] *Id.* at 669.

[38] *Cf.* Garner v. Louisiana, 368 U.S. 157, 159–60 (1961). For a more modern example, consider Peter J. Reilly, *Nay Nay We Won't Pay – Evaders, Protesters and Resisters Versus IRS*, FORBES (Mar. 27, 2015, 3:06 PM), http://www.forbes.com/sites/peterjreilly/2015/03/27/nay-nay-we-wont-pay-evaders-protesters-and-resisters-versus-irs (describing the practice of Americans withholding taxes as a conscientious objection to military spending).

[39] There are some enumerated exceptions. Factual disclosures, like tax filings, can be required by the government, as can commercial disclosures regarding goods or services. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (upholding compelled disclosure of "purely factual and uncontroversial information" in a commercial context). Plea bargains, which may initially appear to be unconstitutional conditions (offering the benefit of reduced jail time in return for compelled speech, namely "I am guilty"), can be distinguished on the grounds that the benefit offered is speculative; if the deal is refused, the government must still prove its case. *See* McKune v. Lile, 536 U.S. 24, 44 (2002) (plurality opinion).

[40] Compelled apologies may also implicate Fifth Amendment rights to the extent that they include self-incriminating statements. *See* Minnesota v. Murphy, 465 U.S. 420, 426 (1984) ("A defendant does not lose [Fifth Amendment] protection by reason of his conviction of a crime; notwithstanding that a defendant is . . . on probation at the time he makes incriminating statements . . . ."). In *KH–H*, however, the defense appears to have waived any Fifth Amendment claim. *See* Oral Argument at 2:37, *KH–H*, 353 P.3d 661 (No. 45461–1–II), http://www.courts.wa.gov/content/OralArgAudio/a02/20150227/454611%20-%20State%20v.%20K.H-H.mp3 ("[W]e didn't actually really raise a Fifth Amendment issue . . . .").

ever, are insufficient to warrant the level of control sought by the government. There is another way to achieve many of the State's objectives without putting to offenders the direct dilemma of either making an expression against their wishes or going to jail for their silence.

A natural place to begin is the Supreme Court's compelled speech doctrine. The First Amendment's "freedom of speech"[41] has been understood as "necessarily comprising the decision of both what to say and what *not* to say."[42] Just as the State is not permitted to ban speech because it offends the sentiments of citizens,[43] so too the State cannot require speech of citizens in support of its views.[44] In the seminal case of *Barnette*, a group of West Virginia parents and children brought suit against a West Virginia school board resolution requiring students to salute the American flag or face expulsion.[45] The Supreme Court, overruling a case decided just three years earlier,[46] declared that the First Amendment could not countenance such an obligation: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein."[47]

The prohibition against compelled speech was further strengthened in *Maynard*. There, a New Hampshire driver objected to the state's motto of "Live Free or Die" on religious and political grounds and desired to obscure the phrase on his license plate.[48] The Supreme Court enjoined the state from enforcing its laws preventing obstruction of the motto on First Amendment grounds.[49] Finding that the state's requirement that Maynard display its motto rendered his license plate a "'mobile billboard' for the State's ideological message," the Court described the burden as an obligation "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[50] In broad terms, the Court stated: "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such

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[41] U.S. CONST. amend. I. The First Amendment's free speech protection is applicable to the states via the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

[42] Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797 (1988).

[43] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989).

[44] Indeed, a state may need stronger justification to force a citizen to say something than to prevent him from speaking at all. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943).

[45] *Id.* at 626–29.

[46] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by Barnette*, 319 U.S. 624.

[47] *Barnette*, 319 U.S. at 642. The Court noted that any exceptions to this grand principle "do not now occur to us," *id.*, though the freedom of those "subject to military discipline" might of necessity be curtailed at times, *id.* at 642 n.19.

[48] Wooley v. Maynard, 430 U.S. 705, 707–08 (1977).

[49] *Id.* at 717.

