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New York's Expanded Son of Sam Law and Other Fiscal Measures to Deter Prisoners' Suits While Satisfying Outstanding Debts

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Anatomy of the Modern Prisoners' Rights Suit

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One very interesting and rapidly changing area of the law within the field of corrections that may have significant and beneficial side effects upon prisoner litigation, as well as furthering the ends of justice, is that area of the law pertaining to inmate accounts and fiscal oversight, the collection and payment of monetary obligations such as fines, restitution and filing fees, and the availability of Son of Sam Law remedies.[1] In New York State corrections, this is an area that has slowly but steadily evolved.

As every criminal justice practitioner knows, before a person can become an inmate serving a sentence of imprisonment in a correctional facility, he or she must first be a defendant in a criminal action in which the prosecution is brought in the name

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1. *See, e.g.*, N.Y. PENAL LAW §§ 60.27, 80.00 (Mckinney 2004); N.Y. C.P.L.R. 1101(f) (McKinney 1999); N.Y. CT. CL. ACT § 11-a (McKinney 1999); N.Y. EXEC. LAW § 632-a (McKinney 2001).

of the people of the state.[2] The basic criminal law courses, routinely covered in law school, explain the rationale behind our penal statutes and why conduct at one level may be considered only a tort, or a civil wrong, the remedy for which would be an action for damages on the part of the individual against whom the transgression was committed, and yet at another level the conduct would be considered a penal offense warranting a criminal prosecution. The underlying theory is that if the offending conduct rises to the level of being criminal, then it is egregious enough to be considered a violation of everyone's rights, and not just the individual victim's rights, and accountability is pursued in the name of the sovereign state.[3]

The paramount authority a state can exercise over an individual arises when there has been a penal law violation resulting in a criminal conviction.[4] The most severe sanction would result in the individual's loss of life, if a state has capital punishment, followed by life imprisonment without the possibility of parole, and thereafter, terms of imprisonment for fixed periods of time, etc.

The sentencing court, however, oftentimes has an array of other sanctions, sometimes optional and sometimes mandatory, that may also be imposed at the same time the sentence of imprisonment is imposed.[5] When these other sanctions are imposed, they comprise the defendant's sentence for the criminal conviction as does the term of imprisonment.[6] For lack of a better term, they are fiscal penalties and require the defendant to forfeit a sum of money. In New York State the kinds of fiscal penalties that can be imposed as a part of a sentence for a criminal conviction include such things as the mandatory surcharge, the fine, restitution, reparation, a designated surcharge and the crime victim assistance fee.[7]

The relationship in the criminal arena between sentences of imprisonment and fiscal penalties has had somewhat of a

2. N.Y. CRIM. PROC. LAW § 1.20(1) (McKinney 2003).

3. *See* CESARE BECCARIA-BONESANA, AN ESSAY ON CRIMES AND PUNISHMENTS (Academic Reprints 1953) (1819).

4. N.Y. PENAL LAW § 1.05(1) (McKinney 2004).

5. *See* N.Y. PENAL LAW §§ 60.00-.35, 80.00-.15 (McKinney 2004).

6. *See id.*; *see also* N.Y. CRIM. PROC. §§ 420.10(6), 420.35 (McKinney 1992).

7. *See* N.Y. PENAL LAW §§ 60.27, 60.35 (McKinney 2004); N,Y. CRIM. PROC. LAW §§ 420.05-.40 (McKinney 1992).

rocky history. Oftentimes in a criminal proceeding the defendant would be indigent and therefore have assigned counsel. As a result, criminal term judges would be loath to impose any type of monetary sanction together with a sentence of imprisonment. They would reason, generally, that if the defendant had insufficient resources to hire his own counsel and was on his way to state prison, he would not have the resources in the future to pay any type of monetary penalty that would also be imposed.

By the same token, prison authorities were reluctant to embrace any new responsibilities related to the collection of monetary penalties. It was difficult enough to fulfill all the responsibilities pertaining to the safe and humane incarceration of that individual, including the delivery of appropriate programs of rehabilitation.[8] Now, to add one more layer to that regimen in the form of the collection of monetary penalties, was viewed at best as a major nuisance, since prisons were not created to be collection agencies, and at worst as a potential source of inmate resentment and unrest. Prison authorities did not want to leave inmates without the wherewithal to retain some money to make commissary and other authorized purchases.

The mandatory surcharge was created in 1982 and required the sentencing court to impose a fixed monetary penalty upon a defendant convicted of an offense.[9] In those days, the amount for a felony was seventy-five dollars, for a misdemeanor it was twenty-five dollars, and for a violation it was fifteen dollars.[10] The initial response of New York's correctional system was to set up a procedure whereby if no due date was specified on the commitment document for the collection of the surcharge, then no steps would be taken to effectuate collection until just prior to the inmate's scheduled release from prison.[11] It did not take the inmates very long to figure out that if they wanted to avoid paying the surcharge, they should either spend all of their money shortly before being released or send it home. The end result was that only a small percentage of mandatory

8. N.Y. CORRECT. LAW §§ 70(2), 136-138 (McKinney 1995).

9. 1982 N.Y. Laws 55 (codified as amended at N.Y. PENAL LAW § 60.35 (McKinney 2004)).

