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ARTICLES

New York's New "Son of Sam" Law—Does It Effectively Protect the Rights of Crime Victims to Seek Redress from Their Perpetrators?

Mark A. Conrad*

To the relief of many in the publishing and broadcast industries, the United States Supreme Court overturned New York's so-called "Son of Sam" law, a statute that required publishers to turn over monies to be paid to criminals for the sale of their "thoughts, feelings, opinions or emotions regarding [their] crimes." The Court not only found New York's statute constitutionally defective due to its overbreadth, but it also jeopardized similar laws in over forty other states.2

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Shortly after the decision in *Simon & Schuster v. Members of the New York State Crime Victims Board*, the New York legislature passed, and Governor Mario Cuomo signed into law, a new bill that will replace the constitutionally defective New York Executive Law section 632-a with a new, identically numbered section. The new measure permits crime victims to sue perpetrators for civil damages up to seven years from the date of a criminal’s release from jail or, if the perpetrator was not incarcerated, seven years from the date of the offense. To facilitate such private causes of action, the law effectively creates a judgment lien in the assets of a convict with collateral estoppel effect, and eliminates a sentencing court’s ability to waive restitution and reparation as a disposition in criminal cases.

Governor Cuomo, at the signing of the bill, stated that “it is grossly unjust for a criminal to profit from criminality and leave the victim uncompensated” and that the “underlying premise of the original Son of Sam bill is as valid today as it was at the time the


5. Id. § 1, 1992 N.Y. Laws 1618, 1618 (to be codified at N.Y. CIV. PRAC. L. & R. § 213-b).

6. Id. § 8, 1992 N.Y. Laws 1618, 1619-20 (to be codified at N.Y. CRIM. PROC. LAW § 420.10(6)(a)).

7. Id. § 12, 1992 N.Y. Laws 1618, 1622 (to be codified at N.Y. PENAL LAW § 60.27(1)).
[original] law was enacted." State Senator Emanuel R. Gold, the primary sponsor of the revised law, noted that "[the new law] attempts to recapture for crime victims much of what was intended for them under the [previous] 'Son of Sam' Law."

However, the question remains whether this new law—whose underlying premise is considered valid by a governor and many of his constituents who are fed up with high crime rates—will be effective in aiding crime victims in their attempts to receive monetary damages from convicts. It seems rather disingenuous for politicians like Senator Gold to pass a "new" "Son of Sam" law intended to "recapture" what was intended by the old law because it cannot be said that the old law—poorly drafted and infrequently used—was resoundingly successful in its goal of prohibiting convicts from profiting as a result of their crime. Yet, with its weaknesses, the old law nevertheless made for sound public policy. The fundamental notion that one should not profit from his crime

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9. See Memorandum of Senator Emanuel R. Gold describing the provisions, justification, and fiscal implications of the new "Son of Sam" law, at 2 (undated) (available from the Senator's Albany office) [hereinafter Sen. Gold Memo].

10. The old law was only invoked to escrow monies in six cases. See Meg Cox, 'Son of Sam' Statute to Get Supreme Test, WALL ST. J., Oct. 8, 1991, at B1. The following lists the criminal, the crime and the funds escrowed as of August 31, 1991:

<table>
<thead>
<tr>
<th>Criminal</th>
<th>Crime</th>
<th>Amount</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jack Henry Abbott</td>
<td>Murder</td>
<td>$16,646.99</td>
<td>Movie, book, play options</td>
</tr>
<tr>
<td>Mark Chapman</td>
<td>Murder</td>
<td>8,924.14</td>
<td>People Magazine interview</td>
</tr>
<tr>
<td>Henry Hill</td>
<td>Accessory to murder, arson,</td>
<td>1,200.00</td>
<td>TV interview</td>
</tr>
<tr>
<td></td>
<td>robbery</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Michele Sindona</td>
<td>Bank fraud</td>
<td>14,660.51</td>
<td>Book</td>
</tr>
<tr>
<td>R. Foster Winans</td>
<td>Securities fraud</td>
<td>20,519.98</td>
<td>Book</td>
</tr>
<tr>
<td>John Wojtowicz</td>
<td>Bank robbery</td>
<td>16,340.46</td>
<td>Movie (Dog Day Afternoon)</td>
</tr>
</tbody>
</table>
is still backed by the crime-weary public and there is a strong state interest in achieving this goal—a point admitted by the *Simon & Schuster* Court.\(^{11}\) Since the Court did not rule that *all* such victim restitution statutes are per se unconstitutional,\(^{12}\) New York could have enacted a new law that would have involved the state more in ensuring that criminals' ill-begotten assets did not reach their hands. However, the New York legislature did not do so.

This article will consider the new law—its effectiveness and its constitutionality—and address the question of whether New York lawmakers shirked their public responsibilities in ducking state involvement in the new statutory scheme. This article will conclude by proposing a model statute that would more effectively aid in the compensation of crime victims and that would still pass constitutional scrutiny under *Simon & Schuster*.

I. THE OLD "SON OF SAM" LAW

Given all that has been written about the birth, life and death of the original law,\(^{13}\) only a short summary of the events leading to the high court's nullification are in order. Section 632-a of the Executive Law was first enacted as a response to the sale of the "Son of Sam" serial killer David Berkowitz’s story of his crimes. The public’s fascination with individuals like Berkowitz led publisher McGraw-Hill to buy the rights to Berkowitz’s story in a deal that included a $250,000 advance, $150,000 profit to the ghost writer, and $75,000 to Berkowitz to be paid through his court-ap-

\(^{11}\) 112 S. Ct. at 510.

\(^{12}\) Id. at 512.

pointed conservator. The resulting public outrage of an admitted killer profiting from his crimes turned the notion that "crime does not pay" on its head and resulted in the passage of section 632-a. Indeed, Berkowitz's crime-related income was ultimately distributed to his victims' families.

