

“Son of Sam” and His Legislative Offspring: The Constitutionality of Stripping Criminals of Their Literary Profits

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We have seen in recent years a growing demand to recognize the victims' rights and needs. In Canadian jurisdictions this has resulted in the introduction of victims-witness assistance programs that are designed to provide support to a victim of crime throughout the court process. Compensation boards have also been set up to provide financial remuneration to those who have suffered injury or loss at the hands of the perpetrator of the crime. In the United States, however, a more aggressive scheme for providing victim redress has been adopted by a number of the state legislatures. These “Son of Sam” laws, named for the convicted New York killer David Berkowitz, operate to confiscate profits reaped by offenders who choose to recount their criminal exploits.

The author examines the development of these laws in the United States and discusses the advantages and disadvantages of such a scheme in the Canadian legal context. This discussion turns on the proposition that royalty stripping violates the right to freedom of expression, subject to the reasonable limit clause found in section 1 of the Charter of Rights and Freedoms. Three potential arguments under clause 1 are discussed in detail: institutional restrictions necessitated by incarceration; victims' rights to receive compensation; and the principle of unjust enrichment. The author concludes that the “Son of Sam” laws have a disproportionate effect on freedom of expression and that they are not the best vehicle for furthering victims' rights.

Depuis quelques années, nous avons assisté à une demande accrue pour la protection des intérêts et des besoins des victimes d'actes criminels. Au Canada, plusieurs gouvernements ont adopté des programmes d'aide et de soutien pour les victimes appelées à témoigner. De plus, des organismes d'indemnisation ont vu le jour afin d'offrir des compensations financières aux personnes qui ont été victimes de blessures ou de pertes matérielles. Par ailleurs, aux Etats-Unis, un système beaucoup plus agressif afin d'aider pareilles victimes a été élaboré par certains états. Ces lois, surnommées “lois du fils de Sam” d'après le nom du meurtrier new-yorkais David Berkowitz, visent à confisquer les profits réalisés par les criminels qui choisissent de dévoiler leurs activités illicites.

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L'auteur étudie l'élaboration de ces lois aux Etats-Unis et discute des avantages et des inconvénients qui résulterait de l'adoption de lois similaires au Canada. Il aborde la question de savoir si l'enlèvement de royautés violerait le droit à la liberté d'expression garanti par la Charte canadienne des droits et libertés et sujet à la clause limitative prévue à son article 1. Certains des arguments pouvant être développés sous l'article 1 sont étudiés en détail: restrictions institutionnelles requises par l'incarcération, droit de la victime de recevoir compensation et principe de l'enrichissement sans cause. L'auteur conclut que ces lois ont un effet disproportionné sur la liberté d'expression et qu'elles ne sont pas le meilleur moyen afin de faire avancer la cause par les droits des victimes.

1. INTRODUCTION

Since the emergence in the 1930s of victimology as a scholarly and academic field of study,¹ there has been a growing public concern with the plight of victims of crime. It became increasingly apparent that the public law characterization of the criminal process as a battle between state and accused resulted in the relegation of the victim to the role of a mere witness in the process with no recognizable interest in the outcome. In response to this problem, most countries enacted legislation to provide for compensation or reparation to victims. The compensation schemes found in various jurisdictions have different formulations, but two elements are common to all. First, as an adjunct to the sentencing process, convicted offenders may be ordered to pay compensation for property loss and out-of-pocket expenses. Second, if the offender is not apprehended or convicted, there exists state-sponsored compensation administered by government agencies. The provision of compensation from public funds usually allows for awards that are not restricted to property loss but include compensation for more intangible losses such as pain and suffering.

Despite the best intentions of governments, many of these compensation schemes have been roundly criticized as being little more than token efforts to appease victims.² It has been argued that

the state-sponsored schemes are too restrictive in scope and too parsimonious in their awards, and that this problem is aggravated by the fact that in most cases it is futile to seek compensation directly from the offender because most offenders are destitute. In this paper, we will examine the novel approach adopted by many jurisdictions in the United States to facilitate obtaining compensation directly from the offender. In the late 1970s state legislatures became enamoured with the idea of confiscating profits reaped by offenders who chose to write books describing their criminal exploits. The idea was to strip criminals of their royalties and to redistribute these funds to victims.

Affectionately known as "Son of Sam"³ laws, these confiscatory schemes have been applauded by some and condemned by others. The major source of discontent has been the belief that depriving offenders of part of the protective value of copyright in their books will deter criminal authors from writing, and society will lose the valuable criminological and sociological insights that these books are assumed to contain. As might be expected, this belief has crystallized into the constitutional claim that restrictions on publishing these crime stories are a violation of the offender's right to free expression and the public's corresponding right to receive information. There can be little doubt that the marketplace of ideas will be impaired if royalty stripping does effectively deter writing, but this in itself does not require the conclusion to be drawn that these schemes are unconstitutional. As with most constitutional questions, the courts must perform a delicate balancing of competing rights and interests, and in this case the right to free expression collides with public demands that victims be accorded due respect and adequate assistance.

In Canada, the issue of victims' rights has been the subject of significant law reform efforts.⁴ In addition, Parliament has recently

1. For a discussion of the rise of victimology, see R. Elias, *The Politics of Victimization* (Oxford: Oxford University Press, 1986); I. Drapkin & E. Viano, eds., *Victimology* (Lexington: Lexington Press, 1974).
2. See R. Elias, "Community Control, Criminal Justice and Victim Services" in E. Fattah, ed., *From Crime Policy to Victim Policy* (New York: St. Martin's Press, 1986); P. Burns, *Criminal Injuries Compensation* (Vancouver: Butterworths, 1980).

3. This epithet is a reference to the serial killer David "Son of Sam" Berkowitz who's case prompted the New York Legislature to enact the first profit-stripping statute. See discussion in R. Inz, "Compensating the Victims from the Proceeds of the Criminal's Story — The Constitutionality of the New York Approach" (1978), 14 *Colum. J. L. & Social Problems* 93.
4. In 1983 a Federal/Provincial Task Force was set up to report on the status of victims of crime — *Federal Provincial Task Force on Justice for Victims of Crime* (Ottawa: Minister of Supply and Services, 1983). The most signifi-

introduced legislation to confiscate the fruits of crime.⁵ The combined interest in victims' rights and legislative reform designed to ensure that offenders do not profit from their wrongdoing suggests that lawmakers in Canada may be interested in adopting the American "Son of Sam" approach. In light of this possibility, whether remote or impending, this paper will discuss the constitutional obstacles to enacting this type of legislation. The paper will begin by examining the development of these laws in the United States before turning to a discussion of the potential infringement of the Canadian Charter of Rights and Freedoms (the Charter).⁶ On the assumption that a cogent argument can be made that royalty stripping violates the right to free expression, it will be necessary to examine the applicability of the reasonable limit clause found in section 1 of the Charter. Three potential claims will be examined with reference to section 1 of the Charter: that stripping criminals of book profits is a reasonable limit upon the right to free expression because this right is outweighed by (1) institutional restrictions upon the rights of prisoners as necessitated by the exigencies of incarceration; (2) the right of victims to receive compensation for losses occasioned by crime; and (3) the principle of unjust enrichment — that no one should profit from their wrongdoing. It is hoped that this examination will show that Son of Sam laws are ill-conceived and not a welcome addition to the well-founded objective of compensating victims of crime.

2. CRIMINAL AUTHORS AND THE AMERICAN APPROACH

Since the advent of print, there has been no shortage of published crime stories. The publishing industry is eager to pander to our fascination with the dramatic content of crime, and we consume these crime stories with great passion. Our fascination may

stem from something as basic as an inherent human interest in the struggle of good and evil, or the crime story may engage a more subtle and sophisticated interest in trying to understand the nature of defiance and rule-breaking. For whatever reason, stories of crime provide valued entertainment for many.

Since there is a large and available commercial market for the sale of books regarding the exploits of criminals, it is not surprising that many people try to profit from publishing stories of sensational crimes. No one is immune from the lure of profit: in the eighteenth century even prison chaplains could amass considerable profits from publishing the last confessions of criminals awaiting execution.⁷ As would be expected, criminals sentenced to lengthy prison sentences might find it profitable to spend their interminable days flexing new-found literary muscles in the hope of accumulating substantial royalty payments that would be available to them upon release from prison.

In 1977, with the conviction of the notorious serial killer David Berkowitz (also known by the alias "Son of Sam"), the New York legislature was spurred into action when it became known that Berkowitz might collect large profits from a contract he entered into for the publication of his account of his murders. Senator Emmanuel Gold sponsored a bill designed to strip the criminal author of the profits he expected to receive upon publication. The Senator stated:

It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four caliber killer, can expect to receive large sums of money for his story once he is captured — while five people are dead, other people injured as a result of his conduct. This bill would make it clear that in all criminal situations the victim must be more important than the criminal.⁸

Since the initiative taken in New York, over 20 states have enacted laws to prevent criminals from profiting from publication contracts.⁹ Before turning to the mechanics of these statutory

cant development has been the introduction of a bill in Parliament to integrate victims into many aspects of the criminal justice system: Bill C-89, An Act to amend the Criminal Code (victims of crime), 2nd Sess., 33rd Parl., 1986-87-88.

5. Bill C-61, An Act to amend the Criminal Code, the Food and Drugs Act and the Narcotics Control Act, 2nd Sess., 33rd Parl., 1986-87.
6. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B of the Canada Act, 1982, c. 11.

