

## NOTES

### OVERKILL: AN EXAGGERATED RESPONSE TO THE SALE OF MURDERABILIA

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#### INTRODUCTION

On May 24, 2007, U.S. Senator John Cornyn of Texas introduced a bill that would make it illegal for any prisoner who is incarcerated in a federal or state prison to deposit any object for delivery or for mailing with the intent that the object be placed in interstate or foreign commerce.<sup>1</sup> Violation of the proposed “Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007” carries a sentence of at least three years and a maximum of ten years to run consecutively to a prisoner’s current sentence.<sup>2</sup> Andy Kahan, the director of the Houston Mayor’s Crime Victims Office, lobbied the Senator to introduce the bill.<sup>3</sup> Kahan, a nationally known advocate for crime victims, learned about the practice of buying and selling memorabilia associated with serial killers as early as 1999. He “launched a crusade to wipe it out, state by state, as an affront to crime victims.”<sup>4</sup> Kahn’s passion stems from his concern for people like Harriett Semander, whose daughter was murdered by Coral Eugene Watts, a confessed killer of thirteen women.<sup>5</sup> Semander learned that items associated with Watts, “like letters and envelopes with his handwriting” were being sold on “Internet

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1. Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. § 2(a) (2007).

2. *Id.*

3. *Day to Day: Texas Law Would Prevent Sale of ‘Murderabilia’* (National Public Radio broadcast July 30, 2007) [hereinafter *Day to Day*] (transcript on file with author).

4. Jeff Barnard, ‘Murderabilia’: *People Want to Get Closer to Killers*, TELEGRAPH-HERALD (Dubuque, Iowa), Oct. 8, 2000, at A4.

5. *Day to Day*, *supra* note 3.

sites that specialize in merchandise from convicted felons.”<sup>6</sup>

Senator Cornyn seeks to prevent the sale of items associated with criminals by blocking them at their source—the prison gates. This is a new approach to the old problem of criminals profiting from their crimes. Many anti-profiting laws aimed at criminals, particularly the so-called “Son of Sam laws” which target proceeds derived by criminals from the sale of the depiction of their crimes, are constitutionally defective.<sup>7</sup>

This Note discusses whether the proposed “Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007”<sup>8</sup> resolves the constitutional problems of past anti-profiting legislation without creating new problems of its own. Part I explains what “murderabilia” is and what policy reasons justify banning its sale. Part II gives an overview of Son of Sam laws and other anti-profiting legislation, and discusses the constitutional problems they have faced. Part III analyzes Senator Cornyn’s bill, and compares it to past legislation that courts have found unconstitutional, to determine whether the bill, if passed, would withstand constitutional challenge. Part IV discusses some possible negative ramifications of the bill. Finally, Part V evaluates the approaches that some states have taken, as well as approaches that others have suggested, to accomplish the dual goals of compensating victims and preventing criminals from profiting from their crimes without violating prisoners’ constitutional rights. Part V asserts that some combination of these other approaches is far superior to Senator Cornyn’s proposed bill.

## I. WHAT IS MURDERABILIA, AND WHY BAN ITS SALE?

The term “murderabilia,” first coined by Andy Kahan, refers to items associated with notorious criminals that have found a market on various Internet sites that cater to serious collectors and to those with a macabre fascination for crime-related memorabilia.<sup>9</sup> The term encompasses anything offered for sale that was either created by or owned by a criminal, as well as any item related to a notorious crime, over which the criminal may or may not have had any control (and for which the prisoner may or may not receive any profit).<sup>10</sup> Those items

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6. *Id.*

7. *See, e.g.,* *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991); *Keenan v. Superior Court of Los Angeles County*, 40 P.3d 718, 735 (Cal. 2002); *In re Opinion of the Justices to the Senate*, 764 N.E.2d 343, 352 (Mass. 2002); *Seres v. Lerner*, 102 P.3d. 91, 100 (Nev. 2004); *see also* Kathleen Howe, 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, 342-43 (2004).

8. Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. (2007).

9. Hilary Hylton, *Cracking Down on “Murderabilia,”* TIME, June 5, 2007, available at <http://www.time.com/time/nation/article/0,8599,1629655,00.html>.

10. The public’s interest in crime-related objects is not a recent phenomenon. For instance, after a fire in 1908 revealed the remains of several victims of serial killer Belle Gunness in LaPorte,

include: “A form letter from Martha Stewart, written on her trademark *Living* stationery and sent to supporters during her prison stay” (selling for \$25) and “[a]n envelope hand-addressed by jailed Panamanian General Manuel Noriega” (priced at \$350).<sup>11</sup> Those innocuous items pale in comparison to some of the “macabre, shocking and soul-chilling prison collectibles” available for purchase online—“magazine fashion ads defaced with satanic symbols and stained with the bodily fluids of a campus shooter, a sketch of a headless victim drawn by a Death Row murderer, even fingernail clippings and foot scrapings from a serial killer.”<sup>12</sup>

Not all sites cater to notorious criminals, however. Prisonart.org<sup>13</sup> and prisonerlife.com<sup>14</sup> are websites that offer prisoners who create crafts and artwork while incarcerated an online outlet for their works regardless of their own notoriety. Why, then, is it so important to prevent prisoners from selling these items?

#### A. Victims' Interests

When Harriett Semander discovered that a letter penned by her daughter's killer was being auctioned off on a website twenty-five years after the murder, “all the feelings of grief [came] flooding back.”<sup>15</sup> Protecting those who have suffered at the hands of vicious criminals from public reminders of the violation they have experienced is the impetus behind Senator Cornyn's bill<sup>16</sup> and Andy Kahan's lobbying efforts in support of the bill.<sup>17</sup> Regardless of society's empathy for such victims, however, the United States Supreme Court stated in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,<sup>18</sup> that “[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.”<sup>19</sup> The Court

Indiana, “Ringling Brothers Circus purchased the pony and cart that Belle's children used to travel back and forth to school.” Dan McFeely, *Belle Gunness*, INDIANAPOLIS STAR, Dec. 30, 2007, at A15. The cart “became an attraction at sideshows across America, wherever the circus went.” *Id.*

11. Hylton, *supra* note 9.

12. *Id.*

13. PrisonArt.org, <http://www.prisonart.org/> (last visited Sept. 30, 2008) (listing for sale a variety of prisoner-made arts and crafts, including acrylics, ceramics, cross stitch, ink art, jewelry, music, oil paintings, textiles and water colors).

14. PrisonerLife.com, Prison Art, <http://www.prisonerlife.com/prisonart/prisonart.cfm> (last visited Sept. 30, 2008).

15. Gigi Stone, ‘Murderabilia’ Sales Distress Victims’ Families, ABC WORLD NEWS, Apr. 15, 2007, <http://abcnews.go.com/wnt/us/story?id=2999398&page=1> (last visited Sept. 30, 2008).

16. See Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. (2007).

17. Barnard, *supra* note 4.

18. 502 U.S. 105 (1991).

19. *Id.* at 118 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

in *Simon & Schuster* further acknowledged that the New York State Crime Victims Board (Board), who pursued the proceeds of mobster Henry Hill's depiction of his exploits, was correct when it did not "assert any interest in limiting whatever anguish . . . victims may suffer from reliving their victimization."<sup>20</sup> Although protecting crime victims from this particular agony is not a state interest powerful enough to overcome First Amendment concerns, the Court in *Simon & Schuster* identified two compelling interests—preventing prisoners from profiting from their crimes and compensating victims of crime—which do justify relief for some victims.<sup>21</sup>

### B. Prisoners Profiting from Their Crimes

A state has "no compelling interest in shielding readers and victims from negative emotional responses to a criminal's public retelling of his misdeeds."<sup>22</sup> It does "have compelling interests in 'ensuring that victims of crime are compensated by those who harm them,' . . . 'preventing wrongdoers from dissipating their assets before victims can recover,' . . . 'ensuring that criminals do not profit from their crimes,' . . . and transferring the fruits of crime from the criminals to their victims."<sup>23</sup> The original Son of Sam law set out to accomplish those goals by providing that any entity contracting with a person accused or convicted of a crime for the purchase of the rights to the story or depiction of his crime must turn over any funds due the criminal to the Board.<sup>24</sup> The Board would hold those funds in escrow

for the benefit of and payable to any victim . . . provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such [accused or convicted] person or his representatives.<sup>25</sup>

Senator Cornyn's bill provides for both criminal and civil forfeiture of any funds acquired in violation of his proposed law, as well as civil remedies for victims including injunction, compensatory and punitive damages, and the cost of bringing the action.<sup>26</sup> Like the drafters of New York's Son of Sam law,<sup>27</sup> Senator Cornyn has attempted to serve those two compelling state

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20. *Id.*

21. *Id.* at 118-19.

22. *Keenan v. Superior Court of Los Angeles County*, 40 P.3d 718, 727 (Cal. 2002) (citing *Simon & Schuster*, 502 U.S. at 118).

23. *Id.* (quoting *Simon & Schuster*, 502 U.S. at 118-20).

24. *Simon & Schuster*, 502 U.S. at 109 (citing N.Y. EXEC. LAW § 632-a(1) (McKinney 1982)).

25. *Id.* at 109 (quoting N.Y. EXEC. LAW § 632-a(1) (McKinney 1982)).

26. Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. §§ 3-5 (2007).

