Son of Son of Sam: Trashing Popular Media and Criminalizing Crime-Related Expression

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Introduction

It makes sense to punish criminals and it makes sense to protect freedom of speech. These principles are axiomatic in America, even if each is supported by a variety of sometimes conflicting rationales. In certain instances, though, speech itself may be criminal, as in cases of fraud or conspiracy, and we do not worry much about burdening speech by punishing such acts. Recently, however, it has become common for courts to impose great restrictions on speech by criminals when such speech is not itself criminal, but is merely related to their illegal acts, such as publication of memoirs or appearance on talk shows. Restrictions typically forbid receipt of payment for expression deemed to be crime-related, or require forfeiture of any resulting income.

Efforts to restrict crime-related expression by statute have been quieted, though by no means barred, by the Supreme Court's rejection of New York's "Son of Sam" law in *Simon & Schuster, Inc. v. New York State Crime Victims Board.*\(^1\) As described below, however, in striking down New York's statute the Court found that states have "an undisputed compelling interest in ensuring that criminals do not profit from their crimes,"\(^2\) as well as a compelling interest in compensating victims.\(^3\) While expressly declining to address the question of "whether book royalties can properly be termed the profits of crime,"\(^4\) the Court in effect invited states and lower courts to find new, more narrowly-tailored means to serve those supposed compelling interests. Lower courts have attempted to do so with fines and individual probation conditions.\(^5\)

In Part I, this article reviews *Simon & Schuster* and argues that "profit from crime" cannot reasonably be defined to include expression-related income of the sort at issue here and that the "compelling interest" of prohibiting criminal profit cannot, therefore, justify significant content-based burdens on expression. Part II reviews a series of cases in which courts have expressed open hostility toward popular media while restricting criminal speech, and argues that, whatever the ostensible interests of the states may be, courts have significantly overreached, creating a subset of disfavored speech which

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1. 502 U.S. 105 (1991); see discussion *infra* Part I.
2. 502 U.S. at 119.
3. Id. at 118.
4. Id. at 119.
5. See *infra* Part III.
is not otherwise recognized in First Amendment jurisprudence. Part III examines the case of former radical activist Katherine Anne Power to illustrate the power of the chilling effect on crime-related expression and the gravity of its consequences in a case of great social significance. The paper concludes with a discussion of why, in the context of criminal punishment, further deprivation of rights matters, and how the reasoning of the courts in these cases weaken First Amendment values.

I Son of Sam and Simon & Schuster

In 1991 the Supreme Court struck down New York's "Son of Sam" law, which required any entity contracting with an accused or convicted person for a depiction of their crime to submit the contract to the Crime Victims Board for review and to turn over to the Board any income owed under the contract. The funds would then be placed in escrow to compensate victims who recovered money damages in civil actions. The law had been hastily passed in an effort to prevent "Son of Sam" killer David Berkowitz from profiting from media interest in his crimes. The Court found the statute to be unconstitutionally overinclusive, noting that the law reached individuals who were never formally accused or convicted of their crimes as well as works that only tangentially expressed thoughts and recollections of the crimes. The statute was also underinclusive, although the Court did not so hold, because it reached only the criminal's profits from expression and not other activities and because it would return profits to the criminal author after five years if not claimed by civil judgments.

   [T]he Legislature, shocked by the large numbers of vicarious thrill seekers and by the media trumpeting forth each little Berkowitz happening, hastened to debar Berkowitz and others from profiting from their heinous misdeeds.
   Section 632-a of the Executive Law, conceived in haste, written in haste, and declared under the cry of the public for the Legislature to exact retribution, reflects its noble spirit, though clothed in loose, vague, and inconsistent language.
10. Id. at 123-24 (Blackmun, J., concurring) ("[T]he New York statute is underinclusive as well as overinclusive and...we should say so.").
The Court began its discussion of the financial disincentives the law imposed on criminal authors by declaring, "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech," and concluded:

New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income. The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective.

Despite the apparent firmness of its statement that content-based financial burdens on speech are inconsistent with the First Amendment, the Court in fact opened the door to such schemes by asserting that states have "an undisputed compelling interest in ensuring that criminals do not profit from their crimes" and "a compelling interest in ensuring that victims of crime are compensated by those who harm them." Recognizing the opening, legislatures and courts have used these justifications to devise various means of depriving criminals of any earnings from their stories, even when these efforts undermine the goal of compensating victims.

