CRIMINAL MANIFESTOS AND THE MEDIA: REVISITING SON OF SAM LAWS IN RESPONSE TO THE MEDIA'S BRANDING OF THE VIRGINIA TECH MASSACRE♦

The truth must dazzle gradually
Or every man be blind.
– Emily Dickinson (1830-1886)[1]

[1] EMILY DICKINSON, *Tell All the Truth, in* THE POEMS OF EMILY DICKINSON (Ralph W. Franklin ed., The Belknap Press 1998).

INTRODUCTION

Imagine that you are the parent of a college student. One morning, a disturbed student at your child's university goes on a murderous rampage, killing thirty-two students, ending his senseless act by taking his own life. In the confusion and hysteria that follows, you learn that your child, sitting in class that morning, was one of the victims.

Now imagine that, a few days after the murders, while details are still scant, while you grapple with the loss of your child, news emerges that a television network has received a package of materials, a collection of videos, writings, and photographs, related to this horrific crime. You learn that the package was apparently mailed to the network by your child's murderer during a quick stop to the post office when he took a break from his murderous acts.

Every time you turn on the television now, you are confronted by the angry ramblings of your child's killer, forced to view close-ups of the last face that your child saw. You learn that NBC, the network to receive the package from the killer, has made the decision to claim that material as its own, sharing it with other networks under the condition that NBC receive credit. NBC has prominently placed its logo on all images and videos and included the following rules: "No Internet use. No archival use. Do not resell. Mandatory credit, NBC News."[2] NBC has turned these materials, created by your child's killer, into a scoop, edging out the competition by asserting some sort of first-place victory in the race for news. Even when the images appear on other networks, NBC's logo remains on the screen, a reminder to the viewer that the images originated with NBC.

Many of the networks, after receiving the materials from NBC, have created custom logos that appear at the bottom of the television screen during coverage of the event, depicting images of a gun sight's crosshairs and logos that include rotating, animated text to remind the viewer that he is watching coverage of the "MASSACRE AT VIRGINIA TECH" and the "DEADLIEST SHOOTING," among others.[3] CNN's logo is even accompanied

[2] Ashley Ewald, *Media Coverage of Virginia Tech Shootings Sparks Controversy and Scrutiny*, Silha Center for the Study of Media Ethics and Law, Spring 2007 Bulletin, *available at* http://www.silha.umn.edu/Spring%202007%20Bulletin/top%20story%20virgina%20tech.htm (last visited Oct. 6, 2007). *See also* Bill Carter, *NBC News Defends ItsUse of Material Sent by the Killer*, N.Y. TIMES, Apr. 20, 2007, at A21; Tim Goodman, *Has NBC Ushered in New Era for Multimedia?*, S.F. CHRON., Apr. 19, 2007, at A14; Kim Pearson, *Cho Manifesto Highlights Challenges for Online News*, ONLINE JOURNALISM REV., May 3, 2007, http://www.ojr.org/ojr/stories/070502 (last visited Oct. 6, 2007).

[3] *See* Simon Dumenco, *Anything This Graphic Should Never Have a Logo: TV Coverage of the Massacre at Virginia Tech Took Insta-Branding to a Grotesque and Appalling Low*, ADVERTISING

by a sound effect: an "ominous whooshing noise."[4] The killer's images and words have superseded the news realm and have become an event, complete with a range of virtual marquees framing its presentation.

The media, in transforming your tragedy into a branding opportunity, has gone beyond its obligation to deliver the news. It has taken the criminal's writings, photographs, and videos, and, instead of delivering the news in an objective, unbiased manner, has broadcast the killer's materials strategically, attempting to maintain its competitive edge. Can the media actually do this, you ask? Are they permitted to turn a criminal's rambling explanation for his crimes into an opportunity for ratings and advertising profits?[5] In the aftermath of the Virginia Tech killings, NBC was widely criticized for its decision to claim ownership of the killer's materials, and the media in general received strong disapproval for branding its coverage of the murders.[6]

For the purposes of this Note, a criminal manifesto is a work created by a criminal, received by the media, in which he describes, explains, confesses to, or otherwise discusses his crimes. This manifesto can take the form of a written paper, a video, a collection of photos, or an amalgam of mediums.[7] Examples of criminal manifestos, in addition to the Virginia Tech killer's multimedia manifesto, include the Unabomber Ted Kaczynksi's manifesto, published in *The New York Times* and *The Washington Post*, and the videos and writings of Dylan Klebold and Eric Harris, the Columbine High School killers.[8] Throughout this Note, the terms "media" and "press" are used to refer to both print and broadcast journalism.

This Note proposes regulations for the media as it broadcasts and brands criminal manifestos. Utilizing Son of Sam laws, which prevent a criminal from profiting from his own crimes, as a basis for such regulations, this Note proposes that the media be permit-

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AGE, Apr. 23, 2007, at 34.

[4] *Id.*

[5] On the day of the shootings, Fox experienced a 115% jump in ratings over its average for the first part of the year. Joe Garofoli, *New-Media Culture Challenges Limits of Journalism Ethics*, S.F. CHRON., Apr. 20, 2007, at A1. CNN experienced a ratings jump of 186%. *Id.* MSNBC.com received a record 108.8 million page views the day after the shootings. *Id.*

[6] "We've come to the point at which murderous psychopaths and TV news executives are of the same mind when it comes to human tragedy: It's a branding opportunity." Dumenco, *supra* note 3. *See also* Ewald, *supra* note 2.

[7] As technology evolves, so can a criminal's chosen form of communication: Seung-Hui Cho's manifesto included a CD, which contained digital video, photographs, and a written statement. *See* Christine Hauser, *Gunman Sent Photos, Video, and Writings to NBC*, N.Y. TIMES, Apr. 18, 2007, *available at* http://www.nytimes.com/2007/04/18/us/18cndvirginia.html?_r=1&scp=1&sq=%22gunman%20sent%20photos%22&st=cse&oref=slogin (last visited Oct. 4, 2008).

[8] Seung-Hui Cho even sympathizes with Dylan and Eric in his own manifesto, suggesting that another concern with broadcasting criminals' works is the risk of copycat crimes. *See id.*

ted to broadcast criminal manifestos, but not to profit by claiming ownership of or branding criminal manifestos in order to boost ratings and advertising revenue. Part I provides an overview of the First Amendment and restrictions on speech. Part II discusses the history of Son of Sam laws in the United States. Part III discusses the application of Son of Sam laws to third parties, as evidenced by the recent trend toward preventing the sale of "murderabilia,"[9] which would prevent third parties from profiting from the sale of criminals' works. Part III will also discuss the recent legislation introduced in both the House and Senate aimed at preventing third parties from profiting from items associated with criminals and their crimes. Part IV discusses the media's First Amendment rights, including the newsgathering right and its relationship to the application of general laws. Part V addresses overcoming First Amendment hurdles when applying a Son of Sam law to the media. Part VI presents a proposal for regulating the media and an argument for federal regulations.

I. A BRIEF OVERVIEW OF THE FIRST AMENDMENT AND RESTRICTIONS ON SPEECH

Court inquiries into the constitutionality of government restrictions on speech generally focus on three facets of the restriction: the restriction's nature, that is, whether the restriction is content-based or content-neutral; the restriction's breadth, that is whether it is over-inclusive; and whether the restriction is a "prior restraint," that is, whether it places a restriction on a certain category of speech before that speech has occurred.

