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## **New York's Son of Sam Law: Alive and Well Today**

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## NEW YORK'S SON OF SAM LAW: ALIVE AND WELL TODAY

### INTRODUCTION

In the aftermath of being struck down by the United States Supreme Court, a new "Son of Sam" law for New York<sup>1</sup> returns to fight for the rights of crime victims and to enforce the adage that crime does not pay. Its quick return to the legislative scene illustrates the state's never-ending concern for its citizens and further communicates an unrelenting message to criminals that they should think twice about selling the rights to their stories in exchange for profits. The "Son of Sam" law, stated in section 632-a of New York State's Executive Law, originally mandated seizure of any money earned by convicted criminals who sold

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1. N.Y. EXEC. LAW § 632-a (McKinney 1982). The statute provides in part:

1. Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representatives.

*Id.* See *infra* Part II for the text of § 632-a as amended.

their rights to movies and books.<sup>2</sup> As this Comment will demonstrate, the recent amendments to this statute will make it resistant to judicial scrutiny.<sup>3</sup> This Comment will trace the source of the "Son of Sam" statute, examine the circumstances which brought about its enactment,<sup>4</sup> review its modification,<sup>5</sup> consider whether the new statute can survive judicial review, and conclude that it will survive such scrutiny.<sup>6</sup>

## I. HISTORICAL BACKGROUND

### A. Origins

In New York, the underlying policy of the "Son of Sam" law dates back before the turn of the century. In *Riggs v. Palmer*,<sup>7</sup> the New York Court of Appeals held that a man who murdered his grandfather could not inherit from his grandfather's estate.<sup>8</sup> The court stated that, "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong . . . . These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes."<sup>9</sup>

Eighty years later, this policy was reflected in the New York State Legislature's 1966 enactment of article 22 of the Executive Law.<sup>10</sup> Entitled "Crime Victims Board," article 22 provided governmental financial assistance to victims of crime. The "Declaration of policy and legislative intent" contained in section 620 of article 22 states, in part, that "many innocent persons

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2. N.Y. EXEC. LAW § 632-a.

3. *See infra* notes 113-31 and accompanying text.

4. *See infra* notes 7-94 and accompanying text.

5. *See infra* notes 95-112 and accompanying text.

6. *See infra* notes 113-31 and accompanying text.

7. 115 N.Y. 506, 22 N.E. 188 (1889).

8. *Id.* at 513, 22 N.E. at 190.

9. *Id.* at 511, 22 N.E. at 190.

10. N.Y. EXEC. LAW § § 620-35 (McKinney 1982).

suffer personal physical injury or death as a result of criminal acts" and that "there is a need for government financial assistance for such victims of crime. Accordingly, it is the legislature's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime."<sup>11</sup> Other sections of article 22 created the Crime Victims Board,<sup>12</sup> detailed its powers,<sup>13</sup> and provided the method for judicial review of the Board's decisions.<sup>14</sup>

### B. "Son of Sam"

In 1977, public outrage spread throughout New York City over rumors that David Berkowitz, the serial killer known as the "Son of Sam," who had randomly killed young women and their escorts, was receiving a large sum of money for the rights to his story. These rumors soon proved to be true. The McGraw-Hill Book Company made a deal for the purchase of the rights to

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11. N.Y. EXEC. LAW § 620 (McKinney 1982).

12. N.Y. EXEC. LAW § 622 (McKinney 1982).

13. N.Y. EXEC. LAW § 623 (McKinney 1982). The statute provides in pertinent part:

To hear and determine all claims for awards filed with the board pursuant to this article, and to reinvestigate or reopen cases as the board deems necessary . . . [t]o coordinate state programs and activities relating to crime victims . . . [t]o cooperate with and assist political subdivisions of the state in the development of local programs for crime victims . . . [t]o study the operation of laws and procedures affecting crime victims and recommend to the governor proposals to improve the administration and effectiveness of such laws.

*Id.* In all, this statute includes 21 powers and duties of the Crime Victims Compensation Board. *Id.*

14. N.Y. EXEC. LAW § 629 (McKinney 1982). *See, e.g.,* *Regan v. Crime Victims Compensation Bd.*, 82 A.D.2d 1007, 442 N.Y.S.2d 170 (3d Dep't 1981) (holding that in a proceeding to review an award, service of process may be made by mail and the request to review the award can be made by the State Comptroller's Council), *aff'd*, 57 N.Y.2d 190, 441 N.E.2d 1070, 455 N.Y.S.2d 552 (1980).

