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Melissa J. Malecki

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SON OF SAM: HAS NORTH CAROLINA REMEDIED THE PAST PROBLEMS OF CRIMINAL ANTI-PROFIT LEGISLATION?

I. INTRODUCTION

Over the last several decades, the media frenzy surrounding notorious individuals has arguably reached higher levels than ever before. In addition, competition between major broadcast networks has pushed the desire for exclusive interviews as well as never before seen or heard footage, depictions, or stories. As a result, the market in which notorious individuals could potentially exploit their crimes in order to earn a profit has seemingly steadily expanded. This has presented states with the difficult task of determining whether criminals should be allowed to profit from their notoriety, and if not, determining the best way to go about preventing criminals from doing so.

In an effort to not only prevent such notorious individuals from profiting from their crimes, but also to deter future criminals from engaging in crime simply to profit, and to provide crime victims with compensation, states have passed "Son of Sam" laws.[1] However, implicit in their function, by restricting the ways in which criminals profit from their notoriety, Son of Sam laws prevent criminals from fully exercising their free speech rights. Thus, the intended positive effects of such legislation have been largely hampered by claims that Son of Sam laws violate First Amendment rights to freedom of speech.[2] As a result, Son of Sam laws have been faced with the difficult task of withstanding strict scrutiny analysis in order to overcome the First Amendment issues, and have not fared well.[3] Essentially, Son of Sam cases present an intense battle between a convicted criminal's interest in freedom of expression and the state's interest in preventing criminals from profiting from their crimes.

The goal of this Comment is to determine, in light of the turbulent past of Son of Sam laws, whether North Carolina's recently passed Son of Sam legislation has improved on defects in the past laws and could withstand a

1. See *infra* Parts II.A and II.B for a general discussion defining Son of Sam legislation, along with a discussion of the history and development of Son of Sam laws.

2. See *infra* Part IV.A for a discussion of First Amendment considerations with respect to Son of Sam legislation.

3. See *infra* Parts IV.B.1 and IV.B.2, regarding Son of Sam laws and strict scrutiny analysis.

constitutional challenge. Part II presents the background of Son of Sam legislation, beginning with a brief general discussion of Son of Sam laws, followed by an in-depth discussion of the history and development of criminal anti-profit legislation. Part III parses the specific text of North Carolina's recent Son of Sam legislation, and Part IV considers the viability of North Carolina's law in light of First Amendment issues and the success (or lack thereof) of other states' Son of Sam laws.

II. BACKGROUND

A. In General

On August 2, 2004, North Carolina's governor signed a Son of Sam bill into law,[4] making North Carolina one of numerous states that have passed some sort of criminal anti-profit legislation.[5] Traditionally, Son of Sam laws are those statutes that "require writers, journalists, publishers, or filmmakers who contract with an accused or convicted person for rights to his 'version' of the crime to turn any payments over to an escrow fund operated by the state,"[6] rather than turning the profits over to the criminal himself. Typically, if a state decides, after seeing the contractual language, that an accused or convicted criminal will be paid for telling his story regarding the crime, the profits made from the story must be paid to the state escrow fund, in order to be made available for victim or state compensation.[7] Essentially, Son of Sam laws aim to provide adequate compensation for crime victims while at the same time preventing criminals from profiting from their crimes.

B. History and Development of Son of Sam Laws

The original Son of Sam law was passed in New York in response to a series of horrific shootings during the summer of 1977 in New York City that had generated an incredible amount of publicity.[8] It was rumored that the murderer, David Berkowitz, who had referred to himself only as Son of Sam

4. Act of Aug. 2, 2004, ch. 159, 2004 N.C. Sess. Laws 159.

5. For a listing of other states' current criminal anti-profit statutes, see Jessica Yager, *Investigating New York's 2001 Son of Sam Law: Problems With the Recent Extension of Tort Liability for People Convicted of Crimes*, 48 N.Y.L. SCH. L. REV. 433, 458 n.119 (2004).

6. JAMES H. STARK & HOWARD W. GOLDSTEIN, THE RIGHTS OF CRIME VICTIMS 265 (Norman Dorsen ed., 1985).

7. *Id.* at 265-66.

8. *Id.* at 266.

by notes left at the crime scenes,[9] would be able to collect up to $200,000 if he were to sell his story.[10] As a result, the New York Legislature quickly enacted what it termed a Son of Sam law to "prevent Berkowitz from selling and profiting from his story."[11] Senator Emanuel Gold, who authored the statute, provided justification for the new law: "'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—while five people are dead, [and] other people were injured as a result of his conduct.'"[12] Oddly enough, New York's Son of Sam law did not apply to Berkowitz, who had been found incompetent to stand trial, because in its original form, the statute was applicable only to convicted criminals.[13]

From its inception, the New York Son of Sam law existed with few significant challenges, withstanding a constitutional attack on grounds of vagueness and an attack on the grounds of impairing contracts,[14] until it was found unconstitutional in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board* in 1991.[15] In *Simon & Schuster*, Henry Hill, a well-known gangster who received immunity in return for trading information about his colleagues, contracted with Nicholas Pileggi, an author, for the creation of a book about Hill's life.[16] Hill and Pileggi signed an agreement with Simon & Schuster, Inc. for the book's publication.[17] Eventually, Pileggi authored *Wiseguy*, in which Hill spoke candidly about, among other things, being convicted of extortion.[18] Within two years, more than one million copies of *Wiseguy* had been printed, and the book served as the underlying

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9. Kathleen Howe, Note & Comment, *Is Free Speech Too High a Price to Pay for Crime? Overcoming the Constitutional Inconsistencies in Son of Sam Laws*, 24 LOY. L.A. ENT. L. REV. 341, 344 (2004).

