

By Stephen F. Rohde

The Demise of California's Son of Sam Law

California followed the lead of the U.S. Supreme Court in finding the law overinclusive

In November 1963, 23-year-old Barry Keenan, the youngest member of the Los Angeles Stock Exchange, had run out of money. Addicted to Percodan, he devised a "business plan" to kidnap Frank Sinatra Jr. From Room 417 at a motel adjoining Harrah's Casino in Lake Tahoe, Keenan and two others abducted the 19-year-old singer and held him hostage until his father, the legendary crooner, paid a \$240,000 ransom. Keenan and his confederates were quickly arrested, tried, and convicted. During their trial, the kidnappers concocted the story that Sinatra Jr. had conspired in his own kidnapping as a publicity stunt. But the jury saw through the tale and Keenan spent four and one-half years in jail.

Keenan returned to obscurity, but for the next 30 years hoped he could some day set the record straight. Opportunity finally arrived in January 1998 when Peter Gilstrap, a reporter for *New Times Los Angeles*, interviewed Keenan about the kidnapping. The ensuing article, "Snatching Sinatra," attracted the attention of Columbia Pictures, which bought

the motion picture rights for \$1.5 million to be divided among *New Times*, Gilstrap, Keenan, and the other kidnappers.

Alleging that he was again being victimized, in July 1998, Sinatra Jr. sued everyone involved in the Columbia deal under California's Son of Sam law. His case eventually progressed to the California Supreme Court, which considered it against the background of a key 1991 U.S. Supreme Court precedent striking down the first Son of Sam law in the country, a law adopted in the throes of one of the most notorious crime sprees in American history.

In the late 1970s, New York was terrorized by serial killer David Berkowitz, popularly known as the Son of Sam. By the time he was apprehended, publicity about his case had enhanced the value of the rights to his story. The New York Legislature sought to prevent Berkowitz and other notorious criminals from exploiting the tales of their sensational crimes

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for personal profit while their victims went uncompensated. The resulting statute was dubbed the Son of Sam law. By 2000, the federal government and more than 40 states, including California, had enacted similar statutes.¹

California's Son of Sam law—Civil Code Section 2225²—provided that all proceeds, past and future, that are paid or owed to a convicted felon from the sale of expressive materials or the rights

thereto were subject to an involuntary trust for designated beneficiaries if the materials "include or are based on the story" of the felony. A "story" meant "a depiction, portrayal, or reenactment of a felony" but "shall not be taken to mean a passing mention of the felony, as in a footnote or bibliography." "Materials" were defined as "books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind."

In August 1998, Sinatra Jr. obtained an injunction requiring Columbia Pictures to hold all present and future proceeds and profits due Keenan in trust for Sinatra Jr. during the pendency of the action. In November 1998, Keenan responded by filing a demurrer and motion to dissolve the preliminary injunction on the grounds that Section 2225 was facially invalid under the free speech clauses of the federal and state Constitutions. The trial court disagreed, and Keenan appealed its decision. In May 1999, the California Court of Appeal upheld the constitutionality of Section 2225.

Given the important free speech issues involved, as the case headed to the California Supreme Court the attorney general of California filed an amicus curiae brief on Sinatra Jr.'s side of the case. Keenan was supported by briefs from the ACLU Foundation of Southern California, the Association of American Publishers, Inc., the American Booksellers Foundation for Free Expression, Magazine Publishers of America, Inc. and PEN Ameri-

can Center.

On February 21, 2001, a unanimous California Supreme Court declared Section 2225 unconstitutional.³ It held that the law imposed content-based financial penalties on protected speech and consequently must satisfy strict constitutional scrutiny. The court acknowledged that the law sought to serve compelling interests in preventing criminals from exploiting their crimes for profit and in compensating crime victims from the profits of crime. But the law was fatally overinclusive, because it confiscated all income from all expressive materials that included significant discussions of their creators' past crimes, whatever their general themes or subjects.⁴

The California Supreme Court adhered closely to U.S. Supreme Court precedent. In *Simon & Schuster v. New York State Crime Victims Board*,⁵ the U.S. Supreme Court confronted a matter of first impression: Could the state constitutionally confiscate the profits from books and movies written by convicted felons in order to compensate their victims?

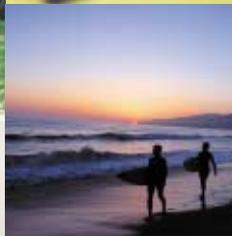
After New York's Son of Sam law went into effect, Simon & Schuster made a deal to publish a book by former-gangster-turned-government-witness Henry Hill. The book would tell the story of Hill's career in organized crime. After considerable investment of time and effort by Hill and his coauthor, the book, *Wiseguy*, was published in 1986. The colorful account of Hill's criminal exploits and life inside the Mafia met with commercial and critical success and was later

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made into the movie *Goodfellas*.

