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VICTIMS' COMPENSATION: CONGRESS ACTS TO MAKE SURE THAT CRIME DOESN'T PAY— SOMETIMES

The entertainment industry's hot pursuit of "exclusive" rights to convicted criminals' stories¹ may soon cool off due to recent federal legislation designed to remove the criminal's profit motive from such depictions. The Victims of Crime Act of 1984 (the "Act")² requires that

1. See, e.g., Wilson, *The Road to Emporia*, Los Angeles Times, Aug. 10, 1986, (Calendar) at 20, col. 1: Over three dozen producers invade Emporia, Kansas to obtain dramatic rights of principals involved in a murder scandal involving the Reverend Thomas Bird and his purported lover and church secretary, Lorna Anderson. Bird was convicted of murdering his wife, Sandra, while Bird and Anderson were convicted of soliciting the murder of Anderson's husband, Marty. No one has yet been charged with the murder of Mr. Anderson; Wilson, *Emporia Update*, Los Angeles Times, Oct. 12, 1986, (Calendar) at 89, col. 1:

CBS has jumped ahead of NBC and ABC in the great race to get those steamy Emporia, Kan., murders on the tube. . . . CBS has green-lighted a script by Mike Robe (who'll also direct) for producer Zev Braun and Interscope Communications. Title: "Kansas Gothic."

Braun wouldn't comment on casting but said "we expect to be in production (in Emporia) by the end of this month. An agent at William Morris said that negotiations "look very good" for Keith Carradine to portray state trooper John Rule, a key investigator in the case and the focus of the CBS pic.

Meanwhile, NBC's project - told from the viewpoint of the minister's murdered wife and family - is still in the writing stage. . . .

The ABC version, from exec Henry Winkler, is likewise in development. But Winkler's project - told from the convicted lovers' point of view - may be held up by the appeals [sic] process.

See also Timnick, *High-Life "Club" Leads Rich Boys Down a Dark Path: Leader's Murder Trial Will Reveal Dramatic Tale of Big-Money Deals*, Los Angeles Times, Nov. 2, 1986, Part II, at 1, col. 1 (concerning the murder trials of members of a Los Angeles investment group and social fraternity known as the "Billionaire Boys Club"):

The saga of rich kids, big money and murder - set against a backdrop of "in" spots like the Hard Rock Cafe, a penthouse condo in Westwood, New York's Plaza Hotel, respected Beverly Hills brokerage houses and Swiss banks - that has unfolded so far in preliminary hearings and [bodyguard Jim] Pittman's first trial has not escaped the attention of Hollywood and the New York publishing world. There are book, movie and television miniseries deals in the making, defendants and witnesses alike are hustling rights to their life stories, and speculation abounds as to who will play the unflappable, Armani-clad, Jeep-driving lead [Joe Hunt].

Id. at 3, col. 1.

2. The Victims of Crime Act of 1984, Pub. L. No. 98-473, Title II, § 1406(a), 98 Stat. 2175 (1984) (codified as amended at 18 U.S.C.A. §§ 3671-3672). 18 U.S.C.A. § 3671 (West 1985) provides:

(a) Upon the motion of the United States attorney made at any time after conviction of a defendant for an offense against the United States resulting in physical harm to an individual, and after notice to any interested party, the court shall, if the court determines that the interest of justice or an order of restitution under chapter 227 or 231 of this title so requires, order such defendant to forfeit all or any part of proceeds received or to be received by that defendant, or a transferee of that defend-

proceeds from such dramatizations be used to directly benefit the victim or be deposited in a general crime victims' assistance fund or be used to pay a portion of the criminal's legal representation. The scope of the Act, however, is not unlimited. In *United States v. MacDonald*,³ ("MacDonald") the federal government attempted to apply the Act to a crime that had occurred almost fifteen years prior to its enactment. The district court denied the government relief under the Act because such an application violates the ex post facto clause of the United States Constitution.⁴

Although the Act, as currently drafted, only concerns criminals

ant, from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of the defendant's thoughts, opinions, or emotions regarding such crime.

(b) An order issued under subsection (a) of this section shall require that the person with whom the defendant contracts pay to the Attorney General any proceeds due the defendant under such contract.

(c) (1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims' Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may—

(A) be levied upon to satisfy—

(i) a money judgment rendered by a United States district court in favor of a victim of an offense for which such defendant has been convicted, or a legal representative of such victim; and

(ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.

(2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or, any part of such proceeds be released from escrow and paid into the Crime Victims' Fund in the Treasury.

(d) As used in this section, the term "interested party" includes the defendant and any transferee of proceeds due the defendant under the contract, the person with whom the defendant has contracted, and any person physically harmed as a result of the offense for which the defendant has been convicted.

3. 607 F. Supp. 1183 (E.D.N.C. 1985).

