

# Stripping a Criminal of the Profits of Crime

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*A victim of a crime may claim that the criminal must make restitution of the benefit gained at his expense. The enrichment may arise directly from the criminal act. For example, a criminal demands money with menaces or obtains property by fraud. No legal system will allow him to retain his enrichment gained at his victim's expense. More difficult problems arise if the criminal's enrichment is an indirect enrichment, for example, if he or members of his family used information relating to his criminal activities and published his story. The victim's common law claim may be defeated by such submissions as: the benefit was not gained at the plaintiff's expense or the criminal did not act wrongfully in using the information so acquired. There is also the forfeiture rule which insures, in England, that neither the legal nor beneficial title to property vests in the criminal; in contrast, in the United States, the criminal will be deemed to hold the property on constructive trust. These issues are discussed in Part I and Part II of the article respectively.*

*Part III of the article discusses briefly the English legislation which seeks to deprive criminals of the profits of their criminal activities. An important statute, the Criminal Justice Act 1988, is not well drafted. The existence of such statutes should not exclude the possibility of a common law restitutionary claim where no confiscation order has been, or can be, made. This point is examined further in Part IV of the article, which discusses the implications of the important decision of the English Court of Appeal in *Attorney-General v. Blake* in 1998, where the defendant's conduct amounted, not only to a breach of contract, but to a serious criminal offense. Part V of the article asks whether there should be further legislative intervention and suggests*

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*that the American statutes provide only limited guidance for the English draftsman. The nature and scope of any future English legislation must now take into account the United Kingdom Human Rights Act 1998. Its possible impact is discussed in the final Part, VI, of the article.*

## INTRODUCTION

Professor Burrows has argued that a criminal act cannot form the basis of a restitutionary claim. In his view, the object of the civil law is to prevent the criminal benefiting from his crime, not to give the victim of the crime any of the criminal's ill-gotten gains.<sup>1</sup> Not every text writer shares this view, although they concede that in some situations where a criminal has benefited from the commission of the criminal act it may not be easy to determine what *benefit* the criminal gained from the crime and whether that benefit was gained *at the victim's expense*. The difficulties are even more formidable if the claim is made against those claiming through the criminal, such as those who take under his will or his intestacy, or the Crown.

Furthermore, there is a tension between society's concern to strip a criminal of the profits of crime and the individual's right to freedom of speech and his right to the peaceful enjoyment of his possessions.<sup>2</sup> In the United States this tension is reflected in constitutional challenges, the criminal invoking the protection of the First and Fifth Amendments. In the United Kingdom there is now the Human Rights Act 1998 which attempts to walk the tight-rope of preserving Parliamentary sovereignty but, at the same time, declares that:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [European Convention on Human Rights.]<sup>3</sup>

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1 Andrew Burrows, *The Law of Restitution* 380 (1993). A comparable policy led to the enactment of the "confiscation" statutes. *See infra* text at notes 49-62.

2 European Convention on Human Rights. *See infra* text at notes 108-21.

3 § 3(1). *See* The Lord Chancellor's (Lord Irvine of Lairg's) *Keynote Address, Constitutional Reform: Principles and Practice* 1, 3 (1998). *See also infra* text at note 108.

## I. CLAIMS BASED ON THE DEFENDANT'S UNJUST ENRICHMENT

### A. Direct Enrichment

There is little direct authority to support a principle that a criminal act is a wrongful act which may ground a restitutionary claim. For the victim will be content to rely on established grounds, such as duress,<sup>4</sup> conversion, deceit, breach of contract<sup>5</sup> and breach of fiduciary duty. However, many crimes cause harm to a known victim and from some of these crimes a criminal may gain a benefit. With the essential ingredients of correlative direct harm and benefit, then, it would be strange if a criminal act could not ground a restitutionary claim.

In *Halifax Building Society v. Thomas*,<sup>6</sup> for example, the claim arguably should have succeeded. The plaintiff, the lender, was the victim of a tortious act which was also a criminal act. The mortgagor had obtained a 100% loan to buy a flat; the Building Society, whose loan was secured by a mortgage, had been induced to lend by the mortgagor's fraudulent misrepresentations. The Court of Appeal held that the mortgagee, which had exercised its statutory power of sale and had obtained full satisfaction of its mortgage debt, could not subsequently 'waive the tort' and claim that the surplus of the sale proceeds belonged to it in equity.<sup>7</sup> Peter Gibson L.J. could not see why once "the creditor has so elected [not to avoid the mortgage but to affirm it] and recovered in

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4 It is said that duress is not a tort per se. See *The Universe Sentinel* [1983] 1 A.C. 366, 385 (Lord Diplock); *The Evia Luck* [1992] A.C. 152, 165-69 (Lord Goff).

5 *Attorney-General v. Blake* [1998] 1 All E.R. 833. See *infra* text at notes 63-83.

6 [1995] 4 All E.R. 673. For comments on the decision, see Peter Birks, *The Proceeds of Mortgage Fraud*, 10 *Trust L. Int'l.* (No. 1) 2 (1996); Peter Jaffey, *Disgorgement and Confiscation*, 92 *Restitution L. Rev.* (1996); Peter Watts, Notes, 112 *L.Q. Rev.* 219 (1996).

7 The Crown had obtained a confiscation order. A personal claim would not have defeated the Crown's proprietary charge over the surplus. The plaintiff's argument based on the construction of the mortgage deed also failed.

*Cf.* *Chief Constable of Leicestershire v. M* [1988] 3 All E.R. 1015, where the mortgagees made no claim to the profits and where the plaintiff was denied an interlocutory injunction restraining a defendant from dealing with assets and the appointment of a receiver of those assets. The plaintiff's claim was based on the ground that the profits represented profits made from the use of property obtained by dishonest means. However, in *Attorney-General v. Blake* [1998] 1 All E.R. 833, 850, *infra* text at note 63, the Court of Appeal restrictively distinguished *Chief Constable of Leicestershire v. M*.

full ... the law should come to his aid to allow him to make a further claim."<sup>8</sup> Moreover, he was not satisfied that the surplus was a benefit which was gained *at the expense of the mortgagee*.<sup>9</sup>

The defendant mortgagor, Thomas, had been prosecuted and found guilty, and a confiscation order had been made against him in respect of the surplus sale proceeds, which had been placed by the Building Society in a suspense account. The contest was therefore between the Building Society and the Crown. The Lord Justice's conclusion would not have been different even if the contest had been between the Building Society and Thomas, for he accepted that "the starting point must be Mr. Thomas' position before the confiscation order."<sup>10</sup> The Building Society had two distinct claims against Thomas: one as a secured creditor for a debt due, and the other, based on Thomas' fraudulent misrepresentations, for the benefit gained from the fraud.<sup>11</sup> In principle, the Building Society should have been able to pursue both claims to judgment.<sup>12</sup> If one claim had been satisfied, however, it should bring the sum so recovered into account.<sup>13</sup>

It may be said that the tortious victim, the mortgagee, gains a windfall if it is allowed to retain the surplus money. It is preferable to allow the victim to retain that windfall, however, than to allow the rogue, Thomas, and the Crown claiming through him, to enjoy the fruits of his fraud. Indeed Peter Gibson L.J. conceded that, if the Building Society had sought to set aside the mortgage for fraud rather than affirming it, it "might then have claimed in equity that it remained the owner of the moneys advanced and traced those moneys into the flat and the sale proceeds, or it might have made a common law claim for money had and received to the society's use."<sup>14</sup>

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8 [1995] 4 All E.R. 673, 680, *citing* Re Simms [1934] Ch. 1 *and criticized in* Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution* 786-89 (5th ed. 1998).