10. *Id.*

11. N.Y. DEP'T OF CORR. SERVS., DIRECTIVE 2788: RESTITUTION BY INMATES, at 4 (Nov. 29, 1984) (on file with the author).

surcharges were ever collected from inmates.[12] While this approach had the desired effect of avoiding the potential of inmate unrest, it contravened at least the spirit of the law.

In an effort to balance these competing interests, New York developed the encumbrance system, which called for a formula to be activated whenever a monetary liability would come into existence, regardless of whether or not a due date was set.[13] Under the formula, twenty percent of an inmate's weekly wages, or the equivalent of one day's wages per week, would be applied toward the outstanding obligation, as well as fifty percent of any outside receipts.[14] So, for example, if an inmate were to make five dollars per week, one dollar would go toward the outstanding obligation. If a family member were to occasionally send him or her ten dollars, then five dollars would be applied toward the outstanding obligation.

Furthermore, if there were multiple monetary obligations, then no more than two encumbrance collections could be activated at any one time.[15] A third obligation would have to await satisfaction of one of the first two.[16] The activation of two encumbrances would mean that 40% of weekly earnings and 100% of outside receipts would be collected toward the two monetary obligations.[17] Encumbrance obligations would be activated in order of chronology.[18] In this way, working inmates would always be assured of having at least some spendable balance from their earnings.

Over the years, New York's Legislature (the Legislature) tightened the procedures pertaining to mandatory surcharges.[19] For example, they added a provision expressly conferring upon a facility superintendent the authority to make collections from

12. N.Y. DEP'T OF CORR. SERVS., REPORT OF CRIME, VICTIM AND MANDATORY SURCHARGE AMOUNTS COLLECTED BY MONTH (Apr. 1985- Mar. 1993) (on file with the author).

13. *See* N.Y. DEP'T OF CORR. SERVS., DIRECTIVE 2788: RESTITUTION BY INMATES (Dec. 9, 1988) (on file with the author).

14. *Id.* at 2.

15. *Id.*

16. *Id.*

17. *Id.*

18. N.Y. DEP'T OF CORR. SERVS., DIRECTIVE 2788: RESTITUTION BY INMATES, at 2 (Dec. 9, 1988) (on file with the author).

19. *See* William C. Donnino, Practice Commentary, N.Y. PENAL LAW § 60.35 (McKinney 2004).

an inmate's funds and from any work release money in order to pay an outstanding surcharge.[20] At one time they enacted a provision to the effect that before a court could waive the surcharge on the basis of an inability to pay, it first had to look to all of an inmate's potential sources of income, including any moneys to be earned in prison. Thereafter, the Legislature changed the law to flatly provide that under no circumstances could the mandatory surcharge be waived.[21] The Legislature has also increased the amount of the mandatory surcharge over the years, and it presently is up to $250 for a felony.[22]

In the early nineties, when New York was also undergoing a fiscal crisis, though nothing close in severity to the present crisis, corrections was called upon to come up with ideas either to generate new revenue or reduce existing expenditures. One revenue generating idea that was ultimately adopted called for the imposition of a five-dollar disciplinary surcharge, similar in concept to the mandatory surcharge, for inmates found guilty of disciplinary infractions.[23]

The big question was whether or not this could be done based upon the existing statutory powers of the Commissioner of Corrections (Commissioner), or whether it would first require express statutory authorization from the Legislature. It was understood that in any legal challenge, opponents would contend that it is within the sole province of the Legislature to create such new penalties.

When the pertinent regulations were filed, the general authority of the Commissioner to oversee the system was cited as

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20. 1983 N.Y. Laws 15 (codified as amended at N.Y. PENAL LAW § 60.35 (McKinney 2004)).

21. *See* 1985 N.Y. Laws 134 (codified as amended at N.Y. CRIM. PROC. LAW § 420.10 (McKinney 1992)); *see also* 1995 N.Y. Laws 3 (codified as admended at N.Y. CRIM PROC. LAW § 420.35 (McKinney 2003)).

22. N.Y. PENAL LAW § 60.35(1)(a) (McKinney 2004). Section 60.35 was also amended to create two new monetary obligations, a sex offender registration fee of fifty dollars and a DNA databank fee of fifty dollars. N.Y. PENAL LAW § 60.35(1)(d)-(e) (McKinney 2004). In August of this year, section 60.35 was again amended to add an additional "supplemental sex offender victim fee of one thousand dollars in addition to the mandatory surcharge and any other fee." 2004 N.Y. Laws 53 (codified as amended at N.Y. PENAL LAW § 60.35(1)(b)).

23. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 253.7(b), 254.7(b) (2004).

the legal predicate.[24] The relevant statute provides in essence that "[t]he commissioner of correction shall have the superintendence, management and control of the correctional facilities in the department and of the inmates confined therein, and of all matters relating to the government, discipline, policing, contracts and fiscal concerns thereof."[25]

A subsequent challenge in state court was commenced. Among other things, the petitioners contended "that the Commissioner [did] not have the authority to levy a monetary penalty for disciplinary infractions at a correctional facility absent the grant of such power by the Legislature."[26] The appellate division stated:

> Correction Law §§ 112 and 137 give the Commissioner broad discretion in the implementation of policies relating to fiscal control and management of correctional facilities and to security and inmate discipline. A court should defer to the Commissioner's interpretation of his authority as long as it is reasonably related to legitimate penological interests. The imposition of the $5 disciplinary surcharge is a legitimate exercise of the Commissioner's authority relating both to discipline and fiscal stability. The sanction, intended to partially reimburse the State for conducting disciplinary proceedings, is not unlike the exercise of the Commissioner's authority by regulations providing for the deduction of money from an inmate's account for restitution or docking the pay of inmates who report late for prison jobs.[27]

As used in this context, the word restitution referred to prison ordered restitution that may be part of an inmate's disciplinary penalty whereby, for example, he or she would be required to repay the Department of Correctional Services (Department) for state property that had been intentionally destroyed.[28]

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24. Regulatory impact statement filed in conjunction with the disciplinary surcharge rule as an emergency measure. (Dec. 18, 1991) (on file with the author).

25. N.Y. CORRECT. LAW § 112(1) (McKinney 2004). Section 137 was also cited, since it referenced the Commissioner's general authority to establish a program of discipline. *See* N.Y. CORRECT. LAW § 137(2) (McKinney 2004).

26. Allah v. Coughlin, 599 N.Y.S.2d 651, 652 (App. Div. 1993).

27. *Id.* at 653 (citations omitted).

28. *See* N.Y. COMP. CODES R. & REGS. tit. 7, §§ 253.7(a)(1)(iv), 254.7(a)(1)(v) (2004).

A similar path was followed with respect to court ordered restitution for crime victims, which New York's statute permits for "the fruits of the offense and . . . the actual out-of-pocket loss" caused thereby.[29] Unlike the situation with mandatory surcharges, however, there was no separate statutory provision expressly authorizing prison administrators to collect money from inmate funds for the payment of such obligations. For several years the Department tried unsuccessfully to remedy this situation through the introduction of legislation. Eventually, when it became clear that such a bill would not pass, the Department changed its internal procedures to allow for the direct collection of money from an inmate's account to be applied to an order of restitution for a crime victim.[30]

A challenge was then brought in state court, with the lower court initially ruling in the inmate's favor by finding that there was "no statutory or regulatory provision specifically authorizing such action."[31] In reversing the lower court, however, the New York State Appellate Division, in *Nardi v. LeFevre*, first cited to the above-quoted language,[32] and then went on to state the following:

> The encumbrance of petitioner's inmate account for the purpose of satisfying a court-ordered restitution obligation manifestly serves a legitimate penological goal, and is consonant with the Commissioner's broad powers to manage the fiscal affairs of correctional facilities, his specific power to maintain inmate accounts and his inherent power to implement sentences imposed by the courts.[33]

Another measure in the early nineties, in response to the fiscal crisis, was the initiation of a lag payroll procedure for inmates.[34] This is comparable to what happens with state employees who have the first three weeks of their salary lagged when they first enter the workforce.[35] It is given back to them

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29. N.Y. PENAL LAW § 60.27(1) (McKinney 2004).

30. N.Y. DEP'T OF CORR. SERVS., DIRECTIVE 2788: COLLECTION AND REPAYMENT OF INMATE ADVANCES AND OBLIGATIONS (July 23, 1992) (on file with the author) [hereinafter COLLECTION AND REPAYMENT].

31. Nardi v. LeFevre, 652 N.Y.S.2d 133, 133 (App. Div. 1997).

32. *See supra* note 31 and accompanying text.

33. *Nardi*, 652 N.Y.S.2d at 133 (citations ommitted).

34. COLLECTION AND REPAYMENT, *surpa* note 30, at 2-3.

35. BUREAU OF STATE PAYROLL SERVS., OFFICE OF THE N.Y. STATE COMPTROLLER, PAYROLL BULLETIN NO. P-679 (Jan. 2, 1991) (on file with the author).

upon their departure from state service.[36] So too with inmates, it was felt that it would be appropriate to lag their payroll. This was accomplished by withholding twenty percent of an inmate's weekly wages over a period of fifteen weeks until a full three weeks worth of pay was withheld.[37] The money would be thereafter paid back to the inmate upon his or her discharge from prison.[38]

Inmates then brought a challenge in federal court to this procedure as well as to the disciplinary surcharge procedure.[39] The district court judge granted summary judgment to the defendants and the inmates appealed to the Second Circuit.[40] Similar to the challenge in state court, the appellants argued that the disciplinary surcharge violated due process because it constituted a forfeiture without proper statutory authority.[41] The Second Circuit stated that:

> There is no 'greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.' This applies to state law claims brought into federal court under pendent jurisdiction as well. The New York courts have already examined the surcharge and found that N.Y. Correctional Law §§ 112, 137 gives the Commissioner of [the Department of Correctional Services] broad discretion in the implementation of policies relating to fiscal control and management of correctional facilities and to security and inmate discipline. The surcharge was held to be a legitimate exercise of the Commissioner's authority. In the interest of Federalism and as a matter of comity, we will not consider this claim.[42]

The appellants had also raised an equal protection claim based upon the fact that, unlike the situation for unincarcerated individuals, there was no hardship waiver for indigent inmates.[43] The court, however, responded by noting "[i]nmates are not similarly situated to unincarcerated persons," and "all their essential needs, such as food, shelter, clothing and medical

36. *Id.* at 7.
37. *See generally* COLLECTION AND REPAYMENT, *surpa* note 30.
38. *Id.* at 5.
39. Rudolph v. Cuomo, 916 F. Supp. 1308 (S.D.N.Y. 1996).
40. Allen v. Cuomo, 100 F.3d 253 (2d Cir. 1996).
41. *See id.*
42. *Id.* at 260.
43. *Id.*

care are provided by the state."[44] The court also found the disciplinary surcharge to be reasonably related to the state's legitimate penological interests of "deterring inmate misbehavior and raising revenues."[45]

Another argument raised by the appellants was that the "pay lag policy deprive[d] them of their property right in the prompt payment of their wages without due process of law."[46] The court did find that while inmates do have a property right in the receipt of payment for their labor, they do not have the right to be paid in a timely manner.[47] The court reached this conclusion after reviewing the relevant statutes governing inmate labor in correctional facilities.[48] It also held that the past practice of the Department in paying inmates all of their wages on a biweekly basis did not create an entitlement on their part for such practice to continue.[49]

One other interesting argument raised by the appellants was "that the pay lag policy violate[d] the Takings Clause of the Fifth Amendment . . . [in] that by withholding earned wages for years interest-free, the state [was] depriving inmates of their private property for public use without just compensation."[50] The court reviewed "the factors to be considered in determining whether a governmental action has 'gone beyond regulation and effects a taking . . .' [which include:] 'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.'"[51] Focusing on this third factor the court found that inmates could not,

> [E]stablish a reasonable investment-backed expectation that [the Department of Correctional Services] will pay their wages biweekly simply because it had done so in the past. . . . The purpose of the investment-backed expectation requirement is to limit recovery to owners "who could demonstrate that they bought their

44. *Id.* at 260-61.
45. *Allen*, 100 F.3d at 261.
46. *Id.*
47. *Id.*
48. *Id.* at 261-62.
49. *Id.*
50. *Allen*, 100 F.3d at 262.
51. *Id.* (citations ommitted).

> property in reliance on a state of affairs that did not include the challenged regulatory regime."[52]

Lastly, the appellants argued "that the pay lag violate[d] the Contracts Clause of Article I, Section 10 of the Constitution by substantially interfering with an existing implied contract between the inmates and [the Department of Correctional Services]."[53] The court found "[t]he inmates [had] failed to establish that a contractual relationship exist[ed]."[54]

The due deference accorded to the Department by the courts in inmate fiscal matters led to another important initiative whereby inmates were precluded from opening any outside bank accounts.[55] The policy reasons underlying this change were to:

> 1) ensure that inmates are not able to shield monetary judgments or settlements from crime victims [or from other court ordered obligations]; 2) deter escapes by preventing inmate access to available funds outside the prison; 3) enforce prison rules against inmate possession of cash and prevent "strong arming" and extortion of funds from weaker inmates; 4) prevent inmate fraud upon those outside the prison; . . . 5) prevent use of inmate funds for illegal purposes . . . .[56]

In addition the initiative sought to prevent inmates from obtaining Department advances when personal funds are available from other sources and to reduce record keeping burdens on facility staff.

Some time thereafter, in conjunction with the New York State Attorney General's Office, the Department standardized the practice that any money to be awarded to an inmate as a result of federal or state litigation, whether by settlement or verdict, would have to be deposited into the inmate's facility account. A standard clause to that effect is inserted into every settlement agreement. In this way, if there are any existing

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52. *Id.* (citing Loveladies Harbor v. United States, 28 F.3d 1171, 1177 (Fed.Cir. 1994)).

53. *Id.*

54. *Id.*

55. N.Y. DEP'T OF CORR. SERVS., DIRECTIVE 2798: INMATE ACCOUNTS, at 1-2 (Aug. 25, 1998) (on file with the author).

56. *Id.* at 1.

monetary obligations or active encumbrances against an inmate's account, the appropriate offsets can be made.