27. *Simon & Schuster*, 502 U.S. at 118.

interests—compensating victims and keeping criminals from profiting from their crimes. The United States Supreme Court determined that the original Son of Sam law was unconstitutional, however, in that it violated a prisoner's First Amendment right to free speech.<sup>28</sup> In order to determine whether Senator Cornyn's proposed law, which takes an entirely different approach from past and current anti-profiting legislation, would pass constitutional muster, it is necessary to examine the flaws uncovered in the original Son of Sam law and in other state laws modeled after it.

## II. THE TROUBLED HISTORY OF SON OF SAM LAWS

### A. *Simon & Schuster v. Members of New York State Crime Victims Board*

In the summer of 1977, postal worker David Berkowitz, the self-named "Son of Sam," caused terror among the citizens of New York and profound grief among his victims, their families, and loved ones.<sup>29</sup> His "murder spree . . . claimed six lives, left seven injured and set off the most extensive manhunt in New York City history."<sup>30</sup> Although the terror may have subsided upon Berkowitz's capture, the pain suffered by victims and their families lingered. Rumor had it that Berkowitz stood to make a substantial profit from the publishing rights to his story.<sup>31</sup> The New York legislature quickly enacted a law to prevent him from profiting from his crimes.<sup>32</sup>

The statute's intent was "to 'ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.'"<sup>33</sup> Ironically, the statute was never enforced against Berkowitz for two reasons. First, he was found incompetent to stand trial and the version of the statute in force at the time applied only to convicted persons.<sup>34</sup> Second, Berkowitz voluntarily donated the proceeds from a book about himself to the victims of his crimes and their estates.<sup>35</sup>

Six years later, New York attempted to enforce the law against mobster Henry Hill, an admitted perpetrator of a multitude of crimes, who, in exchange for his testimony against fellow organized crime members, was granted immunity and was admitted to the Federal Witness Protection Program.<sup>36</sup> When the Board became aware that Hill had contracted with publisher Simon & Schuster for a book about his life, it notified the publisher that, pursuant to the Son of Sam law,

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28. *Id.* at 123.

29. *Id.* at 108.

30. George Hodak, *Son of Sam Is Arrested*, A.B.A. J., Aug. 2007, at 72.

31. *See id.*

32. *Simon & Schuster*, 502 U.S. at 108.

33. *Id.* (quoting Assembly Bill Memorandum Re: A 9019, July 22, 1977, reprinted in Legislative Bill Jacket, 1977 N.Y. Laws, ch. 823).

34. *Id.* at 111.

35. *Id.*

36. *Id.* at 112.

the publisher must turn over its contract with Hill, as well as any proceeds due to him.<sup>37</sup> Simon & Schuster filed suit under 42 U.S.C. § 1983, claiming that the law was a violation of the First Amendment and seeking injunction against its enforcement.<sup>38</sup> The district court found the law constitutional<sup>39</sup> and a divided Second Circuit agreed.<sup>40</sup> “Because the Federal Government and most of the States [had] enacted statutes with similar objectives,”<sup>41</sup> and because the “issue is significant and likely to recur,”<sup>42</sup> the Supreme Court granted certiorari.<sup>43</sup>

1. *Content-Based Speech Regulation.*—The Court first recognized that the New York law, which targeted a criminal’s proceeds earned from any depiction of his crime, was a “content-based statute” in that “[i]t singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content.”<sup>44</sup> As the Court had previously stated and reiterated in this case:

The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.<sup>45</sup>

The Court determined that the provision in the statute that “escrows all of the speaker’s speech-derived income for at least five years” operated as a “disincentive[] to speak.”<sup>46</sup> Applying strict scrutiny, the Court then proceeded to determine whether the law was “narrowly tailored to advance” the State’s compelling interest in ensuring that crime victims are compensated.<sup>47</sup>

2. *Overinclusiveness.*—The Court found the law “significantly overinclusive” in two ways.<sup>48</sup> First, it targeted “works on *any* subject, provided

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37. *Id.* at 114.

38. *Id.* at 114-15.

39. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 724 F. Supp. 170, 180 (S.D.N.Y. 1989), *aff’d sub nom.*, *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 977 (2d Cir. 1990), *rev’d*, 502 U.S. 105 (1991).

40. *See Simon & Schuster*, 916 F.2d at 778, *rev’d* 502 U.S. 105 (1991).

41. *Simon & Schuster*, 502 U.S. at 115 (citing 18 U.S.C. § 3681 (1988)); Karen M. Ecker & Margot J. O’Brien, Note, *Simon & Schuster, Inc. v. Fischetti: Can New York’s Son of Sam Law Survive First Amendment Challenge?*, 66 NOTREDAME L. REV. 1075, 1075 n.6 (1991) (listing state statutes).

42. *Simon & Schuster*, 502 U.S. at 115.

43. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 498 U.S. 1081 (1991).

44. *Simon & Schuster*, 502 U.S. at 116.

45. *Id.* (quoting *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991)).

46. *Id.* at 116-17.

47. *See id.* at 120-21.

48. *Id.* at 121.

that they express the author's thoughts or recollections about his crime, however tangentially or incidentally."<sup>49</sup> Second, the Court determined that the application of the law was overbroad in that the state's definition of "person convicted of a crime," included "any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted."<sup>50</sup> The Court expressed concern that these two provisions combined to "encompass a potentially very large number of works" that would be subject to enforcement.<sup>51</sup> Consequently, the Court reversed, finding that the law was not narrowly tailored to advance the compelling interest of compensating victims of crimes<sup>52</sup> and was, hence, "too overinclusive to satisfy the requirements of the First Amendment."<sup>53</sup>

### B. *Son of Sam Laws After Simon & Schuster*

After the Supreme Court struck down New York's Son of Sam law in 1991, many states attempted to amend their own Son of Sam laws<sup>54</sup> to comply with the Court's holding with limited success.<sup>55</sup> The states are in good company, though. The federal Son of Sam law<sup>56</sup> contains provisions similar to the New York law and, consequently, "the current guidance from the Justice Department to its line prosecutors is that this law cannot be used because of constitutional problems."<sup>57</sup> The evolution of the law in this area is slow-going—Son of Sam laws target criminals who, in those relatively rare instances, have the potential to make significant money from their notoriety. As the Court pointed out in *Simon & Schuster*, the New York law was "invoked only a handful of times," in cases of "highly publicized crimes."<sup>58</sup> Since *Simon & Schuster*, only a few states have faced challenges to their own anti-profiting laws that were amended or revised in an attempt to comply with the Court's holding.<sup>59</sup> Maryland's law was one of

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49. *Id.*

50. *Id.* (citing N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1982)).

51. *Id.* Examples of works that would fall under the statute because they include some admission by the author of the commission of past crimes include *The Autobiography of Malcolm X*, Henry David Thoreau's *Civil Disobedience*, and *The Confessions of Saint Augustine*, among others. *See id.*

52. *Id.* at 123.

53. *Id.* at 122 n\*.

54. *See In re Opinion of the Justices to the Senate*, 764 N.E.2d 343, 347 n.4 (Mass. 2002) (citing state statutes modeled after New York's law).

55. *See, e.g., Keenan v. Superior Court*, 40 P.3d 718, 728 n.13 (Cal. 2002) (noting that as of 2002, only one other state Son of Sam law had been invalidated since *Simon & Schuster*, specifically, Rhode Island's law in *Bouchard v. Price*, 694 A.2d 670 (R.I. 1997)); *Opinion of the Justices*, 764 N.E.2d at 343; *Seres v. Lerner*, 102 P.3d. 91 (Nev. 2004).

56. *See* 18 U.S.C. § 3681 (2006).

57. Paul G. Cassell, *Crime Shouldn't Pay: A Proposal to Create an Effective and Constitutional Federal Anti-Profiting Statute*, 19 FED. SENT'G REP. 119, 119 (2006).

58. *Simon & Schuster*, 502 U.S. at 111.

59. *See, e.g., Keenan*, 40 P.3d at 734 n.22 (holding that the provisions of California's Son

the first challenged.<sup>60</sup>

1. *Curran v. Price*.<sup>61</sup>—Maryland amended its Son of Sam law in 1992 in response to *Simon & Schuster* to make “its provisions content-neutral and remedy the problem of overbreadth.”<sup>62</sup> The law provided that any “‘person’ who enters into a notoriety of crimes contract with a ‘defendant’”<sup>63</sup> must submit that contract to the attorney general for a determination of whether it is a notoriety of crimes contract.<sup>64</sup> If the defendant chooses to contest the determination, the attorney general determines whether the “subject matter of the contract only tangentially or incidentally relates to the crime”<sup>65</sup> (in which case, the contract would not be affected by the Son of Sam law). Any monies due the defendant as a result of a notoriety of crimes contract must be paid to the attorney general and held in escrow for the compensation of crime victims.<sup>66</sup>

In 1993 the newly-amended law was challenged when former school teacher Ronald Price was indicted for “sexual child abuse and unnatural and perverted practices committed upon former students.”<sup>67</sup> Price basked in the media attention that resulted from his indictment.<sup>68</sup> When the assistant attorney general assigned

of Sam law were “invalid infringements on speech” under both the U.S. and California constitutions); *Seres*, 102 P.3d. at 100 (finding that the Nevada law, like the New York law, suffered from overinclusiveness).

