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LIKE FATHER LIKE SON? THE CONSTITUTIONALITY OF NEW YORK'S SON OF SAM LAW

In August 1977, David Berkowitz was arrested by the New York City Police Department for killing six young persons and severely wounding seven others over a thirteen month period.¹ The police investigation leading up to the arrest was intensely followed by the New York press, which regularly published articles detailing, and in the opinion of some, sensationalizing the circumstances surrounding the crimes.² As a result of the signature he

¹ See Robert D. McFadden, *Postal Worker Traced Through Car Believed Used in Getaways*, N.Y. TIMES, Aug. 11, 1977, at A1, D17. Berkowitz was arrested at his apartment building in the Bronx, New York on August 10, 1977, after the police found that a parking ticket had been issued to Berkowitz's car in the same area and at the approximate time of the last shooting. *Id.* The police had followed up on a report from one of Berkowitz's former neighbors who recognized his picture in a police department sketch. *Id.*; see also Martha A. Miles, *Gunman, Who First Struck in 1976, Killed Six and Wounded Seven*, N.Y. TIMES, Aug. 11, 1977, at D17. David Berkowitz first attacked on July 29, 1976, killing one young woman and wounding another while they sat in a double-parked car in the Bronx, New York. *Id.* Berkowitz went on to commit the following shootings: he injured a young man as he sat with a woman in a parked car in Queens, New York on October 23, 1976; one month later, and again in Queens, he shot and wounded two women while they sat on the front porch of one of their homes; on January 30, 1977, he shot and killed a woman as she sat in a parked car in Queens; on March 8, 1977, a half block from his previous murder, he killed another young woman as she walked along the street; he shot to death a young man and woman on April 17, 1977, as they sat in a parked car in the Bronx; and on June 26, 1977, he wounded a young man and woman as they sat in a parked car in Queens. *Id.*; Carey Winfrey, *Son of Sam Case Poses Thorny Issues For the Press*, N.Y. TIMES, Aug. 22, 1977, at 1, 38. Finally, after threatening to attack again on the anniversary of his first shooting, Berkowitz shot two more victims on July 31, 1977, one fatally. *Id.*; Herbert Mitgang, *Publishing: Books Due on "Sam" and Tarnower*, N.Y. TIMES, Dec. 5, 1980, at C29. David Berkowitz pleaded guilty to the murders of six people and received prison terms totalling more than 300 years. *Id.*

² See Edith D. Neimark, *Letter to the Editor*, N.Y. TIMES, Aug. 18, 1977, at A20 (alleging press irresponsibility in its handling of Son of Sam shootings); Winfrey, *supra* note 1, at 38. The press debated among themselves whether the coverage of the Son of Sam shootings was purposely exploitative to increase readership, or whether they were simply availing themselves of all resources to fully inform the public. *Id.* On August 11, 1977, the day after David Berkowitz was arrested, the *New York Post* sold 1 million copies, versus its normal circulation of 609,000, while the *New York Daily News* sold 2.2 million copies, versus its normal circulation of 1.85 million. *Id.* A column in the *New Yorker* magazine voiced concern over a possible secondary effect: encouraging the criminal to strike again or encouraging a would-be criminal to commit a copycat crime. *Id.*; see also David M. Alpern et al., *How They Covered Sam*, NEWSWEEK, Aug. 22, 1977, at 77. The *New York Post* published its discovery of references to "Son of Sam" in a rock and roll record, and theorized that organized crime was involved in the search for the killer. *Id.* Headlines such as "To the .44 Caliber

used on a series of incoherent notes left at the murder scenes, Berkowitz became known as the Son of Sam killer — a nickname given to him by the New York press.³

Apprehensive that Berkowitz's considerable publicity and notoriety might lead to a lucrative contract for his exclusive story rights,⁴ the New York State Legislature quickly enacted⁵ New York Executive Law section 632-a, appropriately nicknamed the Son of Sam law.⁶ The dual purpose of the statute was to compen-

Killer on His 1st Deathday," "Gunman Sparks Son of Sam Chase," "No One is Safe From the Son of Sam," "Mobsters Join Hunt," and "How I Became a Mass Killer" appeared in the New York press. *Id.* But see Alpern et al., *supra*, at 77. Generally, the press complied with police recommendations about publishing information on the case, including not publicizing the fact that the police had found partial fingerprints on a letter written by Berkowitz to *New York Daily News* columnist Jimmy Breslin. *Id.* "[D]eputy inspector Timothy Dowd, the cop who led the search for Son of Sam, judged that on balance, the press was very helpful." *Id.*; Winfrey, *supra* note 1, at 38. Jimmy Breslin published the letter written to him by Berkowitz only after consultation with the police department, who thought that publication of the letter might encourage Berkowitz to write again, possibly leaving a clearer set of fingerprints. *Id.*

The media's influence remained troublesome during their coverage of Berkowitz's trial. See, e.g., Winfrey, *supra* note 1, at 38. The degree of disclosure of evidentiary material by the press and the questionable veracity of the reported details of the crime raised questions about whether David Berkowitz would receive a fair trial in New York. *Id.*; Editorial, *Where to Try the Son of Sam*, N.Y. TIMES, Dec. 13, 1977, at 42 (refusal to change venue of Berkowitz's trial from Kings County to Sullivan County, New York would result in unfair, unjust trial); see also Mary Titus, *Letter to the Editor*, N.Y. TIMES, Aug. 18, 1977, at A20 (inferring that persons who are otherwise good citizens cannot be unprejudicial jurors having once read newspaper accounts of issue at trial) (citing MARK TWAIN, *ROUGHING IT* (1872)).

³ See, e.g., Pete Axthelm et al., *The Sick World of Son of Sam*, NEWSWEEK, Aug. 22, 1977, at 16, 17. Although the exact contents of his notes were never disclosed, it was revealed that Berkowitz told police that Sam was a 6,000-year-old man who spoke to him through a dog. *Id.*; Molly Ivins, *Police Appeal to Killer of Women to Seek Their Help*, N.Y. TIMES, Apr. 29, 1977, at A1. Although the police would not release details of an earlier note written by Berkowitz, the police described the second note left by Berkowitz at the scene of his fourth shooting on April 17, 1977 as "rambling, incoherent and ghoulish." *Id.* In that note, Berkowitz referred to "Sam" as a father figure, told police he was not a misogynist, and said that he was being forced to kill people against his wishes. *Id.*; see also Jimmy Breslin, *Breslin to .44 Killer: Give Up Now!*, N.Y. DAILY NEWS, June 5, 1977, at 3 (in letter sent to columnist Jimmy Breslin, Berkowitz wrote that Sam would not let him stop killing until he got "his fill of blood").

⁴ See Memorandum of Sen. Emanuel R. Gold, *reprinted in* 1977 N.Y. LEGIS. ANN. 267. "It is abhorrent to one's sense of justice and decency that an individual . . . can expect to receive large sums of money for his story once he is captured . . ." *Id.*; see also 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.J. Apr. 1992, at 28, 33. "Public outrage against the 'selling' of David Berkowitz's 'story' compelled the state to pass the 'Son of Sam' law in the first place." *Id.*

⁵ See Matter of Johnsen, 103 Misc. 2d 823, 825, 430 N.Y.S.2d 904, 906 (Sup. Ct. Kings County 1979). "Section 632-a of the Executive Law [was] conceived in haste, [and] written in haste . . ." *Id.*

⁶ Ch. 823, § 1, [1977] N.Y. Laws 1321 (McKinney) (current version at N.Y. EXEC. LAW §

sate victims and to prevent criminals from profiting from their crimes.⁷

New York's original Son of Sam law required a legal entity contracting with a person accused or convicted of a crime in New York to deposit into an escrow account any moneys owing to the person as a result of the "reenactment of such crime, by way of a movie, book, . . . live entertainment of any kind, or from the expression of . . . thoughts, feelings, opinions or emotions regarding such crime."⁸ The New York Crime Victims Board was responsible for establishing these escrow accounts for the benefit of crime victims.⁹ To receive compensation from the escrow account, a vic-

632-a (McKinney Supp. 1993)).

⁷ See, e.g., *Children of Bedford v. Petromolis*, 77 N.Y.2d 713, 727, 573 N.E.2d 541, 548, 570 N.Y.S.2d 453, 460 (1991), *vacated and remanded*, 112 S. Ct. 859, *rev'd*, 79 N.Y.2d 972, 592 N.E.2d 796, 583 N.Y.S.2d 188 (1992). "[T]he statute is a codification of the fundamental equitable principle that criminals should not be permitted to profit from their wrongs and also as an expression of the penological concept which provides that victims expect and are entitled to 'retributive satisfaction' from our criminal justice system." *Id.*; *Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889). "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy . . ." *Id.*; see also S. REP. NO. 497, 98th Cong. 2d Sess. 6-7 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3612-13. The Senate report accompanying the federal Son of Sam law, which was modeled after New York's, and other similar statutes, stated that the purpose of the law was to "preclude criminals from profiting from the glorification of their misdeeds and encouraging others that crime does indeed pay. Any profits reaped from illegal acts are more appropriately used to provide restitution to the direct victim of the crime, or, alternatively, to victims of crime in general." *Id.*; Conrad, *supra* note 4, at 33. "The idea that criminals should profit from their crimes strike many—especially crime victims—as an odious and pernicious concept when many feel they do not get a fair shake in New York's overburdened and 'plea-bargain' plagued criminal justice system." *Id.*

⁸ Ch. 823, § 1, at 1321.