10. STARK & GOLDSTEIN, *supra* note 6, at 266.

11. Howe, *supra* note 9, at 345. Although New York's Son of Sam law was the first example of a codified criminal anti-profit law, the concept of preventing criminals from profiting from their crimes is certainly not a recent development. Within a legal, case-specific context, scholars tend to trace the modern principle back to explicit judicial reasoning from 1889 in the case of *Riggs v. Palmer*. *Id.* at 344 (citing Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889)). There, a grandson killed his grandfather in order to ensure that he would receive his inheritance from his grandfather's will and avoid the risk that his grandfather would change his will before dying. *Riggs*, 22 N.E. at 189. The highest appellate court denied the grandson's collection of the inheritance, reasoning, "[no] one shall be permitted to profit by his own fraud . . . or to acquire property by his own crime." *Id.* at 190.

12. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 108 (1991) (quoting N.Y. ST. LEGIS. ANN. 267 (1977)).

13. *Id.* at 111.

14. STARK & GOLDSTEIN, *supra* note 6, at 280 n.49.

15. *Simon & Schuster*, 502 U.S. at 115-20.

16. *Id.* at 112.

17. *Id.*

18. *Id.* at 113.

story for the film *Goodfellas*.[19]

However, shortly after *Wiseguy* was published, the New York Crime Victims Board discovered the book and required Simon & Schuster to produce copies of its contracts with Hill, provide records of payments to Hill, and withhold any future payments to Hill.[20] After further review, the Crime Victims Board decided that Simon & Schuster's failure to disclose the contract with Hill, as well as its payments to Hill, had violated New York's Son of Sam law.[21] The Board required, under the Son of Sam law, that any money owed to Hill, along with any money already paid to him, had to be given to the Board for placement into the state's escrow fund.[22] As a result, Simon & Schuster filed suit against the Crime Victims Board claiming that New York's Son of Sam law violated its First Amendment right to freedom of speech.[23] That is, by placing a financial burden on Hill's speech, the state was unfairly restricting freedom of expression.

After the district court found the law consistent with the First Amendment and the court of appeals affirmed, the United States Supreme Court granted certiorari and reversed the judgment, finding New York's Son of Sam law to be in violation of Simon & Schuster's First Amendment rights.[24] The Court held that because the law was a content-based restriction of speech, discriminating against *particular subjects* of speech (as opposed to all speech) by financially burdening those subjects, it was presumed inconsistent with the First Amendment.[25] As a result, in order to withstand the constitutional attack, the state would have to show that the law was "'necessary to serve a compelling state interest, and . . . narrowly drawn to achieve that end.'"[26] The Court further concluded that, while New York's Son of Sam law did serve a compelling state interest, it applied to any works involving even the most incidental or irrelevant thoughts offered by a criminal about his crime, and was therefore "significantly overinclusive" for purposes of achieving the state's interest.[27] Thus, the Court held that the statute was not consistent with the First Amendment and was invalid.[28]

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19. *Id.* at 114.
20. *Id.*
21. *Id.*
22. *Id.* at 115.
23. *Id.*
24. *Id.*
25. *Id.* at 115-18. The Court also notes that by penalizing certain expression through content-based restrictions, a state government in effect may prevent certain viewpoints from being heard in the marketplace of ideas, directly implicating the First Amendment. *See id.* at 116.
26. *Id.* at 118 (quoting Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).
27. *Id.* at 121.
28. *Id.* at 123.

In the years since *Simon & Schuster*, states have not only changed existing Son of Sam laws but have created new ones in an effort to comply with the requirement that the laws be narrowly tailored to achieve the state's interest.[29] In its description of legislative responses to *Simon & Schuster*, the National Center for Victims of Crime website reports that "[t]he most common change made to such laws has been expanding them to cover profits received, directly or indirectly, from crimes, not just profits from speech-related activities."[30] As a result of *Simon & Schuster*, New York amended its law to more narrowly target only income "generated as a result of having committed the crime,"[31] placing the emphasis on the criminal's act itself rather than simply on any passing thoughts about the crime.[32] The National Center for Victims of Crime also reports that certain states have even extended their Son of Sam laws to include profit gained through notoriety by other people involved in high-profile cases.[33] The Center uses Georgia legislation as an example: "Georgia makes it illegal for a 'judge, [prosecuting attorney], investigating officer, or law enforcement officer who is a witness in a case to receive . . . remuneration during the period of time between indictment and the completion of direct appeal in any criminal case.'"[34] While very few states' Son of Sam statutes have been challenged in court, no Son of Sam law challenged for constitutionality in relation to the First Amendment has been able to withstand the attack, despite states' efforts to amend past problematic legislation and develop new criminal anti-profit laws.[35]

III. NORTH CAROLINA'S SON OF SAM LAW

As is the case with other jurisdictions, North Carolina's Son of Sam legislation aims at serving two specific purposes: 1) preventing criminals from profiting from crimes they have committed and 2) providing crime victims with better satisfied restitution orders by diverting a criminal's profit to restitution rather than to the criminal's own pocket.[36] In what may be an attempt to prevent or withstand constitutional attacks on the statute, the North

29. *See* Howe, *supra* note 9, at 349-50.

