

January 2004

Investigating New York's Son of Sam Law: Problems with the Recent Extension of Tort Liability for People Convicted of Crimes

Jessica Yager
New York University School of Law

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review



Part of the [State and Local Government Law Commons](#), [Supreme Court of the United States Commons](#), and the [Torts Commons](#)

Recommended Citation

Jessica Yager, *Investigating New York's Son of Sam Law: Problems with the Recent Extension of Tort Liability for People Convicted of Crimes*, 48 N.Y.L. SCH. L. REV. (2003-2004).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

INVESTIGATING NEW YORK'S 2001 SON OF SAM LAW:
PROBLEMS WITH THE RECENT EXTENSION OF TORT
LIABILITY FOR PEOPLE CONVICTED OF CRIMES

JESSICA YAGER*

TABLE OF CONTENTS

I.	Introduction	434
II.	The History	438
	A. 1977: The Son of Sam Law is Born	438
	B. The Son of Sam Law & The Supreme Court.....	439
III.	Current State of the Law	441
	A. 1992: New York Tries Again	441
	B. 2001: New York Goes Too Far	444
	1. Changes: No Longer Limited to Profits, the “Funds of a Convicted Person” Provision is Added	445
	2. Changes: Under Both Provisions, All Assets are Now Available	447
	C. Challenges in the Courts	449
	1. Post –1992 Challenges	449
	2. Post-2001 Challenges	451
	3. Potential for Success in the Courts.....	454
IV.	Problems with the Law	457
	A. New York v. EVERYONE ELSE: A Fifty State Survey	457
	1. Expansion of the Statute of Limitations: New York’s Rejection of the Anti-Profit Model	458
	2. Expansion of Available Funds.....	462
	3. The Targeted Population	465
	B. Conflicts with New York Compensation Law	467
	1. Restitution & Reparation	467

* Law Clerk to the Honorable Napoleon A. Jones Jr. of the United States District Court for the Southern District of California. J.D. New York University School of Law, 2003. I would like to thank Alexander Reinert and Professor Anthony Thompson for their guidance. I would also like to thank David Ehrenberg for his help shaping the ideas presented in this article, as well as for his patience and support.

a.	Overview of Restitution/Reparation Law	467
b.	Conflicts Between Son of Sam Law & Restitution/Reparation Law.....	469
2.	Tort Law	471
a.	Statutes of Limitations: Traditional Tort v. Son of Sam Law	472
b.	Problems with Expanding the Statute of Limitations	474
i.	Practical Problems	475
ii.	Problems of Delay	476
iii.	Problems of Fairness.....	477
C.	Problems Caused by Expansion of Recovery under 2001 Law	479
1.	Legal Problem Posed by Expanded Recovery.	479
2.	Policy Problems Posed by Expanded Recovery.....	484
V.	Conclusion	487

I. INTRODUCTION

A well-known adage states that crime does not pay. Courts have long been enforcing this rule. As far back as 1889, the high court of New York held, “no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong . . . These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.”¹ Codifying this common law tenet, New York passed the nation’s first anti-notoriety law in 1977, New York Executive Law Section 632-a, commonly known as the Son of Sam law. Responding to the profit potential created by the fame of a notorious serial killer, New York tried to create a disincentive to engage in contracts for the sale of crime stories. The law operated to enhance existing tort law available to victims of crimes. Under the law, once profits from the sale of a story were identified, the tort statute of limitations would reopen, giving the victim another opportunity to sue for a judgment to be satisfied from the newly found profits.

1. *Riggs v. Palmer*, 115 N.Y. 506 (1889).

While the initial Son of Sam law came up against a Supreme Court challenge and ultimately was held unconstitutional on First Amendment grounds,² similar laws were adopted by states across the nation. Following New York's lead, the federal government³ and forty-seven states adopted laws designed to prohibit criminals from profiting from the sale of their stories.⁴ These laws have been repeatedly heralded as necessary and moral, justified by the dual public interests of avoiding the glorification of crime and facilitating victim's compensation.⁵ Notwithstanding the Supreme Court's holding that New York's law unconstitutionally targeted the First Amendment rights of the convicted person, the federal government⁶ and many states still have laws on the books that explicitly outlaw the sale of crime stories.⁷ However, after the ruling, a number of states, starting with New York in 1992,⁸ amended their laws so that the extended tort recovery could be sought not only from storytelling profits but also from other profits of the crime.⁹

In 2001, New York amended its law again. An additional provision was added to the law that drastically altered its scope. The new provision allows victims of certain crimes to sue the perpetrators in tort for as long as the perpetrator is under the watch of the criminal

2. *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991).

3. 18 U.S.C. § 3681 (2003).

4. Every state except New Hampshire, North Carolina, and Vermont passed some form of antiprofit law. See list of statutes *infra* note 128.

5. See, e.g., Del. Code Ann. Tit. 11 § 9101 (2001) (finding that it is against public policy to let criminals profit from the sale of their stories); Wash. Rev. Code Ann. § 7.68.300 (2002) (finding a compelling state interest in compensating the victims of crime and in preventing criminals from profiting from their crimes. RCW 7.68.310 through 7.68.340 are intended to advance both of these interests).

6. 18 U.S.C. § 3681(a) (permitting the court to order a convicted person to "forfeit all or any part of proceeds received or to be received by that defendant, or a transferee of that defendant, from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of that defendant's thoughts opinions, or emotions regarding such crime").

7. After *Simon & Schuster*, a number of states followed New York's lead by amending their laws to cover proceeds of the crime, thereby curing the constitutional defect. However, a number of states still have laws that directly target speech, and are therefore probably still unconstitutional. See list *infra* note 128.

8. N.Y. Exec. Law § 632-a (McKinney 1992).

9. See discussion *infra* pp. 484-87.

justice system.¹⁰ Unlike the existing provision that only allowed recovery from the profits of the crime, this new provision permits recovery from any and all of a convicted person's assets. With the addition of this provision, New York's Son of Sam law is now far more severe than the laws of other states. It is also inconsistent with other New York laws and its own original rationales.

This addition to the law unfairly and irrationally targets tortfeasors in the criminal justice system for a harsh civil penalty not faced by other tortfeasors. Under this new provision of the law, a criminal tortfeasor faces the threat of tort liability far longer than a non-criminal tortfeasor. Regardless of the nature of the tort or the extent of monetary damages, criminal tortfeasors have liability hanging over their heads for years, potentially decades or a lifetime, whereas the average tortfeasor faces the threat of civil liability for one or two years. In addition, the law provides a major deterrent to amassing assets, and therefore contributing meaningfully to society in many instances. Particularly insidious, the law was passed specifically to facilitate recovery from civil rights settlements won by prisoners while incarcerated. This law will significantly deter prisoners from bringing lawsuits to vindicate their rights for abuses they suffer while in prison, often at the hands of the state. Equally worrisome, the law provides perverse incentives for prison authorities since the direct result of a violation of an inmate's rights will be the compensation of the prisoner's victim under this law. This law is unfair and unnecessary to achieve the State's legitimate interest in making sure that victims are compensated for their losses. The end result is a less effective and balanced law since the 2001 additions.

This paper will show that, at very least, the State should return to the 1992 version of the Son of Sam law. The amended Son of Sam law is out of step with the laws of other states as well as the rest of New York's victim compensation scheme. It raises a host of ethical questions by specifically targeting prisoners, and distances itself from its original rationale through the vast expansion of the law.

10. See Act of June 25, 2001, ch. 62, 2001 McKinney's Sess. Laws of N.Y. 224 (McKinney Supp. 2001-2002). The law targets the funds of people in prison, on parole, and on probation. There are a number of crimes for which people in New York can be sentenced to lifetime probation. This means that there is a class of people for whom this law creates a never-ending threat of suit. See discussion of the policy problems this creates *infra* p. 484.

The amendment has put the entire law in jeopardy of renewed constitutional challenge. While much has been written about the First Amendment implications of New York's Son of Sam law, little attention has been given to the other constitutional and policy problems raised by the statute. It is these other significant defects of the law that this paper will highlight. To date there is no published legal scholarship addressing the recent amendment and its effects. This paper identifies particular areas where the law is vulnerable to attack so that advocates concerned with the impact of the law can investigate these issues further.

Section II of this paper will discuss the history of the New York law. Starting with the law's origination in 1977, it will map the course of the law through the successful constitutional challenge. This history will help to provide the context for the forces shaping the current law. It is also important to note the drastic ways in which the current law varies from the earlier incarnations of the law, both in its substantive effect and in motivating theory. Section III will outline the law as it was revised in 1992 and then describe the 2001 amendment. This section will also consider legal challenges that have been brought against the amended New York law and the likelihood of their success in the courts. Section IV suggests a number of critiques of the current Son of Sam law. First, it looks at how the law compares to similar laws in other states. This fifty state survey reveals that the 2001 amendment significantly departs from the model the original law created. No other state is as aggressive in its attack on prisoners' rights, signifying that the New York law is unnecessarily harsh. This section will also consider the current law within the context of the larger workings of New York's victim compensation and civil liability schemes. Section IV will end with a consideration of the ways in which the expansion of recovery under the 2001 law raises particularly important legal and policy concerns. The paper concludes with a summation of the legal and policy problems posed by the law, and suggests that advocacy efforts highlighting the practical problems of the law are most likely to bring about change.

II. THE HISTORY

A. 1977: *The Son of Sam Law is Born*

In 1976 and 1977, David Berkowitz terrorized New York City with a string of violent and random attacks that left six people dead and seven others injured.¹¹ As the murders went unsolved, Berkowitz gained notoriety through a series of letters he left for the police and the media, signed with the pseudonym "The Son of Sam."¹² After his capture, Berkowitz attempted to capitalize on his fame by selling the story of his crimes to a publishing house for \$75,000.¹³ Outraged and galvanized at the prospect of Berkowitz profiting by this act, New York passed Executive Law § 632-a, which has come to be known as the Son of Sam law, to prevent criminals from profiting from the commercial sale of their crime stories.¹⁴ The oft-quoted sentiment from the sponsor of the original bill expresses the motivation behind the law: "It is abhorrent to one's sense of justice and decency that an individual . . . can expect to receive large sums of money for his story once he is captured – while five people are dead, [and] other people were injured as a result of his conduct."¹⁵ The first anti-notoriety law of its kind, New York's Son of Sam law quickly became a model for other states and the federal government. Eventually forty-seven states and the federal government adopted similar laws.¹⁶

The original version of the Son of Sam law required any entity contracting with an accused or convicted person for the details of his or her story to submit a copy of the contract and deposit the proceeds due under the contract to the Crime Victim's Board.¹⁷

11. David Berkowitz Called Incapable Of Standing Trial; 2 Doctors Call Berkowitz Incapable of Standing Trial, WASH. POST, Aug. 31, 1977, at A1.

12. *Id.*

13. Steven P. Vargas, *New York's Son of Sam Law: Alive and Well Today*, 11 *TOURO L. REV.* 629, 632 (1995).

14. N.Y. EXEC. LAW § 632-a (McKinney 1982). In the end, the law was never applied to David Berkowitz because he was found unfit to stand trial. Adam Robert Tschorn, *Beyond Son of Sam: Simon & Schuster, Inc. v. New York State Crime Victims Board, and a Constitutionally Valid Alternative to New York Executive Law Section 632-A*, 17 *Vt. L. REV.* 321, 325 (1992).

15. *Simon & Schuster*, 502 U.S. at 109 (quoting Memorandum of Sen. Emanuel R. Gold, reprinted in New York State Legislative Annual, 1977, at 267).

16. *See infra* note 126-28.

17. N.Y. EXEC. LAW § 632-a(1)(ii) (McKinney 1982).

The money in the account was then made available to the victims of the crime as long as the victim brought a civil action within five years of the establishment of the escrow account.¹⁸ The law applied to any person convicted of a crime after a trial or a guilty plea and to “any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted.”¹⁹ In other words, the law provided a different set of rules for tort actions against criminals who attempted to sell their stories. Where a criminal made money from the sale of the crime story, the expiration of the traditional tort statute of limitations did not bar suit. Instead, the Son of Sam law provided for an extended period of limitations (five years from the establishment of the escrow account) during which a victim could bring a tort action to win a judgment to be collected from the profits from the story.

The original version of the law was only applied ten times.²⁰ Soon after its passage, New York’s Son of Sam law came under constitutional attack.²¹ Eventually, one challenge made its way to the Supreme Court.

B. *The Son of Sam Law & The Supreme Court*

In 1981, Henry Hill, protected by the anonymity of the witness protection program, contracted with Simon & Schuster for the right to publish his book, *Wiseguy: Life in a Mafia Family*, detailing his exploits as a successful gangster.²² The book was published and garnered both critical acclaim and popular success, culminating in the adaptation of the story into the Academy Award winning film *Goodfellas*.²³ Once the book was published, however, the Crime Victim’s Board took action. After reviewing the book, the Board deemed it fell within the purview of New York’s Executive Law Sec-

18. N.Y. EXEC. LAW § 632-a(1)(ii) (McKinney 1982).

19. N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1982).

20. Andrew Michael Lauri & Patricia M. Schaubeck, *Like Father Like Son? The Constitutionality of New York’s Son of Sam Law*, 8 ST. JOHN’S J. LEGAL COMMENT 279, 282 (1992).

21. There were four constitutional challenges made to the original law. See *Simon & Schuster*, 502 U.S. 105; *Children of Bedford, Inc. v. Petromolis*, 570 N.Y.S.2d 453 (1991); *Matter of Johnsen*, 430 N.Y.S.2d 904 (N.Y. Sup. Ct. 1979); *Barrett v. Wotjowicz*, 404 N.Y.S.2d 829 (2d Dept. 1979).

22. *Simon & Schuster*, 502 U.S. at 112.

23. *Id.* at 114.

tion 632-a.²⁴ The Board ordered Hill to turn over all the money he had already received under the contract and ordered Simon & Schuster to turn over all future funds payable to Hill. In *Simon & Schuster v. Members of The New York State Crime Victim's Board*,²⁵ Simon & Schuster challenged New York's Son of Sam law on First Amendment grounds. The Court explained that the case was particularly noteworthy at the time. "Because the Federal Government and most of the States have enacted statutes with similar objectives, the issue is significant and likely to recur."²⁶

First the Court acknowledged that the Son of Sam law was a content-based regulation of speech and therefore presumptively inconsistent with the First Amendment.²⁷ As the Court explained, "[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 specific content."²⁸ In order for such a regulation to be legitimate, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."²⁹ The Court unanimously held that the law failed this strict scrutiny review.³⁰

The Court held that the State had a compelling interest in compensating victims and in ensuring that criminals do not profit from their crimes.³¹ However, it concluded that limiting compensation to profits only from storytelling was not necessary to achieve these compelling interests.³² The Court explained, "[t]he distinction drawn by the Son of Sam law [between funds from speech and other profits of crime] has nothing to do with the State's interest in transferring the proceeds of crime from criminals to their victims."³³

24. *Id.*

25. 502 U.S. 105 (1991).

26. *Id.* at 115 (citations omitted).

27. *Id.*

28. *Id.* at 116.

29. *Id.* at 118 (quoting *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987)).