60. See *Curran v. Price*, 638 A.2d 93 (Md. 1994).

61. 638 A.2d 93, 98 (Md. 1994).

62. *Id.* at 99.

63. *Id.* at 96 (citing MD. ANN. CODE art. 27, § 764(a)(5) (1992 Repl. Vol. & Supp. 1993) (repealed 2001)). The court quoted the statute, which indicated that a notoriety of crimes contract is

a contract with respect to

“(i) The reenactment of a crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, or live entertainment of any kind;

(ii) The expression of the defendant’s thoughts, feelings, opinions, or emotions regarding a crime involving or causing personal injury, death, or property loss as a direct result of the crime; or

(iii) The payment or exchange of any money or other consideration or the proceeds or profits that directly or indirectly result from a crime, a sentence, or the notoriety of a crime or sentence.”

*Id.* (quoting MD. ANN. CODE art. 27, § 764(a)(5) (1992 & Supp. 1993) (repealed 2001)).

64. *Id.* (citing MD. ANN. CODE art. 27, § 764(b) (1992 & Supp. 1993) (repealed 2001)).

65. *Id.* at 96 (citing MD. ANN. CODE art. 27, § 764(c)(3) (1992 & Supp. 1993) (repealed 2001)).

66. *Id.* (citing MD. ANN. CODE art. 27, § 764(b) (1992 & Supp. 2003) (repealed 2001)).

67. *Id.* at 97.

68. *Id.* As a result of his indictment, Price “appeared on national television talk shows acknowledging that he had engaged in sexual relationships with several of his female high school students” and “granted interviews to various local and national news media.” *Id.* In one interview, he admitted that he had “entered into a contract to sell ‘his story.’” *Id.*



to the case learned that Price had entered into a contract to relate the details of his crime, he demanded a copy of the contract to determine whether it fit the Son of Sam law's definition of a notoriety of crimes contract.<sup>69</sup> Price claimed that the statute was unconstitutional and refused to turn over the contract. The attorney general filed a complaint for injunctive relief.<sup>70</sup>

The trial court found the statute "unconstitutional and unenforceable."<sup>71</sup> It determined that the law was a "content-based regulation of speech" because the "notoriety of crimes contract was one respecting the expression of the defendant's thoughts, feelings, opinions or emotions regarding a crime."<sup>72</sup> It further found that the statute "swept so broadly as to reach forms of expression which the State had no compelling interest to regulate."<sup>73</sup>

On appeal, the attorney general petitioned the higher court to determine the statute's constitutionality.<sup>74</sup> The Maryland Court of Appeals, however, chose not to make that determination.<sup>75</sup> The court instead focused on the language of the statute and determined that the law's provision requiring a person entering into a notoriety of crimes contract with a defendant to submit that contract to the attorney general put no burden on the defendant to produce the contract.<sup>76</sup> The court acknowledged that

it will be difficult for the Attorney General to obtain a contract where the identity of the other contracting party is not known[,] [b]ut the other party to the contract is required by the statute to produce it, and *assuming the constitutionality of § 764*, is subject to a severe penalty for failure to do so.<sup>77</sup>

Despite the court's reluctance to make a determination of the constitutionality of the statute, the trial court's analysis, combined with the appeals court's statement, indicates that the Maryland Son of Sam law would not pass constitutional muster if challenged.<sup>78</sup>

2. *State v. Letourneau*.<sup>79</sup>—In 1997, Washington school teacher Mary K. Letourneau gained notoriety when she was charged with child rape after admitting to a sexual relationship with one of her teenage students.<sup>80</sup> At her

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* (internal quotation marks omitted).

73. *Id.*

74. *Id.* at 97-98.

75. *Id.* at 104, 107.

76. *Id.* at 106.

77. *Id.* at 107 (emphasis added). The court, having found that the suit against Price was not authorized by statute, chastised the trial court for addressing the constitutionality of the Son of Sam law. *Id.*

78. *See generally* Curran v. Price, 638 A.2d 93 (Md. 1994).

79. 997 P.2d 436 (Wash. Ct. App. 2000).

80. *Id.* at 439-40.

guilty plea hearing, the judge attached conditions to her suspended eighty-nine-month sentence<sup>81</sup> including that she have no contact with her victim and that she “not receive any tangible or intangible property . . . that is a direct or indirect result of her commission of the crimes—in other words, she was ordered not to profit from publishing or otherwise commercializing the story of her crimes.”<sup>82</sup> One professional who evaluated Letourneau for the purpose of the alternative sentencing recommended that she not be permitted any contact with the media because “[b]eing the center of attention feeds into her narcissism and undermines her treatment. If treatment is undermined, it increases the likelihood of reoffense.”<sup>83</sup> However, the trial court’s order prohibited financial gain rather than media contact.<sup>84</sup> In fact, the court referenced Washington’s Son of Sam statute when discussing that particular probation condition.<sup>85</sup>

After Letourneau was discovered in the company of her victim, the trial court revoked the suspension of her sentence, but ruled that the condition against her profiting from her crime was still in effect.<sup>86</sup> Letourneau then challenged the constitutionality of Washington’s Son of Sam statute as “violative of the First Amendment.”<sup>87</sup> The court of appeals found it unnecessary to rule on the constitutionality of the Son of Sam law because it held that the trial court erred in continuing the conditions of probation (including the financial gain prohibition) once probation was revoked.<sup>88</sup> Therefore, the court granted Letourneau relief without directly addressing the Son of Sam law’s constitutionality.<sup>89</sup>

The court did, nevertheless, offer a hint as to its opinion about the anti-profiting law when it stated that “[t]o forbid convicted persons from acquiring any such properties [acquired by reason of the convicted person’s commercialization of the crime] in the first place would frustrate a means by which the Legislature has chosen to fund compensation for victims of crime.”<sup>90</sup> The court further pointed out that there was no “showing in this record that Letourneau committed second degree rape of a child in order to profit from telling her story” or that “allowing her to profit from commercialization of the story of her crimes increases the likelihood that she will commit the offense again.”<sup>91</sup> The court seemed to indicate its support for the Son of Sam law’s

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81. *Id.* at 438. The Court granted Letourneau’s request for a Special Sexual Offender Sentencing Alternative and suspended her sentence provided certain conditions were met. *See id.*

82. *Id.*

83. *Id.* at 442 (internal quotation marks omitted).

84. *Id.*

85. *Id.* at 439.

86. *Id.* at 438-39.

87. *Id.* at 439.

88. *Id.*

89. *Id.*

90. *Id.* at 443.

91. *Id.*

purpose, but remained silent as to its constitutional flaws.<sup>92</sup>

3. In re Opinion of the Justices to the Senate.<sup>93</sup>—After *Simon & Schuster*, Massachusetts repealed its existing Son of Sam law and drafted a new law, ostensibly resolving the problems identified by the United States Supreme Court in the New York law.<sup>94</sup> The proposed amended law provided that

certain contracts with a person who committed a crime be submitted to the division of victim compensation and assistance within the Department of the Attorney General (division) for its determination whether the proceeds under the contract are substantially related to a crime. If so, the contracting entity must pay over to the division any monies which would otherwise be owed to the person who committed the crime. The funds are then to be deposited into an escrow account and made available to the victims of the crime.<sup>95</sup>

According to the court, the bill defined “[p]roceeds related to a crime’ as ‘any assets, material objects, monies, and property obtained through the use of unique knowledge or notoriety acquired by means and in consequence of the commission of a crime.’”<sup>96</sup>

The state senate asked the Massachusetts Supreme Court for an opinion as to whether the new bill violated the First Amendment.<sup>97</sup> The court found that although the bill targeted proceeds from the sale of items that were not related to speech, it still suffered from constitutional defects.<sup>98</sup> A portion of the bill required that the state make a determination and distinguish between proceeds “substantially related to a crime” and those “relating only tangentially to, or containing only passing references to, a crime.”<sup>99</sup> As the court stated, “[b]y definition, if the applicability of the bill’s requirements can only be determined by reviewing the contents of the proposed expression, the bill is a content-based regulation of speech.”<sup>100</sup> The bill had not successfully eliminated the content-based problem that plagued the original Son of Sam law.<sup>101</sup>

4. *Keenan v. Superior Court*.<sup>102</sup>—Thirty-five years after his kidnapping,

92. *See id.*

93. 764 N.E.2d 343 (Mass. 2002).

94. *See id.* at 347 (noting that New York had also repealed its Son of Sam Law and replaced it with a new law intended to remedy the flaws in the original law).

95. *Id.* at 345.

96. *Id.*

97. *Id.* at 344-45.

98. *Id.* at 347.

99. *Id.* at 345.

100. *Id.* at 348.

101. It is worth noting that the court was concerned only with the limits on speech, and that “portions of . . . [the bill] regulate nonexpressive activity, and those portions would not violate or otherwise impinge on the right of freedom of speech.” *Id.* at 347.

102. 40 P.3d 718 (Cal. 2002).

