Hastings Constitutional Law Quarterly

Volume 49 | Number 1 Article 3

2-2022

Making A Constitutional "Son of Sam" Law: Netflix's Booming True Crime Business

Justin Burnworth

Making A Constitutional "Son of Sam" Law: Netflix's Booming True Crime Business

BY JUSTIN BURNWORTH*

TABLE OF CONTENTS

* J.D., PhD Student in Political Science, University of Massachusetts-Amherst. I am eternally grateful to Greg Johnson for informative exchanges and comments on earlier drafts. Further, for being a great mentor and instilling the confidence in me to pursue publication. I would also like to thank my good friend Nick Tonti for the conversation over breakfast that brought to life the topic of this article.

Introduction

It has become impossible to browse Netflix, Hulu, or any other streaming service without being bombarded with the promotion of a new documentary or movie portraying the life of a convicted criminal. From depictions of famous serial killers, such as Ted Bundy, to the fake heiress Anna Sorokin, people are enamored with stories. This has led to a spending spree by media producers to grab the biggest, most eye-catching stories. Media producers pay top dollar for the rights to criminals' stories or even stories of their friends' recounts.[1] One explanation for this love of the immoral elite is that their stories serve as a form of catharsis for the average law-abiding citizen, but that is not what this article will be diving into.[2] Unbeknownst to many, there is a set of laws enacted in nearly forty states that attempt to prevent criminals from profiting from their crimes.[3] These laws are known as "Son of Sam" laws, named after the serial killer David Berkowitz who went on a vicious killing spree in New York in the mid-1970s.[4] They have been used sparingly and challenged on occasion over their history, but with New York's attorney general invoking it against Anna Sorokin a new First Amendment challenge to constitutionality of "Son of Sam" laws is on the horizon.[5]

There is a long history in our legal system of preventing people from benefiting from illegal acts. At its core, it simply doesn't feel right to allow someone to commit a heinous act that we, as a society, have outlawed and then allow the perpetrator to make a profit by regaling in the story. On their face, "Son of Sam" laws seem like logical laws to be implemented in every state. However, the water becomes muddier when you factor in the First Amendment guarantee of freedom of speech. Freedom of speech was of grave importance when forming the United States and the gravity of its value has not diminished in our current era. However synonymous freedom of speech and the American way of life have become, it is not to say that there have been no restrictions on speech.

1. Catherine Thorbecke & Matt Knox, *Former Friend to Fake Heiress Anna Sorokin Talks About Falling Under Her Spell, Losing Over $60k*, ABC NEWS, (Jan. 23, 2019), https://abcnews.go.com/GMA/News/friend-fake-heiress-anna-sorokin-talks-falling-spell/story?id=64488069.

2. Michael Bond, *Why Are We Eternally Fascinated by Serial Killers?*, BBC FUTURE, (Mar. 31, 2016), https://www.bbc.com/future/article/20160331-why-are-we-eternally-fascinated-by-serial-killers.

3. Geraldine Sealey, *Court Revisits 'Son of Sam' Law*, ABC NEWS, (Jan. 7, 2006), https://abcnews.go.com/US/story?id=96479&page=1#:~:text=The%20Supreme%20Court%20struck%20down,California%2C%20to%20rewrite%20their%20laws..

4. *Id.*

5. Sharon Otterman, *'Anna Delvey' Might Not Profit from Netflix Series on Her Life as a Fake Heiress*, N.Y. TIMES, (July 22, 2019), https://www.nytimes.com/2019/07/22/nyregion/anna-delvey-sorokin-netflix.html.

The Supreme Court has laid a freedom of speech groundwork over the past century. From flag burning to not-so-elegant signs hung by students on school grounds, the parameters of exactly what "freedom of speech" entails have been well established and challenged relentlessly. "Son of Sam" laws are no exception to these challenges. In 1991, the Supreme Court ruled that New York's "Son of Sam" law was unconstitutional in *Simon & Schuster v. Crimes Victims Board*.[6]

While Americans hold dear the right to freedom of speech, the Supreme Court has found instances where speech can and must be restricted whether it be child pornography or the use of the infamous "fighting words."[7] Freedom of speech has been and will continue to be restricted, but this only occurs when the category of speech reaches a certain level that justifies regulation. It is rare that is required for suppression and just because the topic might be uncomfortable does not mean that it has reached this level.[8] Former Supreme Court Justice Anthony Kennedy said it best in his opinion in *International Society for Krishna Consciousness v. Lee*, "The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech."[9]

This article will first go through the history of "Son of Sam" laws; Part I will further discuss the Court's reasoning in *Simon & Schuster* which deemed the original New York "Son of Sam" law unconstitutional. Part II of this article will examine the revised New York law that was enacted in 2001 and analyze whether it will suffer the same fate its predecessor if a First Amendment challenge is brought forth. Further, Part II will look at the reasoning behind the Nevada and California's Supreme Courts invalidation of their respective versions of "Son of Sam" laws which were designed with guidance from the revised 2001 New York law. The final part of this article will address whether any "Son of Sam" law could be constructed to be constitutional under the *Simon & Schuster* standard.

6. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 112 (1991).

7. *E.g.* Free Speech Coalition, 535 U.S. 234 (2002); Chaplinksy v. New Hampshire, 315 U.S. 568 (1942).

8. Hustler Mag. v. Falwell, 485 U.S. 46, 55, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988).

9. Lee v. Int'l Soc'y for Krishna Consciousness, 505 U.S. 830, 112 S. Ct. 2709 (1992).

I. How "Son of Sam" Laws Came to Be

A. The Birth of the Original "Son of Sam" Statute

David Berkowitz, known by many by his alias "Son of Sam," was a serial killer in the late 1970s in New York City. [10] He was convicted of second-degree murder for the killing six people and wounding seven more in the city.[11] These murders were senseless and random, seemingly motivated by a desire to kill for the sake of killing another human being.[12] The former postal worker pleaded guilty, against the wishes of his lawyers, and was sentenced to twenty-five years to life sentence.[13]

The state of New York enacted the original "Son of Sam" law in 1977 to prevent criminals such as David Berkowitz from profiting by selling their stories.[14] The law allowed New York's crime board to seize convicted felons' money earned from entertainment deals to help compensate their victims.[15] However, David Berkowitz would never have the law, that derives its colloquial name from him, implemented against him.[16]

A major Supreme Court involving New York's "Son of Sam" law (N.Y. Exec. Law § 632-a), *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, began in 1986 when Henry Hill, along with author Nicholas Pileggi, contracted with Simon & Schuster to publish "Wiseguy", a book detailing Hill's life in organized crime.[17] Within nineteen months, there were more than one million copies of the book in print.[18] New York's Crime Victims Board ordered Hill to return the money that he received for the story and ordered Simon & Schuster to turn over money payable to Hill in accordance with their agreement.[19]

Simon & Schuster brought action against the New York State Crime Victims Board in the United States District Court for the Southern District of New York, claiming that the "Son of Sam" statute violated the First Amendment guarantee of freedom of speech.[20] The district court found the statute consistent with the First Amendment and a divided Court of Appeals

10. Lee Lescaze, *Berkowitz Pleads Guilty to Six 'Son of Sam' Killings*, N.Y. TIMES (May 9, 1978), https://www.nytimes.com/1978/05/09/archives/berkowitz-pleads-guilty-to-six-son-of-sam-killings-reference-to.html.

11. *Id.*

12. *Id.*

13. *Id.*

14. Ethan Bordman, *'Son of Sam' Laws: How Much Does Crime Pay?*, WASH. LAWYER, May 2011, at 27.

15. N.Y. Exec. Law § 632-a (McKinney 2021).

16. *Id.*

17. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 112 (1991).

18. N.Y. Exec. Law § 632-a (McKinney 2021).

19. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. at 114.

20. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 724 F. Supp. 170, 172 (S.D.N.Y. 1989).

affirmed.[21] The Supreme Court granted certiorari on February 19, 1991.[22] This set up a First Amendment freedom of speech versus states' powers showdown at the Supreme Court later that year.[23]

B. The Death of New York's "Son of Sam" Statute: Simon & Schuster v. N.Y. State Crime Victims Board

1. The District and Appellate Court Decisions

The United States District Court for the Southern District of New York began its inquiry into N.Y. Exec. Law § 632-a by delving into the legislative history and the effect the law had on other states.[24] The court noted that twenty-nine other states had enacted laws modeled after New York's "Son of Sam" law that were held constitutional in some state courts. The district court concluded that N.Y. Exec. Law § 632-a, "does [did] not directly affect expressive activity and that it is directed at nonspeech activity."[25] Therefore, the district court did not need to apply the strict scrutiny test to the statute and instead applied the standard of review from *United States v. O'Brien*.[26] This test deemed a statute constitutional if it, "had been enacted within the constitutional power of the government, furthers an important or substantial governmental interest unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedom is no greater than is essential to that governmental interest."[27] Applying the *O'Brien* standard, the district court found that the New York state legislature acted within its authority in the passage of the statute and that the incidental restriction on the First Amendment freedom imposed by N.Y. Exec. Law § 632-a is no greater than is essential for the government's interest in compensating crime victims.[28]