When the New York State Crime Victims Board learned about *Wiseguy*, it invoked the Son of Sam law and ordered Simon & Schuster to pay all future sums due to Hill into a trust. The publisher promptly filed a federal suit, seeking a declaration that the New York law was facially invalid under the First Amendment. Both the district court and a divided federal court of appeals upheld the law.

But in 1991, the U.S. Supreme Court unanimously reversed. Eight justices (Justice Clarence Thomas did not participate), in an opinion written by Justice Sandra Day O'Connor, first noted that "a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." The government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. "The First Amendment presumptively places this sort of discrimination beyond the power of the government."⁶

The Supreme Court Ruling

New York's Son of Sam law was a presumptively invalid content-based burden on speech, said the Court, because "it singles out income derived from expressive activity for a burden the State places on no other income," and "plainly imposes a financial disincentive only on speech of a particular content."⁷ Because the statute penalized speech on the basis of its content, the Court concluded, the law must survive "strict" constitutional scrutiny; in other words, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."⁸

The Court emphasized that the state had no compelling interest in shielding readers and victims from negative emotional responses to a criminal's public retelling of his misdeeds. Indeed, the protection of offensive and disagreeable ideas is at the core of the First Amendment.

On the other hand, the Court conceded that states do have compelling interests in ensuring that victims of crime are compensated by those who harm them, preventing wrongdoers from dissipating their assets before victims can recover, ensuring that criminals do not profit from their crimes, and transferring the fruits of crime from the criminals to their victims.

New York also claimed a compelling interest in preventing criminals from retaining the profits of *storytelling* about their crimes before their victims were compensated. However, the Court noted that the state could

not show why it had a greater interest in compensating crime victims from the profits of *storytelling* than from the criminal's other assets. "In short, the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime."⁹ Accordingly, the Court reasoned, it must examine whether New York's statute was "narrowly tailored to advance the former, not the latter, objective" and concluded it was not.

In the Court's view, two factors in particular illustrated the statute's overbreadth. First, the statute applied to a work on any subject, provided that it expresses the author's thoughts or recollections about the crime, however tangentially or incidentally. Second, the statute's broad definition of "person convicted of a crime" enabled the Board to esrow the income of any authors who admitted in their works to having committed a crime, whether or not they were actually accused or convicted.

These two provisions combined to encompass a potentially very large number of works. Had the Son of Sam law been in effect at the time and place of publication, it would have esrowed payment for such works as *The Autobiography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; *Civil Disobedience*, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience while serving time in jail; and even the *Confessions of Saint Augustine*, in which the author laments "my past foulness and the carnal corruptions of my soul," one instance of which involved the theft of pears from a neighboring orchard.

Amicus Association of American Publishers, Inc. submitted a bibliography listing hundreds of works by American prisoners and ex-prisoners, many of which contain descriptions of the crimes for which the authors were incarcerated, including works by Emma Goldman and Martin Luther King Jr. A list of prominent figures whose autobiographies would be subject to the statute could include Sir Walter Raleigh, who was convicted of treason after a dubiously conducted 1603 trial; Jesse Jackson, who was arrested in 1963 for trespass and resisting arrest after attempting to be served at a lunch counter in North Carolina; and Bertrand Russell, who was jailed for seven days at the age of 89 for participating in a sit-down protest against nuclear weapons.

In sum, the U.S. Supreme Court held that New York's Son of Sam law "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 Court concluded that the Son of Sam law was not narrowly tailored to advance that objective. As a result, the New York statute was inconsistent with the First Amendment.¹⁰

The California Ruling

In *Keenan*, Sinatra Jr. had the imposing burden of distinguishing *Simon & Schuster*. In an effort to save California's Son of Sam law from the fate suffered by New York's, Sinatra Jr. argued that the law was not a presumptively invalid content-based regulation of speech. But the California Supreme Court found that his "effort must fail."

Civil Code Section 2225(b)(1), like the New York statute, placed a direct financial disincentive on speech or expression about a particular subject. The California statute explicitly targeted and confiscated a convicted felon's proceeds from books, films, articles, recordings, broadcasts, interviews, or performances that merely included the story of the felon's crime. While certain classes of speech—obscenity, fighting words, certain defamation—may be subject to viewpoint-neutral regulation because of their directly injurious nature,¹¹ discussions of crime have never been included among those limited exceptions.

