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## Recommended Citation

Jane Langdon, *The Constitutionality of "Son of Sam" Laws after Simon & Schuster v. New State Crime Victims Board*, 3 DePaul J. Art, Tech. & Intell. Prop. L. 58 (1993)

Available at: <https://via.library.depaul.edu/jatip/vol3/iss2/2>

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# THE CONSTITUTIONALITY OF "SON OF SAM" LAWS AFTER *SIMON & SCHUSTER* v. NEW STATE CRIME VICTIMS BOARD

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## I. INTRODUCTION

A "Son of Sam" law is an antiprofit statute requiring criminals to surrender all proceeds received from the sale and publication of their memoirs.<sup>1</sup> New York's "Son of Sam" statute was the first of its kind and acted as a model for many other states and the federal government.<sup>2</sup> This article will review "Son of Sam" laws in general, focusing on New York's Executive Law 632-a which was recently held unconstitutional by the Supreme Court in *Simon & Schuster, Inc. v. New York State Crime Victims Board*.<sup>3</sup> This article will also examine New York's recently revised "Son of Sam" law and, based on the Supreme Court's analysis, propose the elements of a "Son of Sam" law which could possibly withstand constitutional review.

## II. BACKGROUND

### A. The Origin of the "Son of Sam" Law

New York Executive Law 632-a was enacted in 1977 in response to the sensationalism and mass media coverage of the serial killer, David Berkowitz a/k/a "Son of Sam."<sup>4</sup> Even before Berkowitz was apprehended, it was apparent that the notoriety surrounding his heinous crimes would give him the opportunity to realize a large profit from the sale of his story. Ironically, the public supplied the demand for these stories, as well as the force behind the legislation to suppress these books. The "Son of Sam" law was enacted to quiet the public outcry in reaction to the enormous profits earned by criminals for the publication of their stories.<sup>5</sup> New York State Senator Emmanuel Gold, sponsor of the bill, stated in his memorandum to Congress that:

It is abhorrent to one's sense of justice and decency that an individual such as the forty-four caliber killer (Berkowitz) can expect to receive large sums of money for his story once he is captured while five people are dead, and other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.<sup>6</sup>

More specifically, Executive Law 632-a required the surrender to the State Crime Victims

Compensation Board ("Board") of any profits gained from a criminal act by way of a movie, book, or magazine article.<sup>7</sup> The law also required a publisher to surrender to the Board any contract made with a criminal for the publication of a book.<sup>8</sup> However, Executive Law 632-a was not limited to criminals in the ordinary sense, but applied to those "accused or convicted" of a crime, or who "admitted" to a crime in his or her book.<sup>9</sup> Further, the publisher had to relinquish to the Board profits due to the criminal source of the work with respect to any expression of his or her "thoughts, feelings, opinions, or emotions" regarding the crime or "with respect to any reenactment" of the crime.<sup>10</sup> The money paid to the Board was to be put in an escrow account; these funds would go to any victim of the crime in satisfaction of a civil judgment for damages against the "criminal" obtained in an action brought within five years of the establishment of the escrow account.<sup>11</sup> If the charges against the defendant were dismissed, or the defendant was acquitted, the escrow account funds were returned to the defendant.<sup>12</sup> However, a person found not guilty by reason of insanity was "deemed to be a convicted person" and therefore subject to the restrictions of the statute.<sup>13</sup> Prior to paying over the monies, the Board would pay off any subrogation claims of the state for monies paid out to victims by the Board prior to any civil judgments.<sup>14</sup> Additionally, the Board would pay all creditors who present "lawful claims, including state or local government tax authorities."<sup>15</sup>

Based on New York state administrative regulation, the Board had the authority to investigate contracts not voluntarily submitted to it. After an administrative hearing, the Board could enter a final decision bringing a contract within the scope of its authority.<sup>16</sup> If actions were pending after five years, the Board would immediately pay over any moneys in the escrow account to such person or his legal representative.<sup>17</sup>

Although the statute received enormous publicity and incited much debate, its application was very limited. Since the law's enactment in 1977, only \$164,944 in proceeds owed to criminals were confiscated by the Board.<sup>18</sup> The statute required that publishers and others who acquire literature rights notify the Board before paying out money to a criminal author.<sup>19</sup> However, the small amount of monies confiscated

was due in part to the lack of compliance by publishers in turning over their contract to the Board and the Board's reluctance in enforcing the statute because of constitutional concerns.<sup>20</sup> The attempted application of this statute to the best-selling novel by Nicholas Pileggi, entitled *Wiseguy: Life in a Mafia Family*, brought Executive Law 632-a under constitutional attack for the last time in the case of *Simon & Schuster v. New York State Crime Victims Board*.<sup>21</sup>