A. *Content-Based or Content-Neutral?*

In general, courts have held that content-based restrictions on speech violate the First Amendment. In *Police Department of the City of Chicago v. Moseley*, for example, the Supreme Court held that a city ordinance permitting only a certain type of picketing outside of schools violated the First Amendment.[10] The Court's prohibition of content-based restrictions highlights the concern that the government may attempt to control which ideas receive exposure in the public arena.[11] Because the ordinance in *Moseley*

[9] The term "murderabilia" has been credited to Andy Kahan, director of the mayor's Crime Victims Office in Houston, Texas. *See* Gigi Stone, *'Murderabilia' Sales Distress Victims' Families*, ABC NEWS, Apr. 15, 2007, http://abclocal.go.com/wpvi/story?section=bizarre&id=5212701&pt=print (last visited Dec. 27, 2007); Ben Winslow, *Web Sites Selling Hacking Papers as 'Murderabilia'*, DESERET MORNING NEWS, June 13, 2006, at A01.

[10] 408 U.S. 92 (1972). The city ordinance permitted only labor-related picketing outside of schools, and Moseley, the petitioner, was picketing in protest of what he believed to be racial discrimination at the school.

[11] *Id.* at 95 (stating that, "above all else, the *First Amendment* means that government has no

placed limits on picketing outside of schools while, at the same time, permitting labor-related picketing, the Court held that the city ordinance was a content-based restriction in violation of the First Amendment.[12]

In a variety of cases involving content-based restrictions on speech, the Supreme Court has confirmed its test for evaluating the constitutionality of such restrictions.[13] Essentially, the Court has concluded that content-based restrictions on speech must meet strict scrutiny in order to survive constitutional challenges.[14] This strict scrutiny requires that content-based regulations on speech be narrowly tailored to serve a "compelling state interest."[15] In *Moseley*, the Court concluded that the ordinance, which permitted only labor-related picketing, was not narrowly tailored to advance the city's interest in maintaining a peaceful environment.[16] The city went far beyond its goal of preventing disruptive picketing when it chose to exclude picketing "on all but one preferred subject."[17] Rather, the Court found that the city should have addressed its concerns by creating an ordinance that specifically addressed disruptive picketing and dealt "evenhandedly with picketing regardless of subject matter."[18]

Content-neutral regulations, on the other hand, are regulations which are unrelated to the actual content of the speech.[19] In *Ward v. Rock Against Racism*, for example, the City of New York sought to provide a sound system and an independent sound technician to control excessive sound in the area surrounding the bandshell in Central Park, while at the same time providing sufficient sound amplification within the concert arena.[20] This regulation applied to all concerts given in the bandshell, regardless of content, and the Court held that the regulation, because it was "justified without reference to the content of the regulated

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power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[12] *Id.* at 102.

[13] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994); Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 115 (1991); Boos v. Barry, 485 U.S. 312 (1988); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[14] *Boos*, 485 U.S. at 321 (stating that content-based regulations must survive the "most exacting scrutiny" in order to overcome First Amendment challenges) (citing *Perry Educ. Ass'n*, 460 U.S. at 45).

[15] *Id. See also Ark. Writers' Project*, 481 U.S. at 231.

[16] *Moseley*, 408 U.S. at 100 (finding that peaceful labor picketing is no different from peaceful picketing on any other subject).

[17] *Id.* at 101.

[18] *Id.* at 102.

[19] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see also Boos*, 485 U.S. at 320-21; Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[20] *Ward*, 491 U.S. at 787. The city enacted the ordinance in response to noise complaints from park visitors and area residents, as well as to complaints from concertgoers regarding poor sound quality.

speech," was content-neutral.[21] After determining that the regulation was content-neutral, the Court also determined that the regulation was narrowly tailored to achieve the city's interest.[22] The Court found that the government did indeed have a significant interest in both "protecting its citizens from unwelcome noise" and in "ensuring the sufficiency of sound amplification at bandshell events."[23] Moreover, the Court confirmed that content-neutral speech regulations require less scrutiny than content-based regulations.[24] Therefore, although the respondent argued that a less intrusive option existed to satisfy the city's interests, the Court found that the city's regulation was narrowly tailored.[25] Regardless of whether a regulation is content-neutral or content-based, then, it still must be narrowly tailored to address the state's interest; content-neutral regulations, however, are subjected to less scrutiny and will survive constitutional challenges even when alternative, less intrusive modes of regulation are available.

B. *Overbreadth*

Courts have also struck down regulations on speech which are found to be substantially overinclusive.[26] The Supreme Court has refused to classify a regulation as overbroad unless the overbreadth is "substantial;" that is, the court must find that the law could also be applied to a significant amount of constitutionally protected speech.[27] In *Houston v. Hill*, a city ordinance made it unlawful to "in any manner oppose, molest, abuse, or interrupt any policeman in the execution of his duty."[28] The Court found the ordinance to be unconstitutionally overbroad, as it imposed criminal sanctions in response to an individual voicing his constitutionally-protected objections to police behavior.[29] The Court concluded that the ordinance was unconstitutionally overbroad because, as written, it gave police "unfettered discretion to arrest

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[21] *Id.* at 791-93. *See also Renton*, 475 U.S. at 48.
[22] *Ward*, 491 U.S. at 796.
[23] *Id.* at 796-97.
[24] *Id.* at 796-99.
[25] *Id.* at 798 (finding that a content-neutral regulation "must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."). The court highlighted the differing levels of scrutiny for content-based and content-neutral regulations by distinguishing its holding in *Boos v. Barry*, which did require the least restrictive means of achieving the government's interest for a content-based speech regulation. *Id.* at 800 n.6.
[26] *See, e.g.*, City of Houston v. Hill, 482 U.S. 451 (1987).
[27] *See, e.g., id.*; Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984); New York v. Ferber, 458 U.S. 747 (1982); Broadrick v. Oklahoma, 413 U.S. 601 (1973).
[28] *Hill*, 482 U.S. at 455.
[29] *Id.* at 472 (noting that "a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.").

individuals for words or conduct that annoy or offend them."[30] The ordinance, therefore, was found to be substantially overbroad in that it could be applied to a large group of situations in which individuals were engaged in constitutionally protected speech. The Court has held that laws will only be found unconstitutionally overbroad if the overbreadth is "substantial;" it has declined to find overbreadth where the potential application of the statute to protected behavior is either unrealistic or represents only a small fraction of material or behavior that is within the statute's reach.[31]

C. Prior Restraint

A law can also be rendered unconstitutional if it functions as a prior restraint. The Supreme Court has found that prior restraints, regulations that, in some way, target speech before it has even occurred, "are the most serious and the least tolerable infringement on *First Amendment* rights."[32] Prior restraints are most often defined as "'administrative or judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'"[33] Even in the absence of an administrative or judicial order, the Court has found a prior restraint when sufficient coercion existed to cause the regulated party to avoid certain types of speech.[34]

In *Bantam Books, Inc. v. Sullivan*, the Rhode Island Commission to Encourage Morality in Youth sent letters to various publishers, requesting that they comply with a request not to sell certain publications that were deemed inappropriate for minors.[35] The letters informed the publishers that their cooperation would "eliminate the necessity of our recommending prosecution to the Attorney General's department."[36] The Court found that the Commission's actions comprised an unconstitutional prior restraint; their veiled threats of prosecution served to suppress the material they deemed objectionable.[37] Ultimately, the concern over prior restraints is that speech will be chilled - that "communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the *First Amendment*."[38]

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[30] *Id.* at 465.
[31] *See Taxpayers for Vincent*, 466 U.S. at 800-01; *Ferber*, 458 U.S. at 773.
[32] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).
[33] Alexander v. United States, 509 U.S. 544, 550 (1993) (quoting MELVILLE NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, at 4-14 (1984)).
[34] Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).
[35] Some of the objectionable publications were *Peyton Place*, *The Bramblebush*, and magazines such as *Playboy*. *Id.* at 62 n.4.
[36] *Id.* at 63 n.5.
[37] *Id.* at 67.
[38] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973).