The United States Court of Appeals for the Second Circuit affirmed the district court's decision. The second circuit court found that the lower court erred in applying the *O'Brien* standard because that case involved the destruction of draft cards, which was not considered speech.[29] In contrast, this case dealt directly with regulation of speech.[30] Instead, the court of appeals applied a strict scrutiny test to N.Y. Exec. Law § 632-a because there was a denial of payment for an expressive activity which constitutes a direct

21. *Id.*
22. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. at 115.
23. *Id.*
24. Simon & Schuster, Inc., 724 F. Supp. at 173.
25. *Id.* at 178.
26. *Id.*
27. United States v. O'Brien, 391 U.S. 367 (1968).
28. Simon & Schuster, Inc., 724 F. Supp. at 178-79.
29. Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 781 (2d Cir. 1990).
30. *Id.*

burden on that activity.[31] If a statute attempts to use content-based exclusion, it must pass a strict scrutiny analysis which requires the statute to serve a compelling interest and be narrowly tailored to achieve that interest.[32] The court of appeals ruled that the state of New York had a compelling interest in assuring that criminals did not profit from the exploitation of their crimes while their victims were still in need of compensation due to those crimes.[33] It then concluded that the statute was narrowly tailored to serve that compelling interest.[34] The court explained that the statute recognized that the only way a criminal could profit from their crime, other than proceeds from the crime itself, was to write or talk about the committing of the crime. The statute denied criminals any profits from those actions until their victims were adequately compensated.[35] The appellate court concluded that N.Y. Exec. Law § 632-a met the strict scrutiny test of constitutionality and affirmed the decision of the district court.[36]

2. The Supreme Court's Decision in Simon & Schuster

In an 8-0 decision, Justice O'Connor, writing for the majority, concluded that New York's "Son of Sam" law did not pass strict scrutiny because it singled out speech on a particular subject for a financial burden that was not placed on any other speech or income.[37] Further, that while the state had a compelling interest in compensating victims, the "Son of Sam" law was not narrowly tailored to advanced that object.[38] Therefore, the statute's infringement on the First Amendment's guarantee of freedom of speech was ruled unconstitutional.[39]

The Court first deemed N.Y. Exec. Law § 632-a a content-based statute that is inconsistent with the First Amendment because it imposes a financial burden on speakers due to the content of their speech.[40] In order to justify the content-based restriction on the First Amendment the state must show a compelling state interest and that the regulation is narrowly tailored to achieve its purpose.[41] The Court concluded that New York had a "compelling interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims."[42] However, the Court found

31. Meyer v. Grant, 486 U.S. 414, 422-24 (1988).
32. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
33. Simon & Schuster, Inc., 916 F.2d at 782.
34. *Id.*
35. *Id.* at 783.
36. *Id.* at 784.
37. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 123 (1991).
38. Simon & Schuster, Inc. 502 U.S. 105 at 123.
39. *Id.*
40. Leathers v. Medlock, 499 U.S. 439, 447 (1991).
41. Simon & Schuster, Inc., 502 U.S. at 118.
42. *Id.* at 119.

that while "the State has a compelling interest in compensating victims from the fruits of the crime" they have little if any interest in "limiting such compensation to the proceeds of the wrongdoer's speech about the crime."[43]

The Court then looked to see whether the statute was narrowly tailored to the former instead of the latter objective. The Court ruled that the "Son of Sam" law was significantly over-inclusive when it came to ensuring that victims are compensated from the proceeds of crimes.[44] There were two aspects of the statute that caused it to be over-inclusive. First, it applied to works on any subject if they expressed the author's thoughts or recollections about their crime regardless of how tangential or incidental that aspect might be. Second, the statute applied to any individual who admitted to a crime in telling their life story, regardless of whether they were actually accused or convicted of the crime or not.[45]

The Court ran through a plethora of prior works by or about famous figures in history that would have had difficulty being published because the payments would have been escrowed by the "Son of Sam" law. It noted, that works such as *The Autobiography of Malcolm X*, *Civil Disobedience* by Henry David Thoreau, and works by American prisoners and ex-prisoners like Martin Luther King, Jr. and Bertrand Russell, who was jailed at the age of 89 for participating in a sit-down protest against nuclear weapons, would all have had significant obstacles to publication.[46]

