COMMENT

MAKING A KILLING: EVALUATING THE CONSTITUTIONALITY OF THE TEXAS SON OF SAM LAW*

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I. INTRODUCTION

Charles Manson's compact disc, *Lie: The Love & Terror Cult*, which features music he recorded from behind bars, is available through Amazon.com for $14.99.[1] Manson's *Commemoration* album sells for $15.99.[2] The site offers free shipping if both compact discs are purchased together.[3]

Before Internet auction giant eBay changed its policy,[4] "Railway Killer" Angel Resendez-Ramirez sold locks of his hair and scrapings from calluses on his feet for $9.99.[5] The serial murderer sold these items from his cell while on death row in Texas by using a broker outside the prison walls.[6] "'I'm famous,' Resendez-Ramirez [explained], 'Why shouldn't I?'"[7]

As the nation continues to deal with the terrorist attacks of September 11, 2001,[8] the idea of criminals profiting off their

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1. Amazon.com, *Buying Info*, *at* http://www.amazon.com/exec/obidos/ASIN/B000005X1J /qid =1011119478/sr=1-1/ref=sr_1_10_2/002-0975041-1585603 (last visited Dec. 30, 2002) (advertising Charles Manson, *Lie: The Love and Terror Cult* (2001)).

2. *Id*.

3. *Id*.

4. Refer to note 143 *infra* (discussing eBay's change in policy).

5. *See* Marcia Stepanek, *Making a Killing Online: Ghoulish Auctions Run the Gamut from Bad Taste to the Truly Shocking*, BUS. WK. ONLINE, Nov. 20, 2000, *at* http://www.businessweek.com/2000/00_47/b3708054.htm (last visited Dec. 30, 2002) (reporting that Resendez-Ramirez earned his nickname because he almost always murdered his victims close to railroad tracks).

6. *See id*.

7. *Id*. (positing that Resendez-Ramirez's motivation is one of simple financial greed).

8. On September 11, 2001, terrorists hijacked four American commercial jets, crashing two of them into the World Trade Center in New York City, one into the Pentagon in Washington, D.C., and the fourth into a field in rural Pennsylvania. *See* Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead; Bush Promises Retribution; Military Put on Highest Alert*, WASH. POST, Sept. 12, 2001, at A01; Patrick T. Reardon, *Feeling of Invincibility Suddenly*

crimes seems more unsettling than ever.[9] A case-in-point is John Walker, the twenty-year-old American who fought against the United States with the Taliban in Afghanistan.[10] Walker, whose parents are rumored to be contemplating a book deal,[11] has a unique perspective on a situation most Americans struggle to understand. Striking a balance between bringing that perspective to the public and limiting Walker's ability to profit from his involvement in illegal activities remains controversial and challenging.[12]

Although the sale of items or information gained through criminal activity is arguably distasteful, the question of whether it is illegal, or even desirable, is still unclear. Laws designed to prevent criminal notoriety for profit, popularly known as "Son of Sam" laws,[13] tend to have a chilling effect on the First Amendment right of free speech.[14] Yet Son of Sam laws have typically been fraught with legal defects and loopholes, allowing some of the nation's most heinous criminals to continue the exploitation of their victims by commercializing their crimes.[15] In this respect, Son of Sam laws have failed to achieve their intended results while intruding upon the sacred constitutional right of free speech.

The popularity of Son of Sam laws is undeniable—as of 2000, over forty states and the federal government had such laws on the books.[16] However, the ability of these laws to withstand

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Shattered, CHI. TRIB., Sept. 12, 2001, at 1; *Terrorists Destroy World Trade Center, Hit Pentagon in Raid with Hijacked Jets*, WALL ST. J., Sept. 12, 2001, at A1.

9. Interestingly, not every ploy to profit from a crime works to the perpetrator's advantage. *See* Philip Hilts, *Boston Strangler: New Clues, New Mysteries: Forensic Team Finds Evidence that Could Prove Albert DeSalvo Wasn't the Spree Killer*, TORONTO STAR, Dec. 30, 2001, at F08. The family of Albert DeSalvo, a.k.a. the "Boston Strangler," believes DeSalvo confessed to the grisly 1960s murders only to win lucrative book and movie deals. *See id.* DeSalvo attempted to "market himself by making 'choker' necklaces and offering to sing on a record called 'Strangler in the Night.'" *See id.* DeSalvo was fatally stabbed in prison in 1973. *See id.* New DNA evidence indicates that DeSalvo may not have committed the murders to which he confessed. *See id.*

10. *See* Rebecca Traister & Ian Blecher, *Can Taliban Kid Get a Book Deal? Agents Reach for 11-Foot Poles*, N.Y. OBSERVER, Jan. 14, 2002 (reporting that any money received from a film or book deal would purportedly be used to pay for the legal defense of their son).

11. *Id.*

12. Refer to notes 51–87 *infra* and accompanying text (discussing Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991)).

13. Refer to notes 39–54 *infra* and accompanying text (explaining the development of notoriety-for-profit laws following the Son of Sam murders in New York in the 1970s).

14. Refer to notes 60–87 *infra* and accompanying text. The First Amendment reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

15. Refer to notes 1–7 *supra* and accompanying text.

16. *See* Sean J. Kealy, *A Proposal for a New Massachusetts Notoriety-for-Profit Law:*

constitutional challenges is anything but clear. Only one challenge to a Son of Sam law has ever reached the U.S. Supreme Court. In 1991, the Court struck down New York's statute in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,[17] due to its overinclusiveness.[18] However, the Court may have left the door open for less intrusive and more narrowly-written Son of Sam laws.[19]

This Comment argues that Texas's original Son of Sam law falls victim to the same pitfalls as the ill-fated and unconstitutional New York statute, but that recent changes to the Texas law strengthen its constitutional standing.[20] Part II of this Comment reviews the development of Son of Sam laws and traces the history of the *Simon & Schuster* case. Part III examines the laws of several states and how those statutes have fared under court challenges. Part IV returns to the Texas statute, discussing its current language and comparing it to the New York law, as written at the time of *Simon & Schuster*. Part IV also evaluates how the recent amendment to the Texas law strengthens its constitutional foundation.[21] Finally, this Comment suggests an improved model for Son of Sam laws, concluding that the standard set by the Supreme Court in *Simon & Schuster* is attainable with reasonable modifications to current laws.[22]

The Grandson of Sam, 22 W. NEW ENG. L. REV. 1, 3–5 (2000) (describing two governmental purposes of notoriety-for-profit laws: (1) preventing the criminal from benefiting financially from his wrongdoing, and (2) compensating victims and their families in the event that the offender does attempt to benefit financially).

17. 502 U.S. 105 (1991).

18. *See id.* at 121, 123.

19. *See id.* at 123 (holding that "[t]he State's interest in compensating victims from the fruits of crime is a compelling one, but the [New York] Son of Sam law is not narrowly tailored to advance that objective").

20. For the new amendments, see TEX. CRIM. PROC. CODE ANN. § 59.06 (Vernon Supp. 2002) (providing administrative proceedings to govern the disposition of forfeited property).

21. Son of Sam laws target criminals who attempt to profit from the crimes they commit. These laws should be distinguished from recent efforts to prevent third parties from dealing in crime-related memorabilia. Although the issues are closely connected, this Comment focuses primarily on the criminal/profit controversy and only touches on third-party profiting to the extent that the laws overlap.

22. Compelling arguments arise on both sides of the question of whether the U.S. Supreme Court was correct in suggesting that Son of Sam laws could be drafted without violating the First Amendment; however, that question is beyond the scope of this Comment. The goal of this Comment is not to provide critical commentary on the Supreme Court's framework for constitutionality; rather, it is an evaluation of the current Texas law, utilizing the framework established by the Court.

II. BACKGROUND

A. The Development of Son of Sam Laws

The 1889 case of *Riggs v. Palmer*[23] provides an early example of the law's disapproval of criminals profiting from their crimes.[24] Sixteen-year-old Elmer Palmer was slated to inherit a large amount of property from his grandfather.[25] Rather than risk the possibility that his grandfather might change his will before dying naturally, Elmer took it upon himself to secure his inheritance by killing his grandfather.[26] When he tried to claim his bequest, the New York trial court denied the claim.[27] Applying principles of equity, the appellate court affirmed the decision, stating: "No 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."[28] It would be almost ninety years before any state legislature would codify those sentiments.[29]

In the summer of 1977, a series of murders of young women in New York left the city paralyzed with fear and created a media frenzy.[30] Before the investigation was complete, news had spread that publishers were offering to pay a huge sum of money for the

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23. 22 N.E. 188 (N.Y. 1889).

24. *Id*. at 190.

25. *See id*. at 188–89 (noting that at the time his will was executed, the testator "owned a farm, and considerable personal property").

26. *See id*. at 189 (noting that Palmer poisoned his grandfather).

27. *See id*. at 189, 191.

28. *See id*. at 190. The appellate court agreed that, generally speaking, the purpose behind the state's probate statutes should be followed to the letter. *Id*. at 189. However, the court reasoned, "it never could have been [the legislature's] intention that a donee who murdered the testator to make the will operative should have any benefit under it." *Id*. The court, recognizing that the legislature does not always draft laws that "express their intention perfectly," explained that "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter [of the statute]." *Id*. In some cases, therefore, judges are to use "rational interpretation" to determine the intent of the legislature. *Id*.

The court also noted that the decision would not actually take any property away from Palmer, which might have constituted an unauthorized additional punishment on him. *Id*. at 190. Rather, it would simply prevent him from acquiring new property that would effectively reward him for his crime. *Id*.

