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The Constitutionality of Cashing in on Crime: Free Expression, Free Enterprise and Not-Profit Conditions of Probation

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THE CONSTITUTIONALITY OF CASHING IN ON CRIME: FREE EXPRESSION, FREE ENTERPRISE AND NOT-PROFIT CONDITIONS OF PROBATION

I. INTRODUCTION

"Cashing in" on crime has become a most disturbing trend, from movies and books to T-shirts and trading cards. The controversy over criminals making money on their crimes has escalated in the 1990s. Rock lyrics by Charles Manson,[1] art by John Wayne Gacy[2] and his "1-900 I'M INNOCENT" telephone line,[3] Jeffrey Dahmer comic books,[4] television movies about the "Pom Pom Mom"[5] and the "Preppie Murderer",[6] the

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[1] Mike Van Winkle of the California Department of Justice tried to prevent Charles Manson, who was convicted of 7 counts of first degree murder including the 1969 murder of well-known actress Sharon Tate, from receiving royalties for the song about the Tate Killing, *Look At Your Game Girl*, recorded by heavy metal musicians Guns-N-Roses' on their Spaghetti Incident track. Chris Morris, *GN'R Cover of Manson Song Incites Uproar; Son of Sam Law May Bar Convict's Royalties*, Billboard, December 11, 1993, at 5.

[2] The court convicted John Wayne Gacy of murdering 33 young boys in addition to one count of deviate sexual assault and a second count of indecent liberties with a child. Investigators excavated 29 bodies from the crawl space under his home and discovered four bodies in IL rivers. Yet, an original painted while on death row sells for $20,000. *Death-Row Rembrandt*, Business Week, April 4, 1994, at 8; *Day One: Blood Money—The Legal Profits of Crime are Hot Stuff* (ABC television broadcast, May 2, 1994)(explaining "the absolute . . . all-time killer artist is John Wayne Gacy . . . He used to dress up as a clown for neighborhood children. Now, for thousands of dollars, he paints them"); *ABC News*: Terry Madsen, former Gacy Prosecutor (ABC television broadcast, May 2, 1994) (stating "there is no law that can prevent Gacy from selling his paintings or the public from buying them").

[3] Callers can dial in on a 1-900 line and pay $23.88 for a 12 minute call to hear Gacy accuse unnamed persons of the murders and burying the bodies under his home. *Serial Chic*, TIME, March 21, 1994, at 23.

[4] The court convicted Jeffrey Dahmer of 17 murders, cannibalism, and sentenced him to 957 years in prison, yet a comic book based on his life story sells for $12. Auctions have been planned to sell off Dahmer's freezer, dinnerware, hand saw, etc. *Day One: Blood Money—The Legal Profits of Crime are Hot Stuff* (ABC television broadcast, May 2, 1994).

[5] Wanda Webb Holloway and Verna Rae Heath are mothers of two girls who were competing for the same cheerleading position at Channelview Junior High School in Texas (hence the nickname and title for the television movie, "the pom pom mom"). Holloway, who plotted to kill her daughter's rival by paying a hit man, received 15 years in prison

Tonya Harding saga,[7] and network battles over *The Amy Fisher Story*[8] have been major money-makers in the 1990's. Killers are fixtures of pop culture today.[9] "Mass murder merchandise is selling as fast as its produced . . . the magic of marketing has turned criminals into commodities."[10] Yet, the same crime-obsessed society that feeds this market cringes at the thought of a criminal's selling his or her story at a high price tag.[11]

The adage "crime doesn't pay" is deeply ingrained in our legal tradition. Fundamental equitable principles have motivated not-profit legislation in many areas of the law.[12] Courts have incorporated into

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and a $10,000 fine. *Daily News*: John Waters, Director of *Serial Mom* (television broadcast, June 6, 1994).

[6] The strangulation of Jennifer Levin in Central Park, New York on August 26, 1986 by Yale student Robert Chambers coined him the nickname "the preppie murderer." *CNBC Show* (CNBC television broadcast, March 16, 1994).

[7] Olympic ice-skater pled guilty to conspiracy to commit hindering prosecution with respect to the attack on her competitor, Nancy Kerrigan and media circus ensued. *Nightline* (ABC television broadcast, March 16, 1994); Harding v. United States Figure Skating Assn., 851 F. Supp. 1476 (1994).

