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THE VIRGINIA "SON OF SAM" LAW: AN UNCONSTITUTIONAL APPROACH TO VICTIM COMPENSATION

Kerry Casey*

Congress shall make no law . . . abridging the freedom of speech,
or of the press¹

I. INTRODUCTION

The Constitution guarantees freedom of speech and freedom of the press, and prohibits Congress from acting to restrict these rights.² The Supreme Court has held that the states too are bound by the restrictive language of the First Amendment by virtue of the Fourteenth Amendment.³ Nevertheless, the Court has allowed certain restrictions on freedom of speech when the restrictions are narrowly tailored to further compelling government interests.⁴ This Note examines whether state legislatures may limit a criminal's right to tell the story of his crime. If a state legislature may restrict a criminal's right to profit from the exercise of his⁵ freedom of speech, the issue becomes the extent to which a legislature may do so.⁶

Criminal antiprofit laws have been enacted only recently. The first such law was passed in response to the "Son of Sam" murderer.⁷ David Berkowitz was a psychotic twenty-five year-old who shot thirteen people

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¹ U.S. CONST. amend. I.

² *Id.*

³ See *Beauharnais v. Illinois*, 343 U.S. 250, 268 (1952) (Black, J., dissenting) ("[T]he Fourteenth Amendment makes the specific prohibitions of the First Amendment equally applicable to the states.").

⁴ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657-61 (1990).

⁵ I use the pronouns "he," "him," and "his" in reference to the criminal throughout this Note for simplicity.

⁶ The Supreme Court answered neither of these questions in its recent decision in *Simon & Schuster, Inc. v. State Crime Victims Bd.*, 112 S. Ct. 501 (1991). The only thing the Court decided in that case was that New York's "Son of Sam" law was an impermissible restraint on free speech. *Id.* at 512. It reserved the question of whether a restraint on a criminal's right to profit from the story of his crime will ever be permissible in light of the guarantees of the First Amendment. *Id.*

⁷ N.Y. EXEC. LAW § 632-a (Consol. 1983), *repealed by* 1992 N.Y. Laws ch. 618, § 10, *and replaced by* N.Y. EXEC. LAW § 632-a (Consol. Supp. 1992-93). For a discussion of the current New York "Son of Sam" law, see *infra* note 29.

in New York and wrote letters to the New York papers with the details of his crimes.⁸ He used the pen-name "Son of Sam."⁹ His penchant for fame, as well as his literary talent, prompted the New York legislature to pass this nation's first "Son of Sam" law,¹⁰ a statute requiring criminals to turn over the profits¹¹ from the stories of their crimes for use in compensating their victims.¹² Indeed, the New York legislators reasoned that such a statute would "'ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.'" ¹³

In 1977, the New York legislature passed the first "Son of Sam" law¹⁴ in response to a fear that David Berkowitz, the "Son of Sam" killer, would write the story of his crimes and profit thereby.¹⁵ At that time, New York already had in place a general law which sought to compensate victims of a crime through an administrative agency.¹⁶ The legislature hastily amended the existing statute; the result was the original "Son of Sam" law.¹⁷ The New York law became the model for the forty-two other state,¹⁸ as well as the fed-

⁸ Garrett Epps, *Wising Up: "Son of Sam" Laws and the Speech and Press Clauses*, 70 N.C. L. REV. 493, 506 (1992).

⁹ *Id.*

¹⁰ N.Y. EXEC. LAW § 632-a (Consol. 1983).

¹¹ "Profits," as referred to in "Son of Sam" laws, generally means the proceeds from a contract or the money received by a criminal for the story of his crime. *See, e.g.*, VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

¹² Epps, *supra* note 8, at 506.

¹³ *Simon & Schuster, Inc. v. State Crime Victims Bd.*, 112 S. Ct. 501, 504 (1991) (quoting Assembly Bill Memorandum Re: A 9019, July 22, 1977, *reprinted in* Legislative Bill Jacket, 1977 N.Y. Laws, ch. 823).

¹⁴ N.Y. EXEC. LAW § 632-a (Consol. 1983).

¹⁵ *Simon & Schuster*, 112 S. Ct. at 504.

¹⁶ Epps, *supra* note 8, at 506.

¹⁷ *Id.*

¹⁸ The state "Son of Sam" laws include: ALA. CODE §§ 41-9-80 to -84 (1991); ALASKA STAT. § 12.61.020 (1990); ARIZ. REV. STAT. ANN. § 13-4202 (1989); ARK. CODE ANN. § 16-90-308 (Michie 1987); CAL. CIV. CODE § 2225 (West Supp. 1993); COLO. REV. STAT. § 24-4.1-201 (1988); CONN. GEN. STAT. ANN. § 54-218 (West 1985); DEL. CODE ANN. tit. 11, § 9103 (Supp. 1992); FLA. STAT. ANN. § 944.512 (West Supp. 1993); GA. CODE ANN. §§ 17-14-30 to -32 (1990); HAW. REV. STAT. §§ 351-81 to -88 (Supp. 1992); IDAHO CODE § 19-5301 (1987); ILL. ANN. STAT. ch. 70, para. 401-414 (Smith-Hurd 1989 & Supp. 1992); IOWA CODE § 910.15 (Supp. 1993); KAN. STAT. ANN. §§ 74-7319 to -7321 (1992); KY. REV. STAT. ANN. § 346-165 (Michie/Bobbs-Merrill 1993); LA. REV. STAT. ANN. §§ 46:1831 to :1839 (West 1982 & Supp. 1993); MD. ANN. CODE art. 27, § 764 (Supp. 1993); MASS. GEN. ANN. LAWS ch. 258A §§ 1, 8 (West 1988 & Supp. 1993); MICH. COMP. LAWS ANN. § 780.768 (West Supp. 1993); MINN. STAT. ANN. § 611A.68 (West 1987 & Supp. 1993); MISS. CODE ANN. §§ 99-38-1 to -11 (Supp. 1993); MO. ANN. STAT. § 595.045(14) (Vernon Supp. 1993); MONT. CODE ANN. §§ 53-9-103,

eral,¹⁹ "Son of Sam" laws. Black's Law Dictionary defines "Son of Sam" laws as "state statutes providing that any share a criminal might otherwise have in proceeds from a book or other presentation about his crime must be placed into an escrow account for the benefit of any victims of the crime."²⁰

Several policy considerations favor protecting the rights of the victim by enacting "Son of Sam" laws, even if to do so means depriving the criminal of certain constitutionally-guaranteed rights. First, the victim should be compensated by the criminal who harmed him.²¹ Second, the criminal should not be allowed to profit from the story of the crime.²² Third, the victim should not be forced to "relive" the crime when the media presents the story of it from the criminal's perspective.²³

Those opposed to criminal antiprofit laws may assert countervailing arguments. The most important of these, and the one at issue in this Note, is the contention that criminals have the same first amendment right to free speech as other citizens. Furthermore, opponents of "Son of Sam" laws may advance the media's right to freedom of the press under the First Amendment.²⁴ This latter policy consideration exceeds the scope of this

-104 (1993); NEB. REV. STAT. § 81-1836 to -1842(1987); NEV. REV. STAT. § 217-265 (1992); N.J. STAT. ANN. §§ 52:4B-27 to -33 (West 1986); N.M. STAT. ANN. §§ 31-22-22 to -23 (Michie 1990); OHIO REV. CODE ANN. §§ 2969.01 to .06 (Baldwin 1992 & Supp. 1993); OKLA. STAT. ANN. tit. 22, § 17 (West Supp. 1991); OR. REV. STAT. §§ 147.005-.275 (1991); PA. CONS. STAT. ANN. tit. 71, § 180-7.18 (West 1990); R.I. GEN. LAWS §§ 12-25.1-1 to -12 (Michie Supp. 1992); S.C. CODE ANN. § 15-59-40 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. §§ 23A-28A-1 to -14 (1988); TENN. CODE ANN. §§ 29-13-201 to -208 (1980 & Supp. 1993); TEX. REV. CIV. STAT. ANN. art. 8309-1, §§ 3, 16-18 (West Supp. 1991); UTAH CODE ANN. § 78-11-12.5 (Supp. 1991); VA. CODE ANN. §§ 19.2-368.19-.21 (Michie 1990 & Supp. 1993); WASH. REV. CODE ANN. §§ 7.68.200-.280 (West 1992); WIS. STAT. ANN. § 949.165 (West Supp. 1992); WYO. STAT. § 1-40-112(d) (1988). For a discussion and analysis of these laws, see Epps, *supra* note 8, at 500-05 & nn.46-72. The Indiana legislature repealed its original "Son of Sam" law after *Simon & Schuster* was handed down, IND. CODE ANN. § 16-7-3.7-1 to -6, *repealed by* Pub. L. No. 2-1992, § 897, but passed a new version, IND. CODE ANN. 5-2-6.3-1 to -7 (West Supp. 1993).

¹⁹ 18 U.S.C. §§ 3681-3682 (1990).

²⁰ BLACK'S LAW DICTIONARY 1394 (6th ed. 1990). Of course, the federal government has a "Son of Sam" statute as well. See 18 U.S.C. §§ 3681-3682 (1990). For the purposes of this Note, "Son of Sam" law and criminal antiprofit law are interchangeable.

²¹ See, e.g., *Simon & Schuster, Inc. v. State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991).

²² See, e.g., *id.* at 510.

²³ For other asserted justifications for "Son of Sam" laws, see *infra* note 265.

²⁴ See Epps note 8, at 528. Some "Son of Sam" statutes place the burden on the press to meet certain requirements with regard to criminal storytellers, or face liability themselves. See, e.g., N.Y. EXEC. LAW § 632-a(1) (Consol. 1983). Other "Son of Sam"

Note, but remains important as a backdrop for the controversy surrounding "Son of Sam" laws. The Supreme Court of the United States recently held New York's "Son of Sam" law over-inclusive and violative of the First Amendment.²⁵ The Supreme Court limited its holding in *Simon & Schuster* to the New York-type statutes²⁶ and expressly left unanswered the question of the constitutionality of other "Son of Sam" laws.²⁷

This Note examines whether Virginia's "Son of Sam" law could survive a constitutional attack. It begins with a detailed comparison of the Virginia and New York laws. It then undertakes an analysis of Justice O'Connor's opinion for the Court in *Simon & Schuster*. Next, Justice Kennedy's concurring opinion in *Simon & Schuster* is examined. This Note also contrasts the Virginia and New York laws with another variety of criminal antiprofit statute, epitomized by California's "Dan White" law.²⁸ It examines the constitutionality of the Virginia law in light of the recent Supreme Court decision in *Simon & Schuster*, ultimately concluding that the Virginia law is unconstitutional. Finally, this Note examines other approaches the Supreme Court could take when faced with a challenge to a "Son of Sam" law in the future.

laws place the burden on the criminal *and* the media entity to forfeit the proceeds of the media venture. *See, e.g.*, VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

²⁵ *Simon & Schuster*, 112 S. Ct. at 511.