29. *See* Martin S. Goldberg, Note, *Publication Rights Agreements in Sensational Criminal Cases: A Response to the Problem*, 68 CORNELL L. REV. 686, 687 nn.5–6 (1983).

30. *See New York's Son of Sam Law Held Unconstitutionally Over-Inclusive*, 19 J. CONTEMP. L. 366, 371 (1993) (recounting that the serial murderer left a note at one of his crime sites and signed it "'Son of Sam'"). For more information about the Son of Sam murders, see generally David Abrahamsen, CONFESSIONS OF SON OF SAM (1985). *See also* Michael Newton, THE ENCYCLOPEDIA OF SERIAL KILLERS: A STUDY OF THE CHILLING PHENOMENON, FROM THE "ANGELS OF DEATH" TO THE "ZODIAC KILLER" 15–18 (2000).

rights to the killer's story.[31] In hasty response, the New York legislature passed Executive Law section 632-a, popularly deemed the "Son of Sam" law.[32]

The Son of Sam law was designed to prevent criminals from profiting from their crimes through the commercial exploitation of their stories.[33] The law was intended to "'ensure that monies received by the criminal under such circumstances . . . first be made available to recompense the victims of that crime for their loss and suffering.'"[34] To achieve that goal, the law required that any entity contracting with anyone accused or convicted of a crime supply a copy of the contract to the Crime Victims Compensation Board and pay the board any income earned pursuant to that contract.[35] The money would remain in escrow for five years, during which time a victim could bring a civil action against his or her alleged perpetrator.[36] If the civil action was successful, the funds would be used to satisfy any judgment

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31. *See* 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, 201 (1996).

32. N.Y. EXEC. LAW § 632-a (McKinney 2002); *see also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 108 (1991) (discussing the context and haste with which the statute was enacted).

33. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 724 F. Supp. 170, 172 (S.D.N.Y. 1989) (communicating that the statute addressed profits generated by, but not exclusively limited to, books, movies, magazine articles, and television shows).

34. *Simon & Schuster*, 502 U.S. at 108 (quoting Assembly Bill Memorandum Re: A 9019, July 22, 1977, *reprinted in* Legislative Bill Jacket, 1977 N.Y. Laws, ch. 823). Ironically, the law never applied to David Berkowitz, the killer known as Son of Sam. Berkowitz was found incompetent to stand trial, which exempted him from the law. *See id*. at 111. Nevertheless, Berkowitz voluntarily donated the royalties he received from a book chronicling his criminal escapades to his victims or their estates. *See id*. Today, Berkowitz claims to be a born-again Christian and is actively working against the ability of third-parties to sell memorabilia with his likeness. *See ABC News: 20/20* (ABC television broadcast, Nov. 7, 2001) (interviewing David Berkowitz and reporting on the legality of Internet sales of crime souvenirs).

35. *See Simon & Schuster*, 502 U.S. at 108. Specifically, the Court quoted the law, stating:

> 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.

Id. at 109 (quoting N.Y. EXEC. LAW § 632-a(1)).

36. *See id*. at 109–10.

rendered.[37] If no actions were pending after five years, the board would then be required to pay the escrow funds to the accused.[38]

B. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board

The New York Son of Sam law was little used until a mobster named Henry Hill gained notoriety and significant wealth from a book that documented his life of crime.[39] Arrested in 1980 on drug charges, Hill exchanged testimony against his former associates for immunity from prosecution.[40] At the time of *Simon & Schuster*, Hill was living under the security of the Federal Witness Protection Program.[41]

In 1981, Hill contracted with an author named Nicholas Pileggi to write a biography detailing Hill's life of crime.[42] The pair then entered into a publishing agreement with Simon & Schuster, Inc.[43] Hill and Pileggi worked closely together for years, and their collaboration resulted in *Wiseguy: Life in a Mafia Family*, published in January 1986.[44] The book provided a glimpse into the day-to-day life of a member of the Mafia.[45] In the book, Hill recounted some of his most ambitious crimes, including the theft of six million dollars from Lufthansa Airlines and a point-shaving scheme with the Boston College basketball team during the 1978–79 season.[46] The book became

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37. *See id*.

38. *See id*. A controversial portion of this law defined a "person convicted of a crime" to include "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." *Id*. at 100 (quoting N.Y. EXEC. LAW § 632-a(10)(b)).

39. *See id*. at 111–12 (noting that those who had been subject to the law "[had] all become well known for having committed highly publicized crimes," including "Jean Harris, the convicted killer of 'Scarsdale Diet' Doctor Herman Tarnower; Mark David Chapman, the man convicted of assassinating John Lennon; and R. Foster Winans, the former Wall Street Journal columnist convicted of insider trading").

40. *Id*. at 112.

41. *Id*.

42. *Id*.

43. *Id*.

44. *Id*. (noting that the two "talked at length virtually every single day, ... spent more than three hundred hours together[,]" and generated "more than six linear file feet" of notes documenting their conversations (quotation marks omitted)); *see* NICHOLAS PILEGGI, WISEGUY: LIFE IN A MAFIA FAMILY (1985).

45. *See Simon & Schuster*, 502 U.S. at 112 (providing a detailed account of Hill's twenty-five year career as a mobster).

46. *See id*. The Court seemed especially amused by Hill's description of the preferential treatment Mafia members received in prison. *Id*. at 112–13. Describing his prison-time as "a wiseguy convention," Hill recounted:

> It was wild. There was wine and booze, and it was kept in bath-oil or after-shave

a bestseller and was the basis of the award-winning film, *Goodfellas*.[47]

The promise of large royalties for Hill did not escape the attention of the New York State Crime Victims Board ("the Board").[48] Consequently, the same month the book was published, the Board ordered Simon & Schuster to submit copies of the contract the publisher had with Hill, turn over all records of payments made to him, and suspend any further payments.[49] At that point, Simon & Schuster already had paid approximately $100,000 to Hill's agent and was holding almost $28,000 in future payments.[50]

1. The District Court Opinion. Simon & Schuster brought suit against the Board in August 1986, in the Southern District of New York, seeking a declaration that New York's Son of Sam law violated the First and Fourteenth Amendments of the U.S. Constitution and an injunction barring enforcement of the statute.[51] The court granted summary judgment in favor of the Board, finding that the law did "not directly affect expressive activity and that it [was] directed at nonspeech activity."[52] Therefore, the court reasoned, strict scrutiny did not apply, and it instead applied a lesser standard of review.[53] The court found that "any incidental restriction on First Amendment freedom imposed by section 632-a is no greater than is essential for the

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> jars. . . . We had a stove and pots and pans and silverware stacked in the bathroom. We had glasses and an ice-water cooler where we kept the fresh meats and cheeses. When there was an inspection, we stored the stuff in the false ceiling, and once in a while, if it was confiscated, we'd just go to the kitchen and get new stuff.
>
> . . . We never ran out of booze, because we had hacks bringing it in six days a week. Depending on what you wanted and how much you were willing to spend, life could be almost bearable.

See id. at 113–14 (quotation marks omitted) (quoting PILEGGI, *supra* note 44, at 150–51).

47. *See id*. The film, directed by Martin Scorsese, was nominated for the Academy Award for best film in 1990. *See* Internet Movie Database, *Awards for Goodfellas*, *at* http://www.us.imdb.com/Tawards?0099685 (last visited Dec. 30, 2002). However, it lost the Oscar to *Dances with Wolves*. *See* ROBERT OSBORNE, 65 YEARS OF THE OSCAR: THE OFFICIAL HISTORY OF THE ACADEMY AWARDS 306 (1994).

48. *See Simon & Schuster*, 502 U.S. at 114.

49. *Id*.

50. *Id*.

51. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 724 F. Supp. 170, 172–73 (S.D.N.Y. 1989), *aff'g*, Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990), *rev'd*, 502 U.S. 105 (1991).

52. *Id*. at 178–79 (explaining that "the interest in compensating victims does not involve suppressing speech, but merely attaching the proceeds of that speech for the benefit of the victim").

53. *See id*. at 178.

government's interest in compensating crime victims," and thus, the court concluded that the statute was not unconstitutional.[54]

2. The Appellate Court Opinion. The Second Circuit affirmed the district court's judgment, but under different reasoning.[55] The court found that the law imposed "a direct, rather than an incidental, burden on speech" and that, therefore, strict scrutiny applied.[56] In applying the higher level of scrutiny, the court found that New York had a compelling interest in preventing criminals from profiting from their crimes while victims went uncompensated for their victimization.[57] The court concluded that section 632-a was sufficiently narrowly tailored to meet the State's interest.[58] Thus, the New York Son of Sam law did not violate the First or Fourteenth Amendment.[59]

3. The Supreme Court Opinion. Shortly after the New York law went into effect, the federal government[60] and a number of other states enacted similar legislation,[61] prompting

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54. *Id*. at 179. The court also rejected Simon & Schuster's claim that the law violated the Fourteenth Amendment because it was "overbroad and vague." *Id*. at 179–80. The court determined that the law clearly identified how, when, and to whom the provision would be applied. *Id*.

55. *See* Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 778 (2d Cir. 1990), *rev'd*, 502 U.S. 105 (1991).

56. *Id*.

57. *Id*. at 782 ("Our society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for financial loss occasioned by the crime.").

58. *Id*. at 783 (rejecting Simon & Schuster's claim that the statute was both over and underinclusive).

59. *See id*. at 784. Judge Newman's strong dissenting opinion agreed that the strict scrutiny test applied but that the majority had used circular reasoning in concluding that the statute was narrowly drawn. *Id*. at 784 (Newman, J., dissenting). Justice O'Connor would later follow Judge Newman's reasoning in writing for the U.S. Supreme Court. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115–23 (1991).