9 Semble the Lord Justice had doubts because, although the money was the direct product of the deceit, the profitable investment was not. The gain was therefore too remote. *See also* Watts, *supra* note 6, at 219, 220-21. But we see no reason to treat a deceitful defendant more tenderly than an innocent fiduciary. *Cf.* Boardman v. Phipps [1967] 2 A.C. 47.

10 [1995] 4 All E.R. 673, 678.

11 There is established authority, which the Court did not challenge, that the courts have allowed a restitutionary claim for the benefit gained from deceit. *See* the decisions cited in Goff & Jones, *supra* note 8, at 774 n.13.

12 Tang Min Sit v. Capacious Investments Ltd. [1996] A.C. 514, 522, 526 (Lord Nicholls) (P.C.).

13 *See* Peter Birks, *Inconsistency Between Compensation and Restitution*, 112 L.Q. Rev. 375, 378 (1996).

14 [1995] 4 All E.R. 673, 679. However, he doubted whether there was any "real possibility" that the Building Society could have foreclosed, given the court's

It is said that only torts which protect property can ground a restitutionary claim.<sup>15</sup> Yet a person who is guilty of a criminal assault may, on occasion, profit from it. Take the case of the criminal, the traditional "hit-man", who is bribed to assault the plaintiff. It cannot be denied that the criminal's act is wrongful, and that he would not have gained the benefit "but for" the crime, the wrongful act. As Graham Virgo has said:

Where the victim of the crime is unable to sue the criminal for the commission of a tort or breach of fiduciary duty is it possible to found a restitutionary claim on the crime itself? In principle the answer should be "yes" because the commission of a crime is an even more heinous form of wrongdoing.<sup>16</sup>

There are other situations, however, where the enrichment is indirect and where it is more difficult to hold that the enrichment was gained at the plaintiff's expense. It is to these situations we now turn.

## *B. Indirect Enrichment*

### **1. The restitutionary claim against the criminal**

The criminal may seek to exploit his own property (including information acquired) or his own personality to make a profit either for himself, his family or third parties. The victim, or those claiming through him, may then seek to recover the profit from the exploitation. Such were the unusual facts of *Attorney-General v. Blake*,<sup>17</sup> where the Court of Appeal wrote obiter, that a restitutionary claim may lie to recover profits gained from a breach of contract which also amounted to a serious breach of the criminal law. In other situations the restitutionary claim of the victim, or those claiming through him, has failed. For example, in *Rosenfeldt v. Olsen*<sup>18</sup>, the plaintiffs, the parents of children murdered by Olsen, had obtained an unsatisfied judgment against him.<sup>19</sup> In this action they claimed funds which were held in trust for Olsen's wife and

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statutory power to order a sale. *Cf.* Lord Nicholl's dictum in *Tang Min Sit v. Capacious Investments Ltd.* [1996] A.C. 514, 521-22.

15 1 George E. Palmer, *The Law of Restitution* 135 (1978).

16 Graham Virgo, *The Law of Restitution and the Proceeds of Crime - A Survey of English Law* [1998] *Restitution L. Rev.* 34, 37. *See also* Birks, *supra* note 6, at 5, arguing that to award restitution compensates the victim for the trauma suffered in consequence of the crime.

17 [1998] 1 All E.R. 833. For a full discussion of *Blake*, see Part IV of this article.

18 [1986] 25 D.L.R.(4th) 472 (B.C. App. Ct.).

19 The judgments had been obtained under the Family Compensation Act.

children. The source of the trust funds were payments made to the trustees by the Royal Canadian Mounted Police (RCMP) in return for information from Olsen as to where he had buried the murdered children. The Court of Appeal of British Columbia held that the restitutionary claim must fail: The trust fund was not a benefit gained at the plaintiffs' expense, since they had not suffered a "corresponding deprivation."<sup>20</sup>

It is difficult to support the decision on this ground, for a claim for restitution may be based on another's wrongful act. In such situations there is no necessary equation between benefit gained and loss suffered.<sup>21</sup> However, even if it can be said that the plaintiffs, as distinct from their children, had suffered a wrong, there is no English authority which holds that a tort to the person, as distinct from a tortious infringement of another's property, can ground a restitutionary claim.<sup>22</sup> Furthermore, it is arguable that the defendants' benefit was gained not at the plaintiffs' expense but at the expense of the RCMP. Finally, it is not clear that Olsen did act wrongfully in giving the information. For these reasons, it is doubtful whether a common law restitutionary claim would succeed if facts comparable to the *Olsen* case were to arise in England.<sup>23</sup>

## **2. The restitutionary claim against those who succeed to the criminal's own property**

If the difficulties facing the victim (or those claiming through him) in establishing his restitutionary claim against the criminal are formidable, the difficulties in establishing his claim against those claiming through a

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20 [1986] 25 D.L.R. (4th) at 476.

21 *Mason v. The State of New South Wales* (1959) 102 C.L.R. 108, 146 (Windeyer, J.) (High Ct. Austl.).

22 *But see supra* text at notes 15-16; and Goff & Jones, *supra* note 8, at 780-83.

23 A dissenting judge will argue that: (i) the families of the victims stand in the victims' shoes; (ii) the criminal is deemed to have title to the money paid since he was in a position to direct the payer, the RCMP, to whom it should be paid; (iii) the title is only the legal title, for the criminal is a constructive trustee and the victims are the beneficiaries of that trust (*Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669, 715-16 (Lord Browne-Wilkinson) - a thief who steals money is a constructive trustee); (iv) the money "received" by the fiduciary was a bribe, to persuade him to impart the information; (v) the bribe money is held in constructive trust for the families (*Att. Gen. for Hong Kong v. Reid* [1994] A.C. 324 (P.C.)); and (vi) the beneficiaries of the trust established by the RCMP are mere volunteers.

deceased criminal, who use their own property legitimately obtained,<sup>24</sup> to tell their own story or who sell their property or license its use, are even more formidable.<sup>25</sup> It cannot be wrongful to use your own property for your own benefit, if you choose to do so.<sup>26</sup>

## II. THE FORFEITURE RULE AND THE CONSTRUCTIVE TRUST<sup>27</sup>

In English law the forfeiture rule operates to prevent the criminal from obtaining any direct benefit from his crime. Neither the legal nor beneficial title to the property, deriving from the crime, vests in the criminal. In other common law jurisdictions, for example some of the states in the United States, while the legal title to the property passes to the criminal, nevertheless, in order to prevent his unjust enrichment, he is compelled to hold that property in constructive trust for the plaintiff.<sup>28</sup> This is the preferable conclusion. It removes any doubt as to whether the plaintiff, the beneficiary of the trust, has a proprietary claim.