30. NAT'L CTR. FOR VICTIMS OF CRIME, NOTORIETY FOR PROFIT/SON OF SAM LEGISLATION, http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32469 (last visited Jan. 10, 2006).

31. N.Y. EXEC. LAW § 632-a(1)(b)(iii) (McKinney 2001).

32. Tracey B. Cobb, Comment, *Making a Killing: Evaluating the Constitutionality of the Texas Son of Sam Law*, 39 HOUS. L. REV. 1483, 1495-96 (2003).

33. NAT'L CTR. FOR VICTIMS OF CRIME, *supra* note 30.

34. *Id.* (quoting GA. CODE ANN. § 16-10-98 (2004)).

35. Howe, *supra* note 9, at 350.

36. N.C. GEN. STAT. § 15B-30(1)-(3) (2004).

Carolina General Assembly explicitly classifies both of the goals as "compelling interest[s]" for which it finds the legislation necessary.[37] In doing so, should a court ever choose to defer to North Carolina's legislature in determining whether the goals of the legislation are compelling, the legislature has left no doubt as to the importance surrounding the interests addressed by the law.

Under North Carolina's Son of Sam statute, certain contracts that have the potential of producing profits for criminals must be reported to the Crime Victims Compensation Commission (hereafter referred to as "the Commission").[38] Once notified of the contract, the Commission alerts any victims of the criminal who may be eligible to obtain restitution from the criminal.[39] Further, if the Commission is not properly notified of a contract with a criminal, both the criminal and the other party to the contract can be subject to forfeiture of the contracted amount to the Commission, along with other civil penalties.[40] The Commission then deposits the funds into an escrow account and notifies any eligible people with a claim against the criminal that there are funds available to which they may have a right.[41] Finally, whether collecting profits made from the contract or profits forfeited and deposited into the escrow fund, eligible persons may bring a civil action against the criminal offender to collect money for restitution.[42]

Regardless of the other procedural details of North Carolina's criminal anti-profit legislation, the crux of any possible First Amendment constitutional attack against the law would likely be directed at the section of the statute detailing which potential profit-making contracts must be disclosed to the Commission and the profits of which made available for victims of crimes. That particular statutory section addresses not only what type of profits may be seized, but also specific criteria for what constitutes a criminal offender. In doing so, that section becomes most vulnerable to incorporating both overinclusiveness and underinclusiveness.[43] According to the statute,

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37. § 15B-30(3).

38. § 15B-32(a)(1).

39. N.C. GEN. STAT. § 15B-32(b) (2004). According to the statute, an eligible person can include: "[a] victim of the crime for which the offender was convicted[,] . . . [a] surviving spouse, parent, or child of a deceased victim of the crime for which the offender was convicted[,] . . . [or a]ny other person dependent for the person's principal support upon a deceased victim." N.C. GEN. STAT. § 15B-31(5)(a)-(c) (2004).

40. N.C. GEN. STAT. § 15B-33(a) (2004).

41. § 15B-33(d).

42. N.C. GEN. STAT. § 15B-34(a) (2004).

43. For a discussion of overinclusive and underinclusive aspects of Son of Sam statutes, see *infra* Part IV.B.2.

> [e]very person, firm, corporation, partnership, association, or other legal entity, or representative of [any of the previously listed], or entity that knowingly contracts for, pays, or agrees to pay to an offender (i) profit from crime or (ii) funds of an offender where the value or aggregate value of the payment or payments exceeds ten thousand dollars ($10,000) shall submit to the Commission a copy of the contract or reduce to writing the terms of any oral agreement or obligation to pay as soon as practicable after discovering the payment or intended payment constitutes profit from crime or funds of an offender.[44]

In addition, the statute broadly defines "profit from crime" as "[a]ny income, assets, or property obtained through or generated from the commission of a crime for which the offender was convicted, including any income . . . obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of the crime."[45] In sum, North Carolina's Son of Sam statute, like other criminal anti-profit legislation, seeks to obtain from a convicted offender a variety of profits deriving value from the commission of a crime.

IV. CONSTITUTIONAL VIABILITY OF NORTH CAROLINA'S SON OF SAM STATUTE

In order to analyze whether North Carolina's Son of Sam statute will withstand a constitutional attack, it is necessary to not only consider the common First Amendment issues that tend to arise with respect to Son of Sam laws, but also to consider how other states' similar criminal anti-profit laws have fared against claims of First Amendment violations. Taking those two sub-topics into consideration, it will be possible to compare North Carolina's legislation to other states' previously challenged legislation in light of the First Amendment in order to predict the viability of North Carolina's Son of Sam statute.