7. P. Linebaugh, "The Ordinary of Newgate and His Account," in J. Cockburn, ed., *Crime in England 1550-1880* (Princeton: Princeton University Press, 1977).
8. Memorandum of Senator Emanuel Gold, 1977 New York State Legislative Annual, p. 267.
9. For complete citations to all existing statutes, see "Publication Rights Agreements in Sensational Criminal Cases: A Response to the Problem" (1983), 68 Cornell L. Rev. 686 at 687, note 6.

schemes, it must be mentioned that the Son of Sam incident was merely a catalyst for the regulation of a problem that had attracted public attention long before the arrival of Son of Sam. In the United States there are fewer restrictions on the form and structure of lawyers' retainers, and many clever attorneys realized that in cases of sensational criminal events they could secure payment of their fees by having the criminal assign his interest in any future publication contract. Whatever the ethical implications of these attorney-client life story fee agreements,¹⁰ it became an accepted practice to use fee contracts that gave the attorney exclusive rights to a client's life story.

Famous examples of these fee contracts are readily found. The convicted murderer of Martin Luther King, James Earl Ray, is known to have directed payment of at least \$40,000 in royalties to his attorneys for the publishing of the story of his crime.¹¹ One member of the Manson family, Susan Atkin, who was convicted of the brutal slaying of Sharon Tate and others, directed payment of \$52,500 to her attorney and \$131,250 to a trust for her son's benefit in exchange for an interview describing her involvement in the murder.¹² The possibility of realizing upon the profits of criminal authors has resulted in American lawyers exploiting this new-found source of wealth.

The recent case in California of the "Skid Row Stabber"¹³ illustrates the dangers of allowing lawyers to encourage clients to turn their crimes into publishing profits. In 1979 Bobby Joe Maxwell was charged with four counts of robbery and ten counts of murder. The indigent accused was only able to obtain the services of private counsel by means of a life story fee contract. Under the contract, the lawyers stood to gain 85 per cent of the net proceeds of any future publishing or film contract. Realizing that the contract

placed them in a position of conflict of interest, in that the lawyers might be seen as compromising the defence in order to increase book sales, the lawyers included in the retainer an express description of the potential conflicts of interest so that the client could effectively make an informed waiver of his right to have a conflict-free attorney. The contract outlined three potential areas of conflict:

1. the lawyers may have an interest to create publicity, which would increase the money that they might get as a result of this agreement, even if this publicity hurt Maxwell's defence;
2. the lawyers may have an interest not to raise certain defences that would question the sanity or mental capacity of Maxwell, because to raise these defences might make this agreement between the lawyers and Maxwell void or voidable by Maxwell;
3. the lawyers may have an interest in having Maxwell convicted and even sentenced to death so that there would be increased publicity, which might mean that the lawyers would get more money as a result of this agreement.¹⁴

If lawyers in America have no shame in admitting it is possible that they will not vigorously oppose the death penalty for their clients in order to realize greater profits from book sales, then, assuming that such disreputable conduct is a product of greed, there can be little doubt that there exists enormous potential for profit from criminal authors. The Son of Sam case was not a unique instance of criminal profiteering but is just the tip of the iceberg. In New York, the Crime Victims Board has already seized advances or royalties in seven cases, with the largest seizure being a sum of \$100,000 paid by Warner Brothers to John Wojtowicz, whose 1972 bank robbery became immortalized in the film *Dog Day Afternoon*. This money was ultimately distributed to the four bank employees who had been held hostage during the incident, to defence lawyers

10. For a discussion of the ethical implications of these arrangements, see L. Higgins, "Ethics — A Proposal for Judicial Condemnation of Attorney-Client Life Story Fee Arrangements" (1984), 6 West New England L. Rev. 851.

11. J. Rothman, "In Cold Type: Statutory Approaches to the Problem of the Offender as Author" (1980), J. of Crim. Law & Criminology 255, note 2.

12. *Ibid.*

13. The accused was called the "Skid Row Stabber" after being charged with the deaths of 10 skid row derelicts in Los Angeles between Oct. 1978 and Jan. 1979. See discussion in Higgins, note 10, above, at pp. 853-857.

14. These are the exact terms of the contract as taken from *Maxwell v. Superior Court of Los Angeles Cty.*, 639 P. 2d 248 at 261 (1982). The upshot of the case was that the accused had knowingly waived his right to complain about his lawyer's conflict of interest.

and to the offender's former wife.¹⁵ Stripping criminals of literary profits can evidently uncover sizeable sums that can be redistributed to victims.

Most jurisdictions that have adopted a statutory scheme for the stripping of literary profits have closely followed the original plan advanced in New York.¹⁶ The common features of these schemes are as follows:

1. anyone who contracts with a person accused or convicted of a crime with respect to the re-enactment of the crime by way of book, magazine, record or film, or with respect to the expression of the accused's thoughts or feelings about the crime by way of book *etc.*, is required to deposit the proceeds from such contract with an administrative agency that is responsible for administering victim compensation schemes;
2. any funds deposited are held in escrow for five years;
3. the administrative agency is required periodically to post notices in newspapers of general circulation to notify victims that these funds may be available;
4. any victim who has obtained judgment in a civil proceeding against the offender may apply to the Board for release of money held in the escrow account to satisfy the judgment.

It should be noted that, if an accused person is acquitted, most jurisdictions require that the funds in the escrow account be returned to the offender; however, some jurisdictions contain a puzzling provision that allows for this money to be forfeited to the state.¹⁷ In addition, most jurisdictions allow for the convicted offender to apply periodically for release of some of the money for the purpose of paying attorney fees or to satisfy orders of compensation or restitution that are made at the time of sentencing. It is interesting to note that courts have interpreted these schemes to extend any statutory limitations that victims face with respect to

civil suits that are brought against the offender. By judicial construction, any statutory limitation periods begin to run only from the time the escrow account is established and not from the usual starting point of when the cause of action has arisen.¹⁸

Any divergencies in these statutes concern the mode of distributing the funds in the escrow account at the end of the five-year period. There are three basic methods of distribution.

1. Type 1 — All victims with outstanding civil judgments are given a *pro rata* share of the proceeds and any remaining funds are returned to the offender.¹⁹
2. Type 2 — Funds are distributed to various different classes of individuals in addition to distribution to victims. In Florida, for example, funds are distributed as follows: 25 per cent to dependents of the accused; 25 per cent to victims and their dependants to the extent of their damages as ascertained by the Court; 50 per cent to the state for its costs in prosecuting and incarcerating the offender; any remaining funds are then returned to the offender.²⁰
3. Type 3 — Funds are distributed to victims exclusively, or to different classes of individuals or groups in designated shares, and any remaining funds are forfeited to the state.²¹

It is important to distinguish between these three types of distribution because they may have distinct constitutional implications. If the temporary deprivation of access to publishing profits is a violation of freedom of speech, it is necessary under both American and Canadian jurisprudence to determine whether there is a pressing or compelling state interest that outweighs the societal interest in free expression. The type 1 mode of distribution is evidently directed exclusively towards assisting victims, and one would then balance victims' rights against free speech. Under types 2 and 3, it is unclear whether the legislation is premised upon

15. S. Roberts, "Criminals, Authors and Criminal Authors," March 3, 1987, N.Y. Times Book Review, pp. 1, 34.

16. N.Y. Exec. Law, ss. 620-635 (McKinney 1982).

17. See, *e.g.*, Ala. Code, s. 41-9-82.

18. *Barrett v. Wojtowicz*, 404 N.Y.S. 2d 829 (1978).

19. See, *e.g.*, N.Y. Exec. Law, s. 632-a.

20. Fla. Stat., s. 944.512 (Supp. 1979).

21. See, *e.g.*, Ariz. Rev. Stat. Ann., s. 13-4202(D)-(E) (1978) and Ala. Code, s. 41-9-82 (Supp. 1981).

victims' rights, or whether this concern is only incidental to a notion of forfeiture based upon the principle that no one should be permitted to profit from the wrong. If the latter interpretation is right, then the issue is far more confusing, as it would be necessary first to ask whether literary profits are profits from crime or whether they are too indirectly connected to the crime to fall within the principle. If the connection is determined to be direct and not conceptually remote, then it would be necessary to balance the common-law principle of unjust enrichment against free speech.

Before one embarks upon an analysis of the constitutionality of these schemes, it should be noted that from one perspective this entire issue is just a tempest in a teapot. In actuality these schemes do not significantly modify the standard civil process for collecting upon outstanding judgments. In order to trigger application of these schemes, the victim still must successfully litigate his or her claims, and the establishment of an escrow account merely facilitates execution of the judgment by freezing the offender's assets for a period of five years. It is, however, misleading to assert that the schemes are mere enhancers of ordinary civil procedure. At the outset one must question why the decision to render execution of civil judgments more effective is limited only to assets or profits reaped from publishing. The establishment of escrow accounts should logically apply to any windfall funds that the offender may receive while incarcerated. Undoubtedly, the notoriety of life story fee contracts has highlighted the obvious fact that offenders can reap enormous profits from the decision to publish, but this does not justify the singling out of publishing profits as the only profits to be made readily available to victims.

The second anomaly that runs counter to the characterization of the scheme as a mere civil process enhancer is the fact that the state, under some statutory formulations, is an actual beneficiary of the profits. It is surely a rare occurrence for the state to have any outstanding cause of action against an offender as a result of the commission of the crime. The Son of Sam laws are thus not merely technical reformulations of the rules of civil procedure. The critical inquiry must revolve around whether profit stripping is tantamount to the silencing of an individual who deserves to be punished but who nonetheless remains entitled to contribute to the marketplace of expressive activity.