The Supreme Court, however, expressly declined to address the question of "whether book royalties can properly be termed the profits of crime," thus leaving in doubt the validity of the compelling interest underlying most Son of Sam-type cases. The circumstances in which speech itself may be criminal are very few, and the circumstances in which money or goods may be deemed sufficiently related to criminal acts to allow forfeiture are equally few. Crime-related expression is clearly not criminal in the sense that speech comprising incitement or fraud may be. Nor is the income from such
expression clearly forfeitable profit from crime. To say that expression (or compensation from expression) is forfeitable is to say that the thoughts (or feelings or experiences) of the criminal are themselves the fruits of crime in the manner of contraband, or "objects gained from or used to further criminal activity."\(^{20}\) This perspective unrealistically reduces memory or perception to something which may be literally linked to specific events and which may be neatly segregated and quarantined from other memories and perceptions. Yet that is how legislatures and courts have treated the ideas that comprise the content of criminal expression—as if they were isolatable contraband or ill-gotten gains.\(^{21}\)

If crime-related expression is neither criminal nor convincingly analogized to contraband, however, the burdens imposed upon it might be more usefully analogized to penalty enhancement statutes which increase the punishment for crimes motivated by hate. Under such laws, otherwise identical assaults may be punished differently depending upon what the assailant said prior to or during the crime. A penalty enhancement statute of this sort was upheld by a unanimous Supreme Court in *Wisconsin v. Mitchell*,\(^{22}\) on the ground that it was aimed at conduct and so did not violate the First Amendment.\(^{23}\) The Court noted that racial motivation is also penalized in civil rights legislation, and argued that Wisconsin could find that bias-motivated crimes caused greater individual and social harm which "over and above mere disagreement with offenders' beliefs or biases"\(^{24}\) justified

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\(^{20}\) Arthur W. Campbell, *The Law of Sentencing* 53 (1991) (footnotes omitted) "Criminal forfeiture proceedings transfer ownership of specified property from offenders to the state; as such they are strictly scrutinized by appellate tribunals. Items subject to forfeiture generally fall into two categories: objects illegal as contraband, and objects gained from or used to further criminal activity." Traditional forfeiture statutes that rely on these two categories have been consistently found to be constitutionally valid. *Id.*

\(^{21}\) For an extreme position equating expression related to an act with the act itself, see Catharine A. MacKinnon, *Only Words* 33 (1993):

To express eroticism is to engage in eroticism, meaning to perform a sex act. To say it is to do it, and to do it is to say it. It is also to do the harm of it and exacerbate harms surrounding it. In this context, unrecognized by law, it is to practice sex inequality as well as to express it.


\(^{24}\) *Id.* at 488.
additional punishment.\textsuperscript{25}

Assuming that it is true that some motivations, as proven by contemporaneous expression,\textsuperscript{26} merit more severe sanctions than others (given, of course, that a finding of motivation of some sort is generally necessary to distinguish criminal from non-criminal action\textsuperscript{27}), it does not necessarily follow that post-arrest expression also relates to the original criminal intent in such a way that it makes the criminal more culpable and more deserving of punishment. No one has argued seriously that people commit crimes in order to be on television or to increase the advances they might command for their books. Motivation aside, though, it may be true that victims and some members of the general public are so offended by crime-related expression in the media that the additional harm they suffer could be described as a "secondary effect" of the crime, thereby justifying regulation.\textsuperscript{28} But in \textit{R.A.V. v. City of St. Paul},\textsuperscript{29} the Supreme Court rejected the idea that listeners' reactions to speech could constitute the sort of secondary effect that would justify speech regulation.\textsuperscript{30} The usual purpose of speech is to have communicative impact. To control speech on the basis of that impact, or because of the content of the speech, is to thwart the purpose of the First Amendment. In short, then, the "compelling interest" that criminals not be allowed to profit from their stories appears to be based on a purely retributive rationale, not grounded in any convincing analysis of the relationship between the expression and the crime to which it relates.\textsuperscript{31}

\textsuperscript{25} \textit{Id.}

\textsuperscript{26} \textit{Id.} at 488: "The First Amendment ... does not prohibit evidentiary use of speech to establish the elements of a crime or to prove motive or intent."

\textsuperscript{27} See JOSHUA DRESSLER, \textsc{Understanding Criminal Law} 95-106 (1987) (defining \textit{mens rea} and distinguishing degrees of culpability and intention).

\textsuperscript{28} See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding ordinance regulating businesses dealing in sexually explicit materials as a content-neutral attempt to address "secondary effects" such businesses have on local crime rates and property values).

\textsuperscript{29} 505 U.S. 377 (1992).

\textsuperscript{30} \textit{Id.} at 394 ("The emotive impact of speech on its audience is not a 'secondary effect.'").

