TAKING THE ASSETS OF CRIMINALS TO COMPENSATE VICTIMS OF VIOLENCE: A LEGAL AND PHILOSOPHICAL APPROACH

ROY WHITEHEAD AND WALTER BLOCK*

I. LEGAL ANALYSIS

Over 30 years ago, New York was terrorized by a serial killer, David Berkowitz, who was immortalized by the media as the "Son of Sam."[1] By the time Berkowitz was apprehended, publicity about the case had created enormous monetary value in the publication rights to his criminal story. New York's appalled legislature sought to prevent Berkowitz and other criminals from exploiting for profit the tales of their sensational crimes while their victims remained uncompensated. The statute resulting from the legislature's praiseworthy efforts to strip the criminal of his crime related profits and compensate the victim was called the "Son of Sam Law."[2] Its efforts are praiseworthy because criminals should not profit from their violence against victims and surely victims deserve to be compensated for injuries caused by criminal violence. Today, over 40 states, including California, have some form of the "Son of Sam" law. The New York law provided that if any person "accused or convicted of a crime in this state" was "due money under contract with respect to a re-enactment of the crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, or live entertainment of any

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* Roy Whitehead Jr. is an Associate Professor of Business Law at UCA. Walter Block is the Harold E. Wirth Eminent Scholar Endowed Chair and Professor of Economics at the College of Business Administration of Loyola University.

1. On July 9, 2002, Berkowitz was denied parole by New York authorities. He claims that a neighbor's dog ordered the killings. *See In The News*, ARKANSAS DEMOCRAT-GAZETTE, July 10, 2002, at A1.

2. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board, 502 U.S. 105 (1991).

kind," or for expressions of a person's thoughts or feelings about the crime, the contract must be reported to the New York State Crime Victims Board, and the money due must be paid over to the board and placed in an escrow account, primarily for the benefit of victims who, within five years thereafter, won money judgments against the criminal.[3] Convicted persons included those who had "voluntarily and intelligently admitted" crimes for which they were not prosecuted.[4]

We contend that all people who abhor violence should favor stripping the criminal of his profits and compensating the hapless victim. To that end we explore the recent California case, which we call "Son of Sinatra,"[5] to discover a constitutionally pleasing way to accomplish this result. We discuss the constitutional problems that arise when states set out to seize assets of the criminal that have a connection with his storytelling about the crime. Often, the attempt fails because of the application of the First Amendment[6] of the U.S. Constitution as applied to the states by the Fourteenth Amendment.[7] The state of California is one of those jurisdictions that seek to relieve the criminal of his ill gained profits and to attach the assets of the criminal to compensate the victim. The "Son of Sinatra" case arose from a 1962 conspiracy. Keenan, Amsler and Irvin

> kidnapped Sinatra, Jr., from his Nevada hotel room and drove him to Los Angeles, where he was held until his father paid a ransom. During his captivity, Sinatra, Jr., suffered economic loss, physical suffering, and emotional distress. Keenan, Amsler, and Irwin were later apprehended, tried, convicted of felony offenses, and incarcer-

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3. *Id.* at 109.

4. *Id.* at 110.

5. Keenan v. Superior Court, 27 Cal.4th 413 (2002).

6. U.S. Const. Amend. I ("Congress shall make no law...abridging the freedom of speech, or the press...").

7. U.S. Const. Amend. XIV §1 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law...").

> ated under California law. Following their arrests, the kidnappers made media statements, since admitted to be false, that Sinatra, Jr., had conspired in his own kidnapping to extract money from his father. These defamatory statements caused further damage to Sinatra, Jr.'s business and reputation.[8]

Years later, the kidnappers contacted a *New Times Los Angeles* reporter named Gilstrap to set up an interview concerning the kidnapping.

> The purpose was to produce a story for sale to print, broadcast, and film media. Monies derived from exploiting the kidnapping story would be split among Gilstrap, New Times, and the kidnappers. An article entitled *Snatching Sinatra*, authored by Gilstrap, appeared in a January 1998 issue of New Times Los Angeles. In late January 1998 and thereafter, other magazines reported that Columbia Pictures had bought the motion picture rights to *Snatching Sinatra* for up to $ 1.5 million. In February 1998, citing section 2225, Sinatra, Jr., made demand on Columbia Pictures to withhold from the kidnappers, and from Gilstrap and New Times as the kidnappers' "representatives," any monies otherwise due such persons or entities for the motion picture rights. Columbia Pictures refused to do so without a court order.[9]
> The complaint asserted that under section 2225, all monies due to the kidnappers, or to their "representatives" Gilstrap and New Times, for preparation for sale of the story of Sinatra, Jr.'s, kidnapping, the sale of the rights to the story, or the sale of materials that included or were based on the story, were "proceeds" as defined by subdivision (a)(9) and "profits" as defined by subdivision (a)(10), and were thus subject to an involuntary trust in favor of Sinatra, Jr., a statutory "beneficiary" (*id.*, subd. (a)(4)(A)). The complaint sought an order that the defendants, particularly Columbia Pictures and New Times, hold such present and future proceeds and profits in trust for Sinatra, Jr. It also sought an injunction to (1) prevent Columbia Pictures and New Times from paying such proceeds and profits to any other defendant, and (2) require

8. *Keenan*, 27 Cal.4th at 418.

9. *Id.* at 418-19.