4. *Id.* at 1186. U.S. CONST. art. I, § 9, cl. 3 provides that, "No Bill of Attainder or ex post facto Law shall be passed." "Bills of attainder" are defined as "[S]uch special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a 'bill of pains and penalties,' but both are included in the prohibition in the Federal constitution." BLACK'S LAW DICTIONARY 162 (rev. 4th ed. 1968), (citing *Losier v. Sherman*, 157 Kan. 153, 138 P.2d 272, 273 (1943) and *State v. Graves*, 352 Mo. 1102, 182 S.W. 2d 46, 54 (1944)). An ex post facto law is one that is criminal or penal in nature and which changes the punishment, or inflicts a greater punishment, than the law annexed to the crime, when committed, or which punishes as a crime a previous act that was innocent when committed. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

whose offenses resulted in *physical harm* to the victim,⁵ considering the aims and purposes of the Act, criminals who commit "non-violent" crimes may be the next targets of such forfeiture proceedings. Thus, *MacDonald* is important to criminals who have been convicted of "non-violent" crimes and who have profited by selling the rights to their stories.⁶ In addition, the *MacDonald* decision has significance not only for criminals who committed *federal* crimes prior to the effective date of the Act⁷ and hope to profit from retelling their exploits, but also for those who commit crimes in *states* with similar provisions.⁸ The prohibition against passing ex post facto laws is also mentioned in the Constitution as a limitation upon the "states'" powers.⁹ Consequently, *MacDonald* affects state legislatures that enact similar forfeiture statutes immediately after a notorious or heinous crime with the purpose of applying the law

5. See 18 U.S.C.A. § 3671(a), *supra* note 2.

6. Such "non-violent" criminal authors include the Watergate cover-up principals: JOHN DEAN, *BLIND AMBITION: THE WHITE HOUSE YEARS* (1976), J. MAGRUDER, *AN AMERICAN LIFE: ONE MAN'S ROAD TO WATERGATE* (1976), J. MCCORD JR., *A PIECE OF TAPE; THE WATERGATE STORY: FACT AND FICTION* (1974), E. HUNT, *UNDERCOVER: MEMOIRS OF AN AMERICAN SECRET AGENT* (1974); and Clifford Irving, the author of the Howard Hughes autobiography hoax. Note, *Compensating the Victim from the Proceeds of the Criminal's Story - The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROBS. 93 (1978) [hereinafter cited as "*Compensating the Victim*"]. More recently, R. Foster Winans, former journalist for the Wall Street Journal, was convicted of insider trading in 1985 and published *TRADING SECRETS: SEDUCTION AND SCANDAL AT THE WALL STREET JOURNAL* in 1986.

7. §§ 3671 and 3672 of Title 18 shall take effect thirty days after the date of enactment of § 1409 of Pub. L. 98-473 [October 12, 1984]. See § 1409(a) set out as a note under 42 U.S.C.A. § 10601 (West Supp. 1986).

8. See, e.g., ALA. CODE §§ 41-9-80 to 84 (Supp. 1981); ALASKA STAT. § 18.67.165 (1981); ARIZ. REV. STAT. ANN. § 13-4202 (West Supp. 1985); CONN. GEN. STAT. ANN. § 54-218 (West 1985); DEL. CODE ANN. tit. 11, §§ 9101-9103 (1984); FLA. STAT. ANN. § 944.512 (West 1985); GA. CODE ANN. § 27-3401 (1983); IDAHO CODE § 19-5301 (1979); ILL. ANN. STAT. ch. 70, paras. 401-414 (Smith-Hurd Supp. 1986); IND. CODE ANN. §§ 16-7-3.7-1 to .7-6 (Burns 1984); KY. REV. STAT. § 346.165 (1983); LA. REV. STAT. ANN. § 46-1831 (West 1982); MASS. GEN. LAWS ANN. ch. 258A, § 8 (West Supp. 1986); MINN. STAT. ANN. § 611A.68 (West Supp. 1986); NEB. REV. STAT. §§ 81-1836 to 1842 (1981); NEV. REV. STAT. § 217.265 (1983); N.Y. EXEC. LAW § 632-a (McKinney 1982); OKLA. STAT. ANN. tit. 22, § 17 (West Supp. 1985); S.C. CODE ANN. §§ 15-59-40 to 80 (Law. Co-op. Supp. 1986); S.D. CODIFIED LAWS ANN. §§ 23A-28A-1 to 14 (Supp. 1986); TENN. CODE ANN. §§ 29-13-201 to 208 (1980); TEX. REV. CIV. STAT. ANN. art. 8309-1 (Vernon Supp. 1986); WASH. REV. CODE ANN. §§ 7.68.200 to .280 (Supp. 1986); Some statutes may take the form of a prejudgment seizure, as in New York, or a post-conviction lien, as in Florida. See Note, *In Cold Type: Statutory Approaches to the Problem of the Offender as Author*, 71 J. OF CRIM. L. AND CRIMINOLOGY 255 (1980). As with the Act, any proceeds recovered are usually deposited into a crime victims' assistance fund for the purpose of benefiting the direct victim(s) of the crime, or crime victims in general, or both.