Berkowitz's story.<sup>15</sup> The arrangement "included a \$250,000 advance, \$150,000 profit to the ghost writer, and \$75,000 to Berkowitz through his court-appointed conservator, Doris Johnsen."<sup>16</sup> In response to the public outcry over this arrangement, Senator Emanuel R. Gold sponsored a bill to ensure that the victims were compensated first. In his address to the New York State Legislature, Senator Gold said:

It is abhorrent [sic] to one's sense of justice and decency that an individual, such as the forty-four caliber killer, can expect to receive large sums of money for his story once he is captured - while five people are dead, [and] other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.<sup>17</sup>

### C. Section 632-a

The legislature acted swiftly and the bill became law on August 11, 1977. Added as section 632-a to the Executive Law,<sup>18</sup> the statute provided that, whenever any person or other legal entity contracted with a criminal<sup>19</sup> to produce any media re-enactment of the criminal's crime,<sup>20</sup> the contracting party was required to

15. Sue S. Okuda, Comment, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 CAL. L. REV. 1353, 1354-55 (1988).

16. *Id.* at 1354.

17. 1977 N.Y. LEGIS. ANN. 267 (memorandum of Sen. Emanuel R. Gold).

18. See *supra* note 1.

19. A criminal covered by the statute is "any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted." N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1982).

20. A "crime" is defined as:

[A]n act committed in New York state which would, if committed by a mentally competent criminally responsible adult, who has no legal exemption or defense, constitute a crime as defined in and proscribed by the penal law, provided however, that no act involving the operation of

turn over any money owed to the criminal for such reenactment to the New York State Crime Victims Board.<sup>21</sup> The Board would hold the money in an escrow account for the benefit of the criminal's victims. In order for victims to have a claim to the funds, they would have to win a civil judgment against the criminal.<sup>22</sup> Once the civil judgments are satisfied, any remaining moneys would be made available to satisfy any other judgment creditors.<sup>23</sup> Following New York's lead, forty-four state legislatures followed suit enacting similar "Son of Sam" statutes.<sup>24</sup>

By passing the "Son of Sam" law, the New York State Legislature intended to address three main objectives.<sup>25</sup> First, the disbursement provisions reflect the policy that before the criminal could profit from his story, the victim must first be compensated.<sup>26</sup> For example, in New York, the funds directed to the escrow account must first go to the satisfaction of a victim's civil judgment before the criminal can receive any proceeds.<sup>27</sup> The second goal of the law was to compensate victims without burdening government treasuries. This objective was accomplished by requiring that the funds come from the criminal

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a motor vehicle which results in injury shall constitute a crime for the purposes of this article unless the injuries were intentionally inflicted through the use of a vehicle.

N.Y. EXEC. LAW § 621(3) (McKinney 1982).

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

22. N.Y. EXEC. LAW § 632-a(1).

23. N.Y. EXEC. LAW § 632-a(11)(a)-(e) (McKinney 1982).

24. *See, e.g.*, CAL. CIV. CODE § 2225 (West 1995); CONN. GEN. STAT. ANN. § 54-218 (West Supp. 1993); FLA. STAT. ANN. § 944.512 (West. Supp. 1993).

25. John Timothy Loss, Note, *Criminals Selling Their Stories: The First Amendment Requires Legislative Reexamination*, 72 CORNELL L. REV. 1331, 1336 (1987).

26. *Id.* at 1336.

27. N.Y. EXEC. LAW § 632-a (11)(c), (e) (McKinney 1982).

rather than the taxpayer.<sup>28</sup> Lastly, the "Son of Sam" law was intended to block criminals from profiting from their crime.<sup>29</sup>

Ironically, the "Son of Sam" law could not be applied to David Berkowitz. At the time it was first enacted, the law only applied to convicted criminals, and David Berkowitz had not stood trial since he had been deemed incompetent.<sup>30</sup> Nevertheless, Berkowitz voluntarily gave his book royalties to his victims' estates.<sup>31</sup>

#### *D. Challenges to the Son of Sam Law*

The New York Court of Appeals considered the constitutionality of the "Son of Sam" law in *Children of Bedford, Inc. v. Petromelis*.<sup>32</sup> This case involved Jean Harris, convicted for killing the famed "Scarsdale Diet" doctor, Dr. Herman Tarnower. She authored a book, *Stranger in Two Worlds*,<sup>33</sup> which contained her "thoughts, feelings, opinions, or emotions" about the killing of Tarnower.<sup>34</sup> The New York State Crime Victims Board sought to escrow the royalties due to Ms. Harris, which she was trying to give to a foundation for the education of children of imprisoned mothers.<sup>35</sup>

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28. Loss, *supra* note 25, at 1337.

29. Loss, *supra* note 25, at 1337. Of the other states that enacted similar statutes, "thirteen states do not return money remaining in the escrow account to the criminal at the end of the statutory time period for the victims' claims." *Id.*

30. Dennis Hevesi, *Cases Under 'Sam Law': Notorious but Few*, N.Y. TIMES, Feb. 20, 1991, at B8.

31. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 111 (1991).

32. 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453 (1991), *cert. granted*, 112 S. Ct. 859 (1992).

