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WHAT'S WRONG WITH THE PICTURE? REVIEWING PRISON ARTS IN AMERICA

Prisons are about no, the workshops are yes. Prisons are limits, blocks, barriers. Workshops are openings, doors, dances, breakings through. Prisons are about poverty and poor opportunity, boarded houses and rotting schools, a system that leaves so many children out. Workshops are a piece of the reply, they are about the strength of our stories, about our voices, our songs, our laughter, our resistance, about our families, our neighborhoods, our communities, ourselves, about what might and may be.¹

INTRODUCTION

On November 9, 2009, the Parliament of the United Kingdom of Great Britain and Northern Ireland was granted Royal Assent on the Coroners and Justice Bill which aims to deliver more effective and responsive justice and coroner services for victims, witnesses, bereaved families, and the wider public.² Section seven of the Act, “Criminal Memoirs,” will empower the government to seize assets from offenders who have profited from their crimes and will apply to all means of expression including visual arts and works of literature.³ The Ministry of Justice’s impact assessment on the Bill claims governmental intervention is necessary for a number of reasons, specifically the underlying principle that “[c]riminals should not be able to exploit for gain crimes which have devastated the lives of victims and their families.”⁴

The problem received attention in 1998 after allegations were made that Mary Bell, a mother responsible for killing her two young children, was paid

1. Buzz Alexander, *Foreword* to RACHEL MARIE-CRANE WILLIAMS, *TEACHING THE ARTS BEHIND BARS*, at ix, xi–xii (2003). Buzz Alexander is Professor of English Language and Literature at the University of Michigan where he founded the Prison Creative Arts Project and is co-curator of the Annual Exhibition of Art by Michigan prisoners. *U-M professor named one of top in U.S.*, UNIVERSITY OF MICHIGAN NEWS SERVICE (Nov. 21, 2005), <http://www.ns.umich.edu/index.html?Releases/2005/Nov05/r112105c>.

2. Coroners and Justice Act, 2009, c. 25, Introductory Text (U.K.), <http://www.legislation.gov.uk/ukpga/2009/25/introduction> (last visited Feb. 2, 2011).

3. *Id.* §§ 155–165.

4. MINISTRY OF JUSTICE, *IMPACT ASSESSMENT OF NEW SCHEME TO PREVENT CONVICTED CRIMINALS PROFITING FROM ACCOUNTS OF THEIR CRIMES 1* (2008), available at <http://www.justice.gov.uk/publications/docs/coroners-justice-ia-memoirs.pdf>.

for her contribution to the book, *Cries Overheard*.⁵ In 2005, the Government initiated proposals to prevent convicted criminals from profiting from publications about their crimes through the implementation of a civil scheme by which courts can order criminals to repay assets derived from the purchase of memoirs or other accounts of their crimes.⁶

Despite the House of Lord's legitimate desire to fix an unsettling problem, the Act has received numerous complaints from discerning citizens.⁷ Because of its broad-reaching language, the Act authorizes the Court discretion in taking into account a range of factors, including "the social, cultural or educational value of the activity or product" and "the extent to which any victim of the offence [or] the family of the victim . . . is offended by the respondent obtaining exploitation proceeds from the relevant offence."⁸ Critics are concerned the Act might affect works before production because artists, writers, publishers, and curators may decline to move forward with a project for fear that proceeds will be seized at a later date.⁹

Moreover, the law includes provisions which extend beyond the extraordinary case of Mary Bell. The Act may be applied to any art or self-expression including: a person interviewed about their mental illness or addiction and crimes committed while incapacitated; anyone found guilty of any offense, even if that offense took place overseas; an offender that was a foreign national who subsequently settled in the United Kingdom; or any political prisoner convicted under public order and terrorism laws.¹⁰ The Government

5. *Id.* at 3. See also Paul McCann, *Newspapers Tarnished by Mary Bell Coverage*, INDEPENDENT (U.K.), May 1, 2009, at A1 (noting that despite purported outrage over payment to Mary Bell for her book, newspaper reporters gathered outside her home waiting for coveted interviews).

6. MINISTRY OF JUSTICE, *supra* note 4.

7. See, e.g., Sam Leith, *Government Plan to Ban Criminal Memoirs is Moronic*, TELEGRAPH (U.K.), Nov. 30, 2009, <http://www.telegraph.co.uk/comment/columnists/samleith/3563901/Government-plan-to-ban-criminal-memoirs-is-moronic.html>; David Pannick, *Criminal Memoirs; Why Handcuff Should Not be Placed on Literature*, TIMES (U.K.), Nov. 5, 2009, <http://business.timesonline.co.uk/tol/business/law/columnists/article6901288.ece>; Lisa Appignanesi, *Criminal Memoirs Law Open to Abuse*, GUARDIAN (U.K.), July 21, 2009, <http://www.guardian.co.uk/politics/2009/jul/21/criminal-memoirs-law-prisoner-rehabilitation>.

8. ENGLISH PEN, CRIMINAL MEMOIRS: AN ENGLISH PEN BRIEFING ON PART 7 OF THE CORONER'S AND JUSTICE BILL 2 (2009) (quoting Coroners and Justice Act, 2009, c. 25, §§ 155–165 (U.K.)), available at http://www.englishpen.org/usr/pen_criminal_memoirs_brief.pdf.

9. See, e.g., *id.* at 4; Pannick, *supra* note 7; Caspar Walsh, *Crime Memoirs can Help Turn the Page*, GUARDIAN (U.K.), July 20, 2009, <http://www.guardian.co.uk/commentisfree/libertycentral/2009/jul/20/crime-memoirs-money>.

10. Coroners and Justice Act, 2009, c. 25, §§ 155–165 (U.K.); see also ENGLISH PEN, *supra* note 8, at 3.

maintains the measures do not amount to censorship because no one is actually prevented from publishing; instead, it merely disincentivises from doing so.¹¹

This story is a familiar one in the United States. While the fresh debate in Britain has gained extraordinary attention, the legacy of opposition against criminals and profit reached its peak almost two decades ago with the introduction of a widely-controversial book deal sought by a major publishing house in New York City which would detail the harrowing life of David Berkowitz, commonly referred to as the “Son of Sam.”¹² Outraged at the arrangement between the convicted murderer and publisher (in which Berkowitz arranged to receive profits from the story), the New York legislature expediently enacted legislation that would prevent any convicted criminal from gaining profit from their ill-famed notoriety by seizing any assets from such production.¹³

The concept of governmental financial regulation is not a novel concept. If writers can't profit from books, they don't write them; similarly, if artists can't profit from their artistic endeavors, then they often stop creating.¹⁴ The United States Supreme Court warned of these effects in *Simon & Schuster v. Members of New York State Crime Victims Board* when it declared the New York statute unconstitutional.¹⁵ Because the Son of Sam law “single[d] out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content,” the statute in effect disincentivised the production of expression and speech of a particular content protected by the First Amendment.¹⁶

11. MINISTRY OF JUSTICE, *supra* note 4, at 1.

12. *See* *Simon & Schuster v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 108 (1991).

13. The New York law reads:

Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives.

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

14. Julie Hilden, *When Crime Pays, Who Should Get the Money? The Suit to Freeze Scott Peterson's Profits from the Sale of His Story*, FINDLAW (Mar. 2, 2004), <http://writ.news.findlaw.com/hilden/20040302.html>.

15. *Simon & Schuster*, 502 U.S. at 116 (“The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us.”) (quoting *Leathers v. Medlock*, 499 U.S. 439, 448–49 (1991)).

