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NOTE

A PENNY FOR YOUR THOUGHTS: REVISITING *COMMONWEALTH V. POWER*

I. INTRODUCTION

“True crime” stories such as the tales of Tonya Harding or Amy Fisher are among today’s hottest selling television shows, movies, and books.¹ Although the thought of such unscrupulous characters making money by talking about their crimes is repugnant, it is a fact of life in today’s mass communications “marketplace of ideas.” Indeed, a very premise of the First Amendment is that we benefit from a vigorous marketplace of ideas, and that society is diminished when any voice is stilled by government.²

This Note addresses the growing dispute among lower courts regarding the extent to which those convicted of a crime may be subjected to otherwise unconstitutional restrictions on fundamental rights. Specifically, this Note explores whether a court-imposed condition of probation prohibiting a convicted criminal from profiting from the sale of her “story” is constitutionally permissible or if the condition violates a probationer’s right to freedom of expression. This Note will focus on *Commonwealth v. Power*,³ in which the Supreme Judicial Court of

1. See A.J. Jacobs, *Where Are They Now?*, ENT. WKLY., Oct. 21, 1994, at 8 (“After the [Nancy] Kerrigan–Tonya Harding debacle, nearly 40 producers clamored for rights to Kerrigan’s story.”). In fact, the Amy Fisher story was so lurid (i.e. marketable), that three television networks each aired different docudramas dedicated to the subject within the same week. Lee Margulies, *TV Ratings; ABC’s ‘Fisher’ Is King*, L.A. TIMES, Jan. 6, 1993, at F2. Similarly, the HBO movie detailing the life of the Texas Cheerleader-Murdering Mom was critically acclaimed and received numerous awards. See Howard Rosenberg, *‘Cheerleading-Murdering Mom’: Three Semi-Cheers*, L.A. TIMES, Apr. 9, 1993, at F1; *Nighttime Nominees: A Complete Rundown*, L.A. TIMES, July 23, 1993, at F26.

2. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745–46 (1978) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”).

3. 650 N.E.2d 87 (Mass. 1995), *cert. denied*, 116 S. Ct. 697 (1996).

Massachusetts upheld such a restriction on the basis that it reinforced the “moral foundations of our society.”⁴ Relying upon this rationale, the Massachusetts court employed the same reasoning that has often motivated government censors: a desire to shape public opinion by targeting and burdening disfavored speakers.⁵ In her appeal to the United States Supreme Court, Katherine Ann Power challenged the legitimacy of such speech restrictions and questioned the standard of review.⁶ Ultimately, however, her appeal was denied⁷ and the question of the appropriate standard of review remains unresolved.

Part II of this Note sketches the events surrounding Katherine Ann Power’s crime and her years as a fugitive. Part III outlines the purposes of probation. Part IV addresses the growing conflict among the lower courts as to the appropriate standard of review for court-imposed probation conditions that curtail a probationer’s fundamental rights. Part V suggests that an intermediate standard of review, with an appropriate nexus between the character of the violation and the structure of the restriction, is required when probation conditions restrict an individual’s fundamental First Amendment liberties. Such a standard would properly protect speech rights without elevating the status of probationers to that of the general public. Finally, Part VI concludes that the conditions imposed on Power would not survive judicial scrutiny under an intermediate standard of review; and therefore, these conditions impermissibly restrict her freedom of expression.

4. *Id.* at 91. This topic has been explored by others, most notably by Shaun B. Spencer. See Shaun B. Spencer, Note, *Does Crime Pay—Can Probation Stop Katherine Ann Power from Selling Her Story?*, 35 B.C. L. REV. 1203 (1994). Spencer suggests that the probation condition placed on Power violated her freedom of expression because the condition was not necessary to either of the permissible purposes of probation. *Id.* at 1233–35. The restriction neither helps rehabilitate Power nor protects the public from her recidivism. *Id.* This Note seeks to build on that critique. Spencer’s analysis omits a discussion of possible doctrinal developments that would alleviate the conflict among lower courts as to the appropriate standard of review for such probation conditions. More specifically, this Note seeks to demonstrate support for an intermediate standard of review. Such a standard would properly protect First Amendment speech rights without elevating the status of probationers to that of non-probationers. Moreover, precisely because judicial orders direct their commands toward particular individuals, injunctions restraining speech are inherently suspect and therefore deserve a higher level of scrutiny. See *infra* Part V.

5. See discussion *infra* Part V.

6. See Petition for Cert. at 6, *Commonwealth v. Power*, 650 N.E.2d 87 (Mass. 1995), *cert. denied*, 116 S. Ct. 697 (1996).

7. *Power v. Massachusetts*, 116 S. Ct. 697 (1996).

II. THE STORY ITSELF

Like many college students in the late 1960s and early 1970s, Katherine Ann Power found herself in the midst of student activism.⁸ Power initially became active in the student movement while attending Brandeis University in Massachusetts.⁹ A National Merit Scholarship finalist and youth columnist for the *Denver Post*, Power appeared “primed for academic success.”¹⁰ Stemming from her experience at a Roman Catholic girls’ school, where social justice was a significant part of the curriculum, Power became increasingly energized by the growing student protest movement on campus.¹¹

In the spring of 1970, after President Richard Nixon sent troops to Cambodia, four Kent State student protesters were gunned down by the National Guard.¹² These events appear to have galvanized Power; she became a central figure in the National Student Strike Force, a clearinghouse for information about student strikes all over the country.¹³

At Brandeis, Power met the four individuals who would later become her accomplices in a local bank robbery designed to further their efforts in support of the Black Panthers.¹⁴ Stanley Bond, the alleged mastermind of the bank robbery, was participating in a program at Brandeis designed to provide college educations to former prison inmates.¹⁵ Joining in the robbery were Robert Valeri¹⁶ and William Gilday,¹⁷ whom Bond had met in prison, as well as Susan Saxe, Power’s college roommate.¹⁸

On September 23, 1970, in the Brighton area of Boston, Massachusetts, Bond, Saxe, and Valeri robbed the State Street Bank.¹⁹ Power waited in the switch car about a half mile from the bank.²⁰ Outside the bank, Power’s fourth accomplice William Gilday was parked in the

8. See Margaret Carlson, *The Return of the Fugitive*, TIME, Sept. 27, 1993, at 60.

9. See Barbara Kantrowitz et al., *The Fugitive*, NEWSWEEK, Sept. 27, 1993, at 56.

10. *Id.*

11. *Id.*

12. See Carlson, *supra* note 8, at 61.

13. Kantrowitz, *supra* note 9, at 56.

14. *Id.* at 56–57. The Black Panthers were a militant Black Power organization founded in the 1960s by Huey Newton and others.

15. *Id.* at 57.

16. *Id.*

17. Carlson, *supra* note 8, at 61.

18. *Id.*

19. Kantrowitz, *supra* note 9, at 55.

20. *Id.* at 56.

getaway car.²¹ When Boston Police Officer Walter Schroeder arrived at the scene, Gilday fired a submachine gun, fatally wounding Officer Schroeder in the back.²² Although Gilday pulled the trigger, under Massachusetts law, all participants involved in a felony where a victim is killed may be charged with murder.²³

Soon after, police caught three of Power's accomplices.²⁴ Gilday, the gunman, was convicted of murder and sentenced to life in prison.²⁵ Valeri helped convict Bond and Gilday when he testified against them for the Commonwealth of Massachusetts.²⁶ The mastermind of the scheme, Bond, attempted to blast his way out of prison while awaiting trial.²⁷ To the defeat of prosecutors, the bomb exploded and killed him.²⁸ Although both Power and Saxe went underground together, Saxe was eventually caught in 1975.²⁹ Saxe served seven years in prison for her part in the robbery, and now works for a charitable organization in Philadelphia.³⁰

Power, however, continued to elude the police.³¹ She remained on the FBI's ten-most-wanted list for fourteen years.³² With no fruitful leads, the FBI dropped her from the list in 1984.³³ After hiding out in women's communes for several years,³⁴ Power moved with her young son to Oregon's Willamette Valley.³⁵ Appropriating the name of an infant who died the year she was born, Katherine Ann Power became 'Alice Metzinger.'³⁶ After marrying Ronley Duncan,³⁷ 'Alice' served as a restaurant consultant and later opened her own restaurant in Eugene,

21. Carlson, *supra* note 8, at 61.

22. *Id.*

23. See *Commonwealth v. Ortiz*, 560 N.E.2d 698, 700 (Mass. 1990) (felony murder rule imposes criminal liability for homicide on all participants in a felony that results in death).