\textsuperscript{31} The retributive rationale cannot justify the risk of infringement of fundamental constitutional rights absent a clear demonstration of the relationship of the punishment to the crime—a showing which the retributive rationale itself tends to obscure. \textsc{See} CAMPBELL, supra note 20, at 36 (footnotes omitted):

Perhaps the most serious flaw of the retribution rationale is the barrier it erects against a rational approach to crime and sentencing. The symbolic and psychological potency of this rationale, its invocation in the name of protecting cherished cultural values, and its mass appeal all serve to sweep aside scientific
The contours of the argument for protection of speech related to criminal experience are clear: free speech is an affirmative value, not merely grudgingly allowed by the Constitution but actively encouraged;\textsuperscript{32} the First Amendment has been interpreted to imply a right of the public to receive information as well as a right of the media or individuals to speak;\textsuperscript{33} expression describing or touching on criminal experience does not (necessarily) fall within any of the few categories of speech traditionally disfavored in First Amendment jurisprudence;\textsuperscript{34} content-based financial disincentives to speech have a "chilling effect" on free expression as impermissible as any direct restraint.\textsuperscript{35} According to scholar Frederick Schauer, "[a] chilling effect occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from doing so by governmental regulation not specifically directed at that protected activity."\textsuperscript{36}
Despite the clear precedents for protecting crime-related expression, First Amendment protections for criminal speakers and their publishers have been undermined by the unexamined invocation of "compelling interests" in denying criminals profit and compensating victims, and, as discussed below, by the rhetorical positioning of popular media and crime-related expression as disfavored speech.

II

Oprah as an Aggravating Circumstance

The forms and application of punishment reflect social and political values as much or more than they do utilitarian efforts to control crime. Not only do political considerations often overwhelm criminological ones, but judges and other "penal practitioners" are actively engaged in symbolic conduct that shapes social mores. In the words of criminologist David Garland, the penal establishment "routinely interprets events, defines conduct, classifies action, and evaluates worth, and having done so, it sanctions these judgments with the authority of law, forcefully projecting them on to offenders and the public audience alike." While it is perfectly appropriate, and perhaps inevitable, that punishment operates as a social text which conveys meaning, it is important to recognize that the values so conveyed may not comport with legal norms, and that judges enforcing them may exceed their constitutional authority.

The words of judges and politicians addressing crime-related expression suggest that attitudes toward media and criminal speech unduly influence the choice and application of legal standards. For example, although existing laws already prohibited falsifying evidence and bribing, threatening, intimidating, or otherwise influencing witnesses, concern about jury taint and witness motivation swelled in California along with the intensive media coverage of the O.J. Simpson trial. When California passed its legally troubled governmental regulation not openly directed at that protected activity."

37. See DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 20 (1990) ("It is not crime or even criminological knowledge about crime which most affects policy decisions, but rather the ways in which 'the crime problem' is officially perceived and the political positions to which these perceptions give rise.").
38. Id. at 252.
40. See Cubell, supra note 39, at 1139.
"checkbook journalism" law\(^{41}\) allowing criminal prosecution of witnesses, potential witnesses, and jurors who entered agreements or accepted payment for information about trials,\(^{42}\) Governor Pete Wilson was quick to denounce the media, stating that the law would "ensure that witnesses and jurors are a force for justice, not fodder for tabloids, and that attorneys will represent their client[s], not lead a media circus."\(^{43}\) He also fretted that the legal system served as a "clearinghouse for hearsay, idle gossip and rumor-mongering about the lifestyles of the rich and famous."\(^{44}\)

But if one expects heated rhetoric from politicians, one expects more reasoned consideration from judges, who are charged with impartial application of the law. Cases involving crime-related expression have not borne out that expectation, however. In United States v. Seale,\(^{45}\) for example, the Third Circuit described the public's interest in "stories involving bizarre criminal acts" as "almost obsessive."\(^{46}\) "The consumers' appetite for such accounts seems commensurate with the lurid nature of the details of the criminal acts described."\(^{47}\) This gratuitous characterization is found in an opinion vacating the fines imposed on a couple convicted of a notorious kidnap-murder (the fines were seven times the maximum permitted by the United States Sentencing Guidelines for one defendant, and two

California Penal Code Section 116.5 which is aimed at jurors, was successfully enjoined from specific application against plaintiffs Michael Knox, one of the original twelve jurors empaneled but later excused from the O.J. Simpson murder trial in Los Angeles, and Dove Audio, Inc., a California corporation which sought to enter into an agreement with Knox to publish a book concerning his experiences and impressions as a juror in the Simpson case. Three months later, section 132.5 of the California Penal Code and section 1669.7 of the California Civil Code, both of which targeted witnesses [and potential witnesses] who sell information, were permanently enjoined from enforcement following a challenge by the California First Amendment Coalition.

\(^{42}\) Cady, supra note 41, at 676.
\(^{44}\) Id. Cf Simon & Schuster, 502 U.S. at 111 (noting that New York's Son of Sam law had been selectively enforced against defendants whose crimes had received extensive media coverage).
\(^{45}\) 20 F.3d 1279 (3d Cir. 1994).
\(^{46}\) Id. at 1283.
\(^{47}\) Id.
times the maximum for the other) but holding in principle, the right of the court to fine indigent defendants in anticipation of the sale of their media rights. The court distinguished the facts of the case from those of Simon & Schuster by stating, "although there may be an indirect burden placed upon the Seales' speech, as a sufficiently large fine may deprive them of the financial incentive to speak, this burden is established within the context of the criminal penalty, and the fine is not otherwise selective."