[8] Amy Fisher is in prison for shooting Long Island auto mechanic Joey Buttafuoco's wife, Mary Jo, and Mr. Buttafuoco is in prison for having sex with the teenage Amy Fisher. This "tale became the subject of three very profitable made-for-television movies. *Casualties of Love, The Long Island Lolita Story* reportedly made an estimated $500,000 to $700,000 for CBS while *Amy Fisher, My Story* reportedly made NBC somewhere in the neighborhood of $500,000 . . . *The Amy Fisher Story* is said to have raked in more than $1 million for ABC." *Sonya Live* (CNN television broadcast, Dec. 2, 1993).

[9] *Daily News* (television broadcast, June 6, 1994) (Director John Waters stating "Mass murderers are as famous as rock stars . . . notoriety and fame have become one in America. This is very American").

[10] *Day One: Blood Money—The Legal Profits of Crime are Hot Stuff* (ABC television broadcast, May 2, 1994); *see, e.g.*, Damon Darlin, *Manson Family Values,* Forbes, April 11, 1994, at 95 (noting over $120,000 in royalties could be due Manson since Guns N' Roses lead singer Axl Rose wore a T shirt that pictured Manson's face and read "Charlie Don't Surf" in the groups' Estranged video); David Grogan, *Cashing In,* People, August 8, 1994, at 26 (reporting Heidi Fleiss, who was charged with running a prostitution ring that catered to Hollywood's elite, has a mail-order pajama line, including boxer shorts that sell for $24.99).

[11] *Sonya Live* (CNN television broadcast, Dec. 2, 1993) (Anchor Sonya Friedman stating "there was a time when you committed a crime and you paid. Now it seems as though you get paid for the crime").

[12] *See, e.g.*, 18 U.S.C. § 1963 (a) (criminal forfeiture provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) deprives defendants of all profits acquired in connection with illicit activity in that"[a]ny interest derived from any proceeds obtained, directly or indirectly from racketeering activity shall forfeit to the US said funds"); Russello v. United States, 464 U.S. 16, 21 (1983) (interpreting insurance proceeds received as

jurisprudence the moral caveat that "no one shall be permitted to profit by his own fraud, take advantage of his own wrong," or make a "claim upon his own inequity."[13] The judiciary has attempted to address the miscarriage of justice that results when criminals profit from their crimes by imposing not-profit special conditions of probation. However, these conditions are constitutionally questionable in light of the United States Supreme Court's holding in *Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd.*[14]

II. NOT-PROFIT LEGISLATION HELD UNCONSTITUTIONAL

Although criminals' profiting from exploitation of their crimes seems unfair,[15] it becomes difficult to enforce the adage "crime doesn't pay" in light of valued constitutional restrictions that preclude the states from establishing laws that prohibit expressive activity.[16] "If the constitutional guarantee means anything, it means . . . government has no power to restrict

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a result of arson as constituting "interest" that is subject to forfeiture under the RICO statute because they were ill-gotten gains); United States v. Martino, 681 F.2d 952 (1982) (directing forfeiture of moneys received by defendants as insurance payments obtained through arson scheme under criminal forfeiture provisions of RICO); U.S. v. Ginsburg, 773 F.2d 798 (1985), cert. denied. 475 U.S. 1011 (stretching the RICO statute to cover illicit gains thrice removed from the criminal, i.e. Ginsburg had an interest in the legal fees received by the firm of Schmidt & Ginsburg so the court ordered forfeiture); VT. STAT. ANN. tit. 14, § 551 (6) (1974) (Vermont enacted a statute providing that an heir, devisee, or legatee who "stands convicted in any court . . . of intentionally and unlawfully killing the decedent" shall forfeit any share in the decedent's estate); In re Estate of Mahoney, 220 A.2d 475, 478 (1966) (determining "the doctrine of constructive trust is involved to prevent the slayer from profiting from his crime"); Slocum v. Metropolitan Life Ins. Co., 139 N.E. 816, 817 (1923) (explaining that allowing the person who commits murder "to benefit by his or her criminal act, would no doubt be contrary to public policy"); Diamond v. Oreamuno, 248 N.E.2d 910, 914 (1969) (stating "we should not hesitate to permit an action to prevent any unjust enrichment realized by the defendants from their allegedly wrongful act" of insider trading).

[13] Simon & Schuster Inc., v. New York Crime Victims Bd., 502 U.S. 105, 119 (1991) (quoting Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889)).

[14] *Id.* at 123 (holding Son of Sam law inconsistent with the First Amendment in that it singles out particular speech for a financial burden that it places on no other speech or income).

[15] *See* Simon & Schuster, Inc., v. Fischetti, 916 F.2d 777, 782 (1990) (stating "[o]ur society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his crime").