3. FREEDOM OF EXPRESSION

The hallmark of any parliamentary democracy is the right of citizens to engage freely in debate and other expressive activities. This trite observation must be accompanied by another equally trite one: that the freedom to engage in expressive activities is not absolute and there will be numerous occasions when an overriding public interest will justify restrictions on the right to speak. The focus of this inquiry will be on the right of criminals to publish materials describing their criminal exploits and the corresponding right of citizens to receive this information. The controversial Son of Sam laws not only affect the right of criminals to speak and the right of citizens to receive, but also potentially infringe the right of the press to collect and disseminate information freely. This latter right will not be discussed, but it can be safely said that analyzing the public interest in freedom of the press will engage the same balancing considerations employed in analyzing the public's free speech or expression interests.

Two distinct issues must be addressed in the analysis of whether literary profit stripping violates section 2 of the Charter. First, one must examine if the content of the speech deserves constitutional protection. Content-based distinctions²² carry the danger of allowing state prioritization of our right to speak. However, it must be recognized that there are classes of speech that have traditionally been excluded from constitutional protection, and we need to know if profit-motivated descriptions of criminal infliction of injuries are exempt from protection. Assuming that these autobiographical crime stories are deserving of protection, one must then address the second question: whether the scheme to redistribute publishing profits impairs the exercise of the right to free expression. It must be remembered that these schemes do not prohibit speech directly; rather, they merely make the exercise of speech less profitable. Does the removal of the potential for profit deter the exercise of our rights, or is it merely an incidental burden that the Charter will tolerate?

Although the analysis need not begin with an examination of American jurisprudence, Canadian courts struggling in this for-

22. See discussion in G. Stone, *Content Regulation and the First Amendment* (1983), 25 *William and Mary L.Rev.* 189.

mative period of Charter jurisprudence have found it helpful to refer to and incorporate American case law.²³ At least at the level of rhetoric, the Americans have elevated the right of free speech to the position of a “preferred freedom”.²⁴ The courts purport to safeguard this right zealously, believing that infringement of free speech will surely bring about the downfall of the republic. The First Amendment is designed “to secure the widest possible dissemination of information from diverse and antagonistic sources”²⁵ and to “assure a society in which uninhibited, robust and wide open debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish.”²⁶ Whether or not the American courts have in practice extended the fullest protection to this right, anyone who seriously contends that Son of Sam laws would violate the prescriptions of the Charter must account for the fact that the American courts have not yet impugned the integrity of these literary profit-stripping schemes.

It is surprising that few people have attacked the constitutionality of these laws, and in fact the only case that seriously discusses First Amendment concerns reached the conclusion that these laws are constitutionally valid. In *Fasching v. Kallinger*,²⁷ the New Jersey Superior Court upheld the constitutionality of a “type 2” New Jersey statute²⁸ requiring the depositing of publication

profits from the book *The Shoemaker* in an escrow account. The book is an examination of the background and behaviour of the convicted murderer Joseph Kallinger.²⁹ The publisher contracted with Kallinger to provide him with 12 per cent of the profits received by the author in exchange for Kallinger’s provision of information to the author. Kallinger in turn assigned his rights to the contract to his attorney.

The defendant argued that the scheme violated the First Amendment in that it inhibited the publication of legitimate studies of the criminal mind by removing the economic incentive that may prompt criminals to co-operate in providing necessary information. The court’s response focused on the proposition that the statute does not directly and completely prohibit speech as it is a reasonable “time, place and manner” restriction.³⁰ Those writers who want to publish studies of the criminal mind are still permitted to do so by ensuring that the story does not constitute a re-enactment of a particular crime, or by ensuring that any re-enactment does not engage the services of the offender. If the writer finds these alternatives unacceptable, he or she may still publish the works with the only restriction being that the offender will have to forfeit his proceeds.

The Court further reasoned that, if the restrictions were tantamount to an impairment of the right, then the impairment was justified on the basis that the state had a compelling interest in preventing criminals from profiting from crime and that this statute was narrowly drawn to achieve this pressing objective. In addition, the Court believed that this was a case of mere commercial speech that would not be afforded the full protection of the First Amendment. This decision was ultimately reversed on other grounds and the appellate court found no reason to turn to the First Amendment considerations.³¹

Books and films that describe the background and behaviour of offenders are undoubtedly properly classified as forms of ex-

23. For cases approving of resort to American jurisprudence, see *R. v. Carter* (1982), 39 O.R. (2d) 439 at 441, 2 C.C.C. (3d) 412 at 415 (Ont. C.A.); *R. v. Therens*, [1983] 4 W.W.R. 385 at 405, 5 C.C.C. (3d) 409 at 428 (Sask. C.A.); *Hunter, Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*, [1984] S.C.R. 145, 41 C.R. (3d) 97 (*sub nom. Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*). It should be noted that the First Amendment to the United States Constitution refers to freedom of speech and the Canadian Charter refers to freedom of expression; presumably our formulation suggests a more expansive right, but we will proceed on the assumption that there is no significant distinction in the formulation of the rights.

24. R. McKay, “The Preference for Freedom” (1959), 34 N.Y.U. L. Rev. 1182.

25. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976).

26. *Ibid.*, p. 93, note 127.

27. 510 A. 2d 694 (1986).

28. N.J. Stat. Ann. Title 52:4B-26. The New Jersey statute contains a “type 2” mode of distribution in that the funds are distributed in the following priority: 1) to satisfy the civil judgments of victims; 2) to satisfy a court order of restitution; 3) to offset reasonable costs incurred by the board in administering the statute.

29. For a discussion of the *Kallinger* case, see A. Cartwright, “Crime Doesn’t Pay: Authors and Publishers Cannot Profit From A Criminal’s Story” (1987), 55 Cincinnati L.Rev. 831.

30. *Ibid.*, p. 838.

31. Note 27, above.

pression; however, many believe that freedom of expression is limited to freedom of useful expression. Although the constitutional guarantee does not draw a distinction between useful and useless expression, this distinction has been grounded on the view that rights of free speech are political rights that must be respected in order to maintain an open society based upon representative democracy. Accordingly, if the speech in question does not serve the purpose of furthering political debate, then it is a form of speech deserving less, or even no, protection. As Meiklejohn says:

The principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage. . . . The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal — only, therefore, to the consideration of matters of public interest.³²

Accordingly, the American courts have been comfortable in assigning priorities to various forms of speech: political speech deserves the fullest protection, non-political speech deserves less protection, and speech devoid of social value is altogether excluded from the First Amendment.³³ The view that free speech interests merely serve political interests has been criticized as failing to take into account the true nature of freedom and its importance in developing respect for the autonomy and self-actualization of the individual.³⁴ A less restrictive view of the purpose of free expression sees four potential values in protecting rights of expression:

The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political,

32. A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Oxford University Press, 1965), pp. 27, 79.
33. For example, the United States Supreme Court has excluded certain classes of speech from the protection of the Constitution: “the lewd and obscene, the profane, the libelous, and the insulting or fighting words”: *Beauharnais v. Illinois*, 72 S. Ct. 725 (1952). An example of a class of speech deserving some protection, but not the full panoply, is commercial speech: see note 47, below.
34. T. Scanlon, “A Theory of Freedom of Expression” (1972), 1 *Phil. & Pub. Aff.* 204.

decisionmaking, and (4) as maintaining the balance between stability and change.³⁵

The position of Canadian courts to date is difficult to ascertain. What they say seems to indicate a preference for the view that free expression is concerned with political expression, but what they have actually done is extend the protection to a variety of expressive messages. In 1951 Rand J. noted on behalf of the Supreme Court of Canada that “freedom in thought and speech and disagreement in ideas and beliefs, *on every conceivable subject*, are of the essence of our life” [emphasis added].³⁶ Despite the breadth of this statement, the Ontario Court of Appeal is correct in asserting that “the Supreme Court of Canada appears to have adopted the rationale that freedom of expression is essential to the working of a parliamentary democracy”.³⁷ In the most significant post-Charter case that discusses freedom of expression, the *Dolphin Delivery* case,³⁸ the Supreme Court of Canada approved of earlier judicial comments linking free speech with “matters of public policy and public administration”³⁹ and “political expression of the primary condition of social life”.⁴⁰

Aside from this rhetoric, it is illuminating to note that in the *Dolphin Delivery* case the Court actually held that secondary picketing engages free expression interests because “picketers would be conveying a message which at a very minimum would be classed as persuasion, aimed at deterring customers from doing business with the respondent”.⁴¹ The position that free expression extends far beyond political debate is reflected in Canadian decisions that have found Charter violations in laws that prohibit prostitutes from communicating with customers,⁴² and in the Criminal Code prohibition on the dissemination of obscene material.⁴³ Some of these