Responding to the public's anger, the New York legislature drafted a bill intended to give crime victims considerable power to collect against the perpetrators of the crimes against them—at least in theory. In language frequently quoted by the various courts and in other forums, Senator Emanuel R. Gold, the sponsor of the original bill stated:

> It is abhorrent to one's sense of justice and decency that an individual, such as [Berkowitz], can expect to receive large sums of money for his story once he is captured—while five people are dead, other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.

The original law, broad in its scope, required publishers and broadcasters to submit contracts and turn over monies resulting from works dealing with the "reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime" to the state Crime Victims Board for payment to victims of the

15. Berkowitz was an admitted, but not a convicted, killer since he was adjudged not guilty by reason of insanity.
16. In 1987, a court settled the final accounting of $118,433.36 resulting from Berkowitz's share of royalties and fees from interviews and the money was distributed to twelve of his victims and their estates. Cerisse Anderson, $118,000 'Son of Sam' Royalties Shared by 12 Victims or Estates, N.Y. L.J., Sept. 2, 1987, at 1; see also In re Johnsen, id. at 15 (Doris Johnsen was Berkowitz's court-appointed conservator).
crime.  

The original law diverted the profits of both convicted criminals and individuals merely accused of a crime if they were eventually convicted. It defined "victim" as one who suffers "personal, physical, mental or emotional injury, or pecuniary loss as a direct result of the crime." A convict included "any person convicted of a crime... and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted."

The Crime Victims Board reviewed submitted publishing and broadcast contracts to determine whether the work proposed by them discussed a crime or contained an admission to a crime. If the Board found the proposed work in violation of the statute, it was empowered to deposit the monies payable under the contracts in an escrow account for the benefit of victims of the particular crime described or for those victims' representatives. If, within five years of the establishment of the account, a victim brought a civil action against his attacker and obtained a money judgment, the victim could have satisfied his judgment against the account.

Even though the statute applied with equal force to individuals merely accused of a crime, it did require the Board to pay back all monies in escrow in the event that a defendant was acquitted or in the event no one "victim" claimed the money within five years after the establishment of the escrow account.

In the case of a defendant deemed not guilty by reason of mental disease or defect or found unfit to proceed to trial as a result of such a condition, the Board still could consider that person a convict subject to seizure of assets. The old law did permit

18. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).
19. Id. § 632-a(10)(a).
20. Id. § 632-a(10)(b).
21. Id. § 632-a(1).
22. Id. § 632-a(3).
23. Id. § 632-a(4).
24. Id. §§ 632-a(5), 632-a(6). Section 632-a(6) permitted the board to bring an interpleader action to determine disposition of the escrow account if the accused was unfit to stand trial as a result of mental disease or defect.
payments from the escrow account to the accused or convicted for legal representation during any stage of the criminal proceedings (including appeals) up to one-fifth of the total monies escrowed.\textsuperscript{25} Although rarely invoked during its fourteen year existence, the law was used in some celebrated cases. Jean Harris, the convicted murderer of her lover Dr. Herman Tarnower, had royalties attached for her book, \textit{A Stranger in Two Worlds}, because certain portions dealt with the crime.\textsuperscript{26} Mark David Chapman, the killer of ex-Beatle John Lennon had $8,924 seized that was paid to him for his cooperation in a \textit{People Magazine} interview,\textsuperscript{27} and Jack Henry Abbott, a career criminal and talented writer, who killed a young waiter shortly after his release from prison and then wrote about the crime, had $16,646 escrowed.\textsuperscript{28}

The law's encompassing nature—especially its broad definition of convict and its regulation of expression of such persons—made section 632-a ripe for constitutional challenge as violative of first amendment rights of convicts, publishers, and broadcasters. Simon & Schuster, the publisher of \textit{Wiseguy: Life in a Mafia Family}, an autobiographical recollection of a small-time gangster named Henry Hill, became the successful challenger.

Hill, who was known in Mafia parlance as a "wiseguy," became a government witness after his capture, and spent hundreds of hours with author Nicholas Pileggi, to whom he provided specific details about his exploits. These were often lurid accounts describing bribery, assault, extortion, theft, burglary, arson, drug dealing, credit card fraud, and murder.\textsuperscript{29} His story received favorable reviews.\textsuperscript{30} Some of his admitted crimes were spectacular and well-reported; the Boston College point-shaving scandal and the

\begin{itemize}
  \item \textsuperscript{25} \textit{Id.} \textsuperscript{§} 632-a(8).
  \item \textit{See supra note 10.}
  \item \textit{See supra note 10.}
  \item \textit{See Nicholas Pileggi, \textit{Wiseguy: Life in a Mafia Family} (1985); see also Simon & Schuster, 724 F. Supp. at 172-73.}
  \item \textit{For a sampling of reviews of the book, see Brief for Petitioner at 8-9, Simon & Schuster, 112 S. Ct. 501 (No. 90-1059); see also Johnson, \textit{supra} note 13, at 202-06.}
\end{itemize}
theft of $6 million from the Lufthansa Airline terminal at Kennedy Airport were among the most prominent.\textsuperscript{31} The successful book provided the basis for the hit motion picture \textit{Goodfellas}.

Hill served jail time and then received immunity and a new identity under the Federal Witness Protection Program in exchange for testifying against other organized crime members.\textsuperscript{32} The book's success caught the attention of the Crime Victims Board which concluded that the book was "subject to the regulations promulgated in section 632-a, because the book contained Hill's thoughts, feelings, opinions and emotions about and admissions to his participation in criminal activities."\textsuperscript{33} The Board then ordered Simon & Schuster to suspend payments, including any future royalties, to Hill's literary agent and ordered Hill to turn over $96,250 in payments already made to him.\textsuperscript{34}

Simon & Schuster brought a federal action under 42 U.S.C. § 1983 against the Crime Victims Board, claiming that the law violated the publisher's first and fourteenth amendment rights. It alleged that the statute had a chilling effect on speech by making it highly unlikely that any convict would relate his or her exploits to the general public.\textsuperscript{35}

Both the district court\textsuperscript{36} and Court of Appeals for the Second Circuit\textsuperscript{37} upheld the law, but each on strikingly different grounds based on differing constitutional theory. Although \textit{Wiseguy} was clearly classified as speech protected by the First Amendment, the respective courts had conflicting philosophies as to whether the law "incidentally" or "directly" affected that speech. The distinction is


\textsuperscript{32} \textit{Simon & Schuster}, 112 S. Ct. at 506.