24. *Commonwealth v. Power*, 650 N.E.2d 87, 88 (Mass. 1995), *cert. denied*, 116 S. Ct. 697 (1996).

25. Carlson, *supra* note 8, at 61.

26. Kantrowitz, *supra* note 9, at 57.

27. Carlson, *supra* note 8, at 62.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 60.

32. *Id.*

33. See Carlson, *supra* note 8, at 60.

34. Kantrowitz, *supra* note 9, at 57.

35. Carlson, *supra* note 8, at 61.

36. *Id.*

37. *Id.* at 61-62.

Oregon.³⁸ In addition, she became active in the community, teaching nutrition classes at a local college.³⁹

Notwithstanding her many accomplishments, Power became alarmingly depressed.⁴⁰ She consulted with a therapist who helped her realize "that her emotional difficulties would never end until she gave up her life as a fugitive."⁴¹

On September 15, 1993, under the glare of the national news media, Power surrendered to Boston police.⁴² Represented by counsel, Power pleaded guilty in Boston's Suffolk County Superior Court to two counts of armed robbery and one count of manslaughter.⁴³ On October 6, 1993, the trial court sentenced Power to concurrent eight to twelve-year prison terms on the manslaughter and armed robbery charges, consistent with the prosecutor's recommendation.⁴⁴ Beyond the terms set forth in the plea agreement, the court also placed Power on probation for twenty years, with the probation and prison terms to run concurrently.⁴⁵

In addition to her terms of incarceration and probation, the court added a special condition of probation, the central focus of this Note, to apply throughout Power's prison term and her twenty-year probation term.⁴⁶ The court expressly prohibited Power "from directly or indirectly

38. Kantrowitz, *supra* note 9, at 58.

39. *Id.*

40. Carlson, *supra* note 8, at 60-61.

41. Kantrowitz, *supra* note 9, at 58.

42. *Commonwealth v. Power*, 650 N.E.2d 87, 88 (Mass. 1995), *cert. denied*, 116 S. Ct. 697 (1996).

43. *Id.*

44. *Id.* at 89.

45. *Id.*

46. *Id.* Critics contend that Power's acceptance of the sentence constitutes consent to the probation conditions under either of three theories of probation: (1) "act of grace" or "contract;" (2) "constructive custody;" or (3) falling within an administrative search exception. See Cathryn Jo Rosen, *The Fourth Amendment Implications of Urine Testing for Evidence of Drug Use in Probation*, 55 BROOK. L. REV. 1159, 1192-96 (1990).

Under the "act of grace" theory, a probationer impliedly consents to a state's "act of grace," an offer of probation in lieu of prison. *Id.* at 1194. However, in *Gagnon v. Scarpelli*, the Supreme Court rejected this theory, stating that courts may not rely on the "act of grace" theory to deny probationers due process. 411 U.S. 778, 782 n.4 (1973).

The "contract" theory of probation is an expanded version of the "act of grace" theory. Under this theory, the decision to grant probation is an offer of freedom from imprisonment, in consideration for which the probationer agrees to obey the terms of the probation. See Rosen, *supra*, at 1194. However, the Supreme Judicial Court of Massachusetts has similarly rejected this theory of probation. See *Commonwealth v. LaFrance*, 525 N.E.2d 379, 381 n.3 (Mass. 1988). Thus, Power's acceptance of her sentence does not constitute consent. See *Gagnon*, 411 U.S. at 782 n.4; *LaFrance*, 525 N.E.2d at 381 n.3; Rosen, *supra*, at 1194. Under the "constructive custody" theory, the imposition of a penal sentence implicitly places the offender

engaging in any profit or benefit generating activity relating to . . . the criminal acts for which [she was] convicted."⁴⁷ Any violation of this condition could subject Power to life imprisonment.⁴⁸

On November 24, 1993, Power was sentenced in federal court to a five-year prison term to be served concurrently with her eight to twelve-year state prison term.⁴⁹ The federal court also imposed a \$10,000 fine and, ironically, encouraged Power to engage in remunerative activity and to share the proceeds of her story with Officer Schroeder's family.⁵⁰ Power expressed a willingness to do so, but was unable, given the probation conditions imposed by the state court.⁵¹

Power appealed the probation conditions, asserting that the speech restrictions, as drafted, violate the First Amendment.⁵² The Supreme

within the custody of the penal system. Rosen, *supra*, at 1193. Accordingly, the argument goes, an offender is entitled to no more rights than a prisoner could enjoy. *Id.* However, the rationale for this theory is based on the compelling needs of correctional institutions to maintain security and discipline, goals that are not applicable in non-institutional environments. *Id.* Thus, as this theory is based on a legal fiction, it allows courts to avoid consideration of important policy issues. *Id.* These arguments supported the Supreme Court's rejection of the "constructive custody" theory in *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972).

Finally, the administrative search theory suggests that any individual convicted of a criminal act is subject to any reasonable search done in the state's administrative capacity. *See* Rosen, *supra*, at 1195-96. Implicit in this approach is a balancing act between the state's valid interests and the probationer's right to liberty. *Id.* This Note pursues this line of argument.

47. Power, 650 N.E.2d at 89. The Massachusetts Department of Probation, responsible for monitoring probationers' activities, articulated the court's order:

You, your assignees and your representatives acting on your authority are prohibited from directly or indirectly engaging in any profit or benefit generating activity relating to the publication of facts or circumstances pertaining to your involvement in the criminal acts for which you stand convicted (including contracting with any person, firm, corporation, partnership, association or other legal entity with respect to the commission and/or reenactment of your crimes, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentations, live entertainment of any kind, or from the expression of your thoughts, feelings, opinions or emotions regarding such crime). This prohibition includes those events undertaken and experienced by you while avoiding apprehension from the authorities. Any action taken by you whether by way of execution of power of attorney, creation of corporate entities or like action to avoid compliance with this condition of probation will be considered a violation of probation conditions.

Id.

48. Brief for Appellant at 1, *Commonwealth v. Power*, 650 N.E.2d 87 (Mass. 1995) (No. 93-P-1755), *cert. denied*, 116 S. Ct. 697 (1996).

49. Christopher B. Daly, *Radical Fugitive Gets Fine But No More Prison Time*, WASH. POST, Nov. 25, 1993, at A3.

50. Judy Rakowsky, *Power Asks Judge to Reduce Sentence*, BOSTON GLOBE, Feb. 12, 1994, at 59.

51. *See* Letter from Rikki J. Klieman, Esquire, to Hon. Nathaniel Gorton (Nov. 24, 1993) (on file with the *Loyola of Los Angeles Entertainment Law Journal*) [hereinafter Letter].

52. Power, 650 N.E.2d at 90.

Judicial Court of Massachusetts agreed that the probation conditions imposed a content-based restriction on Power's speech.⁵³ Nevertheless, the court upheld the order, stating that the conditions need not survive strict scrutiny, and were valid because the restraint on speech was "reasonably related to a valid probation purpose."⁵⁴

The United States Supreme Court recently denied certiorari to Power's appeal,⁵⁵ thereby leaving open the question as to the appropriate standard of review for court-imposed probation conditions that impinge on First Amendment activity.

