



3-1-2004

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Recommended Citation

Kathleen Howe, *Is Free Speech Too High a Price to Pay for Crime - Overcoming the Constitutional Inconsistencies in Son of Sam Laws*, 24 Loy. L.A. Ent. L. Rev. 341 (2004).

Available at: <https://digitalcommons.lmu.edu/elr/vol24/iss2/4>

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IS FREE SPEECH TOO HIGH A PRICE TO PAY FOR CRIME? OVERCOMING THE CONSTITUTIONAL INCONSISTENCIES IN SON OF SAM LAWS

I. INTRODUCTION

Many people want to hear stories about famous crimes, criminals, and trials, such as that of O.J. Simpson;¹ the Gambino Crime family Underboss, Salvatore “Sammy the Bull” Gravano;² the kidnappings of Polly Klaas³ and Elizabeth Smart;⁴ and the recent death of Laci Peterson and her unborn son, Connor.⁵ While some of these famous stories will be told through the vivid

1. Orenthal James (O.J.) Simpson was criminally charged in 1994 with the murders of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman. He subsequently wrote a book entitled, *I Want to Tell You*, to pay for his defense team. Douglas E. Mirell, *Can O.J. Simpson Profit From the Sale of His Book?*, ENT. L. REP., Jan. 1995, at 3. Simpson was eventually acquitted in the criminal case, although found responsible in a subsequent civil case for wrongful death. Adam Pertman, *Jury Hits Simpson for Another \$25m*, BOSTON GLOBE, Feb. 11, 1997, at A1.

2. Salvatore “Sammy the Bull” Gravano, an ex-mafia Underboss from the Gambino crime family, eventually turned state’s evidence and testified against Gambino crime family boss, John Gotti. See Russell Dean Covey, *Beating the Prisoner at Prisoner’s Dilemma: The Evidentiary Value of a Witness’s Refusal to Testify*, 47 AM. U. L. REV 105, 117 (1997). In 1997, after going into the Federal Witness Protection Program, Gravano published a book about his life in the mafia, entitled *Underboss: Sammy the Bull Gravano’s Story of Life in the Mafia*. See *Arizona v. Gravano*, 60 P.3d 246, 248–49 (2002).

3. Twelve-year-old Polly Klaas was kidnapped from her own home in Petaluma, California and murdered by Richard Allen Davis. CNN.com, *Klaas’ Killer: An Emotional Lightning Rod* (Sept. 27, 1996), at <http://www.cnn.com/US/9609/27/davis.sentencing/index.html>. See also Orly Nosrati, Comment, *Son of Sam Laws: Killing Free Speech or Promoting Killer Profits?*, 20 WHITTIER L. REV. 949, 974 (1999). Davis expressed intentions of selling his story in a television interview. *Id.*

4. Elizabeth Smart was kidnapped from her home in Salt Lake City, Utah on June 5, 2002. Smart was found nine months later, accompanied by self-proclaimed prophet, Brian Mitchell, and his wife, Wanda Barzee, transients who allegedly kidnapped Smart. See *Slowly, Smart Gets Her Life Back*, N.Y. NEWSDAY, April 18, 2003, at A44. Mitchell and Barzee were charged with burglary, kidnapping, and sexual assault. *Id.*

5. Laci Peterson was reported missing from her Modesto, California home on December 24, 2002. John Cote, *Peterson Remains Returned. Bodies of Mother, Son Back in Satnislaus After*

recollections of those closely involved, others will not be told at all—*especially* not by the criminals who committed them. This is because a set of laws, called “Son of Sam” laws, prevent criminals from profiting off their notoriety.⁶

These state and federally enacted Son of Sam laws prohibit criminals from profiting off their notoriety by banning the selling of their stories through mediums such as books, television, and movies.⁷ Specifically, the laws prohibit criminals from receiving the proceeds of such deals by requiring the forfeiture of any profit to government-controlled escrow accounts, which are later distributed to the victims of the crimes.⁸ Son of Sam laws are popular; as of 2002, over forty states and the federal government had enacted these types of laws.⁹

In addition to Son of Sam laws, many states have general forfeiture statutes. However, general forfeiture statutes differ from Son of Sam laws because they are not specifically aimed at taking the criminal’s profits from books, magazines, and other such avenues.¹⁰ Instead, these statutes seek to compensate victims by taking the proceeds that criminals have used or obtained through the commissions of their crimes.¹¹ The two are different

Defense Finishes X-Rays, MODESTO BEE, Aug. 23, 2003, at B1. At the time, 27-year-old Laci was nearly eight months pregnant with a boy who she planned to name Connor. *Id.* In April, 2003, both bodies washed up on the shore of the San Francisco Bay. *Id.* Laci’s husband, 30-year-old Scott Peterson has been criminally charged with the deaths of both Laci and Connor. *Id.* In late September, 2003, Laci’s mother, Sharon Rocha, filed a lawsuit under California’s Son of Sam law, seeking to enjoin Scott from profiting off of Laci’s story if he is found guilty in the trial. John Cote, *Laci Peterson’s Mother Sues Over Story Rights, Case May Test New Law on Profiting From Crime*, MODESTO BEE, Sept. 27, 2003, at A1. If Scott Peterson is found not guilty, he will receive all of Laci’s funds as she did not have a will. *Id.* In February 2004, a California Superior Court Judge tentatively ruled that Peterson could sell the movie rights to his story or to make book deals. Cnn.com, *Peterson Can Sell Book or Movie Rights* (Feb. 26, 2004), at <http://www.cnn.com/2004/LAW/02/26/laci.peterson.book.ap/index.html>. Rocha objected to this ruling and asked the court to keep the payments in trust until a verdict is reached in Peterson’s murder trial. *Id.* The Judge overruled the objection, but then stated that the ruling is tentative. *Id.*

6. See *infra* notes 7–9 and accompanying text (the criminals are not completely prohibited from telling their stories, but prohibited from making a profit off of the stories).

7. *Id.* See, e.g., Tracey B. Cobb, Comment, *Making a Killing: Evaluating the Constitutionality of the Texas Son of Sam Law*, 39 HOUS. L. REV. 1483, 1485–86 (2002).

8. See, e.g., CAL. CIV. CODE § 2225(b)(1) (West 2002) (codifying California’s Son of Sam law). The California Son of Sam law subjects to consequences “[a]ll proceeds from the preparation for the purpose of sale, the sale of the rights to, or the sale of materials that include or are based on the story of a felony for which a felon was convicted.” *Id.*

9. *Crime Can Pay*, STATE LEGISLATURES, June 2002, at 11.

10. See David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 428–29 (1988).

11. See *id.* at 335.

because Son of Sam laws target profits not necessarily obtained through the commission of the crime itself, but include those profits derived from the exploitation of that crime through such means as books and movies.¹²

Despite their broad appeal, Son of Sam laws are problematic because they chill a criminal's right to freedom of speech under the First Amendment.¹³ In fact, the United States Supreme Court, and some state courts have held these laws violative of the First Amendment, which provides "Congress shall make no law . . . abridging freedom of speech."¹⁴ These laws have this chilling effect because they intrude upon the sacred constitutional rights to free speech. For example, they work to instill fear into criminals to prevent their stories from ever being told. Accordingly, such laws should be addressed and reconsidered because the rights they seek to depress are ones that are guaranteed under the First Amendment.¹⁵

When they debuted in the 1970s,¹⁶ Son of Sam laws were the topic of constitutional debate. These discussions have resurfaced as of late in recent court cases. In 2002, the Arizona Court of Appeals held Salvatore Gravano liable for forfeiture under the Arizona Racketeering Act and Arizona Forfeiture Reform Act. The Court held that profits from his previously published book were to be forfeited to the state.¹⁷ Gravano had already been tried by a New York court to recover profits related to the same book, but the court dismissed the charges due to a provision in the New York Son of Sam law that did not allow profits to be taken against criminals convicted in Federal Court.¹⁸ Despite the fact that the New York court was unable to hold Gravano accountable under its own Son of Sam law, the inconsistencies between the states' laws allowed the taking of profits from Gravano's book under Arizona law, for racketeering and other crimes committed in New York.¹⁹

12. Compare *id.* at 335 (discussing forfeiture laws) with *id.* at 428 (discussing Son of Sam laws).

13. See U.S. CONST. amend. I.

14. *Id.*

15. *Id.*

16. See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (discussing the constitutional debate in the 1970s).

17. See *Gravano*, 60 P.3d at 246–48. See also, ARIZ. REV. STAT. §§ 13-2301–2318 (2001 & Supp. 2003) and ARIZ. REV. STAT. §§ 14-4301–4316 (1995 & Supp. 2003).

18. Gravano was sued for the profits of his book in New York after being convicted on federal charges of racketeering under the Federal RICO Act, but the court found that the state could not take his profits under the New York Son of Sam law because he was convicted in Federal Court and the law only applied to state court convictions. See *N.Y. Crime Victims Bd. v. T.J.M. Prods., Inc.*, 705 N.Y.S.2d 320, 322–26 (2000).

19. See *Gravano*, 60 P.3d. at 249–50. The victims of Gravano's crimes in New York would be compensated by the proceeds taken from the Arizona judgment. See *id.* at 254–56.