> that all such payments be made instead to Sinatra, Jr., to the extent of his damages or, in the alternative, to the superior court for distribution for the benefit of the victims of the kidnapping.[10]

Having praised such attempts by the states to deny any profits from their crimes to such criminals, we nevertheless are compelled to explore the possible constitutional infirmities of the California equivalent of the New York "Son of Sam Law." The first prong of the California statute "imposes an involuntary trust, in favor of damaged and uncompensated crime victims as "beneficiaries" on a convicted felon's 'proceeds' from expressive 'materials' (books, films, magazine, and newspaper articles, video and sound recordings, radio and television appearances, and live presentations) that "include or are based on the 'story' of a felony for which the felon was convicted, except where the materials mention the felony only in passing as in a footnote or bibliography." [11]

The second prong of the California statute deals with "things sold for their felony-related notoriety value."[12] This part of the law concerns profits from "rights" or "things" that have enhanced value due to "notoriety gained from the commission of a felony for which a convicted felon was convicted."[13] This provision applies to criminals, their agents and, in some cases, "profiteers of the felony" or people who make money by selling things or rights related to a crime.[14]

The "Son of Sinatra" case raised the primary issue of whether California's law "facially violate[d] constitutional protections of speech by appropriating, as compensation for crime victims, all monies due to a convicted felon from expressive materials that include the story of the

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10. *Id.* at 419.

11. *Id.* at 417.

12. *Id.* at 416-17.

13. *Id.*

14. *Id.*

crime."[15] In order to decide the question, the California court turned to the controlling U.S. Supreme Court decision in *Simon & Schuster, Inc. v. Members of NY State Crime Victims Board.*[16] There, the New York statute "confiscated, for the benefit of crime victims, all monies a criminal was due under contract with respect to a 'reenactment' of the crime, or from the expression of his or her personal thoughts or feelings about the crime, in a film, broadcast, print, recording, or live performance format."[17] The high court determined that the New York law was invalid on its face:

> Finding the New York law facially invalid, the *Simon & Schuster* majority reasoned that the statute, as a direct regulation of speech based on content, must fall unless it satisfied a strict level of constitutional scrutiny. The New York law failed this test, said the majority, because although the state had a compelling interest in compensating crime victims from the fruits of crime, the statute at issue was not narrowly tailored to that purpose. The flaw most clearly identified by the *Simon & Schuster* majority was that the New York statute was overinclusive. The majority noted two respects in which the New York law regulated speech too broadly for its compelling purpose. First, the law applied to expressive works in which one merely *admitted* crimes for which he or she had not been convicted. Second, it confiscated all profits from expressive works in which one made even *incidental or tangential* mention of his or her past crimes for nonexploitative purposes.[18]

The *Keenan* court likewise held that California's Son of Sam law imposed a content-based restriction on free speech:

> [L]ike its New York counterpart, [it] fails to satisfy strict scrutiny because it, too, is overinclusive. Section 2225(b)(1) contains the

15. *Id.* at 415.

16. 502 U.S. 105 (1991).

17. *Keenan*, 27 Cal. 4th at 417.

18. *Id.*

> fundamental defect identified in *Simon & Schuster*; it reaches beyond a criminal's profits from the crime or its exploitation to reach all income from the criminal's speech or expression on any theme or subject, if the story of the crime is included.[19]

In *Simon & Schuster*, six justices, in an opinion by Justice O'Connor, noted that a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.[20] The majority was clearly concerned that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive protected ideas or viewpoints from the market place."[21] The majority reasoned that the "First Amendment presumptively places this sort of discrimination beyond the power of the government."[22]

New York's Son of Sam Law was presumptively an invalid content-based burden on speech. "[The law] singles out income derived from expressive activity for a burden the state places on no other income and it is directed only at works with a specified content. . . . [Therefore, it] plainly imposes a financial disincentive only on speech with a particular content."[23] Because the "Son of Sam" statute penalizes speech on the basis of content, the high court concluded that it could survive constitutional scrutiny only if the state shows that "its regulation is necessary to conserve a compelling state interest and is narrowly drawn to achieve that end."[24]

The high court continued by indicating that the state had no compelling interest in shielding readers and victims from negative emo-

19. *Id.* at 417-18.

20. 502 U.S. at 115-16 (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991)).

21. *Id.* at 115-16.

22. *Id.* at 116.

23. *Id.*

24. *Id.* at 118.

tional responses to a criminal's public retelling of his deeds. This is so because the protection of offensive and disagreeable ideas is at the core of the First Amendment.[25] Constitutionally, states do have a compelling interest in "insuring that victims of crime are compensated by those who harm them",[26] and "preventing wrongdoers from dissipating their assets before the victims can recover."[27] Additionally, the state has a legitimate interest in "ensuring that criminals do not profit from their crimes,"[28] and in transferring the fruits of the crime from the criminals to their victims.[29]

New York asserted a compelling interest in preventing criminals from retaining the profits of storytelling about their crimes before their victims were compensated.[30] However, as the high court said, the state did not show why it had a "greater interest in compensating victims from the proceeds of such 'storytelling' than from [reaching] any of the criminal's other assets."[31] The state was also unable to justify "a distinction between this expressive activity and any other activity in connection with its interest in transferring the fruits of crime from criminals to their victims."[32] The majority reached two conclusions. First, that "the State has a compelling interest in compensating victims from fruits of the crime."[33] Second, that the State has "but little if any

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25. *See id.*

26. *Id.* at 119.

27. *Id.*

28. *Id.*

29. *Id.* at 119-20.

30. *Id.* at 119.

31. *Id.*

32. *Id.* at 119-20.

