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BETWEEN THE DEVIL AND THE DEEP BLUE SEA: CRIME VICTIMS' DILEMMA AFTER *Simon & Schuster, Inc. v. Members of the New York Crime Victims Board*, 112 S. Ct. 501 (1991).

Michele C. Meske

Abstract: In *Simon & Schuster, Inc. v. Members of the New York Crime Victims Board*, the Supreme Court held that a statute, New York's "Son of Sam" law, that allowed crime victims to reach the proceeds of their victimizers' media reenactments of the criminals' wrongful acts violated the First Amendment. By invalidating the statute, the Supreme Court eliminated the only presently available means to prevent criminals from profiting from their crimes and exploiting their victims. This Comment examines the origins of this problem and proposes that courts use restitution's common law doctrines to prevent criminals who sell their stories from profiting at the expense of their victims' suffering.

"By the law of nature it is fair that no one become richer by the loss and injury of another."¹

David Berkowitz, the notorious "Son of Sam" killer, terrorized New York City for over a year with random shootings of young women and their escorts, leaving six people dead and seven wounded.² In response to the public outrage expressed over reports that David Berkowitz had been offered large sums of money for the rights to his story, New York enacted its seminal "Son of Sam" law.³ The law was designed, in part, to prevent David Berkowitz and others like him from profiting from their heinous acts.⁴

1. DIG. 50.17.206 (Pomponius, Various Readings 9).

2. Martha A. Miles, *Gunman, Who First Struck in 1976, Killed Six and Wounded Seven*, N.Y. TIMES, Aug. 11, 1977, at D17.

3. N.Y. EXEC. LAW § 632-a (McKinney 1982 and Supp. 1992). The statute provides:

Every person . . . contracting with any person . . . accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise . . . be owing to the person so accused or convicted or his representatives. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representative.

Id. § 632-a(1).

4. See *Children of Bedford, Inc. v. Petromelis*, 573 N.E.2d 541, 544 (N.Y. 1991), cert. granted, judg. vacated, and remanded, 112 S. Ct. 859 (1992).

New York's law states that whenever any person or other legal entity contracts with a criminal⁵ to produce any media reenactment⁶ of the criminal's crime,⁷ the contracting party is required to turn over any money owed to the criminal for such reenactment to the Crime Victims Board.⁸ The Board holds the money in an escrow account for the benefit of the criminal's victims. The victim must win a civil judgment against the criminal in order to have a claim to the funds.⁹

The New York legislature intended to serve two purposes with the law. First, the legislature sought to recognize victims' rights to be compensated and be free from exploitation.¹⁰ Second, the legislature wanted to implement the widely-held belief¹¹ that a person should not profit by committing a wrong. When criminals sell the stories of their crimes, they are exploiting their wrongs against their victims for gain.¹² New York's legislature, and forty-three other legislatures that followed its lead, designed "Son of Sam" laws to prevent such injustice.¹³

The Supreme Court ruled, however, that the "Son of Sam" law violated the First Amendment, because the law was a content-based disincentive on speech, not narrowly tailored to achieve any compelling state interest.¹⁴ After the Supreme Court's invalidation of the New York law, the future of other "anti-profit" laws seems dim. If society wants to protect crime victims from exploitation when their criminal

5. A criminal covered by the statute is "any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which he has not been prosecuted." N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1982).

6. See *supra* note 3.

7. Section 632-a does not apply to victimless crimes. See *Petromelis*, 573 N.E.2d at 548.

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

9. *Id.*

10. "[T]he victim must be more important than the criminal." 1977 NEW YORK LEGISLATIVE ANNUAL 267 (Mem. of Senator Emmanuel R. Gold) quoted in *Petromelis*, 573 N.E.2d at 548.

11. See Jay Howell, *Don't Let Criminals Profit from Misdeeds*, USA TODAY, Feb. 25, 1991, at 10A; see also, Joel J. Ziegler, *Must We Victimize Crime Victims?*, N.Y. TIMES, Feb. 27, 1988, at A31.

12. The highest New York court recently considered the constitutionality of that state's "Son of Sam" law, and it expressly recognized the fundamental injustice that results when criminals profit by exploiting the stories of their crimes: "Section 632-a embodies the community's belief that it is not only wrong for criminals to commit crimes and profit from them but also wrong for criminals to salt their victims' wounds by profiting from the victimization without recompense to the victims." *Petromelis*, 573 N.E.2d at 548.

13. See Respondent Members of the New York State Crime Victims Board's Brief at 13, *Simon & Schuster* (1991 U.S. Briefs LEXIS No. 90-1059) for a complete list of statutes.

14. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991).

victimizers reap the profits of media reenactments of their crimes, another means must be used. The common law doctrine of restitution may provide those means.

This Comment argues that crime victims should receive the profits their victimizers earn from media reenactments. Principles of equity dictate that criminals should not be allowed to exploit their victims, nor should criminals profit from their crimes. After the Supreme Court's decision, however, "Son of Sam" laws are not a valid method to provide this recovery. This Comment asserts, therefore, that courts should use the common law doctrine of restitution to achieve the goal of preventing exploitation of victims and to ensure that crime does not pay.¹⁵ This Comment advocates restitution for two reasons. First, restitutionary principles are especially adapted to reach profits earned by victimizers. Second, despite the Supreme Court's holding in *Simon & Schuster*, restitution is not susceptible to constitutional invalidation.

I. THE "SON OF SAM" DILEMMA AND THE RESTITUTIONARY ALTERNATIVE

When criminals sell stories about their crimes, they exploit their victims' fear and pain.¹⁶ Media presentations of the crime constitute a "re-victimization" that crime victims suffer while criminals get rich. The Court has rendered legislative attempts to remedy this situation invalid. Crime victims now have two equally unsatisfactory alternatives. They can look to invalid laws for aid, or they can simply submit to exploitation at their victimizers' hands. If states wish to avoid this untenable situation, they must develop an alternative to the now unconstitutional "Son of Sam" laws. One possible alternative is the doctrine of restitution.