This comment argues that uniformity in this area is necessary to create a standard of law that will apply to all criminals equally. Part II provides a background and historic analysis of the development of Son of Sam laws. Part III analyzes the past treatment by several states in this area, highlighting the fact that while most state courts have struck down the laws as unconstitutional, others continue to recognize their the need for them. Part IV examines the lack of uniformity of Son of Sam laws in light of current court decisions and past variations in state laws. The section also explores how to a state legislature might construct a Son of Sam law that would withstand constitutional attack. Part V concludes that to overcome confusion and infringement upon constitutional rights, uniformity and change in this area of law is not only desirable, but necessary.

II. BACKGROUND AND HISTORICAL DEVELOPMENTS OF SON OF SAM LAWS

A. The Evolution of Son of Sam

Although recently publicized, the theory underlying Son of Sam forfeiture statutes is not new. The first case to lay grounds for a forfeiture theory was *Riggs v. Palmer*,²⁰ an 1889 case wherein a teenage boy killed his grandfather to ensure that he would inherit his grandfather's large estate.²¹ When the young man tried to claim his inheritance, the New York trial court denied his share, stating that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."²² It would be almost another century before the need for codification of this idea would arise.

During the summer of 1977, New York City was hit by one of the most horrific crime sprees.²³ David Berkowitz terrorized the city, randomly killing innocent young women and their companions, leaving behind a signature note bearing "Son of Sam" at the crime scenes.²⁴ Berkowitz, who killed six people and injured various others, was arrested in the late

20. 22 N.E. 188 (N.Y. 1889).

21. *Id.* at 189.

22. *Id.* at 190. The court, in discussing the legislative intent of the state statutes on crimes of probate, decided that "it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it." *Id.* at 189.

23. See Angie Cannon and Kate V. Forsyth, *Crime Stories of the Century*, U.S. NEWS & WORLD REPORT, Dec. 6, 1999, at 41, 50.

24. Steven B. Lichtman, *The Right to a Soapbox: A Critique of Simon & Schuster v. Members of New York State Crime Victims Board*, 55 U. PITT. L. REV. 501, 502 (1994).

summer of '77, after which publishers demanded his story.²⁵ Almost immediately, the New York legislature enacted Executive Law section 632-a,²⁶ coined as the “Son of Sam” law,²⁷ to prevent Berkowitz from selling and profiting from his story.²⁸ The statute was premised on the idea of preventing criminals from receiving large sums of money through the telling of their crime stories through mediums such as books, television shows, and movies.²⁹

This law required any entity contracting with a person accused or convicted of a crime to supply the New York State Crime Victims Compensation Board (“the Board”) with the contract and subsequently forfeit to the Board any monies earned under the contract.³⁰ Money collected from the Board was to be placed in an escrow account for five years, during which time any victim from the felon’s previous crimes could collect by bringing a civil action against the criminal.³¹ The enactment of the new law spurred a trend throughout the country, causing many other states and the federal government to quickly enact similar legislation.³² Oddly enough, this law was never applied to David Berkowitz.³³ The Court found him mentally incompetent to stand trial, and thus Berkowitz never became a convicted felon and was able to escape the New York Executive Law Section 632-a designed to trap any profits he made in exploiting the horrific crimes he committed.³⁴

25. *Id.*

26. N.Y. EXEC. LAW § 632-a (McKinney 2002).

27. The law was quickly called the Son of Sam law due to the high publicity of Berkowitz. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108 (1991).

28. § 632-a. See also *Simon & Schuster*, 502 U.S. at 108 (discussing the situation the legislature was faced with when it enacted the statute).

29. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 109 (1991).

30. *Id.* at 108. See also § 632-a(1) (specifically stating what is required for the state to take action under the forfeiture statute, including any expressions of the convicted person’s thoughts by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, or live entertainment of any kind).

31. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 109 (1991).

32. Lichtman, *supra* note 23, at 502.

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

34. *Id.* See also § 632-a. New York’s Son of Sam law specifically stated that a felon would have to be convicted in a New York court to be subject to the forfeiture law. § 632-a(1)(c). Since Berkowitz never stood trial, he did not qualify as a convicted felon. Although Berkowitz was exempt under New York’s Son of Sam Law, he voluntarily donated all the royalties from a book telling his criminal story to his victims or their families. Cobb, *supra* note 7, at 1488 n. 34.

B. Simon & Schuster v. New York State Crime Victims Board

The New York Son of Sam law was used only minimally until the United States Supreme Court issued a landmark First Amendment rights decision in the late 1980s. The statute was used to prosecute Henry Hill, a well-known mobster with a twenty-five year career in organized crime, who traded testimony against many of his former associates in exchange for immunity.³⁵ Hill had met with publishers from Simon & Schuster to document a book about his life in organized crime entitled *Wiseguy: Life in a Mafia Family*.³⁶ The book eventually became the basis for the Oscar-nominated film, *GoodFellas*³⁷ directed by Martin Scorsese.³⁸

The Board immediately caught on to the success of Hill's story and ordered Simon & Schuster to submit copies of the contract and hold any future payments to Hill.³⁹ Simon & Schuster quickly filed suit in New York District Court claiming that the law violated the First and Fourteenth Amendments of the United States Constitution, and they sought an injunction to bar the state from enforcing the statute.⁴⁰

The District Court found in favor of the Board, stating that the "state's interest in compensating crime victims is unrelated to the suppression of free expression and any burden on free expression is merely incidental."⁴¹ The court granted summary judgment for the Board after

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

36. *Id.* See generally NICHOLAS PILEGGI, *WISEGUY: LIFE IN A MAFIA FAMILY* (Simon & Schuster 1985) (discussing Hill's most notorious crimes including a point shaving scheme with the Boston College basketball team during the late 1970s and robbing Lufthansa Airlines of six million dollars).

37. *GOOD FELLAS* (Warner Bros. 1990).

38. The film, *Good Fellas*, was nominated for various Academy Awards in 1990, including Best Picture and Writing (screenplay based on material from another medium). See Academy Awards Database, at

http://awardsdatabase.oscars.org/ampas_awards/DisplayFilmAlpha.jsp?curTime=1075879322731 (last visited Feb. 3, 2004).

39. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 114 (1991).

40. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 724 F. Supp. 170, 172 (S.D.N.Y. 1989), *aff'd*, *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777 (2d Cir. 1990), *rev'd*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991). When the Board invoked the statute upon Simon & Schuster, the publishers were holding nearly \$28,000 in payments for Hill and had already paid nearly \$100,000 to his agent. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 114 (1991). During the time of the trial, Hill was in the protective custody of the Federal Witness Protection Program and living under an assumed name. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 724 F. Supp. 170, 172 (S.D.N.Y. 1989).

41. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 724 F. Supp.

applying a standard of review which was less than the normal strict scrutiny standard.⁴² The court applied this lowered standard of scrutiny because it determined that a fundamental right had not been violated.⁴³ Since this law was directed at non-speech activity, it was not protected under the First Amendment.⁴⁴

The Second Circuit upheld the District Court's ruling for different reasons.⁴⁵ The Appellate Court reasoned that the New York statute was aimed at infringing free speech.⁴⁶ Therefore, it was subject to strict scrutiny.⁴⁷ However, when the court applied the strict scrutiny test, it found that New York had a dual purpose compelling interest in the statute: preventing criminals from profiting from their crimes, while compensating its victims.⁴⁸ The law was held as constitutional, and Simon & Schuster once again appealed, this time to the United States Supreme Court.⁴⁹

Due to the overwhelming popularity of the Son of Sam laws, the Supreme Court granted certiorari and reviewed the case.⁵⁰ By the time the case reached the Supreme Court, most states and the federal government had enacted comparable legislation.⁵¹ The Supreme Court decided that the statute must be reviewed under the most stringent standard of judicial review, strict scrutiny, because the statute imposes a "financial disincentive to create or publish works of a particular content."⁵² The fact that the laws singled out income received from a specific form of expression classified them as content-based speech, which the Supreme Court has always held subject to strict scrutiny review.⁵³

170, 177 (S.D.N.Y. 1989).

42. *Id.* at 180.

43. *Id.*

44. *Id.* at 179–80. *See also* Cobb, *supra* note 7, at 1490–91.

45. *See* Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 778 (2d Cir. 1990).

46. *Id.*

47. *Id.*

48. *Id.* at 783. The Appellate Court decided that when determining the legislative intent of N.Y. EXEC. LAW § 632-a, the statute was aimed at preventing criminals from profiting from their crimes.

49. Cobb, *supra* note 7, at 1491–93.

50. Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991).

51. *Id.* at 115. In fact, the Court said, "Because the Federal Government and most of the States have enacted statutes with similar objectives . . . the issue is significant and likely to recur. We accordingly granted certiorari . . . and we now reverse." *Id.* (citations omitted).

52. *Id.* at 116. The court set out the test for meeting the strict scrutiny review, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* at 118 quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

53. *See* Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105,

To withstand strict scrutiny, the state must prove that there is a compelling government interest in upholding the law and that the law is narrowly tailored to meet that interest.⁵⁴ Under this analysis, the Court found that the statute presented compelling interests in the form of prevention of criminal profitmaking and victim compensation.⁵⁵ However, whether or not the law was narrowly tailored is a more enthralling issue. The state argued that the law was narrowly tailored as it only applied to convicted persons,⁵⁶ and that the language in itself was narrowly tailored because it “ensur[ed] that criminals do not profit from storytelling about their crimes before their victims ha[d] a meaningful opportunity to be compensated for their injuries.”⁵⁷ The Court rejected the Board’s arguments and decided that the statute failed the second prong of the strict scrutiny analysis because the statute was “significantly over-inclusive,” and not narrowly tailored.⁵⁸

In the Court’s opinion, Justice O’Connor gave several reasons why the statute was too broad.⁵⁹ Most significant was the argument that the statute applied to *any* work on *any* subject where an author expressed some thought or recollection of a crime, “however tangentially or incidentally.”⁶⁰ The Court found that this broad provision of the statute required the profits of any person who committed any crime at any time in his past be surrendered, regardless of whether they were accused or convicted.⁶¹ In fact, the Court’s opinion singled out certain important and respected literary works a provision such as that would have impaired, including works by Henry David Thoreau,⁶² and the Autobiography of Malcolm X.⁶³

115–18 (1991).

