2000

A Proposal for a New Massachusetts Notoriety for Profit Law: The Grandson of Sam

Sean J. Kealy

Volume 22
Issue 1
2000

WESTERN NEW ENGLAND LAW REVIEW

ARTICLES

A PROPOSAL FOR A NEW MASSACHUSETTS NOTORIETY-FOR-PROFIT LAW: THE GRANDSON OF SAM

SEAN J. KEALY*

> "No one [should] be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."[1]

INTRODUCTION

In recent years, two women stood convicted of highly publicized major crimes in Massachusetts. Katherine Ann Power ("Power") was a fugitive who committed felony-murder in 1970. She led a life on the run as a fugitive until 1993 when she revealed

* Sean Kealy is Legal Counsel for the Joint Committee on Criminal Justice for the Commonwealth of Massachusetts. He was formerly an Assistant Attorney General assigned to the Division of Victim Compensation and Assistance within the Massachusetts Office of the Attorney General's Family and Community Crimes Bureau. The opinions within this paper are Mr. Kealy's and do not necessarily reflect those of the Attorney General's Office or the Joint Committee on Criminal Justice. The author thanks Susan Kealy, Stacey G. Bloom, Noelle Byrnes, Diane Juliar, Judy Beals, Carolyn Keshian, and Michael Harris for their assistance in writing and revising this Article.

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

her true identity and surrendered to authorities to face the consequences of her crimes.[2] Louise Woodward ("Woodward"), an au pair originally from England, gained notoriety on both sides of the Atlantic Ocean when she was convicted of killing the baby entrusted to her care.[3] Both women captured the attention of the national media for months and reportedly had opportunities to sell their images, stories, and opinions for huge amounts of money.[4] The court system, however, dealt with these infamous defendants in two drastically different ways. In the Power case, the sentencing judge made it a specific condition of her probation that she could never profit from her crime.[5] Woodward's sentence, by contrast, did not include any conditions to keep her from profiting from her notoriety.[6] A lesson to be learned from the differential handling of these cases is that Massachusetts needs a law that specifically addresses whether and to what extent a criminal may profit from his or her heinous, albeit sensational, crimes. A notoriety-for-profit law[7] would provide a means of regulating these high profile situations in a manner that consistently protects the rights of people whose victimizers have become media stars.

---

2. *See* Commonwealth v. Power, 650 N.E.2d 87, 88 (Mass. 1995). Power became involved in radical activities while a student at Brandeis University. *See* Shaun B. Spencer, Note, *Does Crime Pay—Can Probation Stop Katherine Ann Power from Selling Her Story?*, 35 B.C. L. REV. 1203, 1205 (1994). She and several other activists planned to rob a bank to help fund the Black Panthers. *See id.* at 1205-06. On September 23, 1970, Power drove the get-away car while three accomplices robbed the State Street Bank & Trust Co. in Brighton, Mass., and a fourth accomplice sat outside the bank as a lookout. *See Power*, 650 N.E.2d at 88. Two Boston Police officers responded to a silent alarm triggered in the bank. *See id.* As one of the officers entered the bank, he was fatally shot in the back by the lookout. *See id.* All of the defendant's accomplices were apprehended—three within a short period of time and the fourth several years later. *See id.* Power, however, settled in Oregon under an assumed name and successfully avoided apprehension for over twenty years. *See id.* In September 1993, she finally surrendered to the Massachusetts authorities. *See id.* at 88-89.

3. *See* Commonwealth v. Woodward, 694 N.E.2d 1277, 1281 (Mass. 1998).

4. *See* Carol Midgley, *No Deal Will Be Struck on Story Until After Appeal*, Times (London), Nov. 12, 1997, *available in* 1997 WL 9242321. Before her conviction, Woodward had been offered £50,000 by the Daily Mail contingent upon her acquittal. *See id.* Lord Rothermere, chairman of the Daily Mail and General Trust, defended the offer by saying, "if you pay convicted people for their story it enables the victim to sue for compensation." *Id.* For a discussion on Power's opportunities to cash in on her crime see *Greater Boston* (WGBH television broadcast, Nov. 17, 1997).

5. *See Power*, 650 N.E.2d at 89.

6. *See* David Talbot, *Nanny Goes Free; Big Unknown: Will Woodward Profit from Case?*, BOSTON HERALD, June 17, 1998, at 10.

7. See *infra* Part I.A for a discussion of notoriety-for-profit laws.

Over the last twenty years, over 40 states[8] and the federal government[9] have passed legislation to prevent offenders from profiting from their crimes. These notoriety-for-profit or "Son of Sam"[10] laws serve two important governmental purposes: (1) they prevent criminals from profiting from their wrongdoing and (2) they compensate crime victims.[11] However, in 1991, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*,[12] the United States Supreme Court found the first Son of Sam law ever passed unconstitutional.[13] Because the New York law was a model for many other states, including Massachusetts, all Son of Sam statutes have since been reexamined for similar flaws.[14] Massachusetts' own Son of Sam statute was repealed.[15] The Victim's Compensation statute that followed resolved the constitutional problem by wholly eliminating a notoriety provision from its text.[16] However, the Massachusetts Attorney General's Office and the Massachusetts Office of Victim Assistance have filed a new Son of Sam bill with the legislature that provides a constitutional and effective process for protecting the rights of victims.[17]

The first part of this Article will examine the history of Son of Sam statutes, including the genesis of the original New York statute, and the *Simon & Schuster* decision that ultimately invalidated the statute. Part I will also examine possible methods of creating a constitutional Son of Sam statute. Part II discusses whether a Son of Sam law is necessary or desirable from a legal and policy standpoint. Part III examines the various proposals to replace the Son of Sam statute in Massachusetts in the wake of *Simon & Schuster* and further provides a detailed description of the notoriety-for-profit bill currently pending before the Massachusetts Legislature. Finally, this Article concludes that Massachusetts should have a Son

---

8. See *infra* note 36 for a complete list of states that have passed Son of Sam statutes since 1977.

9. *See* 18 U.S.C. § 3681 (1994).

10. See *infra* Part I.A for a discussion of the origin of the term "Son of Sam" law.

11. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 118-19 (1991).

12. 502 U.S. 105 (1991).

13. *See id.* at 123.

14. See *infra* Part I.C.1 for a discussion of how various states have amended their Son of Sam laws in an effort to ensure their constitutionality.

15. *See* MASS. GEN. LAWS ANN. ch. 258A, § 8, *repealed by* St.1993, ch. 478, § 3 (eff. Jan. 1, 1995).

16. *See id.* ch. 258C (West Supp. 1999).

17. See *infra* Part III.B for a discussion of the current "Son of Sam" statute pending in the Massachusetts Legislature.

of Sam statute to protect victims, that an effective and constitutional bill is possible, and that the pending legislation meets these criteria and thus should be enacted.

I. SON OF SAM STATUTES

A. *Genesis of the Son of Sam Statute*

The idea of a notoriety-for-profit law came about in 1977. During the summer of that year, David Berkowitz ("Berkowitz") terrorized New York City with a series of random shootings that resulted in six deaths and left seven people severely injured.[18] Originally referred to by the media as the ".44 Caliber Killer," due to the type of weapon he used to commit his crimes, Berkowitz quickly became known by a new alias that appeared in a note left at a crime scene.[19] The note read in part, "I am a monster. I am the Son of Sam."[20] Soon after his capture, Berkowitz had opportunities to profit from his notoriety by selling the rights to his story.[21] Not surprisingly, the possibility of Berkowitz gaining financially from his murders appalled most people.[22] Still, the media was willing to buy the rights to Berkowitz's recollections and memoirs, suggesting that there would be a significant market for the story.[23] Consequently, an outraged New York State Legislature[24] rushed legislation through which prohibited Berkowitz, or any other criminal,

---

18. *See* Lee Lescaze, *Berkowitz Pleads Guilty in "Son of Sam" Murders*, WASH. POST, May 9, 1978, at A1.

19. *See* Sam Roberts, *Criminals, Authors, and Criminal Authors*, N.Y. TIMES, Mar. 22, 1987, § 7, at 1 (providing background on Berkowitz and the original Son of Sam law).

20. *Id.*

21. *See In Re* Johnsen, 430 N.Y.S.2d 904, 905 (1979) (indicating that Berkowitz's conservator obtained a contract with McGraw-Hill Book Company to publish his story with an advance of $250,000 and with estimated royalties to exceed that amount).

22. *See* Wade Lambert & Stephen Wermiel, *Curbs Upheld on Criminals' Book Profits*, WALL ST. J., Oct. 4, 1990, at B11 (providing background on New York's Son of Sam law).

23. *See* Adam R. Tschorn, *Beyond Son of Sam*, 17 VT. L. REV. 321, 324 & n.12 (1992); Kathleen M. Timmons, Note, *Natural Born Writers: The Law's Continued Annoyance with Criminal Authors*, 29 GA. L. REV. 1121, 1123 (1995); *New York Approves Bill Revising "Son of Sam" Law*, WALL ST. J., July 6, 1992, at 17.

24. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 108-09 (1991) (quoting Senator Emanuel R. Gold, the notoriety-for-profit law's author, who wrote: "[i]t is abhorrent to one's sense of justice and decency that an individual . . . can expect to receive large sums of money for his story once he is captured—while five people are dead, [and] other people were injured as a result of his conduct") (citation omitted).

from profiting from his or her crime.[25]

This unprecedented law created new duties for the Crime Victims Compensation Board of New York ("Board").[26] The Board was now responsible for reviewing all contracts entered into by criminal defendants and could seize all proceeds earned as a result of any re-enactment of the criminal's activities or "thoughts, feelings, opinions, or emotions regarding such crime."[27] As such, any contract entered into with a person accused or convicted of a crime had to be submitted to the Board for review if it related to the re-enactment of the crime.[28] Under the statute, a person convicted of a crime was broadly defined as any individual convicted of a crime at trial or following the entry of a plea of guilty, as well as "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted."[29] Although the statute did not entirely prohibit a criminal from contracting to sell his or her story, the law required that monies related to that contract be maintained by the Board in an escrow account, and that those monies be distributed to the crime victims when a civil judgment was obtained against the criminal defendant.[30] Crime victims had five years to bring a civil action to recover a money judgment against criminal defendants or their representatives.[31] As such, the Board was required to publish legal notices of the contracts to potential victims in the county where the crime took place every six months for five years.[32]

Thus, within a few years of his crimes, the Son of Sam alias was associated not only with Berkowitz, but also with a new class of statutes—Son of Sam laws.[33] Although relatively few crimes can command the public attention that Berkowitz's did, making it seem unlikely that a Son of Sam law would be necessary,[34] a law that

---

25. *See In Re* Johnsen, 430 N.Y.S.2d at 906 ("Section 632-a of the Executive Law [was] conceived in haste, written in haste, and declared under the cry of the public for the Legislature to exact retribution. . . .").

26. *See* N.Y. EXEC. LAW § 622 (McKinney 1996).

27. *Id.* § 632-a(1), *repealed by* L. 1992, ch. 618, § 10 (eff. July 24, 1992).

28. *See id.*

29. *Id.* § 632-a(10)(b).

30. *See id.* § 632-a(1).

31. *See id.*

32. *See id.*

33. Ironically, the statute was never applied to Berkowitz. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 111 (1991) (stating that Berkowitz was found incompetent to stand trial and, at the time, the New York statute only applied to criminals who had actually been convicted).

34. *See id.* (noting that the Son of Sam law had been invoked only a handful of

combined crime, notoriety, and money was extremely popular with both legislators and voters.[35] After the creation of the New York statute, nearly every state, including Massachusetts, passed similar legislation.[36]

---

times); *see also* Garrett Epps, *Wising Up: "Son of Sam" Laws and the Speech and Press Clauses*, 70 N.C. L. REV. 493, 505 & n.73 (1992) (stating that in most jurisdictions outside of New York few cases have been brought under "Son of Sam" statutes).

35. *See* Orly Nosrati, Note and Comment, *Son of Sam Laws: Killing Free Speech or Promoting Killer Profits?*, 20 WHITTIER L. REV. 949, 952 (1999) (noting popularity among state legislatures and the public at large); Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine Be Revived to Dent the Litigation Crisis?*, 32 SAN DIEGO L. REV. 53, 106 n.259 (1995) (noting popularity among the public and state legislatures); Karen M. Ecker & Margot J. O'Brien, Simon and Schuster, Inc. v. Fischetti: *Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 NOTRE DAME L. REV. 1075, 1075-76 (1991) (listing statutes from forty-three state legislatures and the federal government that dealt with such profits); Angela Cartwright, Note, *Crime Doesn't Pay: Authors and Publishers Cannot Profit from a Criminal's Story,* 55 U. CIN. L. REV., 831, 834 (1987) (noting public outrage).

