

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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*The "Son of Sam" Case: Legislative Implications*

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**Abstract.** In *Simon & Schuster, Inc. v. Members of the new York State Crime Victims Board*, the U.S. Supreme Court held that New York State's "Son of Sam" law was inconsistent with the First Amendment's guarantee of freedom of speech and press. This report examines the Supreme Court decision and then considers whether its rationale renders the federal law unconstitutional. Concluding that it likely does, the report considers whether it would be possible to enact a constitutional Son-of-Sam statute. Finally, the report takes note of some state Son-of-Sam statutes that have been enacted since the Supreme Court decision.

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## **The “Son of Sam” Case: First Amendment Analysis and Legislative Implications**

**Updated February 27, 2002**

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<http://wikileaks.org/wiki/CRS-92-56>

# The “Son of Sam” Case: First Amendment Analysis and Legislative Implications

## Summary

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the United States Supreme Court held that New York State’s “Son of Sam” law was inconsistent with the First Amendment’s guarantee of freedom of speech and press. The Son of Sam law, in the Court’s words, “requires that an accused or convicted criminal’s income from works describing his crime be deposited in an escrow account. These funds are then made available to the victims of the crime and the criminal’s other creditors.” “[T]he Federal Government and most of the States have enacted statutes with similar objectives.” This report examines the Supreme Court decision and then considers whether its rationale renders the federal law unconstitutional. Concluding that it likely does, we consider whether it would be possible to enact a constitutional Son of Sam statute. Finally, we take note of some state Son-of-Sam statutes that have been enacted since the Supreme Court decision.

The Court struck down the New York statute apparently because it was both underinclusive in that it applied solely to income derived from the exercise of First Amendment rights, and overinclusive in that it could have applied to books such as Saint Augustine’s *Confessions*, the inclusion of which would not have advanced the government’s legitimate interest in depriving criminals of the profits of their crimes and using these funds to compensate victims. The federal Son of Sam statute would appear to be unconstitutional for the same reasons, and it remains extremely speculative whether it would be possible to devise a constitutional Son of Sam law.



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# The “Son of Sam” Case: First Amendment Analysis and Legislative Implications

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the United States Supreme Court held that New York State’s “Son of Sam” law was inconsistent with the First Amendment’s guarantee of freedom of speech and press.<sup>1</sup> The Son of Sam law, in the Court’s words, “requires that an accused or convicted criminal’s income from works describing his crime be deposited in an escrow account. These funds are then made available to the victims of the crime and the criminal’s other creditors.”<sup>2</sup> “[T]he Federal Government and most of the States have enacted statutes with similar objectives.”<sup>3</sup> This report examines the Supreme Court decision and then considers whether its rationale renders the federal law unconstitutional. Concluding that it likely does, we consider whether it would be possible to enact a constitutional Son of Sam statute.<sup>4</sup> Finally, we take note of some state Son-of-Sam statutes that have been enacted since the Supreme Court decision.

## The New York Statute

The New York statute that the Supreme Court struck down required that anyone who contracts to pay a person accused or convicted of a crime in New York for such person’s “reenactment of such crime,” by way of a movie, book, magazine article, tape recording, or the like, or for such person’s “thoughts, feelings, opinions or emotions regarding such crime,” shall pay over to the Crime Victims Board “any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives.” The Board was then required to deposit the money in an escrow account and pay it to any victims of the accused or convicted person’s crimes who file a claim within five years of the date the escrow account is established. Remaining funds in the account were to be paid to other creditors of the accused or convicted person. The statute defined “person convicted of a crime” to include “any person who has voluntarily and intelligently admitted the commission of a crime,” even if such person has never been accused or convicted of it.

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<sup>1</sup> 502 U.S. 105 (1991).

<sup>2</sup> *Id.* at 108, summarizing N.Y. Executive Law § 632-a.

<sup>3</sup> *Id.* at 115. The federal statute is codified at 18 U.S.C. § 3681. The state statutes in force at the time are listed in Note, *Simon & Schuster, Inc. v. Fischetti: Can New York’s Son of Sam Law Survive First Amendment Challenge?*, 66 Notre Dame L. Rev. 1075, 1075 n.6 (1991) (*Fischetti* was the lower-court version of the Supreme Court case).