\textsuperscript{33} \textit{Simon & Schuster}, 724 F. Supp. at 172.

\textsuperscript{34} \textit{Id.} at 173.

\textsuperscript{35} \textit{Id}.

\textsuperscript{36} \textit{Id.} at 173-80.

important in terms of first amendment jurisprudence. If the regulation is "incidental" to speech, a less onerous standard of review is employed than if the regulation "directly" relates to speech, rendering it "content-based." A state law that incidentally restricts speech is constitutional when the state interest for which it restricted the speech is "substantial" and does not impose sanctions greater than essential to that governmental interest. A state law that directly restricts speech is only constitutional if the state interest for which it restricted the speech is "compelling," and if the law is "narrowly drawn to achieve that end."

The lower court in Simon & Schuster opined that although section 632-a "act[ed] as a procedural hurdle in the publishing process," it did not prohibit speech; rather, it interrupted the "profit-making aspect" of the speech. Finding, therefore, that section 632-a did not directly affect expressive activity, the court applied the less intrusive O'Brien test and concluded that the law furthered a substantial governmental interest and was not more restrictive than was essential to further the state's goals.

The Court of Appeals for the Second Circuit, in a 2-1 decision, upheld the lower court but differed in its reasoning. The panel concluded that the statute directly impacted speech, necessitating the need for "strict scrutiny" review. The majority held that the statute passed the test, stating that the law served a compelling state interest "narrowly tailored" to the state's interest in denying

38. United States v. O'Brien, 391 U.S. 367, 376-77 (1968). Technically, the standard has four components: (1) the governmental regulation must be "within the constitutional power of the Government"; (2) the regulation must "further[] an important or substantial Governmental interest;" (3) the Governmental interest [must be] unrelated to the suppression of free expression"; and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest."

However, many courts apply only the two most important prongs of the test: substantial governmental interest and narrow limitations. See Quincy Cable TV, Inc. v. Federal Communications Comm'n, 768 F.2d 1434 (D.C. Cir. 1985).

40. 724 F. Supp. at 176.
41. Id. at 177.
42. Id. at 179.
44. Id. at 781-82.
"criminals any gain from the stories of their crimes" until their victims had been fully compensated. However, Judge Jon O. Newman, in his dissenting opinion, concluded that the statute did not pass the test. He wrote that the statute was both underinclusive—and a burden to publishers when victims could use state attachment laws to obtain criminals' assets—and overinclusive because it applied equally to books written by those accused of a crime, not just those convicted. He therefore found the statute an unjustifiable "content-based" restriction on speech.

The Supreme Court's unanimous decision echoed some of the concerns of Judge Newman's dissenting opinion. Writing for the Court, Justice Sandra Day O'Connor stated outright that the law was "content-based" and "impose[d] a financial burden on speakers because of the content of their speech." Such laws served effectively to drive certain speech from the marketplace of ideas. The Court rejected New York's attempt to distinguish section 632-a from a recent case rejecting a magazine tax by the state of Arkansas, holding that the issue in both cases was the same: financial burdens operating as disincentives to speak.

The Court found that New York did have a "compelling state interest" in protecting crime victims by ensuring that they obtain compensation from those who harm them and in preventing the wrongdoers from dissipating their assets before the victims can recover. As examples, it cited provisions for prejudgment remedies and restitution orders that also achieve that goal. Additionally, the Court agreed that, as a fundamental principle,
New York has a compelling interest in preventing criminals from profiting from their crimes.\textsuperscript{53} However, the Court chastised the New York for the definition it gave of its interest: to "ensur[e] that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries."\textsuperscript{54}

This constricted definition caused a great many problems for the Court and undermined the statute's legal viability. Justice O'Connor wrote that the state could not rationally articulate why it should have any greater interest in compensating victims from "proceeds of the crime" than from any of the criminals' other assets.\textsuperscript{55} Nor could it justify the distinction between this form of expression and others in connection with its stated interest of "transferring the fruits of crime from criminals to their victims."\textsuperscript{56}

The Court then found the statute to be an unlawful, content-based restriction due to its significant overinclusiveness; the statute thus failed the strict scrutiny test.\textsuperscript{57} Its broad definition of "person convicted of a crime" enabled the Board to escrow the income of any author who admitted to having committed a crime, whether or not the author was actually accused or convicted. Justice O'Connor pointed out that such a broad wording could have escrowed fees from many literary works, giving as examples \textit{The Autobiography of Malcolm X} (which describes crimes committed

\textsuperscript{53} See Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889).
\textsuperscript{54} 112 S. Ct. at 510 (quoting Brief for Respondents at 46, Simon & Schuster, 112 S. Ct. 501 (No. 90-1059)).
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. The Court added, "because the Son of Sam law is so overinclusive, we need not address the Board's contention that the statute is content neutral . . . ." Id. at 511 n.** (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989); Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)). In those cases, the Court determined that the statutes in question were content neutral since they were intended to serve purposes unrelated to the speech, despite incidental effects on some speakers; noting that the regulations were "narrowly tailored," even under the less exacting tailoring standards that had been applied in \textit{Ward} and \textit{Renton} (see discussion of the \textit{O'Brien} standard supra note 38 and accompanying text), the footnote stated that in this case the speech limitations were more directly related to the speech and that the broadness of the definitions could hardly be considered "narrowly tailored." Id. at 511-12 n.**.
before the author became a major civil rights figure), Henry David Thoreau's *Civil Disobedience* (where the author acknowledged his refusal to pay taxes) and the *Confessions of St. Augustine* (wherein the author admits that he stole pears from a neighboring vineyard).  