That is, although the stated rationale of the district court was to prohibit profit from expressive activity related to the crimes, and although the Third Circuit shared the open hostility of the trial judge to that expression, the burden imposed on expression here was not, in theory, content-specific: the fines could presumably be satisfied by earnings from the prison laundry. Despite it's overall approval of the district court's reasoning, however, the court of appeals was forced to recognize that the fines could have the unintended effect of ensuring sale of the story: "Consideration of Mrs. Seale's ability to sell her story as her sole possible future source of income could create the anomalous result of encouraging her to do so (which is clearly what the district court sought to prevent) in order to pay her fine."

In In re Johnsen, a lower court's support for New York's Son of Sam law was similarly loaded with inappropriate characterizations of popular media and audiences:

The sophistication of our society has embellished the field of entertainment to the extent that reading of the "exploits" becomes an acceptable substitute for "live performances in the Roman arena[;]" witness the mad rush of publishers to obtain the literary and motion picture rights to the last days of the condemned murderer who preferred death by execution to life imprisonment.

And in a pre-Simon & Schuster case, United States v. Waxman, the normal, legal, business activity of the popular press was treated

48. Id. at 1282.
49. Id. at 1284.
50. Id. at 1285 n.7.
51. "[I]t's the Court's intent that neither defendant profit from their [sic] brutal crime. They didn't obtain eighteen and a half million dollars [in ransom] from Exxon, and it's my intent that they not obtain or direct the payment of any money from exploiting their foiled crimes." Id. at 1287-88 (quoting the trial record).
52. Id. at 1285 (emphasis added).
54. Id. at 906; see also supra note 8.
with sarcasm and disdain when a convicted art thief challenged the constitutionality of a condition of probation which prohibited him from receiving payment for the sale of his story: "I remain convinced that the sensational crime should not be glamorized by the inevitable book, the barnstorming trip from city to city, the press conferences and autograph sessions, the appearances on TV, the trumpet blast announcing the paperback edition, and finally, with any luck at all, a motion picture."  

The judge's statement was at odds with his prior assertion that the purpose of the condition was to prevent the defendant from profiting from his crime. While that may be a proper judicial function, preventing "glamorization" of a crime in the form of media exposure is not, and the judge's own words clearly reflect a hope that the financial disincentive will chill expression.

Perhaps most troubling of all, a federal district court in New Jersey described a defendant's appearance on the Oprah Winfrey Show as an "aggravating circumstance" that justified an upward departure from sentencing guidelines. The defendant was a private investigator who had been convicted of conspiring to bribe bureaucrats in order to gain access to information in the files of the Social Security Agency. While awaiting sentencing, the defendant "appeared on the Oprah Winfrey Show and detailed the workings of his private investigation business and others like it," and reported that "present and former government employees capitalize on pervasive abuse of confidential information." The trial judge granted the government’s motion for an upward departure.

The Third Circuit reversed and remanded for resentencing, arguing somewhat blandly that "it seems inappropriate to us if the severity of [the defendant's] punishment was increased because he sought to call attention to a situation that is unquestionably a matter of public concern." The court hedged, however, stating that not all aspects of the defendant's appearances were "necessarily irrelevant to

56. Id. at 1247.
57. Id. at 1246 ("The intention of this condition is to preclude the defendant from obtaining any profit or financial benefit or in any way capitalizing upon his art theft or subsequent treatment and this provision shall be construed broadly.").
59. Id. at 45.
60. Id. at 46.
61. Id.
62. Id. at 48.
a decision on departure." Thus, the public skepticism of the defendant toward the integrity of government bureaucrats, which seemed to trouble the prosecutors and the trial judge, was not excluded as a consideration in sentencing.

The attitudes toward media expressed by the judges in these cases exceed the requirements of the adjudication of the matters before the courts, and, to the extent that they form the basis for additional punishment and burden speech rights of defendants, they represent judicial overreaching. David Garland argues that judges are acutely aware of the supralegal symbolic function of their pronouncements, which "provide a continuous, repetitive set of instructions as to how we should think about good and evil, normal and pathological, legitimate and illegitimate, order and disorder." A problem arises, though, when the pronouncements are not about matters within the scope of judicial authority, such as the presence or absence of mitigating factors, but are about things which—to put it flatly—are no part of the judges' business, such as what constitutes a respectable speech venue or what are the appropriate objects of media and public fascination. When, in addition, these opinions become the apparent basis for burdening fundamental rights, then those rights have been wrongly infringed.

