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NOTE

CRIMINALS SELLING THEIR STORIES: THE FIRST AMENDMENT REQUIRES LEGISLATIVE REEXAMINATION

During 1977, "Son of Sam"¹ terrorized New York City residents. Repulsed that the killer stood to profit by selling the story of his crimes,² the New York legislature enacted a law enabling the state to use a criminal's proceeds to compensate his victims.³ In subsequent years, Congress⁴ and thirty-five states⁵ adopted varia-

¹ The New York City press developed the nickname "Son of Sam" for the then unknown murderer after police found a note signed "Son of Sam" at the scene of an April 17, 1977 murder. See Winfrey, "Son of Sam" Case Poses Thorny Issues for Press, N.Y. Times, Aug. 22, 1977, at 1, col. 1, 38, col. 3.

² "It is abhorrent [sic] to one's sense of justice and decency that an individual, such as [Son of Sam], can expect to receive large sums of money for his story once he is captured—while five people are dead, [and others] were injured as a result of his conduct." 1977 NEW YORK STATE LEGISLATIVE ANNUAL 267 (memorandum of Sen. Gold, bill's sponsor).

Senator Gold "developed the bill after reading a newspaper account during the hunt for the 'Son of Sam' stating that the killer 'stood to get rich' and that there would be people 'waiting at the precinct house to get him to sign a contract.' 'That was just the last straw,' the Senator said." *Criminals' Revenues from Stories Curbed*, N.Y. Times, Aug. 13, 1977, at 28, col. 3.

Numerous criminals have profited by telling of their crimes. See Nichols, "What the Hell's a Guy Gonna Do?", USA Today, Jan. 9-11, 1987, at 1A, col. 3, 2A, col. 1 (convicted murderer Roswell Gilbert and his attorney received \$50,000 for rights to *Mercy or Murder?*); *The Wages of Sin*, TIME, Mar. 23, 1987, at 77 (Sydney Biddle Barrows, the "Mayflower Madam," reportedly will receive \$250,000 for book and TV-movie rights); *infra* text accompanying notes 69-70; see also Note, *Publication Rights Agreements in Sensational Criminal Cases: A Response to the Problem*, 68 CORNELL L. REV. 686, 687 n.4 (1983) (describing broad range of payments received by criminals for publication rights agreements).

³ N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1987). For a description of the operation of New York's law, see *infra* notes 12-28 and accompanying text.

⁴ Victims of Crime Act of 1984, 18 U.S.C.A. §§ 3681-3682 (West 1985 & Supp. 1987).

⁵ ALA. CODE § 41-9-80 to -84 (1982); ALASKA STAT. § 12.61.020 (1984); ARIZ. REV. STAT. ANN. §§ 13-4201 to -4202 (Supp. 1987); ARK. CODE ANN. § 16-90-308 (1987); COLO. REV. STAT. §§ 24-4.1-201 to -207 (Supp. 1986); CONN. GEN. STAT. ANN. § 54-218 (West 1985); DEL. CODE ANN. tit. 11, §§ 9101-9106 (Supp. 1986); FLA. STAT. ANN. § 944.512 (West 1985); GA. CODE ANN. §§ 17-14-30 to -32 (1982 & Supp. 1987); IDAHO CODE § 19-5301 (1987); ILL. ANN. STAT. ch. 70, paras. 401-414 (Smith-Hurd Supp. 1987); IND. CODE ANN. §§ 16-7-3.7-1 to .7-6 (Burns 1983); IOWA CODE ANN. § 910.15 (West Supp. 1987); KY. REV. STAT. ANN. § 346.165 (Baldwin 1986); LA. REV. STAT. ANN. §§ 46:1831-1839 (West 1982); MASS. GEN. L. ch. 258A, § 8 (1986); MINN. STAT. ANN. § 611A.68 (West 1987); MO. ANN. STAT. § 595.045(11) (Vernon 1987); MONT. CODE ANN. § 53-9-104(1)(d) (1987); NEB. REV. STAT. §§ 81-1836 to -1840 (1981 & Supp. 1986); NEV. REV. STAT. ANN. § 217.265 (Michie 1986); N.J. STAT. ANN. §§ 52:4B-26 to

tions of New York's "Son of Sam" law.

"Son of Sam" laws intend to "make it clear that in all criminal situations, the victim must be more important than the criminal."⁶ By passing such laws, states seek to ensure that victims receive complete compensation before a criminal can profit from his crime. Indeed, some states never return proceeds to the criminal, even after his victims have received complete compensation. Although all "Son of Sam" laws reach the criminal's proceeds,⁷ none reach profits earned by the author and publisher,⁸ even if victims have re-

-33 (West 1986 & Supp. 1987); N.M. STAT. ANN. § 31-22-22 (Supp. 1986); OHIO REV. CODE ANN. §§ 2969.01 to .06 (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 17 (West Supp. 1987); 71 PA. CONS. STAT. ANN. § 180-7.18 (Purdon Supp. 1987); R.I. GEN. LAWS §§ 12-25.1-1 to .1-12 (Supp. 1986); S.C. CODE ANN. §§ 15-59-40 to -80 (Law. Co-op. Supp. 1986); S.D. CODIFIED LAWS ANN. §§ 23A-28A-1 to -14 (Supp. 1987); TENN. CODE ANN. § 29-13-201 to -208 (1980); TEX. REV. CIV. STAT. ANN. art. 8309-1, §§ 16-18 (Vernon Supp. 1987); UTAH CODE ANN. § 78-11-12.5 (1987); WASH. REV. CODE ANN. §§ 7.68.200 to .280 (Supp. 1987); WIS. STAT. ANN. § 949.165 (West Supp. 1987); WYO. STAT. § 1-40-112 (Supp. 1987).

Maine's law does not expressly address the criminal's profits from his story, but provides that "[a]ny prisoner, . . . who is able to generate income, from whatever source, shall pay 25% of that income to any victim if the court has ordered that restitution be paid." ME. REV. STAT. ANN. tit. 17-A, § 1330(2) (Supp. 1987). California does not have a "Son of Sam" law, but permits its courts to consider "any economic gain derived by the defendant as a result of the crime" when setting the amount of a fine for felony convictions. CAL. GOV'T CODE § 13967(a) (West Supp. 1987).

⁶ 1977 NEW YORK STATE LEGISLATIVE ANNUAL 267 (memorandum of Sen. Gold).

⁷ The term "proceeds" or "profits" refers either to the criminal's percentage share of the author's profits or to a lump-sum payment to the criminal for telling of his crimes.

⁸ References to "author-publisher profits" mean the profits that authors and publishers earn when contracting with a criminal to tell of his crime. For example, if a contract provided for a 10%, 45%, and 45% division of net profits among the criminal, author, and publisher, respectively, author-publisher profits would total 90% of the net profits. References to "author" and "publisher" include anyone who helps the criminal tell of his crime. For example, a playwright and a play's producer would fit within the references to "author" and "publisher" respectively.

New Jersey's appellate division has held that its state "Son of Sam" law does not reach the profits earned by authors and publishers. *Fasching v. Kallinger*, 211 N.J. Super. 26, 41-44, 510 A.2d 694, 702-04 (App. Div. 1986); *see infra* note 82. Arguably, Ohio's law extends to the profits of authors and publishers by reaching all proceeds of "[a]ny offender, or any agent, assignee, conspirator, or accomplice of the offender, . . . or any person who receives money . . . pursuant to [the] contract." OHIO REV. CODE ANN. § 2969.02(B) (Anderson 1987). In particular, the reference to "any person who receives money" invites broad interpretation of the law so as to reach author-publisher profits. In addition, when the time for victims' claims has passed, the Ohio law returns all money "remaining in the separate account to the persons from whom the moneys in the account were obtained." *Id.* § 2969.05; *see also id.* § 2969.04(A) (similar language used to disburse funds after accused not convicted); *cf.* N.J. STAT. ANN. § 52:4B-30(a) (West 1986) (escrow monies released to accused upon acquittal); *Fasching*, 211 N.J. Super. at 42, 510 A.2d at 703 (The court noted that the New Jersey statute "provides for the release of the escrowed monies to the accused upon acquittal, but omits any similar procedure for returning impounded funds to others. If the Legislature intended the act to reach the proceeds owed authors and publishers as well as criminal offenders, it would have also provided a mechanism to return monies to those parties upon acquittal of the offender.").

ceived only partial compensation.