16. *Id.*

The aftermath of the decision in *Simon & Schuster* left state courts scrambling to amend their statutes to meet constitutional requirements.¹⁷ Some statutes withstood numerous changes that essentially changed the foundation and purpose of the original law.¹⁸ Others remained stagnant, unchallenged, and retain the language held unconstitutional by the Supreme Court.¹⁹ However, despite the length of time since *Simon & Schuster*, forty-two Son of Sam statutes remain on the books.²⁰

Critics contend that the implementation and presence of the Son of Sam laws ‘chill’ literary and artistic works by criminals made in the public interest and do nothing to deter the activity politicians sought to eradicate; the kind that inflicts hurt, distress, and frustration in victims and their families.²¹ In theory, the statutes were intended to apply to the most notorious offenders, those such as David Berkowitz and Mary Bell whose crimes left a feeling of horror and disgust in the general public.²² In reality, the statutes punish criminals who receive significant benefits from the artistic and literary process of expression.²³ Both violent and non-violent criminals who participate in prison art programs are demonstrating positive signs of mood improvement, anger management, and functional group behavior while engaged in artistic activity.²⁴ Moreover, the statistics suggest that participating inmates coincide with lower recidivism rates once they return to society.²⁵

However, the current state of prisons mirror similar financial crises plaguing businesses and organizations today—United States correctional institutions have inflated to immeasurable sizes and do not have the funding to support their growth.²⁶ As a result, federal and state governments have

17. See discussion *infra* Part II.C.

18. *Id.*

19. *Id.*

20. *Id.*

21. See *infra* notes 199–207 and accompanying text.

22. *Simon & Schuster v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 108 (“The statute was intended to ‘ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.’”) (quoting Assembly Bill Memorandum Re: A 9019 (July 15, 1977), reprinted in Legislative Bill Jacket, 1977 N.Y. Laws ch. 823).

23. See discussion *infra* Part I.C.1–3.

24. See discussion *infra* Part I.C.1–2. Studies conducted in Florida and California correctional institutions reflect substantial benefits on inmates’ psychological and emotional well being while also contributing to institutional improvements. *Id.* Guards and staff note decreased tensions and improved work environment. *Id.*

25. See *infra* notes 154–156 and accompanying text.

26. See, e.g., N.C. Aizenman, *New High in U.S. Prison Numbers: Growth Attributed to More Stringent Sentencing Laws*, WASH. POST, Feb. 29, 2001, at A1.

enacted budget cuts to address their financial deficiencies.²⁷ In addition to early release programs and correctional officer lay-offs,²⁸ prison art programs have also felt the squeeze.²⁹ While art-in-correction programs thrived through organized support in the seventies, far fewer exist today.³⁰ Presently, it is the work of individual artists, not-for-profit organizations, arts councils, university professors, and students that make these artistic opportunities possible.³¹ With more funds disbursed towards prison construction and basic services, legislative bodies find funding art programs unjustified compared to other directives in need of financial support.³²

Tax-paying citizens and congressional bodies fail to take into account the big picture—prison art programs consistently demonstrate beneficial savings in comparison to their rather insignificant cost of implementation.³³ This comment diverges from the traditional approach to Son of Sam laws in that it does not review state approaches on manipulating the statutes to pass constitutional scrutiny; instead, it calls for a reconsideration of the law in application to prison art programs. Eliminating the Son of Sam laws will pave the way to publicly accepted prison art programs, encourage the prison art market, and in turn use the proceeds to pay for the void in federal funding and prison implementation. The current Son of Sam laws are ineffective at providing compensation to victims and preventing their perpetrator's interest in

27. Grady Hillman, *The Mythology of the Corrections Community*, in *TEACHING THE ARTS BEHIND BARS*, *supra* note 1, at 17–18.

28. See, e.g., Monique Garcia, *Quinn to Release 1,000 Inmates From Prison in Cost-Cutting Move*, CHI. TRIB., Sept. 18, 2009, http://newsblogs.chicagotribune.com/clout_st/2009/09/quinn-to-release-1000-inmates-from-prison-in-costcutting-move.html; James Parks, *Short-Staffed Federal Prisons Endanger Communities, Guards*, AFL-CIO (July 22, 2009), <http://blog.aflcio.org/2009/07/22/short-staffed-federal-prisons-endanger-communities-guards/>.

29. See discussion *infra* Part I.B.3.

30. See discussion *infra* Part I.B.2.

31. The National Endowment for the Arts provides a resource list for arts in corrections and includes organizations such as: Actor's Shakespeare Project, Inc. (located in Massachusetts); Community Arts Network (located in North Carolina); Intersections (located in Oregon); Offender/Victim Ministries' Prison Art Project (located in Kansas); Shakespeare Behind Bars (located in Kentucky); Southwest Correctional Art Network (located in Texas); and the William James Association (located in California). *The Arts in Corrections Resource List*, ART WORKS, <http://www.arts.gov/resources/Accessibility/rlists/corrections.html> (last visited Feb. 2, 2011). University volunteers also play a large role in the development and continuation of prison art programs. See, e.g., *Auburn University Prison Arts Program to Expand Services, Fund Pilot Project with NEA Grant*, WIRE EAGLE (Aug. 6, 2008), <http://wireeagle.auburn.edu/news/429>; cf. *What is the Prison Arts Project?*, WILLIAM JAMES ASSOCIATION, http://www.williamjamesassociation.org/prison_arts.html (last visited Feb. 2, 2011).

32. See, e.g., Shane Goldmacher and Larry Gordon, *Governor's Call for Giving College's Priority Over Prisons Faces Hard Political Tests*, L.A. TIMES, Jan. 7, 2010, <http://articles.latimes.com/2010/jan/07/local/la-me-education-prison7-2010jan07>.

33. See discussion *infra* Part I.C.2.

profiting from notoriety. The majority would not withstand constitutional challenge if analyzed. Therefore, this comment encourages Federal and State legislatures to consider removing the laws to create a federal regulatory scheme that manages the artistic endeavors of prisoners to pay for the prison art programs in this current state of economic turmoil.

Part I of this comment reviews prison art programs in America. Section A begins with a review of the common views of both proponents and critics to lay the foundation of citizens' popular concerns. This section also reviews the intrigue associated with the prison art market in the United States and abroad. Section B covers the establishment and growth of prison art programs in America. Section C culminates Part I with several published studies on the benefits of prison art to inmates, prison staff, taxpayers, and society.

Part II outlines the legal history of the Son of Sam laws beginning with the legislative intent behind the enactment of the original New York statute and continuing through the famous *Simon & Schuster* decision that held the law unconstitutional. This portion also categorizes the current state of the Son of Sam statutes from their adaptation through the Supreme Court decision and highlights alternative legal measures available to victims besides those present under the statute. The history and current review provides the context for the contention that the laws are an ineffective means towards achieving the legitimate goal of victim-protection.

Part III ends with the consideration of removing Son of Sam laws in order to create an inmate profit regulation that provides prisoners with means to fund their artistic endeavors. This comment concludes with a summation of the policy behind promoting such an alternative measure and suggests that advocacy efforts highlighting the problems in corrections and prison art funding are most likely to bring about change.

Wally Lamb's recent book, *Couldn't Keep it to Myself*, is a collection of short stories written by his incarcerated students detailing narratives about family vacations, tributes to family relatives, and painful memories that demand to be examined.³⁴ Some of these memories chronicle their horrid crimes; others reflect histories of incest, rape, and drug abuse.³⁵ Lamb's testimony provides a glimpse into the power of these programs:³⁶

34. WALLY LAMB, *COULDN'T KEEP IT TO MYSELF: WALLY LAMB AND THE WOMEN OF YORK CORRECTIONAL INSTITUTION, TESTIMONIALS FROM OUR IMPRISONED SISTERS* 1-3 (2003). Wally Lamb is the author of *She's Come Undone* and *I Know This Much is True* and has worked with the maximum facility women's correction center in York, Connecticut since 1999 teaching a writing workshop for interested prisoners. *Id.* He is also a contributing activist towards increasing prison arts programs in America because he has witnessed their lasting effects. *Id.*

35. *Id.* at 5.