Restitution can prevent victim exploitation and wrongdoer profit through several remedial doctrines developed specifically to prevent unjust enrichment. These doctrines include the constructive trust,¹⁷ tracing,¹⁸ and apportionment.¹⁹ Although restitution provides an alternative method to implement the above goals, the Court's holding

15. Although the objective of restitution is to prevent unjust enrichment, not to compensate victims, compensation also occurs when restitution is applied to this situation.

16. See ROBERT REIFF, *THE INVISIBLE VICTIM* 3-7 (1979).

17. A constructive trust is a remedial device that courts use to give plaintiffs an equitable right to defendants' ill-gotten gains. See *RESTATEMENT OF RESTITUTION* § 160 (1937).

18. Courts use tracing to follow wrongfully taken property and identify it when a wrongdoer has transformed it or mingled it with other property. See 1 GEORGE E. PALMER, *THE LAW OF RESTITUTION* §§ 2.14, 2.16 (1978).

19. Courts use apportionment when it is equitable to divide ill-gotten gains between the plaintiff and defendant based on each party's proportionate contribution. See *id.* § 2.13 at 166.

in *Simon & Schuster* requires that courts consider First Amendment implications when they use restitution to award the proceeds of wrongdoers' media presentations to victims.

A. "Son of Sam" Legislation

Many legislatures have recognized the fundamental injustice that results when criminals profit from their crimes and further exploit their victims. In order to prevent these unconscionable results, the federal government and forty-three state legislatures enacted "Son of Sam" laws.²⁰ The laws are strikingly similar in form and operation.²¹ The "Son of Sam" laws remedy crime victims' plight in several ways. First, the system forces the party responsible for the victim's injuries, the criminal, to bear the burden of compensation. Second, the system expands the period of limitation in which a victim must commence an action, because the limitation period begins to run when the crime victims board establishes the escrow account, rather than when the criminal commits the crime.²² Finally, the system gives the victim priority over general creditors.²³ The benefits of "Son of Sam" legislation and the principles behind it were not enough, however, to make the law constitutional.

B. *Invalidation of "Son of Sam" Legislation: Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*

In *Simon & Schuster Inc. v. Members of the New York State Crime Victims Board*,²⁴ the publisher of a book co-authored by a low-level Mafia figure raised a First Amendment challenge to New York's "Son of Sam" law.²⁵ Based on the statute's impact on free speech, the Court sustained the challenge.²⁶ The low-level organized crime figure in the Federal Witness Protection Program had collaborated on a book in which he described his crimes.²⁷ The Crime Victims Board demanded the proceeds of the book, and the book's publisher sued the Board on First Amendment grounds.²⁸ The Supreme Court sustained the pub-

20. See *supra* note 13.

21. See *supra* notes 3-9, 13 and accompanying text.

22. See N.Y. EXEC. LAW § 632-a(7) (McKinney 1982).

23. See *Children of Bedford, Inc. v. Petromelis*, 573 N.E.2d 541, 549 (N.Y. 1991), *cert. granted, judg. vacated, and remanded*, 112 S. Ct. 859 (1992).

24. 112 S. Ct. 501 (1991).

25. *Id.* at 507.

26. *Id.* at 512.

27. See generally NICHOLAS PILEGGI, *WISEGUY: LIFE IN A MAFIA FAMILY* (1985).

28. *Simon & Schuster*, 112 S. Ct. at 507.

lisher's First Amendment challenge. The Court categorized New York's "Son of Sam" law as a content-based financial disincentive on speech, because the statute singled out speech concerning a particular subject for a financial burden.²⁹ When a statute imposes a financial burden based on the content of speech, it is presumptively inconsistent with the First Amendment.³⁰ The Court stated that in order to overcome the presumption of unconstitutionality, a state must show that the law is narrowly tailored to further a compelling state interest.³¹ New York's statute failed this two-prong test.

Initially, the Court rejected the compelling interest offered by the Crime Victims Board, but substituted two interests of its own in place of the state's.³² The interest offered by the Board was to "ensur[e] that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries."³³ The Court rejected this because it could find no compelling justification for the state to distinguish between criminals' proceeds from storytelling and their assets from other sources, and attach only the former.³⁴ The Court stated, however, that victim compensation was a compelling state interest.³⁵ It also found that the state had an "undisputed compelling interest" in preventing criminals from profiting from their crimes.³⁶ Therefore, the Court adopted the interest of "compensating victims from the fruits of the crime" as the relevant one for purposes of the narrowly-tailored determination.³⁷

The Court addressed the narrowly-tailored prong by analyzing whether the "Son of Sam" law advanced the Court's adopted interest.³⁸ The Court held that the interest was not legitimately furthered by the statute,³⁹ because the law was significantly overinclusive.⁴⁰ The Court specifically noted that the statute could reach proceeds from books by such figures as Saint Augustine and Martin Luther King, Jr., who included depictions of past criminal activity in their writings but did not profit from these crimes at their victims' expense.⁴¹ Therefore,

29. *Id.* at 508.

30. *Id.*

31. *Id.* at 509.

32. *Id.* at 510-11.

33. *Id.* at 510 (quoting Brief for Resp. at 46).

34. *Id.* at 510-11.

35. *Id.*

36. *Id.* at 510

37. *Id.* at 511.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

the "Son of Sam" law failed the narrowly-tailored prong of the First Amendment analysis, and the Court declared the statute unconstitutional.⁴²

Although the Supreme Court invalidated the New York law, the purposes behind the statute remain. Legislatures are still concerned for victims and still desire to prevent criminals from profiting from their crimes. If these goals are to be effectuated, the judicial system will have to develop an alternative method of recovery. The doctrine of restitution, which courts have developed to protect individuals from wrongdoers who would profit at their victims' expense, may be able to fill the void left by *Simon & Schuster*.