36. Son of Sam statutes enacted thus included: ALA. CODE §§ 41-9-80 to 84 (1991) (enacted in 1979); ALASKA STAT. § 12.61.020 (Lexis 1998) (enacted in 1984); ARIZ. REV. STAT. ANN. §§ 13-4201 to 4202 (West 1989) (enacted in 1978); ARK. CODE ANN. § 16-90-308 (Michie Supp. 1999) (enacted in 1985); CAL. CIV. CODE § 2225 (West Supp. 2000) (effective Sept. 15, 1986; operative July 1, 1987); COLO. REV. STAT. ANN. §§ 24-4.1-201 to 207 (West 1990 & Supp. 1999) (enacted in 1984); CONN. GEN. STAT. ANN. § 54-218 (West 1994 & Supp. 1999) (enacted in 1982); DEL. CODE ANN. tit. 11, §§ 9101 to 9106 (1995) (enacted in 1980); FLA. STAT. ANN. § 944.512 (West 1996 & Supp. 2000) (enacted in 1977); GA. CODE ANN. §§ 17-14-30 to 32 (1997) (enacted in 1979); HAW. REV. STAT. ANN. §§ 351-81 to 88 (Lexis 1999) (enacted in 1986); IDAHO CODE § 19-5301 (1997) (enacted in 1978); 725 ILL. COMP. STAT. ANN. 145/1 to 14 (enacted in 1979 and repealed in 1992); IND. CODE ANN. § 5-2-6.3-3 (West Supp. 1999) (enacted in 1982); IOWA CODE ANN. § 910.15 (West 1994) (enacted in 1982); KAN. STAT. ANN. §§ 74-7319 to 7321 (1992) (enacted in 1986); KY. REV. STAT. ANN. 346.165 (Michie 1997) (enacted in 1978); LA. REV. STAT. ANN. § 46:1831 to 1839 (enacted in 1982 and repealed in 1997); ME. REV. STAT. ANN. tit. 14, § 752-E (West Supp. 1999) (enacted in 1997); MD. CODE ANN., art. 27, § 854 (1996 & Supp. 1999) (enacted in 1987); MASS. GEN. LAWS ANN. ch. 258A, § 8 (enacted in 1977 and repealed in 1993 (eff. Jan. 1, 1995)); MICH. COMP. LAWS ANN. § 780.768 (West 1998) (enacted in 1985); MINN. STAT. ANN. § 611A.68 (West Supp. 2000) (enacted in 1986); MISS. CODE ANN. §§ 99-38-1 to 11 (1994) (enacted in 1987); MO. ANN. STAT. § 595.045(14) (enacted in 1981 and repealed in 1993); MONT. CODE ANN. §§ 53-9-101 to 133 (1999) (enacted in 1977); NEB. REV. STAT. ANN. §§ 81-1835 to 1840 (Michie 1994) (enacted in 1978); NEV. REV. STAT. ANN. § 217.265 (enacted in 1981 and repealed in 1993); N.J. STAT. ANN. §§ 52:4B-28 to 33 (West 1986) (enacted in 1983); N.M. STAT. ANN. § 31-22-22 (Michie Supp. 1999) (enacted in 1983 and effective until July 1, 2001); N.Y. EXEC. LAW § 632-a (enacted in 1977 and repealed in 1992); N.D. CENT. CODE § 32-07.1-01 (1996) (enacted in 1993); OHIO REV. CODE ANN. §§ 2969.01 to .06 (West 1997) (enacted in 1984); OKLA. STAT. ANN. tit. 22, § 17 (West Supp. 2000) (enacted in 1981); OR. REV. STAT. § 147.275 (Supp. 1998) (enacted in 1985); PA. STAT. ANN. tit. 42, § 8312 (enacted in 1982 and repealed in 1995); R.I. GEN. LAWS § 12-25.1-1 to 12 (1994 & Supp. 1998) (enacted in 1983 and ruled unconstitutional in its entirety in *Bouchard v. Price*, 694 A.2d 670 (R.I. 1997)); S.C. CODE ANN. § 15-59-40 (Law. Co-op Supp. 1999) (enacted in 1980); S.D. CODIFIED LAWS §§ 23A-28A-1 to 14 (Michie 1998) (enacted in 1982); TENN. CODE ANN. §§ 29-13-

B. *The Fall of the Son of Sam Statute:* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board[37]

In 1981 publishing giant Simon & Schuster purchased the rights to *Wiseguy: Life in a Mafia Family*, a book written by a previously obscure organized crime figure, Henry Hill ("Hill").[38] The book was published in 1986 and described several crimes committed by Hill and his associates.[39] *Wiseguy* was a best seller and the basis for the hit movie *GoodFellas*.[40] On June 15, 1987, the New York Crime Victims Board ("Board") determined that Simon & Schuster had improperly failed to turn over the contract which was covered under New York's Son of Sam law.[41] The Board ordered the publisher to release all contractual payments owed to Hill or his representatives under the contract and ordered the money held in escrow for victims of crimes committed by Hill.[42] In addition, the Board ordered Hill to turn over the money he had already received.[43] Simon & Schuster sued the Board in federal court seeking a declaration that the New York Son of Sam law violated the First Amendment and an injunction barring the statute's enforcement, based on the argument that the statute placed an improper financial burden on content-based speech.[44]

---

401 to 411 (Supp. 1999) (enacted in 1994) (replacing TENN. CODE ANN. §§ 29-13-201 to 208, which was enacted in 1974 and repealed in 1994); TEX. REV. CIV. STAT. ANN. art. 8309-1 (enacted in 1979 and repealed in 1993); UTAH CODE ANN. § 77-18-8.3 (1999) (enacted in 1996) (replacing UTAH CODE ANN. § 78-11-12.5, which was enacted in 1991 and repealed in 1996); VA. CODE ANN. §§ 19.2-368.19 to .22 (Michie 1995) (enacted in 1990); WASH. REV. CODE ANN. § 7.68.200 to 290 (West 1992 & Supp. 2000) (enacted in 1979); W. VA. CODE §§ 14-2B-1 to 11 (Supp. 1999) (enacted in 1995); WIS. STAT. ANN. § 949.165(2) (West 1996) (enacted in 1983 and effective May 18, 1984); WYO. STAT. ANN. §§ 1-40-301 to 308 (Lexis 1999) (enacted in 1997).

Only three states have not passed any type of Son of Sam legislation: New Hampshire, North Carolina, and Vermont. Seven states have repealed their Son of Sam statutes and have not replaced them: Illinois, Louisiana, Massachusetts, Missouri, Nevada, Rhode Island, and Texas. That leaves 40 states with Son of Sam statutes still on the books.

37. 502 U.S. 105 (1991).

38. *See id.* at 112.

39. *See id.* at 112-13.

40. *See id.* at 114.

41. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 724 F. Supp. 170, 172-73 (S.D.N.Y. 1989).

42. *See id.* at 173.

43. *See id.*

44. *See id.* As interpreted by the United States Supreme Court, a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. *See* Leathers v. Medlock, 499 U.S. 439, 447 (1991). The Court has consistently held that the financial regulation of speech

1. The District and Appellate Court Decisions

The First Amendment states in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[45] To determine whether the statute violated Hill's First Amendment rights, the United States District Court for the Southern District of New York applied the intermediate scrutiny analysis used in *United States v. O'Brien,*[46] and found the statute constitutional.[47] Consequently, the court upheld the Board's decision.[48] The district court found that a "sufficiently important governmental interest in regulating the nonspeech element [of receiving a profit] can justify incidental limitations on First Amendment freedoms."[49] The court reasoned that although the statute made it more difficult to publish books in conjunction with criminal sources, it did not prohibit such arrangements.[50] The Board's job, according to the court, was to review whether the Son of Sam statute applied to certain contracts, not to decide newsworthiness or educational value.[51] Therefore, any burden on free speech was incidental.[52] The court ruled that, in the end, the statute only affected the non-expressive element of the transaction—receiving a profit.[53] The court also held that the statute was narrowly tailored to serve the state's interest in compensating crime victims because such an interest did not involve suppressing speech, but merely attached the proceeds of that speech for the benefit of the victim.[54]

On appeal, the United States Court of Appeals for the Second Circuit reached the same conclusion and affirmed the district

---

raises the specter that the government, through content-based burdens, may drive certain ideas or viewpoints from the marketplace. *See id.* at 448-49.

45. U.S. CONST. amend. I.

46. 391 U.S. 367 (1968). The *O'Brien* Court held that when speech and nonspeech elements are combined in the same conduct, the First Amendment is not infringed if the government demonstrates (1) that it had the power to enact the law, (2) that the law serves a substantial or important governmental interest, (3) that the law is unrelated to the suppression of free expression, and (4) that the restriction on speech is no greater than necessary to further the governmental interest. *See id.* at 376-77.

47. *See Simon & Schuster, Inc.*, 724 F. Supp. at 177-79.

48. *See id.* at 180 (finding that section 632-a was constitutional under both the First and Fourteenth Amendments).

49. *Id.* at 178 (quoting *O'Brien*, 391 U.S. at 376).

50. *See id.* at 176 (noting that payment is only delayed, not denied, to the criminals).

51. *See id.*

52. *See id.* at 177.

53. *See id.*

54. *See id.* at 178-79.

court's decision, but for different reasons.[55] The appellate court found that the statute directly burdened the speech of criminals who wanted to sell their stories, therefore making it a content-based restriction.[56] However, the court found that strict scrutiny, and not the *O'Brien* test, was the correct standard to apply.[57] According to the court, "for the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[58] Nevertheless, the court found that the statute met strict scrutiny standards because it was narrowly drawn to satisfy the compelling interest of ensuring that criminals do not profit from their crimes at the expense of victims.[59] Still dissatisfied, Simon & Schuster appealed to the United States Supreme Court.

2. The Supreme Court Decision

The United States Supreme Court reversed the lower courts' decisions and found the New York statute unconstitutional.[60] Although the Court agreed with the Second Circuit Court of Appeals that the strict scrutiny test should apply, it found that the Son of Sam statute was not sufficiently narrow to meet this standard.[61] In a unanimous decision, the Court held that the New York Son of Sam law was a content-based statute which singled out, and therefore discriminated against, a specific form of speech—the expressive activity of a wrongdoer.[62] Writing for the Court, Justice O'Connor stated, "'[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'"[63] Having found that the Son of Sam law was a content-based statute, the Court applied the strict scrutiny test.[64]

First, the Court addressed whether the state met its burden of

---

55. *See* Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 778 (2d Cir. 1990).

56. *See id.* at 781-82.

57. *See id.* at 782 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

58. *Id.*

59. *See id.* at 783.

60. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 123 (1991).

61. *See id.*

62. *See id.* at 116.

63. *Id.* (quoting Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984)).

64. *See id.* at 118. Regardless of whether the speaker was Hill, for telling his story, or Simon & Schuster, for publishing it, the Court found that the statute targeted content-based speech because "[i]t singles out income derived from expressive activity

showing that the statute served a compelling governmental interest—the first prong of the strict scrutiny test. The Court agreed with the lower courts that New York had two compelling reasons to regulate the speech: (1) to make sure victims of crime are compensated from the fruits of a crime and (2) to prevent offenders from profiting from their crimes.[65] The Court was not persuaded that the statute was narrowly drawn to achieve either of these two compelling purposes.[66] In fact, the Court found that the statute did not meet the strict scrutiny standard because it was significantly over-inclusive.[67]

According to the Court, the New York statute defined "person convicted of a crime" too broadly because the definition included any person who had voluntarily and intelligently admitted to the commission of a crime, even where the person was not in fact accused of or prosecuted for that crime.[68] Second, the statute applied to works on any subject, provided that the works expressed the accused or convicted person's thoughts, feelings, opinions, or emotions regarding the person's crime, however tangentially or incidentally.[69] As a result, the statute would "encompass a potentially very large number of works."[70] On these points, the Court offered several examples of prominent people who could have been affected by this statute, including Dr. Martin Luther King, Jr. and Saint Augustine.[71] As a result, the Court concluded that the statute was over-inclusive, and therefore, not narrowly tailored to achieve

---

for a burden the State places on no other income, and it is directed only at works with a specified content." *Id.*

65. *See id.* at 118-19. The Court was careful to note, however, that there was no compelling interest in "'ensuring that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries.'" *Id.* at 119 (citation omitted). As such, the inquiry into whether the statute was narrowly tailored must be limited to the compelling interest in compensating victims. *See id.* at 120-21.

66. *See id.* at 121-23.

67. *See id.* at 121. Justice Kennedy, in a concurring opinion, stated that the violation of the First Amendment itself was a full and sufficient reason for holding the statute unconstitutional. *See id.* at 124 (Kennedy, J., concurring). Justice Kennedy felt the statute was unconstitutional because it was a content-based restriction and that borrowing the compelling interests and narrowly tailoring analysis was "ill-advised." *Id.* (Kennedy, J., concurring).

68. *See id.* at 121; *see also* N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1982 & Supp. 1991).

69. *See Simon & Schuster, Inc.*, 502 U.S. at 121.

70. *Id.*

71. *See id.* at 121-22 (finding that other works, such as *The Autobiography of Malcom X* and Henry Thoreau's *Civil Disobedience*, would have been subjected to New York's Son of Sam Law had it been enacted at the time of their publication).

the state's compelling governmental interest of compensating crime victims from profits of crime.[72]

The Court also implied that the statute was under-inclusive because it compensated victims of crimes only when the offender profited from selling his or her story, but not from the offender's other assets.[73] The Court stated that the Board could not "explain why the State should have any greater interest in compensating victims from the proceeds of such 'storytelling' than from any of the criminal's other assets."[74] Rather than singling out storytelling, the statute might have fared better if it had looked to all forms of assets held by the offender.[75]

Another flaw in the New York statute identified by the Court was that the compelling interest of compensating victims was third in priority for payment from the escrow fund.[76] The first priority was payment for legal representation.[77] The second priority was payment to the state in subrogation for compensation paid to victims of the crime.[78] Only after those interests had been paid and after a civil judgment had been obtained could the victim recover from the fund.[79] Under this scheme, the Court seemed skeptical that the statute's purpose in fact matched the underlying policy of compensating victims.[80]

Although the Court only directly addressed the New York statute in *Simon & Schuster*, after the decision most Son of Sam laws were called into question.[81] After all, they had been patterned after

---

72. *See id.* at 123.

73. *See id.* at 119.

74. *Id.*

75. *See id.* Justice Blackmun, in a separate opinion, concurred in the result, but argued that the Court should explicitly state that the statute was under-inclusive as well as over-inclusive. *See id.* at 123-24 (Blackmun, J., concurring).