²⁶ *Id.* at 512.

²⁷ *Id.*

²⁸ CAL. CIV. CODE § 2225 (West Supp. 1993). California's "Dan White" law is the equivalent of other states' "Son of Sam" laws. The California law is so named because it was enacted in 1983 when San Francisco Mayor George Moscone's assassin, Dan White, was released on parole. Dan White was also convicted for killing San Francisco Supervisor Harvey Milk. Sue S. Okuda, Comment, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 CAL. L. REV. 1353, 1355 (1988). *See infra* notes 168-208 and accompanying text.

II. THE APPROACH TO "SON OF SAM" LAWS: NEW YORK²⁹ V. VIRGINIA

A. *The Virginia Criminal Antiprofit Law*

On April 9, 1990, Governor Wilder signed Virginia's "Son of Sam" bill into law.³⁰ Because it enacted its statute after passage of most of the other states' "Son of Sam" laws, the Virginia legislature had the benefit of borrowing from numerous state approaches. Unlike the New York legislature, which hastily drafted its law while David Berkowitz remained

²⁹ The New York legislature passed a new "Son of Sam" law in 1992, N.Y. EXEC LAW § 632-a (Consol. 1993-93), after the Supreme Court invalidated its original law in *Simon & Schuster*, 112 S. Ct. 501. The 1992 version of New York's "Son of Sam" law is ambiguous and poorly written. It limits "crime" under the terms of the statute to felonies. *Id.* § 632-a(1)(a). However, it is unclear whether a felon must be criminally convicted in order to be subject to the statutory scheme. Additionally, the law defines "profits of the crime" broadly and in general terms. *Id.* § 632-a(1)(b). Thus, the works to which the law applies are not specified and a party contracting with the criminal is accountable for determining whether the law applies to their contract. The media entity that contracts with the felon for the story of his crime still has the obligation to notify the Crime Victims Board of any payments made or owing to a person charged with or convicted of a felony. *Id.* § 632-a(2)(a). The responsibility then passes to the Board to notify victims of the felony that monies are available. *Id.* § 632-a(2)(b).

Under New York's revised "Son of Sam" statute, the felon's victims have three years to bring a civil suit to recover monetary damages. *Id.* § 632-a(3). The benefit of this scheme, as seems to be the advantage of any criminal antiprofit law, is that the victims have compensation available despite the fact that the statutes of limitations have expired for other traditional tort remedies. *See id.* Victims must notify the Board when they file actions against the criminal, *id.* § 632-a(4), so that the Board can make renewed attempts to notify other victims of the pending suit. *Id.* § 632-a(5)(a)-(b). The Board also has the authority under the statute to prevent the criminal from "wasting" the profits of the crime. *Id.* § 632-a(5)(c). Means available to the Board to prevent waste consist of all the remedies available to the victims-plaintiffs, including attachment and injunction. *Id.* § 632-a(6).

The amended New York law does not take anything from the criminal, but rather makes more funds available to the victims for satisfaction of their claims. Furthermore, victims who have not filed suit within the statute of limitations period for other tort remedies have another chance for compensation from the criminal. It appears that the criminal retains the profits of the story of his crime, subject to the victims' right to obtain a civil judgment against him. *See generally id.* § 632-a. This variation of criminal antiprofit law resembles traditional tort remedies. Indeed, this type of law is not a true "Son of Sam" law because it does not provide for forfeiture of proceeds into a special account or fund as most state "Son of Sam" laws do. *See, e.g.,* CAL. CIV. CODE § 2225(b) (West Supp. 1993); N.Y. EXEC. LAW § 632-a(1) (Consol. 1983); VA. CODE ANN. § 19.2-368.21 (Michie Supp. 1993).

³⁰ JOURNAL OF THE HOUSE OF DELEGATES 1965-69 (Va. April 9, 1990).

on the streets,³¹ the Virginia legislature had the opportunity to consider the constitutionality of its "Son of Sam" law by taking into account some of the criticisms of the New York and other "Son of Sam" statutes.³²

The Virginia criminal antiprofit law provides that only those persons who have pled guilty to a felony, who have been convicted of a felony, or who have been found not guilty of a felony by reason of insanity are subject to the law.³³ The statute further restricts the application of the law to felons who have physically injured or killed another person.³⁴ For this class of felons, any proceeds of a contract for the publication of the stories of their crimes are susceptible to forfeiture.³⁵

Unlike the New York statute, the Virginia law limits the operation of its provisions to those media ventures³⁶ in which the "depiction or discussion of the defendant's crime or an impression of the defendant's thoughts, opinions, or emotions regarding such crime" is "an integral part of the work."³⁷ Under this statute, a circuit court makes the final decision as to whether there is "good cause" for requiring a criminal to forfeit his profits.³⁸ If the court concludes that the proceeds should be forfeited, the criminal and the media entity contracting with him are then

³¹ See *supra* notes 7-17 and accompanying text.

³² The Virginia legislature's concern for protecting the rights of victims, as well as criminals, is evident from both the substance of the law and the proposed, and subsequently adopted, amendments. For example, the House Committee for the Courts of Justice espoused an amendment that provided that the escrow fund be used for certain enumerated purposes—including compensation to the victims—pursuant to an order of a circuit court "*after motion, notice to all interested parties, and opportunity for hearing . . .*" See VA. CODE ANN. § 19.2-368.21(B) (Michie Supp. 1993) (emphasis denotes text inserted by the Committee). Additionally, the Senate Committee for the Courts of Justice inserted the requirement of "good cause shown" as a prerequisite for any order by a circuit court that a criminal forfeit the profits of a media project. *Id.* § 19.2-368.20. These are just two of the due process protections included in the Virginia scheme.

³³ VA. CODE ANN. § 19.2-368.19 (Michie Supp. 1993).

³⁴ *Id.*

³⁵ *Id.* § 19.2-368.20.

³⁶ Generally, media ventures covered by "Son of Sam" laws are any literary, audio, or visual endeavor involving the story of the crime, such as books, movies, articles in magazines or newspapers, tape recordings or records, radio or television shows, and any live presentations. See, e.g., CAL. CIV. CODE § 2225(a)(6) (West Supp. 1993); N.Y. EXEC. LAW § 632-a(1) (Consol. 1983); VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

³⁷ VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993). Cf. N.Y. EXEC. LAW § 632-a(1) (Consol. 1983) (applying the criminal antiprofit law to any media enterprise undertaken by the criminal which involves "the reenactment of such crime" or the "expression of [the criminal's] thoughts, feelings, opinions or emotions regarding [such] crime," whether a major part of the entire work or not).

³⁸ VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

responsible for paying over the monies to the Division of Crime Victims Compensation ("Division").³⁹

The victims⁴⁰ of these violent felonies are the beneficiaries under the Virginia scheme. The Virginia "Son of Sam" law grants supervisory responsibility to the Division,⁴¹ an administrative agency much like New York's Crime Victims Board.⁴² The Division holds the forfeited profits in escrow for five years, during which time victims of the convicted felon may sue the Division for compensation from the fund.⁴³ The Division, however, has no real control over who benefits from the fund. That discretion remains with the circuit courts of Virginia, subject to the constitutional due process rights of "interested parties"⁴⁴—notice and opportunity for a hearing.⁴⁵ If a money judgment is rendered by a court or the Workers' Compensation Commission grants compensation to the victim, the escrow fund may be used to satisfy those awards.⁴⁶ After the five-year period expires, money from the escrow account is paid into the Criminal Injuries Compensation Fund,⁴⁷ making it available for the benefit of crime victims generally.

The Virginia law protects the criminal's rights as well. The criminal defendant may levy upon the escrow fund to satisfy any fines assessed against him by a court in Virginia.⁴⁸ Additionally, the convicted felon may obtain a court order giving him access to the escrow fund for the payment of legal fees incurred in his defense, or appeal, of the criminal charges.⁴⁹ No more than twenty-five percent of the total escrow fund may be used to subsidize the criminal's defense, however.⁵⁰

³⁹ *Id.*

⁴⁰ For the purposes of this chapter of the Virginia law, "victim" is defined as "a person who suffers personal, physical, mental, emotional, or pecuniary loss as a direct result of a crime and includes the spouse, parent, child, or sibling of the victim." *Id.* § 19.2-368.19.

⁴¹ *Id.*

⁴² N.Y. EXEC. LAW § 621 (Consol. 1983).

⁴³ VA. CODE ANN. § 19.2-368.21(A) (Michie Supp. 1993).

⁴⁴ An "interested party" is defined in the statute as "the victim, the defendant, and any transferee of the proceeds due the defendant under a contract, the person with whom the defendant has contracted, the prosecuting attorney for the Commonwealth, and the Division of Crime Victims' Compensation." *Id.* § 19.2-368.19.

⁴⁵ *Id.* § 19.2-368.21(B).

⁴⁶ *Id.* § 19.2-368.21(A)(1).

⁴⁷ *Id.* § 19.2-368.21(C).

⁴⁸ *Id.* § 19.2-368.21(A)(2).

⁴⁹ *Id.* § 19.2-368.21(B)(2).

⁵⁰ *Id.*

B. New York's "Son of Sam" Statute: The Original Criminal Antiprofit Legislation

Virginia's "Son of Sam" law has never been invoked, nor has there been litigation involving it, so that its constitutionality is undetermined. On the other hand, the Supreme Court held New York's "Son of Sam" law unconstitutional in 1991, fourteen years after its enactment.⁵¹ In the fourteen years during which the New York "Son of Sam" law was on the books, it was invoked only ten times, and just a few of those occasions involved litigation.⁵² An examination of the Supreme Court decision in *Simon & Schuster*,⁵³ as well as an analysis of New York's "Son of Sam" statute,⁵⁴ provides some guidance as to the constitutionality of "Son of Sam" laws generally and that of Virginia⁵⁵ in particular.