III

The Chilling Effect and the Radical Who Came in from the Cold

One recent case, above all, illustrates the potential harm of burdening crime-related expression. The case is noteworthy, in part, because in it the court ignored the victim compensation rationale entirely and relied solely on the retributive anti-criminal profit rationale legitimized by Simon & Schuster. It is also noteworthy because the facts of the case highlight both the tenuous relationship between crime-related expression and the criminal acts being punished, and the burden borne by the public when crime-related expression is restricted.

63. *Id.*
64. *Id.* at 46 (“This loss of public confidence ... was enhanced by the Oprah Winfrey Show on which he rather arrogantly appeared, telling people who had not theretofore known that their information, too, may have been compromised [by the corruption of bureaucrats].”)
65. GARLAND, supra note 37, at 252.
In *Commonwealth v. Power*, the Supreme Judicial Court of Massachusetts affirmed a condition of probation that prohibited defendant Katherine Ann Power, and her representatives and assignees, from profiting from the sale of her story. In doing so the court avoided the broad anti-media statements which characterized the cases discussed in Part II of this article, and presented a more subtly reasoned approach to a ban on sale of crime-related expression.

Twenty-three years after participating in a politically-motivated bank robbery in which a policeman was killed, Power voluntarily surrendered to authorities "in the glare of national news media attention" and plead guilty to two counts of armed robbery and one of manslaughter. She was sentenced to concurrent prison terms of eight to twelve years for manslaughter and one armed robbery charge, and twenty years of probation for the second armed robbery charge, which was punishable by life imprisonment.

Power appealed the broadly-worded condition barring the sale of her story, which she had signed in open court, claiming that it was a content-based prior restraint on her speech. The court responded that the condition "merely prohibits the defendant from profiting financially from speech about her crime or her experience as a fugitive." The court distinguished *Simon & Schuster* by noting that it

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67. *Id.* at 89. The condition imposed by the trial court read:

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 or probation will be considered a violation of probation conditions.

68. *Id.* at 88.
69. *Id.* at 88-89.
70. *Id.* at 89.
71. *Id.*
72. *Id.* at 90.
73. *Id.*
“involved a statute of general applicability”74 while the special condition “applies only to the defendant and is reasonably related to a valid probation purpose,”75 that is, deterring the defendant and others “from seeking to profit directly or indirectly from criminality.”76 In fact, Massachusetts has a Son of Sam law similar to that struck down in Simon & Schuster, and the probation condition was apparently fashioned to survive a constitutional challenge while achieving the same effect.77

Power also claimed that the probation condition put her in jeopardy for the acts of third parties, and burdened persons not convicted of any crime. The court responded that “[t]he condition does not restrict any third party from telling the defendant’s story, provided he or she is not acting on the defendant’s authority as her representative or as her assignee.”78 Finally, the court rejected Power’s claim that the condition was unconstitutionally vague and “improperly leaves decisions to probation officers about when she can and cannot speak,”79 stating, “if the language which is challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, it is constitutionally adequate.”80 The Supreme Court denied certiorari.81

Power’s argument that the wording of the special condition was unconstitutionally vague and put her at risk for the acts of third parties is not without merit. If the court had taken the time to analyze its language, rather than falling back on its apparently clear thrust, it might have noted that “indirectly engaging . . . [in] benefit generating activity relating to the publication of facts . . . pertaining to” involvement in her crime, including expression of her “thoughts, feelings, opinions or emotions” is indeed vague enough to put decisions about when she can or cannot speak in the hands of probation officers.82 The condition does not state that she cannot sell...
the rights to her story but rather allows authorities to determine whether or not her expression constitutes a "profit or benefit generating activity." More importantly, the condition does not state that the prohibited profit or benefit must be hers. As worded, the condition could bar Power from cooperating—by talking, without pay—with reporters or television producers whose activity would lead to profit or benefit for themselves or their employers.

Still, the Supreme Judicial Court may have been correct that the condition conveyed "sufficiently definite warnings," though not in the way the court meant. When imposing the condition, trial judge Robert Banks announced, "I will not permit profit from the lifeblood of a Boston police officer by someone responsible for the killing." In a sense, Power was challenging the very clarity of Judge Banks' message as much as the broad language of the condition. The Massachusetts high court's claim that the condition allows Power "to speak on any subject, including her crimes" as long as she does not profit, ignored the substantial, intended chilling effect of harshly expressed and broadly worded State disapproval in a probationary context.

Just three months before the Power decision, the chilling effect doctrine had been reaffirmed by the Supreme Court (although not by name) in United States v. National Treasury Employees Union. There, citing Simon & Schuster, the Court held that section 501(b) of the Ethics in Government Act, which prohibited certain federal employees from accepting honoraria for speaking or writing articles, violated the First Amendment.

Although section 501(b) neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity. Publishers compensate authors because compensation provides significant incentive toward more expression. By denying respondents that incentive, the honoraria ban induces them to curtail their expression if they wish to continue working for the Government.