76. *See id.* at 110.

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.* at 123 (stating that while the interest of compensating victims is a compelling one, New York's statute was not narrowly tailored to achieve that objective).

81. *See* Nosrati, *supra* note 35, at 961; Debra Shields, Note, *The Constitutionality of Current Crime Victimization Statutes: A Survey*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 929, 930-31 (1994) (stating that "[t]he constitutionality of all crime victimization statutes has been seriously jeopardized by the Simon & Schuster decision because most states had adopted statutes very similar to New York's legislation"); Melissa M. Erlemeier, Note, *The First Amendment Prevails over Crime Victim Compensation:* Simon and Schuster, Inc. v. Members of the New York State Crime Victims Board, 26 CREIGHTON L. REV. 1301, 1309 (1992-1993) (noting that after *Simon & Schuster*, most

the same flaws that led to the demise of New York's Son of Sam law.[82] Thus, in response to *Simon & Schuster*, several states amended or replaced their Son of Sam laws in an effort to make them constitutional.[83]

C. *Towards Constitutionality*

1. Content-Neutral

Critical to the constitutionality of a Son of Sam statute is the statute's content-neutrality. *Simon & Schuster* provides that a statute which singles out the speech of criminal authors solely because of its content will be subject to strict scrutiny.[84] While the Court did not specifically address whether a statute that makes no reference to the proceeds generated by First Amendment activities would be considered constitutional, it implied that a statute that did not single out speech or place a financial burden on speech may be content-neutral[85] and thus, might withstand judicial scrutiny.[86] It is important for a court to find that the statute is content-neutral because a content-neutral statute only needs to meet the less rigorous "intermediate scrutiny" test set forth in *United States v. O'Brien*.[87] Thus, any future Son of Sam legislation should strive to be content-

---

states modified their version of New York's Son of Sam law in an effort to satisfy the Court's constitutional analysis).

82. *See* Kevin S. Reed, *Criminal Anti-Profit Statutes and the First Amendment*: Simon and Schuster, Inc. v. New York Crime Victims Board, 15 HARV. J. L. & PUB. POL'Y 1060, 1060 (1992) ("*Simon and Schuster* foretells the demise of all of these criminal anti-profit provisions."); Shields, *supra* note 81, at 933 (concluding that "forty-one out of forty-five current state crime victimization statutes in the country are unconstitutional under Simon and Schuster"). See *supra* note 36 for a complete list of states that enacted Son of Sam statutes in the wake of New York's legislation.

83. *See, e.g.*, CAL. CIV. CODE § 2225 (Supp. 2000) (amended in 1992, 1994, and 1995); COLO. REV. STAT § 24-4.1-201 (1991 & Supp. 1999) (amended in 1988 and 1994); IOWA CODE ANN. § 910.15 (West 1994) (amended in 1992); KAN. STAT. ANN. § 74-7319 (1992) (amended in 1992); MD. ANN. CODE art. 27, § 764 (transferred to section 854 by section 7, ch. 585, Acts 1996) (1996 & Supp. 1999); N.Y. EXEC. LAW § 632(a) (amended in 1992); 42 PA. CONS. STAT. ANN. § 8312 (1998) (amended in 1995); TENN. CODE ANN. § 29-13-403 (Supp. 1999) (amended in 1994); VA. CODE ANN. § 19.2-368.20 (Michie 1995) (amended in 1992).

84. *Simon & Schuster, Inc.*, 502 U.S. at 117-18. See *supra* Part I.B.2 for a discussion of the strict scrutiny test as applied in *Simon & Schuster*.

85. Content-neutral speech restrictions are "those that 'are *justified* without reference to the content of the regulated speech.'" Boos v. Barry, 485 U.S. 312, 320 (1988) (quoting Virginia Pharm. Bd. v. Virginia Citizens' Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

86. *See Simon & Schuster, Inc.*, 502 U.S. at 120-21.

87. 391 U.S. 367 (1968). See *supra* note 46 for a discussion of the *O'Brien* test.

neutral to receive the benefit of this less rigorous standard of review.

Massachusetts' former statute regarding notoriety-for-profit fell within the category of statutes subject to strict scrutiny by virtue of its forfeiture provisions. Massachusetts' statute, like New York's former Son of Sam statute, was not content-neutral because it required forfeiture of proceeds earned by a criminal defendant "with respect to the reenactment of such crime, by way of movie, book, magazine article, radio or television presentation, live entertainment of any kind, or from the expression of such person's thoughts, feelings, opinions, or emotions regarding such crime."[88] Many other state statutes contained similar forfeiture language.[89] For instance, the Rhode Island Supreme Court ruled that its state's Son of Sam statute was unconstitutional because the statute's applicability was limited solely to expressive activity.[90]

Content neutrality may be accomplished by targeting *all* of the offender's assets, rather than just assets related to "story-telling." For instance, Iowa has amended its Son of Sam statute for this purpose and now defines "proceeds" as "the fruits of the crime from whatever source received."[91] Similarly, New York amended its statute in 1992 to address this concern.[92] The new statute removes the

---

88. MASS. GEN. LAWS ANN. ch. 258A, § 8, *repealed by* St.1993, ch. 478, § 3 (eff. Jan. 1, 1995).

89. *See, e.g.*, ALA. CODE § 41-9-80 (1991); ALASKA STAT. §12.61.020(a) (Lexis 1998); ARIZ. REV. STAT. ANN. § 13-4202(A) (West 1989); ARK. CODE ANN. § 16-90-308(a)(1) (Michie Supp. 1999); CAL. CIV. CODE § 2225(b)(1) (West Supp. 2000); COLO. REV. STAT. ANN. § 24-4.1-201(1) (West 1990 & Supp. 1999) (repealed; replaced with § 24-4.1-201(1.5)(a)); CONN. GEN. STAT. ANN. § 54-218(a) (West 1994 & Supp. 1999); DEL. CODE ANN. tit. 11, § 9103(a) (1995); FLA. STAT. ANN. § 944.512(1) (West 1996 & Supp. 2000); GA. CODE ANN. § 17-14-31(a)(1) (1997); HAW. REV. STAT. ANN. § 351-81(2) (Lexis 1999); IDAHO CODE § 19-5301(1) (1997); IND. CODE ANN. § 5-2-6.3-3 (West Supp. 1999); KAN. STAT. ANN. § 74-7319(a) (1992); KY. REV. STAT. ANN. 346.165(1) (Michie 1997); MD. CODE ANN., art. 27, § 854(a)(5) (1996 & Supp. 1999); MICH. COMP. LAWS ANN. § 780.768(2) (West 1998); MINN. STAT. ANN. § 611A.68(2) (West Supp. 2000) (repealed); MISS. CODE ANN. § 99-38-5 (1994); MONT. CODE ANN. § 53-9-104(d) (1999); NEB. REV. STAT. ANN. § 81-1836 (Michie 1994); N.J. STAT. ANN. § 52:4B-28 (West 1986); N.M. STAT. ANN. § 31-22-22(A) (Michie Supp. 1999); OHIO REV. CODE ANN. § 2969.02(A) (West 1997); OR. REV. STAT. § 147.275 (Supp. 1998) (repealed); S.C. CODE ANN. § 15-59-40 (Law. Co-op Supp. 1999); S.D. CODIFIED LAWS § 23A-28A-1 (Michie 1998); UTAH CODE ANN. § 77-18-8.2(2) (1999); WASH. REV. CODE ANN. § 7.68.200 (West 1992); WIS. STAT. ANN. § 949.165(2) (West 1996).

90. *See* Bouchard v. Price, 694 A.2d 670, 677 (R.I. 1997).

91. IOWA CODE ANN. § 910.15(1)(e) (West 1994).

92. The new statute defines "profits from the crime" as:

> (i) [A]ny property obtained through or income generated from the commission of a crime of which the defendant was convicted; (ii) any property ob-

language that specified speech-related activities and subjects all crime-related assets to seizure.[93] At least one commentator believes that as a result of these changes, the New York statute now complies with *Simon & Schuster*.[94]

Still, changes that create "content-neutrality" may not be enough to ensure the constitutionality of a Son of Sam law. The Court in *Simon & Schuster* merely indicated that a statute would be more likely to pass constitutional muster if it was content-neutral, but it did not state what measures would be required to create a content-neutral statute. Indeed, the Supreme Court has stated that "the mere assertion of a content-neutral purpose [will not] be enough to save a law which, on its face, discriminates based on content."[95] Although these new Son of Sam statutes purport to encompass all assets, "storytelling" is still their natural target, and often will be the only source of assets for criminals. Therefore, it is of course possible that a court would look past new purportedly content-neutral language and still find a content-based purpose.[96] For precisely this reason, commentators have emphasized that a Son of

---

> tained by or income generated from the sale, conversion or exchange of proceeds of a crime . . . ; and (iii) any property which the defendant obtained or income generated as a result of having committed the crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, the crime, as well as any property obtained by or income generated from the sale, conversion or exchange of such property and any gain realized by such sale, conversion or exchange.

N.Y. EXEC. LAW § 632-a(1)(b) (McKinney 1996).

93. *See id.*

94. *See* Amr F. Amer, Comment, *Play It Again Sam: New York's Renewed Effort to Enact A "Son of Sam" Law That Passes Constitutional Muster*, 14 LOY. L.A. ENT. L.J. 115, 133-35 (1993).

95. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642-43 (1994).

96. Although a statute may be content-neutral because it applies to all crime-related assets rather than just speech-related activity, the most common way in which a criminal profits from his notoriety is through books, film, or television which are protected activities under the First Amendment. Therefore, the New York Crime Victims Board still considers its statute vulnerable to challenge. The statute was challenged in 1997 when Sammy "The Bull" Gravano sold the rights to his story which resulted in the book *Underboss*. *See* New York State Crime Victims Bd. v. T.J.M. Prods., Inc., 673 N.Y.S.2d 871, 872 (N.Y. Sup. Ct. 1998). The parties that contracted with Gravano sought to dismiss the complaint brought by the New York Crime Victims Board and the case went before the New York Supreme Court. *See id.* at 872-73. The complaint was dismissed, not on constitutional grounds, but rather on the grounds that the statute's definition of crime did not include the federal crimes for which Gravano was convicted. *See id.* at 875. Also, the new statute did not prohibit a contracting party from making agreements with the representative or assignee of a person charged or convicted of a crime. *See id.* at 877.

Sam statute must be narrowly tailored to apply to all of a defendant's crime-related assets.[97]

2. Narrowly Tailored Statute

In addition to being content-neutral, a notoriety-for-profit statute should be tailored to fulfill the circumscribed purpose of compensating victims.[98] This narrow tailoring will allow the statute to withstand even strict scrutiny review if a court should find that the statute is not content-neutral. Narrow tailoring may be accomplished by changing the definitions of to whom and to what the statute will apply as reflected in two key terms: "defendant" and "profits of crime."

a. The definition of "defendant"

When creating a notoriety-for-profit statute, the definition of who the statute applies to, typically the "defendant," should be tailored to focus on only those offenders who have an obligation to compensate victims. In *Simon & Schuster*, the Court held that the New York statute was not narrowly tailored, in part, because the definition of a "person convicted of a crime" was overly broad.[99] The definition allowed the forfeiture of proceeds from anyone accused of a crime or anyone who voluntarily admitted to the commission of a crime, regardless of whether that person was eventually convicted.[100] Several states now have definitions that conform to *Simon & Schuster*'s requirements and may provide model language for a new Son of Sam statute.

For example, Minnesota now defines "offender" as a "person convicted of a crime or found not guilty of a crime by reason of insanity."[101] Similarly, Iowa narrowly defines "convicted felon" as "a person initially convicted, or found not guilty by reason of in-

97. *See* Reed, *supra* note 82, at 1066-68; *see also* Robert Mazow, Comment, Simon & Schuster v. New York State Crime Victims Board: *Should the Supreme Court Have Invalidated New York's* Son of Sam *Statute?*, 28 NEW ENG. L. REV. 813, 841-43 (1994); Erlemeier, *supra* note 81, at 1331.

98. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 120-21 (1991).

99. *See id.* at 121; see *supra* note 68 and accompanying text for the New York statute's definition of a "person convicted of a crime."

100. *See Simon & Schuster, Inc.*, 501 U.S. at 121. For the same reason, Alaska's statute is unconstitutional. Alaska defines "offender" as a "person who has committed a crime in this state, whether or not the person has been convicted of the crime." ALASKA STAT. § 12.61.020(e)(1) (Lexis 1998).