The original New York "Son of Sam" statute differed in some significant ways from Virginia's criminal antiprofit law. The New York law applied to a person who had pled guilty to or had been convicted of a crime in New York, as well as to "any person who ha[d] voluntarily and intelligently admitted the commission of a crime for which such person [wa]s not prosecuted."⁵⁶ Persons found not guilty by reason of insanity also constituted "convicted" persons for purposes of the law.⁵⁷ The statute applied equally to any person accused of a crime and later convicted.⁵⁸ The law was not restricted to felonies, but rather applied to *any* crime.⁵⁹ Thus, misdemeanors and other seemingly victim-

⁵¹ *Simon & Schuster, Inc. v. State Crime Victims Bd.*, 112 S. Ct. 501 (1991).

⁵² Epps, *supra* note 8, at 509. See, e.g., *United States v. MacDonald*, 607 F. Supp. 1183 (E.D. N.C. 1985) (holding that the federal "Son of Sam" statute (18 U.S.C. § 3681 (1990)) applied retroactively was an ex post facto law, and was an unconstitutional attempt to impose forfeiture requirements on the defendant); *Children of Bedford, Inc. v. Petromelis*, 573 N.E.2d 541 (N.Y. 1991), *judgment vacated*, 112 S. Ct. 859 (1992), *on remand*, 592 N.E.2d 796 (N.Y. 1992); *St. Martin's Press v. Zweibel*, 203 N.Y.L.J. 25 (N.Y. Sup. Ct. 1990); *Barrett v. Wojtowicz*, 414 N.Y.S.2d 350 (N.Y. App. Div. 1979) (holding that New York's "Son of Sam" law was within the legislature's "prerogative" for victim compensation); *In re Johnsen*, 430 N.Y.S.2d 904 (N.Y. Sup. Ct. 1979) (holding, in the David Berkowitz case, that the Victims' Compensation Act of New York is applicable to the conservator for a convicted murderer who was under a legal disability).

⁵³ 112 S. Ct. 501 (1991).

⁵⁴ See N.Y. EXEC. LAW § 632-a (Consol. 1983).

⁵⁵ See VA. CODE ANN. §§ 19.2-368.19 to .21 (Michie Supp. 1993).

⁵⁶ N.Y. EXEC. LAW § 632-a(10)(b) (Consol. 1983). Therefore, a person who confessed to a crime would have been subject to forfeiture under this provision, even though he was never formally accused, arrested, or convicted for the crime.

⁵⁷ *Id.* § 632-a(5).

⁵⁸ *Id.* § 632-a(1).

⁵⁹ *Id.* § 632-a(10)(b).

less⁶⁰ crimes subjected the criminal to forfeiture if the other criteria of the law were met.

The New York statute required forfeiture of any proceeds due the criminal under a contract for the story of his crime.⁶¹ Furthermore, the burden was on the party doing business with the criminal to hand over the contract to the New York State Crime Victims Board ("Board") and to pay over the "moneys [sic] which would otherwise, by terms of such contract, be owing to the person . . . accused or convicted or his representatives."⁶² Therefore, the publishing company of a book or the producer of a film was subject to liability for failing to abide by the "Son of Sam" law.

The profits of any media endeavor that included the reenactment of the crime, or any other presentation of the criminal's point-of-view with regard to the crime, was subject to forfeiture in New York.⁶³ The language of the New York statute made its provisions applicable to media projects that included only one sentence about, or a mere reference to, the crime at issue.⁶⁴

The proceeds due under a contract with the accused or convicted criminal *had to* be paid over to the Board in New York.⁶⁵ There was no separate proceeding at which a court decided whether "good cause" had been shown so that a criminal would have to forfeit the profits earned by telling the story of the crime. The profits from the story of the crime were put in an escrow account where they could be levied on by victims⁶⁶ of the crime.⁶⁷ Like the Virginia law, the New York statute gave victims five years after the account was set up to sue civilly and recover damages.⁶⁸ A

⁶⁰ Clearly, only "victims" as defined by the statute may obtain a civil judgment against the criminal defendant to be satisfied by the escrow account. However, under the New York "Son of Sam" law, those entities contracting with a defendant *had to* turn over any proceeds due the defendant under the contract. *Id.* § 632-a(1). Thus, it appears that a criminal could have been made to forfeit his profits for five years even though he had left no real "victims" to levy on the account. Although such an approach only forestalled the criminal's receipt of the proceeds, it seemed to defeat the rationale underlying the criminal antiprofit laws: namely, that the victims of crime should be compensated. *See supra* note 13 and accompanying text. Ultimately, the criminal still profited from the story of his crimes.

⁶¹ N.Y. EXEC. LAW § 632-a(1) (Consol. 1983).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See id.*

⁶⁵ *Id.*

⁶⁶ The New York legislature described a "victim," for the purposes of its criminal antiprofit law, as "a person who suffers personal, physical, mental, or emotional injury, or pecuniary loss as a direct result of the crime." *Id.* § 632-a(10)(a).

⁶⁷ *Id.* § 632-a(1).

⁶⁸ *Id.* § 632-a(1), (7).

civil judgment must have been obtained in New York before a victim would be given access to the escrow account.⁶⁹

The New York criminal antiprofit law provided the criminal with some access to the account as well. The criminal had the right to secure a court order allowing him to draw on the account to pay for his legal counsel at the appellate level.⁷⁰ The criminal's access to the account was limited to twenty percent of the total.⁷¹

In New York, the burden fell on the convicted person to show that five years had passed and that no proceedings were pending against him.⁷² Once the criminal had proven this, the Board was required to disburse the remaining funds to the criminal.⁷³ Thus, a criminal subject to the New York statute did not necessarily lose all of his profits.

C. The Virginia and New York "Son of Sam" Laws: How Do They Differ?

The Virginia "Son of Sam" law applies to a smaller class of criminals than did the New York law. In Virginia, only felons who inflict bodily harm on or kill another are subject to the antiprofit provisions.⁷⁴ Alternatively, the New York law applied to any criminal, regardless of his crime, and regardless of whether there were any victims as defined in the statute.⁷⁵ Furthermore, any person who admitted to the commission of a crime was subject to the provisions of the law.⁷⁶

The Virginia legislature avoided the infirmity of over-inclusiveness which plagued the original New York law⁷⁷ by providing that its "Son of Sam" law applies only to violent felons who kill or do bodily harm to another.⁷⁸ In this respect, Virginia's "Son of Sam" law meets the policy goals of compensating the victims and preventing the criminals from profiting from the stories of their crimes better than the New York law.

Another way in which the drafters of the Virginia criminal antiprofit law avoided constitutional catastrophe was by requiring a court to

⁶⁹ *Id.* § 632-a(1).

⁷⁰ *Id.* § 632-a(8).

⁷¹ *Id.*

⁷² *Id.* § 632-a(4).

⁷³ *Id.*

⁷⁴ VA. CODE ANN. § 19.2-368.19 (Michie Supp. 1993).

⁷⁵ N.Y. EXEC. LAW § 632-a(10)(b) (Consol. 1983). The New York law seemed to apply to persons convicted of tax fraud in the same way that it applied to persons convicted of murder. In the tax fraud scenario, no victim would have existed as defined under § 632-a(10)(a) of New York's Executive Law.

⁷⁶ *Id.*

⁷⁷ *Simon & Schuster, Inc. v. State Crime Victims Bd.*, 112 S. Ct. 501, 511 (1991).

⁷⁸ VA. CODE ANN. § 19.2-368.19 (Michie Supp. 1993).

determine whether a criminal should forfeit his proceeds in a particular case.⁷⁹ Many safeguards inhere in this procedure because the court should balance the criminal's rights against the rights of the victims. First, the attorney for the Commonwealth must petition the court to order forfeiture of the proceeds of the story of the crime.⁸⁰ Second, the court hears each case and decides it on its own merits, based not only on the crime involved, but also on the wishes and needs of the attorney for the Commonwealth, the victims, and the criminal.⁸¹ Third, the court may only order forfeiture for "good cause shown."⁸²

In contrast, the New York law required a party contracting with a convicted criminal or one accused of a crime to surrender a copy of the contract for the story of the crime and to pay the Board any proceeds due the criminal under that contract.⁸³ No judicial or other consideration was taken of the victims' needs in a particular case.⁸⁴ Disbursement of the proceeds to the Board was mandatory,⁸⁵ and the escrow account existed for five years,⁸⁶ regardless of the crime or the claims of the victims, if any. The New York legislation did not ensure that the rights of the criminals were constitutionally protected. Little benefit can be derived from exposing a criminal to forfeiture of profits due him when victims are not correspondingly compensated; yet great constitutional harm may result.

The Virginia and New York laws differ also in that the Virginia law does not apply *unless* the criminal's depiction or discussion of the crime comprises an "integral part of the work."⁸⁷ In contrast, the New York law applied regardless of how much of the work included the story of the crime.⁸⁸ Again, this difference illustrates how the Virginia statute balances the rights of the criminal with the goal of victim compensation.

Finally, the New York law provided that the proceeds remaining after the five-year period be returned to the criminal.⁸⁹ The criminal, however,

⁷⁹ *Id.* § 19.2-368.20. ("Upon petition of the attorney for the Commonwealth filed at any time after conviction of such defendant or his acquittal by reason of insanity and after notice to the interested parties, a hearing upon the motion and a finding for the Commonwealth, for good cause shown, any circuit court in which the petition is filed shall order that such proceeds be forfeited.").

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ N.Y. EXEC. LAW § 632-a(1) (Consol. 1983).

⁸⁴ *See generally id.* § 632-a (no provision requires a court hearing prior to monies being paid over to the Board).

⁸⁵ *Id.* § 632-a(1).

⁸⁶ *Id.*

⁸⁷ VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

⁸⁸ N.Y. EXEC. LAW § 632-a(1) (Consol. 1983).

⁸⁹ *Id.* § 632-a(4).

shouldered the burden of showing that five years had passed and that there were no outstanding claims.⁹⁰ In contrast, the Virginia law provides that the proceeds remaining after five years be paid into the Criminal Injuries Compensation Fund.⁹¹ Thus, it seems that under the Virginia scheme, a criminal's profits could ultimately be used for the benefit of victims who did not suffer at his hands. The goal of compensating victims is still met, and criminals are prevented from profiting from their crimes. Yet the Virginia approach seems unjust. This provision of Virginia's criminal antiprofit statute could prove to be its downfall if the law is ever attacked on first amendment grounds because, despite the Commonwealth's laudable aims, New York and other states have demonstrated that the same goal can be accomplished by less restrictive means.