C. *The Doctrine of Restitution*

The doctrine of restitution developed as judges sought to undo specific injustices that existing law did not address.⁴³ The doctrine consists of substantive and remedial principles of broad practical application,⁴⁴ designed to provide equity in specific cases. The law is based on two guiding principles. The first principle is that people should not profit from their wrongs through unjust enrichment.⁴⁵ The second principle is that persons who gain through conscious wrongdoing must disgorge their tainted earnings.⁴⁶ These principles take effect through a variety of remedies, such as constructive trust,⁴⁷ tracing,⁴⁸ and apportionment.⁴⁹ These principles provide enough elasticity to cover virtually any means people may use to enrich themselves at the expense of others.⁵⁰

1. *Basis for Recovery*

The basis for any claim in restitution is unjust enrichment.⁵¹ There are two elements, therefore, to every restitutionary claim. There must be an injustice, and the injustice must have resulted in an enrichment

42. *Id.* at 512.

43. Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1278 (1989); see *Moses v. Macferlan*, 97 Eng. Rep. 676 (1760); see generally PALMER, *supra* note 18, §§ 1.2-1.3, at 6-16.

44. See Laycock, *supra* note 43, at 1277.

45. See RESTATEMENT OF RESTITUTION §§ 1, 3 (1937).

46. See *id.*

47. See *supra* note 17; see *infra* notes 68-77 and accompanying text.

48. See *supra* note 18; see *infra* notes 78-84 and accompanying text.

49. See *supra* note 19; see *infra* notes 85-88 and accompanying text.

50. See, e.g., *Sieger v. Sieger*, 202 N.W. 742 (Minn. 1925); *Norton v. Haggett*, 85 A.2d 571 (Vt. 1952).

51. See RESTATEMENT (SECOND) OF RESTITUTION § 1 (Tentative Draft No. 1, 1983).

to the defendant at the plaintiff's expense.⁵² Thus, whenever wrongdoers profit through their wrongdoing, they are subject to restitutionary principles.

People are enriched whenever they gain something of value. Restitution is concerned with the value of the gain defendants receive when they invade the legally protected interests of their victims, not with the value of those interests.⁵³ Therefore, restitution does not require that the gain be equal to the value of the interest invaded, nor that there be any economic value to the interest at all.⁵⁴ There need only be a gain as a result of the invasion of a legally protected interest.⁵⁵

The "unjust" prong of a restitutionary claim may be satisfied by a wide array of wrongs. Courts have found unjust enrichment when a defendant committed the wrongs of conversion,⁵⁶ fraud and misrepresentation,⁵⁷ duress,⁵⁸ misuse of a fiduciary relationship,⁵⁹ and murder.⁶⁰ Therefore, virtually any "wrong" will provide the "unjust" element necessary for a successful claim of restitution.

2. Measure of Recovery

The objective of restitution is to identify unjust enrichment and require wrongdoers to disgorge it.⁶¹ In unjust enrichment claims, therefore, courts measure recovery by the defendants' enrichment rather than by the plaintiffs' loss.⁶² The availability of relief measured by the defendants' gain ensures that victims will be able to recover whenever wrongdoers are enriched at their victims' expense, regardless of the actual value of the victims' violated interests.

In some unjust enrichment cases, the defendant's enrichment consists of profits which the wrongdoer earned through the use of the

52. See RESTATEMENT OF RESTITUTION § 1 cmts. a, b, c (1937).

53. See PALMER, *supra* note 18, § 2.10, at 133.

54. *Id.*; *cf.* Raven Red Ash Coal Co. v. Ball, 39 S.E.2d 231 (Va. 1946); Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 173 P.2d 652 (1946).

55. PALMER, *supra* note 18, § 2.10, at 133.

56. See, e.g., Pioneer Mining Co. v. Tyberg, 215 F. 501 (9th Cir. 1914).

57. See, e.g., Janigan v. Taylor, 344 F.2d 781 (1st Cir. 1965), *cert. denied*, 382 U.S. 879 (1965).

58. See, e.g., Welch v. Beeching, 159 N.W. 486 (Mich. 1916).

59. See, e.g., Snapp v. United States, 444 U.S. 507 (1980) (*per curiam*); Beatty v. Guggenheim Exploration Co., 122 N.E. 378 (N.Y. 1919).

60. See RESTATEMENT OF RESTITUTION § 187 (1937); *see also* Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).

61. RESTATEMENT OF RESTITUTION § 1 (1937).

62. Laycock, *supra* note 43, at 1279.

thing or interest invaded.⁶³ In these cases, the thing itself is not recoverable, because it is either intangible, or the wrongdoer has converted the thing into money through sale or other use.⁶⁴ As against an intentional wrongdoer, courts will always require disgorgement of profits when the profits are the product of such use or invasion.⁶⁵ Whenever the trier of fact determines that the defendant's retention of the profits would be unjust, therefore, the plaintiff should be entitled to the profits.⁶⁶

3. *Mechanics of Recovery*

To effectuate restitution's objective of preventing unjust enrichment, courts require defendants to disgorge ill-gotten gains. However, actually identifying and segregating the assets owed to the plaintiff from defendant's other assets can be difficult. Therefore, courts have designed several mechanisms to shape the recovery. Those relevant to solving the "Son of Sam" problem are constructive trust, tracing, and apportionment.⁶⁷

a. *Constructive Trust*

A principle restitutionary remedy is the constructive trust.⁶⁸ The constructive trust is a remedial device that serves the goal of preventing unjust enrichment by requiring wrongdoers to disgorge their ill-gotten gains in favor of their victims.⁶⁹ Judges developed the doctrine in early English and American cases as they sought to prevent various unjust situations.⁷⁰ Those situations included detrimental reliance on promises that were unenforceable under the Statute of Frauds, and fiduciaries profiting from misuse of their trust position.⁷¹

63. See PALMER, *supra* note 18, § 2.12, at 157-66, for a general discussion of the recovery of profits. Restitution of profits for unintended wrongs is considered too harsh a remedy and will not commonly be used. *Id.* § 2.12, at 165.

64. See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940); *Olwell v. Nye & Nissen Co.*, 26 Wash. 2d 282, 173 P.2d 652 (1946).