As currently in force, "Son of Sam" laws fail to achieve their underlying policy goals, and are unconstitutional. The laws—content-based regulations—run afoul of the first amendment⁹ by chilling, and in many cases eliminating, protected speech.¹⁰ States

⁹ The first amendment provides, in relevant part, "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend I. The first amendment applies to the states through the fourteenth amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

¹⁰ No court has yet to declare that any "Son of Sam" law violates the first amendment. The trial court in *Fasching v. Kallinger*, No. 83-7580, slip op. at 32-36 (N.J. Super. Ct. Law Div. July 24, 1985), upheld New Jersey's law against a first amendment attack by the author and publishers of a book detailing the life and crimes of Joseph Kallinger. See F. SCHREIBER, *THE SHOEMAKER: THE ANATOMY OF A PSYCHOTIC* (1983). Because the appellate division held that the statute did not reach author-publisher profits, it did not address the first amendment claims raised by the author and publishers. *Fasching*, 211 N.J. Super. at 44, 510 A.2d at 704. Neither did the appellate division address the criminal's first amendment claims, finding that he had suffered no adverse judgment in the trial court because he had not joined in the motion for summary judgment. *Id.* at 45, 510 A.2d at 704.

Only four other cases have addressed "Son of Sam" laws. In *United States v. MacDonald*, 607 F. Supp. 1183 (E.D.N.C. 1985), the court examined the federal "Son of Sam" law. 18 U.S.C.A. §§ 3681-3682 (West 1985 & Supp. 1987). The government sought the forfeiture of Jeffrey MacDonald's proceeds from the book and television movie about his crimes. See J. MCGINNISS, *FATAL VISION* (1983). The district court held that the forfeiture provision violated the constitutional prohibition against ex post facto laws when applied to a person convicted of crimes prior to the provision's passage. 607 F. Supp. at 1185-86. The court noted that because of this holding it had no need to decide MacDonald's first amendment claim. *Id.* at 1186 n.5.

The remaining three cases addressed the nuances, but not the constitutionality, of New York's law. See *In re Halmi*, 12 Media L. Rep. (BNA) 2388 (N.Y. Sup. Ct. 1986) (New York "Son of Sam" law does not reach "victimless" crime, especially where for any "victims" to recover they would have to admit committing crime), *aff'd*, 128 A.D.2d 411, 512 N.Y.S.2d 650 (1st Dep't 1987); *Barrett v. Wojtowicz*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (2d Dep't 1979) (examining statute-of-limitation provision of New York law); *In re Johnsen*, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (Sup. Ct. 1979) (conservatorship appointment of "Son of Sam" connected with New York law). The Special Term in *Johnsen*, however, asserted, without further analysis, "This court declares Executive Law section 632-a constitutional . . ." *Id.* at 830, 430 N.Y.S.2d at 909.

Most commentaries have concluded that "Son of Sam" laws violate the first amendment when applied to the criminal's proceeds. See Note, *Alabama's Anti-Profit Statute: A Recent Trend in Victim Compensation*, 33 ALA. L. REV. 109, 122-35, 139-40 (1981) [hereinafter Note, *Alabama*]; Note, *Compensating the Victim from the Proceeds of the Criminal's Story—The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROBS. 93, 105-13 (1978) [hereinafter Note, *Compensating the Victim*]; Note, *Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech*, 54 IND. L.J. 443, 449-62 (1979) [hereinafter Note, *Criminals-Turned-Authors*]; see also N. Jones, *Constitutional Analysis of Statutes Requiring that Funds Received by Accused or Convicted Criminals for the Story of Their Crime Be Given to Their Victims* (Congressional Research Service 1982) (on file at *Cornell Law Review*). But see Comment, *In Cold Type: Statutory Approaches to the Problems of the Offender as Author*, 71 J. CRIM. L. & CRIMINOLOGY 255, 257-71 (1980) ("Son of Sam" laws constitutional).

Only first amendment issues are addressed in this Note. For a discussion of due process objections to "Son of Sam" laws, see Note, *Alabama, supra*, at 135-39; Note, *Compensating the Victim, supra*, at 99-105; Note, *Criminals-Turned-Authors, supra*, at 462-65; Comment, *supra*, at 271-73; N. Jones, *supra*, at 3-6. See generally Note, *supra* note 2 (publi-

could amend their laws to permit victims to waive their damages right and criminals to retain some proceeds from their story. These amendments would better achieve the underlying policy goals of "Son of Sam" laws and would lessen the chilling effect on first amendment freedoms. Such amendments, however, would not account for problems of subjective value, high transaction costs, and holdouts. Consequently, states should amend their "Son of Sam" laws to create a statutory division of the profits between the criminal and his victim. These amendments would meet the underlying policies and would better eliminate first amendment objections than the current versions.

States should not extend any statutory division of profits to those earned by authors and publishers.¹¹ Although such an extension would seek to provide victims with additional compensation, it would have the opposite result. Providing additional compensation to victims from the profits of authors and publishers would result in a return to authors and publishers of less than their opportunity costs and therefore they would choose not to write and publish those books requiring them to contract with a criminal.

I

THE OPERATION OF CURRENT "SON OF SAM" LAWS

New York's law,¹² the model for many states, fairly represents the language and operation of "Son of Sam" laws.¹³ The law is triggered when an accused¹⁴ or convicted¹⁵ person contracts to speak¹⁶

cation rights agreements between criminal defendants and their attorneys would reduce constitutional concerns associated with "Son of Sam" laws); Note, *The Son-of-Sam Laws: When the Lunatic, the Criminal, and the Poet Are of Imagination All Compact*, 27 ST. LOUIS U.L.J. 207 (1983) ("Son of Sam" laws violate federal copyright laws).

¹¹ No legal commentator has yet suggested that "Son of Sam" laws should extend to author-publisher profits. See commentaries cited *supra* note 10.

¹² N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1987).

¹³ Only the "Son of Sam" laws of Florida and Nevada notably differ from the New York law. Florida's version attaches a lien directly on the criminal's proceeds, FLA. STAT. ANN. § 944.512(1) (West 1985), and provides that the victims and the convicted felon's dependents each receive 25% of the account. *Id.* § 944.512(2)(a)-(b). Nevada's law attaches a lien on one-half of the criminal's profits. NEV. REV. STAT. ANN. § 217.265 (Michie 1986).

¹⁴ New York's law initially reaches contracts with an accused person. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982). The accused, however, receives all money in the escrow account upon dismissal of the charges or acquittal. *Id.* § 632-a(3).

¹⁵ A "convicted person" includes "any person convicted of a crime in [New York] state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted." *Id.* § 632-a(10)(b). In addition, a convicted person includes a person found not guilty by reason of insanity. *Id.* § 632-a(5). If the accused is incompetent at the time of trial, a court must determine the disposition of the escrow account. *Id.* § 632-a(6).

or write¹⁷ about his crime. The person¹⁸ contracting with the criminal¹⁹ must turn over the criminal's proceeds to the state's Crime Victims Compensation Board.²⁰ The Board then establishes an escrow account for the benefit of the criminal's victims²¹ and publicizes the account's existence.²²

To obtain money from an account, a victim²³ must bring a civil action against the criminal and recover a money judgment²⁴ within five years²⁵ of the account's establishment.²⁶ After the statute of

¹⁶ The statute reaches "the accused or convicted person's thoughts, feelings, opinions or emotions regarding [the] crime." *Id.* § 632-a(1). The statute would seem to apply, for example, when a university pays a criminal to speak about his crime. *See* OHIO REV. CODE ANN. § 2969.02(A)(1)(c) (Anderson 1987) (law triggered when criminal contracts to give a speech).

¹⁷ The statute expressly refers to reenactments "by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, [or] live entertainment of any kind." N.Y. EXEC. LAW § 632-a(1) (McKinney 1982). The statute does not specifically mention newspaper stories, although its language, *see supra* note 16, is broad enough to encompass them. *See* OHIO REV. CODE ANN. § 2969.02(A)(1)(a) (Anderson 1987) (expressly reaching newspaper stories); R.I. GEN. LAWS § 12-25.1-2(b) (Supp. 1986) (same); *see also* N.J. STAT. ANN. § 52:4B-28 (West 1986) (although not specifically mentioning newspapers, refers to "other literary expression[s]").

¹⁸ This term encompasses "[e]very person, firm, corporation, partnership, association or other legal entity." N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

¹⁹ The statute also reaches the criminal's representative or assignee. *Id.*

²⁰ The person contracting with the criminal must submit a copy of the contract to the Board. *Id.* *But see In re Halmi*, 12 Media L. Rep. (BNA) 2388 (N.Y. Sup. Ct. 1986) (Board lacked authority to require person contracting with criminal to submit copy of contract when crime was "victimless"), *aff'd*, 128 A.D.2d 411, 512 N.Y.S.2d 650 (1st Dep't 1987).