III. PROBATION CONDITIONS IN GENERAL

A. Purposes of Probation

Conceived as an alternative to incarceration, probation enables courts to release defendants contingent upon certain conditions.⁵⁶ Similar to a prison term, probation is a criminal sentence. Usually, probation is imposed in lieu of a prison term.⁵⁷ In Power's situation, however, the court imposed a probation sentence to be served concurrently with her prison sentence and beyond.⁵⁸

Trial courts typically reflect on the dual goals of probation when imposing probationary sentences—rehabilitation of the offender and protection of the public.⁵⁹ "These two goals ultimately amount to the same thing: prevention of recidivism."⁶⁰ Rehabilitation prevents future criminal behavior while simultaneously reducing the risk that the offender poses to the public.⁶¹ This effort to prevent offenders from repeating the same or other criminal acts is referred to as special deterrence.⁶² Courts

53. *Id.* at 90.

54. *Id.* at 91.

55. *Commonwealth v. Power*, 116 S. Ct. 697 (1996).

56. ARTHUR W. CAMPBELL, *LAW OF SENTENCING* 100, 112 (2d ed. 1991).

57. *Id.* at 100.

58. *Power*, 650 N.E.2d at 89. One might question the court's motivation for dispensing concurrent incarceration and probation. After all, probation conditions may not be "the vehicle for circumvention of statutory sentencing limits." *Higdon v. United States*, 627 F.2d 893, 898 (9th Cir. 1980).

59. *Commonwealth v. LaFrance*, 525 N.E.2d 379, 383 (Mass. 1988).

60. *Spencer*, *supra* note 4, at 1215.

61. WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 23 (1972).

62. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 149 (1989).

accomplish special deterrence by imposing either prison terms or probation sentences.⁶³ Imprisonment makes it virtually impossible for the offender to commit another crime upon society, at least while the offender is incarcerated.⁶⁴ Probation, on the other hand, attempts to modify the probationer's behavior so that the probationer will not engage in further criminal conduct.⁶⁵

B. Methods of Rehabilitation

Probation conditions designed to rehabilitate the offender often take one of three forms: (1) modification of mental processes; (2) restriction of physical activity; or (3) manipulation of social situations.⁶⁶ The first form is designed to assist the probationer in reforming thinking patterns that may have previously engendered criminal activity.⁶⁷ The second type of rehabilitative probation focuses on the physical activity involved in the crime.⁶⁸ Those convicted of drunk driving, for example, may be ordered to refrain from drinking.⁶⁹ The third type of rehabilitative probation condition is geared toward avoiding certain social situations that may have prompted, and in fact encouraged, criminal activity.⁷⁰ For example, according to one court, a probationer convicted of exporting guns to the Irish Republican Army may be prohibited from associating with any Irish or Irish Catholic associations.⁷¹

In contrast, "general deterrence" attempts to prevent the greater public from engaging in similar criminal conduct "insofar as the threat of punishment deters potential offenders in the general community."⁷² Critics of this reasoning are skeptical about the extent to which any form of punishment actually deters future similar conduct.⁷³ Because punishment of others is only one of several factors in the calculation, it is difficult to accurately predict the deterrent effect of any one activity.⁷⁴

63. Spencer, *supra* note 4, at 1215.

64. *Id.* at 1215-16.

65. NEIL P. COHEN & JAMES J. GOBERT, *THE LAW OF PROBATION AND PAROLE* 183 (1983).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. See *Malone v. United States*, 502 F.2d 554 (9th Cir. 1974); see also *infra* Part IV.B.2.b for further discussion.

72. KADISH & SCHULHOFER, *supra* note 62.

73. See LAFAVE & SCOTT, *supra* note 61, at 23.

74. *Id.*

The nature of the offender's crime, for example, may affect the offender's ability to be deterred.⁷⁵ Those who commit crimes in the "heat of passion" are less likely to be deterred by rational calculations of possible punishment.⁷⁶ Similarly, social factors, including gender, education and class, might dramatically alter the individual's calculations.⁷⁷ Thus, the efficacy of probation as a method of general deterrence is greatly in question.

When articulating the legitimate goals of probation, several courts have distinguished general deterrence from notions of rehabilitation and protection of the public.⁷⁸ In *United States v. Abushaar*,⁷⁹ the Third Circuit invalidated a probation condition because its only purpose was to generally deter similar future conduct by others.⁸⁰ The defendant was convicted of making false statements to the Immigration and Naturalization Service regarding his involvement in a scheme to fraudulently obtain permanent residence status.⁸¹ The defendant then appealed his court-imposed probation condition requiring him to stay out of the United States during his probation period.⁸² The government's sole reason for the condition, according to the court, was to deter others from committing similar offenses.⁸³ The court concluded that although this form of general deterrence is not necessarily invalid, probation conditions must substantially serve the key purposes of probation—that is, rehabilitation and the protection of the public in order to survive judicial scrutiny.⁸⁴

Following the lead of the *Abushaar* court, the Second Circuit further refined the general deterrence/specific deterrence distinction in *United States v. Tolla*.⁸⁵ The defendant, a teacher, was convicted of making false statements to the Internal Revenue Service.⁸⁶ As part of her sentence, she

75. *Id.*

76. *Id.*

77. *Id.*

78. See *United States v. Tolla*, 781 F.2d 29, 35 (2d Cir. 1986) (message to public was not a proper justification for probation condition); *United States v. Abushaar*, 761 F.2d 954, 959 (3d Cir. 1985) (invalidating condition that only served general deterrence because the condition was not reasonably related to rehabilitation and protecting the public).

79. 761 F.2d 954 (3d Cir. 1985).

80. *Id.* at 958–59.

81. *Id.* at 954.

82. *Id.* at 955.

83. *Id.* at 958.

84. See *id.* at 959.

85. 781 F.2d 29 (2d Cir. 1986).

86. *Id.* at 31.

was barred from teaching students under the age of eighteen during her probation.⁸⁷ On appeal, the Second Circuit rejected the trial court's premise that permitting a perjurer to teach young students would send a bad message to the public.⁸⁸ The court reasoned that the trial judge's sentence must properly reflect the goals of probation, not the message to the public.⁸⁹ Despite this rationale, the court upheld this particular condition, reasoning that impressionable children would be protected from the defendant's possible propensity for dishonesty.⁹⁰ Thus, the court further illustrated the inherent tension between general deterrence and both rehabilitation and protection of the public.

IV. STANDARD OF REVIEW

A. General Probation Conditions

Although judges have broad discretion when shaping probation conditions,⁹¹ such conditions must serve the purposes of criminal law.⁹² The test for validity of court-imposed probation conditions is whether they are designed to meet the primary goals of probation: rehabilitation of the offender and protection of the public.⁹³ An appellate court must begin any review of probation conditions by considering whether the purpose behind the trial court's imposition of the conditions is a permissible one.⁹⁴ Upon finding a permissible purpose, the court must then consider whether the impact of the conditions is "needlessly harsh," and therefore impermissible.⁹⁵

For example, in *Higdon v. United States*,⁹⁶ the trial court had required the defendant to forfeit all assets and perform three years of full-

87. *Id.* at 34.

88. *Id.* at 34-35.

89. *Id.* at 35.

90. *Id.*

91. *See, e.g.*, *United States v. Lowe*, 654 F.2d 562, 567 (9th Cir. 1981); *State v. Moses*, 618 A.2d 478, 480 (Vt. 1992).

92. *See, e.g.*, *United States v. Tonry*, 605 F.2d 144, 148 (5th Cir. 1979) ("The judge may, in fact be obliged to, view probation as a substitute for imprisonment and formulate conditions calculated to ensure that the probation furthers the purposes of the criminal law.").

93. *Lowe*, 654 F.2d at 567; *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 n.14 (9th Cir. 1975).

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

95. *Id.* at 898.