A. First Amendment Considerations

As previously explained, the most prominent vulnerability facing a Son of

44. § 15B-32(a)(1).

45. § 15B-31(9). The statute defines "offender" as "[a] person who has been convicted of a felony or that person's legal representative or assignee." § 15B-31(8).

Sam law is the constitutionality of the law in regards to a party's First Amendment rights to freedom of speech. According to the U.S. Constitution's First Amendment grant of personal rights as incorporated through the Fourteenth Amendment,[46] a State "shall make no law . . . abridging the freedom of speech."[47] Son of Sam laws implicate First Amendment freedom of speech by placing a financial burden on the speech of criminals. Essentially, by restricting the profits that criminals can gain from their speech (as well as the incentive for publishers), states place a financial burden on speech about a criminal's past crimes. Furthermore, because the laws specifically burden criminal speech dealing with the crime itself, Son of Sam legislation is considered content-based. That is, rather than burdening all speech by criminals, Son of Sam laws have traditionally burdened criminal speech based on the specific content of the criminal's expression; typically, the speech is about the crime he or she has committed.

Courts have held that such content-based restrictions are particularly dangerous to the interests protected by the First Amendment and are therefore subject to strict scrutiny, the highest level of scrutiny applied to laws accused of violating constitutional rights.[48] In addition, content-based statutes face a strong presumption of invalidity.[49] Thus, under strict scrutiny, unless a state can demonstrate that it has a compelling interest in the legislation and that the law is narrowly tailored to achieve the compelling interest, the law is considered constitutionally invalid.[50] As a result, scholars have suggested that the content-based nature of Son of Sam laws is the foremost hindrance to their validity. While the United States Supreme Court only implied it in *Simon & Schuster*,[51] in *Keenan v. Superior Court of Los Angeles County*,[52] a California Supreme Court justice went so far as to note in his concurrence that if the criminal anti-profit legislation were content-neutral, not only would a lower level of judicial scrutiny be applied, but the legislation would likely survive.[53]

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46. *See* CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION 555-59 (2d ed. 2001) (providing a discussion of incorporation of the Bill of Rights into the Fourteenth Amendment, and explaining how states, too, are liable for violations of rights guaranteed in the Bill of Rights).

47. U.S. CONST. amend. I.

48. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115-16 (1991) (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991)).

49. *Id.* at 115 (citing *Leathers*, 499 U.S. at 447).

50. *Id.* at 118 (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

51. *See id.* at 118-23.

52. Keenan v. Super. Ct. of L.A. County, 40 P.3d 718 (Cal. 2002).

53. *Id.* at 737 (Brown, J., concurring).

B. Previous Application of Strict Scrutiny to Son of Sam Laws

Since the inception of Son of Sam laws, forty-eight states (including North Carolina) have, at one point or another, enacted some sort of criminal anti-profit legislation.[54] Seven states have since repealed their legislation.[55] Other states' Son of Sam laws have proven to be a useful tool for purposes of comparison. Despite the relatively high number of states that have enacted Son of Sam legislation, very few states have had their legislation challenged. However, while there are only a few court cases specifically addressing the constitutionality of Son of Sam laws, those cases do provide substantial insight into the problems plaguing legislation analyzed under strict scrutiny and possible solutions for future legislation.

1. Compelling State Interest in the Legislation

In order for its Son of Sam law to survive strict scrutiny, a state must first be able to demonstrate that it has a compelling interest in the objective of the legislation.[56] In *Simon & Schuster*, the Court acknowledged two different state interests compelling enough to justify the legislation: 1) victim compensation[57] and 2) the prevention of criminals from profiting from their crimes.[58] However, the Court was careful to note that while New York did have "a compelling interest in compensating victims from the fruits of . . . crime,"[59] it did *not* have a compelling "interest in limiting such compensation to the proceeds of the wrongdoer's speech about crime."[60] That is, in order to justify specifically limiting victim compensation to profits earned from speech (as opposed to all profits associated with the crime), a state would have to

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54. Yager, *supra* note 5, at 457. Yager lists New Hampshire, North Carolina, and Vermont as the three states without Son of Sam laws. *Id.* However, as of the writing of this article, New Hampshire and Vermont remain the two states that have yet to have passed any Son of Sam legislation.

55. *Id.* at 457-58.

56. *Simon & Schuster*, 502 U.S. at 115 (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991)).

57. *Id.* at 118.

58. *Id.* at 119.

59. *Id.* at 120.

60. *Id.* at 120-21. Although the Court presented this conclusion in its discussion of whether New York had a compelling interest in legislation, the point seemed better suited to a discussion of how the statute was tailored. That is, New York's interest lies in compensating victims for the crime, regardless of how the statute is tailored. It seems as though tapping proceeds from criminals' speech alone was an underinclusive way of achieving the interest (as will be discussed in subsequent sections), rather than an aspect of the legislation making it less compelling.

present some compelling interest that addressed both the legislation in general and the limitation to speech.

