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DOES CRIME PAY—CAN PROBATION STOP KATHERINE ANN POWER FROM SELLING HER STORY?

*I will not permit profit from the life blood of a Boston police officer by someone responsible for his killing. That is repugnant to me. I could not live with myself if I permitted it.*¹

On September 23, 1970, Katherine Ann Power sat in a parked car, one-half mile from the State Street Bank in Brighton, Massachusetts.² This car was the “switch car” in the escape plan of Power and her armed accomplices.³ Three of Power’s accomplices had just robbed the State Street Bank.⁴ Unknown to the robbers, a silent alarm in the bank had already alerted the police.⁵ Parked outside the bank was Power’s fourth accomplice, William Gilday.⁶ When Boston Police Officer Walter Schroeder arrived at the scene with his partner, Gilday fired a submachine gun at Officer Schroeder, fatally wounding him in the back.⁷

Thus began a twenty-three year flight from justice for Katherine Ann Power.⁸ Police caught three of her accomplices within five days.⁹ They caught the other in 1975.¹⁰ But Power remained at large, the target of the largest womanhunt in FBI history.¹¹ In the early morning on September 15, 1993, after months of secretive negotiations between Power’s attorneys and law enforcement officials, Power surrendered to the Boston Police in the parking lot of Boston College Law School in Newton, Massachusetts.¹² Power pled guilty in Boston’s Suffolk County

¹ Statement by the trial court (Banks, J.) before imposing sentence on Katherine Ann Power. Record Appendix at 89, *Power v. Commonwealth*, SJC No. 06495, Mass. App. Ct. No. 93-P-1755 (filed Dec. 27, 1993) [hereinafter *Appendix*].

² *Id.* at 20, 76.

³ *Id.* at 76.

⁴ *Id.* at 22.

⁵ *See id.* at 23.

⁶ *Appendix, supra* note 1, at 76.

⁷ *Id.* at 24.

⁸ *See* Jacob Cohen, *The Romance of Revolutionary Violence*, NAT’L REV., Dec. 13, 1993, at 28. Professor Cohen taught at Brandeis University while Power was a student, and for a number of years has taught a course at Brandeis on “The Sixties.” *Id.* at 29.

⁹ *Appendix, supra* note 1, at 24–25.

¹⁰ *Id.* at 25.

¹¹ Margaret Carlson, *The Return of the Fugitive*, TIME, Sept. 27, 1993, at 60.

¹² *See* Carlson, *supra* note 11, at 62; Charles Krauthammer, *From People Power to Polenta*, TIME, Oct. 4, 1993, at 94.

Superior Court to charges of armed robbery and manslaughter.¹³ The trial court sentenced Power to eight to twelve years in prison, and in an extraordinary step, a concurrent twenty-year probation term.¹⁴ As a special condition of Power's probation, the court enjoined Power from profiting or benefiting from her crimes.¹⁵ Violation of this condition could result in life imprisonment for Power.¹⁶

Probation conditions like the one imposed on Power must be reasonably related to the purposes of probation.¹⁷ Every state, as well as the federal court system, has its own law of probation.¹⁸ In Massachusetts, the purposes of probation are rehabilitation of the probationer and protection of the public against the probationer's recidivism.¹⁹ Probation conditions that restrict a probationer's constitutionally guaranteed rights are subject to a more careful standard of review than the mere "reasonable relationship" standard.²⁰ Massachusetts probation conditions that restrict a probationer's fundamental rights must be necessary to the purposes of probation.²¹

This Note examines the constitutionality of the probation condition that restricts Katherine Ann Power's freedom of expression as protected by the First Amendment to the United States Constitution. Section I discusses the facts surrounding Katherine Ann Power's crime

¹³ *Appendix, supra* note 1, at 7, 10-13. Power also pled guilty to federal charges that she and her four accomplices broke into a National Guard armory in Newburyport, Massachusetts, on September 20, 1970, and stole a pickup truck, blasting caps, and 400 rounds of .30-caliber ammunition. Christopher B. Daly, *Radical Fugitive Gets Fine But No More Prison Time*, WASH. POST, Nov. 25, 1993, at A3. On November 24, 1993, United States District Court Judge Nathaniel Gorton sentenced Power to a five-year prison term, to run concurrently with her state prison term, as well as a \$10,000 fine. *Id.* Power requested that the judge reduce her sentence and recommend that she serve her time in a federal prison closer to her home in Oregon. See Judy Rakowsky, *Power Asks Judge to Reduce Sentence*, BOSTON GLOBE, Feb. 12, 1994, at 59. Judge Gorton explained that he would not make such a recommendation unless Power demonstrated her remorse by sharing with the Schroeder family the profits from selling her story. *Id.* At her sentencing in federal court, Power said, "[i]f at any time I should be able to accrue a financial reward or compensation for my story, I will do something to benefit the Schroeder family." *Id.* Power's attorney, however, later filed a letter with Judge Gorton stating that she did not believe Power could provide such a benefit to the Schroeder family until the state probation condition was overturned. Brief for Appellant at Ex. B, *Power v. Commonwealth*, SJC No. 06495, Mass. App. Ct. No. 93-P-1755 (filed Dec. 27, 1993) [hereinafter *Brief for Appellant*].

¹⁴ *Id.* at 3.

¹⁵ *Appendix, supra* note 1, at 88-89.

¹⁶ *Id.* at 89.

¹⁷ See *infra* notes 162-90 and accompanying text.

¹⁸ See ANDREW R. KLEIN, *DEFENDING PROBATION REVOCATIONS* (90-662) 7 (MCLE 1989); WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 941-42 (Student ed. 1985).

¹⁹ See *infra* notes 129-61 and accompanying text.

²⁰ See *infra* notes 191-95 and accompanying text.

²¹ See *infra* notes 196-205 and accompanying text.

and flight from justice.²² Section II examines probation and its goals, focusing primarily on probation under Massachusetts law.²³ Section III addresses the standard of review for probation conditions, both in Massachusetts and in other jurisdictions.²⁴ Finally, Section IV analyzes the constitutionality of Katherine Ann Power's probation condition, concluding that it impermissibly restricts her freedom of expression because the condition is not necessary to accomplish an acceptable purpose of probation in Massachusetts.²⁵

I. KATHERINE ANN POWER: RADICAL, FELON, FUGITIVE, AND PRISONER

Katherine Ann Power enrolled at Brandeis University in Waltham, Massachusetts, in 1967.²⁶ Like many college campuses in the late 1960s, Brandeis had a contingent of radical protesters in its student body.²⁷ Power first became involved with this group in 1968, when the group seized a seldom-used building on campus and declared it a "sanctuary" in which they would harbor a soldier who had deserted in protest of the Vietnam War.²⁸ The group turned the building into a commune, which was to be a prefiguration of the uninhibited world to come.²⁹ In 1969, Power was part of a group of Brandeis students who declared a national student strike, demanding the immediate release of all imprisoned Black Panthers and an immediate withdrawal from Viet-

²² See *infra* notes 26–100 and accompanying text.

²³ See *infra* notes 101–61 and accompanying text.

²⁴ See *infra* notes 162–282 and accompanying text.

²⁵ See *infra* notes 283–332 and accompanying text.

²⁶ See Cohen, *supra* note 8, at 29. Two of Power's accomplices in the fatal bank robbery were also students at Brandeis. *Id.* at 28. One was her roommate, Susan Saxe. Carlson, *supra* note 11, at 61. The other was Stanley Bond, who allegedly masterminded the bank robbery. Cohen, *supra* note 8, at 33. Bond was an ex-convict who enrolled in an inmate-education program at Brandeis. Carlson, *supra* note 11, at 61. Richard Onorato, dean of students at the time, protested to the dean of faculty against Bond's admission because he thought Bond was "borderline psychotic." *Id.*

²⁷ See Cohen, *supra* note 8, at 29.

²⁸ *Id.* The "deserter" to whom the group offered sanctuary turned out to be an impostor, not a deserter at all. *Id.* at 30.

²⁹ *Id.* at 29. The "Sanctuarists," as Professor Cohen describes them, numbered approximately 300 students. *Id.* With drugs and guitars in hand, they were exhilarated by their undertaking and undaunted by the prospect of defending their "deserter" against the United States Army's expected attempt to reclaim him. See Cohen, *supra* note 8, at 29. Professor Cohen notes that the group tore down the signs over the men's and women's rooms, and the bathroom stall partitions, because there would be no "self-withholding, bourgeois notions of privacy" in the world to come. *Id.* The group debated for two days whether they should make decisions by unanimous or majority vote. *Id.* They finally decided, although not unanimously, to have a vote on whether to have votes. *Id.* at 29–30. This vote turned out to be inconclusive. *Id.* at 30.

nam.³⁰ Power also participated in the "Brandeis University Strike Information Center" that helped organize and report student protests across the nation.³¹

Many in the media have characterized Power's actions as a protest against the war in Vietnam.³² But this explanation is illogical and ignores the facts.³³ The bank robbery was only the first step of their plan.³⁴ The group hoped to use the stolen cash to buy explosives capable of disabling trains that carried weapons; with these weapons they would arm the Black Panthers.³⁵

Two of Power's accomplices were also Brandeis students: Stanley Bond, the alleged mastermind of the bank robbery, and Susan Saxe, Power's college roommate.³⁶ In addition, the group recruited two ex-convicts to assist in the robbery, William "Lefty" Gilday and Robert Valeri.³⁷ On September 23, 1970, Power sat behind the wheel of the "switch car" parked one-half mile from the State Street Bank.³⁸ Gilday parked across the street from the bank as a lookout.³⁹ As Bond, Valeri and Saxe left the bank, a silent alarm sounded.⁴⁰ Boston Police Officer Walter Schroeder and his partner responded.⁴¹ When Officer Schroeder approached the front door of the bank, Gilday shot him in the back with a submachine gun, fatally wounding him.⁴² Although Gilday pulled the trigger, all the participants in a felony that takes a victim's life may be charged with murder.⁴³

Police caught three of Power's accomplices within five days of the robbery.⁴⁴ Valeri, who received a twenty-five year prison sentence and has since been released, provided evidence that helped convict Gilday.⁴⁵ Gilday received a life sentence for murder.⁴⁶ Bond died in

³⁰ Cohen, *supra* note 8, at 32.

³¹ *See id.*

³² *Id.* at 28.

³³ *See id.* As Professor Cohen asks, what is the symbolic logic of a mere bank robbery which, if successful, would only be reported as a bank robbery? *Id.*

³⁴ *See* Carlson, *supra* note 11, at 61.

³⁵ *Id.*

³⁶ *See id.*; Cohen, *supra* note 8, at 28.

³⁷ *Appendix, supra* note 1, at 21; Carlson, *supra* note 11, at 61.

³⁸ *Appendix, supra* note 1, at 74, 76.

³⁹ *Id.* at 20.

⁴⁰ *See id.* at 22-23.