9. U.S. CONST. art. I, § 10, cl. 1 provides that, "No State shall . . . pass any Bill of Attainder, [or] ex post facto Law . . ."

retrospectively.¹⁰

I. THE FACTS

On February 17, 1970, Dr. Jeffrey MacDonald's wife, Colette, and daughters Kimberly, 5, and Kristen, 2, were murdered in the family's apartment at Fort Bragg, North Carolina. Jeffrey MacDonald ("MacDonald"), an Army physician, was charged with their murders, but the Army dismissed the charges in 1970.¹¹ A reinvestigation resulted in MacDonald's indictment by a federal grand jury in 1975 and ultimately, his trial on July 16, 1979.¹²

On the trial's opening day, MacDonald contracted with author Joe McGinniss ("McGinniss") to grant to McGinniss the "exclusive story rights to the life of Dr. Jeffrey MacDonald" in return for a percentage of any profits.¹³ One month later, MacDonald was convicted on all three murder counts.¹⁴ Four years after his conviction¹⁵ *Fatal Vision*, McGinniss' book concerning the MacDonald case, was published. On February 17, 1984, a television feature was aired under the same name.¹⁶

On March 13, 1984, the Victims of Crime Act was introduced to Congress at the request of the Reagan administration as part of the Comprehensive Crime Control Act of 1984.¹⁷ The Act was passed on Octo-

10. See, e.g., Wilson, *supra* note 1 at 21: "Following the convictions of [Rev. Thomas] Bird and [Lorna] Anderson, Kansas enacted legislation making it illegal for convicted felons to profit from their crimes, with any payments to be placed in a victims' reparation fund. Whether the law can apply retroactively to the Bird-Anderson crimes may have to be decided in a court test case, according to authorities there." See also Justice Ventiera's insightful comments on the rationale behind New York's "Son of Sam" law [N.Y. EXEC. LAW § 632-a (McKinney 1982)]:

The sophistication of our society has embellished the field of entertainment to the extent that reading of the "exploits" becomes an acceptable substitute for "live performances in the Roman arena" - witness the mad rush of publishers to obtain the literary and motion picture rights to the last days of the condemned murderer who preferred death by execution to life imprisonment. With such an atmosphere of public "beneficence" to the criminal, the Legislature, shocked by the large numbers of vicarious thrill seekers and by the media trumpeting forth each little [David] Berkowitz happening, hastened to debar Berkowitz [the "Son of Sam" or ".44 caliber killer"] and others from profiting from their heinous misdeeds." Matter of Johnsen (David A. Berkowitz), 103 Misc. 2d 823, 825, 430 N.Y.S.2d 904, 906 (1979).

11. 607 F. Supp. at 1184.

12. *Id.*

13. *Id.*

14. MacDonald was sentenced to three consecutive life terms. *Id.* at 1186.

15. August, 1983.

16. *MacDonald*, 607 F. Supp. at 1184.

17. S. REP. NO. 497, 98th Cong., 2d Sess. 5, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3607 [hereinafter "S. REP. NO. 497"]. "While [the Act] is the first victims compensation and assistance bill which has been sent to Congress by a President, there has

ber 12, 1984, to become effective thirty days thereafter.¹⁸ Subsequently, the federal government moved, pursuant to paragraph (a) of section 3671 of the Act, for a special order of forfeiture of all proceeds received or to be received by MacDonald arising from his contract with McGinniss.¹⁹ Under this order, all proceeds would be forfeited to the Attorney General and retained in escrow in the Crime Victims' Fund in the Treasury.²⁰ Although apparently not clear from its moving papers,²¹ the government also sought to compel MacDonald to forfeit any proceeds received in settlement or judgment of a breach of contract suit which he had filed

been considerable interest in such legislation in the past. Since the 92nd Congress, the Senate has passed victim compensation legislation seven times." *Id.* at 3608.

18. *See supra* note 7. As originally drafted, § 103 of the Act was based on New York's "Son of Sam" law and other similar state statutes. S. REP. NO. 497, *supra* note 17, at 3612. N.Y. EXEC. LAW § 632-a (McKinney 1982) provides in part that: "Every person . . . contracting with any person . . . accused or convicted of a crime in this state, with respect to the reenactment of such crime . . . or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by the terms of such contract, be owing to the person so accused or convicted or his representatives."

Congress' choice of precedent was rather questionable. New York's "Son of Sam" law was enacted in response to the crime spree of David Berkowitz, known as the "Son of Sam" or ".44 caliber killer." In *Johnsen* (David A. Berkowitz), 430 N.Y.S.2d at 906, Justice Ventiera noted that "Section 632-a of the Executive Law, conceived in haste, written in haste, and declared under the cry of the public for the Legislature to enact retribution, reflects its noble spirit, though clothed in loose, vague and inconsistent language."