The guiding principle of the common law is well established: "no system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person."<sup>29</sup> But this emotive principle is imprecise, and its rationale is not clear. "The result has been controversy as to the scope, uncertainty about the exceptions, and confusion as to the rationale."<sup>30</sup>

The common law decisions generally concern two situations: claims for

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24 *E.g.*, the criminal's diary and photographs bequeathed to them by the criminal, as distinct from property of the victim which the criminal bequeathed to them.

25 *Cf.* the United States authorities *cited infra* text at notes 84-107.

26 The First Protocol, Art. 1, of the European Convention on Human Rights; and see now the United Kingdom Human Rights Act 1998, discussed *infra* text at notes 108-121.

27 There is a considerable literature. *See, e.g.*, T.G. Youdan, *Acquisition of Property by Killing* 89 L.Q. Rev. 235 (1973); T.K. Earnshaw & P.J. Pace, *Let The Hand Receiving It Be Ever So Chast*, 37 Mod. L. R. 481 (1974).

28 For examples, *see infra* text at notes 46-48.

29 *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147, 156 (Fry L.J.), *quoted with approval in Beresford v. Royal Insurance Co.* [1938] A.C. 586, 596 (Lord Atkin).

30 "The so-called 'forfeiture rule' was one of the solutions devised to fill the gaps left following the abolition of the old rule [criminal forfeiture]. The difficulty was that the new rule was devised by judges to solve the necessities of particular cases. It developed without a great deal of consideration, either of its scope, or of its exceptions, or of its fundamental underlying rationale". *Troja v. Troja* (1994) 33

an indemnity under an insurance policy;<sup>31</sup> or where the criminal,<sup>32</sup> having been found guilty of murder or manslaughter, seeks to succeed to the estate of his victim or to claim other benefits,<sup>33</sup> such as a widow's pension, invalid care allowances or other social welfare benefits, payable in consequence of the victim's death or injury.<sup>34</sup>

In the cases where the assured claims an indemnity from his insurer, it is established that the indemnity will be denied if the crime is committed intentionally. In such a case neither the assured nor those claiming through him can claim its benefit.<sup>35</sup> The "succession" case law does not speak with the same clear voice. In particular, it is not at all certain whether the forfeiture rule applies if the criminal, seeking to inherit under a will or an intestacy or to bequeath property so inherited, has no *mens rea*, but is nevertheless found guilty of a criminal offense; for example if the criminal is found guilty of involuntary manslaughter.<sup>36</sup> However, the Forfeiture Act 1982 now gives the court power to make an order modifying the effect of the forfeiture rule if it is just to do so.<sup>37</sup>

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N.S.W.L.R. 269, 278 (Kirby P., *cited with approval in Dunbar v. Plant* [1997] 4 All E.R. 289, 305 (Phillips L.J.)).

31 *See, e.g.*, *Haseldine v. Hoskin* [1933] 1 K.B. 822. For a helpful discussion of these decisions, see Peter Maddaugh & John McCamus, *The Law of Restitution*, 497-506 (1990).

32 or those claiming through him.

33 *See Goff & Jones, supra* note 8, at 805-07.

34 *See, e.g.*, decisions of the Social Security Commissioners, *in J. Soc. Welfare & Fam. L.* 143 (1991).

35 *See, e.g.*, *Tinline v. White Cross Insurance Association Ltd.* [1921] 3 K.B. 327.

36 *See, e.g.*, *Re Giles* [1972] Ch. 544; *Gray v. Barr* (Prudential Assurance Co. Ltd., 3rd party) [1970] 2 Q.B. 626, 640 (Geoffrey Lane J.), [1971] 2 Q.B. 554, 581 (Salmon L.J.); *Re K* (deceased) [1985] Ch. 85 (C.A.); *Re H* (deceased) [1990] Fam. L.R. 175; *Dunbar v. Plant* [1997] 4 All E.R. 289 (C.A.).

But the forfeiture rule does apply to the offense of aiding and abetting a suicide, contrary to § 2(1) of the Suicide Act 1961. *Dunbar v. Plant* [1997] 4 All E.R. 289 (C.A.). Conviction may be conclusive of guilt in subsequent civil proceedings. But an acquittal in criminal proceedings, where the burden of proof is beyond reasonable doubt, is not necessarily conclusive in civil proceedings. In civil proceedings it may be established that, on the preponderance of evidence, the claimant had committed the crime. *See Gray v. Barr* (Prudential Assurance Co Ltd., 3rd party) [1971] 2 Q.B. 554 (C.A.); *Re Sigsworth* [1935] Ch. 89.

37 But the court shall not do so "unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case". § 2(2). But nothing in the Act "shall affect the application of the forfeiture rule in the case of a person who stands convicted of murder". § 5.



It is not always easy to determine when rights directly result to the person asserting them from the crime of the person.<sup>38</sup> Sir Samuel Evans P. had little doubt that Miss Le Neve, Crippen's mistress, was seeking to enforce rights "directly" resulting to her from another's criminal act. Crippen, who had murdered his wife, succeeded to her estate on her intestacy.<sup>39</sup> Le Neve, Crippen's sole executrix and legatee, was refused a grant of administration to his estate; she was seeking to enforce rights directly resulting to her from his crime.<sup>40</sup>

But what if Miss Le Neve had been one of Mrs. Crippen's heirs? She cannot take as Crippen's legatee, but can she take as Mrs. Crippen's heir? Has she been unjustly enriched at the expense of Mrs. Crippen's other heirs? In the United States this problem has arisen more frequently than it has in England. Professor Palmer posits the situation where the murderer is one of two children of the victim, and they are the sole heirs. In his view, the "choice may have to be made between holding that the property goes either to the other heirs or to those who would have been heirs if the slayer is regarded as having died before the decedent."<sup>41</sup> The choice is not an easy one.<sup>42</sup> In England the few decisions appear to distinguish between rights dependent on, and rights independent of, the criminal act.<sup>43</sup> Consequently, if the facts posited by Professor Palmer were to arise in England, an English court might well conclude that the murderer should be deemed to have died before his victim; for the rights of the heirs of the murderer to succeed to the

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38 *Cleaver v. Mutual Reserve Fund Life Association* [1982] 1 Q.B. 147. See discussion of case *supra* text at note 29.

39 *In the Estate of Cunigunda (otherwise Cora) Crippen (deceased)* [1911] P. 108. See also *Re Sigsworth* [1935] 1 Ch. 89.