How much greater the inducement to curtail expression, though, when the speaker is faced not with loss of a job but with violation of probation for a crime punishable by life imprisonment.

84. Power, 650 N.E.2d at 90.
87. National Treasury, 513 U.S. at 454.
88. Id. at 455 (citations and footnotes omitted).
The *Power* court, which did not cite *National Treasury*, acknowledged that the special probation condition implicated Power's First Amendment rights, but took advantage of *Simon & Schuster*’s holdings that a content-based financial burden on speech may be justified if narrowly tailored to serve a compelling State interest, and that preventing profit from criminals speaking about their crimes was such a compelling interest. The court then reasoned that the individually applied special condition was subject only to a "reasonably related" test, unlike the "strict scrutiny" applied against a statute of general applicability.

Even assuming, for the sake of argument, that the *Power* court was correct in relaxing the *Simon & Schuster* standard—which was itself persuasively criticized by Justice Kennedy as a misreading of precedent which would result in insufficient protection of speech rights—the case of Katherine Ann Power would still cast doubt on the social value of burdening speech.

During the 1960s, Power evolved from a Catholic schoolgirl whose recipes won her a homemaking award to a talented and well-liked student at Brandeis University who became involved in anti-war politics, and finally to a radical activist sought for more than twenty years for her role in the theft of 400 pounds of explosives from a National Guard armory and the $26,000 bank robbery in which police officer Walter Schroeder was murdered. When she voluntarily surrendered to face the long-standing charges against her, she was both remorseful and articulate about the historical context of her crimes:

I am surrendering to authorities today to answer charges that arise from a series of acts 23 years ago. I am here to plead guilty to these...
charges, and I am prepared to accept whatever consequences the legal system will impose....

The illegal acts that I committed arose not from any desire for personal gain, but from a deep philosophical and spiritual commitment that if a wrong exists, one must take active steps to stop it, regardless of the consequences to oneself in comfort or security. Although at the time those actions seemed the correct course, they were in fact naive and unthinking.

My intention was never to damage any human life by my acts, and there is no accusation that I was directly responsible for the death of Walter Schroeder. His death was shocking to me, and I have had to examine my conscience and accept any responsibility I have for events that led to it.94

Power’s trajectory seemed to mirror in extreme proportions the experiences of individuals, families, and the nation itself during an era of dramatic social change.95

The Power trial court was, appropriately, more concerned with the illegality and violent results of Power’s actions than with their cultural resonance, and the sentencing judge’s comments reflected the anger expressed by Officer Schroeder’s family.96 Yet the scope of the burden imposed on Power effectively rendered virtually her entire life experience contraband; any income related to her memory, “thoughts, feelings, opinions, or emotions” became subject to criminal forfeiture, as if the thoughts and feelings were coterminous with her crime.97

Even if punishing wrongdoing and preventing criminals from profiting were the primary goals of the trial court, both the trial and Supreme Judicial courts should have recognized that the probation condition also placed a significant burden on expression related to a

95. See, e.g., Kantrowitz et al., supra note 93, at 60:
After all these years, it’s hard to know whom to feel the most sympathy for: the children who lost a father, the family who lost a daughter, the young woman who lost her way in the tumult of the ’60s. And there are others suffering now: a husband with a wife in jail, a son separated from his mother. Even with the best of intentions, some things can never be made right.
96. See supra note 77 and accompanying text; see also Sara Rimer, In Slain Officer’s Family, Anger and Forgiveness, N.Y. Times, Sept. 17, 1993, at A22; Family’s Grief in a Daughter’s Words, N.Y. Times, Oct. 7, 1993 (courtroom statement at sentencing) (“For reasons that I will never comprehend, the press and the public seem far more interested in the difficulties that Katherine Power has inflicted upon herself than in the very real and horrible suffering she inflicted upon my family.”). But note that in the famous Nazi-Skokie case the Seventh Circuit expressly held that the infliction of emotional distress on listeners did not justify burdening the First Amendment rights of the speakers. Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978).
97. See supra note 67 and accompanying text.
story of tremendous political and social significance. And the burden on expression is not borne by Katherine Power alone. Although courts have consistently devalued popular speech by and about criminals\textsuperscript{98} such speech is not of lesser value constitutionally.\textsuperscript{99} The fact that convicted criminals forfeit many rights\textsuperscript{100} does not justify speech restraints that affect not only their ostensible target, the defendant, but media and social discourse generally as well.