⁴¹ *Id.* at 23.

⁴² *Id.* at 24.

⁴³ *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).

⁴⁴ *Appendix, supra* note 1, at 24-25.

⁴⁵ *See Katherine Ann Power*, WASH. TIMES, Oct. 12, 1993, at A16.

⁴⁶ Carlson, *supra* note 11, at 62.

1972 in prison while awaiting trial.⁴⁷ He was making a bomb to blast his way out of prison when the bomb exploded and killed him.⁴⁸ Power and Saxe went underground after the robbery, tapping radical and feminist contacts to stay ahead of the authorities.⁴⁹ Saxe was captured in 1975 in Philadelphia.⁵⁰ After serving five years in prison, she now works for a charitable organization in Philadelphia.⁵¹

The authorities were never able to catch Power.⁵² She became the object of the largest womanhunt in FBI history, keeping her on the FBI's ten-most-wanted list for fourteen years.⁵³ In 1984, the FBI dropped her from the list for a lack of leads.⁵⁴ Power spent nine years living in women's communes, and then moved to Oregon's Willamette Valley with her infant son, whose biological father Power has never named.⁵⁵ Power took the name Alice Metzinger from the birth certificate of an infant who died in the year Power was born.⁵⁶ She became involved with a local meatcutter and bookkeeper, Rodney Duncan, whom she lived with and later married.⁵⁷ She established herself as a valued consultant to the area's gourmet restaurants.⁵⁸ Power opened a restaurant in Eugene, Oregon, and became active in the community, teaching nutrition classes at the local college.⁵⁹

Unlike Katherine Ann Power, the family of Officer Walter Schroeder had no escape from the tragic aftermath of the fatal robbery.⁶⁰ Officer Schroeder's murder left a void in the lives of his wife and nine children.⁶¹ His oldest daughter, Clare, in her victim impact statement at Power's sentencing, said:

While Katherine Ann Power was fleeing across the country spending the money that she stole from the State Street Bank, smuggling sawed-off shot guns through the St. Louis airport and plotting to weld railroad cars to the tracks to disrupt

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *Katherine Ann Power*, *supra* note 45, at A16.

⁵⁰ Carlson, *supra* note 11, at 62.

⁵¹ *Id.*

⁵² See *id.* at 60.

⁵³ *Id.*

⁵⁴ See *id.*

⁵⁵ Carlson, *supra* note 11, at 61.

⁵⁶ *Id.*

⁵⁷ *Id.* at 61-62.

⁵⁸ *Id.* at 61.

⁵⁹ See *20/20: The Fugitive* (ABC television broadcast, trans. no. 1406-1, Feb. 11, 1994).

⁶⁰ See *Appendix*, *supra* note 1, at 54-57.

⁶¹ See *id.*

military shipments, my mother was burying my father in Evergreen Cemetery in Brighton.

While Katherine Power was establishing her new life in Oregon, learning to cook and establishing a restaurant and hunting game birds with her husband, my mother was struggling every day to care for us, provide for us and give us a loving home. . . . She did all of this without the help of a husband. And she did this on a police pension from the Boston police department.⁶²

Clare Schroeder recalled being called to the principal's office in school where her uncle informed her that her father had been shot.⁶³ Later, she had to tell her brothers and sisters that their father was dead.⁶⁴ She said, "I remember walking from house to house, where my brothers and sisters were staying with relatives. I told each of my brothers and sisters that my father had died. Each time . . . I cried all over again. . . ."⁶⁵ Four of Officer Schroeder's children became police officers, his daughters Clare and Erin, and his sons Paul and Edward.⁶⁶ Clare said they became police officers because of their father, to "follow in [his] tradition of service and devotion."⁶⁷ Officer Walter Schroeder was a local hero who single-handedly caught a gang of armed bank robbers in 1968, at the very bank where he would later meet his death.⁶⁸

While the Schroeder family mourned their loss, Katherine Ann Power spent years hiding her secret life from those around her.⁶⁹ The strain of life as a fugitive from justice eventually proved too much for her.⁷⁰ Power could not sleep and thought of suicide.⁷¹ A therapist thought there was something more than depression, and eventually Power revealed her secret.⁷²

⁶² *Id.* at 54–55.

⁶³ *Id.* at 50–51.

⁶⁴ *Id.* at 52.

⁶⁵ *Appendix, supra* note 1, at 52.

⁶⁶ *Id.* at 49.

⁶⁷ *Id.*

⁶⁸ *Id.* at 48.

⁶⁹ *See* Carlson, *supra* note 11, at 60.

⁷⁰ *See id.* at 60–61. In 1992, Power attended a night class on depression at Oregon's Albany General Hospital. *Id.* at 61. At one point, Power attempted to ask a question, but began to sob so violently that she could not speak the words. *Id.* Therapist Linda Carroll said of Power, "I've never seen anybody in such psychic pain. . . . She was pure depression." *Id.*

⁷¹ Carlson, *supra* note 11, at 61.

⁷² *Id.*

Therapist Linda Carroll sent Power to a psychiatrist for the antidepressant medication Trazodone, to treat a chemical imbalance from which Power suffered.⁷³ The therapist also put Power in touch with Oregon lawyer Steven Black, who later contacted Boston lawyer Rikki Klieman.⁷⁴ Power felt compelled to surrender, in order to live truthfully with herself and her loved ones.⁷⁵ Black and Klieman negotiated with the authorities over a period of fourteen months.⁷⁶ During this time Power gradually revealed her secret to her loved ones and friends.⁷⁷ On September 15, 1993, Power surrendered to Boston Police.⁷⁸

Later that day, Power pled guilty in Boston's Suffolk County Superior Court to two counts of armed robbery and one count of manslaughter, which had been reduced from murder.⁷⁹ On October 6, 1993, the trial court sentenced Power to eight to twelve years in prison, pursuant to the recommendation of the assistant district attorney, as outlined in Power's plea agreement.⁸⁰ The court also placed Power on probation for twenty years, with the probation and prison terms running concurrently.⁸¹ Although the text of the Massachusetts probation statute does not expressly prohibit such a combination, it is extremely unusual and is inconsistent with the traditional concept of probation in Massachusetts.⁸² As a special condition of Power's probation, the court prohibited Power "from directly or indirectly engaging in any activity related to the profit or benefit generated as a result of criminal acts" for which she was convicted.⁸³ Violation of this condition could

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *20/20: The Fugitive*, *supra* note 59.

⁷⁶ Carlson, *supra* note 11, at 62. During the negotiations, Klieman kept her contact with both Black and Power extremely limited. Dimitra Kessenides, *Bringing in a Sixties Fugitive*, *AM. LAW.*, Nov. 1993, at 33. She did not meet Power in person until two nights before her surrender, and she met Black in person only once. *Id.* She even started placing phone calls to Black via pay phones, to avoid creating a trail to Black and Power. *Id.* Said Klieman, "I didn't want to know where [Power] was. . . . I would be compromised in doing her negotiations." *Id.*

⁷⁷ Carlson, *supra* note 11, at 62.

⁷⁸ *Id.*; Krauthammer, *supra* note 12, at 94.

⁷⁹ *Appendix*, *supra* note 1, at 10-13.

⁸⁰ *Id.* at 38, 88, 90-91.

⁸¹ *Id.* at 88.

⁸² *See infra* notes 118-23 and accompanying text.

⁸³ *Appendix*, *supra* note 1, at 92. The text of the special condition, as interpreted by the Department of Probation, reads as follows:

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,

subject Power to life imprisonment.⁸⁴ The probation condition exceeded the plea agreement that Power's attorneys had negotiated with the District Attorney's Office.⁸⁵

Power has publicly stated that she feels remorse for her crime.⁸⁶ At her sentencing in state court Power said, "I cannot possibly say in words how sorry I am for the death of Officer Schroeder. My whole adult life has been a continuing act of contrition. . . . I am here today because I recognize that I also have a debt to my society. . . ."⁸⁷ In a letter to the court before her sentencing, Power wrote, "[t]hat I never meant for it to happen cannot excuse the reality that my wrong-head-

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.

Brief for Appellant, *supra* note 13, at Ex. A.

⁸⁴ *Appendix*, *supra* note 1, at 89.

⁸⁵ *Id.* at 88, 90. The trial court told Power on September 15, 1993, that, if the court accepted her guilty plea and exceeded the district attorney's recommendation, she would have an opportunity to withdraw her plea. *Id.* at 30; *see* MASS. CRIM. R. 12(c)(6) (if judge decides to exceed sentencing recommendation in plea agreement, judge shall advise defendant that judge intends to exceed recommendation and shall afford defendant opportunity to withdraw guilty plea). Just before sentencing, the trial court announced that it was exceeding the district attorney's recommendation, and imposed the special condition of probation. *Appendix*, *supra* note 1, at 90. The court then asked whether Power wished to accept the sentence or withdraw her plea. *Id.* Power accepted the sentence, and the court notified her that she had ten days in which to file an appeal of her sentence. *Id.* at 90-91.

Arguably, Power's acceptance of her sentence might constitute consent to the probation conditions under either the "act of grace" or "contract" theories of probation. *See* Cathryn Jo Rosen, *The Fourth Amendment Implications of Urine Testing for Evidence of Drug Use in Probation*, 55 BROOK. L. REV. 1159, 1164 (1990). The "act of grace" theory of probation reasons that, by accepting the state's "act of grace," the offer of probation in lieu of prison, the probationer impliedly consents to abide by the conditions. *See id.* The United States Supreme Court rejected this theory, stating that courts may not rely on the "act of grace" theory to deny probationers due process. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973); Rosen, *supra*, at 1194. The "contract" theory of probation views the decision to grant probation as an offer of freedom from imprisonment, in consideration of which the probationer agrees to obey the conditions. *See* Rosen, *supra*, at 1194. The Supreme Judicial Court of Massachusetts has rejected the notion that accepting probation constitutes a binding contract. *Commonwealth v. LaFrance*, 525 N.E.2d 379, 381 n.3 (Mass. 1988) ("[T]he Commonwealth properly does not argue that the petitioner assented to any unconstitutional condition of her probation. The coercive quality of the circumstance in which a defendant seeks to avoid incarceration by obtaining probation on certain conditions makes principles of voluntary waiver and consent generally inapplicable."). Accordingly, 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.

⁸⁶ *See Appendix*, *supra* note 1, at 83.