The Court found it unnecessary to reach the issue of whether the statute was underinclusive, as well as overinclusive. In a footnote, Justice O'Connor reasoned that the law was so un-narrowly tailored as to make this argument specious. In a separate concurrence, Justice Kennedy criticized the majority's reliance on the "compelling state interest" standard as an inapplicable standard to use in "speech" cases.  

While the decision did not address the constitutionality of the many other "Son of Sam" laws across the country, a number of states had laws virtually identical to the invalidated New York law, and many of these states introduced amended laws to comply with the Court's mandate.

II. NEW YORK'S REVISED SON OF SAM LAW

Reaction to the Court's decision was predictable. State officials were "disappointed"; victims and their families were "outraged".

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58. *Id.* at 511. Other authors potentially affected included Emma Goldman, Martin Luther King, Jr., Jesse Jackson, and Bertrand Russell (who was jailed for seven days at the age of 89 for participating in a sit-down protest against nuclear weapons). *Id.*

59. *Id.* at 511-12 n.**; cf. 112 S. Ct. at 512 (Blackmun, J., concurring).

60. *Id.* at 511-12 n.**.

61. *Id.* at 512-15 (Kennedy, J., concurring).


64. See Deborah Pines, *Son of Sam Law Ruled Unconstitutional*, N.Y. L.J., Dec. 11, 1991, at 1 (describing reaction of Howard Zwickel, Chief of the New York State Attorney General's Litigation Bureau, who argued *Simon & Schuster* for New York State, and
and media and publishing organizations were supportive. After the initial reactions to the decision, the question was raised whether the state should enact a revised Son of Sam law to fit the parameters of the Court's *Simon & Schuster* opinion.

Governor Mario Cuomo went on record stating that New York should enact a revised law. First amendment lawyers admitted that, while the Supreme Court decision would make it difficult to enact a "constitutional" law, it was not impossible to do so. More recent first amendment rulings have confirmed the difficulty of content-based restrictions on speech passing constitutional muster.

The new statute was introduced in March 1992 by Senator Emanuel R. Gold, the sponsor of the original law, along with a number of co-sponsors. It was passed by both houses of the New York State legislature and signed into law by the Governor on July 24, 1992.

The new law may be thought of as composed of two parts. First, there is a totally revised Executive Law section 632-a to replace the old law ruled unconstitutional. Second, there is a
series of amendments to various sections of the state’s Civil Practice Law and Rules (CPLR) and Criminal Procedure Law (CPL) that extend the statute of limitations for private rights of action, redefine “profits from a crime,” and discuss the mechanics of obtaining restitution from a convicted criminal. With limited exceptions, the law does not directly involve any state authority, such as the Crime Victims Board (the agency that oversaw the prior Son of Sam law), and it puts more of the burden on individuals suing to collect damages—akin to judgment-debtors.

The revised legislation also adds a new section to the CPLR permitting a crime victim or his representative to bring an action “to recover damages from a defendant convicted of a crime which is the subject of [the] action, for any [resulting] injury or loss ... within seven years of the date of the crime,” or three years after the discovery of profits from that crime.

The seven-year limitations period was the subject of some contention, since it was changed from a previously proposed term of ten years. Even with the shorter seven-year term, it can be assumed that the victim will have plenty of time to commence an action against a defendant convict. Also, the CPLR’s tolling provisions would apply in the event that the victim leaves the state and is not subject to in personam jurisdiction.

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73. Id. § 1, 1992 N.Y. Laws 1618, 1618 (to be codified at N.Y. CIV. PRAC. L. & R. § 213-b).
74. Id. § 10, 1992 N.Y. Laws 1618, 1621 (to be codified at N.Y. EXEC. LAW § 632-a(3)).
76. In New York, even people classified as “infants” or “insane” are qualified to toll the statute of limitations. See N.Y. CIV. PRAC. L. & R. § 208 (McKinney 1990). An infant is one who has not yet attained 18 years of age. Id. § 105(j). Although the CPLR does not define insanity, courts look to whether an individual is “capable of managing his general business and social affairs.” See McCarthy v. Volkswagen of Am., Inc., 435 N.B.2d 1072, 1074 (N.Y. 1982). The tolling period for a person “disabled” because of infancy or insanity is up to three years after the disability ceases or the disabled dies, if the limitations period on the underlying cause of action is three years or more. N.Y. CIV. PRAC. L. & R. § 208. An automatic 18 month extension is added to the statutory period on the death of the person against whom a cause of action exists. See generally id. §
The alternative limitations proposal, a three year period after discovery of the profit, is also intended to protect the victim of a crime from a situation where the victim has no knowledge of profits or where the convict obtains profits from the crime after the seven year limitations period expires. The section specifically deals with the situation where the seven year period has expired. It gives crime victims the opportunity to bring an action three years after discovery or three years after actual notice is received by the state Crime Victims Board, whichever is later. The Board is required to "take such actions as are necessary" to give notice to "all other known victims of the crime" by mailing or publishing a notice once every six months for three years from initial notification by a victim. The new statute also authorizes the Board, acting on behalf of crime victims, to seek provisional remedies such as attachment in order to ensure that any judgment issued under the law could be satisfied.

As previously noted, the new legislation amends certain provisions of the CPL as well. It requires that victims be informed of the right to seek restitution and reparation; it also mandates that pre-sentencing reports state the economic and actual out-of-pocket losses to the victim and the amount of reparation sought by the victim. Further, no convict may have his probation sentence terminated unless he has made a good faith effort to comply with an order of restitution or reparation. Bail fees may be applied to payment of the restitution or reparation before payment of the fine is credited. If resentencing occurs with respect to any

210(b).