101. MINN. STAT. ANN.§ 611A.68(1)(c) (Supp. 2000).

sanity . . . either by a court or jury trial or by entry of a guilty plea in court."[102] Since *Simon & Schuster*, New York, Maryland, and Delaware have also amended their overly broad definitions. New York's statute now applies only to those who have committed felonies.[103] While Maryland still defines "defendant" as an individual charged with or convicted of a crime,[104] it now requires that any seized money be returned to a defendant who is acquitted.[105] The Court of Appeals of Maryland has since examined the new statute and has not found fault with this new definition.[106]

b. Tailoring the term "profits from crime"

Another problem with the New York statute in *Simon & Schuster* was the statute's overly broad definition of "profits from crime."[107] The Court found that, as written, the statute included all forms of storytelling for profit, even if the work had little to do with the offender's crime.[108] The Court pointed out the problem by noting a range of classic and contemporary literary works that could have been affected by the statute, such as *The Confessions of St. Augustine*, which only tangentially mentions crime.[109] One method of meeting the narrowly tailored requirement of the strict scrutiny test has been to add language to limit what forms of expression may

---

102. IOWA CODE ANN. § 910.15(1)(a) (West 1994).

103. "Crime" is defined as: "any felony defined in the penal law or any other chapter of the consolidated laws of the state." N.Y. EXEC. LAW § 632-a(1)(a) (McKinney 1996). Interestingly, New York seems to have made this definition too narrow. Because the definition does not include federal crimes, the New York Supreme Court for New York County found that the statute did not apply to publication contracts with Sammy Gravano. *See* New York State Crime Victims Bd. v. T.J.M. Prods. Inc., 673 N.Y.S.2d 871 (1998). Other states that define "crime" to include only "major" crimes such as felonies include: ALA. CODE § 41-9-80 (1991); ARIZ. REV. STAT. ANN. § 13-4201(1) (West 1989); CAL. CIV. CODE § 2225(b)(1) (West Supp. 2000); CONN. GEN. STAT. ANN. § 54-218(a) (West 1994 & Supp. 1999); FLA. STAT. ANN. § 944.512(1) (West 1996 & Supp. 2000); IND. CODE ANN. § 5-2-6.3-3 (West Supp. 1999); IOWA CODE ANN. § 910.15(1)(c) (West 1994); MINN. STAT. ANN. § 611A.68(b) (West Supp. 2000); N.M. STAT. ANN. § 31-22-22(A) (Michie Supp. 1999); N.D. CENT. CODE § 32-07.1-01(1) (1996); TENN. CODE ANN. § 29-13-402(2) (Supp. 1999); VA. CODE ANN. § 19.2-368.19 (Michie 1995); W. VA. CODE § 14-2B-3(a) (Supp. 1999); WIS. STAT. ANN. § 949.165(1)(a) (West 1996).

104. MD. ANN. CODE art. 27, § 854(a)(2) (1996 & Supp. 1999).

105. *See id.* § 854(e)(3)(ii).

106. *See* Curran v. Price, 638 A.2d 93, 99 (Md. 1994) (declining to address the merits of the constitutionality of section 764 (now section 854)).

107. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 121 (1991).

108. *See id.* at 120-21.

109. *See id.* at 121.

be reached by the statute. States have taken various approaches to narrow the scope of the term "profits of a crime."

Several states that formerly targeted specific forms of expression within their Son of Sam laws have since tailored their statutes to expressly exclude from the reach of the law works that contain only incidental or tangential references to crimes. Virginia, for example, amended its statute so that profits from crimes "shall not be subject to forfeiture unless an integral part of the work is a depiction or discussion of the defendant's crime or an impression of the defendant's thoughts, opinions, or emotions regarding such crime."[110] Kansas has also amended its statute so that only the proceeds from a work that deals "principally with the crime for which the person is accused and convicted" are subject to forfeiture.[111]

Limiting language does not, however, necessarily mean that the statute will be found constitutional. When Rhode Island's statute was challenged in 1997, the Rhode Island Attorney General argued that because the statute only applied to people convicted of felonies, the law applied "only to 'significant' commercial exploitations of a crime and that 'a tangential or peripheral reference to a prior crime would not trigger [its] provisions.'"[112] However, the Rhode Island Supreme Court found that this restriction did not alleviate the problem that tangential or incidental references to crime were still proscribed by the act.[113] Similarly, Maryland amended its Son of Sam statute by removing language specific to forms of expression and by providing that the statute would not apply to a work that only "tangentially or incidentally relates to the crime."[114] Presently, Maryland's Son of Sam law targets any profits directly or indirectly received from the crime, including, but not limited to, First Amendment activities under its definition of "notoriety of crimes contract."[115] The revised statute was challenged in the 1994 case *Curran v. Price*.[116] Notwithstanding amendments to the stat-

110. VA. CODE ANN. § 19.2-368.20 (Michie 1995).

111. KAN. STAT. ANN. § 74-7319(a) (1992).

112. Bouchard v. Price, 694 A.2d 670, 677 (R.I. 1997) (citation omitted).

113. *See id.* (stating that "the act [is] over broad because it affects all expressive activity").

114. MD. ANN. CODE art. 27, § 854(c)(3) (1996 & Supp. 1999).

115. *See id.* § 854(a)(5). See *infra* note 118 for Maryland's definition of "notoriety of crimes contract."

116. 638 A.2d 93 (Md. 1994). Ronald Price was a high school teacher indicted in 1993 for sexual abuse of students. *See id.* at 97. In September 1993, Mr. Price was convicted of child sexual abuse and another charge and was sentenced to 26 years imprisonment. *See id.* at 97 n.1. In a news interview, Price stated that he had entered into a contract to sell his story. *See id.* at 97 & n.2. The Maryland Attorney General sought

ute intended to make it comply with *Simon & Schuster,*[117] amicus for the appellant, the ACLU, argued that the statute was overly broad due to the definition of "notoriety of crimes contract" and the procedures set forth for review of such contracts by the Attorney General.[118] The Attorney General argued, however, that any overbreadth problems in the definitions were cured by section 746(c)(3) because it removed contracts with subject matter only tangentially or incidentally crime-related from the scope of the statute.[119] Given that even tangentially or incidentally crime-related works would be required to be submitted to the Attorney General for review, the question before the Maryland Court of Appeals was whether the burden of submission and review was necessary and narrowly tailored to serve the state's interest without impermissibly burdening speech unrelated to the advancement of that interest.[120] More specifically, the court questioned whether the procedural safeguards were sufficient to justify the state's prior restraint of speech.[121] The court found that the state, and not the defendant, should have the burden of proving that the work falls within the

---

an interlocutory injunction requiring Price to turn over the contract along with any payments received. *See id.* The American Civil Liberties Union, appearing as *amicus curiae*, challenged the statute as being "a content-based restriction which sweeps too broadly, unconstitutionally burdening speech that is protected by the First Amendment." *Id.* at 98. Price, while contending that the statute was unconstitutional, put forth no legal arguments supporting this contention. *See id.*

117. Amendments in 1993 added section 764(c)(2) & (3) [now section 854(c)(2) & (3)]. Subsection (c)(2) mandates that the Attorney General give his or her decision within 180 days, while subsection (c)(3) states that there is a rebuttable presumption that the contract is a notoriety of crimes contract. *See* MD. ANN. CODE art. 27, § 854(c)(2) & (3) (1996 & Supp. 1999).

118. *See Curran*, 638 A.2d at 101. A "notoriety of crimes contract" was defined in section 764(a)(5) [now section 854(a)(5)] of the Maryland statute as:

> (i) The reenactment of a crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, or live entertainment of any kind; (ii) The expression of the defendant's thoughts, feelings, opinions, or emotions regarding a crime involving or causing personal injury, death, or property loss as a direct result of the crime; or (iii) The payment or exchange of any money or other consideration or the proceeds or profits that directly or indirectly result from a crime, a sentence, or the notoriety of a crime or sentence.

MD. ANN. CODE art. 27, § 854(a)(5) (1996 & Supp. 1999). The Attorney General's review procedures allowed the Attorney General to determine whether a contract qualified as a "notoriety of crimes contract." *See Curran*, 638 A.2d at 101.

119. *See Curran*, 638 A.2d at 101-02; *see also* MD. ANN. CODE art. 27, § 764(c)(3) (Supp. 1993) [(now § 854(c)(3) (1996 & Supp. 1999)].

120. *See Curran*, 638 A.2d at 102.

121. *See id.* at 102-03.

regulatory scheme.[122] The burden of proof within the Maryland statute, therefore, was on the wrong party. In addition, the defendant's right to seek judicial review of the Attorney General's opinion, which could take up to six months, was an unacceptable time frame under federal precedent.[123] Thus, the Maryland Court of Appeals found that the statute's procedural safeguards were insufficient to withstand constitutional scrutiny.

Although inroads have been made to constructing a Son of Sam law that withstands constitutional scrutiny, the experience of various states, such as those described above, suggests that many obstacles remain. Given that problems will arise whenever a Son of Sam law is enacted, not only because of constitutional ramifications but also because there are those who oppose such laws on principle, one must consider the extent to which a Son of Sam statute is beneficial and necessary to justify the efforts of legislators.

II. Is a "Son of Sam" Law Necessary?

Although popular with the public and lawmakers, the very need for a Son of Sam law is often called into question. In light of *Simon & Schuster*, not only does a Son of Sam law present constitutional problems, but because these laws are rarely used, opponents wonder if they are even necessary. Furthermore, critics of such statutes contend that the general goals of Son of Sam laws may be achieved in other ways.[124] After considering each of these argu-

---

122. *See id.* at 102. The court found that a prior restraint on speech places a heavy burden on the state to justify the restraint because "'any system of prior restraint of expression . . . bear[s] a heavy presumption against its constitutional validity.'" *Id.* (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). The court pointed out that "[a] prior restraint of unprotected speech must include sufficient procedural safeguards to avoid unduly suppressing protected speech." *Id.* (citing Freedman v. Maryland, 380 U.S. 51, 58 (1965)). In *Freedman*, the Supreme Court set forth procedural requirements for prior restraints on speech in a motion picture censorship system. *See Freedman*, 380 U.S. at 58-59. The Court held that the state must bear the burden of proving that a film is unprotected expression. *See id.* at 58. It further held that while the state may require advance submission of films, this requirement may not be administered in such a way as to make the state's decision final; only a procedure requiring a judicial determination constitutes a valid restraint. *See id.* "[T]he procedure must also assure a prompt final judicial decision." *Id.* at 59. The Maryland Court of Appeals found section 764's review process in conflict with the *Freedman* standard. *See Curran*, 638 A.2d at 103.

123. The *Freedman* Court considered a six month delay until final appellate review of a censorship decision an impermissible delay; the Maryland statute allowed six months for review by the Attorney General before the possibility of judicial review, which the court likewise found to be a heavy burden. *See Curran,* 638 A.2d at 103.

124. *See* Michelle L. Learned, *The Constitutionality of Cashing in on Crime: Free*

ments, however, it becomes evident that a notoriety-for-profit statute, such as is embodied in the bill currently pending before the Massachusetts Legislature,[125] is the best method of protecting victims in a consistent and clearly defined manner.

A. *Would a Son of Sam Statute Be Used?*

Notoriety-for-profit laws are rarely used since only a small percentage of all criminals have sufficient notoriety or a compelling enough story to get a book or movie deal. In fact, Son of Sam statutes have been used infrequently in the past.[126] Between its enactment in 1977 and its invalidation by the Supreme Court in 1991, the New York law was used only a "handful of times."[127] The Massachusetts version was used only once, in 1987, when former Medford police officer Gerald W. Clemente, Jr. published a book detailing his corrupt activities.[128] The book, *The Cops Are Robbers,* was a commercial success, and he received offers to make his story into a film.[129] Clemente did not receive profits from the book, however, since the bank he burglarized filed a civil suit and obtained an injunction preventing him from receiving royalty payments.[130]

With so few criminals capitalizing on their notoriety, it might

---

Expression, Free Enterprise and Not-Profit Conditions of Probation, 1 SUFFOLK J. TRIAL & APPELLATE ADVOC. 79, 91-92 (1995) (arguing that recovery through civil actions is sufficient to compensate victims and avoid the First Amendment problems presented by Son of Sam statutes and special probation orders).

125. *See infra* Part III.B.

126. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 111 (1991).

127. *See id.* at 111. The cases cited in *Simon & Schuster* include Jean Harris, the convicted killer of "Scarsdale Diet" Doctor Herman Tarnower; Mark David Chapman, the man convicted of assassinating John Lennon; and R. Foster Winans, the former Wall Street Journal columnist convicted of insider trading. *See id.*

128. *See* Duncan Mansfield, *Bill Filed to Limit Criminals' Profits for Crime Books*, THE ASSOCIATED PRESS, Nov. 4, 1987, *available in* 1987 WL 3188327 (noting that after Clemente's book was published in June 1987, state officials were angered about the prospect of him receiving profits from the book, and tried to get the Treasurer's Office to enforce the state's Son of Sam law. The Treasurer's office said the law was too vague. Thereafter, lawmakers filed a bill on November 4, 1987 to strengthen the state's Son of Sam law).

129. *See Lawmakers Act to Bar Inmates' Book Profits*, N.Y. TIMES, Nov. 1, 1987, at 39 (noting that nine movie companies approached Clemente about acquiring film rights to his book). The book did in fact become a made-for-television movie, "Good Cops, Bad Cops," which aired on NBC on December 9, 1990. *See* Ron Miller, *When the Cops Are Robbers*, AUSTIN AM. STATESMAN, Dec. 9, 1990, at 7.

130. *See* Mansfield, *supra* note 128 (reporting that an attorney for the publisher of the book stated that Clemente cannot "personally. . . get a distribution of funds" until the case is settled, although his profits will not amount to much due to the book's limited distribution).

seem as though Son of Sam legislation is unnecessary in the Commonwealth. However, the mere infrequency of the statute's use in the past does not provide a valid argument for keeping the statute off the books. To the contrary, a Son of Sam statute is necessary to prevent a negative image of the criminal justice system. Moreover, the growing popularity of the "true crime" industry[131] suggests that Son of Sam legislation may be used more frequently than it was in the past.

The cases in which Son of Sam statutes are invoked are typically high profile, and therefore, have the potential to influence public perception of our judicial system. For instance, if offenders are free to profit from their victims' misery, the criminal justice system may be seen as allowing the commercialization of crimes, thereby minimizing the plight of victims. Additionally, the absence of a Son of Sam statute may lead the courts to attempt to limit criminals from profiting from their crimes, thus leaving the judicial system open to criticisms that it is legislating rather than adjudicating. For example, in *Commonwealth v. Power*,[132] there was no Son of Sam statute, and so the court imposed probationary terms that would foreclose the offender's ability to profit from her crime by entirely prohibiting her from publishing her story.[133] An effective notoriety-for-profit statute, had it been available at the time of the *Power* case, would have better safeguarded the public image of the criminal justice system without forcing the court to fashion its own

---

131. *See* Elizabeth Jensen & Ellen Groham, *Stomping Out TV Violence: A Losing Fight*, WALL ST. J., Oct. 26, 1993, at B1 (commenting on the large amount of prime time hours devoted to news magazine shows covering crime and made-for-tv movies about crime); Lisa W. Foderaro, *Crimes of Passion, Deals of a Lifetime*, N.Y. TIMES, Feb. 10, 1991, § 4, at 6 (citing recent proliferation in true crime industry).