⁸⁷ *Id.*

edness, my naiveté and my willingness to break the law resulted in the death of another person. . . . To say that I am sorry for his death seems so utterly, utterly inadequate. Daily I confront the damage I have done not only to his life but to the lives of his family and friends."⁸⁸

Despite her expression of guilt and remorse, the trial court forbade her from selling the story of her crime or of her years as a fugitive.⁸⁹ "True crime" stories such as Power's are today's hottest selling television shows, movies and books.⁹⁰ In one week, Charles Manson and Jeffrey Dahmer appeared on prime time television to talk about their crimes.⁹¹ Convicted serial killers' paintings sell for hundreds of dollars each, and appear in exhibits such as "The Death Row Art Show."⁹² Amy Fisher and Joey Buttafuoco have profited from the publicity surrounding their crimes.⁹³ Media watchers speculate that the arrest of CIA official Aldrich Ames and his wife, accused of spying for the KGB, will lead to a made-for-TV movie.⁹⁴ Even John and Lorena Bobbitt, although acquitted of criminal charges, are profiting from the publicity surrounding their cases.⁹⁵ Although the thought of the cast of characters mentioned above making money by talking about their crimes is repugnant, it is a fact of life in today's mass communications "marketplace of ideas."⁹⁶

Clare Schroeder summed up the social discontent with the inequity of criminals reaping profits from the publicity that their crimes generated.⁹⁷ At Power's sentencing, Schroeder said to the court, "we are deeply disturbed that Katherine Power has become a celebrity and that the entertainment industry is clamoring for the rights to her story. The prospect that Miss Power may make a small fortune from selling the story of my father's murder is absolutely obscene."⁹⁸ The trial court sought to eliminate this possibility by imposing the probation condition that prohibits Power from profiting by selling her story.⁹⁹ Power

⁸⁸ Patricia Nealon, *Power Given 8 to 12 Years and Warning*, BOSTON GLOBE, Oct. 7, 1993, at 1, 26.

⁸⁹ See *Brief for Appellant*, *supra* note 13, at Ex. B.; *Appendix*, *supra* note 1, at 92.

⁹⁰ See *Brief for Criminal Justice Institute as Amicus Curiae* at 5-6, *Power v. Commonwealth*, SJC No. 06495, Mass. App. Ct. No. 93-P-1755, (filed Mar. 15, 1994) [hereinafter *CJI Amicus Brief*].

⁹¹ *Id.* at 5.

⁹² *Id.* at 6.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *CJI Amicus Brief*, *supra* note 90, at 7.

⁹⁶ See *id.* at 9.

⁹⁷ See *Appendix*, *supra* note 1, at 62-63.

⁹⁸ *Id.*

⁹⁹ See *id.* at 88-89.

has appealed this special condition of probation to the Supreme Judicial Court of Massachusetts.¹⁰⁰ The balance of this Note explores the propriety of using probation as a vehicle to prevent Katherine Ann Power from selling her story.

II. PROBATION AND ITS GOALS

A. *Probation in Massachusetts*

Probation is generally considered an alternative to incarceration, wherein a court releases a defendant pursuant to certain conditions.¹⁰¹ Many state and federal probation statutes enumerate standard conditions that apply to all probationers.¹⁰² Massachusetts' probation statute requires a mandatory probation fee of all supervised probationers, and the Massachusetts Superior Court Rules establish several standard conditions.¹⁰³ A Massachusetts judge may also impose "special conditions" of probation, tailored to meet the circumstances of each probationer.¹⁰⁴ Many probation statutes list special conditions from which judges may choose, and grant the judge discretion to fashion other appropriate special conditions.¹⁰⁵ Massachusetts' probation statute grants the judge discretion to fashion appropriate special conditions, and a few offense-specific conditions are scattered throughout the Massachusetts General Laws.¹⁰⁶

¹⁰⁰ *Brief for Appellant*, *supra* note 13, at 1. On appeal, Power asks the court to vacate the condition because: (1) the condition is unconstitutionally vague; (2) the condition places Power's freedom in jeopardy from the actions of third parties; (3) the condition is an unconstitutional prior restraint on expression; (4) the condition is an unconstitutional content-based restriction on speech; and (5) the trial court cannot condition acceptance of Power's plea on a waiver of First Amendment rights. *See id.* at 2. This Note examines only whether a content-based restriction of speech is a valid probation condition in Massachusetts.

¹⁰¹ *See* ARTHUR W. CAMPBELL, *LAW OF SENTENCING* 100, 112 (2d ed. 1991); LAFAVE & ISRAEL, *supra* note 18, at 943.

¹⁰² *See* KLEIN, *supra* note 18, at 7.

¹⁰³ MASS. GEN. L. ch. 276, § 87A (1992) (all probationers on supervised probation must pay fee unless it would constitute undue hardship); MASS. SUPER. CT. R. 56 (defendant shall comply with court orders, report to probation officer as required, notify probation officer of change in address, make reasonable efforts to obtain and keep employment, make reasonable efforts to provide support for dependents, and not violate any law, statute, ordinance or regulation).

¹⁰⁴ *See* MASS. DEPT. OF TRIAL CT., COMM. ON STANDARDS, *Standards for Sentencing and Other Dispositions* 4:03 & cmt. (1984) [hereinafter *Standards*].

¹⁰⁵ LAFAVE & ISRAEL, *supra* note 18, at 942.

¹⁰⁶ Statutes authorizing judicial discretion to fashion special conditions: MASS. GEN. L. ch. 276, § 87 (1992) (court may order such probation conditions as it deems proper); MASS. GEN. L. ch. 276, § 87A (1992) (court may order specified rehabilitative programs or community service work); MASS. GEN. L. ch. 280, § 6 (1992) (court may impose costs as condition of probation). Statutes authorizing offense-specific conditions: MASS. GEN. L. ch. 111E, § 12 (1992) (court may order treatment in inpatient or outpatient facility and optional periodic drug tests for drug

A probation term, like a term of imprisonment, is a criminal sentence.¹⁰⁷ Massachusetts sentencing judges may combine probation with imprisonment in several ways.¹⁰⁸ First, and perhaps most familiar, is "straight probation."¹⁰⁹ After a guilty finding, the judge imposes a sentence of probation, without a prison term.¹¹⁰ Second, probation may be combined with a suspended sentence.¹¹¹ The judge may order a sentence of imprisonment, but suspend part or all of the prison sentence.¹¹² When a judge suspends part or all of a prison sentence, the judge must also place the defendant on probation.¹¹³ Suspension of part of the prison sentence, resulting in imprisonment followed by probation, is called a "split sentence."¹¹⁴ Third, the judge may order "pretrial probation" for a person charged with a crime before the court.¹¹⁵ This enables the judge to place some restrictions on a person who has been charged with a crime but has not been found guilty.¹¹⁶ "Pretrial probation" is suited to cases of domestic violence and emergency situations.¹¹⁷

Arguably, the text of the probation statute also permits concurrent terms of imprisonment and probation.¹¹⁸ Although the idea of a prison inmate reporting periodically to meet with a probation officer may seem illogical, the text of the Massachusetts probation statute does not explicitly prohibit concurrent terms of imprisonment and probation like that imposed on Katherine Ann Power.¹¹⁹ However, no precedent exists in Massachusetts for concurrent sentences of imprisonment and probation.¹²⁰ The Massachusetts Standards for Sentencing and Other

abusers); MASS. GEN. L. ch. 119, § 58 (1992) (court may require juveniles to "do work or participate in activities . . . deemed appropriate by the court"); MASS. GEN. L. ch. 119, § 62 (1992) (court may order juveniles to pay restitution if they committed acts involving civil liability).

¹⁰⁷ See *McHoul v. Commonwealth*, 312 N.E.2d 539, 542 (Mass. 1974); *Standards*, *supra* note 104, at 4:00 cmt.

¹⁰⁸ See *Standards*, *supra* note 104, at 4:01, 4:02, 6:00 & cmt.

¹⁰⁹ See *id.* at 4:02 & cmt.

¹¹⁰ See *id.*

¹¹¹ See *id.* at 6:00 & cmt.

¹¹² See *id.*

¹¹³ See *Standards*, *supra* note 104, at 6:00 & cmt.

¹¹⁴ KLEIN, *supra* note 18, at 2.

¹¹⁵ See *Standards*, *supra* note 104, at 4:01 & cmt.

¹¹⁶ See *id.* at 4:01 & cmt.

¹¹⁷ See *id.*

¹¹⁸ See MASS. GEN. L. ch. 276 § 87 ("court . . . may place on probation . . . any person before it charged with an offense . . . for such time and upon such conditions as it deems proper . . . in any case after a finding or verdict of guilty").

¹¹⁹ See *id.*

¹²⁰ Neither the research for this Note, nor the research of the Criminal Justice Institute as *Amicus Curiae* in *Power v. Commonwealth*, revealed any precedent for concurrent sentences of imprisonment and probation. *CJI Amicus Brief*, *supra* note 90, at 31. The Supreme Judicial Court recently defined probation as "a legal disposition which allows a criminal offender to remain in

Dispositions do not contemplate such concurrent sentences.¹²¹ Concurrent terms of probation and imprisonment are fundamentally inconsistent with the common law roots of probation in Massachusetts.¹²² Katherine Ann Power's sentence, eight to twelve years in prison plus a concurrent twenty-year probation term, would be impermissible under federal law and the Model Penal Code.¹²³

If a defendant violates any probation condition during the probation term, the probation officer may "surrender" the defendant to the court on the probation violation.¹²⁴ To "surrender" means to bring the probationer back before the court and to charge the probationer with the probation violation.¹²⁵ The probationer is then entitled to a proba-

the community subject to certain conditions and under the supervision of the court." *Commonwealth v. Durling*, 551 N.E.2d 1193, 1195 (Mass. 1990). This definition weighs strongly against the validity of concurrent sentences of probation and imprisonment. *See id.* Furthermore, a joint report by the Boston Bar Association and the Crime and Justice Foundation states that judges must choose between imposing sentences of incarceration *or* probation. *See BOSTON BAR ASSOCIATION & CRIME & JUSTICE FOUNDATION, TASK FORCE ON JUSTICE, THE CRISIS IN CORRECTIONS AND SENTENCING IN MASSACHUSETTS* 12 (1991). One authoritative text explicitly defines probation as "a sentence not involving confinement. . . ." LAFAVE & ISRAEL, *supra* note 18, at 941.

¹²¹ *See Standards*, *supra* note 104, at 4:00-04 & cmt. In a manual on defending probation revocations, the Chief Probation Officer of the Quincy Division of the Massachusetts Trial Court did not mention concurrent terms as one of the possible sentencing combinations. *See KLEIN, supra* note 18, at 2. According to the manual, possible probation-prison combinations include: straight probation (e.g., defendant found guilty, sentenced to probation term only); suspended sentences (e.g., defendant found guilty, one year prison term, suspended pending completion of probation term); split sentences (e.g., defendant found guilty, one year prison term, six months committed, six months suspended pending completion of probation term); and cases continued without a finding but with probation term imposed. *Id.*

¹²² Probation began in the 1800s as a procedure whereby courts suspended criminals' prison sentences for a short time. *See CHARLES CHUTE & MARJORIE BELL, CRIME, COURTS AND PROBATION* 38 (1956). At the end of the suspension, if a criminal had maintained good behavior, the court would merely impose a small fine in lieu of the prison term. *See id.* Probation thus arose in the Commonwealth of Massachusetts as an *alternative* to imprisonment. *See id.*; Bruce D. Greenberg, Note, *Probation Conditions and the First Amendment: When Reasonableness is Not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 48-49 (1981).