To show that the statute was not narrowly tailored, Justice O'Connor explained that the law would allow the crime board to completely control the profits of a famous historical figure who wrote an autobiography at the end of their career that included a recollection of stealing a nearly worthless item in their youth.[47] The Court referenced that the mere fact that this absurdity is a possibility proves that the statute is not narrowly tailored to serve a compelling State interest.[48] The Court concluded that New York's "Son of Sam" law is inconsistent with the First Amendment because, while the State has a compelling interest in compensating victims from the fruits of a crime the statute, is not narrowly tailored to achieve that objective.[49]

Justice Kennedy wrote a concurring opinion stating that applying the compelling interest and narrowly tailored test to content-based restriction on speech is inappropriate because it gives states the belief that they can censor speech if they believe there is a compelling interest to do so.[50] He argued that the Court should only determine if content-based restrictions on speech

43. *Id.* at 120-21.
44. *Id.* at 121.
45. Simon & Schuster, Inc. 502 U.S. 105 at 121.
46. *Id.* at 121-122.
47. *Id.* at 122.
48. *Id.* at 123.
49. *Id.*
50. Simon & Schuster, Inc. 502 U.S. 105 at 124–125.

fall into one of the historical categories that have been permitted for content-based regulation, or the possibility that a new category might be added.[51] According to Justice Kennedy, this traditional approach is preferable to the ad hoc balancing test used by the court today .[52]

Justice O'Connor acknowledged that other states that have similar laws to New York's and they do not have to determine the constitutionality of those statutes. This leaves the door open to the theoretical possibility that a "Son of Sam" law may be deemed constitutional if it can pass strict scrutiny. However, New York's "Son of Sam" law was held unconstitutional and the book, *Wiseguy*, would continue to sell successfully eventually being adapted into the critically acclaimed film *Goodfellas*, a gangster film classic.

II. New York's Revised 2001 "Son of Sam" Law

A. New York's Attempt to Create a Constitutional Statute in Light of Simon & Schuster

In 2001, New York created a new redefined "Son of Sam" law that it hoped would fix the pitfalls of the 1977 version that was stuck down by the Supreme Court.[53] There were two major changes that were enacted in the new version. First, the original law only dealt with "profits from crimes" relating to proceeds from books, magazines, movies, or other outlets. The scope of the new law was expanded to include all "funds of a convicted person" which includes everything from inheritances to lawsuit settlements.[54] Second, it extended the statute of limitations to three years and the clock does not start running until the profits are discovered.[55]

These revisions occurred after a man who killed Police Officer Edward Byrne in 1999 was awarded $660,000 and Byrne's wife was unable to sue for this money because the then seven-year statute of limitations had run out.[56] The 2001 "Son of Sam" law intended to ensure that victims would have three years after discovery with no limit on time before crime and discovery to sue for money obtained by those who harmed them.

B. Constitutional Challenges to Other States' "Son of Sam" Laws

California and Nevada both had the opportunity to address the constitutionality of "modern" Son of Sam laws. Both statutes were modeled after New York's revised 2001 statute and, even though they differed

51. *Id.* at 127.
52. *Id.*
53. N.Y. Exec. Law § 632-a (McKinney 2001).
54. *Id.*; James C. McKinney Jr., *Accord on Giving Victims More Clout in Son of Sam Law*, N.Y. TIMES, (June 14, 2014) at 38, https://www.nytimes.com/2001/06/14/nyregion/accord-on-giving-victims-more-clout-in-son-of-sam-law.html?searchResultPosition=1.
55. N.Y. Exec. Law § 632-a.
56. McKinney, *supra* note 54.

slightly, they both suffered the same consequence as New York's original statute.

The California case, *Kennan v. Superior Court*, involved the kidnapping of Frank Sinatra, Jr. in order to extort ransom money from his father, singer Frank Sinatra. One of conspirators in the case, Keenan, interviewed with the New Times Los Angeles, a tabloid magazine, which resulted in a January 1998 article titled "Snatching Sinatra" being published .[57] Other magazines then reported that Columbia Pictures bought the film rights to "Snatching Sinatra" for $1.5 million.[58] Sinatra, Jr. sought an injunction invoking California's "Son of Sam" law to redirect payments from his kidnappers to him.[59] The trial court ruled in favor of Sinatra, Jr. and Keenan appealed.

The Court of Appeals ruled that California's "Son of Sam" law, unlike New York's, was not over-inclusive as it only applied to convicted felons and did not go into effect simply because of a "passing mention" of the felony.[60] The Supreme Court of California reversed the decision of the Court of Appeals.[61] The court stated that the California statute was a content-based regulation because it, "places a direct financial disincentive on speech or expression about a particular subject." [62] That put the California statute in the same position as the New York one of having to pass strict scrutiny by showing a compelling interest and narrow tailoring to achieve it.