40 If Miss Le Neve had succeeded to Crippen's estate, then she would have held the estate as a constructive trustee for the benefit of those taking on Mrs. Crippen's intestacy, other than Crippen; she would have been unjustly enriched at their expense. See James Barr Ames, *Lectures on Legal History* 310-11 (1913).

41 4 Palmer, *supra* note 15, at 243-44. A similar problem has arisen when the beneficiary of a life insurance policy, which contains the name of an alternative beneficiary, murders the insured. A majority of the states hold that the murderer was unjustly enriched at the expense of the alternative beneficiary (and those claiming through him) and not at the expense of the estate of his victim. *Id.* at 246-47.

42 Palmer argues that the estate should go to the other child, for the murderer's children "are not in fact heirs, their parent being alive." 4 Palmer, *supra* note 15, at 244-45. In my view this technical argument is not persuasive. Cf. 5 Scott on Trusts 3493-95 (1989).

43 See, e.g., *Re Peacock* [1957] Ch. 310 and *Re Callaway* [1956] Ch. 559; and cf. *Public Trustee v. Hayles* (1993) 33 N.S.W.L.R. 154, 171 (Young J.), and the discussion in Keith Mason & John Carter, *Restitution Law in Australia* § 1910 (1995).

murdered child's estate are independent of the murderer's crime.<sup>44</sup> It is true that, in these situations, the subordinate principle, that the enrichment must be gained at the expense of the plaintiff, is given an expansive meaning.<sup>45</sup> The murderer (or those claiming through him) would be unjustly enriched by his wrongful act if he (or they) were allowed to succeed to his victim's estate.

The facts of *Latham v. Father Divine*<sup>46</sup> posit a different problem. There it was alleged that a testatrix was killed by some of the legatees under her will in order to prevent her changing it and bequeathing some \$350,000 to the plaintiffs. The New York Court of Appeals concluded that, if the allegations were proven, all the legatees would be held to be constructive trustees whether they were implicated in the murder or not. In New York such conduct was not then tortious. Nevertheless, the court was prepared to hold, citing the analogy of the secret trust case law, that the legatees were unjustly enriched at the expense of those whose hopes were disappointed and whose expectations were unrealized.<sup>47</sup> Such conduct amounted to fraud

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44 For the reasons stated in the text, I am not persuaded by Palmer's technical argument to support his solution to his hypothetical problem, namely, that the estate goes to the other child since the murderer's children "are not in fact heirs, their parent being alive". 4 Palmer, *supra* note 15, at 244-45. Cf. 5 Scott on Trusts, *supra* note 42, at 3493-95.

45 Cf. the decisions where the honest fiduciary is held to be a constructive trustee of his enrichment because there was a possibility of a conflict of interest, even though the trust could not have possibly gained that enrichment. See, e.g., Boardman v. Phipps [1967] 2 A.C. 46 (H.L.).

46 85 N.E.2d 168 (N.Y. 1949).

47 Cf. Dixon v. Olmius (1787) 1 Cox Eq. 414. The deceased had intended to re-execute a will which had been revoked, but was prevented from doing so by acts of fraud and violence by the heir at law (or possibly her husband) who prevented the attorney from entering his bedroom. Lord Thurlow overruled a demurrer to that part of the bill which required the heir at law to determine whether the deceased did not intend to republish his will. "I think it impossible to separate the fact of [the deceased's] intention, from the facts of fraud imputed. The defendants must answer the former as well as the latter." *Id.* at 415.

See also the Massachusetts case of *Monach v. Koslowski*, 78 N.E.2d 4 (Mass. 1948), where the sole legatee gave the testator's attorney a false message so that he did not come, as the testator had requested, to prepare a new will leaving half his estate to the plaintiff. The sole legatee was held to be a constructive trustee. In Massachusetts the defendant's conduct was tortious. But the Court held that the constructive trust was a preferable remedy to an action for tort damages. "Damages at best are only an approximation of the loss, while relief in equity, by requiring the wrongdoer to transfer to the intended devisee or legatee that which would have gone to him but for the fraud of the former, gives the intended beneficiary exactly what he would have received in the absence of such fraud." *Id.* at 7.

in equity. "Nothing short of true and complete justice satisfies equity, and, always assuming these allegations to be true, there seems no way of achieving total justice, except by [decreeing a constructive trust]."<sup>48</sup>

### III. THE ENGLISH LEGISLATION: THE CONFISCATION OF THE PROCEEDS OF CRIME

There are a number of English statutory provisions which seek to deprive criminals of the profits of their criminal activity.<sup>49</sup> They include: the Criminal Justice Act 1988<sup>50</sup> [CJA] (as amended); the Prevention of Terrorism (Temporary Provisions) Act 1989;<sup>51</sup> the Drug Trafficking Act 1994;<sup>52</sup> and the Proceeds of Crime Act 1995.<sup>53</sup> In certain circumstances the courts are under a duty to confiscate the proceeds of indictable offenses.<sup>54</sup> Section 71(4) of the CJA provides that a person benefits from an offense if he obtains property as "a result of, or in connection with", the commission of the crime, "and his benefit is the value of the property so obtained."<sup>55</sup> The phrase "in connection with" is open to more than one interpretation. For example, it is doubtful whether it captures advances made by publishers to criminals for the story of the crime.<sup>56</sup> Pat Pottle and Michael Randle were paid £30,000 for their book, *The Blake Escape: How We Freed George Blake and Why*.<sup>57</sup> Having been indicted for offenses relating to the escape, the Crown obtained a charging order over their homes. Their application to discharge it on the ground that it was not a benefit within section 71(4) was unsuccessful. It was held that the £30,000 was property connected with the alleged offenses. Potter and Randle were later acquitted, and, with their acquittal, the charging order was discharged.

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48 85 N.E.2d 168, 170 (N.Y. 1949).

49 Cf. the comparable Australian legislation, cited in 9 Halsbury's Laws of Australia § [130-17315].

50 Ch. 33.

51 Ch. 4.

52 Ch. 37.

53 Ch. 11.

54 § 71(9)(c). A confiscation order must also be made if the criminal is found guilty of one of a limited number of summary offenses.

55 The court is also empowered to make certain assumptions to determine whether the defendant has benefited and the value of that benefit. § 72AA (3)(4)(5).

56 See Arie Freiburg, *Confiscating the Literary Proceeds of Crime*, (1992) Crim. L. Rev. 96.

57 Cf. the facts of Attorney-General v. Blake [1998] 3 All E.R. 833, discussed *infra* text at notes 63-83.

Arguably, the £30,000 paid to Potter and Randle was not property obtained "in connection with" the "commission" of the crime within section 71(4) of the CJA, but was made from their contract with their publisher.<sup>58</sup>

Many of the criminal activities against which these statutes are directed have victims who may not be identifiable. This class includes the clientèle of drug dealers. Again, it is society that is the victim of those who assist a criminal to escape from prison, who deal in arms, or who evade taxes. In such situations a confiscation order is an appropriate remedy.