II. A LOOK BACK AT PREVENTING PROFIT FROM CRIMINAL ACTS

THE CREATION OF THE SON OF SAM LAWS

A. *New York*

During the summer of 1977, a violent serial killer eluded capture in New York City. After murdering six and wounding seven others over the course of eight random shootings, David Berkowitz was apprehended as the "Son of Sam," a name the killer had given himself in letters to the police and the press.[39] The Son of Sam killings had gripped New York for an entire summer, causing hysteria, fear, and extreme curiosity. Much of this attention was fostered by the killer himself, whose cryptic letters taunted the police and the press as the killings continued. After his arrest, based on the relationship with the media that the killer had already cultivated, there was concern that Berkowitz's notoriety might provide him the opportunity to profit from his crimes by telling his story to publishers. The New York legislature responded to this concern by taking steps to introduce a statute which would prevent criminals from profiting from their crimes.[40]

The Son of Sam law was born.[41] Specifically, the statute aimed to "ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering."[42] Senator Emanuel R. Gold, the author of the statute, stated that, "[i]t is abhorrent to one's sense of justice and decency that an individual . . . can expect to receive large sums of money for his story once he is captured – while five people are dead, [and] other people were injured as a result of his conduct."[43]

Notably, the law did not prevent the entity contracting with the criminal from profiting.[44] The act was later amended to require that an entity "contracting with an accused or convicted person for a depiction of the crime" notify the New York State Crime

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[39] Altered Dimensions.net, Son of Sam – David Berkowitz, http://www.altereddimensions.net/crime/SonOfSam.htm (last visited Oct. 6, 2007).

[40] N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991). Interestingly, the statute was never applied to Berkowitz, since the version of the statute at that time required that the individual be convicted, and Berkowitz was found incompetent to stand trial. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 111 (1991).

[41] New York was the first state to enact such legislation. Most other states now also have their own version of a Son of Sam law, and federal statutes were enacted in 1984. *See infra* Part II.B.

[42] *Simon & Schuster*, 502 U.S. at 108 (quoting Assembly Bill Memorandum Re: A 9019, July 22, 1977, *reprinted in* Legislative Bill Jacket, 1977 N.Y. Laws, ch. 823).

[43] *Id.* at 108-09 (quoting Memorandum of Sen. Emanuel R. Gold, *reprinted in* N.Y. STATE LEGIS. ANN. 267 (1997)).

[44] *Id.* at 109.

Victims Board of the contract and turn over income owed to the criminal, to be held in escrow for the victims.[45] Therefore, any publisher or screenwriter was required to notify the Board of a contract with a criminal and turn over any of the criminal's profits. The Act was also amended to define a "person convicted of a crime" rather broadly, including "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted."[46] Over the years, the Son of Sam law was only applied a "handful of times," given that a criminal would need to be quite well-known in order to have the opportunity to publish a profitable memoir.[47]

It was the broad definition of a "person convicted of a crime" that ultimately contributed to the Supreme Court's finding, in the 1991 case of *Simon & Schuster v. New York State Crime Victims Board*, that New York's Son of Sam law violated the First Amendment.[48] The case involved Henry Hill, an organized crime figure, who had entered into a contract with Simon and Schuster to publish his memoirs.[49] Hill, who testified against others in order to avoid prosecution, had never been prosecuted or convicted for his crimes, except for a stint in prison on an extortion conviction.[50] In the book, which was entitled *Wiseguy*, Hill detailed his involvement with a variety of crimes, including a college basketball point-shaving scandal, the theft of six million dollars from an airline, and other incidents of extortion, importation and distribution of narcotics, and robberies.[51] Hill's book was wildly successful.[52] After the book's publication, the Crime Victims Board contacted Simon and Schuster and demanded that the publisher provide the Board with copies of the publisher's contracts with Hill, disclose

[45] Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of 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 such moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives.

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

[46] *Id.* at 110 (quoting N.Y. EXEC. LAW § 632-a(10)(b)).

[47] *Simon & Schuster*, 502 U.S. at 111. The Crime Victims Board seized the profits of Jean Harris (the killer of Herman Tarnower), Mark David Chapman (who assassinated Beatle John Lennon), and R. Foster Winans (a Wall Street Journal columnist convicted of insider trading). *Id.*

[48] *Id.* at 121.

[49] *Id.* at 112.

[50] *Id.* at 112-13. Hill participated in the Federal Witness Protection Program. *Id.*

[51] *Id.*

[52] Over a million copies were in print within nineteen months of its publication. The book was ultimately made into the film, *Goodfellas*, which won many awards. *Id.* at 114.

the amount of money already paid to Hill, and suspend future payments to Hill.[53] After reviewing Hill's contract, the Board found that it violated the New York Son of Sam law and ordered that Hill relinquish all money he had already received, and that Simon and Schuster surrender all present or future funds owed to Hill.[54]

Simon and Schuster sued, alleging that New York's Son of Sam law violated the First Amendment. After both the district court and court of appeals found that the law did not violate the First Amendment,[55] the Supreme Court granted certiorari. Although the law itself did not prohibit any speech, the Supreme Court found that a financial restriction on the work of criminals was sufficient to warrant evaluation under the First Amendment.[56] The Court reversed, finding that New York's law violated the First Amendment because it was overinclusive in that it could apply to "a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated."[57] The Supreme Court established that "a financial disincentive to create or publish works with a particular content" must advance a "compelling state interest" and be narrowly tailored to achieve that interest.[58] The Court therefore concluded that New York's Son of Sam law was not narrowly tailored to advance the state's goal of compensating a criminal's victims with profits from the crime.[59]

In response, New York narrowed its Son of Sam law in order to conform with the Supreme Court's mandate in *Simon & Schuster*: the new law applies only to individuals actually convicted of a crime, targets "profits from a crime" instead of the criminal's speech, and requires that the seized income must actually be "generated as a result of having committed the crime."[60] By targeting profits instead of speech, New York transformed its Son of Sam law into a content-neutral regulation; furthermore, altering the law to apply only to those actually convicted and to profits that are directly linked to the crime creates a law that is sufficiently narrow to meet the state's goal of compensating crime victims.[61]

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[53] *Id.* at 114.
[54] *Id.* at 114-15.
[55] Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 724 F.Supp 170 (S.D.N.Y. 1989); Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990).
[56] *Simon & Schuster*, 502 U.S. at 115.
[57] *Id.* at 121-22 (noting that the Son of Sam law could have been invoked against *The Autobiography of Malcolm X* or *Civil Disobedience*, among others.).
[58] *Id.* at 118 (quoting Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).
[59] *Id.* at 121-23. Because it found the statute to be overinclusive, the Court did not resolve the question of whether New York's law was a content-based speech regulation in violation of the First Amendment, or a content-neutral regulation, whose purpose is unrelated to the content of the regulated speech. *Id.* at 122.
[60] N.Y. EXEC. LAW §§ 632-a(1)(a), a(1)(b), a(1)(b)(iii), a(2)(a), a(3) (McKinney 2001).
[61] The new New York law no longer includes works by individuals who mention past crimes

B. *Federal Legislation*

The federal statute, 18 U.S.C. § 3681, achieves a similar result, by requiring a

> [D]efendant to forfeit all or any part of proceeds received or to be received by that defendant . . . from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of that defendant's thoughts, opinions, or emotions regarding such crime.[62]

Enacted in 1984 as part of the Victims of Crime Act, the committee reports indicate that it was enacted in order to compensate and help victims of crime and, at the same time, to prevent criminals from benefiting from their own crimes.[63] While the federal statute does limit its scope to crimes for which the defendant was actually convicted and to profits from the crime, it is worth noting that the statute's mention of the defendant's thoughts appears to lean towards regulating speech, an aspect of the New York statute that the Supreme Court found unconstitutional. This aspect of the federal statute has not been addressed in the courts and remains as written. Because it targets profits based on expression, however, it is questionable if the regulation would withstand a constitutional challenge.