⁹ See *id.* See generally N.Y. EXEC. LAW § 620 (McKinney 1982 & Supp. 1992) (declaring legislative intent of Crime Victims Board was to provide "aid, care and support . . . as a matter of grace, for such victims of crime"); N.Y. EXEC. LAW § 622(1) (McKinney 1982) (establishing Crime Victims Board in 1966); N.Y. EXEC. LAW § 623(3), (5), (15) (McKinney 1982 & Supp. 1992). The Board was empowered to promulgate rules and regulations to carry out the purposes and provisions of Article 22 of the New York Executive Law, to hear and determine claims for awards filed with it, and to advocate rights and interests of victims before administrative, regulatory, legislative, and judicial bodies. *Id.*

The Crime Victims Board must comply with the procedural provisions of the New York Code of Rules and Regulations. See [1993] 9 NYCRR §§ 525.1-31, 526.1-2. The Board must serve a summons on the contracting parties, the accused or convicted criminal, and the victim, to inform them of the proposed determination and/or order with respect to whether a transaction falls within section 632-a of the Executive Law. *Id.* § 526.1(b). Persons receiving service have an opportunity to object to the Board's determination and/or order and can request a hearing by the Board, at the end of which the Board will issue its final determination. *Id.* § 526.1(b)-(f). An aggrieved party has the right to seek court review of the Board's final decision. *Id.* § 526.1(g). If the chairman of the Board determined that a substantial danger existed that the profits of the crime may be wasted, hidden, encumbered, or removed from the state, an emergency determination and order issuing con-

tim had to bring a civil action against the convicted person¹⁰ within five years of the establishment of the escrow account.¹¹ This law complemented other New York statutes concerning victim compensation and restitution.¹²

The original Son of Sam law was applied only ten times,¹³ and litigated in all but three.¹⁴ Of the seven cases litigated,¹⁵ two in-

fiscation of such moneys to the Board may occur. *Id.* § 526.2. This order is final pending the outcome of a hearing. *Id.*

¹⁰ See ch. 417, § 1, [1978] N.Y. Laws 722 (McKinney) (amending N.Y. EXEC. LAW § 632-a(1) to provide that victim may recover from escrow account only if criminal is convicted); see also ch. 823, § 1, [1977] N.Y. Laws 1321 (McKinney) (current version at N.Y. EXEC. LAW § 632(a)(3)). Once an accused person was acquitted or the charges against him dropped, any moneys held in escrow were to be immediately paid to him and no longer held for the victim's benefit. *Id.* A person convicted of a crime included a person who entered a guilty plea, one convicted of a crime after a trial, and a person who admitted to a crime even though he was never prosecuted for it. *Id.* (formerly codified at § 632-(a)(10)(b)).

¹¹ See ch. 823, § 1 at 1321. If five years have elapsed from the date of the establishment of the escrow account without any claim being made, the moneys must be immediately paid to the convicted person. *Id.*; see also *infra* note 15 (discussing time limit within which victim must claim funds).

¹² See, e.g., N.Y. CIV. PRAC. L. & R. §§ 1310-1352 (McKinney Supp. 1991) (crime proceeds forfeited to State); *id.* §§ 6201-6226 (McKinney 1980 & Supp. 1991) (allowing pre-judgment attachment of defendant's debt or property); N.Y. EXEC. LAW § 631 (McKinney 1982 & Supp. 1991) (crime victim compensation); N.Y. PENAL LAW § 60.27 (McKinney 1987) (providing for restitution or reparation to victim of crime).

¹³ See Garrett Epps, *Wising Up: "Son of Sam" Laws and the Speech and Press Clauses*, 70 N.C. L. REV. 493, 512 (1992). "Since its enactment, the section 632-a scheme has been used against only ten projects." *Id.*; Dennis Hevisi, *Cases Under 'Sam' Law: Notorious But Few*, N.Y. TIMES, Feb. 20, 1991, at B8. "Only 10 cases have come before the New York State Crime Victims Compensation Board under the so-called Son of Sam law since it was enacted in 1977 . . ." *Id.*; see also Conrad, *supra* note 4, at 30 (section 632-a rarely used in its 14 years).

¹⁴ See *New York Crime Victims Board v. Abbott et al.*, No. 40644/92 (Verified Interpleader Complaint filed March 9, 1992). Three separate escrow accounts have been established representing money from Jack Henry Abbott's book *In the Belly of the Beast*, the production rights thereon, and from his book *My Return*, with final disposition of the moneys to various competing claimants pending the resolution of the Crime Victim Board's interpleader complaint. *Id.* at 5-7, 12; see also Key Bank, Public Checking Accounts, *New York State Crime Victims Compensation Board Jack Abbott Account, State of New York Crime Victims Board Jack Abbott "My Turn" Escrow Acct, NYS Crime Victims Board ITF Jack Henry Abbott and Seymore Morgenstern* (statements dated Feb. 28, 1993) (on file with authors). The aggregate balance of the escrow accounts was \$17,195.43. *Id.* See generally Alison Carper, *Widow Wins \$7.5M in Abbott Murder*, N.Y. NEWSDAY, June 16, 1990, at 6. On July 18, 1981, Abbott stabbed and killed Richard Adan, an aspiring actor, outside a New York restaurant where Adan worked as a waiter. *Id.* Abbott was sentenced to a prison term of 15 years to life. *Id.*

Another unlitigated case involved Mark David Chapman, who was convicted of murdering John Lennon outside the musician's apartment building in December 1980 and sentenced to a prison term of 20 years to life. E.R. Shipp, *Chapman Given 20 Years in Lennon's Slaying*, N.Y. TIMES, Aug. 25, 1981, at A1. Funds owed to Chapman as a result of a *People* magazine article were deposited into an escrow account and disposition of the funds is pending the outcome of the Board's interpleader complaint. *Abbott et al.*, No. 40644/92, at

volved constitutional challenges to the law based upon the First

7, 12. The balance of the escrow account as of February 28, 1993 was \$9,335.30. Key Bank, Public Checking Account, *NYS Crime Victims Board Chapman Escrow Account* (statement dated Feb. 28, 1993) (on file with authors).

The third unlitigated case involved Michele Sindona, an Italian financier who was convicted of fraud in the collapse of the Franklin National Bank in 1980 and sentenced to a 25 year prison term. *Sindona Convicted of Jumping Bail*, N.Y. TIMES, Apr. 21, 1981, at B8. As of February 28, 1993, the Board was holding \$15,434.57 in escrow pending distribution. Key Bank, Non-personal N.O.W., *NY Crime Victims Board Michele Sindona & Nick Tosches Escrow Account* (statement dated Feb. 28, 1993) (on file with authors). The escrow funds represent royalties from the book *Power on Earth*, on which Michele Sindona collaborated. *Abbott et al.*, No. 40644/92, at 11-12.

¹⁸ See *Barrett v. Wojtowicz*, 66 A.D.2d 604, 608, 414 N.Y.S.2d 350, 353 (2d Dep't 1979). In December 1977, proceeds owed to Wojtowicz from the movie *Dog Day Afternoon*, which dramatized his attempted bank robbery, were placed in escrow. *Id.* In January 1978, five years and five months after the crime, the plaintiff instituted a suit to recover his money from the escrow account, claiming that he was a victim of assault and battery and false imprisonment during the robbery. *Id.* at 608, 414 N.Y.S.2d at 353. The court held that the five-year period within which a victim of a crime could bring a civil action to recover moneys held in escrow commenced on the date of the establishment of the escrow account, even though the one-year statute of limitations relating to the underlying tortious acts had expired. *Id.* at 614, 414 N.Y.S.2d at 356. Additionally, the court noted that a civil action brought by a victim seeking proceeds from an escrow account creates a new in rem cause of action and does not revive the in personam action for the tort. *Id.* at 615, 414 N.Y.S.2d at 357; see also Memorandum of Sen. Gold, *supra* note 4, at 267. "This bill also reinstates the statute of limitations so that if a number of years go by before the criminal makes his agreement to a publisher the crime victims may still bring their actions and be compensated." *Id.* The Board is holding \$17,093.39 in escrow pending disposition to claimants. *Abbott et al.*, No. 40644/92, at 12; Key Bank, Public Checking, *State of New York Crime Victims Board Dog Day Afternoon Escrow Account* (statement dated Feb. 28, 1993) (on file with authors).

The next case to be litigated involved David Berkowitz. See *Matter of Johnson*, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (Sup. Ct. Kings County 1979). Berkowitz's conservator brought suit seeking approval and authority to enter into a contract for the publication of Berkowitz's story. *Id.* at 824, 430 N.Y.S.2d at 905. The court held that although New York's law did not specifically state that a person convicted of a crime could no longer act on his own behalf, the court could appoint a conservator who would control his rights and have jurisdiction over moneys which would otherwise be owing to such convicted person as a result of a contract. *Id.* at 827, 430 N.Y.S.2d at 907. In construing the language of the statute, the *Johnson* court stated that "the Conservator is not embraced by the descriptive word 'representative' of 'any person . . . convicted of a crime,' but is in fact a representative of the court accountable only to the court." *Id.* at 829, 430 N.Y.S.2d at 908-09. It was inherent in the statute that an imprisoned convict could have his rights controlled by the court. *Id.* at 827, 430 N.Y.S.2d at 908. The court summarily held that section 632-a was constitutional. *Id.* at 830, 430 N.Y.S.2d at 909. Interestingly, although the Son of Sam law did not apply to Berkowitz because at the time the law did not apply to those mentally incompetent to stand trial, the \$120,000 that was to be paid to Berkowitz was eventually distributed to a number of victims. Hevesi, *supra* note 13, at B8.