60. The federal Son of Sam statute provides:

> Upon the motion of the United States attorney made at any time after conviction of a defendant for an offense under section 794 of this title or for an offense against the United States resulting in physical harm to an individual, and after notice to any interested party, the court shall, if the court determines that the interest of justice or an order of restitution under this title so requires, order such defendant to forfeit all or any part of proceeds received or to be received by that defendant, or a transferee of that defendant, from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of that defendant's thoughts, opinions, or emotions regarding such crime.

18 U.S.C. § 3681 (2001).

61. After the New York law was implemented, forty-two states enacted similar legislation. National Center for Victims of Crime, *FYI: Notoriety for Profit/"Son of Sam" Legislation*, *at* http://www.ncvc.org/Infolink/Info65.htm (last visited Dec. 30, 2002).

the U.S. Supreme Court's decision to grant certiorari and review the law.[62] Justice O'Connor authored the Court's majority opinion, first explaining 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."[63] She emphasized that financial regulation offends the First Amendment because it allows the government to "effectively drive certain ideas or viewpoint from the marketplace."[64] Justice O'Connor referred to *Leathers v. Medlock*,[65] a case decided earlier the same year, in which the Court invalidated a tax imposed on certain media based on the content of their speech.[66] Justice O'Connor compared the two cases and concluded that New York's Son of Sam law also constituted a content-based statute.[67] Explaining the Court's determination of content-based speech, Justice O'Connor wrote that the statute "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."[68] Justice O'Connor concluded that "the [Son of Sam] statute plainly imposes a financial disincentive only on speech of a particular content."[69]

The Court then determined that strict scrutiny is the proper level of review for statutes that constitute content-based restrictions on free speech.[70] The Court explained that under strict scrutiny analysis, to justify this type of restriction, the State must show it has a compelling interest and that the statute is narrowly tailored to meet that interest.[71] The Court left no doubt that the State satisfied the first prong of the strict scrutiny analysis, determining that the State of New York had two compelling interests: compensating

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62. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 498 U.S. 1081 (1991). Justices Blackmun, *Simon & Schuster*, 502 U.S. at 123–24 (Blackmun, J., concurring in the judgment), and Kennedy, *id.* at 124–28 (Kennedy, J., concurring in the judgment), wrote concurring opinions, and Justice Thomas took no part in the decision. *Id.* at 123.

63. *Id.* at 115–16 (describing this notion as being "engrained in our First Amendment jurisprudence" and "so 'obvious' as to not require explanation").

64. *Id.* at 116.

65. 499 U.S. 439 (1991).

66. *Simon & Schuster*, 502 U.S. at 115–16 (referring to *Leathers*, 499 U.S. at 447–48).

67. *Id.* at 116.

68. *Id.*

69. *Id.*

70. *Id.* at 117–18.

71. *Id.*

victims[72] and ensuring that criminals did not profit from their crimes.[73]

However, the Court found that the statute failed to meet the second prong of the strict scrutiny test because it was "significantly overinclusive" and thus not sufficiently narrowly tailored.[74] The statute, the Court explained, applied to any work where an author expressed any thoughts or recollections of his crime, "however tangentially or incidentally."[75] Further, the statute defined "person convicted of a crime" to include anyone who had merely admitted to having committed a crime at any time in his past, even if he had never actually been accused or convicted.[76] The Court found that these provisions would have affected a number of important, respected literary works including *The Autobiography of Malcolm X*,[77] Henry David Thoreau's *Civil Disobedience*,[78] and *The Confessions of Saint Augustine*,[79] the last of which mentioned an instance of stealing pears from a vineyard.[80]

Noting that these works would probably have been written even if the law had been in place, the Court still shuddered at the idea that many great works of literature could have been affected by the extreme reach of the law.[81] As Justice O'Connor wrote,

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72. *See id*. at 118–19 (noting that "[e]very State has a body of tort law serving exactly this interest").

73. *See id*. at 119. Justice O'Connor called this interest a "fundamental equitable principle," explaining 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.'" *Id*. (quoting Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889)). The Court rejected the Board's third compelling interest argument, defining the State's interest as "ensuring that criminals do not profit from storytelling about their crimes before their victims have [had] a meaningful opportunity to be compensated for their injuries." *Id*. at 119–20 (quotation marks omitted). The Court refused to accept a differentiation between profits attained through storytelling and other assets, finding that any interest by the State in classifying such assets was "hardly compelling." *Id*. at 120.

74. *Id*. at 121.

75. *Id*.

76. *Id*. Specifically, the law included "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 2002).

77. A. HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X (1964).

78. HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (1849), *in* HENRY DAVID THOREAU, WALDEN AND DISOBEDIENCE (Paul Lauter ed., 2000).

79. SAINT AUGUSTINE, THE CONFESSIONS OF SAINT AUGUSTINE (Peter Pauper Press 1935).

80. *See Simon & Schuster*, 502 U.S. at 121. The Court also mentioned Jesse Jackson and Bertrand Russell, both jailed in relation to peaceful protests, as illustrations of the statute's overinclusive reach. *Id*. at 122.

81. *See id*. & n.* (noting that under any analysis, the Son of Sam law "is too overinclusive").

"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."[82] The law would include anyone who simply admitted to committing a crime, even if the crime occurred long ago and was not the primary subject of the work.[83] The Court concluded that a law requiring a prominent figure who wrote a book late in life and referred to a youthful indiscretion to give over all income received from that book for five years indicates that the statute was not narrowly tailored to meet the State's objective.[84] Thus, the Court struck down the statute as unconstitutional because it failed to pass strict scrutiny analysis.[85]

Importantly, the Court ended its opinion reiterating that the decision applied merely to the New York law as drafted.[86] The Court hinted that more narrowly tailored legislation would likely withstand constitutional evaluation.[87]

III. SON OF SAM LAWS FOLLOWING *SIMON & SCHUSTER*

In the aftermath of the *Simon & Schuster* case, several states amended their laws to account for the constitutional violations the Supreme Court outlined.[88] Since then, challenges have met with varying success. However, the Court has not reviewed any of the revised statutes, leaving open the ultimate question of the constitutionality of such statutes.[89] Prominent cases involving the statutes of New York, Washington, and California may be indicative of the fate of Son of Sam laws nationally.

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82. *Id*. at 122.

83. *See id*. at 121–22 (finding that the broad definition of a "person convicted of a crime" includes "any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted" (citing N.Y. EXEC. LAW § 632-a(10)(b)).

84. *See id*. at 123.

85. *Id*.

86. *Id*.

87. *See id*. ("The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment.").

88. *See* CAL. CIV. CODE § 2225 (West 2002) (amended in 1992, 1994, and 1995); COLO. REV. STAT. § 24-4.1-201 (West 2002) (amended in 1988 and 1994); IOWA CODE ANN. § 910.15 (West 1994) (amended in 1992); KAN. STAT. ANN. § 74-7319 (1992) (amended in 1992); N.Y. EXEC. LAW § 632-a (McKinney 2002) (amended in 1992); 42 PA. CONS. STAT. ANN. § 8312 (West 1998) (amended in 1995); TENN. CODE. ANN. § 29-13-403 (2000) (amended in 1994); VA. CODE ANN. § 19.2-368.20 (Michie 2001) (amended in 1992)); *see also* Kealy, *supra* note 16, at 12.

89. Refer to notes 70–114 *supra* and accompanying text.

A. New York

At the time of the *Simon & Schuster* decision, the New York Crime Victims Board had escrow accounts associated with five criminals.[90] Striking down the state's Son of Sam law stripped the Board of its authority to hold these funds.[91] The legislature responded in 1991 by amending its law to correct the shortcomings the Supreme Court outlined in *Simon & Schuster*.[92]

The amendments improve on the old law in a number of ways. First, the new language limits the provision to only those convicted of a crime, rather than anyone who simply admits to having ever committed a crime,[93] a problem at the heart of the Supreme Court's finding of overinclusiveness.[94] The amendment avoids the type of unintended outcomes the Court suggested could occur due to the overreaching nature of the old law.[95]

The language of the new law also shifts its focus away from speech-related activities to more generally targeting "profits of the crime."[96] By redirecting its focus, the law minimizes the chilling effect a speech-directed restriction creates on free speech

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90. Orly Nosrati, Note & Comment, *Son of Sam Laws: Killing Free Speech or Promoting Killer Profits?*, 20 WHITTIER L. REV. 949, 962 (1999).

91. *See id*. (noting that the decision to remove the Board's authority was made after it was determined that "neither the Board nor the State of New York had any claim to the funds").

92. *See id*. N.Y. EXEC. LAW § 632-a(3) was amended to read:

> [A]ny crime victim shall have the right to bring a civil action in a court of competent jurisdiction to recover money damages from a person convicted of a crime of which the crime victim is a victim, or the representative of that convicted person, within three years of the discovery of any profits from a crime or funds of a convicted person, as those items are defined in this section.

Id.

93. *Id*. § 632-a(1)(c)[i]–[iii].

94. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 121–23 (1991) ("[T]he statute is, to say the least, not narrowly tailored to achieve the State's objective . . . .").

95. Refer to notes 55–59 *supra* and accompanying text (discussing the *Simon & Schuster* appellate court opinion).

96. The statute defines "profits from a crime" as:

> (i) [A]ny property obtained though 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, 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.