[16] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (stating "[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection").

expression because of its message, its ideas, its subject matter, or its content."[17] Since crime has been a staple of our literary heritage, a genuine controversy arises between alleviating the public's outrage at criminal's profiting and guaranteeing these First Amendment protections.[18]

Many states have wrestled with the seemingly blurry line between free expression and free enterprise by enacting Son of Sam statutes to prevent criminals from cashing in on their crimes.[19] Legislators in New York addressed this apparent inequity by passing the first Son of Sam law.[20] New York's legislature enacted section 632-a of the New York Executive Laws in 1977 to prevent serial killer David Berkowitz from profiting from the sale of his story as the Son of Sam killer.[21] Senator Emanuel Gold, who authored the Son of Sam law, explained that the law was a social statement: "It said that if a criminal is going to get money into his or her hands, we

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[17] *Simon & Schuster*, 502 U.S. at 126 (quoting Police Dep't v. Mosley, 408 U.S. 92, 95 (1972)).

[18] *See id. Simon & Schuster* provides the following examples of literary works that would have been subject to a Son of Sam law that the First Amendment should protect: "the *Autobiography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; *Civil Disobedience*, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the *Confessions of Saint Augustine*, in which the author laments "my past foulness and the carnal corruptions of my soul," one instance of which involved the theft of pears from a neighboring vineyard". *Id. See also* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances").

[19] *Sonya Live* (CNN television broadcast, Dec. 2, 1993) (New York's Son of Sam law author Senator Emanuel R. Gold stating "[t]he original law became a model for 43 states, the federal government and foreign nations"), *See Nightline* (ABC television broadcast, Mar. 1994) (noting Olympic ice-skater Tonya Harding may face Oregon's 'Son of Sam' law, "[t]he idea of those is that convicted criminals should not be able to profit from their crimes by selling rights to books, interviews, movies, television programs").

[20] N.Y.Exec.Law § 632-a(1) (McKinney 1982 and Supp. 1991) (providing "[e]very person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives". *see* 1977 N.Y. Laws 823, 1978 N.Y. Laws 417, 1986 N.Y. Laws 74.

[21] Assembly Bill Memorandum Re: A9019, July 22, 1977, *reprinted in* Legislative Bill Jacket, N.Y.LAWS ch. 823.

should worry about the victim and whether or not they were properly compensated."[22] Son of Sam legislation places any money paid to a criminal for the rights to his story in an escrow account in order to satisfy victims' future civil judgments.[23] The United States Supreme Court addressed the constitutionality of the aforementioned statute for the first time in *Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd.*[24]

The Son of Sam law at issue in *Simon & Schuster* provided that any publisher who contracted with anyone accused or convicted of a crime must pay moneys for any book, magazine, record, radio or television presentation that expresses that person's "thoughts, feelings, opinions or emotions regarding such crime" to the Crime Victims Board (the Board).[25] The money would be placed in an escrow account for a period of five years to pay any judgment that a victim might obtain against the criminal.[26] The Board discovered that Simon & Schuster contracted with known organized crime leader Henry Hill to publish a book about his life entitled *Wiseguy: Life in a Mafia Family*, which was later made into 1990's best film *Goodfellas*.[27] The Supreme Court noted that the Son of Sam law placed a financial burden on speakers because of the speech's content and established "a financial disincentive to create or publish works with a particular content."[28] Thus, the court held that the state could not constitutionally seize profits reaped by criminals who author pieces about their crimes.[29]

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[22] *Sonya Live* (CNN television broadcast, Dec. 2, 1993); *see Simon & Schuster*, 502 U.S. at 108 (quoting Son of Sam author, "It is abhorrent to one's sense of justice and decency that an individual. . . .can expect to receive large sums of money for his story once captured while five people are dead"); Barbara Freedman Ward, Note, "Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech", 54 IND.L.J. 443 (Spring, 1979); 18 U.S.C. § 3671 (1984) (providing that where physical harm results, a defendant may be required to forfeit the proceeds received from the depiction of the crime in a movie, book or magazines).

[23] *Simon & Schuster*, 502 U.S. at 108.

[24] *Id.* at 123 (holding Son of Sam law inconsistent with First Amendment in that it singles out particular speech for a financial burden that is placed on no other speech).

[25] *Id.* at 108 (quoting N.Y.Exec.Law. § 632-a).

[26] *Id.*

[27] *Simon & Schuster*, 502 U.S. at 113.

[28] *Id.* at 118.

[29] *Id.* at 123.

