SON OF SAM GOES INCOGNITO:
EMERGING TRENDS IN CRIMINAL ANTI-PROFIT STATUTES

By

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To the memories of my father, brother, and sister:
Joseph Earl Locke Sr., Joseph Earl Locke Jr., and Kimberly Locke.

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Laws preventing criminals from profiting from crimes, especially by telling their stories, exist in most states. Twenty-eight states have laws similar to New York's original "Son of Sam" law declared unconstitutional in 1991. However, a growing number of states have eliminated references to expressive materials from their anti-profit statutes. Some states also are using general forfeiture statutes to seize proceeds from criminal storytelling. Eliminating references to expressive materials and pursuing relief through general forfeiture statutes are promising ways for states to achieve the compelling interests of preventing criminal profiteering and compensating victims without violating the First Amendment. However, analysis of procedural provisions of the laws reveals that these goals can be thwarted by the way the laws are administered.

CHAPTER 1
INTRODUCTION

When the time came for serial killer David Berkowitz, AKA the "Son of Sam," to tell the story of how he shot and killed several people in New York City during 1976 and 1977, he chose to collaborate with forensic psychiatrist David Abrahamsen. Apparently, Berkowitz was not concerned with profiting from the book *Confessions of Son of Sam*. "I feel that by helping you it will also be helping society. I want no financial rewards for my cooperation," Berkowitz wrote in June 1979, nearly two years after his arrest.[1] Berkowitz later agreed to donate twenty-five percent of book royalties to the victims of his crimes.[2]

Despite Berkowitz's self-professed altruism, his killing spree and subsequent sale of rights to his story led to a new breed of laws that prevent criminals from benefiting financially by telling their stories. The media attention surrounding his crimes provoked the New York legislature to enact a law calling for the forfeiture of criminals' profits from books, movies, and other mediums in which crimes are depicted. Proof of Berkowitz's influence on the laws is evident in the fact that these laws to prevent criminal profiteering, in effect in thirty-nine states,[3]

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[1] DAVID ABRAHAMSEN, CONFESSIONS OF SON OF SAM ix (Columbia Univ. Press 1985). David Berkowitz, also known as the ".44 caliber killer," was arrested Aug. 10, 1977. *Id.* Berkowitz, who left notes for police signed "Son of Sam," was found mentally incompetent to stand trial for the six murders he committed, but in June 1978 he was sentenced to several hundred years in prison for the murders. *Id.*

[2] *Id.*

[3] *See* ALA. CODE § 41-9-80 (2006); ALASKA STAT. § 12.61.020 (2006); ARIZ. REV. STAT. § 13-4202 (2006); ARK. CODE ANN. § 16-90-308 (2006); COLO. REV. STAT. § 24-4.1-201 (2006); CONN. GEN STAT. § 54-218 (2006); DEL. CODE ANN. tit. 11, § 9103 (2006); FLA. STAT. ANN. § 944.512 (2006); GA. CODE ANN. § 17-14-31 (2006); HAW. REV. STAT. §§ 351-81 -88 (2006); IDAHO CODE § 19-5301 (2006); IND. CODE ANN. §§ 5-2-6.3-1 -7 (2006); IOWA CODE § 910.15 (2005); KAN. STAT. ANN. § 74-7319 (2006); KY. REV. STAT. ANN. § 346.165 (2006); ME. REV. STAT. ANN., tit. 14, § 752-E (2005); MD. CODE ANN., CRIM. PROC. §§ 11-621 TO -632 (2006); MICH. STAT. ANN. § 780.768 (2006); MINN. STAT. § 611A.68 (2005); MISS. CODE ANN. §§ 99-38-1 TO -11 (2006); MONT. CODE ANN. § 53-9-104 (2006); NEB. REV. STAT. §§ 81-1836 TO -1839 (2006); N.J. STAT. §§ 52:4B-62 -70 (2006); N. M. STAT. ANN. § 31-22-22 (2006); N.Y. EXEC. LAW § 632-a (2006); N.D. CENT. CODE § 32-07.1-01 (2006); OHIO REV. CODE ANN. § 2969.02 (2005); OKLA. STAT., tit. 22 § 17 (2006); OR. REV. STAT. § 147.275 (2006); 42 PA. CONS. STAT. § 8312 (2006); R.I. GEN. LAWS § 12-25.1-3 (2006); S.D. CODIFIED LAWS §§ 23A-28A-1 TO -14 (2006); TEX. CRIM. PROC. CODE art. § 59.06 (2006); UTAH CODE ANN. § 77-18.8.3 (2006); VA. CODE ANN. §§ 19.2-368.19 TO -

are commonly referred to as "Son of Sam" laws. Most "Son of Sam" laws are modeled after the original New York statute.[4] Although he was the namesake for the laws, the statute never applied to Berkowitz. The original statute only applied to convicted criminals, not those declared incompetent to stand trial, like Berkowitz.[5]

Despite goals of compensating crime victims and preventing criminals from profiting from their crimes, "Son of Sam" laws like the one New York enacted in 1977 have not been embraced by the courts. In 1991, the U.S. Supreme Court struck down the New York statute in *Simon & Schuster v. New York State Crime Victims Board.* The Court held that the law did not pass the strict scrutiny required for content-based restrictions to be valid and was therefore inconsistent with the First Amendment.

The result of *Simon & Schuster* has been a state statutory landscape of "Son of Sam" laws that is increasingly diverse and is likely to continue changing as states receive more challenges to their anti-profit laws. This thesis diverges from the traditional approach to "Son of Sam" laws in that it does not focus solely on constitutional analysis but instead examines every anti-profit statute in the nation. Chapter 2 provides an overview of First Amendment theory and jurisprudence and discusses the Supreme Court's decision in *Simon & Schuster*. Chapter 3 presents the general trends and theories in legal literature regarding "Son of Sam" laws.

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22 (2006); WASH. REV. CODE §§ 7.68.200 TO -290 (2006); W. VA. CODE §§ 14-2B-1 TO -11 (2006); WIS. STAT. § 949.165 (2006); WYO. STAT. ANN. §§ 1-40-301 TO -308 (2006).

[4] N.Y Exec. Law § 632-a(1) (Mckinney 1982) reads:

> 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.*

[5] Simon & Schuster, Inc. v. N.Y. Crime Victims Bd., 502 U.S. 105, 111 (1991).

Research methodology is presented in Chapter 4. Chapter 5 examines "Son of Sam" laws across the nation according to the degree they target specific mediums of expression. Relevant case law is used to illustrate the various incarnations of "Son of Sam" laws. Chapter 6 analyzes the general statutory provisions for administering the laws. After a summary of the research findings, Chapter 7 concludes that the majority of "Son of Sam" laws are unconstitutional, though a new trend in anti-profit statutes may offer a way for states to compensate victims and prevent criminal profiteering in a way that can withstand constitutional scrutiny. But more disturbing is that the procedural aspects of the laws reveal that the compelling government interests advanced by "Son of Sam" laws — compensating victims and preventing criminal profiteering — are undermined by statutory provisions that allow the laws to function as schemes to offset state costs in prosecuting, defending, and imprisoning criminals.