In \textit{National Treasury}, the Supreme Court noted that a burden on the speech of government employees would burden “the public’s right to hear what the employees would otherwise have written and said,”\textsuperscript{101} and that while there is “no way to measure the true cost of that burden . . . it might deprive us of the work of a future Melville or Hawthorne.”\textsuperscript{102} The Court’s example illustrates the larger social danger of the chilling effect; but it also illustrates the irrelevant calculation of “worthiness” that usually precedes recognition of a chilling effect. It is inherently bad to deter a speaker;\textsuperscript{103} it is bad to deprive the public of that speaker’s ideas. Yet somehow, when faced with an actual speaker whose ideas (or acts) are before the court, rather than a potential speaker about whom the court can only speculate—that is, when faced with Katherine Ann Power rather than the specter of Herman Melville—courts routinely find that the value of the speech is outweighed by the supposed value of the judicially imposed burden.

Each criminal speaker who appeals a speech restriction does so because she considers it to be an unconstitutional burden or prior restraint. In all of the cases described here, widespread public interest in the acts, and perhaps the expression, of the defendants has already been demonstrated. For a court to decide that a speaker in this position is less deserving of First Amendment protection than a hypothetical, unnamed class member who is subject to a speech-

\begin{footnotesize}
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  \item \textsuperscript{98} See supra Part II.
  \item \textsuperscript{99} See supra note 34.
  \item \textsuperscript{100} See, e.g., Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding disenfranchisement of convicted criminals, even when they have completed their sentences and periods of parole); \textit{Power}, 650 N.E.2d at 91 n.6 (surveying burdens imposed on probationers by a variety of courts).
  \item \textsuperscript{101} \textit{National Treasury}, 513 U.S. at 470.
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} See DWORKIN, supra note 32, at 197: “[A]lmost everyone who believes in rights at all would admit . . . that a man has a moral right to speak his mind in a non-provocative way on matters of political concern, and that this is an important right that the State must go to great pains to protect.”
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burdening statute suggests that the court is assigning a value to the content of the known speech, thus creating a subset of disfavored speech which is not otherwise recognized in First Amendment jurisprudence. This suggestion is strongly reinforced by the words of the judges themselves.104 These are improper determinations for courts to make. Even legislatures may not legitimately distinguish speech as more or less “worthy,” outside the limited categories of obscenity, incitement of lawless behavior, or fraud.105

Despite the anti-media rhetoric of most courts addressing crime-related expression, each would insist that it has not valued the speech and found it wanting, but has looked for a chilling effect and found none.106 In United States v. Terrigno,107 the Ninth Circuit stated that a probation condition barring receipt of money or anything of value from appearances, writing, “or any other media coverage”108 had not forbidden her from speaking, only from profiting:

[We see no danger that the public will be denied the benefits of full exposure of the facts of her crime and conviction nor that Terrigno will be denied her first amendment rights of expression because the trial court’s condition only forbids Terrigno’s making a profit, it does not restrict expression at all.109

The Power court, too, stated that the special condition allowed Power to speak on any subject and “merely” prohibited her from profiting from speech about her crime (which was construed to include the twenty-three years subsequent to the criminal acts).110

The defendants in these cases, though, have felt a chill, and the Supreme Court has acknowledged that a content-based financial

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104. See supra note 101. See also CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 168-70 (1993) (even if content-based restrictions may be proper at times, such restrictions often flow from unrevealed and improper government motives).

105. See Cohen v. California, 403 U.S. 15, 23 (1971) (holding that the State may not ban expletives (“fuck the draft”) to “maintain what [officials] regard as a suitable level of discourse within the body politic.”); Chicago Police Dept. v. Mosley, 408 U.S. 92, 96 (1972) (noting that government “may not select which issues are worth discussing or debating in public facilities.”); but see Young v. American Mini Theatres, 427 U.S. 50, 70 (1976) (noting that non-obscene sexually explicit material less protected than political speech: “few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”).

106. A notable exception is United States v. Seale, 20 F.3d 1279, 1285 (3d Cir. 1994), in which the court noted that defendant’s sale of her story was “clearly what the district court sought to prevent.” See supra notes 45-50 and accompanying text.

107. 838 F.2d 371 (9th Cir. 1988).

108. Id. at 373.

109. Id. at 374.

110. Power, 650 N.E.2d at 90.
disincentive to speech "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."¹¹¹ The chill may take the form of a direct disincentive, or may arise from a combination of factors, such as the clarity of the court's disapproval (and a consequent desire not to anger the court) or the vagueness of the prohibition.¹¹² It is impossible to know whether or not the media have been affected in these cases. Katherine Ann Power’s story disappeared from the news shortly after her sentencing and no television movie about her life ever appeared. That may prove nothing more than the fickleness of the news and entertainment industries (and their audiences), but it must be noted that the doctrines of the right of privacy and the right of publicity have created a strong disincentive to non-news media actors representing a defendant’s story without her consent or cooperation.¹¹³ Therefore, burdening the speech rights of an individual will, at the least, affect the circumstances in which decisions about media coverage and programming are made.¹¹⁴

IV

Conclusion: Much Ado About Nothing?