Demonstrating the desire to craft a federal regulation that passes constitutional muster, a recent bill introduced in the House amends § 3681 so that it presents a content-neutral, narrowly-tailored regulation.[64] Rather than target profits from specific endeavors such as books, films, or newspaper articles, the amendment alters the language to target "any profits made possible by the offense."[65] Moreover, it inserts the compelling interest requirement directly into the language of the act, replacing "the interest of justice or an order of restitution"[66] with "the compelling interest of preventing wrongdoers from profiting from their crimes or of providing restitution to the victims of those crimes."[67] Although this amendment is still in Committee, the efforts to create a federal regulation that conforms with the constitutional mandate of *Simon & Schuster* indicate a continuing dedication to crafting a lasting regulation that compensates the victim and pre-

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for which they were not convicted, and for which there are no victims seeking compensation. *See Simon & Schuster*, 502 U.S. at 121-22.

[62] 18 U.S.C. § 3681(a) (2006).

[63] S. REP. NO. 98-497, at 1-2, 6-7 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3607, 3607-08, 3612-13.

[64] *Criminal Restitution Improvement Act of 2007*, H.R. 845, 110th Cong. § 6 (2007).

[65] *Id.*

[66] 18 U.S.C. § 3681(a).

[67] H.R. 845, *supra* note 64.

vents criminal profit.

C. *California*

Highest State Court Finds State Son of Sam Law Unconstitutional, Yet Opens the Door for a Constitutional Son of Sam Law

In 2002, California's highest court found the California Son of Sam law unconstitutional in *Keenan v. Superior Court*,[68] patterning its decision, in large part, after the Supreme Court's reasoning in *Simon & Schuster*.[69] Individuals who had been involved in the kidnapping of Frank Sinatra, Jr. planned a book and film about the kidnapping.[70] After comparing California's Son of Sam law to the shortcomings of the New York law identified in *Simon & Schuster*, the court concluded that California's law, like New York's pre-*Simon & Schuster* law, was overinclusive. Despite the fact that California's law applied only to those persons actually convicted of felonies and also included an exemption for "mere passing mention" of a crime, the court still found that the law could be applied to a significant group of protected works and was therefore not narrowly tailored to the state's interest in compensating crime victims with the fruits of a crime.[71]

Judge Brown's concurrence in *Keenan*, however, argues that not every Son of Sam law is unconstitutional *per se*.[72] Judge Brown states that he wrote a concurring opinion, rather than joining the majority, "[l]est it seem the moral of the story is crime *does* pay;" his opinion discusses possible formulations of a Son of Sam law that would cure the constitutional deficiencies identified in the New York and California Son of Sam laws.[73] Demonstrating the court's acceptance of a significant state interest in compensating crime victims with profits from the crime, Judge Brown states that a law that targeted *all profits* derived from a crime, regardless of

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[68] CAL. CIV. CODE § 2225(b)(1) (2000). Subsection (b)(1) comprised the first prong of California's Son of Sam law.

[69] Keenan v. Superior Court of Los Angeles County, 40 P.3d 718 (2002).

[70] *Id.* at 723. An article entitled "Snatching Sinatra" appeared in a Los Angeles tabloid, and Columbia Pictures bought the film rights to the story. *Id.*

[71] *Id.* at 732-33 (finding that California's law could still be applied to a work that had "little or nothing to do with . . . the state's interest in compensating crime victims from the fruits of crime," such as those that "might mention past felonies as relevant to personal redemption; warn from experience of the consequences of crime; critically evaluate one's encounter with the criminal justice system; document scandal and corruption in government and business; describe the conditions of prison life; or provide an inside look at the criminal underworld.") (footnote omitted). The court goes on to identify, as the Supreme Court did in *Simon & Schuster*, specific works that would have been subject to California's law, including *The Autobiography of Malcolm X*, which tells of burglaries for which Malcolm X was convicted, and the novels of G. Gordon Liddy and John Dean, which describe their roles in the Watergate scandal. *Id.* at 734 n.20.

[72] *Id.* at 736.

[73] *Id.* at 735 (stating that "[a] properly drafted statute can separate criminals from profits derived from their crimes while complying with the First Amendment.").

whether the profits derived from the criminal's retelling of the crime, would potentially overcome the constitutional problems identified by the *Simon & Schuster* and *Keenan* courts.[74] A law that focuses on profits, rather than on storytelling, would be content-neutral, and would therefore be subject only to intermediate scrutiny.[75] Judge Brown unequivocally concludes that "[a] law that neutrally seizes all profits of crime comports with *Simon & Schuster* . . . and thus the First Amendment."[76] In outlining possible solutions to the Son of Sam laws' constitutional problems, Judge Brown validates the government's interest in compensating crime victims and, at the same time, acknowledges a judicial interest in, and the possibility of, balancing individuals' First Amendment rights with the rights of crime victims.

Moreover, it is noteworthy that the second prong of California's Son of Sam law, section 2225(b)(2) of the California Civil Code,[77] which addressed profits from memorabilia made notorious because of a connection to a crime, was not at issue in *Keenan* and was therefore unaffected by the court's finding that the first prong of the Son of Sam law was unconstitutionally overbroad.[78] This second prong is similar to crime memorabilia statutes that are in place in other states and also to the bills that are currently pending in Congress.[79] Judge Brown, in his concurrence, notes that section 2225(b)(2) is potentially a content-neutral regulation in that it seizes "all income from anything sold or transferred by the felon . . . including any right, the value of which thing or right is enhanced by the notoriety gained from the commission of a felony."[80] Although section 2225(b)(2) targets all profits, Judge Brown notes that its content-neutral status is uncertain, as it still targets memorabilia that enjoys notoriety from a crime.[81] At the same time, however, Judge Brown suggests that the memorabilia section could still be deemed to be content-neutral and avoid strict scrutiny if its purpose is found to be unrelated to the content of the speech, despite its "incidental effects on some speakers or

[74] *Id.* at 737 (noting that a law that targets all profits would not be content-based, thereby avoiding strict scrutiny, and would be narrowly tailored to address the interest of compensating crime victims).

[75] *Id.* Judge Brown goes on to state that "a limitation on the law's scope to storytelling is the Achilles' heel of a Son of Sam provision." *Id.* at 738.

[76] *Id.* at 739.

[77] CAL. CIV. CODE § 2225(b)(2). This subsection of the law was added in 1994. *Keenan*, 40 P.3d at 721.

[78] *Keenan*, 40 P.3d at 721 n.4 (noting that the section on memorabilia is "clearly severable" from the first prong of the law).

[79] *See infra* Part III.

[80] *Keenan*, 40 P.3d at 738 (quoting CAL. CIV. CODE § 2225(b)(2) (2000)).

[81] *Id.* at 739 (noting that if Sinatra's kidnapper published a collection of poetry anonymously, his profits would not fall under subsection 2225(b)(2), but that they would fall under the subsection if that collection were entitled "Sizzling Sonnets from the Sinatra Snatcher").

messages but not others."[82] Finally, Judge Brown concludes that even if the memorabilia section were categorized as content-based, it would still pass a constitutional challenge if it "pursues a compelling interest . . . and is narrowly drawn."[83] According to Judge Brown, then, section 2225(b)(2) of the California Civil Code, which targets *all* profits from memorabilia made more valuable based on a connection to a crime, would most likely be found constitutional, regardless of whether the regulation is ultimately categorized as content-neutral or content-based.