Frank Sinatra, Jr. sought enforcement of California's Son of Sam law.<sup>103</sup> The January 1998 issue of *New Times Los Angeles* contained an article based on the author's interviews with Sinatra's convicted kidnappers entitled *Snatching Sinatra*.<sup>104</sup> The profits from the story were to be split among the publisher, the author, and the kidnappers.<sup>105</sup> In addition, other publications reported that Columbia pictures had purchased the rights to the kidnapping story for \$1.5 million.<sup>106</sup> Sinatra insisted that the studio withhold payment to the kidnappers or their representatives and, upon Columbia's refusal, he filed suit seeking enforcement of California's Son of Sam law.<sup>107</sup>

Sinatra argued that the California law, unlike the New York law, was not facially invalid.<sup>108</sup> The California law attempted to avoid the overinclusiveness of the overturned New York law in two ways. First, it targeted proceeds "based on' the 'story' of a felony for which the felon was convicted, *except where the materials mention the felony only in 'passing . . . , as in a footnote or bibliography.'*"<sup>109</sup> The court held that this exception was insufficient to eliminate the content-based element of the statute.<sup>110</sup> It still "places a direct financial disincentive on speech or expression about a particular subject."<sup>111</sup> Under strict scrutiny, the law suffered from overinclusiveness similar to the New York law.<sup>112</sup> Second, the law applied only to convicted felons which purported to eliminate the Supreme Court's concern expressed in *Simon & Schuster* about enforcement against those who have "admitted crimes for which he or she had not been convicted."<sup>113</sup> "Though section 2225(b)(1), unlike the New York law, applies only to persons actually convicted of felonies, and states an exemption for mere 'passing mention of a felony, as in a footnote or bibliography,' these differences [did] not cure the California statute's constitutional flaw."<sup>114</sup>

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103. *Id.* at 722-23.

104. *Id.* at 723.

105. *Id.*

106. *Id.*

107. *Id.* The portion of the statute that the Petitioner challenged was the part of section 2225 modeled largely after New York's law (section 2225(b)(1)). *See id.* at 721 n.4. What was not addressed by this court, because it was not raised by the Petitioner, is the constitutionality of section 2225(b)(2), which "confiscates profits from memorabilia, property, things, or rights sold for values enhanced by their felony-related notoriety value." *See id.*

108. *See id.* at 723.

109. *Id.* at 721 (quoting CAL. CIV. CODE § 2225 (1986), *reprinted in* CAL. CIV. CODE § 2224.1(a)(D)(7) (1985)).

110. *Id.* at 728.

111. *Id.*

112. *See id.* at 731.

113. *Id.* at 722 (citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991)).

114. *Id.* (internal citations omitted). Additionally, although the court did not directly address the issue, the ACLU suggested that the statute was overbroad in another way—it provided that confiscated funds earned by the felon, if not claimed by the victim of the crime within a five year

5. *Seres v. Lerner*.<sup>115</sup>—Convicted killer Jimmy Lerner wrote a book while he was incarcerated in the Nevada State Prison, which recounted his life in prison and “contained descriptions of the events surrounding the killing” of his victim.<sup>116</sup> The victim’s sister brought suit on behalf of their mother under Nevada’s Son of Sam law.<sup>117</sup> The law allowed a victim to bring an action “which arises from the commission of a felony, against the person who committed the felony within [five] years after the time the [criminal] . . . becomes legally entitled to receive proceeds for any contribution to any material that is based upon or substantially related to the [crime] . . . against that victim.”<sup>118</sup>

Although the state attorney general argued that the law was simply an enlargement of the statute of limitations for tort actions brought by victims of crime, the Nevada Supreme Court disagreed and applied *Simon & Schuster*.<sup>119</sup> The court stated that Nevada’s Son of Sam law “allows recovery of proceeds from works that include expression both related and unrelated to the crime, imposing a disincentive to engage in public discourse and nonexploitative discussion of it” and was, therefore, overinclusive under *Simon & Schuster*’s strict scrutiny analysis.<sup>120</sup>

### III. SENATOR CORNYN’S APPROACH

The proposed “Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007”<sup>121</sup> was introduced in the United States Senate by Senator John Cornyn on May 24, 2007,<sup>122</sup> and introduced in the United States House of Representatives by co-sponsors, Congressmen Dave Reichert (R-Washington) and Brad Ellsworth (D-Indiana), on September 25, 2007.<sup>123</sup> The bill represents a new approach for advancing those two compelling state interests identified in *Simon & Schuster*—ensuring that criminals do not profit from their crimes and compensating victims.<sup>124</sup> The bill provides, in part, that

any person who, while incarcerated in a prison, knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail, any

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period, be turned over to the state’s crime victims restitution fund, forcing a convicted felon to “give up speech-related income for the benefit of *crime victims generally*, even after his own victims have been compensated.” *See id.* at 731 n.17.

115. 102 P.3d. 91 (Nev. 2004).

116. *Id.* at 92.

117. *Id.*

118. NEV. REV. STAT. § 217.007 (1993), *construed in Seres*, 102 P.3d at 94.

119. *See Seres*, 102 P.3d at 99.

120. *Id.* at 100.

121. Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. (2007).

122. *See* 153 CONG. REC. S6,844-01 (daily ed. May 24, 2007).

123. *See* 153 CONG. REC. H10,762-03, H10,763-02 (daily ed. Sept. 25, 2007).

124. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-19 (1991).

property, article, or object, with intent that the property, article, or object be placed in interstate or foreign commerce, shall be fined under this title and imprisoned not less than 3 years and not more than 10 years. Any sentence imposed under this subsection shall run consecutive to any other sentence imposed.<sup>125</sup>

Rather than target proceeds as they are earned, this bill attempts to prevent prisoners from earning any money in the first place.<sup>126</sup>

Senator Cornyn made no remarks on the record when he introduced the bill in the Senate,<sup>127</sup> but his co-sponsors, both of whom are former law enforcement officers, spoke on behalf of the proposed law in the House of Representatives.<sup>128</sup> Their remarks reveal the bill's intended purpose.<sup>129</sup> By no coincidence, the bill was introduced in the House on the National Day for Remembrance for Murder Victims.<sup>130</sup> Congressman Ellsworth spoke of his experience in law enforcement where he "saw firsthand the devastation violent crimes bring to victims and their families and to the communities where they occur."<sup>131</sup> He professed "the need to defend victims rights in the aftermath of their unspeakable loss."<sup>132</sup> He declared that the proposed legislation would "prohibit America's *most heinous criminals and murderers*" from exploiting their crimes "by preventing criminals from selling their wares in public auction."<sup>133</sup>

Congressman Reichert was no less passionate with his remarks. He also recognized that day as a "National Day of Remembrance for Murder Victims" and recounted the "pain on the faces of victims and victims['] families, unexplainable, unimaginable pain that covers their faces and their families for the rest of their [lives]."<sup>134</sup> He expressed both his concern over prisoners "using their fame and notoriety to make a buck," and his disdain for the "industry coined as 'murderabilia,' where tangible goods owned and/or created by convicted murderers are sold for their profit."<sup>135</sup> He added that this proposed legislation "aims to shut down this business."<sup>136</sup>

Congressman Ellsworth's references to "America's most heinous criminals"<sup>137</sup> and "victims of violent crimes"<sup>138</sup> reveal that he is primarily

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125. S. 1528, § 2(a).

126. *Id.*

127. *See* 153 CONG. REC. S6,844-01 (daily ed. May 24, 2007).

128. *See* 153 CONG. REC. H10,762-03, H10,763-02 (daily ed. Sept. 25, 2007).

129. *See id.*

130. *See id.*

131. 153 CONG. REC. H10,762-03 (daily ed. Sept. 25, 2007) (statement of Rep. Ellsworth).

132. *Id.*

133. *Id.* (emphasis added).

134. 153 CONG. REC. H10,763-02 (daily ed. Sept. 25, 2007) (statement of Rep. Reichert).

135. *Id.*

136. *Id.*

137. 153 CONG. REC. H10,762-03 (daily ed. Sept. 25, 2007).

138. *Id.*

concerned about murderabilia sales related to violent criminals. Unfortunately, the bill does not distinguish between violent and non-violent criminals, nor does it make allowance for the fact that some crimes are victimless.<sup>139</sup> It seeks to impose its restrictions on *all prisoners*, regardless of the crimes they committed.<sup>140</sup> Additionally, although this bill does not specifically target speech, it necessarily restricts free speech through the sweeping language in its provisions. An examination of the bill's constitutional implications is, therefore, worthwhile.

### A. *The First Amendment*

The Supreme Court held that the original Son of Sam law violated the First Amendment right to free speech.<sup>141</sup> Applying strict scrutiny, it also determined that because the regulation was content-based it must be “narrowly tailored to advance” a compelling state interest in order to survive a constitutional challenge.<sup>142</sup> “[E]ven regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.”<sup>143</sup> Whether the bill is deemed a content-based or content-neutral regulation determines the level of scrutiny to which it would be subjected if it were adopted and subsequently challenged.<sup>144</sup>

On its face, Senator Cornyn's bill does not appear to be a prohibition against free speech, but rather a prohibition against prisoners making money.<sup>145</sup> By preventing prisoners from delivering or mailing items for the purpose of sale beyond the prison gates,<sup>146</sup> the bill seeks to avoid the content-based element that

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139. See Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S.1528, 110th Cong. (2007).

140. *Id.* § 2(a).

141. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991).

142. *Id.* at 121.

143. *Id.* at 117 (quoting *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983)).