77. Act of July 24, 1992, ch. 618, § 10, 1992 N.Y. Laws 1618, 1620-21 (to be codified at N.Y. Exec. Law § 632-a(3)).
78. Id.
79. Id., 1992 N.Y. Laws 1618, 1621 (to be codified at N.Y. Exec. Law § 632-a(5)).
80. Id. (to be codified at N.Y. Exec. Law § 632-a(6)).
81. Id. §§ 3-4, 1992 N.Y. Laws 1618, 1618-19 (to be codified at N.Y. Crim. Proc. Law §§ 390.30(3)(b)-390.30(4)).
82. Id. § 5, 1992 N.Y. Laws 1618, 1619 (to be codified at N.Y. Crim. Proc. Law § 410.90(3)(a)).
83. Id. § 6, 1992 N.Y. Laws 1618, 1619 (to be codified at N.Y. Crim. Proc. Law § 420.10(1)(e)).
condition relating to restitution or reparation, the court must state the reasons for the changes on the record.\textsuperscript{84}

The law also amends the CPL to permit the docketing of a restitution order imposed by the court if the defendant fails to pay any court-ordered restitution. Such a court order will be considered a first lien upon all real property in which the defendant thereafter acquired an interest. The lien has preference over all other liens, security interests, and encumbrances (except a lien or interest for the benefit of the government or a purchase money interest in any property).\textsuperscript{85} If the sentencing report remits any or all of the restitution or reparation, it must provide all affected parties with the notice to give them the opportunity to be heard.\textsuperscript{86}

One of the major changes in the new law is definitional. The revised section 632-a(1) redefines the salient terms of the statute. "Crime" is defined as "any felony defined in the penal law or any other chapter of the consolidated laws of the state."\textsuperscript{87} This is a significant limitation over the prior law's application to persons accused or convicted of a crime in the state.\textsuperscript{88} The prior definition was an open-ended clause that included not only felonies, but also misdemeanors and situations where the defendant was merely accused of committing a crime. Presumably, this limitation was drafted to avoid the problems of overbreadth that the Court referred to in voiding the earlier statute.\textsuperscript{89}

The term "profits from the crime" is now defined as:

(i) any property obtained through or income generated from the commission of a crime of which the defendant was convicted; (ii) any property obtained by or income generat--

\textsuperscript{84} Id. § 7, 1992 N.Y. Laws 1618, 1619 (to be codified at N.Y. CRIM. PROC. LAW § 420.10(5)).

\textsuperscript{85} Id. § 8, 1992 N.Y. Laws 1618, 1619-20 (to be codified at N.Y. CRIM. PROC. LAW § 420.10(5)(a)).

\textsuperscript{86} Id. § 9, 1992 N.Y. Laws 1618, 1620 (to be codified at N.Y. CRIM. PROC. LAW § 420.30(2)).

\textsuperscript{87} Id. § 10, 1992 N.Y. Laws 1618, 1620 (to be codified at N.Y. EXEC. LAW § 632-a(1)(a)).

\textsuperscript{88} See N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

\textsuperscript{89} See Simon & Schuster, 112 S. Ct. at 511.
ed from the sale, conversion or exchange of proceeds of a crime, including any gain realized by such sale, conversion or exchange; and (iii) any property which the defendant obtained or income generated as a result of having committed the crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, the crime, as well as any property obtained by or income generated from the sale, conversion or exchange of such property and any gain realized by such sale, conversion or exchange. The old law did not specifically define this concept, except to include monies from the reenactment of the crime by way of reproduction in certain media and to include monies earned from the sale of the criminal's thoughts, feelings, opinions or emotions regarding the crime. The revised statute's standard of property not possessed "but for" commission of the crime, is borrowed from New York asset forfeiture statute.

The new law logically denotes a "crime victim" to be the victim of the offense or his representative. The old law's definition was similar, but not quite as specific. It stated that the victim was one who "suffers personal, physical, mental or emotional injury, or pecuniary loss as a direct result of the crime." While essentially the same, the old law could have included one directly affected by a misdemeanor offense or a situation where A, B, and C were "victimized" by the defendant's actions, but the defendant was only charged for crimes against A.

The new statute creates a role for the state's Crime Victims Board, but it is a limited one. The law requires that every person or legal entity (e.g. corporation, partnership, or association) which knowingly contracts for or pays any "profit from the crime" must

90. See Act of July 24, 1992, ch. 618, § 10, 1992 N.Y. Laws 1618, 1620 (to be codified at N.Y. EXEC. LAW § 632-a(1)(b)).
91. See N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).
94. See N.Y. EXEC. LAW § 632-a(10) (McKinney 1982).
give written notice to the Board as soon as practicable after discovering that the payment is crime-related. Upon receipt, the Board is required to notify other known victims of the crime of the existence of such profits at their last known addresses and to publish a legal notice once every six months for three years, in a newspaper of general circulation in the county where the crime was committed and in counties contiguous to it.\textsuperscript{95} This requirement is intended to facilitate other civil actions against those monies and to permit the three-year statute of limitations to run in the event the seven-year period has expired.\textsuperscript{96} The old law stated essentially the same legal notice requirements (except that it contained a five-year publication period), but it did not require any direct notice to the victims.\textsuperscript{97}

Borrowing from the concept of an expanded reading of the statute of limitations, the law gives the victims or their legal representatives the right to bring civil actions for damages either during the seven-year statute of limitations period\textsuperscript{98} or within three years of discovery.\textsuperscript{99} The three-year discovery period does limit damages, however, to the value of the profits of the crime.\textsuperscript{100}

The old law did not mention private rights of action, since it was the Crime Victims Board that escrowed the monies directly from the publishers of criminals' works. The revised statute requires a victim to give notice to the Board when commencing such an action by delivering the summons and complaint, so that the Board may give notice to other victims of the crime.\textsuperscript{101}

Where the Board itself takes action on behalf of crime victims,
the new law also permits it to apply for provisional remedies, such as attachment, injunction, receivership and notice of pendency—all available under the CPLR.\textsuperscript{102}