54. See *supra* text accompanying note 52.

55. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118–19 (1991).

56. See *id.* at 119–21.

57. *Id.* at 119.

58. *Id.* at 121.

59. *Id.*

60. *Id.* at 121.

61. *Simon & Schuster*, 502 U.S. at 121.

62. See HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (1849), in HENRY DAVID THOREAU, WALDEN AND DISOBEDIENCE (Paul Lauter ed., 2000). The Court discusses how Thoreau, who refused to pay taxes and ended up going to jail, would be applicable under N.Y. EXEC. LAW § 632-a. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

63. See ALEX HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X (1964). The Court recognizes that crimes that civil rights leader Malcolm X committed before he was in the public eye would also fall under the Son of Sam statutes. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

The Court concluded that “[a] list of prominent figures whose autobiographies would be subject to the statute if written [would] not be difficult to construct . . . the Son of Sam law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated.”⁶⁴ In effect, the law was so far-reaching that it would have included works sacred to history and literature.⁶⁵

Overall, the Court found the statute unconstitutional because it was inconsistent with the First Amendment.⁶⁶ However, the most critical portion of the holding was that the Court did not determine that *all* Son of Sam laws were or would be unconstitutional, but only that New York’s Executive Section 632-a, as written, was unconstitutional.⁶⁷ The Court hinted that more narrowly tailored legislation could possibly pass constitutional muster under strict scrutiny.⁶⁸ Thus, while the opinion in *Simon & Schuster* declared New York’s law unconstitutional, it provided the necessary framework by which states could craft their own “narrowly tailored” Son of Sam statutes.⁶⁹

III. STATES’ TREATMENT OF SON OF SAM LAWS: FREEDOM OF SPEECH V. GOVERNMENT INTEREST

A. *The Aftermath of Simon & Schuster*

*Simon & Schuster*⁷⁰ paved the way for the reevaluation and re-tailoring of the existing state of Son of Sam laws according to guidelines set forth in the Court’s decision. The Court emphasized that even seemingly unorthodox speech (such as that of a convicted criminal) needs

64. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

65. *See id.*

66. *Id.* at 123.

67. *Id.*

68. *See id.* The Court stated,

The Federal Government and many of the States have enacted statutes designed to serve purposes similar to that served by the Son of Sam law. Some of these statutes may be quite different from New York’s, and we have no occasion to determine the constitutionality of these other laws But the [New York] Son of Sam law is not narrowly tailored As a result, the statute is inconsistent with the First Amendment.

Id.

69. *See Cobb, supra* note 7, at 1494.

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

protection.⁷¹ This was a signal to other states that the rationale for Son of Sam laws presented a compelling state interest,⁷² and left open the possibility that a Son of Sam law could be upheld if it was narrowly tailored and specific.⁷³

Although many states changed their Son of Sam laws to reflect the revisions mandated by the Supreme Court in *Simon & Schuster*, only a few states have had their statutes challenged, such as New York, California, Maryland, Washington, and Florida.⁷⁴ As seen in *Arizona v. Gravano*,⁷⁵ general forfeiture statutes have faced similar constitutional challenges.⁷⁶ Despite the amendments made to the laws after *Simon & Schuster*, no Son of Sam statute has been upheld as constitutional after being attacked in court.⁷⁷ The *Gravano* decision, which declared that a criminal's profits gained from a book could be forfeited, was decided under a general forfeiture statute, and did not specifically involve a Son of Sam law.⁷⁸

B. Following Simon & Schuster: States Allowing Criminals to Profit

1. New York

In 1991, following the *Simon & Schuster* opinion, the New York legislature set out to change Executive Law 632-a to reflect the Supreme Court's suggestions for narrowly tailoring such a law.⁷⁹ The new law provided that only persons "convicted of [a] crime" would be subject to the law, thereby narrowing the scope to preclude those who admitted to committing a crime at some point in their past.⁸⁰ The new law also clarified

71. See Nosrati, *supra* note 3, at 961.

72. *Id.* at 958.

73. See *id.* at 960.

74. See discussion *supra* Part III.A–C.

75. 60 P.3d 246 (Ariz. Ct. App. 2002).

76. See, e.g., *id.* at 248.

77. See generally Cobb, *supra* note 7, at 1494.

78. *Arizona v. Gravano*, 60 P.3d 246, 255–57 (Ariz. Ct. App. 2002).

79. Nosrati, *supra* note 3, at 962.

80. See N.Y. EXEC. LAW § 632-a(2)(a) (McKinney 2004). The law states in relevant part:

(ii) any funds of a convicted person, as defined in paragraph (c) of subdivision one of this section, where such conviction is for a specified crime and the value, combined value or aggregate value of the payment or payments of such funds exceeds or will exceed ten thousand dollars, 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 constitutes profits from a crime or funds of a convicted person.

the phrase that included anything “tangentially or incidentally”⁸¹ related to the crime and made a stricter standard to include only profits “generated as a result of having committed the crime.”⁸² These corrections changed the law so that authors who briefly mentioned or discussed some past crime or action could not be held liable under the law unless they had been convicted of a crime.⁸³ Nonetheless, despite these revisions, the law later proved to again have problems.⁸⁴

New York Supreme Court’s 1995 decision in *Sandusky v. McCummings*, the case that first challenged the revised Son of Sam statute, was not based on First Amendment issues.⁸⁵ Jerome Sandusky, a 72-year-old man, was mugged in a New York City subway station by Bernard McCummings.⁸⁶ McCummings was later shot by transit police officers and recovered \$4.3 million from a jury for the injuries he sustained during the shooting, which left him paralyzed for life.⁸⁷ Sandusky sought to receive the profits of this settlement under New York’s revised Son of Sam law.⁸⁸ The case focused on the precise language in the statute that stated “profits of a crime,”⁸⁹ and looked at whether the language was meant to include profits derived from things other than books and movies.⁹⁰

The New York Supreme Court interpreted the phrase “profits of a crime” as *not* including the money generated from McCummings’ large tort award.⁹¹ In reaching their decision, the court looked at the legislative intent

81. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

82. *Id.* § 632-a(1)(b)(iii). The law in this section states:

[A]ny 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, a 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.

Id.

83. By clarifying the phrase “tangentially or incidentally” related to the crime, the revised statute did not apply to convicted criminals who merely mentioned the crime. *See id.* § 632-a. The profits would have to be a direct result of having committed the crime. *Id.* § 632-a(1)(b)(iii).

84. *See generally* *Sandusky v. McCummings*, 625 N.Y.S.2d 457 (Sup. Ct. 1995).

85. *Id.*

86. *Id.* at 457–58.

87. *Id.* at 458.

88. *See id.*

89. N.Y. EXEC. LAW § 632-a(1)(b).

90. *Sandusky*, 625 N.Y.S.2d at 460.

91. *See* Daniel Wise, *Crime Victim Loses Share in Tort Award, Judge Rules Inapplicable Revised ‘Son-of-Sam’ Law*, N.Y.L.J., Mar. 7, 1995, at 1.

behind the revised Son of Sam law.⁹² The Court concluded that tort recoveries are not consistent with the intent behind the phrase “profits of a crime,”⁹³ and rather interpreted the phrase as being limited to money “generated from the commission of the crime of which the defendant was convicted.”⁹⁴ The court argued that McCummings’ tort award was not generated from the crime, because the police officer’s act was an independent intervening event that broke the causal connection with the crime.⁹⁵ In essence, McCummings’ tort recovery was not based on his mugging of Sandusky, but rather on the officer’s negligence.⁹⁶ This holding, however, precluded the court from reaching the First Amendment issues of this case.⁹⁷

The revised New York statute was challenged again in 2000, when Salvatore “Sammy the Bull” Gravano⁹⁸ was sued by the New York State Crime Victims Board for profits he received from his book, *The Underboss*, which told the story of his life in the Gambino crime family.⁹⁹ Gravano was convicted of racketeering under the Federal RICO Act¹⁰⁰ and sentenced to sixty months in prison, for which he turned state’s evidence and testified against other head Gambino figures such as mafia kingpin John Gotti.¹⁰¹ The Board claimed that because the book was based upon crimes for which Gravano had been convicted, the profits should be surrendered under New York’s Son of Sam law.¹⁰²

Since the statute was inapplicable to Gravano’s situation, Gravano’s case, like *Sandusky*, escaped constitutional evaluation. Specifically, the New York Supreme Court upheld the trial court’s ruling that the statute could not be applied to Gravano because Gravano was convicted under a federal statute in federal court, as opposed to under New York law.¹⁰³ The court determined that the Board did not have authority to bring the suit

92. See *Sandusky*, 625 N.Y.S.2d at 460.

93. See *id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. See Cobb, *supra* note 7, at 1496–97.

98. Salvatore (Sammy “the Bull”) Gravano was the subject of a recent Arizona case, in which he was found liable under an Arizona general forfeiture statute for profits made in conjunction with his book; see *Gravano*, 60 P.3d 246. See also Covey, *supra* note 2 and accompanying text.