CHAPTER 2
FIRST AMENDMENT THEORY AND JURISPRUDENCE

Congress shall make no law…abridging the freedom of speech, or of the press . . . .
—First Amendment to the U.S. Constitution

Value of the First Amendment

The free speech provision of the First Amendment embodies different values for different people. Generally, the First Amendment is valuable for its contributions to: the attainment of truth, self-governance, personal fulfillment and autonomy, and as a checking function against government power.[1] Ideas espoused by the First Amendment find their roots in John Milton's classic 1644 work *Areopagitica*, in which he railed against the British government's publication licensing scheme:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?[2]

Milton's metaphor gave way to the popular "marketplace of ideas" concept of the First Amendment. U.S. Supreme Court Justice Holmes, in his dissenting opinion in the 1919 case *Abrams v. United States*, invoked this metaphor in opposition to the majority's decision to affirm the convictions of Russian immigrants arrested for circulating anarchist leaflets. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market…," Holmes wrote.[3] The injection of ideas into the market, whether through leaflets, newspaper stories, or books, is not a guarantee for all speakers. First Amendment jurisprudence has resulted

[1] *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 S. CT. REV. 1, 1 (2004); KENT R. MIDDLETON, WILLIAM E. LEE & BILL F. CHAMBERLIN, THE LAW OF PUBLIC COMMUNICATION 25-31 (2005).

[2] *Areopagitica*, *in* 32 GREAT BOOKS OF THE WESTERN WORLD 409 (1952).

[3] Abrams v. United States, 250 U.S. 616 (1919).

in a "hierarchy" of speech, from speech that receives the most protection under the Constitution to speech that receives no constitutional protection.

Protected Speech

The types of speech most protected by the First Amendment are political and social speech, sometimes referred to as "core" speech. Speech that falls into these categories will receive the most protection when challenged in the courts. In *New York Times v. Sullivan*, for example, the U.S. Supreme Court established a high standard for public officials to overcome if they wished to sue the media for libel.[4] The underlying theory behind the holding in *Sullivan* is that political speech – specifically, speech drawing attention to the activities of public officials – is central to the meaning of the First Amendment.

Commercial speech and (non-obscene) sexual expression will receive constitutional protection but to a lesser degree than the protection received by political or social speech. More regulation is tolerated in connection with commercial speech and sexual expression than other types of speech protected under the First Amendment. In *Central Hudson Gas v. Public Service Commission of New York*, the U.S. Supreme Court set forth a test for determining whether commercial speech is protected by the First Amendment: 1) it should not be misleading and related to lawful activity; 2) the government interest should be substantial; 3) if the first two prongs are met, the government regulation should advance the government's interest; and 4) the government's interest could be carried out by less restrictive means.[5] If the commercial speech at issue meets the *Central Hudson* test, then the speech will be protected by the First Amendment.

[4] N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

[5] Central Hudson Gas v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980). *See also* Nike, Inc. v. Kasky, 539 U.S. 654 (2003).

Non-Protected Speech

Unlike, political, social, commercial, and non-obscene speech, some categories of speech are so outside the bounds of the purpose of the First Amendment that they receive no constitutional protection. Fighting words, threats, false advertising, fraud, and obscenity are categories of unprotected speech. The protection exception for fighting words originated in the 1942 case *Chaplinsky v. New Hampshire.*[6] Chaplinsky was a member of the Jehovah's Witness religious group convicted under a New Hampshire statute for calling the City Marshall a "God damned racketeer" and "a damned Fascist."[7] The U.S. Supreme Court upheld Chaplinsky's conviction, noting that "it is well understood that the right of free speech is not absolute at all times and under all circumstances."[8] According to the Court, Chaplinsky's words were of "no essential part of any exposition of ideas, and [were] of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[9] The justifications outlined by the *Chaplinsky* Court extend to the other categories of unprotected speech.

Standards of Review

Although some speech, such as social or political speech, is protected by the First Amendment, this protection is not absolute. Protected speech may still be subject to government regulation. In determining the validity of a particular governmental regulation on expression, courts have formulated two judicial tests: strict scrutiny and intermediate scrutiny. Strict scrutiny is the more difficult test to pass, requiring the government to have compelling interests

[6] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[7] *Id.*

[8] *Id.*

[9] *Id.*

behind the regulation, and that the regulation is narrowly tailored to achieve these compelling interests. Intermediate scrutiny allows the government to meet a lower burden in regulating free speech: the regulation must serve a substantial government interest, be unrelated to the suppression of free expression, and be "no greater than is essential to the furtherance of that interest."[10]

In order to determine which test to apply—strict scrutiny or intermediate scrutiny—courts must first determine what type of regulation is at issue. If the regulation is *content-based*, strict scrutiny will apply. Content-based regulations are those that restrict expression based on the content of the message – i.e., works depicting a crime. If the statute is *content-neutral*, intermediate scrutiny applies. Examples of content-neutral laws include restrictions on times of parades or rules against burning draft cards.

Simon & Schuster v. New York State Crime Victims Board

"Son of Sam" laws are examples of content-based speech regulations that call for the application of strict scrutiny – the government must have a compelling interest and the regulation must be narrowly tailored to achieve that interest. While the serial killer "Son of Sam" prompted the enactment of New York's criminal anti-profit statute, a mobster was at the center of the case that led to the statute's downfall. Publishing company Simon & Schuster initiated the action in 1987, challenging the New York State Crime Victims Board's claim to book royalties earned by gangster Henry Hill.[11] Hill and author Nicholas Pileggi collaborated to produce a book titled

[10] United States v. O'Brien, 391 U.S. 367 (1968).

[11] *Simon & Schuster*, 502 U.S. at 114, 115.

Wiseguy: Life in a Mafia Family.[12] The book recounted Hill's criminal career involving theft, robbery, extortion, and drug trafficking.[13]

The board invoked the New York "Son of Sam" law, which allowed the board to seize profits from a person accused or convicted of a crime who tells his or her story.[14] Simon & Schuster challenged the statute on grounds that it violated the First Amendment.[15] The board argued the law was not enacted with any illicit intent to suppress the exchange of ideas and that victim compensation, not prohibition of offensive speech, was the intention of the law.[16] Both the Southern District Court of New York and the U.S. Court of Appeals for the Second Circuit sided with the board, holding the statute to be consistent with the First Amendment.[17]

The U.S. Supreme Court, however, reversed the lower courts' rulings and held that New York's "Son of Sam" law was overbroad and violated the First Amendment. The Court deemed the New York statute a content-based restriction because it "singled out speech on a particular subject for a financial burden that it places on no other speech and no other income."[18] The Court applied the strict scrutiny standard of review to the New York statute, concluding that although the state had compelling interests to compensate victims and prevent criminals from profiting from their crimes, the New York law was not narrowly tailored to meet these

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[12] *Id.* at 112.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 115.

[16] *Simon & Schuster*, 502 U.S. at 117.

[17] *Id.*

[18] *Id.* at 123. *See also* Leathers v. Medlock, 499 U.S. 439 (1991) (holding that Arkansas' sales tax application to cable television services but not print media does not violate the First Amendment); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (holding that Arkansas' taxing of general interest magazines but not newspapers, trade journals, etc., violates the First Amendment).

interests.[19] The law encompassed works on any subject in which crimes were mentioned, even if only in a cursory fashion.[20] Additionally, the statute's broad definition of a "person convicted of a crime" included "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted" and extended the law's application to authors of expressive material who were never convicted or even accused of crimes.[21] The Court pointed out that under the New York "Son of Sam" law, potential proceeds from valuable works such as *The Autobiography of Malcolm X* and *Confessions of St. Augustine* would be subject to seizure, even though the books are not primarily about criminal wrongdoing.[22]

[19] *Simon & Schuster*, 502 U.S. at 123. "We conclude simply that in the Son of Sam law, New York has singled out speech on a particular subject for a financial burden it places on no other speech and no other income. 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." *Id.*

[20] *Id.* at 121.

[21] *Id.* at 110.

[22] *Id.* at 121.