N.Y. EXEC. LAW § 632-a(1)(b).

rights.[97] Any proponent of the new law would undoubtedly argue that it no longer constitutes a content-based speech restriction.[98]

Finally, the new law narrows the scope of its application to income obtained through the commission of a crime.[99] This change underscores the Court's concern that an author who even mentions a crime "tangentially or incidentally"—such as in a footnote—would be subject to confiscation of his or her profits.[100] The amended language allows the law to more directly target writings that relate to the commission of a crime, as opposed to merely mentioning it in passing.[101]

The first challenge to the revised New York law was brought by the 1995 case of *Sandusky v. McCummings*.[102] In *Sandusky*, a seventy-two-year-old mugging victim sought $4.3 million in recovery from a perpetrator who had received that amount for injuries sustained when a police officer shot him during the mugging.[103] The New York Supreme Court granted the perpetrator's motion to dismiss, finding that, although the intent of the legislature was to prevent criminals from profiting from their crimes, this situation did not fit within the definition of "profits from the crime."[104] The court explained that the shooting of the perpetrator by the police officer was "an intervening event that broke any causal connection with the crime itself."[105]

Although this challenge to the amended New York law did not address the free speech issue, it did suggest an initial acceptance of the post-*Simon & Schuster* revisions.[106] The court

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97. *See id.* § 632-a(1)(a)–(c) (placing great importance on the definitions of "crime," "profits from a crime," and "funds of a convicted person").

98. Refer to notes 210–12 *infra* and accompanying text (finding that the new law removes the content-based character of speech-focused laws).

99. *See* N.Y. EXEC. LAW § 632-a(1)(b) (defining "profits from a crime").

100. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 121 (1991) ("[T]he statute applies to works on *any* subject, provided that they express the author's thoughts or recollections about his crime . . . .").

101. *See* N.Y. EXEC. LAW § 632-a(1)(b).

102. 625 N.Y.S.2d 457 (N.Y. Sup. Ct. 1995).

103. *Id.* at 457–58. New York Transit Authority Police Officers Christine Mead and Manuel Rodriquez witnessed the victim being beaten. *Id.* at 458. Officer Rodriguez fired five shots, hitting Bernard McCummings, the perpetrator, twice in the back. *Id.* The shooting left McCummings paralyzed for life. *Id.*

104. *Id.* at 460 (noting that the legislature did not enact a law allowing a crime victim to seek any income received by a perpetrator from any source whatsoever). Instead, the legislature "limited the source of recovery to income generated from the commission of the crime of which the defendant was convicted." *Id.* (quotation marks omitted) (quoting N.Y. EXEC. LAW § 632-a(1)(b)). The court stated that its job is to interpret the laws written by the legislature, not "to correct supposed errors, omissions or defects in the legislation." *Id.*

105. *Id.*

106. *See id.* at 458. The court mentions *Simon & Schuster* in a footnote, stating,

supported the law by analyzing its statutory construction, suggesting that if the facts had fit the law, the victim might have prevailed.[107] However, because the case simply defined a term of art and did not address the First Amendment questions still at issue, the case was of relatively little precedential value for other states in evaluating the constitutional bases of their laws.

B. Washington

One of the most high-profile cases of the 1990s occurred in the State of Washington, where a former grade-school teacher admitted to having a relationship with a thirteen-year-old student.[108] The relationship produced two children, and the teacher, Mary Kay Letourneau, was sent to prison for seven and a half years.[109] The sentencing court imposed on Letourneau a restriction against profiting from the commercialization of her crimes.[110] The appellate court overturned that restriction, stating that it would "frustrate the purposes" of Washington's Son of Sam law.[111] The legislature, the court noted, intended the law to

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"[t]he Legislature amended the law in 1991 to overcome [the] infirmities [outlined by the Supreme Court]." *Id.* at 458 n.2. The court simply accepted the revised Son of Sam law as valid, focusing exclusively on the language of the statute. *Id.*

107. *See id.* at 459–60 ("Much as this court sympathizes with plaintiff's plight, the judicial function is to interpret, declare, and enforce the law, not to make it . . . .").

108. State v. Letourneau, 997 P.2d 436, 440 (Wash. Ct. App. 2000). The case received national and international attention. *See, e.g.*, Henry Bailey, *Teacher Pleads Guilty to Sex with Pupil*, COM. APPEAL (Memphis), Aug. 8, 1997, at A2; Luke Burbank, *Teacher Jailed for Raping Student*, S. CHINA MORNING POST, Nov. 16, 1997, at 8; Hugo Gurdon, *Rape Boy 'Wanted Baby,'* DAILY TELEGRAPH (London), Aug. 23, 1997, at 14; *Teacher Faces Jail for Rape*, IRISH TIMES, Nov. 15, 1997, at 13; *Teacher Faces Jail in Rape*, BOSTON GLOBE, Aug. 8, 1997, at A16; *Teacher Who Bore Boy's Child Guilty of Rape*, DALLAS MORNING NEWS, Aug. 8, 1997, at 17A.

109. *Letourneau*, 997 P.2d at 438–40. Letourneau pleaded guilty in August 1997 to two counts of second degree rape of a child. *Id.* at 438. She had given birth to the couple's first child that May. *Id.* at 440. The court imposed an eighty-nine month sentence, with 180 days of confinement in the county jail, and suspended the remainder of her sentence if she complied with certain conditions, including no contact with the victim. *Id.* However, two weeks after being released from the county jail, Letourneau was found alone with the victim in her car. *Id.* The court revoked the suspension and ordered her to serve the eighty-nine month sentence in the state prison. *Id.* Letourneau gave birth to the couple's second child in October 1998. *See id.*

110. *See id.* The main justification for the court imposing such a restriction was the recommendation of mental health professionals who had evaluated Letourneau and concluded that she needed to be shielded from the media as part of her treatment. *Id.* at 442. The professionals noted that she had used the media to convince herself and others that she was different from other sex offenders, and that interviews by the media undermined her treatment, increasing the likelihood that she would commit the offenses again. *Id.* at 442–43. However, the appellate court rejected that argument, finding that the lower court did not restrict Letourneau's ability to conduct interviews, only from profiting as a result of them. *See id.*

111. *Id.* at 443. The basis of the crime actually emanated from the trial court, not

compensate victims of crime through the seizure of property from the perpetrator.[112] Any restriction on a criminal's ability to earn money would likewise limit the ability of a victim to recover compensation for his or her injuries.[113] Although the court declined to review the First Amendment claims, it indirectly validated the law by promoting its use in compensating victims.[114] This case represents another judicial nod toward the constitutionality of Son of Sam laws nationally.

C. California

California also revised its law in response to the *Simon & Schuster* decision, ultimately adopting changes to Civil Code section 2225 in 1994.[115] The California changes were similar to those made to the New York law, limiting the scope to persons actually convicted of felonies[116] and excluding crimes mentioned in mere passing, "as in a footnote or bibliography."[117] Recent amendments have expanded the law to require forfeiture of profits from the sale of any item whose value "is enhanced by the notoriety gained from the commission of a felony for which a convicted felon was convicted."[118]

The first prong of the statute was recently challenged in the highly-publicized case of *Keenan v. Superior Court*,[119] whose unusual facts indicate the promise of a hit movie.[120] In 1963, a

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from a statute. The appellate court noted that the Son of Sam law constitutes the legislature's "means of teaching convicted felons that 'crime does not pay.'" *Id.* Specifically, the purposes of the law are to compensate victims of crime and prevent criminals from profiting from their crimes. *See id.*

112. *See id.* ("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.").

113. *Id.*

114. *See id.* ("These statutes establish the means by which the Legislature has chosen to advance these compelling state interests . . . .").

115. *State Uses "Son of Sam" Law for First Time*, L.A. TIMES, Apr. 15, 1995, at A15. The law has since been amended to include memorabilia relating to a crime. Refer to Part II.B.3 *supra*.

116. *See* CAL. CIV. CODE § 2225(b)(1) (West 2002). The law subjects to penalty "[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 convicted felon was convicted." *Id.*

117. *Id.* § 2225(a)(7) (defining "story").

118. *Id.* § 2225 (a)(10) (defining "profits").

119. 85 Cal. Rptr. 2d 417 (Cal. Ct. App. 1999), *cert. denied*, 123 S. Ct. 94 (2002).

120. *See* Harriet Chiang, *Sinatra Kidnap Goes Back to Court: Jurists to Decide if Criminal Can Sell Movie-Rights of Story*, S.F. CHRON., Dec. 7, 2001, at A21. The law was first challenged in 1995 when Attorney General Dan Lungren sought proceeds that Joe Hunt and Rodney Alcala, both death row inmates, received from the commercialization of their stories. *See* Nosrati, *supra* note 90, at 973–74. The case was dismissed due to

high school student named Barry Keenan devised a plan to make some easy money.[121] He and two friends kidnapped Frank Sinatra, Jr., son of famed singer Frank Sinatra, from a hotel room and demanded a $240,000 ransom for his safe return.[122] Sinatra was released after only a few days, and Keenan served a prison term for kidnapping.[123]

Thirty-five years later, Keenan sought to cash in on his experience, attempting to sell the rights to the story.[124] Sinatra sued under California's Son of Sam law, demanding his "beneficiary's interest."[125] The lower court sided with Sinatra, and the appellate court affirmed.[126]

The appellate court found that the California law, as revised in 1994, did not carry the same defects as the original New York law.[127] Specifically, the court determined that the law was not "triggered by a 'tangential' or 'incidental' reference to a past criminal act," but only by stories that reflected the crime "for which [the criminal] was convicted."[128] The law specifically excluded any "'passing mention of the felony, as in a footnote or bibliography.'"[129] Further, the court found the amendment, limiting application of the law to convicted felons, sufficient to survive constitutional challenges.[130] Therefore, the court rejected Keenan's overinclusiveness claim.[131]

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inadequate evidence of pecuniary gains. *See id*. at 974.