96. 627 F.2d 893 (9th Cir. 1980).

time charity work as a condition of probation for his fraud conviction.⁹⁷ The defendant, an army sergeant, had defrauded the government of several hundred thousand dollars while operating several clubs for servicemembers in Vietnam.⁹⁸ The trial court suspended the defendant's prison sentence as long as he abided by the conditions of probation set forth by the court.⁹⁹ These conditions required the defendant to forfeit all of his assets, including his home, and to perform three years of full-time unpaid charitable work.¹⁰⁰

On appeal, the Ninth Circuit invalidated the forfeiture and work conditions as not "reasonably related" to the rehabilitation of the defendant or the protection of the public.¹⁰¹ The court stated that the permissible purposes of probation are rehabilitation and protection of the public.¹⁰² Thus, where the conditions do not reflect legitimate probationary purposes, a court will generally invalidate the conditions.

Although a court's sentencing discretion is broad, it is generally accepted that a court's discretion to fix conditions of probation is further limited by basic standards of criminal law.¹⁰³ For example, a court cannot inflict probation restrictions that have been found to be improper conditions of imprisonment or parole.¹⁰⁴ Similarly, a court cannot impose conditions that are "impossible or extremely difficult to satisfy,"¹⁰⁵ or conditions which are too vague to sufficiently guide the probationer.¹⁰⁶

B. Probation Conditions that Infringe on Constitutional Rights

The Supreme Court in *Griffin v. Wisconsin*¹⁰⁷ recognized that a probationer has a reduced liberty interest. The Court found that probationers have "conditional liberty," depending on special probation restrictions.¹⁰⁸ Nonetheless, probationers retain a higher degree of liberty

97. *Id.* at 896.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 898.

102. *Higdon*, 627 F.2d at 897.

103. *See* *United States v. Tonry*, 605 F.2d 144, 148 (5th Cir. 1979).

104. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 264 (9th Cir. 1975). "[I]t is virtually certain that those restraints that have been held improper when placed on prisoners and parolees will also be unsuitable as probation conditions." *Id.*

105. COHEN & GOBERT, *supra* note 65, at 209.

106. *See* *People v. McDowell*, 130 Cal. Rptr. 839, 843 (Ct. App. 1976) (finding that the wording of the condition as imposed was "not sufficiently precise").

107. 483 U.S. 868 (1987).

108. *Id.* at 874 ("To a greater or lesser degree, it is always true of probationers . . . that they

than those who are formally incarcerated.¹⁰⁹ This probationer/prisoner distinction has sparked debate over the extent to which probationers should be accorded constitutional rights.¹¹⁰

Many probation conditions implicate constitutional rights in their mission to promote the rehabilitation of probationers and the protection of the public. And although a probationer may have only conditional liberty interests, these rights are not absolutely eliminated.¹¹¹ Rehabilitation, as often noted, cannot successfully occur unless there is real change within the offender.¹¹² Given the rehabilitative goals of probation, constitutional interests should be protected to the greatest extent possible. A penal system without a firm commitment to the fundamental concerns articulated in the Bill of Rights undermines its own attempt to adjust lawless behavior. "There is no better way to ensure that probation meets its goals of rehabilitation and protecting the public than to provide this opportunity for the offender to become a law-abiding member of society."¹¹³

1. Probation Restrictions Involving Fundamental Rights

Probation conditions that restrict fundamental rights (as opposed to merely articulated liberties) are subject to even more careful review.¹¹⁴ If those conditions are not designed to aid in rehabilitating the probationer or protecting the public, they will be invalidated.¹¹⁵

*Commonwealth v. LaFrance*¹¹⁶ illustrates one such situation. In *LaFrance*, the court rejected a probation condition that permitted a "blanket threat of warrantless searches."¹¹⁷ After pleading guilty to burglary and larceny charges, LaFrance "received a suspended sentence

do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'" (citations omitted)).

109. See Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 60 (1992). "Probationers and parolees walk an interesting line. They dwell among the public with whom they share many of the guarantees of the Bill of Rights, but they remain subject to the strictures of the criminal justice system." *Id.*

110. *See id.*

111. *See* discussion *infra* Part IV.B.1-3.

112. *See* EDGARDO ROTMAN, BEYOND PUNISHMENT: A NEW VIEW ON THE REHABILITATION OF CRIMINAL OFFENDERS 8 (1990) (noting that significant change will come only from the individual's own insight).

113. Jaimy M. Levine, Comment, "Join the Sierra Club!": *Imposition of Ideology as a Condition of Probation*, 142 U. PA. L. REV. 1841, 1860 (1994).

114. *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988).

115. *See, e.g., Commonwealth v. LaFrance*, 525 N.E.2d 379, 383 (Mass. 1988).

116. *Id.*

117. *Id.*

with probation for two years.”¹¹⁸ After violating her initial probation, the defendant was confined to a corrections home and then again released on probation, subject to new provisions.¹¹⁹ The special conditions imposed by the judge required the defendant to “[s]ubmit to any search . . . with or without a search warrant, . . . [at] the request of a probation officer.”¹²⁰ After examining the U.S. Supreme Court’s treatment of warrantless searches, the appellate court concluded that “[u]pholding the warrant requirements [of reasonable suspicion] for searches of the probationer’s home does not impede the dual goals of probation, protecting the public and rehabilitation.”¹²¹ Thus, where probation conditions interfere with the probationer’s fundamental right to be free of unreasonable searches and seizures, the conditions must be “necessary” to serve the goals of probation if they are to be valid.¹²²

2. Probation Restrictions Involving Freedom of Expression

It is well-established that probationers may be subject to restrictions that would be impermissible if applied to the general public.¹²³ However, lower courts are divided over the application of this general rule to restrictions of First Amendment rights.¹²⁴ A number of courts adhere to the rule that content-based restrictions on speech always trigger the strictest scrutiny.¹²⁵ Other courts have upheld conditions restricting First Amendment activities where the conditions were “reasonably related” to the purposes of probation.¹²⁶

In a related context, the Supreme Court has suggested that the appropriate level of review for such content-based speech restrictions

118. *Id.* at 380.

119. *Id.*

120. *Id.* at 380 n.2.

121. *LaFrance*, 525 N.E.2d at 383 (citations omitted).

122. *Id.*

123. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975) (en banc) (holding that probationers are subject to limitations that are inapplicable to ordinary persons).

124. *Compare In re Mannino*, 92 Cal. Rptr. 880 (Ct. App. 1971) with *United States v. Terrigno*, 838 F.2d 371 (9th Cir. 1988) and *United States v. Waxman*, 638 F. Supp. 1245 (E.D. Pa. 1986).

125. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115–18 (1991); *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

126. *See United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988); *United States v. Waxman*, 638 F. Supp. 1245 (E.D. Pa. 1986).

would be an intermediate level of scrutiny.¹²⁷ The Court reasoned, in *Madsen v. Women's Health Center, Inc.*,¹²⁸ that precisely because judicial orders are directed toward particular individuals, injunctions restraining speech “carry greater risks of censorship and discriminatory application,”¹²⁹ and must be measured by more rigorous tests than their legislative counterparts.¹³⁰ Although Part V of this Note contains a more in-depth discussion of the argument for intermediate scrutiny, the following section is devoted to comparing the two competing standards of review—strict scrutiny and rational basis.

a. Strict Scrutiny

A number of federal and state courts have held that probation conditions infringing on constitutionally protected rights are subject to “special scrutiny,”¹³¹ and must be “fine-tuned” to probationary goals closely related to the crime.¹³² Where “conditions that restrict freedom of expression extend beyond preventing recidivism, courts [have narrowly tailored] the conditions or eliminate[d] them completely.”¹³³ For example, in *In re Mannino*,¹³⁴ the California Court of Appeal invalidated probation conditions that barred the defendant from speaking or writing about political issues and also prohibited his passive membership in political organizations.¹³⁵ Yet, the court upheld the condition forbidding “active” participation in political demonstrations.¹³⁶

Mannino was convicted of assault during a political demonstration.¹³⁷ The court reasoned that written political speech was only tenuously connected to Mannino’s criminal acts and suggested nothing about his recidivism.¹³⁸ “Petitioner’s writing, albeit in protest of

127. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2524 (1994).