Also included in the law are provisions amending the Penal Law to give sentencing courts discretion to require restitution or reparation to crime victims and to require restitution as part of the sentence imposed on the convict.\textsuperscript{103} Also, district attorneys may advise courts, on or before sentencing, that victims seek restitution or reparation and may advise as to the amount sought. In that situation, or if a victim impact statement reports that a victim seeks restitution or reparation, the court will be required to rule that defendant make restitution of the fruits of the offense and reparations for the actual out-of-pocket loss caused to the victim.\textsuperscript{104} If the court declines to order reparation or restitution, it must state its reasons for the record.\textsuperscript{105} Finally, the new statute amends the penal law to raise the cap from $10,000 to $15,000 for restitution ordered upon conviction of a felony and from $5,000 to $10,000 for restitution ordered upon conviction of any other offense.\textsuperscript{106}

III. CIVIL LIBERTIES OBJECTIONS

Even with its far narrower scope, the new law has come under attack by certain civil liberties groups as constitutionally defective. In a recent memorandum, the New York Civil Liberties Union (NYCLU) focused on the issue of whether income generated “as a result of having committed [a] crime, including any assets or income obtained through the use of unique knowledge obtained during the commission of . . . the crime” may constitute “profits from the crime.”\textsuperscript{107} This issue was not addressed by the Supreme

\begin{itemize}
\item \textsuperscript{102} \textit{Id.}, 1992 N.Y. Laws 1618, 1621 (to be codified at N.Y. Exec. Law § 632-a(6)(a)).
\item \textsuperscript{103} \textit{Id.} at § 12, 1992 N.Y. Laws 1618, 1622 (to be codified at N.Y. Penal Law § 60.27(1)).
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} \textit{Id.}
\item \textsuperscript{106} \textit{Id.} at § 16, 1992 N.Y. Laws 1618, 1623 (to be codified at N.Y. Penal Law § 60.27(5)(a)).
\item \textsuperscript{107} \textit{See} New York Civil Liberties Union, 1992 Legislative Memorandum No.
Court in *Simon & Schuster*. Disputing that such income—including, of course, book proceeds—may constitute profits of crime, the NYCLU concluded that the new statute was constitutionally infirm, as well.\(^{108}\) The NYCLU also objected to the notice requirement under which "any entity" that "contracts for, pays, or agrees to pay, any profit from a crime ... to a person charged with or convicted of [a] crime [must] give written notice to the crime victims board."\(^{109}\)

Although the Civil Liberties Union conceded that the government has "broad power" to recover the proceeds or fruits of a crime (giving the federal RICO statute\(^{110}\) and New York's forfeiture statute\(^{111}\) as examples), it found fault with the effect of the new Son of Sam law's definition of just what the "proceeds" are.\(^{112}\) The NYCLU noted that the new statute's definition is, in fact, broader in scope than that used in New York's forfeiture law,\(^{113}\) and—to the extent that this definition could include income received from writing a book—the Civil Liberties Union objected to the definition.\(^{114}\) It asserted that this "problematic" approach "stretch[es] the meaning of [the] word ['proceeds'] beyond recognition."\(^{115}\)

Offering what it considered an informative analogy, the
NYCLU observed that books written by former presidents and government officials dealing with their experiences in office have been considered "separate, individual literary act[s]," rather than acts directly related to their government service. The point of this somewhat tortured analogy was that the criminal-author's book, according to the NYCLU, was not a proceed of the crime, but rather a product of an "intervening creative and expressive enterprise." It added that there was nothing in the law that would require labelling the employment income of a criminal who obtained work (e.g. as a bus driver) after his crime as "proceeds from the crime"; the statute singled out literary works as subject to this encumbrance.

The Simon & Schuster Court elected not to address whether "proceeds from the crime" may fairly include income from storytelling about one's crimes. The old law did not offer a definition of proceeds of a crime, but its first section implicitly defined the term in its general concept of moneys received as a result of a work depicting the commission of a crime. Petitioner Simon & Schuster briefed the issue, making arguments substantially similar to those of the NYCLU. While this issue seems ripe for subsequent adjudication, the test case will probably not involve the New York law.

It seems unavoidable that New York's new statute will pass constitutional muster since the state activity authorized by it is minimal and since the income received from a convict's speech is not singled out. As noted earlier, the definition of "profits from the crime" in the new statute encompasses all property obtained or income generated from the commission of the crime. Further,

116. Id. (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (finding unauthorized publication of portions of President Ford's memoirs not to be fair use)).
117. Id. (emphasis in original).
118. Id. at 2-3.
119. 112 S. Ct. at 510.
120. See N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).
122. See supra notes 90-92 and accompanying text.
the new law is grounded in the well-established power of states to compel forfeiture of illegally obtained assets.\textsuperscript{123} It is therefore all the more likely that courts will grant considerable deference to the will of New York's legislature as a valid exercise state power.

IV. APPROACHES OF OTHER STATES

Despite such arguments, there seems little doubt that the revised law is considerably narrower in scope than the original statute struck down by the Court. The key difference is the far more limited—and less intrusive—role of the Crime Victims Board and the far greater responsibility given to victims or their representatives to institute private causes of action to recover for their injuries. The new statute also creates a presumption favoring restitution and reparation as a disposition of criminal cases; the sponsors of the statute hope that it will expand the opportunities for crime victims to be compensated by the person responsible for victimizing them.\textsuperscript{124}

It is difficult to determine at this time whether the new law will be successful—only time will tell. One wonders though if the New York legislature could have enacted a statute that would have involved the state more actively in protecting the rights of crime victims by facilitating monetary compensation. The \textit{Simon & Schuster} Court did not rule that all victim compensation laws were per se unconstitutional. Implicitly, therefore, the laws of certain other states that permit seizure of criminal assets may withstand constitutional scrutiny.\textsuperscript{125} The Court focused on the fact that New York's statute was overbroad because it applied to works on

\begin{itemize}
  \item[124.] See Sen. Gold Memo, \textit{supra} note 9, at 2.
  \item[125.] 112 S. Ct. at 512 ("We have no occasion to determine the constitutionality of [other states'] laws.").
\end{itemize}
any subject (provided that the author’s thoughts or recollections about his crime were expressed).126

In fact, it is interesting to compare the provisions of other states’ “Son of Sam” laws. A number of states, such as Pennsylva-nia,127 New Jersey,128 Illinois129 and Massachusetts,130 aped the New York law to a great extent. Other states, however, have passed laws that may be able to pass constitutional muster, even though their laws involve the state more directly than does the revised New York law.