33. *Id.* at 718, 573 N.E.2d at 543, 570 N.Y.S.2d at 455.

34. *Id.*

35. Linda Greenhouse, *High Court Upsets Seizing Of Profits On Convicts' Books*, N.Y. TIMES, Dec. 11, 1991, at A1, B8.

Applying strict scrutiny,<sup>36</sup> the court of appeals acknowledged that the New York law served a compelling state interest because it not only compensated victims of crime, but also advanced the state's interest in prohibiting criminals from profiting from their crimes.<sup>37</sup> The law was also held to be narrowly tailored to meet this interest since it sought not to regulate the content of the criminal's speech, but rather, to regulate the receipt of payment for such speech.<sup>38</sup> Furthermore, the court also held that the law did not necessarily result in the complete forfeiture of money, but rather, resulted in a delay in the payment.<sup>39</sup> Finally, the court stated that the New York "Son of Sam" law did not prevent others from publishing the criminal's story.<sup>40</sup>

Another case, *Barrett v. Wojtowicz*,<sup>41</sup> involved the robbery of three banks. These events were later portrayed in the film *Dog Day Afternoon*. One of Wojtowicz's victims invoked the "Son of Sam" law to claim part of the proceeds from the film. The Crime Victims Board collected \$75,062 and paid out approximately

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36. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1451 (2d ed. 1988).

[T]he idea of strict scrutiny acknowledges that other political choices—those burdening fundamental rights, or suggesting prejudice against racial or other minorities—must be subjected to close analysis in order to preserve substantive values of equality and liberty. Although strict scrutiny in this form ordinarily appears as a standard for judicial review, it may also be understood as admonishing lawmakers and regulators as well to be particularly cautious of their *own* purposes and premises and of the effects of their choices.

*Id.* See, e.g., *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 724 F. Supp. 170, 174 (S.D.N.Y. 1989) ("The strict scrutiny test requires a showing of compelling state interest and a law narrowly tailored to fit that interest."), *rev'd*, 502 U.S. 105 (1991).

37. *Bedford*, 77 N.Y.2d at 720, 573 N.E.2d at 544, 570 N.Y.S.2d at 456.

38. *Id.* at 729, 573 N.E.2d at 550, 570 N.Y.S. 2d at 462.

39. *Id.* at 720, 573 N.E.2d at 544, 570 N.Y.S.2d at 456.

40. *Id.* at 730, 573 N.E.2d at 550, 570 N.Y.S.2d at 462.

41. 94 Misc. 2d 379, 381, 404 N.Y.S.2d 829, 830 (Sup. Ct. Kings County 1978), *aff'd*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (2d Dep't 1979).



\$71,000 to victims.<sup>42</sup> The Board also collected an additional \$14,411 from continued showings of the movie.<sup>43</sup> Aside from the monetary relief that was obtained with the help of the statute, *Barrett* also helped to make the statute of limitations on claims against the escrow accounts more beneficial for crime victims. The court in *Barrett* pointed out that:

[T]he time limit . . . as being five years from the date of the crime does not begin to run until the escrow account is established, thereby extending the time in which a plaintiff victim may initiate a civil action to five years after the moneys have been deposited with the board.<sup>44</sup>

*Barrett* was one of the law's best achievements in its fight for crime victims' compensation.<sup>45</sup>

Although the "Son of Sam" statute went largely unchallenged through the 1980s, some legal commentators suggested that the law violated the First Amendment.<sup>46</sup> Such arguments included that the law either eliminated or chilled speech and that the statute deprived the public of valuable information such as the criminal's thoughts about the crime and the criminal justice system. The publishing industry, pinched by the law, claimed that more and more criminals were reluctant to write books because they felt they would never see their profits.

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42. Hevesi, *supra* note 30, at B8.

43. Hevesi, *supra* note 30, at B8.

44. *Barrett*, 94 Misc. 2d at 381, 404 N.Y.S.2d at 830.

45. Up until 1991, there were nine other cases that came up before the Crime Victims Board under "Son of Sam." In these cases, the board successfully collected \$134,000 from criminals and handed out \$71,450 to victims. Hevesi, *supra* note 30, at B8.

46. U.S. CONST. amend. I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free speech thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

*E. Simon and Schuster, Inc.*

In September of 1981, Simon & Schuster, Inc. entered into a contract with Henry Hill to publish *Wiseguy: Life in the Mafia Family*, a book about Hill's life as a foot soldier.<sup>47</sup> In the book, Hill admitted to having committed various crimes including a "theft of \$6 million from Lufthansa Airlines in 1978, the largest successful cash robbery in American history."<sup>48</sup> After publication in 1986, more than one million copies of the book were printed. The book was later converted into a film, *Goodfellas*, which received an Academy Award in 1990.<sup>49</sup> Shortly thereafter, the New York State Crime Victims Board became aware of the book's success and directed Simon & Schuster to hand over all contractual documents involving the book company and Henry Hill, as parties to the contract.<sup>50</sup> After the order was complied with, the Board determined that Simon & Schuster had violated New York's "Son of Sam" law because it had not furnished the Board with copies of Hill's contract and had paid Hill royalties from the book.<sup>51</sup> The Board then ordered Hill to turn over all payments made to him by the book company and ordered Simon & Schuster to forward all of Hill's future payments to the Crime Victims Board.<sup>52</sup>

In October of 1989, Simon & Schuster brought suit in the United States District Court for the Southern District of New York, seeking an order declaring that New York's "Son of Sam" law violated both the First and Fourteenth Amendments.<sup>53</sup> On

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47. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 112 (1991).