99. See *N.Y. State Crime Victims Bd. v. T.J.M. Prods., Inc.*, 705 N.Y.S.2d 320, 323 (2000).

100. 18 U.S.C. § 1962(c) (2000).

101. *T.J.M. Prods., Inc.*, 705 N.Y.S.2d at 323.

102. *Id.*

103. *Id.* at 325.

under the revised Son of Sam law, since the definition of the word “crime” included only state felonies.¹⁰⁴ The court concluded that the case was also defective because the lawsuit was not brought by any of the victims of Gravano’s crimes, as is required under the law.¹⁰⁵ Thus, the proceeds were not forfeitable under the New York law, and Gravano was allowed to receive the profits from his book at that time.¹⁰⁶

Although New York amended its law to reflect the changes suggested by the Supreme Court in *Simon & Schuster*, subsequent litigation involving the statute did not discuss its constitutionality.¹⁰⁷ Thus, no cases have been upheld under New York’s revised Son of Sam law, nor has the law been declared unconstitutional. Because neither case was decided on constitutional grounds, those decisions have been of little use to New York as well as other states, in determining whether their Son of Sam laws are constitutional.¹⁰⁸

2. California

California’s Son of Sam law had not been challenged on constitutional grounds since its enactment in 1983.¹⁰⁹ In 1994, however, the state amended the law in response to the *Simon & Schuster* ruling and soon saw repercussions in the courtroom.¹¹⁰ Specifically, California changed its

104. N.Y. EXEC. LAW § 632-a(1)(a); see also *T.J.M. Prods., Inc.*, 705 N.Y.S.2d at 325.

105. Barry Tarlow, *Rico Report: The Later Misadventures of ‘Sammy the Bull,’* THE CHAMPION, Nov. 2001, at 54, 55.

106. See *T.J.M. Prods., Inc.*, 705 N.Y.S.2d at 326; see also *supra* note 2; see also *supra* note 98 and accompanying text. See generally discussion *infra* Part III.C.2 (discussing in detail the outcome of the *Arizona v. Gravano* case and the legal problems associated with the decision).

107. See, e.g., *Sandusky*, 625 N.Y.S.2d at 457. The Court, however, does recognize the importance of the interests involved, stating, “Much as this court sympathizes with plaintiff’s plight, the judicial function is to interpret, declare, and enforce the law, not to make it.” *Id.* at 460.

108. Cobb, *supra* note 7, at 1497.

109. Nosrati, *supra* note 3, at 971.

110. See *State Uses ‘Son of Sam’ Law for First Time*, L.A. TIMES, Apr. 15, 1995, at A15. This law was amended in large part due to such high-profile cases as football player O.J. Simpson and rap superstar Snoop Doggy Dogg. See *supra* note 1 and accompanying text. California’s Son of Sam law was never applied in Simpson’s case because he was never found guilty of any crimes. *Id.* Snoop Doggy Dogg (real name Calvin Broadus) is a successful rap artist and celebrity who was arrested for the murder of 20-year-old Phillip Woldemariam in 1993. See Tina Daunt, *D.A. Will Not Retry Rapper, Ex-Bodyguard*, L.A. TIMES, Mar. 19, 1996, at B1. Almost immediately following his arrest, he released the album “Doggystyle,” which sold over 4 million copies. *Id.* California’s Son of Sam law was never applied to Snoop because he was acquitted of the murder charge. See *id.* Had he been convicted, profits from his records could have been sought, as many of his songs discuss various criminal activities Snoop had been involved in over the years. See *id.*; see also CAL. CIV. CODE § 2225 (West 2003).

law to include not just profits earned from the sale of story rights¹¹¹ but *all* notoriety rights.¹¹² Furthermore, the law was narrowed so that crimes merely mentioned in the work were no longer included.¹¹³ By narrowing the scope of works that would fall within the statute, the California Legislature sought to conform the law to the framework the *Simon & Schuster* opinion laid out.¹¹⁴

The most notable challenge to the California law came in 2002 in the case of *Keenan v. Superior Court*.¹¹⁵ In 1963, Barry Keenan was a twenty-three year old penniless member of the Los Angeles Stock Exchange.¹¹⁶ Keenan successfully kidnapped legendary singer Frank Sinatra's son, Frank Sinatra Jr., and held him for ransom.¹¹⁷ Sinatra paid the ransom and shortly thereafter Keenan was arrested, convicted of kidnapping, and sentenced to prison.¹¹⁸

Thirty-five years after his conviction, Keenan was interviewed by a Los Angeles reporter.¹¹⁹ This interview sparked the interest of Columbia Pictures. Believing the story could be a big success, Columbia Pictures eventually paid Keenan and other parties over a million dollars for the movie rights.¹²⁰ Sinatra Jr. immediately sued Keenan and the other parties under California's Son of Sam law, seeking the money from the deal as "proceeds" of the crime.¹²¹ California's lower and appellate level courts both agreed with Sinatra, and held for the profits to be forfeited.¹²² Keenan appealed the case to the California Supreme Court,¹²³ and successfully argued to overturn the earlier decisions and hold California's Son of Sam law as unconstitutional.¹²⁴

111. *California Amends its "Son of Sam" Law to Permit Victims to Recover Income Earned from the Commission of a Felony, Even if it is Earned Prior to Conviction*, ENT. L. REP., Jan. 1996, at 22.

112. See CAL. CIV. CODE § 2225.

113. *Id.*

114. *Id.*

115. *Keenan v. Super. Ct. of L.A. County*, 40 P.3d 718 (Cal. 2002).

116. Stephen F. Rohde, *The Demise of California's Son of Sam Law*, 26 L.A. LAW. 14 (2003).

117. *Id.*

118. *Id.*

119. *Id.* Keenan was interviewed for an article in the *New Times Los Angeles* in 1998. *Id.*

120. *Id.* The movie deal's profits were to be split among Keenan, the *New Times* (as well as its reporter) and Keenan's co-conspirators. *Id.*

121. *Keenan*, 40 P.3d at 723.

122. See Cobb, *supra* note 7, at 1499.

123. *Keenan*, 40 P.3d at 718.

124. See generally *Keenan*, 40 P.3d at 718 (holding California's Son of Sam law unconstitutional).

In holding California's Son of Sam law unconstitutional, the California Supreme Court followed *Simon & Schuster* and applied the two-part strict scrutiny test.¹²⁵ While finding that the law satisfied the first prong because there was a compelling state interest,¹²⁶ the court held that the statute's means were not narrowly tailored to its end.¹²⁷ The court reasoned that the statute was so broad that it actually discouraged a vast range of creative and expressive works.¹²⁸

Although the California legislature drastically changed the California law to conform to constitutional requirements and avoid a decision similar to the Supreme Court ruling in *Simon & Schuster*, the California Supreme Court still found the cases to be similar.¹²⁹ The statute confiscated the profits from all works that made more than a "passing, nondescriptive reference to the creator's past crimes."¹³⁰ Although the statute's language was narrower than that of the New York law, it still encompassed speech protected by the First Amendment.¹³¹ The California Supreme Court held that the statute was an "overinclusive infringement of protected speech because it target[ed] and confiscate[d] all [of] a convicted felon's proceeds from expressive materials that include[d] any *substantial account* of the felony, in whatever context."¹³²

Keenan demonstrated that California's Son of Sam law had some fatal problems.¹³³ However, similar to *Simon & Schuster*, the California Supreme Court stated that the *Keenan* ruling should be narrowly construed, and that legislators had the option of drafting another law to avoid the problems it found.¹³⁴ Later in 2002, California State Senator Bruce

125. See *Keenan*, 40 P.3d at 722; see also *supra* note 52 (defining the two part test for strict scrutiny).

126. The Court found that the state had a compelling interest in ensuring that victims of the crime are compensated by those who harm them, and preventing criminals from capitalizing off their crimes before victims have recovered. *Id.*

127. The Court held that the law was over-inclusive because it reaches all of the criminal's speech or expression so long as the story of the crime is included. *Id.*

128. See *id.* at 726.

129. Rohde, *supra* note 116, at 17. This case was a good test for California's law because *Keenan* was a convicted felon, which was the very part of the law that kept O.J. Simpson from being sued under the same statute. See discussion *supra* note 1. See also Cobb, *supra* note 7, at 1501.

130. *Keenan*, 40 P.3d at 733.

131. *Id.* The court states that the phrase "passing mention" is too unclear that it presents an "impermissibly vague basis the censorship of protected speech." *Id.*

132. *Id.* at 734 n. 21 (emphasis in original).

133. See *Keenan*, 40 P. 3d at 726. The United States Supreme Court denied certiorari to *Keenan* in late 2002. *Sinatra v. Keenan*, 537 U.S. 818 (2002).

134. Mike Mckee, *Calif. Justices Junk 'Son of Sam' Law*, THE LEGAL INTELLIGENCER, Feb.

McPherson introduced the "Son of Sam II" bill to the state Senate.¹³⁵ The primary difference in the bill was that it "significantly increase[d] the statute of limitations a victim ha[d] to sue."¹³⁶ The law was quickly passed by California lawmakers¹³⁷ despite the criticism that it did not solve the problems laid out in *Keenan*.¹³⁸

Although the California law has been amended,¹³⁹ it still may have a chilling effect on freedom of speech, inconsistent with the First Amendment. Despite statements made by legislators, the recent revisions do not seem to address the First Amendment problems.¹⁴⁰ For this law to withstand constitutional attack, it will require subsequent revision to address the over-inclusive language discussed in *Keenan*.¹⁴¹

3. Maryland

Like California, Maryland revised its Son of Sam law after the *Simon & Schuster* decision to avoid any constitutional infirmities.¹⁴² The law was

25, 2002, at 4, 7.