Sinatra Jr. also argued that laws imposing financial penalties on speech do not necessarily violate the First Amendment. He cited cases approving the principle that the government need not *subsidize* the exercise of free speech or other constitutional rights.¹² But the California Supreme Court pointed out that Sinatra Jr. had failed to show how Section 2225(b)(1), by confiscating income from speech based on its content, departs from the presumptively unconstitutional type of statute at issue in *Simon & Schuster*. By denying compensation for an expressive work, a law may chill not only the free speech rights of the author or creator but also the reciprocal First Amendment right of the work's audience to receive protected communications.¹³

Though there is no compelling interest in targeting a criminal's *storytelling* proceeds in particular for the purpose of compensating crime victims, the state does have a compelling interest in using the fruits of crime generally for that purpose. The court assumed, in this regard, that the fruits of crime include a criminal's proceeds from exploiting the story of the crime. The question thus arose whether Section 2225(b)(1), within its sphere of operation, was narrowly tailored to ensure that the fruits of crime are used to compensate the victims of crime.

The California Supreme Court was convinced that Section 2225(b)(1), like the New York law, was overinclusive and therefore invalid. As did the New York statute, Section 2225(b)(1) penalized the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims. Even if the fruits of crime may include royalties from exploiting the story of one's crimes, Section 2225(b)(1) did not confine itself to such income. Instead, it confiscated all of a convicted felon's proceeds from speech or expression on any theme or subject which *includes* the story of the felony, except for a mere passing mention. By this "financial disincentive," the court found that Section 2225(b)(1), like its New York counterpart, "discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds."¹⁴

Indeed, the court held that in at least one respect the involuntary trust provision of Section 2225(b)(1) operated more harshly against expressive materials that depict the creator's past crimes than did the escrow account in the New York law at issue in *Simon & Schuster*. Under the New York statute, proceeds from a crime story contract were to be turned over to the New York Board for placement in escrow, but if, at the end of five years, no valid claims of the criminal's victims or creditors were pending, remaining funds in the account were returned to the criminal.¹⁵ Under Section 2225(b)(1), by contrast, any entrusted amounts not subject to legitimate individual claims at the end of the five-year trust period were to be turned over to the state controller for allocation to the Restitution Fund, available for all crime victims.

Sinatra Jr. nonetheless argued that Section 2225(b)(1) applied only to expressive materials that include the "story" of a felony for which one was convicted, and exempted mere "passing mention of the felony, as in a footnote or bibliography." These restrictions, Sinatra Jr. argued, negate *Simon & Schuster's* concern that all profits from an expressive work would be confiscated even though the work mentioned a past offense only "tangentially or incidentally."

But the California Supreme Court was not persuaded. In *Simon & Schuster*, the U. S. Supreme Court had illustrated the overbroad sweep of the New York statute by showing that it encompassed even minor, unprosecuted offenses or mere tangential or incidental mention of past crimes in a larger context. But the court said that it did not "read *Simon & Schuster* as suggesting that a statute which exhibited marginal narrowing in these particular regards would necessarily pass

constitutional muster."

Instead, the court's concern was with "the essential values of the First Amendment." The vice of the New York law was that in order to serve a relatively narrow interest—compensating crime victims from the fruits of crime—the statute targeted, segregated, and confiscated *all* income from a wide range of expressive works containing protected speech on themes and subjects of legitimate interest, simply because material of a certain content—reference to one's past crimes—was included.

One motivated in part by compensation might discuss his or her past crimes, including those that led to felony convictions, in many contexts not directly connected to exploitation of the crime. The court suggested that "one might mention past felonies as relevant to personal redemption; warn from experience of the consequences of crime; critically evaluate one's encounter with the criminal justice system; document scandal and corruption in government and business; describe the conditions of prison life; or provide an inside look at the criminal underworld."¹⁶

The court ruled that mention of one's past felonies in these contexts may have little or nothing to do with exploiting one's crime for profit, and thus with the state's interest in compensating crime victims from the fruits of crime. Yet Section 2225(b)(1) permanently confiscated all income, whenever received, from all expressive materials, whatever their subject, theme, or commercial appeal, that include a substantial description of such offenses, whatever their nature and however long in the past they were committed. Thus, even as limited to felony convictions, Section 2225(b)(1) was not narrowly tailored to achieve the compelling interests it purported to serve.¹⁷

Sinatra Jr. also suggested the California statute applied only when an expressive work provides narrative detail about a felony for which the work's author or creator was convicted, and did not discourage mere acknowledgement of a prior felony conviction in the context of another subject.¹⁸ As the California attorney general put it, a "story," as defined by Section 2225(a)(7), must be a "vivid" depiction, portrayal, or reenactment.