65. PALMER, *supra* note 18, § 2.12, at 165; see also RESTATEMENT OF RESTITUTION § 151 cmt. e (1937).

66. PALMER, *supra* note 18, § 2.12, at 165.

67. Courts also use quasi-contract to shape an award of restitution in appropriate cases. RESTATEMENT (SECOND) OF RESTITUTION 87-88 (Tentative Draft No. 1, 1983). A discussion of the doctrine of quasi-contract is, however, beyond the scope of this Comment.

68. See RESTATEMENT OF RESTITUTION 1-2 (1937).

69. See *id.* § 160 cmts. a, c.

70. PALMER, *supra* note 18, § 1.3, at 9-16.

71. *Id.* § 1.3, at 10-11.

When a court creates a constructive trust, it gives the plaintiff an equitable right to whatever enrichment the defendant has obtained as a result of his wrongdoing.⁷² This creates a corresponding duty in the defendant to hold the property for, or convey it to, the plaintiff.⁷³ In these aspects, the constructive trust resembles the express trust.⁷⁴ The express trust is, however, distinct from the constructive trust. A primary difference lies in their methods of creation. A settlor creates an express trust by manifesting an intent to do so.⁷⁵ A court creates a constructive trust as a remedial measure to prevent unjust enrichment. Therefore, the constructive trust is a malleable technique, limited only by the inventiveness of wrongdoers who find new ways to enrich themselves unjustly.⁷⁶ Thus, courts may use the constructive trust to do justice in a variety of situations where wrongdoers have profited at their victims' expense.⁷⁷

b. Tracing

An important companion to the constructive trust in equity is the notion of tracing. Courts developed tracing rules in cases where the defendant had sold or traded the asset taken from the plaintiff, and had invested the proceeds of the transfer in some other asset or fund. Tracing allows the plaintiff to follow the thing taken by the wrongdoer through transformations in its form and to determine the asset's present form.⁷⁸ The court can then place a constructive trust on the present form of the asset originally taken from the plaintiff, and require the defendant to transfer ownership of the traced good to the plaintiff.⁷⁹ Courts apply tracing most often when the defendant has wrongfully used the plaintiff's goods to produce a profit, and the wrong was knowing as opposed to mistaken.⁸⁰

72. *See id.* § 1.3, at 15.

73. RESTATEMENT OF RESTITUTION § 160 cmts. a, c (1937).

74. An express trust is created by express words, and requires one party, the trustee, to hold property for the benefit of another party, the beneficiary. RESTATEMENT (SECOND) OF TRUSTS §§ 1(d), (e), 2(a) (1959).

75. *Id.* § 1(e).

76. *Latham v. Father Divine*, 85 N.E.2d 168 (N.Y. 1949).

77. *See, e.g., Nebraska Nat'l Bank v. Johnson*, 71 N.W. 294 (Neb. 1897); *Latham*, 85 N.E.2d at 168.

78. *See, e.g., Newton v. Porter*, 69 N.Y. 133 (1877).

79. PALMER, *supra* note 18, § 2.14, at 180; *see also, Nebraska Nat'l Bank*, 71 N.W. at 294; *Fulp v. Fulp*, 140 S.E.2d 708 (N.C. 1965).

80. *See PALMER, supra* note 18, § 2.14, at 180–81; *see, e.g., Snapp v. United States*, 444 U.S. 507 (1980) (*per curiam*). Restitution of profits earned by an unintentional wrongdoer is unlikely. *See supra* note 63.

Courts also use tracing when defendants have commingled the plaintiffs' goods with their own.⁸¹ In order to protect plaintiffs' interests, courts invoke two presumptions with respect to commingled property. Both presumptions impute to the defendant an intent to act for the plaintiff's benefit.⁸² Under the first presumption, when a defendant withdraws money from a commingled fund and dissipates it, the money left in the fund belongs to the plaintiff, and the plaintiff may recover it.⁸³ The second presumption opposes the first presumption, but reaches the same pro-plaintiff result. Under the second presumption, when a defendant withdraws money from a commingled fund and invests it, then dissipates the remaining fund, the asset purchased with the funds belongs to the plaintiff, and the plaintiff may recover the asset.⁸⁴ Thus, under either of the two presumptions, tracing operates to the advantage of the plaintiff, either by presuming that the wrongdoer withdrew assets from the commingled fund and transformed them into another asset, or by presuming that the wrongdoer left the plaintiff's property in the fund.

c. Apportionment

In some situations, tracing the plaintiff's goods into profits and impressing the profits with a constructive trust may result in the plaintiff receiving not only the value of the thing taken, but the value of the defendant's efforts as well.⁸⁵ When this result seems to deprive the defendant of more than is fair, a court may apportion the profits between the plaintiff and the defendant.⁸⁶ Apportionment is not appropriate, however, when the court has no rational means of determining an equitable apportionment. In that case, a court might award the plaintiff all the profits, depending on the equity of the underlying situation.⁸⁷ Additionally, courts may divest the defendant of a right to apportionment, and the plaintiff may be awarded the entire amount of the profits, if the wrong was particularly egregious.⁸⁸

81. See PALMER, *supra* note 18, § 2.16, at 193-207.

82. *Id.* § 2.16, at 194, 205.

83. *Knatchbull v. Hallett*, 13 Ch. D. 696 (1879). The presumption is commonly known as the "Rule of Jessel's Bag." PALMER, *supra* note 18, § 2.16, at 196.

84. *In re Oatway*, 2 Ch. 356 (1903).

85. See Laycock, *supra* note 43, at 1287.

86. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940).