135. Kevin Livingston, *Bill Aims to Revive Spirit of 'Son of Sam' Law*, THE RECORDER, Apr. 24, 2002, at 3.

136. Press Release, Senator Bruce McPherson, Son of Sam II Legislation Passed Overwhelmingly by California State Senate (June 20, 2002) at http://republican.sen.ca.gov/news/15/pressrelease1897_print.asp (last visited Feb. 16, 2004). The bill increases the statute of limitations for victims to sue their assailants from one year to ten years. *Id.*

137. Press Release, Senator Bruce McPherson, Davis Signs McPherson's Son of Sam Law – Felons Now Financially Accountable to Victims: Urgency Measure Becomes Law Immediately After Gov. Signs It (Sept. 17, 2002) at http://republican.sen.ca.gov/news/15/pressrelease1998_print.asp (last visited Feb. 16, 2004).

138. Livingston, *supra* note 135. Richard Specter, Sinatra's attorney in the *Keenan* case, said in reference to the new legislation, "If the goal is to compensate victims, this isn't the way to do it." *Id.*

139. *See supra* note 110.

140. *See* Sept. 17, 2002 Press Release, Bruce McPherson, *supra* note 137. Senator Bruce McPherson, in support of the "Son of Sam II" legislation said, "Felons do have a right to free speech. They do not have a right to profit at the expense of their victims. The Supreme Court ruling created an unjustifiable loophole . . . that loophole no longer exists and California has a Son of Sam law able to withstand any Constitutional challenge." *Id.*

141. *See supra* note 5. The next controversial case could be the Scott Peterson case. The venue for Peterson's trial, which is set for 2004, was moved from Laci Peterson's hometown of Modesto, Calif. to nearby San Mateo County, Calif., due to a Superior Court Judge's ruling that Modesto's jury pool had already been tainted by the media. Mark Arax and Don Wright, *Peterson Trial is Moved to San Mateo County*, L.A. TIMES, Jan. 21, 2004, at B6. The Peterson case is highly publicized and could bring another controversy similar to the O.J. Simpson case.

142. Maryland's original Son of Sam statute was enacted in 1987 and codified as MD. CODE ANN., CRIMES AND PUNISHMENTS, § 764 (Supp. 2002). *See* Nosrati, *supra* note 3, at 968. The amended statute was codified as MD. CODE ANN., CRIMES AND PUNISHMENTS, § 854 (1996 &

soon challenged in the case of *Curran v. Price*.¹⁴³ Ronald Price was a former teacher indicted for “sexual child abuse and unnatural and perverted practices,”¹⁴⁴ who expressed an intent to sell his story.¹⁴⁵ Based on Maryland’s Son of Sam statute, Maryland’s Attorney General, Joseph Curran, sought an injunction against Price and the Hollywood producer with whom Price had contracted.¹⁴⁶

Although the Fourth Circuit found the statute unconstitutional and unenforceable,¹⁴⁷ the Maryland Court of Appeals took the case and detailed the constitutional problems of the law following the *Simon & Schuster* guidelines.¹⁴⁸ The court found the statute had many significant problems that would chill free speech rights of criminals.¹⁴⁹ Like *Keenan*, the statute was overbroad in many aspects and its ultimate aim was to suppress free speech.¹⁵⁰ Maryland’s law was not held unconstitutional,¹⁵¹ but rather required that Price incriminate himself—an act which may itself violate another aspect of Price’s constitutional rights.¹⁵² The court held that the suit against Price was unauthorized.¹⁵³ In an attempt to avoid overturning the law, the Maryland Court of Appeals dismissed Price’s case without first getting to its merits.¹⁵⁴ Although the law was not struck down in Maryland, the court acknowledged that it suffered from the same overbreadth problems as the laws that were struck down in New York.¹⁵⁵ Both decisions were based heavily on the fact that the statutes were not narrowly tailored.¹⁵⁶

Supp. 2002). The amended law was very similar to the guidelines prescribed in the *Simon & Schuster* opinion. Compare *id.*, with *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

143. *Curran v. Price*, 638 A.2d 93 (Md. 1994).

144. *Id.* at 97.

145. *Id.* Price told a reporter in a television interview that he had already contracted to sell his story. *Id.*

146. See Nosrati, *supra* note 3, at 967.

147. *Id.*

148. *Id.* at 968.

149. See *Curran*, 638 A.2d 93, 103.

150. *Id.* at 103 (discussing that section 764 applies to crimes that could involve minimal loss; the statute constituted a prior restraint; the statute was content-based in character; the statute included the “expression” of the author’s thoughts, feelings or emotions on the crime; and the statute included profits that were directly or indirectly received as a result of the crime).

151. *Curran*, 638 A.2d at 107.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 101–102.

156. See also discussion *supra* Part III.A.

C. States Nodding Towards Constitutional Son of Sam Laws

1. Washington

Washington courts have not expressly declared Washington's Son of Sam law constitutionally valid, although the state seems to recognize the existence of a government interest in such a law.¹⁵⁷ In an extremely high profile case in Washington, teacher Mary Kay Letourneau admitted to having an affair with a thirteen-year-old student that ultimately produced two children.¹⁵⁸ Letourneau was convicted of second-degree child rape and was sentenced to seven and a half years in prison.¹⁵⁹ When Letourneau began writing her autobiography, the sentencing court imposed a restriction to prevent her from profiting from her crime.¹⁶⁰ She appealed, claiming the restriction violated her First Amendment rights.¹⁶¹

The Washington Court of Appeals overturned the sentencing court's restriction.¹⁶² The court reasoned that the restriction would "frustrate the purposes" of Washington's Son of Sam law,¹⁶³ including compensating victims and preventing criminals from profiting from their crimes.¹⁶⁴ The court held that if the criminal's rights to profit were limited, the victims would have less chance of recovering money from them.¹⁶⁵ Although the court did not discuss the legality of the state's Son of Sam law or the First Amendment issues in the case, it allowed Letourneau to conduct interviews, to write a book or sell the story rights for a movie, and to eventually earn profits from telling her story.¹⁶⁶ The lower court's restriction had not prevented Letourneau from ever having contact with the

157. See *State v. Letourneau*, 997 P.2d 436, 445 (Wash. Ct. App. 2000).

158. *Teacher Convicted of Raping Student in Washington State Can Profit From Her Story, Court Rules; Woman is Reportedly Writing an Autobiography That Tells of Relationship*, ST. LOUIS POST-DISPATCH, Apr. 19, 2000, at A5. Letourneau was married with four children when her affair began. *Id.*

159. *Id.* Letourneau was originally confined for only 180 days, granted she perform certain conditions. See *Letourneau*, 997 P.2d at 440. However, upon release, she was soon found alone with the victim and sent to prison, where she gave birth to the couple's second child. See *id.*

160. *Letourneau*, 997 P.2d at 438.

161. *Id.* at 439.

162. *Id.*

163. *Id.* at 443.

164. *Id.*

165. See *id.* The rationale is that criminals are not normally making profits while in prison. Thus, this ideology has a better chance of encouraging some form of victim compensation.

166. See *Teacher Convicted of Raping Student*, *supra* note 158.

media, but only from making a profit.¹⁶⁷ The court said that to “forbid convicted persons from acquiring any such properties in the first place would frustrate a means by which the Legislature has chosen to fund compensation for victims of crime.”¹⁶⁸

Although the case did not reach or consider the merits of the Son of Sam law, the court found a need for a law to ensure victim compensation, which it deemed a true compelling governmental interest.¹⁶⁹ The court’s reasoning indirectly validated the Son of Sam law by identifying victim compensation as a compelling interest, and suggesting that seizing notoriety profits relating to the crime is one way of achieving such victim compensation.¹⁷⁰

2. Arizona

Arizona courts recently handled one of the most peculiar forfeiture cases this country has ever seen.¹⁷¹ The Arizona State Court of Appeals’ verdict in *Arizona v. Gravano* created a very murky future for the Son of Sam laws.¹⁷² Sammy Gravano was in the Federal Witness Protection program in Arizona¹⁷³ when he was arrested in 2000 and charged for heading an illegal drug distribution ring.¹⁷⁴ The Arizona Attorney General immediately sought to have Gravano forfeit all of the money that he had received from *The Underboss*,¹⁷⁵ the memoir of his life in organized crime, under an Arizona forfeiture statute.¹⁷⁶ Perplexing was the fact that the book reported on crimes committed in New York, and the fact that proceeds from the book were paid in New York.¹⁷⁷ In other words, the book itself

167. *Letourneau*, 997 P.2d at 442.

168. *Id.* at 443.

169. *Id.*

170. *Id.*

171. *Arizona v. Gravano*, 60 P.3d 246 (Ariz. Ct. App. 2002).

172. Petition for review was denied on July 1, 2003 by the Arizona Supreme Court. *State v. Gravano*, 2003 Ariz. LEXIS 101 (Ariz. July 1, 2003).