However, the victim of a crime may be identifiable. He may have instituted civil proceedings against the criminal; the court may then make, but is not obliged to make, a confiscation order.<sup>59</sup> These statutory provisions do not entitle the victim, as distinct from the Crown, to claim property obtained "as a result of, or in connection with" the commission of the crime, or the value of any "pecuniary advantage" thereby obtained. There is then a tension between the statutory right of the Crown and any restitutionary claim of the victim. The Crown's statutory right must prevail. Indeed there is dicta concluding that the "courts should not indulge in parallel creativity by the extension of general common law principles."<sup>60</sup> These dicta may lead to a conclusion that the common law should never contemplate any restitutionary claim.<sup>61</sup> But, in principle, there should be a restitutionary claim where no confiscation order has been, or can be, made. This conclusion is supported by dicta of the Court of Appeal in *Attorney-General v. Blake*<sup>62</sup>, where no confiscation order could be made. The Court was prepared to hold that a restitutionary claim may lie for profits gained from a breach of contract which also amounted to a serious breach of the criminal law. The implications of its decision will be discussed in the following Part of this article.

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58 For the same reason it is doubtful whether the facts of *Rosenfeld v. Olsen* (1986) 25 D.L.R.(4th) 472 (B.C. App. Ct.) (*see supra* text at note 18) would fall within the sub-section.

59 CJA, § 71(1)(C). Similarly, all courts have power to make a compensation order in respect of loss of, or damage to, property. Powers of Criminal Courts Act 1973, § 35.

60 Chief Constable of Leicestershire v. M [1989] 3 All E.R. 1015, 1018 (Hoffmann, J.), *cited with approval in* *Halifax Building Society v. Thomas* [1995] 4 All E.R. 673, 682 (Peter Gibson, L.J.) *But see infra* note 66.

61 It is arguable that if the criminal is a constructive trustee of his profits for the benefit of his victim, then the Crown cannot confiscate property to which the criminal is not beneficially entitled. But the confiscation order will normally be made before any civil suit is brought.

62 [1998] 1 All E.R. 833, 843-46 (per curiam). *See infra* text at notes 63-83.

#### IV. THE IMPLICATIONS OF THE DECISION OF THE COURT OF APPEAL IN *ATTORNEY-GENERAL V. BLAKE (JONATHAN CAPE LTD., 3RD PARTY)*<sup>63</sup>

George Blake, a Russian spy, had earned substantial royalties from the publication of "No Other Choice". In *Attorney-General v. Blake* the Court of Appeal held that the Attorney-General was entitled, on "extremely rare"<sup>64</sup> occasions, to intervene by instituting civil proceedings to prevent the criminal law being flouted, and to uphold the public policy embodied in the Criminal Justice Act 1988 (Part IV).<sup>65</sup>

An order restraining the defendant [Blake] from receiving further benefits would not be open to any objection on the ground of retrospectivity or lack of proportionality; it only has prospective effect; it is a lesser penalty than a confiscation order under the legislation; it supports the criminal law in an area relating to the interests of national security; and it does not interfere with freedom of expression.<sup>66</sup>

The remedy "should be fashioned to achieve the public law policy of aiming to prevent the offender from profiting as a result of, or in connection with, his crime."<sup>67</sup> The facts of *Attorney-General v. Blake* were exceptional. In "No Other Choice", Blake described his life as a spy. While he did not disclose any confidential information, he had committed a serious criminal offense, a breach of section 1(1) of the Official Secrets Act 1989; and there was no likelihood that he would return to England from Russia to stand trial. He was in breach of his undertaking not to divulge any official information gained as a result of his employment.<sup>68</sup> In these circumstances, the Attorney-General has a "legal right in public law to apply to the court for an injunction in a case

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63 [1998] 1 All E.R. 833. The judgment of the Court was delivered by Lord Woolf M.R.

64 *Attorney-General v. Blake* [1998] 1 All E.R. 833, 851.

65 As amended by the Proceeds of Crime Act 1995. See *supra* text at note 53.

66 [1998] 1 All E.R. at 849-50, *distinguishing* Chief Constable of Leicestershire v. M [1989] 1 W.L.R. 20, 23. The Attorney-General was in a different legal and constitutional position from the Chief Constable; and it was in the context of a claim by the Chief Constable to freeze assets that Hoffmann J. had said that the "courts should not indulge in parallel creativity [referring to the interventions of Parliament] by the extension of general common law principles." [1998] 1 All E.R. at 849-50.

67 [1998] 1 All E.R. at 851.

68 This undertaking applied, not only during the period of his service, but after he had ceased to be in the service of the Crown.

of this kind";<sup>69</sup> and the court has power to grant an injunction if "it appears to be just and convenient to do so".<sup>70</sup> Blake would benefit from the commission of his serious crime unless he was restrained

from receiving or from authorising any person to receive on his behalf any payment or other benefit resulting from or in connection with the exploitation of "No Other Choice" in any form or of any information therein relating to security and intelligence which is or has been in his possession by virtue of his position as a member of the Secret Intelligence Services.<sup>71</sup>

An English court has then a common law jurisdiction to fashion a remedy to effect the public policy of the CJA, as amended. The common law, as developed in *Blake*, does not give the victim of a serious criminal offense the right to recover the profits of crime, although the criminal may be enjoined from enjoying the fruits of his crime. The royalties were, therefore, retained by Blake's publisher. However, if the serious criminal offense is also a breach of the criminal's contract with his victim, the victim may be able to recover the profits made from the breach of contract.<sup>72</sup> If Blake had been convicted of the crime, then, as has been seen,<sup>73</sup> it is doubtful whether the Crown would have been entitled to confiscate his royalties: if the CJA enabled the Crown to do so, by coincidence, the victim of Blake's crime, the Crown, will recover the profits of the crime.<sup>74</sup>

The boundaries of this common law jurisdiction are very uncertain. For example, the Court of Appeal emphasized that the occasions on which the Attorney-General should seek to intervene to uphold the criminal law are "extremely rare." Although it is the Attorney-General, and not the court, who determines whether the crime is so serious as to compel his intervention,<sup>75</sup>

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69 [1998] 1 All E.R. 833, 852.

70 Supreme Court Act 1981, § 37(1).

71 This was the form of the injunction. [1998] 1 All E.R. 833, 852.

72 See *infra* text at notes 78-83.

73 See *supra* text at notes 49-58.

74 The Crown did not seek to enjoin the publisher. But the publisher, having notice of the injunction against Blake, would be in contempt if it ignored it.

It would be surprising if the publisher could appropriate the royalties for its own benefit, as distinct from "retaining" them. (For the wording of the injunction, see *supra* text at note 71.) The Court of Appeal simply said that if there is a use proposed for the unpaid royalties, which is not contrary to the public interest, then the court can authorize that use, by way of variation of the terms of the injunction, on the application of the Attorney-General, having served notice to Blake and his publisher. [1998] 1 All E.R. 833, 852.