III. NEW YORK'S "SON OF SAM" LAW HELD UNCONSTITUTIONAL

Justice O'Connor, writing for the Court, reviewed New York's "Son of Sam" law with strict scrutiny.⁹² Under her analysis, New York had to demonstrate that its law was necessary to serve a compelling state interest and that the statute was narrowly drawn to achieve that end.⁹³ The Court concluded that New York failed to meet this test.⁹⁴ An unanimous Court found the New York "Son of Sam" law unconstitutional.⁹⁵

The *Simon & Schuster* case arose when Henry Hill, mobster and gangster, contracted with author Nicholas Pileggi and publisher Simon & Schuster to write *Wiseguy*, the story of his ignoble career.⁹⁶ The irony is that Hill was never even prosecuted for his role in these mob activities.⁹⁷ He received immunity for testifying against others with whom he had

⁹⁰ *Id.*

⁹¹ VA. CODE ANN. § 19.2-368.21(C) (Michie Supp. 1993).

⁹² *Simon & Schuster, Inc. v. State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991). The Court undertook a first amendment analysis; the case did not involve a due process or an equal protection analysis. *See generally id.* at 504-12.

⁹³ *Id.* at 509.

⁹⁴ *Id.* at 512 (holding that "[t]he State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective").

⁹⁵ *See id.* at 504. Justices Blackmun and Kennedy wrote concurring opinions, and Justice Thomas took no part in the decision. *Id.* at 512.

⁹⁶ *Id.* at 506. Some of Hill's more famous, or infamous, crimes include robbing Lufthansa in 1978 and making off with nearly six million dollars in cash and jewelry, and persuading "two Boston College basketball players to shave points during the 1978-79 season." Epps, *supra* note 8, at 497.

⁹⁷ *Simon & Schuster*, 112 S. Ct. at 506.

worked, and today is living under the Federal Witness Protection Program.⁹⁸

The New York State Crime Victims Board directed Simon & Schuster to pay the Board the equivalent of the proceeds from *Wiseguy* that it had already paid to Hill.⁹⁹ The Board claimed to get its authority to demand payment from the publisher under section 632-a of the New York Executive Law.¹⁰⁰ In response, Simon & Schuster sued the Board.¹⁰¹ The Supreme Court granted certiorari to decide whether the New York "Son of Sam" law violated the First Amendment.¹⁰²

Justice O'Connor concluded that New York's criminal antiprofit law was over-inclusive and that it violated a criminal's right to free speech.¹⁰³ O'Connor noted that a presumption of unconstitutionality arose in this case because the government placed a burden on the speech of criminals that it did not place on any other type of speech.¹⁰⁴ Specifically, the New York "Son of Sam" law imposed a monetary burden on speakers, solely because of the content of their speech.¹⁰⁵ The statute also required forfeiture of profits of a criminal's speech on topics unrelated to his crimes.¹⁰⁶ Thus, the law ran contrary to the Supreme Court's consistent holdings that the government may not keep selected views from the marketplace of ideas.¹⁰⁷ O'Connor further contended that characterizing a speaker as "media"—the publisher—or "nonmedia"—the criminal—was irrelevant to the analysis because a state cannot "impose content-based financial disincentives on *any* speaker."¹⁰⁸

New York asserted two interests that the Court found compelling.¹⁰⁹ The State had a valid interest in demanding that those who harm people should compensate them.¹¹⁰ Furthermore, the State had a compelling interest in preventing criminals from reaping the profits of their crimes.¹¹¹ Thus, the victim should benefit at the expense of the criminal, because the criminal has benefitted indirectly from the harms inflicted on the victim. The Court, however, took issue with the Board's narrower justification for

⁹⁸ *Id.*

⁹⁹ Epps, *supra* note 8, at 499.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Simon & Schuster*, 112 S. Ct. at 508.

¹⁰³ *Id.* at 512.

¹⁰⁴ *Id.* at 508.

¹⁰⁵ *Id.*

¹⁰⁶ See N.Y. EXEC. LAW § 632-a(1) (Consol. 1983).

¹⁰⁷ See *Simon & Schuster*, 112 S. Ct. at 508.

¹⁰⁸ *Id.* at 509.

¹⁰⁹ *Id.* at 509-10.

¹¹⁰ *Id.* at 509.

¹¹¹ *Id.* at 510.

the "Son of Sam" law—the State's 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"—which the Court held to be an insufficient justification for the law.¹¹² O'Connor also observed that the Board could not rationalize why the victims should be compensated out of the profits from the story of the crime rather than from the criminal's assets in general.¹¹³

Although the Court acknowledged that New York had two compelling justifications,¹¹⁴ it held that the law was not narrowly tailored to meet those goals.¹¹⁵ The legislature's intent was immaterial, the Court concluded, because the effect of the legislative scheme was to discriminate against criminals.¹¹⁶ Furthermore, other alternatives were available to the New York legislature. The Court cited traditional tort remedies, restitution orders at sentencing, and prejudgment attachment proceedings.¹¹⁷ All of those compensation schemes were available in New York at the time.¹¹⁸

Justice O'Connor hinted that there was an under-inclusiveness problem with the New York statute, but ultimately refused to address that issue.¹¹⁹ She noted that the State had reasons for benefiting victims with the "fruits of the crime," and yet the State had no rationale for limiting the source of such compensation to speech about the crime.¹²⁰ A law that singles out speech is suspect under the First Amendment.¹²¹

The Court focused on two main problems with the New York criminal antiprofit law. First, the law applied to any work that included the criminal's thoughts and opinions on the crime, even if the reference to the

¹¹² *Id.*

¹¹³ *Id.* ("The distinction drawn by the Son of Sam law has nothing to do with the State's interest in transferring the proceeds of crime from criminals to their victims.").

¹¹⁴ *Id.* at 509-10.

¹¹⁵ *Id.* at 512.

¹¹⁶ *Id.* at 509.

¹¹⁷ *Id.* at 505, 509.

¹¹⁸ *See, e.g.,* N.Y. CIV. PRAC. L. & R. § 1311 (forfeiture actions), § 6201 (grounds for attachment), § 5225 (payment or delivery of property of judgment debtor) (Consol. Supp. 1992-93); N.Y. CRIM. PROC. LAW § 420.10 (Consol. Supp. 1992-93) (collection of fines, restitution, or reparation); N.Y. PENAL LAW § 60.27 (Consol. Supp. 1992-93) (restitution and reparation).

¹¹⁹ *Id.* at 511 & note. A "Son of Sam" law could be considered under-inclusive if it does not provide access to all income and assets of a criminal—an approach which would benefit the victims financially. The constitutional issue of under-inclusiveness arises when a legislature chooses to deal only with some, but not all, aspects of a problem.

¹²⁰ *Id.* at 511.

¹²¹ *See id.* at 508 ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.") (citing *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)).

crime was only a minimal or incidental part of the work.¹²² Second, the law defined criminal very broadly.¹²³ Under New York's definition, persons who were convicted or accused, who pled guilty, who were found not guilty by reason of insanity, or who admitted to criminal acts without being accused or convicted, were all equally subject to the forfeiture provisions of the New York "Son of Sam" law.¹²⁴ The result was that the New York law applied to many "criminals" as well as to many media ventures.¹²⁵ The real problem, however, was that the law "reache[d] a wide range of literature that d[id] not enable a criminal to profit from his crime while a victim remain[ed] uncompensated."¹²⁶

The Court failed to address additional issues that would have been helpful in analyzing the constitutionality of other "Son of Sam" laws. For example, the majority did not examine the question of whether a "Son of Sam" statute could ever be constitutional.¹²⁷ Furthermore, it declined to confront the issue of whether the amorphous phrase "profits of crime" even included book royalties.¹²⁸ Finally, although the Court discussed the content-based nature of the law, it concluded that characterizing it as content-neutral or content-based was unnecessary because the law was over-inclusive and could not coexist with the free speech guarantees of the First Amendment.¹²⁹

Justice Kennedy would have provided criminals with even broader first amendment protection.¹³⁰ In his concurring opinion, Kennedy took a more absolute approach to first amendment jurisprudence.¹³¹ He rejected the use of the strict scrutiny test in first amendment cases, reserving that approach for equal protection analyses.¹³² Kennedy urged the Court to ask only whether the restriction was content-based.¹³³ An affirmative answer to that

¹²² *Simon & Schuster*, 112 S. Ct. at 511.

¹²³ *Id.*

¹²⁴ *Id.* at 511. See N.Y. EXEC. LAW § 632-a(5), (10)(b) (Consol. 1983).

¹²⁵ *Simon & Schuster*, 112 S. Ct. at 511.

¹²⁶ *Id.*

¹²⁷ See *id.* at 512 (Blackmun, J., concurring) ("Most other States have similar legislation and deserve from this Court all the guidance it can render in this very sensitive area.").

¹²⁸ *Id.* at 510.

¹²⁹ *Id.* at 511-12.

¹³⁰ *Id.* at 512 (Kennedy, J., concurring).

¹³¹ MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH, A TREATISE ON THE THEORY OF THE FIRST AMENDMENT 82 (Supp. 1992).

¹³² *Simon & Schuster*, 112 S. Ct. at 512-13 (Kennedy, J., concurring) ("[R]esort to the [strict scrutiny] test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so.").