As a result of *Simon & Schuster*, California amended its Son of Sam statute, and the legislature asserted that "[t]he state has a compelling interest in ensuring that convicted felons do not profit from their crimes and that the victims of crime are compensated by those who harm them."[61] Consequently, in *Keenan*, applying strict scrutiny to California's Son of Sam law, the California Supreme Court held that the state did indeed "have a compelling interest in using the fruits of crime" to compensate crime victims.[62] However, in reasoning similar to the United States Supreme Court in *Simon & Schuster*, the California Supreme Court explicitly ruled that the state did not have a "compelling interest in targeting a criminal's storytelling proceeds *in particular* for the purpose of compensating crime victims."[63] The court further clarified that general use of "fruits of crime" *including* proceeds from speech (but not limited to those earnings from speech), used for the purpose of victim compensation was indeed a compelling state interest.[64]

In Arizona, the constitutionality of the state's general forfeiture law was challenged in *Arizona v. Gravano*.[65] While the law specifically applied to proceeds gained through racketeering-related activities, the general forfeiture law was similar to Son of Sam laws in that it provided for forfeiture to a state fund of money and property earned in relation to a crime.[66] The statute applied to "all proceeds traceable to an offense included in the definition of racketeering."[67] "Proceeds" included "any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly, and any fruits of [the] interest, in whatever form."[68]

Although the court concluded that the statute was content-neutral and therefore did not have to undergo strict scrutiny, it still considered whether the state had a compelling interest in the legislation.[69] The court reasoned that

61. Act of Aug. 25, 2000, ch. 261, 2000 Cal. Stat. 261.

62. Keenan v. Super. Ct. of L.A. County, 40 P.3d 718, 730 (Cal. 2002).

63. *Id.* (emphasis in original).

64. *Id.*

65. Arizona v. Gravano, 60 P.3d 246 (Ariz. Ct. App. 2002).

66. ARIZ. REV. STAT. ANN. § 13-2314(D)(7) (2002).

67. § 13-2314(G)(1), (3).

68. § 13-2314(N)(3).

69. *Gravano*, 60 P.3d at 254. The court admitted that because of its content-neutral nature, the law would be subject only to intermediate scrutiny and would therefore have to be related only to a substantial governmental interest. *Id.* at 253-54. However, the state argued that it had a compelling interest, and the court proceeded to analyze whether the state's interest was indeed compelling. *Id.* at 254.

not only did the state have a compelling interest in compensating victims of racketeering, but also that the state had a compelling interest in compensating out-of-state victims of racketeering harmed by a criminal who had later moved to Arizona.[70] Additionally, the court found a compelling state interest in "ensuring that criminals do not profit from their crimes when the criminal has relocated to Arizona."[71]

Furthermore, both the Rhode Island Supreme Court in *Bouchard v. Price*,[72] and the Nevada Supreme Court in *Seres v. Lerner*,[73] agreed that their states' Son of Sam laws served a compelling government interest.[74] Relying on *Simon & Schuster*, both courts concluded that victim compensation and prevention of criminals obtaining profits from their crimes were sufficiently compelling to satisfy the first prong of the strict scrutiny test.[75]

Thus, because states generally do not encounter difficulty in showing at least some compelling interest for their criminal anti-profit legislation, the focus of the constitutionality of the laws with respect to the First Amendment shifts to whether the state narrowly drew its statute to achieve the compelling state interest.[76]

2. A Narrowly Tailored Statute

Under strict scrutiny, the more difficult problem facing states has undoubtedly been ensuring that their criminal anti-profit legislation is fashioned in such a way that it is narrowly tailored to achieve the compelling interests discussed above. That is, the statute must neither be too overinclusive nor too underinclusive. More commonly, overinclusiveness has been a sufficient ground for failure of Son of Sam statutes to overcome strict scrutiny, allowing courts to omit any discussion of possible underinclusiveness.[77]

Typically, two problems have arisen in regards to overinclusiveness of Son of Sam laws. The first problem, as evidenced in *Simon & Schuster*, is to

70. *Id.* at 254.

71. *Id.* The court concluded that "Arizona has a compelling interest in ensuring that victims of crime are compensated and in ensuring that criminals do not profit from their crimes . . . even if the victims do not reside in Arizona and the crimes were committed elsewhere." *Id.*

72. Bouchard v. Price, 694 A.2d 670 (R.I. 1997).

73. Seres v. Lerner, 102 P.3d 91 (Nev. 2004).

74. *Id.* at 97; *Bouchard*, 694 A.2d at 677.

75. *Seres*, 102 P.3d at 97; *Bouchard*, 694 A.2d at 670.

76. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 121 (1991); Keenan v. Super. Ct. of L.A. County, 40 P.3d 718, 730 (Cal. 2002).