35. Emerson, “Towards a General Theory of the First Amendment” (1962-63), 72 *Yale L.J.* 877 at 878.
36. *Boucher v. R.*, [1951] S.C.R. 265 at 288.
37. *R. v. Zundel* (1987), 58 O.R. (2d) 129 at 148, 31 C.C.C. (3d) 97 at 116 (Ont. C.A.).
38. *R. W.D.S.U., Loc. 580 v. Dolphin Delivery Ltd.*, [1987] 1 W.W.R. 577.
39. Quoting from *Switzman v. Elbling*, [1957] S.C.R. 285 at 326.
40. *Ibid.*, p. 306.
41. *Dolphin Delivery*, note 38, above, at p. 588.
42. See, e.g., *R. v. Skinner* (1987), 58 C.R. (3d) 137 (N.S. C.A.); *R. v. Jahelka* (1987), 58 C.R. (3d) 164 (Alta. C.A.).
43. In *R. v. Red Hot Video Ltd.* (1985), 45 C.R. (3d) 36 (B.C. C.A.), the Court

cases have found that the Charter violation is a reasonable limit under section 1 of the Charter,⁴⁴ but the consensus appears to be that “freedom of expression is a right of *everyone* and is not limited to debate of high principles or policy”.⁴⁵

If the Charter protects solicitation by prostitutes, then it must *a fortiori* extend to crime stories authored by criminals. It must be beyond dispute that these stories or studies are not without redeeming social value, and that they contribute to valuable sociological explorations. As one writer has noted:

As a general matter, the publication of such works is desirable for a number of reasons. They may communicate ideas and information to the public that will inform debate on important questions. They may provide information that law enforcement agencies and criminologists would find useful in combatting or studying crime. They may have the effect of discouraging others from engaging in criminal conduct. They may have literary or other artistic or cultural value. The process of creation may have a rehabilitative effect on the authors. The fact that any particular work fails to accomplish any or all of these objectives is not a reason for discouraging publication of the entire genre.⁴⁶

The New Jersey Superior Court was probably well aware of these social benefits, but it was unduly affected by the fact that the criminal author would in most cases be more concerned with publishing profits than with these social values. Whether or not this is a correct assumption, it appears to have led the Court to conclude that these publications fall into the category of commercial speech, and thus are deserving of less protection. In the United States the last decade has seen a judicial debate concerning the proper approach to valuing commercial speech, and the conclusion has been reached that this form of speech is deserving of some lesser degree of protection.⁴⁷ A similar debate has emerged in Canada: the Ontario Divisional Court has concluded that commercial speech is excluded from protection,⁴⁸ while the Quebec Court of Appeal

assumed that obscene publications fell within the scope of s. 2 of the Charter.

44. *Jahelka*, note 42, above, and *Red Hot Video*, note 43 above.

45. *Skinner*, note 42, above, at p. 159.

46. J. McCamus, “Recovery of the Indirect Profits of Wrongful Killing: The New Constructive Trust and the Olson Case” (1985), 20 E.T.R. 165 at 173.

47. For a brief discussion of the American case law, see S. Braun, “Should Commercial Speech Be Accorded Prima Facie Constitutional Recognition Under the Charter of Rights and Freedoms?” (1986), 18 Ottawa L. Rev. 37.

48. *Re Klein and L.S.U.C.* (1985), 50 O.R. (2d) 118.

recently held that “there is no rule of interpretation that would exclude commercial expression from freedom of expression”.⁴⁹

There is no need to engage in a lengthy analysis of this debate, because the characterization of crime stories as commercial speech is wholly misconceived. This characterization is premised upon the belief that an expressive message becomes commercial speech if the sole motivation behind the expression is one of profit. Surely the profit motive is irrelevant to the proper characterization of the content of the speech. The critical factor in assessing the content of speech is the public’s right to know — a right that is assessed independently of the motivation of the speaker. The public is entitled to information that may be of value to it, and this entitlement is an implied component of the right to free expression:

The obverse of the concept of freedom of expression is the right of the person to receive the message expressed; the right of the public and individuals to know what is being expressed by others with a message to communicate applies equally to the democratic political process . . . and as in my opinion to the pit and thrust of economic competition in a free market economy.⁵⁰

The potential for reaping profit from expression does not convert expression into a less-protected commercial enterprise because “no weight is ascribed to the fact that petitioners have profited from the sale of publications” and “commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment”.⁵¹ A form of expression only becomes commercial expression that is deserving of less protection when the message is “one which has as its purpose the proposal of an economic transaction. . . one which promotes or attempts to entice a specific decision on the part of the recipient of the message to agree to an economic exchange of money in return for goods or services”.⁵² Commercial expression is a form of adver-

49. *Irwin Toy Ltd. v. Québec (A.G.)* (1986), 32 D.L.R. (4th) 641n.

50. *Klein*, note 48, above, at p. 129. The U.S. Supreme Court confirmed that free speech includes a right to know in *Stanley v. Georgia*, 89 S. Ct. 1243 (1969).

51. *Ginzburg v. U.S.*, 383 U.S. 463 at 474 (1966), quoted in *Irwin Toy*, note 49, above, at p. 665.

52. R. Sharpe, “Commercial Expression and the Charter” (1987), 37 U. of T. L.J. 229 at 230.

tising or solicitation, but it does not embrace stories or studies published with a view to profit.

The presence of the profit motive does, however, relate to another aspect of the analysis of free expression. Assuming that this form of speech is covered by section 2 of the Charter, one must ask whether a literary profit-stripping scheme infringes upon this right. It must be remembered that the legislation does not prohibit the criminal from disseminating information concerning his behaviour; it merely makes this enterprise less profitable. The U.S. Supreme Court has commented that "freedom of speech presupposes a willing speaker",⁵³ and one must question the willingness of a speaker who will speak only if he is given a guarantee of profit. In an ideal world, all speakers would surely wish to contribute their thoughts regardless of profit, but it is unrealistic to disregard the strong influence of commercial motivations that exist in this world and to restrict the right of free speech to those who are motivated solely by noble aspirations.

It is obvious that "artistic or cultural expression very often has a commercial purpose",⁵⁴ and that the denial of an opportunity to profit will deter many speakers from engaging in the often arduous enterprise of expressing themselves. In a case questioning the constitutionality of the Ontario Censor Board, an argument was advanced that a statutory scheme of prior restraint and censorship is acceptable because it applies only to those who seek to exhibit films in public for profit. The response of the Court is worth quoting in its entirety:

Counsel for the Crown argued that the limits are reasonable since they curtail only the freedom of those who wish to exhibit films to the public or for gain. He points out that any one can make films, show them privately, rent them and sell them. Hence, it is said the freedom of expression is only curtailed to the extent that a person wishes to exhibit film to the public or for profit. It would be fair to assume that the prime purpose of making films is to exhibit them to the public. If a film-maker cannot show his film to the public there is little point in making it. Moreover, the profit motive cannot be a valid reason to prevent a film-maker from showing his work, for one who shows film for profit can have no less freedom of expression than one who does so not for profit. The extent of freedom of expression cannot

53. *Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council*, 425 U.S. 748 at 756 (1976).

54. *Irwin Toy*, note 48, above, at p. 652.

depend on that, for there is nothing wrong with making a profit from one's art or one's ideas.⁵⁵

It may be argued that profit-stripping schemes do not have as their purpose the restriction of free speech, but the Supreme Court of Canada has made it perfectly clear that "both purpose and effect are relevant in determining constitutionality".⁵⁶ If the effect of removing the potential for profit is to deter publication, then the scheme is unconstitutional. The relevant question is whether the right is unduly burdened, and the Supreme Court has aptly noted that "it matters not... whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable".⁵⁷ Restrictions on amounts of money that can be spent on expressive activity have been recognized as unconstitutional.⁵⁸ Surely the converse is equally true: restrictions upon the amount of money that can be earned through expressive activity unduly burden free speech. It would be difficult to verify statistically the deterrent impact of Son of Sam laws, but it would be counter-intuitive to assert that the laws do not create any disincentive to publishing. American publishers have expressed their dissatisfaction with the operation of these laws, and there is at least one documented example of a criminal author postponing the publication of her book as a direct result of these laws.⁵⁹

It thus appears that these laws do run counter to the guarantee of free expression, and the next inquiry requires an examination of

55. *Re Ont. Film & Video Appreciation Soc. and Ont. Bd. of Censors* (1983), 41 O.R. (2d) 583 at 591 (Ont. Div. Ct.), affirmed 45 O.R. (2d) 80 (Ont. C.A.).

56. *R. v. Big M Drug Mart* (1985), 18 D.L.R. (4th) 321 at 350 (S.C.C.).

57. *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 at 759, 30 C.C.C. (3d) 385 at 418 (*sub nom. Edwards Books and Art Ltd. v. R.*). In a similar vein, the U.S. Supreme Court has commented that "freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference": *Bates v. Little Rock*, 361 U.S. 516, 523 (1960).

58. *Nat. Citizens' Coalition Inc./Coalition Nationale des Citoyens Inc. v. A.G. Canada*, [1984] 5 W.W.R. 436 (Alta. Q.B.); *Buckley v. Valeo*, 424 U.S. 1 (1976).