²¹ N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

²² *Id.* § 632-a(2). Alabama, for example, requires that all known victims receive notification of the escrow account. ALA. CODE § 41-9-81 (1982).

²³ The statute defines a victim as "a person who suffers personal, physical, mental, or emotional injury, or pecuniary loss as a direct result of the crime." N.Y. EXEC. LAW § 632-a(10)(a) (McKinney 1982); *see Halmi*, 12 Media L. Rep. (BNA) at 2389 (crime of promoting prostitution lacks "victims" because no one injured "as a direct result" of crime and even if persons directly injured, they would recover only by admitting crime of patronizing a prostitute and public policy "does not permit a party to a crime to maintain a civil action against a co-participant arising from the illegal conduct" (quoting § 632-a(10)(a)).

²⁴ Pennsylvania's law provides that "the accused or convicted person may voluntarily request that the board make payments to eligible persons who have not recovered money judgments." 71 PA. CONS. STAT. ANN. § 180-7.18(a) (Purdon Supp. 1987). Rhode Island pays the victim's "reasonable" attorney fees out of the account. R.I. GEN. LAWS § 12-25.1-5 (Supp. 1986).

²⁵ N.Y. EXEC. LAW § 632-a(1) (McKinney 1982). Utah extends the time for recovery to six years. UTAH CODE ANN. § 78-11-12.5(1)(b) (1987). Six states shorten the time period. ILL. ANN. STAT. ch. 70, para. 403 (Smith-Hurd Supp. 1987) (two years); IND. CODE ANN. § 16-7-3-7-5 (Burns 1983) (two years); LA. REV. STAT. ANN. § 46:1835(B) (West 1982) (three years); MASS. GEN. L. ch. 258A, § 8 (1986) (three years); OHIO REV. CODE ANN. § 2969.04(B) (Anderson 1987) (three years); WIS. STAT. ANN. § 949.165(8)(b) (West Supp. 1987) (three years).

Rhode Island allows the victim to bring suit within three years of the last payment to the fund. R.I. GEN. LAWS § 12-25.1-4(A) (Supp. 1986). Montana's law provides "for

limitations runs,²⁷ the criminal receives any money in the escrow account upon his showing that no actions are pending against him.²⁸

II

POLICY JUSTIFICATIONS FOR "SON OF SAM" LAWS

"Son of Sam" laws serve three main goals.²⁹ First, the laws mainly seek to compensate crime victims before the criminal profits from the sale of his story.³⁰ The disbursement provisions in most laws best demonstrate this policy. For example, under New York's law, victims satisfy their civil judgments before the criminal receives his proceeds.³¹

such period of time as the [overseeing state board] may determine is reasonably necessary to perfect the claims of the victims or dependents." MONT. CODE ANN. § 53-9-104(1)(d) (1987).

²⁶ N.Y. EXEC. LAW § 632-a(1), (7) (McKinney 1982); see *Barrett v. Wojtowicz*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (2d Dep't 1979). All but two states either expressly begin the statutory time period with the establishment of the escrow account or waive the general statute of limitations provision. Connecticut requires that the victim bring a civil action within five years of the "date of the crime," yet does not waive the general statute of limitations. CONN. GEN. STAT. ANN. § 54-218 (West 1985). Minnesota waives the statute of limitations unless a court order discharged the criminal from his sentence or the criminal's sentence expired. MINN. STAT. ANN. § 611A.68(2) (West 1987).

²⁷ Surprisingly, the New York statute provides for the criminal to receive excess proceeds only after the statutory time period. The statute does not address the possibility that the criminal could pay victims' judgments without resort to the proceeds from telling of his crimes.

²⁸ N.Y. EXEC. LAW § 632-a(4) (McKinney 1982). New York's law permits the criminal to obtain money from the account before the statutory time period ends to pay for legal representation provided that the total disbursement does not exceed 20% of the account. *Id.* § 632-a(8). For a discussion of how states disburse funds after the statutory time period and how the chosen method relates to state interests, see *infra* notes 34-36 and accompanying text.

²⁹ Arguably, "Son of Sam" laws serve two other goals as well. First, the Senate report accompanying the federal "Son of Sam" law suggests that the law seeks "to preclude criminals from . . . encouraging others that crime does indeed pay." S. REP. NO. 497, 98th Cong., 2d Sess. 6-7, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3607, 3611.

Second, "Son of Sam" laws might seek to compensate the victim for any invasion of privacy caused by publication of the crime story. Courts have yet to recognize "invasion of privacy" as a cause of action when the criminal contracts to tell of his crime and the victim is still alive, see *Barrett v. Wojtowicz*, 94 Misc. 2d 379, 382-83, 404 N.Y.S.2d 829, 831 (Sup. Ct. 1978), or when the victim has died. See *Fasching v. Kallinger*, 211 N.J. Super. 26, 39, 510 A.2d 694, 701 (App. Div. 1986) ("The general rule is: the right of privacy dies with the individual."). The *Fasching* court also refused to recognize a "relational" right of privacy in the deceased victim's parents and sister. *Id.* at 39-41, 510 A.2d at 701-02. In light of the courts' treatment, "Son of Sam" laws do not appear to serve an independent policy of compensating victims for an invasion of privacy.

³⁰ Compensating victims through "Son of Sam" laws complements the groundswell of legislation now addressing the plight of crime victims. See Smith, *Victim Compensation: Hard Questions and Suggested Remedies*, 17 RUTGERS L.J. 51, 52 n.11 (1985) (collecting statutes and commentaries addressing victim compensation).

³¹ N.Y. EXEC. LAW § 632-a(11)(c), (e) (McKinney Supp. 1987). But before victims

Second, "Son of Sam" laws facilitate victim compensation without further burdening state and federal treasuries.³² The Senate report connected with the federal "Son of Sam" provision noted that "[t]he purpose of this provision is to derive funds for the [Crime Victims Fund] primarily from wrongdoers who are responsible for the suffering of victims."³³ States have a strong interest in seeing that the financial burden falls on the criminal, reducing taxpayers' liability or freeing up tax revenues for disbursement elsewhere.

Finally, some "Son of Sam" laws seek to prevent the criminal from profiting from his crime. Thus, thirteen states do not return money remaining in the escrow account to the criminal at the end of the statutory time period for victims' claims.³⁴ The Senate report

receive compensation, the criminal can receive part of his proceeds to pay for attorney fees in criminal proceedings. *Id.* § 632-a(8), (11)(a) (McKinney 1982 & Supp. 1987).

Most laws disburse money remaining in the escrow account to the criminal, but only when the statutory time limit for victims' claims expires. *See* COLO. REV. STAT. § 24-4.1-201(3) (Supp. 1986) (except for funds paid to department of corrections to maintain criminal in custody); DEL. CODE ANN. tit. 11, § 9103(d) (Supp. 1986); FLA. STAT. ANN. § 944.512(2)(d) (West 1985) (to convicted felon after his release, parole, or expiration of sentence); GA. CODE ANN. § 17-14-31(d) (1982); IDAHO CODE § 19-5301(3) (1987); IOWA CODE ANN. § 910.15(3) (West Supp. 1987); KY. REV. STAT. ANN. § 346.165(3) (Baldwin 1986); MASS. GEN. L. ch. 258A, § 8 (1986); MINN. STAT. ANN. § 611A.68(5) (West 1987); NEB. REV. STAT. § 81-1837 (Supp. 1986); N.M. STAT. ANN. § 31-22-22(F) (Supp. 1986); N.Y. EXEC. LAW § 632-a(4) (McKinney 1982); OHIO REV. CODE ANN. § 2969.05 (Anderson 1987) (returned "to the persons from whom the moneys in the account were obtained"); 71 PA. CONS. STAT. ANN. § 180-7.18(d) (Purdon Supp. 1987); R.I. GEN. LAWS §§ 12-25.1-3(C)(6), (8), 1-6(B) (Supp. 1986) (one-half to violent crimes indemnity fund); S.C. CODE ANN. § 15-59-60 (Law. Co-op. Supp. 1986); S.D. CODIFIED LAWS ANN. § 23A-28A-8 (Supp. 1987); TENN. CODE ANN. § 29-13-203(1) (1980); TEX. REV. CIV. STAT. ANN. art. 8309-1, § 18 (Vernon Supp. 1987); UTAH CODE ANN. § 78-11-12.5(8) (1987); WASH. REV. CODE ANN. § 7.68.240 (Supp. 1987); WIS. STAT. ANN. § 949.165(8)(b) (West Supp. 1987).