30. *Simon & Schuster*, 502 U.S. at 123.

31. *Id.* at 118 - 19.

32. *Id.*

33. *Id.* at 120.

The Court also held that the law was not narrowly tailored to achieve the State's compelling interests of victim compensation and preventing criminals from profiting from their crimes.³⁴ The statute's broad definition of "persons convicted of a crime" allowed the State to target people who admitted to crimes of which they had not been convicted.³⁵ The Court found that this broad definition rendered the law overly inclusive.³⁶ The Court concluded:

[I]n the Son of Sam law, New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income. The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law in not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment.³⁷

After this ruling, New York repealed its law.³⁸

III. CURRENT STATE OF THE LAW

A. 1992: *New York Tries Again*

After the Supreme Court struck down the original Son of Sam law, New York attempted to pass a new version of the law that avoided the constitutional pitfalls of the first. Finding that the Supreme Court ruling "has deprived crime victims and their personal representatives of a useful means by which to seek recompense from the criminal responsible for their victimization,"³⁹ the State passed a new set of bills that provided even more protections for

34. *Id.*

35. *Id.*

36. The Court stated, "[s]hould a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the Board would control his entire income from the book for five years, and would make that income available to all of the author's creditors, despite the fact that the statute of limitations for this minor incident had long since run. That the Son of Sam law can produce such an outcome indicates that the statute is, to say the least, not narrowly tailored to achieve the State's objective of compensating crime victims from the profits of crime." *Id.* at 123.

37. *Id.*

38. N.Y. EXEC. LAW § 632-a, *repealed by* L. 1992, c. 618, § 10, eff. July 24, 1992.

39. Memorandum of Senator Emmanuel Gold, Governor's Bill Jacket to L. 1992, c. 618 at 6.

the rights of victims.⁴⁰ As the legislative history describes, “[t]his bill . . . attempts to recapture for crime victims much of what was intended for them under ‘Son of Sam.’ In many ways, it accomplishes much more.”⁴¹ In combination with a number of provisions liberalizing the civil and restitutional compensation laws,⁴² the State passed a revised Son of Sam law as part of its wider attempt to provide for greater victim compensation.⁴³

Like its predecessor, the 1992 version of the Son of Sam law primarily altered the tort statute of limitations; the law provided for an extension of the time within which a victim could bring a tort action against a convicted person. While the structure of the law remained the same, the law made a number of alterations to the original Son of Sam law framework.⁴⁴ The legislative history of the bill identifies three changes implemented in the 1992 law that remedied the problems of the prior statute:

- (i) it does not target speech alone or speech of specified content but defines “profits of crime” as any property obtained or income generated from the crime; (ii) it applies only to persons convicted of a felony and thereby avoids the prior law’s much broader definition encompassing persons who admit to crimes or are convicted of misdemeanors; and (iii) it requires that the income be generated “as a result of having committed the crime” and thereby avoiding reaching income generated by reasons separate and apart from the crime.⁴⁵

There were other differences between the two versions. Under the 1992 law, the victim was given three years from the date of discovery of assets from the crime to bring a civil action, which could only be

40. *Id.*

41. *Id.*

42. See discussion of changes made to other compensation laws *infra* Part IV B & C.

43. S. 21017/A. 10915-B, 215th N.Y. Gen. Ass., 2d Sess. (1992) (enacted as Act of July 24, 1992, ch. 618 §§ 1-17, 1992 N.Y. Laws 1618-23 (codified at N.Y. EXEC. LAWS § 632-a (McKinney 1992))).

44. Compare N.Y. EXEC. LAW § 632-a (McKinney 1992) with N.Y. EXEC. LAW § 632-a (McKinney 1982).

45. Memorandum to the Governor from Attorney General Robert Abrams (July 16, 1992), Governor’s Bill Jacket, L. 1992, c. 618 at 23-24.

satisfied from these assets.⁴⁶ Additionally, the targeted assets were not automatically placed in an escrow account; rather the Board was empowered to take traditional steps to protect the assets from wasting.⁴⁷

Like the original version of the law, the new version was intended to achieve the State's interest in making sure criminals do not profit from their crimes. The legislative history reveals that support for the bill also rested on the importance of this objective. Letters like one from Alliance for Consumer Rights declared, "Victimized once at the hands of a wrongdoer, innocent citizens should not be victimized again by criminals who salt their victim's wounds by profiting from the victim's unwanted role in the criminal story."⁴⁸ Much like the sentiments expressed by the constituents in support of the law, the legislative history indicates that the legislature's rationale for re-passage of the Son of Sam law was particularly focused on preventing criminals from profiting from their crimes.⁴⁹

While the law also facilitated victim compensation, this was not its primary purpose, nor the primary means by which the legislature intended to increase compensation. The law was passed along with a set of amendments to the restitution and tort laws, which were solely intended to achieve the State's interest of compensating victims.⁵⁰ In particular, the tort law was amended to extend the statute of limitations for torts arising from criminal acts to seven years. Discussing this general amendment of the tort law, a legislative memo from the Governor explains this is "a first step towards implementing our objective of compensating victims for their wrongs suffered."⁵¹ The next sentence goes on to discuss the Son of Sam law, "[r]ecognizing that preventing criminals from profiting from crime is a distinct and compelling State interest, [this bill] also creates a distinct three-year statute of limitations, dating from the time

46. N.Y. EXEC. LAW § 632-a(3) (McKinney 1992).

47. N.Y. EXEC. LAW § 632-a(3) (McKinney 1992).

48. Letter in Support of Revised Son of Sam law from Alliance for Consumer Rights, Governor's Bill Jacket, L. 1992, c. 618 at 46.

49. Gold memorandum *supra* note 39.

50. Abrams letter *supra* note 45.

51. Memorandum from Governor Mario Cuomo (July 24, 1992), Governor's Bill Jacket, L. 1992, c. 618 at 8.

a victim discovers that the perpetrator has or is receiving profits from a crime.”⁵² Hence, the Son of Sam law allowed the State to achieve its distinct objective of preventing criminals from profiting from their crimes. This is especially evident given the close overlap between the Son of Sam law and the tort law also amended at the same time. The State acted to facilitate victim compensation by amending the tort law for victims of crime and then attempted to limit profiting from crime through the Son of Sam law.

In the package of bills passed in 1992, New York figured out how to achieve both of the compelling interests recognized by the Court through laws that were, arguably, sufficiently narrow and content-neutral. Unlike the rash reaction to an unseemly political problem that created the first law in 1977, the 1992 Son of Sam law was a small part of a considered attempt to overhaul the State’s compensation system. In a significant effort, changes were made to numerous State laws that impact how victims of crime are compensated. Changes made were carefully calibrated to create a holistic approach to how victims and perpetrators of crime are treated in New York courts. The laws complimented one another and worked together to achieve the goals of the State.

New York’s new law was successfully passed in 1992 and remained good law until it was amended by the legislature in 2001.

B. 2001: *New York Goes Too Far*

Once again, in 2001, the New York legislature was galvanized into action by the horrific facts of a crime story. This time the story was that of David McClary who murdered New York City Police Officer Edward Bryne in 1988.⁵³ McClary was found guilty and sentenced to a term of twenty-five years to life in a New York State prison.⁵⁴ In 1990, McClary brought a civil rights lawsuit pursuant to 42 U.S.C. §1983 alleging “that his placement in administrative segregation for a period in excess of four years violated his procedural due process rights.”⁵⁵ In 1999, a jury found liability and Mc-

52. *Id.*

53. Memorandum from Governor George Pataki (June 25, 2002), Governor’s Bill Jacket, L. 2001, c. 62 at 5.

54. *Id.*

55. McClary v. Kelly, 4 F. Supp. 2d 195, 197 (W.D.N.Y. 1998).

Clary was awarded \$660,000.⁵⁶ The court found the jury verdict excessive and gave McClary the option of consenting to remittitur in order to avoid a new trial. The verdict was remitted to \$237,500, the amount McClary had sought.⁵⁷

By the time McClary won the judgment, the seven-year statute of limitations for Police Officer Byrne's family to bring a tort claim relating to a crime⁵⁸ had lapsed. Officer Byrne's family was barred from bringing suit against McClary for damages. The Son of Sam law did not reopen the statute of limitations because McClary's newly-found assets were not profits from the crime. The legislature responded to the perceived injustice of this situation. The legislative history of the amendment makes its purpose and rationale abundantly clear: "The shortcomings of the current Son of Sam law are tragically illustrated in the case of murdered New York City Police Officer Edward Byrne. The bill will remedy this injustice by reviving the claims of crime victims and their families, such as the family of Officer Byrne, and permit their recovery of expenses for injuries and suffering."⁵⁹ In other words, the State was particularly interested in ensuring that civil rights settlements won by prisoners for violation of their rights in prison would be available to victims, no matter how much time had passed since the commission of the tort.

1. Changes: No Longer Limited to Profits, the "Funds of a Convicted Person" Provision is Added

The most significant change made to the law in 2001 was the addition of the funds-of-a-convicted-person provision. A drastic change from the limited targeting of profits of the crime, the law now reopens the statute of limitations for tort actions not only when the convicted person receives profits from crime, but also when he or she receives money from ANY SOURCE.⁶⁰ The addition of this provision divorces the law from its original anti-profit moor-

56. McClary v. Coughlin, 87 F. Supp. 2d 205, 207 (W.D.N.Y. 2000).

57. *Id.* at 218.

58. This special seven year statute of limitations for the victims of crime was instituted in the 1992 bundle of bills that also contained the new version of the Son of Sam law. See generally Governor's Bill Jacket, L. 1992, c. 618.

59. Pataki Memorandum *supra* note 54.

60. N.Y. EXEC. LAW § 632-a(1)(c) (McKinney 2002).

ings. Now, the law acts as a general tort law, except it provides a never-ending threat of suit (unlike the one or two year threat faced in a typical tort context), and it only applies to people under the watch of the criminal justice system. With the addition of the funds-of-a-convicted-person provision, the law can no longer be justified by the State's interest in ensuring that criminals do not profit from their crimes.⁶¹

The funds-of-a-convicted-person provision acts much like the existing profits-from-a-crime provision. A new statute of limitations is triggered once money is detected and the victim then has three years from the date of this discovery to bring suit.⁶² However, there are three critical differences between the funds-of-a-convicted-person provision and the profits-from-a-crime provision: (i) under new provision the money that triggers the reopening of the statute of limitations is money from any source totaling ten thousand dollars, other than earned income or child support;⁶³ (ii) the new provision only applies to people under the watch of the criminal justice system;⁶⁴ and (iii) unlike the profits of the crime provision that applies to all convicted felons,⁶⁵ the new provision only applies to people convicted of particular enumerated felonies, "specified crimes" defined in the statute.⁶⁶

61. While it might appear that the funds-of-a-convicted-person provision subsumes the profits-from-a-crime provision, the two remain distinct. The former only applies to people while under the watch of the criminal justice system, plus an additional three years. Also, it only applies to people convicted of certain enumerated felonies. The latter, in contrast, has no such limits. Hence it has much wider applicability and will apply in many instances where the former does not.

62. N.Y. EXEC. LAW § 632-a(3) (McKinney 2002).

63. N.Y. EXEC. LAW § 632-a(1)(c) (McKinney 2002).

64. The new "funds of a convicted person" provision only applies to convicted felons while they are under the watch of the criminal justice system – in prison, on probation or parole – or if the money was accrued while the person was in the system and not more than three years have passed since the person has been released. N.Y. EXEC. LAW § 632-a(1)(c) (McKinney 2002).

65. The statute reads: "Profits from a crime" mean (i) any property obtained through or income generated from the commission of a crime of which the defendant was convicted . . ." N.Y. EXEC. LAW § 632-a(1)(a) (McKinney 2002). "Crime" means (i) any felony defined in the laws of the state; or (ii) an offense in any jurisdiction which includes all of the essential elements of any felony defined in the laws of this state. . . ." N.Y. EXEC. LAW § 632-a(1)(a) (McKinney 2002).

66. The statute reads, "Funds of a convicted person means all funds and property received from any source by a person convicted of a specified crime. . . ." N.Y. EXEC. LAW

2. Changes: Under Both Provisions, All Assets are Now Available

Another key change imposed by the 2001 amendment involves the sources of funds available for satisfaction of a judgment won under the Son of Sam law. While the Son of Sam law simply allows a victim to bring a tort action when he or she would otherwise be barred by the operation of the statute of limitations, recovery pursuant to the Son of Sam law claim was not the same as normal tort recovery. Under the 1992 version of the law, when the law applied exclusively to proceeds of the crime, recovery was limited to the assets targeted by the law—the proceeds from the crime.⁶⁷ A plaintiff who brought suit pursuant to the provision could only recover his or her pro rata share of the profits of the crime. In 2001, the law no longer contains this limit under either provision.

The legislative history makes it clear that under the funds-of-a-convicted-person provision, recovery is permitted from all of the convicted person's assets. As explained above, the law only applies if a convicted person has amassed assets totaling ten thousand dollars or more, from any source other than earned income or child support. However, once that ten thousand dollar limit is reached, the victim can bring a tort action and recover *any and all* of the convicted person's assets. While earned income and child support cannot be used to calculate the ten thousand dollar trigger, when it comes to recovery under the law there is no segregation of earned income or child support. Describing the ten thousand dollar trigger excluding earned income and child support, the legislative history states, "[t]he sole purpose of the provision is to determine whether a person must give notice; the provision has no effect on the ability of a crime victim to recover a convicted person's employment income in a civil action."⁶⁸ In other words, the section of the statute defining the funds-of-a-convicted-person provision is used to define when the reporting requirement and new liability period kick in. While earned income and child support are exempted

§ 632-a(1)(c) (McKinney 2002). See N.Y. EXEC. LAW § 632-a(1)(e) (McKinney 2002) (defining "Specified Crime").

67. N.Y. EXEC. LAW § 632-a(3) (McKinney 1992) (stating "any damages awarded in such action shall be recoverable only up to the value of the profits of the crime").

68. Pataki Memorandum, Governor's Bill Jacket, L. 2001, c. 62 at p. 6.

from the tallying of assets for the purpose of reporting under the statute, funds from these sources, as well as all other sources, are available to a plaintiff suing under the funds-of-a-convicted-person provision of the law.⁶⁹

The 2001 amendment also altered aspects of the profits-from-a-crime provision. Most significantly, the 2001 law appears to have removed the limit on recovery that existed in the 1992 version. While the 1992 version of the law explicitly limited recovery to the profits of the crime, this language is missing from the 2001 profits of the crime provision.⁷⁰ The legislative history fails to directly comment on this alteration. A memorandum from the bill sponsor states generally,

[s]ignificantly, employment income earned by a convicted person, as well as all other forms of earned and unearned income, are always recoverable by a crime victim once the crime victim commences a cause of action pursuant to Executive Law [632]-a or any other statute of limitations. . . . Any judgment obtained by a crime victim against an inmate or prisoner may be enforced or executed against all assets of such person except for the first \$1,000 on deposit in an institutional account to his or her credit.⁷¹

This language, coupled with the removal of the language limiting recovery, suggests that the legislature intended for recovery under both the profits-from-a-crime provision and the funds-of-a-convicted-person provision to include all the convicted person's assets. Both provisions are used to trigger the reopening of the statute of limitations, under which a plaintiff can obtain a civil judgment to be satisfied from any and all of the defendant's assets.⁷²

69. N.Y. EXEC. LAW § 632-a(1)(c) (McKinney 2002).

70. *Compare* N.Y. EXEC. LAW § 632-a(3) (McKinney 1992) *with* N.Y. EXEC. LAW § 632-a(3) (McKinney 2002).