CHAPTER 3
LITERATURE REVIEW

In *Simon & Schuster*, the U.S. Supreme Court deemed the New York "Son of Sam" law a content-based restriction on speech.[1] When applying strict scrutiny to the law, the Court found that the state did have compelling interests in compensating crime victims and ensuring that criminals do not profit from their crimes.[2] However, the state did not narrowly tailor the law to achieve these interests. The Court's determination that New York's "Son of Sam" law was content-based and its use of strict scrutiny have dominated the commentary regarding "Son of Sam" laws. Many scholarly articles[3] have focused on the *O'Brien* test for content-neutral statutes. The *O'Brien* test, enunciated by the U.S. Supreme Court in the 1968 case *United States v. O'Brien*, offers an intermediate scrutiny standard for analyzing content-neutral regulations: the regulation must further a substantial government interest in a way that only incidentally limits First Amendment freedoms.[4] A student Note[5] cited by the Court in *Simon & Schuster* argues that the Southern District of New York's decision[6] to scrutinize New York's "Son of Sam" law using the *O'Brien* test was appropriate. The Note argues that the law is content-neutral because

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[1] *Id.* at 116.

[2] *Id.* at 118-19.

[3] *See, e.g.*, Karen M. Ecker & Margot J. O'Brien, Note, *Simon & Schuster, Inc. v. Fuschetti: Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 NOTRE DAME L. REV. 1075 (1991) (concluding that New York's "Son of Sam" law only incidentally burdens speech, and should be upheld); Lisa Ann Morelli, *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: How the Characterization of a Speech Regulation Can Effectively Destroy a Legitimate Law*, 42 CATH. U.L. REV. 651 (1993) (proposing intermediate scrutiny review of "Son of Sam" laws because they combine speech and non-speech regulation and because public policy supports a lower standard of review); Gilbert O'Keefe Greenman, *Son of Simon & Schuster: A "True Crime" Story of Motive, Opportunity and the First Amendment*, 18 HAWAII L. REV. 201 (1996) (suggesting the Court's strict scrutiny analysis in *Simon & Schuster* negatively affected First Amendment jurisprudence).

[4] United States v. O'Brien, 391 U.S. 367 (1968). *See also* JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER 240 (2d ed. 1996).

[5] Karen M. Ecker & Margot J. O'Brien, Note, *Simon & Schuster, Inc. v. Fuschetti: Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 NOTRE DAME L. REV. 1075 (1991).

[6] Simon & Schuster v. N.Y. Crime Victims Bd., 724 F. Supp. 170 (S.D.N.Y. 1989).

it restricts the *proceeds* of the speech, not the speech itself, and that any limits on the speech are incidental.[7] Other legal commentaries utilize the *O'Brien* test as a standard in formulating model laws that would achieve the same goals of compensating victims and preventing criminal profit but would be constructed to withstand intermediate scrutiny.[8]

A 1994 study of crime victim statutes looked at "Son of Sam" laws throughout the nation.[9] The article found that forty-one out of the forty-five "crime victimization statutes" in existence at that time were unconstitutional under *Simon & Schuster*.[10] Using statutes from 2006 and legal challenges to "Son of Sam" laws in the past decade, this thesis offers a current picture of criminal anti-profit laws in the United States. This thesis also illustrates the path that some of those forty-one states have taken since *Simon & Schuster* to ensure that their "Son of Sam" laws will be effective. Additionally, this thesis analyzes the statutory provisions for administering "Son of Sam" laws, contributing to a greater understanding of how the administration of crime victimization statutes can negate the intent of the laws.

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[7] Karen M. Ecker & Margot J. O'Brien, Note, *Simon & Schuster, Inc. v. Fuschetti: Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 NOTRE DAME L. REV. 1075, 1100 (1991).

[8] *See* Sean J. Kealy, *A Proposal for a New Massachusetts Notoriety-for-Profit Law: The Grandson of Sam*, 22 W. NEW ENG. L. REV. 1 (2000); Gilbert O'Keefe Greenman, *Son of Simon & Schuster: A "True Crime" Story of Motive, Opportunity and the First Amendment*, 18 HAWAII L. REV. 201 (1996).

[9] Debra Shields, *The Constitutionality of Current Crime Victimization Statutes: A Survey*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929 (1994).

[10] *Id*. at 933.

CHAPTER 4
METHODOLOGY

To gain an accurate picture of the varying ways states legislate to prevent criminal profiteering and compensate crime victims, relevant statutes in all fifty states will be analyzed for their approach to pursuing these goals. Categories were constructed from the language of the statutes themselves, with close attention paid to the degree each statute targets expressive material and the specific ways the law is required to be administered. In order to locate the relevant statutes, the First Amendment Center's[1] compilation of "Son of Sam" laws, circa 2000, was used as a starting point. Using the legal research database LexisNexis, each statute's citation information was entered, producing the current statute in force. The text of each statute was then analyzed and compared with other statutes. To ensure the timeliness of this analysis, the statutes were garnered from LexisNexis at the beginning of the research process and in the initial stages of publication preparation, approximately two years later.

[1] *See* David L. Hudson Jr., *"Son of Sam Laws"* http://www.firstamendmentcenter.org//speech/arts/topic.aspx?topic=son_of_sam

CHAPTER 5
CATEGORIES OF "SON OF SAM" LAWS

Criminal anti-profit statutes across the country can be organized into two major categories according to the degree they target specific mediums of expression: expression-specific laws and unique knowledge laws.[1] In addition, some states supplement their "Son of Sam" laws with broader statutes that target all funds of inmates, regardless of how the funds were obtained.

Expression-Specific "Son of Sam" Laws

The majority of "Son of Sam" laws currently in effect are closely patterned after the original New York law. Twenty-eight states[2] have laws that allow seizure of proceeds from "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," using this phrase or wording very similar.[3] Arizona, for example, has added "internet or online presentation or depiction."[4] Montana includes "play" as a medium.[5] Virginia is the only state to specifically include the newspaper as a medium of expression subject to the law.[6]

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[1] There are seven states that will not be discussed because they do not have active "Son of Sam" statutes. They are Massachusetts, Missouri, Nevada, New Hampshire, North Carolina, South Carolina, and Vermont.

[2] The states target specific mediums of expression are Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, Ohio, Oklahoma, South Dakota, Texas, Utah, Virginia, Washington, and Wisconsin.

[3] This wording was taken from the New York statute struck down in *Simon & Schuster*. *See* N.Y Exec. Law § 632-a(1) (McKinney 1982).

[4] ARIZ. REV. STAT. § 13-4202 (2006).

[5] MONT. CODE ANN. § 53-9-104 (2006).

[6] VA. CODE ANN. §§ 19.2-368.19 TO -22 (2006).

One aspect of the original New York law criticized by the U.S. Supreme Court in *Simon & Schuster* was that the statute applied to works on any subject that included a reenactment or thoughts about a crime, even if the depiction of crime is only incidental.[7] In response to this weakness, five states are more specific about what books, movies, and other expressive materials are subject to anti-profit statutes.[8] In these states, expression concerning the crime must comprise a substantial portion of the entire work. Delaware, for example, uses the phrase "primary contents of the work."[9] In Oklahoma and Virginia, a work is subject to the law only if an "integral portion" of the work refers to the crime.

The twenty-eight states that specifically target expression are the most vulnerable to constitutional challenges to their laws. *Simon & Schuster* paved the way for declaring these types of laws unconstitutional, and state courts have reached similar conclusions to the *Simon & Schuster* Court when addressing challenges to these laws.[10]

Keenan v. Sinatra

In the 2002 case *Keenan v. Sinatra*, the California Supreme Court struck down California's version of the "Son of Sam" law, which targeted expressive materials.[11] In 1963, Barry Keenan, acting with accomplices, kidnapped singer Frank Sinatra's nineteen-year-old son

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[7] Simon & Schuster v. N.Y. Crime Victims Bd., 502 U.S. 105, 121 (1991). "As a means of ensuring that victims are compensated from the proceeds of crime, the Son of Sam law is significantly over inclusive. . .the statute applies to works on *any* subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally." *Id.*

[8] DEL. CODE ANN. tit. 11, § 9103 (2006); KAN. STAT. ANN. § 74-7319 (2006); OKLA. STAT., tit. 22 § 17 (2006); VA. CODE ANN. §§ 19.2-368.19 TO -22 (2006); WIS. STAT. § 949.165 (2006).