III. NOT-PROFIT SPECIAL CONDITIONS OF PROBATION

After *Simon & Schuster* struck down the legislatures' remedy for criminals' profit-making, sentencing judges repackaged the not-profit concept.[30] The old wine is simply in a new bottle, namely not-profit special conditions of probation.[31] In *Simon & Schuster* the Supreme Court found a law that was not narrowly tailored to achieve the State's compelling interest in compensating victims from the fruits of crime invalid under a strict scrutiny analysis.[32] However, the validity of not-profit special conditions of probation is determined under an abuse of discretion standard (a less restrictive test than strict scrutiny).[33] This suggests that the old anti-profit concept in its repackaged form may be held constitutional if the not-profit

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[30] *See, e.g.*, Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (1992) (Newman, J., dissenting) (admonishing that courts are now challenged to resist "the passions of the moment and apply the paramount restrictions of the Constitution"); United States v. Fountain, 768 F.2d at 803 (stating "the prospect that these multiple murderers might someday be cashing royalty checks for the stories of their crimes . . . is an insult to the victims and an affront to society's moral beliefs").

[31] *See* Commonwealth v. Power, 650 N.E.2d. 87 (Mass. 1995) (Katherine Ann Power, the 1960's radical in the "switch car" during a bank robbery, pled guilty to manslaughter and armed robbery for the 1970 killing of a Boston Police Officer after evading justice for 23 years under an assumed name in Oregon). This case provides an excellent example of a not-profit special condition of probation:

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

Id. at 87.

[32] *Simon & Schuster*, 502 U.S. at 118.

[33] *See Power*, 650 N.E.2d at 91 (determining "a special condition of probation is not subject to the same rigorous First Amendment scrutiny that is employed against a statute of general applicability").

probation condition meets the goals of probation: rehabilitation and protection of the public.[34]

Sentencing judges have broad discretion when determining conditions of probation and are subject to reversal on appellate review only for abuse of discretion.[35] This principle has been stated, "[a]bsent compelling reason for appellate interference, the task of line-drawing in probation matters is best left to the discretion of the sentencing judge."[36] Judicial departure from enumerated guidelines may be warranted. Many sentencing judges depart from such guidelines in cases involving sensational crimes where defendants may receive earnings from the publishing or broadcasting of their stories of criminal involvement.[37]

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[34] *Id.* (clarifying "as long as the condition meets the reasonably related test, it is not per se unconstitutional even if it restricts a probationer's fundamental rights"). *See also* United States v. Bolinger, 940 F.2d 478, 480 (9th Cir. 1991) (holding special condition of supervised release that defendant not associate with motor cycle clubs valid), United States v. Peete, 919 F.2d 1168, 1181 (6th Cir. 1990) (granting condition of probation requiring defendant to give up profession pursuant to 118 U.S.C.S. § 3651).

[35] 18 U.S.C. § 3651 (1984). The statute provides in pertinent part that when any jurisdictionally proper court is "satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, [it] may . . . place the defendant on probation for such period and upon such terms and conditions as the court deems best". *Id.*; Chapter 279, section 1A of the Massachusetts General Laws provides that "[w]hen a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence, or any part thereof, be suspended, and that he be placed on probation for such time and on such terms and conditions as it shall fix". MASS. GEN. L. ch. 279 § 1A (1992).

[36] United States v. Lowe, 654 F.2d 562, 568 (9th Cir. 1981). *See, e.g.*, United States v. Hughes, 964 F.2d 536, 542 (6th Cir. 1992) (stating "a trial court has broad discretion in determining the conditions of probation and on appellate review is subject to reversal only for abuse of discretion"); United States v. Danilow Pastry Co., Inc., 563 F. Supp. 1159, 1166 (S.D.N.Y. 1983) (articulating that sentencing court has an inherent discretion to impose sentences tailored to meet the defendant's particular circumstances); Porth v. Templar, 453 F.2d 330, 334 (10th Cir. 1971) (confirming that the sentencing judge has broad power when imposing probation condition).

[37] *See* United States v. Merritt, 988 F.2d 1298, 1309 (2nd Cir. 1993) (sustaining the Judge's departure from the Sentencing Commission's Guidelines based on the defendant's determination to profit from his crime, "when a court finds an atypical case" that "significantly differs from the norm, the court may consider whether a departure is warranted") (quoting United States v. Rogers, 972 F.2d 489, 493 (2nd Cir. 1992)); United States v. Waxman, 638 F. Supp. 1240, 1247 (E.D.Pa. 1986) (upholding probation condition prohibiting defendant convicted of stolen property and interstate transportation from capitalizing on his art theft through any media medium); United States v. Fountain, 768 F.2d 790, 803 (7th Cir. 1985) (assessing cases involving the profitable sale of the criminal's story insofar as courts "do not interpret its' [Congress'] irresolution as forbidding district judges to deal with the issue on a case-by-case basis").