Florida’s law illustrates an approach that does not as blatantly target income from literary works above other assets and that is limited to reach only works regarding crimes of which an author is convicted. Its criminal procedure law creates a state lien on proceeds “from literary or other type[s] of account[s]” of the crime of which the defendant was convicted.131 The lien automatically attaches upon conviction but deals only with income generated from the convict’s accounts of crimes of which he was convict-ed.132 “Conviction” is defined as a guilty verdict or a guilty or nolo contendere plea by the defendant; it does not include an adjudication as not guilty by reason of insanity, nor does it include admissions of other crimes that the convict may make in a literary work.133 It will be recalled that the New York law was not so limited, permitting the escrow of income of any author who admitted in his work to having committed a crime, whether or not he was ever convicted or even accused.134

The lien covers “royalties, commissions, proceeds of sale or any other thing of value payable to or accruing to a convicted felon or a person on his behalf, including any person to whom the

126. *Id.* at 511.
132. *Id.* § 944.512(1).
133. *Id.*
proceeds may be transferred by gift from any literary, cinematic or other account of the crime for which [the felon] was convicted. The phrase "or other account of the crime" is somewhat vague and certainly could be read to include monies from sources other than literary works regarding a convict's crime. The statute also creates a pecking order for claimants of the proceeds.

Arizona limits the reach of its law to individuals convicted of a crime, and in its definition of "convicted" it includes individuals found not guilty by reason of insanity. It takes an contract-law-oriented approach, prohibiting any contract with an accused with respect to reenactment of his crime by movie, book, article or other media representation. It justifies this approach on public policy grounds. Money will only be seized if a defendant is convicted (or ruled not guilty by reason of insanity) of the crime in question and if the victim brings an action for losses arising from that crime within five years of the establishment of the account. If a defendant is not convicted, any seized income is returned to him; if no suits are brought within five years of the establishment of the account, any seized income is put into the state general fund.

Other states have limited the reach of their Son of Sam laws in a manner similar to Arizona. Iowa's law, for example, is limited to reach only individuals convicted of a crime; the laws in Ohio and Nevada are similarly limited. While it cannot

136. Id. § 944.512(2). The Florida law mandates that 25 percent of the income affected by the statute go to the dependents of the felon and that 25 percent go to the victim of the crime and his dependents, to the extent of their damages as determined by the court. The income left over is distributed as an outright award to the crime victim. Id.
137. ARIZ. REV. STAT. ANN. § 13-4202(B) (1989).
138. Id. § 13-4202(F).
139. Id. § 13-4202(A).
140. Id.
141. Id. § 13-4202(B).
142. Id. § 13-4202(D).
143. Id. § 13-4202(E).
be certain that the Arizona law would survive constitutional scrutiny after *Simon & Schuster*, one would expect it to have a better chance than the old New York law because it addresses itself to the Court's overbreadth concerns by reaching only to income generated by convicts' recollections of crimes of which they were convicted and not to the income of persons merely accused of a crime.

V. A REVISION THAT WOULD BETTER SERVE CRIME VICTIMS

Because many states have yet to revise their Son of Sam laws, it is worthwhile to consider what might be done to enact a constitutional Son of Sam law that would provide for state seizure of convicts' income from story-telling about their crimes. The New York legislature did not attempt to do this, one suspects, because it feared another legal challenge. However, this author believes that a statute could be written that would permit direct state involvement in asset seizure but that would not run afoul of *Simon & Schuster*. Such a statute would be beneficial to the public because it would streamline the process and put less of an onus on crime victims.

The Court did not rule that income seizure under any Son of Sam law would be unconstitutional. It specifically held that New York had a compelling state interest for its law.147 The New York law was struck down because it was not narrowly tailored to achieve its compelling state interest.148 This is a substantial open door.

To exploit the open door, lawmakers in states seeking to amend their Son of Sam laws to pass muster under *Simon & Schuster* (and

147. *Simon & Schuster*, 112 S. Ct. at 511. Justice Blackmun agreed in his concurring opinion that New York had a compelling state interest for its law. *Id.* at 512 (Blackmun, J., concurring). Justice Kennedy agreed that New York's law was unconstitutional, but he asserted that compelling-state-interest analysis derives from the Court's equal protection jurisprudence and that it does not belong in a straight first amendment case. *Id.* at 512 (Kennedy, J., concurring).
148. *Id.* at 512.
this affects, at the very least, lawmakers in all states that copied the New York law) should concentrate on either or both (depending on the state) of two goals: (1) Narrowing the definition of “person convicted of a crime,” and (2) Tightening the fit between the end of compensating crime victims and the means of confiscating income derived from expressive activity. New York’s law had trouble in each of these areas.

VI. MEETING THESE GOALS WITH A PROPOSED MODEL STATUTE

Among the reasons for which the Simon & Schuster Court criticized the overbreadth of the old New York law was that, by its terms, the old section 632-a could reach the assets of individuals who had not been convicted (or even accused) of the crimes about which they wrote.\(^{149}\) The statute did this through its broad definition of “person convicted of a crime,” which could include a person who had “voluntarily and intelligently admitted the commission of a crime for which such person [was] not prosecuted.”\(^ {150}\) To be assured of passing constitutional review, new statutes ought only to reach the assets of convicted criminals; this would exclude, as well, individuals found not guilty by reason of insanity. Where the income derived by a convicted criminal from story-telling about his crime can be reached by the victim of that crime, there is a substantially closer fit between statutory ends and means.