36. *60 Minutes: Couldn't Keep it to Myself* (CBS television broadcast May 9, 2004).

There are things [people] need to know about prison and prisoners. There are misconceptions to be abandoned, biases to be dropped. There are a heart and a mind that need opening. There are many. We are a paradoxical nation, enormously charitable and stubbornly unforgiving. We have called into existence the prisons we wanted. I am less and less convinced they are the prisons we need.³⁷

I. THE PROBLEM WITH PROFIT

A. *Art in Opposition*

It is not difficult to comprehend why victims, citizens, and public officials are outraged at the idea of a convicted murderer being able to profit from his or her notoriety as a demonic monster. As the author of the Son of Sam statute explained, “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”³⁸ It is therefore apparent why the public is similarly offended when prisoners create works of art while incarcerated, regardless of whether the work reflects the convicted crime. News outlets worldwide brim with such stories.³⁹

In April 2009, London’s Royal Festival Hall purchased an elaborately intricate origami sculpture for £600 to be placed in its lobby.⁴⁰ The piece, titled *Bringing Music to Life*, is a depiction of an orchestra created from folded scores of Beethoven’s Ninth Symphony.⁴¹ Shortly after its anonymous debut, the identity of the artist was revealed—Colin Pitchfork, a sex-murderer convicted of raping and killing two fifteen-year-old girls over twenty years

37. LAMB, *supra* note 34, at 7.

38. Memorandum of Sen. Emanuel R. Gold, Governor’s Bill Jacket to 1992 N.Y. Laws ch. 618, reprinted in 1977 NEW YORK STATE LEGISLATIVE ANNUAL 267, 267. In response to the Supreme Court’s decision finding the New York Son of Sam statute unconstitutional, Senator Gold noted that the ruling “has deprived crime victims and their personal representatives of a useful means by which to seek recompense from the criminal responsible for victimization.” *Id.*

39. See, e.g., Caspar Walsh, *Crime Memoirs Can Help Turn the Page*, GUARDIAN (U.K.), July 20, 2009, <http://www.guardian.co.uk/commentisfree/libertycentral/2009/jul/20/crime-memoirs-money>; Deborah Orr, *This Artwork was Made by a Killer. It is not Less Valid for That*, INDEPENDENT (U.K.), Apr. 20, 2009, at 14; Boyd Tonkin, *Elected Vandals in the House of Freedom*, INDEPENDENT (U.K.), Apr. 11, 2009, at 28; Michael Howie, *Crime Stories Won’t Pay for Much Longer*, SCOTSMAN (Scotland), Jan. 14, 2009, at 17; Chris Watt, *Plan to Prevent Criminals from Cashing In*, HERALD (Scotland), Jan. 5, 2009, at 13.

40. Sophie Grove, *Beyond the Bars*, NEWSWEEK, Aug. 28, 2009, <http://www.thedailybeast.com/newsweek/2009/08/28/beyond-the-bars.html>.

41. *Id.* The image of *Bringing Music to Life* is available at http://i.dailymail.co.uk/i/pix/2009/04/10/article-1169119-0464BFE1000005DC-977_634x346.jpg.

ago.⁴² The Royal Festival Hall promptly removed the piece inspiring a mass of published debates.⁴³

Opponents' arguments against the production and profit of prison art rely upon the principle that prison is a place of punishment, not a setting where violators should flourish. They fear that the production and media attention of the art celebrates society's most violent sociopaths. Lynda Mann, the mother of one of Pitchfork's victims, said paying her daughter's "evil, wicked and cruel killer for his work show[s] a lack of conscience. For a man who did that to be rewarded for making paperwork art—good or bad—is not right. [He] is supposed to be in prison as a punishment for what he did."⁴⁴ Citizens' growing concerns over the matter vary and include the following: fear that their tax money is being used for purposes to which they don't support, victim's rights are being placed below those of convicted criminals, the rehabilitation of lifetime offenders is not beneficial to society, the fear that art of this kind has the potential to inspire potential offenders, and criminals should not be allowed to experience joy from the "absorption of artistic endeavor[s]."⁴⁵

On the other end of the spectrum are proponents for the creation of prison art for its contribution to the art world, its rehabilitative effects on prisoners, and a concern for maintaining the freedoms of speech and expression. As evidenced in the title of her editorial, "This artwork was made by a killer. It's no less valid for that," Deborah Orr applauds the detail and aesthetic value of *Bringing Music to Life* while acknowledging the personal distress that might be caused by the display of the piece.⁴⁶ Despite the victims, Orr contends that the pieces should be viewed as creative works of art rather than focusing on its creator. As support, she cites the prolific works of Dr. W.C. Minor, a Nineteenth Century killer and provider of thousands of entries into the Oxford English Dictionary submitted from his prison cell. "It's idiotic, the idea that

42. Grove, *supra* note 40.

43. Compare Orr, *supra* note 39 ("Innocuous artwork should not be the focus of witch-hunts. . . . Attacking an artwork because it has been made by a child killer is inhumane behaviour in itself"), with Jonathan Jones, *Good Riddance to Colin Pitchfork's Artwork*, GUARDIAN (U.K.), Apr. 9, 2009, <http://www.guardian.co.uk/artanddesign/jonathanjonesblog/2009/apr/09/colin-pitchfork-sex-murderer-art> (explaining that despite the "standard liberal response an art critic might be expected to make on this question," Jones instead states "[t]he only art I want to see by a man like Colin Pitchfork would be an attempt to face the nature of his crime. This tableau of pretty figures of musicians seems more like a bland denial.>").

44. Sarah Chalmers, *Work of Art or Monstrous Cynicism? Convicted Paedophile Creates Extraordinary Paper Sculpture in Bid to Win Freedom*, DAILY MAIL (U.K.), Apr. 11, 2009, <http://www.dailymail.co.uk/news/article-1169119/Work-art-monstrous-cynicism-Convicted-paedophile-creates-extraordinary-paper-sculpture-bid-win-freedom.html>.

45. See, e.g., *supra* notes 41, 43 and accompanying text.

46. Orr, *supra* note 39.

the Oxford English Dictionary . . . should be hidden because [it is] somehow tainted by the crimes of their creators.”⁴⁷

Art critic Jonathon Jones adds, in an argument reminiscent of the Supreme Court’s opinion in *Simon & Schuster*,⁴⁸ that the following would be affected if the law suppressed works of art just because they were made by murderers:

[R]emove the works of Caravaggio from art galleries, take down Cellini’s Perseus from the Loggia of the Signoria in Florence, consign his Nymph of Fontainebleau to the Louvre storeroom, and reopen the files on a lethal knife fight involving Hans Holbein. You’d have to worry about Vincent van Gogh because, moments before cutting off his ear, he threatened his friend Gauguin with the same knife. You might also worry about Carl Andre, the minimalist sculptor who was acquitted of second degree murder following the death of his wife, Ana Mendieta, in 1985. And so forth.

Just because a work of art is great does not mean its creator was virtuous. There is no connection between aesthetic ability and moral rectitude. The criminal artist is, indeed, a cultural myth, and has been since the Renaissance, when artists like Cellini were forgiven their crimes by popes who revered their abilities.⁴⁹

Most recently, film producer Roman Polanski has received substantial news coverage for a recent extradition attempt by Swiss authorities in collaboration with the Los Angeles District Attorney’s office.⁵⁰ Polanski, a French citizen, was convicted in California for having sex with a thirteen-year-old female in 1977.⁵¹ Polanski fled the United States to Europe in 1978 before his sentencing and has not openly returned since, even after winning an Oscar for directing *The Pianist* in 2002.⁵² His victim has since publicly forgiven him for the crime that occurred some thirty years ago.⁵³ Despite such offense and conviction, Polanski has contributed significant advancements to the film industry with wide appraisal: *Knife in the Water*, *Rosemary’s Baby*, *Chinatown*, *Tess*, and *The Pianist*.⁵⁴ Following the contentions of both Deborah Orr and

47. *Id.*

48. *See infra* notes 202–204 and accompanying text.