An attempt by the Crime Victims Board to seize money owed to the "Mayflower Madam" Sydney Biddle Barrows from two books and a television movie about her life was unsuccessful. Esther Pessin, *Domestic News*, UPI, June 3, 1986, available in LEXIS, Nexis Library, Wires File. The New York Supreme Court found prostitution to be a victimless crime, thus there was no victim to bring a claim under the Son of Sam law. *Id.* The Crime Victims Board itself established that funds paid to the "Subway Gunman" Bernhard Goetz were not within its reach, as his crime of violating state firearm laws was also victimless.

Amendment. In the first, *Children of Bedford, Inc. v. Petromolis*,¹⁶ the New York State Court of Appeals held that the statute was constitutional under the First Amendment since it served a compelling state interest and was narrowly tailored to achieve that interest.¹⁷ The second and most recent case was *Simon & Schuster, Inc. v. New York State Crime Victims Board*.¹⁸ In *Simon & Schuster*, as will be discussed more fully below, the United States Supreme Court reversed the New York State Court of Appeals and held New York's Son of Sam law unconstitutional.¹⁹ Consequently, in July 1992, the New York State Legislature repealed the statute and enacted a new New York Executive Law section 632-a (the "new Son of Sam law").²⁰

Epps, *supra* note 13, at 512.

In a more recent case, R. Foster Winans was convicted of securities, wire, and mail fraud and conspiracy for leaking the contents of his *Wall St. Journal* column, *Heard on the Street*, prior to its publication, to a stockbroker in exchange for a percentage of the profits generated from trading on the information. *See St. Martin's Press, Inc. v. Zweibel*, N.Y.L.J., Feb. 26, 1990, at 21 (Sup. Ct. N.Y. County). Winans wrote a book about his activities entitled *Trading Secrets: Seduction and Scandal at the Wall Street Journal*, which was published in 1986. *Id.* In 1987, the Crime Victims Board issued an Emergency Determination and Order seeking all funds due Winans from his contract with St. Martin's Press. *Id.* St. Martin's Press brought an interpleader action in which the New York Supreme Court held that New York's Son of Sam law applied retroactively to federal crimes committed in New York and that the law did not violate the First Amendment of the Constitution. *Id.* St. Martin's Press was thus ordered to comply with the Board's Emergency Determination and Order. *Id.*; *see also* Hevesi, *supra* note 13, at B8 (Board was holding \$20,029 in escrow as of Feb. 20, 1991).

¹⁶ 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453 (1991), *vacated and remanded*, 112 S. Ct. 859, *rev'd*, 79 N.Y.2d 972, 592 N.E.2d 796, 583 N.Y.2d 188 (1992).

¹⁷ *Id.* at 724, 729-30, 573 N.E.2d at 547, 550, 570 N.Y.S.2d at 459, 462. The court held that although "the statute was content-based and imposed a direct burden on speech," it withstood federal constitutional challenge since its dual objectives of preventing criminals from profiting from their crimes and compensating victims are compelling state interests. *Id.* Furthermore, the statute was narrowly tailored to achieve its purpose in that it provided a specific benefit for a victim, it gave a victim priority over other creditors, and it established a time frame within which the victim could bring a claim. *Id.* However, the court rejected the Board's argument that the statute affected speech only incidentally because its purpose and method of compensation was unrelated to the criminal's freedom of speech and thus did not prevent a criminal from speaking about his crime. *Id.* at 724, 573 N.E.2d at 546, 570 N.Y.S.2d at 458. Moreover, the Court found that the statute did not violate the Free Speech Clause of the New York State Constitution, *id.* at 732, 573 N.E.2d at 551, 570 N.Y.S.2d at 463, nor was it void for vagueness, as it "clearly delineate[d] the class of individuals within its scope, the events that trigger its application, and the acts required for compliance and enforcement." *Id.* at 730-31, 573 N.E.2d at 550-51, 570 N.Y.S.2d at 462-63.

¹⁸ 112 S. Ct. 501 (1991).

¹⁹ *Id.* at 512. "[T]he statute is inconsistent with the First Amendment." *Id.*; *see infra* notes 38-51 and accompanying text (discussing Supreme Court decision and rationale in *Simon & Schuster*).

²⁰ N.Y. EXEC. LAW § 632-a (McKinney Supp. 1993).

The purpose of this Note is to analyze New York's new Son of Sam law. This Note will apply the First Amendment analysis used by the Supreme Court in *Simon & Schuster* to determine the constitutionality of New York's original Son of Sam law. Additionally, the Note will analyze the new Son of Sam law as a forfeiture law, an issue as of yet unaddressed by the Supreme Court. Part One suggests that the Supreme Court properly invalidated New York's original Son of Sam law. Part Two concludes that New York's revised Son of Sam law survives First Amendment challenge. Finally, Part Three proposes that the new law is properly classified as a civil forfeiture statute and would withstand constitutional challenge on that basis.

I. DETERMINING THE CONSTITUTIONALITY OF A REGULATION WHICH PURPORTS TO BURDEN SPEECH OR EXPRESSIVE CONDUCT

A. *The Elements of Constitutional Analysis*

The First Amendment of the United States Constitution provides, in part, that "Congress shall make no law . . . abridging the freedom of speech; or of the press; or of the right of the people peaceably to assemble; and to petition the Government for a redress of grievances."²¹ This language reflected the fundamental desire of our nation's founders that "there exist an equality of status in the field of ideas."²² The United States Supreme Court has

²¹ U.S. Const. amend. I.

²² *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also* *Whitney v. California*, 274 U.S. 357 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1982). The *Whitney* Court noted:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear or punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedies for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id. at 375-76 (Brandeis, J., concurring); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). "[The First Amendment] presupposes that right conclusions are gathered out of a multitude of tongues, rather than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *Id.*;

labored to delineate the boundaries of constitutionally protected speech and expressive conduct, and to determine the appropriate degree of judicial scrutiny to be afforded such activity.²³ The resulting lineage of precedent provides a clear standard by which to analyze the constitutionality of a law which has the effect of restricting speech or expressive conduct. The elements of this analysis include: whether the activity can be classified as speech²⁴ or expressive conduct;²⁵ whether the regulation is content-based²⁶ or

cf. *Cohen v. California*, 403 U.S. 15, 24 (1971) (free expression removes governmental restraints from public discussion); *Bridges v. California*, 314 U.S. 252, 270 (1941) (privilege to "speak one's mind . . . on all public institutions" is fundamental right); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (free political discussion is fundamental constitutional right essential to proper working of democratic government). *See generally* 4 ANNALS OF CONG. 934 (1794) (statement of James Madison). "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." *Id.*

²³ *See, e.g.*, *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538, 2547-48 (1992) (ordinance prohibiting expressive conduct was facially unconstitutional); *Simon & Schuster*, 112 S. Ct. at 512. The *Simon & Schuster* Court decided that section 632-a, which expressly singled out proceeds from speech and speech-related activities for seizure, was violative of the First Amendment. *Id.*; *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (finding that Arkansas tax which expressly applied to publications disseminating only certain types of information posed threat to First Amendment); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521 (1981) (holding San Diego ordinance facially unconstitutional because it expressly restricted erection of billboards and thus hampered commercial speech); *New York Times*, 376 U.S. at 270 ("a profound national commitment [exists] to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937). The *Palko* Court noted that the protection of freedom of speech was paramount because "our history, political and legal" acknowledged that "freedom of thought [] and speech" is an indispensable pre-condition of "nearly every other form of freedom." *Id.*

²⁴ *See, e.g.*, *Brandenburg*, 395 U.S. at 448-49 (racial and anti-semitic remarks made by Ku Klux Klan leader constitute speech); *Beauharnis v. Illinois*, 343 U.S. 250, 266 (1952) (libelous remarks); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (obscenity); *Debs v. United States*, 249 U.S. 211, 215 (1919) (convention address given Ohio Socialist Party opposing American entry into World War I and extolling virtues of socialism).

²⁵ *See, e.g.*, *R.A.V.*, 112 S. Ct. at 2550 (cross-burning); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (flag-burning); *Texas v. Johnson*, 491 U.S. 397, 410 (1989) (burning draft card to express objection to American involvement in Vietnam War); *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 293 (1984) (sleeping in national park to draw attention to plight of homeless Americans); *Spence v. Washington*, 418 U.S. 405, 415 (1974) (decorating American flag with peace symbol to protest American incursion into Cambodia and Kent State massacre); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98 (1972) (labor strike picketing); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 514 (1969) (wearing black armband to protest American involvement in Vietnam War); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (displaying red flag "as a sign, symbol, or emblem of opposition to organized government" in violation of local ordinance).