132. 650 N.E.2d 87 (Mass. 1995).

133. The probation contract contained the following provision:

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

Id. at 89.

means of protecting the victim.[134]

Meanwhile, the "true crime" industry continues to blossom.[135] More and more books, movies, and television dramas revolve around real-life incidents and offenders. Given the public's seemingly insatiable thirst for this type of "entertainment," an effective notoriety-for-profit law is needed to counterbalance the negative impact of public perception of the criminal justice system. Indeed, the burgeoning popularity of notorious crimes as the focus of society's entertainment suggests more criminals will have greater opportunity to profit from their crimes, thus calling for greater use of Son of Sam statutes in the future. Consequently, notwithstanding the previously rare usage of Son of Sam statutes, an effective notoriety-for-profit law is necessary in the Commonwealth. Such legislation would be unnecessary only if there were other means available to prevent criminals from profiting from their wrongdoing while simultaneously compensating victims.

B. *Non-Statutory Methods Would Not Be as Effective as a Son of Sam Law*

Civil libertarians opposed to the use of notoriety-for-profit laws primarily rely on two arguments. The first argument is that these laws have a chilling effect on the First Amendment rights of criminals.[136] Secondly, the general goals of these laws may be accomplished through other methods, including probationary requirements, restitution orders, and civil actions filed by the victims themselves.[137] In fact, one could argue that the *Power* case proves that probationary requirements provide a constitutional alternative to a statutory framework prohibiting criminals from profiting from their crimes.[138] In reality, however, each of these alternatives—

---

134. See *infra* notes 155-161 and accompanying text for further discussion of the problems that arose from the probation terms in the *Power* case.

135. For a discussion of the escalation of the "true crime" market see *supra* note 131.

136. *See* Nostrati, *supra* note 35, at 977, 983 (arguing that California's Son of Sam law has a chilling effect on speech); Kerry Casey, Note, *The Virginia "Son of Sam" Law: An Unconstitutional Approach to Victim Compensation*, 2 WM. & MARY BILL OF RIGHTS J. 495 (1993) (arguing that Virginia's law has a chilling effect on speech).

137. *See, e.g.,* Learned, *supra* note 124, at 79-93 (questioning the constitutionality of special conditions on probation and suggesting that civil judgments adequately protect victims without implicating the First Amendment).

138. *See id.* at 89-90; see also *infra* notes 147-148 and accompanying text for a discussion of the Massachusetts Supreme Judicial Court's ruling that probation terms instituted in the *Power* case did not violate the defendant's constitutional rights.

civil action, restitution, and probation—have serious flaws that a well-written Son of Sam statute could eliminate.

A civil action brought against an offender may certainly serve to compensate a victim. Unfortunately, it is impractical for every victim in every case to obtain a civil judgment against an offender's assets. Even assuming that an action was successful, an offender may not have assets to satisfy a judgment. Of course in some cases, such as with Power or Berkowitz, it may be obvious from the time of arrest, due to the amount of publicity surrounding the case, that an offender could easily sell his or her story and acquire substantial assets. However, in many cases the victim may choose not to bring a civil action only to find out later, after seeing the movie or reading the book, that the offender sold his or her story. One such example is the case of Henry Hill, a little-known criminal outside local organized crime circles until a book about his exploits was published and later used as the basis for the movie *GoodFellas*.[139] Thus, because even an obscure offender needs only a compelling story and a willingness to strike it rich in the "true crime" market, a Son of Sam law is necessary to ensure that victims will be compensated regardless of whether or not it occurs to them to bring a civil action against their offenders. Moreover, a victim may not have the resources to bring suit. Consequently, the prospects of a civil action cannot adequately protect the interest of compensating victims in all cases of "notorious" crimes.

Similarly, restitution cannot be relied upon to compensate victims in every instance. Many judges are extremely reluctant to order restitution if they believe it cannot be paid by the criminal, especially in situations where the only prospect of restitution is the possible future sale of the offender's story.[140] A judge may also have concerns that a defendant will be compelled to commit another crime to pay their obligations.[141] In addition, the loss associated with most crimes cannot be sufficiently computed. Indeed, it may be impossible to place a monetary value on the loss that is suffered. Any restitution ordered at sentencing, therefore, is not

---

139. *See* Simon and Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 112-14 (1991).

140. *See* Lorraine Slavin & David J. Sorin, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982,* 52 FORDHAM L. REV. 507, 570 (1984) (arguing that victims have a low likelihood of recovering compensation in the form of restitution).

141. *See id.*

only speculative, but may also be considered a token amount to the victim.

Likewise, probationary terms can be used to compensate victims. Such terms were used in *Commonwealth v. Power*.[142] Power plead guilty to two indictments—armed robbery and manslaughter—for which the judge sentenced her to eight to twelve years imprisonment.[143] The judge also ordered twenty years probation with the special condition attached that Power not profit from her crimes or her experiences during the years she avoided apprehension.[144] She was then given the opportunity to rescind her guilty plea, but she declined.[145] Power later appealed the special condition directly to the Massachusetts Supreme Judicial Court, arguing that the restriction imposed a prior restraint on content-based speech, that it placed her in jeopardy for the actions of third parties, and that the special condition was unconstitutionally vague.[146]

The Supreme Judicial Court upheld the special condition as "reasonably [related] to the goals of sentencing and of probation" regardless of whether the condition affected a "preferred" right.[147] The court also noted that the holding of *Simon & Schuster* was not applicable to the case because "[a] special condition of probation is not subject to the same rigorous First Amendment scrutiny that is employed against a statute of general applicability. The condition in the instant case applies only to the defendant and is reasonably

---

142. 650 N.E.2d 87 (Mass. 1995).

143. *See id.* at 89.

144. *See id.;* see *supra* note 133 for the specific text of the probation terms set by the judge. Like Massachusetts, Utah also gives its judges discretion when setting probation and parole terms to restrict criminals from profiting financially from their crimes. *See* UTAH CODE ANN. § 77-27-10.5 (1999) (parole); § 77-18-8.5 (probation). These statutes provide, in part:

> [T]he court may place the defendant on probation [or parole] and as a condition of probation [or parole], the court may order the defendant to be prohibited from directly or indirectly engaging in any profit or benefit generating activity relating to the publication of facts or circumstances pertaining to the defendant's involvement in the criminal act for which the defendant is convicted.

Id. § 77-18-8.5(1), § 77-18-10.5(1).

145. *See Power*, 650 N.E.2d at 89.

146. *See id.* at 88.

147. *See id.* at 89. In reaching its decision, the court examined chapter 276, section 87 of the Massachusetts General Laws which allows a trial court to "place on probation . . . any person before it charged with an offense or a crime for such time and *upon such conditions as it deems proper* . . . after a finding or verdict of guilty." *Id.* at 89 (emphasis added). The court also noted the great latitude that judges have in sentencing when their sentences are within the limits of the statute. *See id.*

related to a valid probation purpose."[148] Thus, the Supreme Judicial Court upheld the constitutionality of the use of probationary terms to limit an offender's ability to profit from his or her crime.

Nevertheless, probation is not an effective alternative to a Son of Sam law. First, probation is not always given; rather, it is within the court's discretion to require probation.[149] In fact, even in clearly notorious cases, it may not be imposed. A compelling example is the case of *Commonwealth v. Woodward.*[150] In *Woodward*, a British au pair was convicted of killing a baby in her care.[151] Given the amount of media attention surrounding the case, the sentencing judge, Judge Hiller B. Zobel, must have known that the defendant had gained world-wide notoriety and that she was likely to have ample opportunity to profit from her notoriety. Nevertheless, Judge Zobel chose not impose any profit-related probationary requirements on Woodward.[152] She was left free to market her notoriety in the United States.[153] This was the situation until the family of Woodward's victim filed a civil suit in United States District Court and obtained a preliminary injunction barring Woodward from spending money connected to the sale of her story.[154]

---

148. *Id.* at 91. See *supra* Part I.B for a discussion of *Simon & Schuster*.

149. See *supra* note 147 for the text of MASS. GEN. LAWS ch. 276, § 87 (1998), which gives the court discretion in imposing probation.

150. 694 N.E.2d 1277 (Mass. 1998).

151. *See id.* at 1281. Woodward was convicted of second degree murder, but the sentence was later reduced to involuntary manslaughter. *See* Corey Goldberg, *Massachusetts High Court Backs Freeing Au Pair in Baby's Death*, N.Y. TIMES, June 17, 1998, at A1.

152. *See Woodward*, 694 N.E.2d at 1300 (Greaney, J. dissenting) ("In his memorandum reducing the verdict, the judge does not . . . consider imposing on Woodward any appropriate terms of probation. . . .").

153. Interestingly, Woodward would have a hard time selling her story in her own country because the United Kingdom's Press Complaint Commission Code of Practice forbids the paying of money to convicted criminals and their families. *See* Midgley, *supra* note 4. This is a voluntary code of practice among British newspapers by which newspapers do not make payments to criminals or their associates unless their story is deemed to be in the public interest. *See* Talbot, *supra* note 6.

154. *See* Patricia Nealon, *U.S. Judge Puts Ban on Woodward's Use of Profits from Case*, BOSTON GLOBE, June 30, 1998, at B2. The preliminary injunction issued by Judge William G. Young required Woodward to notify the victim's family and the court if she signed any contracts to sell her story and barred her from spending the money. *See id.* Judge Young stated that Woodward's only potential asset was the value of her celebrity. *See id.* According to the judge:

> Whatever their protestations, these parties need each other in the most practical sense: absent insurance, if [the victim's family] is to have any chance to collect [its] expected judgment, Woodward must amass the necessary funds, and the only potential source appears to be the same media that all parties agree are most morally repugnant.

Furthermore, because offenders may not gain fame until their story is sold, and a court is not in a position to *predict* whether an offender will become notorious or otherwise have the opportunity to benefit financially from his or her crime, victims can not rely on *Power*-type restrictions being placed on the offender during sentencing. In these cases, neither the state nor the victim knows if the offender has money-making potential and thus neither is likely to seek probationary terms that limit the offender's ability to sell his or her story. Consequently, a system that is triggered at the time a criminal attempts to sell his or her story is necessary. Such a system, as would be imposed by Son of Sam legislation, would serve the state's interests regardless of how little or well-known the criminal was at the time of sentencing. If the criminal proves to be a notorious one, his or her victims would be compensated.

Probation is also deeply flawed as a means of prohibiting a criminal from marketing his or her notoriety because a typical probation order is couched in terms of a broad prohibition on an activity that does not allow for exceptions. This was true in the *Power* case. As a result of her broad probationary restriction,[155] Power abstained from publishing anything, regardless of content or compensation, in fear that such a publication might violate her probation.[156] Although Power had indicated that whatever compensation she would receive would be shared with the family of her victim,[157] the threat of revocation remained.[158] Indeed, the terms of the probation order prohibited her from making an agreement with her victim's family to accomplish this goal.[159] For this reason Power's own attorney, Rikki Klieman, stated that a statutory scheme may be preferable to a condition of probation since it would be more

---

Id.

155. See *supra* note 133 for the terms of Power's probation. The sweeping nature of this order may be seen in the first sentence: "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." Commonwealth v. Power, 650 N.E.2d 87, 89 (Mass. 1995).

156. *See, e.g.,* Jordana Hart, *An Inmate's Introspection: Katherine Ann Power Talks of Her Life and Her Crime*, BOSTON GLOBE, July 5, 1994, at B1 (stating that Power was refusing, at the time of the interview, any book or movie contracts until after her appeal of Judge Bank's probation order. The probation order was subsequently upheld).

157. *See id.*

158. *See id.*

159. See *supra* note 133 for the terms of Power's probation.

flexible.[160] Such a scheme would not only allow criminals an opportunity to market their stories without the fear of serving a prison sentence for violating a court order, but would also provide compensation to victims.[161]

Based on this analysis, non-statutory alternatives do not appear to achieve the desired social and policy benefits derived from Son of Sam statutes. A Son of Sam statute is therefore necessary to ensure that all victims of crime are compensated when a criminal is able to profit from his or her crime.

C. *Public Policy Favors Publication by Criminal Offenders*

A consideration which enters into the Son of Sam debate perhaps more rarely than it should is that criminal offenders should be able to publish their life stories, without restriction, for the benefit of society. This public policy argument is persuasive even where free speech (i.e., First Amendment) rationales are not implicated. However, a Son of Sam statute does not have to undermine the benefits a society gains when a criminal relates the events that have made him or her notorious; rather, a properly drafted statute can ensure that this benefit is conferred.

When a criminal details his experiences, society is benefitted because various specialists can gain a greater knowledge of the criminal mind and its methods. In particular, law enforcement, criminologists, and sociologists often gain a better understanding of the offender's life experience.[162] This insight may not only be of academic interest, but may serve the practical purposes of criminal profiling and lead to the earlier apprehension of other criminals.[163] Some critics may contend that Son of Sam legislation discourages criminals from relating this information. If a criminal has nothing to gain financially from his or her publication, then the argument is that he or she has no incentive to relate the story and may choose not to do so. However, Son of Sam legislation does not always eliminate an offender's ability to profit financially from recounting his or her story.[164] Additionally, offenders might have other mo-

160. *See Greater Boston* (WGBH television broadcast, Nov. 17, 1997).