71. Nozzolio Memorandum, Governor's Bill Jacket, L. 2001, c. 62 at 12-13.

72. While the removal of the limit on recovery makes both provisions of the law operate similarly once they are triggered, the two provisions are still distinct. There are circumstances in which one would allow suit and the other would not, for example, when a convicted person amasses less than ten thousand dollars from the proceeds of a crime. In addition, the profits-from-a-crime provision can encompass earned income, for example the profits from writing a book or article about a crime.

In addition to apparently expanding recovery under the profits-from-a-crime provision, the 2001 amendment also expanded the crimes to which this provision applies. While the funds-of-a-convicted-person provision only applies to certain specified felonies, the profits-from-a-crime provision applies to all felonies. In addition, the amendment extended the profits-from-a-crime crime provision to cover federal and out of state convictions, as long as the victim was a resident of New York or the crime took place in state.⁷³

This paper will show how, in its rush to address what it saw as an important political problem, the legislature abandoned the logic and cohesion achieved by the 1992 Son of Sam law in the State's victim compensation scheme. Next, the paper will discuss recent constitutional challenges brought against the amended law. In the following sections, this paper will look at the anti-profit laws adopted by other states to illustrate the extent to which New York's amended law harshly deviates from its own original model, which has now been adopted by the rest of the nation. Then, it will consider more carefully the ways in which the 2001 Amendment conflicts with New York's existing civil liability and compensation scheme, and the particular problems raised by the expansion of assets available under the law.

C. Challenges in the Courts

1. Post-1992 Challenges

Between 1992 and 2001, when the law only applied to profits from crime, there were only two reported cases involving the 1992 Son of Sam law in New York courts.⁷⁴ Neither raised constitutional

73. Compare N.Y. EXEC. LAW § 632-a(1)(a) (McKinney 1992) with N.Y. EXEC. LAW § 632-a(1)(a) (McKinney 2002).

74. *New York State Crime Victims Board v. T.J.M. Productions, Inc.*, 705 N.Y.S.2d 320 (1st Dept. 2000) (holding that the Crime Victims Board did not have standing under New York Executive Law § 632-a to bring action to recover profits earned by defendant for book about crime where there was no lawsuit brought by a victim); *Sandusky v. McCummings*, 625 N.Y.S.2d 457 (N.Y. Sup. Ct. 1995) (holding that damages award won by convicted person for injuries sustained while fleeing the crime scene did not constitute profits of the crime under New York Executive Law § 632-a). In 1995, two cases were decided involving the original Son of Sam law. One involved the question of how the Crime Victims Board was to dispose of funds collected under the original, now invalidated, law. *New York State Crime Victims Board v. Abbott*, 627 N.Y.S.2d 629, 632 (1st Dept. 1995). The court held that the Board did not have to return the

challenges to the law. It is particularly interesting that no further First Amendment challenges were made to the law. Many commentators have argued that the legislature may have corrected the constitutional infirmity because in *Simon & Schuster* the Supreme Court seemed particularly concerned with the fact that the law “singled out speech on a particular subject for a financial burden that it place[d] on no other speech and no other income.”⁷⁵ The Supreme Court agreed with the State that compensating victims and preventing criminals from profiting were compelling interests.⁷⁶ The Court found, specifically, that compensating victims with the proceeds of crime is a compelling interest.⁷⁷ The Court took issue with the choice to limit victim compensation to only proceeds from storytelling.⁷⁸ But by expanding the law to allow recovery from all profits, and no longer singling out speech as the only vulnerable proceed, the law might be appropriately tailored as to avoid the First Amendment problem in the eyes of the Court.⁷⁹

funds. *Id.* The other case involved a suit in federal court by plaintiff who claimed he was unconstitutionally denied movie royalties under the original Son of Sam statute where a production company had delivered profits from a real crime movie to the Crime Victims Board. *Heath v. Warner Communications, Inc.*, 891 F. Supp. 167, 170 (S.D.N.Y. 1995). The court granted summary judgment for the defendant, holding that the plaintiff could not maintain the suit because he had been awarded profits as part of settlement agreement under which he could not commence litigation for additional profits without leave of the court. *Id.* at 170. The court also held that the action was barred by res judicata because the issues had been litigated before, even though in the interim the statute had been held unconstitutional. *Id.* at 172.

75. Steven P. Vargas, *New York's Son of Sam Law: Alive and Well Today*, 11 *TOURO L. REV.* 629, 647 (1995) (quoting *Simon & Schuster*, 502 U.S. at 123); Andrew Michael Lauri & Patricia M. Schaubeck, *Like Father Like Son? The Constitutionality of New York's Son of Sam Law*, 8 *ST. JOHN'S J. LEGAL COMMENT* 279, 294 (1992) (arguing that the law has fixed the problem that the Court identified in *Simon & Schuster* While the law will still be analyzed under strict scrutiny, the 1992 version will survive review because it is narrowly tailored to achieve the State's compelling interest.).

76. *Simon & Schuster*, 502 U.S. at 118-19.

77. *Id.* at 120-21.

78. The Court explained, “[t]he Board cannot explain why the State should have any greater interest in compensating victims from the proceeds of such ‘storytelling’ than from any of the criminal’s other assets.” *Id.* at 119.

79. Some commentators criticized the 1992 version of the law on other, non-constitutional grounds. See, e.g., Adam Robert Tschorn, *Beyond Son of Sam: Simon & Schuster, Inc. v. New York State Crime Victims Board, and a Constitutionally Valid Alternative to New York Executive Law Section 632-A*, 17 *VT. L. REV.* 321, 346-47 (1992) (arguing that the 1992 version of the law is under-inclusive regarding its definition of who counts as a “person convicted of a crime,” and under-inclusive with regards to the definition of

2. Post-2001 Challenges

While the funds-of-a-convicted-person provision does not raise the First Amendment problems posed by its companion (the profits-from-a-crime provision) because it does not target speech, it raises a host of other constitutional problems. The amendment was passed in 2001 and to date at least three cases have been filed challenging the constitutionality of the current law.⁸⁰ These cases involve Fourteenth Amendment challenges to the funds-of-a-convicted-person provision. Two of these cases have resulted in decisions at preliminary stages addressing some of the constitutional claims.⁸¹

In *Snuszki v. Wright*, the plaintiff brought suit under the amended version of Executive Law Section 632-a(1)(c), the funds-of-a-convicted-person provision, against her mother's killer for money the defendant received in a civil rights settlement from the New York State Department of Correctional Services.⁸² Wright, the defendant, made a motion to dismiss the plaintiff's complaint, arguing that the amended law was unconstitutional.⁸³ Wright claimed the amended law violated his constitutional rights to equal protection, substantive due process, and his right to access the courts.⁸⁴ He claimed that he was being treated differently than other similarly situated people, namely other tortfeasors, in violation of the Fourteenth Amendment's guarantee of equal protection.⁸⁵ He further argued that this unequal treatment inhibited exercise of his fundamental rights. Wright claimed that the law violated his substantive due process rights by limiting his access to the courts. He argued that the law's revival of lapsed tort claims, years

what assets count as "profits of a crime." Tschorn advocates for an alternative statute, which he outlines in his article.)

80. *Doe v. Cusack*, 02 Civ. 9610 (DAB) (RLE) (S.D.N.Y. filed December 3, 2002); *Snuszki v. Wright*, 751 N.Y.S.2d 344 (N.Y. Sup. Ct. 2002); *New York State Crime Victims Board v. Majid*, 749 N.Y.S.2d 837 (N.Y. Sup. Ct. 2002).

81. *Snuszki*, 751 N.Y.S.2d 344; *Majid*, 749 N.Y.S.2d 837.

82. *Snuszki*, 751 N.Y.S.2d at 346.

83. *Id.*

84. *Id.* at 347.

85. Defendant's Reply to the Intervener's Memorandum of the Constitutionality of Section 632-a(3) of the Executive Law at 6, *Snuszki*, 751 N.Y.S.2d 344 (N.Y. Sup. Ct. 2002) (No. 11-0189/01).

after the incident, was arbitrary and conscious shocking.⁸⁶ Lastly, Wright claimed that the law violated his First Amendment right to access the courts.⁸⁷

The court addressed all three of the defendant's constitutional claims. With regard to the defendant's equal protection claim, the court rejected Wright's contention that a fundamental right was at stake.⁸⁸ It explained that there is no fundamental right to the protection of the statute of limitations.⁸⁹ Furthermore, it held that this law puts no restrictions on the defendant's ability to access the courts simply because any judgment he may receive can be used to satisfy a judgment against him.⁹⁰ Because no fundamental right was implicated, and the defendant did not claim to be a member of a protected class, the court analyzed the law under a rational basis standard, requiring that governmental classifications be rationally related to a legitimate governmental interest.⁹¹ The court held that the amended law satisfied this standard.⁹² In dicta, the court noted that the Supreme Court recognized compensating victims as a *compelling* governmental interest, while to pass this test the government's interest need only be legitimate.⁹³ The court held that extending the statute of limitations is rationally related to this interest.⁹⁴ Hence, the amended law satisfied the rational basis test.

With regard to Wright's access to the courts claim, the court held that the law places no affirmative restriction on the defendant prohibiting him from pursuing legal relief for any wrong committed against him.⁹⁵ Lastly, the court rejected Wright's substantive due process claim. The court held that there is nothing "arbitrary, conscience-shocking or oppressive" about allowing a victim to be

86. Memorandum of Law in Support of the Constitutionality of Section 632-a(3) of the Executive Law at 19-20, *Snuszki*, 2002 WL 31687184 (N.Y. Sup. Ct. 2002) (No. 11-0189/01) (citing Defendant's Memorandum at 12).

87. *Id.*

88. *Snuszki*, 751 N.Y.S.2d at 348.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (citing *Simon & Schuster*, 502 U.S. 105 (1991)).

94. *Snuszki*, 751 N.Y.S.2d 344 (N.Y. Sup. Ct. 2002).

95. *Id.*

compensated.⁹⁶ The court held again that no fundamental right of Wright's had been violated.⁹⁷ Hence, the court upheld the funds-of-a-convicted-person provision of the law and denied Wright's motion to dismiss the plaintiff's complaint.

In 1999, Abdul Majid was an inmate at Sullivan County Correction Facility.⁹⁸ He brought a civil rights action against several New York State corrections officers claiming that he had been subjected to excessive force and severely injured by three correctional officers. He also claimed that his First Amendment right to freely exercise his religion while incarcerated had been violated.⁹⁹ In November of 2001, the parties to the suit entered into a settlement, under which Majid received fifteen thousand dollars for his injuries.¹⁰⁰

In *New York State Crime Victims Board v. Majid*, the Crime Victims Board ("CVB") brought a motion, pursuant to Executive Law § 632-a(6), to enjoin Majid and the State from distributing money Majid had received from the settlement.¹⁰¹ Majid claimed that the amended Son of Sam law violated his constitutional rights. It was unclear what provision of the law he was challenging, but because the question of the constitutionality of the statute of limitations was not ripe,¹⁰² the court assumed the challenges applied to the section of the statute under which the plaintiff was seeking an injunction, Executive Law Section 632-a(6) ("subsection 6"). Subsection 6 is the section of the law that gives the CVB the power to protect the assets at issue by seeking provisional remedies, such as attachment, injunction, receivership and notice of pendency, otherwise available to a plaintiff.¹⁰³

96. *Id.* at 348-49.

97. *Id.* at 349.

98. *Majid v. Wilhelm*, 110 F. Supp. 2d 251, 253 (S.D.N.Y. 2000).

99. *Id.*

100. Plaintiff's Memorandum of Law in Support of Declaratory and Injunctive Relief at 5, *Majid v. Crime Victims Board* (S.D.N.Y.) (No. 02 CV-2907). This case is distinct from *Majid v. New York Crime Victims Board*. It appears to be a suit brought by Majid to avoid the action that was subsequently brought for an injunction by the Crime Victims Board in *Majid*, 749 N.Y.S.2d 837 (N.Y. Sup. Ct. 2002). This memorandum is on file with the author.

101. *Majid*, 749 N.Y.S.2d at 838.

102. *Id.* at 840.

103. N.Y. EXEC. LAW § 632-a(6) (McKinney 2002).

The court granted the plaintiff an injunction, holding that subsection 6 of the amended law did not violate Majid's constitutional rights. The court held that there was no *ex post facto*¹⁰⁴ violation because subsection 6 merely allows the CVB to apply to courts for pre-existing provisional remedies.¹⁰⁵ Not only is there no creation of a criminal penalty, there is no creation of a new civil remedy because all the law allows is realization of the lapsed tort remedy.¹⁰⁶ With regards to Majid's procedural due process claim, the court held that Majid had received notice of the CVB's action and had fought it vigorously, so he had been afforded due process of the law.¹⁰⁷ The court held that there was no substantive due process problem because there was a reasonable connection between the State's interest in compensating victims and allowing the CVB to protect assets from wasting.¹⁰⁸ Lastly, the court held there was no equal protection problem posed by giving the CVB the ability to apply for remedies that are available to all others, including the defendant himself.¹⁰⁹ Hence, a New York court upheld another aspect of the amended Son of Sam law.

3. Potential for Success in the Courts

At first glance, the Son of Sam law, particularly the funds-of-a-convicted-person provision, raises constitutional questions. There are due process implications, as well as equal protection questions, raised by the application of the law. While these claims have strong rhetorical appeal, they will likely face skepticism in the courts. As explained in more detail below, it will be difficult to establish that this law infringes upon a fundamental right or discriminates against

104. The Constitution prohibits the passage of *ex post facto* laws by states. U.S. Const. Art. 1, § 10, cl. 1. An *ex post facto* law is a law that retroactively makes conduct criminal after the conduct has occurred. *Doe v. Pataki*, 120 F.3d 1263, 1272 (2d Cir. 1997). In order for a statute to violate the *Ex Post Facto* clause of the Constitution, it must be a penal law. A statute is not considered penal, even if it has punitive aspects, if its primary purpose is regulatory. *Id.* at 1274. In extreme cases, a civil penalty can be "so punitive in fact" that it violates the *Ex Post Facto* clause. *Id.* at 1275. However, this is a difficult standard to satisfy. The court in *New York Crime Victims Board v. Majid* rejected this claim with respect to the Son of Sam law, as other courts likely will as well.

105. *Majid*, 749 N.Y.S.2d at 840.

106. *Id.*

107. *Id.*

108. *Id.* at 841.

109. *Id.*

a protected class. Courts are likely to analyze its validity applying a rational basis standard, under which the law will survive.