²⁶ *See R.A.V.*, 112 S. Ct. at 2547. In *R.A.V.*, a city ordinance proscribing only certain types of speech and expressive conduct, associated with "disfavored subjects of race, color, creed, religion or gender," and not others, was determined to be content-based since the prohibition was related to the content of the message. *Id.*; *Simon & Schuster*, 112 S. Ct. at

content-neutral;²⁷ whether government has a compelling interest in regulating speech or expressive conduct;²⁸ and whether the regulation, if content-based, is narrowly tailored to achieve the government's asserted compelling interest.²⁹

508 (New York statute allowing seizure of profits derived solely from criminal's speech and expressive conduct was content-based since it did not impose similar burden on other forms of speech or expressive conduct); *Carey v. Brown*, 447 U.S. 455, 459-60 (1980) (Illinois statute which prohibited picketing of all residences, but made exception for peaceful labor picketing, was content-based since it made impermissible distinction based upon contents of picketer's message); *Mosley*, 408 U.S. at 92 (Chicago ordinance prohibiting picketing outside of any school, except school involved in labor dispute, was content-based since it relied upon contents of picketer's message as basis for regulation).

²⁷ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "[T]he principle inquiry in determining content-neutrality, in speech cases generally . . . is whether the government has adopted a regulation of speech because it disagrees with the message it conveys." *Id.* *Ward* involved a New York City ordinance which regulated the volume of music emanating from public concerts at city-owned parks. *Id.* The Court found the statute to be content-neutral since it was "justified without reference to the content of the regulated speech." *Id.* (citing *Clark*, 483 U.S. at 293); see also *Clark*, 483 U.S. at 295 (National Park Service ordinance proscribing camping in "memorial-core parks" to protest homelessness in America was content-neutral since it was justified without reference to content of demonstrator's message).

²⁸ See, e.g., *Burdick v. Takushi*, 112 S. Ct. 2059, 2066 (1992) (Hawaii statute prohibiting write-in voting served compelling state interest of avoiding "factionalism" and "party raiding" at election time); *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461 (1991) (Indiana public indecency statute prohibiting nude dancing in public forums furthered compelling state interest of protecting "societal order and morality"); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 79, *reh'g denied*, 497 U.S. 1050 (1990) (government has compelling interest in retaining competent workers and statute allowing discharge, demotion or transfer of incompetent employees served this interest); *Ward*, 491 U.S. at 782 (City of New York has substantial interest in "protecting citizens from unwelcome and excessive noise, even in a traditional public forum such as the park"); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54, *reh'g denied*, 475 U.S. 1132 (1986) (municipal zoning ordinance prohibiting location of adult theatre within 1,000 feet of any church, school, single- or multiple-dwelling home served compelling interest of preventing urban blight); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981). "[Improving] traffic safety and appearance of [the] city—are substantial governmental goals." *Id.*; *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) (Minnesota Agricultural Society had compelling interest in "managing the flow of the crowd" at fair).

²⁹ See, e.g., *Ward*, 491 U.S. at 799. "[T]he requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation . . . [and] the means chosen are not substantially broader than necessary to achieve that interest." *Id.*; *Clark*, 468 U.S. at 296 (National Park Service regulation proscribing unlicensed camping in "memorial-core parks" narrowly tailored to serve compelling government interest of maintaining parks in "an attractive and intact condition"); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984) (Los Angeles ordinance prohibiting posting signs on public property was narrowly tailored to meet compelling state interests of preserving aesthetic beauty, quality of life, and property values in urban areas); *Heffron*, 452 U.S. at 654 (Minnesota Agricultural Society rule prohibiting unlicensed dissemination of information at state fair narrowly tailored to serve compelling state interest of keeping crowd moving in an orderly fashion); *United States v. O'Brien*, 391 U.S. 367, 382 (Selective Service regulation prohibiting purposeful destruction of draft card narrowly tailored to serve compelling government interest of preserving an efficient system for raising armies), *reh'g denied*, 393 U.S. 900 (1968).

The First Amendment is implicated when a regulation has the effect of proscribing speech or expressive conduct.³⁰ Assuming a regulation has such an effect, the first step in any First Amendment analysis is to determine whether it is content-based or content-neutral. The principle inquiry in determining whether a statute is content-based is "whether the government has adopted a regulation because of the disagreement with the message it conveys."³¹ By contrast, a regulation is content-neutral if it is "justified without reference to the content of the regulated speech."³² With few exceptions,³³ content-based regulations of speech and expressive conduct are presumptively unconstitutional and therefore subject to strict judicial scrutiny.³⁴ Further, to survive constitutional challenge, a content-based statute must be narrowly drawn to achieve a compelling state interest.³⁵ Alternatively, if a statute is deemed to be content-neutral, it will not invoke strict judicial scrutiny and need only be rationally related to its purpose to be sustained as constitutional.³⁶

³⁰ See *infra* notes 39 & 41 and accompanying text (citing examples of when government's attempted regulation of speech and expressive conduct has invoked First Amendment protections).

³¹ *Ward*, 491 U.S. at 791.

³² *Id.* (quoting *Clark*, 468 U.S. at 293).

³³ See, e.g., *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538, 2542-43. The Supreme Court noted:

From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); see also *Roth v. United States*, 354 U.S. 476, 485 (1957) (obscenity not protected); *Beauharnis v. Illinois*, 343 U.S. 250, 266 (1952) (libel not protected). But see *Gooding v. Wilson*, 405 U.S. 518, 518, 522 (1972). A Georgia statute which proscribed the unprovoked use of "opprobrious words or abusive language, tending to cause a breach of the peace" was facially unconstitutional since its application was not limited to fighting words, and since it was easily "susceptible of application to protected expression." *Id.*

³⁴ See, e.g., *R.A.V.*, 112 S. Ct. at 2547 (content-based restrictions on expressive conduct are presumptively unconstitutional).

³⁵ See *infra* notes 28 & 29 and accompanying text (citing examples of content-based regulations sustained as constitutional since they were narrowly tailored to serve compelling state interest).

³⁶ See, e.g., *Leathers v. Medlock*, 111 S. Ct. 1438, 1444 (1991) (finding Arkansas cable television tax content-neutral and sustaining same as constitutional after applying a lesser standard of judicial scrutiny).

B. The Elements of Analysis Applied: Simon & Schuster, Inc. v. New York Crime Victims Board

The case which successfully challenged the constitutionality of New York's original Son of Sam law was *Simon & Schuster, Inc. v. New York Crime Victims Board*.³⁷ In February 1985, Simon & Schuster published *Wiseguy: Life In A Mafia Family*, a book which recounted the criminal exploits of Henry Hill, a former foot soldier in the world of organized crime.³⁸ In May 1987, pursuant to section 632-a of New York's Executive Law,³⁹ the Crime Victims Board ordered Simon & Schuster to relinquish all past and future profits from the sale of the book and the subsequent movie based upon the book, entitled *Goodfellas*.⁴⁰ In August 1987, Simon & Schuster commenced an action in the United States District Court for the Southern District of New York, seeking a declaratory judgment that section 632-a was unconstitutional, and for injunctive relief precluding enforcement of the statute.⁴¹ In determining that the law did not impermissibly burden speech or expressive conduct, the District Court held the statute constitutional.⁴² The United States Court of Appeals for the Second Circuit affirmed.⁴³

³⁷ 112 S. Ct. 501 (1991).

³⁸ *Id.* at 506. Henry Hill's career in organized crime spanned 25 years and he included among his most notable accomplishments the 1978-79 Boston College basketball team point-shaving scandal, and the 1978 Lufthansa robbery of \$6,000,000 in cash. *Id.*

³⁹ Ch. 823, § 1, [1977] N.Y. Laws 1321 (McKinney) (current version at N.Y. EXEC. LAW § 632-a (McKinney Supp. 1933)).

⁴⁰ *Simon & Schuster*, 112 S. Ct. at 507. Before Simon & Schuster had complied with the Board's order, dated January 31, 1986, it had already disbursed to Hill's agent a payment of \$96,250 representing advances and royalties, and was withholding another \$27,958 for additional payment to Hill. *Id.*

⁴¹ *Simon & Schuster, Inc. v. New York Crime Victims Comp. Bd.*, 724 F. Supp. 170, 173 (S.D.N.Y. 1989), *aff'd*, 916 F.2d 777 (2d Cir. 1990), *rev'd*, 112 S. Ct. 501 (1992).

Plaintiff further alleges that section 632-a impairs its ability to undertake publishing contracts that arguably fall within the statute's reach. The statute thus has a chilling effect in that books concerning crime, about which the public has a right to know, will not be published. In addition, plaintiff argues that section 632-a affects editorial decisions and will result in self censorship of certain subjects.

Id.

⁴² *Simon & Schuster*, 724 F. Supp. at 178.

Based on the foregoing, the Court finds that section 632-a does not directly affect expressive activity and that it is directed at nonspeech activity. As a result, the Court need not apply a test of strict scrutiny to the statute. Instead, section 632-a is subject to a lesser standard of review as dictated by the Supreme Court in *O'Brien*.

Id. The Court subsequently applied the *O'Brien* test and found the statute constitutional. *Id.*; see *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

⁴³ *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777 (2d Cir. 1990), *rev'd*, 112 S. Ct. 501 (1991). The Court of Appeals stated that the District Court incorrectly applied the *O'Brien* test. *Id.* at 781. However, they ultimately affirmed the District Court, finding section 632-a

Citing the enactment of Son of Sam laws by forty-one other states and Congress as a compelling reason for permitting review,⁴⁴ the Supreme Court granted certiorari to determine the constitutionality of section 632-a.⁴⁵

The Supreme Court initially noted that section 632-a comprised a burden on speech and therefore implicated the First Amendment.⁴⁶ The majority further found that the statute was content-based.⁴⁷ Moreover, although the Court conceded that compensating a victim from the fruits of the crime is a compelling state interest,⁴⁸ it concluded that the state had "little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime."⁴⁹ Finally, both the majority and concurring opinions reasoned that section 632-a was not narrowly tailored since its application to authors and speakers who have not been convicted of a crime would result in the impairment of their First Amendment speech rights while doing little or nothing to

to be narrowly tailored to its purpose. *Id.* at 783.