49. Jones, *supra* note 43.

50. Michael Cieply & Brooks Barnes, *Polanski Arrested in Switzerland in 1970s Sex Case*, N.Y. TIMES, Sept. 28, 2009, at C1.

51. *Id.*

52. *Id.*

53. *Id.*

54. The following films received artistic awards: *Knife in the Water* (1963), nominated for Best Foreign Language Film; *Rosemary’s Baby* (1968), nominated for Best Screenplay Adaptation; *Chinatown* (1974), nominated for Best Picture; *Tess* (1979), nominated for Best Picture; *The Pianist* (2002), nominated for Best Picture, won Academy Award for Best Director. *The Official Academy Awards Database*, ACADEMY OF MOTION PICTURE ARTS AND SCIENCES, http://awardsdatabase.oscars.org/ampas_awards/BasicSearchInput.jsp (last visited Feb. 2, 2011).

Jonathon Jones, Polanski's tainted past does not deflect from his significant contributions to the film community and should not lessen or trivialize his artistic achievements.

However, despite the fiery debates of critics and politicians, the reality of "prison art" is not what is captured in the media limelight. The literary and artistic works created by notorious murderers such as David Berkowitz, John Wayne Gacy, and Colin Pitchfork are what stir the fortitude and curiosity demonstrated in excerpts above. As Jones noted in his editorial, the criminal artist is but a cultural myth.⁵⁵

The production of art by famed criminals has created a niche in both the United States and United Kingdom. Private collectors are entranced by the "taboo life of people in prison."⁵⁶ "[They] imagine that the underworld might be revealed by having access to their work. . . . [and] [t]hat's what's driving this market."⁵⁷ When limiting the discussion to such pieces, the appeal appears to focus on the spectacle, intrigue, and morbid fascination. As support, one can turn to the popularity and acclaim received by the film industry's coverage of serial killers and mafia families.⁵⁸

Some consumers are driven by a glimpse into this unfamiliar world regardless of the quality of the work. Two paintings by the Kray twins, brothers who ran a violent gang called "The Firm" in the 1960s who were convicted of murder and racketeering, sold for nearly £1,000 a piece at the beginning of 2009.⁵⁹ Just recently, Reggie Kray's new painting of a menacing feature outside a bleak building was released for purchase from a popular auction house.⁶⁰ Does this piece sell for its aesthetic quality or for the creator's penchant for torture and murder? Regardless of the reason for interest, there

55. *Id.*

56. Grove, *supra* note 40.

57. *Id.*

58. The following motion pictures depict serial killers from the past three decades: *The Deliberate Stranger* (Ted Bundy), *To Catch a Killer* (John Wayne Gacy), *Helter Skelter* (Charles Manson), *Dahmer* (Jeffrey Dahmer), *Ed Gein* (murderer that influenced films such as *The Texas Chainsaw Massacre* and *Silence of the Lambs*), *The Boston Strangler* and the *Summer of Sam* (David Berkowitz). THE INTERNET MOVIE DATABASE, <http://www.imdb.com/> (last visited Feb. 2, 2011). The remaining motion pictures depict the life of American Mafia: *Mobsters* (Lucky Luciano), *The Gotti Story* (John Gotti), *Goodfellas* (Henry Hill and the Luchese family), *Donnie Brasco* (Bonanno family), *Casino* (Frank Rosenthal), *American Gangster* (Frank Lucas), *The Departed* (Whitey Bulger), and *The Untouchables* (Al Capone). *Id.*

59. Grove, *supra* note 40.

60. Mark Brown, *Reggie Kray's paintings and letters up for auction*, GUARDIAN (U.K.), Aug. 20, 2010, <http://www.guardian.co.uk/artanddesign/2010/aug/20/reggie-kray-paintings-letters-auction>.

continues to be a clear consumer demand for notorious criminal art and items known as “murderabilia”.⁶¹

But the *reality* of “prison art” represents a step away from the highly controversial pieces of Colin Pitchfork and Roger Kray; instead, art created by convicted criminals in therapeutic settings across the United States and United Kingdom reflect naïve creations which have beneficial effects on both violent and non-violent offenders. The statistics reflect a wide category of inmates far distanced from the ill-gained notoriety referenced in the above discussions. As of December 31, 2001, there were an estimated 5.6 million adults who had served time in state or federal prison.⁶² The United States Department of Justice cited 1,305,253 prisoners being held in federal or state prisons and local jails in June of 2000.⁶³ Half of inmates in 2002 were held for a violent crime or drug offense and that figure mirrors the almost unchanged statistics from 1996.⁶⁴ In addition, the Federal Bureau of Investigation (FBI) estimates that less than one percent of all murderers fit within the classification of serial killers.⁶⁵ These statistics reveal the significant difference between the number of people who have served, and are currently serving, time within federal and state corrections and the small percent of notorious and famous criminals to which so much media attention in this controversy is devoted.

B. *History of Prison Art in America*

Prisoners have been creating literature and artwork since the beginning of the United States penal system. However, such works were often completed in informal prison settings or by the initiative of the individual prisoner. Phyllis Cornfeld, an in-house artist, documents a strong visual arts tradition behind

61. Murderabilia is defined as collectibles of notorious killers, coined by Andy Kahan, director of the Houston-based Mayor’s Crime Victims Office. Thomas Vinciguerra, *The ‘Murderabilia’ Market*, N.Y. TIMES, June 5, 2011, at WK. 2. For further discussion on “Murderabilia,” see generally Suna Chang, Note, *The Prodigal Son Returns: An Assessment of Current Son of Sam Laws and the Reality of the Online Murderabilia Marketplace*, 31 RUTGERS COMPUTER & TECH. L.J. 430 (2005) (discussing the current state of the Son of Sam laws in application to “Murderabilia”); Hilary Hylton, *Cracking Down on Murderabilia*, TIME, June 5, 2007, <http://www.time.com/time/nation/article/0,8599,1629655,00.html> (addressing the market craze for “Murderabilia” and legislative attempts to target its online trade).

62. THOMAS P. BONCZAR, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (2003), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=836>.

63. JAMES J. STEPHAN & JENNIFER C. KARBERG, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., CENSUS OF STATE AND FED. CORRECTIONAL FACILITIES, 2000, at 5 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/csfcf00.pdf>.