59. The Scarsdale Murderess, Jean Harris, has been advised to hold off publishing her account of the murder: see S. Clark, "The Son of Sam Laws: When the Lunatic, the Criminal, and the Poet are of Imagination all Compact" (1983), 27 St. Louis U. L.J. 297, 222; Roberts, note 15, above, at p. 35.

whether the restriction on the right is a reasonable limit under section 1 of the Charter. Before turning to this issue, we should note in passing the irony of the conclusion that a denial of profit is an unconstitutional restriction on speech. The ability to profit from one's literary labours is an incidental but inextricable part of the protection provided by copyright laws that guarantee the author the "sole right to produce or reproduce the work".⁶⁰ By concluding that a stripping of literary profits is an unconstitutional burden upon free speech, we have implicitly elevated copyright protection to constitutional status; we move towards the American position that "copyright is the engine of free expression".⁶¹ The irony of this development is that copyright has traditionally been viewed as standing in an irreconcilable tension with the right to free expression. Allowing an author to possess exclusive rights to his or her labour may encourage creative endeavours; however, the existence of a monopoly over the dissemination of information is contrary to the public's right to receive and know. This tension has been mediated in copyright law by the development of doctrines such as fair use, or fair dealing, and the idea/expression dichotomy.⁶² The upshot of a ruling that Son of Sam laws violate the constitution is a strengthening of the protection of copyright, and this strengthening may be justified partially on the basis of the public's right to receive information concerning crime, notwithstanding the traditional concern that copyright may sometimes jeopardize the free flow of information to the public. In analyzing the constitutionality of Son of Sam laws, we are faced with the anomaly that the public's right to know is presented as a justification for strengthening copyright protection, even though this right to receive information has more traditionally been seen as a reason for limiting the scope and protection of copyright.

60. Copyright Act, R.S.C. 1970, c. 30, s. 3.

61. D. Shipley, "Copyright & The First Amendment After Harper and Row v. Nation Enterprises" (1986), Brigham Young U. L. Rev. 983 at 1024.

62. See H. Hoberman, "Copyright and the First Amendment: Freedom or Monopoly of Expression" (1987), 14 Pepperdine L. Rev. 571; for a Canadian case in which the doctrine of fair dealing is discussed in the context of a Charter challenge, see *R. v. James Lorimer & Co.* (1984), 77 C.P.R. (2d) 262 (Fed. C.A.).

4. SECTION 1 OF THE CHARTER AND THE JUSTIFICATIONS FOR PROFIT STRIPPING

Once it is established that Son of Sam laws do violate the Charter, it is incumbent upon the Crown to prove that this limitation upon the right of free expression is a "reasonable limit that is demonstrably justified in a free and democratic society". The Supreme Court of Canada has clearly established the test for a showing that an infringement is justified:

Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Secondly, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.⁶³

Once this test is pruned of its redundancies, it is apparent that there are two major concerns that must be addressed. First, the Court must engage in a balancing exercise to determine if the state objective outweighs the violated right. If the objective is of greater importance, it will be upheld if, and only if, the legislative scheme to implement the objective is narrowly drawn to achieve the stated purpose. The critical question is then "what alternative measures for implementing the objective were available to the legislators when they made their decisions".⁶⁴ With this framework in mind, we will examine three possible justifications for profit-stripping: (a) the status of being convicted of crime entails a corresponding loss of rights; (b) unjust enrichment; and (c) victims' rights.

(a) Collateral Consequences of Conviction

Confiscation of literary profits falls historically within the powers that states have exercised to confiscate the property of convicted felons. Two well-accepted claims have been advanced to

63. *Edwards Books & Art*, note 57, above, at p. 768 (S.C.R.), p. 425 (C.C.C.).

64. *Skinner*, note 42, above, at p. 160.

justify this scheme. First, it was accepted that the prisoner forfeited his entitlement to rights ordinarily held by citizens. Second, in addition to this loss of status, it could be said that the institutional exigencies of incarceration required that most rights be suspended or bestowed at the discretion of the prison administration. These collateral consequences of conviction, which operate above and beyond the designated punishment of incarceration, have come under attack in the past two decades, with the result that one's status as prisoner has been held not to outweigh one's right to free expression.

Our penal heritage includes not only barbarous punishment, but also a notion of civil death⁶⁵ that resulted in a corresponding loss of political rights, the right to inherit or bestow inheritances, and the loss of various legal rights including the right to sue.⁶⁶ Attendant upon conviction for a capital offence was the practice of attainder, under which the offender forfeited all of his property to the King. By the end of the nineteenth century the general forfeiture of property upon conviction was abolished in Canada and England.⁶⁷ All that remained were specific and discrete forfeitures that were triggered by proof of designated prerequisites (for example, forfeiture of any conveyance proved to be used in the transportation of narcotics⁶⁸).

The abolition of civil death did not result in the elevation of the prisoner to the status of citizen with his or her full panoply of rights. Lawmakers still operated on the assumption that prisoners remained "slaves of the state"⁶⁹ and, when prison litigation began to flourish in the United States in the 1950s, the courts at first re-

sponded by simply deferring to the decision of penal administrators. This deference eventually crystallized into the "hands-off" doctrine.⁷⁰ The Canadian judiciary followed the lead of American courts. They developed the position that they would not review decisions made by prison administrators that affected substantive rights of prisoners. The attitude of the Canadian courts was reflected in the following pronouncement by the Ontario Court of Appeal:

Since his right to liberty is for the time being non-existent, all decisions of the officers of the Penitentiary Service with respect to the place and manner of confinement are the exercise of an authority which is purely administrative, provided that such decisions do not otherwise transgress rights conferred or preserved by the Penitentiary Act.⁷¹

In other words, the classic position on prisoners' rights was that they retained only rights that were specifically preserved by statute; all other rights were forever abandoned during incarceration. However, in the United States, the due process revolution of the Warren court in the 1960s had a significant impact upon prisoners' rights, and slowly but surely the courts began to oversee the decisions of prison administrators. In fact, every facet of prison administration eventually came under constitutional scrutiny, and the hands-off doctrine was replaced by an activist stance on the part of the judiciary. Under the "totality of circumstances" doctrine,⁷² the courts closely monitored prison conditions to determine if they constituted cruel and unusual punishment. If any violations were detected, the courts were not reluctant to order affirmative relief that extended as far as requiring the prisons to construct new buildings, despite the fiscal pressures that state legislatures claimed as an obstacle to constitutional compliance.⁷³

65. See, M. Damaska, "Adverse Legal Consequences of Conviction" (1968), 59 *J. of Crim. L., Criminology and Political Science* 351; J. Gobert and N. Cohen, *Rights of Prisoners* (Colorado Springs: McGraw-Hill, 1981), para. 2.01. The province of Quebec retained a form of civil death until finally abolished in 1971: S.Q. 1971, c. 84, s. 13.

66. Ironically, civil death also included immunity from lawsuit, which would defeat the claims of victims.

67. In England, the State ceased the practice of forfeiture of the convicted felon's property in 1870 with the enactment of 33 & 34 Vict. c. 23, and in Canada the concept of "corruption of blood" was abolished with the enactment of our first Criminal Code in 1892.

68. Narcotics Control Act, R.S.C. 1970, c. N-1, ss. 10-11.

69. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt) 790 at 796 (1871).

70. Gobert and Cohen, note 65, above, para. 1.02.

71. *R. v. Institutional Head of Beaver Creek Correctional Camp*, [1969] 1 O.R. 373 at 379, 2 D.L.R. (3d) 545 at 551 (Ont. C.A.).

72. See Robbins and Buser, "Punitive Conditions of Prison Confinement" (1977), 29 *Stan. L. Rev.* 893; Forman, "The Cruel and Unusual Punishment Proscription: Evolving Standards of Decency" (1973), 19 *Loyola L. Rev.* 81; Collins, "The Defence Perspective in Prison Conditions Cases," in Robbins, ed., *Prisoners and the Law* (1985). Collins comments that "the totality of prison conditions approach gave the bench license to evaluate virtually every aspect of the prison, even though specific areas would be of no constitutional significance if they were evaluated alone" (at 7-5).

73. See, e.g., Collins, note 72, above, at 7-4 to 7-5; *Holt v. Sarver*, 309 F. Supp. 362 at 385 (1970).

With respect to First Amendment rights, the courts operated upon the new assumption that these rights were retained and could only be curtailed upon a showing of institutional exigencies:

In the first amendment context a corollary of this principle is that a prison inmate retains those first amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analysed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.⁷⁴

Accordingly, the denial of the right of a prisoner to receive information or mere correspondence, or to correspond or write with a view to publication, could be justified only if the state could show that this denial was absolutely necessary for institutional security or if the exercise of the right would be counter-productive to the rehabilitation of the prisoner.⁷⁵

Once again, the Canadian courts followed the lead of the Americans. In the pre-Charter jurisprudence, the Supreme Court of Canada established that decisions of prison administrators were subject to judicial review,⁷⁶ and that inmates retained all civil rights except those expressly or implicitly removed by statute.⁷⁷ The advent of the Charter further strengthened the status of prisoners as rights-bearing citizens, and the position that rights may only be curtailed on the basis of institutional necessity now appears well entrenched:

Moreover, simply because remanded inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the

considerations underlying our penal system. . . . [T]he maintaining of institutional security and preserving [of] internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights.⁷⁸

The focus of inquiry has now changed so that state officials bear the burden of justifying Charter violations with respect to offenders. The recent flurry of right-to-vote cases for prisoners⁷⁹ indicates that it is now improper merely to assert that the loss of the right is a collateral consequence of conviction: it must be shown that the right to vote cannot be exercised because it will jeopardize institutional security. Similarly, a prohibition on the publication of books by inmates can be justified only if it raises security problems or is counter-productive to inmate rehabilitation. Surely the passive and reflective nature of writing does not engage these dangers; rather, it must contribute to security and rehabilitation.