The Court also faulted the old New York law for singling out income derived from expressive activity for differential treatment in a manner not narrowly tailored to meet the compelling state interest that justified the differential treatment in the first instance.\(^ {151}\) The ends/means fit can be remedied through the definition of “profits from the crime” or by eliminating the differential treatment—reaching all assets regardless of source. The latter option would create overbreadth problems of its own. The former option was selected by the New York legislature in revising its Son of Sam law; the legislature, of course, defined “profits from

\(^{149}\) Simon & Schuster, 112 S. Ct. at 511.

\(^{150}\) N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1982).

\(^{151}\) Simon & Schuster, 112 S. Ct. at 510.
the crime" outright and worded its definition so that it could include expressive activity.\textsuperscript{152}

Simon & Schuster did not find fault with New York's asset seizure scheme, whereby the Crime Victims Board put income from criminals' story-telling into an escrow account for the benefit of crime victims. Nonetheless, the new law takes the Board out of the business of escrowing income, permitting it only to attach profits from the crime while victim-plaintiffs sue their attackers to collect out of the attackers' crime-related profits. As noted, this scheme is less desirable than one under which the state, through its crime victims board, seizes and holds the assets itself.

Incorporating the changes required by Simon & Schuster and avoiding changes not required by it, the following first subpart of a model statute should not only pass constitutional muster but would better serve the public:

1. Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of that person, convicted of a crime in this state, with respect to its reenactment in a motion picture, book, magazine article, audio tape recording, phonograph, radio or television presentation, live portrayal in an entertainment or dramatic context, or from the expression of the convict's thoughts, feelings, opinions or emotions regarding the particular crime of which he or she was convicted, shall submit a copy of such contract to this state's Crime Victims Board and pay over to the Board any monies to which the convict would be entitled under the contract if a victim of that particular crime reenacted in any of the above media or expressed by the convict files a "notice of claim" with the Board. The notice must be filed within: (a) three years after conviction, or (b) one year of the date the contract, or (c) three months of publication, broadcast or release of the work depicting or reenacting the thoughts, feelings, opinions or emotions of the convict

\textsuperscript{152} Act of July 24, 1992, ch. 618, § 10, 1992 N.Y. Laws 1618, 1620 (to be codified at N.Y. EXEC. LAW § 632-a(1)(b)).
regarding the crime, whichever is latest.\textsuperscript{153}

Observe that only upon conviction of a criminal will his media contract have to be filed with the state. Under this model subpart one, it is still up to victims to file claims. This diminishes the role of the Board, but it does provide the added safety of keeping the income at issue from reaching convicts' hand—a contrast from the revised law that the New York legislature passed.

Model subpart two could specify the requirements of the notice of claim in the following manner:

2. The notice of claim shall be a form, devised by the Board, which shall include the following:
   (a) the name and address of the claimant, and
   (b) a copy of the police report naming the claimant as a victim of the particular crime for the story of which the convict received a fee.

The notice would be either filed with the Board by the victim personally or by his legal representative, or it would be sent registered mail. The failure of a victim to file notice within the time periods set out in subpart one would result in the loss to the victim of the right to involve the state Crime Victims Board; the victim would, however, retain the rights described in subpart four of the model statute (which appears below).

The purpose of subpart two is to involve the victim or his representative more directly in the filing of a claim than did the old New York law; it could also serve to preserve the victim's entitlement to the more lenient statute of limitations scheme available under this model victim compensation law. The notice of claim requirement would in effect be a condition precedent to the filing of a claim against the convict's story-telling income. This requirement would also serve to effectuate the narrower tailoring of the model statute.

The model law would continue:

\textsuperscript{153} See Conrad, supra note 13, at 58 (earlier version of author's proposed "Son of Sam" law).
3. On receipt of notice in accord with subpart (2), the Board shall be empowered to collect income due the convict under the contract described in subpart (1) and to deposit that income in an escrow account for the benefit of or payable to any victim or the legal representative of any victim of the particular crime for the representation or depiction of which the convict was paid under the contract.

4. Nothing in this victim compensation law shall detract from the right of a victim to maintain an independent, individual cause of action against the convict for damages caused by the commission of a crime; the victim or his or her representative may bring such an action within seven years of the date of conviction.

Subpart three basically echoes the functional provisions of the old New York statute; subpart four grants the rights available under the new New York law. Subpart four gives victims the rights of judgment creditors to bring a general action for damages suffered as a result of the crime. In a sense, subpart four actually broadens the rights of victims by providing added rights in suits against any of a convict's assets, not just the "royalties" from media works; it operates here in the manner of a general forfeiture law.\(^{154}\)

**CONCLUSION**

New York took the cautious route in adopting its revised Son of Sam law. Future Supreme Court decisions may show that New York was wise to do so. However, the *Simon & Schuster* decision left open the possibility of a substantially more victim-friendly statute than New York enacted. Public demand for some enhanced procedure to permit crime victims to collect monies made by convicts from their crimes deserves special consideration.

The public outrage against the selling of David Berkowitz's story, of course, compelled New York to pass the Son of Sam law in the first place. The public sense that criminals should not profit from their crimes seems no less strong today than it was 14 years ago.

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ago. Victims may also feel angered that the overburdened criminal justice system appears to dole out more plea bargains than convictions. The fact that the old New York law was rarely used in its 14-year life does not diminish the outrage of many crime victims.

The drive to deny criminals the fruits of their crimes is alive and well. Quite recently, in the highly publicized Sidney J. Reso kidnapping/murder case, a New Jersey state trial judge sought to take control of any assets to which defendant Arthur D. Seale might be entitled from selling his story. The judge did so despite the fact that New Jersey, which copied the old New York law, has yet to pass a new Son of Sam statute. Because of the great public interest in protecting crime victims and preventing criminals from profiting from their crimes, the State of New York should have endeavored to create a stronger law than it did. As has been demonstrated, it should have been possible to do so without running afoul of *Simon & Schuster*. It is not too late for other states.

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