77. *See Simon & Schuster*, 502 U.S. at 122; *Keenan*, 40 P.3d at 731.

whom the statute applies. New York's statute applied broadly to any "person convicted of a crime."[78] However, in defining the term "person convicted," the statute actually allowed forfeiture of proceeds from anyone accused of a crime or anyone who voluntarily admitted to the commission of a crime, regardless of whether that person was eventually convicted.[79] Thus, although the state had a compelling interest in preventing criminal profiteering from crimes, the statute was overinclusive in that it applied to, and therefore took earnings from, potentially innocent people who may have admitted to a crime which they did not commit. That is, the statute had the ability to strip profits from people who had not even committed a crime, a result that did not serve the state's interest of keeping crime profits out of criminals' hands. A particularly illustrative example of this principle could occur in a recording artist's lyrics detailing a crime he never committed, but chose to write about as if he had, simply for artistic purposes critical to the song. Were the state allowed to prevail under an overinclusive statute, the recording artist would essentially be stripped of profits from his record, after merely describing a crime that he had never even committed. Thus, such overinclusive statutes result in particularly poor public policy.

For purposes of comparison, Alaska's Son of Sam legislation,[80] although not yet challenged, would likely not be considered narrowly tailored, and therefore fail to satisfy the second prong of strict scrutiny, because it defines an offender as a "person who has committed a crime in this state, whether or not the person has been convicted of the crime."[81] Alaska's statute, like the original New York statute, is likely overinclusive because it lacks a way of pinpointing people who have committed crimes but have not been convicted. Therefore, without a definite process of ensuring that someone who has not been convicted has actually committed a crime, the statute has the possibility of mistakenly sweeping in profits from people who the state believes have committed crimes but who in reality have not. Thus, an action such as this would not further the state's interest in preventing *criminals*, specifically, from profiting from a crime.

The second common problem that arises with respect to overinclusiveness is to *which* profits the statute applies. For example, the *Simon & Schuster* Court noted that the original New York statute applied to any works, regardless of the subject, as long as the author in some way recounted the

78. N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1982 & Supp. 1991).

79. Sean J. Kealy, *A Proposal for a New Massachusetts Notoriety-for-Profit Law: The Grandson of Sam*, 22 W. NEW ENG. L. REV. 1, 10 (2000). The Supreme Court discussed this principle as well in *Simon & Schuster*. *See also Simon & Schuster*, 502 U.S. at 121.

80. ALASKA STAT. § 12.61.020(e)(1) (1998).

81. *Id.*

crime.[82] For example, profits made by an author of a cookbook would be subject to the statute, even if the only reference to the author's criminal act was a passing sentence on the "Dedication" page of the book. The *Simon & Schuster* Court found such a provision to be overinclusive and pointed out the flaw of a statute that would collect profits from speech that did not even derive its profitability from notoriety of the author.[83] Thus, although certain works would not have even allowed an author to profit from his crime, if the crime was mentioned in any way, the author still would have been stripped of earnings that did not have a specific link to the crime.[84]

Similar to the court in *Simon & Schuster*, in *Keenan*, the California Supreme Court held that the state's Son of Sam statute "penalize[d] the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims."[85] California's legislation provided a remedy for some of the problems found in New York's Son of Sam statute.[86] Not only was the law limited in application to people who had actually been convicted of a felony, but it also provided an exception for works that included only a "passing mention of the felony, as in a footnote or bibliography."[87] However, despite the legislature's attempted improvements, the court held that the law was overinclusive[88] because it still allowed for confiscation of profits that were not necessarily received as a result of exploitation of criminal acts:

> Mention of one's past felonies in these contexts may have little or nothing to do with exploiting one's crime for profit, and thus with the state's interest in compensating crime victims from the fruits of crime. Yet section 2225(b)(1) entrusts and permanently confiscates all income, whenever received, from all expressive materials, whatever their

82. *Simon & Schuster*, 502 U.S. at 121.

83. *See id.* The Court notes that a statute such as New York's original Son of Sam statute would have wrongly escrowed profits from books such as Malcolm X's autobiography or Thoreau's famous *Civil Disobedience*. *Id.* Although Malcolm X's autobiography most likely gained profitability from the author's life as a public figure, in the book he recounted crimes he had committed prior to being a public figure. *See id.* Thus, according to such legislation as New York's, his profits would have been subject to a state escrow fund. *Id.* Similarly, although Thoreau's book likely gained virtually no profitability from past criminal acts of the author, Thoreau did admit to refusing to pay taxes in his book, and therefore would have had to turn over profits from his book. *See id.*

84. *See id.* at 122.

85. Keenan v. Super. Ct. of L.A. County, 40 P.3d 718, 731 (Cal. 2002).

86. CAL. CIV. CODE § 2225(b)(1) (West 2000).

87. § 2225(a)(7).

88. *Keenan*, 40 P.3d at 731-33.