[9] DEL. CODE ANN. tit. 11, § 9103 (2006).

[10] *See* Bouchard v. Price, 694 A.2d 670 (1997) (holding that Rhode Island's "Son of Sam" law was not narrowly tailored and thus unconstitutional); Keenan v. Sinatra, 40 P.3d 718 (2002); Seres v. Lerner, 102 P.3d 91 (2004). *See also* Curran v. Price, 334 Md. 149 (1994).

[11] Keenan v. Sinatra, 40 P.3d 718, 721 (2002).

from a Nevada hotel room.[12] Keenan and his two accomplices were later apprehended, tried, and convicted for the kidnapping.[13] In January 1998, Keenan was interviewed by a writer for the Los Angeles tabloid *New Times* for an article titled "Snatching Sinatra."[14] Subsequent reports indicated that Columbia Pictures had purchased the movie rights to Keenan's story.[15] Frank Sinatra Jr. commenced action against Keenan under California's "Son of Sam" law for any storytelling proceeds.[16]

The California statute was very similar to the New York law invalidated by the *Simon & Schuster* Court. The California law targeted proceeds from expressive materials "based on the story of a felony for which a convicted felon was convicted."[17] Sinatra argued that the California law avoided the overinclusiveness of the New York law by 1) only applying the law to persons actually convicted of a felony; and 2) exempting expressive materials that include only a "passing mention of the felony, as in a footnote or bibliography."[18] Keenan argued that despite these diversions from the New York law, California's anti-profit statute was still overinclusive and did not pass a strict scrutiny standard of review.[19]

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[12] *Id.* at 722.

[13] *Id.*

[14] *Id.* at 722-23.

[15] *Id.* 723.

[16] *See* CAL. CIV. CODE § 2225 (2002). "All 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, shall be subject to an involuntary trust for the benefit of the beneficiaries set forth in this section." *Id.* Materials are defined as "books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind." *Id.*

[17] *Id.*

[18] *Keenan*, 40 P.3d at 732.

[19] *Id.* at 724.

The California Supreme Court held that the statute was facially invalid under the First Amendment. It reasoned that although the California law was limited to convicted felons, such convicted felons might still have valuable stories to tell in a way not directly connected to exploiting their crimes.[20] The Court mentioned works that could warn about the consequences of crime, evaluate the criminal justice system, or describe conditions of prison life.[21] The Court stated that the exemption for passing references to crime still includes "within its ambit a wide range of protected speech, discourages the discussion of crime in no exploitative contexts, and does so by means not narrowly focused on recouping profits from the *fruits of crime*."[22] California's "Son of Sam" law would affect those same works mentioned in the *Simon & Schuster* decision, such as *The Autobiography of Malcolm X*.[23] Therefore, the California Supreme Court overruled lower courts' rulings that the law did not infringe on the First Amendment, and the law was struck down. In response, the California Legislature enacted "Son of Sam II," which extended the statute of limitations for victims to bring suits for damages against defendants convicted of serious felonies to ten years after conviction.[24]

Seres v. Lerner

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[20] *Id.* at 732

[21] *Id.*

[22] *Id.* at 733.

[23] *Id.* at 734 n.20.

[24] "'Son of Sam' statutes: federal and state summary." The First Amendment Center, <http://www.firstamendmentcenter.org/about.aspx?id=12746> (last visited Oct. 10, 2007). In another high-profile California case, a judge ordered the rights to O.J. Simpson's unreleased book "If I Did It" be auctioned off for the benefit of the family of the late Ron Goldman. *O.J. Simpson can't have book, TV proceeds*, THE ASSOCIATED PRESS, March 14, 2007. In 1995, former football star and actor O.J. Simpson was acquitted of the murders of his wife, Nicole Brown Simpson, and her friend, Ron Goldman. *Id.* Goldman's family was later awarded a $33.5 million judgment against Simpson after he was found liable for the murders in a wrongful-death lawsuit. *Id.* Goldman's family had been unsuccessful in collecting on the judgment, prompting Los Angeles County Superior Court Judge Gerald Rosenburg to order the auction of the rights for Simpson's book, which reportedly explained how Simpson would have committed the crimes. *Id.* Amid public outrage, the book and accompanying television interview were never released. *Id.*

Another "Son of Sam" law targeting expressive materials that failed to meet the strict scrutiny test after *Simon & Schuster* was that of Nevada. In late 2004, the Nevada Supreme Court declared that state's "Son of Sam" law unconstitutional under *Simon & Schuster*.[25] In *Seres v. Lerner*, Donna Seres sued Jimmy Lerner under Nevada's "Son of Sam" statute to recover proceeds from a book Lerner authored.[26] Lerner was convicted in 1998 of manslaughter in connection with the death of Mark Slavin, Seres' brother.[27] Lerner published a book, *You Got Nothing Coming, Notes from a Prison Fish*, in 1999.[28] The Nevada "Son of Sam" law allowed a felony victim to recover from the felon any proceeds generated from published materials based on or substantially related to the offense.[29] Actions brought forth to claim publication proceeds under the Nevada statute received an extension of the five-year statute of limitations for wrongful death suits.[30] Seres brought the action after the five-year period expired.[31]

The Nevada Supreme Court determined the statute to be content-based because it allowed for the filing of claims against publication proceeds after the statute of limitations had expired for other tort actions, exclusively applying to income derived from speech.[32] The Court recognized that Nevada had compelling interests in compensating victims of crimes and preventing criminal profiteering, but the Nevada law was not narrowly tailored to meet those

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[25] Seres v. Lerner, 102 P.3d 91 (2004).

[26] *Id.* at 92. Seres sued on behalf of her mother.

[27] *Id.*

[28] *Id.*

[29] NEV. REV. STAT.§ 217.007 (2004).

[30] *Id.*

[31] *Seres*, 102 P.3d at 92.

[32] *Id.* at 96.

interests.[33] The *Seres* Court found the law overbroad because it allowed for recovery of proceeds from works "substantially" related to the felony.[34] Lerner's book was only partially related to the homicide and was mostly about life in prison and his religious experiences.[35] Additionally, Nevada's "Son of Sam" law was constitutionally overinclusive because the statute did not require conviction for the statute to apply.[36] The Court reasoned that the definition of "person who committed the felony" could be construed to include individuals never accused or even convicted of felonies.[37] The Court held that the Nevada law suffered from the same defects the New York "Son of Sam" law did when the *Simon & Schuster* Court invalidated it.

Unique Knowledge "Son of Sam" Laws

In response to the negative judicial treatment of "Son of Sam" laws that target specific mediums of expression and the thoughts and feelings of criminal defendants, several states have revised their laws to eliminate such references. Instead, these eleven states target profits obtained as a result of committing a crime.[38] These new "Son of Sam" laws seek to recover "assets obtained through the use of unique knowledge obtained during commission of or in preparation for a crime." This phrase is used in eight states.[39] Iowa uses the phrase "fruits of the

[33] *Id.* at 98.

[34] *Id.*

[35] *Id.* at 97-98.

[36] *Id.* at 98.