## B. The Constitutionality of New York's "Son of Sam" Law

The facts of *Simon & Schuster v. New York State Crime Victims Board* arose in 1986 when a publishing company, Simon & Schuster, published an autobiographical, non-fiction book about the life and mafia career of Henry Hill.<sup>22</sup> The author, Nicholas Pileggi, spent hundreds of hours interviewing Hill about his past criminal activities, which included bribery, assault, extortion, theft, burglary, arson, drug dealing, credit card fraud and murder.<sup>23</sup> Upon publication of the book, the Board informed Simon & Schuster about Executive Law 632-a and requested a copy of their contract for review.<sup>24</sup> The Board ordered Simon & Schuster to stop all payments to Hill's literary agency in connection with the book and demanded Hill forfeit \$96,250 in proceeds already paid to him. Henry Hill and Simon & Schuster resisted turning over the earnings from this book.

On August 3, 1987, Simon & Schuster commenced an action against the members of the New York State Crime Victims Board requesting an order that New York Executive Law 632-a violated the First and Fourteenth Amendments.<sup>25</sup> Simon & Schuster argued that the "Son of Sam" law regulated speech based on its content and the identity of the speaker, which violated the First Amendment.<sup>26</sup> Furthermore, they argued that this law had a chilling effect on speech by "interfering with the publishing and editorial decisions of publishers and writers" and curtailing the availability of sources for non-fictional stories.<sup>27</sup> They argued that most criminals would not offer to tell their stories without compensation, thus, the statute obstructed the free market place of ideas by robbing the public of such literature.<sup>28</sup> Finally, Simon & Schuster argued the statute had been applied arbitrarily and was without a clear and neutral standard, thereby violating the due process clause of the Fourteenth Amendment of the U.S. Constitution.<sup>29</sup> Simon & Schuster's challenge to Executive Law 632-a eventually led to its demise.

The district court concluded that Executive Law 632-a had only an "incidental" effect on speech because "the state's interest in compensating crime victims is unrelated to the suppression of free expression."<sup>30</sup> The court found this interest to be "substantial," thus withstanding constitutional muster.<sup>31</sup> As well, the court held that the statute's effect "is limited to the non-expressive elements of the activity: receiv-

ing a profit."<sup>32</sup>

The First Amendment issues in this case received more careful consideration by the court of appeals. The Second Circuit ruled that "the statute...imposes a direct, rather than an incidental burden on speech and therefore must meet the requirements of the strict scrutiny test to survive constitutional challenge."<sup>33</sup> The appellate court found two compelling state interests: "preventing criminals from profiting from their crimes," and "assuring that a criminal not profit from the exploitation of his or her crime, while the victims of that crime are in need of compensation by reason of their victimization."<sup>34</sup> Thus, the court of appeals concluded that the statute was narrowly drawn to satisfy the compelling state interest of compensating victims of crimes out of the proceeds of the sale of a criminal's story, thereby withstanding strict scrutiny review.<sup>35</sup>

The Supreme Court granted certiorari in order to make the final determination as to whether Executive Law 632-a was inconsistent with the First Amendment's protection of free speech. Publishers were pleasantly surprised when a unanimous Supreme Court deemed New York's "Son of Sam" law unconstitutional, thus reversing the Second Circuit Court of Appeals.<sup>36</sup> The Court looked to earlier precedent in determining the First Amendment implications of this law. In *Arkansas Writers' Project v. Ragland*, the Supreme Court reviewed the use of a content-based magazine tax and held that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press."<sup>37</sup> In *Leathers v. Medlock*, the Court ruled that a tax imposed only on cable television services, excluding other media, was not an unconstitutional, differential taxation.<sup>38</sup> The Court reasoned there that the legislative intent was not to restrict speech based on its content; however, the Court admitted that a statute is "presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."<sup>39</sup>

The *Simon & Schuster* Court stated that whether the speaker was considered to be Henry Hill, whose income was confiscated and placed in an escrow account because of the story he told, or the petitioner, Simon & Schuster, Inc., which was limited to publishing books about crime with the aid of only those criminals willing to forego compensation for at least five years, the law places a financial disincentive only on speech of a particular content.<sup>40</sup> The Supreme Court previously ruled "the fact that society may find speech offensive is not a sufficient reason for suppressing it."<sup>41</sup> Accordingly, the "Board disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers."<sup>42</sup>

Justice O'Connor, who delivered the Court's opin-

ion, acknowledged two legitimate compelling state interests: ensuring victims are compensated by those who harm them and ensuring criminals do not profit from their crimes.<sup>43</sup> The first interest was already accomplished through tort laws, pre-judgment remedies and restitution.<sup>44</sup> Likewise, the second interest was fulfilled by statutory provisions for the forfeiture of the fruits of a crime.<sup>45</sup> Notably, the Supreme Court failed to recognize a third compelling interest the protection of crime victims from "secondary victimization due to the repeated exposure of the often heinous criminal acts."<sup>46</sup> Unnecessary publicity can cause much pain to crime victims, thus making the deterrence of such acts an arguably compelling interest.<sup>47</sup>