The Supreme Court of California stated that the State did have a compelling interest to ensure that the "fruits of crime" are used to compensate the victims, however the court found that the law was over-inclusive.[63] This was because the law penalized the content of speech far beyond the boundaries necessary to ensure victim compensation.[64] The court stated that California did not "cure" New York's over-inclusive problem by limiting the statute to those actually convicted of crimes and not concerning itself with mere mentions of past crimes.[65] The court explained that it did not read *Simon & Schuster* to suggest that by simply narrowing those aspects marginally, it would allow the statute to survive a constitutional challenge.[66]

57. Keenan v. Super. Ct. of Los Angeles Cty., 27 Cal.4th 413 (2002); the article was re-published in March 1998 in the Washington Post, Peter Gilstrap, *Snatching Sinatra*, WASH. POST, (Mar. 8, 1998), https://www.washingtonpost.com/archive/lifestyle/1998/03/08/snatching-sinatra/5f406163-1d9d-4a81-b62e-9f312893d60b/.

58. Keenan, 27 Cal.4th at 419.

59. *Id.*

60. *Id.* at 421.

61. *Id.* at 433.

62. *Id.* at 427.

63. Keenan, 27 Cal.4th at 431.

64. *Id.*

65. *Id.* at 432.

66. *Id.* at 433.

The court concluded that the California "Son of Sam" statute, just as the New York statute, discourages the conversation surrounding crimes in a way that is not narrowly tailored to deal with compensating victims with the "fruits of crimes."[67]

The case in Nevada involving a constitutional challenge to its "Son of Sam" law was *Seres v. Lerner*. The case involved Jimmy Lerner who published a 1999 prison memoir titled *You Got Nothing Coming, Notes from a Prison Fish* after he was convicted for the manslaughter of Mark Slavin.[68]

Donna Seres, Mark Slavin's sister, brought suit against Lerner invoking Nev. Rev. Stat. § 217.007 or Nevada's "Son of Sam" law.[69] The Supreme Court of Nevada first looked to the First Amendment issue that requires an infringement on free speech by the state itself.[70] The court ruled that the statute created an independent cause of action that initiated enforcement under the state's levy and execution statutes and therefore implicated state action as required.[71]

Just as with the New York and California statutes, the Supreme Court of Nevada found the state's "Son of Sam" law to be content-based because it placed a direct burden only on speech with specific content.[72] The court noted that Nevada does have a compelling interest in compensating victims as well as preventing direct profiting from crimes. However, as has been reasoned in the previous two cases, the court ruled that Nevada's "Son of Sam" law was not narrowly tailored to serve that compelling interest.[73] The court focused on how the statute, "penalizes that speech based upon its discrete content by seizing all proceeds, regardless of the extent to which the work relates to the crime against the victim."[74]

The court remarked that Seres admitted that all of the profits from the book would be subject to recovery even though only a portion of it referenced the crime.[75] The court explained that narrowing the statute to divide the profits in proportion to which portions reference the crime would be judicial rewriting of legislation and nearly impossible to calculate.[76] Therefore, it concluded that the law cannot be narrowly tailored to cure its over-inclusiveness.[77] The court determined that the Nevada "Son of Sam"

67. *Id.* at 431.
68. Keenan, 27 Cal.4th at 431.
69. *Id.*
70. *Id.* at 431-432.
71. *Id.* at 432.
72. *Id.* at 433.
73. Seres v. Lerner, 102 P. 3d 91, 97 (Nev. 2004).
74. *Id.* at 97.
75. *Id.*
76. *Id.* at 97-98.
77. *Id.* at 98.

law violated the First Amendment just as the original New York and California statutes did.[78]

To take the discussion a step further, the Supreme Court of Nevada stated that Justice Kennedy's concurring opinion in *Simon & Schuster* was rather persuasive.[79] Justice Kennedy argued that when a law is determined to be content-based speech regulation that the court should not borrow the compelling interest justification because it could lead a state to believe that it can restrict speech anytime it believes it has a compelling interest to do so, resulting in inconsistencies with previous treatment of First Amendment rights.[80]

III. The Fate of New York's Current Revised "Son of Sam" Law

A. The Revised Statute Will Suffer the Same Destiny as its Precursor if a Constitutional Challenge is Brought Based on the First Amendment