[50] *Id.* at 715.

interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[51]

Absent any other factors, K.H.-H.'s constitutional case would seem straightforward: the State's demand of an apology requires nonfactual speech that K.H.-H. does not want to provide and is thus impermissible.[52] Apologies include both an indication of the moral propriety of a law,[53] and a public admission of fault.[54] The State thus intended to use him as a vehicle for its message despite his personal disagreement.[55] But the State in *KH–H* argued that this case was an exception to the general rule because K.H.-H.'s conviction diminished his right to be free from compelled speech.[56] And indeed, those convicted and on probation do suffer restricted rights,[57] with only a reasonable connection to "goals of probation" required for such restrictions.[58] But this limited review for First Amendment rights of probationers makes little sense, and has led to judicial mischief across the country.

The justifications for lowered protections for probationers generally have been premised on one of two theories: the idea that probation is a

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[51] *Id.* at 717.

[52] *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995) ("[O]ne who chooses to speak may also decide 'what not to say . . . .'" (quoting Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 16 (1986) (plurality opinion))).

[53] Contrition indicates that an offender recognizes the wrongness of his failure to follow the law. But our Constitution countenances speech that supports the destruction of government officials, *see* Rankin v. McPherson, 483 U.S. 378 (1987) (hope that the President would be assassinated), laws, *see* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (anarchical or seditious speech), and the Constitution itself, *cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969) (promotion of racially discriminatory policies). If disagreement with laws is political speech, there is no reason that the disagreement loses its political nature because the proponent violates the law. Of course, one who breaks the law, even justly, must suffer the consequences, but he need not believe the reason he is punished is just. *Cf.* ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, q. 95, art. 2 (Fathers of the English Dominican Province trans., 1915) (c. 1271) ("'[T]hat which is not just seems to be no law at all': wherefore the force of a law depends on the extent of its justice." (quoting ST. AUGUSTINE, DE LIBERO ARBITRIO bk. I, ch. 5, 9 (c. 388))).

[54] For some, the public admission of wrongdoing, rather than whether the conduct was wrong, is the sticking point. *Cf.* ARTHUR MILLER, THE CRUCIBLE 142–43 (1953) ("What others say and what I sign to is not the same!" *Id.* at 143.).

[55] The exact reason of K.H.-H.'s disagreement is unknown, but he had no obligation to provide it.

[56] Oral Argument, *supra* note 40, at 25:22 ("[O]ur criminal justice system says that when you are convicted of an offense, . . . your rights will be . . . limited in certain ways.").

[57] *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) ("[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." (quoting Price v. Johnston, 334 U.S. 266, 285 (1948))).

[58] United States v. Turner, 44 F.3d 900, 903 (10th Cir. 1995); *see also* United States v. Terrigno, 838 F.2d 371, 374 (9th Cir. 1988) (describing the test for constitutionality of probation restrictions as whether they are "primarily designed to meet the ends of rehabilitation and protection of the public"). The Supreme Court has thus far avoided the question. *See* Griffin v. Wisconsin, 483 U.S. 868, 874 n.2 (1987) (reserving the question of the standard of review for probation conditions).

grace granted to offenders or that the offender has waived any objection by accepting probation rather than jail.[59] The Supreme Court has rejected the former,[60] and the latter implicates the unconstitutional conditions doctrine.[61] Contentions that a compelled apology is acceptable because the offender's age reduces his right to speech are also unavailing.[62] Thus, the only justification is the acknowledged reduction of First Amendment rights in the prison and probation contexts.[63] But the rationale for equal restrictions for prisoners and probationers in the freedom-of-speech context makes little sense. First Amendment restrictions in a prison system serve different interests than do restrictions on a probationer, who is already interacting in some manner with society.[64] Without the broad discretion afforded prison officials for institutional security,[65] the only interests whose furtherance would justify a reduction of probationers' First Amendment rights are protection of the public and rehabilitation.[66] Neither is convincing as a motivation for reducing the level of scrutiny for compelled speech.

The government's reliance on the need to protect the public makes some sense with regard to probability of harm. A citizen convicted of breaking the law, upon release to the public, is more likely to commit further crimes,[67] and so the State's suspicion that citizens on probation may break the law again may well be justified.[68] But restrictions of free

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[59] *Developments in the Law — Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1949–50 (1998).

[60] *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 n.4 (1973). Despite this rejection, a number of courts still use the grace justification. *See, e.g.*, Lopez v. State, No. 606, 2013, 2014 WL 2927347 (Del. June 25, 2014).