33. *Id.* at 120-21.

interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime."[34]

Second, the high court then determined that the statute was significantly overinclusive.[35] It cited two factors that illustrated the statute's overbreadth:

> (1) "[T]he statute applies to works on *any* subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally;"[36] and
> (2) "[T]he statute's broad definition of 'person convicted of a crime' enables the Board to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted."[37]

To illustrate the overbreadth of the two provisions, the court discussed several works of literature that would potentially fall within the provisions of the New York law. The court reasoned that:

> Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as The Autobiography of Malcolm X, which describes crimes committed by the civil rights leader before he became a public figure; Civil Disobedience, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the Confessions of Saint Augustine, in which the author laments "my past foulness and the carnal corruptions of my soul," one instance of which involved the theft of pears from a neighboring vineyard. . . . works by American prisoners and ex-prisoners, many of which contain descriptions of the crimes for which the authors were incarcerated, including works by such authors as Emma Goldman and Martin Luther King, Jr. A list of prominent figures whose

34. *Id.*

35. *Id.* at 121.

36. *Id.*

37. *Id.*

> autobiographies would be subject to the statute if written is not difficult to construct: The list could include Sir Walter Raleigh, who was convicted of treason after a dubiously conducted 1603 trial; Jesse Jackson, who was arrested in 1963 for trespass and resisting arrest after attempting to be served at a lunch counter in North Carolina; and Bertrand Russell, who was jailed for seven days at the age of 89 for participating in a sit-down protest against nuclear weapons.[38]

The majority was clearly troubled by the possibility that the "Son of Sam" law threatens a wide range of protected literature. Some of that threatened literature might not enable a criminal to profit from his crime.[39]

As the high court majority wrote, New York's Son of Sam law "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."[40] Although New York's "interest in compensating victims from the fruits of crime is a compelling one . . . the Son of Sam law is not narrowly tailored to advance that objective," because it "has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income."[41] As a result, the court opined that New York's law was "inconsistent with the First Amendment."[42]

Having steeped itself in the juices of *Simon & Schuster*, the California Supreme Court in *Keenan* then turned to the trying task of determining whether or not the California statutory provisions fit within the proscriptions therein set out. First, the court reasoned that the California

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38. *Id.* at 121-22.

39. *Id.*

40. *Id.* at 116.

41. *Id.* at 123.

42. *Id.*

statute, like that explored in *Simon & Schuster*, "places a direct financial disincentive on speech or expression about a particular subject."[43]

The court was convinced, however, that Section 2225, like the New York law in *Simon & Schuster*, was "overinclusive and was therefore invalid" under the First Amendment.[44] The California court reasoned that the statute, "penalize[d] the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims."[45] The court said that, "[e]ven if fruits of the crime may include royalties from exploiting the story of one's crimes, [the relevant section] does not confine itself to such income."[46] Rather, "it confiscates *all* of the convicted felon's proceeds from speech or expression on *any* theme or subject which includes the story of the felony, except by mere passing mention."[47] By imposing a financial disincentive, the California law "discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds."[48]

Citing *Simon & Schuster*, the California court expressed its concern that this law infringed upon the "essential values of the First Amendment."[49] The court said that the constitutional problem with the New York law was that, "in order to serve a relatively narrow interest—compensating crime victims from fruits of the crime—the New York statute targeted, segregated, and confiscated *all* income from, and thus unduly discouraged, a wide range of expressive works containing protected speech on themes and subjects of legitimate interest" to the

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43. *Keenan*, 27 Cal.4th at 427.

44. *Id.* at 431.

45. *Id.*

46. *Id.*

47. *Id.* at 432.

48. *Id.*

49. *Id.* at 433.

public.[50] This was so "simply because the content...of the material was included" to make reference to past crimes.[51]

The California majority concluded by again complaining that, "[h]ad Section 2225 been in effect at the time and place of publication, the statute would have applied to numerous works by authors whose discussions of larger subjects make substantial, and often vividly descriptive, contextual reference[s] to prior felonies of which they were convicted.[52] The court said that a statute operating in this fashion disturbs and discourages protected speech to a degree substantially beyond that necessary to serve the state's compelling interest in "compensating crime victims from fruits of the crime."[53] A convicted felon, for example, might tell stories about his crimes for several constitutionally pleasing reasons other than personal profit. It may very well be of public interest for the criminal to express views on punishment, assaults and batteries in prison, the cause of sex crimes, or an evaluation of the role of lawyers in the criminal justice system. All of these approaches may have no causal connection to the exploitation of the crime involved. Accordingly, the court concluded that, by precluding these types of story telling, Section 2225(b)(1) is facially invalid under the First Amendment to the United States Constitution.[54]

Sadly, for public confidence, the court's decision has the potential to give an impression that the criminal may profit from his crimes while the victim remains uncompensated for the violence imposed upon him. Justice Brown, in an attempt to mute this unappealing idea, offered a concurring opinion agreeing with the result in the *Keenan* case. Troubled by the very real possibility that the decision would be interpreted by the public as one that encouraged the idea that violent crime can pay, she wrote separately to express her finding that a properly

50. *Id.*

51. *Id.*

52. *Id.* at 435.

53. *Id.*

54. *Id.* at 436.

drafted statute can separate criminals from their profits constitutionally.[55] She suggests that profits derived from crimes can be collected by the state for the benefit of victims while at the same time complying with the requirements of the First Amendment. Justice Brown reasoned that *Simon & Schuster* reflected the praiseworthy notion that crime "should neither impoverish the victim [n]or enrich the criminal."[56] She believed that the Supreme Court's opinion clearly recognized the compelling interest in "insuring that victims of crime are compensated by those who harm them."[57] Conversely, the high court acknowledged "the compelling interest in 'ensuring that criminals do not profit from their crimes.'"[58] The effect of these two interests is both to prevent criminals from profiting from their crimes and to restore victims to their status quo.