144. See *State ex rel. Napolitano v. Gravano*, 60 P.3d 246, 253 (Ariz. Ct. App. 2002) (stating that content-neutral regulations of speech are subject to an intermediate level of scrutiny, thus they must further an important governmental interest that is unrelated to the suppression of free speech and any incidental burden on free speech must not be greater than necessary to further that interest); *Seres v. Lerner*, 102 P.3d. 91, 96 n.31 (Nev. 2004) (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)).

145. See Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S.1528, 110th Cong. § 2(a) (2007).

146. *Id.* The bill does include exceptions, allowing the mailing or delivery of an item if the purpose

is to satisfy debt that is—(A) imposed by law or a court order, including—(i) support obligations; (ii) property taxes; (iii) income taxes; (iv) back taxes; (v) a legal judgment, fine, or restitution; (vi) fees to cover the cost of incarceration, including fees for health

existed in the original Son of Sam law and its progeny.<sup>147</sup> In those laws, now deemed unconstitutional, the target was expressive activity specifically related to the crime committed by the speaker.<sup>148</sup> This proposed law neither singles out expressive activity, nor makes any reference to the content of the speech.<sup>149</sup> Its all-inclusiveness, however, necessarily regulates expressive activity.

The Supreme Court has stated that “the State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>150</sup> “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>151</sup> Further, a “time, place, or manner regulation may [not] burden substantially more speech than is necessary to further the government’s legitimate interests.”<sup>152</sup> “Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”<sup>153</sup>

*1. Government Interests.*—The government interest suggested by the title of the bill is to stop the sale of murderabilia and protect the dignity of crime victims. The provisions of the bill appear to be designed to advance the two compelling interests identified by the Court—compensating crime victims<sup>154</sup> and preventing criminals from profiting from their crimes.<sup>155</sup> As Andy Kahan, the original proponent of the bill, remarked:

If you [prisoners] want to draw, paint, doodle, sketch, or whatever, feel

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care while incarcerated . . . ; and (vii) other financial obligations mandated by law or a court order; or (B) incurred through a contract for—(i) legal services; (ii) a mortgage on the primary residence of the immediate family of the prisoner; (iii) the education or medical care of the prisoner or a member of the immediate family of the prisoner; or (iv) life, health, home, or car insurance.

*Id.* § 2(d)(1).

147. See, e.g., *Simon & Schuster*, 502 U.S. at 116; *Keenan v. Superior Court of Los Angeles County*, 40 P.3d 718, 729 (Cal. 2002); *Seres*, 102 P.3d. at 96.

148. See, e.g., *Simon & Schuster*, 502 U.S. at 116 (1991); *Keenan*, 40 P.3d at 729; *Seres*, 102 P.3d. at 96.

149. See S.1528 § 2(a).

150. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

151. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

152. *Id.* at 799 (citing *Frisby*, 487 U.S. at 485).

153. *Id.*

154. See S.1528 § 2(d)(1)(A). The bill makes an exceptions for a mailing or delivery for the purpose of satisfying “a legal judgment, fine, or restitution.” *Id.*

155. See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-19 (1991).



free to do so. You're just not going to make any money off of it. And if you're truly remorseful, then go ahead and ship your artwork out and let all proceeds go back to the victim's [sic] families. You shouldn't make one red cent.<sup>156</sup>

Kahan's passionate concern for victims of violent crime, however admirable, and his disdain for violent criminals, however understandable, do not change the fact that the bill goes far beyond its intended goal of protecting victims from the indignity of seeing crime-related items appear for sale on the Internet. The bill targets all prisoners, regardless of the circumstances surrounding their convictions<sup>157</sup> and prohibits the sale of "any property, article, or object,"<sup>158</sup> regardless of whether the items are related to the prisoners' crimes.

2. *Overinclusiveness*.—It is questionable whether Senator Cornyn's anti-profiting bill is "narrowly tailored to serve a significant government interest" as required by the Court in a content-neutral time, place, or manner regulation of expression.<sup>159</sup> Although sometimes a law that is broader is better able to withstand constitutional challenge than one that targets a particular activity (especially speech),<sup>160</sup> that may not be the case with the proposed bill. Some of the activity banned by this bill has absolutely no relation to any government interest.<sup>161</sup> The bill applies to all prisoners, regardless of whether their crimes have an identifiable victim.<sup>162</sup> If there is no victim then there may be no one deserving of compensation. The co-sponsors of the bill, as well as its chief proponent, Andy Kahan, all seem to be concerned about victims of violent crimes, specifically murder,<sup>163</sup> and yet their bill makes no distinction between a "cold-blooded, diabolical killing machine"<sup>164</sup> and a person convicted of a victimless crime.<sup>165</sup> Additionally, the bill would affect prisoners who lack any

156. *Day to Day*, *supra* note 3.

157. S.1528 § 2(a).

158. *Id.*

159. *Frisby v. Schultz*, 487 U.S. 474, 481-82 (1988).

160. For instance, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991), owners of a bar that featured nude dancing challenged Indiana's public nudity statute, claiming a violation of free speech (because it restricted "expressive" dancing). The Court held the statute constitutional, applying *United States v. O'Brien*, 391 U.S. 367 (1968), and suggesting that the significant government interest was "protecting societal order and morality." See *Barnes*, 501 U.S. at 567-68.

161. By way of example, suppose if a prisoner convicted of drug possession paints a landscape while in prison and wishes to sell it. No identifiable government interest is stymied. The prisoner has neither profited from his crime nor left any victim uncompensated.

162. See S.1528 § 2(a).

163. See 153 CONG. REC. H10,762-03, H10,763-02 (daily ed. Sept. 25, 2007); *Day to Day*, *supra* note 3. Kahan states: "[T]here's nothing more nauseating and disgusting than to find out the person who murdered one of your loved ones now has items being hawked by third parties for pure profit." *Day to Day*, *supra* note 3.

164. *Day to Day*, *supra* note 3.

165. In a victimless crime, presumably there would be no civil judgment or restitution order

notoriety and whose personal items are not likely to appeal to the consummate murderabilia collector.

Senator Cornyn's bill may be a content-neutral regulation, but like its content-based predecessors, it

penalizes . . . speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims. . . . By this financial disincentive, . . . [it] discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds.<sup>166</sup>

It fails to meet the Court's requirement for a content-neutral, time, place, or manner regulation in that it does not "leave open ample alternative channels of communication."<sup>167</sup> As the Court stated: "By denying compensation for an expressive work, a law may chill not only the free speech rights of the author or creator, but also the reciprocal First Amendment right of the work's audience to receive protected communications."<sup>168</sup> For many of the activities banned by this bill, there is no significant government interest to justify the prohibition and the "practical effect . . . [of the bill would be] to chill a wide range of expression."<sup>169</sup>

### B. Applying *Turner v. Safley*<sup>170</sup>

A section of the proposed bill provides that "[t]he Director of the Bureau of Prisons and the head of the department of corrections, or other similar agency, for any State may promulgate uniform guidelines to restrict the privileges of any person that violates this section."<sup>171</sup> Consequently, if the bill were adopted, enforced, and challenged, a target of that challenge could be a prison administrator who imposed sanctions on a prisoner. It is beneficial, therefore, to analyze the constitutionality of the bill under the Supreme Court's holding in *Turner v. Safley*,<sup>172</sup> where the Court held that prison regulations that impinge on

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resulting from the crime, and hence no uncompensated victim.

166. *Keenan v. Superior Court of Los Angeles County*, 40 P.3d 718, 731 (Cal. 2002).

167. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). The only way for a prisoner to sell a tangible item (other than a written work, which could be e-mailed if the prisoner had computer access) is to deposit the item for mailing or delivery. Hence, there is no alternative channel of communication left open by the proposed legislation.

168. *Keenan*, 40 P.3d at 729 n.15 (citing *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976)).

169. *In re Opinion of the Justices to the Senate*, 764 N.E.2d 343, 349 (Mass. 2002).

170. 482 U.S. 78 (1987).

171. Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. § 2(c) (2007).

172. *Turner*, 482 U.S. at 89. It must be noted that the Court might analyze a First Amendment challenge to the bill just as it would any other First Amendment case. In *Johnson v. California*, 543 U.S. 499, 500 (2005), a prisoner rights case, Justice O'Connor rejected the use of a *Turner* analysis, saying, "The right not to be discriminated against based on one's race is not susceptible to *Turner's*

the constitutional rights of prisoners must be “reasonably related to legitimate penological interests.”<sup>173</sup>

In *Turner*, the Court stated that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,”<sup>174</sup> but it also acknowledged the challenges facing prison administrators.<sup>175</sup> The Court identified as its task: “[T]o formulate a standard of review for prisoners’ constitutional claims that is responsive both to the ‘policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.’”<sup>176</sup> The Court adopted a “lesser standard of scrutiny” than applied by the Eighth Circuit,<sup>177</sup> and devised four factors relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration<sup>178</sup> withstands constitutional challenge:

whether the regulation has a “valid, rational connection” to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are “ready alternatives” to the regulation.<sup>179</sup>

An analysis of Senator Cornyn’s bill, using the lowered standard of scrutiny set out in *Turner* reveals that the bill would probably not survive. There is a valid rational connection between the provisions of the bill and the two government interests identified by *Simon & Schuster*.<sup>180</sup> The bill prohibits prisoners from mailing or otherwise delivering any item with the intent that the item “be placed in interstate or foreign commerce,”<sup>181</sup> thereby preventing any

logic . . . .” See Trevor N. McFadden, Note, *When to Turn to Turner? The Supreme Court’s Schizophrenic Prison Jurisprudence*, 22 J.L. & POL. 135, 150 (2006) (asserting that *Turner* signified a “judicial retreat from the protection of prisoners’ rights” but notes that the Court has refused to apply *Turner* to certain constitutional claims such as the equal protection claim in *Johnson*). *Id.* at 135-36.