[37] *Id.*

[38] The states that seek to recover income obtained as a result of committing a crime are Colorado, Iowa, Maine, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, West Virginia, and Wyoming. *See* COLO. REV. STAT. § 24-4.1-201 (2006); IOWA CODE § 910.15 (2006); ME. REV. STAT. ANN., tit. 14, § 752-E (2005); N.J.STAT. §§ 52:4B-62 TO -70 (2006); N.Y. EXEC. LAW § 632-a (2006); N.D. CENT. CODE § 32-07.1-01 (2006); OR. REV. STAT. § 147.275 (2006); 42 PA. CONS. STAT. § 8312 (2006); R.I. GEN. LAWS § 12-25.1-3 (2006); W. VA. CODE §§ 14-2B-1 TO -11 (2006); WYO. STAT. ANN. §§ 1-40-301 TO -308 (2006).

[39] The states that use the term "unique knowledge" are Colorado, Maine, New Jersey, New York, North Dakota, Pennsylvania, West Virginia, and Wyoming. *See* COLO. REV. STAT. § 24-4.1-201 (2006); ME. REV. STAT. ANN., tit. 14, § 752-E (2005); N.J.STAT. §§ 52:4B-62 TO -70 (2006); N.Y. EXEC. LAW § 632-a (2006); N.D. CENT. CODE §

crime" in its statute.[40] Oregon describes the profits subject to forfeiture as those that were gained as a result of the crime.[41] In Rhode Island, criminals who commercially exploit their crimes are required to turn proceeds over to the state.[42]

The advantage of laws that do not contain specific references to expression is that because they lack such references, they are more likely to be reviewed using intermediate scrutiny. This less demanding standard of review increases the possibility that these "Son of Sam" laws will be considered valid under the First Amendment.

32-07.1-01 (2006); 42 PA. CONS. STAT. § 8312 (2006); W. VA. CODE §§ 14-2B-1 TO -11 (2006); WYO. STAT. ANN. §§ 1-40-301 TO -308 (2006).

[40] IOWA CODE § 910.15 (2006).

[41] OR. REV. STAT. § 147.275 (2006).

[42] R.I. GEN. LAWS § 12-25.1-3 (2006).

Table 5-1 Categories of "Son of Sam" laws

States	Expression-specific	Unique knowledge
Alabama	X	
Alaska	X	
Arizona	X	
Arkansas	X	
Colorado		X
Delaware	X	
Florida	X	
Georgia	X	
Hawaii	X	
Idaho	X	
Indiana	X	
Iowa		X
Kansas	X	
Kentucky	X	
Maine		X
Maryland	X	
Michigan	X	
Minnesota	X	
Mississippi	X	
Montana	X	
Nebraska	X	
New Jersey		X
New Mexico	X	
New York		X
North Dakota		X
Ohio	X	
Oklahoma	X	
Oregon		X
Pennsylvania		X
Rhode Island		X
South Dakota	X	
Texas	X	
Utah	X	
Virginia	X	
Washington	X	
West Virginia		X
Wisconsin	X	
Wyoming		X

Sandusky v. McCummings

There is little case law involving these increasingly popular[43] "unique knowledge" laws. In New York, there have been at least two major challenges to that state's law since *Simon & Schuster*, but neither directly addressed First Amendment issues. The first, *Sandusky v. McCummings*, did not involve proceeds from a book, movie, or other type of expression but a settlement awarded to a convicted criminal.[44] In 1984, Bernard McCummings was shot twice in the back by a New York Transit Authority officer who observed McCummings beating and strangling a seventy-two-year-old man in a subway station.[45] McCummings was paralyzed and later received a $4.3 million verdict against the Transit Authority for the officer's negligence.[46]

Sandusky, McCummings' elderly victim, invoked New York's revised "Son of Sam" law when he sought compensation for personal injuries against his assailant. The New York law allows for victims to bring actions for damages against "income generated as a result of having committed the crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, the crime."[47] The central question for the New York trial court when it addressed the case in 1995 was whether the $4.3 million verdict constituted "income generated as a result of having committed the crime."[48]

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[43] *See* Debra Shields, *The Constitutionality of Current Crime Victimization Statutes: A Survey*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929, 933 (1994). There were only four such statutes in 1994. *Id.*

[44] Sandusky v. McCummings, 164 Misc. 2d 700 (1995).

[45] *Id*. at 701. McCummings later pleaded guilty to the felony charge of attempted robbery and was incarcerated. *Id.*

[46] *Id.*

[47] N.Y. EXEC. LAW § 632-a (2004).

[48] *Sandusky*, 164 Misc. 2d at 702.

The court held that the verdict did not fall under the assets outlined in the New York "Son of Sam" law.[49] It reasoned that the shooting was "an intervening event that broke any causal connection with the crime itself."[50] It stated that to apply the "Son of Sam" law to the case would distort the legislative intent of the law.[51]

New York State Crime Victims Board v. T.J.M. Productions

The other pertinent case to this class of "unique knowledge" laws also occurred in New York, and like *Sandusky v. McCummings*, it did not directly address First Amendment issues. In *New York State Crime Victims Board v. T.J.M. Productions*, a New York appellate court held that the New York State Crime Victims Board on its own did not have statutory authority to seek publication proceeds from a convicted felon.[52] The Board sought proceeds paid to mobster Salvatore "Sammy the Bull" Gravano for the book *Underboss*.[53] Gravano, a former member of the Gambino crime family, had been convicted of violating the federal racketeering act.[54] The board sued T.J.M. Productions, a company created by *Underboss* author Peter Maas; Maas individually; and other entities associated with the book.[55]

The Court dismissed the Board's claim because New York's "Son of Sam" law gave the "right to bring a civil action to recover monies identified as the profits from the crime" to victims or the Board on behalf of victims, not the Board alone.[56] The Board brought the action itself and

[49] *Id.* at 706.

[50] *Id.* at 705.

[51] *Id.* at 706.

[52] N.Y. Crime Victims Bd. v. T.J.M. Prods., 265 A.D.2d 38, 47 (2000).

[53] *Id.* at 43.

[54] *Id. See also* 18 U.S.C.S. § 1962(c).

[55] *T.J.M. Prods.*, 265 A.D.2d at 43.

[56] *Id.* at 44.

not on behalf of victims, and therefore had exceeded its statutory authority.[57] Additionally, the Court relied on a lower court's finding that New York's "Son of Sam" law did not apply to Gravano. Gravano was convicted in federal court, and the New York law was limited to defendants convicted of felonies defined by New York.[58] In its opinion, the Court alluded to the unresolved constitutional issue of whether publication proceeds truly represent profits of the crime but stated that the "significant constitutional question" was raised in an action that the Board had no authority to bring.[59]

Broader Anti-Profit Remedies

In addition to statutes that clearly state a public policy against criminal compensation for storytelling proceeds, general forfeiture statutes serve to complement state efforts to compensate victims. For example, Tennessee has a victim compensation statute that is procedurally similar to the other laws presented in this chapter but instead allows the attorney general to "collect all income, from whatever source derived, which is owing to the defendant, or representative or assignee of the defendant, after the date of the crime."[60] These broad anti-profit remedies have proved successful in allowing victims to claim defendant funds obtained from expressive activity related to crimes, as well as other sources.

Arizona v. Gravano

Although Arizona has a "Son of Sam" law modeled after the original New York law, it chose to pursue book proceeds from a well-known mobster under a general forfeiture statute. In

[57] *Id.*

[58] *Id.* at 47.

[59] *Id.*

[60] TENN. CODE ANN. § 29-13-402 TO 410 (2006).

fact, the state of Arizona was able to accomplish what New York couldn't: seizing proceeds from Salvatore Gravano's book *Underboss*.