48. *Id.*

49. *Id.* at 114.

50. *Id.*

51. *Id.*

52. *Id.* at 114-15.

53. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 724 F. Supp 170, 178 (S.D.N.Y. 1989), *aff'd sub nom. Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777 (2d Cir. 1990), *cert. granted sub*

the First Amendment issue, Simon & Schuster argued that section 632-a of the Executive Law compelled editors to alter their books to avoid the pinch of the statute's restrictions, thus resulting in self-censorship.<sup>54</sup> Simon & Schuster contended that the statute also forced publishers to obtain prior review from governmental officials before accepting a book for publication.<sup>55</sup> Simon & Schuster further claimed that "[t]he mere fact that the law was passed for a beneficent purpose, compensating crime victims, does not fulfill the strict scrutiny test."<sup>56</sup> On the other hand, the New York State Crime Victims Board argued that, although accused or convicted criminals are restricted from directly receiving profits, they were not restricted from actually writing. Section 632-a, they contended, "regulates the author's non-expressive activity rather than prohibits the author's expression."<sup>57</sup> Lastly, the Board asserted that the statute only indirectly affected the press' ability to publish or an individual's decision to express his opinions.<sup>58</sup>

With respect to the First Amendment issue, the district court recognized that, although the statute posed a procedural hurdle in the publishing process, it was not impossible for publishers and authors to create books with the cooperation of a criminal source, nor was such cooperation proscribed by section 632-a.<sup>59</sup> Furthermore, the district court held that the Board's review, as required by section 632-a, did not restrict expression since the Board merely determined whether section 632-a applied to a given contract between an accused or convicted criminal and a publisher.<sup>60</sup> Additionally, the district court found that the Board

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*nom.* Simon & Schuster v. Members of N.Y. State Crime Victims Bd., 448 U.S. 1081, *rev'd*, 502 U.S. 105 (1991).

54. *Id.* at 174.

55. *Id.*

56. *Id.* at 174.

57. *Id.* at 175.

58. *Id.* at 174.

59. *Id.* at 176.

60. *Id.*

“does not determine the newsworthiness or the educational value of a work.”<sup>61</sup>

The district court held that there was no need to apply strict scrutiny since the statute “[did] not directly affect expressive activity and that it [was] directed at nonspeech activity.”<sup>62</sup> Instead, the court applied a less demanding standard articulated by the Supreme Court in *United States v. O’Brien*.<sup>63</sup> In *O’Brien*, the Court held that “a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”<sup>64</sup> Additionally, a “statute [is] constitutional if it ha[s] been enacted within the constitutional power of the government, furthers an important or substantial governmental interest unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedom is no greater than is essential to that governmental interest.”<sup>65</sup>

The district court held that section 632-a withstood the lesser standard of review proposed by *O’Brien*, and that it was neither unconstitutional on its face, nor unconstitutional as applied to Simon & Schuster.<sup>66</sup> The statute explained how one covered by it can comply with its requirements.<sup>67</sup> Accordingly, Simon & Schuster could not claim that the law did not provide fair warning to those within its scope. Likewise the publisher could not claim that the standards of enforcement were not clear, since the book was written for the purpose of getting an inside look into the world of organized crime. In fact, the source of information for

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61. *Id.*

62. *Id.* at 178.

63. 391 U.S. 367 (1968).

64. *Id.* at 376.

65. *Id.*

66. *Simon & Schuster, Inc.*, 724 F. Supp. at 179.

67. The contracting party must “submit a copy of such contract to the board to 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.” N.Y. EXEC. LAW § 632(a)(1) (McKinney 1982).

the book was a career criminal.<sup>68</sup> Simon & Schuster's request for summary judgment declaring the statute's unconstitutionality was thus denied.<sup>69</sup>

On March 22, 1990, the United States Court of Appeals for the Second Circuit affirmed the district court's decision upholding the constitutionality of the "Son of Sam" law. However, the judgment was founded on different grounds from those relied upon by the district court. The Second Circuit found that the statute in question imposed a direct, rather than an incidental burden on speech and therefore it was subject to the requirements of the strict scrutiny test.<sup>70</sup>

The Second Circuit held that the district court erred in using the *O'Brien* test.<sup>71</sup> The court could not agree that the governmental interest advanced by section 632-a bore no relation to expression, stating that "the statute burdens directly the speech of those who wish to tell (and sell) the stories of their crimes."<sup>72</sup> The court also pointed out that a wait of possibly five years, "depending on claims against the escrow fund, can hardly be seen as providing an adequate financial incentive."<sup>73</sup> The court explained that without this financial incentive, most criminals would be less inclined to speak or write about their crimes.<sup>74</sup> Thus, the denial of payment was found to constitute a direct burden on the expressive activities of criminals relating to their crimes.