> subject, theme, or commercial appeal, that include a substantial description of such offenses, whatever their nature . . . .[89]

Similarly, in *Bouchard*, the Rhode Island Supreme Court held that its Son of Sam law failed in substantially the same ways as the New York and California laws by failing to limit the applicability of its law to those commercial exploitations of crime which were significant rather than merely incidental.[90] The law applied to all expressions of "events and circumstances constituting and/or surrounding and/or motivating the crime or alleged crime."[91]

In addition to being overinclusive, a statute may also fail to be narrowly tailored to serve a compelling state interest by being too underinclusive. In *Simon & Schuster*, without expressly labeling it as such, the Court implied that a statute that financially burdened only those assets gained from a criminal's speech rather than assets gained from any commercial exploitation of the crime, would be underinclusive.[92] As described earlier, the Court questioned why a state would have any greater interest in seizing assets only from expressive activity rather than any or all other activities that derive profit from exploitation of the crime.[93] Such a discussion implies a degree of underinclusiveness. However, since the Court was already able to invalidate the statute based on its overinclusiveness, it failed to delve into an explicit analysis of those parts of the statute that were specifically underinclusive.[94]

In *Keenan*, the California Supreme Court took a similar path, focusing on the overinclusiveness of the statute, a sufficient ground for failing to withstand strict scrutiny, and therefore avoiding discussion of underinclusiveness.[95] However, in his concurrence, Justice Brown addressed underinclusiveness of Son of Sam statutes and suggested that "a limitation on the law's scope to storytelling is the Achilles' heel of a Son of Sam provision."[96] Brown cited Virginia's Son of Sam legislation[97] as an example of a law that allows a state to seize all profits gained by a criminal through

89. *Id.* at 732-33.

90. Bouchard v. Price, 694 A.2d 670, 676-77 (R.I. 1997).

91. R.I. GEN. LAWS § 12-25.1-3(a) (1983).

92. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 119-20 (1991).

93. *See id.*

94. *Id.* at 121-23.

95. Keenan v. Super. Ct. of L.A. County, 40 P.3d 718, 731 (Cal. 2002).

96. *Id.* at 738 (Brown, J., concurring).

97. VA. CODE ANN. § 19.2-368.20 (2002).

exploitation of a crime, regardless of the means pursued by the criminal to earn money from the exploitation.[98] Such a statute resolves the New York statute's problem of underinclusiveness by not simply seizing profits obtained through expression. Thus, the statute better serves the compelling interest of preventing criminals from profiting from their crimes by allowing states to seize all of a criminal's profits earned through exploitation of the crime.

The Rhode Island Supreme Court articulated these principles in its explicit discussion of the underinclusiveness of its Son of Sam law in *Bouchard*.[99] Rhode Island's statute enabled seizure of a criminal's profits made through commercial exploitation of the crime, defining commercial exploitation as "any publication, reenactment, dramatization, interview, depiction, explanation, or expression through any medium of communication which is undertaken for financial consideration."[100] The court noted that no justification was given for the statute's limitation to expressive activities and suggested that victim compensation would be better served by "making available to a victim *all* the criminal's assets, however and wherever derived."[101] Thus, the court suggested that by expanding a Son of Sam statute to include activities other than mere exploitive expression, the legislation would be less likely to be deemed underinclusive.[102]

C. How Will North Carolina's Statute Fare Against Constitutional Attacks?

As stated earlier, the most common attack on Son of Sam legislation is that the law violates a party's First Amendment rights. North Carolina has had the distinct benefit of being able to see what aspects of other states' legislation have been problematic in constitutional challenges over the last few decades. The most logical place to begin analyzing North Carolina's law is to determine whether the statute is content-based, in order to determine the type of scrutiny to which the law would be subject in a possible challenge. Although North Carolina's Son of Sam statute applies to income "generated from the commission of a crime" including that gained "from the sale of crime memorabilia or obtained through the use of unique knowledge obtained during the commission"[103] of a crime, it would still likely be considered content-based. Inclusive in the statute is a seizure of those profits gained by a criminal through speech or expression. However, not all expressions by a

98. *Keenan*, 40 P.3d at 738 (Brown, J., concurring).

99. Bouchard v. Price, 694 A.2d 670, 677-78 (R.I. 1997).

100. R.I. GEN. LAWS § 12-25.1-2(3) (1983).

101. *Bouchard*, 694 A.2d at 677.

102. *See id.*

103. N.C. GEN. STAT. § 15B-31(9) (2005).

criminal which gain income in any capacity are subject to a financial burden by the state—only those expressions which generate income "from the commission of a crime for which the offender was convicted."[104] Therefore, since North Carolina's statute includes a burden placed on income derived from expression about a *particular* subject, the law is most likely content-based. As a content-based regulation, the statute faces a strong presumption of invalidity[105] and must be narrowly tailored to achieve a compelling state interest in order to overcome that burden and be considered constitutional.[106]

North Carolina's legislature has explicitly stated compelling state interests that it hopes the statute will serve.[107] Included in those state interests are victim compensation[108] and prevention of criminals from profiting from their crimes,[109] both of which have been recognized by other courts as compelling state interests. Although previous courts have criticized a supposed compelling state interest in preventing criminals from profiting only from expression about their crime,[110] North Carolina's law would seemingly not be subject to such criticism because it allows seizure of a criminal's profits from multiple sources of exploitation.[111] Thus, since providing some sort of compelling state interest has generally not been a problem with previously challenged Son of Sam laws, and because North Carolina would probably not fall under past criticism posed by courts, North Carolina's Son of Sam law would likely survive the first prong of strict scrutiny.