A few weeks before a New York appellate court in *Board v. T.J.M. Productions* dismissed the New York State Crime Victims Board's claim against Gravano's royalties from the book *Underboss*, Gravano was arrested in Arizona on charges of distributing the illegal drug Ecstasy.[61] Two months after his arrest, Arizona sought to forfeit money and property owned by Gravano as proceeds of his Ecstasy distribution ring, which they alleged was conducted through racketeering.[62] The state asserted that under the Arizona Racketeering Act and the Arizona Forfeiture Reform Act, royalties from *Underboss* also were subject to forfeiture.[63] The state argued that these proceeds were traceable to Gravano's criminal activities in New York and were used to fund racketeering and drug distribution in Arizona.[64] Gravano argued that Arizona's seizure of the book royalties violated the First Amendment.[65]

The Arizona Supreme Court determined that the forfeiture statutes were content-neutral because they contained no reference to expressive materials and were based on a causal connection between racketeering and property.[66] The laws applied if the value of the commercial contract was substantially a result of racketeering and did not depend on the content of the work.[67] The Court held that the Arizona statutes not only passed the *O'Brien* standard of intermediate scrutiny required of content-neutral statutes, but they also passed a strict scrutiny

[61] Arizona v. Gravano, 204 Ariz. 106, 108 (2000).

[62] *Id.* at 109.

[63] *Id*. *See also* ARIZ. REV. STAT. §§ 13-2301 to -2318; ARIZ. REV. STAT. §§ 13-4301 to -4316.

[64] *Gravano*, 204 Ariz. at 109-111.

[65] *Id.* at 109.

[66] *Id.* at 113.

[67] *Id.*

standard of review.[68] The Court also held that the forfeiture laws advanced the compelling government interests of ensuring that victims are compensated and preventing criminals from profiting from their crimes, and the laws were narrowly tailored to do so.[69] The $420,000 in profits from *Underboss* were later distributed to eight families whose loved ones were killed by Gravano during his time with the Gambino crime family. [70]

Snuszki v. Wright

After its unsuccessful attempt to obtain publication proceeds from Gravano in *T.J.M Productions*, New York amended its "Son of Sam" law to expand the definition of "funds of a convicted person" to all of an inmate's monies, excluding child support or earned income.[71] Victims of specified crimes can bring civil actions for money damages from the inmate, provided they file suit within three years of learning of the inmate's funds.[72] The change in the law stepped away from the traditional model of seizing expression-related funds. The revised New York statute has been unsuccessfully challenged on constitutional grounds,[73] though the cases have not involved First Amendment challenges to seized proceeds from expressive activity.[74]

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[68] *Id.* at 114.

[69] *Id.* at 115.

> In sum, the application of Arizona's forfeiture laws is limited to preventing racketeers from benefiting from their crimes, and to compensating victims for their losses and the State for costs incurred in the prosecution of racketeers. We conclude that Arizona's forfeiture statutes not only survive intermediate scrutiny, but also are narrowly tailored to further the compelling interests of the State, and therefore satisfy a strict scrutiny standard as well. We therefore hold that Arizona's forfeiture statutes, as applied to Gravano's royalties from *Underboss*, do not violate either federal or state freedom of speech provisions. *Id.*

[70] Greg B. Smith, *Kin of Gravano's Victims Get 420G in Payback*, NEW YORK DAILY NEWS, July 22, 2004, at 3.

[71] N.Y. EXEC. LAW § 632-a (2006).

[72] *Id.*

[73] *See* N.Y. Crime Victims Bd. v. Majid, 193 Misc.2d 710 (2002) (rejecting defendant's claim that the seizure of $15,000 resulting from the settlement of a federal civil rights lawsuit was unconstitutional on ex post facto, due process, or equal protection grounds); Romero v. Pataki, 2006 WL 842177 (S.D.N.Y., Mar. 31, 2006) (declining to

In *Snuszki v. Wright*, Melanie Snuszki, daughter of a woman murdered by Thomas Wright, sued Wright under the revised "Son of Sam" law after learning that he received $25,000 in his prison account.[75] The $25,000 was the result of a settlement of Wright's claims that New York correctional officers violated his civil rights.[76] Wright requested the New York trial court dismiss Snuszki's complaint, challenging the "Son of Sam" law as unconstitutional because it inhibited his right of access to the courts;[77] violated his right to equal protection under the law;[78] and violated his due process rights.[79] The court rejected all of his constitutional claims and granted Snuszki's request to freeze Wright's funds. First, the supposed disincentive for inmates to file civil rights claims in the courts was rejected because there was no "actually injury" or restrictions on Wright's ability to pursue legal relief, and the purpose of the federal civil rights statute – to deter wrongdoing – was still served, regardless of whether a victim's money damages were later used to satisfy a judgment against the defendant.[80] Second, the inmate was not denied equal protection because he was not a member of a "suspect class" and he was not deprived of

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adjudicate certain constitutional claims against New York's revised "Son of Sam" statute because they were not ripe).

[74] However, a pending New York case involving rap artist "Shyne," whose real name is Jamal Barrow, may involve future First Amendment claims against New York's revised "Son of Sam" law. Barrow was convicted of, *inter alia*, first-degree assault following a shooting at nightclub on Dec. 27, 1999. Thompson v. 76 Corp., 2007 WL 414437, *1 (N.Y.A.D. 2 Dept., Feb. 6, 2007). Barrow was sentenced to ten years in prison. *Id.* Following his imprisonment, Barrow entered into a recording agreement with Island Def Jam Music Group valued at up to $3 million. *Id.* Natania Reuben was shot in the face by Barrow during the nightclub incident, and she sought an injunction to prevent Barrow from spending money that she might receive. *Id.*

[75] Snuszki v. Wright, 193 Misc.2d 490 (2002). Wright was the estranged husband of Melanie Wright Snuszki's mother, Peggy Ann Bannach Wright. *Id.* at 491.

[76] *Id.*

[77] *Id.* at 492.

[78] *Id.* at 493.

[79] *Id.* at 494.

[80] *Id.* at 492-493.

any fundamental constitutional right.[81] Finally, the court rejected Wright's substantive due process claim because he was not being deprived of any fundamental right.[82] Snuszki was later awarded $1 million in damages against Wright.[83]

Rolling v. Florida

In Florida, a general forfeiture statute, not that state's "Son of Sam" law, prevented serial killer Danny Rolling and his "cyber wife" Sondra London from making money in connection with a book of his artwork and the sale of his autographs.[84] By his own admission, Rolling killed five Gainesville, Florida, college students in 1990.[85] He pleaded guilty to five counts of first-degree murder in 1994 and was subsequently sentenced to death.[86]

Long before Rolling's gruesome killing spree, the state of Florida was quick to enact a "Son of Sam" law in 1977, following New York's lead.[87] Florida's "Son of Sam" law allows the state to impose a lien on proceeds from "any literary, cinematic, or other account of the crime" for which a person was convicted.[88] More than twenty years after Florida's "Son of Sam" law

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[81] *Id.* at 493. The court noted that the "there is no fundamental right to the protection of a state's statute of limitations" in response to Wright's claim that the extended statute of limitations for crime victims denied him a fundamental right. *Id.*

[82] *Id.* at 494.

[83] Snuszki v. Wright, No. 08409, slip op. (A.D.N.Y., 4th D. Nov. 17, 2006).

[84] Florida v. Rolling, et al., No. 93-265-CA, (Fla. 8th Cir., Dec. 31, 1997).

[85] Bryan Robinson, "Florida v. London and Rolling," <http://www.courttv.com/archive/verdicts/rolling.html > (last visited Oct. 10, 2007).

[86] *Id.* Rolling was executed in October 2006. Bridget Murphy, *Danny Rolling dies for 5 brutal killings*, FLA. TIMES-UNION (Jacksonville), Oct. 26, 2006, at A1.

[87] FLA. STAT. § 944.512 (2006).