64. BONCZAR, *supra* note 62.

65. NAT’L CTR. FOR THE ANALYSIS OF VIOLENT CRIME, U.S. DEP’T. OF JUST., SERIAL MURDER: MULTIDISCIPLINARY PERSPECTIVES FOR INVESTIGATORS 2 (2008), available at <http://www.fbi.gov/stats-services/publications/serial-murder>.

bars in her book, *Cellblock Visions*.⁶⁶ In institutions lacking designated programs, prisoners were known to create art out of isolation and innovation—some have created pieces by sculpting bars of soap, painting handkerchiefs with the dyes of M & Ms or other food products, or drawing pictures with such tools as Bic pens.⁶⁷ A prisoner at the California State Prison-Sacramento describes the presence of art before the institution of ‘Arts in Corrections’:

Long before there was any money, before there were art “programs” of Arts-In-Corrections or whatever money made, there were artists in prison. There were poets and writers and painters. There were musicians and singers and composers. Where there was no paint there came paintings made from coffee, from Koolaid, from crushed chalk. Things were sculpted in soap, and sometimes when the poet had no ink he used shoe polish in his pen. And these people all knew each other, shared ideas and materials, shared books, collaborated and competed. There was a community And where there is a community of these wall painters, these storytellers and singers, there is also the true, and only, heart of this society. Art is necessary the way love is necessary.⁶⁸

1. 1900s through 1960s

Formal ‘Arts in Corrections’ is a relatively new concept that emerged in the middle of the twentieth century. The 1950s, commonly referred to as the “Era of Treatment,” was a period associated with a rise in literature-based treatment in correctional settings.⁶⁹ This method functioned in connection with group therapy where prisoners would meet with a librarian to discuss books in relation to their lives.⁷⁰ The therapeutic use of literature was supported by Herman Spector, the librarian at San Quentin from 1947 to 1968, who believed that literature had the power to change prisoners’ lives.⁷¹

66. See PHYLLIS KORNFELD, *CELLBLOCK VISIONS: PRISON ART IN AMERICA* 9–23 (1997). Kornfeld continues to teach art behind bars to prisoners in Connecticut through the Community Partners in Action Prison Arts Program. *About Phyllis Kornfeld*, *CELLBLOCK VISIONS*, <http://www.cellblockvisions.com/about.html> (last visited Feb. 2, 2011).

67. See KORNFELD, *supra* note 66, at 16–18.

68. Krista Brune, *Creating Behind the Razor Wire: An Overview of Arts in Corrections in the U.S.*, COMMUNITY ARTS NETWORK (Jan. 2007), http://wayback.archive-it.org/2077/20100906203717/http://www.communityarts.net/readingroom/archivefiles/2007/01/creating_behind.php. Krista Brune, a 2006 Princeton graduate, developed this site after conducting year-long research in the field of prison arts funded by the ReachOut 56 Fellowship. *Id.*

69. TODD R. CLEAR, GEORGE F. COLE & MICHAEL D. RESIG, *AMERICAN CORRECTIONS* 56 (8th ed. 2009).

70. *Id.*

71. ERIC CUMMINS, *THE RISE AND FALL OF CALIFORNIA’S RADICAL PRISON MOVEMENT* 17 (1994). Spector emerges as one of the key figures in Cummins’ tale of the radical prison movement in California from the 1950s to 1980. *Id.* In addition to establishing an extensive

In addition, other artistic opportunities became available in prison settings. Federal and state systems approved theater performances and group writing programs. In a now-famous performance, actors from the San Francisco Actor's Workshop presented Samuel Beckett's *Waiting for Godot* to fourteen hundred prisoners at San Quentin penitentiary on November 19, 1957.⁷² This presence of arts and education programs in prisons during the 1950s was relative to a renewed commitment to rehabilitation and reform. This shift in corrections' mentality was symbolically marked by the American Prison Association changing its name to the American Correctional Association in 1954.⁷³ Many correctional facilities introduced educational opportunities, exercise rooms, vocational training, counseling, less harsh discipline methods, better food and other reforms believed to be necessary for prisoners' treatment.⁷⁴

2. 1970s through 1980s

Arts in Corrections gained considerable acceleration in the seventies through the presence of local and national activism. Following the aftermath of a violent prison uprising in Attica, NY, support of the prisoners' rights movement increased.⁷⁵ There was a desire among many activists, artists, and educators to work and teach inside the prisons which increased art and educational workshops often funded by government, arts councils, colleges, and volunteers.⁷⁶

The California Arts Council was a forerunner in establishing a sustainable model in arts in corrections. In 1977, a three-year pilot of the Prison Arts

library at San Quentin, Spector conducted a "Great Books" class, where he encouraged prisoners to relate the books to their lives, and sponsored group counseling sessions. *Id.*

72. David Smith, *In Godot We Trust*, OBSERVER (U.K.), March 8, 2009, <http://www.guardian.co.uk/culture/2009/mar/08/samuel-beckett-waiting-for-godot> (quoting Rick Cluchey, a prisoner who performed in the San Quentin production, "*Waiting for Godot* resonates with the incarcerated because it depicts a vacant landscape and characters imprisoned within themselves, but with great humour. Beckett approved of our work at San Quentin and we later became great friends.").

73. *Past, Present & Future*, AMERICAN CORRECTIONAL ASSOCIATION, <http://www.aca.org/pastpresentfuture/history.asp> (last visited Feb. 2, 2011).

74. See D.W. Dowd, *Pit and the Pendulum—Correctional Law Reform from the Sixties into the Eighties*, 29 VILL. L. REV. 1, 14 (1984).

75. Randy James, *A Brief History of Prison Riots*, TIME, August 11, 2009, <http://www.time.com/time/magazine/article/0,9171,1916301,00.html>. The upheaval at Attica took place in 1971, over four days, and is considered the deadliest to date. *Id.* Prisoners in excess of 1,000 rebelled, held prison guards hostage, and issued demands including improved living conditions. *Id.* The rebellion resulted in the murder of 32 inmates and 11 guards. *Id.*

76. Brune, *supra* note 68.

Program began at the California Medical Center at Vacaville.⁷⁷ Designed by Eloise and Page Smith, this pilot project received support from the California Arts Council's Artists in Social Institutions Program and the San Francisco Foundation.⁷⁸ After a successful pilot, the program developed into the now widely recognized Arts-in-Corrections, the established fine arts program in California's state prisons. This innovative arts program received its funding from the Department of Corrections through contracts provided by two nonprofit organizations, the William James Association in northern California and Artsreach in southern California.⁷⁹ These community-based arts organizations administered the program and searched for regional contract artists for hire.

California Arts-in-Corrections became a model for similar programs in other states. For instance, the Connecticut Prison Association began its Prison Arts Program in 1978 based on the California approach.⁸⁰ The Connecticut Department of Corrections provided one-fourth to one-third of the program's funding through a contract.⁸¹ Arts-in-Florida joined with the Department of Juvenile Justice to carry out an arts-in-juvenile justice program that continues today.⁸²

After published support of such pilot programs, the Law Enforcement Assistance Administration (LEAA) and the National Endowment for the Arts (NEA) combined their efforts in 1977 which resulted in the placement of artists in fifty-four state and federal penal facilities.⁸³ This federal support for arts programming in corrections continued for the next twenty-five years with the NEA funding the artists-in-residencies.⁸⁴ States that had participated in the LEAA and NEA partnership, such as Oklahoma and Texas, maintained their arts programs in the prisons throughout the early 1980s.⁸⁵

77. WILLIAM CLEVELAND, *ART IN OTHER PLACES: ARTISTS AT WORK IN AMERICA'S COMMUNITY AND SOCIAL INSTITUTIONS* 77 (2000).

78. See Hillman, *supra* note 27, at 21; *What is the Prison Arts Project?*, *supra* note 31.

79. *What is the Prison Arts Project?*, *supra* note 31.

80. Brune, *supra* note 68.

81. *Id.*

82. Grady Hillman, *A Journey of Discouragement and Hope: An Introduction to Arts and Corrections*, COMMUNITY ARTS NETWORK (Dec. 2001), http://wayback.archive-it.org/2077/20100906195256/http://www.communityarts.net/readingroom/archivefiles/2001/12/a_journey_of_di.php. For further discussion on Grady Hillman, see *infra* notes 97–98 and accompanying text.