The *Johnsen* court went on to note that in a prior case, *Barrett v. Wojtowicz*, 66 A.D.2d 604, 414 N.Y.S.2d 350, 354 (1979) the *Wojtowicz* court had set forth a handwritten comment found on [§ 632-a's] legislative bill jacket stating: "This bill is terribly drafted!! Its intent & objectives should be praised, but it should be vetoed with a promise to resubmit a bill which will (1) be clear [and] (2) have a chance of surviving a constitutional attack." *Wojtowicz* involved application of § 632-a to John Wojtowicz, convicted of robbing a branch of the Chase Manhattan Bank and whose crime was depicted in the 1975 film entitled "Dog Day Afternoon." Section 632-a was amended after its enactment and the *Johnsen* court found it to be constitutional. 430 N.Y.S.2d at 909. Congress was well aware of the New York law's potential constitutional problems. S. REP. NO. 497, *supra* note 17, at 3613.

The Act, although patterned after similar states' provisions, was intended to complement state forfeiture laws. The Congressional Committee on the Judiciary intended that "§§ 102 and 103 of [the Act] be interpreted as granting the Federal government concurrent jurisdiction over the profits, but not preemptive authority over state actions." *Id.* at 3612. Thus, where the criminal has violated both Federal and state law, if the state has a "Son of Sam" law, then the Federal prosecutor is expected to "consult his state counterpart about who would seek to seize the profits" and refrain from proceeding where "the interests of justice would best be served by proceeding under state law rather than the Federal law." *Id.*

19. *MacDonald*, 607 F. Supp. at 1184. At the time of its motion, the government alleged that MacDonald had received approximately \$83,101.56 in proceeds from October 2, 1979 through August 7, 1984. *Id.*

20. 18 U.S.C.A. § 3671 (b) and (c) (West 1985). *See also* 42 U.S.C.A. § 10601 (West Supp. 1986).

21. *MacDonald*, 607 F. Supp. at 1184.

against McGinniss in the United States District Court for the Central District of California.

The government set forth two theories for recovery. First, the government argued that the policies which underlie the Act compel the court to require that MacDonald forfeit all of the proceeds that he received from *Fatal Vision*, including those received before the effective date of the Act.²² This result would further the Act's underlying policies to "derive funds for the [victims' assistance] program primarily from wrongdoers who are responsible for the suffering of victims,"²³ and to serve the interests of justice.²⁴ Second, the government argued that even if the Act were found to be applied ex post facto as to events occurring before its effective date, MacDonald would be subject to its provisions to the extent he would receive any money or enter into any contracts after the Act's effective date.²⁵

II. DECISION OF THE COURT

The United States District Court for the Eastern District of North Carolina rejected both of the government's contentions, finding that the Act satisfied the two part test for identifying an ex post facto law as set forth in *Weaver v. Graham*.²⁶ In *Weaver*, the petitioner, a prisoner in a Florida prison, had challenged the constitutionality of a state statute enacted after his conviction which would have extended his prison sentence by reformulating his "gain-time."²⁷ At the time the new statute was enacted, Weaver had accrued considerable gain-time. If the new statute were applied to him, it would have increased Weaver's sentence by over two years beyond that derived from the gain-time formula in effect at the date of his conviction.²⁸ The gain-time formulation existing at the time of trial is a "significant factor" which affects the defendant's decision to plea bargain and is routinely taken into consideration by the sentencing judge when calculating the length of sentence.²⁹ Consequently, the new statute could not apply to Weaver.³⁰

22. *Id.*

23. *Id.* at 1185.

24. *Id.*

25. *Id.* at 1186.

26. *Id.* at 1185-86 (citing *Weaver v. Graham*, 450 U.S. 24 (1981)).

27. *Weaver*, 450 U.S. at 27. Gain-time is the amount of time that is reduced from a prisoner's sentence if the prisoner satisfies certain conditions, such as good behavior. *Id.* at 21 & nn. 1-2.

28. *Id.* at 27.

29. *Id.* at 25 (citations omitted).

30. *Id.* The *Weaver* court also held that the state was prohibited from applying any "hy-

Although the two cases differed factually, *Weaver* was similar to *MacDonald* in two respects. First, the dates of the defendants' respective crimes occurred before the effective date of the statutes at issue. Second, the government attempted to apply the respective statutes to conduct of defendants which had occurred before the effective date of the statute or, in the alternative, to events which had occurred only after the effective dates of the statutes.

The *MacDonald* court followed the two part test set forth by Justice Marshall in *Weaver* to determine whether a criminal or penal law has been applied ex post facto: "[I]t must be *retrospective*, that is, it must apply to events occurring before its enactment, and it must *disadvantage* the offender affected by it."³¹

The critical event in any ex post facto analysis is the date that the event took place—the crime.³² In *MacDonald*, the event occurred in 1970. But the government was attempting to apply a 1984 law to an event that occurred in 1970. The Act would change "the legal consequences of acts . . . [completed by MacDonald] before [the Act's] effective date" by depriving MacDonald of the monetary benefits he had received as a result of the crimes for which he was convicted.³³ Consequently, the facts satisfied the first prong of the *Weaver* test.³⁴

In *MacDonald*, the defendant also satisfied the second prong, which requires a showing of disadvantage.³⁵ The district court found that the government's ultimate goal of having MacDonald "forfeit the monetary benefits he has received from the crimes for which he was convicted" was a disadvantage to MacDonald, regardless of the valuable aims and purposes of the Act.³⁶ Accordingly, the Act would be ex post facto as applied to MacDonald.³⁷

The government's alternative theory sought forfeiture of MacDonald's post-1984 profits since they would be received after the effective date of the Act. The district court rejected this theory as well based upon the "well-settled rule that the critical date for ex post facto analysis is the

brid" reformulation to *Weaver*'s sentence by combining the old statutory formulation with the new statutory formulation. *Id.* at 24, 26-27.