The Supreme Court has implicitly recognized victim compensation as a "strong and legitimate" interest. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974), the Court noted that states should ensure that private individuals receive complete compensation for injuries to their reputation. When the victim suffers a tort from crime, rather than from a civil wrong, the state's interest in compensating the victim seems at least as great.

³² For example, New York's law provides that the state acquires rights in up to one-half of the victim's civil judgment if the state has paid compensation to the victim. *See* N.Y. EXEC. LAW §§ 632-a(11)(b), 634 (McKinney Supp. 1987).

³³ S. REP. NO. 497, *supra* note 29, at 5, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3611.

³⁴ ALA. CODE § 41-9-82 (1982); ALASKA STAT. § 12.61.020 (1984); ARIZ. REV. STAT. ANN. § 13-4202(E) (Supp. 1987); ARK. CODE ANN. § 16-90-308(c)(2) (1987); CONN. GEN. STAT. ANN. § 54-218(b) (West 1985); ILL. ANN. STAT. ch. 70, para. 406(6)(b) (Smith-Hurd Supp. 1987); IND. CODE ANN. § 16-7-3.7-5 (Burns 1983); LA. REV. STAT. ANN. § 46:1835(B) (West 1982); MO. ANN. STAT. § 595.045(11) (Vernon 1987); MONT. CODE ANN. § 53-9-104(I)(d) (1987); N.J. STAT. ANN. § 52:4B-30(a)(5) (West 1986); OKLA. STAT. ANN. tit. 22, § 17(C) (West Supp. 1987); WYO. STAT. § 1-40-112(f) (Supp. 1987). The federal "Son of Sam" law provides that a court directs disposition and may require that all or any part of the remaining escrow proceeds revert to the Crime Victims Fund in the Treasury. 18 U.S.C.A. § 3681(c)(2) (West 1985 & Supp. 1987).

noted that "[t]he purpose is to preclude criminals from profiting from the glorification of their misdeeds Any profits reaped from illegal acts are more appropriately used to provide restitution to the direct victim of the crime, or, alternatively, to victims of crime in general."³⁵ States have long staked out a strong interest in not allowing criminals to profit from their crimes.³⁶

III

"SON OF SAM" LAWS AND THE FIRST AMENDMENT

The Supreme Court classifies laws that regulate speech as content-based if they restrict public discussion of an entire topic.³⁷ "Son of Sam" laws fit into this classification.³⁸ The laws restrict public discussion of an entire topic by inhibiting the criminal's speech *concerning his crime*.³⁹ The laws, however, would not reach the

³⁵ S. REP. NO. 497, *supra* note 29, at 6-7, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3612-13; *see also* United States v. MacDonald, 607 F. Supp. 1183, 1186 (E.D.N.C. 1985) ("[T]he [federal] forfeiture statute serves a valuable purpose in preventing wrongdoers from profiting from their crimes"); Press Release of Gov. Thomas H. Kean (Jan. 26, 1983) (New Jersey "Son of Sam" law "intended to prevent perpetrators of sensational crimes from profiting by their criminal actions") (on file at *Cornell Law Review*).

³⁶ *See, e.g.*, Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) (law cannot permit legatee to take under will when legatee murdered testator to prevent will's revocation).

³⁷ *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980). City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986), apparently has narrowed the test for content-based regulations to one where regulations have the "predominant intent" and not the "secondary effect" of regulating speech on the basis of content. *See generally* *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 190-200 (1986). In *Renton* the Court held that a city ordinance was not content-based even though it prohibits adult motion picture theaters from locating within 1,000 feet of certain structures. The Court noted that the city sought, among other things, to prevent crime, protect the city's retail trade, and maintain property values—not to suppress the content of the films shown at the theaters. 475 U.S. at 48. "Son of Sam" laws, however, expressly reach a certain category of speech—speech resulting when the criminal contracts to tell the story of his crime. Consequently, the laws fit within the content-based category, notwithstanding *Renton's* recent narrowing of that category.

³⁸ Courts should reject the argument that "Son of Sam" laws do not regulate speech, but rather regulate only the profits from speech. *See, e.g.*, Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 493-94 (1985) (*NCPAC*) (rejecting any distinction between restricting expenditures to produce political speech and restricting the speech itself; noting spending limitations are "much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system"); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 967 n.16 (1984) ("Any restriction on the amount of money a charity can pay to a third party as a fundraising expense could be labelled 'economic regulation.'" The statute, however, is a direct restriction on the charities' first amendment activity even though the statute regulates only the economic relationship between charities and professional fundraising.). *But cf.* *NCPAC*, 470 U.S. at 508 (White, J., dissenting) ("[T]he expenditures in this case 'produce' core First Amendment speech[;] . . . they are not speech itself.").

³⁹ Arguably, "Son of Sam" laws do not completely restrict publication of the criminal's perspective. For example, the criminal could give interviews to the author, yet not

criminal's proceeds if he contracted to write a cookbook because the cookbook would not tell the story of his crime.⁴⁰

The Court holds content-based regulations constitutional only if they are narrowly drawn means⁴¹ of serving compelling state interests.⁴² The Court will not uphold such regulations merely on a

enter into a contract for any of the book's proceeds. Moreover, an author could write a book based on the criminal's confession contained in the trial transcript. Indeed, the first amendment prevents states from restricting books derived solely from trial transcripts. See *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity."). Similarly, no state interest would support a law reaching the situation where the criminal provides interviews without contracting to receive any proceeds. The criminal would receive no profits from which to pay victim compensation, and would not profit from his crimes.

⁴⁰ But see *NEV. REV. STAT. ANN. § 217.265* (Michie 1986) ("Son of Sam" law reaches payments criminal "receives based on his notoriety as an offender").

⁴¹ The Supreme Court declares a statutory scheme unconstitutional as not a narrowly tailored means if an alternative structure would achieve the state interests and would deter speech less. See, e.g., *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 19 (1986) (plurality opinion) (state can serve interest by means that do not violate utility's first amendment rights); *FCC v. League of Women Voters*, 468 U.S. 364, 388-89 (1984) (interest asserted by government is already insulated and safeguarded by other provisions of Public Broadcasting Act); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 (1982) (case-by-case analysis, rather than state's mandatory closure law, would serve state interests just as well and deter less speech).

In addition, the Supreme Court will not uphold laws that do not achieve the asserted state interests. See, e.g., *League of Women Voters*, 468 U.S. at 398-99 (assuming substantial interest, restriction not crafted with sufficient precision to remedy those dangers that justify the restriction); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 72 (1981) (borough's interest in creating commercial areas fails where no evidence exists that ban on live entertainment alone will achieve borough's goal); *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981) (state regulation of delegate selection process invalid when state interests are directed at presidential primary voting and not separate delegate selection process).

⁴² *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 (1980). Some speech, however, receives no first amendment protection because of its content. See *Connick v. Myers*, 461 U.S. 138 (1983) (government employer may impose employment-related sanctions on public employees for statements made in their employment capacity not touching on matters of public concern); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Haig v. Agee*, 453 U.S. 280, 308-09 (1981) (disclosures with declared purpose of obstructing intelligence operations); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitements to riot); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (group libel); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

The speech that "Son of Sam" laws regulate fits none of these categories. Although a book describing the crime may contain graphic language, see F. SCHREIBER, *supra* note 10, at 322, the Supreme Court has stressed that words alone cannot qualify as obscenity. See *Ferber*, 458 U.S. at 764-65.

In addition, no first amendment protection extends to the above restricted expressions because they "are no essential part of any exposition of ideas, and are 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." *Chaplinsky*, 315 U.S. at 568. In *contra*, the books reached by "Son of Sam" laws have great informational value. See *infra* text accompanying notes 54-55.

Some have suggested that "Son of Sam" laws deserve less first amendment protec-

showing that speakers have alternative means of expression.⁴³ In summary, courts must subject "Son of Sam" laws to exacting first amendment scrutiny, without regard to speakers' alternative means of expression.⁴⁴

Supreme Court precedent suggests that state interests must meet two criteria to receive the "compelling" label. First, the state must have a strong interest in realizing the statute's underlying policies.⁴⁵ Second, the magnitude of the state interests achieved must outweigh the restriction's chilling effect on speech. Supreme Court decisions⁴⁶ indicate that if a regulation chills speech too much,⁴⁷ the Court will not describe the interests as "compelling." The Court

tion because they regulate commercial speech. *See Fasching v. Kallinger*, No. 83-7580, slip op. at 34 (N.J. Super. Ct. Law Div. July 24, 1985) (The court ruled that New Jersey's statute did not exact a penalty based upon content by reasoning that "[t]he United States Supreme Court has stated that speech motivated purely for profit is a form of commercial speech. Thus, First Amendment protection is not automatically given to the publication just because the commercial speech happens to be an area of legitimate public concern." (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978))); Comment, *supra* note 10, at 262 (supporting first amendment validity of "Son of Sam" laws by broadly arguing that Supreme Court "has repeatedly shown greater willingness to accept governmental regulations which only restrict profit-motivated speech").