121. *Cash for Crime: Ex-Con Challenges State's "Son of Sam" Law*, SAN DIEGO UNION-TRIB., Dec. 10, 2001, at B6 [hereinafter *Cash for Crime*].

122. *Id*.

123. *See* Chiang, *supra* note 120.

124. *See Cash for Crime*, *supra* note 121. Keenan agreed to be interviewed for a *New Times Los Angeles* magazine story about the kidnapping, which was then to be sold to the media, with the profits being shared by Keenan, the reporter, and the magazine publisher. *Keenan*, 85 Cal. Rptr. 2d at 418. The magazine published the story *Snatching Sinatra* in its January 15, 1998 issue. *Id*. Keenan sold the movie rights to his story to Columbia Pictures for $485,000. *Cash for Crime*, *supra* note 121.

125. *Keenan*, 85 Cal. Rptr. 2d at 418.

126. *See id*. at 423 (rejecting Keenan's narrow single point of contention: that California's statute is overinclusive).

127. *See id*. at 422 (analyzing the California law using the Supreme Court's opinion in *Simon & Schuster*).

128. *See id*. (contrasting the New York statute found to be overinclusive in *Simon & Schuster*, in which the broad definition of "person convicted of a crime" encompassed works in which an author confessed to a crime for which he had never been accused or convicted, with the California statute that "does not allow the state to escrow or otherwise confiscate the income of an author who was never actually accused or convicted").

129. *See id*. (quoting CAL. CIV. CODE § 2225(a)(7) (West 1995) (defining "story" as "a depiction, portrayal, or reenactment of a felony")).

130. *Id*. (noting that the amendment "does not allow the state to escrow or otherwise confiscate the income of an author who was never actually accused or convicted").

131. *Id*. at 423. The court also affirmed the lower court's rejection of an ex post facto argument, finding that section 2225 "does not retroactively alter the definition of any

Keenan appealed to the California Supreme Court, which overturned the appellate court in February 2002.[132] Using *Simon & Schuster* as its guide,[133] the court found that the California law, like the New York law, was not narrowly tailored because it "penalize[d] the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims."[134] The court observed that section 2225(b)(1) not only confiscated funds received from the telling of the story of the crime, but seized "*all* a convicted felon's proceeds from speech or expression on *any* theme or subject which includes the story of the felony, except by mere passing mention."[135] The court concluded that the effect of the statute is to discourage "the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds."[136]

The *Keenan* court specifically rejected the California legislature's efforts to comply with *Simon & Schuster*.[137] First, the court rejected the legislature's attempt to limit the reach of the law to only those actually convicted of a felony.[138] The court further noted that the law still applies to works authored by a felon that merely discuss his criminal past without exploiting his crimes, such as a review of the criminal justice system or discussion of personal redemption.[139] Thus, the court found the law was not narrowly tailored to achieve the compelling interest of the State.[140]

Second, the *Keenan* court rejected the legislature's attempts to comply with *Simon & Schuster* by excluding works where the

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crime or increase the punishment for any criminal act." *Id*.

132. Keenan v. Super. Ct., 40 P.3d 718, 721 (Cal. 2002).

133. *See id*. at 725 ("We conclude the analysis of *Simon & Schuster* governs this case and renders section 2225(b)(1) invalid as well.").

134. *Id*. at 731.

135. *Id*.

136. *Id*.

137. *Id*. at 724 (rejecting plaintiff's argument that "section 2225 solved the *overinclusiveness* problem identified in *Simon & Schuster* because, unlike the New York statute, California's law applied only to convicted felons and exempted expressive materials which made mere 'passing mention' of the felony").

138. *See id*. at 722 (stating that "the California statute is still calculated to confiscate all income from a wide range of protected expressive works by convicted felons, on a wide variety of subjects and themes, simply because those works include substantial accounts of the prior felonies").

139. *See id*. at 732 (noting that "[m]ention of one's past felonies in these contexts may have little or nothing to do with exploiting one's crime for profit, and thus with the state's interest in compensating crime victims from the fruits of crime").

140. *See id*. at 733.

crime was merely mentioned in passing.[141] The court further noted that this exemption did not cure the broader flaws of the law implicated by the *Simon & Schuster* decision, observing:

> A statute that confiscates all profits from works which make more than a passing, nondescriptive reference to the creator's past crimes still sweeps within its ambit a wide range of protected speech, discourages the discussion of crime in nonexploitative contexts, and does so by means not narrowly focused on recouping profits from the *fruits of crime*.[142]

The *Keenan* court struck down the California law because, like the New York law in *Simon & Schuster*, it reached works beyond those necessary to meet the interest of the State in compensating victims from the fruits of the crime.[143] The U.S. Supreme Court denied certiorari in this case in October 2002,[144] suggesting that Son of Sam laws nationally face an uphill battle.[145]

IV. TEXAS'S SON OF SAM STATUTE

Texas's Son of Sam statute consists of two provisions in section 59.06 of the Code of Criminal Procedure.[146] The first

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141. *See id.* ("[N]othing in *Simon & Schuster* suggests the New York law could have cured its overinclusive effect simply by providing an exemption for tangential or incidental references.").

142. *Id*. (quotation marks omitted).

143. *See id.* at 734.

144. Sinatra v. Keenan, 123 S. Ct. 94 (2002).

145. Another California case may provide some insight into the judicial unwillingness to limit the ability of profiting from crime; however, this case concerns witnesses of a crime, not perpetrators. In the wake of publicity associated with the O.J. Simpson trial, California passed laws making it a crime for "a person to receive any payment or benefit for providing information about what he or she knows or reasonably should know is a crime, or where that person knows or reasonably should know that he or she may be called as a witness in a criminal prosecution." *See* Cal. First Amendment Coalition v. Lungren, No. C 95-0440-FMS, 1995 WL 482066, at *1 (N.D. Cal. Aug. 10, 1995). The idea was to limit the ability of witnesses to sell their stories. *See id.* at *1–*2 (revealing that the motivation behind the legislation was to limit the possibility of tainted jurors). For example, in the O.J. Simpson trial, the prosecution was unable to call a potential witness because she had already received $5,000 for appearing on the television tabloid show *Hard Copy* to discuss her knowledge of the suspect and the case. *See id.* at *2.

The California First Amendment Coalition, a professional journalism organization, sought and received a permanent injunction preventing the law from being enforced. *See id.* at *1. The court found that the laws constituted content-based regulations that failed to pass muster under strict scrutiny analysis, noting that the State's interests were not sufficiently compelling and that alternative, less restrictive means existed to achieve the State's interests. *See id.* at *5–*6. Additionally, the court held that the statutes were overbroad, similar to the New York statute struck down in *Simon & Schuster*. *See id.* at *7–*8. Although not aimed toward criminals, this case may be instructive as to the fate of future challenges to Son of Sam laws.

146. TEX. CRIM. PROC. CODE ANN. § 59.06(k)(1), (2) (Vernon Supp. 2002).

provision, like New York's original law, focuses on profits earned through expression of the crime in books, movies, and other media.[147] The second provision, added in 2001, targets profits from tangible items related to the crime.[148] Because the two prongs of the statute distinguish between speech and non-speech activities, the law would probably meet the same fate as the original New York law in *Simon & Schuster* and the California law in *Keenan*. However, by revising the law to eliminate the speech/non-speech distinction, Texas could create a constitutionally sound statute.

A. Comparison to the New York Law

The first prong of the Texas statute reads: "The attorney for the state shall transfer all forfeited property that is income from, or acquired with the income from, a movie, book, magazine article, tape recording, phonographic record, radio or television presentation, or live entertainment in which a crime is reenacted to the attorney general."[149] Similar to the New York law, the Texas law places a financial burden on the specific subject of speech and thus is presumptively invalid.[150] To overcome the presumption of unconstitutionality, the law must prove to be narrowly tailored to meet the state's compelling interest,[151] which the Texas statute does not seem to do.

The Supreme Court has already accepted the proposition that a state has a compelling interest in compensating victims of crime and preventing criminals from profiting from their crimes.[152] Therefore, for any state's law to pass constitutional muster, it must be narrowly tailored enough to meet that interest. Narrowly tailored does not mean that "there [can] be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[153]

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147. *See id.* § 59.06(k)(1).

148. *See id.* § 59.06(k)(2).

149. *See id.* § 59.06(k)(1).

150. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991))).

151. *See id.* at 118.

152. *See id.* at 118–19 ("There can be little doubt . . . that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them. . . . The State likewise has an undisputed compelling interest in ensuring that criminals do not profit from their crimes.").

153. *See* Bd. of Trs. v. Fox, 492 U.S. 469, 478 (1989) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

Notwithstanding the Supreme Court's stated position, the Texas statute makes no attempt to comport with the *Simon & Schuster* decision and still contains at least one of the fatal "narrowly tailored" flaws outlined by the Court. Like the original New York law, the Texas law applies to "works on *any* subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally."[154] Thus, the law applies to any expression of the crime, regardless of how significant or exploitative the mention of the crime might be. As such, the law "clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated."[155] Accordingly, because the Texas statute is apparently overinclusive, it is unlikely that the current Texas statute could survive a constitutional challenge.

B. The Murderabilia Amendment

1. What Is Murderabilia? One of the latest twists to the Son of Sam laws has been the emergence of an underground trade in objects associated with crime, especially murder.[156] These objects, known as "murder memorabilia" or "murderabilia," include manufactured items representative of criminals or crimes, such as murderer trading cards or figurines, and non-manufactured items associated with the criminals or crimes themselves.[157] Letters and paintings by inmates are especially popular, and items like hair and fingernail clippings from criminals also provide easy objects for criminals to cultivate and sell.[158] Charles Manson is probably the most popular figure in murderabilia, followed by such infamous criminals as John Wayne Gacy, Richard "Nightstalker" Ramirez, and cannibal Jeffrey Dahmer.[159]

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154. *See Simon & Schuster*, 502 U.S. at 121.