The Board attempted to narrow the implications of the statute to that of merely compensating the victims first and then allowing the criminals to regain their profits in five years. But the Board could not justify using the proceeds from these books to compensate victims, while not using the criminal's other assets or other fruits of the crime for compensation.<sup>48</sup> Thus, the Supreme Court ruled that the "distinction drawn by the 'Son of Sam' law has nothing to do with the state's interest in transferring the proceeds of crime from criminals to their victims," but is merely a method of suppressing a certain form of speech.<sup>49</sup>

In holding that Executive Law 632-a unconstitutionally burdened free speech, the Supreme Court concluded the "Son of Sam" law was not narrowly tailored but was, in fact, "significantly overinclusive."<sup>50</sup> The Court found fault in the statute's ability to suppress an author's expression about crime, however "tangentially or incidentally."<sup>51</sup> In addition, the application of the statute to a "person convicted of a crime" implicated the work of individuals who were never prosecuted for a crime but admitted to criminal activity in their book.<sup>52</sup> The statute, for example, would apply to a book in which the author admitted to criminal activity in one single paragraph, although the entire book was hundreds of pages in length. The breadth of this law could have suppressed such great works as *The Autobiography of Malcolm X*, which documented certain criminal activity of Malcolm X; *Civil Disobedience*, in which the author, Henry David Thoreau, admitted to tax evasion; and *The Confessions of Saint Augustine*, in which the author admitted to stealing a pear from a neighbor's tree.<sup>53</sup> Although these examples may seem extreme, counsel for the Board admitted that the profits from these specific works would have been escrowed under New York's "Son of Sam" law.<sup>54</sup> Finally, because of the law's overinclusiveness, the Court declined addressing the question of whether the statute was content-neutral.<sup>55</sup>

For those who closely follow the Supreme Court's opinions on free speech, this decision may have been incongruous, considering the Court's recent approval of state limitations on expression.<sup>56</sup> However, the

Supreme Court declined to analyze any of the other states' "Son of Sam" statutes or the federal government's law because some of these laws were quite different from New York's.<sup>57</sup> The Court may be leaning towards increased First Amendment protection, especially with a recently elected liberal Executive branch and an upcoming Supreme Court appointment by President Clinton.

### C. National Survey of Other "Son of Sam" Laws<sup>58</sup>

Since the origin of New York's "Son of Sam" law in 1977, the federal government and forty-two states have enacted similar statutes.<sup>59</sup> These statutes are unaffected by the Supreme Court decision in *Simon & Schuster* until they face an independent challenge, although the statutes which are similar to New York's will probably not survive constitutional review if litigated.<sup>60</sup> It will be necessary for these states and the federal government to examine the constitutionality of their "Son of Sam" laws in light of the *Simon & Schuster* decision. So far, New Jersey is the only state which has proposed an amendment to its "Son of Sam" statute.<sup>61</sup> This new bill added language to the original New Jersey statute to clarify that an "integral part of the defendant's work must depict or discuss the defendant's crime" in order for the proceeds of the contract to be subject to the statute.<sup>62</sup> As well, the new statute deleted the section which included within the purview of the statute "reenactments...from expression of the person's thoughts, feelings, opinions or emotions regarding the crime."<sup>63</sup>

Virtually all of the statutes have the same purpose—to compensate the crime victims.<sup>64</sup> Many states have enacted statutes which do not focus on suppressing speech or escrowing funds, but rather focus on seeking restitution from the criminal from any financial sources or assets, in order to compensate the victim.<sup>65</sup> For example, Maine has a statute which states that any prisoner "who is able to generate income, from whatever source, shall pay twenty-five percent of that income to any victim if the court ordered that restitution paid."<sup>66</sup> This statute would probably withstand a Supreme Court challenge because it does not focus on speech and is narrowly tailored, thus avoiding a conflict with the First Amendment.

The nature of the criminal activity necessary to invoke a "Son of Sam" law varies widely from state to state. Only five states require the commission of a felony crime in order to fall within the purview of their "Son of Sam" laws.<sup>67</sup> Ten other states and the federal government define the relevant crime as "one involving violence or personal injury."<sup>68</sup> The rest of the states apply their statute to any crime, regardless of the degree of the offense.