[61] *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) ("[The] government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."); *cf.* United States v. Knights, 534 U.S. 112, 118 n.4 (2001) ("The Government sees our unconstitutional conditions doctrine as a limitation on what a probationer may validly consent to in a probation order.").

[62] *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969). Even under Justice Thomas's theory of minors' rights being contingent upon their parents' permission, *see* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2760 (2011) (Thomas, J., dissenting), forcing children to speak likely violates the right of parents to raise their children, *cf.* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (striking down a law that "interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

[63] *See* Pell v. Procunier, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.").

[64] *See id.* at 822–23 (listing the considerations in restricting prisoners' speech as deterrence of crime, rehabilitation, and security of the prison facility).

[65] *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 416 (1989).

[66] United States v. Consuelo-Gonzalez, 521 F.2d 259, 264 (9th Cir. 1975) (en banc).

[67] *See* United States v. Knights, 534 U.S. 112, 121 (2001).

[68] In *Knights*, the Court permitted a reduced level of suspicion for searches of probationers. *Id.*

speech rights before they are exercised implicate the menace of prior restraints, a remedy long considered suspect in English and American speech jurisprudence.[69] Circuit courts have reasoned, however, that some prior restraints of probationers are permissible for positive free speech rights (such as protest or association) on the rationale that exposure to situations similar to previous violations invites future ones[70]: the overeager protester may break the law in his zeal, so he is prevented from protesting.[71] Yet even supposing that the First Amendment could countenance prior restraints for probationers, making a citizen speak a message not his own has little to do with stopping crimes. At best, it operates as a method of forcing a potential reoffender to reconsider his actions before attempting similar misdeeds in the future. This basis is better placed under the rubric of rehabilitation.

The rehabilitation argument boils down to the question of how much personal autonomy the Constitution shields in cases where a citizen has been shown to have broken the law. Many protected demonstrations of First Amendment speech have been curtailed in the name of rehabilitating criminals.[72] The State clearly has a compelling interest in preventing future violations of the law and in either convincing law-breakers of the justness of the law or accustoming them to a law-abiding life. In the prison context, the Supreme Court has upheld the severe curtailment of all forms of leisure reading as an incentive to correct behavior.[73] In the realm of probation, judges have been known to restrict the right to procreate as a condition.[74] These restrictions reflect the fact that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'"[75] It is not clear, however, that the freedom from compelled speech is a "conditional liberty." It can be distinguished from most other freedoms by the simple fact that it is a protection against a violation of the individ-

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[69] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). The traditional view of freedom of speech was to permit speech and visit punishment only once the speech actually violated a law. 4 WILLIAM BLACKSTONE, COMMENTARIES *152 ("Every freeman has an undoubted right to lay what sentiments he pleases before the public; . . . but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.").

[70] *See* Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 203–04 (1967).

[71] *See* United States v. Turner, 44 F.3d 900, 903 (10th Cir. 1995).

[72] For example, Charles Malone was prohibited from "belong[ing to] or participat[ing] in any Irish Catholic organizations" to help prevent his further illegal supplying of the Irish Republican movement with weapons. Malone v. United States, 502 F.2d 554, 555 (9th Cir. 1974); *see also, e.g.*, *Turner*, 44 F.3d at 903 (upholding ban on picketing based on "speculat[ion] that . . . [probationer] might not be able to restrict her activities within lawful parameters").

[73] *See* Beard v. Banks, 548 U.S. 521, 526 (2006) (plurality opinion).

[74] State v. Oakley, 629 N.W.2d 200, 201 (Wis.), *modified*, 635 N.W.2d 760 (Wis. 2001).