Justice Brown stressed that the Supreme Court deemed the New York law unconstitutional because "it imposed a financial burden on speakers due to the content of their speech."[59] In *Simon & Schuster*, the high court said that "the state has a compelling interest in compensating victims from fruits of the crime, but little if any interest in limiting such compensation to proceeds of the wrongdoer's speech about the crime."[60] Justice Brown points out that the state's compelling interest in compensating victims from the proceeds of crime would be better served by making available to the victim all the criminal's assets, however, and wherever derived.[61]

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55. *Id.* at 438.

56. *Id.*

57. *Id.* (quoting *Simon & Schuster, Inc.*, 502 U.S. at 118).

58. *Id.* (quoting *Simon & Schuster, Inc.*, 502 U.S. at 119).

59. *Simon & Schuster, Inc.*, 502 U.S. at 115-116.

60. *Id.* at 120-121.

61. *Keenan*, 27 Cal.4th at 440.

Justice Brown astutely observes that *Simon & Schuster* does not "stand for the proposition that the government cannot recruit the proceeds of expressive activity relating to a crime. Rather, the government cannot single out those proceeds for special treatment while ignoring other assets."[62] Consequently, when the state goes after all of the criminal's assets, it may thus constitutionally order restriction from all sources including, but not limited to, the defendant's income from storytelling. The law was designed to prevent a criminal from enjoying *any* of his wealth while his victim remains uncompensated.[63]

The reason the New York law was defective was that it did not fully deprive criminals of all their profits, only those that resulted from storytelling. The law's message was not that crime doesn't pay but that *speaking* about it doesn't pay. Deterring transgression is a compelling state interest. Deterring speech is not.

Justice Brown contends that California's limitation on the law's scope solely to storytelling is the fatal flaw of the so-called Son of Sam provision.

The majority in *Simon & Schuster* observed that statutes may be content neutral, and thus avoid strict scrutiny where they are intended to serve purposes unrelated to the content of regulated speech, not withstanding their incidental effect on speakers or messages.[64] Consequently, contends Justice Brown, a law that neutrally seizes *all* (emphasis added) profits from crime comports with *Simon and Schuster* and thus with the First Amendment.[65]

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62. *Id.* at 440 (quoting United States v. Seale, 20 F.3d 1279, 1285 n.7 (3d Cir. 1994)).

63. *Id.* at 441.

64. *Simon & Schuster*, 502 U.S. at 122.

65. *Keenan*, 27 Cal.4th at 443.

66. *Simon & Schuster*, 502 U.S. at 120-121.

the state's compelling interest in compensating victims from the proceeds of crime would be better served by making all of the criminal's assets available to the victim—however and wherever derived.[67]

Consequently, a state may constitutionally seize assets by pursuing its compelling interest of compensating victims, in which case the government may seize assets from any source, including assets that are not fruits of the crime, up to the amount of the victim's damage. Additionally, a state may constitutionally seize assets by pursuing the compelling interest of depriving criminals of assets that are fruits of the crime. There is no reason why a state must select only one compelling interest to pursue. It may pursue all interests separately, seizing all assets up to the amount of damage under the compensation rationale and then all fruits flowing from the crime under the ill gained profits rationale. Since each would neutrally seize assets in furtherance of a compelling state interest, the law would avoid the constitutional bear traps encountered in *Simon & Schuster* and *Keenan*.

Finally, we note that several state statutes allow the pursuit of assets wherever located and however obtained.[68] States that adopt Justice Brown's astute idea of allowing the pursuit of all assets will likely avoid the first Amendment trap encountered in *Keenan*.

II. PHILOSOPHICAL ANALYSIS

We now turn to a philosophical discussion of compensating the victims of violence. This section of the paper will attempt to first articulate and then apply the libertarian theory of political economy[69] to

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67. *Keenan*, 27 Cal.4th at 440.

68. ME. REV. STAT. ANN. tit. 14, § 752-E (2003); WYO. STAT. ANN. § 1-40-302 (2003); W.VA. CODE § 14-2B-3 (2003).

69. *See generally* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (Clarendon Press 1998); *See also* Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law Without Government*, J. OF LIBERTARIAN STUD., Vol. IX, No. 1, 1-26 (Winter 1989); WALTER BLOCK, DEFENDING THE UNDEFENDABLE (Fox and Wilkes 1985); Walter Block, *Libertarianism vs. Libertinism*, J. OF LIBERTARIAN STUD., Vol. 11, No. 1, 117-128 (1994); Alfred G.

the issues of free speech rights and the status of the criminal vis-à-vis his victim, and compensation owed by the former to the latter.

Let us first make clear that the libertarian theory of punishment[70] is one of compensation for the victim; that is, the perpetrator is punished by forcing him to compensate the injured party to the extent of the rights violation perpetrated upon him.[71] This is in sharp contrast to the competing models, e.g., crime prevention, rehabilitation, etc. The reason for this is that libertarianism is predicated on an attempt to attain *justice*, not the desiderata of the schools of thought that support these alternatives, such as utilitarianism.