As described by one commentator, almost all of the statutes contain language limiting their authority

to "monies received as a result of specific expressive activity by the individual accused or convicted of the crime; this expressive activity is defined in terms of its content."<sup>69</sup> Although many states follow the language of the original New York law, some states go further. For instance, Montana's law regulates all expression "relating to" the predicate crime and Ohio's law applies to all expression referring to "any part of the defendant's life story...if the publication's value results in part from notoriety brought by commission of an offense."<sup>70</sup> Nevada's statute allows for seizure of not only the profits received from speech, but also other payments which one receives based on his notoriety as an offender.<sup>71</sup> Rhode Island's law applies to any paid expression, while Wyoming's is limited to reenactments.<sup>72</sup>

As to the status of the criminal, only nine states and the federal government limit their statutes' application to persons who have already been convicted.<sup>73</sup> Most of the other statutes provide that those merely "accused" of a crime will have their revenues sequestered but they will be refunded by the state if they are not convicted.<sup>74</sup> However, three states provide a means by which victims can seize these monies even from defendants who are acquitted.<sup>75</sup> Finally, twenty-six state statutes and the federal law provide that "all or a substantial part of the monies sequestered under their provisions shall be forfeited even if no victims come forward to make demands for compensation."<sup>76</sup>

The next section examines the revisions which have been incorporated into New York's "Son of Sam" law in an attempt to comply with the First Amendment analysis in *Simon & Schuster*.

### III. NEW YORK'S REVISED "SON OF SAM" LAW

On August 13, 1992 Governor Mario Cuomo signed a new "Son of Sam" law under which criminals will again be required to surrender profits made from their expressions about their life story as a criminal.<sup>77</sup> Governor Cuomo appears confident that the new bill will withstand a constitutional challenge because it does not concentrate on speech for any particular burden; he feels that "instead, the bill implements broadly, wisely and fairly a vision of essential justice between those who have been hurt and those who have hurt them."<sup>78</sup>

The new law attempts to correct the flaws which led to its demise in the Supreme Court on December 10, 1991. First, the revised law applies only to felony crimes, which is a significant change from the old law which applied to all crimes.<sup>79</sup> Second, the new law applies to any proceeds generated from the commission of a felony crime, thus acting as a general attachment law and not merely as a seizure of the profits derived from the expression of ideas, although such profits are still encumbered.<sup>80</sup> Third, the new law

applies only to those persons convicted or formally charged with a crime, not merely those accused of a crime or who admit to a crime for which they are never prosecuted.<sup>81</sup> Nevertheless, the new law does not contain language limiting its application only to works which focus predominantly on the author's criminal acts.

The statute allows judges in criminal cases to order reparation by defendants, thus acting as a priority lien for victims to collect any assets the criminal might acquire.<sup>82</sup> As well, the new statute extends, "from one to seven years, the maximum time a victim would have to file for civil damages from a criminal."<sup>83</sup> Finally, the statute provides a three year statute of limitations for victims to sue for damages which runs from the date of discovery of any profits of the crime.<sup>84</sup>

Free speech advocates feel that any attempt to seize an author's profits gained from telling his life story is a First Amendment violation.<sup>85</sup> They say the new law violates the constitutional right to free speech in the same manner as the old law, but under the new definition a burden would not be placed exclusively on speech.<sup>86</sup> Presumably, "profits of a crime" could embrace other earnings based on knowledge and expertise gained through a life of crime.<sup>87</sup> For example, the revised law could arguably include monies paid to burglars who have become security consultants and fees paid to ex-addicts for drug counseling.<sup>88</sup>

New York's revised "Son of Sam" law is no longer a content-based regulation, which is a step towards gaining constitutional acceptance. However, the statute may continue to be challenged on the basis of its incidental effect on free speech. The next section proposes the elements of a constitutional "Son of Sam" law.

### IV. DRAFTING A CONSTITUTIONAL "SON OF SAM" STATUTE

The Supreme Court analysis in *Simon & Schuster* provides some guidance in drafting victims' compensation statutes. Justice O'Connor's opinion implied a statute that is narrowly tailored to advance the compelling interest of compensating victims from the fruits of a crime would pass constitutional muster.<sup>89</sup> Thus, "all that the opinion definitely requires is the law be limited to those book royalties which can be said to constitute the proceeds of a crime."<sup>90</sup> Arguably, a "Son of Sam" statute that limits its application to books which focus on the author's crime would not be overinclusive in the manner described by Justice O'Connor.<sup>91</sup>