<sup>4</sup> “Son of Sam” was the nickname of David Berkowitz, a serial killer whose 1977 crimes gave rise to the New York statute in question.

## The First Amendment

The First Amendment to the Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” and it equally limits the states.<sup>5</sup> Any law that limits speech on the basis of its content, including a law that imposes a financial burden on speakers because of the content of their speech, is presumptively unconstitutional.<sup>6</sup> To overcome this presumption of unconstitutionality, “the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”<sup>7</sup> Thus, a state’s compelling interest in maintaining public safety might allow it to prohibit “falsely shouting fire in a theatre” – if it did not at the same time restrict speech in a manner beyond what was necessary to maintain public safety.<sup>8</sup>

## The Supreme Court Decision

The Supreme Court found that the New York statute served two compelling interests: “ensuring that victims of crime are compensated by those who harm them,” and “ensuring that criminals do not profit from their crimes.”<sup>9</sup> The Court found that the state, however, had no compelling interest in “ensuring that criminals do not profit from storytelling about their crimes. . . . The [New York State Crime Victims] Board cannot explain why the State should have any greater interest in compensating victims from the proceeds of such ‘storytelling’ than from any of the criminal’s other assets.”<sup>10</sup> “In short,” Justice O’Connor wrote for the Court, “the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer’s speech about the crime. We must therefore determine whether the Son of Sam law is narrowly tailored to advance the former, not the latter, objective.”<sup>11</sup>

The Court in this last sentence seems to be asking whether the statute is *underinclusive*, in that it applies *only* to speech. It might appear that the Court had already answered the question in its previous sentence when it said that “the State has . . . little if any interest in limiting such compensation to the proceeds of the wrongdoer’s speech about the crime.” But the Court did not think it had, as it said

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<sup>5</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>6</sup> *See, Simon & Schuster, supra* note 1, at 115.

<sup>7</sup> *Id.* at 118. The Court has indicated that, in the case of a content-based restriction on speech, such as that imposed by New York’s Son of Sam statute, “narrowly drawn” means that the regulation must constitute “the least restrictive means to further the articulated interest.” *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989).

<sup>8</sup> The quotation is from Justice Holmes’ opinion for the Court in *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>9</sup> *Simon & Schuster, supra* note 1, at 118, 119.

<sup>10</sup> *Id.* at 119.

<sup>11</sup> *Id.* at 120-121

elsewhere in the opinion that it “need not decide whether . . . the Son of Sam law is underinclusive. . . .”<sup>12</sup>

In any case, the Court at this point begins to address not whether the statute is *underinclusive*, in applying *only* to speech, but whether the statute is *overinclusive*, in applying to *too much* speech – *i.e.*, in applying to speech to which it need not apply in order to advance its compelling interests. It concludes that it is. Here are three comments it makes on this subject:

As a mean of ensuring that victims are compensated from the proceeds of crime, the Son of Sam law is significantly overinclusive. . . . [T]he statute applies to works on *any* subject, provided that they express the author’s thoughts or recollections about his crime, however tangentially or incidentally. In addition, the statute’s broad definition of a “person convicted of a crime” enables the Board to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted.<sup>13</sup>

Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as *The Autobiography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; *Civil Disobedience*, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the *Confessions of Saint Augustine*, in which the author laments “my past foulness and the carnal corruptions of my soul,” one instance of which involved the theft of pears from a neighboring vineyard.<sup>14</sup>

Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the Board would control his entire income from the book for five years, and would make that income available to all of the author’s creditors, despite the fact that the statute of limitations for this minor incident had long since run. That the Son of Sam law can produce such an outcome indicates that the statute is, to say the least, not narrowly tailored to achieve the State’s objective of compensating crime victims from the profits of crime.<sup>15</sup>

After these comments on the statute’s *overinclusiveness* (in applying to too much speech), the court appears to conclude that the statute is *underinclusive* (in applying only to speech), though it has said that it “need not decide whether” it “is underinclusive as well as overinclusive.”<sup>16</sup> It writes:

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<sup>12</sup> *Id.* at 122, n.\* (the Court uses an asterisk instead of a number presumably because this is the only footnote in the opinion).