All of the above changes made it much easier for the Department to adopt the new federal filing collection procedures when the Prison Litigation Reform Act of 1996 (PLRA)[57] came into existence. Along these same lines, when the state also subsequently adopted state court filing fee requirements for inmates the Department was able to adjust with little fanfare.[58]

When the PLRA became law, it also had special requirements with respect to crime victims. Specifically, sections 807 and 808 of the Act provide as follows:

> Any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State or local jail, prison, or correctional facility or against any official or agent of such jail, prison or correctional facility, shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner. The remainder of any such award after full payment of all pending restitution orders shall be forwarded to the prisoner.[59]

> Prior to payment of any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State or local jail, prison or correctional facility or against any official or agent of such jail, prison or, correctional facility, reasonable efforts shall be made to notify the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending payment of any such compensatory damages.[60]

As a result of these provisions, the Department set up new procedures whereby outreach efforts were made to crime victims to advise them of any such impending awards.[61] Oftentimes this necessitated working through the concerned district attorney's office since information pertaining to the identity and

57. Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 18 U.S.C. § 3626; 28 U.S.C. §§ 1346, 1915; 42 U.S.C. § 1997 and other scattered sections).

58. 1999 N.Y. Laws 412 (codified as amended at N.Y. C.P.L.R. 1101(f) (McKinney 1999)).

59. Pub. L. No. 104-134, § 807, 110 Stat. at 1321-75 to -76 (codified as amended at 18 U.S.C. § 3626(1997)).

60. § 808, 110 Stat. at 1321-76 (codified as amended at 18 U.S.C. § 3626(1997)).

61. N.Y. DEP'T OF CORR. SERVS., DIRECTIVE 4036: NOTIFICATION TO VICTIM OF INMATE RELEASE OR DAMAGES AWARD (Aug. 29, 2001) (on file with the author).

mailing address of crime victims is not routinely transmitted to or maintained by the Department.[62]

All of the aforementioned policies and procedures provided an effective means of oversight and control over inmate accounts. They also provided the wherewithal to effectuate notice to crime victims and they allowed for the possibility of a recovery by the crime victims if they were able to act in a timely manner. While the procedures in and of themselves were quite effective, the substantive problem remained that, in the overwhelming majority of cases, the crime victims found themselves barred by the state's relevant statute of limitations from being able to commence a civil action against the inmate.

The practical reality is that at the time a criminal prosecution is brought for a brutal crime such as a rape or murder, the crime victim or surviving family member is only thinking of the criminal trial, the conviction of the defendant, and the imposition of the longest possible sentence. For a whole host of reasons, the typical crime victim or family member at that time is not also thinking of filing a civil lawsuit to obtain a monetary judgment against a defendant. Perhaps the most significant reason is that the average defendant will not have any proceeds at that time with which to pay a significant judgment. Hence, in the normal course of events, a crime victim will not initiate a civil lawsuit, thus allowing a statute of limitations to lapse.[63]

While the PLRA required that the concerned crime victims receive notification of inmate damage awards, it did not create any independent right on their part to seek a recovery against such proceeds.[64] Thus, finding themselves time barred by the statute of limitations, crime victims endured tremendous frustration and feelings of re-victimization upon the receipt of such

62. *See id.* at 2.

63. *See* Michelle G. Lewis Liebeskind, *Back to the Basics for Victims: Striking Son of Sam Laws in Favor of an Amended Restitutionary Scheme*, 1994 ANN. SURV. AM. L. 29, 61-76 (1994); *see also Victims' Rights Symposium*, 8 ST. JOHN'S L. REV. 1 (1992).

64. *See* Pub. L. No. 104-134, § 808, 110 Stat. 1321-76 (1996) (codified as amended at 18 U.S.C. § 3626 (1997)).

notices. All of this changed when New York drastically revamped its Son of Sam Law in 2001.[65]

The original Son of Sam Law came into existence in 1977 with New York becoming the first state to enact a law to prevent convicted criminals from obtaining financial rewards from their own crimes.[66] The law was prompted by the capture of serial killer David Berkowitz, a.k.a. Son of Sam, whom the New York State Legislature sought to preclude from profiting from his notoriety.[67] The original law provided that all proceeds from the sales of "books, magazines, motion pictures" or other media exploitations of crimes, otherwise payable to the convicted perpetrator, were to be paid to the Crime Victims Board for the benefit of the victims of crime.[68]

The advantage provided by this law was that for the first time, crime victims were able to bring a civil action after discovery of a criminal's proceeds despite the expiration of any other statute of limitations. Subsequently, the law was used against other criminals of significant notoriety such as Jean Harris, the killer of Dr. Tarnower, the author of "The Scarsdale Diet," and Mark David Chapman, the killer of former Beatle John Lennon.[69]

Some time thereafter, the United States Supreme Court, in *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*,[70] declared a portion of the law unconstitutional under the First Amendment because it "singled out speech on a particular subject for a financial burden that it places on no other speech or income."[71] To cure the defect, the New York State Legislature expanded the definition of "profits from the crime" to include inter alia "any property obtained through or income generated from the commission of a crime of which the defendant was con-

65. 2001 N.Y. Laws 62 (codified as amended at N.Y.EXEC. LAW § 632-a (McKinney 2001); N.Y. CT. CL. ACT §§ 20 to –a (McKinney 2001) and other scattered sections).