The constraints on probation arose as a central issue in a Massachusetts case which received national attention. In *Commonwealth v. Power*,[38] the Supreme Judicial Court of Massachusetts upheld a restrictive post-sentencing order prohibiting the defendant, Katherine Ann Power, from gaining financially by telling her story.[39] Katherine Power challenged the imposed condition on the grounds that it unconstitutionally imposed a prior restraint on content-based speech violating her First Amendment right to freedom of expression.[40] Even though "the condition allows the defendant to speak on any subject, including her crimes, whenever, and through whatever medium she desires", the court noted that the condition implicated the defendant's First Amendment rights since it constituted a financial disincentive to speak.[41] Moreover, the court emphasized the judiciary's discretionary authority: "we begin with the recognition that judges are permitted great latitude in sentencing."[42] The court continued to explain that the 1992 edition of chapter 276, section 87 of the Massachusetts General Laws grants the trial court the authority to impose probation for "such time and upon such conditions as it deems proper."[43] A sentencing judge has the power to impose conditions designed to protect the public and rehabilitate the accused.[44]

Probation conditions are not per se invalid "simply because they affect a probationer's ability to exercise constitutionally protected rights."[45] Defendants on probation often surrender constitutional rights such as the freedom to travel out of state without permission, freedom to associate, and the right to employment.[46] Impingement of constitutional rights cannot,

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[38] 650 N.E.2d 87 (Mass. 1995).

[39] *Power*, 650 N.E.2d at 89.

[40] *Id.* at 88.

[41] *Id.* at 90.

[42] *Power*, 650 N.E.2d at 89.

[43] *Id.*

[44] *Id.* at 91.

[45] *Power*, 650 N.E.2d at 90 (quoting United States v. Tonry, 605 F.2d 144, 148 (5th Cir. 1979) (finding condition of probation enforceable, even if it affects a "preferred" right, when the condition meets the goals of sentencing and probation)).

[46] *Id.* at 91 (citing United States v. Romero, 676 F.2d 406 (9th Cir. 1984) (probationer convicted of drug offense prohibited from associating with others convicted of drug offenses); Malone v. United States, 502 F.2d 554 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975) (probationer convicted of gun exportation for Irish Republican Army prohibited from visiting Irish pubs); Whaley v. United States, 324 F.2d 356 (9th Cir. 1963), cert. denied (probationer convicted of impersonating agent of FBI while repossessing vehicle prohibited from working as a repossessor); Markley v. State, 507 So. 2d 1043

therefore, justify vacating conditions of probation.[47] Every probationer would otherwise be entitled to removal of standard conditions of probation. Assuming *Simon & Schuster* determined that not-profit special conditions of probation constitute an impermissible disincentive to free speech (affecting preferred rights), this restriction is not necessarily invalid.[48] "The test for validity of probation conditions, even where 'preferred' rights are affected, is whether they are primarily designed to meet the ends of rehabilitation and protection of the public."[49] Even though courts subject probation conditions that restrict fundamental rights to careful review, the not-profit probation condition has survived.[50]

The Court of Appeals for the Ninth Circuit upheld a condition which precluded the defendant from profiting from her crime.[51] Terrigno was convicted of embezzling public funds from a Federal Counselling Center. Part of her sentence included the probation condition that she not receive any financial remuneration for "speaking engagements, written publications, movies or any other media coverage dealing with her involvement in this offense."[52] The court held that the condition reasonably related to Terrigno's rehabilitation because it reminded her "in a very practical sense that 'crime doesn't pay'."[53]

Additionally, many federal courts have permitted probation conditions that restrict First Amendment expression.[54] So long as the not-profit

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(Ala. Crim. App. 1987) (probationer convicted of burglary and criminal mischief at abortion clinic required to stay 500 yards away from the clinic); Goldschmitt v. State, 490 So.2d 123 (Fla. Dist. Ct. App. 1986) (probationer convicted of drunk driving required to place bumper sticker on automobile identifying his conviction); State v. Sprague, 336 S.E.2d 852 (1981) (probationer convicted of harassment required to maintain 10 p.m. curfew)).

[47] *See Power*, 650 N.E.2d at 91.