<sup>13</sup> *Id.* at 121 (italics in original; citations omitted).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 123.

<sup>16</sup> *See*, note 12, *supra*.



We conclude simply that in the Son of Sam law, New York has singled out speech on a particular subject for a financial burden that 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.<sup>17</sup>

Although the Court's precise holding seems uncertain, it appears reasonable to conclude that the Court considered the statute to be both underinclusive and overinclusive. Justice Blackmun, in a concurring opinion, attempted to clarify, writing, in full:

I am in general agreement with what the Court says in its opinion. I think, however, that the New York statute is underinclusive as well as overinclusive and that we should say so. Most other States have similar legislation and deserve from this Court all the guidance it can render in this very sensitive area.<sup>18</sup>

This is important because it suggests that the statute was both underinclusive in not applying to assets other than those derived from the exercise of First Amendment rights, and was overinclusive for its potential application to works like Saint Augustine's *Confessions*.

## The Federal Statute

The federal Son of Sam statute, 18 U.S.C. § 3681, applies to convictions under 18 U.S.C. § 794, which makes it a federal crime to gather or deliver defense information to aid a foreign government, and to convictions for federal crimes "resulting in physical harm to an individual." Thus, unlike the New York statute, the federal statute is limited to convictions and is limited to specified types of crimes. Apart from this, the federal statute is similar to the New York statute in relevant respects. Like the New York statute, it applies to contracts relating to a depiction of a crime in any medium, and to contracts for an expression of the defendant's "thoughts, opinions, or emotions regarding such crime."<sup>19</sup> Proceeds from such contracts are retained in escrow in the Crime Victims Fund in the Treasury and for five years are used for victim compensation, fines imposed by a federal court, and the defendant's legal representation. Remaining amounts may be paid into the Crime Victims Fund in the Treasury.<sup>20</sup>

Like the New York statute, the federal statute is limited to proceeds received for activities protected by the First Amendment. Therefore, there seems little doubt that it also is unconstitutionally underinclusive. Is it also unconstitutionally overinclusive?

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 123-124.

<sup>19</sup> 18 U.S.C. § 3681(a).

<sup>20</sup> The Crime Victims Fund exists apart from the "Son of Sam" statute and receives funds from sources other than criminals' publication contracts. It is established at 42 U.S.C. § 10601.

Unlike the New York statute, it would not apply to Saint Augustine's theft of pears, as his crime today would not violate the espionage statute or result in physical harm to an individual (assuming it would violate federal law). However, the federal statute would apply to a prominent figure who wrote his autobiography at the end of his career, and included in an early chapter a brief recollection of a conviction for having committed a federal crime in which he caused physical harm to an individual. This might be a relatively minor federal crime, such as a traffic violation on federal land.<sup>21</sup> Although the federal statute is not as overinclusive as the New York statute, it nevertheless would apply in situations where it would not seem likely to advance the federal interest in depriving criminals of the profits of their crimes and in using these funds to compensate victims. Consequently, like the New York statute, it apparently would be unconstitutionally overinclusive as well as underinclusive.

## A Constitutional Son of Sam Statute?

To be constitutional, a Son of Sam statute apparently would have to avoid both underinclusiveness and overinclusiveness. We discuss these issues in turn.

**Underinclusiveness.** A Son of Sam statute could attempt to avoid underinclusiveness by applying to a criminal's assets beyond those derived from speech about his crime. It might cover all his income derived from his crime, which would include, in addition to income from writing or speaking about the crime, income derived directly from the crime, such as stolen money, income from investments of stolen money, or income derived from the sale of stolen property. Or it might apply not only to all income derived from a crime, but to all an individual's income while in prison, or even to all his assets, including those legally acquired prior to the commission of the crime. We will consider possible constitutional problems with both these possibilities.