¹³³ *Id.* at 513 (Kennedy, J., concurring). A content-based regulation is one that restricts speech based on its message and hence can rarely withstand constitutional scrutiny. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). However, content-based restrictions

inquiry would mandate a holding that the law was unconstitutional and would end his analysis.¹³⁴ Kennedy also reconciled the cases in which the Court had taken a strict scrutiny approach or one like it.¹³⁵ Those tests had been applied in cases in which the law at issue was not content-based.¹³⁶ If a law is content-based, Kennedy reasoned, it is unconstitutional, making further analysis extraneous.¹³⁷

Justice Kennedy concluded his concurring opinion with two caveats: that "raw censorship" should never withstand constitutional scrutiny,¹³⁸ and that the protections of free speech and free press as provided for in the First Amendment were gradually weakening.¹³⁹ In summary, his opinion supports the argument that all "Son of Sam" laws are unconstitutional because they restrict speech on the basis of content.¹⁴⁰

IV. CAN A "SON OF SAM" LAW EVER BE CONSTITUTIONAL?

Justice Kennedy hinted that all "Son of Sam" laws violate the first amendment guarantee of free speech.¹⁴¹ Any content-based regulation will not withstand constitutional attack under Justice Kennedy's approach.¹⁴² O'Connor, on the other hand, expressly reserved the question of whether criminal antiprofit statutes may be permissible.¹⁴³ In the future, the Court should conclude that a "Son of Sam" law can be constitutional if it takes the criminal's interests into consideration and if it is not over- or under-inclusive. Justice Kennedy's opinion in *Simon & Schuster* could be the foundation for such an approach. This type of law would be difficult, if

have been upheld if they restrict speech in an unprotected category—obscenity, incitement, and defamation, for example; if they protect another constitutional right; if they are directed at nonspeech elements and there are only secondary effects on speech; or if they limit the time, place, or manner of speech. *Simon & Schuster*, 112 S. Ct. at 514-15 (Kennedy, J., concurring).

¹³⁴ *Simon & Schuster*, 112 S. Ct. at 512-13 (Kennedy, J., concurring). Of course, Kennedy recognized that those content-based regulations governing the "historic and traditional categories" would be upheld. *Id.* at 514 (Kennedy, J., concurring). Those laws which restrict obscenity, defamation, and incitement, for example, may be permissible statutory schemes. *Id.* (Kennedy, J., concurring). One can hardly imagine that a "Son of Sam" law would fit into one of these categories such that it would be upheld by the Court even though content-based.

¹³⁵ *Id.* at 513 (Kennedy, J., concurring).

¹³⁶ *Id.* (Kennedy, J., concurring).

¹³⁷ *Id.* (Kennedy, J., concurring).

¹³⁸ *Id.* at 515 (Kennedy, J., concurring).

¹³⁹ *Id.* (Kennedy, J., concurring).

¹⁴⁰ See *supra* notes 133-34.

¹⁴¹ *Simon & Schuster*, 112 S. Ct. at 513 (Kennedy, J., concurring).

¹⁴² *Id.* (Kennedy, J., concurring).

¹⁴³ *Id.* at 511-12.

not impossible, to fashion, but Epps' model law, described below, comes closest to being a constitutional "Son of Sam" law.¹⁴⁴

A. A Model Criminal Antiprofit Law

Garrett Epps has proposed the most narrowly drawn "Son of Sam" law imaginable.¹⁴⁵ His model remedies, to a large extent, the over-inclusiveness which plagued New York's "Son of Sam" law in *Simon & Schuster*, and offers a less restrictive alternative. This narrowly drawn law is aimed only at convicted criminals who have committed "truly heinous crimes."¹⁴⁶ Furthermore, the law makes only criminals subject to forfeiture, without exposing the media to liability.¹⁴⁷ Additionally, proceeds from the story of a crime are sequestered only after an individual determination, made by the court, on the motion of an adverse party, with notice to all interested parties.¹⁴⁸ Then, upon an order of the court, the forfeiture provisions apply only to "monies from a specific expressive project by a specific criminal."¹⁴⁹ Only individual victims who obtain civil judgments are compensated, and there is no forfeiture to a general crime victims' fund.¹⁵⁰

If the Supreme Court were to hold a "Son of Sam" law constitutional, Epps' model would provide the best example. Therefore, this scheme should be the model for states amending their laws in response to the decision in *Simon & Schuster*. Epps, however, urges that the first amendment guarantees are paramount to the victims' interests even when a statute is very narrowly drawn.¹⁵¹ He asserts that *no* "Son of Sam" law

¹⁴⁴ See Epps, *supra* note 8, at 534. Of course, a "Son of Sam" law like New York's revised statute is not a pure "Son of Sam" law as are the original New York, Virginia, and California laws. See *supra* note 29. Presumably, a law which compensates victims by making the profits of a criminal's story, *as well as* any other assets he might have, available to his victims is not a pure "Son of Sam" law. New York's revised law can properly be considered a second-generation "Son of Sam" law. These new "Son of Sam" laws may raise constitutional issues beyond the scope of this Note.

¹⁴⁵ *Id.* at 534-35.

¹⁴⁶ *Id.* at 534. By "truly heinous crimes," Epps means "violent felon[ies]." *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 534-35.

¹⁵¹ See *id.* at 535. The free speech issue in "Son of Sam" laws involves a criminal's right to tell the story of his crime. See *supra* text accompanying notes 14-20. The right to free speech is a constitutionally-protected right under the First Amendment. A victim's right to compensation for his suffering and his right not to be forced to relive the crime are statutorily-protected rights. See Epps, *supra* note 8, at 506. Constitutional guarantees override statutory rights. However, a criminal is not always entitled to full protection of his constitutional rights. See, e.g., *Lewis v. United States*, 445 U.S. 55, 65 (1980) (federal

could be narrowly tailored so that it could further nonspeech purposes without impermissibly burdening a criminal's right to freedom of speech.¹⁵² Epps' view can be harmonized with that of Justice Kennedy because both call for broad first amendment protection.¹⁵³

If the Court were faced with a narrowly drawn statute, Justice Kennedy's analysis in *Simon & Schuster* would not necessarily win over a majority of the Court. No Justices joined in Kennedy's concurring opinion.¹⁵⁴ Justice Kennedy's position does comport with traditional first amendment jurisprudence, so that aspect of it might encourage the Court to retreat from *Simon & Schuster*. Justice O'Connor, writing for the Court in *Simon & Schuster*, conceded that other alternatives existed for compensating criminals in New York.¹⁵⁵ In the future, the Court should continue to find that less restrictive alternatives are available and hold that most, if not all, "Son of Sam" laws are unconstitutional. Epps urges that changes in state restitution laws could provide access to criminals' other assets and, thus, would be an appropriate avenue through which states could meet their interests without violating criminals' rights to freedom of speech.¹⁵⁶

B. Virginia's "Son of Sam" Law Is Not as Narrowly Tailored as Possible

Although Virginia's "Son of Sam" law is not over-inclusive in the ways that New York's law was,¹⁵⁷ it nevertheless is not the least restrictive alternative available. However, the Virginia law and Epps' model law are identical in several ways. Both laws are aimed at criminals who are

firearm statute prohibiting a felon from possessing a firearm does not violate fifth amendment due process despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds); *Meachum v. Fano*, 427 U.S. 215, 216 (1976) (holding that the Due Process Clause of the Fourteenth Amendment does not "entitle[] a state prisoner to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to the prisoner, absent a state law or practice conditioning such transfers on proof of serious misconduct . . ."); *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974) (holding that equal protection rights are not violated when a state denies a convicted felon the right to vote).

¹⁵² Epps, *supra* note 8, at 535 ("Under this analysis, a "Son of Sam" law cannot survive unless it is narrowly tailored to further its legitimate nonspeech-related purpose—compensation of victims, not compensation of victims solely from the proceeds of expressive activity.").

¹⁵³ *Id.* at 535; *Simon & Schuster, Inc. v. State Crime Victims Bd.*, 112 S. Ct. 501, 512-15 (1991) (Kennedy, J., concurring).

¹⁵⁴ *Simon & Schuster*, 112 S. Ct. at 512 (Kennedy, J., concurring).

¹⁵⁵ See *supra* notes 117-18 and accompanying text.

¹⁵⁶ Epps, *supra* note 8, at 542.

¹⁵⁷ See *supra* notes 103-26 and accompanying text.

convicted or acquitted by reason of insanity, or who plead guilty.¹⁵⁸ They apply only to violent felons—those who kill or inflict bodily harm on another.¹⁵⁹ An individual determination made by a court, after notice to all interested parties, triggers the operation of the laws.¹⁶⁰

However, Virginia's statute and Epps' model criminal antiprofit law differ in other respects. First, in Virginia, the attorney for the Commonwealth petitions the court for an order of forfeiture.¹⁶¹ In contrast, Epps' model provides that an adverse party shall move for forfeiture in a particular case.¹⁶² This difference, however, is inconsequential in terms of a first amendment evaluation because this distinction does not affect the speaker's rights. Second, the Virginia law applies a criminal's forfeited monies to the victims of that criminal.¹⁶³ Epps' model is in accord with this principle.¹⁶⁴ The two approaches diverge, however, because the Virginia method provides that after the five-year period for claims has passed, all of the forfeited monies are to be pooled in the Criminal Injuries Compensation Fund.¹⁶⁵ Under this scheme, a criminal is forced to compensate victims other than those who suffered injustices at his hands. Epps specifies that sequestered profits should be used only to compensate individual victims who obtain civil judgments, with no forfeiture to a general crime victims' treasury.¹⁶⁶

Assuming a "Son of Sam" law could be constitutional, a strict first amendment analysis would find the Virginia law invalid because it is overbroad. The Virginia statute takes money away from a criminal to compensate the criminal's victims and then provides that the criminal loses access to the money even after his victims have been compensated.¹⁶⁷

C. *The California Approach: A Narrowly Tailored Alternative*

The California criminal antiprofit law¹⁶⁸ is a narrowly tailored law that might pass muster under even the strictest analysis. The California law has never been invoked.¹⁶⁹ The California and Virginia statutes are similar, and

¹⁵⁸ VA. CODE ANN. § 19.2-368.19 (Michie Supp. 1993); Epps, *supra* note 8, at 534.

¹⁵⁹ VA. CODE ANN. § 19.2-368.19 (Michie Supp. 1993); Epps, *supra* note 8, at 534.

¹⁶⁰ VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993); Epps, *supra* note 8, at 534.

¹⁶¹ VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

¹⁶² Epps, *supra* note 8, at 534.

¹⁶³ VA. CODE ANN. § 19.2-368.21(B)(1) (Michie Supp. 1993).

¹⁶⁴ Epps, *supra* note 8, at 534-35.

¹⁶⁵ VA. CODE ANN. § 19.2-368.21(C) (Michie Supp. 1993).

¹⁶⁶ Epps, *supra* note 8, at 535.

¹⁶⁷ VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

¹⁶⁸ CAL. CIV. CODE § 2225 (West Supp. 1993).