¹²³ *See* 18 U.S.C. § 3561(a)(3) (1988 & Supp. 1992) (court may order probation unless defendant is at same time sentenced to term of imprisonment); MODEL PENAL CODE § 6.02(d) (1985) (court may not sentence defendant to simultaneous terms of probation and imprisonment). A federal judge may impose a special probation condition that the probationer remain in the custody of the Bureau of Prisons during nights and weekends or reside at a community corrections facility. 18 U.S.C. §§ 3563(b)(11), (12) (1988). The Model Penal Code permits "shock probation," wherein the judge may impose an initial term of up to 30 days in prison as a special probation condition. MODEL PENAL CODE §§ 6.02(3) (b), (d). The purpose of "shock probation" is to stun the probationer with the harsh realities of imprisonment, then release the probationer into society with a strong impression of the consequences of crime. *See CAMPBELL, supra* note 101, at 104.

¹²⁴ *Commonwealth v. Durling*, 551 N.E.2d 1193, 1195 (Mass. 1990).

¹²⁵ *Id.*

tion revocation hearing.¹²⁶ Upon finding a violation of a probation term that was part of a suspended sentence, the judge must vacate the suspension and order the execution of the previously suspended sentence.¹²⁷ In contrast, finding a "straight probation" violation allows a court to impose any sentence appropriate to the offense for which probation was originally imposed.¹²⁸

B. *The Goals of Massachusetts Probation*

Although some probation statutes identify the specific goals of probation, Massachusetts' probation statute does not.¹²⁹ The Massachusetts Supreme Judicial Court, however, recently recognized the dual goals of probation: rehabilitation of the probationer and protection of the public.¹³⁰ These two goals ultimately amount to the same thing: prevention of recidivism.¹³¹ Rehabilitation of the probationer prevents future criminal behavior through measures that eliminate or substantially reduce the probationer's criminal propensities.¹³² By reducing the probationer's criminal propensities, probation reduces the risk that the probationer poses to the public.¹³³ This concept of preventing recidivism is also called "specific" or "special" deterrence.¹³⁴

Specific deterrence is an effort to prevent offenders from repeating the same or other criminal acts.¹³⁵ Courts may accomplish specific deterrence both by imprisonment and by probation.¹³⁶ Imprisonment

¹²⁶ *Id.* A probation revocation hearing is not part of a criminal prosecution, and therefore a probationer is not entitled to all the constitutional protections applicable to a criminal trial. *Id.* (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973)). Because revocation hearings deprive probationers of liberty within the Due Process Clause of the Fourteenth Amendment to the United States Constitution, probationers are entitled to some protection. *Id.* at 1195-96. The minimum due process requirements include: written notice of the claimed violations; disclosure of the evidence against the probationer; the opportunity to be heard in person, and to present witnesses and evidence; the right to confront and cross-examine adverse witnesses; a neutral hearing body, which need not be lawyers or judicial officers; and a written statement by the factfinders as to the evidence relied on and reasons for revocation. *Id.* at 1196.

¹²⁷ See *Standards*, *supra* note 104, at 6:00 & cmt.

¹²⁸ See *id.*

¹²⁹ See MASS. GEN. L. ch. 276, § 87 (1992).

¹³⁰ *Commonwealth v. LaFrance*, 525 N.E.2d 379, 381, 383 (Mass. 1988).

¹³¹ See James C. Weissman, *Constitutional Primer on Modern Probation Conditions*, 8 NEW ENG. J. PRIS. L. 367, 373-74 (1982).

¹³² CAMPBELL, *supra* note 101, at 29.

¹³³ See Weissman, *supra* note 131, at 373-74.

¹³⁴ See *United States v. Abushaar*, 761 F.2d 954, 959 (3d Cir. 1985); CAMPBELL, *supra* note 101, at 25.

¹³⁵ See CAMPBELL, *supra* note 101, at 25.

¹³⁶ See *id.*

makes it impossible for the offender to perpetrate another crime upon society, at least during the prison term.¹³⁷ Probation changes the probationer's behavior such that, assuming the probationer obeys the conditions, he or she will not perpetrate another crime upon society.¹³⁸

The concept of "general deterrence" is related to, but different from, specific deterrence.¹³⁹ Both general and specific deterrence seek to prevent crime.¹⁴⁰ General deterrence prevents the public at large from wrongdoing by punishing one offender, thereby intimidating the general public with the fear of punishment.¹⁴¹ Specific deterrence, on the other hand, deters future wrongdoing by an individual offender by rehabilitating or incapacitating the offender.¹⁴²

The common law development of probation in Massachusetts illustrates the distinction between general and specific deterrence.¹⁴³ Probation, as it began in Massachusetts, focused on improving the probationer's circumstances and preventing further crimes against society by the probationer.¹⁴⁴ If a court wanted to deter the general public from committing crimes, it would make an example of the offender by sending him or her to prison.¹⁴⁵ Instead, the court allows as the probationer a chance to rehabilitate himself or herself, yet maintains supervision over the probationer to protect the public from the probationer's potential recidivism.¹⁴⁶ The Massachusetts Supreme Judicial Court has repeatedly affirmed that the focus is on rehabilitating the probationer and protecting the community from his or her recidivism,

¹³⁷ See *id.* at 18.

¹³⁸ See *id.* at 18, 25.

¹³⁹ See *id.* at 25.

¹⁴⁰ See CAMPBELL, *supra* note 101, at 18, 25.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ A Boston cobbler and philanthropist named John Augustus is commonly known as the "father of probation." NEIL P. COHEN & JAMES J. GOBERT, *THE LAW OF PROBATION AND PAROLE* 7 (1983). In 1841, Augustus began voluntarily providing bail for offenders in the local courts to obtain postponement of their sentences, conditioned upon their good behavior. See CHUTE & BELL, *supra* note 122, at 38; Greenberg, *supra* note 122, at 48-49. Augustus helped the offenders obtain employment, cope with family problems, find homes, and deal with other practical matters. See CHUTE & BELL, *supra* note 122, at 38. At the end of the postponement he brought the offenders back to court where, if there were no further complaints against them, the judge imposed a nominal fine. *Id.* Augustus called this process "bail[ing] out on probation." *Id.*

¹⁴⁴ See *supra* note 143.

¹⁴⁵ See CAMPBELL, *supra* note 101, at 18, 25.

¹⁴⁶ See CHUTE & BELL, *supra* note 122, at 38; Greenberg, *supra* note 122, at 49.

and not on generally deterring the public.¹⁴⁷ General deterrence is therefore not a valid goal of probation in Massachusetts.¹⁴⁸

Several federal courts, in defining the legitimate goals of probation, have distinguished general deterrence from the concepts of rehabilitation and protection of the public.¹⁴⁹ In 1985, in *United States v. Abushaar*, the United States Court of Appeals for the Third Circuit held that a probation condition that served only the purpose of general deterrence was invalid.¹⁵⁰ An alien, who made false statements to the Immigration and Naturalization Service regarding his involvement in

¹⁴⁷ See *Commonwealth v. Olsen*, 541 N.E.2d 1003, 1004-05 (Mass. 1989) ("Probation is granted with the hope that the probationer will be able to rehabilitate himself or herself under the supervision of the probation officer."); *Commonwealth v. Vincente*, 540 N.E.2d 669, 671 (Mass. 1989) ("Evidence that a probationer is not complying with the conditions of probation may indicate that he or she has not been rehabilitated and continues to pose a threat to the public."); *King v. Commonwealth*, 140 N.E. 253, 254 (Mass. 1923) ("judge . . . places the defendant on probation upon certain terms and conditions, provided such disposition can be made with due regard to the protection of the community, and the past history and present disposition of the person . . . indicate that he may reasonably be expected to reform without punishment").

¹⁴⁸ See *Olsen*, 541 N.E.2d at 1004-05; *Vincente*, 540 N.E.2d at 670; *King*, 140 N.E. at 254; see also CAMPBELL, *supra* note 101, at 18, 25; CHUTE & BELL, *supra* note 122, at 38; Greenberg, *supra* note 122, at 49; Weissman, *supra* note 131, at 373-74.

¹⁴⁹ See *United States v. Tolla*, 781 F.2d 29, 35 (2d Cir. 1986) (message to public 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 not reasonably related to rehabilitation and protecting public). *But see* *United States v. Tonry*, 605 F.2d 144, 148 (5th Cir. 1979) (conditions must be reasonably related to "rehabilitation of the probationer, protection of the public against other offenses during its term, deterrence of future misconduct by the probationer or general deterrence of others, condign punishment, or some combination of these objectives"); *United States v. Arthur*, 602 F.2d 660, 664 (4th Cir.) (upholding probation condition of community service as reasonably related to rehabilitation and protecting public, noting that condition served, in part, as deterrent to other potential offenders), *cert. denied*, 444 U.S. 992 (1979).

Recent amendments to federal sentencing laws confuse the issue. Federal law now distinguishes between probation, in which there is no prison term imposed, and "supervised release," in which a period of probation follows a prison term. 18 U.S.C. §§ 3563(b), 3583(d) (1988 & Supp. 1992). Both may "afford adequate deterrence to criminal conduct" and "protect the public from further crimes of the defendant." 18 U.S.C. §§ 3553(a)(2)(B) & (C), 3563(b), 3583(d)(1). One may interpret "deterrence to criminal conduct" to mean general deterrence, because reading it to mean specific deterrence would make the two phrases redundant. See 18 U.S.C. § 3553(a). Straight probation conditions may "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense." See 18 U.S.C. §§ 3553(a)(2)(A), 3563(b). Supervised release conditions, however, may not serve these goals. See 18 U.S.C. §§ 3553(a), 3583(d)(1). The reason for this distinction may be that the prison term satisfies the sentencing purposes of punishment and general deterrence, thus obviating the need to consider those factors in conditions of supervised release. See 18 U.S.C. §§ 3553(a)(2), 3563(b), 3583(d)(1).