A Son of Sam statute that covered all income derived from a crime arguably would have the purpose and effect primarily of limiting speech. This is because non-speech income derived from a crime may already, to a large extent, be seized under federal statutes, such as those that provide for fines or restitution.<sup>22</sup> A statute's *purpose*, however, is unlikely to raise a First Amendment problem, as the Supreme Court has said that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."<sup>23</sup> But the *effect* on speech of a Son of Sam statute that covered all income derived from a crime would raise a First

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<sup>21</sup> Section 13 of title 18, U.S. Code, provides that whoever in a place within the special maritime and territorial jurisdiction of the United States (which includes some federal property within a state, 18 U.S.C. § 7(3)) is guilty of an act or omission, which although not otherwise a federal crime, is a crime in the jurisdiction where the place is situated, "shall be guilty of a like offense and subject to a like punishment." In other words, federal law incorporates state law under such circumstances.

<sup>22</sup>*E.g.*, 18 U.S.C. § 3556. In addition, the Federal Racketeer Influenced and Corrupt Organizations Act (RICO), imposes forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . ." 18 U.S.C. § 1963(a)(3).

<sup>23</sup> *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

Amendment question. This is because, even if the statute were not aimed at speech, it would still have an *incidental* effect on speech.

The Supreme Court, however, uses a less stringent standard to assess the constitutionality of incidental restrictions on speech than to assess the constitutionality of content-based restrictions on speech. In the case of incidental restrictions, rather than requiring that the regulation constitute the least restrictive means to serve a *compelling* governmental interest, it is sufficient if it “furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.”<sup>24</sup> Subsequent to this statement, the Court made clear that, though it had said that an incidental restriction must be “no greater than is essential” to further a substantial government interest, an incidental restriction “need not be the least restrictive or least intrusive means” of furthering the interest. Rather, the restriction must be “narrowly tailored,” and “the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.’”<sup>25</sup>

Applying the incidental restrictions test, it appears that, if, as the Court said in *Simon & Schuster*, the state has a “compelling” interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims, then it ipso facto would also have a “substantial” interest in furthering these interests. The question, then, would be whether these interests “would be achieved less effectively absent the regulation.” But, absent the regulation, these interests would arguably not be as effectively achieved, because the criminal would be permitted to retain his income from speech. Therefore, a Son of Sam statute that applied to all income derived from a crime would appear not to have the *underinclusiveness* problem that the Court found the New York statute to have. It would still, however, have the *overinclusiveness* problem, which we discuss below.

Continuing to examine *underinclusiveness*, however, we must consider possible constitutional problems with a Son of Sam statute that applied not only to all income derived from a crime, but to all an individual’s income while in prison, or even to all his assets, including those legally acquired prior to the commission of the crime. Such a statute would apparently have to be limited to individuals convicted of a crime, as there would be due process problems with taking property from a person accused but

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<sup>24</sup> *Id.* at 377.

<sup>25</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989). The Court was referring here to time, place, or manner regulations, but it treats these the same as incidental restrictions; *see*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984). *Ward* makes clear that, although both the “strict scrutiny” imposed on content-based restrictions and the test for time, place, and manner (and incidental) restrictions require “narrow tailoring,” “the same degree of tailoring is not required” under the two; under the time, place, or manner (and incidental restrictions) test, a “least-restrictive-alternative analysis is wholly out of place.” *Id.* at 798-799 n.6.

not convicted of a crime.<sup>26</sup> Further, for the government to take assets unrelated to a crime, and in excess of the amount needed to compensate victims of the crime, would in effect be to impose a punishment in addition to the criminal's sentence. Therefore, it might be unconstitutional in particular cases if the forfeiture it imposed were so disproportionate to the crime as to constitute an excessive fine or cruel and unusual punishment in violation of the Eighth Amendment.<sup>27</sup>

**Overinclusiveness.** Even if a Son of Sam statute applied to all income, speech and non-speech, and was thereby not *underinclusive*, it would still apparently have to be narrowly tailored so as not to apply to writings such as Saint Augustine's *Confessions* and thereby not "burden substantially more speech than is necessary to further the government's legitimate interests."<sup>28</sup> This raises the question, what specific types of writings or speech must be excluded because their inclusion would not advance these governmental interests? The Court did not answer this question explicitly. In a passage quoted above, the Court expressed disapproval of the reach of the New York statute in two respects:

[T]he statute applies to works on *any* subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally. . . . In addition, the statute's broad definition of a 'person convicted of a crime' enables the Board to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted.