"Some things never change" applies seamlessly to New York's revised "Son of Sam" law, which will likely be held unconstitutional just like its previous version. However, the difference this time is that the state created a statute that provides that anyone who contracts for or agrees to pay for:

(i) any profits from a crime as defined in paragraph (b) of subdivision one of this section, to a person charged with or convicted of that crime…[or]…any funds of a convicted person, as defined in paragraph (c) of subdivision one of this section, where such conviction is for a specified crime and the value, combined value or aggregate value of the payment or payments of such funds exceeds or will exceed ten thousand dollars, shall give written notice to the office of the payment…[81]

Since the 1991 *Simon & Schuster* decision, no new First Amendment constitutional challenges to New York's "Son of Sam" law have been brought, though there were two challenges to Nevada and California statutes. Some argue that this is because the law's expansion of funds recoverable from a convicted person no longer singles out speech and, therefore, narrowly tailors the law as the Supreme Court required for it to be constitutional.[82]

I agree that the part (ii) of the law which states "funds of convicted criminals" does not cause any First Amendment conflicts. The first part of the revised "Son of Sam" law still has the same effect as the original statute because it places a financial disincentive to create works with particular

78. Seres v. Lerner, 102 P. 3d 91, 100 (Nev. 2004).
79. *Id.* at 100-101.
80. *Id.* at 101.
81. N.Y. Exec. Law § 632-a (McKinney 2001).
82. David L. Hudson Jr., *'Son of Sam' Laws*, FREEDOM FORUM INST., (Mar., 2012), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/arts-first-amendment-overview/son-of-sam-laws/.

content. This means that part (i) of N.Y. Exec. Law § 632-a is content-based just as before, and therefore requires the state to show that the statute has a compelling interest and that the law has been narrowly tailored to serve that interest. The Supreme Court noted that New York had a compelling interest in, "depriving criminals of the profits of their crimes, and in using these funds to compensate victims."[83] It can be assumed that this state interest still exists in the same capacity today.

N.Y. Exec. Law § 632-a prevents, "every person, firm, corporation, partnership, association or other legal entity, or representative of such person, firm, corporation, partnership, association or entity, which knowingly contracts for, pays, or agrees to pay: (i) any profits from a crime…."[84] Section (i) of the statute defines "profits from a crime" as, "(i) any property obtained through or income generated from the commission of a crime of which the defendant was convicted…."[85]

This definition of "profits from a crime" causes the revised "Son of Sam" statute to be over-inclusive because it applies to any work that happens to mention aspects of a crime the speaker was convicted or charged with in their past. The revised New York statute is executable against any person charged with or convicted of the crime that they are referencing.[86] This seems to be a narrower definition than in the original statute which used the phrase "person convicted of a crime" and included mentioning a crime that the speaker was never actually charged with or found guilty of.

However, the court in *Keenan* noted that just because the California statute had narrowly limited the persons to those convicted of the crime and did not include mere passing mention does not mean that the over-inclusive issue was solved.[87] In fact, it ruled that it had little to no affect, and it did not read *Simon & Schuster* to show that narrowing those aspects cured the statute.[88] Using the interpretation of *Simon & Schuster* by the California Supreme Court, New York's current "Son of Sam" has not cured its over-inclusive issue. The statute inhibits the conversation surrounding speech because of its specific content and, while a State does have a compelling interest in compensating victims, the statute has not been narrowly tailored to do so.

New York's current "Son of Sam" law burdens speech disproportionality to serve the interest of compensating victims and is therefore a direct infringement on the First Amendment guarantee of freedom of speech. While the change in 2001 added new criminal funds that

83. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 119 (1991).

84. N.Y. Exec. Law § 632-a (McKinney 2001).

85. *Id.*

86. *Id.*

87. Keenan v. Super. Ct. of Los Angeles Cty., 27 Cal.4th 413 (2002).

88. *Id.*

are available for the state to obtain for the victims of its crimes, part (i) of the statute essentially mirrored the original "Son of Sam" law. This would result in a nearly identical examination of the constitutionality of the statute. It would be held unconstitutional for the reasons stated above, just as the original statute had been by the Supreme Court in *Simon & Schuster*. It leaves one to beg the question of whether a constitutional "Son of Sam" law can exist in reality, as seemingly suggested by the Court in *Simon & Schuster*.