⁴⁴ *Simon & Schuster*, 112 S. Ct. at 508. "Because the Federal Government and most of the states have enacted statutes with similar objectives . . . the issue is significant and likely to recur." *Id.*; see, e.g., 18 U.S.C. §§ 3681-82 (1992) (federal courts have discretionary power to order forfeiture of violent criminal's proceeds from depiction of crime in a book, movie, or other medium); ALA. CODE §§ 41-9-80 to -84 (1992). This act provides, in language virtually identical to New York's original Son of Sam law, for the forfeiture of proceeds received by convicted felons from the depiction of their criminal acts "by way of a movie, book, magazine article, radio or television presentation, live entertainment of any kind, or from the expression of such person's thoughts, feelings, opinions or emotions regarding such crime." *Id.*; CONN. GEN. STAT. ANN. § 54-218 (West 1990) (law tracks language of New York's original Son of Sam law but applies only to profits derived as result of "crime of violence"); IDAHO CODE § 19-5301 (1992) (law utilizes language virtually identical to New York's original Son of Sam law but provides for seizure of profits only when assailant is convicted of crime or acquitted on ground of mental disease or defect); WIS. STAT. § 949.165 (1989-90) (law utilizes exact language of New York's original Son of Sam law but only provides compensation to victims of "serious crimes").

⁴⁵ *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 111 S. Ct. 950 (1991).

⁴⁶ *Simon & Schuster*, 112 S. Ct. at 508.

⁴⁷ *Id.* "The Son of Sam law is . . . a content-based statute. It singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content." *Id.*

⁴⁸ *Id.* at 509.

There can be little doubt, on the other hand, that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them. Every State has a body of tort law serving exactly this interest. The State's interest in preventing wrongdoers from dissipating their assets before victims can recover explains the existence of the State's statutory provisions for prejudgment remedies and orders of restitution.

Id.

⁴⁹ *Id.* at 511.

enhance their victim's chances of being compensated.⁵⁰

II. DETERMINING THE CONSTITUTIONALITY OF NEW YORK'S NEW SON OF SAM LAW

In response to the Supreme Court's decision in *Simon & Schuster*, the New York Legislature and Governor Mario M. Cuomo moved swiftly in enacting an amended version of section 632-a.⁵¹ The central revisions to the new law included: the deletion of language which expressly purported to burden speech or expressive conduct;⁵² the introduction of new language which narrowed the class of persons from whom a victim may recover;⁵³ and

⁵⁰ *Id.*

As counsel for the Board conceded at oral argument, 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. (Blackmun, J. concurring). "I think, however, that the New York statute is underinclusive as well as overinclusive and that we should say so. *Id.* at 512.

⁵¹ See Ten-Day Bill Budget Report On Bills, Assembly Bill 10915-B (July 14, 1992); Memorandum of Governor Mario M. Cuomo filed with Assembly Bill Number 10915—B (July 24, 1992). The United States Supreme Court handed down its decision in *Simon & Schuster* on December 10, 1991. The New York State Senate presented Senate Bill No. 21017 to the New York State Assembly on June 26, 1992. The New York State Assembly ratified Assembly Bill No. 10915—B on July 14, 1992. This bill, which serves as New York's new Son of Sam law, was signed into law by Governor Mario M. Cuomo on July 24, 1992.

⁵² Compare N.Y. EXEC. LAW § 632-a(1)(b) (McKinney Supp. 1993):

"Profits from the crime" means (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, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, the crime, as well as any property obtained by or income generated from the sale, conversion or exchange of such property and any gain realized by such sale, conversion or exchange.

with repealed by ch. 618, § 10 [1992] N.Y. Laws 177 (McKinney):

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 any monies which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives.

⁵³ N.Y. EXEC. LAW § 632-a(1)(b) (McKinney Supp. 1993). The new statute allows recovery only from a person convicted of a felony. *But see repealed* by ch. 618, § 10 [1992] N.Y. Laws 174 (McKinney):

A person convicted of a crime shall include any person convicted of a crime in this

the incorporation of language modifying the time in which a victim may commence an action for recovery.⁵⁴ By adopting these changes the legislature has, to a large extent, resolved the constitutional infirmities which plagued the original law.⁵⁵

As a preliminary matter, it should be noted that the new law may still be classified as content-based since it prohibits the speech or expressive conduct of a convicted felon based upon the content of his or her message. Accordingly, the new law, like its predecessor, will remain the subject of strict judicial scrutiny. However, the importance of this classification is obviated by the fact that the new law, unlike its predecessor, is narrowly tailored inasmuch as it redefines the class of persons from whom a victim can recover as well as the time frame within which a victim may commence an action for recovery.

Specifically, the original law defined "profits from the crime" as any moneys earned 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

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 from which such person is not prosecuted.

Id. (emphasis added).

⁵⁴ N.Y. EXEC. LAW §632-a(3) (McKinney Supp. 1993).

Notwithstanding any inconsistent provision of the estates, powers and trusts law or the civil practice law and rules with respect to the timely bringing of an action, any crime victim shall have the right to bring a civil action in a court of competent jurisdiction to recover money damages from a person convicted of a crime of which he or she is a victim, or the legal representative of that convicted person, within three years of the discovery of any profits of the crime. If an action is filed pursuant to this subdivision after the expiration of all other applicable statutes of limitation, any other crime victims must file any action for damages as a result of the crime within three years of the actual discovery of profits from the crime or of actual notice received from or notice published by the crime victims board of such discovery, whichever is later.

Id.; cf. N.Y. EXEC. LAW §632-a(1) (McKinney's 1982 & Supp. 1992), *repealed* by ch. 618, § 10 [1992] N.Y. Laws 177 (McKinney) (victim must "within five years of the date of the establishment of such escrow account, bring a civil action in a court of competent jurisdiction and recover a money judgement for damages against such person or his representatives").

⁵⁵ See *infra* notes 61-62, 64-65 and accompanying text (citing *Simon & Schuster* Court's objections to New York's original Son of Sam law on grounds that: law expressly burdened or impaired speech; law was content-based; victim's recovery limited to "proceeds of wrongdoer's speech about crime" and law was overinclusive and not narrowly tailored).

crime.”⁵⁶ By comparison, the new law permits the forfeiture of any property obtained through or income generated from “the commission of a crime of which a defendant was convicted . . . the sale, conversion or exchange of proceeds of a crime . . . [and] the unique knowledge obtained during the commission of, or in preparation for the commission of such crime.”⁵⁷

Furthermore, the original Son of Sam law permitted the forfeiture of moneys from any person “accused or convicted of a crime in this state.”⁵⁸ The original law also defined a convicted person as “any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial”⁵⁹ as well as “any person who has voluntarily and intelligently admitted the commission of a crime for which such person has not been prosecuted.”⁶⁰ By contrast, the new law deleted this definition entirely and specifically permitted a crime victim to recover money damages only from a person convicted of a “crime.”⁶¹ In addition, the new law narrowed its definition of a crime to “any felony defined in the penal law or any other chapter of the consolidated laws of the state.”⁶²

Finally, the new law is also narrowly tailored with respect to its statute of limitations procedure. The new law modified the statute of limitations in the original law by reducing the time in which a victim may commence an action from five years to three years.⁶³ Moreover, the new law provided that the statute of limitations commences upon “the discovery of any profits of the crime,”⁶⁴ whereas the old law required that the statute of limitations run from the “date of the establishment of the escrow account.”⁶⁵ This last amendment will further narrow the circumstances under which a crime victim will be allowed to commence an action for

⁵⁶ N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1992), repealed by ch. 618, § 10 [1992] N.Y. Laws 174 (McKinney).

⁵⁷ N.Y. EXEC. LAW § 632-a(1)(b) (McKinney Supp. 1993).

⁵⁸ N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1992), repealed by ch. 618, § 10 [1992] N.Y. Laws 177 (McKinney).

⁵⁹ *Id.* § 632-a(10)(b).

⁶⁰ *Id.*

⁶¹ N.Y. EXEC. LAW § 632-a(1)(a) (McKinney Supp. 1993).

⁶² *Id.* § 632-a(1)(a).

⁶³ See *supra* note 54 and accompanying text (comparing statute of limitations provisions in old and new Son of Sam laws).

⁶⁴ N.Y. EXEC. LAW § 632-a(3) (McKinney Supp. 1993).

⁶⁵ N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1992), repealed by ch. 618, § 10, [1992] N.Y. Laws 174 (McKinney).

recovery, thus making it markedly easier for a reviewing court to deem the statute narrowly tailored and sustain it as constitutional in spite of the fact that it is content-based.

Hence, by limiting its reach to only those individuals convicted of a felony, as well as by reducing the time in which a victim may commence an action for recovery, the new law directly addressed the argument of the *Simon & Schuster* Court that the old law was overinclusive. As a result, the content-based scheme of the new law is neutralized allowing it to pass constitutional muster.

Although it seems clear that the new Son of Sam law will pass a First Amendment analysis, there remains the possibility of attack from another angle; namely that the statute is an example of a forfeiture law that falls outside the boundaries of constitutionality. The following section will propose that the statute is properly classified as a forfeiture law, and further, that in applying a traditional forfeiture analysis it will be sustained as constitutional.