31. 607 F. Supp. at 1185 (quoting *Weaver*, 450 U.S. at 29) (emphasis added) (footnotes omitted).

32. 607 F. Supp. at 1186 (quoting *Weaver*, 450 U.S. at 30-31, and *Marshall v. Garrison*, 659 F.2d 440, 442 n.3 (4th Cir. 1981)).

33. 607 F. Supp. at 1185-86 (citing *Weaver*, 450 U.S. at 31).

34. 607 F. Supp. at 1185.

35. *Id.* at 1186.

36. *Id.*

37. *Id.*

date on which the crime was committed by the criminal defendant."³⁸ MacDonald's crime was committed in 1970. Thus, the government could not impose any additional punishment on him, including invoking forfeiture provisions on proceeds received *before* or *after* the effective date of the Act.³⁹

III. ANALYSIS OF THE EX POST FACTO CHALLENGE TO THE ACT⁴⁰

The district court's rejection of the government's emotionally appealing arguments strongly reaffirmed the policy underlying the prohibition against ex post facto laws, the purposes of which are to provide fair notice of which acts will subject the perpetrator to criminal sanctions, and to prevent vindictive criminal legislation.⁴¹ Accordingly, the ex post facto prohibition is only relevant to criminal laws and not to civil statutes.⁴²

38. *Id.* at 1185-86 (citing *Weaver*, 450 U.S. at 30-31 and *Marshall*, 659 F.2d at 442 n.3).

39. 607 F. Supp. at 1186.

40. The district court noted, but declined to rule on the remaining constitutional arguments set forth by MacDonald, that the Act is unconstitutional because it "(1) chills speech protected by the First Amendment; (2) violates the due process clause and is a taking of property under the Fifth Amendment; and (3) impairs a criminal defendant's Sixth Amendment right to counsel." *MacDonald*, 607 F. Supp. at 1186 n.5.

These objections, although not within the scope of this article, have been the subject of other articles concerned with similar forfeiture provisions. See, e.g., Note, *Compensating the Victim from the Proceeds of the Criminal's Story - The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROBS. 93 (1978); Note, *In Cold Type: Statutory Approaches to the Problem of Offender as Author*, 71 J. OF CRIM. L. AND CRIMINOLOGY 255 (1980); Note, *Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech*, 54 IND. L.J. 443 (1979); Note, *Publication Rights Agreements in Sensational Criminal Cases: A Response to the Problem*, 68 CORNELL L.R. 686 (1983) (citing Am. Law Division, Cong. Research Service, Lib. of Congress, *Constitutional Analysis of a New York Statute Requiring Funds Received by Alleged Criminals for Certain Purposes to be given to Their Victims*, Sept. 8, 1977).

41. *Dufresne v. Baer*, 744 F.2d 1543, 1546 & nn.10-11 (11th Cir. 1984) (citing *Weaver*, 450 U.S. at 30: "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated," and *Warren v. United States Parole Commission*, 659 F.2d 183, 187 (D.C. Cir. 1981): "From the outset . . . the ex post facto clauses have been understood to have been principally aimed at curtailing legislative abuses.").

42. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 396 (1798). But see, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (retrospective application of loyalty oath is ex post facto where punishment for refusal to swear was a criminal offense and result was to forbid priest from teaching or preaching); and *Burgess v. Salmon*, 97 U.S. 381, 385 (1878) ("Act of Congress to collect tax penalty, although enforceable by civil suit, cannot be applied retroactively, because had the proceeding against defendant been taken by indictment instead of suit for excess tax, and the one was equally authorized with the other, the proceeding would certainly have fallen within the description of an *ex post facto* law.").

A. *Is the Act a "Criminal" Law?*

The character of a forfeiture proceeding, that is whether it is civil or criminal in nature, depends on the statute under which the forfeiture is sought to be enforced.⁴³ By its wording the Act contains both penal and civil remedies. That is, the government must move, after a conviction but in conjunction with the criminal proceeding, for an order of special forfeiture under section 3671 paragraph (a) of the Act. Any proceeds recovered by the government are then deposited into the Crime Victims' Assistance Fund (the "Fund"). The Fund may be used to satisfy any money judgment obtained by the victim, or the victim's legal representative, against the convicted criminal in a civil proceeding pursuant to section 3671 paragraph (c) of the Act.