155. *See id.* at 122.

156. Interview with Andy Kahan, Director, Mayor's Crime Victims Assistance Office, in Houston, Tex. (Jan. 8, 2002) [hereinafter Interview with Kahan]. Kahan has been a leader in the movement to prevent the trade of murderabilia and worked with the Texas legislature to draft the murderabilia statute in 2001. *Id.*; *see also* Rosanna Ruiz, "*Murderabilia Bill" Puts Victims First: Perry Signs Law to Ban Criminal Profiteering*, HOUS. CHRON., Aug. 30, 2001, at 27A.

157. *See* Stepanek, *supra* note 5 (discussing the wide array of criminal memorabilia available for sale via the Internet).

158. *See id.*

159. *See* Interview with Kahan, *supra* note 156. Kahan said that some of the most notable items he has uncovered include a Pez candy dispenser in the likeness of John Wayne Gacy, a high school yearbook signed by Oklahoma City bomber Timothy McVeigh, foot scrapings from the "Railway Killer," Angel Resendez-Ramirez, and a Jeffrey Dahmer doll with a zipper along its belly. *Id.* Opening the zipper reveals tiny cloth body parts. *Id.*; *see also* Stepanek, *supra* note 5.

Buyers are plentiful in this macabre industry.[160] What was once an underground practice has entered the mainstream through the help of Internet auction sites like eBay and Yahoo.[161] Sites dedicated solely to the trade and collection of such items have also developed,[162] permitting dealers and buyers to enter into anonymous transactions and avoid scrutiny by an unsuspecting public.[163] They have also allowed inmates to skirt prison rules prohibiting transactions outside the prison walls by enabling agents to easily sell the paraphernalia on their behalf.[164]

Traditional Son of Sam laws do not prevent criminals from commercializing their crimes through non-speech-related activities.[165] Generally, those laws apply only to the recounting or reenactment of a crime through speech-related activities such as movies and books.[166] Murderabilia does not necessarily fit within the reach of the statutes, making it a legal, if unsavory, avenue for criminals to profit from their notoriety.[167]

Seeing murderabilia collected like baseball cards has enraged victims rights advocates, sparking a new wave of activism.[168] As Andy Kahan, Director of the Mayor's Crime Victims Office in Houston, Texas, and a leader in the fight against murderabilia, has said: "No one should be able to rob, rape and murder and then turn around and make a buck off of

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160. At its height, the murderabilia business saw 200–250 crime-related items up for sale on the major Internet auction sites. Interview with Kahan, *supra* note 156; *see also Online Extra: An Underground Market Moves to Mainstream America*, BUS. WK. ONLINE, Nov. 20, 2000, *at* http://businessweek.com/2000/00_47/b3708056.htm (last visited Jan. 15, 2003) (questioning Andy Kahan of the Houston Crime-Victims Office about his crusade against auctioning of "murderabilia" on eBay).

161. *See* Matt Schwartz, *eBay Will Prohibit Sales of "Murderabilia,"* HOUS. CHRON., May 9, 2001, at 25A. In May 2001, eBay abruptly changed its policy to prohibit these types of items from being sold on its auction site. *Id.* Initially, eBay resisted changing its policy, which required only that merchandise be legal. *Id.* The company claimed it did not want to be in the business of regulating morality on its site. *Id.*

162. *See, e.g.*, Supernaught.com, *at* http://www.supernaught.com (last visited Jan. 17, 2003). This site describes itself as "the best online source for contemporary and historical artifacts from the underside of American life." *Id.*

163. Interview with Kahan, *supra* note 156.

164. *See ABC News: 20/20*, *supra* note 34. Not all criminals condone the trade of murderabilia. The Son of Sam himself, David Berkowitz, has become an outspoken opponent of the practice. *Id.*

165. *See, e.g.*, 18 U.S.C. § 3681 (2000); FLA. STAT. ANN. § 944.512(1) (West 2001); TEX. CRIM. PROC. CODE ANN. § 59.01 (Vernon Supp. 2002).

166. *See, e.g.*, 18 U.S.C. § 3681 (requiring a defendant to forfeit profits they receive from the depiction of a crime "in a movie, book, newspaper, magazine, radio or television production").

167. *See, e.g.*, Mary Doclar, *Auctioning Crime Memorabilia Online Is Legal, but Critics Say It Is Not Right*, NEWS & OBSERVER, Aug. 9, 2000, at A6.

168. Interview with Kahan, *supra* note 156.

it."[169] Victims' advocates have taken the underground industry public and have asked lawmakers to join in the fight.

2. How the Laws Are Changing in Response. Texas has been one of the early leaders in amending its Son of Sam statute to close this ever-widening loophole in the standard notoriety-for-profit laws. During its 2001 session, the Texas legislature responded to this chilling phenomenon by enacting an amendment to the existing Son of Sam legislation.[170] The amendment, which took effect September 1, 2001, expanded the scope of the law to cover the value of tangible goods owned by a criminal that is increased due to the notoriety of the criminal.[171] The provision expands the restriction on criminals' profiting from their crimes, but ironically, it may also strengthen the state's claim of constitutionality.

Texas was not the first state to limit sales by criminals of items related to their crimes.[172] Although not specifically aimed at murderabilia, the language of New York's law, as revised following the *Simon & Schuster* decision, is broad enough to include murder memorabilia, effectively making it the nation's first murderabilia statute.[173] In 2000, California amended its law specifically to include murderabilia,[174] and Texas became the third state in 2001, modeling its law after California's.[175] Three other states have murderabilia laws pending.[176] Each statute uses

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169. *See ABC News: 20/20*, *supra* note 34.

170. TEX. CRIM. PROC. CODE ANN. § 59.06(k)(2) (Vernon Supp. 2002).

171. *Id*. The amendment provides:

> The attorney for the state shall transfer to the attorney general all income from the sale of tangible property the value of which is increased by the notoriety gained from the conviction of an offense by the person accused or convicted of the crime, minus the deduction authorized by this subdivision. The attorney for the state shall determine the fair market value of property that is substantially similar to the property that was sold but that has not been increased in value by notoriety and deduct that amount from the proceeds of the sale.

Id.

172. *See* Eric Berger, *Texas House Tentatively OKs Crime-Memorabilia Bill*, HOUS. CHRON., May 1, 2001, at A19 (noting that California expanded its Son of Sam law to include crime memorabilia in 2000).

173. Refer to notes 90–98 *supra* and accompanying text (discussing the statute's altered language as designed to target "profits of the crime" rather than specific speech-related activities).

174. *See Weekend Edition Saturday* (National Public Radio broadcast, May 20, 2000). Marc Klaas, whose daughter Polly was kidnapped from her home and murdered in 1993, pushed for the change to California's law after finding letters written by his daughter's murderer for sale on eBay. *Id*.

175. The Texas bill received overwhelming support in both the House and Senate. *See* Berger, *supra* note 172.

176. Interview with Kahan, *supra* note 156. The states are Colorado, Massachusetts, and Pennsylvania. *See id*. Kahan has been working with these states to draft legislation

different language, but all hope to achieve the same goal—preventing criminals from further exploiting their victims by profiting from their crimes.[177]

Rather than stating exactly which items require forfeiture of their profits by the criminal, the Texas law simply requires that the increased value gained from the notoriety be turned over to the state's attorney general.[178] This change affects any profits made off the fruits of the crime, not just speech-related activities.[179] Still, the amendment is really just an addition to the existing law, which needs modification to overcome its constitutional weaknesses.[180]

3. How the Murderabilia Amendment Strengthens the Constitutionality of Son of Sam Laws. The Supreme Court in *Simon & Schuster* explained that where states attempt to regulate the content of speech, there is a presumption that the regulation violates the First Amendment of the Constitution.[181] To overcome this presumption, the state must show a compelling interest in regulating the speech and that the statute is narrowly tailored to achieve that interest.[182] The downfall for the New York law was that the statute was overinclusive.[183] By amending Son of Sam laws to include murderabilia, states may overcome the problem of overinclusiveness, thus avoiding violation of First Amendment rights.

Son of Sam laws traditionally restrict the ability of criminals to profit from story-telling.[184] The Texas murderabilia amendment instead focuses on the increased value an item gains from the commission of a crime.[185] The amendment looks not at the item's relation to a crime, but rather at how much more valuable the item becomes as a result of someone committing a

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similar to the Texas statute. *Id.*; *see also* Kathleen Burge, *Making a Killing: Bill Takes Aim at Sales by Criminals; Free Speech an Issue*, BOSTON GLOBE, Dec. 11, 2001, at B4 (referring to the proposed Massachusetts bill).

177. *See* Interview with Kahan, *supra* note 156.

178. TEX. CRIM. PROC. CODE ANN. § 59.06(k)(2) (Vernon Supp. 2002).

179. *See id.* (requiring profits from "the sale of tangible property the value of which is increased by the notoriety gained from the conviction of an offense by the person accused or convicted of the crime" to be turned over to the attorney general).

180. *See* Berger, *supra* note 172 (positing that "[e]xpanding the state's law to the sale of personal memorabilia could further open the Texas law to a challenge").

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

182. *See id.* at 118.

183. *See id.* at 123.

184. Refer to notes 35–38 *supra* and accompanying text (describing the origin and aim of New York's first Son of Sam law).