87. See, e.g., *Belford v. Scribner*, 144 U.S. 488 (1892).

88. See Laycock, *supra* note 43, at 1289.

4. *Restitution in Action: Snepp v. United States*

The Supreme Court's decision in *Snepp v. United States*⁸⁹ provides an example of how a court's use of a restitutionary remedy, constructive trust, can prevent unjust enrichment. In *Snepp*, the United States sued a former CIA agent, Frank W. Snepp III, for breach of his agreement not to publish any material about his CIA experiences without first submitting his writings to the CIA for prepublication review and approval.⁹⁰ Snepp wrote and published a book about his experiences with the CIA in Vietnam without receiving the requisite clearance.⁹¹ The CIA sued to enjoin further publication of the book.⁹² The district court held that Snepp had breached his agreement, as well as his position of trust, with the CIA.⁹³ The court enjoined further breaches of the confidentiality agreement and imposed a constructive trust on Snepp's profits from the book.⁹⁴

The Court of Appeals for the Fourth Circuit agreed that Snepp had breached his confidentiality agreement, but reversed the district court's ruling that Snepp had breached any fiduciary duty he owed to the government.⁹⁵ The court based its holding on its perception that Snepp had a First Amendment right to publish unclassified material, and on the United States' admission that Snepp's book contained no classified information.⁹⁶ In other words, the court believed Snepp's fiduciary obligation extended only to protecting classified information, and he had not failed in this obligation. Therefore, the court held the constructive trust remedy was improper, and remanded the case for a jury trial to determine damages for breach of contract only.⁹⁷

The Supreme Court reversed the Fourth Circuit's decision and reinstated the constructive trust over Snepp's book proceeds.⁹⁸ The Court reasoned that because Snepp was in a position of trust,⁹⁹ and because the government had suffered irreparable damage,¹⁰⁰ the restitutionary remedy was the most equitable and effective.¹⁰¹

89. 444 U.S. 507 (1980) (per curiam).

90. *Id.* at 507-08.

91. *Id.* at 507.

92. *United States v. Snepp*, 456 F. Supp 176 (E.D. Va. 1978).

93. *Id.* at 179-80.

94. *Id.* at 181-82.

95. *United States v. Snepp*, 595 F.2d 926, 932, 935-36 (4th Cir. 1979).

96. *Id.* at 931, 935-36.

97. *Id.* at 936-38.

98. *Snepp v. United States*, 444 U.S. 507, 516 (1980) (per curiam).

99. *Id.* at 510-11.

100. *Id.* at 512-13.

101. *Id.* at 515-16.

Although the Court did not explicitly state its holding in terms of preventing unjust enrichment, it is possible to identify the two elements of a claim for restitution in the facts of *Snepp*. First, Snepp gained experience and knowledge from the CIA during his employment there. He transformed this intangible information into a book which earned him substantial profits.¹⁰² This pecuniary enrichment was unjust because Snepp deliberately and surreptitiously breached his confidentiality agreement.¹⁰³ Therefore, Snepp was enriched at the expense of the United States, and the Court required him to disgorge his book profits by way of a constructive trust in favor of the United States.

II. SOLVING THE "SON OF SAM" DILEMMA: THE RESTITUTIONARY ALTERNATIVE

After *Simon & Schuster*, states may not use "Son of Sam" laws to prevent victim exploitation nor to divest criminal authors of their undeserved profits. The Court's holding leaves crime victims with unconstitutional legislation on the one hand, and exploitation on the other. States can, nonetheless, fill this void in justice. Using restitutionary principles, courts can prevent criminal authors' unjust enrichment by impressing the criminals' profits with constructive trusts in favor of their victims. The restitutionary approach provides a basis for a crime victim's claim, a measure of recovery for the victim, and remedial devices to effect the crime victim's relief. Restitution is particularly useful to those who have been harmed because virtually any wrong that enriches the wrongdoer in a tangible way, be it tortious, criminal, or even moral,¹⁰⁴ may provide a court with a basis for requiring the wrongdoer to disgorge the unjust enrichment. Additionally, the restitutionary approach is not susceptible to the First Amendment challenge that defeated New York's "Son of Sam" law. Therefore, restitution is a viable solution to the "Son of Sam" dilemma.

In *Simon & Schuster*, the Court stated as a "fundamental equitable principle"¹⁰⁵ that "[n]o one shall be permitted to profit . . . or to

102. At the time the United States filed suit, Snepp had already received about \$60,000 in advances from his publisher. *Id.* at 508 n.2.

103. *United States v. Snepp*, 456 F. Supp. 176, 179 (E.D. Va. 1978).

104. *See, e.g., Bron v. Weintraub*, 199 A.2d 625, 630 (N.J. 1964) (constructive trust imposed on property on the basis that the property owners had "traffic[ked] in the misfortunes of others").

105. *Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd.*, 112 S. Ct. 501, 510 (1991) (quoting *Children of Bedford v. Petromelis*, 573 N.E.2d 541, 548 (N.Y. 1991), *cert. granted, judg. vacated, and remanded*, 112 S. Ct. 859 (1992)).

acquire property by his own crime."¹⁰⁶ The use of restitution provides a means to solve the "Son of Sam" dilemma that arises when criminals turn a profit by writing books¹⁰⁷ about their crimes. The restitutionary method requires the victim to sue the wrongdoer and base the action on unjust enrichment.¹⁰⁸

A. Basis for the Crime Victim's Claim: Unjust Enrichment

An action to require the criminal author to disgorge book proceeds could be based on unjust enrichment. As previously mentioned, an unjust enrichment action requires both an injustice and an enrichment.¹⁰⁹ The "Son of Sam" situation supports a restitution action because the criminal author is unjustly enriched by the book profits at the victim's expense. The criminal author's profits are enrichment. The injustice, however, is a conglomeration of two wrongs: (1) the crime itself, and (2) the media presentation. It is the intersection of the crime and its subsequent exploitation that makes the enrichment unjust. Considering the undisputed compelling belief that criminals should not profit from their crimes,¹¹⁰ courts should compel criminal authors to disgorge their profits regardless of the availability of a "Son of Sam" law.

1. Criminal Authors' Book Profits Are Enrichment

Criminal authors are enriched when they gain experience and information by committing a crime. Criminal authors then use the experience and knowledge they gained wrongfully at their victims' expense and transform it into a book. The profits from these books are the final form of the criminal authors' enrichment. The profits are enrichment in the most literal sense, because they result in monetary gain.