161. *See id.*

162. *See, e.g.*, JOEL NORRIS, SERIAL KILLERS: THE GROWING MENACE (1988). The author of this book interviewed several serial killers, including Henry Lee Lucas, Carlton Gary, Bobby Joe Long, Leonard Lake, and Charles Manson, to discern the nature and unifying patterns of serial killers.

163. *See id.*

164. Many Son of Sam statutes contain provisions that permit convicted defend-

tives for publishing their stories, such as recompense or fame.

Even victims may not object to the offenders' attempts to make money from their stories if they too can share in the financial benefit. The victim or the victim's family are all too often aware of the harsh reality that they can never be made "whole." At the very least, they may find some solace in recovering money from the offender to pay medical expenses, lost wages, or loss of support—civil remedies that would otherwise be unavailable to victims if the offender was initially without assets, and so victims chose not to pursue civil remedies.

In light of these policy arguments, a criminal should not be wholly prohibited from selling his or her story. Rather, a statute should be in place that allows offenders to sell their stories and gives them some incentive to do so. A Son of Sam statute that gives offenders *some* ability to gain financially from selling their notoriety is one most likely to produce a published story which can benefit both victims and society.

Notwithstanding the arguments in favor of a Son of Sam law to compensate victims, currently there is no Son of Sam law in Massachusetts. However, the Massachusetts Attorney General's Office has reviewed the case law and state responses to *Simon & Schuster* and in 1999 filed revised notoriety-for-profit bills with the legislature.[165] The proposed law entails various provisions designed to meet the needs of crime victims in Massachusetts in an effective and constitutional manner.

---

ants to recover a percentage of any monies received because of their notoriety if there are no pending judgments against them after a specified period of time. These state statutes include: COLO. REV. STAT. ANN. § 24-4.1-201(3) (West 1990 & Supp. 1999) (100% after five years); DEL. CODE ANN. tit. 11, § 9103(c) (1995) (100% after five years); GA. CODE ANN. § 17-14-31(d) (1997) (100% after five years); HAW. REV. STAT. ANN. § 351-88 (Lexis 1999) (100% after ten years); IOWA CODE ANN. § 910.15(8) (West 1994) (100% after five years); MD. CODE ANN., art. 27, § 854(e)(3)-(4) (1996 & Supp. 1999) (100% after five years); MISS. CODE ANN. § 99-38-9(4) (1994) (court order determines how much money should go to the support of minor dependents); NEB. REV. STAT. ANN. § 81-1837 (Michie 1994) (100% after five years); N.M. STAT. ANN. § 31-22-22(F) (Michie Supp. 1999) (100% after five years); OHIO REV. CODE ANN. § 2969.05 (West 1997) (100% after three years); OR. REV. STAT. § 147.275(6) (Supp. 1998) (100% after five years); S.C. CODE ANN. § 15-59-40 (Law. Co-op Supp. 1999) (100% after five years); S.D. CODIFIED LAWS § 23A-28A-8 (Michie 1998) (100% after five years); TENN. CODE ANN. § 29-13-407(a)(1) (Supp. 1999) (100% after three years); WASH. REV. CODE ANN. § 7.68.240 (West 1992) (50% after five years); W. VA. CODE § 14-2B-7(d) (Supp. 1999) (100% after three years); WIS. STAT. ANN. § 949.165(8)(b) (West 1996) (100% after three years).

165. *See* S. 804, 181st Leg., Reg. Sess. (Mass. 1999), *amended and reintroduced as* S. 1950, 181st Leg., Reg. Sess. (Mass. 1999).

III. CREATING A CONSTITUTIONAL SON OF SAM LAW FOR MASSACHUSETTS

The statute which contained the previous Son of Sam law, chapter 258A of the Massachusetts General Laws, was repealed in 1994[166] to make way for the new Compensation of Victims of Violent Crime Act.[167] The new statute, however, did not include a replacement notoriety-for-profit section.[168] Presumably, this was because the legislature knew that due to *Simon & Schuster*, the Son of Sam statute as written was unconstitutional, and that a completely different piece of legislation would have to be drafted. The legislature may have expected a replacement bill to have been drafted and passed into law before the January 1, 1995 repeal date for chapter 258A. Indeed, a proposed Son of Sam law was filed by the Senate Judiciary Committee during the 1994[169] and 1995[170] sessions of the legislature. Those bills, however, were based largely on the former New York statute and were believed to contain many potential constitutional problems.[171] In response, the Attorney General's Office ("AGO"), in conjunction with Massachusetts Office of Victim Assistance ("MOVA"), undertook a comprehensive analysis of *Simon & Schuster* and reviewed how other states had revised their Son of Sam statutes in order to draft a suitable Son of Sam statute for Massachusetts. Although the first bill proposed by the AGO proved unsuccessful,[172] the AGO amended the bill and introduced revised versions in 1999.[173]

A. *Senate Bill 852: "An Act Relative to the Profits from Crime"*

The MOVA board approved a notoriety-for-profit bill in late

166. Chapter 258A was repealed by St.1993, ch. 478, § 3, effective Jan. 1, 1995. *See* MASS. GEN LAWS ANN. ch. 258A (West Supp. 1999).

167. *See* MASS. GEN. LAWS ch. 258C, §§ 1-13 (1998). This act created the "Victim Bill of Rights" and reorganized the Attorney General's Office's Victim Compensation Division and the process by which victims obtain financial relief from the state for their crime-related injuries and lost wages.

168. *See id.*

169. *See* S. 752, 179th Leg., Reg. Sess. (Mass. 1994).

170. *See* S. 878, 179th Leg., Reg. Sess. (Mass. 1995).

171. See *supra* Part I.B.2 for a discussion of the flaws the Supreme Court found in New York's Son of Sam statute that led to its determination that the statute was unconstitutional.

172. *See* S. 852, 181st Leg., Reg. Sess. (Mass. 1997).

173. *See* S. 804, 181st Leg., Reg. Sess. (Mass 1999) (amended and reintroduced as S. 1950, 181st Leg., Reg. Sess. (Mass. 1999)). The revised version of S. 804 was introduced on August 9, 1999. It retained all of the language found in S. 804, but added a second section to the amendment. See *infra* note 190 for the language added to S. 1950.

1996. This bill, titled "An Act Relative to Profits from Crime," was filed with the Senate Judiciary Committee during the 1997 session as Senate Bill 852.[174] The bill required a party who contracted with a criminal offender to submit a copy of the contract or a summary of the terms of an oral agreement to the Division of Victim Compensation and Assistance ("Victim Compensation Division") within thirty days.[175] The contracting party was also obligated to remit to the Victim Compensation Division any money or consideration owed to the offender as a result of the agreement.[176] If a party did not comply, the bill specified significant civil penalties.[177] The money remitted to the Victim Compensation Division would then be placed in an escrow fund.[178] After the account was established, the Victim Compensation Division had thirty days to determine whether the contract included proceeds of the crime and whether the proceeds were "substantially related to the crime."[179] The bill further required the Victim Compensation Division to notify victims of the existence of a contract with an offender either by certified mail or advertisements in local publications.[180] This notice was

---

174. S. 852, 181st Leg., Reg. Sess. (Mass. 1997). The primary sponsor of Senate Bill 852 was the Chairman of the Senate Judiciary Committee, William R. Keating. *See id.*

175. *See id.* § 14(b).

176. *See id.*

177. *See id.* § 14(c). If the contracting party failed to adhere to section 14(b), then the Division of Victim Compensation and Assistance was authorized to petition the superior court for an order of enforcement. *See id.* If the court found that a contracting party had in fact violated subsection (b):

> [T]he court shall, in addition to any other relief, impose on the contracting party a civil penalty of the value of the contract or agreement. If the court finds such violation to have been knowing or willful, it shall impose a civil penalty up to three, but not less than two, times the value of the contract or agreement.

Id.

178. *See id.* § 14(f). Upon a determination that a defendant had entered into a contract agreement to receive proceeds substantially related to a crime for which he or she had been charged or convicted (under section 14(e)), the Victim Compensation Division was authorized to "place into escrow all monies or other consideration remitted by the contracting party, *up to the amount* determined by the division to constitute" proceeds from the crime. *See id.* (emphasis added). Any remaining monies or consideration were to be returned to the contracting party. *See id.*

179. *See id.* § 14(e).

180. *See id.* § 14(d). The Victim Compensation Division had to send notification by certified mail to the victim's last known address. *See id.* The Victim Compensation Division also had to "provide legal notice in a newspaper of general circulation in the county in which the crime was committed. . . ." *Id.* The Victim Compensation Division was required to publish such a notice once every six months for one year from the date it received the contract agreement paying a defendant money. *See id.* Thereafter, the

designed to give victims another opportunity to bring a civil action against criminal offenders.[181] Judgments against the criminal offender would be satisfied from the escrow account,[182] and any remaining funds would be split between the defendant and the Witness Assistance Fund.[183]

Although this bill retained the escrow account mechanism common in the pre-*Simon & Schuster* laws,[184] it included several safeguards that were intended to cure the constitutional defects identified in *Simon & Schuster*. These safeguards included a provision that limited the types of crimes that would trigger the law to felonies[185] and a requirement that the law would only apply to proceeds that arose from activities that were "substantially related" to the crime for which the defendant was charged or convicted.[186]

Senate Bill 852 was approved by the Judiciary Committee after a public hearing during the spring of 1997 and was referred to the Senate Ways and Means Committee.[187] There was a renewed interest in notoriety-for-profits laws during November and December 1997, due to the conviction and sentencing of Louise Woodward in the Middlesex Superior Court.[188] As speculation mounted that Woodward was going to sell her story to an American publisher or media outlet, Attorney General Harshbarger wrote to Senate Ways and Means Chairman Stanley Rosenberg urging him to take action on Senate Bill 852.[189]

However, members of the Senate Ways and Means Committee, including Chairman Rosenberg, were concerned that Senate Bill 852 infringed upon criminals' rights to publish their stories and experiences. Furthermore, members of the Ways and Means Committee were mindful that having money held in escrow for

---

Victim Compensation Division could provide additional notice as it deemed necessary. *See id.*

181. *See id.* § 14(g). Subsection (g) gave victims three years from the time of the last published public notice to bring civil action against a defendant for money damages. *See id.*

182. *See id.* § 14(f).

183. *See id.* § 14(j).

184. *See id.* § 14(f).

185. *See id.* § 14(a).

186. *See id.* § 14(e).

187. *See* S. 852, 181st Leg., Reg. Sess. (Mass. 1997).

188. *See, e.g.*, Letter from Scott Harshbarger, Attorney General of Massachusetts, to Senator Stanley Rosenberg, Chairman, Senate Ways and Means Committee (Nov. 13, 1997) (on file with the *Western New England Law Review*) (discussing S. 852) [hereinafter Letter]; *Greater Boston* (WGBH television broadcast, Nov. 17, 1997).

189. *See, e.g.*, Letter, *supra* note 188.

potentially many years might be considered too intrusive. Finally, the Senate Ways and Means Committee expressed concerns about the review process for determining what property could be seized. These concerns mirrored the objections of Howard Kaplan ("Kaplan"), Chairman of the Trustees of the Civil Liberties Union of Massachusetts Foundation ("CLUM"), who met with Attorney General Harshbarger on November 26, 1997, and expressed CLUM's opposition to any type of criminal profits law. Although the Attorney General countered that a properly crafted bill could provide important protection for victims without infringing on First Amendment rights, in light of the constitutional concerns, the Senate Ways and Means Committee ultimately did not bring Senate Bill 852 to a vote during the legislative session that ended in June 1998.

The Senate Ways and Means Committee's objections prompted further review of Senate Bill 852 by members of the AGO in an attempt to strengthen the bill's safeguards regarding free speech and property rights. As a result of this examination, the Attorney General proposed several substantive changes to Senate Bill 852.[190] Most importantly, the escrow account scheme was discarded in favor of a system in which a party who contracts with a criminal would be responsible for posting a bond for "proceeds" owed to the criminal.[191] Secondly, provisions that mandate an administrative hearing were added to give a contracting party a greater opportunity to dispute the findings of the Victim Compensation Division.[192] Finally, "substantially related to a crime" was more fully defined within the body of the bill.[193] The result is a

---

190. *See* S. 804, 181st Leg., Reg. Sess. (Mass 1999). This new Son of Sam Amendment was introduced on January 6, 1999 by Senator Cheryl A. Jacques. *See id.* A revised version of this amendment was introduced by the Committee on the Judiciary on August 9, 1999. *See* S. 1950, 181st Leg., Reg. Sess. (Mass. 1999). The revised version of the amendment retained all of the language pertaining to section 14 from the January 1999 version. It added, however, a second section to the amendment, which states:

> Section 2A of Chapter 260 of the General Laws is hereby amended by adding after the first sentence the following language: "Actions for torts against a criminal defendant by his victim as defined by Section 14 of Chapter 258C shall be tolled during any period of incarceration, parole, or probation of the defendant for the crime committed against the victim."

Id. § 2.

191. *See* S. 1950, § 14(c), 181st Leg., Reg. Sess. (Mass 1999).

192. *See id.* § 14(k). Under this subsection, a contracting party has fifteen days from the date of the mailing of the notice to appeal to the Attorney General. *See id.* Thereafter, the Attorney General must cause the Victim Compensation Division to hold a public hearing on the Victim Compensation Division's action. *See id.*

193. *See id.* § 14(g). An activity is "substantially related to a crime" if:

piece of legislation that attempts to address the constitutional concerns of CLUM and the Senate Ways and Means Committee. The new proposal is Senate Bill 1950 and is currently pending in the Massachusetts Legislature.