Upon dismissing the use of the *O'Brien* test, the Second Circuit turned to the issue of whether the "Son of Sam" statute could withstand strict scrutiny. The court recognized that the state

68. *Simon & Schuster, Inc.*, 724 F. Supp at 180.

69. *Id.*

70. *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 778 (2d Cir. 1990), *cert. granted sub nom. Simon and Schuster, Inc. v. Members of N.Y. State Victims Bd.*, 498 U.S. 1081, *rev'd*, 502 U.S. 105 (1991).

71. *Id.* at 781.

72. *Id.*

73. *Id.*

74. *Id.*

indeed had “a compelling interest in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of their victimization.”<sup>75</sup> The court noted that this compelling state interest was served because the law assured that funds set aside from the profits of criminals were being made available for payments of later civil judgments by victims of that criminal.<sup>76</sup>

The Second Circuit also found that section 632-a was narrowly tailored to meet the state’s interest. It explained that the only way a criminal could profit directly from a specific crime involving a particular victim was by writing, talking about, or reenacting the crime<sup>77</sup> and that the “[F]irst [A]mendment right to speak is restricted only as a consequence of their inability to profit until the victim is compensated.”<sup>78</sup>

On December 10, 1991, the United States Supreme Court reversed the decision of the Second Circuit and unanimously held New York’s “Son of Sam” law unconstitutional.<sup>79</sup> Justice O’Connor, speaking for the Court, began by acknowledging that a statute is “‘presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.’”<sup>80</sup> The Court further explained that this presumption could be overcome if the state could show that it had a “compelling state interest” and that the statute was sufficiently narrowly drawn so as to implement that interest.<sup>81</sup>

The Court recognized that “[t]he State has a compelling interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims.”<sup>82</sup> Despite this finding, the Court held that section 632-a was too broad or “significantly

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75. *Id.* at 782.

76. *Id.* at 783.

77. *Id.*

78. *Id.*

79. *Simon and Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

80. *Id.* at 115 (quoting *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)).

81. *Id.* at 118.

82. *Id.* at 119.

overinclusive" as drafted. The Court pointed out that the statute, as written, made it applicable to works on any subject so long as it reflected the author's thoughts or recollections of his crime, regardless of how incidental it was.<sup>83</sup> The statutory clause, "person convicted of a crime," applied too broadly to any author who merely admitted to a crime in his work regardless of "whether or not the author was ever actually accused or convicted."<sup>84</sup> Taking these two provisions together, the Court concluded that the "Son of Sam" law would affect many great "works" which would have the detrimental adverse effect of denying the criminal the right to profit from his crimes while leaving the victim uncompensated.<sup>85</sup>

Justice O'Connor argued that the statutory reach of the law would allow it to effect such works as the *Confessions of Saint Augustine* and the *Autobiography of Malcolm X*. Moreover, in emphasizing the ineffectiveness of the statute's broad reach over "works," Justice O'Connor stated:

Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the [Crime Victims] Board would control his entire income from the book for five years, and would make that income available to all the author's creditors, despite the fact that the statute of limitations for this minor incident had long since run.<sup>86</sup>

In conclusion, Justice O'Connor ruled that New York, through its "Son of Sam" statute, "singled out speech on a particular subject for a financial burden that it place[d] on no other speech and no other income."<sup>87</sup> Although the state had a compelling state interest in compensating a victim from the fruits of a crime, the "Son of Sam" law was not narrowly drawn to advance that

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83. *Id.* at 121.

84. *Id.* (citing N.Y. EXEC LAW § 632-a (10)(b) (McKinney 1982)).

85. *Id.* at 122.

86. *Id.* at 123.