III. ANALYSIS OF SON OF SAM LAW AS A FORFEITURE STATUTE

"Forfeiture is . . . the divestiture of specific property without compensation, in consequence of some default or act forbidden by law."⁶⁶ In other words, it is the loss of some property, or right to property as a punishment for some illegal act.⁶⁷ At common law a forfeiture was deemed to be an action in personam.⁶⁸ Today,

⁶⁶ 37 C.J.S. *Forfeitures* § 1 (1944). It is "the result which flows from a failure to comply with the law." *Id.*; see also 60 N.Y. JUR. 2D *Forfeitures and Penalties* §§ 81-82 (1987). Forfeiture is distinguishable from a penalty in that a penalty does not redress a private injury and is a monetary punishment for performing an act which is prohibited or from not performing an act that is required. *Id.*

⁶⁷ BLACK'S LAW DICTIONARY 650 (6th ed. 1990); see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, *reh'g denied*, 417 U.S. 977 (1974). At English common law, the value of an object causing the death of a person was forfeited to the Crown as a deodand. *Id.* at 680-81. The deodand, from the Latin *Deo dandum*, meaning 'to be given to God,' is traceable to Biblical and pre-Judeo-Christian practices. *Id.* at 681. The King was to use the deodand for either the saying of Masses or charitable uses. *Id.* The deodand eventually became a source of Crown revenue and was adapted as a "penalty for carelessness." *Id.* It was also imposed on those convicted of felonies and treason and on those violating customs and revenue laws. *Id.* at 681-82. Deodands were not part of United States common law. *Id.* at 682. Prior to the adoption of the United States Constitution, however, the states were using forfeiture statutes to force forfeiture of commodities and vessels used in violation of customs and revenue laws. *Id.* at 683. After the adoption of the Constitution, federal and state forfeiture statutes proliferated and now "reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Id.*

⁶⁸ *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827). "The forfeiture did not, actually speaking, attach in rem, but it was a part, or at least a consequence, of the judgment conviction." *Id.* at 14. In order for the Crown to establish its right to and recover goods and

there can be no forfeiture without authorization of law, usually by statute.⁶⁹ Statutory forfeiture in criminal jurisprudence is commonly in rem, which is an action against the property itself.⁷⁰ There are many federal and state statutes authorizing forfeiture when profits are derived through the commission of a crime.⁷¹

A. *New York Forfeiture Statutes*

The New York State Legislature has enacted many forfeiture statutes.⁷² In 1984, it enacted Article 13-A of the Civil Practice Law and Rules ("Article 13-A"),⁷³ empowering authorities to recover property constituting the proceeds or substituted proceeds of a crime.⁷⁴ The purpose of the statute was to ensure that a

chattels, the offender must have been convicted. *Id.* Only at this point did the offender divest his right to the property. *Id.*; C.J.S., *supra* note 66, § 2; *see also infra* note 105 (comparing in personam and in rem forfeiture).

⁶⁹ *See, e.g.*, IDAHO CODE § 18-314 (1992) (conviction of any person for crime does not cause a forfeiture of property unless expressly imposed by law); NEV. REV. STAT. ANN. § 212.010 (Michie 1992) (recognizing that conviction for crime does not cause a forfeiture of property unless specifically authorized by law); OR. REV. STAT. § 137.270 (1991) (stating that no conviction of any person for crime causes forfeiture of property except in cases where expressly provided by law); V.I. CODE ANN. tit. 14, § 103 (1991) (stating that criminal conviction of any person will not result in forfeiture of any property unless expressly imposed by law); C.J.S., *supra* note 66, § 3.

⁷⁰ *The Palmyra*, 25 U.S. at 15. In a forfeiture proceeding in rem, the proceeding is independent of and unaffected by any criminal proceeding against the offender. *Id.* The conviction of the offender is not a requisite to enforcement of an in rem forfeiture. *Id.*; C.J.S. *supra* note 66, § 2; C.J.S., *supra* note 66, § 2; *see also infra* note 105 (comparing in personam and in rem proceedings).

⁷¹ *Calero-Toledo*, 416 U.S. at 683. "[C]ontemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Id.*; *see, e.g.*, *United States v. Ambrosio*, 575 F. Supp. 546, 549 (E.D.N.Y. 1983). Several activities which involve forfeiture to the United States government include illegal gambling, 18 U.S.C.S. § 1082 (Law. Co-op. 1979 & Supp. 1992), illegal bribes, 18 U.S.C.S. § 3666 (Law. Co-op. 1990 & Supp. 1992), liquor violations, 18 U.S.C.S. § 3667 (Law. Co-op. 1990), and narcotics violations, 49 U.S.C.S. Appx. § 782 (Law. Co-op. 1990 & Supp. 1992). *Id.* Forfeiture to the states is also prescribed by law. *See, e.g.*, ALA. CODE § 20-2-93 (1992) (controlled substances); ILL. REV. STAT. ch. 38, para. 11-20 (1991 & Supp. 1992) (obscenity); 1992 Kan. Sess. Laws 289 (theft of livestock); NEV. REV. STAT. ANN. § 179.121 (Michie 1991) (murder, robbery, kidnapping, burglary, and grand larceny); N.C. GEN. STAT. § 14-2.3 (1991) (felonies).

⁷² *See* 60 N.Y. JUR 2D *Forfeitures and Penalties* § 4 & n.23 (1987) (citing examples, including CLS Agr. & M. Law § 44 (violations of agricultural and marketing regulations), CLS Gen. Bus. Law § 12 (commodities exposed for sale on Sunday), CLS Gen. Bus. Law § 284 (violations pertaining to freight and baggage), CLS Penal Law § 410.00(1) (equipment used in photographing and procuring pornographic still or motion pictures), CLS Pub. Health Law § 3388 (vehicles, vessels or aircraft unlawfully used to conceal, convey or transport controlled substances)).

⁷³ N.Y. CIV. PRAC. L. & R. §§ 1310-1352 (McKinney Supp. 1992).

⁷⁴ *Id.* § 1311(1); *see infra* notes 85-86 (defining proceeds and substituted proceeds of crime).

criminals do not profit from their crimes, especially crimes related to illicit drug trafficking and organized crime.⁷⁶

B. Comparison of Article 13-A and the New Son of Sam Law

New York's new Son of Sam law can be classified as a forfeiture statute, as it requires the criminal to divest himself or herself of property attained from the commission of a wrongful act,⁷⁶ but varies from and supplements Article 13-A in several aspects. Both statutes have the same objective: to prevent the unjust enrichment of a criminal as a result of his crime.⁷⁷ Article 13-A, however, is an action in restitution,⁷⁸ while the Son of Sam law provides compensation to the victim for a wrong.⁷⁹ Under the new Son of Sam law, actions by the Crime Victims Compensation Board are taken solely on behalf of the victims, with the entire recovery payable to the victims.⁸⁰ However, under Article 13-A, forfeited property is

⁷⁶ See Governor's Memorandum on Approval of ch. 669, N.Y. Laws (Aug. 1, 1984), reprinted in 1984 N.Y. Laws 3627 (McKinney) [hereinafter Governor's Memorandum]. "[T]he forfeiture statute can be used by law enforcement agencies throughout the state as an effective tool to take the profit out of crime. . . . Our law enforcement agencies are fighting a constant battle against illicit drug trafficking, and other forms of organized crime." *Id.* See generally *Dillon v. Neira*, 130 Misc.2d 434, 439, 495 N.Y.S.2d 622, 626 (Nassau County Ct. 1985). "The purpose of the statute is to take the profit out of crime, not to arbitrarily seize any and all assets of a defendant absent some showing that the assets are the product of the defendant's criminal endeavors." *Id.*

⁷⁷ See *supra* text accompanying note 55 (defining profits of crime that must be forfeited under statute); *supra* notes 66-67 and accompanying text (defining and discussing forfeiture).

⁷⁸ See Memorandum of Sen. Emanuel R. Gold, reprinted in 1992 LEGIS. ANN. 237. "This bill, however, attempts to recapture for crime victims much of what was intended for them under "Son of Sam." *Id.*; *supra* note 7 (setting forth purpose of original N.Y. EXEC. LAW §632-a); Governor's Memorandum, *supra* note 75, at 3627-28 (memorandum of Gov. Cuomo regarding intent of Article 13-A).

⁷⁹ See N.Y. CIV. PRAC. L. & R. § 1311 (McKinney Supp. 1992). The statute entitles the appropriate claiming authority to bring an action against a criminal defendant to recover the proceeds of a crime, the substituted proceeds of a crime, the instrumentality of a crime, or a money judgement in lieu thereof. *Id.* A claiming authority is defined as a district attorney, attorney general, or appropriate corporation counsel or county attorney. *Id.* § 1310(11); see also Governor's Memorandum, *supra* note 75, at 3627-28. Governor Cuomo's memorandum that accompanied Article 13-A stated that the statute could be used by "law enforcement agencies." *Id.*

⁸⁰ See N.Y. EXEC. LAW § 632-a(3) (McKinney Supp. 1993). "[A]ny crime victim shall have the right to bring a civil action . . . to recover money damages from a person convicted of a crime of which he or she is a victim . . ." *Id.*

⁸⁰ *Id.* A victim of a crime must bring a civil action to recover money damages from a person convicted of a crime, such damages being limited to the value of the profits of the crime. *Id.* The Board, acting on behalf of victims, is empowered to pursue all provisional remedies otherwise available to victims. *Id.* § 632-a(6).

sold,⁸¹ and the proceeds, after certain apportionments,⁸² are paid to the general fund of the municipality.⁸³ Persons claiming an interest in the property subject to forfeiture, not necessarily a victim, may commence a special proceeding to determine their rights to the property.⁸⁴ The forfeiture provisions in Article 13-A commonly require forfeiture of both the proceeds of a crime⁸⁵ and the substituted proceeds of a crime.⁸⁶ In addition to the proceeds and substituted proceeds of a crime, New York's new Son of Sam law has within its reach assets obtained by the criminal from the use of unique knowledge gained from the commission of the crime.⁸⁷ Thus, because the type of property subject to the new Son of Sam law is more expansive and the law is for the direct benefit of the crime victim, it is broader in scope and an extension of Article 13-A. The only substantial difference between the statutes is the remedy afforded by each, not their effect.