If commercial speech truly described the books reached by "Son of Sam" laws, then the definition of commercial speech would encompass *any* book. Commercial speech, however, is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983) (economic motivation for mailing birth-control pamphlets would clearly be insufficient by itself to turn pamphlets into commercial speech). Indeed, the Supreme Court has recognized that books, *Smith v. California*, 361 U.S. 147, 150 (1959), and motion pictures, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952), although sold for profit, do not fit within the definition of commercial speech.

⁴³ *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980).

⁴⁴ Thus, the fact that authors could publish a criminal's perspective by using trial transcripts or by otherwise not entering into a contract would not prevent "Son of Sam" laws from violating the first amendment.

⁴⁵ *Compare Clark v. Committee for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (strong interest in conserving park property for people who wish to visit it); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (strong interest in upholding state constitutional provisions); *and Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (strong interest in protecting "safety and convenience" of persons using public forums) *with Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (no strong interest in regulating campaign expenditures of groups uncoordinated with candidate); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 (1982) (no strong interest in encouraging sex-crime victims to testify when press can still get trial transcripts and publicize substance of victims' testimony); *and Widmar*, 454 U.S. at 272-73 (no strong interest in maintaining strict separation of church and state when state has misinterpreted Supreme Court precedent).

⁴⁶ *See, e.g., Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (state interest in preventing voters from making ill-advised choice of candidates does not provide compelling justification for limiting speech); *Widmar*, 454 U.S. at 276 (state interest in complying with state constitutional provision not sufficiently compelling to justify content-based discrimination against religious speech); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97,

thus engages in a balancing process⁴⁸ to determine if "First Amendment values must yield to other societal interests."⁴⁹

The Court's concern with content-based regulations stems from its belief that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'"⁵⁰ Otherwise, government gains "control over the search for political truth,"⁵¹ removing the "uninhibited, robust, and wide-open"⁵² debate that the first amendment seeks to ensure. "Son of Sam" laws implicate these concerns if they chill or eliminate the criminal's right to speak.

The Court has also relied on the "marketplace of ideas" theory to support a general right to hear.⁵³ Under this theory, content-based regulations, by eliminating or chilling speech, hamper the dissemination of information, causing the public to engage in less informed decision making. If "Son of Sam" laws chill speech, the public loses information of great value. No studies examining the criminal's thought processes will appear because the author can write the book only if the criminal cooperates.⁵⁴ Furthermore, the criminal's story could provide insight into the workings of the criminal justice system, media reaction to the crime, or the criminal's prior or subsequent psychiatric treatment.⁵⁵ Chilling speech from

104 (1979) (state interest in protecting identity of juveniles lacked sufficient magnitude to subordinate "important rights created by the First Amendment").

⁴⁷ Of course, the Court has recognized that a regulation is not unconstitutional just because it deters *some* speech. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); *see, e.g.*, Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, 466 U.S. 435, 455-56 (1984) (government interest in industrial peace justifies interference with dissenting labor union member's first amendment rights); FCC v. WNCN Listeners Guild, 450 U.S. 582, 603 (1981) (first amendment does not grant individual listeners a right to FCC review of abandonment of their favorite entertainment programs); *see also* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (federal statute prohibiting deposit of unstamped material in mailbox was valid time, place, and manner regulation because significant government interest in preventing loss of mail revenue justified burden on expression).

⁴⁸ *See, e.g.*, Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3164 (1986) ("The undoubted freedom to advocate unpopular and controversial views . . . must be balanced against the society's countervailing interest . . .").

⁴⁹ *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion); *cf.* *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034, 2037 (1986) (noting that in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969), "free speech aspects of the . . . claim were found to be outweighed by the governmental interests").

⁵⁰ *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537-38 (1980) (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972)).

⁵¹ *Id.* at 538.

⁵² *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁵³ *See, e.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *see also* *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion).

⁵⁴ *See infra* section III(1).

⁵⁵ *See, e.g.*, F. SCHREIBER, *supra* note 10.

the criminal's perspective thus infringes the public's right to hear and to receive important information.

A. "Son of Sam" Laws Violate the First Amendment

Current "Son of Sam" laws provide victims with a damages right. In other words, the laws seek to ensure that victims receive complete compensation for injuries resulting from a crime committed by a person who later sells his story. The laws aim to make the wrongdoers, and not state treasuries, the source of the compensation. Some "Son of Sam" laws prevent the criminal from profiting at all from his story by allowing states to seize and never return the proceeds. All current "Son of Sam" laws give the criminal an "injunctive power" because he can prevent the laws from achieving their goals by either not speaking or not contracting to speak. As demonstrated below, the criminal's "injunctive power" nullifies the victim's damages right. In addition, the laws violate the first amendment.

1. *Where Criminals Never Receive Proceeds, the Victim Has a Worthless Damages Right, and the Laws Violate the First Amendment*

Thirteen states do not return any money to the criminal at the close of the statutory time limit for victims' claims. These states thus remove any profit incentive for the criminal to tell his story. Consequently, in these states "Son of Sam" laws either chill the criminal's speech or force authors and criminals to resort to alternative means of expression. Eliminating speech or causing resort to alternative means results in no compensation for victims and burdens state treasuries. Although the state achieves its interest in not permitting a criminal to profit from his speech, the laws violate the first amendment because the chilling effect on speech and the consequent decrease in information available to the public outweigh the magnitude of this state interest. The following scenarios illustrate these conclusions.

a. *Scenario One.* "Son of Sam" laws that never return money remaining in the escrow account to the criminal remove his profit incentive to speak. The lack of profit motive causes the criminal not to contract and not to talk with the author, who planned, for example, to write a case study on the criminal's thought process. The author is unable to publish without the criminal's participation.

Comment. The victim receives no compensation under "Son of Sam" laws for two independent reasons. First, the laws are not triggered because the criminal did not contract to tell the story of his

crime. Second, no proceeds exist to attach. States must burden their treasuries to compensate victims. States achieve only their interest in preventing criminals from profiting from their crimes.

Under this scenario, the “Son of Sam” laws have dramatic first amendment effects. The laws eliminate all speech, removing the constitutional benefits accorded by the right to speak and the right to hear. Balancing the complete chill on speech against the one state interest, courts should hold that “Son of Sam” laws violate the first amendment.

b. *Scenario Two.* As in Scenario One, the lack of profit motive causes the criminal not to contract and not to talk with an author. Now, however, the author publishes without the criminal’s participation—gathering information, for example, from trial transcripts or newspaper accounts of the crime.

Comment. Again the victim receives no compensation under “Son of Sam” laws. Because the criminal did not contract to tell the story of his crime, the laws do not reach the proceeds from the book. As in Scenario One, states must burden their treasuries to compensate victims. States achieve only their interest in preventing criminals from profiting from their crimes. The laws, however, continue to have detrimental first amendment effects. The laws eliminate speech concerning the criminal’s perspective, removing the constitutional benefits accorded by the right to speak and the right to hear. In addition, Supreme Court precedent prevents courts from considering speech that results from alternative means of expression; thus, courts must discount the speech resulting from authors who publish without the criminal’s participation. Courts should balance the chill on speech against the state’s interest in preventing profit by criminals and find that the laws violate the first amendment.

c. *Scenario Three.* As in Scenarios One and Two, the “Son of Sam” laws remove the criminal’s profit incentive to speak and to contract for a share of the book’s proceeds. Now, however, the criminal, seeking to receive additional publicity and notoriety from his crime, allows the author to interview him but does not contract with the author. The author thus is able to publish with the criminal’s participation.

Comment. The victim again receives no compensation under “Son of Sam” laws. Although the criminal did give a personal interview to the author, the laws do not reach the proceeds from the book because the criminal did not contract to tell the story of his crime. States must again burden their treasuries to compensate vic-

tims, and they achieve only their interest in preventing criminals from profiting from their crimes.

Under this scenario, "Son of Sam" laws have little detrimental first amendment effect. They eliminate no speech. Supreme Court precedent, however, prevents courts from considering speech resulting from alternative means of expression. Thus, courts must discount the speech resulting when authors publish with the criminal's participation and the criminal does not contract to tell his story. Courts should balance the chill on speech against the single state interest and find that the laws violate the first amendment.

d. *Scenario Four.* Despite the lack of profit motive resulting from "Son of Sam" laws, a criminal contracts to tell the story of his crime so he can gain control over non-profit-related benefits. For example, the criminal may want his picture to appear on the book's cover. In addition, the criminal may contract in order to receive additional publicity and notoriety from his crime. In return, the criminal provides the author with "exclusive" interviews.