75 "The Attorney-General, because of his central role in the enforcement of the criminal

"the court will carefully scrutinize the application to ensure that it is in the interests of justice that the application should be granted."<sup>76</sup> The Court of Appeal surmised, adopting the submission of the Solicitor-General, that it is unlikely to be granted unless it is "providing carefully targeted support to the enforcement of substantive legislation enacted by Parliament."<sup>77</sup>

The judgment of the Court of Appeal in *Attorney-General v. Blake* is important for another reason. Blake, like Frank Snep, <sup>78</sup> was bound by contract not to disclose confidential information without clearance. He had not obtained such clearance. The Court expressed the tentative view, without benefit of argument, that restitutionary damages<sup>79</sup> could be awarded in at least two situations: (i) "skipped performance ... where the defendant fails to provide the full extent of the services which he has contracted to provide and for which he has charged the plaintiff",<sup>80</sup> and (ii) "where the defendant has obtained his profit by doing the very thing which he contracted not to do", which "covers the present case exactly."<sup>81</sup> But the Solicitor-General declined to advance the restitutionary claim before the Court of Appeal. The Crown's claim for breach of contract therefore failed, for the damages were merely nominal.

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law, is in a peculiarly appropriate position to judge when to make an application to court for a remedy". *Id.* at 851.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* The proposed injunction was said to be justified under the European Convention on Human Rights "as being a necessary and proportionate measure adopted in the interests of national security." The Court of Appeal appears to be referring to Article 10 (the right to freedom of expression).

*Cf.* now the Human Rights Act 1998, on which see Part IV.

<sup>78</sup> *Snep v. U.S.*, 444 U.S. 507 (1980). Snep had published a book without obtaining clearance. The Supreme Court held that he was in breach of his fiduciary duty in doing so and invoked "the concept of the remedial constructive trust on the proceeds of publications without prior clearance". In *Blake* the Court of Appeal preferred "to award restitutionary damages directly for breach of contract, rather than distort the equitable concepts of fiduciary duty or constructive trust in order to accommodate them" [1998] 1 All E.R. at 846.

<sup>79</sup> "Damages" invokes for lawyers "loss suffered"; and the phrase "restitutionary damages" does not free itself of that connotation. But the plaintiff is essentially seeking an accounting of profits. An accounting is an equitable remedy which the court may or may not grant; precedent would draw the boundaries of that discretion. [1998] 1 All E.R. at 845.

<sup>81</sup> *Id.* at 846. However, damages should not depend on the defendant's moral culpability; his motives should be irrelevant. Nor should it be relevant that the defendant's breach has enabled him to enter into a more profitable contract with third parties. *Id.* at 845-46.

Jurists have long suggested that, in certain circumstances, a defendant in breach should account to the other contracting party for profits from a breach of contract, although there is no unanimity of agreement what those circumstances should be. Two points may be made in conclusion. First, until the dicta in *Blake*,<sup>82</sup> the English authorities, at least in the Court of Appeal, have been hostile to the recognition of even the possibility of such a remedy.<sup>83</sup> Second, if the Crown had advanced the claim, then the Court of Appeal was prepared to hold that Blake would have to account to the Crown for the profits. In *Blake* the breach of contract was also a serious offense. But the dicta of the Court of Appeal are wide enough to enable the innocent party to recover profits gained from a breach of contract even though that breach of contract was not a criminal offense.

## V. SHOULD THERE BE FURTHER LEGISLATIVE INTERVENTION?

Given the uncertainty of the scope of the common law, is it desirable to introduce legislation which will strip criminals of the profits of their crimes? The United States experience demonstrates that there are many problems for the draftsman.<sup>84</sup>

It was the state of New York which first enacted legislation to

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82 [1998] 1 All E.R. 833, 844, *citing dicta in* Hospital Products Ltd. v. U.S. Surgical Corporation Ltd. (1984) 58 A.L.J.R. 587, 620 (Deane, J.); *Jaggard v. Sawyer* [1995] 1 W.L.R. 269, 281 (Bingham M.R.).

83 *See, e.g.,* Surrey County Council v. Bredero Homes [1993] 1 W.L.R. 1361 (C.A.).

84 *Cf.* the Queensland Crimes (Confiscation of Profits) Act 1989. Section 60 provides that the Court may make an order that a person convicted of a "serious offence" forfeit to the Crown the "the proceeds received or to be received by him, or by any other person on his behalf, from a contract relating to:

"(a) a depiction of a serious offence or alleged serious offence in a movie, book, newspaper, magazine, radio or television production, or a live entertainment of any kind;

or

(b) an expression of the person's thoughts, opinions or emotions regarding the serious offence or alleged serious offence."

The other contracting party may be directed to pay the contract moneys to the Treasury on behalf of the Crown. The Treasurer may, if directed by the Governor in Council on the recommendation of the Attorney-General, apply the money to satisfy a court order that the defendant make restitution or that the defendant pay damages to a person for injury suffered. The person in whose favor an order is



deprive criminals of the profits of their crimes.<sup>85</sup> A serial murderer, David Berkowitz, the self-entitled "Son of Sam", was offered a book deal to tell the world about his notorious criminal activities. He received a \$250,000 advance before he had been tried and convicted. The public outrage which followed led to the statute which sought to deprive him of media profits, which were the product of his publishing contract with the third party.<sup>86</sup> These profits were to be held in escrow<sup>87</sup> for five years to satisfy any civil judgment against him.<sup>88</sup> Consequently, in New York, victims of a crime have the right to satisfy, from the "profits" of crime, an award of damages which they have obtained against the criminal.<sup>89</sup> This is the limit of their right to "compensation".

The New York statute was subsequently adopted in other states as well.<sup>90</sup>

Although the Supreme Court subsequently struck down the New York statute on the ground that it was over-inclusive, the Supreme Court did acknowledge that the state had "an undisputed compelling interest in ensuring that criminals do not profit from their crimes" and in "ensuring that victims of crime are compensated by those who harm them."<sup>91</sup> Within four months the

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made may apply within five years that it be satisfied out of the moneys paid to the Crown. After five years all claims are absolutely barred, and the moneys are paid to Consolidated Revenue (§ 63).

*See also* The South Australia Crimes (Confiscation of Profits Act, No. 17 of 1986, § 4(2)).

85 Executive Law, § 632-a (1997, Ch. 838, amended in 1978, Ch. 417).

86 The Court of Appeals of Maryland has held that the Maryland statute, based on the New York statute, does not require the criminal to submit to the Attorney-General "a suspected notoriety of crimes" contract. *J. Joseph Curran, Jr. v. Ronald W. Price*, 638 A.2d 93 (1994). But the statute does require the other party to the contract to produce it, and he is subject to a severe penalty if he fails to do so. *See* Maryland Code (1957, 1992 Repl., and 1993 Cum. Supp.) Art. 27, §764.