Under the second and, in this case, more challenging prong of strict scrutiny, North Carolina's legislation faces the task of being neither too overinclusive nor too underinclusive in regards to its method of achieving the compelling state interest. In regards to the problem of *to whom* the statute applies, North Carolina's legislature seems to have remedied the past problem of New York's overinclusive group of people covered under the law. Unlike New York's Son of Sam law, North Carolina's law applies narrowly to only those "person[s] who [have] been convicted of a felony" or the legal representatives of those persons.[112] That is, North Carolina clearly distinguishes between people who admit to a crime which they have not

104. *Id.*

105. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991)).

106. *See id.* at 118 (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

107. N.C. GEN. STAT. § 15B-30 (2005).

108. § 15B-30(2).

109. § 15B-30(1).

110. *Simon & Schuster*, 502 U.S. at 119-20.

111. N.C. GEN. STAT. § 15B-31(9).

112. § 15B-31(8).

committed, people who are merely accused of a crime but never found guilty, and people who later admit to a crime for which they were never convicted, and those offenders who have been convicted of a felony. Thus, by narrowing the group of people whose profits are eligible for seizure by the state, North Carolina better ensures that *criminals* and criminals alone are not allowed to profit from their crimes, specifically furthering the state's compelling interest.

North Carolina also seems to have remedied the past problems of New York and Rhode Island's underinclusive legislation. Rather than limiting the profits eligible for seizure to those gained from exploitive *expression* about the crime, North Carolina's Son of Sam law expands the earnings eligible for escrow to "[a]ny income, assets, or property obtained through or generated from the commission of a crime for which the offender was convicted."[113] The legislature explicitly includes profits earned from the sale of crime memorabilia, the sale of knowledge derived from the crime, or any income derived from the sale of assets or property obtained through the crime.[114] Also, it seems likely that a court could interpret the statute to include not only memorabilia used during the commission of the crime, but also memorabilia that gained profitability through the notoriety of the criminal. Thus, North Carolina's law does not seem to be plagued by the same underinclusive problems hinted at in *Simon & Schuster* and described in *Bouchard*. The statute again seems to better serve the state's compelling interests by not being limited to profits gained through speech or expression. Through North Carolina's legislation, victims will have a broader range of income-bearing activities from which they will be able to receive compensation.

The one possible weakness of North Carolina's Son of Sam law that other states' legislation have also suffered from is that it does not provide an explicit provision exempting income that is not derived from the criminal act itself. Rather, North Carolina seems to use limiting language, restricting eligible income to that "obtained through or generated from the commission of a crime."[115] That is, instead of including an express provision exempting income derived by the criminal from something that only mentions the crime in passing or is only tangentially related to the crime, through the language used, the legislature seems to make such a provision unnecessary by limiting profits eligible for seizure to those activities deriving profitability directly from the commission of the crime. Such language may obviate the need for an express exemption, provided a court would interpret it in the same manner. Unfortunately, the task of narrowing a Son of Sam statute to avoid inclusion

113. § 15B-31(9).
114. § 15B-31(9).
115. § 15B-31(9).

of circumstances only tangentially related to the act of committing the crime proves quite difficult for legislatures. Not only have courts given virtually no insight into ways in which legislatures may better address the problem, but ultimately, even if a statute does except profits not substantially derived from the notoriety of the criminal, devising a bright line to distinguish those profits substantially related versus tangentially related to a crime could be a daunting task. Thus, although seemingly unlikely, were a court specifically looking for a vulnerability in the statute, it could find one in this area.

V. CONCLUSION

After nearly three decades of faulty Son of Sam legislation in other states, North Carolina has made incredible strides towards a law that will be better able to withstand a constitutional attack. In doing so, North Carolina's legislation serves as a model for future legislation in other states. At the very least, North Carolina has improved upon multiple problematic areas of past legislation.

To begin, North Carolina clearly presents a compelling state interest in the legislation without limiting the state's interest to income derived from expression. Further, while the law begins by narrowing its scope to those persons *convicted* of a crime in North Carolina, it also *expands* its scope by encompassing profits from any sources derived as a result of the commission of the crime. Thus, the legislature may have remedied past problems articulated by courts, relating to both overinclusiveness and underinclusiveness. Although the law does not expressly exempt tangential expression about the crime, the language used seems to make the legislation applicable only to those profits that directly derive their value from the commission of the crime. By narrowly tailoring its statute to a compelling state interest, North Carolina's legislature would have a strong argument in a constitutional challenge that the interests advanced in the statute outweigh the party's First Amendment interests and that the statute encompasses only those factors necessary to achieve the interest. Thus, as a result of its improvements over past legislation, North Carolina's law stands a strong chance of surviving strict scrutiny under a First Amendment challenge.

Although Son of Sam laws have been rarely invoked or challenged, modern trends towards attempting to capitalize on criminal notoriety suggest increasing probabilities of both. The fact that Son of Sam laws have consistently failed constitutional attacks in the past suggests that lawmakers must take remedial efforts to devise the most effective and valid legislation to serve states' criminal anti-profit interests. Despite some potential weaknesses

in its Son of Sam law, North Carolina seems to have made significant strides in developing a Son of Sam law that will be found constitutionally viable.

MELISSA J. MALECKI

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