83. Hillman, *supra* note 82.

84. *Id.*; see also P.B. Taft, *Alchemy of Prison Art*, 5 CORRECTIONS MAG. 12 (1979). This publication focused on the use of art therapy to measure attitudinal changes in correctional institutions in New Jersey and Oklahoma. *Id.* Despite enthusiasm of prison officials and inmates, the article considers factors that may curtail growth in the programs including public inflation, public conservatism, and skepticism. *Id.*

85. Hillman, *supra* note 82. *But see* Samuel H. Pillsbury, *Understanding Penal Reform: The Dynamic of Change*, 80 N.W. JOUR. OF CRIM. L. & CRIMINOLOGY 726, 768 (1989). The end of

Arts programs in the prisons also existed within community colleges and universities. For instance, Jean Trounstine, a professor at Middlesex Community College, began teaching English literature and drama courses to the women at the Massachusetts Correctional Institution in Framingham in 1986.⁸⁶ She taught in the facility for a decade with the assistance of federal Pell Grants that provided funding to prison students for college education.⁸⁷ In 1994, however, Congress voted to eliminate Pell Grants for federal and state prisons, effectively abolishing all federally financed college education for prisoners. By removing federal support and funding for the 350 existing programs, only three of the college programs in prisons remained.⁸⁸ Trounstine continued her classes as a volunteer for two years, but could not sustain the work without guaranteed funding.⁸⁹

3. 1990s to Present

The mid-1980s and 1990s reflected a remerging prison boom. With President Ronald Reagan and other politicians taking a “tough on crime” stance, the length of sentences increased, the use of parole and probation declined, and the construction of prisons skyrocketed.⁹⁰ In spite of this constant prison construction, correctional facilities across the country were plagued with overcrowding. By 1990, the nation spent nearly \$30 billion on corrections, as opposed to \$6 billion in 1979.⁹¹ Most of these funds were allocated to construction, staff salaries, and basic services, with limited funding directed towards education and the arts.⁹² It became difficult to manage and provide high quality arts programming with diminished interest and funds.⁹³

the eighties, however, reflected a different environment. The reality of prison conditions in the eighties were “overcrowded conditions, meaning less privacy, less recreation, less work, and more violence.” Pillsbury, *supra* note 85, at 768. Prisons were also housing more prisoners with longer sentences. *Id.*

86. See *Profile of Jean Trounstine*, <http://ctl.umassd.edu/Profilestrounstine.cfm> (last visited Feb. 2, 2011). Trounstine’s University of Massachusetts’s faculty site includes links to studies, evaluations, and teaching texts for those interested in pursuing education within the prison system. *Id.*

87. Brune, *supra* note 68.

88. Charles Ubah, *Abolition of Pell Grants for Higher Education of Prisoners: Examining Antecedents and Consequences*, 39 J. OF OFFENDER REHAB. 73, 76, 80 (2004).

89. See *Biography of Jean Trounstine*, JEWISH WOMEN’S ARCHIVE, <http://jwa.org/exhibits/wwd/jsp/bio.jsp?personID=pjtrounstine> (last visited Feb. 2, 2011).

90. Hillman, *supra* note 27, at 21–25.

91. *Id.*

92. *Id.*

93. Hillman, *supra* note 82. With the majority of funding allotted towards construction and basic services, arts and education programs in correctional facilities felt a funding squeeze, yet they did not disappear entirely. *Id.* During the late 1980s and early to mid 1990s, additional arts-based programs began in correctional facilities across the country. *Id.* Individual artists,

While there was an attempt to create a national program through the collaboration of the National Endowment for the Arts (NEA) and the Federal Bureau of Prisons in 1977, today no such authority remains that federally promotes arts programs in correctional settings.⁹⁴ The Office of Juvenile Justice and Delinquency Prevention (OKKDP) has entered into three demonstration projects with the NEA around providing arts programs to high-risk or court-involved youth.⁹⁵ State programs, however, are running on the collaborative effort of volunteers and university organizations. Because of California's recent budget crisis, the founding Prison Arts Project is facing staff layoffs of statewide artist facilitators. The William James Association has conducted a letter-writing complaint system to be sent to the California Senate and Department of Corrections in protest.⁹⁶

C. *The Big Picture – Art as an Effective Rehabilitation Tool*

Society's misconceptions regarding prisoner art are in part to blame for the current demise of these worthy programs. As evidenced in the discussion above, taxpayer uproar over providing artistic opportunities to prisoners creates a dark cloud in the realm of profit. The present economy makes the justification for arts-in-corrections an even steeper up-hill battle. Not according to Grady Hillman, the poet and writer who first became involved with arts-in-corrections more than twenty-five years ago.⁹⁷ When prompted by the regular inquisition, "Why should I . . . pay for [art] lessons for some convict when I can't afford it for my own kids," Hillman replies:

It just makes the world a little safer for your kids. Yes, your kids should have art lessons. Everyone should have art lessons. But these programs pay for

nonprofit organizations, arts councils, and university professors or students made these artistic opportunities possible. *Id.* However, despite the growth in volunteerism, fewer incarcerated individuals have access to arts and cultural resources now than they did in the late 1970s. *Id.* Unfortunately, even if arts programming within correctional settings continues to expand, these programs cannot keep pace with the needs of a rapidly growing incarcerated population. *Id.*

94. *Id.*

95. *Id.* However, Hillman completed such a collaboration project in 2001 and believes there is no interest in the Justice Department for revisiting a LEAA-style national arts program for adults or juveniles. *Id.*

96. Laurie Brooks, *Save Arts in Corrections*, WILLIAM JAMES ASSOCIATION (Oct. 30, 2009), <http://williamjamesassociation.org/blog/2009/10/save-arts-in-corrections/> (last visited Feb. 2, 2011).

97. Interview by Steven Durland, National Endowment for the Arts, with Grady Hillman, co-founder of Southwest Correctional Arts Network (1996), available at <http://www.nea.gov/resources/accessibility/a-maintain.html>. Grady Hillman first became involved with arts-in-corrections in 1981 when he completed a creative writing residency in the Texas Prison System. *Id.* "Since then, [Hillman] has worked in more than fifty correctional facilities in Florida, California, Massachusetts, Colorado, Idaho, Oklahoma, Texas, Peru, and Ireland." *Id.* Hillman is regarded as a nationally recognized correctional arts programmer. *Id.*

themselves and they represent a significant benefit to the community at large. The people come back out. Ninety-five percent of the people who go into prison come back out. And how do you want them to come back out? Do you want them to be bitter and angry and hostile? Or do you want something in place that maintains their humanity and keeps the human side alive?⁹⁸

Hillman contends that art programs in prison produce radical statistics that demonstrate reduced rates of violence that subsequently decrease guard and administrative over-time hours.⁹⁹ These programs have additionally been associated with lowered recidivist rates among inmates.¹⁰⁰ This section will survey a variety of studies regarding the positive benefits of prison art programs on inmates' psychological conditions, violence, recidivism, and value as compared to the cost of program implementation.

1. Psychological Effect

In 1997, Florida State University Professor David Gussak outlined eight advantages of art therapy in correctional settings only to discover a substantial lack of empirical data on the topic.¹⁰¹ As a result, he conducted a pilot study in a medium to maximum-security male adult prison in rural Florida in 2003 to measure the effectiveness of art therapy services on the prison population.¹⁰² Gussak hypothesized "that if prison inmates receive art therapy services, then they will exhibit marked change in their behavior and attitude, and an improvement in their mood, socialization and problem-solving abilities within the correctional environment."¹⁰³ The results of that study, and follow-up studies, support the hypothesis; namely, that art therapy is beneficial for participating inmates.¹⁰⁴

Gussak's interest in art therapy within correctional settings occurred long before his studies in Florida—he worked as a professional art therapist in a Northern California prison conducting medical and psychiatric care to the prison population.¹⁰⁵ In that capacity, the author spoke of the "darker side of

98. *Id.*

99. *Id.*

100. *Id.*

101. David E. Gussak, *The Benefits of Art and Art Therapy with Prison Inmates*, in *THE PERSON IN ART: CONCEPTUAL AND PICTORIAL FRAMES ON ART AND MENTAL HEALTH* 113, 113 (Hans-Otto Thomashoff & Ekaterina Sukhanova eds., 2008).