[48] *See* Simon & Schuster, Inc., 502 U.S. at 114-15.

[49] United States v. Terrigno 838 F.2d 371, 374 (9th Cir. 1988) (quoting United States v. Lowe, 654 F.2d 562, 567 (9th Cir. 1981)).

[50] *See Power*, 650 N.E.2d at 93.

[51] *Terrigno*, 838 F.2d at 374.

[52] *Id.* at 373 (holding it is not unreasonable to place upon an embezzlement and conversion defendant a probation condition specifying that she not receive any financial enumeration for speaking about her crime).

[53] *Id.* at 374.

[54] *See, e.g., Bolinger*, 940 F.2d at 480 (sustaining a condition prohibiting participation in activities or memberships in motorcycle clubs as a valid restriction on freedom of association because the sentencing judge could have concluded that defendant was more likely to relapse into crime if he returned to prior associations and, therefore, the condition

probation condition reasonably relates to the goals of sentencing, the alleged deprivation of liberty or property may be permissible.[55] Therefore, a probation restriction may affect even fundamental rights such as freedom of speech and freedom of association when the condition is reasonably related to the purposes sought to be served by probation.[56] "Central to any rehabilitation effort . . . is the convicted defendant's acknowledgment of his guilt."[57] The *Power* court's reasoning is illustrative of this principle.[58] It is not unreasonable to think that the rehabilitation of a person convicted of armed robbery of a bank "will be more effective if she is reminded in a very practical sense that 'crime does not pay'."[59]

The Supreme Court has approved the restitutionary element of probation as fulfilling the rehabilitative goal of "requiring the defendant to accept responsibility for his or her transgressions."[60] In *United States v. Davies*[61] the Court of Appeals for the Seventh Circuit held that the legislature had granted authority to the district court to impose restitution in an amount greater than that sought in order to foster defendant's acceptance of responsibility for his unlawful acts.[62] In *United States v. Waxman*[63] the

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was reasonably related to the ends of rehabilitation); *Peete*, 919 F.2d at 1168 (sustaining condition that prevented a defendant convicted under the Hobbs Act from seeking or serving in an elected public office); United States v. Garcia, 741 F.2d 363, 368 (11th Cir. 1984) (explaining that keeping a defendant convicted of grand jury contempt separated from named suspected terrorists, in order to aid his rehabilitation and protect the public, was not unreasonable); United States v. Lowe, 654 F.2d 562, 567 (9th Cir. 1981) (finding condition which prohibited a convicted trespasser from entry within 250 feet radius, although it rendered the defendant unable to distribute literature on a public roadway or attend weekly meetings at an adjacent private organization, passed constitutional muster); United States v. Tonry, 605 F.2d 144, 152 (5th Cir. 1979) (concluding condition that forbade defendant, who had been convicted of federal election laws, from running for office or engaging in political activity during his probation did not to offend the Constitution); United States v. Krutschewski, 509 F. Supp. 1186, 1189 (1981) (explaining the goals of sentencing to be "rehabilitation, deterrence of the individual defendant, general deterrence of other people from engaging in criminal activity and protection of the public").

[55] *See Terringo*, 838 F.2d at 374; *see also Power*, 650 N.E.2d at 91.

[56] *Terigno*, 838 F.2d. at 374; *Power*, 650 N.E.2d at 89.

[57] United States v. McLauglin, 512 F. Supp. 907, 909 (D. Md. 1981).

[58] *See Power*, 650 N.E.2d at 87.

[59] *Compare Power*, 650 N.E.2d at 87 *with Terrigno*, 838 F.2d at 374.

[60] *McLauglin*, 512 F. Supp. at 909 (quoting Durst v. United States, 434 U.S. 542, 554 (1978)).

[61] 683 F.2d 1052 (7th Cir. 1982).

[62] *Id.* at 1055.

[63] 638 F.Supp 1245 (E.D. Pa. 1986).

defendant received stolen property and was placed on probation with the condition that he not profit financially from the sale of any television or radio appearance. The *Waxman* court further explained the reasonableness of a rehabilitative motivated condition, "[c]ertainly, it is in his own interest for Dr. Waxman to learn that society will neither tolerate criminal behavior nor permit the criminal to profit from it when he can be prevented from doing so."[64] A similar rehabilitative purpose motivates most probation conditions, restricting the criminal's ability to profit from his or her own wrongdoing.[65]