But these arguments failed to convince the California Supreme Court that Section 2225(b)(1) focused with sufficient precision on the fruits of crime, while leaving other speech-related income undisturbed. *Simon & Schuster* illustrated the overbreadth of the New York statute by observing that it reached even incidental and tangential mention of past crimes, but nothing in *Simon & Schuster* suggested New York could have cured the

law's overinclusive effect simply by providing an exemption for tangential or incidental references. Moreover, *Simon & Schuster* neither stated nor implied that the federal Constitution might allow confiscation, on behalf of crime victims, of all proceeds from any expressive work that includes a descriptive account, or even a "vivid" account, of a past crime committed by the author.

Such "arbitrary demarcation lines," according to the California court, do not comport with the basic rationale of *Simon & Schuster*. "A statute that confiscates all profits from works which make more than a passing, nondescriptive reference to the creator's past crimes still sweeps within its ambit a wide range of protected speech, discourages the discussion of crime in nonexploitative contexts, and does so by means not narrowly focused on recouping profits from the *fruits of crime*."¹⁹

The court also pointed out that Keenan, joined by his amici curiae, urged that the "passing mention" exemption is so imprecise and unclear that it constituted an impermissibly vague basis for the censorship of protected speech. But, the court decided that it did not need to resolve the vagueness issue, because it was persuaded that, by any reasonable interpretation, the statute remained overinclusive.

Certainly the statutory definition of "story" includes any substantial account of the facts and circumstances of a past felony that led to conviction, and the "passing mention" exemption would not provide a safe harbor to materials containing a substantial account. But the court noted that there are multiple contexts in which expressive materials, with diverse subjects and themes unrelated to the exploitation of one's crimes, might include substantial accounts of those episodes.²⁰

The court observed that Section 2225(b)(1) would have applied to numerous works by authors whose discussions of larger subjects make substantial, and often vividly descriptive, contextual reference to prior felonies of which they were convicted. A statute that operates in this fashion disturbs or discourages protected speech to a degree substantially beyond that necessary to serve the state's compelling interest in compensating crime victims from the fruits of crime. Accordingly, the court concluded, consistent with *Simon & Schuster*, that Section 2225(b)(1) was facially invalid under the First Amendment to the U.S. Constitution.

Significantly, the court held that it reached a similar result under the liberty of speech clause of the California Constitution.²¹ The California provision provides similar, and sometimes greater, protection of speech than the First Amendment,²² and neither party

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had suggested any reason why it should provide lesser protection under the circumstances of this case.

The court concluded its opinion by stressing the narrow nature of its holding under both the federal and California Constitutions. It held that Section 2225(b)(1) was an over-inclusive infringement of protected speech because it targeted and confiscated all proceeds a convicted felon receives from expressive materials that include any substantial account of the felony, in whatever context. The court expressed no view on whether a statute targeting the income gained from expressive works that include accounts of the author's crimes could be drafted narrowly and precisely enough to overcome this problem of constitutional overbreadth.

Moreover, nothing the court said precluded a crime victim, as a judgment creditor, from reaching a convicted felon's assets, including those derived from expressive materials that describe the crime, by generally applicable remedies for the enforcement and satisfaction of judgments.²³ Nor did the court intend, by its analysis in this case, to preclude further legislative steps, not directly related to the content of speech, to ensure that a convicted felon's income and assets, including those derived from storytelling about the crimes, are and remain available to compensate persons injured or damaged by the felon's crimes.²⁴

Because the court concluded that the challenged provisions were invalid infringements on speech, it did not address Keenan's separate argument that, as applied to him, Section 2225, which was enacted 20 years *after* the kidnapping of Sinatra Jr., violated federal and state constitutional prohibitions of *ex post facto* legislation.²⁵

Reaction to *Keenan* was swift and predictable. Supporters of Son of Sam laws decried the decision, complaining that it gave criminals a blank check to profit from their crimes. The California Legislature threatened to rewrite the state's Son of Sam law, but in the end merely extended the statute of limitation to 10 years for victims to claim restitution from any income earned by the wrongdoer, not merely proceeds derived from books and movies.

Supporters of the First Amendment, on the other hand, applauded the fact that following the unanimous lead of the U.S. Supreme Court in 1991, the unanimous California Supreme Court in *Keenan* resisted the invitation to put aside fundamental constitutional principles in the name of compensating victims or punishing criminals. By carefully dissecting the flaws in California's Son of Sam law, the court underscored the preeminent value the law places on freedom of ex-

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pression, even in the face of the popular notion that "crime shouldn't pay."