87. *Id.*

objective, and consequently, the statute was inconsistent with the First Amendment.<sup>88</sup>

Justice Kennedy, concurring, took a more conservative position. He agreed that the statute imposed severe restrictions on authors and publishers. However, he thought the Court was wrong in its use of the strict scrutiny standard.<sup>89</sup> “That test or formulation,” he explained, “derives from our equal protection jurisprudence and has no real or legitimate place when the Court considers the straightforward question whether the state may enact a burdensome restriction of speech based on content only, apart from any consideration of time, place, and manner or the use of public forums.”<sup>90</sup> Justice Kennedy appeared to warn against the use of this standard when considering content-based restrictions because “the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so.”<sup>91</sup> He pointed out that “[o]ur precedents and traditions allow no such reference.”<sup>92</sup> Furthermore, Justice Kennedy suggested that the case in question should have allowed for the use of a more certain test rather than one with “the capacity to weaken central protections of the First Amendment.”<sup>93</sup> Despite these reservations, he maintained his concurrence with the Court’s decision.<sup>94</sup>

## II. THE “SON OF SAM” LAW REVISED

### *A. In General*

The Supreme Court’s ruling gave the New York State Legislature the signal to go back to the drawing board. Within a

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88. *Id.*

89. *Id.* at 124 (Kennedy, J., concurring).

90. *Id.* (Kennedy, J., concurring).

91. *Id.* at 124-25 (Kennedy, J., concurring).

92. *Id.* at 125 (Kennedy, J., concurring).

93. *Id.* at 128 (Kennedy, J., concurring).

94. *Id.* at 124-28 (Kennedy, J., concurring).



few months, the legislature drafted a revised section 632-a,<sup>95</sup> and by the fall of 1992, it was signed into law by Governor Mario Cuomo. The Governor stated, at a ceremony marking the signing of the bill in Manhattan's State Supreme Court, that "it makes sense to say that if you hurt somebody and you then make money from it, you shouldn't keep it. It should go to the people you hurt."<sup>96</sup> The new law provides, in relevant part, that every person or entity

which knowingly contracts for, pays, or agrees to pay, any *profit from a crime*, as defined in subdivision one of this subsection, to a person charged with or convicted of that crime shall give written notice to the crime victims board of the payment, or obligation to pay as soon as practicable after discovering that the payment or intended payment is a profit from a crime.<sup>97</sup>

The legislature also narrowed the scope of the statute by adding separate definitions of "crime"<sup>98</sup> and "profits from the crime."<sup>99</sup>

95. N.Y. EXEC. LAW § 632-a(2)(a) (McKinney Supp. 1995).

96. Stacey Shelton, *New Law Curbs Inmates' Book, Movie Profits*, NEWSDAY, Aug. 14, 1992, at 18.

97. N.Y. EXEC. LAW § 632-a(2)(a) (McKinney Supp. 1995) (emphasis added).

98. A "crime" is defined as "any felony defined in the penal law or any other chapter of the laws of the State [of New York]." N.Y. EXEC. LAW § 632-a(1)(a) (McKinney Supp. 1995).

99. "Profits from the crime" are 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 generated 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.

N.Y. EXEC. LAW § 632-a(1)(b) (McKinney Supp. 1995).

The revised statute was essentially a three-point response to the *Simon & Schuster, Inc.* opinion.<sup>100</sup> One of the new features of the law is that it does not target speech. By attempting to reach only “profits from a crime,” and by construing such “profits” in the strictly materialistic terms of “property” and “assets,” the statute is basically utilizing the “special interest” ingredient the Court found to be compelling - that of “transferring the proceeds of crime from criminals to their victims.”<sup>101</sup> In fact, by not targeting speech, the new law went beyond the requirements of *Simon & Schuster, Inc.* since the Court supported the notion of targeting content-based speech as long as it was done narrowly.<sup>102</sup>

Second, a requirement that any escrowed income be “generated as a result of having committed the crime,”<sup>103</sup> addresses the concern that the law might reach a work that discussed a crime “tangentially or incidentally.”<sup>104</sup> Thus, the autobiography of a prominent figure that, as an aside, described a youthful prank, would not be subject to the requirements of the new “Son of Sam” law.<sup>105</sup>

Finally, the new statute restricts its application to only those persons “charged with or convicted of [a] crime,”<sup>106</sup> instead of “any person who has voluntarily . . . admitted the commission of a crime.”<sup>107</sup> This restriction satisfies the Supreme Court’s concern that the law might affect a person who has never been charged with a crime, but who later discusses a criminal act in a published memoir.<sup>108</sup>

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100. See *infra* notes 101-08 and accompanying text.

101. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 108, 120 (1991).

102. *Id.*

103. N.Y. EXEC. LAW § 632-a(1)(b)(iii) (McKinney Supp. 1995).

104. *Simon & Schuster, Inc.*, 502 U.S. at 121.

105. *Id.* at 123.