173. Tarlow, *supra* note 105. Gravano underwent plastic surgery after testifying against mob-boss John Gotti and other members of the Gambino crime family and moved to Arizona as part of the Federal Witness Protection Program. Gravano served some five years in prison for the multiple murders he committed prior to moving to Arizona. *See Gravano*, 60 P.3d at 248.

174. *Gravano*, 60 P.3d at 248. Gravano, along with his wife, children and 20 other people, was charged with distributing the dangerous drug “Ecstasy” throughout the country. *Id.* *See also* Tarlow, *supra* note 105, at 54.

175. *Gravano*, 60 P.3d at 248–49.

176. *Id.* (seeking forfeiture under the Arizona Racketeering Act, ARIZ. REV. STAT. §§ 13-2301- to -2318 (2001 & Supp. 2002) and the Arizona Forfeiture Reform Act, ARIZ. REV. STAT. §§ 14-4301 to -4316 (2001 & Supp. 2002)).

177. Tarlow, *supra* note 105, at 54.

had virtually no ties with Arizona.¹⁷⁸ Ironically, prior to his trial in Arizona, Gravano was tried under the New York Son of Sam law, where the court held that proceeds from his book could not be taken.¹⁷⁹

The Arizona Attorney General alleged that the proceeds Gravano procured during his reign in organized crime were used to fund his Ecstasy Enterprise, and thus subject to the general forfeiture statute.¹⁸⁰ The action tied the proceeds directly to racketeering, and thus the state argued to take the entire proceeds from Gravano's book.¹⁸¹ Gravano moved to dismiss the complaint, contending that the taking of those earnings arising from the book would violate his First Amendment rights.¹⁸²

Although the state argued that the law could pass a strict scrutiny analysis, the court concluded that such scrutiny was unnecessary¹⁸³ because the state relied on a general forfeiture statute (directed at non-speech) to convict Gravano, as opposed to the Son of Sam law (directed at speech).¹⁸⁴ The court's decision rested on the fact that the standard of scrutiny for non-speech conduct is intermediate as opposed to strict.¹⁸⁵ The statute was further deemed content neutral and the gratuitousness of strict scrutiny became even more apparent—thus, while the court agreed that the statute *could* pass strict scrutiny, it would not have to and focused on whether it met a lower standard of scrutiny: identifying an important or substantial governmental interest.¹⁸⁶

The court held that ensuring crime victim compensation was the compelling purpose of the Arizona forfeiture statute.¹⁸⁷ The court also

178. *See id.*

179. N.Y. Crime Victims Bd. v. T.J.M. Prods., Inc., 705 N.Y.S.2d at 322, 326 (2000). *See* discussion *infra* note 17.

180. *Gravano*, 60 P.3d at 249. The state maintained that since the ecstasy ring was conducted through racketeering, the Arizona Racketeering Act could be applied to any money used to fund it. *Id.*

181. *Id.* The court said that the proceeds were traceable to racketeering activity because “they would not exist” if it were not for Gravano's criminal activity. *Id.* The Arizona Statute authorizes forfeiture of “all proceeds traceable to” specific crimes. ARIZ. REV. STAT. § 13-2314(D)(6)(c).

182. *Gravano*, 60 P.3d at 249. The case was not tried under the Arizona Son of Sam law because before the state filed the complaint against Gravano, Gravano's attorney convinced the prosecution that the law could not be used against money Gravano had already received under the literary rights agreement and not proceeds of a crime. Tarlow, *supra* note 105, at 56.

183. *Gravano*, 60 P.3d at 254.

184. *Id.* at 253.

185. *Id.*

186. *See id.*

187. *Id.* at 254. The reasoning in the use of the general forfeiture statutes seems very similar to those used in earlier Son of Sam cases. *See generally* discussion *infra* Part III.B.1-3.

concluded that this law was narrowly tailored because it was limited to racketeering and preventing racketeers from profiting from their crimes.¹⁸⁸ Subsequently, the royalties from Gravano's book were seized by the state of Arizona, and Gravano was sentenced to twenty years in prison for his involvement in the Ecstasy ring.¹⁸⁹

However, Gravano still believed he was entitled to royalties from *The Underboss*. In 2003, after the Arizona Court of Appeals ruled that Gravano's royalties could be seized, Gravano appealed to the United States Supreme Court.¹⁹⁰ The appeal contended that the Arizona Court of Appeals violated Gravano's free speech rights and created a "financial disincentive" to other potential authors.¹⁹¹ The arguments made and the circumstances surrounding *Gravano* are akin to those in *Simon & Schuster*.¹⁹² Specifically, Gravano's attorney, Larry Hammond, made claims similar to those highlighted in the *Simon & Schuster* decision—that the Arizona statute would chill particular criminals' speech, especially those involved in racketeering.¹⁹³ On January 23, 2004, the United States Supreme Court denied review of Gravano's appeal without comment.¹⁹⁴ As such, the Arizona Court of Appeals' verdict stands.

Although Gravano was technically held accountable under the state's racketeering statute, the Arizona court's analysis parallels earlier *Son of Sam* cases.¹⁹⁵ Thus, this case presents an unclear precedent: the court stated that the law *would* be upheld under strict scrutiny analysis, however only required an intermediate level of scrutiny to determine the constitutionality

188. *Gravano*, 60 P.3d at 255.

189. Tarlow, *supra* note 105, at 59. *See also*, Austin Fenner, *Sammy Bull's Stuck in Pink-Panty Prison*, DAILY NEWS (N.Y.), Mar. 4, 2003, at 20 (discussing Gravano's prison situation and sentence).

190. Tony Mauro, *Is Ex-Mobster Entitled to Book Royalties?*, LEGAL TIMES, Jan. 12, 2004, at 10.

191. *Id.*

192. *Id.* Hammond declared that the law could be applied to other books including Malcolm X, Harriet Tubman, and Jean Genet, just as the *Simon & Schuster*, opinion stated. *Id.* *See also* *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

193. *See* Mauro, *supra* note 190 (quoting Hammond's brief stating, "While the government faces no limitation in broadcasting its own satisfaction with its enforcement of anti-racketeering laws, a person who has been the object of such enforcement actions, and wishes to communicate her view that these laws are unjust or unjustly applied, may do so only if prepared to forfeit to the government any compensation for her efforts.")

194. *Gravano v. Arizona*, 2004 U.S. LEXIS 842 (Jan. 26, 2004). *See also* Owen Moritz, *Sammy Bull Gets Supreme Dissing: Mob Rat's Bid for Book Royalties Shot Down*, DAILY NEWS (N.Y.), Jan. 27, 2004, at 21.

195. *See* discussion *infra* Part III.B.1–3. *Compare* *Gravano*, 60 P.3d 246, with *Sandusky*, 625 N.Y.S.2d 457, and *Keenan*, 40 P.3d. 718, and *Curran*, 638 A.2d 93.

of the law.¹⁹⁶ This is contrary and inconsistent with prior U.S. Supreme Court's holdings involving Son of Sam laws, which required and traditionally mandated a strict level of scrutiny.¹⁹⁷ In the end, the Arizona decision presents a non-Son of Sam law that is virtually identical to Son of Sam laws, but which is narrowly tailored to apply only to crimes involving racketeering. The *Gravano* court ultimately concluded that the narrowly tailored statute would likely satisfy the second prong of the strict scrutiny test.¹⁹⁸

IV. CREATING A CONSTITUTIONAL SON OF SAM LAW

A. *Value of Son of Sam Laws v. Value of First Amendment Rights*

Where a First Amendment right is at issue in a state statute, there is a question of whether the government's interest in restricting the controversial speech outweighs the value of allowing the speech.¹⁹⁹ A criminal's speech is no exception to this rule. Public order advocates believe that Son of Sam laws are necessary to ensure both victim compensation and punishment to criminals.²⁰⁰ Some advocates even argue that the underlying issue under Son of Sam laws is not a First Amendment issue at all.²⁰¹ For one, Sinatra's lawyer was quoted saying, "[f]reedom of speech only addresses your right to speech. It doesn't address your right to be paid for speaking."²⁰²

Conversely, First Amendment advocates argue such laws clearly violate a criminal's rights.²⁰³ Some opposing Son of Sam laws believe in absolute freedom of speech granted by the First Amendment, and therefore

196. *Gravano*, 60 P.3d at 254.

197. *Id.* See discussion *infra* Part III.B.1-3.

198. See *Gravano*, 60 P.3d at 255.

199. See discussion *supra* Part II.B.

200. Jeanne E. Dugan, Note, *Crime Doesn't Pay—Or Does It?: Simon & Schuster, Inc. v. Fischetti*, 65 ST. JOHN'S L. REV. 981, n. 2 (1991). See also discussion *supra* Part III.C.1.

201. Martha Bellisle, *Killer's Bestseller: Freedom of Speech or Crime Profits?*, RENO GAZETTE J., Feb. 22, 2004, at A1. In reference to a recent Nevada Son of Sam law challenge, Washoe County District Attorney Richard Gammick stated, "I'm not sure what the First Amendment issue is here." He added, "Nobody says [the criminal] can't write the book. [The criminal] just shouldn't profit from it."

202. Harriet Chiang, *State High Court Will Rule On 'Son of Sam' Law*, S.F. CHRONICLE, Nov. 29, 1999, at A1. However, the Court in *Keenan v. Super. Ct.*, 40 P.3d 718 (Cal. 2002) ruled that the California Son of Sam law was unconstitutional, therefore Keenan could sell his story.