102. *Id.*

103. *Id.*

104. David Gussak, *The Effectiveness of Art Therapy in Reducing Depression in Prison Populations*, 51 *INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY* 444, 446 (2007); David E. Gussak, *Raising the Bars: Art Therapy in the American Prison System*, in *ART IN TREATMENT: TRANSATLANTIC DIALOGUE* 102, 120 (Dee Spring ed., 2007)

105. Gussak, *Raising the Bars*, *supra* note 104, at 102.

the human psyche” witnessed within the prison walls.¹⁰⁶ Accordingly, the prevalence of mental disorders and illnesses in prison creates uncompromising conditions for prisoners, prison guards, and potential citizens when that prisoner returns to society.

One of the most prevalent mental illnesses in prison is depression. A study by Eyestone and Howell conducted in 1994 discovered that twenty-five percent of 102 inmates evaluated demonstrated severe depressive symptoms and another thirty-one percent had depressive like symptoms that did not meet American Psychiatric Association standards at the time.¹⁰⁷ In addition, prison life itself can cause psychological distress and aggravate and intensify preexisting conditions. As a result, prisoners regularly demonstrate suicidal tendencies, self-abusive behavior, and aggression.¹⁰⁸

The problem, however, is that psychological conditions often remain untreated for a variety of reasons. Gussak cites vulnerability and weakness as an explanation. “Inmates with mental illness are the most vulnerable in state prisons. They can be victimized by predatory inmates or untrained staff.”¹⁰⁹ Despite statistics which emphasize the presence of mental health treatment in prisons, the reality is that certain therapy is not provided because many inmates refuse to seek treatment or complain of symptoms to avoid appearing weak in the community.¹¹⁰ Moreover, many prisoners remain silent due to increased illiteracy and the inability to effectively communicate mental, physical, emotional, or psychological problems.¹¹¹

Although there is a long-standing presence of formal and informal art programs in the

U.S. correctional system, there had been little research conducted to measure the effectiveness of art therapy on prisoners.¹¹² Gussak delineated eight benefits that art therapy may have in prison:

106. *Id.*

107. Gussak, *The Effectiveness of Art Therapy*, *supra* note 104, at 445. The author refers to a 1994 study on depression in inmate populations. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 444; *see also* David Gussak, *The Effects of Art Therapy on Male and Female Inmates: Advancing the Research Base*, 36 ARTS IN PSYCHOTHERAPY 5 (2009).

Artistic expression is a fundamental component of prison. This is evidenced through craft shops, inmate-painted wall murals, decorative envelopes that inmates use to send letters to loved ones, and intricate tattoos designed and displayed with pride. The ability to create “good art” is a status builder and can earn respect and friendship for the artist from his or her peers. Such creative expression may originate through the sublimation of aggressive and libidinal impulses and may provide the artistic inmate an acceptable “escape.”

Gussak, *The Effectiveness of Art Therapy*, *supra* note 104, at 445.

1. Art is helpful in the prison environment, given the disabilities extant in this population, contributed to by organicity, a low educational level, illiteracy, and other obstacles to verbal communication and cognitive development.
2. Art allows the expression of complex material in a simpler manner.
3. Art does not require that the inmate and/or client know, admit, or discuss what he has disclosed. The environment is dangerous, and any unintended disclosure can be threatening.
4. Art promotes disclosure, even while the inmate and/or client is not compelled to discuss feelings and ideas that might leave him vulnerable.
5. Art has the advantage of bypassing unconscious and conscious defenses, including pervasive dishonesty.
6. Art can diminish pathological symptoms without verbal interpretation.
7. Art supports creative activity in prison and provides necessary diversion and emotional escape.
8. Art permits the inmate and/or client to express himself in a manner acceptable to the inside and outside culture.¹¹³

Accordingly, Gussak initialized a 2003 pilot study to examine the predicted benefits.¹¹⁴ The study was conducted twice weekly over four weeks to forty-eight inmates ranging in age from twenty-one to sixty-three years; seventy-eight percent were white and fifty-three percent had completed high school or equivalent education.¹¹⁵ The participants' crimes "ranged from drug possession . . . to first-degree murder."¹¹⁶

Every participant received eight sessions of group art therapy with each session culminating in a seven-category survey where the inmate would evaluate his or her behavior and mood.¹¹⁷ Additionally, the participant would complete a drawing of "*a person picking an apple from a tree*" to be evaluated according to the Formal Elements Art Therapy Scale (FEATS) to assess the presence of major diagnoses: Major Depression, Bipolar Disorder, Schizophrenia and Delirium, Dementia, Amnesia and Other Cognitive Disorders.¹¹⁸

Throughout the study, researchers compiled case vignettes to mark improvements in participants. Devin, a twenty-one year old male, presented

113. Gussak, *The Effectiveness of Art Therapy*, *supra* note 104, at 446.

114. *Id.* at 446–47.

115. Gussak, *Raising the Bars*, *supra* note 104, at 112–13.

116. *Id.*

117. *Id.* at 113–14.

118. *Id.* at 114. For further discussion on FEATS, see Linda M. Gantt, *The Formal Elements Art Therapy Scale: A Measurement System for Global Variables in Art*, 18 ART THERAPY: J. OF THE AM. ART THERAPY ASS'N 51 (2001).

himself as socially withdrawn, poorly motivated, and pessimistic.¹¹⁹ While he sporadically attended drug and alcohol groups, he consistently attended all eight art-therapy sessions.¹²⁰ Devin “became less withdrawn, and more engaged in the art process.”¹²¹ He “was considerably more animated and interacted much more with his peers . . . [and his] attitude and interaction with others greatly improved even outside the art therapy sessions.”¹²² Mark, a twenty-one-year-old male serving his third year of a fifteen-year sentence, was regarded as pessimistic, aggressive, and labeled as an “a—hole” for his demeanor.¹²³ For the initial ‘create a self-symbol’ assignment, Mark constructed a sculpture of a boy who had “just gotten his ‘head blown off in a drive-by shooting’” to illustrate his negative view of the world.¹²⁴ The image consumed fifty percent of the page and was covered in dark storm clouds.¹²⁵ Through the course of the program, Mark “became cordial to the staff and peers, interacted more in sessions[,] . . . became more willing to talk about personal information,” and took creative lead in one group project.¹²⁶ On his program evaluation, Mark stated that he learned to express himself through art, would use the program again, and “hope[d] [h]e could be allowed more time to think the art through.”¹²⁷

The results of the pre and post surveys and the FEATS revealed significant change—all participants demonstrated improved attitude, socialization skills, and compliance with institutional rules.¹²⁸ The FEATS scales also demonstrated positive changes in the use of bright colors, energy, and space, which supports the conclusion that inmates experienced positive mood increases while participating in the programs.¹²⁹ Subsequently, administrators recorded improved social skills noting “more aware of their surroundings,” “exhibit more of a sense of belonging,” and “greater cooperation with staff and peers.”¹³⁰ The follow-up study, conducted in 2006 upon request of the Florida Department of Corrections, confirmed the pilot study results.¹³¹ Prisoners who

119. David Gussak, *Art Therapy with Prison Inmates: A Pilot Study*, 31 ARTS IN PSYCHOTHERAPY 245, 250 (2004).

120. *Id.*

121. *Id.* at 251.