[88] *Id.* Even before his conviction, the state of Florida attempted to enforce section 944.512 against Rolling. In 1993, a circuit court judge granted the state a temporary injunction against the disbursement of any proceeds from Rolling's recounting of his crimes, pursuant to the statute. On appeal, the First District Court of Appeal in Florida ruled that since the statute confined the law to those convicted of a crime, the injunction didn't apply to Rolling, who had yet to be convicted of the crimes. *See* Rolling v. Florida, 630 So. 2d. 635 (Fla. Dist. Ct. App. 1994).

was enacted, Florida's First District Court of Appeal considered Rolling's and London's claim that the state's attempt to seize proceeds from his autographs and a book titled *The Making of a Serial Killer* was unconstitutional.[89] The appellate court did not address the law's constitutionality.[90] Instead, the court held that proceeds from Rolling's art and writings were subject to a lien under another portion of Florida law.[91] The 1994 Civil Restitution Lien and Crime Victims' Remedy Act[92] provided a way for the state and crime victims to recover damages via a lien on the criminal's "real and personal property," which would conceivably include proceeds from any work, including literary or artistic expression.[93] Since the state had the ability to enforce the lien under statutes other than the "Son of Sam" law, and these other statutes were not constitutionally challenged by Rolling or London, the appellate court affirmed a circuit court's judgment for the state.[94]

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[89] Rolling & London v. Florida, 741 So. 2d 627 (Fla. Dist. Ct. App. 1999).

[90] *Id.* at 629.

[91] *Id.*

[92] Bryan Robinson, "Florida v. London and Rolling," <http://www.courttv.com/archive/verdicts/rolling.html > (last visited Oct. 10, 2007).

[93] FLA. STAT. § 960.29 (2006).

[94] *Rolling*, 741 So. 2d at 627. *See also* Florida v. Rolling (Fla. 8th Cir., Dec. 31, 1997).

CHAPTER 6
PROCEDURAL PROVISIONS OF "SON OF SAM" LAWS

Regardless of whether particular states' "Son of Sam" laws target specific mediums of expression, the procedure by which the laws are administered is generally as follows: First, individuals or businesses who contract with the defendant must turn over the defendant's proceeds to the state. The proceeds are then placed in an escrow account. The state must make efforts to notify victims, through both direct contact and publication of legal notice in a newspaper. Next, victims have approximately five years to bring civil actions to recover damage awards from the account. In addition to victims, the public defender's office, the state, and even the criminal are permitted by law to receive distributions from the account. This chapter examines how "Son of Sam" statutes require the laws to be administered.

A contract between a person or business and the defendant is required for the "Son of Sam" law to be effective in thirty-six of the thirty-nine states that have such laws.[1] For example, in *Simon & Schuster*, the contract existed between publishing company Simon & Schuster and

[1] The state "Son of Sam" laws that require a contract for enforcement are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See* ALA. CODE § 41-9-80 (2006); ALASKA STAT. § 12.61.020 (2006); ARIZ. REV. STAT. § 13-4202 (2006); ARK. CODE ANN. § 16-90-308 (2006); COLO. REV. STAT. § 24-4.1-201 (2006); CONN. GEN STAT. § 54-218 (2006); DEL. CODE ANN. tit. 11, § 9103 (2006); GA. CODE ANN. § 17-14-31 (2006); HAW. REV. STAT. §§ 351-81 TO -88 (2006); IDAHO CODE § 19-5301 (2006); IND. CODE ANN. §§ 5-2-6.3-1 TO -7 (2006); KAN. STAT. ANN. § 74-7319 (2006); KY. REV. STAT. ANN. § 346.165 (2006); ME. REV. STAT. ANN., tit. 14, § 752-E (2005); MD. CODE ANN., CRIM. PROC. §§ 11-621 TO -632 (2006); MICH. STAT. ANN. § 780.768 (2006); MINN. STAT. § 611A.68 (2005); MISS. CODE ANN. §§ 99-38-1 TO -11 (2006); MONT. CODE ANN. § 53-9-104 (2006); NEB. REV. STAT. §§ 81-1836 TO -1839 (2006); N.J.STAT. §§ 52:4B-62 TO -70 (2006); N. M. STAT. ANN. § 31-22-22 (2006); N.Y. EXEC. LAW § 632-a (2006); N.D. CENT. CODE § 32-07.1-01 (2006); OHIO REV. CODE ANN. § 2969.02 (2006); OKLA. STAT., tit. 22 § 17 (2006); OR. REV. STAT. § 147.275 (2006); 42 PA. CONS. STAT. § 8312 (2006); R.I. GEN. LAWS § 12-25.1-3 (2006); S.D. CODIFIED LAWS §§ 23A-28A-1 TO -14 (2006); UTAH CODE ANN. § 77-18.8.3 (2006); VA. CODE ANN. §§ 19.2-368.19 TO -22 (2006); WASH. REV. CODE §§ 7.68.200 TO -290 (2006); W. VA. CODE §§ 14-2B-1 TO -11 (2006); WIS. STAT. § 949.165 (2006); WYO. STAT. ANN. §§ 1-40-301 TO -308 (2006).

organized crime figure Henry Hill. Additionally, sixteen of these states require that a copy of the contract or written notice be submitted to the state.[2]

When the proceeds of such contracts are turned over to the state, they are generally deposited in an escrow account.[3] A departure from the escrow account scheme is found in Arizona, which describes a "crime victim account";[4] in Minnesota a "special account";[5] North Dakota calls for a "constructive trust";[6] an "offender's profit fund" is utilized in Ohio;[7] and Rhode Island describes the account as a "criminal royalties fund."[8] Utah is unique in that its "Son of Sam" law does not seek forfeiture of proceeds from a contract but allows for a special condition of sentencing that prohibits defendants from ever engaging in a contract related to expressing themselves regarding their crimes.[9]

While compensating victims is a stated goal of "Son of Sam" laws, victims do not simply receive a check in the mail if funds are turned over to the state. Victims must bring action in civil court within a specified amount of time, usually three to five years. Thirty-five states with "Son of Sam" laws require that the victim file a civil action or apply to the state - Florida, Montana,

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[2] The states that require a copy of the contract or written notice to be submitted to the board are Colorado, Delaware, Georgia, Hawaii, Indiana, Maryland, Mississippi, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, South Dakota, Washington, West Virginia, and Wisconsin.

[3] Escrow accounts are statutorily required in Alabama, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Maryland, Michigan, Minnesota, Mississippi, Montana, New Mexico, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[4] ARIZ. REV. STAT. § 13-4202 (2006).

[5] MINN. STAT. § 611A.68 (2005).

[6] N.D. CENT. CODE § 32-07.1-01 (2006).

[7] OHIO REV. CODE ANN. § 2969.92 (2006).

[8] R.I. GEN. LAWS § 12-25.1-3 (2006).

[9] UTAH CODE ANN. § 77-18.8.3 (2006).

Ohio, and Utah do not have such provisions.[10] In thirteen states, victims have five years from the establishment of the escrow account to file a claim against the account.[11] Five states share a similar statutory provision that allows victims three years from discovering the proceeds to take action.[12] Other states vary in their approach to how much time victims have to take advantage of the "Son of Sam" statutes. In Connecticut, for example, the five-year statute of limitations begins running on the date of the crime, which could be problematic if a criminal is not apprehended within five years of the crime.[13] Kansas only allows victims six months after being notified to file actions against the criminal.[14]

Though the intent of "Son of Sam" laws is to compensate victims, victims must compete for crime proceeds with other entities, such as the public defender and the defendant, who are often statutorily authorized to receive proceeds from expressive materials about crime. In fact, only eight states name victims as the sole beneficiaries of proceeds forfeited under "Son of Sam" laws.[15] More than half of the states with anti-profit statutes allow the criminal to petition a court to use some of the funds to pay for legal representation.[16] Two of these states – Rhode Island and Wisconsin – even list public defender costs as a higher priority for payment than victim

[10] FLA. STAT. ANN. § 944.512 (2006); MONT. CODE ANN. § 53-9-104 (2006); OHIO REV. CODE ANN. § 2969.92 (2006); UTAH CODE ANN. § 77-18.8.3 (2006).