185. *See* TEX. CRIM. PROC. CODE ANN. § 59.06(k)(2) (Vernon Supp. 2002).

crime.[186] Thus, the Texas statute has become a true notoriety-for-profit law.

As an example, under the original statute, a murderer could not profit from movie rights to his story, but could profit by selling a photo of himself.[187] With the murderabilia amendment, he could sell either but, in the case of the photo, would get to keep only the amount of money the photo would have fetched absent the notoriety gained by the commission of the crime.[188]

Still, as far as avoiding First Amendment problems, the murderabilia amendment revises the statute only to the extent that it applies to tangible items.[189] Under the Texas law as written without the murderabilia provision, a felon could not profit from writing a book depicting his life of crime but could profit from selling a cookbook or a novel.[190] Thus, the original statute targets only speech related to the crime itself.[191] The murderabilia provision does not remove the restriction on the speech's content; it merely adds a non-speech-focused element.[192]

However, even though the murderabilia provision does not directly target speech, Texas may still encounter different First Amendment problems. Many items may fall into a gray area, making it difficult to determine whether to categorize them as speech or non-speech. Examples include letters written by criminals to third parties. The value associated with the letter is not in its content, but in the authorship and the signature affixed on it. Even if the letter does not refer to the crime or victims, it may still be protected by the First Amendment.

A murderabilia amendment that included speech-related activities would have required forfeiture of profits from all types of writings. Arguably, this broader reach would have closed another loophole in the Son of Sam laws. However, such an amendment would have been vulnerable to First Amendment

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186. *See id*.

187. *See id*. The statute is limited to profits from "which a crime is reenacted." *Id*. § 59.06(k)(1).

188. *See id*. § 59.06(k)(2) ("The attorney for the state shall determine the fair market value of property that is substantially similar to the property that was sold but that has not been increased in value by notoriety and deduct that amount from the proceeds of the sale.").

189. *See id*. § 59.06(k)(1).

190. *See id*. § 59.01 (addressing only income from "a movie, book, magazine article, tape recording, phonographic record, radio or television presentation, or live entertainment in which the crime was reenacted").

191. *See id*.

192. *See id*. § 59.06(k)(2).

challenges by criminals, weakening the effectiveness of the rest of the murderabilia provision.[193]

As written, the murderabilia prong of the Texas Son of Sam statute is probably constitutionally sound. Although perhaps not perfect, the addition of a murderabilia statute allows lawmakers to close one growing loophole and better meet the goals of protecting victims and preventing criminals from benefiting from their crimes.[194]

V. PUTTING IT ALL TOGETHER: CREATING A CONSTITUTIONAL LAW

Son of Sam laws may not even be necessary to achieve the goals intended by state legislators. In addition to their constitutional uncertainty, the laws are rarely used.[195] Alternatives exist that meet the same objectives while avoiding threats to the constitutional right to free speech.[196] Nevertheless, Son of Sam laws are politically popular.[197] Although the laws are still on shaky constitutional ground, incorporating certain elements into revised Son of Sam laws may help them find stronger footing.

The Supreme Court in *Simon & Schuster* accepted two state interests as sufficiently compelling to pass constitutional muster: preventing criminals from profiting from their crimes and compensating victims.[198] The New York statute's downfall was

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193. California's law specifies that the murderabilia provision does not apply "where the seller is exercising his or her first amendment rights." CAL. CIV. CODE § 2225(a)(3)(B) (West 2002).

194. Interview with Kahan, *supra* note 156. Victims' rights advocates admit that another goal is to close down the businesses of dealers who specialize in crime-related memorabilia. *Id.* As drafted, the Texas law reaches dealers only to the extent that they serve as brokers, selling items on behalf of criminals. However, many dealers have no association with the criminals, and the sale of crime-related merchandise with no connection to the criminal remains legal, if distasteful. *Id.*

Dealers counter that the line between what is appropriate and inappropriate is blurred. *Weekend Edition Saturday* (National Public Radio Broadcast, May 20, 2000). For example, the public may consider it wrong to sell items associated with the shooting at Columbine High School but find it perfectly acceptable to collect artifacts associated with the Holocaust. *Id.* ("After all, people . . . collect Nazi memorabilia, wanted posters of Bonnie and Clyde and photos of Jesse James.").

195. *See* Kealy, *supra* note 16, at 20 (noting that few criminals have sufficient notoriety to even receive book or movie deals).

196. The case of O.J. Simpson illustrates the effectiveness of civil judgments. Simpson, although acquitted of murder, was found liable in the wrongful death of his ex-wife, Nicole Brown, and her friend, Ron Goldman. Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 497 (Cal. Ct. App. 2001). The victims' families obtained a $33.5 million judgment against Simpson, functionally attaching a lien to all of his income, regardless of its source. *Id.*

197. *See* Kealy, *supra* note 16, at 19 (stating that the laws are "popular with the public and lawmakers").

198. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502

that it was not narrowly tailored to meet those interests.[199] However, the Court seemed to indicate a willingness to find constitutional a law that overcomes the narrowly tailored requirement of the strict scrutiny analysis.[200] By including the following elements, states may be able to revise their Son of Sam laws such that they fit within the Court's framework for constitutionality.

A. Avoiding Content-Based Speech

The critical factor for drafting a constitutionally sound Son of Sam law is content-neutrality.[201] The Supreme Court explained in *Simon & Schuster* that content-based restrictions on speech always trigger a strict scrutiny analysis.[202]

The Court determined that statutes are content neutral "where they [are] intended to serve purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers but not others."[203] However, the Court also clarified that the restrictions on speech must still be narrowly tailored to meet the state's objectives.[204]

The Texas murderabilia amendment provides a good start for the kind of language that avoids a focus on content-based speech.[205] The provision applies to profits gained from the commission of a crime rather than actual expressions regarding that crime.[206] The language does not consider whether the content of what is sold is related to the crime.[207] It still allows the

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U.S. 105, 118–19 (1991).

199. *See id*. at 121 ("As a means of ensuring that victims are compensated from the proceeds of crime, the Son of Sam law is significantly overinclusive.").

200. *See id*. at 123.

201. *See* Kealy, *supra* note 16, at 12 ("Critical to the constitutionality of a Son of Sam statute is the statute's content-neutrality.").

202. *See Simon & Schuster*, 502 U.S. at 117–18. ("The Son of Sam law establishes a financial disincentive to create or publish works with a particular content. In order to justify such differential treatment, 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" (quoting Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987))).

203. *Id*. at 122 n.* (referring to Ward v. Rock Against Racism, 491 U.S. 781 (1989) and City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)).

204. *See id*. (noting that a regulation is not narrowly tailored where "'a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals'" (alteration in original) (quoting *Ward*, 491 U.S. at 799)).

205. Refer to Part II.B.3 *supra* (describing the Court's rejection of content-based provisions in *Simon & Schuster*).

206. *See* TEX. CRIM. PROC. CODE ANN. § 59.06(k)(2) (Vernon Supp. 2002) (targeting any tangible item that has increased in value from a notorious crime).

207. *See id*. (addressing only "tangible property the value of which is increased by the notoriety").

criminal to reap fair market value for the sale, and the state collects only that value added by commission of a crime.[208] By removing the content-based character of speech-focused laws, the Texas murderabilia amendment invites a lower level of scrutiny by the Court.[209]

A more effective approach might be to simply confiscate all profit earned through the notoriety of having committed a crime rather than separating tangible and non-tangible items. For example, Iowa's Son of Sam law defines "proceeds" as "the fruits of the crime from whatever source received."[210] The law targets all income earned due to the commission of a crime, not just income earned from expression related to the crime.[211] Such a broad law allows lawmakers to include tangible items as well as speech without focusing on the content of that speech, thus perhaps avoiding the constitutional pitfalls associated with a content-based statute.

The Supreme Court in *Simon v. Schuster* reviewed the New York law under a strict scrutiny analysis because the law "singled out speech on a particular subject for a financial burden that it places on no other speech and no other income."[212] By creating a content-neutral regulation based purely on profits from notoriety, a Son of Sam law may be reviewed under a more moderate level of scrutiny, thus improving its chances of survival.

B. Limiting the Reach of the Law

The *Simon & Schuster* Court ultimately struck down the New York law due to the statute's overinclusive reach.[213] The law would have applied even to crimes where the statute of limitations had expired or where the effects of the crime were

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208. *See* Berger, *supra* note 172. The House sponsor of the bill, Representative Robert Talton, explained: "Criminals can recoup an item's fair market value. . . . We're just going after the profits because of their fame." *Id.*

209. Justice Kennedy's concurrence follows a strict content-based speech restriction approach, arguing that the compelling interest and narrowly tailored analysis is inappropriate with regard to restrictions on speech. *Simon & Schuster*, 502 U.S. at 124–28 (Kennedy, J., concurring in the judgment). Instead, under Justice Kennedy's analysis, the test is simply whether the restriction is based on the content of the speech. *Id.* (Kennedy, J., concurring in the judgment). If so, then the restriction is unconstitutional. *Id.* (Kennedy, J., concurring in the judgment). By amending the law to move its focus away from content, the law may also survive under Justice Kennedy's more stringent test.

210. IOWA CODE ANN. § 910.15(1)(e) (West 1994).

211. *Id.*

212. *Simon & Schuster*, 502 U.S. at 123.

213. *Id.* at 121–23.

insignificant.[214] To avoid overinclusiveness, lawmakers can make certain improvements to include only serious crimes in which the perpetrator was accused or convicted.