66. 1977 N.Y. Laws 823 (codified as amended at N.Y. EXEC. LAW § 632-e (McKinney 1991)), *repealed by* 1992 N.Y. Laws 618.

67. *See* Jessica Yager, *Investigating New York's 2001 Son of Sam Law: Problems with the Recent Extension of Tort Liability for People Convicted of Crimes*, 48 N.Y.L. SCH. L. REV. 433, 434 (2003).

68. N.Y. EXEC. LAW § 632-e (McKinney 1991)(repealed 1992).

69. *See* Liebeskind, *supra* note 53.

70. 502 U.S. 105 (1991).

71. *Id.* at 123.

victed."[72] The law as so revised would permit a crime victim to recover the gains a convicted perpetrator realizes from the commission of a crime. It no longer limited recovery to proceeds from books, magazines or motion pictures. "At least 31 states, as well as the federal government, have some form of legislation restricting the distribution of a crime-related book, motion picture, and comparable revenues to persons accused or convicted of crime."[73]

The statute's major inadequacy, however, was that the victim only had standing to sue in the narrow exception where the criminal had obtained "profits from the crime."[74] Money or property that a criminal would acquire from all other sources, such as bequests and civil recoveries from successful lawsuits, could not be recovered by a crime victim in a Son of Sam award, if the statute of limitations had otherwise lapsed.

In the spring of 2001, this shortcoming became a major political story because of a jury award to an inmate named David McClary. Inmate McClary was serving a prison term of twenty-five years to life for the killing of police officer Edward Byrne in 1988. This is the same person in whose name "Byrne Grant Funding" was created by Congress to annually fund millions of dollars of appropriations for various law enforcement purposes.[75] The jury award in the amount of $660,000 arose from the administrative segregation of inmate McClary for an extended period of time. This figure was ultimately found to be excessive and was reduced to $237,500.[76] However, the money had not as yet been paid when the bill was being considered by the Legislature.

At the time the lines were clearly drawn. Among other things the proposal to amend the statute would create a new category of covered funds called "funds of a convicted person."[77] The new category would cover all funds and property that a con-

72. N.Y. EXEC. LAW § 632-a(1)(b)(i) (McKinney 2001).

73. Gregory G. Sarno, Annotation, *Validity, Construction, and Application of "Son of Sam" Laws Regulating or Prohibiting Distribution of Crime-Related Book, Film, or Comparable Revenues to Criminals*, 60 A.L.R. 4th 1210, §2 (2004).

74. *Id.*

75. 42 U.S.C. § 3750 (1988).

76. McClary v. Coughlin, 87 F. Supp. 2d 205 (W.D.N.Y. 2000), *aff'd*, 237 F.3d 185 (2d Cir. 2001).

77. N.Y. EXEC. LAW § 632-a(1)(c) (McKinney 2001).

victed person would receive from any source.[78] The failure to pass the bill would mean that the Byrne family would not have an opportunity to possibly bring their own civil lawsuit to go after this award.

Needless to say, the Legislature passed this amendment to the Son of Sam Law which then allowed the Byrne family to move to freeze the damages award that had been deposited into an escrow account by the inmate's attorney and to commence a civil lawsuit for the wrongful death of Edward Byrne. The lawsuit was filed and the family obtained a judgment of $100 million against inmate McClary.[79] By writ of execution, the family was then able to recover the $237,500 that was being held in escrow.

The revisions to the Son of Sam Law encompass a whole panoply of substantive changes that are spread among a number of statutes which include the Executive Law, the Court of Claims Act, the State Finance Law, the Correction Law, the General Municipal Law, the Surrogate's Court Procedure Act, the Civil Practice Law and Rules, and the Criminal Procedure Law.[80] In essence, whenever persons convicted of certain crimes receive money in excess of $10,000, notification must be given to the victims of the crime by the Crime Victims Board.[81] Such victims will then be able to commence a lawsuit against the perpetrator within three years of being notified by the Crime Victims Board that the criminal, or his or her representative, has received or will receive funds covered by the law, notwithstanding the expiration of any other statute of limitations.[82]

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78. *Id.*

79. Byrne v. McClary, No. 12614/01 (N.Y. Sup. Ct., Feb. 15, 2002) (judgment for the plaintiffs); *see* Steve Dunleavy, *Cop Killer Gets Beat At His Own Nasty Game*, N.Y. POST, Feb. 17, 2002, at 21; *see also* Matt Gryta, *Victim's Kin Trying to Get Killer's Cash From Escrow*, BUFF. NEWS, Apr. 14, 2002, at C14.