III. THE PENDULUM SWINGS THE OTHER WAY – "MURDERABILIA" AND LIMITING THIRD-PARTY PROFITS FROM CRIME

As a part of its attempt to comport with the Supreme Court's mandate against overbreadth in *Simon & Schuster*, New York changed its Son of Sam law to apply only to criminals actually convicted of a crime.[84] Seventeen years have passed since *Simon and Schuster*, however, and the American public remains obsessed with crime.[85] New technologies have made it easier than ever to buy and sell crime-related objects.[86] Online auctions selling criminal memorabilia indicate that the criminal is no longer the only individual who can profit from his work; third parties can make a significant profit by selling criminal memorabilia online.[87] Therefore, a third party, by contracting with criminals or other third parties, can easily benefit from a criminal's crime. Often, the criminal may not even be aware that his items are for sale; Ted Bundy's Volkswagen, for example, as discussed *supra* note 87, was purchased at a police auction.

The public outcry against the sale of such items is evidenced by auction website eBay's ban on the sale of "murderabilia" from its site.[88] After years of Son of Sam laws that limit the seizure of income to income received by individuals actually convicted of a

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[82] *Id.* at 739.
[83] *Id.*
[84] *See* N.Y. EXEC. LAW § 632-a, *supra* note 40.
[85] Marty Graham, *Making a 'Murderabilia' Killing*, WIRED, Dec. 8, 2006, *available at* http://www.wired.com/science/discoveries/news/2006/12/72259.
[86] Suna Chang, Note and Comment, *The Prodigal "Son" Returns: An Assessment of Current "Son of Sam" Laws and the Reality of the Online Murderabilia Marketplace*, 31 RUTGERS COMPUTER & TECH. L.J. 430, 432 (2005). *See also* Graham, *supra* note 85.
[87] "The omnipresence of the Internet has not only led conventional retailers to set up virtual shops, but has also lured sellers (and buyers) of less-conventional goods online." Chang, *supra* note 86, at 432 (footnote omitted). Among the online retailers is www.murderauction.com, which, at my last visit on October 7, 2007, offers, among other items, a Christmas card mailed by serial killer Ted Bundy shortly before his execution, a hubcap from the Volkswagen that Bundy used to commit his crimes, and a medical examiner's wound chart of Sharon Tate, one of Charles Manson's victims. *See* http://www.murderauction.com/ (last visited Oct. 7, 2007).
[88] *See* eBay, http://pages.ebay.com/help/policies/offensive.html (last visited Oct. 7, 2007).

crime, there is now a renewed desire to prevent third parties from profiting from crimes.

Some states' Son of Sam laws prevent third parties from profiting as well. California's Son of Sam law, for example, defines a "profiteer of the felony" as "any person who sells or transfers for profit any memorabilia or other property or thing of the felon, the value of which is enhanced by the notoriety gained from the commission of the felony for which the felon was convicted."[89] The law goes on to stipulate that a victim or victim's beneficiary may bring an action against a profiteer of the felony.[90]

Even more compelling is the recent legislation introduced in Congress to prevent criminals from mailing items to third parties for their eventual sale. Although these bills target criminals' use of the mail system in order to mail "murderabilia" items, their intent is clear: for most transactions, third-party vendors rely, at some point in the chain of possession, on a criminal's providing the relevant items. With no inventory, third-party vendors will also be precluded from selling "murderabilia." Both of these nearly identical bills have been introduced in the House and Senate and have been referred to Committee.[91]

IV. THE FIRST AMENDMENT AND THE MEDIA: DOES THE MEDIA RECEIVE SPECIAL TREATMENT?

The media enjoys the same broad First Amendment rights as individuals, and any regulation that will potentially affect the media must survive the strict scrutiny of content-based regulations, the intermediate scrutiny of content-neutral regulations, and undergo overbreadth analysis. When a law presents a potential application to the media, however, should the media enjoy any special exemption? The Supreme Court has, on many occasions, declined to recognize any greater First Amendment protection for the media than that which already exists for individuals. For example, although many states have recognized a special right of the media to protect the identities of confidential sources and have

[89] CAL. CIV. CODE § 2225(a)(3)(B). *See supra* Part II.C for further discussion.

[90] *See* CAL. CIV. CODE § 2225(c)(1). The law excludes the inherent value of the item – a profiteer would be able to retain the inherent value of a hubcap, for example, but not the enhanced value gained by its notoriety from being a hubcap from Ted Bundy's automobile.

[91] *See* Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. (1st Sess. 2007) (a bill "to amend chapter 87 of title 18, United States Code, to end the terrorizing effects of the sale of murderabilia on crime victims and their families"); Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, H.R. 3665, 110th Cong. (1st Sess. 2007) (a bill "[t]o amend chapter 87 of title 18, United States Code, to end the terrorizing effects of the sale of murderabilia on crime victims and their families."). These bills were introduced in May and September 2007, respectively, and are still under consideration.

enacted reporters' "shield laws,"[92] the Supreme Court has declined to provide this special right to the media, and there is, at this writing, no federal shield law.[93]

Moreover, the Supreme Court has held that the media is not exempt from abiding by general laws that do not target the press' ability to deliver the news.[94] In *Associated Press v. United States,* the Court refused to find that the First Amendment exempts the press from federal antitrust laws.[95] The Court found that a group of member newspapers could not function in such a way as to create a monopoly and refused to exempt the newspapers from antitrust liability.[96] Moreover, the Court found that a refusal to exempt the press from antitrust laws actually furthered the goals of the First Amendment by broadening the news' potential audience.[97]

The Court has also declined to exempt the press from compliance with federal labor laws. *Associated Press v. NLRB* established that the press must comply with the National Labor Relations Act, which allows employees the right to organize and bargain.[98] Because the National Labor Relations Act did not hinder the ability of the press to deliver the news, the court declined to grant an exemption to the press.[99] The Court went on to find that "[t]he publisher of a newspaper has no special immunity from the application of general laws."[100] In *Oklahoma Press Publishing Co. v. Walling,* the Court confirmed its position in *Associated Press* and held that the press must also comply with the Fair Labor Standards Act, which requires that employees be paid at minimum wage and also establishes limits on working hours.[101]

Echoing the belief that laws should not focus solely on the press, the Supreme Court has also held that the press must pay

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[92] *See* A Guide to Journalist Shield Laws, http://www.poynterextra.org/shieldlaw/index.htm (last visited Jan. 1, 2008).

[93] *See* Branzburg v. Hayes, 408 U.S. 665 (1972) (rejecting a claim that the First Amendment creates a "shield" for reporters which permits them to avoid disclosing the identities of their sources when subpoenaed).

[94] *See* Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (finding that the general law at issue was not motivated by a desire to interfere with the press). "[G]enerally applicable laws do not offend the *First Amendment* simply because their enforcement against the press has incidental effects on its ability to gather and report the news. . . . [E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 669-70.

[95] 326 U.S. 1 (1945).

[96] The newspapers only provided access to members of the association, and membership was restricted. *Id.* at 9.

[97] *Id.* at 20. *See also* Citizens Publ'g Co. v. United States, 394 U.S. 131, 139-40 (1969).

[98] The Associated Press had fired an employee who attempted to organize employees for collective bargaining purposes. 301 U.S. 103, 123 (1937).

[99] *Id.* at 133 (finding that "[t]he order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication.").

[100] *Id.* at 132.

[101] 327 U.S. 186 (1946).

general taxes that are applicable to all organizations, but cannot be subject to special taxes that may inhibit its ability to deliver the news.[102] Where taxes do not "single out" the press, a generally applicable tax will not be found unconstitutional, and the press will be required to adhere to the tax provisions.[103]

In *Cohen v. Cowles Media Co.*, the Supreme Court strongly reaffirmed its position that the media is required to comply with general laws.[104] In *Cohen*, a newspaper argued that it should be exempt from liability for general breach of contract after it published the name of a source who had been promised anonymity.[105] The Court rejected the newspaper's First Amendment claims; although the law may have had "incidental effects" on the ability of the newspaper to "gather and report the news," the Court maintained that general laws "are not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations."[106] The media, then, has not been granted any special exemptions from laws of general applicability.[107] In many cases, enforcing the law against the media actually serves to advance First Amendment values by expanding news sources and creating a larger potential audience. Moreover, the Court has never found that laws of general application present any significant burden to the media and its ability to gather and deliver the news.