Under the equal protection clause, the Son of Sam law is likely to be analyzed under a rational basis standard because no protected class is targeted by the law. It is not hard to establish that the law treats similarly situated groups differently. Criminal tortfeasors are treated differently than non-criminal tortfeasors. People under the watch of the criminal justice system are treated differently than those who have completed their sentences. Yet, because no protected class is targeted for this differential treatment, the government need only justify its actions by proving that the law is rationally related to a legitimate governmental interest.¹¹⁰ Given the Court's holding in *Simon & Schuster*, acknowledging the State's compelling interests in compensating victims and preventing criminals from profiting from crime,¹¹¹ it seems unlikely that any court will find that the law is not rationally related to a legitimate state interest. Given that the Supreme Court decided the issue in dictum, no court is likely to hold that New York's law is not rational.

Similarly, substantive due process claims are likely to receive rational basis review because of the difficulty of establishing that the law infringes on a fundamental right.¹¹² The difficulty with showing that a fundamental right is infringed upon, which has been raised in this context as a right to privacy, familial association, and property,¹¹³ is that a plaintiff will have to explain why under the

110. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (explaining “[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.”).

111. *Simon & Schuster*, 502 U.S. at 118-19.

112. Laws that infringe on fundamental rights are subject to heightened scrutiny, requiring the government to meet a higher standard to justify its actions. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

113. Plaintiff's Complaint at 9-12, *Doe v. Cusack*, 02 Civ. 9610 (DAB) (RLE) (S.D.N.Y.).

initial tort statute of limitations there is no constitutional problem, but under the expanded one there is. The fact that the Son of Sam law does not provide for any new remedies makes such an argument particularly difficult. If a regular tort suit is constitutional, it is hard to argue that a suit brought under the Son of Sam law is not, given that there is no substantive difference in between the two causes of action. This claim is further undermined by the fact that legislatures have broad authority to set and alter statutes of limitations as they see fit, and the Court has held that when they do, no constitutional rights are implicated.¹¹⁴ Hence, it will be difficult for a plaintiff to convince a court that the extension of time to bring a suit, alone, infringes on a fundamental right.

A procedural due process claim appears the least likely to prevail because the convicted person is afforded process – he or she can challenge any attachment of money prior to judgment; is allowed to litigate the question of damages in court; and liability is based on the criminal conviction, where the person presumably received due process. Even the retroactive application of the amended Son of Sam law fails to raise a significant due process problem because of a line of Supreme Court cases that acknowledges the broad discretion legislatures have to amend and retroactively apply statutes of limitations without warning.¹¹⁵ While the federal due process clause holds little hope, in Section IV.C.1 below, I suggest an alternative State due process claim that has not been raised and that warrants further inquiry.

While they might not ultimately prevail, constitutional challenges are valuable because they provide strong rhetorical arguments against the law. Even if there is not an equal protection violation, for example, there are glaring equal protection concerns raised by the law that can be used to build organizing momentum and to educate the public about the importance of protecting prisoners' rights. Ultimately, lobbying and litigation used in tandem to illustrate the inconsistencies of the law and why it is such poor policy may be more likely to bring about change than constitutional challenges alone. Cases like the ones discussed above bring to light how unfair the law can be. Prisoners' rights advocates wishing to

114. See discussion *infra* note 213.

115. See discussion *infra* note 218.

challenge the law should use such cases to show lawmakers that the law is unfair and irrational. The next section will highlight three additional, non-constitutional, problems posed by the law as amended. Again, discussion of these problems may help advocates prove to lawmakers why this law should be changed.

IV. PROBLEMS WITH THE LAW

In this section, I will discuss a few key problems I believe are posed by the current Son of Sam law. Because the law was amended so recently, to date there has been no legal scholarship examining the impact of the new expansion of the law. The arguments I raise are intended to flag aspects of the law that are particularly vulnerable to attack, which might be useful to advocates planning to challenge the amended law either in the courts or in the legislature. First, to provide a larger context within which to consider the harsh provisions of New York's law, I will look at antiprofit laws of other states. Next, I will consider the conflicts between the Son of Sam law and other provisions of New York victim compensation law. This comparison, in particular, highlights the problems raised by the expansion of the statute of limitations in the funds-of-a-convicted-person provision. Last, I will look at one of the most problematic aspects of the amended law, the expansion of recovery to all funds held by the convicted person.

A. *New York v. EVERYONE ELSE: A Fifty State Survey*

A survey of the antiprofit laws found in other states reveals that New York's law, as it stands after the 2001 amendment, is far more punitive than the laws found in other states. It also shows the extent to which New York has deviated from the model it created, while the rest of the states with similar laws have remained true to the format and purposes of the original law.

After New York passed the original Son of Sam law in 1977, the majority of states and the federal government followed its lead. Only three states failed to pass some form of the law: New Hampshire, North Carolina, and Vermont.¹¹⁶ Subsequently, in seven

116. Sean J. Kealy, *A Proposal for a New Massachusetts Notoriety-for-Profit Law: The Grandson of Sam*, 22 W. NEW ENG. L. REV. 1 (2000).

states, Son of Sam laws have been repealed and not replaced.¹¹⁷ Today, the federal government¹¹⁸ and forty states have antiprofit laws in place.¹¹⁹

1. Expansion of the Statute of Limitations: New York's Rejection of the Anti-Profit Model

At their core, many state laws operate like New York's: they extend or renew civil claims otherwise barred by the tort statute of limitations.¹²⁰ In twenty-six states, the tort statute of limitations is replaced with a new time clock that runs from the discovery of the targeted funds or the establishment of an escrow account for such

117. 725 ILL. COMP. STAT. ANN. 145/1 to 14 (repealed 1992); LA. REV. STAT. ANN. § 46:1831 to 1839 (repealed 1997); MA ST 258A § 8; §§ 1 to 9 (repealed 1993 (eff. Jan. 1, 1995)); MO. ANN. STAT. § 595.045(14) (repealed 1993); NEV. REV. STAT. ANN. § 217.265 (repealed 1993); TEX. REV. CIV. STAT. ANN. Art. 8309-1 (repealed 1993); CAL. CIV. CODE § 2225 (Statute held unconstitutional on first amendment grounds by *Keenan v. Superior Court of Los Angeles County*, 117 Cal. Rptr. 2d 1 (Cal. 2002)).

118. 18 U.S.C. § 3681 (2003).

119. ALA. CODE §§ 41-9-80 to 84 (2002); ALASKA STAT. § 12.61.020 (Michie 2002); ARIZONA REV. STAT. ANN. §§ 13-4201-4202 (2002); ARK. CODE ANN. § 16-90-308 (Michie 2001); COLO. REV. STAT. ANN. §§ 24-4.1-201-207 (2002); CONN. GEN. STAT. ANN. § 54-218 (2002); DEL. CODE ANN. Tit. 11 §§ 9101 to 9106 (2001); FLA. STAT. ANN. § 944.512 (2002); GA. CODE ANN. §§ 17-14-30 to 32 (2002); HAW. REV. STAT. ANN. §§ 351-81 to 88 (2001); IDAHO CODE § 19-5301 (2002); IND. CODE ANN. § 5-2-6.3-1 to 7 (2002); IOWA CODE ANN. § 910.15 (2002); KAN. STAT. ANN. §§ 74-7319-7321 (2002); KY. REV. STAT. ANN. § 346.165 (Michie 2002); ME. REV. STAT. ANN. Tit. 14, § 752-E (West 2002); MD. CODE ANN., CRIM PROC § 11-621 – 633 (2002); MICH. COMP. LAWS ANN. § 780.768 (West 2002); MINN. STAT. ANN. § 611A.68 (2002); MISS. CODE ANN. §§ 99-38-1 to 11 (2002); MONT. CODE ANN. §§ 53-9-101-133 (2002); NEB. REV. STAT. ANN. §§ 81-1835 to 1840 (Michie 2002); N.J. STAT. ANN. §§ 52:4B-28 to 33 (West 2002); N.M. STAT. ANN. § 31-22-22 (Michie 2002) (repealed eff. July 1, 2006); N.Y. EXEC. LAW § 632-a (McKinney 2002); N.D. CENT. CODE § 32-07.1-01 (2001); OHIO REV. CODE ANN. §§ 2969.01 to .06 (West 2002); OKLA. STAT. ANN. tit. 22, § 17 (West 2002); OR. REV. STAT. § 147.275 (2001); PA. STAT. ANN. tit. 42 § 8312 (West 2002); R.I. GEN. LAWS § 12-25.1-1 to 12 (2002); S.C. CODE ANN. § 17-25-500- 570 (Law. Co-op 2002); S.D. CODIFIED LAWS §§ 23A-28A-1 to 14 (Michie 2002); TENN. CODE ANN. §§ 29-13-401 to 411 (2002); UTAH CODE ANN. § 77-18-8.3 – 8.5 (2002); VA. CODE ANN. §§ 19.2-368.19 to .22 (Michie 2002); WASH. REV. CODE ANN. § 7.68.200 to 290 (2002); W.VA. CODE §§ 14-2B-1 to 11 (2002); WIS. STAT. ANN. § 949.165 (West 2001); WYO. STAT. ANN. §§ 1-40-301 to 308 (Michie 2002).

120. I assume that the statutes that provide a number of years within which a victim must bring suit are providing a limitations period distinct from the one established for regular torts. Furthermore, most statutes run from the date the funds are discovered or the escrow account for the funds is established. Hence, the running of the statute of limitations under these statutes is not connected to the running of the traditional tort statute of limitations.

funds.¹²¹ In six states, the antiprofit law extends the time after the commission of the crime within which the victim may bring a civil action.¹²² While many states use these laws to extend or reopen the statute of limitations to bring a civil action against a criminal tortfeasor, there are some states that do not use these laws to alter

121. ALA. CODE § 41-9-80 (2002) (complainant has 5 years from establishment of escrow account); ARIZONA REV. STAT. ANN. §§ 13-4202(B)(2) (2002) (complainant has 5 years from establishment of escrow account to bring claim to commission); COLO. REV. STAT. ANN. § 24-4.1-201 (2002) (complainant has 5 years from establishment of escrow account); DEL. CODE ANN. Tit. 11 § 9103 (2001) (complainant has 5 years from establishment of escrow account); GA. CODE ANN. § 17-14-31 (2002) (complainant has 5 years from the establishment of escrow account); IDAHO CODE § 19-5301(1) (2002) (complainant has 5 years from establishment of escrow account); IOWA CODE ANN. § 910.15(7) (2002) (complainant has 5 years from establishment of escrow account); KAN. STAT. ANN. § 74-7319(d) (2002) (complainant has 6 months from date of notification of funds); KY. REV. STAT. ANN. § 346.165(2),(4) (Michie 2002) (complainant has 5 years from date the Board receives profits); ME. REV. STAT. ANN. Tit. 14, § 752-E (West 2002) (complainant has 3 years from the discovery of the profits of the crime); MD. CODE ANN., CRIM PROC § 11-626 (2002) (complainant has 5 years from establishment of escrow account); MINN. STAT. ANN. § 611A.68(4)(b) (2002) (complainant has 5 years from the date on which the money is paid to the Crime Victims Board); MISS. CODE ANN. § 99-38-7(2002) (complainant has 1 year from the establishment of escrow account); NEB. REV. STAT. ANN. § 81-1838 (Michie 2002) (complainant has 5 years from date money is paid into escrow account); N.J. STAT. ANN. § 52:4B-28 (West 2002) (complainant has 5 years from establishment of escrow account); OHIO REV. CODE ANN. § 2969.03 (West 2002) (complainant has 3 years from establishment of escrow account); OR. REV. STAT. § 147.275(3)(b) (2001) (complainant has 5 years from establishment of escrow account); PA. STAT. ANN. tit. 42 § 8312(b) (West 2002) (complainant has 3 years from the discovery of the profits); R.I. GEN. LAWS § 12-25.1-4 (2002) (complainant has 3 years from date of last payment into criminal royalties fund); S.C. CODE ANN. § 17-25-530 (Law. Co-op 2002) (complainant has 3 years from discovery of profits); S.D. CODIFIED LAWS §§ 23A-28A-3 (Michie 2002) (complainant has 5 years from establishment of escrow account); TENN. CODE ANN. §§ 29-13-403, 404 (2002) (complainant has 3 years from establishment of escrow account); WASH. REV. CODE ANN. § 7.68.200 (2002) (complainant has 5 years from the establishment of escrow account); W.VA. CODE §§ 14-2B-1 to 11 (2002) (prosecutor has 3 years from notice of the funds); WIS. STAT. ANN. § 949.165(10) (West 2001) (complainant has 3 years from the establishment of the escrow account); WYO. STAT. ANN. §§ 1-40-303(b)(ii) (Michie 2002) (complainant has 5 years from the establishment of the escrow account).

122. ALASKA STAT. § 12.61.020(c) (Michie 2002) (complainant has 10 years from date of crime or discovery of perpetrator); ARK. CODE ANN. § 16-90-308(c)(2) (Michie 2001) (complainant has 5 years from the filing of the charges, presumably in the criminal prosecution); CONN. GEN. STAT. ANN. § 54-218(a) (2002) (complainant has 5 years from date of crime); MONT. CODE ANN. § 53-9-125 (2002) (complainant has 1 year from date of crime); N.D. CENT. CODE § 32-07.1-01(2) (2001) (complainant has 6 years from the date of conviction); OKLA. STAT. ANN. tit. 22, § 17(C) (West 2002) (complainant has 7 years from the date of the criminal indictment).

the existing tort statute of limitations. Rather the antiprofit law is used to protect assets, usually by authorizing the creation of an escrow account, in order to satisfy civil judgments and restitution orders granted under the existing tort timeframe.¹²³

The alteration of the statute of limitations is a characteristic New York's law shares with the majority of other states. Yet New York has drastically deviated from the practice of other states with respect to what triggers the antiprofit law and thereby the new liability period. In New York, after the 2001 amendment, in addition to being triggered by profits of the crime, a new liability period is also triggered by the receipt of funds totaling ten thousand dollars from any source other than earned income and child support, under the funds-of-a-convicted-person provision.¹²⁴ A drastic de-

123. HAW REV. STAT. ANN. § 351-88 (2001); IND. CODE ANN. §§ 5-2-6.3-1 to 7 (2002); MICH. COMP. LAWS ANN. § 780.768 (West 2002); N.M. STAT. ANN. § 31-22-22 (Michie 2002) (repealed eff. July 1, 2006); VA. CODE ANN. §§ 19.2-368.19 to .22 (Michie 2002). Florida does have an anti-profit statute, but it seems to be used to supply restitution and does not require the victim to bring a civil action. It, therefore, has no effect on the existing statute of limitations. FLA. STAT. ANN. § 944.512 (2002). Utah has laws that allow courts to prohibit a convicted person from selling his or her story as a condition of a sentence of incarceration or probation. UTAH CODE ANN. § 77-18-8.3 – 8.5 (2002).