If all we wanted to do was prevent crime, we need not catch, prosecute, and incarcerate the real criminal in any given case. We could, instead, pick a believable candidate for the "role" of offender (e.g., a man in his twenties, not a grandmother of eighty). As long as we did this surreptitiously enough, arguendo, we could reduce felonies in this entirely unjust manner. We could do so far more efficiently than at present. Under our usual procedures, we must spend significant amounts of time finding and trying the evildoer. Under this alternative system, we need only go out on the street and wait until a likely candidate

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Cuzán, *Do We Ever Really Get Out of Anarchy?*, J. OF LIBERTARIAN STUD., Vol. 3, No. 2, 151-158 (Summer 1979); Jerry W. Dauterive et al., *A Taxonomy of Government Intervention*, J. OF THE SW. SOC'Y OF ECONOMISTS (1985); ANTHONY DE JASAY, THE STATE (Basil Blackwell 1985).

70. WALTER BLOCK, FESTSCHRIFT FOR ANTONY DE JASAY [RADICAL LIBERTARIANISM: PUNISHMENT THEORY FOR THE STATE] (forthcoming) (on file with author); Stephan Kinsella, *A Libertarian Theory of Punishment and Rights*, 30 LOY. L.A. L. REV. 607 (1997); Stephan Kinsella, *Legislation and the Discovery of Law in a Free Society*, 11 J. OF LIBERTARIAN STUD. 132 (1995); Stephan Kinsella, *The Undeniable Morality of Capitalism*, 25 ST. MARY'S L.J. 1419, 1426-1436 (1994) (reviewing HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1993)); Stephan Kinsella, *Estoppel: A New Justification for Individual Rights*, 17 REASON PAPERS 61 (1992); MURRAY N. ROTHBARD, FOR A NEW LIBERTY (1978).

71. RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW, 203 (1998), *available at* http://www.netlibrary.com/ebook_info.asp?product_id=12394.

comes along, and then grab him. Alternatively, we could engage in the preventive detention of all high crime cohorts[72], such as black male teenagers, despite the fact that they had not been found guilty of violating any law. This, too, would "solve" the problem of wrongdoing, but without an iota of justice involved; indeed, under the very opposite of such principles.

This will not do for the libertarian. Here, crime, preeminently, is a disparagement of the particular victims' rights, by a specific perpetrator. It is not an attack upon society as a whole, except insofar as an attack on any one person places another in fear; but, in this particular case, it is only that one person who must be made whole again,[73] not others. And, while it is impossible to place the victim back on the plane of life he was following before the outrage, justice consists of at least attempting to do so as far as possible.

In contrast, the problem with punishment for any purpose other than victim compensation is that while it may indeed visit justice upon the perpetrator, it does nothing for the victim in this regard. Worse, the latter is called upon to pay for this punishment (e.g., incarceration), as is so often the case in the modern era, then injustice is perpetrated upon the victim twice over. Insult is added to injury as first the victim is forced to do the bidding of the criminal, and then of the state, when he must pay taxes for the care, feeding, upkeep, and yes, punishment of the thug. It cannot be denied, of course, that the criminal richly deserves castigation. This indeed occurs under the principle of compensation to the victim, as it is the criminal himself, not the state, courtesy of money mulcted from taxpayers, who must perform the compensation function under the libertarian legal code.

Criminal rehabilitation is even worse from a perspective that focuses on victim compensation such as libertarianism. At least under punishment theory the victim is protected from further incursions. This occurs in two senses: one, while the criminal is in jail undergoing his punishment, he is out of circulation at least for the duration, and can count upon no further depredations. Secondly, it is possible he will learn his

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72. Such as black male teenagers.

73. Barnett, *supra* note 75, at 198.

lesson (if his treatment was severe enough) and that if publicized this will serve as an objective lesson for all other would be malefactors. However, under rehabilitation, if successful, only the general public safety is enhanced. This does nothing for the present victim, surely a miscarriage of justice. And if, more likely, it is unsuccessful, not even that benefit is derived. Moreover, even if the perpetrator is reformed, justice is still not done to him[74] as he is actually *rewarded* for his misdeeds, by being morally improved. The fact that his incarceration includes color television, recreation rooms, air conditioning, wholesome food, etc., only constitutes an additional moral outrage.[75] If rehabilitation occurs as a result, or along side of, restitution, well and good; but this cannot be the be all and end all of punishment.

According to libertarianism, man is a self-owner. There are no "human rights" as such, over and above the fact that an individual's most important and primary property right consists of his ownership over his own person. To interfere with that right is to engage in an illicit taking, e.g., to participate in a theft. So in effect murder is the theft of a life, kidnapping is the (temporary) theft of a man's body, slavery is the permanent theft of the human person, rape is the theft of sexual services of a woman, assault and battery is akin the theft of bodily integrity.

Why put things in such an artificial, unaccustomed and metaphorical manner? Why not adopt the more typical and usual language that drives

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74. Stephan Kinsella, *Punishment and Proportionality: The Estoppel Approach*, 12 J. OF LIBERTARIAN STUD. 51 (1996).

75. One reason that rehabilitation does not work very well under modern institutions is that financial reward is not predicated upon a reduced recidivism rate. That is, those prisons that do a good job in this regard are not automatically rewarded with extra profits, nor are those that fail penalized monetarily. Compare this with virtually every other good or service in the economy: plumbing, peanut butter, parsley, pizza. The reason there are no problems with regard to these items is that entrepreneurs who succeed in providing us with a high quality level of these products at low cost, and thus satisfy the profit and loss test, are duly rewarded. Those who do not suffer automatic losses, and, if they do not mend the error of their ways, bankruptcy. It is due to this automatic feedback mechanism that satisfactory results emanate. But no such process is operational in the prison "industry." Inmates are given parole when presumably "rehabilitated," and if they commit other crimes, those responsible for unleashing these monsters on an unsuspecting public pay no price for their errors.

a wedge between theft of a good (e.g., a car, a television set) and trespass upon or invasion of another person's body? The main reason for doing so is to facilitate communication regarding the libertarian theory of punishment. It is preeminently a compensation theory, and this process instinctively makes more sense to most people for inanimate objects than for violations of "human rights."