In the first sentence of this quotation, the Court seems to imply that works containing an author's merely tangential or incidental recollection of his crime must be excluded. Suppose, however, that a prominent figure published an autobiography that contained a brief description of a crime he had committed, but that the crime was particularly lurid, and not publicly known before. Revelation of the crime, even tangentially, might greatly increase sales of the autobiography and could constitute profiting from the crime in just the manner that it is in the government's interest to prevent. Consequently, one apparently cannot conclude that a Son of Sam statute must necessarily exclude from its coverage *all* works with merely tangential or incidental descriptions of their author's crime.

In the second sentence of the above quotation, the Court seems to imply that works containing an author's discussion of a crime he committed but for which he was never actually accused or convicted must be excluded. While such works may

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<sup>26</sup> This is not to say that there are no due process problems, under a Son of Sam statute that applied only to income derived from a crime, with taking property of a person not convicted of a crime. The Supreme Court did not address the issue in its decision.

<sup>27</sup> See, e.g., *Harmelin v. Michigan*, 501 U.S. 957 (1991), in which a majority of the justices found that the Cruel and Unusual Punishments Clause has a proportionality requirement, but a different majority held that mandatory life in prison without parole for possession of more than 650 grams of cocaine does not violate the clause.

<sup>28</sup> *Ward, supra*, note 25, at 799.

include those with merely brief recollections of youthful pranks, they may also include those with confessions of serious crimes of significant public interest that would sell precisely because of such interest. Consequently, one cannot conclude that a Son of Sam statute must necessarily exclude from its coverage *all* works about crimes for which the author was never accused or convicted.

As also quoted above, the Court gave examples of specific books that it implied may not be covered by a Son of Sam statute.<sup>29</sup> The Court apparently believed that coverage of these books would not advance the governmental interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims. The Court did not explain, however, what these books have in common or why it apparently believed that their coverage would not advance the stated governmental interest.

That the books may all be considered classics, or great literature, or contain important messages, would not appear to entitle them to additional constitutional protection. To make any of these factors a criterion of constitutional protection would be to discriminate on the basis of content, which is permissible only to serve a compelling governmental interest. In any event, most literary classics were not deemed such at the time of publication, and it would be futile for a statute to exclude those works that in the future will be deemed literary classics. Furthermore, even if one could know which books would become literary classics, the fact that a book is considered a literary classic does not entail that its inclusion in a Son of Sam statute would not advance the stated governmental interests. If “Son of Sam” himself had written a book about the murders he committed, it is possible that his book might have had great literary merit. Yet depriving him of his profits and paying them to his victims’ families would seem no less in the government’s interest.

Another factor that the books on the Court’s list may have in common is that their authors may not have written them with the intention of profiting from their crimes. Rather, they may have intended to convey a moral or political message, or to create a work of art. However, an author’s motivation would seem immaterial to whether the statute advanced the state’s interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims. The state’s interest would be advanced anytime a book by a criminal about his crime made a profit. Further, an author’s having “lesser” motivations, such as greed, would not reduce the First Amendment protection to which his speech is entitled.

One factor that the books do *not* have in common is that the crimes they discuss were minor or political, as *The Autobiography of Malcolm X* describes violent crimes that the author committed for no political motive. Another that they do *not* have in common is that they all discussed crimes that had been committed many years before;

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<sup>29</sup> The Court also mentions an *amicus* brief containing “a sobering bibliography listing hundreds of works by American prisoners and ex-prisoners, many of which contain descriptions of the crimes for which the authors were incarcerated, including works by such authors as Emma Goldman and Martin Luther King, Jr.” 501 U.S., at 121-122. The Court adds three other persons arrested or convicted of crimes whose autobiographies would be subject to the statute: Sir Walter Raleigh, Jesse Jackson, and Bertrand Russell.