First, it is necessary to consider whether book royalties can be considered the proceeds of a crime.<sup>92</sup> According to New York's forfeiture statute, proceeds of a crime include "any property obtained through the commission of a felony crime."<sup>93</sup> This has been inter-

preted to mean that the property be "directly related to criminal activity."<sup>94</sup> The Supreme Court may not accept the notion that book royalties derive directly from criminal activity, due to the intervening act of the criminal author telling his story. For example, Henry Hill spent over three hundred hours discussing his story with Nicholas Pileggi, the writer of *Wiseguy*.<sup>95</sup> This is a considerable amount of time and effort which occurred subsequent to any criminal activity, arguably breaking the chain of relation. Conversely, book royalties could be considered to be the proceeds of a crime in the sense that the crime is a necessary and absolute prerequisite to writing the book and receiving the proceeds. Without the crime, the criminal would have no story to tell and therefore no profits to earn from telling about his life. Thus, it may be necessary to draft a statute that more specifically defines "proceeds of a crime," or this determination may need to be analyzed on a case by case basis. Further, it may be necessary to add language to the statute that considers whether the author received notoriety prior to his criminal activity, thus making his lifestory valuable regardless of his crimes. For example, Mike Tyson was a well-known heavyweight fighter prior to his highly publicized rape conviction. Therefore, the profits from any autobiographical movie or book written about his life may not be considered the direct proceeds of a crime.

Another issue which should be confronted in a constitutional "Son of Sam" law is the problem of under-inclusiveness, an issue raised by Justice Blackmun in his *Simon & Schuster* concurrence.<sup>96</sup> Arguably, most "Son of Sam" laws are under-inclusive because they only seize criminal profits received from expressive speech, but do not seize other proceeds from the particular crime.<sup>97</sup> The states' failure to confiscate any criminal proceeds other than those derived from protected speech strongly suggests that "Son of Sam" laws are not tailored to obtain the objective of compensating crime victims from all crime proceeds, "but are rather narrowly tailored to accomplish the impermissible purpose of preventing criminals specifically from profiting by writing about their crimes."<sup>98</sup> The problem of under-inclusiveness could be cured by providing for the "forfeiture of all fruits of crime from whatever source derived."<sup>99</sup> However, this approach would encompass works such as St. Augustine's *Confessions*, which would not further the government's interest of compensating victims with the fruits of a crime. Additionally, a statute that confiscated all of a criminal's assets would still place a burden on speech.

An ideal "Son of Sam" statute should be drafted using very specific and careful language, so as not to be over-inclusive or under-inclusive. First, the statute should apply only to crimes with identifiable victims. Second, the statute should also require conviction; it should not apply to the proceeds of works in which

the author "admits" to a crime or in which the author has merely been "accused" of a crime. The application of the statute to the latter goes against the basic premise of our legal system—innocent until proven guilty. Third, the statute should apply to all proceeds of the crime in general and not just proceeds from criminal reenactments in movies or novels. However, the statute should not consider as "proceeds of a crime" literary works in which the overriding theme is not the criminal acts of the author, but merely include incidental references to criminal activity. As well, the author should be notorious exclusively for his commission of the expressed criminal acts. Although a new statute will most likely be contested again as unconstitutional, it is vital for legislators to comply with the Court's analysis in *Simon & Schuster* in order to protect both the interest of crime victims and the freedom of speech of the criminal.<sup>100</sup>

## V. CONCLUSION

The "Son of Sam" laws are a valid and important means of compensating crime victims. However, if Governor Cuomo's amendments or those proposed in this article do not cure the constitutional problems in the eyes of the Supreme Court, this method of compensating victims may not remain constitutionally valid. If this should occur, criminal codes could be amended to allow the imposition of large fines in extremely notorious cases, when the court feels that the criminal might stand to gain an enormous profit from telling his life story.<sup>101</sup> States could then confiscate any earnings to satisfy the judgment.<sup>102</sup> A narrowly tailored "Son of Sam" law may not confiscate the profits gained by *all* criminals for telling their story, but it may withstand constitutional review and compensate those victims who are the focus of these widespread laws.

Jane Langdon

1. Nicholas Katsoris, *The Supreme Court Frees "Son of Sam"*, 9 ENT. & SPORTS LAW, Winter 1992, at 14.

2. Garnett Epps, *Wising Up: "Son of Sam" Laws and the Speech and Press Clauses*, 70 N.C.L. REV. 493 (1992).

3. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 724 F. Supp. 170 (S.D.N.Y. 1989) *aff'd sub. nom. Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777 (2d Cir. 1990), and *rev'd.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, -U.S.-, 112 S.Ct. 501 (1991).

4. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, -U.S.-, 112 S.Ct. 501; N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1992), repealed July 24, 1992 by L. 1992 c. 618 § 10.

5. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, -U.S.-, 112 S.Ct. 501.

6. 1977 N.Y. ST. LEGIS. ANN. 267 (memorandum of Senator Gold).

7. N.Y. EXEC. LAW § 632-a required that:

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, opinion, 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.

8. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982) (This statute was amended in 1992 in an effort to comply with the Supreme Court decision in *Simon & Schuster*, the new statute uses the same numbering).