[11] The states that allow for victim actions within five years of the establishment of an escrow account are Arizona, Colorado, Delaware, Idaho, Kentucky, Maryland, Michigan, Minnesota, New Mexico, Oregon, Texas, Washington, and Wyoming.

[12] The state allow for victim actions with three years of discovery of profits are Maine, Nebraska, New York, Pennsylvania, and West Virginia.

[13] CONN. GEN STAT. § 54-218 (2006).

[14] KAN. STAT. ANN. § 74-7319 (2006).

[15] The states that name victims as the sole beneficiaries of forfeited proceeds are Alabama, Maine, New Jersey, New York, North Dakota, Pennsylvania, Texas, and Wyoming.

[16] The twenty-two states that allow proceeds to be used for legal representation of defendant are Arizona, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Maryland, Minnesota, Mississippi, Nebraska, New Mexico, Oklahoma, Rhode Island, South Dakota, Tennessee, Virginia, Washington, West Virginia, and Wisconsin.

compensation.[17] Other statutory provisions which allow states to recoup costs they incur when a person is convicted of a crime include allowing for costs of incarceration to be distributed from the accounts.[18] In Montana, proceeds may eventually end up in the state's general fund.[19] Criminal defendants and their minor dependents are also potential beneficiaries of funds forfeited under "Son of Sam" laws. Fifteen states permit monies left in the account after the statute of limitations has expired to be returned to defendants.[20] For defendants with children, three states (Florida, Minnesota, and Mississippi) have provisions that allow for distributions from the accounts to dependents.[21]

The procedural components of "Son of Sam" laws are often overshadowed by the constitutional debate surrounding the laws, but these aspects of the laws are valuable as subjects of commentary themselves. In particular, the varying ways in which states distribute forfeited funds can have a significant impact on the ability of states to reach the goals (victim compensation and prevention of criminal profiteering) of "Son of Sam" laws.

[17] R.I. GEN. LAWS § 12-25.1-3 (2006); WIS. STAT. § 949.165 (2006).

[18] The states that provide for costs of incarceration to be withdrawn from anti-profit funds are Florida, Indiana, Michigan, Oklahoma, and South Dakota.

[19] MONT. CODE ANN. § 53-9-104 (2006).

[20] The states that return money to criminals if no victim action is taken are Colorado, Delaware, Georgia, Hawaii, Idaho, Kentucky, Maryland, Nebraska, New Mexico, Oregon, South Dakota, Washington, West Virginia, and Wisconsin.

[21] FLA. STAT. ANN. § 944.512 (2006); MINN. STAT. § 611A.68 (2005); MISS. CODE ANN. §§ 99-38-1 TO -11 (2006).

Table 6-2 Recipients of seized funds

State	Victims only	Legal costs	Prison costs	Defendant	Dependents
Alabama	X				
Arizona		X			
Arkansas		X			
Colorado				X	
Connecticut		X			
Delaware		X		X	
Florida			X		X
Georgia		X		X	
Hawaii		X		X	
Idaho		X		X	
Indiana		X	X		
Iowa		X			
Kentucky				X	
Maine	X				
Maryland		X		X	
Michigan			X		
Minnesota		X			X
Mississippi		X			X
Nebraska		X		X	
New Jersey	X				
New Mexico		X		X	
New York	X				
North Dakota	X				
Oklahoma		X	X		
Oregon				X	
Pennsylvania	X				
Rhode Island		X			
South Dakota		X	X	X	
Tennessee		X			
Texas	X				
Virginia		X			
Washington		X		X	
West Virginia		X		X	
Wisconsin		X		X	
Wyoming	X				

CHAPTER 7
SUMMARY AND CONCLUSION

Summary

The findings presented in the previous chapters show that "Son of Sam" laws in the fifty states are very similar in how they dictate that such anti-profit laws are carried out. In thirty-six of the thirty-nine states with active "Son of Sam" laws, there must be a contract in existence in order for the law to be effective. Funds are then deposited in an escrow account or other designated fund, making them available for victims to file claims against. And, while victim compensation is one goal of "Son of Sam" laws, victims must often compete with other potential recipients of the money, including public defenders, court-appointed attorneys, the state, and dependents of criminals.

Most states, twenty-eight, still target the specific mediums of expression and thoughts of the defendant as outlined in the New York law struck down in *Simon & Schuster*. A growing trend among states is to eliminate references to expression in favor of laws that target proceeds derived from a "unique knowledge" of a crime, as eleven states have done. Finally, some states use their general forfeiture statutes to pursue criminal storytelling proceeds. The potential success for this approach has been illustrated in cases involving Arizona, New York, and Florida.

Conclusion

A survey of "Son of Sam" laws across the country lends itself to two major conclusions. First, although "Son of Sam" laws have been touted as a way to compensate crime victims and prevent criminals from profiting from their crimes, an examination of the statutory provisions regarding the administration of criminal anti-profit laws reveals that neither goal is guaranteed. Most states allow for defendants to use criminal profits for legal representation, which would likely go to the public defender or a court-appointed attorney. In fact, Wisconsin and Rhode

Island prioritize public defender costs before victim reparations. Another five states allow the seized funds to be used to pay for incarcerating the criminal. And Montana has a provision for unused funds to go in the state's general fund. Thus, while the stated intent of these laws is to compensate victims and prevent criminal profiteering, in practice they often serve as a tool for states to defray the costs of giving a defendant a fair trial and any subsequent incarceration. The goal of preventing criminals from profiting from their wrongdoing cannot be obtained if, as in sixteen states, there are funds still available after the statute of limitations for victim action has expired. These states simply return the money to the defendant. If certain individuals' First Amendment rights are to be compromised by "Son of Sam" laws similar to New York's original statute, then it is vital that the government's compelling interests have the opportunity to be realized. In many states, procedural provisions of "Son of Sam" statutes thwart the goals of such laws.

A second major observation of this fifty-state survey is that in light of the case law presented in Chapter 5, the twenty-eight states that continue to have laws that target expressive materials would be wise to amend their laws. State case law since *Simon & Schuster* regarding these types of laws has reiterated how vulnerable these statutes are to constitutional challenges.

Eleven states have already steered clear of targeting works such as books or movies and instead choose to focus on assets the defendant received as a result of the crime, including those obtained through a "unique knowledge" of the crime. While these types of laws have not advanced in the courts to the point of First Amendment scrutiny, it appears that they would fare much better in the courts than expression-specific laws. As many authors have suggested, these laws would likely be analyzed using intermediate scrutiny and are likely to pass such a standard of review.

States who wish to revise their laws could take an even further step away from expression-specific laws by using forfeiture statutes that extend to all income or property, as Tennessee, Arizona, New York, and Florida have done, to obtain proceeds from expressive materials. These broad laws have been successful when challenged in the courts and offer yet another option for the twenty-eight states whose current laws are likely unconstitutional under *Simon & Schuster*. These states with constitutionally vulnerable "Son of Sam" laws should not wait for a legal challenge to revise their laws. "Son of Sam" laws are rarely challenged, but when they are, it is usually because an individual has committed a particularly heinous or notorious crime. Rather than wait and allow such criminals to profit from their crimes because of poor legislation, states should take proactive measures to ensure that the legislative intent of anti-profit laws is realized.

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BIOGRAPHICAL SKETCH

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