Comment. The victim receives no compensation under "Son of Sam" laws. Although the contract triggers the laws, they reach only the criminal's nonexistent profits and not his non-profit-related benefits. Again states must burden their treasuries to compensate victims. States achieve only their interest in preventing criminals from profiting from their crimes, but the criminal may value the additional publicity and notoriety more than any anticipated profits.

The laws have little detrimental first amendment effect in this situation. They eliminate no speech, realizing most of the constitutional benefits accorded by the right to speak and the right to hear. Because the criminal has contracted to tell the story of his crime, the speech does not result from an alternative means of expression. Consequently, courts may find that "Son of Sam" laws do not chill speech. Courts balancing the absence of a chill on speech against the state's interest should uphold the laws as valid under the first amendment.

e. *Scenario Five.* Despite the lack of profit motive resulting from these "Son of Sam" laws, a criminal contracts to tell the story of his crime because he genuinely wants to compensate his victims for his wrongdoing.

Comment. The victim receives compensation under "Son of Sam" laws because the criminal contracted to tell the story of his crime, and proceeds resulted under the contract. States need not burden their treasuries to compensate victims, and the criminal does not profit from his crime. Consequently, the state achieves all three of its interests.

Under this scenario, the laws have little detrimental first amendment effect. The laws eliminate no speech, realizing most of the constitutional benefits accorded by the right to speak and the right to hear. Courts should balance the absence of a chill on speech against the three state interests and should sustain the laws.

f. *Scenario Six.* A criminal has independent wealth that victims could reach to satisfy their judgments. Consequently, the criminal contracts to tell the story of his crime to protect his independent wealth.⁵⁶

Comment. The victim receives compensation either through "Son of Sam" laws, because the criminal contracted to tell the story of his crime and proceeds resulted under the contract, or through judicial process against the criminal's independent wealth. States need not burden their treasuries to compensate victims. If victims receive compensation from the escrow account, the criminal profits from his crime because he conserves his independent wealth. If victims receive compensation from the criminal's independent wealth, the criminal does not profit from his crime because proceeds remaining in the escrow account revert to the state, not the criminal.

Under this scenario, the laws have no detrimental first amendment effect. The laws eliminate no speech, realizing most of the constitutional benefits accorded by the right to speak and the right to hear. Balancing the absence of a chill on speech against the two achieved state interests, courts should hold that the "Son of Sam" laws do not violate the first amendment.

In summary, these "Son of Sam" laws, except when applied to extremely remorseful or wealthy criminals, fail to achieve the underlying state interests, chill or eliminate speech, and thus violate the first amendment.

2. *Even if Criminals Receive Proceeds, the Victim May Have a Worthless Damages Right, and the Laws Violate the First Amendment*

The remaining states return the balance of the escrow account to the criminal at the close of the statutory time limit for victims' claims. By refunding this money, these states relinquish their interest in preventing the criminal from profiting from his crime. Nonetheless, compensating victims and not burdening state treasuries remain strong state interests.

Under this statutory scheme, a criminal who estimates that his

⁵⁶ If victim compensation would exceed the criminal's independent wealth plus his profits, the criminal's actions would fall under one of the prior five scenarios.

anticipated profits will exceed judgments against him for victim compensation will contract to tell the story of his crime. Because the statute has not "chilled" the criminal's speech, the statute does not violate the first amendment. Moreover, because the victim receives compensation from the realized profits, the state achieves its interests.

If, however, a criminal estimates that his anticipated profits will be less than judgments against him, he will have no monetary incentive to contract to publish his story. The consequences in this case are similar to those in the scenarios discussed above; the criminal most likely would exercise his "injunctive power" and thus render a victim's damages right worthless. In addition, the laws would "chill" speech, violating the first amendment.

Significantly, the criminal's proceeds rarely will exceed victim compensation. For example, Joseph Kallinger received approximately \$23,000⁵⁷ to collaborate on a book that included a description of his murder of Maria Fasching.⁵⁸ A civil judgment for the murder almost certainly would exceed \$23,000.⁵⁹ Consequently, no practical difference exists between laws that keep or return the criminal's proceeds at the close of the statutory time period for victims' claims. Thus, as currently in force, all "Son of Sam" laws violate the first amendment by chilling or eliminating speech. In addition, victims have a worthless damages right.

IV

AMENDING "SON OF SAM" LAWS TO ALLOW CRIMINALS TO PROFIT AND VICTIMS TO HAVE INJUNCTIVE POWER BETTER MEETS THE UNDERLYING POLICIES AND BETTER ALLAYS FIRST AMENDMENT CONCERNS

State legislatures should amend their "Son of Sam" laws because victims rarely will receive compensation under current "Son of Sam" laws and because the laws violate the first amendment. State legislatures could allow victims to waive their damages right. In effect, victims then would have "injunctive power" because they could prevent the work's publication by refusing to waive their damages right. In addition, legislatures could permit the criminal to retain some proceeds when he contracts to tell the story of his crime.

⁵⁷ *Fasching v. Kallinger*, 211 N.J. Super. 26, 31-32, 510 A.2d 694, 697 (App. Div. 1986). Kallinger never directly received proceeds from the book because he had assigned his rights in the contract to his criminal defense attorney. *Id.*

⁵⁸ F. SCHREIBER, *supra* note 10, at 321-22.

⁵⁹ See 3 PERSONAL INJURY § 10 (L. Frumer & M. Friedman eds. 1984) (listing damages awards for specific types of injuries); 5 M. BELL, MODERN TRIALS §§ 67.2 to .7 (2d ed. 1982) (same).

In many cases under these amendments, victims will receive compensation from the criminal and not the state treasury. Also, in most cases, the laws will not chill or eliminate speech because the criminal and victim receive money only if the book is sold and creates profits. In some cases, however, problems of subjective value, high transaction costs, and holdouts may frustrate the amendments' aims.

A. Illustration of the Amendments' Benefits

The Coase Theorem⁶⁰ predicts that, absent transaction costs,⁶¹ parties will bargain so that the object of the bargain goes to the party who values it most highly, regardless of the initial assignment of legal rights. The Coase Theorem also suggests that prohibiting the holder of a legal entitlement from waiving his entitlement may prevent the right from going to the party who values it most highly.⁶²

In the context of "Son of Sam" laws, victims' inability to waive their entitlement can put victims, the criminal, and the public in a worse position. Suppose the victim receives a civil judgment against the criminal for \$10,000. Suppose further that the criminal estimates he can receive \$7,500 by signing a contract for a percentage of the author's net earnings from the book. Because the entire \$7,500 payment will go toward satisfying the victim's \$10,000 judgment, the criminal has no pecuniary incentive to contract to tell the story of his crime. Additionally, if the author cannot write the book without the criminal's cooperation, speech is eliminated, implicating first amendment concerns.

The victim thus receives no compensation because the criminal did not contract to tell the story of his crime and therefore no proceeds exist. Consequently, the state must burden its treasury to compensate the victim of the crime. The state achieves its policy objective of not allowing the criminal to profit from his crime, but the law has a dramatic first amendment effect. The law eliminates protected speech and thus violates the first amendment.

If legislatures amend the "Son of Sam" laws to permit the crim-

⁶⁰ Legal scholars and economists have derived the Coase Theorem from Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Coase himself never stated a precise theorem but numerous formulations exist based on Coase's work. See Zerbe, *The Problem of Social Cost in Retrospect*, 2 RES. L. & ECON. 83, 84 (1980).

⁶¹ "Transaction costs" are the costs of carrying out market transactions. Specifically, "it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, [and] to draw up the contract" Coase, *supra* note 60, at 15.

⁶² See Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 264 n.72 (1987).

inal to profit and the victim to waive his entitlement, the above disadvantages would never materialize. According to the Coase Theorem, the victim and the criminal will bargain and divide the expected \$7,500 proceeds. Because the criminal now can profit, he will contract to tell the story of his crime. The state achieves its interests in victim compensation without burdening the state treasury. The laws encourage, rather than chill, speech, thereby obviating first amendment concerns. In addition, the criminal's immediate receipt of profits eliminates any chilling effect inherent in the current statutory scheme that prohibits the criminal from profiting until the statutory period for victims' claims has passed.

B. Problems Remaining After Amendment

Such amendments will fail to achieve their goals in the following three circumstances: (1) when the value the victim places on avoiding additional publicity exceeds the amount of money the victim can receive when negotiating for a share of the book's profits; (2) when transaction costs prevent the parties from reaching an agreement; and (3) when one or more victims hold out. In any one of these situations, the amendments will not achieve the underlying statutory goals, and will violate the first amendment by eliminating speech.