106. N.Y. EXEC. LAW § 632-a(2)(a) (McKinney Supp. 1995)

107. N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1982).

108. See *Simon & Schuster, Inc.*, 502 U.S. at 122.

Thus, the new "Son of Sam" law is free of the constitutional blemishes that led to its predecessor's downfall. Governor Cuomo stated, in his Approval Memorandum, that "none of the provisions of [the] bill singles out speech for any particular burden. Instead, the bill implements broadly, wisely and fairly a vision of essential justice between those who have been hurt and those who have hurt them."<sup>109</sup> Richard H. Girgenti, Division of Criminal Justice Services Commissioner, observed that the new statute was "much broader and more sweeping than the original 'Son of Sam' ever was."<sup>110</sup>

It is questionable whether the new law can apply to any other speech and still be a content-based restriction. Nevertheless, one need only examine the new statute to see that it clearly refers to "any profit."<sup>111</sup> In contrast to the old statute, which aimed at seizing any money earned by convicted criminals in movie, book, or any other deals which related to the story of the crimes, the new statute shows by its "construction" that all the criminal's earnings would be available to the victim. The new law redefines "assets" more broadly and "criminals" more narrowly than the former law.<sup>112</sup> The legislators purposely intended to give "any profits" an expansive meaning. Even if the criminal refuses to contract with a publisher, the compelling state interest of compensating the victim will still be served by any other profit received by the criminal.

### *B. Potential Challenges*

The new law still does not satisfy the publishing community's contention that the law is a facelift which hides deeper constitutional problems. Some argue that the underlying concerns

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109. 1992 N.Y. LEGIS. ANN. 383 (Governor's Approval Memorandum).

110. Gary Spencer, *Legislature Wraps Up With Flurry of Bills; Judicial Nominees Left Unconfirmed*, N.Y. L.J., July 7, 1992, at 1.

111. N.Y. EXEC. LAW § 632-a (2)(a)(McKinney Supp. 1995).

112. See Michelle G. Lewis Liebeskind, Note, *Back to Basics for Victims: Striking Son of Sam Laws in Favor of an Amended Restitutionary Scheme*, 1 ANN. SURV. AM. L., 29, 47-61 (1994).

of *Simon & Schuster, Inc.* are still present and can be used in the future for a challenge to the constitutionality of the law.<sup>113</sup>

For example, it could be argued that the "Son of Sam" statute is still overinclusive with respect to certain works. In *Simon and Schuster, Inc.*, the publishing industry argued that the autobiography of Sir Walter Raleigh would be subject to the statute's reach, since his crime was treason, which was a felony.<sup>114</sup> This is a poor example when considering that the present version of the statute targets a person who "knowingly contracts for, pays, or agrees to pay, any profit from a crime . . . to a person charged with or convicted of that crime . . . ." <sup>115</sup> It is highly doubtful that Sir Walter Raleigh's main intention for writing his autobiography was to generate profits from his treason given the prevalent patriotism that existed in the sixteenth century. It is also highly doubtful that he would intend to incriminate himself. In addition, "crime," as stated in section 632-a, is defined as any felony under the New York State law.<sup>116</sup> Sir Walter Raleigh's actions in sixteenth century England may not fall under the gambit of what today the law considers to be felonious treason. It is extremely unlikely that anyone who describes a felony in a small part of his or her autobiography will be effected by the statute. The royalties could hardly be considered as being generated only from those crimes.

The main focus of the Supreme Court's decision in *Simon & Schuster, Inc.*, was that the original law "singled out speech on a particular subject for a financial burden that it place[d] on no other speech and *no other income*."<sup>117</sup> In an article discussing the state legislature's intent to protect victims, Governor Mario Cuomo was reported as saying of the new law that "all the

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113. Jessica R. Friedman, *Son of "Son of Sam": Crime Still Doesn't Pay (Royalties)*, NEWSLETTER OF THE ENT., ARTS & SPORTS L. SEC. OF THE N.Y. ST. B. ASS'N, Vol. 5, No. 2, at 10 (Fall 1993).

114. *Simon & Schuster, Inc.*, 502 U.S. at 511.

115. N.Y. EXEC. LAW § 632-a (2)(a) (McKinney Supp. 1995).

116. N.Y. EXEC. LAW § 632-a (1)(a) (McKinney Supp. 1995).

117. *Simon & Schuster, Inc.*, 502 U.S. at 512 (emphasis added).

criminal's earnings would be available to the victim . . . ."<sup>118</sup> Not surprisingly, the statute provides in relevant part, that profits from a crime are defined as "*any assets* obtained through the use of unique knowledge obtained during the commission of . . . the crime."<sup>119</sup> But, a drug dealer, for example, committing the crime, would not have attained that "unique knowledge" that allowed him to creatively contribute to the book on the hazards of drug use in the first place. To state that a "person's royalties [are] pure "profit" fails to take into account the creative contributions"<sup>120</sup> for which the royalties represent payment. This is trivial because the creative contributions the royalties wish to pay derive its source from "unique knowledge." Thus, profits should be construed to include royalties.