1. Defining Defendant. Notoriety-for-profit laws should apply to felons accused or convicted of crimes. One of the glaring deficiencies of the New York law was its inclusion of even those who only admitted to having committed a crime, regardless of whether they had been charged.[215] Laws conforming to *Simon & Schuster* should limit their definitions of criminals to only those formally accused or convicted of a crime.[216]

Some states have revised their laws to take effect only after conviction.[217] However, this creates a significant loophole allowing would-be felons to take advantage of what may be a long period of profit-making before actually being convicted.[218]

This deficiency took on heightened visibility during the incredible publicity of the O.J. Simpson case. During his trial, Simpson earned royalties from his book, *I Want to Tell You*, and from licensed merchandise.[219] These proceeds were not subject to California's Son of Sam law because they were earned pre-conviction.[220] Of course, Simpson was acquitted, so even the post-conviction limitation of the law did not apply to his case.[221] Nonetheless, the situation highlighted the possibility of abusing the law's intent, and the California legislature quickly amended its statute to account for profits made prior to conviction.[222]

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214. *Id.*

215. *Id.* at 121.

216. *See* Kealy, *supra* note 16, at 15–16 (explaining that Minnesota, Iowa, New York, Delaware, and Maryland have revised their definitions of "defendant" to better fit within the *Simon & Schuster* framework).

217. *See, e.g.*, VA. CODE ANN. § 19.2-368.19 (Michie 2001) (restricting the term "defendant" to a "person who pleads guilty to, is convicted of, or is found not guilty by reason of insanity with respect to a felony"); N.Y. EXEC. LAW § 632-a(1)(b) (McKinney 2002) (limiting the law to apply only to profits "generated from the commission of a crime of which the defendant was convicted").

218. *But cf. 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*, 8 ENT. L. REP. 22 (1996) [hereinafter *California Amends Its Law*] (describing California's attempt to include profits that O.J. Simpson's book earned prior to and during his trial, which would have been beyond the state's existing Son of Sam laws had he been convicted).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* The amended statute now provides that proceeds "may have been accrued, earned, or paid before or after the conviction." CAL. CIV. CODE § 2225(a)(10) (West 2002).

2. Types of Crimes. Laws should be amended to apply only to serious crimes. In *Simon & Schuster*, Justice O'Connor mentioned *The Confessions of Saint Augustine*, in which the author wrote about stealing pears from a neighbor's vineyard, as an example of the types of crimes potentially causing undesirable outcomes under the New York law.[223] Justice O'Connor noted that any law subjecting a prominent figure to the confiscation of his or her entire income from an autobiography for merely mentioning a nearly worthless youthful prank is overinclusive.[224] Drafting the law to require profits gained from the notoriety of having committed a serious crime, rather than simply targeting authors who merely mention having committed a crime, avoids such unintended outcomes.

Some states limit their laws to criminals who commit crimes resulting in physical injury or death.[225] These provisions, while limiting the reach of the statutes to those criminals the legislatures envisioned when they passed the laws, overlook the tremendous impact other crimes might have on their victims.[226] Victims of fraud or burglary, although not physically harmed, may experience severe emotional or financial harm.[227] Perpetrators of such crimes hurt others and should be included in any law that prevents profiting from misdeeds. Any law that provides otherwise would be underinclusive.

3. Showing Good Cause. Similarly, a model Son of Sam law should include a formal procedure to ensure that confiscating an accused's profits is reasonable. The Texas law provides a good example for this element.[228] Forfeiture should never be automatic. Instead, a hearing should be held to determine whether good cause exists for the property to be taken away.[229] The accused must also have an opportunity to appeal such decisions. Under the New York law, these procedures were at the sole discretion of the Crime Victims Board, rather than a judge.[230] Moving the

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223. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 121 (1991). Refer to note 79 *supra*.

224. *Id.* at 123.

225. *See, e.g.*, VA. CODE ANN. § 19.2-368.19 (Michie 2001) (defining "defendant").

226. *See* Psychology Information Online, *Offender & Victim Counseling, at* http://www.psychologyinfo.com/forensic/offender_and_victim_counseling.html (last visited Dec. 30, 2002) (explaining that victims can experience psychological trauma from crimes in which the victim was not present, such as burglary of a home).

227. *Id*.

228. TEX. CRIM. PROC. CODE ANN. § 59.04–.06 (Vernon Supp. 2002) (providing rules for forfeiture proceedings).

229. *Id*.

230. *See* N.Y. EXEC. LAW § 632-a(7)(iv) (McKinney 2002) (vesting the Board with

procedures for confiscating ill-gotten profits to the judiciary ensures that the law applies only to those persons intended by the legislature and helps avoid the types of illogical consequences mentioned by Justice O'Connor.[231]

C. Persisting Problems

Even a seemingly constitutional Son of Sam law leaves open the possibility of problems with the law's administration. For example, how does one judge the notoriety of someone like O.J. Simpson, whose fame did not begin with the crime of which he was accused?[232] Or how would such a law deal with the case of Andrea Yates, a Houston mother accused of drowning her five children?[233] Her husband Russell is the closest relative of her victims, yet collaboration with his wife to write a family story would arguably subject him to forfeiture of his proceeds as her representative.[234]

In some cases, the value of knowledge gained from the telling of the story might outweigh the benefits received from the law. For example, writings by American Taliban John Walker may help the United States better understand his actions, as well as the inner workings of a terrorist organization.[235] The insight into his unique experiences could enhance national security, which may arguably be of more value to society than preventing him from profiting from his crime.

The U.S. Supreme Court will probably uphold Son of Sam laws as constitutional when the laws are more narrowly drafted as outlined in *Simon & Schuster*.[236] However, even the most narrowly tailored law affects the free speech rights of criminals.[237] Supreme Court Justices have long argued the extent

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authority to "adopt, promulgate, amend and repeal administrative rules and regulations governing the procedures to be followed with respect to hearings, including rules and regulations for the administrative appeal of a decision").

231. Refer to notes 63–69 *supra* and accompanying text (describing Justice O'Connor's disdain with the overreaching New York statute).

232. Again, Simpson would not be subject to the law because he was acquitted of the crimes of which he was accused. However, his case provides an example of a problem that previously might not have been considered. *California Amends Its Law*, *supra* note 218, at 22.

233. *See* Mike Glenn et. al., *Mom of 5: "I Killed My Kids," Children May Have Died in Tub*, HOUS. CHRON., June 21, 2001, at A1.

234. *See* TEX. CRIM. PROC. CODE ANN. § 59.01(7)(A) (Vernon Supp. 2002) (including the income of a representative or assignee of the person accused or convicted of a crime in the definition of "proceeds").

235. Refer to text accompanying notes 10–12 *supra* (discussing Walker).

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

237. *See id*. at 124 (Kennedy, J., concurring in the judgment).

to which government should be able to restrict speech. To avoid such problems, perhaps the best approach to achieve the state's goals is to simply make it easier for victims to sue their assailants in civil courts.

VI. CONCLUSION

Ever since the Son of Sam spent a horrifying summer terrorizing the New York area in the late 1970s,[238] legislatures have been trying to devise a way to keep criminals from profiting off their crimes.[239] The Son of Sam laws that have developed over the past two decades fulfill that goal, but the question of their constitutionality remains unanswered.

In a number of states, and certainly in Texas, the quest for constitutionality has not yet been reached. The Texas law remains fraught with the same flaws that brought down the New York law in 1991.[240] The Supreme Court, through its *Simon & Schuster* decision, offered states a hint at what elements would be unacceptable in crafting a Son of Sam law.[241] Yet the Texas legislature has failed to heed the Supreme Court's advice by refusing to write a law that might fit within the *Simon & Schuster* construct.[242]

The Texas Son of Sam law's strongest element has come with the recent addition of the murderabilia provision.[243] By shifting the focus away from speech and toward a more generalized category of notoriety for profit, the murderabilia provision lends acceptability to the Texas Son of Sam law under the *Simon & Schuster* framework. However, the murderabilia provision, rather than standing as a separate part of a two-part law, should be incorporated as an element in a completely overhauled and unified law.

A number of high profile crimes have occurred in Texas over the past few years, any of which might provide a basis for a challenge to the Son of Sam law.[244] Until the legislature revises

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238. Refer to note 30 *supra* and accompanying text.

239. Refer to note 16 *supra* and accompanying text (noting that forty states and the federal government have Son of Sam laws).

240. Refer to Part II.B.3 *supra* (identifying flaws as overinclusiveness and being content based).

241. Refer to Part II.B.3 *supra*.

242. Refer to Part IV.A *supra* (comparing the Texas statute to the New York statute).

243. Refer to Part IV.B.3 *supra* (discussing the strengths and weaknesses of the Texas murderabilia provision).

244. Refer to note 233 *supra* and accompanying text (describing the story of Andrea Yates). *See also* Patrick Rogers et al., *Murder by Mercedes? Police Say Clara Harris Ran Down Her Cheating Husband in a Texas Parking Lot*, PEOPLE MAG., Aug. 19, 2002, at 83;

the Texas law to comport with the Supreme Court's directive in *Simon & Schuster*, its Son of Sam law remains vulnerable to a constitutional attack. It is time the legislature takes the steps necessary to ensure that crime doesn't pay in Texas.

Tracey B. Cobb

Texas Housewife Who Drowned Her Children Sentenced to Life in Prison, AGENCE FRANCE-PRESSE, Mar. 15, 2002. The Justice Department recently charged Andrew Fastow, a top executive at Enron, with a number of crimes related to the near-demise of the once powerful company. *See* Alexei Barrionuevo et al., *Leading the News: Enron's Fastow Charged with Fraud*, WALL ST. J., Oct. 3, 2002, at A3. Fastow's story would undoubtedly fetch a high price if the Texas Son of Sam law was deemed unconstitutional.