B. A Constitutional Challenge To New York's Current "Son of Sam" Law Is Imminent

On its face, the Supreme Court's requirement that four of the nine Justices vote to accept a case to grant certiorari ("cert") is simple but the actual practice is much more steeped in mystery.[89]Legal and political scholars have found that, generally, the Supreme Court will grant cert to cases that have national significance, solve disputes among the federal circuits, or cases that could have significant precedential value.[90]

Before a case can even attempt to break the barrier to the Supreme Court, it needs an appellant determined enough to handle the long, drawn-out process of appeals. In the case of New York's "Son of Sam" law, this is where Anna Sorokin comes into play. Anna Sorokin posed as a fake German heiress, Anna Delvey, with a claimed trust fund worth 60 million euros.[91] She ran rampant through New York City's elite circles beginning in 2013, accumulating nearly $200,000 in unpaid bills which included luxury hotels, shopping sprees, and a $100,000 loan that she duped City National Bank into approving.[92]

In May 2019, Sorokin was convicted of multiple counts of grand larceny and sentenced to twelve years in prison. The judge stated that Sorokin showed no remorse for her actions and an anonymous juror said that Ms. Sorokin seemed more worried about which designer outfit that she would wear during the trial rather than proving her innocence.[93] After her arrest, Anna Sorokin signed a deal with Netflix to produce a series portraying her scam of New York's elite.[94] Further, while serving her sentence, Sorokin

89. *Supreme Court Procedures*, U.S. Courts, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Sept. 3, 2021).

90. *Id.*

91. Emily Palmer, *'Anna Delvey,' Fake Heiress: 7 Bizarre Highlights From Her Trial*, N.Y. TIMES, (Apr. 28, 2019), https://www.nytimes.com/2019/04/28/nyregion/anna-sorokin-delvey-trial.html.

92. *Id*.

93. Jan Ransom, *Sorokin, Who Swindled N.Y.'s Elite, Is Sentenced to 4 to 12 Years in Prison*, N.Y. TIMES, (May 9, 2019), https://www.nytimes.com/2019/05/09/nyregion/anna-delvey-sorokin-sentenced.html.

94. Otterman, *supra* note 5.

started writing two books on her exploits in New York and her life behind bars in hopes of publication.[95] In an interview, Sorokin said, "I'd be lying to you and to everyone else and to myself if I said I was sorry for anything…I regret the way I went about certain things."[96]

This quote certainly supports the judge's conclusion that Sorokin does not see the wrongfulness in her actions. It is likely that Sorokin will appeal her case which could possibly end up in front of the Supreme Court. This notoriety would likely serve as a self-promotional step for Sorokin which could be leveraged into a television series, book deals, and the like. If the situation arises, her grand larceny charges would likely not be granted cert by the Supreme Court, but New York's Attorney General invoked the state's "Son of Sam" law to block any proceeds that Sorokin was due to receive from her Netflix deal.

Sorokin and her legal team could certainly bring a new case against New York challenging the constitutionality of the law by claiming that it suppresses her First Amendment freedom of speech right, just as *Simon & Schuster* did in 1991. I believe the Court would duly consider granting cert to clear the muddy waters surrounding "Son of Sam" statutes.

C. Is it Possible to Construct a Constitutional "Son of Sam" Law?

It is not possible to construct a constitutional "Son of Sam" law because of chilling affect it could have on the speech of those who fought against graves injustices in their past. When constructing a law, the architect must discern what is "fair." Generally, a new law is implemented because a glaring wrong has shown itself under the current legal system and those granted with the authority to address societal wrongs are attempting to cure it. This is what New York attempted to do in 1977 and then again in 2001. The legislature, along with public opinion, felt that it was wrong that criminals could potentially profit from selling the stories of the heinous crimes that they committed against innocent victims. This was a completely logical step to make, considering the circumstances following the offers made to David Berkowitz for his story. It does not feel "fair" to allow Anna Sorokin to commit crimes and then to profit by regaling in the glory of her despicable acts against society. In a vacuum, it would be very difficult to argue against this line of thinking. However, we do not live in a vacuum. We live in a country governed by the United States Constitution and the enumerated guaranteed rights contained in the Bill of Rights.

Supreme Court jurisprudence shows that freedom of speech is not all encompassing and there is some speech that is simply not protected. However, these exceptions are few and far between. I do believe there are occasions where states have the right and obligation to limit freedom of

95. *Id.*
96. *Id.*

speech, but the Supreme Court has established a difficult strict scrutiny test that must be passed in those cases.

As mentioned, *ad nauseum* above, the strict scrutiny test requires that a state have a compelling interest in regulating speech and that the law is narrowly tailored to achieve that interest. The Court in *Simon & Schuster* set a high bar for this to be achieved due to the grave concerns that they had regarding limiting freedom of speech. Justice O'Connor described how "Son of Sam" laws would have discouraged the publication of books by Martin Luther King, Jr, Malcom X, and Bertrand Russel depicting the story of their lives which included, justifiable but unlawful, crimes that they committed.