124. The New York statute states in relevant part:

(1)(c) "Funds of a convicted person" means all funds and property received from any source by a person convicted of a specified crime, or by the representative of such person. . . . excluding child support and earned income, where such person:

(i) is an inmate serving a sentence with the department of correctional services or a prisoner at a local correctional facility or federal correctional institute . . . ; or

(ii) is not an inmate or prisoner but who is serving a sentence of probation or conditional discharge or is presently subject to an undischarged, indeterminate, determinate or finite term of imprisonment or person of post-release supervision or term of supervised release . . . ; or

(iii) is no longer subject to a sentence of probation or conditional discharge or indeterminate, determinate or definite term of imprisonment or period of post-release supervision or term of supervised release, and where within the previous three years: the full or maximum term or periods terminated or expired of such a person was granted discharge by a board of parole pursuant to applicable law . . . and includes only [money received within the three years from interests, benefit of any kind, recovery, awards, etc accrued before the expiration of the sentence.]

2(a). 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 . . . to a person charged with or con-

parture from its own antiprofit model and the laws of the rest of the nation, this is one of the most fundamental changes made by the State in the recent amendment.¹²⁵ New York's law now provides extended liability – in some cases never-ending liability – over assets having nothing to do with the criminal act at issue. In all other states, the laws remain true to their anti-profit motivations. In twenty-six states the new limitations period or creation of escrow account is triggered by receipt of profits from the sale of the crime story.¹²⁶ In twelve other states, the trigger occurrence is the receipt of proceeds of the crime more generally.¹²⁷ By using the receipt of

victed of that crime . . . ; or (ii) 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 aggregated value of the payment or payments of such funds exceeds or will exceed ten thousand dollars, shall give written notice to the crime victims board of the payment or obligation to pay as soon as practicable after discovering that the payment or intended payment constitutes profits from a crime of funds of a convicted person. . . .

3. Notwithstanding any inconsistent provision of the estates, powers and trust law or the civil practice law and rules with respect to the timely bringing of an action, any crime victim shall have the right to bring a civil action in a court of competent jurisdiction to recover money damages from a person convicted of a crime of which the crime victim is a victim, or the representative of that convicted person, within three years of the discovery of any profits from a crime or funds of a convicted person, as those terms are defined in this section.

N.Y. EXEC. LAW § 632-a (McKinney 2002).

125. See implications of this expansion discussed *infra* Part IV.C.

126. ALA. CODE § 41-9-80 (2002); ALASKA STAT. § 12.61.020(a) (Michie 2002); ARIZONA REV. STAT. ANN § 13-4202 (2002); ARK. CODE ANN. § 16-90-308(a)(1) (Michie 2001); CONN. GEN. STAT. ANN. § 54-218(a) (2002); DEL. CODE ANN. Tit. 11 § 9103 (2001); FLA. STAT. ANN. § 944.512(1) (2002); GA. CODE ANN. § 17-14-31 (2002); HAW. REV. STAT. ANN. § 351-81 (2001); IDAHO CODE § 19-5301(1) (2002); KAN. STAT. ANN. § 74-7319 (2002); KY. REV. STAT. ANN. § 346.165(1) (Michie 2002); MD. CODE ANN., CRIM PROC § 11-622 (2002); MICH. COMP. LAWS ANN. § 780.768(1) (West 2002); MINN. STAT. ANN. § 611A.68(1)(a) (2002); MISS. CODE ANN. § 99-38-5(2002); MONT. CODE ANN. § 53-9-104 (2002); NEB. REV. STAT. ANN. § 81-1836 (Michie 2002); N.J. STAT. ANN. § 52:4B-28 (West 2002); N.M. STAT. ANN. § 31-22-22(A) (Michie 2002) (repealed eff. July 1, 2006); OHIO REV. CODE ANN. § 2969.02 (West 2002); R.I. GEN. LAWS § 12-25.1-3 (2002); S.D. CODIFIED LAWS § 23A-28A-1 (Michie 2002); UTAH CODE ANN. § 77-18-8.3 – 8.5 (2002) (note that Utah's law differs from the rest; in Utah the anti-notoriety law allows the court to prohibit a convicted person from selling his or her story as a condition of his or her sentence); WASH. REV. CODE ANN. § 7.68.200 (2002); WIS. STAT. ANN. § 949.165(2) (West 2001).

127. COLO. REV. STAT. ANN. § 24-4.1-201 (2002); IND. CODE ANN. § 5-2-6.3-3 (2002); IOWA CODE ANN. § 910.15(1)(e) (2002); ME. REV. STAT. ANN. tit. 14, § 752-E(3) (West

any money (no longer only money connected to the commission of the crime) to trigger Section 632-a, New York's law can no longer be justified by the antiprofit rationale that was the impetus for this law originally.¹²⁸

2. Expansion of Available Funds

Another significant difference between the New York law and the laws of other states has to do with what funds are available to a victim who brings suit pursuant to an antiprofit law. While traditional tort law allows recovery from all assets, most antiprofit laws limit recovery to the sources of money targeted by the statute. The limited recovery under antiprofit laws becomes significant when the statute of limitations for the traditional tort claim has lapsed. In many states, the victim's recovery under the antiprofit laws is limited to the money targeted by the statute (either profits from the sale of the story or profits of the crime), which in many cases will be less than recovery under tort law. A number of statutes state this explicitly.¹²⁹ Other states imply this by placing the targeted funds

2002); N.D. CENT. CODE § 32-07.1-01(1)(e) (2001); OKLA. STAT. ANN. tit. 22, § 17(A) (West 2002); OR. REV. STAT. § 147.275(1) (2001); PA. STAT. ANN. tit. 42 § 8312(a) (West 2002); S.C. CODE ANN. § 17-25-520 (Law. Co-op 2002); VA. CODE ANN. §§ 19.2-368.20 (Michie 2002); W.VA. CODE § 14-2B-3 (2002); WYO. STAT. ANN. § 1-40-303(a) (Michie 2002).

128. See discussion of New York's repudiation of this rationale *infra* Part IV. Note that Tennessee is the one other state where all of a defendant's money is attachable under the law. TENN. CODE ANN. §§ 29-13-401 to 411 (2002). However, there is some internal inconsistency in the law making it hard to determine through statutory interpretation alone how the law operates. For example, the law is called "Victim Compensation from the Proceeds of the Crime Act of 1994." TENN. CODE ANN. § 29-13-401 (2002). Yet it authorizes the collection of all of the defendant's income – not just proceeds of the crime. TENN. CODE ANN. § 29-13-403 (2002). Also, the law states that the statute of limitations does not start to run until all money owed to the defendant under "the contract" have been paid into the escrow account, suggesting that perhaps the law is concerned with contracts for profits of the crime. TENN. CODE ANN. § 29-13-404 (2002). Yet, the statute fails to state what kind of contract it references.

129. N.D. CENT. CODE § 32-07.1-01(2) (2001) (All profits from the crime belonging to the convicted felon are subject to a constructive trust for the benefit of the beneficiaries set forth in this section. The trust continues until six years after the date of conviction. If an action is filed by a beneficiary to recover the beneficiary's interest in a trust within that time limitations, the trust character of the property continues until the conclusion of the action); OHIO REV. CODE ANN. 2969.03 (West 2002) ("if the civil action is brought after the expiration of the statute of limitations that would apply to the civil action but for this division, the court shall state in a judgment in favor of the

in an escrow account used to satisfy civil judgments.¹³⁰ There are a small number of states that do not expand the statute of limitations, and therefore do not alter recovery allowed under the tort law.¹³¹ Under New York's amended law, however, there is no limit to the assets available to the victim during this renewed statutory pe-

victim that the judgment may be enforced only against the separate account maintained in the name of that offender in the recovery of offender's profits fund"); OR. REV. STAT. § 147.275(3) (2001) (A victim can recover damages from escrow account containing proceeds of the crime if he or she brings a civil action within five years of the date the account is established); PA. STAT. ANN. tit. 42 § 8312(b) (West 2002) ("Right of action. Notwithstanding other rules of civil procedure, victim has 3 years from discovery of profit to bring civil action. Any damages awarded only payable up to amount of profits"); S.C. CODE ANN. § 17-25-530 (Law. Co-op 2002) ("Victim can bring civil action for damages anytime within three years of discovery of profits. Damages are recoverable up to amount of profits."); W.VA. CODE § 14-2B-5 (2002) (" . . . If, but for the provisions of this section, any party would be barred from bringing an action due to the expiration of the applicable statute of limitations, said party may not recover damages against the defendant in excess of the value of the crime profits allotted to said party by the court in accordance with the provisions of this article"); WYO. STAT. ANN. § 1-40-303(b) (Michie 2002) (Notwithstanding any other applicable statute of limitations, any person who is a victim of the criminal act from which a defendant receives profits under subsection (a) of this section may, within five (5) years of the establishment of the escrow account: (i) Enforce any order of restitution entered against the defendant against the monies on deposit in the escrow account; or (ii) Bring a civil action in a court of competent jurisdiction to recover a judgment against the defendant or the defendant's representatives or designees and enforce the judgment against monies on deposit in the escrow account).

130. ALA. CODE § 41-9-80 (2002); ALASKA STAT. § 12.61.020(b) (Michie 2002); ARIZONA REV. STAT. ANN § 13-4202(2)(b) (West 2002); ARK. CODE ANN. § 16-90-308(c)(1) (2001); COLO. REV. STAT. ANN. § 24-4.1-201 (2002); CONN. GEN. STAT. ANN. § 54-218(a) (2002); DEL. CODE ANN. Tit. 11 §§ 9103 (2001); GA. CODE ANN. §§ 17-14-31 (West 2002); IDAHO CODE § 19-5301(1) (West 2002); IOWA CODE ANN. § 910.15 (West 2002); KAN. STAT. ANN. § 74-7319 (2002); KY. REV. STAT. ANN. § 346.165(2) (Michie 2002); MD. CODE ANN., CRIM PROC § 11-624 (2002); MINN. STAT. ANN. § 611A.68 (West 2002); MISS. CODE ANN. §§ 99-38-7 (2002); MONT. CODE ANN. §§ 53-9-125 (2002); NEB. REV. STAT. ANN. § 81-1835 to 1840 (Michie 2002); N.J. STAT. ANN. § 52:4B-28 (West 2002); OKLA. STAT. ANN. tit. 22 § 17(C) (West 2002); S.D. CODIFIED LAWS § 23A-28A-3 (Michie 2002); WASH. REV. CODE ANN. § 7.68.200 to 290 (West 2002); WIS. STAT. ANN. § 949.165(4)-(6) (West 2001). Maine's law does not provide for the creation of an escrow account, but does suggest that recovery under the law is limited to profits from the crime. For example, the law outlines requirements for when an entity paying profits of a crime has to give notice to the victim of such profits, and then the statute provides an extended limitations period to run from the date of the discovery of profits from the crime. ME. REV. STAT. ANN. Tit. 14, § 752-E (West 2002).

131. See *supra* note 116.

riod.¹³² The only other states that seem to allow such broad recovery outside the traditional tort limitations period are Rhode Island¹³³ and, possibly, Tennessee.¹³⁴ By allowing such broad recovery outside the traditional tort recovery period, New York forces its criminal tortfeasors to face the threat of tort liability for far longer than criminal tortfeasors almost anywhere else in the country.

132. While earned income is not used to calculate whether § 632-a is triggered, it is available for recovery in a suit commenced pursuant to § 632-a. A memorandum from Governor Pataki makes this clear, “funds earned as employment income will generally not be used to determine whether a convicted person has received in excess of \$10,000 and, therefore, whether notice must be given to the [Crime Victims Bureau] . . . The sole purpose of the provision is to determine whether a person must give notice. The provision has no effect on the ability of a crime victim to recover a convicted person’s employment income in a civil action.” Memorandum from Governor George Pataki (June 25, 2002), Governor’s Bill Jacket, L. 2001, c. 62 at 1306. A statement from the bill’s sponsor also confirms this, “Significantly, employment income earned by a convicted person, as well as all other forms of earned and unearned income, are always recoverable by a crime victim once the crime victim commences a cause of action pursuant to Executive Law (632)-a or another other statute of limitations.” Nozzolio Memorandum, Governor’s Bill Jacket, L. 2001, c. 62 at 11. See policy implications *infra* Section IV.C.

133. R.I. GEN. LAWS § 12-25.1-4.1 (2002) (“Assets available. A victim, his or her guardian, or in the case of a deceased victim, his or her legal representative, in addition to any rights conveyed pursuant to this chapter, may seek recovery from any of the criminally responsible person’s assets. A victim may proceed against the defendant’s assets, whether or not these assets represent royalties obtained from the commercial exploitation of the crime.”).

134. TENN. CODE ANN. § 29-13-403 (2002) (“all income of Defendant’s after the date of the crime is collected & put into acct. victim can collect as long as civil action brought within 3 years of crime”). The Tennessee law is confusing, however, because in a number of other sections it suggests that the purpose of the law is to collect proceeds from the crime, not income generally as this section suggests. For example, the short title of the law is “Victim Compensation from the Proceeds of the Crime Act of 1994.” Tenn. Code Ann. § 29-13-404 (2002). Also, the section discussing the statute of limitations states:

Statute of Limitations for bringing civil action under 403(b) doesn’t start running until:

- (1) All moneys owing to the defendant under the terms of the contract have been paid to the attorney general and reporter; and
- (2) An escrow account has been established for the benefit of the defendant’s victims.

Tenn. Code Ann. § 29-13-404 (2002). It is not clear from the plain reading of the statute what contract is being referred to in this section. Like the short title, this reference suggests that the real target of the statute is profit from the crime, made by entering into a contract for profit. Hence, this confusion in the Tennessee statute suggests that it might in fact be much more narrow (and traditional) than the New York law.

3. The Targeted Population

A final significant difference between New York's law and that of other states is found in the description of the targeted population. Seventeen states only apply their antiprofit laws to people convicted of crimes.¹³⁵ Twenty-one states also target people accused of crimes.¹³⁶ Alaska is the only state where the "offender" must be someone who committed a crime in the state, without regard to conviction or indictment.¹³⁷ In most states, the antiprofit law applies to all crimes, however, eight states limit the law's applicability to crimes classified as felonies.¹³⁸ A smaller number of states further limit the class of people impacted by the law. Connecticut's law is limited to profits derived as a result of a crime of violence.¹³⁹ Under the Utah law, a court may prohibit a convicted person from selling his or her story as a condition of his or her sentence of probation.¹⁴⁰ Wisconsin's law only applies to money

135. ALA. CODE § 41-9-80 (2003); ARK. CODE ANN. § 16-90-308 (Michie 2003); COLO. REV. STAT. ANN. § 244.1-201(1) (West 2003); FLA. STAT. ANN. § 944.512 (West 2002); HAW. REV. STAT. ANN. § 351-82 (Michie 2003); IOWA CODE ANN. § 910.15 (West 2002); KY. REV. STAT. ANN. § 346.165 (Michie 2002); MICH. COMP. LAWS ANN. § 780.768(1) (West 2003); MINN. STAT. ANN. § 611A.68(1) (2003); NEB. REV. STAT. ANN. § 81-1836 (Michie 2002); N.D. CENT. CODE § 32-07.1-01(e)(1) (2003); OHIO REV. CODE ANN. § 2969.01 (West 2003); PA. STAT. ANN. tit. 42 § 8312(a) (West 2003); S.C. CODE ANN. § 17-25-510 (Law. Co-op 2002); UTAH CODE ANN. § 77-18-8.3 – 8.5 (2003); VA. CODE ANN. § 19.2-368.19 (Michie 2003); WYO. STAT. ANN. § 1-40-303(a) (Michie 2003).