In a society that allows not only the jailing and disenfranchisement of criminals but their execution as well, limitations on their speech rights may seem almost trivial. Deprivation of one right is never a justification for deprivation of another, though, and freedom of expression is arguably the most important right of all. But

¹¹⁴ Note that the Supreme Court did not decide whether it was the individual object of the financial disincentive or the media who was the “speaker” in Simon & Schuster, but remarked that the disincentive affected both:

Whether the First Amendment “speaker” is considered to be [author] Henry Hill, whose income the statute places in escrow because of the story he has told, or [publisher] Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive... 502 U.S. at 116.
does it truly matter if, as a result of a probation condition, the “media circus” is reduced to a mere media garden party, or a convicted criminal is discouraged from speaking? Or is a popular movie-of-the-week or paid interview with a criminal “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”? Judges and legislators seem to think so when they express concern over “idle gossip,” “rumor-mongering,” “obsessive” public interest in “bizarre criminal acts,” and “the glare of national news media attention.” However, gossip and rumor are forms of knowledge. They are among the ways in which communities circulate and interpret social information. Whatever the level of insight or the intellectual depth of tabloid television and newspapers, they are far more popular than C-SPAN or the New York Times, presumably because they convey more of what people want to know in forms accessible and meaningful to them. Judges who decide that an imposition on such media is no imposition have overreached.

In the cases discussed above, the courts have invoked the favorite arguments of those who would limit a basic right: The right is not really limited in this case; or, the right is limited but marginally so, and only in response to an abuse; or, the limit placed on the right here is necessary to avoid a greater harm to society.

The first of these arguments, that the right is not really limited, is disingenuous. Some of the courts have admitted their intention to prevent the sale of story rights or “glamorization” of crime; all have singled out expressive activity in the context of public and media attention. While unable to bar speech directly, these courts have crafted acknowledged disincentives to speech which, because individually applied, are meant to survive challenges that would defeat statutes with the same effects.

The third argument, that the right is limited in order to prevent a


116. This observation is not meant to suggest that public tastes and desires are not shaped and, perhaps, created, in part, by popular media—i.e., not to say that commerce is truly driven by consumers. There is obviously a complex interplay between providers and consumers that shapes the end product. Nor is it meant to suggest that the New York Times, and even C-SPAN, are not responsive to their audiences. But judicial valuation of media content is inappropriate whether that content is “high” or “low,” and whether the content is shaped by consumer demand or producer “creation” of demand.

117. Cf. DWORKIN, supra note 32, at 200 (describing grounds “consistently . . . used to limit the definition of a particular right.”).
greater harm to society, is not serious in this context. It is highly questionable to argue that income from speech about crime is forfeitable criminal profit, and more questionable still to say that a judge may decide that profitable (or "beneficial") cooperation with the media by the criminal is a new wrong which would cause measurable harm to a society apparently eager to hear his story. The third argument is best reserved for assessing such problems as the rights of speakers to enter homes uninvited, or of individuals to set off explosives on their property.

Only the second of the arguments, that the right is only marginally limited in response to a wrong, merits consideration. Like the third argument, though, it requires that one accept the notion that rights are measurable in degree and may be meaningfully weighed against other rights or social values—an approach that seriously undervalues the significance of rights to individuals and to society. The calculations of this sort that courts have made so far to address crime-related expression have significantly overreached and unnecessarily degraded the expressive rights of citizens.

If the public and the courts believe that compensation for expression is profit from crime, then broad fines already sanctioned under the sentencing guidelines and well-established tort-law principles offer sufficient remedy. Criminals may be fined and jailed. Victims may sue for civil damages. But to single out speech as a

118. See supra notes 107-110 and accompanying text.

119. See Dworkin, supra note 32, at 204 (government must "not define citizens' rights so that these are cut off for supposed reasons of the general good."). To critique ad hoc regulation of speech and the balancing of speech against other rights and values is not necessarily to argue for the supremacy of individual speech rights, or individualism generally. Most reasoned justifications of speech rights are based on some notion of public interest. See Joseph Raz, The Morality of Freedom 179 (1986):

In the Common Law freedom of expression is regularly defended, where it is defended, on grounds of the public interest, that is on the interests of third parties. The right holder's interest itself conceived independently of its contribution to public interest, is deemed insufficient to justify holding others to be subject to the extensive duties and disabilities commonly derived from the rights of free speech.


120. See Timmons, supra note 11, at 1169 ("Traditional tort law maintains a balance between society's need to prevent incentives for committing crime while allowing for adequate victim compensation. . . . Moreover, tort law does not interfere with the criminal author's right to free speech.").
means of righting a wrong is wrong. If the public does not want crime-related expression reported or dramatized, it will abandon media that do so. If the public abhors the phenomenon of "checkbook journalism," it will shun outlets that pay their news sources. The First Amendment is hollow, though, if judges may consider the content of, and venue for, speech in order to decide which speakers and which topics merit its full protection.