B. *Senate Bill 1950: A New Proposal*

With significant changes made to address the concerns of the Massachusetts Legislature as well as those of the United States Supreme Court as expressed in *Simon & Schuster*, a new Son of Sam bill, Senate Bill 804, was filed in December 1998.[194] This bill was amended and reintroduced as Senate Bill 1950 in August 1999.[195] The new proposal should be upheld on constitutional grounds because it is both content-neutral and narrowly tailored to meet the specific purpose of compensating victims.

The proposed legislation would be incorporated into the Victim Compensation statute and would place control over notoriety-for-profit cases with the AGO's Division of Victim Compensation and Assistance ("Victim Compensation Division") which administers the Victim of Violent Crimes Fund.[196] This legislatively created fund provides awards of up to $25,000 to compensate victims of violent crimes for related burial expenses, medical bills, and lost wages.[197] This program is largely funded through assessments against offenders who plead or are found guilty of a crime or admit to sufficient facts for a guilty finding in the district or superior courts.[198] With a legal staff available to file injunctions, attachments, and restraining orders necessary to enforce the statute's pro-

---

> [I]t principally derives from the unique knowledge or notoriety acquired by means and in consequence of the commission of a crime for which the defendant has been charged or convicted, or which the defendant has voluntarily admitted. Activity that is tangentially related to a crime, or that contains only a passing inference to a crime, shall not be determined to be substantially related.

Id.

194. S. 804, 181st Leg., Reg. Sess. (Mass. 1999).

195. S. 1950, 181st Leg., Reg. Sess. (Mass. 1999). See *supra* note 190 for a discussion of S. 1950.

196. *See id.* § 14(a). Past Son of Sam bills have placed responsibility for regulating notoriety-for-profit actions with the Massachusetts Office of Victim Assistance ("MOVA"). *See, e.g.*, S. 878, § 8(a), 179th Leg., 1st Annual Sess. (Mass. 1995). Section 8(a) defined "board" as "the Victim and Witness Assistance Board as established in section four of Chapter two hundred and fifty eight B of the General Laws." *See id.*

197. *See* MASS. GEN. LAWS ch. 258C, § 3 (1998).

198. *See id.* ch. 258B, § 8. The amounts assessed are $35 for a misdemeanor and not less than $60 for a felony if the offender is an adult. *See id.* If the offender is adjudicated a delinquent child, the amount assessed is $30. *See id.* This money goes to

visions, the Victim Compensation Division is in the best position to regulate notoriety-for-profit cases and to identify the victims of the related crime. Moreover, placement of the notoriety-for-profit provision within a larger statute which, by its terms, is clearly designed to compensate victims of crime, demonstrates that the primary goal of the new law is to compensate the victims of crime, as opposed to limiting the speech of criminals or regulating speech that relates criminals' stories.

The proposed legislation would be triggered whenever a person or business, termed the "contracting party,"[199] contracts with or agrees to pay a "defendant" who is attempting to profit from past criminal activity. A "defendant" would include those people who have been charged with or convicted of a crime or who have voluntarily admitted to the commission of a crime.[200] In contrast to previous under-inclusive laws that specifically targeted storytelling, the proposed legislation includes profits gained from *any* use of the defendant's notoriety or unique knowledge gained from committing a crime.[201] The proposed legislation's reach, however, avoids being

---

the Massachusetts Victim and Witness Assistance Fund. *See id.* Such funds are also available to prosecutors' offices to fund victim and witness advocacy programs. *See id.*

199. Senate Bill 1950 defines a "contracting party" as "any person, firm, corporation, partnership, association or other private legal entity which contracts for, pays, or agrees to pay a defendant consideration which it knows or reasonably should know may constitute proceeds from a crime." S. 1950, § 14(a). This language differs from the earlier version, Senate Bill 852, in that "private" is inserted before "legal entity" to exclude situations where law enforcement or the government deem it necessary to enter into an agreement with a defendant. *See* S. 852, § 14(a), 181st Leg., Reg. Sess. (Mass. 1997).

200. *See* S. 1950, § 14(a). The proposed bill defines "defendant" as "a person who has been charged with or convicted of a crime, or has voluntarily admitted the commission of a crime." *Id.* This definition differs from Senate Bill 852 in that it includes voluntary admissions in an effort to expand the number of criminal offenders covered by the bill. *See* S. 852, § 14(a). The drafters were concerned with the possibility that a defendant who has gained notoriety from some crimes could exploit crimes he or she was not charged with or that could not be charged due to a statute of limitations or grant of immunity. Thus, the proposed legislation defines "conviction" as:

> [A] finding or verdict of guilty or of not guilty by reason of insanity, a plea of guilty or a finding of sufficient facts to warrant a finding of guilty whether or not final judgment or sentence is imposed, or an adjudication of delinquency or of youthful offender status as defined in section 52 of Chapter 119.

S. 1950, § 14(a).

201. *See* S. 1950, § 14(a). The proposed bill defines "proceeds of the crime" as:

> [A]ny assets, material objects, monies, and property obtained through the use of unique knowledge or notoriety acquired by means and in consequence of the commission of a crime from whatever source received by or owing to a defendant or his representative whether earned, accrued, or paid before or after the disposition of criminal charges against the defendant.

over-inclusive by targeting only those defendants who have been charged with, convicted of, or who have admitted to committing a felony.[202] This change meets the Supreme Court's mandate to narrowly tailor a Son of Sam statute by limiting its scope to people who have committed major crimes.[203] While optimistic that Senate Bill 1950 would survive constitutional scrutiny, the AGO also included additional provisions to ensure its effectiveness.

1. The Reporting Requirement

The AGO has taken the position that an effective reporting requirement is essential to any notoriety-for-profit law.[204] Not only does a reporting requirement serve to notify victims, but it permits the AGO to monitor any action taken by either the contracting party or the defendant to circumvent the law. The proposed legislation mandates that the contracting party,[205] rather than the defendant, submit to the Victim Compensation Division a copy of the contract or a summary of the terms of an oral agreement within

---

Id. See *supra* Part I.B for a discussion of the Supreme Court's discussion of under-exclusivity pertaining to New York's Son of Sam statute.

202. *See* S. 1950, § 14(a). The proposed bill defines "crime" from which the defendant has gained his notoriety as:

> [A]ny violation of Massachusetts law that is punishable by imprisonment in state prison and any federal offense committed in the Commonwealth that is punishable by death or imprisonment for a term of more than one year. Crime shall also include any offense committed by a juvenile which would be a crime if the juvenile were an adult.

Id. This definition parallels the definition of "felony" in chapter 90F of the Massachusetts General Laws. See *supra* Part I.B for a discussion of the Supreme Court's discussion of New York's Son of Sam statute's over-inclusive language.

203. See *supra* Part I.B.2 for a discussion of the narrow tailoring requirement established by the Supreme Court in *Simon & Schuster*. By contrast, the previous Massachusetts Son of Sam statute included all crimes. *See, e.g.,* MASS. GEN. LAWS ch. 258A, § 8, *repealed by* St.1993, ch. 478, § 3 (eff. Jan. 1, 1995). The definition for crime was "an act committed by an adult or a juvenile in the Commonwealth which, if committed by a mentally competent criminally responsible adult . . . would constitute a crime . . . ." *Id.* Other states have also limited the scope of their Son of Sam statutes to felonies. *See, e.g.,* N.Y. EXEC. LAW § 632-a(1)(a) (McKinney 1996) (defining "crime" as "any felony defined in the penal law"); IOWA CODE ANN. § 915.10(5) (West Supp. 1999) (defining "violent crime" as "a forcible felony. . . includ[ing] any other felony or aggravated misdemeanor which involved the actual or threatened infliction of physical or emotional injury"). See *supra* note 103 for a description of other states that have similarly limited the scope of their statutes.

204. Letter from Scott Harshbarger, Attorney General of Massachusetts, to Senator William Keating and Representative John Rogers (May 2, 1997) (on file with the *Western New England Law Review*) (discussing Senate Bill 852).

205. For a discussion of the argument that placing the burden on the defendant to report possible profits from selling his story might force a defendant to bear witness against himself, see *Curran v. Price*, 638 A.2d 93, 106-07 (Md. 1994).

thirty days of its execution.[206] The bill further empowers the Victim Compensation Division to prevent any wasting of assets. Specifically, the Victim Compensation Division may act on behalf of victims through attachment, injunction, receivership and notice of pendency.[207]

Another provision essential to an effective notoriety-for-profit law is a clear and significant penalty for contracting parties who do not fully report their deals with criminal offenders. If a Son of Sam law is ignored and monies are turned over to the offender, the money is often unrecoverable. Therefore, it is important that a Son of Sam statute prevent such activity before it takes place. The absence of a non-compliance penalty was seen as a flaw of the former Massachusetts Son of Sam law and has also been addressed by other states.[208] The proposed legislation seeks to eliminate this concern by providing that the Attorney General's Office may seek an order for enforcement in the superior court.[209] Furthermore, a

---

206. *See* S. 1950, § 14(b). This subsection proposes:

> Any *person, firm, corporation, partnership, association or other legal entity* which contracts for, pays, or agrees to pay a defendant consideration which it knows or reasonably should know may constitute proceeds of a crime shall, within thirty days of the agreement, submit to the division a copy of its contract or a summary of the terms of any oral agreement.

Id. (emphasis added).

207. *See* S. 1950, § 14(p). This subsection proposes: "The division, acting on behalf of any victim, shall have the right to apply for any and all provisional remedies, available under civil practice law and rules, including, but not limited to, attachment, injunction, receivership and notice of pendency." *Id.*

208. For example, the revised statutes in New York, Kansas, and Colorado may all be deficient in that they fail to provide penalties and remedies to enforce their provisions. *See., e.g.,* COLO. REV. STAT. ANN. § 24-4.1-201 to 207 (West 1990 & Supp. 1999); KAN. STAT. ANN. § 74-7319 to 7321 (1992); N.Y. EXEC. LAWS § 632-a (McKinney 1996). Several states have made failure to comply with their statute's notice and payment provisions either a felony or a misdemeanor. *See., e.g.,* ALA. CODE § 41-9-80 (1991) (felony); CAL. CIV. CODE § 2225(g) (West Supp. 2000) (contempt); DEL. CODE ANN. tit. 11, § 9106 (1995) (misdemeanor); GA. CODE ANN. § 17-14-32 (1997) (misdemeanor); MINN. STAT. ANN. § 611A.68(8)(a) (West Supp. 2000) (gross misdemeanor); MISS. CODE ANN. § 99-38-11(2) (1994) (misdemeanor); N.D. CENT. CODE § 32-07.1-01(7) (1996) (misdemeanor); OKLA. STAT. ANN. tit. 22, § 17(A) (West Supp. 2000) (felony); TENN. CODE ANN. § 29-13-410 (Supp. 1999) (misdemeanor); WIS. STAT. ANN. § 949.165(14) (West 1996) (misdemeanor). Other states have chosen to enforce their statutes' notice provisions with civil penalties. *See* ARIZ. REV. STAT. ANN. § 13-4202(L) (West 1989) (fine); HAW. REV. STAT. ANN. § 351-87 (Lexis 1999) (lien); KY. REV. STAT. ANN. 346.165(6) (Michie 1997) (lien); MD. CODE ANN., art. 27, § 854(o) (1996 & Supp. 1999) (fine); OKLA. STAT. ANN. tit. 22, § 17(A) (West Supp. 2000) (fine); PA. STAT. ANN. tit. 42, § 8312(g) (West 1998) (fine); TENN. CODE ANN. § 29-13-410 (Supp. 1999) (fine); WIS. STAT. ANN. § 949.165(14) (West 1996) (fine).

209. *See* S. 1950, § 14(d). This subsection proposes:

> If the provisions of subsections (b) or (c) are violated, the division may peti-

civil penalty may be assessed against non-complying contracting parties equal to the value of the contract.[210] In cases where the court finds that the violation was "knowing and willful," the penalty may be two or three times the value of the contract.[211] The size of the potential fine should be an incentive for publishers or other contracting parties to disclose contracts and agreements which may be covered by the statute. Additionally, civil penalties that are collected will benefit victims by being deposited in the Victim Compensation Fund.[212]

Thus, the advantages of the bill's mandated full disclosure provision are twofold. The bill, if passed, will cast a wide enough net to reach all parties who attempt to benefit from a crime without being mindful of the victims of that crime, while allowing the Commonwealth to pass on to victims as much information as possible. By notifying both the Victim Compensation Division and victims of the contract terms, the offender's profits may be reached through a court action before they are distributed and lost.

2. Notification

The notification requirement,[213] which gives victims the infor-

---

tion the superior court for an order of enforcement. Such action shall be brought in the county in which the contracting party resides or has his principle place of business, or in Suffolk County if the contracting party does not reside or have a principal place of business in the commonwealth. Upon a finding that a contracting party has violated either subsections (b) or (c) the court shall, in addition to any other relief, impose on the contracting party a civil penalty of the value of the contract or agreement. If the court finds such violation to have been knowing or willful, it shall impose a civil penalty up to three, but not less than two, times the value of the contract or agreement. To the extent monies or other consideration received by the division as a result of such order exceed the value of the contract or agreement, they shall be deposited into the victim compensation fund maintained by the treasurer in accordance with section 4(c). Any remaining monies or consideration shall be held by the division pending the determinations required by subsection (g).

Id.