128. 114 S. Ct. 2516 (1994).

129. *Id.* at 2524.

130. *Id.*

131. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975); *see also Sobell v. Reed*, 327 F. Supp. 1294, 1303 (S.D.N.Y. 1971) (holding that such conditions must be “tested by ‘stringent standards’ and subjected to ‘rigid scrutiny’” (quoting *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968))).

132. *United States v. Smith*, 972 F.2d 960, 961 (8th Cir. 1992) (quoting *United States v. Tolla*, 781 F.2d 29, 34 (2d Cir. 1986)).

133. *Spencer*, *supra* note 4, at 1228.

134. 92 Cal. Rptr. 880 (Ct. App. 1971).

135. *Id.* at 886–87.

136. *Id.* at 888.

137. *Id.* at 885.

138. *See id.* at 886.

or for a change of [] existing conditions, does not appear to have any direct relationship to the crime of which he was convicted, nor has it been shown to have any effect on his future criminality.”¹³⁹ Consequently, the court invalidated the provision because it unduly violated Mannino’s constitutional rights.¹⁴⁰ In contrast, the court reasoned that Mannino’s active participation in political demonstrations was directly linked to his past criminal conduct and would likely increase his propensity to continue such behavior.¹⁴¹ Accordingly, the court held that the prohibition against active participation in demonstrations was valid.¹⁴² Hence, the court upheld certain restrictions on the freedom of expression, but invalidated other conditions “insofar as they were unrelated to preventing recidivism by the probationer.”¹⁴³

The tension between preventing recidivism and restraining free expression is further illustrated in *Porth v. Templar*.¹⁴⁴ Porth, an avid anti-tax advocate, was convicted of tax evasion.¹⁴⁵ After serving his sentence, he was placed on probation prohibiting him from “circulating . . . materials . . . questioning the constitutionality of the Federal Reserve System and the Federal Income Tax laws”¹⁴⁶ On appeal, Porth sought to invalidate these conditions.¹⁴⁷ “[I]n the abstract,” the court noted, the speech restriction “appears to prohibit conduct which is not per se harmful. To muzzle the appellant to this extent is on its face a violation of his First Amendment freedom of expression.”¹⁴⁸ Although a defendant “forfeits much of his freedom of action and even freedom of expression,” it is only “to the extent necessary to successful rehabilitation and protection of the public”¹⁴⁹ Because there was neither public danger from his anti-tax crusade, nor a probability that his speech would result in further criminal conduct on his part, the conditions prohibiting such protest speech were invalid.¹⁵⁰ Nonetheless, the court stated that insofar as any of the defendant’s speech was “designed to urge or encourage others to violate

139. *Id.* at 886.

140. *In re Mannino*, 92 Cal. Rptr. at 886–87.

141. *Id.* at 887.

142. *Id.*

143. Spencer, *supra* note 4, at 1228.

144. 453 F.2d 330 (10th Cir. 1971).

145. *Id.* at 332.

146. *Id.* at 332 n.1.

147. *Id.* at 331.

148. *Id.* at 334.

149. *Id.*

150. *See Porth*, 453 F.2d at 334.

the laws, the condition [was] valid.”¹⁵¹ Here, the restriction clearly relates to the protection of the public by minimizing unlawful conduct. Implicit in the court’s decision is the distinction between restricting expression for the purpose of rehabilitation or protection of the public and restricting expression beyond the traditional goals of probationary sentences.

b. Reasonable Relationship

A majority of courts have upheld probation conditions restricting First Amendment activities where the conviction was for a crime committed during the course of expressive activity and the conditions were “reasonably related” to the goals of the probationary sentence. When former Congressman Richard Tonry violated election laws, the court upheld a probation condition barring Tonry from participating in electoral politics.¹⁵² Following a grand jury investigation of alleged violations of the Federal Election Campaign Act (“FECA”), Tonry pled guilty to four counts, including conspiracy to violate the FECA, acceptance of a political contribution in excess of FECA limits, and promising benefits in exchange for political contributions.¹⁵³ Upon his release from prison, Tonry appealed the probation conditions as violative of his First Amendment right to engage in political activity.¹⁵⁴ The Fifth Circuit reasoned that the condition was “tailored to advance both the purposes of the federal election statute and the purposes of the probation act: rehabilitation and protection of the public.”¹⁵⁵ The Fifth Circuit added, “Tonry will be deprived of some of his constitutional rights while under probation, but this deprivation is appropriate to the nature of his crimes.”¹⁵⁶ Thus, the court found that the conditions of probation were reasonably related to the general goals of probation and were therefore permissible.¹⁵⁷

Applying the same form of analysis, a defendant convicted of a drug offense was prohibited from associating with others convicted of drug offenses as a term of his probation.¹⁵⁸ Similarly, a probationer convicted of exporting guns for the Irish Republican Army was barred from

151. *Id.*

152. *United States v. Tonry*, 605 F.2d 144, 146, 150–51 (5th Cir. 1979). “[I]t was intended that defendant not run for political office nor engage in any political activity, be it federal, state, local, municipal or parochial, during the period of probation.” *Id.* at 146.

153. *Id.* at 146.

154. *Id.* at 146–47.

155. *Id.* at 150–51.

156. *Id.* at 151.

157. *Id.*

158. *United States v. Romero*, 676 F.2d 406 (9th Cir. 1982).

associating with any Irish or Irish Catholic organizations, participating in the American Irish Republican movement, and visiting Irish pubs.¹⁵⁹

Massachusetts joins the majority of courts which apply a weaker standard, requiring only that the probation condition be reasonably related to the general aims of the criminal justice system.¹⁶⁰ Consequently, the ruling in *Power* “contributes to a growing dispute among the lower courts about the extent to which those convicted of crime may be subjected to otherwise unconstitutional restrictions on fundamental rights.”¹⁶¹

3. Probation Conditions Involving Financial Disincentives

Two other lower courts have dealt with probation restrictions similar to the type imposed in *Power*.¹⁶² In *United States v. Waxman*,¹⁶³ the court rejected the defendant’s request to modify probation conditions barring him from profiting financially from commercial depiction of his criminal conduct.¹⁶⁴ Waxman, an art connoisseur, pled guilty to receiving stolen property in connection with numerous art thefts.¹⁶⁵ In response to Waxman’s impermissible purpose challenge, the judge stated, “I imposed this restriction on Dr. Waxman, not to punish him, but to restrict his ability to profit from his own wrongdoing.”¹⁶⁶ The court suggested that the sentence was designed to demonstrate that crime does not pay: “[N]ot only may they have to pay the piper but that they cannot expect the piper to pay them for their memoirs.”¹⁶⁷ In response to Waxman’s First Amendment claim, the court held that the restriction did not bar him from “speak[ing] to whom he wishes[,] . . . only . . . that he [may] not be paid for doing

159. *Malone v. United States*, 502 F.2d 554, 555 (9th Cir. 1974).

160. *See, e.g., United States v. Williams*, 787 F.2d 1182 (7th Cir. 1986) (drug screening condition related to defendant’s crime of possessing stolen mail and forging government checks); *Edwards v. State*, 327 S.E.2d 559 (Ga. Ct. App. 1985) (condition banishing probationer from judicial circuit); *State v. Miller*, 499 N.W.2d 215, 217 (Wis. Ct. App. 1993) (condition related only to prior crimes).

161. *See* Petition for Cert. at 4, *Commonwealth v. Power*, 650 N.E.2d 87 (Mass. 1995), *cert. denied*, 116 S. Ct. 697 (1996).

162. *See* Spencer, *supra* note 4, at 1229.