¹⁶⁹ Okuda, *supra* note 28, at 1356. Litigation arose under the New York and New Jersey "Son of Sam" laws, but no other state, nor the federal, "Son of Sam" law had

yet they differ in significant ways. Under the California scheme, only a convicted felon, one who pleads guilty to a felony, or one found not guilty by reason of insanity of a felony committed in California is subject to the law.¹⁷⁰ "Felony" includes any felony as defined by California or United States law.¹⁷¹ In contrast, Virginia's law applies to felonies resulting in bodily harm or death of another.¹⁷² The Virginia Code therefore applies to fewer felons than the California statute and is more narrowly drawn in that respect.¹⁷³ Nevertheless, the California law implies that there must be a victim in order for the proceeds of a criminal's storytelling to be put in trust.¹⁷⁴ The Code requires the Attorney General of California to prove that it is more probable than not that there will be beneficiaries before a court orders imposition of a constructive trust.¹⁷⁵

In Virginia, the attorney for the Commonwealth may file a petition at *any time* after the felon's conviction or acquittal by reason of insanity and after notice has been given to interested parties.¹⁷⁶ A hearing is held, and if the attorney for the Commonwealth shows "good cause," the circuit court in which the petition was filed must order forfeiture of the proceeds of the felon's storytelling.¹⁷⁷ There is a similar provision in the California Code whereby the Attorney General may bring an action in a California superior court asking that a trust be established with the proceeds of a

gone to the courts when the Supreme Court decided *Simon & Schuster*. See *supra* note 52 and accompanying text; *Fasching v. Kallinger*, 546 A.2d 1094 (N.J. Super. Ct. App. Div. 1988) (holding that New Jersey's "Son of Sam" law was not meant to apply retroactively), *cert. denied*, 555 A.2d 623 (N.J. 1989).

¹⁷⁰ CAL. CIV. CODE § 2225(a)(1) (West Supp. 1993).

¹⁷¹ *Id.* § 2225(a)(2).

¹⁷² VA. CODE ANN. § 19.2-368.19 (Michie Supp. 1993).

¹⁷³ Under the California scheme, a white collar criminal and a murderer are both subject to the imposition of an involuntary trust. However, because the California Attorney General must show that it is more probable than not that there are beneficiaries who have potential claims against the trust, there is an implied requirement that there be an ascertainable victim before a court will impose a trust. See CAL. CIV. CODE § 2225(e)(3) (West Supp. 1993). The result of this approach may be that some criminals are being unjustly enriched (those who have no ascertainable victims). See Okuda, *supra* note 28, at 1358-59. However, if the State's interest is in compensating victims and there are no victims, then perhaps the law should not apply. *Id.* at 1359.

¹⁷⁴ See generally CAL. CIV. CODE § 2225(e)(3) (West Supp. 1993).

¹⁷⁵ *Id.* The California involuntary trust statute defines a "beneficiary" as, a person who, under applicable law, other than the provisions of this section, has or had a right to recover damages from the convicted felon for physical, mental, or emotional injury, or pecuniary loss proximately caused by the convicted felon as a result of the crime for which the felon was convicted. *Id.* § 2225(a)(4)(A). If the beneficiary dies, the beneficiary's estate or another person may sue on the beneficiary's behalf. *Id.* § 2225(a)(4)(B)-(C).

¹⁷⁶ VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

¹⁷⁷ *Id.*

felon's story about the crime.¹⁷⁸ The action may be brought "*within six months* after the receipt of proceeds by a convicted felon or six months after the date of conviction, whichever is later."¹⁷⁹ The California statute also expressly provides that the Attorney General prove two things: first, that the proceeds at issue meet the statutory definition of proceeds subject to forfeiture under the involuntary trust provision, and second, that establishing a trust is necessary because there are beneficiaries who could take under the law.¹⁸⁰ If a court finds that these prerequisites are met, it must order imposition of an express trust.¹⁸¹ Thus, both statutes require that a victim exist.¹⁸²

Under both the California¹⁸³ and Virginia¹⁸⁴ laws, the proceeds of a criminal's storytelling that may be reached are those received for the sale of his story. The California and Virginia laws apply to the same types of storytelling mediums.¹⁸⁵ However, the Virginia Code states that the felon's treatment of the crime in a particular work must be an "integral part of the work."¹⁸⁶ Thus, it seems that more works are excluded from the operation of the Virginia Code than are excluded under the California Code, which applies to any "depiction, portrayal, or reenactment of a felony . . . [which is more than] a passing mention of the felony, as in a footnote or bibliography."¹⁸⁷ Yet, the Virginia Code does apply to the mere discussion of the defendant's crime or "an expression of the defendant's thoughts, opinions, or emotions regarding such crime" if it is "an integral part of the work,"¹⁸⁸ whereas the California Code requires the "depiction, portrayal, or reenactment of a felony."¹⁸⁹ Furthermore, a California court considering forfeiture in a particular case¹⁹⁰ might find that

¹⁷⁸ CAL. CIV. CODE § 2225(e)(1)-(2) (West Supp. 1993).

¹⁷⁹ *Id.* (emphasis added).

¹⁸⁰ *Id.* § 2225(e)(3).

¹⁸¹ *Id.*

¹⁸² *Cf.* N.Y. EXEC. LAW § 632-a(1) (Consol. 1983) (requiring automatic forfeiture of the profits of a criminal's storytelling without an independent judicial determination).

¹⁸³ CAL. CIV. CODE § 2225(a)(9) (West Supp. 1993).

¹⁸⁴ VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

¹⁸⁵ *See* CAL. CIV. CODE § 2225(a)(6) (West Supp. 1993) (" 'Materials' means books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind."); VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993) (applying to "a movie, book, newspaper, magazine, radio or television production, or live entertainment [or publication] of any kind . . .").

¹⁸⁶ VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

¹⁸⁷ CAL. CIV. CODE § 2225(a)(7) (West Supp. 1993).

¹⁸⁸ VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

¹⁸⁹ CAL. CIV. CODE § 2225(a)(7) (West Supp. 1993).

¹⁹⁰ *Id.* § 2225(e).

materials which include minimal references to a criminal's felonies are not subject to the provisions of the Code.

Under the California statute, an involuntary trust is set up with the proceeds from the convicted felon's storytelling.¹⁹¹ Virginia takes a similar approach by setting up an escrow fund.¹⁹² In both states the victims, or beneficiaries, are entitled to file actions against the fund, or trust, to receive compensation.¹⁹³

The state holds the monies for five years in both California and Virginia.¹⁹⁴ In Virginia, after the five-year period expires, the remaining monies are put into the Criminal Injuries Compensation Fund.¹⁹⁵ In California, however, the Code does not specify whether the criminal will receive the funds remaining in the trust at the end of the statutory period.¹⁹⁶ The issue of what becomes of the criminal's profits after the victims are compensated is a key factor in the constitutionality of "Son of Sam" laws. Thus, it is imperative to a first amendment analysis to know whether the proceeds will be returned to the criminal or whether they will be paid into a general victims' compensation fund under the California scheme.

The California "Dan White" criminal antiprofit law differs in three other significant ways from the Virginia statute. First, the proceeds placed in an involuntary trust under the California law are available to the victims, or other beneficiaries, less any monies paid to them from the Restitution Fund,¹⁹⁷ restitution paid by the felon to satisfy a court order,¹⁹⁸ or any other money paid by the criminal in satisfaction of a judgment.¹⁹⁹ By using this formula, the California scheme accounts for the fact that the beneficiaries of the law have other means available to them for compensation.

Second, before it can distribute monies to the beneficiaries, a California court must order payment of any outstanding fines, costs borne by the government for the felon's defense, and attorney's fees related to the

¹⁹¹ *Id.* § 2225(b).

¹⁹² VA. CODE ANN. § 19.2-368.21(A) (Michie Supp. 1993).

¹⁹³ *Id.* § 19.2-368.21; CAL. CIV. CODE § 2225(c) (West Supp. 1993).

¹⁹⁴ *See* CAL. CIV. CODE § 2225(b), (e)(3) (West Supp. 1993); VA. CODE ANN. § 19.2-368.21(C) (Michie Supp. 1993).

¹⁹⁵ VA. CODE ANN. § 19.2-368.21(C) (Michie Supp. 1993).

¹⁹⁶ CAL. CIV. CODE § 2225(b), (e)(3) (West Supp. 1993); *but see* Okuda, *supra* note 28, at 1359 ("The court makes final disposition of the trust to the beneficiary. If no beneficiaries file claims against the trust within the five year trust period, the convicted felon receives the trust funds.").

¹⁹⁷ CAL. CIV. CODE § 2225(a)(5)(C)(i) (West Supp. 1993).

¹⁹⁸ *Id.* § 2225(a)(5)(C)(ii).

¹⁹⁹ *Id.* § 2225(a)(5)(C)(iii).

prosecution of the felony.²⁰⁰ Payment of the felon's debts precedes payment of the beneficiaries' claims, but at least ten percent of the proceeds are reserved for the beneficiaries.²⁰¹ Of course, any proceeds remaining after the felon pays the government and his attorneys will be available to the beneficiaries as well.²⁰² Thus, the California statute takes the criminal's pecuniary obligations to the government into account, at the expense of his victims.

The Virginia law, however, puts the needs of the victim first. Whereas the criminal can put as much as ninety percent of the proceeds of his storytelling toward his expenses under the California statute, in Virginia "[n]o more than twenty-five percent of the total proceeds in escrow may be used for [the felon's] legal representation."²⁰³ The escrow fund, however, may be levied upon to pay any fines or costs owed by the felon.²⁰⁴ In this way the interests of the State and the criminal are balanced against the interests of the victims.

Finally, the California law does not require notice to the victims of a crime that monies are available.²⁰⁵ This practice seriously undermines the policy goals of the State in enacting such a law because victims will not be fully compensated if they do not know that a trust exists for their benefit.²⁰⁶ The Virginia law, however, requires the attorney for the Commonwealth to give "notice to the interested parties" before bringing an action for forfeiture against a criminal storyteller.²⁰⁷ Thus, under the Virginia approach, victims are informed that proceedings are underway, and if an escrow fund is established, they are aware of it.²⁰⁸

V. FACTORS TO CONSIDER IN DETERMINING THE CONSTITUTIONALITY OF THE VIRGINIA STATUTE

The original New York "Son of Sam" law was over-inclusive in ways that the Virginia statute is not. Therefore, the Supreme Court's concerns about the breadth of the original New York law are not realized in Virginia's criminal antiprofit provisions.²⁰⁹ First, under the original New

²⁰⁰ *Id.* § 2225(d).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ VA. CODE ANN. § 19.2-368.21(B)(2) (Michie Supp. 1993).