210. *See id.*

211. *See id.*

212. *See id.* § 14(o). Subsection (o) proposes:

After all civil claims instituted by victims against the defendant have been satisfied, or after three years of publication, if no claims have been filed, one-half of the value of the bond required in subsections (c) and (i) shall be returned to the contracting party. The remaining portion of the bond shall be deposited into the victim compensation fund maintained by the treasurer in accordance with section 4(c).

Id.

213. *See id.* § 14(e). This section requires that the Victim Compensation Division notify victims by certified mail and publicize the existence of proceeds in a newspaper

mation needed to protect their interests, is one of the most important provisions of the proposed legislation. Regardless of whether the Victim Compensation Division determines that the money qualifies as "substantially related" proceeds,[214] the victims may take action on their own to reach the proceeds.[215] The proposed legislation provides victims a better chance to protect their rights by giving victims early notice and complete information.

The proposed legislation mandates that the Victim Compensation Division take reasonable steps to notify victims of the existence of a contract to pay an offender.[216] If the offender's victims are known, notification must be made by certified mail.[217] If the identity or location of victims is not known, the Victim Compensation Division must also place notices in newspapers in the county or counties where the crimes occurred.[218] These legal notices must be made every six months for one year, but may continue as long as the Victim Compensation Division deems appropriate.[219]

3. Posting a Bond

After the Victim Compensation Division has obtained the contract or agreement from a contracting party, the contracting party must file a bond with the Commonwealth.[220] The Victim Compensation Division then must determine what part of the contract, if any, is actually burdened by the bond requirement.[221] This determination consists of a two-part process. First, the Victim Compensation Division must determine whether the contract includes "proceeds"; that is, whether the money or assets involved in the contract are the result of the use of knowledge or notoriety acquired by the commission of a crime.[222] Second, the Victim Com-

---

of general circulation in the county where the crime was committed—twice in the first year after it receives the contract or agreement and thereafter as it sees fit. *See id.*

214. *See id.* § 14(g). See *supra* note 193 for the text of subsection (g).

215. *See id.* § 14(f). This section provides that victims have three years, from the date of the last mandatory published public notice, to file a civil action to recover money damages from a defendant. *See id.*

216. *See id.* § 14(e).

217. *See id.* Notification must be made by certified mail to a victim's last known address. *See id.*

218. *See id.*

219. *See id.*

220. *See id.* § 14(c). This bond must be "equal in amount to any proceeds of the crime which by the terms of the contract would otherwise be owing to a defendant." *Id.*

221. *See id.* § 14(g).

222. *See id.* "Proceeds of the crime" is defined in section 14(a). See *supra* note 201 for the text of the definition of "proceeds of the crime."

pensation Division must determine whether the proceeds are "substantially related" to the crime.[223] Whereas "proceeds" is a broad standard, a determination of what is "substantially related" narrows what will be withheld from the defendant and addresses the overbreadth problems identified by the Supreme Court in *Simon & Schuster*.[224]

Although the previous legislative proposal, Senate Bill 852, mandated that the Victim Compensation Division determine which contracts with criminal offenders were substantially related to the crime for which they had been charged or convicted, it failed to define "substantially related."[225] Under the terms of the new bill, an activity is "substantially related" if it "principally derives from the unique knowledge or notoriety acquired . . . [from] the commission of a crime for which the defendant has been charged or convicted, or . . . has voluntarily admitted."[226] The bill further states that an activity is not substantially related if it is only tangentially related, or contains only a passing reference, to the crime.[227] The purpose of this more detailed definition is for the proposed law to avoid the trap of reaching work that relates to a crime in only a remote way.[228]

The new statute requires the Victim Compensation Division to determine whether to invoke the statute within thirty days of receipt of the contract, again so as not to overly burden the contracting party's nor the offender's rights to free speech and contract.[229] Under the proposed law, the Victim Compensation Division is authorized to issue written civil investigative demands for information to assist it in expeditiously making this determina-

---

223. *See id.* See *supra* note 193 for the text of the definition of "substantially related."

224. See *supra* Part I.B.2 for a discussion of how the *Simon & Schuster* Court characterized the over-breadth problem.

225. *See* S. 852, § 14(e), 181st Leg., Reg. Sess. (Mass. 1997).

226. S. 1950, § 14(g).

227. *See id.*

228. See *supra* Part I.B.2 for a discussion of the Supreme Court's finding that over-inclusive language invalidates forfeiture statutes.

229. *See* S. 1950, § 14(g). This subsection proposes:

> Within thirty days from the receipt of a contract or agreement, or upon its own initiative if no contract or agreement is submitted, the division shall determine whether the terms of the contract or agreement include proceeds of a crime as defined in subsection (a) and, if so, whether such proceeds arise from activity that is substantially related to a crime.

Id.

tion.[230] Once the Victim Compensation Division has determined that all or a portion of the proceeds are substantially related to a felony, and therefore subject to the statute, the contracting party is notified and may be required to post a new bond.[231] The bond establishes a fund which preserves the money that could potentially be obtained by a victim through a civil judgment,[232] while avoiding the more cumbersome and intrusive escrow account procedures of the former proposed statute.[233]

4. Administrative Review

Another significant change from Senate Bill 852 is the addition of an explicit procedure by which a contracting party may have the Victim Compensation Division's decision reviewed.[234] After being notified of the Victim Compensation Division's decision,[235] an aggrieved contracting party has fifteen days to appeal for review by the Attorney General, which includes a public hearing.[236] The re-

230. *See id.* § 14(h). Subsection 14(h) proposes:

> In order to make the determinations required by subsection (g) the division shall be authorized to issue written civil investigative demands which may be served by certified mail, and which shall be returned within fifteen days from the date of service. Whenever a person fails to comply with a civil investigative demand served on him pursuant to this section, the division may petition the superior court for an order of enforcement. Such action shall be brought in the county in which the party resides or has his principal place of business, or in Suffolk County if the party does not reside or have a principal place of business in the commonwealth. Failure to comply with an order entered under this section shall be punished as a contempt of court. All information collected by the division pursuant to this section shall be kept in accordance with the provisions of chapters 4, 66, and 66A.

Id.

231. *See id.* § 14(i). Subsection 14(i) proposes:

> Upon making the determinations required by subsection (g), the Division may continue to hold the bond filed in accordance with subsection (c), or may require the contracting party to file a new bond equal to the amount determined by the Division to constitute proceeds arising from activity that is substantially related to a crime.

Id.

232. *See id.* "The bond held by the Division shall be used to satisfy, in part or in full, any civil judgment obtained by a victim against the defendant arising from the crime." *Id.*

233. *See, e.g.*, S. 852, 181st Leg., Reg. Sess. (Mass. 1997).

234. *See* S. 1950, § 14(k) - (*l*).

235. *See id.* § 14(j). This subsection proposes: "Within fifteen days of the determination required by subsection (g), the division shall notify the contracting party of its determinations by certified mail." *Id.*

236. *See id.* § 14(k). This subsection proposes:

> Within fifteen days of the date of mailing of the notice of the division's determination, a contracting party aggrieved by the division's determination may

sult of the review proceedings, along with information about the contracting party's right to judicial review, must then be sent to the contracting party by certified mail within ten days of the public hearing.[237] If still unsatisfied, the contracting party has an additional thirty days to file a complaint in the superior court.[238] Judicial review would then be in accordance with established procedures for the review of administrative decisions.[239]

5. Action to Be Taken by Victims

Even after the Victim Compensation Division has received the contract, started its review process, and notified potential victims, a victim is not automatically entitled to the bond posted. Instead, any victim wishing to reach the funds must bring and prevail in a civil action against the defendant.[240] However, the proposed legislation

---

appeal to the attorney general, by serving on the attorney general a written notice to that effect. Thereupon the attorney general shall immediately cause the division or his designee to hold a public hearing on the division's action appealed from. The division shall notify the contracting party by certified mail of the determination upon appeal within ten days of the closing of the hearing. Such notice shall include information regarding the contracting party's right to a petition for judicial review of the determination of the division.

Id.

237. *See id.*

238. *See id.* § 14(e).

239. *See id.* Subsection 14(e) proposes:

Within thirty days of the date of the date of mailing of the notice of the division's determination, the contracting party may file a complaint for judicial review in the superior court in the county in which the contracting party resides or has his principal place of business, or in Suffolk County if the contracting party does not reside or have a principal place of business in the commonwealth. Proceedings upon any such complaint shall be in accordance with chapter 30A. If no petition is filed within the time specified, the decision of the division shall be final.

Id.

240. *See id.* § 14(i). This subsection proposes:

Upon making the determinations required by subsection (g), the division may continue to hold the bond filed in accordance with subsection (c), or may require the contracting party to file a new bond equal to the amount determined by the division to constitute proceeds arising from the activity that is substantially related to a crime. *The bond held by the division shall be used to satisfy, in part or in full, any civil judgment obtained by a victim against the defendant arising from the crime.*

Id. (emphasis added).

In contrast, S. 852 dealt exclusively with an escrow account scheme:

Upon making the determinations required by subsection (e), the division shall place into escrow all monies or other consideration remitted by the contracting party, up to the amount determined by the division to constitute proceeds arising from activity that is substantially related to the crime for which

significantly expands a victim's ability to bring civil actions against the defendant by extending the applicable statute of limitations. Rather than limiting victims to bringing actions within six years of being harmed, they will have the right to file suit anytime within three years of the last published legal notice.[241]

6. Payments of Civil Judgment

If after being "fully and finally prosecuted" the defendant is not convicted, the bond is to be returned to the contracting party.[242] On the other hand, if the defendant is convicted of the crime,[243] a civil judgment obtained against him or her that arises from the crime may be satisfied by the bond posted with the Victim Compensation Division.[244] After all civil judgments are satisfied, or if no claims have been filed against the defendant or the contracting party during the three year period after the last publication, the remainder of the value of the bond will be split between the con-

---

> the person has been charged or convicted. Any remaining monies or consideration shall be returned to the contracting party. Any civil judgment against the defendant arising from the crime shall be paid from the proceeds being held in escrow, or from proceeds which may be received in the future.

S. 852, § 14(f), 181st Leg., Reg. Sess. (Mass. 1997).

241. *See* S. 1950, § 14(f). Section 14(f) proposes:

> Notwithstanding any other provision of the General Laws with respect to the timely bringing of an action, any victim shall have the right to bring a civil action to recover money damages from a defendant or his legal representative within three years of the last mandatory published public notice provided for in subsection (e).

Id.

242. *See id.* § 14(n). This subsection proposes: "The division shall return to the contracting party the bond required in subsections (c) and (i) if the defendant is fully and finally prosecuted and is not convicted of the crime, or has not voluntarily admitted the commission of the crime." *Id.* This does not mean, however, that victims will be unable to obtain compensation as a result of their civil actions. Even if a defendant is found not guilty in a criminal proceeding, he may still be found responsible for injuries by a civil court. Although the Attorney General's role ends at this point, the notification process and holding period for the funds will presumably protect victims' rights to recovery better than if there were no notoriety-for-profit legislation.

243. In addition to governing defendants who have been charged with or convicted of a felony, the proposed legislation includes anyone who has voluntarily admitted to committing a felony. *See id.* § 14(m). The purpose of this provision is to include people who admit and wish to profit from criminal activity, but who were not charged with a crime. These situations may include times when the Commonwealth decides not to prosecute or an admission by a person to the crime after the statute of limitations has expired.

244. *See id.* § 14(n). "The bond required in subsections (c) and (i) shall not be used to satisfy any civil judgment for a victim until the defendant has been fully and finally convicted of the crime for which he has been charged or until the defendant has voluntarily admitted the commission of the crime." *Id.*

tracting party and the Victim Compensation Fund.[245] The defendant, therefore, may still profit in some way from his work, but at least some of the money will benefit crime victims in general. This provision serves to address Justice O'Connor's statement in *Simon & Schuster* that the money in question need only benefit victims generally, and not necessarily an actual victim: "We need only conclude that the State has a compelling interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims."[246]

Finally, the proposed legislation includes a provision that prevents a defendant or a contracting party from side stepping or avoiding the law.[247] Any action that would defeat the purpose of the statute is void.[248] In particular, the provision nullifies actions such as creating corporate entities or executing a power of attorney in order to keep an agreement secret, in order to avoid the processes established by the bill.[249]

CONCLUSION

Despite several recent criminal cases that evidence an immediate need for a law that protects the rights of crime victims in situations in which criminals profit from their notoriety, Massachusetts currently does not have a such a statute. In response, the Massachusetts Attorney General's Office has filed a bill with the state

---

245. *See id.* § 14(o). Section 14(o) proposes:

> After all civil claims instituted by victims against the defendant have been satisfied, or after three years of publication no claims have been filed, one-half of the value of the bond required in subsections (c) and (i) shall be returned to the contracting party. The remaining portion of the bond shall be deposited into the victim compensation fund maintained by the treasurer in accordance with section 4(c).

Id.

246. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 119 (1991). The Maryland statute reviewed in *Curran v. Price* also provided that funds in escrow that were unclaimed by victims would eventually be transferred to a general victim's compensation fund. *See* Curran v. Price, 638 A.2d 93, 104 (Md. 1994). The Court of Appeals of Maryland acknowledged that this requirement was not narrowly tailored to ensure that a defendant not profit from the crime at the expense of the particular crime victim, but it noted that this did not appear to be a requirement under *Simon & Schuster*. *See id.*

247. *See* S. 1950, § 14(q). This subsection proposes: "Any action taken by a defendant, or his representative, whether by way of execution of a power of attorney, creation of corporate entities or otherwise, to defeat the purpose of this section shall be null and void." *Id.*

248. *See id.*

249. *See id.*

legislature that has been crafted to protect victims while remaining within the bounds of the Constitution. An "Act Relative to the Profits from Crime" should be enacted and signed into law, once again affirming the age-old adage that "crime does not pay."