136. ARIZONA REV. STAT. ANN § 13-4201(1) (West 2003); CONN. GEN. STAT. ANN. § 54-218(a) (West 2003); DEL. CODE ANN. Tit. 11 § 9101 (2003); GA. CODE ANN. §§ 17-14-30 to 32 (2002); IDAHO CODE § 19-5301 (Michie 2003); IND. CODE ANN. § 5-2-6.3-3 (2003); KAN. STAT. ANN. §§ 74-7319-7321 (2002); ME. REV. STAT. ANN. Tit. 14, § 752-E(2) (West 2003); MD. CODE ANN. CRIM. PROC. § 11-621(b)(1) (2002); MISS. CODE ANN. §§ 99-38-5 (2002); MONT. CODE ANN. § 53-9-104(d) (2002); N.J. STAT. ANN. § 52:4B-28 (West 2003); N.M. STAT. ANN. § 31-22-22 (Michie 2003); OKLA. STAT. ANN. tit. 22, § 17 (West 2002); OR. REV. STAT. § 147.275(1)(a) (2001); R.I. GEN. LAWS § 12-25.1 (2002); S.D. CODIFIED LAWS § 23A-28A-1 (Michie 2003); TENN. CODE ANN. §§ 29-13-402(3) (2003); WASH. REV. CODE ANN. § 7.68.200 (West 2003); W. VA. CODE § 14-2B-3(d) (2003); WIS. STAT. ANN. § 949.165(2) (West 2002).

137. ALASKA STAT. § 12.61.020(d),(e) (Michie 2002) (in the absence of a criminal conviction, the statute requires the victim to prove that the defendant committed the crime by a preponderance of the evidence).

138. ALA. CODE § 41-9-80 (2002); ARIZ. REV. STAT. ANN. § 13-4201(1) (West 2003); FLA. STAT. ANN. § 944.512 (West 2002); IND. CODE ANN. § 5-2-6.3-3 (Michie 2003); IOWA CODE ANN. § 910.15 (2002); MINN. STAT. ANN. § 611A.68(1) (West 2003); N.D. CENT. CODE § 32-07.1-01 (2003); R.I. GEN. LAWS § 12-25.1-2 (2002).

139. CONN. GEN. STAT. ANN. § 54-218 (West 2003).

140. UTAH CODE ANN. § 77-18-8.3 (2003).

received from the commission of “serious crimes,”¹⁴¹ as defined by Wisconsin’s Criminal Procedure Law.¹⁴² New York, however, is the only state that treats people under the watch of the criminal justice system differently from people outside the criminal justice system.¹⁴³

The funds-of-a-convicted-person provision of the New York law only targets people currently in the criminal justice system. It does this by incorporating this distinction into the statute’s definition of funds-of-a-convicted-person. Unlike the profits-from-a-crime provision of the New York law that applies to all convicted felons for the rest of their lives,¹⁴⁴ the funds-of-a-convicted-person provision of the law only applies to people convicted of certain felonies while they are in prison, on parole or probation, plus an additional three years after the end of their sentence.¹⁴⁵ New York has singled out people under the watch of the criminal justice system for this particularly harsh penalty: as long as you are in the criminal justice system, you face the threat of tort liability whenever you accrue assets.

While some may argue that targeting fewer people is better than targeting more, the danger of such narrow targeting is that politically unpopular groups have to bear the brunt of unfair legislation that would not be accepted if applied to a broader class of people. Here the legislature is applying a uniquely harsh civil penalty to a small, unpopular, and, for the most part, politically powerless minority that will have difficulty fighting back.

By expanding the statute of limitations to allow a new tort action when a convicted person amasses assets from any source, by expanding the victim’s recovery to all of the convicted felon’s assets, and by only applying these two new, harsh sanctions to people under the watch of the criminal justice system, New York’s law is out of step and much harsher than national norms in this area. New York’s law is both broader and much narrower than the laws of other states. It allows for recovery of a much broader category of assets, but it also targets a small group of people for particularly harsh treatment under the law. The inconsistencies between New

141. WIS. STAT. ANN. § 949.165(2) (West 2002).

142. *Id.* § 969.08(10)(b).

143. N.Y. EXEC. LAW § 632-a(1)(c) (McKinney 2002).

144. *Id.* § 632-a(1)(b).

145. *Id.* § 632-a(1)(c).

York and other states call into question the logic and usefulness of New York's current law. The irrationality of New York's law is suggested by the fact that while it used to be model legislation, no other state (save one perhaps) has followed the changes it implemented in 2001. Looking to other states is one way to convince legislatures, and perhaps courts, that New York's law is much less effective than it should be and much more draconian than it need be.

B. *Conflicts with New York Compensation Law*

As the last section illustrated, New York's law significantly diverges from the antiprofit laws found in other states in many important ways. This section will consider the various ways that the New York Son of Sam law, as amended, is inconsistent with other provisions of New York law intended to facilitate victim compensation, namely restitution/reparations law and tort law. Ultimately, these inconsistencies reveal the extent to which the 2001 amendment of New York's Son of Sam law is an illogical and inappropriate addition to the State's existing compensation law framework.

1. Restitution & Reparations

a. Overview of Restitution/Reparation Law

Like most states, New York has criminal restitution and reparation laws that allow criminal courts to order compensation of victims as part of a convicted person's sentence. As *New York Jurisprudence Second* explains, "[r]estitution and reparation are alternative conditions. Their distinction is qualitative: restitution consists of the fruits of the offense, and reparation consists of an amount the defendant can afford to pay. The choice of either is, by the statutory language, permissive, alternative, and discretionary, but must be reasonable."¹⁴⁶ Restitution "is a procedure whereby the court has discretion to place a defendant on probation, and at the same time prevent him from profiting by his criminal act."¹⁴⁷

146. 34 N.Y. JUR. 2D *Criminal Law* § 2776 (2002).

147. *Id.*

Under New York law, courts have a strong mandate to consider awarding restitution and reparations in criminal cases.¹⁴⁸ New York Penal Law Section 60.27 states, “[i]n addition to any of the dispositions authorized by this article, the court shall consider restitution or reparation to the victim of the crime and may require restitution or reparation as part of the sentence imposed upon a person convicted of an offense.”¹⁴⁹ The Section goes on to explain that in cases where the victim impact statement or the district attorney inform the court that the victim is seeking restitution or reparation, “the court shall require, unless the interests of justice dictate otherwise, in addition to any of the dispositions authorized by this article that the defendant make restitution of the fruits of the offense and reparation for the actual out-of-pocket loss. . . .”¹⁵⁰ The court is required to make a finding as to the out-of-pocket loss suffered by the victim and the exact dollar amount of any fruits of the crime.¹⁵¹ In making the finding, the court must consider the victim impact statement and if the record fails to provide sufficient evidence, or if the defendant requests one, the court must conduct a hearing on the issue. Generally, the court may not award reparations or restitution in excess of fifteen thousand dollars in the case of a felony, or ten thousand dollars in the case of any offense other than a felony.¹⁵² The statute requires the court to clearly state its reasons for declining to order reparations or restitution on the record.¹⁵³

A number of the current provisions found in Section 60.27 were implemented in 1992, in the same bundle of legislation that

148. Others have argued for that restitution law in New York, instead of the Son of Sam law, is a more appropriate way to compensate victims. See generally Michelle Liebeskind, *Back to Basics for Victims: Striking Son of Sam Laws in Favor of an Amended Restitution Scheme*, 1994 ANN. SURV. AM. L. 29 (1994).

149. N.Y. PENAL LAW § 60.27(1) (McKinney 2002).

150. *Id.*

151. *Id.* § 60.27(2).

152. *Id.* § 60.27(5)(a),(b). There are three exceptions allowing a court to exceed the amount limits provided for in this section: (i) “the court in its discretion may impose restitution or reparation in excess of the amounts specified . . . provided however that the amount in excess must be limited to the return of the victim’s property, including money, or the equivalent value thereof; and reimbursement for medical expenses actually incurred by the victim prior to sentencing as a result of the offense committed by the defendant;” (ii) the defendant consents; or (iii) as a condition of probation or conditional discharge as provided in paragraph (g) of subdivision two of section 65.10.

153. *Id.* § 60.27(1).

passed the Son of Sam law. The cap on restitution and reparation awards was raised from ten thousand to fifteen thousand dollars in felony cases and from five thousand to ten thousand dollars in cases other than felonies.¹⁵⁴ The requirement that sentencing courts determine the dollar amount of the fruits of the offense and the out-of-pocket loss of the victim, using the victim impact statement, was added. The definition of victim, for the purposes of receiving restitution and reparation, was expanded. The presumption that sentencing courts impose reparation or restitution, unless the interests of justice require otherwise, was added. Lastly, the bill added the requirement that the court place its reasons on the record if it chooses to deny restitution or reparation.¹⁵⁵ In addition to these amendments of the principle restitution and reparation law, section 60.27, other changes were made to other provisions of the Criminal Procedure Law, the Penal Law, and the Executive Law as they applied to restitution and reparations.¹⁵⁶

b. Conflicts Between Son of Sam Law & Restitution/ Reparation Law

As shown above, it is evident that New York restitution and reparation law overlaps with the purpose of the Son of Sam law to a great extent. As noted above, the two bodies of law were both amended in 1992, along with other laws impacting victim compensation, and were intended to work in tandem to ensure adequate victim compensation. Changes made to the body of laws impacting restitution and reparation were intended to “help ensure that more victims obtain order[s] of restitution and reparation that will be based on most, if not all, of the actual losses they suffered as a result of the crime.”¹⁵⁷ The amendments were used to cure inconsisten-

154. Memorandum of Senator Emmanuel Gold, Governor’s Bill Jacket to L. 1992, c. 618 at 6.

155. *Id.*

156. N.Y. CRIM. PROC. LAW § 390.30, *amended by* L. 1992, c. 618 §§ 3,4; N.Y. CRIM. PROC. LAW § 410.90, *amended by* L. 1992, c. 618 § 5; N.Y. CRIM. PROC. LAW § 420.10, *amended by* L. 1992, c. 618 §§ 6, 7, 8; N.Y. CRIM. PROC. LAW § 420.30, *amended by* L. 1992, c. 618 § 9; N.Y. PENAL LAW § 65.05, *amended by* L. 1992, c. 618 § 14; N.Y. PENAL LAW § 65.10, *amended by* L. 1992, c. 618 § 15; N.Y. EXEC. LAW § 641, *amended by* L. 1992, c. 618 § 11.

157. Memorandum from Attorney General Robert Abrams, to Mario Cuomo, Governor (July 16, 1992), Governor’s Bill Jacket, L. 1992, c. 618 at 24.

cies in the law, including the fact that there was no ceiling on restitution orders as a condition of probation while ceilings were placed on restitution from defendants sent to prison.¹⁵⁸ The legislative history also reports that New York is the only state that imposes a monetary ceiling on restitution orders: "New York State stands alone in limiting judicial discretion by setting a specific dollar cap on such orders, regardless of a victim's total damages and regardless of a defendant's ability to pay."¹⁵⁹

The purpose of the 1992 amendments was to increase victims' ability to recover damages. Yet, the legislative history in general, and specifically with respect to restitution and reparation, evidences a desire to balance the interests of the victim and the convicted person. Under New York restitution law, the court is required to consider economic status of the defendant in coming to its finding.¹⁶⁰ As the 1992 legislative history explains, consideration of both the victim's loss and the defendant's finances "serve to prevent the victim from enjoying an unjust enrichment, and the defendant from suffering under an unduly harsh and unreasonable restitution order."¹⁶¹ This balancing of interests is also achieved by the provision found in Section 60.27 of the Penal Law providing that restitution and reparation shall not be ordered where they are not in the interests of justice.¹⁶² Regard for the interests of justice is also manifested in the State's ceiling on restitution and reparation.¹⁶³

The 2001 amendment to the Son of Sam law serves to undermine any reasonable consideration of the convicted person's condition or ability to pay achieved by restitution/reparation law. The funds-of-a-convicted-person provision allows recovery, years after the incident, without consideration of the impact of payment on a convicted person's condition. By allowing recovery of all assets once the ten thousand dollar threshold is reached, the law allows

158. *Id.* at 25.

159. *Id.*

160. *Id.*

161. *Id.*

162. "In the event, or when the victim impact statement reports that the victim seeks restitution or reparation, the court shall require, unless the interests of justice dictate otherwise . . . that the defendant make restitution of the fruits of the offense and reparation for the actual out-of-pocket loss . . ." N.Y. PENAL LAW § 60.27(1) (McKinney 2002).

163. *See Abrams Memorandum* at 25.

recovery of wages, particularly undermining any interest in the convicted person's well-being or self-sufficiency. The law also creates a major disincentive to pursue vindication of rights in court. The legislature acknowledged this problem and attempted to address it¹⁶⁴ by allowing a convicted person to keep ten percent of any money judgment.¹⁶⁵ However, it is hard to imagine that this meager percentage is enough to provide meaningful incentive for prisoners to bring suit for violations of their rights, given the time, resources and risks involved in litigation.

While the court is forced to consider the interests of the convicted person when it awards restitution and reparation, there is no similar burden on courts acting under the Son of Sam law, even though the laws address the same circumstances: the ability of victims of crime to get compensation for their injuries. While drafted in the same bundle of bills to complement one another, this inconsistency now places the Son of Sam law in direct conflict with the restitution and reparation law. In many cases, the consequence of this conflict is that the Son of Sam law will eviscerate the just impact achieved under restitution and reparation law.

2. Tort Law

Traditionally, tort law has been the vehicle used by victims to sue for compensation of losses caused by a tortfeasor's conduct. Today, New York tort law exists as a supplement to any restitution and/or reparation received by a plaintiff. The Penal Law section describing New York's restitution and reparation rules states, "[a]ny payment made as restitution or reparation pursuant to this section shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment."¹⁶⁶ The Son of Sam law re-opens the traditional tort statute of limitations, and by doing so directly conflicts with New York's tort law.

164. Memorandum from George Pataki Governor (June 25, 2002), Governor's Bill Jacket, L. 2001, c. 62 at 7. This disincentive to litigate will be discussed further in Section IV.C.

165. N.Y. EXEC. LAW § 632-a(3) (McKinney 2002).

166. N.Y. PENAL LAW § 60.27(6) (McKinney 2002).

a. Statutes of Limitations: Traditional Tort v. Son of Sam Law

The statute of limitations in New York State for torts is short. A plaintiff has one year to bring suit for assault, battery or false imprisonment¹⁶⁷ and two years for wrongful death.¹⁶⁸ However, the legislature has recognized the particular difficulties faced by crime victims who also suffer monetary injury. First of all, the harm in such cases is often more severe than the harm caused by non-criminal tortious conduct. In addition, where a tortfeasor is sentenced to prison, recovering money may be made more difficult because of his or her lack of income. In reaction to these additional barriers to recovery, the legislature has passed a number of provisions to aid crime victims in tort recovery.