Thoreau's *Civil Disobedience* concerned an adult crime (refusal to pay taxes), his discussion of which, incidentally, was not a tangential aspect of *Civil Disobedience*.

In short, it does not seem possible to single out any feature common to the books on the Court's list that must be excluded from a Son of Sam statute in order for the statute to avoid being found overinclusive. The government's interest could be advanced by seizing the profits of a book even if its description of its author's crimes was tangential or incidental, even if the author had never been accused or convicted of the crime, even if the crime had occurred many years before or was a relatively minor crime, even if the book had literary merit, and even if the author had not written it with the intention of profiting from his crime.

Now, a defender of a Son of Sam statute that was not limited to speech might argue that, if it is not possible to single out any feature common to the books on the Court's list that must be excluded from a Son of Sam statute in order for the statute to avoid being found overinclusive, then this means that the statute may include these books, as "a substantial governmental interest . . . would be achieved less effectively absent the regulation."<sup>30</sup> But this would be overlook the Court's explicit statement that the New York statute was "overinclusive" for including these books.<sup>31</sup>

There is a limitation that might be placed in a Son of Sam statute that *might* increase the chances of its being found constitutional. It would be to limit the use of the criminal's income or assets to compensating the victims of his crime, and returning to the criminal any funds that remained. Both the New York statute and the federal Son of Sam statute provide for funds that are not used to compensate victims of the crime to be used for other purposes. In its decision, the Court notes this about the New York statute, but does not mention it in its analysis of the statute's constitutionality. Therefore, one cannot conclude that the Court found this aspect of the statute objectionable under the First Amendment. Nevertheless, this aspect of the statute, although it furthers the governmental interest in depriving a criminal of the fruits of his crime, does not further the governmental interest in compensating victims. Consequently, to remove this aspect, and allow the criminal to recover any amounts not claimed by victims, might increase the chances of a Son of Sam statute's being found constitutional.<sup>32</sup> Of course, to narrow a statute in this manner would make no difference if the Court were to find the statute unconstitutional for any of the other reasons discussed above.

## Developments since *Simon & Schuster*

After *Simon & Schuster*, several states revised their Son of Sam statutes in an effort to make them constitutional. We will note those of California, Maryland, New York, and Pennsylvania.

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<sup>30</sup> See, note 25, *supra*.

<sup>31</sup> *Simon & Schuster*, *supra* note 1, at 122 n.\*

<sup>32</sup> It would also eliminate any possible Eighth Amendment problem; see, note 27, *supra*.

California's pre-*Simon & Schuster* statute had applied only to "proceeds" relating to "the story of a felony for which a convicted felon was convicted." Since 1994, it has been applied also to "profits," which it defines as "all income from anything sold or transferred, including any right, the value of which is enhanced by the notoriety gained from the commission of a felony for which a convicted felon was convicted."<sup>33</sup> In 2000, it was extended further to apply, with limited exceptions, to "profiteer[s] of the felony," *i.e.*, "any person[s]" who derive income by selling memorabilia, property, rights, or things for values enhanced by their felony-related notoriety." In 2002, the California Supreme Court ruled the statute unconstitutional.<sup>34</sup>

The California court found that the California statute "contains the fundamental defect identified in *Simon & Schuster*; it reaches beyond a criminal's profits from the crime or its exploitation to reach all income from the criminal's speech or expression on any theme or subject, if the story of the crime is included. Though [the California statute], unlike the New York law, applies only to persons actually convicted of felonies, and states an exemption for mere 'passing mention of the felony, as in a footnote or bibliography,' . . . these differences do not cure the California statute's constitutional flaw. By any reasonable construction, 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 prior felonies."