2. Exploitation of Crime Is Unjust

The "Son of Sam" situation presents a clear instance of a wrongdoer profiting unjustly. Society condemns criminal behavior and labels it "wrong." Criminal authors flaunt societal values when they commit

106. *Id.* (quoting *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889)).

107. For the sake of simplicity, this Comment will refer to all media portrayals of crime as "books," and all criminals as "criminal authors."

108. Victims may be unwilling to undertake civil actions against criminal authors because the victims lack the funds necessary for litigation or because they fear the trauma of a trial. States might overcome this obstacle by providing funds for the restitution action, or by undertaking the action on the victims' behalf. Cf. Marvin E. Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 240-241 (1965).

109. See *supra* footnotes 51-60 and accompanying text.

110. *Simon & Schuster*, 112 S. Ct. at 510.

and exploit crimes. Criminal authors gain the information and experience they need to produce books or other material about real-life crime by hurting their victims. The crime victims suffer once when a crime is committed against them, and again when the crime becomes the subject of a book by the very person responsible for their suffering. Allowing criminal authors to profit from their crimes at the expense of their victims is, thus, simply unjust.

Crimes, by definition, are the most abhorrent forms of wrongs; that is why society has determined that they should be prohibited and punished. Criminal authors take their wrongs one step further by capitalizing on them. They profit at the expense of their victims' suffering. Therefore, courts should award restitution to victims of criminal authors to prevent unjust enrichment.

B. Measure of Victims' Recovery: Criminal Authors' Profits

As stated, restitution measures recovery by the defendant's gain.¹¹¹ This measure of recovery is significant to victims who sue criminal authors, because the measure is concerned with the value of the defendant's gain, not the value of the claimant's invaded interest.¹¹² Where the harm consists of mental anguish over the exploitation of a crime and the victim's subsequent suffering, the damages are extremely difficult to quantify. On the other hand, the criminal author's proceeds are usually substantial and easily ascertainable.¹¹³ Therefore, restitution provides a simple and equitable measure of relief.

Courts will award profits as a specific measure of recovery when the wrong was intentional and the profits are the product of a wrongful taking or other interference with the injured party's legally protected interest.¹¹⁴ The criminal author's profits are the direct result of the intersection of two intentional acts: the crime and the exploitation of the victimization through the published book. Further, criminal authors violate their victims' legally protected interest of being free from victimization of any kind. Hence, the proper measure of relief is the amount of profit the criminal author receives.

111. See *supra* note 62.

112. See *supra* note 62.

113. At the time Henry Hill, the criminal-author in *Simon & Schuster*, first came to the notice of the New York Crime Victims Board, he had already received \$96,250 from Simon & Schuster, and the publisher was holding \$27,958 for payment to him. *Simon & Schuster*, 112 S. Ct. at 507.

114. PALMER, *supra* note 18, § 2.12, at 165.

C. *Mechanics of Crime Victims' Recovery*

1. *Creating a Constructive Trust on Criminal Authors' Profits*

Using the restitutionary approach, courts could award criminal authors' profits to their victims through the creation of constructive trusts that give victims an equitable right to wrongdoers' gain.¹¹⁵ *Snepp v. United States* illustrates how this remedial device works.

In *Snepp*, the Court gave the United States a constructive trust on Frank Snepp's book profits when he enriched himself by breaching his confidentiality agreement.¹¹⁶ The criminal author presents much the same problem as Frank Snepp did when he published a book in breach of his secrecy agreement. Although the nature of the wrong is different, the same unquantifiable harm results, and the enrichment is equally unjust. Because a constructive trust over the book proceeds reaches only that which criminal authors receive at the expense of their victims, nothing is taken from criminals that they have any right to retain.

2. *The Significance of Tracing*

Tracing allows the plaintiff to reach whatever asset a court attributes to the thing the wrongdoer took, be it money or an intangible interest.¹¹⁷ Tracing rules are necessary primarily when courts must follow the plaintiff's property into a commingled mass and identify it.¹¹⁸ Tracing was necessary, for example, in *Snepp* because Frank Snepp's enrichment through breach of his secrecy agreement was not identifiable in the book he wrote. Criminal authors do not trigger tracing, because their criminal enrichment is explicitly identified in their books and need not be followed through any transformations. Tracing is still significant in this context, however, because its presumptions are based on pro-plaintiff sentiment which bolsters victims' claims to book profits.

Tracing is specifically relevant because criminal authors take an intangible interest from their victims and mingle it with their own efforts to produce a book. The profits from these books are the product of a mingled "bag,"¹¹⁹ and a court may presume that this gain is

115. See *supra* notes 72–73 and accompanying text.

116. *Snepp v. United States*, 444 U.S. 507, 516 (1980) (per curiam).

117. See, e.g., *id.*; *Cablevision of Breckenridge, Inc. v. Tannhauser*, 649 P.2d 1093 (Colo. 1982).

118. See PALMER, *supra* note 18, § 2.16, at 193-207.

119. See *supra* note 83.

held by criminal authors for the benefit of their victims.¹²⁰ The court implicitly imputes a motive to the criminal author to use the mingled "bag" to produce a benefit for the victim.¹²¹ Tracing, with its pro-plaintiff motivation, supports the claims of victims to the profits that criminal authors receive through victimization.

3. *Apportioning Profits Between Victims and Criminal Authors*

A court can avoid an unjust result by apportioning profits between the plaintiff and the defendant when it is undesirable to require the defendant to disgorge the entire gain.¹²² This is an appealing feature of the constructive trust because it allows a court to avoid an all-or-nothing result. If a court is willing to allow the criminal author to keep the profits from efforts subsequent to the crime, it may still award some portion of the book proceeds to the victim according to the degree to which the victimization contributed to them.¹²³ The apportionment in each individual case depends on the specific facts.¹²⁴ In this case, the culpability of the act and the connection between the wrong and the resulting profits would likely prompt an award of all of the criminal author's profits.¹²⁵

III. ADVANTAGES OF RESTITUTION OVER TORT RECOVERY

In addition to effectuating the stated goals of the "Son of Sam" laws, restitution provides benefits to crime victims that are unavailable under traditional tort theories such as assault and wrongful death. Restitution provides two important advantages over traditional tort recovery.¹²⁶ The first advantage is an extended period in which the

120. See *supra* notes 82-84 and accompanying text.

121. See *supra* notes 82-84 and accompanying text.

122. See *supra* notes 85-88 and accompanying text. Apportionment is also available to distribute the profits among more than one claimant. See PALMER, *supra* note 18, § 2.18, at 214-17 (discussion of tracing fictions applicable to multiple claims against a single commingled fund).