In 1992, along with the passage of the renewed Son of Sam law, New York established a special tort liability scheme for victims of crime. New York Civil Procedure Laws and Rules provides for a statute of limitations of seven years from the date of the crime for the victim to bring a civil action.¹⁶⁹ In 2001, the legislature amended this law to provide a ten-year statute of limitations for civil actions arising from certain enumerated violent crimes.¹⁷⁰ In addition, the Estates, Powers and Trust Law provides that where a criminal prosecution has been brought against a person who committed the tort of wrongful death, the victim's representative has at least one year from the termination of the criminal case to bring suit in tort.¹⁷¹

In 1992 and again in 2001, New York recognized the special need of victims for an extended period to bring tort actions against tortfeasors. On two separate occasions, the legislature provided for an extended statute of limitations, recognizing the particular difficulties facing crime victims who seek civil compensation for their injuries. The purposes of these laws was clearly to facilitate compensation, distinct from the purpose stated for the Son of Sam law, which was to prohibit criminals from profiting from their crimes.¹⁷²

167. N.Y. C.P.L.R. § 215 (McKinney 2002).

168. N.Y. EST. POWERS & TRUSTS LAW § 5-4.1(1) (McKinney 2003).

169. N.Y. C.P.L.R. § 213-b(1) (McKinney 2002).

170. *Id.* § 213-b(2), amended by L. 2001, c. 62 § 16, eff. June 25, 2001.

171. N.Y. EST. POWERS & TRUSTS LAW § 5-4.1(2) (McKinney 2003).

172. See discussion *supra* note 36.

Yet, the tort laws still impose a statute of limitations, recognizing myriad reasons why the State encourages people to bring suits against tortfeasors – even those who also face criminal liability – in a reasonably timely manner.¹⁷³

In direct conflict with the statute of limitations provisions in the tort laws, the Son of Sam law operates to expand the statute of limitations for commencement of a tort action against a person convicted of a felony. Under the profits-from-a-crime provision, any time the convicted person receives profits from a crime, the tort statute of limitations is reopened for a period of three years.¹⁷⁴ Similarly, the funds-of-a-convicted-person provision provides that any time a person convicted of an enumerated felony amasses assets totaling ten thousand dollars or more while under the watch of the criminal justice system,¹⁷⁵ the tort statute of limitations is reopened.¹⁷⁶

While both provisions of the law reopen the statute of limitations, in fact, the profits-from-a-crime provision is the more expansive of the two because it applies to all people convicted of felonies for their entire lives. Anytime someone receives a profit from a crime, the statute of limitations is reopened.¹⁷⁷ However, the funds-of-a-convicted-person provision raises far more practical problems because, i) people are less likely to come into profits from a crime years after the crime is committed, and ii) people have control over when they receive profits from a crime. The funds-of-a-convicted-person provision links liability to the receipt of money from almost any source, meaning there is little one can do to avoid liability even years after the crime. Furthermore, the liability trigger under the profits-from-a-crime provision is linked to the underlying crime. Under the funds-of-a-convicted-person provision, the liability is reopened for reasons having nothing to do with the crime. Hence, in addition to the practical differences, there is a philosophical difference between the two provisions. Because the funds-of-a-convicted-person provision is more likely to allow recovery significantly after the traditional tort period, the following sub-

173. Rationales for statutes of limitations will be discussed in the next subsection.

174. N.Y. EXEC. LAW § 632-a(3) (McKinney 2002).

175. *Id.* § 632-a(1)(c) (defining “funds-of-a-convicted-person”).

176. *Id.* § 632-a(3).

177. *Id.*

section addresses the particular problems of expanding the statute of limitations based on the funds-of-a-convicted person provision, though many of the critiques apply to both provisions of the law.

b. Problems with Expanding the Statute of Limitations

In order to fully understand the impact of the Son of Sam law, one must consider the rationales for the statute of limitations in tort and whether it makes sense to abandon them when a tort was committed during the course of a particular felony. While the statute of limitations for crime-based torts has been expanded in recent years, there are still clear limits within which plaintiffs must bring suit. The Son of Sam law appears to eviscerate these limits. It is possible to defend the Son of Sam law's extension of the statute of limitations by arguing that the law does not provide any tools not already at the disposal of the victim. Assuming that the victim brought a civil action in the allotted time frame, all of the convicted person's assets would be available for satisfaction of that judgment for up to twenty years from the date of its issuance.¹⁷⁸ So in some instances, the Son of Sam law does not allow for recovery different from what would have been allowed if the plaintiff had brought suit during the initial tort period.¹⁷⁹ Yet, it is critical to note that even the collection of existing judgments is limited to a twenty-year period because of the State's interest in finality.¹⁸⁰ This expansion, or abandonment, of the statute of limitations poses practical problems with respect to the incentives it provides, as well as problems related to undermining the fairness and timeliness rationales for time limits in litigation, all of which will be discussed below.

178. "A money judgment is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recovering it was first entitled to enforce it. . . ." N.Y. CPLR § 211 (McKinney 2002).

179. This is the case where the Son of Sam law allows recovery after the tort statute of limitations has run but before twenty years have passed.

180. *See, e.g.*, In re Application of New York University, 63 N.Y.S.2d 556, 558 (3d Dept. 1946) (explaining that limit on enforceability of judgments was designed "like any Statute of Limitations . . . to bring about a given end to stale claims, and procedural remedies respecting same, as between the original parties or their privies.")

i. Practical Problems

Going far beyond the limits of the tort laws and the civil judgment law, the funds-of-a-convicted-person provision creates a never-ending liability period. As long as a person is under the watch of the criminal justice system, he or she is never safe from liability. For people who have lifetime probation, this law will make their assets vulnerable until the civil judgment is satisfied, which could take the rest of their lives.¹⁸¹ Unlike the average tortfeasor, people convicted of crimes who fall under this provision are not afforded the protection of a limited number of years within which a plaintiff must bring suit or a twenty-year expiration of a civil judgment.

Lifetime probation is available for a wide variety of drug related crimes.¹⁸² Therefore, there are likely to be many people in this category. While it may be that many of these drug crimes are victimless, there is nothing in the statute that suggests that the victim must be associated with the crime for which the convicted person is on probation. The statute states, "any crime victim shall have the right to bring a civil action in a court of competent jurisdiction to recover money damages from a person convicted of a crime of which the crime victim is a victim."¹⁸³ For instance, assume a person commits an assault, goes to prison and then is released. Years pass and that person commits a drug offense for which he receives a sentence of lifetime probation. Under the funds-of-a-convicted-person provision of the Son of Sam law, the assault victim could sue him in tort at any time for the rest of his life – even though the crime for which he is on probation is not the crime that produced the victim.

181. In New York, someone may be sentenced to lifetime probation for commission of a Class A-II or Class B felony involving controlled substances. N.Y. PENAL LAW § 70.06(5) (McKinney 2003). Class A-II felonies involving a controlled substance include, criminal sale of a controlled substance in the second degree (N.Y. PENAL LAW § 220.41) (McKinney 2003); criminal possession of a controlled substance in the second degree (N.Y. PENAL LAW § 220.18) (McKinney 2003). Class B felonies involving a controlled substance include, criminal possession of a controlled substance in the third degree (N.Y. PENAL LAW § 220.16) (McKinney 2003); criminal sale of a controlled substance in or near school grounds (N.Y. PENAL LAW § 220.44) (McKinney 2003); criminal sale of a controlled substance in the third degree (N.Y. PENAL LAW § 220.39) (McKinney 2003).

182. See listed offenses *infra* note 190.

183. N.Y. EXEC. LAW § 632-a(3) (McKinney 2002).

In addition to people on lifetime probation, there are many people on probation for varying amounts of time who will also be impacted unfairly by this law. The effect of the never-ending threat of liability is quite severe. It is possible that this extreme penalty will have the consequence of discouraging people from productively reengaging in society. By providing such a major disincentive to the collection of assets,¹⁸⁴ rehabilitation of people involved in the criminal justice system might be severely hampered. If the law allowed recovery of assets for a period of time that eventually ended, like a regular tort statute, the detrimental deterrent effects would not be as severe. Similarly, the profits-from-a-crime provision does not have the same deterrent implications because the receipt of profits of a crime is much easier for a convicted person to control and predict. The problem posed by the funds-of-a-convicted-person provision is exacerbated by the fact that this extremely broad liability is so unpredictable. There is little one can do to protect him or herself from the application of this provision, seeing that such a broad range of assets can trigger the law.

ii. Problems of Delay

In addition to the practical problems raised by the law, the disposal of the traditional notion of the statute of limitations in this context poses philosophical problems as well. Statutes of limitations foster the values of finality and ripeness in our legal system. As the Supreme Court has explained, statutes of limitations

represent a public policy about the privilege to litigate and their underlying rationale is 'to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory,' Such statutes 'are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected,' they 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has

184. Earned income is excluded from the calculation of the ten thousand dollars necessary to trigger the law. However, once the law is triggered, all assets are available to the plaintiff in a civil action. The problems raised by this particular provision of the law will be discussed in more detail in the next section.

been lost, memories have faded, and witnesses have disappeared,' and they 'are primarily designed to assure fairness to defendants' (C)ourts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.'¹⁸⁵

Obviously, the tort claims allowed by the Son of Sam law differ from the average tort claim in some meaningful ways. Under the Son of Sam law, damages are litigated, but liability is established based on the underlying criminal conviction. This fact makes some of the strong arguments made by the Court about the harm caused by delay of litigation weaker in this context. However, even under the Son of Sam law, the harms of delay are still relevant because of the difficulty they pose for litigation of damages. As the law stands, a convicted felon might be forced to litigate damages years after the injury at issue occurred, implicating all of the unreliability problems resulting from delay discussed above.

iii. Problems of Fairness

In addition to the reliability rationale, the New York State legislature itself recognizes there are other bases for supporting statutes of limitations because, in cases where liability has been litigated, they have set a limit on the collection of judgments.¹⁸⁶ When an action is brought to collect a judgment arising from a case that has already been litigated, it is hard to see how the lapse of time causes any practical problems inhibiting a plaintiff's ability to recover. Yet, the State has chosen to impose a statute of limitations. This suggests that New York recognizes justifications, other than the problems posed by delay, for applying a statute of limitations.

In addition to avoiding the logistical problems of litigating stale claims, statutes of limitations also function as a protection for defendants. As New York Jurisprudence states, "fairness to the defendant is the primary purpose, based on the recognition that a defendant should be secure in his or her reasonable expectation that the slate has been wiped clean of ancient obligations. . ."¹⁸⁷ These values are undermined by the Son of Sam law's never-ending

185. U.S. v. Marion, 404 U.S. 307, 327 n.14 (1971) (citations omitted).

186. N.Y. C.P.L.R. § 211 (McKinney 2002).

187. 75 N.Y. JUR. 2D *Limitations and Laches* §2 (2002).

threat of liability for certain felons under the watch of the criminal justice system. Under the funds-of-a-convicted-person provision, the convicted person is forced to live life with the fear of potentially devastating monetary liability hanging over his or her head for as long as he or she is under the watch of the criminal justice system.

The threat of liability posed by the funds-of-a-convicted-person provision is fundamentally unfair. The money that triggers the law is unrelated to the crime. The extent of the victim's damages has no bearing on whether or not the law is applicable. This means that someone with minimal damages from a minor assault may be allowed to bring suit fifteen years after the tort because the tortfeasor happens to have been successfully prosecuted, whereas a victim with significant damages from a car crash is not able to collect three years after the tort because the tortfeasor was not prosecuted. The law allows some victims to recover for years longer than others and subjects some tortfeasors to liability for years longer than others, with no consideration of the nature of tortious act, damages, or situations of the involved parties. By arbitrarily expanding the statute of limitations in this way, New York has undermined the interest in fairness achieved by the reasonable repose normally achieved by the application of a statute of limitations.

While the legislature is empowered to replace the value of finality with others that it deems more pressing when crime victims seek compensation, given the internal inconsistencies of New York's laws, it is not at all clear that it has consciously chosen to do so. In fact, the value of finality is still strongly represented in the clear limits found in other laws that directly address the ability of crime victim's to win compensation.¹⁸⁸ Not only is the Son of Sam law in direct conflict with other New York laws intended to address victim compensation, it also abandons the important values achieved by the existence of a statute of limitations, including fairness to defendants, timeliness of litigation and encouraging defendants to participate meaningfully in society without fear of never-ending liability. The incongruity between the Son of Sam law and the rest of New York's victim compensation scheme reveals the weaknesses of the system and provides strong ammunition for an attack on the current law.

188. See discussion *infra* Parts B.1.b., B.2.a.

C. *Problems Caused by Expansion of Recovery Under 2001 Law*

In addition to the conflicts with tort and restitution law discussed above, another problematic aspect of the Son of Sam law is the expansion of recovery allowed under the 2001 amendment. Distinct from the question of what money triggers the Son of Sam law, here I will consider what money is available to a victim suing under the Son of Sam law. Under the 2001 amendment, once a victim brings suit pursuant to the Son of Sam law, he or she may recover from all of the convicted person's assets. This is a marked departure from the earlier version of the law that limited recovery to the assets targeted by the statute, the profits of the crime. This expanded recovery poses a number of legal and policy problems that have been referred to above and will be more fully addressed in this section.

1. Legal Problem Posed by Expanded Recovery

Prior to the 2001 amendment, the Son of Sam law only allowed recovery from money constituting profits of the crime.¹⁸⁹ The limited recovery allowed under the Son of Sam law was particularly significant when the traditional tort statute of limitations had run: when a plaintiff brought suit after the tort statute of limitations had run, the recovery was limited to the targeted funds rather than all the convicted person's assets, which would have been available had the case been brought under the tort law. After the 2001 amendment, all of a convicted person's assets are available to a victim bringing suit under either provision of the law.¹⁹⁰

The Son of Sam law is still only triggered by a certain set of money. The renewed three-year statute of limitations is triggered when (i) a convicted person under the watch of the criminal justice system amasses assets totaling ten thousand dollars or more from any source other than earned income or child support;¹⁹¹ or (ii) when a convicted person receives profits from a crime.¹⁹² However, the legislative history makes plain that a cause of action brought during this renewed period can be satisfied from any assets held by

189. N.Y. EXEC. LAW § 632-a(3) (McKinney 2002).

190. *Id.* § 632-a(3).

191. *Id.* § 632-a(2)(a)(ii).

192. *Id.* § 632-a(2)(a)(i).

the convicted person.¹⁹³ Under the funds-of-a-convicted-person provision, earned income and child support are not used to calculate whether the ten thousand dollar threshold has been reached, however, they and all other assets of the convicted person are available to satisfy any judgment resulting from a Son of Sam law action. Similarly, only profits of a crime can trigger the profits-from-a-crime provision, but once the provision applies, all assets of the convicted person are available to satisfy a judgment won by the victim.