For example, while compensation for the theft of a car might be easily comprehended, matters are far less clear in this regard concerning murder, rape, etc. Let us then clearly establish how libertarian compensation theory might work as far as inanimate matters are concerned, as a launching pad for later dealing with violation of animate human beings.

The formula for assessing proper compensation is "two teeth for a tooth,"[76] plus expenses of capturing the criminal, plus a risk or fright assessment. Why is it precisely "two teeth for a tooth," rather than 1.9 or 2.1 "teeth?" Simple. Consider the car theft. When the robber is apprehended, the first thing that must be done, in justice, is to remove the automobile from his ill-gotten horde of gains. That is the first "tooth." Secondly, what the carjacker did to the owner of the vehicle must in turn be done to him. Simple justice requires no less. Since he transferred ownership of an automobile from the proper owner of it to himself, then this must be done to *him*. E.g., the car thief must be forced to disgorge a vehicle of similar value (or some other equivalent consideration) to the victim. That is the second "tooth." Thus, so far, we have arrived at exactly 2.0 "teeth," no more, no less.

But there is more to be done, far more. First of all, there were the costs imposed by the criminal on honest men of searching for and capturing him. These expenditures, too, must be defrayed, and paid by the villain.[77] Only if he has an instant attack of remorse, and immediately

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76. MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY, 94 n. 6 (1982).

77. These costs would be paid by the perpetrator not to the victim, but rather to the forces of law and order which would be private in a fully libertarian society. *See* P.J. Hill et. al., *An American Experiment in Anarcho-Capitalism: the not so Wild, Wild West*, 3 J. LIBERTARIAN STUD. 9-29 (1979); Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law Without Government*, 9 J. LIBERTARIAN STUD. 1-26 (1989); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*,

turns himself and the stolen automobile in to the police would the fiend undertake no obligation at all on this score.

Secondly, and perhaps more controversially, when the carjacker engaged in his evil deed, the motorist had no idea of what would happen to him. Likely, he feared for his very life. To allow such a malefactor to escape with merely the return of the stolen goods to the rightful owner, and by paying over a car or something else of similar value of his own, and compensating the police forces for their manpower and other costs, would be a travesty of justice. It would only *begin* to pay the compensatory debt he owes. No. The car stealer and possible kidnapper and/or murderer, must be placed in fear of his *own* life, precisely what he imposed on his victim. How can the criminal learn what it is like to have his life threatened? The only possible just solution to this imbalance is to make the criminal occupy as similar a position as possible. One way this could be attained is to force him to play a game of Russian roulette, where the proportion between the number of bullets and empty chambers would be commensurate with the severity of the threat imposed upon the victim.

Suppose, then, that the car was stolen from the owners' garage while they were out of town on vacation. When they returned, their only fear was that the criminal, having once gotten away with his foul deed, would return again to brutalize them. Conceivably, under these circumstances, they might wish to move out of town, leaving no forwarding address, losing their jobs and friends, in an effort to put as much distance, emotional, physical and geographical, between them and a repeat of this unsavory event. Then, with this only "slight" scaring, the fright penalty imposed might be one of pulling the trigger on a gun with 100 chambers, and only two or three of them loaded with a bullet. An intermediate scenario might be one where an armed thief stole the automobile from the street in front of the house, or worse, from a locked garage while the family was at home, but not involved directly. This might call for, respectively, 5 and 10 loaded chambers out of 100. And

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S. ECON. J., 55: 644-661 (1989); BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE (1990); Bruce L. Benson, *The Impetus for Recognizing Private Property and Adopting Ethical Behavior in a Market Economy: Natural Law, Government Law, or Evolving Self-Interest*, 6 REV. AUSTRIAN ECON. 43 (1993).

what of the case where the car door was forcibly opened while the motorist was behind the wheel, a gun was stuck in his face, he was thrust out of his car and onto the street in a dangerous neighborhood? An argument could be made for as many as half the chambers filled with bullets. The point is, there is a continuum. The more heavily armed and thus the more threatening the mugger, the more frightening the situation (victim present, molested), the higher the proportion of bullets in the chambers of the Russian roulette gun there would be.

Where does the compensation come in? This must be answered, since the treatment outlined above sounds more like direct punishment than compensation. The compensation enters the picture when we reflect upon the option that that victim has the opportunity to let the criminal off the hook if he pays him off to do so. Suppose there is a *very* wealthy car thief, Bill Gates himself. He commits criminal acts, and then *laughs* at the libertarian comeuppance, given that it is limited to two teeth plus expenses. But when the fright consideration is brought to bear, he might be willing to give up virtually his entire fortune not to be forced to play Russian roulette, even with a relatively low proportion of bullets to chambers.

This one proviso alone, completely apart from any other consideration, ought to put to the notion that a strictly compensatory model, along libertarian lines as sketched out above, would not *also* contain provision for crime reduction, the presumed goal of the utilitarian. If the prospect of even a small probability that the death penalty[78] might be imposed for even relatively minor crimes does not put a severe dent in criminal behavior, then nothing will.[79]

We have now established at least an outline of libertarian punishment theory. Let us now use it to address the issue analyzed in the first section of this paper: to wit, the propriety of allowing "Son of Sam" and

78. *See* Isaac Ehrlich, *The Deterrent Effect of Criminal Law Enforcement,* 2 J. LEGAL STUD. 259-276 (1972); Isaac Ehrlich, *Participation in Illegitimate Activities -- A Theoretical and Empirical Investigation,* 81 J. OF POL. ECON. 521-565 (1973) (analysis on the retardant effects of the death penalty on crime).