123. The burden of proof is relevant to the apportionment between the claimant and the defendant. Claimants usually must prove that their property went into the commingled "bag." PALMER, *supra* note 18, § 2.13, at 167. Once a claimant meets this burden of proof, however, the defendant may have to "distinguish between his own property and that of the innocent party." *Smith v. Mottley*, 150 F. 266, 268 (6th Cir. 1906). Further, a claimant may be entitled to the entire mass of property accumulated by a wrongdoer if the wrongdoer has made it impossible or unreasonably burdensome for the claimant to establish what portion of the claimant's funds went into the mass. See *Smith v. Township of Au Gres*, 150 F. 257 (6th Cir. 1906).

124. See *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (N.Y. 1919).

125. See PALMER, *supra* note 18, § 2.12, at 165; Laycock, *supra* note 43, at 1289.

126. These advantages were also provided by the now invalid "Son of Sam" laws. See *supra* notes 22-23 and accompanying text.

victim may seek recovery. The second advantage is a priority in favor of the victim over the criminal's general creditors.

Restitution extends the period of time available to victims to seek redress from criminal authors. Crime victims may always sue their victimizers within the applicable statute of limitations for a personal injury action and obtain a judgment that may be valid for up to twenty years.¹²⁷ Victims have little incentive to do so, however, because the majority of criminals do not have assets sufficient to satisfy a judgment.¹²⁸ In restitution, victims may wait to sue until after criminal authors have received profits from their books and there is an asset to recover.¹²⁹ Restitution, therefore, provides a significant advantage over tort recovery to victims who are injured and exploited by criminal authors.

The second benefit of a restitutionary claim is that it allows victims to gain priority over criminal authors' general creditors. In the tort context, assets subject to a civil judgment are also subject to the claims of creditors. In the restitution context, however, creditors are subject to a constructive trust unless they are bona fide purchasers of the property subject to the trust.¹³⁰ Crime victims who receive a constructive trust will not have to share the profits with any creditors of the criminal author. Hence, restitution provides crime victims with two important advantages over traditional tort recovery.¹³¹

IV. SUSCEPTIBILITY OF RESTITUTION TO CONSTITUTIONAL CHALLENGE

Although restitution provides an attractive alternative means of reaching criminal authors' media proceeds, a claim for disgorgement of the criminal's profits impacts the free expression rights of the criminal author. Therefore, restitution is subject to the First Amendment

127. See, e.g., IOWA CODE ANN. § 614.1(6) (West Supp. 1992) (twenty years); UTAH CODE ANN. § 78-12-22 (1992) (eight years); WASH. REV. CODE § 4.16.020(2) (1989) (ten years).

128. See REIFF, *supra* note 16, at 137; cf. LeRoy L. Lamborn, *The Propriety of Governmental Compensation of Victims of Crime*, 41 GEO. WASH. L. REV. 446, 451 n.20 (1973).

129. There is sufficient authority for the proposition that plaintiffs may choose to regard either the time of the original wrongful act or the time of the pecuniary enrichment as the time when the cause of action arose if the two occurrences did not happen simultaneously. Cf. *Felder v. Reeth*, 34 F.2d 744 (9th Cir. 1929) (injured party may choose point at which enrichment occurred for purposes of figuring interest); PALMER, *supra* note 18, § 2.3, at 63-65 (injured party may obtain the advantage of a longer limitation period by using quasi-contract rather than tort to recover unjust enrichment from a tortfeasor).

130. RESTATEMENT OF RESTITUTION § 173 cmts. j, k (1937).

131. Although it is not an advantage over tort recovery, it is important to note that a cause of action for restitution is not terminated by the death of either party. RESTATEMENT OF RESTITUTION § 149(2) (1937).

analysis applied to New York's "Son of Sam" law in *Simon & Schuster*.

Most commonly, a governmental entity implicates First Amendment rights when it takes some official action that directly or indirectly burdens free expression.¹³² First Amendment scrutiny may also be triggered even when there is a dispute between two private parties and the only official involvement is through the court that adjudicates the dispute.¹³³ Courts will therefore need to address a criminal author's First Amendment claims even though the method used to reach book proceeds is restitution, not a "Son of Sam" law.

A. *Applicable Tests for Validity*

There are three ways in which a state might burden free expression: by singling out expressive activity for control or penalty (content-based action);¹³⁴ by impacting expressive activity through controls or penalties which pursue goals unrelated to expression (content-neutral action);¹³⁵ or by censoring expression in advance of its dissemination (prior restraint).¹³⁶ A court's determination that a challenged action is either content based or content neutral determines what form First Amendment scrutiny will take.¹³⁷

1. *Content-based Regulations*

The Supreme Court demonstrated the analytical approach for content-based regulations that burden criminal authors' speech in *Simon & Schuster*.¹³⁸ There the Court held that regulations, like the "Son of

132. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Cohen v. California*, 403 U.S. 15 (1971); *United States v. O'Brien*, 391 U.S. 367 (1968). This comports with the constitutional doctrine which generally requires "state action" to be involved in order for a plaintiff to have a valid claim. See, e.g., *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978).

133. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964). "Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment." *Cohen v. Cowles Media*, 111 S. Ct. 2513, 2517 (1991); see also *Shelley v. Kraemer*, 334 U.S. 1 (1948).

134. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 789-90 (2d ed. 1988).

135. *Id.*

136. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 *LAW & CONTEMP. PROBS.* 648 (1955).