87 The statute requires the appropriate state agency to notify the crime victim of the existence of escrowed funds. § 3 (1978).

Different states have adopted different solutions to determine how unclaimed escrow funds are distributed at the end of the five year period. *See* Alan Young, *Son of Sam and His Legislative Offspring: The Constitutionality of Stripping Criminals of Their Literary Profits*, 4 *Intell. Prop. J.* 25, 33 (1989).

88 The limitation period governing any civil action was also extended § 7 (1978).

89 New York Executive Law §625-a (3): "any damages awarded in such [civil] action shall be recoverable only up to the value of the profits of the crime."

90 The state statutes are conveniently collected by Kathleen Timmons, *Natural Born Writers: The Law's Continued Annoyance with Criminal Authors*, 29 *Ga. L. Rev.* 1121 n.54 (1995).

91 *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105, 118-19 (1991).

New York legislature responded to the Supreme Court's decision, enacting an amended and more narrowly drafted statute which added separate definitions of "crime" and "profits from crime".<sup>92</sup> In particular, the amended statute (i) does not target speech; (ii) seeks to ensure that it does not reach works which discuss the crime only "tangentially or incidentally";<sup>93</sup> and (iii) applies only to persons charged with or convicted of a crime and not a person who later admits committing a crime for which he was never charged.<sup>94</sup>

It is evident that these statutes cannot easily be transported, for two very different reasons. Some of the statutory provisions have been drafted to avoid constitutional challenge. Furthermore, in the United States, the amount of civil damages to compensate the victim is determined by the jury. Many of the awards would certainly be regarded as excessive in England. In one case the families of the victims of a criminal, who had murdered 15 boys and men, were awarded some 80 billion dollars for the violation of the victims' civil rights. In comparison, bereavement damages in England are fixed at £7,500.<sup>95</sup> Nonetheless, England can learn from the American experience if further legislation is contemplated.

First, the legislature must define a "crime" for the purpose of any legislation which seeks to deprive a criminal of profits from the crime. In New York, for example, "'crime' means any felony defined in the penal law or any other chapter of the consolidated laws of the state."<sup>96</sup>

Second, state legislatures have had difficulty in determining what profits are derived from the crime. Statutory provisions range from the sweeping definition of the Iowa Code and (the less broad) New York Law to the more specific Massachusetts definition.<sup>97</sup>

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92 Executive Law, Art. 22, §632a (1992) (McKinney 1992). In 1996 twenty - five other states which had adopted the New York statute had not amended it. See Gilbert Greenman, *Son of Simon & Schuster: A "True Crime" Story of Motive, Opportunity and the First Amendment*, 18 Hawaii L. Rev. 201, 212 (1996).

93 Cf. *Simon & Schuster*, 502 U.S. at 121.

94 For an argument that the revised statute is still over-inclusive, see Steven Vargas, *New York Son of Sam Law: Alive and Well Today*, 11 Touro L. Rev. 629, 646 (1995).

95 Administration of Justice Act 1982, § 1(3)(b). There is also *The Criminal Injuries Compensation Scheme* (12 December 1995), established in exercise of powers conferred on the Home Secretary by the Criminal Injuries Compensation Act 1995. §§ 1-6, 12. There is an elaborate Tariff of Injuries which determines the amount of compensation awarded to the victim and, if deceased, such persons as his spouse, children and parents.

96 Executive Law §632-a 1(a). Cf. § 71(9)(c) of the English CJA. See *supra* text at note 50.

97 But the Supreme Court, New York County, has held that the definition of "profits of crime" does not catch tort damages awarded to a criminal, a mugger, who was

Third, no American statutory provision reaches persons claiming through the criminal, such as those who take under his will or on his intestacy. It is then no surprise to learn that the statutes have been held not to apply to the author, who buys from the criminal the rights to his stories, or the publisher. In *Fasching v. Kallinger*,<sup>98</sup> the survivors of a murder victim brought claims for "money damages" against the convicted murderer and the author and publisher who had contracted with the criminal to write and publish the book, which recounted the murderer's life history and described the criminal episode. The actions were based, *inter alia*, on unjust enrichment and the New Jersey "Son of Sam Law". The New Jersey Superior Court, Appellate Division, agreed with the opinion of the Law Division that:

the doctrine of unjust enrichment did not apply because plaintiffs never expected any remuneration from the publisher and the author and no direct relationship existed between the parties which would create a reasonable expectation of benefit ....<sup>99</sup>

The Court also rejected the argument that the author and publisher had aided the criminal to profit from his crime. "There are no cases suggesting that an author or publisher producing a book about a criminal and compensating him for his story aids the criminal in his illegal goal."<sup>100</sup> The statute's forfeiture provisions did not therefore extend to the author who reenacted the crime, or the publisher of that reenactment.

Thus, "Son of Sam" statutes may be circumvented easily, as a final illustration, *Danmark Publishing Inc. v. Department of Justice of the State of Oregon*,<sup>101</sup> demonstrates. The murderer entered into a contract with a publishing company, created by her father, for the publication of a book describing the murder of her daughter and the attempted murder of her two other children. The contract included provisions which provided an annual payment of up to \$500 for her, and which allowed her father to deduct from the contract payments any sums owing to him, whether or not arising out of the

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fleeing from the scene of the crime. *Sandusky v. McCummings*, 625 N.Y.S.2d 457 (N.Y. Sup. Ct. 1995).

98 510 A.2d 694 (N.J. Super. Ct. App. Div. 1986).

99 *Id.* at 699, *citing* Callano v. Oakwood Park Homes Corp., 219 A.2d 332 (N.J. Super. Ct. App. Div. 1966) and the Pennsylvania court in *Collazo v. Kallinger*, 11 Media L. Rep. (BNA) 1509 (Pa. Common Pleas 1985).

100 510 A.2d at 700. Furthermore, the "Son of Sam Law" did not apply to these facts, for neither the author nor the publisher were the "agents" or "representatives" of the criminal within the meaning of the statute.

101 816 P.2d 629 (Or. Ct. App. 1991).

contract. The Department of Justice found that these contractual provisions were actions taken to defeat the purpose of the Oregon "Son of Sam" statute and were null and void. However, the Oregon Court of Appeals held that the statute "does not delegate to department any role in fashioning a remedy ... Because the legislature has specified a particular remedy, department is without authority to fashion a different one, even when it concludes that the different remedy would better accomplish the purpose of the statute."<sup>102</sup>

The "Son of Sam" statutes presented the American courts with formidable constitutional and drafting problems. Consequently, they have resorted to other devices designed to strip criminals of the profits of crime. These include:<sup>103</sup> (i) large fines;<sup>104</sup> (ii) restitution orders;<sup>105</sup> and (iii) prohibiting financial gain as a condition of probation.<sup>106</sup>

As has been seen,<sup>107</sup> it is doubtful whether the common law is sufficiently developed to provide the victim with a remedy to deprive a criminal of his indirect enrichment. Furthermore, it is most probable that the common law does not prevent those claiming through the criminal from exploiting property, including copyright rights, to which they have legitimately succeeded. Statutory intervention would be necessary to change this situation.