¹⁵⁰ 761 F.2d 954, 959 (3d Cir. 1985).

a scheme to fraudulently obtain permanent residence status, appealed a probation condition requiring him to stay out of the United States during his probation.¹⁵¹ The Third Circuit noted that the government's sole reason for the condition was general deterrence: to deter others from committing similar offenses.¹⁵² The court stated that probation conditions that deter others by way of example are not necessarily invalid, but to survive they must serve substantially the purposes of probation: rehabilitation and protection of the public.¹⁵³ Because the sole purpose of the condition was general deterrence, the court invalidated it as unrelated to the goals of probation.¹⁵⁴ Explicit in the court's reasoning is the conclusion that general deterrence is a concept wholly distinct from rehabilitation and protection of the public.¹⁵⁵

The United States Court of Appeals for the Second Circuit similarly distinguished general deterrence from rehabilitation and protection of the public in 1986, in *United States v. Tolla*.¹⁵⁶ The court reviewed probation conditions prohibiting a teacher, convicted of making false statements to the Internal Revenue Service, from teaching students under age eighteen during her probation.¹⁵⁷ The court rejected the trial judge's justification that allowing a perjurer to teach young people would send a bad message to the public.¹⁵⁸ The court explained that the sentencing court's objective should be the goals of probation, not the message to the public.¹⁵⁹ Nevertheless, the court upheld the condition because it would protect the impressionable children from the defendant's possible propensity for dishonesty.¹⁶⁰ Thus, the court distinguished general deterrence from rehabilitation and protection of the public.¹⁶¹

¹⁵¹ *Id.* at 954-55.

¹⁵² *Id.* at 958.

¹⁵³ *See id.* at 959.

¹⁵⁴ *Id.*

¹⁵⁵ *Abushaar*, 761 F.2d at 959.

¹⁵⁶ *See* 781 F.2d 29, 35 (2d Cir. 1986).

¹⁵⁷ *Id.* at 31.

¹⁵⁸ *See id.* at 34-35.

¹⁵⁹ *See id.* at 35.

¹⁶⁰ *See id.*

¹⁶¹ *See Tolla*, 781 F.2d at 35.

III. THE STANDARD OF REVIEW OF PROBATION CONDITIONS

A. *The Standard of Review Generally*

Sentencing judges have broad discretion in fashioning probation conditions.¹⁶² The basic standard of review for abuse of this discretion is whether the conditions are "reasonably related" to the goals of probation.¹⁶³ The United States Court of Appeals for the Ninth Circuit applied this standard in the 1980 case of *Higdon v. United States*.¹⁶⁴ The court of appeals held that probation conditions requiring the probationer to forfeit all assets and work three years of full-time charity work were not reasonably related to rehabilitation or protection of the public.¹⁶⁵ Army Master Sergeant Higdon was convicted of defrauding the government of several hundred thousand dollars while he operated servicemen's clubs in Vietnam.¹⁶⁶ The United States District Court for the Central District of California imposed a five-year suspended prison term and placed Higdon on probation.¹⁶⁷ Special conditions of probation required Higdon to forfeit all his assets, including his home, and to work full time for charity for three years, without pay.¹⁶⁸

On appeal, the Ninth Circuit invalidated the conditions as not reasonably related to rehabilitating the probationer or protecting the public.¹⁶⁹ The court established an analytical framework within which to evaluate the reasonable relationship.¹⁷⁰ First, the court considered whether the trial judge imposed the conditions for a permissible purpose.¹⁷¹ If the purpose were impermissible, the conditions would fail.¹⁷² Second, the court considered whether the impact of the conditions was substantially greater than necessary to carry out the purposes.¹⁷³ If

¹⁶² See *United States v. Lowe*, 654 F.2d 562, 567 (9th Cir. 1981); *State v. Moses*, 618 A.2d 478, 480 (Vt. 1992).

¹⁶³ 18 U.S.C. § 3563(b) (1988 & Supp. 1991) (judge may fashion conditions "to the extent that such conditions are reasonably related to" enumerated goals); LAFAYE & ISRAEL, *supra* note 18, at 943.

¹⁶⁴ 627 F.2d 893, 898 (9th Cir. 1980).

¹⁶⁵ *Id.* at 896, 898.

¹⁶⁶ *Id.* at 896.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Higdon*, 627 F.2d at 898.

¹⁷⁰ See *id.* at 897.

¹⁷¹ *Id.*

¹⁷² See *id.*

¹⁷³ *Id.*

so, the conditions would fail.¹⁷⁴ The court then applied this framework to the case.¹⁷⁵

The Ninth Circuit stated that the permissible purposes of probation are rehabilitation and protection of the public.¹⁷⁶ The court warned that, although punishment may be an incidental effect of conditions that serve the permissible goals, punishment may not be the primary purpose of a condition.¹⁷⁷ The court also explained that probation conditions may not be used to circumvent statutory sentencing limits.¹⁷⁸ The court specified that a proper inquiry into the sentencing judge's purpose includes an examination of the text of the conditions and the transcript of the judge's remarks at the sentencing hearing.¹⁷⁹ The transcript of Higdon's sentencing hearing indicated that the judge was outraged at Higdon's abuse of public trust during wartime, and believed that the statutory maximum sentence was too lenient.¹⁸⁰ The Ninth Circuit also stated that the severity of the conditions might indicate an impermissible purpose.¹⁸¹ The court, however, declined to decide whether the judge's primary purpose was punishment.¹⁸²

The Ninth Circuit then considered whether the conditions were reasonably related to permissible purposes.¹⁸³ The court reiterated that the conditions must not restrict the probationer's lawful activities substantially more than necessary.¹⁸⁴ The court then carefully examined the effect of the forfeiture of assets and the burdensome work schedule.¹⁸⁵ The court concluded that the staggering impact of the conditions disrupted Higdon's family life and health, and led him to violate probation, thus frustrating the rehabilitative goal.¹⁸⁶ Because the impact of the conditions was substantially greater than necessary to ac-

¹⁷⁴ *Higdon*, 627 F.2d at 897.

¹⁷⁵ *See id.* at 898. The court noted that yet another consideration, the extent to which the conditions serve the legitimate needs of law enforcement, might be relevant in some cases. *Id.* at 897 n.7. The court cited as an example a case where probation officers wished to conduct occasional searches of a drug dealer to prevent recidivism. *Id.*

¹⁷⁶ *Id.* at 897-98.

¹⁷⁷ *Higdon*, 627 F.2d at 898 & n.8.

¹⁷⁸ *Id.* at 898.

¹⁷⁹ *See id.* at 898 & n.9.

¹⁸⁰ *See id.* at 898 & n.11.

¹⁸¹ *Id.* at 898.

¹⁸² *Higdon*, 627 F.2d at 898.

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See id.* at 899-900.

¹⁸⁶ *See id.* at 896.

compish their goals, the court held that the condition was not reasonably related to the permissible goals.¹⁸⁷

Thus, the most basic standard of review of probation conditions asks whether they are reasonably related to the goals of probation.¹⁸⁸ The purpose must be a permissible one, i.e., one of the goals of probation.¹⁸⁹ The requirement of a reasonable relationship between the condition and the goals means only that the conditions must not be substantially more restrictive than necessary to accomplish the permissible purpose.¹⁹⁰

B. *Probation Conditions That Restrict Probationers' Fundamental Rights: The Standard of Appellate Review*

The mere fact that a probation condition restricts a fundamental right does not invalidate the condition.¹⁹¹ Nevertheless, courts subject probation conditions that restrict fundamental rights to more careful review than the mere "reasonable relationship" standard.¹⁹² Massachusetts requires that such conditions be necessary to the purposes of rehabilitation and protection of the public.¹⁹³ Other jurisdictions apply various, less stringent standards of review to conditions that restrict fundamental rights.¹⁹⁴ Although Massachusetts has not yet ruled on probation conditions that restrict probationers' freedom of expression, other jurisdictions have applied their less stringent standards of review to such conditions.¹⁹⁵

1. Conditions That Restrict Probationers' Fundamental Rights: Massachusetts Law

In 1988, in *Commonwealth v. LaFrance*, the Supreme Judicial Court of Massachusetts considered for the first time a probation condition

¹⁸⁷ See *Higdon*, 627 F.2d at 898, 899-900.

¹⁸⁸ See *supra* notes 162-87 and accompanying text.

¹⁸⁹ See *Higdon*, 627 F.2d at 897.

¹⁹⁰ See *id.* at 898.

¹⁹¹ *United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991).

¹⁹² See *United States v. Peete*, 919 F.2d 1168, 1181 (6th Cir. 1990) (conditions that restrict fundamental rights subject to careful review); *United States v. Lowe*, 654 F.2d 562, 568 (9th Cir. 1981) (judicial discretion carefully reviewed where conditions restrict fundamental rights); *State v. Friberg*, 435 N.W.2d 509, 516 (Minn. 1989) (judicial discretion carefully reviewed where conditions restrict fundamental rights).

¹⁹³ See *infra* notes 196-205 and accompanying text.

¹⁹⁴ See *infra* notes 206-10 and accompanying text.

¹⁹⁵ See *infra* notes 235-70 and accompanying text.

that restricted a probationer's fundamental rights.¹⁹⁶ The court invalidated a probation condition authorizing warrantless searches by a probation officer, because warrantless searches are not necessary to accomplish the goals of probation.¹⁹⁷ Following LaFrance's plea of guilty to burglary and larceny, the trial court sentenced LaFrance to a suspended sentence with probation for two years.¹⁹⁸ The trial court ordered, as a special condition of probation, that the defendant submit to searches, with or without a warrant, at the request of a probation officer.¹⁹⁹

On appeal, the Supreme Judicial Court of Massachusetts first held that, under article fourteen of the Massachusetts Declaration of Rights, the probation condition could validly subject LaFrance to searches based on reasonable suspicion, rather than probable cause.²⁰⁰ The court reasoned that the reduced level of required suspicion was nec-

¹⁹⁶ See 525 N.E.2d 379, 381 (Mass. 1988).

¹⁹⁷ See *id.* at 382-83.

¹⁹⁸ *Id.* at 380.

¹⁹⁹ *Id.* at 380 n.2. The condition required the defendant to "[s]ubmit to any search of herself, her properties or any place where she then resides or is situate, with or without a search warrant, by a probation officer or by any law enforcement officer at the direction . . . of the probation officer." *Id.*

²⁰⁰ *LaFrance*, 525 N.E.2d at 381. The text of article fourteen provides that:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant . . . to . . . search . . . arrest . . . or seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure. . . .

MASS. CONST. part I, art. XIV.