²⁰⁴ *Id.* § 19.2-368.21(A)(2).

²⁰⁵ See generally CAL. CIV. CODE § 2225 (West Supp. 1993).

²⁰⁶ *Id.*

²⁰⁷ VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

²⁰⁸ The unconstitutional New York law also had a notice requirement so that victims were apprised of the existence of the escrow account. N.Y. EXEC. LAW § 632-a(2) (Consol. 1983).

²⁰⁹ See *Simon & Schuster, Inc. v. State Crime Victims Bd.*, 112 S. Ct. 501, 511 (1991).

York scheme, a criminal who contracted to sell the story of his crime had to automatically forfeit his proceeds regardless of whether the person was ever convicted or even formally accused.²¹⁰ The Virginia approach applies only to convicted felons²¹¹ who have done bodily harm to or killed another.²¹² Thus, the Virginia Code defines “defendant” clearly and unambiguously; the definition is neither vague nor overbroad, and there can be no question about those to whom the statutory scheme applies. Second, New York’s original statute pertained to all works by a criminal that included the expression of the criminal’s thoughts and feelings about the crime, no matter how small a part of the entire project.²¹³ The Virginia Code excludes criminals from the operation of the law unless the story of the crime is an “integral part” of the literary or media venture.²¹⁴

Aside from these differences, the Virginia law has some procedural protections which would favor finding the law constitutional. Profits from the story of a crime are not automatically forfeited, but rather the attorney for the Commonwealth must decide to file a petition for an order that the proceeds be forfeited.²¹⁵ Therefore, the parties contracting with a convicted criminal do not have the responsibility for determining which works may be subject to the law. Thus, media entities probably do not run the risk of liability themselves.

Furthermore, “good cause” must be shown, a hearing must be held, and all interested parties must be notified before a court concludes that a criminal should forfeit his profits.²¹⁶ These requirements serve two important functions. First, a criminal is not subject to automatic forfeiture, but rather each case is considered individually and on its own merits. Second, the victims are notified that this avenue is open, giving them the opportunity to testify at the hearing and to sue if the court orders forfeiture. Clearly, a criminal should not be allowed to profit from his crime and a victim should be compensated. The Virginia scheme balances the two interests on a case-by-case basis, protecting both the rights of criminals and those of victims.

²¹⁰ N.Y. EXEC. LAW § 632-a(10)(b) (Consol. 1983). The law applied by its terms to one who admitted to the commission of a crime. *Id.*

²¹¹ The law also applies to those who plead guilty and those who are found not guilty by reason of insanity. VA. CODE ANN. § 19.2-368.19 (Michie Supp. 1993). New York’s law applied to these categories of criminals as well. N.Y. EXEC. LAW § 632-a(10)(b) (Consol. 1983).

²¹² VA. CODE ANN. § 19.2-368.19 (Michie Supp. 1993).

²¹³ N.Y. EXEC. LAW § 632-a(1) (Consol. 1983). Thus, a criminal’s profits were subject to forfeiture if the work contained only one sentence about the crime.

²¹⁴ VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

²¹⁵ *Id.*

²¹⁶ *Id.*

Potential problems, however, inhere in the Virginia criminal antiprofit law. The statute places no restrictions on where the felony must have occurred.²¹⁷ A constitutional analysis by the United States Supreme Court could result in a finding that the law is overbroad in this regard because the Virginia legislature seeks protection of victims outside of Virginia—people who are not within its jurisdiction.

Additionally, after an order of forfeiture is issued, the criminal *and* the media entity must pay over all proceeds due under the contract.²¹⁸ It is not clear whether the person contracting with the felon is responsible for monies already paid to the criminal which he may have spent or may refuse to hand over. In reality, then, the Virginia legislature might not have overcome the problem of “double liability” of the media entity which was encountered under the original New York scheme.²¹⁹

Finally, in Virginia, the money remaining in the escrow fund when the five-year statutory period expires must be paid into the Criminal Injuries Compensation Fund.²²⁰ The goal of compensating a victim with the proceeds of the story of the crime is undermined because funds are pooled in a reservoir for general victim compensation. A criminal has minimal, if any, financial incentive to tell the story of his crime because all proceeds are forfeited regardless of the amount needed to compensate the victim. Furthermore, the law requires only that twenty-five percent of the proceeds be available to the defendant to pay for his legal representation. A chilling effect on speech might therefore result.²²¹

In a challenge to the Virginia law, the Supreme Court should find the Virginia “Son of Sam” law unconstitutional in light of the First Amendment and the decision in *Simon & Schuster*.²²² The Supreme Court in *Simon & Schuster* found constitutional infirmity with the New York scheme because “[i]t single[d] out income derived from expressive activity for a burden the State places on no other income, and it [wa]s directed only at works with a specified content.”²²³ Therefore, the Court concluded, the New York statute was impermissibly content-based.²²⁴ Virginia’s “Son of Sam” law²²⁵ is similarly content-based. Additionally,

²¹⁷ See generally *id.* § 19.2-368.19 to .21.

²¹⁸ *Id.* § 19.2-368.20.

²¹⁹ See N.Y. EXEC. LAW § 632-a(1) (Consol. 1983).

²²⁰ VA. CODE ANN. § 19.2-368.21(C) (Michie Supp. 1993).

²²¹ A criminal may wish to tell his story for several other reasons: (1) because he wishes to compensate his victims; (2) because he wants his side of the story available to the public, perhaps to clear his name; or (3) because he hopes to become famous and wants to be in the public spotlight. These reasons seem far-fetched and unlikely, however.

²²² *Simon & Schuster, Inc. v. State Crime Victims Bd.*, 112 S. Ct. 501 (1991).

²²³ *Id.* at 508.

²²⁴ *Id.*

²²⁵ See VA. CODE ANN. §§ 19.2-368.19 to .21 (Michie Supp. 1993).

the Court found that the New York legislature had compelling interests in compensating victims of crimes and ensuring that criminals did not profit from their crimes.²²⁶ The New York law, however, was not narrowly tailored to meet these interests because it only required forfeiture of those assets related to "storytelling."²²⁷ Virginia's "Son of Sam" law also targets only speech-related assets for forfeiture.²²⁸ There are undoubtedly less restrictive and less ambiguous alternatives available to the Virginia legislature, such as the model proposed by Garrett Epps.²²⁹

VI. A FRAMEWORK FOR THE FUTURE

When faced with a criminal antiprofit law in the future, the Supreme Court could take a number of approaches to the first amendment issue. First, it could decide the validity of the law on a case-by-case basis, applying the strict scrutiny test. Justice O'Connor and the majority took this approach in *Simon & Schuster*.²³⁰ Under her analysis, a state must have a compelling interest and the statute must be narrowly drawn to achieve that end.²³¹ The Court found a compelling interest in compensating victims from the "fruits of the crime."²³² The Court also approved a state's interest in preventing a criminal from profiting from his crimes.²³³ A law which is narrowly drawn to achieve these ends would withstand strict scrutiny. Although it held that New York's "Son of Sam" law was not narrowly drawn, the Court gave no hint as to what a narrowly drawn "Son of Sam" law should look like, or if there could even be such a law. Virginia's statute, as written, does not appear to be narrowly drawn such that it would satisfy the strict scrutiny test.²³⁴

Second, the Court could give broad first amendment protection to criminals by adopting Justice Kennedy's approach.²³⁵ Under his test, the Court should only ask whether a law is content-based.²³⁶ If it is, and the

²²⁶ *Simon & Schuster*, 112 S. Ct. at 509-10.

²²⁷ *Id.* at 510.

²²⁸ See generally VA. CODE ANN. §§ 19.2-368.19 to .21 (Michie Supp. 1993).

²²⁹ Epps, *supra* note 8, at 534-35. See *supra* notes 143-50 and accompanying text.

²³⁰ 112 S. Ct. at 508.

²³¹ See *id.* at 509.

²³² *Id.* at 511.

²³³ *Id.* at 510.

²³⁴ See *supra* notes 157-67, 218-28 and accompanying text.

²³⁵ *Simon & Schuster*, 112 S. Ct. at 512 (Kennedy, J., concurring).

²³⁶ *Id.* at 513 (Kennedy, J., concurring). Justice Kennedy actually focused on the "content-based" issue, but conceded that other questions must also be asked where the compelling interest test is not applied. Those questions include: (1) "whether some other constitutional right is impaired," (2) "whether, in the case of a regulation of activity which combines expressive with nonexpressive elements, the regulation aims at the

speech does not fall within one of the unprotected categories,²³⁷ the law is unconstitutional. It is difficult to imagine a "Son of Sam" law which could survive such a broad first amendment analysis.

In addition to the approaches employed by Justices O'Connor and Kennedy, commentators have posited other precedent to which the Court might look in examining "Son of Sam" laws.²³⁸ The Court could consider the line of cases involving the constructive trust theory.²³⁹ Preventing unjust enrichment constitutes the cornerstone of this approach. Garrett Epps advanced the constructive trust alternative as support for a Supreme Court decision which would uphold the validity of "Son of Sam" laws.²⁴⁰ Epps would base a constructive trust decision in the "Son of Sam" context on *Snepp v. United States*.²⁴¹

Snepp, an ex-CIA case officer, agreed not to reveal any classified information which he had learned while an employee of the CIA.²⁴² He further agreed to let the CIA review anything he wrote prior to publication.²⁴³ Thus, when Snepp wrote a book discussing information about which he agreed not to write, the government claimed that Snepp had breached a contract.²⁴⁴ If a person agrees not to speak about certain things, one would think that he has voluntarily given up his right to free speech under the First Amendment. Moreover, even if the right to free speech was abridged in *Snepp*, the classified information at the core of the case could probably be characterized as speech "calculated or likely to bring about imminent harm"—speech which the government has the power to regulate in spite of the First Amendment.²⁴⁵

The Virginia "Son of Sam" law involves no contract. Rather it imposes a penalty on a criminal who tells and sells the story of his crimes. It applies to indirect profits of a crime. The "Son of Sam" law has a chilling effect on speech by giving the criminal no financial incentive to speak. Furthermore, the "Son of Sam" law does not deal with a category

activity or the expression," and (3) "whether the regulation restricts speech itself or only the time, place, or manner of speech." *Id.* at 514-15 (Kennedy, J., concurring).