173. *Turner*, 482 U.S. at 89.

174. *Id.* at 84.

175. See *id.* at 85.

176. *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 406 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989)).

177. *Id.* at 81. The Eighth Circuit Court of Appeals had applied a “strict scrutiny analysis.” *Id.*

178. In *Simon & Schuster*, the Court struck down the New York’s Son of Sam law because it violated the First Amendment rights of prisoners. This seems to establish that those rights do survive incarceration. See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

179. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (quoting *Turner*, 482 U.S. at 89-91).

180. See *Simon & Schuster*, 502 U.S. at 118-19 (identifying two compelling state interests: (1) “ensuring that criminals do not profit from their crimes”; and (2) “ensuring that victims of crime are compensated by those who harm them”).

181. See Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007,

profiting from their crimes. There is an exception to the prohibition when the profit is used to pay restitution, fines, or civil judgments, which promotes the compensation of victims.<sup>182</sup> Where the bill runs into trouble is with the remaining three factors. If a prisoner wishes to sell something outside the prison walls, there is no alternative to “knowingly deposit[ing] [the object] for mailing or delivery.”<sup>183</sup> By contrast, in *Overton v. Bazzetta*,<sup>184</sup> when the Court considered a challenged prison regulation that limited prisoners’ visitors, it pointed out that “inmates can communicate with those who may not visit by sending messages through those who are allowed to visit” as well as “communicate . . . by letter and telephone.”<sup>185</sup>

A consideration of the third *Turner* factor—the impact on prison staff, prison resources, and other inmates of allowing the prisoner to exercise his or her rights<sup>186</sup>—reveals that this bill is unrelated to the operation of prisons. In *Overton*, the Court found that removing the restriction on visitors “would cause a significant reallocation of the prison system’s financial resources and would impair the ability of corrections officers to protect all who are inside a prison’s walls.”<sup>187</sup> If this new law were adopted, prison officials would likely have to play a role in its enforcement. For example, additional monitoring of outgoing mail and other deliveries. This notion, combined with the fact that the bill does not address any security issues within prisons, demonstrates that prison administrators are better off without it.

Finally, the last step in the *Turner* analysis is to determine whether the regulation is reasonable because of the “absence of ready alternatives.”<sup>188</sup> There are reasonable alternatives to Senator Cornyn’s proposed bill that do not impinge on prisoners’ constitutional rights, but still provide for the compensation of victims.<sup>189</sup> For instance, a law that targets any proceeds from a crime as opposed to *all income* that a prisoner might earn during incarceration resolves the constitutional problems of *Simon & Schuster* while making funds available for victim compensation.<sup>190</sup>

In *Turner*, the Court described a Missouri prison regulation restricting a prisoner’s right to marry as “an *exaggerated response* to . . . security objectives” that “sweeps much more broadly than can be explained by petitioners’ penological objectives.”<sup>191</sup> Likewise, the proposed “Stop the Sale of

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S. 1528, 110th Cong. § 2(a) (2007).

182. *See id.* § (2)(d)(1)(A).

183. *See id.* § 2(a).

184. *Overton*, 539 U.S. at 126.

185. *Id.* at 135.

186. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

187. *Overton*, 539 U.S. at 135.

188. *Turner*, 482 U.S. at 90.

189. *See infra* Part V.

190. *See, e.g., State ex rel. Napolitano v. Gravano*, 60 P.3d 246, 257 (Ariz. Ct. App. 2002) (holding law targeting the proceeds of racketeering constitutional).

191. *Turner*, 482 U.S. at 97-98 (emphasis added).

Murderabilia to Protect the Dignity of Crime Victims Act of 2007” can be characterized as an exaggerated response to the sale of murderabilia. The bill’s primary purpose is to spare victims and their families from the pain of public auction of memorabilia related to the crimes against them, and to avoid the pain of the knowledge that the perpetrators of the crimes are making a profit.<sup>192</sup> In an attempt to accomplish those goals, they have fashioned a law with serious constitutional weaknesses. A First Amendment content-neutral speech regulation analysis reveals that the bill is overinclusive in that it “burden[s] substantially more speech than is necessary to further the government’s legitimate interests.”<sup>193</sup> When analyzed as a prison regulation under *Turner*, the bill again fails to pass muster. In addition to the constitutional issues raised by this bill, there are some potential, possibly unintended, ramifications that add weight to the argument that it is an exaggerated response to the problem of murderabilia sales.

#### IV. COLLATERAL EFFECTS OF THE BILL

When Senator Cornyn’s co-sponsors introduced the bill on the floor of the United States House of Representatives, they expressed concern about “tangible goods owned and/or created by convicted murderers [being] sold for their profit,”<sup>194</sup> and stressed “the need to defend victim[s]’ rights in the aftermath of their unspeakable loss.”<sup>195</sup> In support of those victims, however, they propose a bill whose provisions target *all prisoners*, regardless of whether they have been convicted of a violent crime and whether there are victims to whom the prisoners owe some form of compensation.<sup>196</sup> The overinclusiveness of the bill, as well as the sanctions it includes for violation of its provisions,<sup>197</sup> necessarily lend themselves to unintended consequences, including: difficulty for victims in obtaining the compensation that is due them; a stifling of prison art programs; and challenges in enforcing the provisions of the bill.

##### A. Restitution and Victim Compensation

Compensation for victims is a compelling state interest, whether it comes from adherence to a restitution order or as a damages award brought by the victim in a civil action against the perpetrator.<sup>198</sup> The Supreme Court expressed concern for victims when it acknowledged, in *Simon & Schuster*, the State’s

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192. See 153 CONG. REC. H10,763-02 (daily ed. Sept. 25, 2007); 153 CONG. REC. H10,762-03 (daily ed. Sept. 25, 2007).

193. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

194. 153 CONG. REC. H10,763-02 (daily ed. Sept. 25, 2007) (statement of Rep. Reichert).

195. 153 CONG. REC. H10,762-03 (daily ed. Sept. 25, 2007) (statement of Rep. Ellsworth).

196. See *Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007*, S. 1528, 110th Cong. § 2(a) (2007).

197. *Id.* § 3.

198. See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). Regarding the compelling interest of compensating victims, the Court notes that “[e]very State has a body of tort law serving exactly this interest.” *Id.*

“interest in preventing wrongdoers from dissipating their assets before victims can recover.”<sup>199</sup> Senator Cornyn’s proposed law provides exceptions to the prohibition against prisoners selling items. Included in those exceptions are sales for the purpose of satisfying a debt that is “a legal judgment, fine, or restitution.”<sup>200</sup> The bill also provides that when a prisoner violates the law (i.e., the prisoner mails or delivers some item with intent that the item be placed in interstate or foreign commerce),<sup>201</sup> the victim may bring a civil suit to recover damages.<sup>202</sup> The law does not, however, provide that the proceeds earned from the sale be held in escrow to satisfy that civil award.<sup>203</sup> It provides no mechanism for ensuring that those profits are transferred to the victim. On the contrary, any funds earned from violation of the law are to be forfeited to the United States.<sup>204</sup> So, if a crime victim is harmed by the sale of some item related to the perpetrator of the crime against him or her, a civil remedy is available, but there is no guarantee that funds will be available to satisfy any awarded damages.

### B. Rehabilitation Interests

In 1983, Phyllis Kornfeld took a job teaching art to inmates in three Oklahoma State penitentiaries and began a life-long career helping prisoners express themselves through art.<sup>205</sup> In an account of her experiences, she states, “Personally, it is always an illuminating exciting event to see the prisoners discover something very positive, and mysterious, coming from inside themselves. The art is often miraculously fresh, and despite the context, there is a lot of joy.”<sup>206</sup> She adds that “[s]o many of the prisoners are overtaken with creative force as soon as they get their hands on the materials, . . . and all I have to do is get out of the way.”<sup>207</sup> One website where prisoners can sell their art describes itself as “an open and uncensored forum networking prisoners, prisons and the world.”<sup>208</sup> On its Prison Art page, it highlights artists including: “Kaliman” (described as “one of the most prolific artists to emerge out of today’s prison system [whose] . . . artwork reaches deep into the souls of incarcerated

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199. *Id.*; see *Keenan v. Superior Court*, 40 P.3d 718, 736 (Cal. 2002) (Brown, J., concurring) (stating that “[t]he constitutionality of seizing a criminal’s assets to compensate his victims is beyond dispute”).

200. S.1528 § 2(d)(1)(A)(v).

201. *Id.* § 2(a).

202. *Id.* § 5.

203. *See id.*

204. *Id.* § 3.

205. CellblockVisions.com, Prison Art in America—About Phyllis Kornfeld, <http://www.cellblockvisions.com/about.html> (last visited Oct. 16, 2008).