The court noted that the United States Supreme Court recently upheld a state regulation that authorized warrantless searches by probation officers based on reasonable grounds. *LaFrance*, 525 N.E.2d at 381 (citing *Griffin v. Wisconsin*, 483 U.S. 868 (1987)). The Fourth Amendment generally requires government agents to obtain a warrant based on probable cause before conducting a search or seizure. See *LAFAVE & ISRAEL*, *supra* note 18, at 109. In *Griffin*, the United States Supreme Court noted that the text of the Fourth Amendment mandates that judicial warrants may issue only upon probable cause. 483 U.S. at 877; see U.S. CONST. amend. IV ("no Warrants shall issue, but upon probable cause"). The holding of the Supreme Judicial Court of Massachusetts in *LaFrance* contradicts this aspect of *Griffin*. See *LaFrance*, 525 N.E.2d at 381-82; see also *Griffin*, 483 U.S. at 877-78. To comply with *Griffin*, the *LaFrance* court should have (1) permitted warrantless searches upon reasonable suspicion, or (2) required search warrants based upon probable cause. See *LaFrance*, 525 N.E.2d at 381-82; see also *Griffin*, 483 U.S. at 877-78. Although article fourteen of the Massachusetts Declaration of Rights does not contain a probable cause requirement for warrants, the Fourth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply against the states. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (Fourth Amendment protection against unreasonable searches and seizures, incorporated through Fourteenth Amendment, imposes exclusionary rule on states); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (Fourth Amendment right to privacy enforceable against states through Due Process Clause of Fourteenth Amendment).

essary to aid LaFrance's rehabilitation, to ensure her compliance with the probation conditions, and to protect the public.²⁰¹ The court next held that the probation condition could not validly subject LaFrance to warrantless searches under article fourteen.²⁰² The court observed that eliminating the warrantless search condition would not impede the goals of probation: rehabilitation and protecting the public.²⁰³ Therefore, the court held, warrantless searches were not necessary to accomplish the goals of probation.²⁰⁴ The court thus held that, where probation conditions restrict a probationer's fundamental rights against unreasonable searches and seizures, the restriction must be necessary to serve the goals of probation: rehabilitation and protecting the public.²⁰⁵

2. Conditions That Restrict Probationers' Fundamental Rights: Jurisdictions Other Than Massachusetts

Jurisdictions other than Massachusetts also apply heightened scrutiny to probation conditions that restrict fundamental rights.²⁰⁶ Those jurisdictions, however, apply this heightened scrutiny less stringently than Massachusetts' "necessary to accomplish the purposes of probation" test.²⁰⁷ In one formulation of this heightened scrutiny test, courts balance three factors: (1) the goals of probation; (2) the extent to which the constitutional rights enjoyed by law abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement.²⁰⁸ In another formulation, the condition must be (1) care-

One may try to reconcile *Griffin* and *LaFrance* by holding that probation officer searches are administrative searches, for which warrants may issue upon less than probable cause. See *Griffin*, 483 U.S. at 877 n.4; *LaFrance*, 525 N.E.2d at 381-82; see also *LAFAVE & ISRAEL*, *supra* note 18, at 944-45. However, the Court's opinion in *Griffin* indicates that probation officer searches are not administrative searches. See *Griffin*, 483 U.S. at 877-78. Thus, it seems that the *Griffin* Court has interpreted the Fourth Amendment to require a state to provide less protection of privacy rights than its own state constitution would otherwise provide. See *Griffin*, 483 U.S. at 877-78; *LaFrance*, 525 N.E.2d at 381-82.

²⁰¹ See *LaFrance*, 525 N.E.2d at 381. The court warned, however, that no level of suspicion below reasonable suspicion would meet the requirements of article 14. *Id.* at 381-82.

²⁰² *Id.* at 382.

²⁰³ *Id.* at 383 ("[u]pholding the warrant requirements for searches of the probationer's home does not impede the dual goals of probation, protecting the public and rehabilitation") (quoting *State v. Griffin*, 388 N.W.2d 535, 545 (Wis. 1986) (Abrahamson, J., dissenting), *aff'd*, 483 U.S. at 868 (1987)).

²⁰⁴ See *id.* at 382-83.

²⁰⁵ See *LaFrance*, 525 N.E.2d at 381-83.

²⁰⁶ See *infra* notes 208-10 and accompanying text.

²⁰⁷ See *infra* notes 208-10 and accompanying text.

²⁰⁸ See *United States v. Lowe*, 654 F.2d 562, 567 (9th Cir. 1981); *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979); *State v. Haynes*, 423 N.W.2d 102, 103-04 (Minn. Ct. App. 1988).

fully drawn to serve the goals of probation, and (2) logically related to the criminal conduct in which the probationer engaged.²⁰⁹ Finally, some courts merely state that probation conditions restricting a probationer's freedom must be "especially fine-tuned."²¹⁰

3. Conditions That Restrict Probationers' Freedom of Expression as Protected by the First Amendment

Determining whether Power's probation condition restricts a fundamental right requires a brief examination of the First Amendment's protection of freedom of expression.²¹¹ No Massachusetts law governs probation conditions restricting freedom of expression.²¹² Other jurisdictions, however, have upheld such conditions to the extent that they relate to preventing the probationer from repeating his or her crime.²¹³ Two federal courts have upheld conditions prohibiting probationers from selling their crime stories.²¹⁴

a. *The First Amendment: Freedom of Expression*

The First Amendment to the United States Constitution prevents the government from abridging the freedom of expression.²¹⁵ Freedom of expression encourages social discourse on important and controversial issues.²¹⁶ The First Amendment's essence prevents the government from prohibiting the expression of an idea merely because society finds it distasteful.²¹⁷ If the government regulates speech based on its content, i.e., the message itself or the effect of the message on its audience, the government must generally show that the regulation is narrowly drawn to serve a compelling state interest.²¹⁸

²⁰⁹ See *United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991).

²¹⁰ *United States v. Smith*, 972 F.2d 960, 961 (8th Cir. 1992).

²¹¹ See *infra* notes 215-34 and accompanying text.

²¹² See *Brief for Appellant*, *supra* note 13, at 32.

²¹³ See *infra* notes 235-70 and accompanying text.

²¹⁴ See *infra* notes 271-82 and accompanying text.

²¹⁵ U.S. CONST. amend. I. The text of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." *Id.*

²¹⁶ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²¹⁷ *Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991).

²¹⁸ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 833 (2d ed. 1988). The government may alternatively show that the speech falls within an unprotected category such as fighting words, obscenity or defamation. See *id.* at 849, 861.

The government need not completely prohibit speech to restrict the freedom of expression.²¹⁹ Imposing a financial burden on speakers because of the content of their speech is presumptively inconsistent with the First Amendment.²²⁰ In 1991, in *Simon & Schuster v. New York Crime Victims Board*, the United States Supreme Court invalidated a law that restricted the ability of criminals to profit from telling their crime stories.²²¹ New York's "Son of Sam" law placed the compensation for such crime stories in an escrow account for five years, to satisfy claims against a criminal by his or her victims, the victims' families, the criminal's creditors, and state and local tax authorities.²²² The Court observed that the statute imposed a financial burden on speech based on its content.²²³ According to the Court, therefore, to survive constitutional scrutiny, the statute must be necessary to a compelling state interest and narrowly drawn to achieve that end.²²⁴

The Court recognized compensation of crime victims from the proceeds of the crime as a compelling state interest.²²⁵ The Court, however, held that the New York legislature did not narrowly tailor the statute to serve that purpose.²²⁶ The statute applied to any work that expressed the criminal's thoughts about the crime, however incidentally or tangentially.²²⁷ Moreover, the statute applied to any author who *admitted* commission of a crime, regardless of whether the person was ever accused or convicted.²²⁸ The Court also observed that the criminal's creditors would have claims against the proceeds, in addition to the victims and their families.²²⁹ The Court concluded that the "Son of Sam" law was overinclusive because the law reached many works that neither enabled criminals to profit from their crimes nor left victims uncompensated.²³⁰ The Court, therefore, invalidated New York's Son

²¹⁹ See *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

²²⁰ See *Leathers*, 499 U.S. at 447.

²²¹ 112 S. Ct. at 512.

²²² N.Y. EXEC. LAW § 632-a (repealed by 1992 N.Y. Laws c. 618, § 10, effective July 24, 1992) (West 1982 & Supp. 1994). The statute defined a convicted criminal as one who pled guilty to a crime, was convicted of a crime after trial, or admitted to the commission of a crime. *Id.*

²²³ See *Simon & Schuster*, 112 S. Ct. at 509.

²²⁴ *Id.* at 509.

²²⁵ *Id.* at 511. The Court expressly left open the question of whether book royalties can properly be termed proceeds of a crime. *Id.* at 510. The Court noted that singling out income from "storytelling" was unrelated to the state's interest in transferring all crime proceeds from criminals to victims. *Id.* at 510.

²²⁶ *Simon & Schuster*, 112 S. Ct. at 512.

²²⁷ *Id.* at 511.

²²⁸ *Id.*

²²⁹ *Id.* at 512.

²³⁰ *Id.* at 511.

of Sam law because it was not narrowly tailored to compensate crime victims from the crime proceeds.²³¹

Simon & Schuster establishes that the government need not actually prohibit speech to implicate First Amendment rights.²³² Restricting the ability to profit from certain speech based on the content of that speech restricts First Amendment rights and is presumptively unconstitutional.²³³ Therefore, a probation condition that prohibits a probationer from profiting by selling his or her crime story restricts the probationer's fundamental right to freedom of expression.²³⁴

b. *Probation Conditions That Restrict Probationers' Freedom of Expression: Jurisdictions Other Than Massachusetts*

The Power probation restriction on freedom of expression presents an issue of first impression under Massachusetts law.²³⁵ Other jurisdictions, however, have ruled on such conditions.²³⁶ These jurisdictions generally uphold conditions that restrict probationers' freedom of expression, to the extent that the conditions are related to preventing the probationer from repeating his or her crime.²³⁷ For example, in 1981, in *United States v. Lowe*, the United States Court of Appeals for the Ninth Circuit upheld probation conditions that restricted the probationers' ability to distribute leaflets and assemble near a nuclear submarine base.²³⁸ The court reasoned that the conditions were closely related to the probationers' crime: trespassing on the base during a demonstration.²³⁹

The probationers in *Lowe* trespassed on the Naval Submarine Base in Bangor, Washington to protest the government's maintenance of the Trident weapons system.²⁴⁰ During one of a series of demonstrations at the base, the probationers scaled a boundary fence and entered Navy property.²⁴¹ Following conviction for this unlawful entry, the

²³¹ *Simon & Schuster*, 112 S. Ct. at 512.

²³² *See id.* at 509.

²³³ *See id.*

²³⁴ *See id.*

²³⁵ *See Brief for Appellant, supra* note 13, at 32.

²³⁶ *See infra* notes 235-70 and accompanying text.

²³⁷ *See United States v. Tonry*, 605 F.2d 144, 146, 150-51 (5th Cir. 1979) (upholding probation condition prohibiting former Congressman from participating in politics, where former Congressman violated election laws).

²³⁸ *See United States v. Lowe*, 654 F.2d 562, 567-568 (9th Cir. 1981).

²³⁹ *See id.* at 564, 567-68.

²⁴⁰ *Id.* at 564.