V. CAN A FEDERAL REGULATION THAT TARGETS ALL PROFITS FROM CRIMINAL MANIFESTOS SURVIVE CONSTITUTIONAL CHALLENGES UNDER THE FIRST AMENDMENT?

The current federal regulation, *supra* Part II.B, only applies to profits due to the criminal himself, and not to any profits received by third parties. In proposing federal regulations on all profits from criminal manifestos, regardless of the recipient, it is valuable to use, as a starting point, an existing Son of Sam law that applies to third-party profits and has evaded constitutional challenges. The "memorabilia" prong of California's Son of Sam law targets all profits that are derived from criminal notoriety.[108] The law seizes "all profits," with profits defined as:

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[102] Leathers v. Medlock, 499 U.S. 439, 447 (1991) (finding that "a tax limited to the press raises concerns about censorship of critical information and opinion"); *see also* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 387-88 (1990); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227-28 (1987); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 583, 585 (1983); Grosjean v. Am. Press Co., 297 U.S. 233, 249-51 (1936).

[103] *Leathers*, 499 U.S. at 447-48.

[104] 501 U.S. 663 (1991).

[105] *Id.*

[106] *Id.* at 669-70.

[107] *Id.*

[108] *See* CAL. CIV. CODE § 2225(b)(2).

> [A]ll income from anything sold or transferred by the felon, a representative of the felon, or a profiteer of the felony, including any right, the value of which thing or right is enhanced by the notoriety gained from the commission of a felony for which a convicted felon was convicted.[109]

The funds are placed in a trust for "beneficiaries," which are defined as individuals who have the "right to recover damages from the convicted felon for physical, mental, or emotional injury, or pecuniary loss proximately caused by the convicted felon as a result of the crime for which the felon was convicted."[110] By including income from items transferred by a "profiteer of the felony" within its definition of "profits," the California statute includes third-party profits.[111]

Turning to the constitutional analysis, the first point of issue is whether a regulation that targets all profits, including those made by third parties, from materials made notorious through a connection to crime, including criminal manifestos, is content-based or content-neutral. As discussed in Part II.C, *supra*, although the regulation applies to all profits, which would indicate a content-neutral regulation, it still targets certain materials based on their connection to a crime, which could be characterized as content-based. Regardless of its ultimate classification as content-based or -neutral, however, the regulation will need to be narrowly tailored to advance a compelling interest. As Judge Brown concluded in *Keenan*, a law that "neutrally seizes all profits of crime," whether it is content-based or content-neutral, satisfies the First Amendment so long as it is narrowly drawn to satisfy a compelling interest.[112]

Is there, then, a compelling interest in preventing criminals and third parties from profiting from crimes and in applying those profits toward compensating the victims of crime? A federal regulation would necessarily recognize the dual interests served by seizing profits from crime - both compensating the victims and preventing a criminal or other third party from profiting. Judge Brown, in his concurring opinion in *Keenan*, asserts that a state may simultaneously seek to advance both interests, so that a criminal cannot resume his profiteering once his victims have been compensated.[113] A federal regulation targeting profits from crime,

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[109] *Id.* at § 2225(a)(10).
[110] *Id.* at § 2225(a)(4)(A).
[111] The provision defines "profiteer of the felony" as "any person who sells or transfers for profit any memorabilia or other property or thing of the felon, the value of which is enhanced by the notoriety gained from the commission of the felony . . . ." *Id.* at § 2225(a)(3)(B).
[112] Keenan v. Superior Court of Los Angeles County, 40 P.3d 718, 739 (2002).
[113] *Id.* (noting that "there is no apparent reason why a state must select only one compelling interest to pursue.")

then, may incorporate both interests, neutrally seizing profits to compensate victims and to prevent criminals and third parties from profiting. Once the victims have been compensated, any remaining seized profits should be contributed to a general victim restitution fund.[114]

Recent events indicate that the government has a strong interest in both concerns. In 2006, a federal judge ordered that items which had been seized from Unabomber Theodore Kaczynski's cabin be sold in an Internet auction, with the proceeds to go to the victims.[115] The fact that the judge ordered an auction to satisfy the restitution order indicates a compelling interest in seeing the restitution order fulfilled and the victims compensated, and that the interest was so compelling that the state was willing to design its own solution for fulfilling the restitution order.[116] The government, at the direction of the Ninth Circuit, even sought the victims' approval of the auction plan, once again indicating a strong desire to compensate the victims.[117] Moreover, the desire to prevent Kaczynski or third parties from profiting from Kaczynski's crimes is indicated by the fact that the victims themselves retained the right to credit bid on any unpurchased items, with the money they spent deducted from Kaczynski's restitution order.[118] Because leftover auction items were to be returned to Kaczynski, the court's approval of this plan signals a desire to prevent Kaczynski, or any other third parties, from profiting from the sale of his property. The online auction of Kaczynski's personal belongings, therefore, indicates both a desire to curtail criminal and third-party profits from crimes and to compensate the criminal's victims.

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[114] California's Son of Sam law achieves this dual purpose by holding the funds in a trust for the victims for a certain period of time, after which the funds are transferred to a restitution fund. CAL. CIV. CODE § 2225(b)(2).

[115] United States v. Kaczynski, 446 F. Supp. 2d 1146 (E.D.Cal. 2006). The auction profits would go towards the $15 million restitution order that the same judge ordered that Kaczynski pay to his victims. *Id.* Among the items to be auctioned off are Kaczynski's large collection of books (*e.g. 201 Russian Verbs, Caesar's Gallic War, Camping and Woodcraft, Effects of Nuclear Weapons, Elements of Style*), clothing, tools, and personal writings. *Id.* at 1155-61. *See also* Serge F. Kovaleski, *Unabomber Wages Legal Battle to Halt the Sale of Papers*, N.Y. TIMES, Jan. 22, 2007, at A1; Carolyn Marshall, *Court Orders Plan for Papers of Unabomber*, N.Y. TIMES, July 22, 2005, at A16; Jesse McKinley, *Personal Items of Unabomber Will Be Sold*, N.Y. TIMES, Aug. 12, 2006, at A12. I anticipate the argument that an individual who makes a purchase at the auction could then resell it for a profit; yet, that profit would also fall under the umbrella of a federal regulation targeting "all profits," much like the proposed memorabilia statutes.

[116] The Ninth Circuit remanded the case to the district court and directed the government to identify a plan, "the principal purpose of which shall be to maximize monetary return to the [Named Victims]." United States v. Kaczynski, 446 F. Supp. 2d at 1148 (quoting United States v. Kaczynski, 416 F.3d 971, 977 (9th Cir. 2005)).

[117] *Id.* at 1149 (noting that the victims' input should be solicited since the "'very purpose' of the restitution order 'is to provide financial compensation for [the victims'] great losses.'").

[118] *Id.* at 1152-53.

The recent case of O.J. Simpson's fictional confession, *If I Did It*, also crystallizes the significant government interest in preventing criminals and third parties from profiting from crimes while victims go uncompensated. O.J. Simpson, found civilly liable for the deaths of Nicole Brown Simpson and Ron Goldman, was ordered to pay a multi-million dollar judgment to the Goldman family.[119] In 2006, Simpson penned his hypothetical retelling of the murders of Nicole Brown Simpson and Ron Goldman and entered into a book deal with HarperCollins and planned a television interview on Fox.[120] Both the book deal and interview were cancelled amid public disapproval.[121] The civil judgment remains largely unpaid, and, in August 2007, a federal bankruptcy court awarded the book rights to the family of victim Ron Goldman.[122] The initial order to auction the book rights for the benefit of the Goldman family, followed by the subsequent award of the book rights to the Goldman family, once again indicates a dual interest in preventing the criminal and third parties from profiting from crimes and in compensating victims.