203. Most absolute free speech activists believe that the freedom of speech is absolute, therefore many restrictions on freedom of speech are violations of the constitution.

argue that speech should only be subject to very minimal restrictions. Criminal speech is indispensable to the “marketplace of ideas” concept of freedom of speech.²⁰⁴ The concept maintains that speech made in the marketplace advances political truth and a democratic society.²⁰⁵ According to believers, restricting such speech regulates the marketplace, and thereby shrouds the truth and injures society as a whole.²⁰⁶

Are Son of Sam laws a *necessary* evil? Although these laws restrict some criminal’s right to free speech, most states believe, particularly after the *Simon & Schuster* Supreme Court opinion, that laws ensuring victim compensation are necessary.²⁰⁷ Notwithstanding this belief, Son of Sam laws are rarely invoked.²⁰⁸ The premise behind enacting such legislation has been to further victim compensation, which utilizes society to remedy the victim’s loss—an object different from providing victims with restitution.²⁰⁹ This premise has proved to be a legitimate governmental interest.²¹⁰

Cases such as *Arizona v. Gravano*²¹¹ that side-step Son of Sam laws and obtain the same end through a different means have secured a loophole in the system.²¹² *Gravano* paved the road to taking a criminal’s profits through the use of a general forfeiture statute.²¹³ The state used Arizona’s uniquely tailored forfeiture statute, which encompasses profits derived from racketeering only, to circumvent confronting the constitutionality of the Arizona Son of Sam law.²¹⁴ This scenario created two potential options: (1) the option of being sued in another state with a different standard so

204. Gilbert O’Keefe Greenman, *Son of Simon & Schuster: A “True Crime” Story of Motive, Opportunity and the First Amendment*, 18 U. HAW. L. REV. 201, 245–46 (1996).

205. See *Abrams v. United States*, 250 U.S. at 630 (1919). Justice Holmes’ dissent provides the theory of the marketplace of ideas that in absolute speech comes truth. *Id.*

206. *Id.* See also Lori F. Zavack, Note, *Can States Enact Constitutional “Son of Sam” Laws After Simon & Schuster, Inc. v. New York State Crime Victims Board?*, 37 ST. LOUIS U. L.J. 701, 715 (1993).

207. See *Crime Can Pay*, *supra* note 9.

208. See discussion *supra* Part III.A.

209. See Dugan, *supra* note 200. Restitution restores the victim’s property lost or destroyed through the crime; compensation, however, seeks to remedy the problem through society by counterbalancing the victim’s loss. *Id.*

210. See discussion *supra* Part III.B–C (discussing recent case decisions).

211. *Arizona v. Gravano*, 60 P.3d 246 (2002).

212. *Id.* at 249 (discussed in Part III.C., used the state’s general forfeiture statute to gain forfeiture of the criminal’s book profits). See also, Greenman, *supra* note 204, at 215–16 (discussing a case in which a Massachusetts court “side-stepped” *Simon & Schuster*).

213. *Gravano*, 60 P.3d at 249.

214. *Id.* at 255.

long as jurisdiction avails,²¹⁵ and (2) the option of being sued under different states using non-Son of Sam laws. The popularity of such laws makes it obvious that most states understand the need for Son of Sam laws. The impediment to creating such laws to withstand criticism and enjoy longevity is the difficulty of meeting the framework set forth by the United States Supreme Court's decision in *Simon & Schuster*.²¹⁶

The Court's decision in *Simon & Schuster* solidified the possibility of a Son of Sam law passing constitutional muster. The Court identified the glitch in the statute as being its over-breadness, and clearly declared that if states narrowly tailored their laws, the laws would be upheld.²¹⁷ Since that time, states have done everything in their power, either amending their old laws or simply enacting new ones, with the hopes of creating "narrowly tailored" laws that are within the predilection of the US Supreme Court.²¹⁸ However, since *Simon & Schuster*, the Supreme Court has been faced with a case where it could review the forward progress of the states in regards to creating such laws.²¹⁹

In summary, to withstand judicial scrutiny, Son of Sam laws must possess certain characteristics. For one, almost all state court decisions,²²⁰ as well as the Supreme Court's *Simon & Schuster* opinion, have stated that the laws must possess the dual compelling governmental interest of preventing criminals of profiting from their crimes, and providing victim compensation.²²¹ The problem lies in creating statutes that *are* sufficiently narrowly tailored and that meet these interests. By introducing the following elements into Son of Sam laws, states should be able to design laws that are devoid of the constitutional defects seen in past Son of Sam cases.

215. For example, Gravano was unsuccessfully tried under the New York Son of Sam law, but tried again in Arizona under the general forfeiture statute. See discussion *infra* Part III.C.2.

216. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991).

217. *Id.*

218. See Cobb, *supra* note 7, at 1494 n. 88. California, Colorado, Iowa, Kansas, New York, Pennsylvania, Tennessee and Virginia all amended their Son of Sam laws after *Simon & Schuster*. *Id.*

219. See Cobb, *supra* note 7, at 1494. In fact, in January 2004, the United States Supreme Court again denied review to a Son of Sam issue in Gravano's case. *Gravano v. Arizona*, 2004 U.S. LEXIS 842 (Jan. 26, 2004).

220. Sean J. Kealy, *A Proposal for a New Massachusetts Notoriety-for-Profit Law: The Grandson of Sam*, 22 W. NEW ENG. L. REV. 1 at 11-12 (2000).

221. *Id.* at 10.

B. Content Neutrality

The most critical element is the language of the law and the possible interpretations of that language. The laws should not be content-based, but rather content-neutral.²²² Content-neutral laws are laws that do not discriminate based on the substance or subject matter of speech.²²³ Content-based laws, on the other hand, single out speech based solely on either their substance or subject-matter.²²⁴ While content-based laws often fail judicial scrutiny,²²⁵ content-neutral laws have an enhanced probability of surviving, often because they are subject to a lower level of review.²²⁶ According to Erwin Chermersky, a constitutional law professor at the University of Southern California, content-based restriction on the speech of felons “cannot survive.”²²⁷

State courts have applied different standards of judicial scrutiny to Son of Sam laws, partly due to the lack of a single precedent establishing the required level of scrutiny for such laws.²²⁸ The US Supreme Court in *Simon & Schuster* used the strict scrutiny analysis only because it determined the law to be content-based speech, which mandates strict scrutiny analysis.²²⁹

The type of speech in New York’s Son of Sam law was deemed content-based because it imposed financial disincentives on the speaker depending on the subject matter of the speech.²³⁰ For example, under that statute, if the criminal were to write a book on something other than his former life in crime, proceeds from the book would not be subject to forfeiture. The Supreme Court in *Simon & Schuster* said that a statute would be content-neutral “where [it] intended to serve purposes unrelated to the content of the regulated speech, despite [its] incidental effects on some speakers but not others.”²³¹

Thus, content-neutral Son of Sam laws must be formatted closely to

222. *Id.* at 12.

223. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 (1991).

224. *See Kealy, supra* note 220, at 12.

225. *Id.*

226. *Id.* at 12–13.

227. *See Chiang, supra* note 202, at A8.

228. *See discussion supra* Part III.B–C.

229. *See Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

230. *Id.* at 117–18.

231. *Id.* at 122.

Arizona's general forfeiture statute,²³² or Texas's so-called "murderabilia" amendment.²³³ Both of these statutes apply only to profits gained from the commission of the crime, rather than profits gained from telling a story.²³⁴ In order to have a content-neutral law, a state must ensure that the law is sufficiently broad to avoid singling out a particular type of speech in its text.²³⁵

Thus, constructing an effective content-neutral law requires drafting a law broad enough to encompass all profits earned through the crime, rather than from expressions regarding the crime itself. Thus, similar to the Arizona and Texas laws, the law would seek income earned from the commission of the crime.²³⁶ Another example of such a law is Iowa's Son of Sam statute, which broadly defines proceeds of the crime as "the fruits of the crime from whatever source received."²³⁷ As of late, New York also amended its law to encompass all profits of the crime.²³⁸

By making the law sufficiently broad, the law focuses on tangible items, such as the criminal's clothing or other crime paraphernalia, as well as speech. Thus, by taking the focus away from the actual substance of the speech, the law becomes subject to intermediate scrutiny²³⁹ and evades various constitutional problems encountered in the past. This alleviates the glitch identified in *Simon & Schuster*, and shirks from only attacking

232. ARIZ. REV. STAT. §§ 13-2301-2318 (2001 & Supp. 2002). This statute only applies to profits that are derived from racketeering, specifically. *Id.* The statute is content-neutral because it does not seek forfeiture of solely published works, but any property that is traceable through racketeering. *See id.*

233. TEX. CRIM. PROC. CODE ANN. 59.06(k)(2) (Vernan 2002 & Supp. 2004). This amendment applies only to profits gained from the commission of a crime, rather than the expressions of the crime. *Id.* Further, this law does not look to see if the content of what is sold is actually linked to the crime, making it content-neutral. *Id.*

234. *See Cobb, supra* note 7, at 1509; *see also Gravano*, 60 P.3d at 253.

235. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991).

236. *See Cobb, supra* note 7, at 1510; *see also Gravano*, 60 P.3d at 253.

237. IOWA CODE ANN. § 910.15(1)(e) (West 2003).

238. N.Y. EXEC. LAW 632-a(1)(b) (McKinney 1996). The statute reads in pertinent part:

"(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 . . . ; 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."

Id.

239. *See discussion infra* note 241.