### C. Amy Fisher

Although new and improved, the law does not reach all situations in which criminals sell their stories. One example is the case of Amy Fisher, the seventeen-year old "Long Island Lolita" who pled guilty to shooting her alleged lover's wife. When bail was set at two million dollars, Amy Fisher, in an unprecedented deal, sold the exclusive rights to her story in return for an arrangement that allowed her to be released from jail.<sup>121</sup> The complicated deal involved the Fisher Family putting up \$900,000 in exchange for International Fidelity Insurance's preparation of a policy on a two million dollar bond. Fidelity's premium, which was five percent of the two million dollar total, was split sixty percent/forty percent between KLM Film Productions and the Fisher family. In return for KLM's percent of the premium,

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118. Betsy Kuller, *Cuomo Proposes Measure To Protect Victims*, GANNETT NEWS SERVICE, Mar. 23, 1992.

119. N.Y. EXEC. LAW § 632-a (1)(b)(iii) (McKinney Supp. 1995) (emphasis added).

120. Friedman, *supra* note 113, at 12 .

121. Doris Toumarkine and Barry Layne, *'Lolita' Rights Deal Frees her on \$2 Million Bail*, BPI ENTERTAINMENT NEWSWIRE, July 31, 1992.

KLM acquired all rights to Amy Fisher's story, "including all motion pictures, TV and literary or dramatization rights."<sup>122</sup> Also included in the arrangement were all televised and printed interviews.<sup>123</sup>

If Amy Fisher did not appear at every court date, her parents' home and assets would be forfeited.<sup>124</sup> As a condition of approving the bond, Judge Marvin Goodman of Nassau County ordered Fisher not to make any contact with Mary Jo Buttafuocco, the woman she was eventually convicted of shooting. Judge Goodman threatened to revoke the bond if Ms. Fisher made any attempt to communicate with the Buttafuoccos.<sup>125</sup>

Amy Fisher's decision to sell her rights in return for money to pay for her bond immediately prompted an attack by Mary Jo Buttafuocco. Buttafuocco attempted to obtain the \$60,000 in bail bond money revoked by freezing and seizing the money under the terms of the "Son of Sam" law.<sup>126</sup> Michael Ridenow, Buttafuocco's attorney, filed an order to show cause asking the movie firm, KLM Productions of Smithtown, why the money should not be surrendered to the court.<sup>127</sup> As Ridenow explained, he took this action because he believed that "no one besides Mary Jo Buttafuocco" should "benefit from the shooting and because Buttafuocco is fearful for herself and her family now that Fisher has been released on bond."<sup>128</sup> Eric Naiburg, Fisher's attorney, argued that since Fisher did not receive the cash herself, she did not profit from the deal. Naiburg further argued that Fisher had

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122. *Id.*

123. *Id.*

124. Michael Alexander and Shirley E. Perlman, *How Bond Money Was Raised*, *NEWSDAY*, July 29, 1992, at 21.

125. Selwyn Raab, *Amy Fisher Freed on Bail; Judge Imposes Restrictions*, *N.Y. TIMES*, July 29, 1992, at B5.

126. Shirley E. Perlman and Phil Mintz, *Lawyer: Freeze Fisher's Funds*, *NEWSDAY*, July 31, 1992, at 20.

127. *Id.*

128. *Id.*

not been convicted of anything, and would thus not be subject to the restrictions of the "Son of Sam" law.<sup>129</sup>

The New York State Supreme Court, Nassau County, refused to revoke the \$60,000 share of Fisher's bond that was secured by the film company since "the money was used for what the court considers a necessity, that is the constitutional right to be bailed to prepare the [ ] accused's case."<sup>130</sup> The court was not convinced that the \$60,000 payment was made to defraud Fisher's creditors or to frustrate the enforcement of a later judgment. Furthermore, the court ruled that, under the "Son of Sam" law, Buttafuoco did not have a right to claim the \$60,000 put toward the bail bond, but indicated that she may have a claim on any future earning Fisher might realize from the notorious case. Judge Hart then observed that Fisher's parents "were attempting to rescue their daughter, whose health, the court was informed, was deteriorating while she was incarcerated."<sup>131</sup>

#### CONCLUSION

The public at large will always be disturbed by criminals profiting from their crimes. Cases such as Amy Fisher, about whom three separate television movies were made, and John Esposito, who imprisoned a ten-year old in an underground bunker and whose arraignment was visited by a top movie studio representative, will continue to foster this public concern. Despite the critics who feel that the new "Son of Sam" law still resonates with constitutional infirmities, the fact that the statute rests on a legitimately recognized compelling state interest will ensure the necessary support to pass constitutional muster.

The Court in *Simon & Schuster, Inc.* evenhandedly instructed the New York State Legislature on how to modify the old "Son of Sam" law so that it is free of its constitutional blemishes today. As the hands of time move on, "Son of Sam" laws and

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129. *Id.*

130. *Amy Fisher Does Not Have to Return to Jail*, UPI, Aug. 7, 1992.

131. *Id.*

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their progeny will be on the New York books in one form or another as the constitutional waves continue to reshape the statute to conform to society's concerns about crime victims.

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