The analysis next turns to whether the regulation is narrowly tailored to address that compelling interest, or if it is unconstitutionally overbroad, which the Supreme Court identified as the flaw in New York's Son of Sam law in *Simon & Schuster*.[123] As an initial matter, it is worth noting that Seung-Hui Cho, the Virginia Tech murderer, committed suicide before NBC even received his manifesto. Cho was, therefore, never officially a "convicted felon," in that criminal proceedings against him were never initiated. Yet the timing of a criminal's death should not dictate the application of a law that targets profits from his manifesto. Had Cho survived, he most certainly would have been convicted. Moreover, by mailing his manifesto to NBC during his crime, he transferred his manifesto to NBC before his death. Word of the manifesto spread quickly, and its large broadcast bestowed upon Cho an enormous

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[119] *See* B. Drummond Ayres Jr., *Civil Jury Finds Simpson Liable in Pair of Killings*, N.Y. TIMES, Feb. 5, 1997, at A1. The judgment is now at $38 million. *See also Judge Keeps O.J. From Book, TV Proceeds*, NewsMax.com, Mar. 14, 2007, *available at* http://archive.newsmax.com/archives/articles/2007/3/14/102934.shtml (last visited Oct. 4, 2008) [hereinafter *Judge Keeps O.J. From Book, TV Proceeds*].

[120] *See* Mireya Navarro, *Is Publishing the Sweetest Revenge?*, N.Y. TIMES, Aug. 19, 2007, at 10.

[121] *Id.*

[122] *See In re* Lorraine Brooke Assoc., Inc., No. 07-12641-BKC-AJC, 2007 WL 2257608 (Bankr. S.D. Fla. Aug. 2, 2007). After the book and television interview were cancelled, the California Superior Court ordered that the rights be auctioned in order to prevent Simpson from garnering any profit, with the proceeds going to the Goldman family. The auction was cancelled after Lorraine Brooke Associates, a company purportedly owned by Simpson's children that owned the rights, declared bankruptcy. *See* Greg Risling, *O.J. Simpson Book Rights Auction on Hold*, Apr. 16, 2007, *available at* http://www.redorbit.com/news/entertainment/903306/oj_simpson_book_rights_auction_on_hold/index.html (last visited Jan. 11, 2008); *see also* Judge Keeps O.J. From Book, TV Proceeds, *supra* note 119.

[123] 502 U.S. 105 (1991).

notoriety. Anyone watching the news that week would have had difficulty avoiding Seung-Hui Cho's disturbing videos and images. The writers of California's law probably did not imagine that someone not prosecuted for a crime could attain any kind of notoriety that would generate profit. When criminals have access to materials that allow them to create and distribute their own "press kits," however, notoriety no longer hinges on the institution of criminal proceedings against the criminal. Had Cho lived, his notoriety would have been solidly cemented in the public's mind well before any criminal proceedings had started.

In the past, criminal notoriety often accelerated over a longer period of time, as the criminal either communicated with the media as he continued to commit crimes,[124] or during high-profile court proceedings. Seung-Hui Cho committed a felony, regardless of whether he was prosecuted for it. Notoriety survives death; anti-murderabilia statutes apply to materials from now-deceased criminals.[125] If one of the compelling interests behind Son of Sam laws is to compensate crime victims, failure to convict because of the death of the criminal should have no bearing on the application of the law. When a statute targets all profits, including third-party profits, if any individual is still able to profit from the crime, the death of the criminal is irrelevant.

The "actual conviction" language is included in California's law in order to avoid the overbreadth problem identified in *Simon & Schuster*. Without the requirement that the individual actually be convicted, works like *Civil Disobedience*, in which authors describe past crimes for which they were not convicted, would be subject to the law. Yet federal regulations of profits from criminal manifestos can still apply in the case of criminals whose prosecutions and certain convictions fail due to death without treading too close to overbreadth; as Judge Brown found in his concurrence in *Keenan*, there is a "fundamental difference" between works by already-famous authors that happen to mention past crimes, and works by those who committed serious crimes and whose works are only notable because of those crimes.[126] Eliminating the "actual conviction" language from a federal regulation and differentiating between these two vastly disparate situations should not present an insurmountable obstacle when applying a federal regulation.

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[124] *E.g.*, David Berkowitz's letters sent to the police and the media while his murders continued, *supra* note 39.

[125] California's current Son of Sam law, for example, seizes profits from "profiteers of the felony," necessarily acknowledging that third parties can profit from criminal notoriety at any time, including after the death of a criminal. CAL. CIV. CODE § 2225(a)(3)(B); (a)(10) (Deering 2008). Indeed, many murderabilia websites offer memorabilia from deceased criminals; *see* murderauction.com, *supra* note 87.

[126] Keenan v. Superior Court of Los Angeles County, 40 P.3d 718, 735 (2002).

Would federal regulations of all profits from crime create an unconstitutional prior restraint? A regulation that targets all profits, regardless of whether they derive from expressive activity or items of personal property, would avoid classification as a prior restraint on speech; because its target is profits, and not specific content as in *Bantam Books*, as discussed in Part II, *supra*, the regulation would not aim to dissuade individuals from certain kinds of speech.

In *Alexander v. United States*, the defendant, who owned businesses that sold "sexually explicit" items, was found guilty of violating federal obscenity laws and the Racketeer Influenced and Corrupt Organizations Act (RICO).[127] In addition to a prison sentence and fine, the defendant was also subject to forfeiture proceedings under RICO, which required that he forfeit his businesses and their assets, as well as $9 million that he had earned through racketeering.[128] The defendant argued that the RICO forfeiture provisions acted as a prior restraint on speech in that the forfeiture had "effectively shut down his adult entertainment business" and prevented his future expression.[129] In finding that the RICO forfeiture provisions did not constitute a prior restraint on speech, the Court held that a prior restraint "'describe[s] . . . orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'"[130] However, the Court held that the forfeiture order presented no "legal impediment" to petitioner's ability to engage in any future expressive activity; rather, it just deprived him of assets derived from his prior racketeering offenses.[131] The Court emphasized that RICO was "oblivious" to the expressive nature of the assets – it targets all assets associated with racketeering, regardless of any expressive quality.[132] Because RICO does not target any particular expressive activity, and instead targets racketeering profits regardless of their source, the Court found that the forfeiture did not constitute an unconstitutional prior restraint on speech.[133] The Court noted that the defendant was free to return to his adult entertainment business the very next day, if he so chose.[134] Similarly, a federal regulation that targets *all profits* from crime, regardless of their origin, would not constitute a prior restraint, as it would not focus on or aim to suppress any particular expressive activity. A crimi-

[127] Alexander v. United States, 509 U.S. 544, 546 (1993).
[128] *Id.* at 548.
[129] *Id.* at 549.
[130] *Id.* at 550 (quoting MELVILLE NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, at 4-14 (1984)).
[131] *Id.* at 551.
[132] *Id.* (noting that books, cars, drugs, and cash are all forfeitable under RICO).
[133] *Id.*
[134] *Id.*

nal, or anyone else, is free to write about or otherwise take part in expressive activity involving the crime; the profits, however, are simply not available.