137. TRIBE, *supra* note 134, at 791-92.

138. See *supra* notes 29-42 and accompanying text.

Sam" law, that impose a financial burden on speech must be narrowly tailored to further a compelling state interest.¹³⁹

2. Content-neutral Regulations

A content-neutral law is defined as one that on its face deals with conduct having no connection with speech,¹⁴⁰ but in application incidentally burdens free expression. The Supreme Court enunciated the applicable constitutional test for content-neutral laws in *United States v. O'Brien*.¹⁴¹ The *O'Brien* test applies when speech and nonspeech elements are combined in the same course of conduct,¹⁴² and when the regulation affecting that conduct only incidentally burdens expression.¹⁴³ The test has four parts. First, the court asks whether the action is within the "constitutional power" of the state. Second, the court asks whether the law furthers an "important or substantial" state interest. Third, the court considers whether the interest is "unrelated to the suppression of free expression." Finally, the court determines whether the "incidental restriction" on free expression is no greater than necessary to further that interest.

3. Prior Restraints

A prior restraint occurs when the government censors speech in advance of publication.¹⁴⁴ In *Near v. Minnesota*,¹⁴⁵ the Supreme Court invalidated a state law which provided a procedure for abating "malicious, scandalous, and defamatory"¹⁴⁶ newspapers on the grounds that the law either suppresses publication altogether, or causes a publisher to seek clearance from a judge before publishing.¹⁴⁷ After *Near*, speakers may challenge regulations which either suppress expression altogether, or prompt speakers to obtain clearance before speaking. If a court finds that a regulation has this effect, and that the prior restraint is not justified by any "exceptional" circumstances,¹⁴⁸ the court should invalidate the regulation.

139. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991).

140. *United States v. O'Brien*, 391 U.S. 367, 375 (1968).

141. 391 U.S. 367 (1968).

142. *Id.* at 376.

143. *Id.*

144. Emerson, *supra* note 136, at 648.

145. 283 U.S. 697 (1931).

146. *Id.* at 702.

147. *Id.* at 712-13.

148. *Id.* at 716. The Court stated that a state of war would constitute "exceptional" circumstances. *Id.*

B *Validity of Restitution*

1. *Restitution Is Content Neutral*

A law is content neutral when it is intended to serve goals unrelated to the content of the affected speech.¹⁴⁹ Restitution is concerned with preventing unjust enrichment. There is nothing necessarily expressive about enriching oneself at the expense of another. Thus, on its face, restitution is content neutral, because it is not concerned with controlling or penalizing expressive activity in general, nor with speech of any specific content, but only with preventing unjust enrichment.

Restitution, although content neutral, may still burden speech in some applications. If criminals are aware restitution may require them to disgorge their book proceeds, they may be disinclined to produce books at all. This possible burden on expressive conduct is enough to require that courts' use of restitution satisfy the First Amendment scrutiny of *O'Brien*.

2. *Restitution Satisfies the O'Brien Test*

The first prong in *O'Brien* requires that the courts' use of restitution must be within the state's constitutional power. Clearly, a state may enforce rules of law in its courts. Second, *O'Brien* requires that the courts' use of restitution must further a substantial state interest. The Supreme Court in *Simon & Schuster* labelled as compelling the interest promoted when courts require criminal authors to disgorge their profits, ensuring that criminals do not profit from their crimes.¹⁵⁰ Thus, restitution, which serves the same ends, furthers a substantial state interest. Third, the interest must be unrelated to the suppression of expression. The interest here, preventing unjust enrichment, is grounded in equity, and there is nothing that necessarily links it to a criminal's expressive rights. Finally, the burden must be no greater than necessary to further the state's interests. The state action, however, does not have to constitute the least-restrictive means.¹⁵¹ Restitution enables courts to require criminal authors to disgorge the profits they earned by capitalizing on their crimes, and award those profits to

149. "[O]ur definition of 'content-neutral' speech regulations [is] those that 'are justified without regard to the content of the regulated speech.'" *City of Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986) (citations omitted).

150. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 509-10 (1991).

151. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

those criminals' victims. This method is no broader than necessary to prevent unjust enrichment. Further, apportionment is always possible in a restitution action to avoid unjust results.¹⁵² Therefore, authors who mention a minor infraction in passing are not liable to have their book proceeds escrowed as they were under the "Son of Sam" legislation.

Under each of the prongs of *O'Brien*, restitution is a constitutionally valid means of preventing criminal authors' unjust enrichment. Thus, restitution provides a constitutionally viable means for filling the void left by *Simon & Schuster*.

3. *Restitution Is Not a Prior Restraint on Expression*

Courts' use of restitution to require disgorgement of criminal authors' profits does not constitute an unconstitutional prior restraint. A claim of prior restraint by a criminal author would be inappropriate in this context. No censorship could be involved in the adjudication of the unjust enrichment claim; the material has already been published. The only way the restitutionary remedy could suppress publication is where the criminal author foresees being required to disgorge the profits and foregoes publication as a result. This presumes that criminal authors would foresee what is a rather remote possibility, and that further, they have no motive for publishing other than profit. Each is a difficult presumption to make. Courts' use of restitution has, at most, a speculative deterrent effect on the criminal author. Therefore, restitution does not constitute a prior restraint.

V. CONCLUSION

Society recognizes that a fundamental injustice occurs when criminals profit from their crimes by exploiting their victims. "Son of Sam" laws were enacted to prevent these injustices in the specific instances where criminals profit from media reenactments of their crimes. In *Simon & Schuster*, the Supreme Court invalidated New York's "Son of Sam" law, rendering its method of reaching criminal authors' profits void. To prevent criminals from exploiting their victims for gain, therefore, the justice system should find another method of reaching those profits. As shown in *Snepp*, restitution can provide that method. Restitution is a malleable remedy aimed at preventing unjust enrichment. It provides a source of liability, a measure of recovery, an equitable device for disgorgement of profits, and overcomes the First Amendment challenge sustained in *Simon & Schuster*.

152. See *supra* note 86 and accompanying text.

Therefore, courts should recognize restitution as a method for reaching unjust enrichment where the "Son of Sam" laws failed.