Another purpose of the challenged probation condition is to reduce the profit motive for criminal behavior because media exposure and expectation of profits may be an incentive to potential criminals to commit crimes.[66] The *Waxman* court subscribed to this reasoning in stating that it is in society's interest to learn by example that not only may criminals have to "pay the piper but that they cannot expect the piper to pay them for their memoirs."[67] Imprisonment is not an effective deterrence if the defendant retains the profits of crime.[68] Deterrence would be better served by separating the defendant from his ill-gotten gains.[69] Allowing the criminal to profit from his or her crime could be perceived by the public as unjust enrichment.[70] Requiring the defendant to accept responsibility for his or her crime by not capitalizing on it would not only foster confidence in the legal system but also provide "a sense of justice in that citizens will know that the damage done will be repaired."[71] The *Power* court's reasoning clearly

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[64] *Id.* at 1246 (concluding that condition imposed did not violate defendant's First or Fifth Amendment rights because it did not prohibit his speech but merely prohibited him profiting from that speech).

[65] *See Power*, 650 N.E.2d at 417.

[66] *See Waxman*, 638 F. Supp. at 1246; *see also Sonya Live* (CNN television broadcast, December 2, 1993) (contemplating "should anyone really profit in a fundamental way from the commission of crimes, and do we open ourselves up then for people to commit something bizarre because they know that there will be a profit?").

[67] *Waxman*, 638 F. Supp. at 1246.

[68] *Id. See also Power*, 650 N.E.2d at 91 (stating not-profit probation condition serves "valuable punitive and deterrent purposes beyond those that would be served through the imposition of a prison sentence alone").

[69] *Krutschewski*, 509 F. Supp. at 1190.

[70] *Fischetti*, 916 F.2d at 783 (noting that Son of Sam statute satisfies victims' sense of justice and desire for retribution in addition to preventing a criminal's unjust enrichment).

[71] *McLauglin*, 512 F. Supp. at 910.

illustrates that the not-profit probation condition is reasonably related to sentencing:

> This defendant, and other defendants similarly situated, are deterred from seeking to profit directly or indirectly from criminality, the moral foundations of our society are reinforced by the condition, the defendant (and others like her) are given to understand that the crime committed and her successful, albeit illegal, fugitive status of over twenty-three years will bring neither reward, benefit, nor profit and her rehabilitation and understanding of the depth of her criminality are enhanced.[72]

Assuming that the special not-profit condition of probation is surrounded with a presumption of constitutionality in that it meets the ends of rehabilitation and protection of the public, this would only support restricting the probationer's speech.[73] Publishing companies, production companies, and the public still have a First Amendment right to have a free marketplace exchange of ideas.[74] Without a financial incentive to convey their criminal activities, would-be storytellers would not speak. Thus, "the denial of payment for expressive activity constitutes a direct burden on that activity."[75] The Supreme Court's "disincentive to free speech" rationale, as articulated in *Simon & Schuster*, parallels the not-profit probation condition's negative effect on free enterprise and private contracts.[76] The dissent in *Simon & Schuster, Inc. v. Fischetti* contemplated whether such a financial disincentive may have prevented the works *Where Do We Go From Here?* by Martin Luther King, Jr., *Witness* by Whitaker Chambers, and *On Civil Disobedience* by Henry David Thoreau from being published.[77] Similarly, not-profit special conditions of probation impose a direct disincentive to produce works with a specific content in that they

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[72] *Power*, 650 N.E.2d at 92.

[73] *See Simon & Schuster*, 502 U.S. at 105.

[74] *Id.*

[75] Meyer v. Grant, 486 U.S. 414, 422-24 (1988).

[76] *Simon & Schuster*, 502 U.S. at 115 (interpreting the Son of Sam statute to be unconstitutional since it subjects the criminal's speech to a financial burden that it places on no other speech and no other income and, therefore, said restriction is presumptively inconsistent with the Amendment). *See also* Leathers v. Medlock, 499 U.S. 439, Arkansas Writer's Project Inc. v. Ragland, 481 U.S. 221, 230; *Power*, 650 N.E.2d at 90 (interpreting statute in *Simon & Schuster* to be presumptively unconstitutional given it placed a financial burden on speakers due to the content of their speech).