“speech on a particular subject” and “no other speech and no other income.”²⁴⁰ As such, content-neutral laws, with content-neutral purposes will stand constitutionally. Content neutrality also solves the conundrum of applying differing levels of scrutiny, as content-neutral laws are only subject to intermediate scrutiny,²⁴¹ and introduces uniformity in administration of the laws.

C. Narrowly Meeting the Ends

While constructing content-neutral Son of Sam regulations is a step in the right direction, it does not present a complete solution to problems encountered by Son of Sam laws. The Supreme Court in *Simon & Schuster* also struck down the New York law because it failed to meet the second element of strict scrutiny: the requirement of being narrowly tailored to meet the state’s interest.²⁴² By failing to meet this second requirement, the law was deemed over-inclusive.²⁴³ To narrowly tailor such a law, a state must create narrow terms to limit its reach. States could achieve such tailoring in a variety of ways. In fact, some states have already attempted to do so in the wake of *Simon & Schuster*.²⁴⁴

1. Limiting “Profits” Of the Crime

Along with the territory of drafting content-neutral laws comes the fact that the phrase “profits of the crime” is defined as including only those items actually generated as a result of the crime. As such, when using literary works, the statutes would exclude works that contain only incidental or tangential references to the crimes, thus overcoming one of

240. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991).

241. Content-neutral regulations must pass the intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). The test states that a regulation will be constitutional if (1) it is within the constitutional powers of the government, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free speech, and (4) the incidental regulation on free speech is no greater than essential. *Id.* at 377. The key difference between strict scrutiny and intermediate scrutiny is that the government must only show an “important” interest, versus the compelling interest required under strict scrutiny. However, there is much criticism that intermediate scrutiny is merely a slightly heightened version of rational basis review. See Richard A. Seid, *A Requit for O'Brien: On the Nature of Symbolic Speech*, 23 CUMB L. REV. 563, 576 (1993).

242. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991).

243. *Id.* at 123.

244. See discussion *supra* Part III.B–C (discussing states treatment of the laws since *Simon & Schuster*).

the problems in *Simon & Schuster*.²⁴⁵

Several states, including Virginia, have amended their laws to reflect this change, stating that profits from crimes “shall not be subject to forfeiture unless an integral part of the work is a depiction or discussion of the defendant’s crime or an impression of the defendant’s thoughts, opinions, or emotions regarding such crime.”²⁴⁶ However, this must be contrasted with *Keenan*,²⁴⁷ where the court held that having too broad of a reach was also unconstitutional.²⁴⁸ Thus, an ideal law would limit the works subject to Son of Sam laws to those works that are substantially comprised of stories of the crime, and whose profits depend upon the story. Coupling such a provision with a content-neutral law will result in a law that endures judicial scrutiny.

2. Convictions and Crimes

Son of Sam laws should specifically apply only to those accused and convicted of crimes. As mentioned previously, California’s definition of the defendant applies only to felons *convicted* of the crime.²⁴⁹ By tailoring the statute to encompass only those eventually convicted of crimes, this sufficiently narrows the reach of the law. In addition, Minnesota, Iowa, New York and Delaware have similarly molded their laws to include only those convicted of a crime.²⁵⁰ By limiting the language to include only criminals accused and convicted of a crime, the laws would fall in sync with the *Simon & Schuster* framework,²⁵¹ and not hold liable those who merely admit to committing a crime—thus preserving the integrity and value of literary works.²⁵²

245. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

246. VA. CODE ANN. 19.2-368.20 (1995). See also KAN. STAT. ANN. 74-7319(a) (1992), which states that proceeds are only subject to forfeiture if the work deals “principally with the crime for which the person is accused and convicted.”

247. *Keenan*, 40 P.3d 718.

248. See discussion *supra* Part III.B.2.

249. See CAL. CIV. CODE § 2225(a)(1) (Supp. 1999).

250. See Kealy, *supra* note 220, at 15–16. Iowa’s law even gets past the problem that New York had in attempting to prosecute the Son of Sam killer, himself, the law states that a “convicted felon” is “a person initially convicted, or found not guilty by reason of insanity . . . either by a court or jury trial or by entry of a guilty plea in court.” IOWA CODE ANN. § 910.15(1)(a) (West 2003).

251. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121–23 (1991).

252. *Simon & Schuster* considered that if a person were to be held liable for merely mentioning a past crime, such a law would have a drastic effect upon the literary community. See *id.* at 121.

Similarly, such laws should apply only to *serious* crimes, but should not single out specific crimes.²⁵³ Some state laws limit their reach to only criminals who commit crimes that cause physical injury or death.²⁵⁴ However, by limiting the reach of Son of Sam laws in this way, the victims of other crimes go ignored and like the victims of Gravano's crimes, may encounter emotional and financial upsets.²⁵⁵ On the other hand, if the reach is not limited, and laws become applicable to all crimes, the affect on the literary world may be grave. Specifically, many of the world's great artists, literary and musical, may face confiscation of their profits as a result of mentioning some childhood prank or drug charge.²⁵⁶ As such, the ideal law should entail a provision that includes crimes that have a substantial, not just incidental, affect on their victims.²⁵⁷

Additionally, the laws should take affect while the defendant is awaiting trial, before actual conviction takes place. Some states currently have laws that take effect only after conviction.²⁵⁸ Laws do so to avoid applying Son of Sam laws to those acquitted of their crimes, such as O.J. Simpson.²⁵⁹ The problem arises due to the large gaps of time between arrest or arraignment and actual trial, where the defendant who eventually is convicted is able to secure some type of profit as a result of his crimes. If the law takes affect while the defendant is awaiting trial, and if after trial the defendant is not convicted, monies deposited into the trust account are returned. This ensures that in case the trial becomes delayed for an extended period of time, neither the criminals or their agents spend profits that under the Son of Sam laws belong to their victims.

3. Forfeiture Should Not Be Automatic

A final measure to creating a constitutional Son of Sam law is to

253. See Cobb, *supra* note 7, at 1512.

254. *Id.*

255. *Id.*

256. For example, Snoop Doggy Dogg's mention of drugs in his songs could potentially cause his profits to be surrendered, although it is arguable about who the victims of such a crime would be. See, e.g., Snoop Doggy Dogg, *Pump Pump*, DOGGYSTYLE (Death Row 2001), available at <http://www.lyred.com/lyrics/Snoop+Dogg/Doggystyle/Pump+Pump/> (last visited Feb. 4, 2004).

257. This would also help make sure that there are, in fact, victims to the crimes so that the law is not used frivolously. Some Son of Sam laws had provisions wherein the Crime Victims Board would put the money in the escrow account before the victims even came forward, and if no victims ever came forward, the money would be returned to the criminal. See discussion *supra* Part I.

258. Cobb, *supra* note 7, at 1511.

259. See *id.*

allow the accused an extra safeguard, by requiring the accuser to show just cause as to why the forfeiture is reasonable. Currently, many Son of Sam laws grant automatic forfeiture to a trust account as soon as a suit is filed.²⁶⁰ A hearing determining whether there is good cause to take criminals' profits would eliminate any uncertainty in applying the law for fear that harm would come to a literary work. In Texas, the Son of Sam law requires a hearing to show cause, a procedure that is not uncommon in most judicial proceedings.²⁶¹

By granting a judge the discretion to decide whether good cause is present for the purpose of taking profits, the risk of potential abuse will be eliminated, and an extra step in protecting the criminal's rights would be added. This procedure would also ensure that potential problems discussed in *Simon & Schuster* are cleansed prior to the case going to trial.

V. CONCLUSION

Son of Sam laws have undergone many transformations and reconstructions since their introduction in the 1970s. Although the laws have developed significantly since that time, their validity still remains in question.

260. See discussion *supra* Part III.B–C.

261. TEX. CRIM. PROC. CODE ANN. § 59.05 (2002).

Until a precedent with a clear roadmap is set, the laws remain susceptible to constitutional attack. Content Neutral and narrowly tailored Son of Sam laws that limit the phrase “profits of the crime,” define specific crimes and convictions, and employ automatic forfeiture are likely to withstand constitutional muster. A solution to this problem is dire as many recent high profile crime cases, including Laci Peterson,²⁶² Andrea Yates,²⁶³ and John Muhammad, will likely call the rule in question.²⁶⁴

*Kathleen Howe**

262. See *supra* note 5.

263. Lisa Teachey and Carol Christian, *Yates Story Could Test State's Ban on Profiting From Crime*, HOUSTON CHRONICLE, June 6, 2002, at A27 (discussing how Andrea Yates, the Texas mother who drowned her five children, could soon test the constitutionality of the Texas Son of Sam statute).

264. Josh White, *Other Jurisdictions Seek to Try Sniper*, THE WASHINGTON POST, Dec. 7, 2003, at C1.

* I would like to extend my sincere gratitude to the editors and staff of the Loyola of Los Angeles Entertainment Law Review, especially Kevin Tidwell, Talin Haroutunian, Suzanne Garringer, Nick Kurtz, Rachel Pimentel, Leena Sheet, and Emily Ayers, for believing in me and this Comment, and for all of their hard work, patience, and advice. Furthermore, I would like to exclusively thank Crystin Wieggers for her amazing editing skills, guidance, and inspiration throughout this entire process. I would also like to thank my family and friends, particularly Sarah and Joel, for their unconditional moral support and encouragement. Finally, this comment is dedicated to my parents, Fred and Bonnie, for their infinite love and support, and especially for making me into the person that I am today.