9. *Id.*

10. *Id.*

11. N.Y. EXEC. LAW § 632-a.

12. N.Y. EXEC. LAW § 632-a(3).

13. *Id.*

14. *Id.*

15. *Id.*

16. N.Y. COMP. CODES R. & REGS. tit. 9, § 526.1 (McKinney 1990).

17. N.Y. EXEC. LAW § 632-a(4).

18. Daniel Wise, *Passage of New Son of Sam Law Seen Unlikely*, N.Y.L.J., Dec. 12, 1991 at 1.

19. N.Y. EXEC. LAW § 632-a(2)(a).

20. *Id.*

21. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, -U.S. at-, 112 S.Ct. at 501.

22. See, Mark Conrad, *The Demise of New York's 'Son of Sam' Law-The Supreme Court Upholds Convicts' Rights to Sell Their Stories*, N.Y. ST. B.A., Mar.-Apr. 1992, at 28.

23. *Id.*

24. *Id.*

25. *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 724 F. Supp. 170.

26. See *Carey v. Brown*, 447 U.S. 455 (1980) in which the Supreme Court ruled that laws which discriminate against speech on the basis of the content of that speech are presumptively inconsistent with the First Amendment; *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) in which the Supreme Court ruled that a law is presumptively violative of the First Amendment if it discriminates based on the identity of the speaker.

27. *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 724 F. Supp. at 173.

28. Conrad, *supra* note 22., at 28

29. *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 724 F. Supp. at 183.

30. *Id.* at 176.

31. *Id.* at 179; *U.S. v. O'Brien*, 391 U.S. 367 (1968) (holding that an incidental effect only requires the government interest to be substantial and must not impose sanctions greater than is essential to achieving the government interest).

32. *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 724 F. Supp. at 177.

33. *Simon & Schuster v. Fischetti*, 916 F.2d at 781-787 (2d Cir. 1990).

34. *Id.* at 782.

35. *Id.* at 784.

36. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, -U.S. at-, 112 S.Ct. at 501; Katsoris, *supra* note 1, at 14

37. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

38. *Leathers v. Medlock*, -U.S.-, 111 S. Ct. 1438 (1991).

39. *Id.* at-, 1447.

40. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, -U.S. at-, 112 S. Ct. at 509.

41. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988), quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978).

42. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, -U.S. at-, 112 S.Ct. at 509.

43. *Id.* at 511.

44. *Id.*

45. *Id.* at 510.

46. Katsoris, *supra* note 1, at 15.

47. *Id.*

48. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, -U.S. at-, 112 S. Ct. at 510.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 511; N.Y. EXEC. LAW § 632-a(10)(b), stated:

A person convicted of a crime shall include any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted.

53. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, -U.S., at-,112 S.Ct. at 511; See A. HALEY & MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 108-125 (1964); H. THOREAU, *CIVIL DISOBEDIENCE* 18-22 (1984, reprinted 1969); *THE CONFESSIONS OF ST. AUGUSTINE* 31, 36-37 (Franklin Library ed. 1980).

54. *Deborah Pines, Son-of-Sam Challenge Argued Before High Court*, N.Y.L.J., Oct. 16, 1991, at 1.

55. Conrad, *supra* note 22, at 5; See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, -U.S. at-, 112 S. Ct. at 512 (Blackmun, J., concurring); Justice Blackmun argued in his concurrence that this issue should have been addressed.

56. See *Barnes v. Glen Theatre*, -U.S. at-, 111 S.Ct. 2456 (1991) (upholding an Indiana public indecency statute that required nude dancers to wear G-strings and pasties in order to reduce the exposure of nudity. The plurality opinion noted that although such behavior was "marginally" protected by the First Amendment, the court concluded that the statute's requirement was only an incidental burden on free speech; See generally *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (upholding a restriction on an inmate's right to attend religious services due to the superior concern of prison safety); See *Rust v. Sullivan*, -U.S. at-, 111 S.Ct. 1759 (1991) (upholding a ban on abortion advice in Federally-funded clinics); See *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (denying a First Amendment challenge because of the greatly restricted application of the First Amendment in the institutional setting, prisoners cannot engage in any organized expressive behavior, such as peaceful union meeting in a prison yard); See Eric Neisser, *Winning Sometimes Has To Make You Wonder*, N.J.L.J., Jan. 27, 1992, at 25.

57. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, -U.S. at-, 112 S.Ct. at 512.