C. *Constitutionality of the New Son of Sam Law as a Forfeiture Statute*

The express statutory language of Article 13-A states that it is "civil, remedial, and in personam in nature and shall not be

⁸¹ N.Y. CIV. PRAC. L. & R. § 1349(2) (McKinney Supp. 1992).

⁸² *Id.* § 1349(2)(a)-(g). Proceeds of the sale are used in the following order: to satisfy any liens or claims against the property; to pay restitution, reparations, or damages to a victim of the crime for which the forfeiture was effected; to pay restitution, reparations, or damages to a victim of any crime committed by the defendant; to reimburse the claiming authority for amounts expended to maintain the property; to pay the claiming authority 15% of the proceeds to satisfy the costs incurred for the investigation and litigation of the forfeiture; to pay the claiming authority 15% of the proceeds to satisfy the costs incurred in protecting the property; and to contribute 40% of the remaining proceeds to the substance abuse service fund. *Id.*

⁸³ *Id.* § 1349(2)(h). Seventy-five percent of any moneys remaining after apportionment are to be deposited into a general fund to be utilized for law enforcement use in the investigation of penal law offenses. *Id.* The remaining twenty-five percent is to be deposited into a general fund to be used for the prosecution of penal law offenses. *Id.*

⁸⁴ *Id.* § 1327; *see also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683, *reh'g denied*, 417 U.S. 977 (1974). "[T]he innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Id.*; OLIVER WENDELL HOLMES' JR., *THE COMMON LAW* 25 (1881). "It did not matter that the forfeited instrument belonged to an innocent man." *Id.*

⁸⁵ *See* N.Y. CIV. PRAC. L. & R. § 1310(2) (McKinney Supp. 1992) (defining proceeds of crime as that which is obtained through commission of felony).

⁸⁶ *Id.* § 1310(3) (defining substituted proceeds of crime as property obtained through sale or exchange of proceeds obtained through commission of felony).

⁸⁷ *See* N.Y. EXEC. LAW § 632-a(1)(B) (McKinney Supp. 1993). The law provides for the forfeiture of proceeds and substituted proceeds of a crime "including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission, of a crime . . ." *Id.*

deemed to be a penalty or criminal forfeiture for any purpose."⁸⁸ The New York courts have upheld the legislature's intent⁸⁹ and the law's constitutionality.⁹⁰

If the new Son of Sam law is, as contended, a forfeiture statute, the determination of its constitutionality must be governed by the analysis applied to other forfeiture statutes. The first issue to be addressed is whether the law provides a criminal penalty or a civil remedy.⁹¹ If criminal, then the statute must comply with the constitutional provisions afforded to criminal prosecutions.⁹² If civil, then those provisions are not applicable. In determining a statute's nature, the Supreme Court traditionally looks first to the express language of a statute and legislative intent for an indication, either expressly or impliedly, of how the legislature viewed the statute.⁹³ If the legislature deemed the statute civil, then the court must "inquire further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention."⁹⁴ However, as to the latter inquiry, the Court has "noted that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."⁹⁵

Applying this analysis, it is clear that the New York State Legislature intended the new Son of Sam law to be a civil forfeiture statute. Although the express language of the statute is silent re-

⁸⁸ N.Y. CIV. PRAC. L. & R. § 1311(1) (McKinney Supp. 1992).

⁸⁹ See *Dillon v. Neira*, 130 Misc. 2d 434, 436, 495 N.Y.S.2d 622, 624 (Nassau County Ct. 1985). An Article 13-A action is a hybrid in that although it is directed at criminals, it is civil and remedial in nature. *Id. Contra Himelein v. Frank*, 141 Misc. 2d 416, 421, 532 N.Y.S.2d 977, 980 (Sup. Ct. Cattaraugus County 1988), *rev'd*, 155 A.D.2d 964, 547 N.Y.S.2d 775 (1989) (finding that "Article 13-A CPLR forfeiture is a criminal penalty").

⁹⁰ See *Morgenthau v. Citisource, Inc.*, 68 N.Y.2d 211, 220-21, 508 N.Y.S.2d 152, 156-57, 500 N.E.2d 850, 854-55 (1986) (statute provides minimum procedural due process requirements); *Dillon v. Schiavo*, 114 A.D.2d 924, 925, 495 N.Y.S.2d 197, 198 (2d Dep't 1985) (lack of provision for adversarial hearing does not render statute unconstitutional).

⁹¹ See *Himelein*, 141 Misc. 2d at 420, 532 N.Y.S.2d at 980 (key issue for construing forfeiture statute is whether it is punishment or remedial device).

⁹² See U.S. CONST. amend. V (protection against double jeopardy and self-incrimination in criminal cases); U.S. CONST. amend. VI (right to jury trial in criminal prosecutions); U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment). See generally *United States v. Ward*, 448 U.S. 242, 248 (explaining constitutional import of making distinction between civil and criminal penalties), *reh'g denied*, 448 U.S. 916 (1980).

⁹³ See *Ward*, 448 U.S. at 248. "This Court has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." *Id.*

⁹⁴ *Id.* at 248-49; see *Himelein*, 141 Misc. 2d at 419, 532 N.Y.S.2d at 979. "[T]here is a real question as to whether [Article 13-A] is a wolf in sheep's clothing . . ." *Id.* (citations omitted).

⁹⁵ *Ward*, 448 U.S. at 248-49 (citing *Fleming v. Nestor*, 363 U.S. 603, 617-621 (1960)).

garding the legislature's view of the statute, it can be gleaned from its provisions and the legislative history of the statute. The statute requires that the maximum a victim can recover from a convicted criminal is the value of the profits of the crime.⁹⁶ This seems more of a remedial measure for the victim rather than as an affirmative punishment of the criminal, because it is not, for instance, a fine imposed regardless of the amount of profits reaped by the criminal. Also, the statute only applies if the criminal realizes any profit from his crime.⁹⁷ If the legislature sought to punish a criminal by this statute, its provisions would not rest with the certain amount of discretion the criminal has in converting or generating profits from his crime. Further, the stated objective of the statute was not to punish the criminal, but to compensate the victim and prevent the criminal from profiting from his crime.⁹⁸

In order to determine whether the statute's actual purpose or effect negates the legislature's intention, the seven factor set forth by the Supreme Court in *Kennedy v. Mendoza-Martinez*⁹⁹ must be applied. The first factor is whether the sanction involved an affirmative disability or restraint.¹⁰⁰ If so, this implies the statute is criminal in nature. Since the statute works to deprive the convicted criminal of property owed to him, it is considered an affirmative disability or restraint, and therefore, under the first factor, would be classified as criminal.¹⁰¹

The second consideration is whether this type of forfeiture statute has "historically been regarded as punishment" and therefore, criminal in nature.¹⁰² The original Son of Sam law created a proceeding in rem,¹⁰³ which is generally civil in nature,¹⁰⁴ since the

⁹⁶ N.Y. EXEC. LAW § 632-a(3) (McKinney Supp. 1993).

⁹⁷ N.Y. EXEC. LAW § 632-a(1)(B) (McKinney Supp. 1993).

⁹⁸ See *supra* note 77 (setting forth legislative intent of new Son of Sam law).

⁹⁹ 372 U.S. 144, 167 (1962); see *Ward*, 448 U.S. at 249 (noting list of considerations is not exclusive, but provides guidance).

¹⁰⁰ *Mendoza-Martinez*, 372 U.S. at 168.

¹⁰¹ See N.Y. EXEC. LAW § 632-a(3) (McKinney Supp. 1993). A crime victim has a right to bring a civil action against a person convicted of the crime in order to recover any profits from the crime. *Id.*; see also *Himelein v. Frank*, 141 Misc. 2d 416, 421, 532 N.Y.S.2d 977, 980 (Sup. Ct. Cattaraugus County 1988), *rev'd*, 155 A.D.2d 964, 547 N.Y.S.2d 775 (1989) (recognizing deprivation of property as affirmative disability or restraint).

¹⁰² *Mendoza-Martinez*, 372 U.S. at 168.

¹⁰³ See *supra* note 15 (discussing *Barret v. Wojtowicz* in which it was stated that action against escrow account creates in rem action).