When the Son of Sam law was initially passed in 1977, one of the first cases addressing the constitutionality of the new law held that it was constitutional because it only authorized in rem proceedings: proceedings against a particular pot of money that the legislature determined the convicted person did not have a legitimate right to possess. *Barrett v. Wojtowicz*¹⁹⁴ was the first case to consider the legal implications of the newly passed Son of Sam law in 1979. In that case, the plaintiff brought suit for assault, false imprisonment and invasion of privacy based on harm suffered during a bank robbery five years earlier.¹⁹⁵ The bank robbery at issue was the basis for the movie *Dog Day Afternoon*.¹⁹⁶ *Wojtowicz*, the defendant in the tort action, pled guilty to the robbery.¹⁹⁷ Having sold his rights to the story for use in the film, *Wojtowicz* received a payment of \$43,000 in 1977.¹⁹⁸ Pursuant to the newly enacted Son of Sam law, this money was placed in an escrow account. The plaintiff instituted a suit pursuant to the Son of Sam law one month after this payment was made, which was five years and five months after the commission of the crime.¹⁹⁹

The court held that the plaintiff's action was not barred by the traditional one-year limitations period for tort actions because of the Son of Sam law, which provided victims five years from the date of the establishment of the escrow fund to bring a tort action.²⁰⁰ Next, the court considered the novel question of whether the stat-

193. See *supra* text accompanying notes 14-16.

194. 414 N.Y.S.2d 350 (2d Dept. 1979).

195. *Id.* at 351.

196. *Id.* at 352.

197. *Id.*

198. *Id.* at 353.

199. *Id.*

200. The statute was amended in 1978 to clear up an ambiguity in the original version concerning when the five-year statute of limitations began to run. *Id.* at 355.

ute's extended limitations period was constitutional. The court, in its discussion of this question, quoted commentary from New York Practice stating, "[t]he state constitution's due process clause has been construed to require all revivor statutes to be demonstrably reasonable."²⁰¹ The court also cited New York case law holding that "the Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated."²⁰² Hence, in reaching its decision regarding the constitutionality of the Son of Sam law, the court acknowledged limits on the ability of the legislature to revive otherwise extinguished causes of action. The court ultimately held that, despite these limitations, the Legislature's actions here were constitutional:

[W]e hold that it was within the Legislature's prerogative to expand the limitations period for the commencement of a *civil* assault or false imprisonment suit from one year after the tortious events to five years after the establishment of an escrow account relating to a *crime* in which plaintiff was a victim, even though those causes of action had already been barred, if the recovery is limited solely to satisfactions out of the escrow account. Indeed it was the rectification of what would otherwise be a terrible wrong.²⁰³

The court made clear that it read the statute as creating a new cause of action, distinct from a traditional tort cause of action, with recovery limited to the listed sources of funds. However, its holding with respect to the limited recovery seems to be more than a question of statutory interpretation. The court seems to have held that broader recovery is not permissible, regardless of what the statute says:

There is no question here that the one-year limitations of CPLR 215 barred the traditional in personam actions for assault and false imprisonment. Accordingly, any judgment that may be recovered by plaintiff should be

201. *Id.* at 356.

202. *Id.* at 356 (quoting *Gallewski v. Hentz & Co.*, 301 N.Y. 164, 174 (1950)).

203. *Id.* at 356.

deemed one in rem and be limited by the court to a recovery of the pro rata amount which is found to be payable to him from the escrow account held by the Crime Victims Compensation Board for the benefit of all the victims of the defendant's crime and such judgment should not be deemed a judgment in personam against any other assets of the defendant.²⁰⁴

Unfortunately, the court does not provide any further explanation of this finding. Even so, it raises an important question about the permissible scope of the Son of Sam law's reach.

In *Wotjowicz*, the court held that the 1977 Son of Sam law created a new cause of action that was closely linked to the preexisting tort causes of action.²⁰⁵ Along with creating a new cause of action, the law also created a new statute of limitations and limited recovery to the funds in the escrow account, thereby distinguishing a Son of Sam law claim from the broad recovery permissible under a traditional tort claim. However, the court intimated that the limited recovery might be required even if the statute did not require it. The court implied that if the Son of Sam law allowed recovery identical to that available under the tort law, it would be reviving the lapsed tort cause of action, which might raise due process problems. The court discussed the limits placed on revivor statutes by the New York Constitution, "the state constitution's due process clause has been construed to require all revivor statutes to be demonstrably reasonable."²⁰⁶ The court then concluded that the legislature could expand the limitations period here because to not do so

204. *Id.* at 357. *Wotjowicz* is repeatedly cited for the proposition that the legislature has broad authority to amend statutes of limitations as long as the lapse in time has not vested a party with title to real or personal property. There is extensive case law on this point, which relates directly to the question of when a statute of limitations can be amended and applied retroactively. See, e.g., *Campbell v. Holt*, 115 U.S. 620 (1885); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). However, I do not believe that the holding of *Wotjowicz* can be so easily categorized. After discussing this rule about amended statutes of limitations, the court does go on to make the statement this footnote is citing. This suggests that there is some limit on the ability of the legislature to revive a lapsed cause of action. While the limited discussion of *Wotjowicz* makes it difficult to conclude this definitively, I believe that the ambiguity of this language leaves open a possible means of attacking the 2001 amendment's expansion of recovery under the Son of Sam law.

205. *Wotjowicz*, 414 N.Y.S.2d at 357.

206. *Id.* at 356.

would be a terrible wrong. This analysis is confusing because it suggests both that the law creates a wholly new cause of action, but it also discusses the question of revival statutes and justifies the law by reference to the standard for legitimate expansion of existing statutes of limitations. Given the brevity of the opinion, little can be found in the document to help resolve this confusion. However, even if the rationale for the decision is confused, the result is clear. The court explicitly held the law's limited *in rem* recovery constitutional because to bar recovery in this circumstance would be wrong.²⁰⁷ The court also suggested that there is a state constitutional standard that might limit the legislature's ability to extend the statute of limitations in other situations.²⁰⁸

Given the court's language, and the lack of any subsequent contradictory case law, *Wotjowicz* brings into question the 2001 amendment's expansion of recovery to all assets of the convicted person. It might provide an alternative State constitutional ground for challenge to the amended law that has not yet been raised. The expansive recovery allowed under the amended law, which lacks the strong moral claim of the limited profits of the crime recovery under the 1992 law, might very well exceed the constitutional bounds discussed in *Wotjowicz*. While there is well-established case law holding that legislatures have broad discretion to amend and retroactively apply statutes of limitations under the federal constitution,²⁰⁹ it appears from the language of *Wotjowicz* that the State

207. *Id.*

208. *Id.* at 356-57.

209. It is well established that defendants do not have a right to the protection of a statute of limitations. Rather, the statute of limitations is an arbitrary procedural bar that has no impact on the underlying claim. The legislature, therefore, has broad discretion to alter and retroactively impose statutes of limitations without creating any due process problems for a defendant. *See, e.g., Campbell*, 115 U.S. 620 (1885). Courts have distinguished between statutes of limitations and statutes of repose, holding that in the case of the latter, the running of the statute does extinguish the right at stake. Hence the retroactive amendment of a statute of repose does raise due process problems. *Gulf Ship Island R.R.*, 268 U.S. 633 (1925). Because of the confusion caused by the repose/limitations distinction, there is an emerging circuit split in this area. The rejection of the *Campbell/Danzer* analysis is limited so far to the D.C. Circuit and the Fourth Circuit, both of which have replaced it with a rational basis test. *E.g., Wesley Theological Seminary of the United Methodist Church v. United States Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989); *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071 (4th Cir. 1995). Second Circuit courts remains faithful to the original *Campbell/Danzer* rules. *See*,

Constitution might provide additional due process protections allowing challenges not available under the federal Constitution.

2. Policy Problems Posed by Expanded Recovery

In addition to the legal problems posed by the expansion of recovery under the 2001 amendment, the expansion is inconsistent with the stated rationale for the Son of Sam law and raises significant policy problems.

Until 2001, the Son of Sam law was intended to prevent convicted felons from profiting from their crimes. Tort law and restitution law were concerned with victim compensation. In fact, tort and restitution laws were amended in 1992 to address the particular problem of crime victims' tort claims.²¹⁰ This issue was addressed in the tort and restitution laws because the purpose of the Son of Sam law was distinct – it was an antiprofit law.²¹¹

Once again, in 2001 the legislature amended the tort law, the restitution law, and the Son of Sam law. But rather than respecting the long-established and distinct purposes of these laws, the legislature radically altered the operation of the Son of Sam law. As of 2001, the Son of Sam law is a harshly punitive tort law – completely divorced from its anti-profit mooring. The legislative history documents that the amendment to the Son of Sam law was passed to target a particular source of money – civil judgments won by prisoners,²¹² a set of funds unrelated to the commission of the crime. In addition to civil judgments, all assets of the convicted person are now available under the Son of Sam law, representing not only a massive expansion but also a distinct break from the traditional purposes of the law.

There is little doubt that the 2001 amendment of New York's Son of Sam law was motivated by public outrage at the case of David McClary. The record contains many expressions of this sentiment: "if a criminal gains the ability to pay while he or she is a ward of the local, State or federal criminal justice system (or acquires a finan-

e.g., Barr v. McGraw-Hill, 1992 WL 196754, at *7 (S.D.N.Y. 1992); Adler v. Berg Harmon Assocs., 790 F. Supp. 1235 (S.D.N.Y. 1992).

210. See discussion *supra* p. 435.

211. See discussion *supra* p. 436.

212. Act of June 25, 2001, c. 62, 2001 N.Y. LAWS 530 (Consol.), Gm-4 (amending Son of Sam Law).

cial or proprietary interest while a ward of the system), then the victim who was injured by the criminal should no longer shoulder expenses that directly relate to the crime.”²¹³ The legislative history is filled with strong rhetoric like this supporting the sweeping expansion of the law. In many instances, the sentiment reveals the illogical thinking behind the law. In a press release supporting the new Son of Sam law, Senate Majority Leader Joseph Bruno commented,

[t]he tragedy and trauma of falling victim to a crime is only compounded by the knowledge that a criminal can profit from his deeds while the victim continues to suffer. The Governor’s common sense proposal ensures that no victim will suffer the further indignity of seeing his or her attacker gain an undeserved windfall.²¹⁴

He refers to the State’s interest in not allowing a criminal to “profit from his deeds.” Yet this interest was achieved by the 1992 version of the law. Expanding recovery to all assets of the convicted person does nothing to further this anti-profit interest. Senator Bruno also refers to the State’s interest in not allowing a criminal to gain an “undeserved windfall.” The civil judgment won by David McClary in compensation for the harms he suffered while in prison – the asset that incited the expansion of the law – cannot legitimately be classified as an undeserved windfall even if one supports the idea of his victim gaining access to those funds. Further evidencing the reactionary sentiment supporting the amendment, the bill’s primary sponsor, Senator Guy Velella (R-Bronx), stated, “[i]t is foolish to treat prisoners like they are on vacation. We should not allow inmates to make money on their handicrafts.”²¹⁵ These comments suggest the legislature’s rejection of the anti-profit rationale was fueled by a rash, emotional response to a highly political circumstance. This apparent lack of forethought explains why the law poses so many practical problems.

213. Nozzolio Memorandum, Governor’s Bill Jacket, L. 2001, c. 62 at 19.

214. Press Release “Governor George Pataki, Governor Pataki Renews Call to Strengthen Son of Sam Law” (March 26, 2001), (on file with the *New York Law School Law Review*).

215. Joe Mahoney, *Measure Forbids Inmates to Pocket Art Sale Profits*, DAILY NEWS (New York), June 20, 2001, at 4.

While the legislature arguably has the discretion to target people under the watch of the criminal justice system this way, it does so at the expense of New York's own carefully calibrated system of civil compensation laws. As discussed earlier, allowing recovery outside the traditional tort limitations period makes sense only if recovery is limited. To allow broad in personam recovery undermines the purposes of the statutes of limitations imposed by various other provisions of New York law. Most significantly, the law directly undermines the purpose and effect of the existing tort law that imposes a special statute of limitations for victims of crime. This law cannot be justified by the simple explanation that the legislature has decided that, under these circumstances, no statute of limitations should exist. The legislature has passed two laws that seem to address the exact same circumstance, yet they directly conflict. In addition to this direct conflict, the expanded Son of Sam law conflicts with the intentions and spirit of restitution law and tort law in other ways discussed above.²¹⁶ These conflicts support my contention that the law is a poorly considered political reaction that fails to consider the competing significant interests at stake.

Furthermore, the funds-of-a-convicted-person provision creates never-ending liability for people on lifetime probation and irrationally targets people involved in the criminal justice system. As discussed above, there is a large population of people in New York that face the threat of lifetime probation.²¹⁷ By threatening the assets accumulated by people on probation and parole, the State is directly undermining the rehabilitative purposes of probation, parole and the criminal justice system more generally. In addition to posing a continual threat to the accrual of assets, the law targets this population alone for this harsh sanction. The law chooses not to burden non-criminal tortfeasors, or criminal tortfeasors who are not involved in the criminal justice system, in this way. While in Section III.C.3 I discussed the reasons why this unequal treatment is not likely to be found unconstitutional, it is highly suspect. The strength of the equal protection challenge here is key to revealing the reactionary and illogical nature of this law.

216. See discussion *supra* Part IV.B.1-2.

217. See discussion *supra* Part IV.B.2.b.i.

Lastly, the law provides a host of disturbing incentives for prisons and prisoners alike. The legislative history clearly explains that the amendment to the law was passed in order to allow victims access to civil rights awards won by prisoners while in prison. This creates a major disincentive for the vindication of prisoner's rights. The diminished threat of legal action, combined with the reality that any award will go to the prisoner's victim, in turn minimizes the disincentives for prison authorities to not violate the rights of inmates. As one newspaper article reported, "Critics say the measures make prisoners little more than slaves and do nothing to rehabilitate them."²¹⁸ The threat that the law poses to the existing protections of prisoners' rights is worrisome – not only from the perspective of prisoner rights advocates, but for anyone who believes that the criminal justice system should do more than simply punish. This law undermines a number of protections currently found in other New York laws, yet does so in ad hoc and inconsistent ways that render it arbitrary and excessively punitive. It is not at all clear why this particular set of convicted people should be singled out for this extreme penalty when many other similarly situated people (non-criminal tortfeasors, criminal tortfeasors no longer in the system) are not subject to it.

V. CONCLUSION

Perhaps the 1992 version of the Son of Sam law still raised First Amendment questions. Perhaps it failed to provide for the compensation of every victim in every instance. However, the 1992 version of the Son of Sam law was a thoughtful solution to a difficult problem that requires the unemotional consideration of both the victim's and the convicted person's interests. The 2001 Amendment to the Son of Sam law allowed emotional rhetoric to disturb the careful balance achieved by the legislature. Not only is the law internally inconsistent, as the legislative history reveals, it is inconsistent with the intentions of the rest of New York's compensation law. It is also harsher than the laws found in other states. While constitutional challenges to the law might face difficulty, the strength of the legal arguments, combined with evidence of how

218. Michael Gormley, *Son of Sam Law Expansion OK'd*, TIMES UNION (Albany), June 26, 2001, at B2.

out of step the law is with similar laws in other states and with New York's own laws, might provide fuel for successful political organization and lobbying efforts. The considerable policy and legal problems raised by this law may be highlighted and used to encourage the legislature to take another look at this complex issue.