The Supreme Court has not always lived up to its role of protecting minority rights, but it is a role that the Court has, been the champion of.[97] On their face, "Son of Sam" laws serve a public good, but when you look at the totality of their effects, as the Supreme Court did, you see that they can have a detrimental effect on the freedom of speech. This is where the "fairness" factor of the law comes into play. A state cannot regulate the speech of some for a compelling reason if doing so suppresses the speech of many others.

The California Supreme Court correctly ruled that California's "Son of Sam" law did not cure its over-inclusive issue simply by limiting it to those actually convicted of crimes and doing away with enforcement for "passing mentions" of crimes. The court explained that it did not read *Simon & Schuster* to show that the Supreme Court felt that the over-inclusive issue of the original "Son of Sam" could be so easily cured.

As Justice O'Connor commented, if a famous historical figure wrote a book depicting their life that contained a crime they were convicted of then the entire proceeds would be controlled by the state and would, in turn, disincentivize publishers from agreeing to publish these important pieces of literature.[98] This outcome is still plausible with those slight amendments and, therefore, a statute with those two changes would still be over-inclusive, making the task of creating a constitutional "Son of Sam" law rather daunting.

The worries of the Supreme Court in 1991 still exist to this day, potentially more so. Social activism is ever-growing and will always be staple of American society. The fact that great historical figures would potentially be prevented from sharing their stories made the Supreme Court in *Simon & Schuster* very concerned about the ramifications of a "Son of Sam" law. The same could happen today.

---

97. Ilya Somin, *The Supreme Court Is a Check on Big Government, Protection for Minorities*, N.Y. TIMES, (Feb. 15, 2016), https://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-court-is-a-check-on-big-government-protection-for-minorities.

98. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 121 (1991).

Whether the movement is Occupy Wall Street, the Ferguson Riots, Standing Rock, or any other social justice movement, those involved run the risk of committing crimes in an attempt to stand up against injustice. Just as the proceeds from works produced by Martin Luther King, Jr, Malcom X, or Bertrand Russell could be fully in control of a particular state, or simply not published because of the lack of ability to generate proceeds, the same could happen to modern activists. This would prevent their stories from reaching others that have also noticed similar inequalities, creating a hurdle in galvanizing social justice movements because it hampers their ability to come together as one group. Further, it hurts social movements because it prevents the spread of stories of social injustices to individuals that simply are not aware of their existence, for whatever reason that might be.

Harry S. Truman echoed the fear the Supreme Court has shown regarding the regulation of freedom of speech, "Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear."[99] New York, California, and Nevada have all tried and failed to create a constitutional "Son of Sam" law. The work has not been without merit, but the results show what I have come to conclude myself while conducting research for this article: when it comes to a "Son of Sam" law that restricts speech, it is not possible to create one that can be narrowly tailored in such a way to serve the purpose of prohibiting criminals from profiting from their crimes without disproportionately restricting freedom of speech.

Preventing criminals from profiting from their crimes is a just cause to fight, but in doing so it gives states the power to silence those individuals that stand up to the grave injustices that inhabit the United States. States should turn their focus to enacting statutes that encompass the second half of the current New York "Son of Sam" statute which allows victims to go after "funds of a convicted person." This provision has no First Amendment issue, though it may have other constitutional issues that would need to be explored on their own merit.[100]

Conclusion

New York's revised "Son of Sam" still suffers the pitfalls of its predecessor and will suffer the same fate that its cousin statutes in California and Nevada did when they were ruled unconstitutional by their respective

99. Harry S. Truman, Special Message to the Congress on the Internal Security of the United States (Aug. 8, 1950) (transcript available on Truman Library website).

100. Brendan J. Lyons, *State Invoked Son of Sam law against former Rikers inmates who claimed abuse*, TIMES UNION, (Dec. 7, 2019), https://www.timesunion.com/news/article/State-invokes-Son-of-Sam-law-against-former-14882330.php.

state supreme courts. The over forty-year attempt to create a constitutional "Son of Sam" law has been a valiant effort put forth by states with New York leading the charge. However, considering the Supreme Court's ruling in *Simon & Schuster*, it is not possible to create a statute that is narrowly tailored to serve a compelling interest without a substantial restriction on freedom of speech. Preventing criminals from profiting from their crimes is without a doubt a compelling state interest, but the ramifications that come with that freedom of speech regulation are simply too dangerous to ignore.

***