79. The death penalty, of course, would have a limited deterrent effect on those willing to commit suicide in the course of their murderous activities.

libertarian model, is not properly a self owner. He can either be enslaved permanently (for a capital crime) or temporarily (until he pays off his debt). But in *neither* case does the issue of his free speech rights arise; as long as he is a prisoner, others own him and they alone control his free speech rights.

In conclusion, the issue of convicts speaking freely and pocketing money for doing so does not arise. As non-self owners, they are prohibited from engaging in such activity. The *real* issue is whether or not they may be *forced* to speak against their will by their masters; it is our conclusion that they may.

others of that ilk to benefit from the sale of their life stories to the press. In order to do this, we must first apply libertarian punishment theory to their specific crimes, e.g., murder. How would libertarianism address this issue? True to the insight that we must extrapolate from crimes against property to crimes against persons (since the former is typically more straightforward than the latter) we proceed in this vein.

What then is the murderer doing when he kills his victim, if we are to characterize this crime against the person in the same manner as violence against property? Simple. He is stealing a life. But we have already established the model for dealing with theft: two teeth for a tooth, plus expenses, plus a fright penalty. All we need do now is apply that insight to the present context.

We are immediately faced with a difficulty when we try to effectuate the first "tooth" in this process. Unfortunately, present medical technology does not allow for the transfer of a life out of the body of the live murderer and into that of the dead victim. We can of course execute the live murderer, but at our present levels of ability, we are not at all able to transfer his life into the victim's dead body. Relieving A, the murderer, of his (now) improperly kept-to-himself life may indeed punish him, but will do little good for B, the victim, in terms of compensation. Thus, we are in a position to impose punishment on A, but not grant compensation to B, our goal.

Fortunately, we have a "weapon" at our disposal: our imaginations. Use of concocted scenarios[80] may shed light on the justice of the matter, even if technology is not now, and may never be, at the level of accomplishment necessary to effectuate this solution. Imagine, then, that we do indeed *have* a machine, which is able not only to relieve A of his illicitly cleaved-to life, but *also* to transfer this life out of A and into B. This latter person, it will be appreciated, is the only one in this little scenario *deserving* of this life, in that this is the first part ("tooth") of a just compensatory remedy for the crime of murder.

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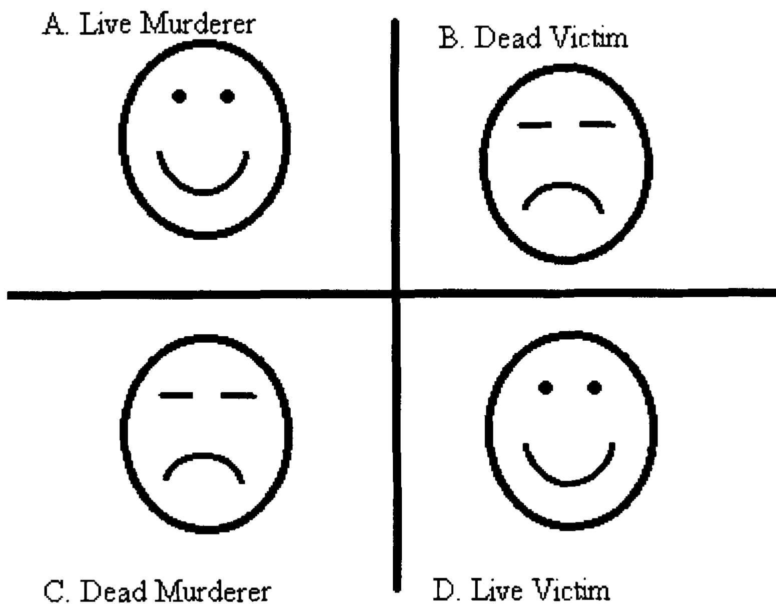
80. The late Robert Nozick is the past master of utilizing imaginary machines, and scenarios, in an attempt to shed light on what would otherwise be intractable philosophical challenges. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

Consider the diagram below. At the first level, we have a live murderer (A—happy face) and a dead victim (B—sad face). We flick a switch, and viola! emerges from our machine a live ("re-enlifed") victim (C—happy face) and a dead murderer (D—sad face). Is there anyone so rash, even a staunch opponent of capital punishment, who would oppose the forcing of A into the machine, the pulling of the switch, and the resultant state of affairs?[81] Presumably, the only basis upon which to deny this would be an opposition to justice, or a hatred so severe of imaginary constructions that a person so minded would be willing to defend a very unjust state of affairs. For, surely, the ideal punishment for murderer is (at least) to force him to give back to his victim the life he stole from him.



81. We assume, arguendo, that we know for sure that A did indeed murder B. Or, if not, then that the person responsible for pulling the switch, guilty of the miscarriage of justice implicit in taking the life of an innocent man, A, by forcing him to undergo the rigors of this machine will, in turn, be placed in this very contraption and thereby forced to give his own life back to A.

Unfortunately, the second tooth of our process is difficult to implement, given that A has but one life, not to "give to his country," but, more pertinently, to offer to his *victim*. However, if people were like the proverbial cat and had "nine lives," then this tooth, too, could apply. The murderer would immediately give up a second life as the "second tooth." He might well also forfeit a third life (to say nothing of the monetary expenses necessary to compensate his capturers), assuming that the fright portion of the penalty works out in such a manner.