Of course, the Son of Sam laws do not in themselves prohibit writing; they merely prohibit the reaping of profit. Perhaps it could be argued that allowing inmates to accumulate wealth will jeopardize security by engendering jealousy among poorer inmates and will eventually lead to incidents of robbery and extortion within the prison. This is unpersuasive because regulations exist that require funds received by an inmate to be placed in an "inmate trust fund", and such funds can only be accessed if the prison administration is convinced that "the payment is calculated to assist in the reformation and rehabilitation of the inmate".⁸⁰ To accommodate the needs of institutional security, the prison administrators are required to act as custodians of the prisoner's wealth. Even in this limited position of control, there is judicial authority for the proposition that the administrators cannot violate the Charter in their decisions concerning the disposition of funds accumulated by inmates.⁸¹

74. *Pell v. Procunier*, 417 U.S. 817 at 822 (1974).

75. See Gobert and Cohen, note 65, above, at para. 4.05. In this section, the authors discuss cases dealing with prisoners' writing for publication. For the most part, inmates have been allowed to write and publish; however, there are examples given of institutions that have prohibited writing entirely, presumably on the basis that the writing is considered anti-rehabilitative because it may glorify or justify the author's crimes.

76. *Martineau v. Matsqui Institution Disciplinary Bd.*, [1980] 1 S.C.R. 602, 13 C.R. (3d) 1.

77. This proposition emerges implicitly from the case of *Solosky v. R.* (1979), 50 C.C.C. (2d) 495 (S.C.C.), in which the Supreme Court placed restrictions upon the power of prison officials to censor inmate correspondences.

78. *Maltby v. A.G. Sask.* (1982), 2 C.C.C. (3d) 153 at 173 (Sask. Q.B.).

79. See *Re Jolivet* (1983), 7 C.C.C. (3d) 431 (B.C. S.C.); *Badger v. Manitoba (A.G.)* (1986), 39 Man. R. (2d) 107, 27 C.C.C. (3d) 158 (Man. Q.B.), affirmed 29 C.C.C. (3d) 92, 39 Man. R. (2d) 230 (*sub nom. Badger v. Manitoba*) (Man. C.A.); *Levesque v. Canada (A.G.)* (1985), 25 D.L.R. (4th) 184 (Fed. T.D.).

80. Penitentiary Service Regulations, C.R.C. 1970, vol. xiii, c. 1251, s. 32.

81. *Henry v. Commissioner of Penitentiaries*, [1987] 3 F.C. 420 (Fed. T.D.).

In summary, a literary profit-stripping scheme cannot be justified on the basis of the status of the criminal author. In another context, the Federal Court has sensibly indicated that it is improper to thwart the ability of convicted offenders to earn a livelihood;⁸² the prisoner is not a slave of the state, nor should he or she be a complete dependant of the state. Allowing the prisoner to gain self-sufficiency through a legitimate vocation is one of the best ways of ensuring that this individual will succeed in reintegrating himself into society upon release.

(b) Unjust Enrichment

The underlying premise of literary profit stripping may be to give effect to the common-law principle that no one should profit from their wrongdoing. The proposition is easily stated:

No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong . . . or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.⁸³

The most common application of this principle has been seen in cases disallowing a murderer to claim any benefits flowing to him under the victim's will.⁸⁴ Parliament intends to give statutory recognition to this principle through its proposed amendments to the Criminal Code allowing for a stripping of all assets acquired through the commission of designated crimes.⁸⁵

Where an inheritance or other benefit accruing from a pre-existing legal obligation between wrongdoer and victim is involved, or where the legislature prevents the retention of fruits of crime, there is a direct causal link between the wrongful act and the resultant benefit. In the context of a Son of Sam law, the connection between the wrong and the benefit is attenuated: interposed between the wrong and the benefit is the lawful act of the criminal in writing or contributing to writing, and, in fact, the benefit reaped is

more directly connected to the literary efforts of the criminal. Of course, there can be little doubt that the expectant profits from publishing are in most cases realized solely as a result of the public notoriety of the crime, and, in the absence of the intentional infliction of injury upon a victim, the criminal would have likely had little success in the highly competitive publishing industry.

The case law dealing with succession to property upon wrongful death draws a distinction between "rights dependent on and rights independent of the criminal act".⁸⁶ In the context of these profit-stripping schemes, this distinction is critical. There is nothing problematic in denying an author the full protection of copyright where the copyright owner's anticipated gain would flow from an illegal act,⁸⁷ but re-enacting a crime in literary form is a legal activity. If we allow the principle that no one is to profit from wrongdoing to apply where there is an attenuated connection between the wrongful act and the benefit, we end up doing indirectly what cannot be done directly. As has already been shown, criminals are no longer subject to a general civil disability upon conviction, and "it might be suggested that the disabling of a criminal from generating profit by subsequent and different conduct conflicts with the policies underlying the abolition of attainder and forfeiture".⁸⁸

The drawing of causal connections is a hazardous enterprise, since a great deal depends upon the subjective perspective of the observer. At a minimum, it could be said that the criminal's wrongful act is a necessary condition for the realization of subsequent profit, in that the publication would not have come into existence but for the crime. However, not all necessary conditions can be considered in the determination of what constitutes the cause of a given phenomenon: it would be the height of absurdity

82. *Litwack v. National Parole Bd.* (1986), 26 C.C.C. (3d) 65 (Fed. T.D.).

83. *Riggs v. Palmer*, 115 N.Y. 506 at 511-512 (1889).

84. See discussion in Fridman and McLeod, *Restitution* (Toronto: Carswell, 1982), pp. 561-564; Goff and Jones, *The Law of Restitution*, 3rd ed. (London: Sweet and Maxwell, 1986), pp. 624-631.

85. Note 5, above.

86. Goff and Jones, note 84, above, at pp. 628-629.

87. See, e.g., *Aldrich v. One Stop Video Ltd.* (1987), 13 B.C.L.R. (2d) 106 (B.C. S.C.), in which the court denied a remedy for copyright infringement of obscene material; see also, *Snepp v. U.S.*, 100 S. Ct. 763 (1980), in which the court ordered that the profits from a publication concerning the author's employment with the C.I.A. were to be impressed with a constructive trust, because the author published contrary to his contractual obligations with the C.I.A..

88. McCamus, note 46, above, at p. 169.

for a fire marshal to report to the press that a fire was caused by the existence of oxygen and the presence of wood. Before the principle of unjust enrichment can override the right of the criminal to free expression, we must be able to say with some degree of certainty that his profit is a direct consequence of his crime.

Consider the recent Canadian case of the serial killer Clifford Olson. In 1981 the R.C.M.P. had reason to believe that Olson was responsible for the deaths of 11 missing children. There was a paucity of evidence and the police had yet even to recover the missing bodies. In order to bring this case to a close and to resolve the uncertainty of the parents of the missing children, the R.C.M.P. arranged to pay \$100,000 to Olson's dependants in exchange for information relating to the whereabouts of the children. After the conviction of Olson, the parents of the murdered children brought an application to recover the \$100,000, claiming unjust enrichment. The application was granted and the judge imposed a constructive trust upon the money for the benefit of the parents.⁸⁹ The decision was premised upon the principle that no one should be able to claim a benefit accruing from their criminal acts.

On appeal, the B.C. Court of Appeal concluded that this was not an appropriate case for applying a constructive trust as a remedy for unjust enrichment.⁹⁰ The Court held that four requirements need be present for the invocation of this remedy: (1) an enrichment; (2) a corresponding deprivation; (3) an absence of any juristic reason for the enrichment; and (4) a causal connection, that is, a clear link between the contribution and the disputed assets.⁹¹ The trial judge believed that it was not necessary to show some commensurability between the plaintiff's loss and the criminal's gain, but the Court of Appeal disagreed:

In meeting that requirement, the plaintiffs must show that they were deprived when the funds were paid to McNeney. . . . It is clear on the facts of this case that the payment by the R.C.M.P. to McNeney was not made as compensation for the deaths of the children. As I have indicated, it was authorized by the Attorney-General primarily to obtain evidence to convict Olson of the murders of the children. The payments to McNeney did not deprive the plaintiffs of money which, if it had not been paid to

89. *Rosenfeldt v. Olson*, [1985] 2 W.W.R. 502, 20 E.T.R. 133 (B.C. S.C.).

90. *Rosenfeldt v. Olson*, [1986] 3 W.W.R. 403 (B.C. C.A.).

91. *Ibid.*, pp. 407-408.

McNeney, would properly have been payable to the plaintiffs. Thus the payment to McNeney did not result in any corresponding deprivation to the plaintiffs.⁹²

The same logic applies to the publication of crime re-enactments. It cannot be said that the criminal is being paid as compensation for the crime, nor can it be said that the victims are deprived of money to which they are directly entitled. However, despite the causation difficulties, there is admittedly something disconcerting or even abhorrent about the criminal profiting from his literary description of his deeds. Even so, assuming that the causal problem is dismissed as overly formalistic, one must still contend with the balancing problem of whether the principle of unjust enrichment outweighs the right to free expression. The following argument cannot be lightly dismissed:

While such profit does not appeal to one's sensibilities as particularly praiseworthy, neither is the problem of a sufficient magnitude to qualify as one of the gravest abuses, endangering paramount interests [which] give occasion for permissible limitation when First Amendment rights are involved.⁹³

The principle that no one should profit from their crime is one of variable application. It allows the Court to employ its equitable jurisdiction to prevent an obvious miscarriage of justice. It is a question of balancing equities,⁹⁴ and, as such, it is difficult to apply the principle across the board to all cases in which the criminal decides to write about his or her exploits. The injustice attending blanket application of the principle has been given legislative recognition in England in a statute that allows for exemption from the rule even in cases of wrongful death and inheritance.⁹⁵ Abstractly

92. *Ibid.*

93. B. Wand, "Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech" (1979), 54 *Indiana L.J.* 443, 459.

94. See *Hardy v. Motor Insurers' Bureau*, [1964] 2 All E.R. 742 (H.L.). At 750-751, Lord Diplock elaborates upon the maxim *ex turpi causa non oritur actio* by commenting:

[T]he court's refusal to assert a right, even against the person who has committed the anti-social act, will depend not only on the nature of the anti-social act but also on the right asserted. The court has to weigh the gravity of the anti-social act and the extent to which it will be encouraged by enforcing the right sought to be asserted against the social harm which will be caused if the right is not enforced.