¹⁰⁴ See *Himelein*, 141 Misc. 2d at 419, 532 N.Y.S.2d at 979. "Such in rem proceedings were viewed as civil in nature although they did have punitive characteristics." *Id.* (citation omitted).

action is taken against the property itself and not against the owner of the property.¹⁰⁵ The newly enacted law should also be considered an *in rem* statute, and therefore civil, as the procedures required for recovery are substantially the same as the original statute.¹⁰⁶

The third issue considered is whether the statute is triggered only on a finding of scienter.¹⁰⁷ If so, the statute is assumed to be penal. The new Son of Sam law encompasses only felonies,¹⁰⁸ which in New York requires scienter.¹⁰⁹ Therefore, the law is only implicated when scienter is present, and could be considered penal.

The fourth consideration is whether the statute's operation will promote retribution and deterrence, the traditional aims of punishment.¹¹⁰ In enacting the new Son of Sam law, the New York Legislature reasserted its resolve to compensate the victim and prevent unjust enrichment to the criminal, much the same as the

¹⁰⁵ See *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 513 (1921). "It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental." *Id.*; *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827). The *Palmyra* Court stated:

The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing, and this whether the offence be *malum prohibitum* or *malum in se* [T]he practice has been, and so this Court understands the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.

Id.; *United States v. Ambrosio*, 575 F. Supp. 546, 550 (E.D.N.Y. 1983) (considering owner as third party and property subject to forfeiture therein as offensive to law); see also *id.* at n.8. "The [RICO] statute is set forth in terms of violations committed by defendants. On the other hand, an *in rem* forfeiture statute would be couched in terms of articles of property. A typical *in rem* forfeiture statute might use language to the effect that 'Property used in commission of a violation'" *Id.* (citing Note, *RICO Forfeiture and the Rights of Innocent Third Parties*, 18 CALIF. U. L. REV. 345, 350, n.62 (1982)).

¹⁰⁶ Compare ch. 823, § 1, [1977] N.Y. Laws 1321 (McKinney) (current version at N.Y. EXEC. LAW § 632-a (McKinney Supp. 1993) (victim had right to bring civil action against person within five years of date of establishment of escrow account) and N.Y. EXEC. LAW § 632-a(3) (McKinney Supp. 1993) (victim must bring civil action against convicted person within three years of discovery of profits of crime).

¹⁰⁷ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1962).

¹⁰⁸ See N.Y. EXEC. LAW § 632-a(a)(A) (McKinney Supp. 1993). "'Crime' means any felony defined in the penal law or any other chapter of the consolidated laws of the state." *Id.*

¹⁰⁹ See *Himelein v. Frank*, 141 Misc. 2d 416, 421, 532 N.Y.S.2d 977, 980 (Sup. Ct. Cattaraugus County 1988) (requiring scienter in some form for crime to be classified as felony), *rev'd*, 155 A.D.2d 964, 547 N.Y.S.2d 775 (1989); see also N.Y. PENAL LAW art. 120—Assault and Related Offenses (McKinney 1987 & Supp. 1993); *Id.* art. 125—Homicide, Abortion and Related Offenses; *Id.* art. 135—Kidnapping, Coercion and Related Offenses.

¹¹⁰ *Mendoza-Martinez*, 372 U.S. at 168; see *infra* note 112 (setting forth traditional aims of penal statutes).

original Son of Sam law.¹¹¹ These objectives have not traditionally been the aim of penal statutes.¹¹² Further, although the statute may incidentally deter crime in some instances, it will not have retributive or deterring effects on crimes in which no profits are reaped. It is therefore contended that the primary effect of the new Son of Sam law will not be to promote retribution and deterrence and, under the fourth factor, should be classified as civil.

The fifth element to consider is whether the behavior to which the statute applies is already a crime.¹¹³ Since an underlying felony must have been committed to invoke the new Son of Sam law,¹¹⁴ this part of the test is indicative of a penal statute.

The next factor is whether a purpose other than retribution may be rationally assigned to the statute.¹¹⁵ Since the explicit legislative intent was to prevent unjust enrichment to the criminal and to compensate the victim, there is a reasonable alternative purpose attributable to the law, and under this factor, the statute could be considered civil.

The final element in the *Mendoza-Martinez* test considers whether the forfeiture appears excessive in relation to the alternative purpose assigned.¹¹⁶ Since the alternative purpose is to prevent unjust enrichment and to compensate the victim, the forfeiture of the profits derived from a criminal activity appears to be a rational method for achieving this objective. As one court has noted, "[A]s a matter of common sense, stripping a criminal of the benefits of his criminal activity . . . is clearly not 'excessive in relation' to this remedial purpose."¹¹⁷ Accordingly, the statute should be considered civil under this element.

These factors are not assigned individual weights nor has it been determined that a majority of responses need to be found on either side to reach a conclusion.¹¹⁸ Notwithstanding this apparent

¹¹¹ See *supra* note 77 (setting forth legislative intent of new Son of Sam law).

¹¹² See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 1.5, at 22-29 (2d ed. 1986) (discussing theories of punishment including prevention, restraint, rehabilitation, deterrence, education, and retribution).

¹¹³ *Mendoza-Martinez*, 372 U.S. at 168.

¹¹⁴ See N.Y. EXEC. LAW § 632-a(1)(A) (McKinney Supp. 1993) (crime defined as any felony in consolidated laws of New York).

¹¹⁵ *Mendoza-Martinez*, 372 U.S. at 168-69.

¹¹⁶ *Id.* at 169.

¹¹⁷ *Himelein v. Frank*, 141 Misc. 2d 416, 422, 532 N.Y.S.2d, 977, 980 (Sup. Ct. Cattaraugus County 1988), *rev'd*, 155 A.D.2d 964, 547 N.Y.S.2d 775 (1989).

¹¹⁸ See *id.* at 423, 532 N.Y.S.2d at 982.

lack of guidance in applying the *Mendoza-Martinez* test, careful analysis of these factors indicates that the new Son of Sam law is civil in nature. The provisions of the statute and the clear legislative intent negate the conclusion that the new Son of Sam law is a criminal forfeiture statute. The statute only requires forfeiture if profits are realized from the commission of a felony crime. If there are no profits, the statute does not apply. Also, the legislature explicitly stated its intent that the statute be remedial in nature and act to take the profit out of crime and compensate the victim. This conclusion is further supported by the fact that the majority of the seven factors of the *Mendoza-Martinez* analysis indicate that the new Son of Sam law is civil as applied and in its effect. Accordingly, since the new Son of Sam law is a civil forfeiture statute, it need not comply with the constitutional provisions afforded to criminal prosecutions and would therefore be upheld as constitutional.

CONCLUSION

Recent events, including the publication of *Amy Fisher: My Story*,¹¹⁹ and the sale of book and movie rights to the story of Branch Davidian cult leader David Koresh,¹²⁰ suggest that it will only be a matter of time before New York's new Son of Sam law faces constitutional challenge. An analysis of the new law, however, clearly shows that any efforts by the victims of these crimes to recover any profits will meet with success.

Like its predecessor, New York's new Son of Sam law is con-

¹¹⁹ See Shirley E. Perlman & Tom Demoretcky, *Mary Jo Monitors Royalties*, *NEWSDAY*, Apr. 7, 1993, at 23. Mary J. Buttafuoco, victim of a failed murder attempt by Amy Fisher, the alleged teenaged mistress of her husband Joey Buttafuoco, plans to file papers in New York State Supreme Court to block distribution of profits realized by Fisher in connection with the publication of her book, *Amy Fisher: My Story*. *Id.* Fisher's lawyer, Eric Naiburg, claims that Fisher is not profiting from the book, since all rights to her story were signed over to KLM Productions in exchange for the latter having posted here bail. *Id.*; Shirley Perlman & Susan Forrest, *The Writer's Voice: Not Quite Amy*, *NEWSDAY*, Apr. 19, 1993, at 46. The book describes Fisher's alleged affair with Joey Buttafuoco and her subsequent attempt to murder his wife Mary Jo. *Id.*

¹²⁰ See Rod Dreher, *Making Crime Pay?: Cult Leader Seeks To Sell His Story*, *WASH. TIMES*, Apr. 7, 1993, at A1. Koresh retained an attorney to negotiate the sale of the story surrounding the siege of the Branch Davidian compound in Waco, Texas. *Id.* The siege followed a failed effort by the Federal Bureau of Alcohol, Tobacco, and Firearms to arrest Koresh for assorted federal weapons violations. *Id.* Four federal agents and an undetermined number of Koresh's followers were killed in the raid. *Id.* According to David Beatty, Director of Public Affairs for the National Victims Center, in Koresh contracted with a New York publisher, the New York Son of Sam law would be implicated. *Id.*

tent-based since its proscription of the speech and expressive conduct of a convicted felon is based upon the content of that individual's message. Accordingly, it will be subject to strict judicial scrutiny. However, the new law, unlike its predecessor, is narrowly tailored to achieve what the Supreme Court has already acknowledged to be the dual compelling state interests of compensating crime victims and preventing criminals from profiting from their illegal acts. Consequently, the fact that the new law is narrowly drawn to achieve such interests both counteracts the presumption against constitutionality triggered by its proscription of speech and expressive conduct, and satisfies the standard of strict judicial scrutiny incurred by its content-based design. Accordingly the new law will withstand First Amendment analysis.

Additionally, if attacked under a forfeiture argument, the new law should be classified as a civil forfeiture law. Clearly, it was the legislature's intent for the law to be civil in nature and the application of the law, as determined by the seven part *Mendoza-Martinez* test, is consistent with this intent. Thus, as a civil remedy, the Son of Sam law is constitutional since it need not comply with the higher standard of constitutional protections afforded criminal prosecutions.

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