²³⁷ Obscenity, defamation, and incitement fall within categories of speech which are not constitutionally protected. *See id.* at 514 (Kennedy, J., concurring).

²³⁸ *See, e.g.,* Epps, *supra* note 8; Okuda, *supra* note 28.

²³⁹ Epps has suggested this as an approach the Court could take in ruling on the constitutionality of criminal antiprofit laws. *See* Epps, *supra* note 8, at 522-24.

²⁴⁰ *Id.*

²⁴¹ 444 U.S. 507 (1980) (per curiam).

²⁴² *Id.* at 507-08.

²⁴³ *Id.*

²⁴⁴ *See generally id.*

²⁴⁵ *Simon & Schuster, Inc. v. State Crime Victims Bd.*, 112 S. Ct. 501, 513 (1991) (Kennedy, J., concurring).

of speech that the Court has allowed states to restrict.²⁴⁶ Therefore, even under the *Snepp* approach, Virginia's "Son of Sam" law might not withstand constitutional attack.

Other cases have upheld the validity of constructive trusts.²⁴⁷ Courts have conceded that constructive trusts are permissible in cases such as *Riggs v. Palmer*.²⁴⁸ In *Riggs*, a sixteen year-old boy murdered his grandfather to prevent him from changing his will.²⁴⁹ The New York court held that the boy should take his legacy impressed with a constructive trust because a murderer should not be allowed to profit from his crime.²⁵⁰

The *Riggs* scenario differs from the situation in which a criminal has his profits subjected to forfeiture because he has written about the story of his crime. *Riggs*-type situations involve the direct profits of a crime in the form of a legacy, bequest, or intestate share. The murder results directly in enrichment of the murderer. On the other hand, in the criminal storyteller context, the profits of the crime are indirect. The criminal does not receive a financial benefit by inflicting bodily harm on or killing another. Rather, the criminal who later tells the story of the crime is the one with whom the law is concerned. Most importantly, only speech-related activities invoke the forfeiture provisions of the "Son of Sam" law. The laws which prevent a murderer from receiving a legacy or bequest from the victim do not implicate speech.

According to Epps, a law that requires a criminal to surrender proceeds obtained in violation of a federal drug law could also have precedential value in convincing the Court to uphold "Son of Sam" laws under a constructive trust approach.²⁵¹ *Caplin & Drysdale, Chartered v. United States*²⁵² involved a law firm which was paid by a drug defendant client with monies subject to relinquishment under a federal law.²⁵³ The Supreme Court, while acknowledging the burden on a criminal's sixth amendment right to counsel, found that the burden was sufferable because of the Government's important interests in raising money for law enforcement, preventing criminals from profiting from their crimes, and making assets available for restitution.²⁵⁴

²⁴⁶ See *supra* notes 133, 237 and accompanying text.

²⁴⁷ Epps, *supra* note 8, at 524-28.

²⁴⁸ 22 N.E. 188 (N.Y. 1889).

²⁴⁹ *Id.* at 188-89.

²⁵⁰ *Id.* at 190. The court observed that "[n]o one shall 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." *Id.*

²⁵¹ Epps, *supra* note 8, at 526-28.

²⁵² 491 U.S. 617 (1989).

²⁵³ *Id.* at 619-20.

²⁵⁴ *Id.* at 629-30.

Again, the Virginia "Son of Sam" law is distinguishable. The federal law at issue in *Caplin & Drysdale* required forfeiture of the direct proceeds of the drug crime—the property and money which the criminal obtained from violating the federal drug laws.²⁵⁵ The Virginia "Son of Sam" law involves the indirect profits of crime—those profits obtained from storytelling about the crime. Although the federal drug law does not restrict speech in any way, the Court acknowledged that it does impose a burden on the sixth amendment right to counsel.²⁵⁶ The Court concluded that one constitutional right is as important as the next and there is no "hierarchy" among rights.²⁵⁷ Nevertheless, the Court held constitutional the federal law demanding relinquishment of the profits of a drug crime.²⁵⁸ This opinion lends support to the argument that "Son of Sam" laws like Virginia's are constitutional.

Okuda has suggested another approach.²⁵⁹ That approach involves application of the test enunciated in *City of Renton v. Playtime Theaters, Inc.*²⁶⁰ to challenges of the constitutionality of "Son of Sam" laws.²⁶¹ In *Renton*, the Supreme Court examined a law that had only a secondary effect on speech but that was not aimed at speech itself.²⁶² The Court held that laws with an indirect effect on speech are constitutional if the government asserts a substantial interest and other means of communication remain open.²⁶³ In applying this test to "Son of Sam" laws, the Court should also consider whether the government has employed the least restrictive means available for meeting the state's interest.²⁶⁴

Although at least one commentator has argued in favor of the constitutionality of "Son of Sam" laws under the "secondary effects" analysis of *Renton*,²⁶⁵ Virginia's "Son of Sam" law should be held

²⁵⁵ See 21 U.S.C. § 848 (1988).

²⁵⁶ *Caplin & Drysdale*, 491 U.S. at 629-30.

²⁵⁷ *Id.* at 628. The Court reasoned that:

[i]f defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal; and forfeiture, or even the threat of forfeiture, may similarly prevent a defendant from enjoying these rights as fully as he might otherwise. *Nonetheless, we are not about to recognize an ant forfeiture exception for the exercise of each such right.*

Id. (emphasis added).

²⁵⁸ *Id.* at 635.

²⁵⁹ Okuda, *supra* note 28, at 1366-68.

²⁶⁰ 475 U.S. 41 (1986).

²⁶¹ Okuda, *supra* note 28, at 1366-68.

²⁶² *Id.* at 1366.

²⁶³ *Renton*, 475 U.S. at 47, 62.

²⁶⁴ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

²⁶⁵ Okuda, *supra* note 28, at 1366-68. In her Comment, Okuda argues that California's

invalid under this test because the statute does not employ the least restrictive means available.²⁶⁶ Traditional tort claims,²⁶⁷ and perhaps a statute similar to New York's revised "Son of Sam" law,²⁶⁸ are less restrictive approaches. Moreover, "Son of Sam" laws generally do not leave other avenues of communication open because they attempt to apply to *all* media outlets.²⁶⁹

VII. CONCLUSION

Under any of the approaches discussed above, the Commonwealth of Virginia, or any state, would be hard-pressed to convince the United States Supreme Court that its "Son of Sam" law is constitutional. Although the Court has allowed states to make in-roads into the protected area of the First Amendment, the current Court seems unlikely to continue that trend. Kennedy's near-absolute protection of free speech and O'Connor's strict scrutiny analysis put the burden on the state to fashion a neutral law for the compensation of victims. Virginia's "Son of Sam" law, as written, is unconstitutional under any analysis.

The Court should adopt Justice Kennedy's approach in *Simon & Schuster, Inc. v. State Crime Victims Board*²⁷⁰ if it must decide the validity of a "Son of Sam" law in the future. A content-based law should be struck down. If the law is content-neutral, Kennedy concedes that other approaches, including the compelling interest test, might be acceptable.²⁷¹

"Dan White" law is constitutional under the *Renton* "secondary effects" analysis. First, she asserts that the state has an interest in compensating victims, preventing a convicted criminal from being unjustly enriched, reducing the burden on society of supporting victims in social programs, giving the victim an opportunity for justice and retribution, and making the criminal aware of the results of his crime. *Id.* at 1367. The California law is narrowly tailored; it applies only to convicted felons, requires victims to prove damages before they will be compensated, and applies to the story of the felony for which the criminal was convicted. *Id.* at 1367-68. In addition, the California scheme does not turn on the speaker's viewpoint. *Id.* at 1368. Okuda further contends that the statute does not limit speech. *Id.* In theory, Okuda concludes, all avenues of communication remain open. *Id.* Furthermore, the law does not prohibit or limit access to the media, and it only operates *after* the criminal has told his story to the media. *Id.*

²⁶⁶ See, e.g., *Schad*, 452 U.S. at 68 (discussing rationale pertaining to standard of review).

²⁶⁷ See, e.g., *supra* note 117 and accompanying text.

²⁶⁸ N.Y. EXEC. LAW § 632-a (Consol. Supp. 1992-93); N.Y. EXEC. LAW § 632-a (Consol. 1983), *repealed by* 1992 N.Y. Laws ch. 618, § 10 (Consol. 1992).

²⁶⁹ See, e.g., *supra* notes 36, 188.

²⁷⁰ 112 S. Ct. 501, 512-15 (1991) (Kennedy, J., concurring).

²⁷¹ See *id.* at 513-14 (Kennedy, J., concurring) (acknowledging the use of the compelling interest test, or one like it, in many first amendment cases, but noting that none of those cases had at issue a content-based law).

Although the state has interests in protecting and compensating victims, less restrictive alternatives are available to meet these concerns. For example, a statute that provides access to all of a criminal's assets would give victims a better opportunity for full compensation. A longer statute of limitations for the tort remedies would also meet victim compensation goals.

The state's concern with preventing criminals from reaping the profits of their crimes could also be met by less restrictive alternatives. A law making a criminal's assets available to his victims would deal effectively with this interest. Increasing the statute of limitations for tort remedies, however, would not be necessary to meet this goal.

The state's interests, while important, have no place in Kennedy's approach because once the Court concludes that a law is content-based, it should strike it down as unconstitutional.²⁷² Under Kennedy's content-based analysis, the criminal's first amendment right to free speech controls. Kennedy opposes ad hoc, case-by-case balancing by the Court, while accepting the limits of the content-based inquiry—namely, that a state may restrict the right to speech on the basis of content where obscenity, defamation, incitement to violence, or other unprotected speech is at issue.²⁷³ Thus, the state can meet its interests within the limits set by traditional first amendment jurisprudence. This solution makes the most sense and is in keeping with first amendment precedents.²⁷⁴

²⁷² The content-based approach is limited. *See supra* note 133.

²⁷³ *Simon & Schuster*, 112 S. Ct. at 514 (Kennedy, J., concurring).

²⁷⁴ Adopting Kennedy's analysis, however, will require a departure from the *Simon & Schuster* holding. *See supra* notes 130-40 and accompanying text.