Having taken this science-fiction trip, let us now return to reality, even though it is a dimension with less justice in it, due to the absence of this wonderful life-transfer machine. Without it, but thanks to our imagination of it, we can now see our way more clearly toward a just solution of what to do with the murderer, and his "right" to sell his story to the press. His right to his very life is forfeit. That much is clear, thanks to the machine. But if this life cannot be transferred to the dead victim, can it be transferred at all? Indeed, it can. It can be transmitted not to the victim himself, of course, but rather to his heir. A murders B. A's very life now belongs to C, the heir of B. C can do with A's life *whatever* he wishes. If he desires, he may have B executed[82] privately. Or, he may do so publicly in a large theater and charge ticket prices for admission. C may also *enslave* A and force him to do his bidding for the rest of his life. Yet another option is for C is to sell A's body parts to those in need of transplants to help compensate for the loss of B's life[83].

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82. C may not torture A to any extent, including death, unless A was guilty of doing that to B. Such acts are different than murder and do not constitute a valid "tooth."

83. *See* Andy H. Barnett et al., *Markets for Organs: The Question of Supply*, CONTEMP. ECON. POL'Y, Apr. 1999, at 147; Andy H. Barnett et al., *The Medical Community's Opposition to Organ Markets: Ethics or Economics*, REV. OF INDUS. ORG., Dec. 1993, at 669; Walter Block et. al., *Human Organ Transplantation: Economic and Legal Issues*, QUINNIPIAC L. HEALTH J., 1999-2000, at 87; Walter Block, *The Case for a Free Market in Body Parts*, *in* ESSAYS IN THE ECON. OF LIBERTY: THE FREE MARKET READER, 266 (Llewellyn Rockwell ed., Ludwig von Mises Institute 1988); Megan Clay & Walter Block, *A Free Market for Human Organs*, J. OF SOC., POL'Y. & ECON. STUD., 2002, at 227 (analysis of markets in used body parts).

We have established that A's life is forfeit. He owes it to *someone*. Unfortunately, due to a lack of advanced medical technology[84], he cannot give it to B, the man he murdered. But B left heirs, C, to whom all his worldly possessions go. But *one* of B's possessions, in justice, is A's life. Therefore, A's life now properly belongs to C.

We now may directly approach the problem of murderers selling their life stories. Suppose there are journalists interested in telling the story of A (and his "interaction" with B) and willing to offer A $1 million for this privilege. What should ensue in a just society? Should A be allowed to enter into such a contract? There is no question of A making this decision on his own, let alone keeping *any*, and certainly not *all*, of this money for himself. Remember, A is now C's slave[85]. It is up to C, not A, to decide whether A will give the interview to the journalist or not. If A sees any financial reward from his cooperation with the writer, it will stem from C's generosity, not A's rights. A has no rights, not even that of not to be killed; A forfeits his life and is properly owned by C.

Suppose A refuses to do the interview against C's wishes; that is, C wants A to tell his story to the journalist, but A is unwilling to do so. There is a simple remedy open to C in such a situation: he can legally threaten to kill A unless A complies with C's wishes on that matter. According to the life transfer machine example, A's life no longer properly belongs to him. It is now C's property. Therefore, C must decide if the interview between A and the writer should take place and who should receive the monetary proceeds offered by the latter for the story.

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84. If the government would stop wasting such valuable resources, there may be a way to solve this medical problem instead of only contemplating it as a matter of science fiction.

85. A is a justified slave in that this is part and parcel of his proper compensation–punishment to C for a capital crime against B. This is in sharp contrast to the slavery that occurred in the U.S., where innocent people, not murderers, were seized and enslaved against their will.

Now, consider a lesser crime: car theft. A steals B's car, but does not have the means to pay B back one car, let alone two.[86] A, then, is resting "comfortably" in a jail different than those now in operation. It is dedicated to forcing A to work hard labor (e.g., a chain gang) to pay B what he owes him. There is no air conditioning, game rooms, or television; there is nutritious, but poorly tasting fodder as food. There is hard labor for 16 hours a day, six and a half days per week. A, in other words, undergoes an experience akin to slavery; but, it is only on a temporary basis until he pays off his debt to B.

Along comes our proverbial journalist into this idyllic scene who wants to do a story on A for $1 million. How does the libertarian punishment-compensation theory apply here? In this case, B may again force A to tell his story, whether he agrees to or not on the ground that B is owed $200,000, and this debt must be paid off as quickly as possible.[87] And, of course, the *first* $200,000 of this $1 million goes to B. It is only after he has fully paid off his debt to B that he is once again a free man. After his credit is paid, A may make decisions for himself and keep the money paid to him.

Consider an objection to our thesis: the Draconian punishment proposal violates A's free speech rights to tell his story to the press. A reply to this is that only free men can have free speech rights. Free speech is something properly denied to legitimate slaves. There are simply no free speech rights on or with other people's property. Suppose D comes to E's house at three in the morning when the latter is trying to sleep and proceeds to read the Declaration of Independence in a loud voice. E objects and orders D to leave his premises. D refuses on the ground that his free speech rights are being abridged by E. This is a ludicrous "debate." As anyone can see, free speech rights protect people against incursions of the exercise of free speech on and with their *own* property, not on that of others. But the prisoner, in the

86. We assume no costs of capture, and that the trial by Russian roulette concluded without loss of A's life. We also abstract from the possibility of B allowing A to skip this game in return for even greater compensation owed to B.

87. Hence, the 16-hour a day, six-and-a-half-day week, with cheap food, clothes, etc.