Maryland's Son of Sam statute, amended several times after *Simon & Schuster*, requires submission to the Attorney General a copy of any "notoriety of crimes contract" and payment to the Attorney General of any moneys or consideration received pursuant to such contract. A "notoriety of crimes contract" is defined as a contract with the defendant, or a representative or assignee of the defendant, with respect to:

- (i) The reenactment of a crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, or live entertainment of any kind;
- (ii) The expression of the defendant's thoughts, feelings, opinions, or emotions regarding a crime involving or causing personal injury, death, or property loss as a direct result of the crime; or
- (iii) The payment or exchange of any money or other consideration or the proceeds or profits that directly or indirectly result from a crime, a sentence, or the notoriety of a crime or sentence.<sup>35</sup>

In *Curran v. Price*, this statute was challenged as unconstitutional, but the Maryland Court of Appeals avoided the question by deciding "that the statute does not require a defendant to submit to the Attorney General a suspected notoriety of

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<sup>33</sup> California Civil Code § 2225.

<sup>34</sup> *Keenan v. Superior Court*, 2002 WL 243394 (Cal., Feb. 21, 2002).

<sup>35</sup> Md. Ann. Code, Art. 27, § 854.

crimes contract,” which is what was at issue in the case.<sup>36</sup> This was because, to require submission of a contract that was merely suspected of being a notoriety of crimes contract would implicate the defendant’s constitutional privilege against self-incrimination.

New York amended its Son of Sam statute to apply to any “profits from the crime,” which it defines to include:

- (i) any property obtained through or income generated from the commission of a crime of which the defendant was convicted;
- (ii) any property obtained by or income generated from the sale, conversion or exchange of proceeds of a crime, including any gain realized by such sale, conversion or exchange; and
- (iii) any property which the defendant obtained or income generated as a result of having committed the crime . . . .<sup>37</sup>

The New York statute defines “crime” as “any felony defined in the penal law or any other chapter of the consolidated laws of the state.” In *New York State Crime Victims Board v. T.J.M. Productions, Inc.*, the state sought to enforce the law “against several entities and individuals associated with the writing and publication of the book *Underboss*, which recounts the life of defendant Salvatore Gravano . . . , a former member of the Gambino crime family . . . .”<sup>38</sup> The complaint alleged that Gravano had been convicted of “racketeering charges pursuant to the Federal Racketeer Influenced and Corrupt Organizations (“RICO”) law. . . . Thus Gravano’s conviction was for crimes which are not ‘defined in the Penal Law of this state.’” The court concluded:

The complaint fails to state a cause of action under the Son of Sam Law. Therefore, there is no need for this court to determine whether the Son of Sam Law passes constitutional muster. “Courts should not address constitutional issues when a decision can be reached on other grounds.”

Pennsylvania’s Son of Sam statute now applies to any “profit from a crime,” the definition of which is identical to New York’s definition of “profits from the crime,” quoted above.<sup>39</sup>

## Conclusion

As Justice Blackmun complained in his concurring opinion, the Court in *Simon & Schuster* did not provide legislatures with all the guidance that it might have provided as to the constitutionality of Son of Sam statutes that are different from the New York statute it struck down. What apparently may be inferred from the decision with some confidence is that a Son of Sam statute, to be constitutional, must, to avoid

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<sup>36</sup> 638 A.2d 93 (Md. 1994).

<sup>37</sup> N.Y. Executive Law § 632-a.

<sup>38</sup> 673 N.Y.S.2d 871(1998).

<sup>39</sup> 42 Pa.C.S.A. § 8312.



underinclusiveness, encompass a criminal's income or assets beyond those derived from writing or speech. In addition, to avoid overinclusiveness, it must not apply to works whose coverage by the statute would not advance the legitimate governmental objective of compensating victims with the fruits of crime.

Fashioning a Son of Sam statute that is not overinclusive would be difficult because the Supreme Court, rather than specifying a category of publications that would not advance legitimate governmental interests, offered a list of books and hypothetical books describing their authors' crimes that appear to have no other feature in common beyond their fame or potential fame. Consequently, even if a statute excluded works with any apparently relevant feature of any of the books the Court listed, it is impossible to predict whether the exclusion of additional books, not containing any of these features, might be required by the Court.

In short, although the Court did not foreclose the possibility of a constitutional Son of Sam statute, the possibility of such a statute, and the form such a statute would take, remain extremely speculative.