58. The statistics in this survey do not include New York's revised "Son of Sam" law.

59. Alabama, ALA. CODE § 41-9-80; Alaska, ALASKA STAT. §12.61.020; Arizona, ARIZ. REV. STAT. ANN. § 13-4202; Arkansas, ARK. STAT. ANN. §16-90-306; California, CAL. CIV. CODE §2224.1(B); Colorado, COLO. REV. STAT. §§ 24-4.1-201 to 24.4.1-207; Connecticut, CONN. GEN. STAT. § 54-218; Delaware, DEL. CODE ANN. tit. 7, §§ 9101-06; Florida, FLA. STAT. ANN. § 944.512; Georgia, GA. CODE §§ 17-14-30 to 17-14-32; Hawaii, HAW. REV. STAT. §§ 351-81 to 88; Idaho, IDAHO CODE § 19-5301; Illinois, ILL. REV. STAT. ch. 70 para. 403; Indiana, IND. CODE § 16-7-3.7(1-6); Iowa, IOWA CODE § 910.15; Kansas, KAN. STAT. ANN. § 74-7321; Kentucky, KY. REV. STAT. ANN. § 346.165; Louisiana, LA. REV. STAT. ANN. § 46:1831; Maine, ME. REV. STAT. ANN. tit. 17-a §1330(2); Maryland, MD. ANN CODE art. 27, § 764; Massachusetts, MASS. GEN. LAWS ANN. ch. 258A, § 8; Michigan, MICH. COMP. LAWS. § 780.768; Minnesota, MINN. STAT. § 611A.68; Missouri, MO. REV. STAT. § 595.045.11; Montana, MONT. CODE ANN. § 53-9-