[77] *Fischetti*, 916 F.2d at 787.

restrict expression depending on "its message, its ideas, its subject matter, or its content" as clearly as did the Son of Sam statutes.[78]

The *Power* court's interpretation of *Simon & Schuster* demonstrates that signals from the Supreme Court are not necessarily easy to decipher.[79] The court's holding may have solved the problem of Katherine Power profiting from her crime; in doing so, however, the court manipulated existing law and discarded long-standing First Amendment jurisprudence.[80]

IV. CONCLUSION

The idea of an axe murderer cashing movie royalty checks is unsettling. First Amendment jurisprudence, however, establishes that suppressing speech because some readers may find it objectionable can never be deemed a compelling interest.[81] Although we must maintain a link between community values and the penal system to insure that society does not lose confidence in the government's ability to uphold public order, morality must not become a tool for impinging upon First Amendment rights. If the system were allowed to so operate, the conscience of the community would in effect have the judiciary carrying its moral burden. It is not the courts' province to weigh the desirability of social policy and implement that which the legislature cannot. If the First Amendment precludes states from establishing laws that prohibit expressive activity, then it must also restrict individual justices from doing the same. A court's imposition of conditions which prevent criminals from cashing in on their crimes, and any subsequent enforcement of such conditions by appellate courts, would constitute adverse government action aimed at communicative content.[82] Thus, after the Supreme Court's holding in *Simon & Schuster*, a sentencing judge who in his or her discretion imposes a special not-profit condition of probation may constitute "a compelling reason for appellate interference."[83]

The constitutional tensions between values of free expression and free enterprise raised by not-profit special conditions of probation could be

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[78] *Compare Simon & Schuster*, 502 U.S. 105 *with Power*, 420 Mass 410.

[79] *See* Power, 650 N.E.2d 87 (Mass. 1995), petition for cert. filed (Aug. 16, 1995) (indicating the survival of not-profit conditions of probation may only be temporary in Massachusetts).

[80] *See, e.g., Simon & Schuster*, 502 U.S. 105; *Medlock*, 499 U.S. 439; *Arkansas Writer's Project*, 481 U.S. 221.

[81] *See* Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988).

[82] *See id.*

[83] *See Simon & Schuster*, 502 U.S. 105.

circumvented by simply allowing civil judgments to remedy the problem. There is no need to impinge upon valued First Amendment rights when such a practical alternative solution exists. Judgments awarded to victims in civil suits make it impossible for criminals to benefit from the fruits of their crime. In the past, civil judgments have effectively remedied the problem of criminal's profiting from their crime, without implicating the First Amendment. For example, royalties owed to convicted murderer Charles Manson for a song featured on a Guns N' Roses album are marked for payment toward a previous 1971 civil judgment.[84] A Los Angeles federal court ordered that any royalty money be paid to Bartek Frykowski, son of one of the Manson's victims.[85] Similarly, a Wisconsin court ruled that Jeffrey Dahmer, who began a 999-year prison sentence in 1992 for murdering, dismembering, and cannibalizing 17 boys, owed $80 million in restitution to the families of his victims.[86] Thomas Jacobson, the attorney for the families of Dahmer's victims, was concerned about the affect of *Simon & Schuster*'s holding on existing not-profit legislation. Jacobson explained, "we brought a civil suit against Jeffrey Dahmer, and I obtained eight judgments for over $10 million per family . . . the judgment we obtained against Dahmer gets around the problems of the Son of Sam law being declared unconstitutional . . . we're entitled to go ahead and execute on the judgment and take whatever assets he has available."[87]

There is no justification for not-profit special conditions of probation when they encroach upon First Amendment protections. Moreover, their continued use only prompts needless litigation, given the existence of the aforementioned less restrictive solution. The holding in *Commonwealth v. Power* addressed the same social policy that New York's Legislature attempted to promulgate by passing the Son of Sam law.[88] Judicial intervention with respect to the underlying not-profit policy completely departs from existing law.[89] The paramount restrictions of the Constitution

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[84] Chris Morris, *Manson Royalties From Guns N' Roses Song Go To Victim's Kin*, BILLBOARD, December 18, 1993 at 8; Damon Darlin, *Manson Family Value*, FORBES, April 11, 1994 at 95 (the initial award by the court of $500,000 has been renewed every 10 years and now approximately $1.2 million is owed to Bartek Frykowski. His attorney has served the record label with a writ of execution that requires all royalties due Manson to be paid to meet the judgment).

[85] *Id.*

[86] David Grogan, *Cashing In*, PEOPLE, August 8, 1994 at 26.

[87] *Sonya Live* (CNN television broadcast, Dec. 2, 1993).

[88] *See Simon & Schuster*, 502 U.S. 105.

[89] *See id.*

which protect speech have unnecessarily been cast aside by justices who have "legislated" the exact social policy that the Supreme Court barred legislators from enacting. Courts must resist this desire to legislate to preserve the First Amendment.

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