VI. APPLYING REGULATIONS ON PROFITS FROM CRIME TO THE MEDIA

The final step is to assess the application of this general federal regulation to the media. The Supreme Court, in denying media exemptions from laws of general application, has always based its decisions, in part, on the fact that the laws at issue had no effect on the media's ability to gather and deliver the news.[135] The Court's recognition that the media's ability to carry out its role was unaffected suggests that the Court, if confronted with a law that directly challenged the media's ability to carry out its role, could grant the media an exemption. Would federal regulations that seize the media's overt profits from criminal manifestos impede the media's ability to gather and deliver the news? The proposition that a regulation seizing media profits from criminal manifestos would chill the media's efforts or ability to gather and deliver news does not carry much weight. As an initial matter, it is generally the criminal who provides the media with his manifesto; in the case of the Virginia Tech massacre, Seung-Hui Cho sent his manifesto to NBC unsolicited, and it merely appeared in NBC's mailroom, awaiting discovery – no active "newsgathering" took place.[136] Moreover, the material was received by NBC lawfully, and NBC's decision to air it was, arguably, the correct one if it concluded that it was in the public's interest to broadcast the manifesto.

It would be ironic indeed, however, if the news media chose not to air certain material if it were unable to derive extra profit from it. The right to gather and deliver the news to the public, a right which the media so staunchly champions, would be severely subverted if the media altered its broadcast decisions based on the opportunity for greater profit. The public could no longer depend on the media's newsgathering efforts in the name of free speech, if the media itself were to choose its content based on the opportunity for additional profit and not based on public interest, relevance, or importance. The proposed regulation does not affect the media's ability to air criminal manifestos; it merely seizes overt profits that such manifestos generate. Moreover, the law does not single out the media; rather it targets all profits, whether made by the media, the criminal, or some other third party.

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[135] *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 669-70 (1991); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 192 (1946); Associated Press v. United States, 326 U.S. 1, 20 (1945); Associated Press v. NLRB, 301 U.S. 103, 133 (1937).

[136] Bill Carter, *supra* note 2 (noting CBS News vice president Paul Friedman's observation that rather than engaging in "enterprise reporting," NBC had merely "'picked [Cho's manifesto] up in its mailroom.'").

While it is true that the media is, by nature, a for-profit venture, a federal regulation can easily differentiate between inherent and overt profit, just as the memorabilia section of California's Son of Sam law excludes the seizure of the inherent value of seized items.[137] Could the fact that the media inherently profits from its news coverage create a situation in which the regulation could be overbroad when applied to the media? That is, could the regulation seize profits from general reporting on a crime or a criminal manifesto? This is a valid concern, and the regulation would necessarily differentiate between simple news reporting and behavior by the media that garners profits beyond those inherent in delivering the news. Just as California's memorabilia section of the Son of Sam law excludes the inherent value of an item, any federal regulation would necessarily exclude the inherent profit that the media generates through news coverage of a crime.[138] However, actions like those taken by NBC, claiming ownership of the materials, and the actions taken by other networks in creating special logos and sound effects for their coverage, go beyond the realm of normal news reporting. In order to avoid a finding of overbreadth based on its definition of profits gained by the media, then, the federal regulation would need to differentiate between inherent profit and overt profit.[139] Because existing statutes already recognize the difference between overt and inherent profit, there should be no obstacle to implementing an inherent profit

[137] *See* discussion *supra* note 90.

[138] California's Son of Sam law seems to have also contemplated the problem of targeting the media: its definition of "profiteer of a felony" excludes the media's reporting of the crime or reporting of the sale of memorabilia. Notably, the law does not entertain the idea that the media itself may be involved in profiting from crime memorabilia. CAL CIV. CODE § 2225(3)(B).

[139] The media generates much of its profits from advertising revenue. Media ratings, which reflect the number of viewers for any given program, lead to increased advertising revenue for the media, since advertisers choose to place their ads with those networks and programs that have the most viewers. A network can achieve increased ratings and revenue, then, by garnering more viewers; airing sensational material (complete with story-customized logos and sound effects) and laying claim to newsworthy material (by labeling the material with the network's insignia so that even those who view it on other networks are made aware that the named network was "first") are two methods of attracting increased viewership. Moreover, networks can increase their advertising prices in response to strong ratings. *See* Jill Cozzi, *Two Views of TV: Viewer is Product,* BERGEN REC., Apr. 28, 1998, at L8 (noting that "[t]elevision revenue and media company profits are generated by selling advertising time, and advertising time is sold based on a given show's success in delivering warm bodies in front of the TV set."). Differences in ratings and advertising revenue are quantifiable, making it possible to calculate the monetary effects of broadcasting certain materials. *See generally,* Nielsen, About the Nielsen Company, www.nielsen.com/about/index.html (last visited Feb. 3, 2008).

The degree to which advertising revenue contributes to the news media's profits is highlighted by news coverage of the September 11 terrorist attacks. The major networks did not air any advertisements for four days and suffered considerable, measurable losses in profits during that period. An analyst estimated that Viacom, owner of CBS and MTV, could lose $350 million. *See* Geneva Overholser, *Media Profits and Terrorist Attacks,* SEATTLE POST-INTELLIGENCER, Sept. 27, 2001, at B4.

clause into a federal regulation of criminal manifestos.[140]

Of course, once the regulation receives public support, it may ultimately create an environment of self-regulation, in which the media generates its own in-house guidelines for handling criminal manifestos. The media, ultimately, has a choice: it can garner extra profits from criminal manifestos that it, in turn, donates to the victims or to a restitution fund, or it can refrain from taking steps that increase its inherent profits.

CONCLUSION

A regulation that neutrally targets all profits from crime does not restrict the media's First Amendment rights; in fact, it increases the options that the media has for delivering the news, and, at the same time, permits the media to contribute to society through victim compensation. Moreover, it makes the information available to a larger group of media networks with no strings attached, ultimately increasing the public's access to information. The proposed regulation would not prohibit the media from airing or otherwise using the criminal manifesto in its broadcasts; it is merely not permitted to retain the overt profits generated by that broadcast. The reason for First Amendment protections of the media is to allow the media broad access in order to deliver the news to the public; applying a Son of Sam law to the media, where that law also applies to any other entities that stand to receive profits from a criminal's acts, does not subvert the media's mission of delivering the news. In fact, it gives the media the unique opportunity to benefit victims' families at the same time.

A law that regulates "profits" from crime does not single out the media; any profits generated as a direct result of the criminal act would fall under the regulation. The Third Circuit, in refusing to reverse fees imposed on a criminal, gave its approval to a regulation that targets all profits from crime when it expressly stated that, "*Simon and Schuster* does not . . . stand for the proposition that the government cannot recoup the proceeds of expressive activity relating to crime. Rather, the government cannot single out those proceeds for special treatment while ignoring other assets."[141] The media cannot be exempt from this general regulation, as it has no direct impact on its newsgathering and delivery

[140] The measurable connection between increased ratings and advertising revenue is further highlighted by the NFL's recent efforts to prevent churches from showing the Super Bowl on large screens for church members. Because ratings are calculated based only on the number of home-viewers, "[l]arge Super Bowl gatherings around big-screen sets outside of homes shrink TV ratings and can affect advertising revenue." *See* Jacqueline L. Salmon, *NFL Pulls Plug on Big-Screen Church Parties for Super Bowl*, WASH. POST, Feb. 1, 2008, at A01.

[141] United States v. Seale, 20 F.3d 1279, 1285 n.7 (3d Cir. 1994).

ability. The focus on "profits" most likely renders the regulation content-neutral, since its enforcement is not dependent upon any particular expression. Yet even if the incidental effect on speech imputes a content-based categorization on the regulation, the law would still comport with the First Amendment, provided that it is narrowly tailored to advance a compelling state interest.

My proposed regulation is sufficiently narrowly tailored, as it only applies to profits that directly derive from the criminal act, and it does not target inherent profit. Furthermore, the regulation does not present an unconstitutional prior restraint, as it does not target an expression before it has occurred; rather, it neutrally targets profits. I acknowledge that it is the media's role to air newsworthy material. If, however, the media chooses to benefit beyond the normal inherent profit by claiming ownership of the manifesto, or by branding its news coverage so as to increase viewership, those profits would necessarily fall under the aegis of the regulation.

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