- 104(2)(E); Nebraska, NEB. REV. STAT. § 81-1836-42; Nevada, NEV. REV. STAT. § 217.265; New Jersey, N.J. REV. STAT. § 52-4B-26; New Mexico, N.M. STAT. ANN. § 31-22-22; Ohio, OHIO REV. CODE ANN. §§ 2969.01-06; Oklahoma, OKLA. STAT. § 17; Oregon, OR. REV. STAT. § 147.275; Pennsylvania, PA. CONS. STAT. § 180-7.18; Rhode Island, R.I. GEN. LAWS § 12-25.1-1; South Carolina, S.C. CODE ANN. §§ 15-59-40 to 15-59-80; South Dakota, S.D. CODIFIED LAWS ANN. §§ 23 A-28A-1 to 14 (1988); Tennessee, TENN. CODE ANN. §§ 29-13-116 to 29-13-206; Texas, TEX. REV. CIV. STAT. ANN. art. 8309-1 §§ 16-18; Utah, UTAH CODE ANN. § 78-11-12.5; Washington, WASH. REV. CODE §§ 768.200 to 768.280; Wisconsin, WIS. STAT. ANN. § 949.165; Wyoming, WYO. STAT. § 1-40-112; 18 U.S.C. § 3681(a)(1988); See Epps, *supra* note 2.
60. Katsoris, *supra* note 1, at 16.
61. A.B. 2014, 205th N.J. Legis., 1st Reg. Sess. (1992).
62. *Id.*
63. *Id.*
64. *Id.*
65. Katsoris, *supra* note 1, at 16.
66. *Id.*; See ME. REV. STAT. ANN. tit. 17-a, § 1330 (West 1990).
67. Alabama, ALA. CODE § 41-9-80; California, CAL. CIV. CODE § 225(b); Florida, FLA. STAT. § 944.512(1); Indiana, IND. CODE § 16-7-3.72; Minnesota, MINN. STAT. § 611A.68.1(b).
68. See 18 U.S.C. § 3681(a); Connecticut, CONN. GEN. STAT. § 54-218; Illinois, ILL. REV. STAT. ch. 70, para. 403; Louisiana, LA. REV. STAT. ANN. §§ 46:1831; Maryland, MD. ANN. CODE art. 27, § 764; Missouri, MO. REV. STAT. § 595.045.11; Montana, MONT. CODE ANN. § 53-9-104(2)(E); New Mexico, N.M. STAT. ANN. § 31-22-22; Oregon, OR. REV. STAT. § 147.275; Rhode Island, R.I. GEN. LAWS § 12-25.1-1; Wisconsin, WIS. STAT. § 949.165.
69. Epps, *supra* note 2.
70. See MONT. CODE ANN. § 53-9-104(1)(d); OHIO REV. CODE ANN. § 2969.02(3).
71. Nevada, NEV. REV. STAT. § 217.265.
72. See R.I. GEN. LAWS § 12-25.1-2(b); Wyoming, WYO. STAT. § 1-40-112.
73. Arkansas, ARK. STAT. ANN. § 16-90-306; California, CAL. CIV. CODE § 2224.1(B); Florida, Fla. Stat. Ann. § 944.512; Iowa, IOWA CODE § 910.15; Massachusetts, MASS. GEN. LAWS ANN. ch. 258A, § 8; Michigan, MICH. COMP. LAWS § 780.768; Minnesota, MINN. STAT. § 611A.68; Nevada, NEV. REV. STAT. § 217.265; Rhode Island, R.I. GEN. LAWS § 12-25.1-1.
74. See e.g. Iowa, IOWA CODE § 910.15; Maryland, MD. ANN. CODE art. 27, § 764 (e)(3)(i); Massachusetts, MASS. GEN. LAWS ANN. ch. 258A, § 8; Washington, WASH. REV. CODE §§ 768.200 to 768.280.
75. Alaska, ALASKA STAT. § 12.61.020; Delaware, DEL. CODE ANN. tit. 7, §§ 9101-06; Tennessee, TENN. CODE ANN. §§ 29-13-116 to 29-13-206; Texas, TEX. REV. CIV. STAT. ANN. art. 8309-1 §§ 16-18; Utah, UTAH CODE ANN. § 78-11-12.5; Washington, WASH. REV. CODE §§ 768.200-768.280; Wisconsin, WIS. STAT. ANN. § 949.165; Wyoming, WYO. STAT. § 1-40-112; 18 U.S.C. § 3681(a).
76. Total forfeiture is provided by 18 U.S.C. § 3681(c)(2); Alabama, ALA. CODE § 41-9-80; Alaska, ALASKA STAT. § 12.61.020; Arizona, ARIZ. REV. STAT. ANN. § 13-4202; Arkansas, ARK. CODE ANN. § 16-90-306; Connecticut, CONN. GEN. STAT. § 54-218; Illinois, ILL. REV. STAT. ch. 70, para. 403; Indiana, IND. CODE § 16-7-3.7(-6); Kansas, KAN. STAT. ANN. § 74-7320(3); Maryland, MD. ANN. CODE art. 27, § 764(e)(f); Minnesota, MINN. STAT. § 611A.68; Mississippi, MISS. CODE ANN. § 99-38-9(3)-(4); Missouri, MO. REV. STAT. § 595.045.11; Montana, MONT. CODE ANN. § 53-9-104(2)(E); New Jersey, N.J. STAT. ANN. § 52:4B-30(a)(5); Ohio, OHIO REV. CODE ANN. §§ 2969.01 to 2969.06; Oklahoma, OKLA. STAT. ANN. tit. 22, § 17C; Washington, WASH. REV. CODE §§ 768.200 to 768.280; Wyoming, WYO. STAT. § 1-40-112; 18 U.S.C. § 3681(a). Partial forfeiture is provided for by Colorado, COLO. REV. STAT. §§ 24-4.1-201 to 24.4.1-207; Florida, FLA. STAT. ch. 944.512; Georgia, GA. CODE ANN. §§ 17-14-30 to 17-14-32; Louisiana, LA. REV. STAT. ANN. §§ 46:1831; Michigan, MICH. COMP. LAWS § 780.768; Nevada, NEV. REV. STAT. § 217.265; Rhode Island, R.I. GEN. LAWS § 12-25.1-1; South Dakota, S.D. CODIFIED LAWS ANN. § 23A to 28A-5.
77. N. Y. Governor Cuomo Signs Revised 'Son of Sam' Law, ENT. LITIG. REP., September 21, 1992.
78. Gary Spencer, *Revised 'Son of Sam' Law Signed by Governor Cuomo*, N.Y.L.J., Aug. 14, 1992, at 1.
79. N.Y. EXEC. LAW § 632-a(1)(a) (McKinney Supp. 1993).
80. *Id.* at § 632-a(1)(b)(iii).
81. N.Y. EXEC. LAW § 632-a(1)(b)(i), repealed, stated that the statute applied to "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is never prosecuted".
82. *New York Governor Cuomo, supra* note 77.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. Georgia Sargent, *'Son of Sam' Law Revised; Free Speech Impact Weighed*, TRIAL, Nov. 1992, at 104.
88. *Id.*
89. Paul J. Slevin, *Son of Sam Laws Following the High Court's Simon & Schuster' Ruling*, N.Y.L.J., Dec. 27, 1991, at 1; Paul J. Slevin is the Chairman of the American Bar Association subcommittee on "Son of Sam" laws.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*; See N.Y. CIV. PRAC. & R. § 1310 (McKinney Supp. 1993).
94. See *Vergari v. Lockhart*, 144 Misc.2d 860, 865 (N.Y. Sup. Ct. 1989).
95. Slevin, *supra* note 89, at 1.
96. *Simon & Schuster v. Members of New York Crime Victims Bd.*, —U.S. at—, 112 S. Ct. at 512 (Blackmun, J., concurring).
97. Slevin, *supra* note 89, at 1.
98. *Id.*
99. Donald A. Dripps, *"Son of Sam Laws" and the First Amendment*, TRIAL, March 92, at 74.
100. Katsoris *supra* note 1, at 16.
101. Dripps, *supra* note 99, at 76.
102. *Id.*