163. 638 F. Supp. 1245 (E.D. Pa. 1986).

164. *Id.* at 1246.

165. *Id.* at 1245.

166. *Id.* at 1246.

167. *Id.*; *see also* Spencer, *supra* note 4, at 1235 (suggesting that crime itself does not pay, publicity does).

so.”¹⁶⁸ The court ultimately found the “probation-condition rehabilitative in nature, deterrent in effect, . . . reasonable”¹⁶⁹ and therefore valid.

Similarly, in *United States v. Terrigno*,¹⁷⁰ the Ninth Circuit rejected a challenge to a probation condition that barred the defendant from profiting from any commercialization of her criminal acts.¹⁷¹ After a jury convicted Terrigno of embezzlement and conversion of public funds from a federally funded counseling center where she was executive director, the court sentenced Terrigno to a community treatment center and probation.¹⁷² The probation term specified “[t]hat the defendant, during the period of probation, not receive any financial remuneration . . . from any speaking engagements, written publications, movies, or any other media coverage dealing with her involvement in this offense.”¹⁷³

Terrigno appealed the probation condition contending it violated her First Amendment rights.¹⁷⁴ On review, the appellate court determined that the condition did not restrict Terrigno’s right to speak, but merely her ability to profit by exploiting her story.¹⁷⁵ The court determined that the profit restriction would aid in Terrigno’s rehabilitation by sending her a message that “crime does not pay.”¹⁷⁶ As a result, the appellate court found that the restriction on profit by selling a crime story was reasonably related to Terrigno’s rehabilitation and was therefore permissible.¹⁷⁷

Critics contend that the *Waxman* and *Terrigno* cases can be significantly distinguished from *Power*.¹⁷⁸ Both the *Waxman* and *Terrigno* decisions precede the Supreme Court’s ruling in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,¹⁷⁹ which held that financial disincentives upon content-based speech inherently violate the freedom of expression guaranteed by the First Amendment.¹⁸⁰ In *Simon & Schuster*, the court reasoned that financial burdens, by their very nature, serve as disincentives to speech.¹⁸¹ Additionally, critics have suggested

168. *Waxman*, 638 F. Supp. at 1246.

169. *Id.* at 1247.

170. 838 F.2d 371 (9th Cir. 1988).

171. *Id.* at 373–74.

172. *Id.* at 373.

173. *Id.*

174. *Id.* at 374.

175. *Id.*

176. *Terrigno*, 838 F.2d at 374.

177. *Id.*

178. See *Spencer*, *supra* note 4, at 1234.

179. 502 U.S. 105 (1991).

180. *Id.* at 117.

181. *Id.* at 116.

that these cases can be distinguished on other grounds. Because Power's probation condition runs concurrent to her prison term, the trial court manipulated the probation sentence to add further punishment to the defendant.¹⁸²

V. THE CASE FOR INTERMEDIATE SCRUTINY

In light of the analytical divergence among the lower courts on this issue, the Supreme Court's recent holding in *Madsen* may provide a more workable standard of review—intermediate scrutiny. Although the *Madsen* Court addressed restraining orders on anti-abortion protesters rather than probationers, the Court's reasoning clearly applies: because judicial orders direct their commands toward particular individuals, injunctions restraining speech “carry greater risks of censorship and discriminatory application.”¹⁸³ Applying intermediate scrutiny could limit those risks and properly curtail the effect of improper probation conditions.

A. *Madsen* as a Case Study

Madsen involved a challenge to an injunction restraining anti-abortion protesters from demonstrating within certain limits of a local women's clinic.¹⁸⁴ The Court rejected the claim that the injunction was content-based solely because it singled out anti-abortion protesters.¹⁸⁵ Anti-abortion protesters, the Court reasoned, were the only individuals engaged in the unlawful conduct. Because the injunction was directed at the effect of the protests, not their substance, the injunction was not subject to traditional strict scrutiny.¹⁸⁶ Nor was it subject to the most lenient level of review.¹⁸⁷

The Court explained that the disparity between injunctions and generally applicable ordinances warranted an application of heightened

182. Spencer, *supra* note 4, at 1235. “[T]he only apparent purpose of putting Power on probation while she is in prison is to create a situation in which the Probation Department acts as her censor.” Brief for Appellant at 20 n.13, *Commonwealth v. Power*, 650 N.E.2d 87 (Mass. 1995) (No. 93-P-1755), *cert. denied*, 116 S. Ct. 697 (1996). “The Commonwealth knows where Power is and what she is doing while incarcerated. The only function the probation officer can serve during the years Power is in prison is as censor—enforcer of the prior restraint.” *Id.*

183. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2524 (1994).

184. *Id.* at 2521.

185. *Id.* at 2523.

186. *Id.* at 2524.

187. *Id.*

scrutiny.¹⁸⁸ “Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are [societal] remedies imposed for [specific] violations (or threatened violations) of a legislative or judicial decree.”¹⁸⁹ The Court further declared that injunctions also “carry greater risks of censorship.”¹⁹⁰ Yet, the Court did not entirely disregard the advantages of injunctions over generally applicable statutes. Injunctions can be both narrowly tailored and offer more precise relief.¹⁹¹ After balancing these concerns, the Court determined that the differences between court-ordered injunctions and generally applicable statutes “require a somewhat more stringent application of general First Amendment principles”¹⁹²

Nonetheless, the Court refused to apply strict scrutiny, contending that the injunction was neither content nor viewpoint based.¹⁹³ Although the injunction did regulate the activities of a particular group, including their speech activities, the injunction was directed only at the effects of their conduct within a specific dispute, not at the contents of their message.¹⁹⁴

Ultimately, the standard articulated by the Court represents a compromise approach.¹⁹⁵ “We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.”¹⁹⁶

Applying an intermediate level of scrutiny, the Court identified three significant state interests compelling the injunction: (1) the protection of women’s rights to medical or counseling services; (2) public safety; and (3) residential privacy.¹⁹⁷ The thirty-six foot “buffer zone” at clinic entrances was held to be substantially related to promoting each of the goals articulated.¹⁹⁸ The noise restrictions were also upheld as

188. *Id.*

189. *Madsen*, 114 S. Ct. at 2524.

190. *Id.*

191. *Id.* (citing *United States v. Paradise*, 480 U.S. 149, 183 (1987)).

192. *Id.*

193. *Id.* at 2524.

194. *Id.*

195. *See Madsen*, 114 S. Ct. at 2525. Justice Stevens argued for a rational basis type of analysis. *See id.* at 2531–32. Justice Scalia, on the other hand, argued for strict scrutiny. *Id.* at 2538. Chief Justice Rehnquist, writing for the Court, set the standard at the intermediate level of scrutiny. *Id.* at 2525.

196. *Id.* at 2525.

197. *Id.* at 2526. In *Madsen*, residential privacy was analogized to medical privacy. *Id.*

198. *Id.* at 2527.

substantially related.¹⁹⁹ Yet, the Court invalidated the portions of the injunction that banned “images [that were] observable,”²⁰⁰ and created both a thirty-six foot “buffer zone” around the clinic itself, and a 300-foot “no approach zone” around the clinic and the private homes of the clinic staff.²⁰¹ The Court held these portions to be broader than necessary to achieve the goals of the state.²⁰²

B. *The Relationship Between Injunctions and Probation*

The concerns the Court identified regarding court-ordered injunctions are equally applicable to court-ordered probation conditions. Similar to a court-ordered injunction, probation is directed toward a specific defendant and is designed to remedy a specific problem. Moreover, the possibility that a judicial decree will “carry greater risks of censorship”²⁰³ is equally possible with judicially-mandated probation sentences. Furthermore, what makes injunctions particularly suspect is the effect of the collateral bar rule, a rule equally applicable to probation structures. Consequently, the intermediate level of scrutiny applied to injunctions should similarly be applied when reviewing court-ordered probation conditions.