²⁴¹ *Id.*

trial court ordered suspended sentences and imposed a probation condition that the probationers not come within 250 feet of the base.²⁴² This condition effectively prevented the probationers from distributing leaflets on the public road adjacent to the boundary fence.²⁴³ The condition also prevented them from attending weekly anti-Trident meetings on private property adjacent to the base.²⁴⁴

On appeal, the Ninth Circuit upheld the conditions against the probationers' freedom of speech and freedom of association challenges.²⁴⁵ The court recognized that probation conditions restricting fundamental rights merit careful review.²⁴⁶ The court stated that such conditions, to be valid, must be designed primarily to rehabilitate the probationer and protect the public.²⁴⁷ The court considered the following factors in evaluating the condition: (1) the purposes of probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement.²⁴⁸

Applying these factors to the facts, the court first noted that the condition protected the public from repeat offenses by the probationers.²⁴⁹ Because their offense required them to climb the barrier fence, the court reasoned that the 250-foot restriction discouraged the probationers from repeating their crime and protected the public from further crimes.²⁵⁰ Second, the court noted that the condition imposed a minimal restriction on freedom of expression and association.²⁵¹ The court reasoned that the condition only restricted the First Amendment activities that required close proximity to the barrier fence.²⁵² Outside the 250-foot zone, the probationers enjoyed the same First Amendment rights as law-abiding citizens.²⁵³ Finally, the court noted that the 250-foot zone served as a buffer, enabling law enforcement officials to detect probation violations.²⁵⁴ The court thus upheld probation condi-

²⁴² *Id.*

²⁴³ *Lowe*, 654 F.2d at 564.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 567-68.

²⁴⁶ *Id.* at 567.

²⁴⁷ *Id.*

²⁴⁸ *Lowe*, 654 F.2d at 567.

²⁴⁹ *See id.* at 567-68.

²⁵⁰ *See id.*

²⁵¹ *See id.*

²⁵² *See id.*

²⁵³ *See Lowe*, 654 F.2d at 567-68.

²⁵⁴ *Id.* at 568.

tions restricting freedom of speech and association because the conditions were closely related to the probationers' crime.²⁵⁵

When, however, conditions that restrict freedom of expression extend beyond preventing recidivism, courts narrow the conditions or eliminate them completely.²⁵⁶ For example, in 1971, in *In re Mannino*, a California appeals court invalidated probation conditions prohibiting the defendant from speaking or writing in protest, and prohibiting membership in protest organizations.²⁵⁷ The court upheld, however, a condition forbidding active participation in a demonstration.²⁵⁸ In *Mannino*, a California trial court convicted the defendant for an assault stemming from his active participation in a demonstration.²⁵⁹ In overturning the probation conditions prohibiting protest speech or writing and membership in protest organizations, the appellate court reasoned that writing and membership in protest organizations were unrelated to a recurrence of the crime.²⁶⁰ The court recognized that speaking might lead to another confrontation under certain circumstances, but the prohibition of all forms of protest speech was overbroad.²⁶¹ Finally, the court reasoned that active demonstration had led to the crime and would likely do so again, thus the prohibition against active participation in demonstrations was valid.²⁶² Thus, the court invalidated probation conditions that restricted freedom of expression insofar as they were unrelated to preventing recidivism by the probationer.²⁶³

Similarly, in 1971, in *Porth v. Templar*, the United States Court of Appeals for the Tenth Circuit struck down probation conditions that prohibited the probationer from speaking or writing activities that questioned the constitutionality of the federal tax laws.²⁶⁴ The trial court convicted the probationer of failure to file his tax returns.²⁶⁵ The probationer was involved in a campaign to urge people to disregard the federal income tax laws.²⁶⁶ The appellate court reasoned that al-

²⁵⁵ See *id.* at 567-68.

²⁵⁶ See *Porth v. Templar*, 453 F.2d 330, 334 (10th Cir. 1971); *In re Mannino*, 92 Cal. Rptr. 880, 886-87 (Cal. Ct. App. 1971).

²⁵⁷ 92 Cal. Rptr. at 886-87.

²⁵⁸ *Id.* at 887.

²⁵⁹ *Id.* at 881.

²⁶⁰ See *id.* at 886.

²⁶¹ See *id.* at 886-87.

²⁶² *Mannino*, 92 Cal. Rptr. at 887.

²⁶³ See *id.* at 886-87.

²⁶⁴ 453 F.2d 330, 334 (10th Cir. 1971).

²⁶⁵ *Id.* at 332.

²⁶⁶ *Id.* at 334.

lowing the defendant to express his opinion on the tax laws was not harmful.²⁶⁷ Accordingly, the condition was invalid.²⁶⁸ The court stated, however, that the condition could validly prohibit the defendant from encouraging others to violate the tax laws.²⁶⁹ Thus, the court invalidated probation conditions that restricted freedom of expression insofar as they were unrelated to preventing a recurrence of the probationer's crime.²⁷⁰

c. *Cases Upholding Conditions Similar to Power's Probation Conditions*

Two courts have upheld probation conditions that prohibit criminals from profiting by selling their stories.²⁷¹ In 1988, in *United States v. Terrigno*, the United States Court of Appeals for the Ninth Circuit upheld a probation condition prohibiting Terrigno from profiting by selling her crime story.²⁷² The trial court convicted Terrigno of embezzlement of public funds that were intended for the poor and homeless.²⁷³ Reviewing the limitation on Terrigno's ability to sell her story, the court of appeals determined that the condition did not restrict Terrigno's freedom of speech, merely her ability to profit thereby.²⁷⁴ The court reasoned that the profit restriction would send a message to Terrigno that "crime doesn't pay," aiding her rehabilitation.²⁷⁵ The court of appeals thus held that the restriction on profit by selling a crime story was reasonably related to Terrigno's rehabilitation.²⁷⁶

In 1986, in *United States v. Waxman*, the United States District Court for the Eastern District of Pennsylvania upheld, on Waxman's

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Porth*, 453 F.2d at 334. Although the court's reasoning might suggest that general deterrence drives its decision, advocacy of illegal conduct is a type of speech which has not traditionally enjoyed stringent First Amendment protection. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (government may proscribe advocacy of illegal conduct where advocacy is (1) directly related to producing imminent lawless action, and (2) likely to incite or produce such action). Moreover, the probationer's crime in *Porth* was part of a larger scheme to urge people to violate the federal income tax laws. See 453 F.2d at 334. The condition, as the court of appeals narrowed it, thus served to prevent the probationer from continuing down a path of illegal conduct. See *id.*

²⁷⁰ *Id.* at 334.

²⁷¹ *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988); *United States v. Waxman*, 638 F. Supp. 1245, 1246 (E.D. Pa. 1986). For an argument distinguishing these cases from *Power v. Commonwealth*, see *infra* notes 319-32 and accompanying text.

²⁷² See 838 F.2d at 374.

²⁷³ *Id.* at 373.

²⁷⁴ *Id.* at 374.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

motion for reconsideration, its own probation condition that Waxman not profit by selling his crime story.²⁷⁷ Waxman pled guilty to receiving stolen property in connection with numerous art thefts.²⁷⁸ The court stated that it did not impose the restriction on profit to punish Waxman.²⁷⁹ The court imposed the condition to send the message to Waxman, and to society, that "crime doesn't pay."²⁸⁰ The court stated that the condition did not restrict Waxman's freedom of speech, merely his ability to profit thereby.²⁸¹ Thus, the court held that the condition prohibiting profit was reasonably related to the purposes of probation.²⁸²

IV. KATHERINE ANN POWER'S PROBATION CONDITION

The United States Supreme Court has held that governmental imposition of a financial burden on speech based on its content is presumptively inconsistent with the First Amendment.²⁸³ Katherine Ann Power's probation condition prohibits her from profiting by selling her "story."²⁸⁴ The condition imposes a serious financial burden on speech of a specified content: anything related to her crime or her life as a fugitive.²⁸⁵ Therefore, the condition restricts her freedom of expression under the First Amendment.²⁸⁶ This restriction of a fundamental right triggers a more careful level of review than the mere reasonable relationship standard.²⁸⁷

²⁷⁷ See *Waxman*, 638 F. Supp. at 1246.

²⁷⁸ *Id.* at 1245.

²⁷⁹ *Id.* at 1246.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² See *Waxman*, 638 F. Supp. at 1246. Because the court intended to send a message to society, as well as to Waxman, the trial court apparently considered general deterrence to be a permissible purpose of probation. See *id.*

²⁸³ See *Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991).

²⁸⁴ *Appendix, supra* note 1, at 88-89, 117.

²⁸⁵ *Id.*

²⁸⁶ See *Simon & Schuster*, 112 S. Ct. at 509.

²⁸⁷ See *supra* notes 191-210 and accompanying text. The Supreme Judicial Court of Massachusetts could strike down this condition under several additional theories. The court could hold that the First Amendment establishes a base level of protection that every state must provide, regardless of each state's test for probation conditions that restrict fundamental rights. Such a holding would, of course, be subject to review by the United States Supreme Court. Similarly, the Supreme Judicial Court of Massachusetts could hold that article sixteen of the Massachusetts Declaration of Rights establishes a base level of protection upon which probation conditions may not infringe. See MASS. CONST. part I, art. XVI ("The right of free speech shall not be abridged."); see also *Commonwealth v. LaFrance*, 525 N.E.2d 379, 382 (Mass. 1988) (holding that warrantless searches by probation officer violate article fourteen of Massachusetts Declaration of Rights). Such a holding would not be open to federal review. When reviewing probation conditions

A. *The Power Probation Condition Is Not Necessary to a Permissible Purpose Under Massachusetts Probation Law*

The test for Massachusetts probation conditions that restrict fundamental rights asks whether the conditions are necessary to serve the goals of probation.²⁸⁸ The dual goals that Massachusetts probation conditions must serve are rehabilitation of the probationer and protection of the public against the probationer's recidivism.²⁸⁹ General deterrence, aimed at the public at large, is not a permissible goal of Massachusetts probation.²⁹⁰ One can test whether a condition is necessary to the goals of probation by asking whether eliminating the condition would impede the goals of probation, as the Supreme Judicial Court of Massachusetts did in *Commonwealth v. LaFrance*.²⁹¹ Would eliminating the condition impede efforts to rehabilitate Katherine Ann Power and to protect the public from her recidivism?

1. *The Probation Condition Is Not Necessary for Rehabilitation or Protecting the Public Against Recidivism*

The probation condition is not necessary to Power's rehabilitation because she has already taken steps to rehabilitate herself. Power turned herself in to suffer the consequences of her actions.²⁹² She does not deny responsibility for the death of Officer Schroeder.²⁹³ Power regrets the pain that she caused the Schroeder family.²⁹⁴ Power's ability to admit responsibility for her crime is an essential step toward rehabilitation.²⁹⁵

restricting freedom of expression, however, state and federal courts have merely asked whether the restriction is acceptable in light of the goals of probation, rather than find a base level of constitutional protection for probationers. *See supra* notes 235-70 and accompanying text.

Finally, the court could avoid the constitutional issue by declaring that concurrent sentences of probation and imprisonment violate the Massachusetts probation statute. *See supra* notes 118-23 and accompanying text. Avoiding constitutional issues where other grounds for decision are available is a fundamental rule of judicial restraint. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985) (prior to reaching constitutional questions, federal courts must consider non-constitutional grounds for decision); *Globe Newspaper Co. v. Comm'r*, 571 N.E.2d 617, 619 (Mass. 1991) (addressing question of statutory interpretation first "so as to avoid the constitutional question if it is fairly possible to decide the case on other grounds"); *Commonwealth v. Bartlett*, 374 N.E.2d 1203, 1206 (Mass. 1978) (court will ordinarily "not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of").