The district court correctly applied the ex post facto analysis because a forfeiture proceeding, although civil in form, may be criminal in nature.⁴⁴ For example, a statute may provide that the proposed forfeiture proceeding be presented with the indictment in a criminal case.⁴⁵ Thus, criminal forfeiture proceedings must be distinguished from purely civil forfeiture proceedings. Criminal forfeiture proceedings, such as those contemplated by the Act, must be brought in connection with the underlying criminal conviction. Their effect, as will be seen, is to increase or detrimentally alter the punishment for a crime, and so are criminal in nature. They are brought by the government, on behalf of the people and so are distinguishable from those civil forfeiture actions that solely concern a dispute between private individuals. The result of this distinction is that under the Act, a victim, even with a civil judgment in hand against the defendant, would not be able to obtain relief under the Act in the absence of a prior criminal conviction.

B. *Did the Act Increase or Alter MacDonald's Punishment or Sentence?*

The second prong of the ex post facto analysis requires that a law create a crime out of an act that was innocent when done or increase or detrimentally alter the punishment for a crime after it has been committed.⁴⁶ By its language, the Act does not create a new crime. Further, the Act's forfeiture proceeding does not technically "alter" the punishment

43. 37 C.J.S. *Forfeiture* § 5 at 15 (1943).

44. *Id.* "Where it may be gathered from the statute that the action is meant to be criminal in its nature it cannot be considered as civil." (citations omitted).

45. 37 C.J.S. *supra* at 15.

46. *Calder*, 3 U.S. (3 Dall.) at 390.

or sentence originally "annexed" to MacDonald's crime,⁴⁷ in the same manner as the "gain-time" formulation in *Weaver* did not "technically" alter Weaver's original sentence or punishment.⁴⁸ This lack of technical annexation, however, will not prevent it from being considered as increasing or detrimentally altering MacDonald's punishment.⁴⁹ As the Supreme Court noted in *Weaver*, "[a] statute may be retrospective even if it alters punitive conditions *outside* the sentence, as where a statute requiring solitary confinement prior to execution is applied to someone who committed a capital offense prior to its enactment, but not when applied only prospectively."⁵⁰

Thus, the court properly concluded that MacDonald was entitled to all of the proceeds resulting from dramatizations of his criminal acts. In doing so, the court acted in conformity with the ultimate goal of the ex post facto clause: to prevent vindictive criminal legislation.

IV. IS THE ACT VULNERABLE TO OTHER CONSTITUTIONAL CHALLENGES?

Although the district court declined to consider MacDonald's other constitutional challenges to the Act,⁵¹ in light of the Act's intent, it appears to be vulnerable to a challenge not raised by MacDonald — that the Act violates the equal protection clause.⁵² One of the stated purposes of the Act is "[t]o improve federal assistance to the victims of federal crime."⁵³ Nothing, however, in the legislative history suggests a rationale for limiting its application to only "violent offenders," that is, those

47. That is, any forfeiture presumably will not appear as part of MacDonald's record or be a condition of restitution or a term of his parole or release.

48. *Weaver*, 450 U.S. at 31.

49. See also *Cummings*, 71 U.S. at 325: "The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

50. *Weaver*, 450 U.S. at 32 (citations omitted) (emphasis added).

51. See *supra* note 40.

52. U.S.CONST. amend. V provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." Although the fifth amendment does not contain an equal protection clause as contained in the fourteenth amendment, which applies to the states, the Supreme Court has held that the due process clause of the fifth amendment forbids the federal government from denying equal protection of the laws. *Vance v. Bradley*, 440 U.S. 93, 94-95 n.1 (1979). Further, the Supreme Court's approach to fifth amendment claims has always been precisely the same as with equal protection claims under the fourteenth amendment. *Weinberger v. Weisenfeld*, 420 U.S. 636, 639 n.2 (1975).

53. S. REP. NO. 497, *supra* note 17, at 3611.

whose crimes result in physical harm.⁵⁴ Thus, the language of the Act appears to expressly exclude those victims who suffer only property damage or are victims of "white-collar" crime. By creating this discriminatory classification, the Act seems ripe for such an equal protection challenge.⁵⁵

Historically, courts are quite reluctant to overturn a statute unless it burdens a suspect class or a fundamental interest which distinguishes between classes.⁵⁶ Thus, as a first step, a convicted criminal must show that a fundamental right, which is either explicitly or implicitly protected by the Constitution, has been infringed.⁵⁷ The courts will probably not accord a violent criminal's right to profit from his or her crime the same protection afforded other recognized fundamental rights.⁵⁸

Absent a showing that a burden on a fundamental right exists, a convicted criminal would have to show that he is a member of a suspect class. The indicia of a "suspect class" include whether the class is one that is (1) saddled with such disabilities, or (2) subjected to such a history of purposeful unequal treatment, or (3) relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.⁵⁹

A convicted criminal could probably not satisfy these criteria sufficiently to justify a court overturning the Act. For example, certain criminal classes, particularly those convicted of violent crimes or felonies,

54. S. REP. NO. 497, *supra* note 17, at 3610, states that the first section of S. 2423, as amended by the Committee on the Judiciary, "contains a finding that it is against public policy for a criminal to profit from the glorification of his crime or to encourage lawlessness among others." (emphasis added) *Id.* at 3610. Further, § 101 is to establish a crime victims' assistance fund which would receive, among other things "all royalties and other monies paid to a convicted Federal defendant as a result of any contract to depict his crime in the media. The purpose of this provision is to derive funds for the program primarily from wrongdoers who are responsible for the suffering of victims." *Id.* at 3611. (emphasis added).