## VI. THE POSSIBLE IMPACT OF THE HUMAN RIGHTS ACT 1998

The United States legislation demonstrates that there are formidable drafting difficulties in defining the "profits of a crime". Apart from drafting difficulties, which may be overcome, the Human Rights Act 1998, which seeks to enact many of the most important provisions of the European Convention on Human Rights, presents other problems. It states that primary and subordinate legislation must be "read and given effect in a way which is compatible with Convention rights."<sup>108</sup> In the debates in the House of Lords,

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<sup>102</sup> *Id.* at 632.

<sup>103</sup> See generally, Kathleen Timmons, *Natural Born Writers: The Law's Continued Annoyance With Criminal Authors*, 29 Ga. L. Rev. 1121 (1995).

<sup>104</sup> *United States v. Seale*, 20 F.3d 1279 (3d Cir. 1994) (upholding a fine to prevent the possibility of profit).

<sup>105</sup> See *United States v. Jackson*, 978 F.2d 903 (5th Cir. 1992) (upholding restitution as a means of punishment).

<sup>106</sup> See, e.g., *United States v. Waxman*, 638 F. Supp. 1245 (E.D. Pa. 1986); Utah Code Annotated, 1996 Supp., 77-18-8.3 (giving courts power to make such an order).

<sup>107</sup> See *supra* text at notes 24-26.

<sup>108</sup> § 3(1).

the Lord Chancellor said in relation to clause 6,<sup>109</sup> which makes it unlawful for a "public authority" to act in a way which is incompatible with Convention rights, that the Bill's provisions should *only* apply to public authorities and not to private individuals,<sup>110</sup> a view which Lord Lester Q.C. appears to endorse.<sup>111</sup> If the Lord Chancellor's interpretation of the Act prevails, the statute will operate vertically but not horizontally. However, Professor Sir William Wade Q.C. interprets the Bill very differently, relying on the definition of "public authority" as including a "court".<sup>112</sup> He concludes that if the Bill does operate vertically and only vertically then

[i]t would be a poor sort of "incorporation" which exempted private individuals and bodies from respecting the fundamental rights of their fellow-citizens and drove them back to Strasbourg with all its costs in time and money - the very evil which "incorporation" is supposed to remedy.<sup>113</sup>

Professor Wade finds little solace in the Lord Chancellor's words, which were meant to reassure him that, in

the very rare cases where the higher courts will find it impossible to read and give effect to any statute in a way incompatible with Convention rights, they will be able to make a declaration of incompatibility.<sup>114</sup>

Professor Wade is not reassured. For the "declaration of incompatibility" :

- (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
- (b) is not binding on the parties to the proceedings in which it is made.<sup>115</sup>

However, the declaration *may* lead to a ministerial "remedial order", amending the offending legislation "as he [the minister] considers necessary

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109 Now § 6 of the Act.

110 Parl. Deb., H.L., 3 November, col. 1231.

111 Parl. Deb., H.L., 18 November, col. 521.

112 § 6(3)(a).

113 *The United Kingdom's Bill of Rights, in Constitutional Reform: Principles and Practice* 61, 63 (1998).

114 Lord Irvine L.C., *Keynote Address*, in *Constitutional Reform*, *supra* note 113, at 1, 4, *citing* cl. 4 of the Bill (§ 4 of the Act).

115 § 4(6).

to remove the incompatibility", which must be approved in draft by positive resolution of each House of Parliament.<sup>116</sup>

A "Convention right" which assumes particular importance in this context is the right to protection of property. *Article 1* of the First Protocol reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The Convention also protects, significantly, freedom of expression. *Article 10* reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

If legislation were to be introduced in the United Kingdom seeking to confiscate the profits of crime, then Parliament should decide (a) whether the "profits" (however defined) should vest in the Crown or whether victims have any rights, and, if so, under what conditions, to those profits; and (b) whether the legislation should be directed only at criminals and not at those who succeed to their property and third parties, such as authors and publishers who contract with the criminal.

If the court is asked to consider whether the statutory provisions

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116 § 10, & Sched. 2.

are "incompatible with one or more of the Convention rights ...",<sup>117</sup> the Crown must be given notice where "a court is considering whether to make a declaration of incompatibility", and is entitled to be joined as a party to the proceedings.<sup>118</sup> It may submit that (a) it is "in the public interest" to deprive a person of his possessions;<sup>119</sup> and (b) it is proper to restrict his right to "freedom of expression" in order to prevent "disorder or crime".<sup>120</sup>

It may be that a court will be less ready to restrict the rights of innocent parties, such as the criminal's legatee or a person contracting with the criminal, than those of the criminal himself. These are questions which Human Rights lawyers will undoubtedly explore. They will not be writing on a clean slate, for there are European precedents, and the principles formulated therein, to guide them.<sup>121</sup>

## CONCLUSION

It is possible that Parliament will be persuaded to enact legislation which will seek to achieve two purposes: to deprive a criminal of profits indirectly arising from his crime and to grant the victim, or those claiming through the victim, a restitutionary claim to those profits. The enactment of such legislation will require British judges to decide whether its provisions are compatible with the entrenched rights of peaceful enjoyment of one's possessions and of freedom of expression. The legislation arguably may infringe, not only the rights of the criminal, but those of innocent parties, such as his children, his publisher and a news hungry press. A court may then be required to determine (a) whether the legislation deprives a person of his possessions and of his right to freedom of expression; (b) if it does, whether the public interest justifies overriding those rights; and (c) whether "the

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117 § 4. For example, it may be submitted that the legislation may impair "peaceful enjoyment of [the petitioner's] possessions" and infringes his "right to freedom of expression".

118 § 5.

119 Article 1, First Protocol. *Cf.* the observations of the Supreme Court in *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105, 118-19 (1991), discussed *supra* text at notes 91-93.

120 Article 10(2). In *Attorney-General v. Blake* [1998] 1 All E.R. 833, 851, the Court of Appeal concluded that the "proposed injunction can readily be justified under the European Convention of Human Rights as being a necessary and proportionate measure adopted in the interests of national security."

121 *See generally*, D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* 372-416, 516-39 (1995).

means chosen to attain these objectives [are] proportional or appropriate to the ends."<sup>122</sup> In answering these questions British courts may well be guided by the decisions of the European Court of Human Rights, the Supreme Court of the United States and the Supreme Court of Canada.<sup>123</sup>

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<sup>122</sup> *R. v. Edwards Books & Art Ltd.* [1986] 2 S.C.R. 713, 768 (Sup. Ct. Canada).

<sup>123</sup> Alan Young, "Son of Sam" and his Legislative Offspring: *The Constitutionality of Stripping Criminals of Their Literary Profits*, 4 *Intell. Prop. J.* 25, 35 (1989).