C. *Problems of Prior Restraint*

Interestingly, the Court in *Madsen* refused to apply a “prior restraint” analysis to the injunction.²⁰⁴ Although injunctions often take the form of prior restraints on constitutionally protected speech,²⁰⁵ “[n]ot all injunctions which may incidentally affect expression . . . are ‘prior restraints.’”²⁰⁶ In *Madsen*, the anti-abortion protesters were not restrained from communicating their ideas entirely; they were permitted to express themselves in other areas throughout the community.²⁰⁷ Additionally, the Court noted that the injunction was not issued because of the content of the protesters’ expression, but rather because of their prior unlawful conduct.²⁰⁸

199. *Id.* at 2528.

200. *Id.* at 2529.

201. *Madsen*, 114 S. Ct. at 2529–30.

202. *Id.*

203. *Id.* at 2524.

204. *Id.* at 2524 n.2.

205. *See New York Times Co. v. United States*, 403 U.S. 713 (1971).

206. *Madsen*, 114 S. Ct. at 2524 n.2.

207. *Id.*

208. *Id.*

A claim that Power's probation conditions constitute a prior restraint would likely fall prey to similar arguments. Power's attorneys argued that the probation conditions functioned as a prior restraint because the order "requires Power to have her speech pre-approved by her probation officer . . . [with] unfettered discretion . . . [and] the authority to threaten Power with . . . life imprisonment[] for any perceived violation."²⁰⁹ This argument, however, is not entirely supportable. The probation condition itself does not prevent Power from re-telling her story; it merely bars financial compensation for any re-telling. Also, like the prohibition issued against anti-abortion protesters in *Madsen*, the restriction in *Power* was issued not because of the content of her potential speech, but because of Power's prior unlawful conduct. Nevertheless, the position of the probation officer as arbiter may indeed teeter on the edge of impermissible prior restraints.

D. Problems of Financial Burdens: Simon & Schuster Concerns

Problems of prior restraint, however, are not the only forms of speech restrictions. The Court has noted that the government need not completely prohibit speech in order to restrict freedom of expression.²¹⁰ Imposing a financial burden on speech based on its content is presumptively inconsistent with the First Amendment.²¹¹ In *Simon & Schuster*, the Court invalidated New York's "Son of Sam" law. The statute required anyone contracting with a person accused or convicted of a crime, with respect to telling his or her story in the media, to place all profits received in an escrow account. The Crime Victims Board was then responsible for distributing such profits to the victims.²¹² The Court determined that the "[s]tate has a compelling interest in ensuring that victims of crime are compensated by those who harm them."²¹³

Nevertheless, the Court found that the "Son of Sam" law was "overinclusive," and therefore inconsistent with the First Amendment.²¹⁴ Specifically, the statute applied to works on any subject expressing the author's thoughts or recollections about her crime, however tangentially or

209. Petition for Cert. at 4–5, *Commonwealth v. Power*, 650 N.E.2d 87 (Mass. 1995), cert. denied, 116 S. Ct. 697 (1996).

210. See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115–16 (1991).

211. *Id.* at 115.

212. *Id.* at 109.

213. *Id.* at 118.

214. *Id.* at 121–23.

incidentally related.²¹⁵ In addition, the statute's broad definition of "person convicted of a crime" cast too wide a sweep, according to the Court.²¹⁶ "Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as *The Autobiography of Malcolm X*, . . . [Henry Thoreau's] *Civil Disobedience* . . . and even the *Confessions of Saint Augustine*."²¹⁷ Thus, as a method of ensuring that victims are compensated from the indirect proceeds of crime, the Court found the "Son of Sam" law to be "significantly overinclusive."²¹⁸

The *Simon & Schuster* Court suggests that, in today's marketplace, money and speech cannot be separated. "In the context of financial regulation, it bears repeating . . . that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."²¹⁹ The Court continued:

[t]he constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in to the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.²²⁰

Following this logic, no financial burden would be permissible.

E. Financial Burdens on Katherine Ann Power

Similar to the conditions set forth in New York's "Son of Sam" law, the probation conditions placed on Katherine Ann Power prohibit her from profiting by selling her story.²²¹ The condition imposes a serious financial burden on speech of a specified content—anything related to her crime, her life as a fugitive, or her decision to turn herself in.²²² By doing so, the probation condition operates as a disincentive to speech. Consequently, like any other content-based speech restriction, this condition violates her

215. *Id.* at 121; Spencer, *supra* note 4, at 1225.

216. *Simon & Schuster*, 502 U.S. at 121.

217. *Id.*

218. *Id.*

219. *Id.* at 116.

220. *Id.* at 116 (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

221. *Commonwealth v. Power*, 650 N.E.2d 87, 89 (Mass. 1995), *cert. denied*, 116 S. Ct. 697 (1996).

222. *Id.*

First Amendment right to free expression.²²³ Any restriction of a fundamental right warrants a more careful analysis than the mere reasonable relationship level of review.²²⁴

F. The Problem of "Reasonable" Scrutiny

According to the Massachusetts Supreme Judicial Court, however, such a restriction need only survive a single, relatively insignificant hurdle: that it be "reasonably related to a legitimate purpose of criminal sentencing."²²⁵ Such restrictions are, in fact, self-justifying. Prohibiting probationers from speaking for compensation, the Massachusetts court concluded, is always permissible because it reinforces "the moral foundations of our society."²²⁶

In its final analysis, the Massachusetts court employed the same reasoning that has continually motivated government censors: a desire to shape public opinion by targeting and burdening disfavored speakers.

That is flatly contrary to constitutional values, and that is why content-based restrictions always trigger strict scrutiny. To hold, as the Massachusetts court did, that probationers' speech may be restricted on the basis of its content because of a judicial judgment that society is better off without that speech, is to deny those speakers the very core protection of the First Amendment.²²⁷

Here, the court has broadly taken aim at particular protected speech with the explicit purpose of suppressing it on the basis of content. The probation conditions neither impose a "time, place, or manner restriction,"²²⁸ nor are their effects limited to speech in non-public forums.²²⁹ The conditions, as drafted, impose a general ban on any compensated speech by Power related to her past criminal conduct.²³⁰

223. See *Simon & Schuster*, 502 U.S. at 116.

224. See *infra* Part V.F.

225. *Power*, 650 N.E.2d at 91.

226. *Id.*

227. Petition for Cert. at 10, *Commonwealth v. Power*, 650 N.E.2d 87 (Mass. 1995), *cert. denied*, 116 S. Ct. 697 (1996).

228. Time, place, or manner restrictions merely limit the delivery of speech, not its substantive content. *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (teachers' organization, other than elected bargaining representatives, barred from using school mailboxes to communicate with teachers).

229. *Cf. International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (holding that an airport designed for public travel was not a public forum for religious speech).

230. *Power*, 650 N.E.2d at 89.

Inasmuch as the probation conditions in *Power* are aimed at protected speech and discriminate on the basis of content, they are invalid regardless of whether Massachusetts can present a “compelling interest.”²³¹ As Justice Kennedy articulated, weighing free speech rights against the state’s interest in content-based suppression of speech is “unnecessary and incorrect,” because a “resort to [that] might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so. Our precedents and traditions allow no such inference.”²³² As the Supreme Court stated, “the government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.”²³³

Thus, the question becomes: why should courts apply a rigorous standard of review when analyzing a legislative action that violates a fundamental right and yet apply a less stringent standard when analyzing a judicial action involving a fundamental right?²³⁴ Moreover, this inquiry reflects the larger question of whether morality is a sufficient basis for restricting First Amendment freedoms at all. Because morality is so inherently subjective, and therefore capable of discriminatory application, the appropriate standard of review for courts reviewing probation conditions should be one of intermediate scrutiny.