1. *Victims Would Rather Avoid Additional Publicity*

Suppose that a victim will not waive his damages right for less than \$1,000 because he values avoiding additional publicity at that amount.⁶³ Suppose additionally that the criminal expects profits of only \$750. In this situation neither party can benefit from a bargain; consequently, the victim will not exercise his waiver right, and the criminal will not publish his story.

This scenario matches that where the criminal receives profits only after the time allotted for claims has passed. In that situation, victims will have received compensation only from state treasuries, and the laws will have violated the first amendment by eliminating speech. The same result occurs when the victim values avoiding additional publicity more highly than the amount he could receive by bargaining with the criminal.

2. *Transaction Costs Prevent Agreement*

Although Professor Coase initially posited zero transaction

⁶³ For discussion of protecting victims' right to privacy as a policy justification for "Son of Sam" laws, see *supra* note 29.

costs,⁶⁴ he recognized this as "a very unrealistic assumption."⁶⁵ He noted, however, that transaction costs will not prevent a rearrangement of rights unless the costs exceed the gains from trade that the parties can realize from the transaction.⁶⁶

Transaction costs generally include identifying the parties with whom to negotiate, informing them of the desire to negotiate, the actual negotiations, and the drafting of the final agreement.⁶⁷ Consequently, transaction costs should have a relatively small impact on bargaining when only one known victim exists.⁶⁸ In such a case, the criminal's gains (i.e., profits) should exceed remaining transaction costs. For example, Jeffrey MacDonald received at least \$83,000⁶⁹ for *Fatal Vision*, the story of his crimes. Similarly, Joseph Kallinger received about \$23,000⁷⁰ for *The Shoemaker*, the book containing references to his crimes.

Transaction costs, however, substantially increase if multiple victims exist.⁷¹ A criminal with twenty-five victims would incur costs in identifying and informing his victims as well as negotiating and drafting contracts with all of them. In the multiple-victim setting, transaction costs could exceed the criminal's profits.

3. *Holdouts Block Agreement*

Holdout behavior can occur when the criminal must negotiate with multiple victims. This problem resembles that encountered in the classic example of land assembly transactions. In the land assembly situation, one buyer seeks to acquire a large block of property, separate smaller parcels of which are owned by a number of different individuals. Each selling landowner hides his true valuation, hoping he can appropriate part of the surplus that results when the buyer values the land at a higher price than the sellers do collectively. If too many buyers hold out for a share of this surplus, the collective selling price demanded will exceed the value to the buyer. As a result, the land assembly, although efficient, is frustrated.⁷²

⁶⁴ Coase, *supra* note 60, at 6.

⁶⁵ *Id.* at 15.

⁶⁶ *Id.* at 15-16; Schwab, *supra* note 62, at 266-67.

⁶⁷ See *supra* note 61.

⁶⁸ Of course, if the thought of negotiating with the criminal repulses the victim, no bargaining will occur. Thus, the bargaining parties' dislike for one another operates as an extremely high transaction cost preventing an efficient solution.

⁶⁹ See *United States v. MacDonald*, 607 F. Supp. 1183, 1184 (E.D.N.C. 1985).

⁷⁰ See *supra* note 57 and accompanying text.

⁷¹ Judge Posner suggests that transaction costs may rise exponentially with the number of parties to a transaction. R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.5, at 44 n.1 (3d ed. 1986).

⁷² See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-08 (1972) (example of holdout problem in

The same result may occur when a criminal negotiates with several victims. Suppose a criminal has three victims, each of whom would settle for thirty percent of the criminal's proceeds.⁷³ Suppose also that the criminal estimates that he will need ten percent of the proceeds to cover his opportunity costs. Suppose further that each victim demands forty percent of the criminal's share and refuses to change his bargaining stance. In such a situation the criminal, because he receives no profits, would rather not contract to tell the story of his crime. As a result, victims receive compensation only by burdening state treasuries. The law violates the first amendment because it eliminates speech.

V

AMENDING "SON OF SAM" LAWS TO CREATE A MANDATORY STATUTORY DIVISION OF THE CRIMINAL'S PROFITS BEST MEETS THE UNDERLYING POLICIES AND BEST ALLAYS FIRST AMENDMENT CONCERNS

A. The Proposed Amendment

Because victims rarely receive compensation under current "Son of Sam" laws and because the laws violate the first amendment, state legislatures should amend these laws. States could amend the current laws to permit victims to waive their damages right and to permit criminals to retain some of their proceeds. These amendments, however, would fail to lessen the concerns associated with the current laws when subjective value, high transaction costs, or holdout problems exist.

Perhaps the best solution for states is to amend their current "Son of Sam" laws to create a mandatory statutory division of the criminal's profits. To deter contracts whereby the criminal receives a low percentage of the proceeds on the face of the contract, but later receives "under-the-table" payments, the laws should first provide that a criminal must contract to receive an amount corresponding to at least a certain percentage of the author's proceeds.⁷⁴ The laws should then provide that the criminal gets part of these proceeds with the remainder distributed to his victims.⁷⁵

land assembly context). One possible response to the holdout problem is to employ the government's eminent domain power to force sale of individual parcels. See *infra* note 80.

⁷³ I posit this as the true valuation of each party to avoid implicating the case where a victim values some non-profit-related right more than his expected amount of compensation. See *supra* text accompanying note 63 (avoiding additional publicity).

⁷⁴ The statute could apply a figure derived from the average percentage received when anyone contracts to tell his story to an author.

⁷⁵ Determining the precise numerical percentages is a legislative task. Legislatures should set the percentages so the criminal receives profits that exceed his opportunity

For example, suppose the state determines that the criminal should receive an amount equal to at least 12.5% of the author's proceeds. Suppose it further determines that the criminal should retain only 10% of the amount due him under the contract. As a result, victims will receive 90% of the criminal's profits.

Thus, suppose the author receives \$160,000. The criminal is due \$20,000 (12.5% of \$160,000) under his contract with the author. The criminal can retain \$2,000 (10% of the profits due him under the contract). Victims thus receive \$18,000.⁷⁶

B. Advantages of the Proposal over Current "Son of Sam" Laws

Current "Son of Sam" laws can result in no compensation for crime victims and force states to burden their treasuries when compensating these victims. Although the state may have an interest in not permitting criminals to profit from their crimes, "Son of Sam" laws usually achieve only this interest while they violate the first amendment.

As demonstrated above, victims receive compensation under the proposal. The wrongdoer compensates the victim, avoiding resort to state treasuries. In addition, the proposal would not violate the first amendment. Because criminals will profit as a result of the book's publication, the proposal encourages speech, rather than chilling or eliminating it.⁷⁷

costs of cooperating with the author. For example, suppose the criminal could either cooperate with the author or earn \$1,000 making license plates. The criminal thus will cooperate on the book about his crime only if his expected profits from the book exceed \$1,000. Legislatures should provide that the criminal and the victim cannot contract around the percentages. Permitting waiver could prevent publication where one party overstates his true value, and the bluff subsequently blocks an agreement.

Alternatively, if one assumes that the legislature can set the appropriate percentage that determines the criminal's share of the profits, it is also conceivable that the legislature could establish a lump-sum payment that would induce the criminal's cooperation. The danger is that the lump-sum payment will not exceed the criminal's opportunity cost.

In addition, because the criminal has low opportunity costs, legislatures could put a cap on the amount of profits a criminal can receive. The goal of the amendments is to cover the criminal's opportunity costs. Legislatures need not reward criminals with a windfall when, for example, a best-selling book reaps substantial profits. Similarly, the criminal should not capitalize on profits earned because the author's fame encourages people to buy the work regardless of its content.

⁷⁶ These figures loosely reflect those in *Fasching v. Kallinger*, 211 N.J. Super. 26, 31-32, 510 A.2d 694, 697 (App. Div. 1986).

⁷⁷ See Note, *supra* note 2, at 702-03 (arguing that contingent fee arrangements in sensational criminal cases would give defendants "greater incentive" to exercise their first amendment rights).

C. Advantages of the Proposal over Amending "Son of Sam" Laws to Allow Victims to Waive Their Damages Right

Amending the laws to create a mandatory division of profits removes the barriers to publication created by subjective value, high transaction costs, and holdout problems. The proposal actually encourages first amendment activity and furthers the state's strong interest in compensating victims.