95. Goff and Jones, note 84, above, at pp. 626-627.

stated, the maxim accords with one's intuitive sense of justice, but its application cannot be divorced from the particular facts of any given case. A Son of Sam law is an overinclusive response that is not narrowly tailored to the problem of unjust enrichment. The law would apply equally to a book that graphically details every moment of the crime in every chapter, as well as a book in which there is only a fleeting reference to the crime. The law further applies equally to a book that glorifies the crime and one in which the criminal author soundly condemns his prior conduct. This overinclusive coverage is far from the necessary balancing of equities that is required for invocation of the principle.

In a recent decision of the Supreme Court of Canada, it was held that the principle that no one should profit from wrongdoing could not operate in disregard of the principle of the presumption of innocence.⁹⁶ If this concern for preventing unjust enrichment does not have sufficient weight to oust the presumption of innocence, then, quite apart from the problems of causation and overinclusion, how can it be said that it is weighty enough to override the right to free expression? The balancing of principles and the weighing of competing interests do not admit of mathematical precision, but, in this case, all considerations point in favour of upholding the constitutional right.

c) Victims' Rights

On November 6, 1987, the Minister of Justice, Ray Inatyshyn, explained at a press conference that the government was determined to increase the legislative protections of victims 'because the victim of crime is often a forgotten person in our criminal justice system'.⁹⁷ Much ink has been spilt in the past decade over the plight of this forgotten participant in the criminal justice system⁹⁸ resulting in numerous recent reforms. How the

victim happened to become an invisible participant is not entirely clear, but it is true that the machinery of justice added insult to injury by excluding the victim from the process.

Historically, all crimes were indistinguishable from torts. The emergence of a conception of crime as a state concern did not initially impair the ability of the victim to seek compensation in the criminal proceedings. In fact, the fundamental premise of prosecution of crime in England was that it was to be initiated and brought to completion by the complainant, and the notion of public prosecution by state officials that began officially in the late nineteenth century was viewed as an exception to the rule of private prosecution.⁹⁹ Eventually prosecution by state officials became the norm, but the lingering belief that the system was premised upon private prosecution blinded the state to the fact that, slowly but surely, the victim was being squeezed out of all consideration. This development should be contrasted with the situation on the Continent, where it was readily accepted that prosecution by the state was the proper response to crime. The open acceptance of the exclusion of the victim from the prosecutorial process forced the state to develop other mechanisms for victim satisfaction. In France, for example, there developed the practice of the *action civile*, in which the victim was allowed to join his civil claim to any ongoing state prosecution.¹⁰⁰

The enactment of Son of Sam laws is another response to the plight of victims. These laws are designed to supplement existing compensation schemes by ensuring that the criminal's windfall publishing profits are not dissipated and are thus made readily available to satisfy the civil judgments of victims. If the state purports to justify the infringement of free expression rights on the basis of the compelling and pressing interest in assisting victims, it is important to note that this justification will only apply to a "type 1" mode of distribution, in which the victims have exclusive rights to the funds existing in the escrow account, with any remaining funds

96. *R. v. Fleming*, [1986] 1 S.C.R. 415, 25 C.C.C. (3d) 297.

97. R. Cleroux, "Sweeping Reforms Proposed in Payments to Crime Victims," 6 Nov. 1987, *The Toronto Globe and Mail*, p. 2.

98. For sampling of the literature, see Elias, note 1 above; Fattah, note 2 above; *Victims' Right's Symposium* (1983-84), 11 *Pepperdine L. Rev.* 1-182.; J. Hagan, *Victims Before the Law: The Organizational Domination of Criminal Law* (Toronto: Butterworths, 1983); E. Ziegenhagen, *Victims, Crime and Social Control* (New York: Praeger, 1977); B. Galaway & J. Hudson, eds., *Perspectives on Crime Victims* (St. Louis: C.V. Mosby Co., 1981).

99. For a brief description of the evolution of the role of the public prosecutor, see Law Reform Commission of Canada, *Private Prosecutions* (1986), pp. 33-37.

100. P. Campbell, "A Comparative Study of Victim Compensation Procedures in France and The United States" (1979-80), 3 *Hastings Int'l and Comparative L. Rev.* 321 at 323-332.

being returned to the offender. Any other mode of distribution that allows other creditors, or the state itself, to share in the distribution of proceeds cannot be justified on the basis of the pressing state concern with victim assistance.

At the outset, one must question the need for a profit-stripping scheme in the light of existing compensatory schemes. At the present time in Canada, it is possible for victims to apply at the time of sentencing under section 653 of the Criminal Code for compensation for loss or damage to property. In addition, under section 446.2 of the Code, the Court may order the restitution of property obtained by the commission of the offence if such property is "before the Court"; for example, if it has been lawfully seized during investigation. These provisions are significantly limited, since awards are limited to property loss and the Court is precluded from awarding compensation for "pain and suffering" or "injured feelings".¹⁰¹ In addition, the criminal court will not entertain applications for compensation if the claim is disputed or unduly complex.¹⁰²

Realizing the limited applicability of these supplementary sentencing provisions, most provincial jurisdictions have enacted victim compensation schemes that allow victims to apply for compensation, whether or not the offender has been apprehended and successfully prosecuted. The scheme in Ontario allows for compensation for injury or loss up to an amount of \$25,000.¹⁰³ Not only is it extremely rare for a victim to receive the maximum award, but any award is to be decreased in light of any other benefit or compensation received,¹⁰⁴ and in light of the Board's assessment of the victim's behaviour "that may have directly or indirectly contributed to his death or injury".¹⁰⁵ Despite the best intentions of the governments, most compensatory schemes have been condemned as inefficient and limited vehicles for compensation.¹⁰⁶ Some com-

mentators have gone so far as to suggest that these compensation schemes are mere political palliatives that mask the state's lack of concern for victims.¹⁰⁷

It is unfair to cast aspersions upon state efforts to assist victims in this way, since compensation schemes are merely a small part of official responses to a victim's needs. In addition to compensation schemes, there are victim-witness programs, social service referral programs, crisis intervention programs, victim advocacy programs and victim-offender mediation programs.¹⁰⁸ Recently Manitoba passed legislation creating a victim's Bill of Rights¹⁰⁹ to ensure that victims are notified of developments in the prosecution and are afforded limited rights of participation in the process. At a minimum, it can be said that the state is sincere in its efforts to assist, but, as might be expected, it is unwilling to invest needed funds to transform its sincere wishes into effective programs. If funding is the major obstacle to effective assistance, then there is all the more reason for the state to tap into the windfall publishing profits of criminals.

The importance of the state objective of compensating victims cannot be gainsaid. As the Law Reform Commission of Canada has commented:

Recognition of the victim's needs underlies at the same time the larger social interest inherent in the individual victim's loss. Thus, social values are reaffirmed through restitution to victims. Society gains from restitution in other ways as well. To the extent that restitution works towards self-correction, and prevents or at least discourages the offender's commitment to a life of crime, the community enjoys a measure of protection, security and savings. Depriving offenders of the fruits of their crimes or ensuring that offenders assist in compensating victims for their losses should assist in discouraging criminal activity.¹¹⁰

The compelling interest in compensating victims has been noted in most jurisdictions, to the extent that in 1983 the Council of Europe enacted the European Convention on the Compensation of Victims of Violent Crime to ensure that all signatory nations estab-

101. *R. v. Groves* (1977), 17 O.R. (2d) 65, 39 C.R.N.S. 366 (Ont. H.C.); *R. v. Farley*, [1976] W.W.D. 128 (Man. C.A.).

102. *R. v. Zelensky*, [1978] 2 S.C.R. 940 at 963-964, 41 C.C.C. (2d) 97 at 113; *R. v. O'Reilly*, Ont. C.A., June 21, 1984.

103. Compensation for Victims of Crime Act, R.S.O. 1980, c. 82, as am. S.O. 1986, c. 37.

104. *Ibid.*, s. 17(3).

105. *Ibid.*, s. 17(1).

106. Note 2, above.

107. Elias, note 2, above.

108. Elias, note 2, above, at pp. 297-299; Federal/Provincial Task Force, note 4, above, at pp. 75-81.

109. Justice for Victims Act, S.M. 1986, c. J40, C.C.S.M. J40.

110. Law Reform Commission of Canada, *Restitution and Compensation* (1974), pp. 7-8.

lished minimum requirements to meet the needs of victims.¹¹¹ The government of Canada has recently escalated its efforts to assist victims by announcing its intention to inject some 16 million dollars into provincial compensation schemes, and to enact legislation that requires offenders, upon sentencing, to pay a fine surcharge that will be deposited in a provincial fund set up for victim compensation.¹¹² The compelling state objective may be praised by all, but is it of sufficient weight to allow for the violation of freedom of expression?