G. *The Problem of Strict Scrutiny*

Critics argue that the highest standards of scrutiny simply provide probationers with the same level of constitutional protection as nonprobationers.²³⁵ Clearly, this is a legitimate critique. Those who engage in unlawful activity should forfeit some of the constitutional protections generally provided. How else do we as a society regulate criminal activity but confine the most harmful of criminals to government-run facilities?

231. Petition for Cert. at 11, *Commonwealth v. Power*, 650 N.E.2d 87 (Mass. 1995), cert. denied, 116 S. Ct. 697 (1996).

232. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124–25 (Kennedy, J., concurring).

233. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 401 (1992).

234. For a similar argument, see *State v. Friberg*, 435 N.W.2d 509, 520 n.6 (Minn. 1989) (Popovich, J., dissenting). “I cannot understand why the trial court’s decision in this case should receive a lesser standard of scrutiny than the legislative acts of Congress . . . or the State . . .” *Id.*

235. See Thomas E. Bartrum, Note, *Birth Control as a Condition of Probation—A New Weapon in the War Against Child Abuse*, 80 KY. L.J. 1037, 1045 (1992).

Where fundamental constitutional rights are concerned, an infringement should be allowed only when necessary to meet a compelling or substantial state interest. Indeed, the probationer is not off "scot-free." Probation conditions properly impose on the probationer a list of duties and responsibilities. Moreover, the state's compelling interests in rehabilitation and public safety adequately ensure a distinction between permissible infringements upon the constitutional rights of probationers and impermissible infringements upon the constitutional rights of nonprobationers.

H. Intermediate Scrutiny: A Possible Solution

Echoing the Court's logic in *Madsen*, an intermediate level of scrutiny should apply to probation conditions that jeopardize First Amendment rights, particularly the right of free expression. Such a standard would appropriately balance the multiple interests at stake: the rehabilitation and deterrence interests, as well as the larger societal interests of promoting free speech and guarding against governmental censorship even when the speech in question is inimical to the values society wants to encourage. As is often stated, perhaps the best way to personally censor objectionable speech is to ignore it.²³⁶

VI. INTERMEDIATE SCRUTINY AS APPLIED TO KATHERINE ANN POWER

The Massachusetts court's lenient review of Power's probation condition ignores the Court's more recent elucidation of an intermediate standard of review in *Madsen*. Applying intermediate scrutiny, the condition imposed on Power would impermissibly restrict her freedom of expression.

236. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Id. Because *Virginia State Board* explored commercial advertising, arguably this line of thinking is inapplicable to the present case. However, the argument itself is a general one commonly used in First Amendment cases. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978).

A. Governmental Interests

What is the compelling governmental interest in freezing Power's expressive activity? Power's expression is neither a threat to society nor would it create an immediate danger to the community. Her words alone could not compel violence or lawless activity. In fact, Power's own repudiation of her life in hiding implies that any commercialization of her life story would discourage, not glorify, unlawful conduct.

Power has ably demonstrated her own rehabilitation by turning herself in to authorities.²³⁷ She does not deny responsibility, and she has expressed remorse for the acts she committed and the pain she caused others.²³⁸

To the extent that the state has an interest in punishment, Power is both in prison and on probation. There is no legal basis for stifling expression as a method of punishment. Indeed, the core of First Amendment protection is that society benefits from a vigorous marketplace of ideas, and we are all diminished when any voice is stilled by government.²³⁹ Both public discourse and literature are replete with writings of prisoners and ex-prisoners.²⁴⁰

Arguably, the important governmental interest at stake is in compensating victims of crime for the losses they endure.²⁴¹ If compensation is so important, how does conditioning Power's speech reflect and indeed further this important governmental interest? In this case, ironically, the conditions actually bar the victims of crime from receiving any form of financial compensation for their losses.²⁴² Despite Power's intimations that she would remunerate the Schroeder family, the conditions of her probation limit her from doing so.²⁴³

237. Carlson, *supra* note 8, at 62.

238. *Id.*

239. *Pacifica*, 438 U.S. at 745-46.

240. The Supreme Court has noted the writings of former prisoners Emma Goldman, Martin Luther King, Jr., and Henry David Thoreau in a similar vein. See *Simon & Schuster*, 502 U.S. at 121-22. Beyond those, the views from imprisoned labor organizers such as Eugene Debs as well as the participants in the Watergate scandal (including John Ehrlichman, Jeb Stuart Magruder and H.R. Haldeman) have been published. In fact, Patricia Hearst has written a chronicle of her life, as has Margaret Sanger.

241. See, e.g., *Simon & Schuster*, 502 U.S. at 118 (noting that the state's interest in compensating victims from the fruits of crime is compelling).

242. See Letter, *supra* note 51.

243. *Id.*

Finally, to the extent that the government has an interest in generally deterring others from committing similar crimes, the argument is flawed. The premise for such an argument rests upon the following logic:

There must be a number of people who will decide to commit crimes if Power is allowed to sell her story. These criminals must then plan crimes with the goal of getting caught, and with the further goal of generating enough publicity to reap substantial book or movie royalties. Finally, the criminals must hope to receive short enough prison sentences to one day enjoy their royalties.²⁴⁴

Such foolish logic could not possibly support such restrictions on Power's freedom of expression. Indeed, assuming that the government could and should control the content of speech, is this not a story that should be told? Power has expressed her remorse and her reluctance to glorify her past life as a fugitive. After all, she voluntarily turned herself in to authorities when concealment of her prior activities had been entirely successful. Thus, none of the potential compelling state interests provided offer sufficient justification for the total prohibition of Power's free expression.

B. The Nexus Between Interests and Means

Intermediate scrutiny requires that the government activity in question be substantially related to an important government interest.²⁴⁵ Assuming, for the sake of argument, these articulated interests are valid, do the means used by the *Power* court substantially relate to these goals?

The condition, as drafted, is a feeble attempt at protecting the public from Power's criminal conduct because it bears no relation to the societal dangers of armed robbery. After all, Officer Schroeder was shot by a gun, not by a book.

In terms of her own rehabilitation, Power voluntarily turned herself over to the authorities. Since she has fully accepted responsibility for her actions, it is unclear how discouraging her from telling her story will contribute to her rehabilitation. She did not commit the crime for pecuniary gain, so it is difficult to discern a substantial relationship between restraining her profitable speech and reforming her criminal character. Moreover, there is no evidence that she has participated in any other dangerous or anti-social behavior that would be corrected by speech

244. Spencer, *supra* note 4, at 1232-33.

245. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2525 (1994).

restrictions. Stifling expression is a questionable method of punishment, yet clearly denying Power a property interest in the sale of her story significantly contributes to her punishment.

As demonstrated above, conditioning Power's speech does not substantially further the interest in compensating victims of crime. The restriction placed on Power actually works to the detriment of these crime victims. Power was eager to share any proceeds of her story with the Schroeder family, but this condition prohibited her from doing so.²⁴⁶

Finally, the probation condition placed on Power fails to relate sufficiently to the government interest in generally deterring similar criminal conduct. To support such an argument, one would have to make some rather implausible assumptions: primarily, that individuals will see Power's story as a suggestion to commit crimes in order to sell one's own narrative upon release from jail.²⁴⁷ With only a tenuous relationship between the interests and the means, Power's probation restrictions inherently violate the protections guaranteed under the First Amendment and should thus be stricken.

VII. CONCLUSION

Court-imposed probation conditions directed toward particular individuals carry great risks of censorship and discriminatory application. Similar to legislative actions that implicate fundamental rights, judicial actions should be subject to exacting scrutiny so as to limit those risks and properly balance the interests at stake. Adopting the Supreme Court's reasoning in *Madsen*, an intermediate level of scrutiny should apply to probation conditions that work to limit First Amendment rights. Under this standard, the conditions imposed on Katherine Ann Power would not survive judicial scrutiny and therefore impermissibly restrict her freedom of expression.

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246. See Letter, *supra* note 51.

247. Spencer, *supra* note 4, at 1232-33.

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