In addition, the proposal does not allow victims to block publication in those situations where the victims value avoiding additional publicity more than the amount of expected damages. Although states may have a valid interest in protecting victims' privacy,⁷⁸ that interest cannot support the elimination of speech.⁷⁹

Also, the proposal eliminates the problem of high transaction costs because criminals will not need to negotiate with their victims. Similarly, the proposal eliminates the holdout problem. Seizing on a solution resembling eminent domain, the proposal precludes victims from overvaluing their compensation right, because the statute posits the value for them.⁸⁰ In summary, under the proposal, economically efficient exchange is not frustrated, the victim receives compensation, the criminal profits, and speech is protected.

VI

STATES SHOULD NOT AMEND "SON OF SAM" LAWS TO REACH AUTHOR-PUBLISHER PROFITS

Currently, no "Son of Sam" law expressly reaches the profits earned by authors and publishers,⁸¹ and courts do not engage in statutory construction to so extend them.⁸² In response to *Fasching*

⁷⁸ See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487-91 (1975).

⁷⁹ See *supra* notes 37-55 and accompanying text; cf. *Cox Broadcasting*, 420 U.S. at 491-97 (state may not impose sanctions on accurate publication of rape victim's name obtained from public records).

⁸⁰ This solution resembles eminent domain, which eliminates holdout problems by allowing the government to condemn land for a public use as long as it pays "just compensation," measured by the land's fair market value. For a discussion of eminent domain, see generally J. DUKEMINIER & J. KRIER, *PROPERTY* 1093-1128 (1981).

⁸¹ See statutes cited *supra* notes 3-5.

⁸² *But see supra* note 8 (noting courts could construe Ohio's "Son of Sam" law to reach author-publisher profits). The Senate Judiciary Committee expressly stated that the reference to "transferee" in the federal "Son of Sam" law, 18 U.S.C.A. § 3681(a) (West 1985 & Supp. 1987), was intended to "ensure that innocent parties, such as Truman Capote, the author of 'In Cold Blood,' or other authors who have not participated in criminal conduct and who wish to depict the defendant's crime are not affected by the [federal 'Son of Sam' provision]." S. REP. NO. 497, *supra* note 29, at 6, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3612.

In *Fasching v. Kallinger*, 211 N.J. Super. 26, 510 A.2d 694 (App. Div. 1986), the plaintiffs argued that the author and the publishers were "agents" or "representatives" of the criminal, and therefore within the reach of New Jersey's "Son of Sam" law. *Id.* at

v. Kallinger,⁸³ however, state legislatures may consider amending their laws to reach author and publisher profits.

States may believe that reaching such profits creates a larger reservoir of money, thereby ensuring that victims receive more compensation. For example, suppose the author and the publisher agree to divide profits equally. Suppose further that the criminal receives 10% of the author's proceeds. Consequently, of the total profits, the publisher receives 50%, the author receives 45%, and the criminal receives 5%. Suppose the state then requires authors and publishers each to forfeit 5% of their profits for victim compensation. Seemingly, victim compensation would increase, while the burden on the state treasury would decrease.

This reasoning, however, is flawed. Publication agreements between authors and publishers account for the opportunity costs of authors and publishers. Consequently, if the money received by authors and publishers under a statutory division of profits does not exceed those opportunity costs, authors and publishers will write and publish books unaffected by the statutory alteration.

As a result, prospective authors will not contract with criminals

42, 510 A.2d at 703; *see* N.J. STAT. ANN. § 52:4B-26 (West 1986). The trial court agreed, interpreting the statute as requiring the deposit of all author-publisher proceeds into an interest-bearing account for the benefit of the victim's next-of-kin. 211 N.J. Super. at 41, 510 A.2d at 702. The appellate division reversed, concluding that the statutory language and legislative history failed to support the trial judge's interpretation. *Id.* The court seized upon the statutory provision that "provides for the release of the escrowed monies to the accused upon acquittal, but omits any similar procedure for returning impounded funds to others." *Id.* at 42, 510 A.2d at 703. The court reasoned, "If the Legislature intended the act to reach the proceeds owed authors and publishers as well as criminal offenders, it would have also provided a mechanism to return monies to those parties upon acquittal of the offender." *Id.*

In the vast majority of "Son of Sam" laws, an acquitted person, without reference to anyone else, receives all the money in the escrow account. *See, e.g.*, IOWA CODE ANN. § 910.15(3) (West Supp. 1987); KY. REV. STAT. ANN. § 346.165(3) (Baldwin 1986); TENN. CODE ANN. § 29-13-203(2) (1980). Under the *Fasching* court's rationale, courts should not construe these laws to reach author-publisher profits.

Similarly, courts should not construe state laws having similar disbursement at the close of the time period for victims' claims to reach author-publisher profits. *See, e.g.*, FLA. STAT. ANN. § 944.512(1) (West 1985); MINN. STAT. ANN. § 611A.68(5) (West 1987). Courts should reach the same conclusion in those states where the money that remains in the escrow account after the statutory time period reverts to the states. *See, e.g.*, ALA. CODE § 41-9-82 (1982); CONN. GEN. STAT. ANN. § 54-218(b) (West 1985); MO. ANN. STAT. § 595.045(11) (Vernon 1987); WYO. STAT. § 1-40-112(f) (Supp. 1987). In addition, four states expressly limit their "Son of Sam" laws to the profits of the accused or convicted person. ARIZ. REV. STAT. ANN. § 13-4202(A) (Supp. 1987) ("any monies which would be paid to the accused"); MONT. CODE ANN. § 53-9-104(1)(d) (1987) ("any proceeds paid or owed to the individual under the . . . contract"); NEV. REV. STAT. ANN. § 217.265 (Michie 1986) (money that the "offender receives . . . based on his notoriety as an offender"); OKLA. STAT. ANN. tit. 22, § 17(A) (West Supp. 1987) ("any money . . . contracted to be paid to the defendant").

⁸³ 211 N.J. Super. 26, 510 A.2d 694 (App. Div. 1986); *see supra* note 82.

to tell criminals' stories. Victims will not receive compensation because "Son of Sam" laws do not apply if no contract exists. States then must compensate victims from their state treasuries. Moreover, the laws would violate the first amendment because they will eliminate criminals' speech.⁸⁴

CONCLUSION

Congress and most states have adopted laws that compensate victims by using profits when the criminal contracts to tell the story of his crime. These so-called "Son of Sam" laws thus seek to ensure that wrongdoers, and not state treasuries, provide the compensation. In addition, some states do not permit the criminal to profit from his crime, retaining the criminal's proceeds even after he has completely compensated his victims.

The "Son of Sam" laws currently in force fail to achieve their underlying policy goals and violate the first amendment. They are content-based regulations that are not narrowly tailored to achieve compelling state interests. In most cases, because the criminal lacks any profit incentive, he will not contract to tell the story of his crime. Consequently, the laws eliminate speech, abridging the criminal's right to speak and the public's right to hear. In addition, no profits result for victim compensation; thus, states must burden their treasuries if victims are to receive any compensation.

States could amend their "Son of Sam" laws to allow victims to waive their damages right and criminals to retain some proceeds from their stories. Such amendments would better achieve the underlying policy goals and lessen the first amendment chilling effect. Problems of subjective value, high transaction costs, and holdouts,

⁸⁴ States should not amend their "Son of Sam" laws to reach author and publisher profits when victims can waive their damages right and criminals can retain some profits. Nothing inherent in author and publisher profits eliminates the problems of subjective value, high transaction costs, or holdouts. In addition, no book concerning the criminal's story will result when the remaining profits of the author and the publisher do not exceed their opportunity costs.

Similarly, states should not amend the "Son of Sam" laws in force to reach author and publisher profits because of two disincentives. First, authors and publishers would receive their profits only after the time period for victims' claims, generally five years, had lapsed. Second, as above, no book concerning the criminal's story will result when the remaining profits of the author and publisher do not exceed their opportunity costs. Unlike the discussion in the text concerning the criminal's profits, *see supra* section IV, victim compensation need not exceed author-publisher profits, but only decrease expected profits to below author and publisher opportunity costs. In addition, authors and publishers do not help the criminal profit from his wrongdoing by paying him to tell his story. *See Fasching*, 211 N.J. Super. at 37, 510 A.2d at 700. Consequently, states can rely only on their interests of compensating victims and not having such compensation burden their treasuries.

however, would undercut the effectiveness of the proposed amendments.

States thus should amend their "Son of Sam" laws to implement a mandatory division of the profits between the criminal and his victims. These amendments best meet the underlying policies and best eliminate first amendment objections. States, however, should not reach the profits earned by authors and publishers. Author-publisher profits remaining after victim compensation might not cover the opportunity costs of authors and publishers. As a result, they would neither write nor publish books that require them to contract with the criminal.

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