80. 2001 N.Y. Laws 62 (codified as amended at N.Y. EXEC. LAW § 632-a (McKinney 2001); N.Y. CT. CL. ACT §§ 20 to -a (McKinney 2001); N.Y. STATE FIN. § 8 (Mckinney 2001); N.Y. CORRECT. §§ 116, 500-c (Mckinney 2001); N.Y. GEN. MUN. § 70 (McKinney 2001); N.Y. SURR. CT. PROC. ACT § 2222-a (McKinney 2001); N.Y. C.P.L.R. § 5011, 5205 (McKinney 2001); N.Y. CRIM. PROC. § 410.10 (Mckinney 2001) and other scattered sections).

81. *See* N.Y. EXEC. LAW § 632-a(2)(a) (McKinney 2001).

82. *Id.* § 632-a(3).

The "funds of a convicted person" provision includes all funds and property received from any source, excluding child support and earned income.[83] The specified crimes include, among other things, convictions for a violent felony offense as defined in Penal Law section 70.02, a class B felony, and any penal law felony that is titled as a felony in the first degree,[84] except that drug and marihuana offenses are excluded as are welfare fraud, the criminal diversion of prescription medications and prescriptions, gambling and prostitution.[85] Earned income means income derived from one's own labor or through active participation in a business as distinguished from dividend or investment income.[86]

There are a variety of notice provisions included in the revisions as well as an array of penalties for the failure to comply. For example, whenever any person or entity agrees to pay "funds of a convicted person" whose "value, combined value or aggregate value . . . exceeds . . . $10,000," that person or entity must notify the Crime Victims Board.[87] While earned income is not included with the $10,000 calculation for determining whether or not the notice requirement is triggered, ultimately earned income can be the subject of recovery by a crime victim.

With respect to penalties, if an individual knowingly and willfully fails to provide the requisite notice, the Crime Victims Board shall impose an assessment of up to the amount of the payment or obligation to pay, and a civil penalty of up to one thousand dollars or ten percent of the payment or obligation to pay, whichever is greater.[88]

Similarly, if a probationer or parolee, or a person who is no longer a probationer or parolee but who acquired a financial or proprietary interest during his or her sentence, receives a payment in excess of $10,000, he or she as well as the payor must give notice to the Crime Victims Board.[89]

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83. *Id.* § 632-a(1)(c).

84. *Id.* § 632-a(1)(e)(i)(A)-(B), (1)(e)(i)(C).

85. *Id.* § 632-a(1)(e)(ii).

86. N.Y. EXEC. LAW § 632-a(1)(f) (McKinney 2001).

87. *Id.* § 632-a(2)(a)-(b).

88. *Id.* § 632-a(7)(b)(i) (McKinney 2001).

89. *Id.* § 632-a(1)(c)(ii)-(iii), (2)(b).

The law as revised also requires both the Department of Correctional Services and a local correctional entity to provide notice to the Crime Victims Board whenever an inmate's account contains more than $10,000.[90]

In addition, an obligation is placed upon the Office of the State Comptroller to notify the Crime Victims Board in any case where it is to pay a judgment or settlement that an inmate obtains in the Court of Claims, or in any state or federal court, and to wait for a period of thirty days before making such payment.[91] The intended purpose of this provision is to further the State's overriding goal of ensuring that moneys an inmate receives are not dissipated and will remain available to satisfy any outstanding financial obligations that the inmate may have incurred while incarcerated and any obligation the inmate has with respect to a crime victim. The Crime Victim's Board thus has a brief period of time within which to locate crime victims or their surviving family members, to inform them of the existence of funds and their ability to commence a civil action under the extended statute of limitations period and to apply to a court for a provisional remedy on their behalf.

The Crime Victims Board is empowered to act on behalf of the "plaintiff," and all other victims to avoid the wasting of assets and to apply for any and all provisional remedies including but not limited to attachment and injunction.[92] A protocol has been developed whereby after a crime victim is notified of the existence of "funds of a convicted person," if such crime victim indicates an intent to commence a civil claim against the concerned inmate, he or she provides a written notice to the Crime Victims Board. Thereafter, the Attorney General's Office, on behalf of the Crime Victim's Board, will commence a proceeding in state court that seeks a preliminary injunction against the inmate and the superintendent of the facility where the inmate is housed, from in any way disbursing the funds deposited in, or to be deposited into the inmate's account.

The statute further provides that if the inmate's funds are the result of a judgment in a lawsuit for compensatory damages, then ten percent of that money is immune to a judgment

90. N.Y. CORRECT. LAW §§ 116, 500-c(7) (McKinney 2001).
91. N.Y. CT. CL. ACT §§ 20(6-a), 20-a (Mckinny 2001).
92. N.Y. EXEC. LAW § 632-a(6) (McKinney 2001).

on behalf of the crime victim.[93] There is no such exemption for any portion of a judgment that represents punitive damages.[94] Furthermore, a judgment obtained by a crime victim against an inmate following the discovery of "funds of a convicted person," shall not be subject to execution or enforcement against the first one thousand dollars deposited in the inmate's account.[95] Thus if an inmate were to have $2,000 in his or her account, and also win a judgment for compensatory damages for $40,000, $1,000 of the amount already in the account would be immune from suit, and $4,000, which represents 10% of the judgment, would also be immune.