The value of the *Keenan* case rests in its appreciation of how society at large benefits from the widest array of voices addressing our criminal justice system. *Keenan* is no more about merely protecting convicted felons than decisions upholding the rights of protestors to burn the American flag or of Nazis to march in Skokie, Illinois, were only about those particular individuals. Cases guaranteeing First Amendment rights have little to do with the particular message or messenger involved and have everything to do with the principle of insuring that the public's right to know is protected.

In the long run, given the decisions in *Simon & Schuster* and *Keenan*, anyone who values wide-open, robust debate and the resolution of important public policy issues through the open clash of ideas, instead of repression imposed by governmental restrictions, will celebrate the elimination of all Son of Sam laws, thereby contributing to an open marketplace of ideas where books and movies about crime and punishment will succeed or fail on their merits, free of direct or indirect censorship. ■

¹ See Kealy, *A Proposal for a New Massachusetts Notoriety for Profit Law*, 22 W. NEW ENG. L. REV. 1, 22 (2000);

Comment, *Son of Sam Laws*, 20 WHITTIER L. REV. 949, 953, & nn.48, 49 (1999).

² The California law was first enacted in 1983 as Civil Code §2224.1. In 1986, the law was recodified as §2225, and it has since been amended on several occasions.

³ *Barry Keenan v. Superior Court*, 27 Cal. 4th 413 (2002), cert. denied, U.S. LEXIS 5564 (Oct. 7, 2002).

⁴ *Id.* at 423.

⁵ *Simon & Schuster v. New York State Crime Victims Board*, 502 U.S. 105 (1991).

⁶ *Id.* at 115-16.

⁷ *Id.* at 116.

⁸ *Id.* at 118.

⁹ *Id.* at 120-21.

¹⁰ *Id.* at 123.

¹¹ See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

¹² E.g., *Lyng v. Automobile Workers*, 485 U.S. 360 (1988) (denial of food stamps to household with striking worker); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (denial of tax exemption to organizations engaged in lobbying); *Harris v. McRae*, 448 U.S. 297 (1980) (denial of federal funds to reimburse abortions).

¹³ *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 756 (1976); see *Pacific Gas. & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 8 (1986) (plur. opn. of Powell, J.). The chilling effect of financial disincentives was recognized again in *United States v. Treasury Employees*, 513 U.S. 454, 468-70 (1995), in which the Court struck down a congressional ban on the receipt by certain high level government employees of honoraria for speeches. See also *Virginia Pharmacy Bd.*, 425 U.S. at 756-57; *Mine Workers v. Illinois Bar Ass'n.*, 389 U.S. 217, 222 (1967); *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

¹⁴ *Barry Keenan v. Superior Court*, 27 Cal. 4th 413, 431-32 (2002), cert. denied, U.S. LEXIS 5564 (Oct. 7, 2002).

¹⁵ *Simon & Schuster*, 502 U.S. at 109; see N.Y. EXEC. LAW, §632-a(4).

¹⁶ *Keenan*, 27 Cal. 4th at 433.

¹⁷ *Id.* at 434.

¹⁸ *Id.*

¹⁹ *Id.* at 435.

²⁰ The examples given by the court (in addition to those previously cited by the U.S. Supreme Court) included such notable works as Eldridge Cleaver's *Soul on Ice* (1968), which discusses his rapes of white women, for which he was incarcerated, as since-repented acts of racial rage; memoirs published by Charles Colson (*Born Again* (1976)), G. Gordon Liddy (*Will!* (1980)), and John Dean (*Blind Ambition: The White House Years* (1976)) detailing their criminal roles in the Watergate coverup; and the memoirs of Patricia Hearst, the scion of a publishing dynasty, who was kidnapped by the Symbionese Liberation Army and later participated with her captors in an armed bank robbery for which she was imprisoned (*Every Secret Thing* (1981)).

²¹ CAL. CONST. art. I, §2, subd. (a).

²² E.g., *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal. 4th 352, 366-67 & n.12 (2000).

²³ See generally CODE CIV. PROC. §§481.010 *et seq.*, 680.010 *et seq.*

²⁴ Because the court concluded that §2225(b)(1) was overbroad for its legitimate purpose, it did not address Keenan's contention, derived from Justice Kennedy's concurring opinion in *Simon & Schuster*, that a content-based regulation of speech is unconstitutional per se and can never be justified by an interest of the state. *Keenan*, 27 Cal. 4th at 436.

²⁵ *Id.*

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