55. N.Y. EXEC. LAW § 632-a, after which the Act was patterned, also suffers from this unequal classification. See, e.g., *Compensating the Victim*, *supra* note 6, at 118: "The victim should be compensated from the criminal's profits, regardless of the nature of his loss." (citation omitted).

56. *Vance*, 440 U.S. at 96-97.

57. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, *reh'g denied*, 411 U.S. 959 (1973).

58. Such rights include the right to marry (*Zablocki v. Redhail*, 434 U.S. 374 (1978)), the right of privacy (*Roe v. Wade*, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973)), and the right of procreation (*Skinner v. Oklahoma*, 316 U.S. 535 (1942)). But see *Compensating the Victim*, *supra* note 6, at 118 (finding that New York's "Son of Sam" law violates the first amendment): "When the denial of equal protection 'plainly involves expressive conduct within the protection of the First Amendment . . . discriminations . . . must be tailored to serve a substantial governmental interest.'"

59. 16A AM. JUR. 2d *Constitutional Law* § 750 at 815 (1979).

have long been subjected to statutes prohibiting or restricting the terms of their parole, probation or suspension of sentences.⁶⁰ Despite this disparity, courts have uniformly upheld such classifications against equal protection challenges.⁶¹ Courts consistently find such classifications advance legitimate legislative goals in a rational fashion.⁶² The rational standard test, employed by the courts in judging such statutes,⁶³ is a minimal standard which the government should easily meet, given the relatively narrow terms of the Act and its legislative history.⁶⁴

Even where, as here, the statute does not completely achieve its goal of preventing criminals from profiting from their crimes, adequate reason to strike down the Act as unconstitutional does not exist. The equal protection clause does not require that all evils of the same genus be eradicated.⁶⁵ A legislature may proceed a step at a time and partially eliminate the perceived evil, thereby deferring complete regulation to the future.⁶⁶

Even though the Act appears to be insulated against an equal protection challenge, a more equitable law would provide that all criminals, both violent and *non-violent*, are subject to forfeiture proceedings. Proceeds received from such "non-violent" criminals, even though not subject to distribution to an individual claimant in a number of cases,⁶⁷ could be deposited into a general victims' assistance fund and distributed according to the remainder of section 3671 paragraph (c) of the Act.⁶⁸ This would more effectively implement the goals of the Act.⁶⁹

60. For example, a statute which prohibits probation to persons convicted of the crime of recklessly or maliciously possessing a destructive device has been upheld (*People v. Westoby*, 63 Cal. App. 3d 790, 134 Cal. Rptr. 97 (1976)) as well as a statute which imposes the death sentence or life imprisonment without the possibility of parole on a defendant who kills a known police or peace officer, while the officer is performing his or her official duties (*Barnes v. State*, 263 Ind. 320, 330 N.E.2d 743 (1973)).

61. Annotation, *Validity of Statutes Prohibiting or Restricting Parole, Probation, or Suspension of Sentence in Cases of Violent Crime*, 100 A.L.R.3d 431, 442-52 (1980).

62. *Id.*

63. See, e.g., *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

64. See *supra* notes 53-54 and accompanying text and *infra* note 69.

65. *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949).

66. See, *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

67. For example, white collar crimes such as computer "hacking" or violation of certain securities laws would be almost impossible to distribute directly to its "victims." See generally, *Compensating the Victim*, *supra* note 6, at 118 n.128.

68. 18 U.S.C.A. § 3671(c) (West 1985).

69. "The purpose of [the Act], . . . is to provide limited Federal funding to the States, with minimal bureaucratic 'strings attached,' for direct compensation and service programs to assist victims of crime, including victims of Federal crime. In addition, it provides funds to improve Federal efforts which assist crime victims and establishes a Federal Victim of Crime Advisory Committee." S. REP. NO. 497, *supra* note 17, at 3607; See also *supra* notes 53-54.

V. PERMISSIBLE SCOPE OF THE ACT.

In ruling that MacDonald was not subject to any provisions of the Act, the district court was not required to determine the permissible scope of the Act. The Act is vague in its scope in two areas: (1) the type of proceeds the government may obtain, and (2) the type of victims it is intended to benefit.

In *MacDonald*, the government not only wanted proceeds from *Fatal Vision*, but it seemed to seek all proceeds resulting from MacDonald's breach of contract suit against McGinniss.⁷⁰ The plain language of the Act states that the proceeds subject to forfeiture are "those received or to be received by the defendant . . . from a contract relating to a depiction of such crime. . . ." ⁷¹ Although this language does not provide for forfeiture of settlement or judgment proceeds, one could argue that an "equitable" interpretation of the Act supports forfeiture of any proceeds, *however received*, from a convicted criminal who has profited from a depiction of his crime. The legislative history of the Act provides additional support. "The Crime Victims' Assistance Fund is to receive all *royalties and other monies* paid to a convicted Federal defendant *as a result* of any contract to depict his crime in the media."⁷² The noun "result" is defined as "something that results as a consequence, issue, or conclusion."⁷³ Since MacDonald's lawsuit for breach of contract was a consequence of his contract, the government may have had more than an equitable argument as support for its contention.