It might be argued that this praiseworthy objective cannot thwart the guarantee of constitutional rights because the rights of victims are not constitutionally enshrined¹¹³ and surely a well-entrenched constitutional right outweighs a mere entitlement to compensation. This is a specious argument because the balancing that must be undertaken under section 1 of the Charter does not presuppose a weighing of commensurate constitutional rights. There may be cases in which a section 1 analysis will require a balancing of constitutional rights (for example, freedom of the press under section 2 versus the right to a fair trial under section 11(d)), but, in most cases, what is contemplated by the section 1 limitation upon rights is the balancing of rights as offset by well-recognized and approved state objectives. In examining the constitutionality of random police inspections of cars at spot checks (for example, the R.I.D.E. (Reduce Impaired Driving Everywhere) program), the courts posit as the pressing state objective the maintenance of highway safety, and this objective is accepted despite the absence of any well-entrenched right of owners and drivers of automobiles.¹¹⁴

A derivation of the argument that victims' rights are more properly characterized as mere entitlements is the argument that

111. See Council of Europe, *Explanatory Report on the European Convention on the Compensation of Victims of Violent Crime* (Strasbourg: Council of Europe, Publishing Section, 1984).

112. Note 4, above.

113. Two cases have drawn significant conclusions from the exclusion of the victim from the terms of the Charter: see *Chartrand v. Quebec (Min. of Justice)* (1986), 55 C.R. (3d) 97 (Que. S.C.); *Hamilton v. R.* (1986), 30 C.C.C. (3d) 65 (B.C. S.C.).

114. See *R. v. Ladouceur* (1987), 59 O.R. (2d) 688, 57 C.R. (3d) 45 (Ont. C.A.); *Iron v. R.* (1987), 55 C.R. (3d) 289 (Sask. C.A.).

compensatory awards to victims are made *ex gratia* and that there is no obligation on the state to provide such awards. Accordingly, it would be anomalous to impair constitutional rights solely to render effective an imperfect obligation. Once again, this argument misses the mark because most state objectives, such as maintaining highway safety, are not obligatory undertakings. In any event, a cogent counter-argument can be made that victim assistance is a state obligation because the state has a duty to protect its citizens from criminal injury:

One of the primary and most important duties of government is to provide for the physical safety of those under its jurisdiction, and, failing that, for the successful prosecution of those who infringe on that safety. Similarly, one of the most important rights of all inhabitants of a given political entity is to receive protection. . . . While the government cannot do the impossible and should not be considered to be an insurer, it should be held responsible in attempting to fulfill its duties of protection and prosecution.¹¹⁵

The proper resolution of the balancing of the right to free expression and the right to compensation for crime is problematic, and, no doubt, reasonable people will strike the balance differently. In my view, we need not resolve this issue because the Son of Sam laws do not satisfy the other requirements of section 1 of the Charter as a result of disproportionality and the availability of less restrictive means to achieve the state objective. First, one must question why it is that publishing profits have been singled out as the only source of funds to be made available to victims. Publishing profits may be a likely source of revenue, but there is no reason why the legislation should not demand that all persons who contract with an incarcerated offender be required to deposit the funds in the escrow account for the benefit of victims.

Second, one must recognize that the entire legislation is premised upon a successful civil suit by the victim. Son of Sam laws do not purport to create a new cause of action, nor do they allow victims access to funds without first showing their entitlement through a successful suit. In effect, the legislation is merely providing a mechanism for enforcing judgments out of a fund generated

115. R. Aynes, "Constitutional Considerations: Government Responsibility and the Right Not to be a Victim" (1983-84), 11 *Pepperdine L. Rev.* 63 at 115-116.

by the exercise of free speech rights. One must therefore inquire into whether existing enforcement mechanisms are deficient in protecting the rights of victims. The mechanisms in place under the Rules of Practice may have noticeable deficiencies,¹¹⁶ but the provisions for seizure and sale and garnishment of wages¹¹⁷ are at least adequate against a debtor who is not indigent. Of course, the motivation for creating Son of Sam laws has been the realization that most offenders are indigent; yet there are offenders who may happen upon windfall profits later in life.

The ordinary civil process for executing judgments against debtors who are penniless, but who have future potential for profit, is seriously flawed. Creditors may be able to make use of *Mareva* injunctions,¹¹⁸ and there is case law suggesting that the Attorney General may obtain an injunction on behalf of a victim restraining the offender from dissipating current assets.¹¹⁹ However, once again, these mechanisms are only effective against existing funds, and for potential sources of wealth in the future the creditor must rely upon periodic examination of the debtor¹²⁰ to determine if there are any changes in his wealth that may be subject to execution. The procedure is completely "hit and miss" and is an ineffective method for securing victim compensation.

The current problems in enforcing judgments may justify a special procedure for a special class of creditor, the victim of crime. However, it is possible to achieve the objective of effective victim compensation without triggering the constitutional problems inherent in Son of Sam legislation. This can be done by adopting the notification requirements already present in the impugned legisla-

tion, so that anyone contracting with an incarcerated offender must notify the court or an administrative board of the contract, and, in turn, the victim will be notified of the potential source of funds. If the legislature believes that there is still the danger of funds being dissipated, notwithstanding the notification, then the ordinary methods of execution can be supplemented by requiring the contracting party to deposit all funds in an escrow account. The escrow account still poses a constitutional problem with respect to publishing profits. However, the section 1 Charter argument, based upon the compelling objective of assisting victims, should be sustained if the funds in the escrow account are derived from all types of contracts, to forestall the contention that the establishment of an escrow fund has a disproportionate impact upon individuals exercising their rights of free expression.

5. CONCLUDING OBSERVATIONS

Many people may dismiss Son of Sam laws as simply a necessary evil in a country such as the United States, where crass commercialism is rampant, and where any person with initiative can profit from the most despicable endeavours. Such naïveté cannot be taken seriously. The rise of the criminal as successful literary figure may have been accelerated in the United States due to the presence of the life story fee contract; but the serial killer as literary hero is not a product of any particular time or place. The great success of Roger Caron's book, *Go Boy*, and of works detailing the exploits of Peter Demeter or Helmut Buxbaum,¹²¹ indicates that there is a substantial market for criminal authors. It can be noted in passing that members of society are not innocent and passive observers of the injustice of criminals profiting from publication. Society is an active accomplice to this injustice, which would not occur if we restrained our appetite for consuming stories that sordidly describe crimes and other cruelties.

This paper has, it is hoped, shown that any attempts by lawmakers to redistribute publishing profits for the benefit of victims is

116. For a discussion of some of the problems relating to enforcement of debts, see Ontario Law Reform Commission, *Report on the Enforcement of Judgement Debts & Related Matters* (1981).

117. Rules of Civil Procedure, O. Reg. 560/84, s. 60.07 (seizure and sale), s. 60.08 (garnishment).

118. For cases detailing the preconditions for the use of this special interlocutory injunction, see *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.); *Aetna Financial Services Ltd. v. Feigelman*, [1985] 2 W.W.R. 97 (S.C.C.); see also, D. McAllister, *Mareva Injunctions*, 2nd ed. (Toronto: Carswell, 1987).

119. *A.G. Ontario v. Stranges* (1984), 46 O.R. (2d) 452, 12 C.C.C. (3d) 455 (Ont. H.C.); affirmed 47 O.R. (2d) 348, 13 C.C.C. (3d) 575.

120. Note 117, above, s. 60.18. The Rules of Practice allow for one examination of the debtor per year (or more with leave of the court).

121. G. Jonas, *By Persons Unknown: The Strange Death of Christine Demeter* (Toronto: Macmillan of Canada, 1977). Immediately after the conviction of Helmut Buxbaum for the murder of his wife, three books appeared in the market: Chip Martin, *Buxbaum: A Murderous Affair* (1986); T. Bissland, *Buxbaum* (1986); H. Bird, *Conspiracy to Murder* (1986).

subject to constitutional infirmity in Canada. Such schemes cannot be justified on the basis that prisoners are not competent to be rights-bearers, because it is quite clear that the protection of the Charter does not end at the prison gate. Similarly, no justification can be found in the laudable objectives of compensating victims or denying offenders the profits of crime. Both these justifications fall short of being reasonable limits prescribed by law, because they both suffer from the flaw of having a disproportionate impact on the right of free speech. Perhaps it may be argued that, standing alone, each justification is flawed, but that the synergistic combination of both should cure whatever flaw is inherent in either standing alone. It may be argued that publication profits that cannot be considered an unjust enrichment, because of a remote causal connection between wrongdoing and profit, may still be stripped on the basis that the state has a pressing obligation to make the victim whole, and that any profits that cannot be properly channelled to victims may still be forfeited by falling back upon an unjust enrichment claim. This argument raises the novel and suspect constitutional proposition that two flawed justifications for infringement become magically transformed into one coherent and flawless justification.

Before victims of crime jump on the bandwagon calling for restrictions on the ability of the criminal to profit from publications of re-enactments, they should remember that:

The scrupulous and the just, the noble, humane and devoted natures, the unselfish and the intelligent, may begin a movement — but it passes away from them. They are not leaders of a revolution. They are its victims.¹²²

The advancement of Son of Sam laws as a vehicle for furthering victims' rights has the potential for making the compensated victim a victim of another kind. By deterring the dissemination of valuable insights into the behaviour of dangerous individuals, all victims are denied the opportunity of having information made available that will help them understand what led to their victimization in the first place.

122. The words of Joseph Conrad as quoted in W.H. Auden and L. Kronenberger, *Aphorisms: A Personal Selection* (Harrisonburg: Penguin, 1985) p. 310.