[75] Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) (alteration and omission in original) (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

ual freedom of thought (an even greater violation than silencing[76]), tantamount to an attempted "inva[sion of] the sphere of intellect and spirit."[77] The danger must be "grave" indeed to warrant such forced professions.[78]

But the benefits of compelled apologies are more focused on punitive rather than rehabilitative purposes. A court-compelled apology is unlikely to effect true contrition or remorse; one commentator describes it as "a drop in the ocean of a convict's socialization."[79] Rather than truly rehabilitate, forced speech is more likely at best to humiliate. Immanuel Kant described the purpose of forced apologies as retributive: "[T]he humiliation of the pride of such an offender . . . will compensate for the offense as like for like."[80] It is unclear how beneficial such humiliation will be in convincing offenders that a law is just and should be followed, but several scholars are skeptical.[81]

There is another way to achieve the rehabilitative objective sought by the State. If the government wishes to reward those who voluntarily express contrition before sentencing, it may do so.[82] Indeed, rewarding voluntary contrition makes more sense, as it more closely aligns with the rehabilitation justification. Insincere apologies have been described as "worthless,"[83] and serve mainly as an opportunity to humiliate the offender. True apologies help the offender, the victim, and society in general. At the same time, requiring a "sincere" apology from an offender[84] forces him to either lie to the State and sell the apology or undergo an emotional transformation that changes his belief on the subject. Both are deeply problematic intrusions on the individual's autonomy and run counter to the theory of the First Amendment. With regard to the latter, the "marketplace of ideas" relies on the conflict of

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[76] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943).

[77] *Id.* at 642; *cf.* GEORGE ORWELL, NINETEEN EIGHTY-FOUR 293 (1949) ("'They can't get inside you,' she had said. But they could get inside you. . . . There were things, your own acts, from which you could not recover.").

[78] *KH–H*, 353 P.3d at 668 (Bjorgen, A.C.J., dissenting in part).

[79] NICK SMITH, JUSTICE THROUGH APOLOGIES 81 (2014).

[80] IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101–02 (John Ladd trans., Bobbs-Merrill 1965) (1797).

[81] *See, e.g.*, SMITH, *supra* note 79, at 83.

[82] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (U.S. SENTENCING COMM'N 2013). The key distinction is whether the court seeks presentencing evidence of contrition or implements contrition as a condition of the sentence.

[83] Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1293 (2006); *cf.* MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS 298 (M.A. Screech ed. & trans., Penguin Books 2003) (1580) ("Courtiers were praising the Emperor Julian one day for administering such good justice: 'I would be prepared to be proud of such praises,' he said, 'if they came from persons who could dare to condemn and censure any actions of mine when they were contrary to justice.'").

[84] *KH–H*, 353 P.3d at 663 (quoting Report of Proceedings at 149).

beliefs in the hope that the truth will out.[85] By adding false professions of belief, the State is artificially altering the market in an attempt to make its product more popular. But courts have already rejected this strategy.[86]

In *KH–H*, the Washington Court of Appeals was afforded a rare chance to address this problem. Given the short sentence duration and the coercive nature of the choice offered to offenders, most take the deal. An appellate court, removed from the conflict presented to a lower court,[87] is likely the surest medium for removing this First Amendment violation. And there was no need to defer to the federal courts' deficient reasoning in this realm.[88] In nonetheless accepting the prosecution's justification of "rehabilitation," the court permitted the continuance of an egregious wrong in sentencing practices.

The implication of the extent of the "rehabilitation" justification is that courts can demand that civil disobedients recant and jail them for their defiance. The particularly severe consequences at play when the State wishes to compel a citizen to speak against his will and confess a belief in something with which he disagrees strongly militate against adopting a test of mere reasonable relationship to "rehabilitation," with enormous deference on what constitutes rehabilitation. Rather, a higher level of scrutiny should serve to determine whether the government's interest is truly compelling enough. In most cases, it will fail.

The behavior of which K.H.-H. was convicted was repugnant. And if the concern that K.H.-H. would continue to be disrespectful to women is well founded, Washington is right to denounce such a knavish attitude. But to convince him to announce the validity of its position, Washington must use persuasion, not coercion, notwithstanding his due conviction. As much as we might like to encourage contrition, when it comes to a choice between jail and a compelled apology, the First Amendment means never having to say you're sorry.

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[85] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he 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.").

[86] *Cf.* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas . . . .").

[87] Judges who believe the practice unconstitutional will invariably not use these conditions. But judges who do use them are unlikely to reconsider the constitutionality of their actions, as doing so restricts their own near-plenary power.

[88] *See KH–H*, 353 P.3d at 668 n.4 (Bjorgen, A.C.J., dissenting) ("[I]n passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position . . . ." (quoting Freeman v. Lane, 962 F.2d 1252, 1258 (7th Cir. 1992))).