Given the policy behind the Act, it may be argued that the most equitable approach is for all proceeds that "result" from a contract, as well as any proceeds that are collaterally related to a depiction of the crime, to be amenable to forfeiture. Consequently, all proceeds from a grant, award, stipend or Pulitzer Prize that result from a depiction of the crime, and not merely from the contract itself, and payable to the criminal or his transferee, would be subject to forfeiture proceedings.⁷⁴ Perhaps in an attempt to avoid any first amendment freedom of speech or due process challenge, the Act properly limits its scope to forfeiture of

70. 607 F. Supp. 1184.

71. 18 U.S.C.A. § 3671(a) (West 1985) (emphasis added).

72. S. REP. NO. 497, *supra* note 17, at 3611 (emphasis added).

73. *Webster's New Collegiate Dictionary* 987 (1979).

74. For an example of the problems administrators have in determining what constitutes a "depiction of the crime" under such statutes, see, e.g., *Los Angeles Times*, Aug. 31, 1986, (Book Review) col. 1, at 11: The publisher for Jean Harris, convicted of murdering Scarsdale diet inventor Dr. Herman Tarnower, may appeal a ruling by New York State Crime Victims Board declaring that Harris' book falls under New York's "Son of Sam" law. The publisher maintains that Harris' book does not concern the crime, but concerns prison reform.

proceeds payable to the criminal or his transferee.⁷⁵

The Act may also be too narrow in the scope of the victims it seeks to benefit. The Act allows the Fund to be used only to satisfy a money judgment rendered in favor of a "victim of an offense for which such defendant has been convicted. . . ."⁷⁶ As it appears, it would be possible for the following scenario to exist: the defendant is charged with two crimes, for example murder and rape, and is acquitted of the rape charge; the victim may still obtain a civil judgment against defendant for damages arising out of an assault and battery on the rape. Under the terms of the Act, the victim would not be able to levy against the Fund in this instance, even though there may be proceeds in the Fund arising out of the murder conviction, because the victim is not a "victim of an offense for which defendant was convicted." Because of this narrow language this victim would be in the same position as before the existence of the Act, with a judgment in hand and the only means of execution upon the defendant's personal assets. Given the intent and policy of the Act, this anomolous result is surely not what Congress intended.

VI. CONCLUSION

In addition to reaffirming the policies underlying the prohibition against applying laws in an ex post facto manner, the *MacDonald* decision also represents the importance of careful legislative drafting. The Act, although it is an admirable public policy statement and has specific legislative goals, cannot be applied in a vindictive, retrospective manner, no matter how heinous the crime or notorious the criminal. At the same time, it is apparent that the scope of the Act is too narrow in the type of proceeds it may reach and the type of victim it intends to benefit, and unfair in subjecting only violent criminals to forfeiture proceedings. Congress, if it is serious about making sure that crime does not pay, should act to immediately correct these defects in the Act.⁷⁷

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75. "The Committee amendment refers to money payable to the defendant's 'transferee,' rather than 'any other party.' This is to ensure that innocent parties, such as Truman Capote, the author of 'In Cold Blood' or other authors who have not participated in criminal conduct and who wish to depict the defendant's crime, are not affected by the proposed . . . change." S. REP. NO. 497, *supra* note 17 at 3612.

76. 18 U.S.C.A. § 3671(c)(1)(A)(i) (West 1985).

77. 18 U.S.C.A. § 3671 should be amended to read as follows:

(a) Upon motion of the United States attorney made at any time after conviction of a defendant for an offense against the United States and after notice to any interested party, the court shall, if the court determines that the interest of justice or an order of restitution under chapter 227 or 231 of this title so requires, order such

defendant to forfeit all or any part of proceeds received or to be received by that defendant, or a transferee of that defendant, *from a contract, award, judgment, settlement or other monetary payment which arises from or is related to* a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of the defendant's thoughts, opinions, or emotions regarding such crime.

(b) An order issued under subsection (a) of this section shall require that the person with whom the defendant contracts, *or from whom any award, judgment, settlement, or other monetary payment is due*, pay to the Attorney General any such proceeds or payment.

(c) (1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims' Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may—

(A) be levied upon to satisfy—

(i) a money judgment rendered by a United States district court in favor of a victim of *any* offense for which such defendant has been convicted, or a legal representative of such victim; and

(ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.

(2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or any part of such proceeds be released from escrow and paid into the Crime Victims Fund in the Treasury.

(d) As used in this section, the term "interested party" includes the defendant *under the contract, or who is entitled to receive any monetary payment, the person with whom the defendant has contracted or from whom defendant is entitled to receive any payment, and any person who has suffered physical harm or incurred damages as a result of any offense for which the defendant has been convicted.*