²⁸⁸ *See Commonwealth v. LaFrance*, 525 N.E.2d 379, 381-83 (Mass. 1988).

²⁸⁹ *See supra* notes 129-61 and accompanying text.

²⁹⁰ *See supra* notes 139-61 and accompanying text.

²⁹¹ *See* 525 N.E.2d at 382-83.

²⁹² *See Appendix, supra* note 1, at 83.

²⁹³ *See id.*

²⁹⁴ *See id.*

²⁹⁵ *See United States v. Clark*, 918 F.2d 843, 845, 848 (9th Cir. 1990) (upholding probation

Ironically, the probation condition actually impedes Power's rehabilitation. She also pled guilty to robbing a federal armory, and the United States District Court for the District of Massachusetts sentenced her to a prison term concurrent with her state term.²⁹⁶ The district court *encouraged* Power to sell her story and share the proceeds with the Schroeder family.²⁹⁷ The court suggested this as a way for Power to demonstrate her remorse.²⁹⁸ Power can take no such action because of the state probation condition.²⁹⁹ A probation condition is necessary to a permissible purpose if eliminating the condition would impede that purpose.³⁰⁰ Permitting Power to sell her story and share the proceeds with the Schroeders would certainly not impede her rehabilitation. Thus, the probation condition is not necessary to her rehabilitation.

Restricting Power's ability to profit from selling her story bears no relationship to her recidivism. She lived a quiet life during her years in hiding, and harmed no one.³⁰¹ The only person she considered harming was herself, until her therapist began treating her.³⁰² Finally, what possible danger will Power pose to society from within the walls of her jail cell? Preventing Power from selling her story bears no logical relationship to preventing her recidivism, and is clearly not necessary to accomplish that purpose.

2. The Power Condition Is Not Necessary to Accomplish General Deterrence

Assuming, *arguendo*, that general deterrence is a permissible purpose of Massachusetts probation, prohibiting Power from selling her story is not necessary to accomplish general deterrence. Allowing Power to sell her story will have a negligible effect, if any, on the behavior of the general public in Massachusetts, which is the focus of general deterrence.³⁰³ The argument that the no-profit condition promotes general deterrence 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

condition that police officers, convicted of perjury, make public apology, because offender's recognition of fault is first step toward rehabilitation).

²⁹⁶ Daly, *supra* note 13, at A3.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ See *Brief for Appellant*, *supra* note 13, at Ex. B.

³⁰⁰ See *supra* notes 200-04 and accompanying text.

³⁰¹ See Carlson, *supra* note 11, at 61.

³⁰² See *id.*

³⁰³ See *supra* notes 139-42 and accompanying text.

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. Surely the restriction on Power's freedom of expression cannot be necessary to prevent publicity-driven criminals from following such an absurd plan.

B. *Even Under the Less Stringent Tests of Other Jurisdictions, the Power Condition Would Fail*

1. The Power Condition Does Not Meet the "Heightened Scrutiny" Test

Other jurisdictions have upheld conditions that restrict probationers' freedom of expression to the extent that they prevent the probationers from repeating their crimes.³⁰⁴ In 1971, in *In re Mannino*, a California appeals court struck down probation conditions that restricted the probationer's freedom of expression.³⁰⁵ Mannino committed an assault in connection with his role in an anti-war demonstration.³⁰⁶ The court reasoned that the conditions prohibiting him from writing or speaking in protest of the war bore no relation to preventing his recidivism.³⁰⁷ The court, however, upheld the condition prohibiting Mannino from active participation in demonstrations.³⁰⁸ The court reasoned that this condition kept Mannino out of the circumstances that led to his crime and would likely lead to a repeat offense.³⁰⁹ Thus, the court upheld conditions restricting Mannino's freedom of expression only insofar as they prevented him from repeating his crime.³¹⁰

The condition that prevents Katherine Ann Power from selling her story bears absolutely no relationship to preventing her recidivism. Power's crime was committed as part of a bank robbery. She cannot possibly commit another bank robbery while serving an eight to twelve year prison sentence. Even if she were not in prison, there is no reason to believe she is likely to commit another bank robbery. During her time in hiding she has shown no propensity for robbing banks.³¹¹ She understands that her crime was inexcusable and irresponsible.³¹²

³⁰⁴ See *supra* notes 235-70 and accompanying text.

³⁰⁵ 92 Cal. Rptr. 880, 887 (Cal. Ct. App. 1971).

³⁰⁶ *Id.* at 887.

³⁰⁷ *Id.* at 886-87.

³⁰⁸ *Id.* at 887.

³⁰⁹ *Id.*

³¹⁰ See *Mannino*, 92 Cal. Rptr. at 886-87.

³¹¹ See Carlson, *supra* note 11, at 61.

³¹² See *Appendix, supra* note 1, at 83.

Furthermore, in the cases upholding probation conditions that restrict freedom of expression, the conditions kept the probationers out of the circumstances that led to their crimes.³¹³ This is not true of the condition in *Power v. Commonwealth*. The circumstances leading to Power's crime included her involvement in radical student groups in the late 1960s and early 1970s, and more specifically the plan to arm the Black Panthers.³¹⁴ Prohibiting Power from selling her story bears absolutely no relationship to insulating Power from those circumstances. Indeed, similar circumstances will likely never recur.

2. The Power Condition Does Not Meet the Mere "Reasonable Relationship" Test

Two federal courts have held that conditions similar to Power's are reasonably related to rehabilitation.³¹⁵ Although this is not the proper test of the Power condition under Massachusetts law, the Power condition is not even reasonably related to rehabilitation. In *Terrigno* and *Waxman*, the probationers received no prison time.³¹⁶ The courts, therefore, felt the need to send a message to the probationers by prohibiting profit.³¹⁷ The courts reasoned that sending such a message was reasonably related to rehabilitating the probationers.³¹⁸ In contrast, Katherine Ann Power is currently serving an eight to twelve year term of imprisonment. Years of incarceration will drive home a far stronger message than preventing Power from selling her story.

Terrigno and *Waxman* are distinguishable from the Power case for several reasons.³¹⁹ First, both *Terrigno* and *Waxman* preceded *Simon & Schuster v. New York Crime Victims Board*.³²⁰ In 1988, *Simon & Schuster* established that to impose a financial disincentive upon certain speech based on its content was to restrict freedom of expression.³²¹ The *Terrigno* and *Waxman* courts, however, expressly stated that the probation conditions prohibiting profit by selling crime stories did not restrict free speech.³²² Because the *Terrigno* and *Waxman* courts found

³¹³ See *supra* notes 235-70 and accompanying text.

³¹⁴ See Cohen, *supra* note 8, at 28.

³¹⁵ United States v. Terrigno, 838 F.2d 371, 375 (9th Cir. 1988); United States v. Waxman, 638 F. Supp. 1245, 1246 (E.D. Pa. 1986).

³¹⁶ *Terrigno*, 838 F.2d at 375; *Waxman*, 638 F. Supp. at 1245-46.

³¹⁷ *Terrigno*, 838 F.2d at 374; *Waxman*, 638 F. Supp. at 1246.

³¹⁸ *Terrigno*, 838 F.2d at 374; *Waxman*, 638 F. Supp. at 1246.

³¹⁹ See *Terrigno*, 838 F.2d at 374; *Waxman*, 638 F. Supp. at 1246.

³²⁰ See *Terrigno*, 838 F.2d at 371; *Waxman*, 638 F. Supp. at 1245.

³²¹ See *Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991).

³²² *Terrigno*, 838 F.2d at 374; *Waxman*, 638 F. Supp. at 1246.

no restriction of the fundamental right to free speech, the courts upheld the conditions under the mere reasonable relationship test.³²³

Second, by imposing concurrent terms of prison and probation, the trial court contorted the probation statute to impose more punishment than available through conventional sentencing options. In *Higdon v. United States*, the United States Court of Appeals for the Ninth Circuit stated that sentencing judges may not use probation conditions to circumvent conventional sentencing limits.³²⁴ To ascertain the trial court's motivation, the *Higdon* court examined the text of the probation order and the trial court's statements at sentencing.³²⁵ Examining the Power condition in this manner reveals that the trial court sought to effect more punishment on Power than available through the sentence that the District Attorney recommended.

At Power's sentencing, the trial court stated that he was departing from the plea agreement by adding a twenty-year term of probation.³²⁶ To explain the departure, the court said, "I will not permit profit from the life blood of a Boston police officer by someone responsible for his killing. That is repugnant to me. I could not live with myself if I permitted it."³²⁷ The trial court, therefore, understood that a prison term could not prevent Power from profiting. The only way for the court to prevent her from profiting was with the special condition of probation. As the Ninth Circuit observed in *Higdon*, probation conditions may not be the vehicle for circumvention of the limits of a prison sentence.³²⁸

Finally, by sending a message that "crime doesn't pay," the *Terrigno* and *Waxman* courts miss the critical issue. When a criminal sells his or her story to the media, it is publicity that pays, not crime. Courts should not decide that there are certain types of publicity from which people may not benefit. For better or for worse, the "marketplace of ideas" reflects the value that our free society places on speech.³²⁹ The price of freedom is that people must permit speech that they dislike.³³⁰ Although the thought of Power profiting by selling the story of her crime may be repugnant, the essence of the First Amendment is that government may not suppress speech merely because society finds it

³²³ *Terrigno*, 838 F.2d at 374; *Waxman*, 638 F. Supp. at 1246.

³²⁴ 627 F.2d 893, 898 (10th Cir. 1980).

³²⁵ *Id.*

³²⁶ See *Appendix*, *supra* note 1, at 88.

³²⁷ *Id.* at 89.

³²⁸ 627 F.2d at 898.

³²⁹ See *CJI Amicus Brief*, *supra* note 90, at 9.

³³⁰ See *id.*

offensive.³³¹ Indeed, it is unpopular speech that the First Amendment must protect.³³² Private individuals may censor offensive speech on their own by ignoring it. In the "marketplace of ideas," this may be the most effective disincentive of all.

V. CONCLUSION

In a free market, freedom of expression enables people to profit from both fame and infamy. Offended by Katherine Anne Power's potential to profit from her notoriety, the trial court imposed a probation condition that restricted Katherine Ann Power's freedom of expression. The condition is not necessary to either of the permissible purposes of probation in Massachusetts: rehabilitation of the probationer, and protecting the public from the probationer's recidivism. Therefore, the condition must fail as an unconstitutional restriction on Power's freedom of expression.

SHAUN B. SPENCER

³³¹ 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.")

³³² See *Johnson*, 491 U.S. at 414, *Pacifica Foundation*, 438 U.S. at 745-46.