206. *Id.*

207. *Id.*

208. PrisonerLife.com, <http://prisonerlife.com/prisonart/prisonart.cfm> (last visited Oct. 16, 2008).

men and women”);<sup>209</sup> “Raymond Gray” (who “has spent more than [twenty-nine] years in prison,” “learned from life, and hard times, and even from love” and whose “artwork reflects all of these”);<sup>210</sup> and “Iqbal Karimii” (who “developed his skills while incarcerated, and . . . [who has] since created hundreds of paintings specializing in landscapes, seascapes, portraits, and wild life” as “his way of communicating”).<sup>211</sup>

Ed Mead, the proprietor of [prisonart.org](http://prisonart.org),<sup>212</sup> one of many websites where prisoners can sell their arts and crafts (and which will become illegal if Senator Cornyn’s bill is passed)<sup>213</sup> said in an interview with National Public Radio:

One of the reasons that these guys are in there is because they have this low self-esteem, this low opinion of themselves. And while they’re in their families are often on welfare or could use some assistance. Or these guys could need to save money for their release and to help them out and ease the burden. So you know, if you can help them out, what’s the downside?<sup>214</sup>

This seems like a legitimate question, particularly considering that Mead has rules about what he will allow to be sold on his site—“nothing he considers racist, sexist or homophobic.”<sup>215</sup>

An increase in personal income does not appear to be the only factor motivating prisoners who create art while in prison. Jimmy Lerner, while incarcerated for committing manslaughter, wrote a book entitled *You Got Nothing Coming—Notes from a Prison Fish* and included this comment in the forward to the paperback edition: “Money was not a factor in writing the book. I wrote to save my sanity, to save my life. For a long time I was just keeping a diary, a journal. I finally wanted it published because I felt I had something important to say.”<sup>216</sup>

Another program that would be discontinued under the proposed law is Art Behind Bars (ABB), which was started in Florida and is described on its website as an “Art-Based Community Service Since 1994.”<sup>217</sup> Through its “skill-based training and art education,” ABB aims to “give inmates the opportunity to

209. *Id.*

210. *Id.*

211. *Id.*

212. PrisonArt.org, <http://prisonart.org> (last visited Oct. 16, 2008).

213. At least it would be illegal for a prisoner who sells artwork for a purpose other than to satisfy one of the debts included in the bill’s exceptions. See Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. § 2(d)(1) (2007).

214. *Day to Day*, *supra* note 3.

215. *Id.*

216. *Seres v. Lerner*, 102 P.3d. 91, 100 n.52 (Nev. 2004) (quoting *Foreword to JIMMY LERNER, YOU GOT NOTHING COMING—NOTES FROM A PRISON FISH*, at xv (Broadway Books 2003)). On the home page of the website for [prisonart.org](http://prisonart.org), there is quote from Pablo Picasso: “We artists are indestructible; even in a prison.” PrisonArt.org, *supra* note 212.

217. ArtBehindBars.org, <http://www.artbehindbars.org/> (last visited Oct. 16, 2008).

contribute to society through the donation of artwork to numerous non-profit organizations.”<sup>218</sup> Proceeds from the direct sale of prisoner-made artwork “go back into the program to purchase art supplies,” and the program boasts of having raised more than \$75,000 for various charities by the donation of art.<sup>219</sup> A prisoner donating an item to a charity, knowing that the item would be auctioned off, would violate Senator Cornyn’s bill.<sup>220</sup> Such collateral effects were likely not foreseen by the proponents of the bill. Moreover, there is insufficient evidence to suggest that they would argue that these programs have no socially redeeming value and should be discontinued. Society has nothing to lose and everything to gain by allowing prisoners to receive training while incarcerated, and in the process, contribute to charitable causes.

### C. Problems with Enforcement and Effectiveness

The proposed anti-profiting legislation forbids prisoners from mailing or otherwise delivering any item with the intent that the item be placed in interstate commerce.<sup>221</sup> It allows exceptions for items that are sold to satisfy certain (primarily government-imposed) debts.<sup>222</sup> One question arises as to how this law would be enforced. Are prison officials equipped to monitor outgoing mail to the extent that they can discern whether a prisoner has the requisite intent that the item he or she is mailing be placed in interstate commerce? Even if they can determine that the intent exists, their job does not end there. The bill allows inmates to sell items if the sales are used to pay off certain debts.<sup>223</sup> Who, then, is going to monitor these sales to make sure that the proceeds are used lawfully?

Another question arises as to the effectiveness of this bill. Its proponents have suggested that it will “shut down this business” of murderabilia sales on the Internet.<sup>224</sup> There are at least a couple of instances, however, where that would not happen, even if the bill was enacted into law. First, because of the exceptions provided in the bill,<sup>225</sup> a truly violent, vicious criminal who is driven not by financial incentive, but rather by a dark desire to further torment his victims and their families, and to gain notoriety for himself, could put anything out there for public consumption, no matter how distasteful, regardless of whether it is related

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218. ArtBehindBars.org, Learn More, [http://www.artbehindbars.org/index.php?option=com\\_content&task=view&id=23&itemid=37](http://www.artbehindbars.org/index.php?option=com_content&task=view&id=23&itemid=37) (last visited Oct. 16, 2008) [hereinafter ArtBehindBars.org, Learn More]. Organizations that have benefited from the ABB program include Habitat for Humanity, Take Stock in Children, and AIDS Help. *Id.*

219. ArtBehindBars.org, Learn More, *supra* note 218.

220. *See* Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. § 2(a) (2007). An auction could conceivably place an item in interstate commerce.

221. *See id.*

222. *See id.* § 2(d)(1).

223. *See id.*

224. 153 CONG. REC. H10,763-02 (daily ed. Sept. 25, 2007) (statement of Rep. Reichert).

225. *See* S. 1528 § 2(d)(1).



to his crime or his victims. As long as the funds are used to satisfy a debt identified in the exceptions to the bill,<sup>226</sup> those murderabilia sales would be beyond its reach.

Further, if an inmate mails or delivers an item to a family member or friend, without any intent that the item be sold, and that family member or friend decides to auction off the item on the Internet, again, the bill would have no reach—it would be ineffective in stopping the sale of murderabilia.

## V. DRAFTING AN EFFECTIVE AND CONSTITUTIONAL LAW

The United States Supreme Court in *Simon & Schuster* held New York's Son of Sam law unconstitutional because it regulated speech based on its content—a violation of the First Amendment.<sup>227</sup> In the years since then, some states have attempted to amend their own Son of Sam laws to comply with *Simon & Schuster* with little success.<sup>228</sup> Senator Cornyn's proposed bill, while it eliminates the content-based speech problem of the New York law, may not be narrowly tailored enough to withstand a constitutional challenge.<sup>229</sup> It may not be possible to draft a law that would prevent *every* prisoner from profiting from his or her crime while providing compensation to *every* victim, but some states approach that goal.<sup>230</sup>

### A. One Approach—Targeting All Proceeds of a Crime

One of the issues the Supreme Court had with the New York Son of Sam law was that it forfeited only profits earned from the *depiction* of a crime, which made it a content-based speech regulation.<sup>231</sup> Texas attempted to resolve the constitutional issue by targeting proceeds from items owned by a criminal whose value is enhanced by the criminal's notoriety.<sup>232</sup> A North Carolina law attempts to reach the same result by targeting income “generated from the commission of a crime.”<sup>233</sup> Finally, an Arizona law that targets all *proceeds* from a crime has

226. *Id.*

227. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

228. *See supra* Part II.B.

229. *See supra* Part III.A.2.

230. *See, e.g., In re Opinion of the Justices to the Senate*, 764 N.E.2d 343, 347 (Mass. 2002). The proposed bill targeted proceeds from a crime. The court noted that portions of the bill that regulated non-expressive activity “would not violate or otherwise impinge on the right of freedom of speech.” *Id.*

231. *Simon & Schuster*, 502 U.S. at 116.

232. Tracey B. Cobb, Comment, *Making a Killing: Evaluating the Constitutionality of the Texas Son of Sam Law*, 39 HOUS. L. REV. 1483, 1505 (2003).

233. Melissa J. Malecki, Comment, *Son of Sam: Has North Carolina Remedied the Past Problems of Criminal Anti-Profit Legislation?*, 89 MARQ. L. REV. 673, 687 (2006) (quoting N.C. GEN. STATE. § 15B-31 (2005)).

been upheld as constitutional by that state's court of appeals.<sup>234</sup>

1. *State v. Gravano*.<sup>235</sup>—Arizona successfully obtained the proceeds from “Sammy the Bull” Gravano’s book about his life in organized crime without invoking its Son of Sam law.<sup>236</sup> Gravano was convicted in New York on a racketeering charge and was allowed to enter the federal Witness Protection Program. He was subsequently arrested in Arizona for distributing ecstasy.<sup>237</sup> Charged with racketeering in Arizona, Gravano was subject to civil forfeiture under the Arizona Racketeering Act and the Arizona Forfeiture Reform Act.<sup>238</sup> Those laws authorized the State to “seize any property that constituted the proceeds of racketeering.”<sup>239</sup>

The state successfully seized money, guns, jewelry, cellular phones, and a vehicle from Gravano.<sup>240</sup> The State then sought forfeiture of all of Gravano’s rights and benefits in connection with “the non-fiction work about Gravano’s life that was written by Peter Maas, published by Harper Collins (UK), Inc., in 1997, and entitled *Underboss: Sammy the Bull Gravano’s Story of Life in the Mafia* (‘*Underboss*’).”<sup>241</sup> Gravano’s First Amendment challenge to the forfeiture of profits from the book failed when the trial court determined that the “*Underboss* proceeds were traceable to racketeering because ‘the proceeds would not exist were it not for Mr. Gravano’s criminal activities in New York’ and because those activities would also violate Arizona’s racketeering laws.”<sup>242</sup> The appeals court affirmed and determined that the statutes were content-neutral regulations that “come into play based on the existence of a causal connection between racketeering and property.”<sup>243</sup> The statutes serve the purpose of “removing the economic incentive to engage in racketeering, reducing the financial ability of racketeers to . . . engage in crime, . . . compensating victims of racketeering, and reimbursing the State for the costs of prosecution.”<sup>244</sup>

2. *The Texas Murderabilia Amendment*.—In 2001, in an attempt to comply with the holding in *Simon & Schuster*, Texas amended its Son of Sam law and “expanded the scope of the law to cover the value of tangible goods owned by a criminal that is increased due to the notoriety of the criminal.”<sup>245</sup> Unlike Son of Sam laws that targeted only expressive activity related to the crime, this amendment targets murderabilia and “focuses on the increased value an item

234. *State ex rel. Napolitano v. Gravano*, 60 P.3d 246, 253 (Ariz. Ct. App. 2002).