The other significant change encompassed by this law pertains to an extended or revived statute of limitations. In addition to the new three-year period within which to file a lawsuit following the receipt of notice of "funds of a convicted person," an amendment was also made to Civil Practice Law and Rules section 213-b to provide that a crime victim may commence an action, where the injury or loss resulted from a "specified crime" as defined in Executive Law section 632-a, within ten years of the date of the conviction of the defendant. In all other cases, the crime victim has a seven-year statute of limitations to commence an action.[96]

Thus far there has only been limited litigation involving the Son of Sam Law. There is one interesting decision wherein the court had to balance the equities between securing the availability of funds for the crime victim and ensuring that child support obligations were met.[97]

There have been also several decisions of importance involving challenges to the constitutionality of the law. In *Snuszki v. Wright*,[98] the inmate, Thomas Wright, alleged a number of grounds of unconstitutionality after a Son of Sam Law action had been filed by the murder victim's daughter.[99]

93. N.Y. C.P.L.R. 5205(k) (McKinney 2001).

94. *See id.*

95. N.Y. EXEC. LAW § 632-a(3) (McKinney 2001).

96. N.Y. C.P.L.R. 213-b (McKinney 2001).

97. N.Y. State Crime Victims Bd. v. Zaffuto, 763 N.Y.S.2d 442 (Sup. Ct. 2003).

98. Snuszki v. Wright, 751 N.Y.S.2d 344 (Sup. Ct. 2002), *aff'd*, 767 N.Y.S.2d 749 (App. Div. 2003).

99. *Id.*; *see also* N.Y. State Crime Victims Bd. v. Majid, 749 N.Y.S.2d 837 (Sup. Ct. 2002).

Inmate Wright had received $25,000 as part of a federal civil rights lawsuit settlement. In this lawsuit, he first alleged that the statute denied him access to the courts and violated his constitutional entitlement to equal protection of the law and substantive due process.

The court dispelled with the first argument by noting that no restrictions had been placed on him by the statute that prohibit him from pursuing legal relief against any alleged wrong that is committed against him now or in the future. In particular, the court stated the following:

> The settlement monies that the defendant received were the result of an action brought pursuant to section 1983 of Title 42 of the United States Code. The purpose in enacting section 1983 was not only to provide compensation to persons injured, but also to serve as a deterrent against future constitutional deprivations. The fact that some or all of the monies that the defendant received may have to be used to satisfy a judgment . . . in the future does not establish that he was not compensated for the wrong committed against him in the past or result in a benefit to the defendants in which the action was brought against.[100]

The court also found the equal protection challenge to be without merit wherein the defendant alleged that he was being selectively treated by the statute, as opposed to other civil defendants where the statute of limitations period would eventually expire preventing an action from being brought.[101] First, the court noted that since the defendant was not a member of a suspect class, the proper test is a rational basis standard of review. The court also reiterated that there is no fundamental right to the protection of a statute of limitations.[102]

The court then reasoned that any victim of a criminal act which causes injury has a right to seek legal relief and that the subject statute "simply allows the victim of a crime to pursue a cause of action against those who have harmed him or her at a time when such person actually has funds."[103] The court further noted that while a prior version of the statute was found unconstitutional, the underlying policy in compensating victims

100. *Snuszki*, 751 N.Y.S.2d at 347 (citation omitted).
101. *Id.* at 348.
102. *Id.*
103. *Id.*

of crime from the assets of the person who caused the harm has been found to be a compelling state interest. The court concluded that the revived statute of limitations that allows crime victims to bring an action within three years of the discovery of "funds of a convicted person" is rationally related to a legitimate penological interest.[104]

With respect to the substantive due process claim, the court first reiterated that the defendant's rights of access to the courts had not been impaired.[105] The court then found that there was nothing arbitrary, conscience-shocking or oppressive in permitting crime victims to seek compensation from those who have caused them injury once they discover that the person who harmed them has acquired assets.[106]

Conclusion

New York's Son of Sam Law is an important tool to help curb abusive inmate litigation, but more importantly, it advances the interests of justice by providing crime victims with a viable means of redress long after the original statute of limitations to file a civil action may have expired. In *Simon & Schuster*, the Supreme Court stated:

> There can be little doubt . . . that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them. Every State has a body of tort law serving exactly this interest. The State's interest in preventing wrongdoers from dissipating their assets before victims can recover explains the existence of the State's statutory provisions for prejudgment remedies and orders of restitution.[107]

The enhanced Son of Sam Law raises this interest to an entirely new level.

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104. *Id.*

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

106. *Id.*at 348-49.

107. Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).