235. *Id.*

236. *See id.* at 249 n.1.

237. *See id.* at 248.

238. *See id.* at 249 (discussing ARIZ. REV. STAT. ANN. §§ 13-2301 to -2318 (2001 & Supp. 2002); ARIZ. REV. STAT. ANN. §§ 13-4301 to -4316 (2001 & Supp. 2002)).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 253.

244. *Id.*

245. Cobb, *supra* note 232, at 1505.

gains from the commission of a crime.”<sup>246</sup> It “looks not at the item’s relation to a crime, but rather at how much more valuable the item becomes as a result of someone committing a crime.”<sup>247</sup> The amendment escapes the content-based regulation problem by targeting “fruits of the crime” regardless of the content.<sup>248</sup> However, it creates a new problem. Difficulties will likely arise when measuring to what extent the value of an object was enhanced by the criminal’s notoriety. A similar “enhanced notoriety” provision existed in the California statute overturned by *Keenan*, but because that particular provision was not at issue, the court did not address it.<sup>249</sup>

3. *More State Responses to Simon & Schuster*.—North Carolina created a new Son of Sam law that targets 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’ of a crime.”<sup>250</sup> As Justice Brown opined in *Keenan*, “a limitation on the law’s scope to storytelling is the achilles’ heel of a Son of Sam provision.”<sup>251</sup> In his concurring opinion he pointed out that Virginia law

seizes “[a]ny proceeds or profits received . . . by a defendant . . . from any source, as a direct or indirect result of his crime or sentence, or the notoriety which such crime or sentence has conferred upon him.” Regardless of whether a Virginia criminal profited by selling her account of the crime, her autograph, or her furniture for an exorbitant price, she could not enjoy such revenues under this law.<sup>252</sup>

By eliminating expressive activity as the sole target, these laws have a better chance of surviving constitutional challenge. The courts and law enforcement are still faced with the challenge of determining or measuring notoriety resulting from the commission of a crime—a somewhat abstract quality that is not easily gauged. Perhaps one solution to this dilemma is to focus not solely on the means by which a criminal earns money and instead put more emphasis on the other compelling state interest identified by the Court in *Simon & Schuster*—compensating victims.<sup>253</sup>

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246. *Id.* at 1506.

247. *Id.* at 1506-07. As an example, if a prisoner were able to command a tidy sum from the sale of a photo of himself or herself due to the prisoner’s notoriety, the prisoner would be allowed to keep only “the amount of money the photo would have fetched absent the notoriety gained by the commission of the crime.” *Id.* at 1507.

248. *Id.* at 1506, 1509.

249. *See Keenan v. Superior Court of Los Angeles County*, 40 P.3d 718, 721 (Cal. 2002).

250. Malecki, *supra* note 233, at 687 (quoting N.C. GEN. STAT. § 15b-31(9) 2005)).

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

252. *Id.* (citing VA. CODE. ANN. § 19.2-368.20) (1992), *reprinted in* VA. CODE ANN. § 19.2-368.20 (2008)).

253. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

*B. Compensating Victims—A Focus on Restitution and Satisfaction  
of Civil Judgments*

“[T]he State has a compelling interest in ensuring that victims of crime are compensated by those who harm them.”<sup>254</sup> The *Simon & Schuster* Court pointed out that “[e]very State has a body of tort law serving exactly this interest,” and further, that “[t]he State’s interest in preventing wrongdoers from dissipating their assets before victims can recover explains the existence of . . . statutory provisions for prejudgment remedies and orders of restitution.”<sup>255</sup> The Massachusetts Supreme Court also suggested that there were “less cumbersome” ways of “compensating victims and preventing notorious criminals from obtaining a financial windfall from their notoriety.”<sup>256</sup> These methods include

[p]robation conditions, specifically designed to deal with a defendant’s future income and obligations . . . [and] writs of attachment against the defendant’s assets [brought by victims as part of a civil action] or writs of trustee process of amounts owed to the defendant, including (but not limited to) assets or earnings derived from expressive activity.<sup>257</sup>

Law professor and Federal District Judge Paul Cassell points out that “nothing in the First Amendment forbids a judge from imposing as part of a defendant’s sentence the condition that the defendant shall not profit from his crime.”<sup>258</sup> He recommends that Congress pass a new federal anti-profiting statute—following the approach of Arizona’s law—that “forbids profiting from a federal crime in any way—not profiting solely through protected First Amendment activities.”<sup>259</sup> Additionally, and perhaps more critical to advancing the interest of victim compensation, he suggests that the federal restitution statute, which is “restricted to situations where a defendant is incarcerated,” be expanded to include the following language:

If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source,<sup>[260]</sup> including inheritance, settlement, or other judgment, during a period of incarceration, supervised release, or probation, such person shall be required to apply the value of such resources to any restitution or fine still owed.<sup>261</sup>

Judge Cassell argues that an expansion of the period of time (to include supervised release and probation) in which a convicted criminal is subject to the federal restitution statute, would prevent criminals from profiting from their

254. *Id.*

255. *Id.*

256. *In re* Opinion of the Justices to the Senate, 764 N.E.2d 343, 350 (Mass. 2002).

257. *Id.*

258. Cassell, *supra* note 57, at 120.

259. *Id.* at 122.

260. This would not limit the source of victim compensation only to proceeds from the crime.

261. Cassell, *supra* note 57, at 123.

crimes and increase the chances for victim compensation.<sup>262</sup>

### C. Combining Approaches—A Possible Solution

The trend among the states of amending their anti-profiting laws so that they target any proceeds that a criminal earns from the commission of his or her crime<sup>263</sup> is a positive step toward ensuring that criminals do not profit from their crimes. Arizona has shown that such a law can withstand a First Amendment challenge.<sup>264</sup> This type of law would also prevent prisoners from profiting from murderabilia sales—a major concern of Senator Cornyn and other proponents of his bill. It would do so without restricting the First Amendment rights of prisoners who are not attempting to exploit their crimes, but merely trying to survive in prison and perhaps prepare themselves for the day they obtain release.

Additionally, the law should grant the state the authority to seize the assets of any prisoner against whom a restitution order, fine or *civil judgment*<sup>265</sup> is entered and to transfer those funds to the appropriate entity. Much like the provisions in the federal restitution statute,<sup>266</sup> a state should be allowed to seize funds in such cases regardless of how they were earned. A combination of these approaches would address the two compelling interests identified in *Simon & Schuster*.<sup>267</sup> First, a law modeled after Arizona's anti-racketeering statute<sup>268</sup> that allows the state to seize any profits resulting from the commission of a crime ensures that prisoners do not profit from their crimes. Second, a restitution law that allows *any* income seized under an outstanding restitution order, fine, or civil judgment to be transferred to the victims provides a mechanism for victims to receive the compensation owed them.

### CONCLUSION

The proposed “Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007” is not a reasonable way to stop the sale of crime memorabilia. Its overinclusiveness invites a constitutional challenge if the bill is passed. Expanding state Son of Sam laws to include all proceeds from a crime,

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262. *Id.*

263. *See, e.g., State ex rel. Napolitano v. Gravano*, 60 P.3d 246 (Ariz. Ct. App. 2003); Cobb, *supra* note 232, at 1509; Malecki, *supra* note 233, at 687.

264. *See Gravano*, 60 P.3d 246 at 248.

265. Civil judgment is not included in the federal statute, however, its addition would help victims of violent crimes (or their families) collect on civil judgment awards before prisoners can dissipate their earnings.

266. *See* 18 U.S.C. § 3664(n) (2006).

267. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

268. *See* ARIZ. REV. STAT. ANN. §§ 13-2301 to -2318 (2001 & Supp. 2002); ARIZ. REV. STAT. ANN. §§ 13-4301 to -4316 (2001 & Supp. 2002).

combined with providing for seizure of prisoner assets to satisfy restitution orders and civil judgments has a better chance of meeting those two compelling interests identified by the Court—compensating victims and ensuring that criminals do not profit from their crimes—without running afoul of the U.S. Constitution.