122. *Id.*

123. *Id.*

124. *Id.*

125. Gussak, *supra* note 119, at 252.

126. *Id.*

127. *Id.*

128. Gussak, *Raising the Bars*, *supra* note 104, at 115.

129. *Id.*

130. *Id.*

131. Gussak, *The Effectiveness of Art Therapy*, *supra* note 104, at 453–56; *see also* Gussak, *Raising the Bars*, *supra* note 104, at 119–20. The Florida Department of Corrections, Office of

participated in the art therapy sessions “elevated their mood . . . [and] interacted more appropriately with others in the general population.”¹³²

2. Cost Benefits and Recidivism

In 1983, political scientist Lawrence Brewster, then a professor at San Jose State University, was commissioned by the William James Association and the California Department of Corrections to conduct a rigorous nine-month evaluation of the department’s arts-in-corrections (AIC) activities, costs, and benefits.¹³³ In Brewster’s analysis, the institutions significantly reduced rates of behavioral-code violations, prison racist incidents, and cooperation with staff and family increased. Brewster estimated that the program’s \$162,790 cost generated benefits worth \$228,522 in the four prisons studied.¹³⁴

In an interview with the San Jose University Digest regarding his nine-month research on AIC, Larry Brewster voiced his reservations with the commission, “I didn’t expect to be won over, but I was.”¹³⁵ The study was designed to describe and evaluate the operations, costs, and benefits of the Program in four Northern California Correctional facilities: California Medical Facility at Vacaville (CMF), Deuel Vocational Institution (DVI), San Quentin State Prison, and Correctional Training Facility (CTF).¹³⁶ Brewster applied the statistical data and analyzed a cost-benefit analysis from three perspectives—social, taxpayer, and individual.¹³⁷ In addition, the report outlined AIC program objectives, highlights, and art-related activities.¹³⁸

Mental Health, and the psychiatric and correctional staff of the Florida prison requested a continuation of art therapy services after the success of the program and 2003 pilot study. *Id.*

132. Gussak, *The Effectiveness of Art Therapy*, *supra* note 104, at 458.

133. *What is the Prison Arts Project?*, *supra* note 31. The William James Association is a nonprofit, community service corporation founded in 1973 that promotes service in the arts, environment, education, and community development. *Id.* The Association is responsible for founding the Prison Arts Project in the state of California in 1977. *Id.* The Arts-in-Corrections Program (AIC) was established by the legislature in July 1980, and at the time, was partly funded by the California Department of Corrections. LAWRENCE G. BREWSTER, WILLIAM JAMES ASS’N & CAL. DEPT. OF CORR., AN EVALUATION OF THE ARTS IN CORRECTIONS PROGRAM OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS 1–2 (1983), *available at* http://www.williamjamesassociation.org/reports/Brewster_report_full.pdf.

134. BREWSTER, *supra* note 133, tbl.10, at 40.

135. WILLIAM JAMES ASS’N & CAL. DEPT. OF CORR., BREWSTER REP. ABSTRACT 4, *available at* http://www.williamjamesassociation.org/reports/Brewster_report_abstract.pdf.

136. BREWSTER, *supra* note 133, at 2.

137. *Id.* at 4–5.

The social perspective focuses on the use of societal resources and the need to maximize benefits to society but does not consider the distributional effects—who the winners and losers are. A taxpayer perspective considers how one group, taxpayers, benefit from the program and what those benefits cost in tax dollars The individual participant’s perspective considers the benefits that Arts-in-Corrections participants enjoy and any costs that they incur.

With regard to inmates, the study found that recreational activities through the arts “release[d] energy[,] . . . relieve[d] tensions created by confinement, spur[red] the passage of time, and promote[d] the physical and mental health of inmates.”¹³⁹ Some 2,528 inmates participated in 7,028 hours of art instruction in 1982 with an average class size of 8.5.¹⁴⁰ The art instruction was not focused on education, therapy, career placement, or correction. Instead, it was a period of “relaxation and expression for inmates without being exposed to recriminations.”¹⁴¹ Evaluators noted improved confidence and discipline as demonstrated through their willingness to complete projects and interest in leadership roles.¹⁴² For many inmates, the community arts initiatives presented opportunities to collaborate with local communities in an effort to begin the long process of reintegration into society.¹⁴³

The program also demonstrated benefits to taxpayers through reduced tension, institutional enrichment, and community service.¹⁴⁴ As is the case in today’s prisons, California’s prisons in the early eighties suffered overcrowding and were expected to swell to double by 1988.¹⁴⁵ Subsequently, tensions were exacerbated which resulted in increased disciplinary reports; however, AIC participants reflected an average of fifty-one percent lower disciplinary reports compared to non-participants.¹⁴⁶ The decrease in incidents estimated an average savings cost of \$77,406 when considering the administrative hours spent investigating, writing, and hearing disciplinary actions.¹⁴⁷ In addition, inmates partook in site beautification projects such as murals and stain glass construction that would have otherwise been paid to outside contractors resulting in an estimated \$25,000.¹⁴⁸

Brewster also compiled a cost-benefit comparison to determine whether AIC reaped benefits for more than the inmates and the prisons. The total cost

Id. at 5.

138. *Id.* at 8–15.

139. *Id.* at 8. The report also noted that recreation is directly related to the outside life activity of leisure time and it has been suggested that the incorrect use of leisure time may have contributed to the criminal activity in the first place. *Id.* at 16, 19.

140. *See id.* at 21 for a summary of inmate and staff comments.

141. *Id.* at 24.

142. BREWSTER, *supra* note 133, at 24. “For many, their involvement in . . . art projects represented the first time they could remember following a task through to completion.” *Id.*

143. *Id.* at 26.

144. *Id.* at 26–32.

145. *Id.* at 27.

146. *Id.* at 29. Excluding inmates with no ‘disciplinaries’, the relationship between participation in the program and improved prison relations becomes more dramatic: 75% of the inmates at CMF and 80.6% at CTF demonstrated lower ‘disciplinaries’. *Id.*

147. *Id.* at 29.

148. BREWSTER, *supra* note 133, at 32–33.

to enact art programs within four institutions in 1982 totaled \$144,147.¹⁴⁹ While the art instruction cost \$144,147, it yielded total social benefits of \$200,522—taxpayer benefits of \$77,406 and individual benefits of \$123,116.¹⁵⁰ Community service cost \$1,573, but gained a return of \$3,000.¹⁵¹ The service to the institutions typically cost \$5,270, however, AIC beautification projects resulted in a \$25,000 social and taxpayer benefit.¹⁵² Overall, the AIC study concluded total institution, taxpayer, and social benefits of \$228,522 compared to the original cost of implementation.¹⁵³

Moreover, the California Department of Corrections (CDC) compiled a seven-year research synopsis to track one-hundred and seventy-seven inmates who had participated in at least one AIC class per week for a minimum of six months.¹⁵⁴ The results of the study were favorable when compared to statistics compiled on the parole outcomes of all CDC inmates—AIC participants demonstrated an eighty-eight percent rate of favorable outcome compared to the little over seventy-two percent rate for all CDC releases.¹⁵⁵ Two years following release, AIC participants had a little over sixty-nine percent favorable outcome compared to forty-two percent for all releases.¹⁵⁶

The results of the year long study were conclusive—AIC, within the four institutions studied, demonstrated positive affects towards services for inmates, tension between inmates and inmates and staff, cost avoidance, institutional enrichment, and interaction between the institution and surrounding community.¹⁵⁷ While the cost of program implementation in 1982 cost \$162,790, the benefits of the program reflected a savings of \$65,732.¹⁵⁸ Recidivism rates of participants showed a promising decrease. Unfortunately, the dated results of the Brewer report and subsequent studies by the California Department of Corrections remain the most cited authorities on prison programs today. They do, however, suggest that prolonged studies of prison art programs would reveal substantial transformations to inmates, staff, and institutions.

149. *Id.* tbl.10, at 40.

150. *Id.*

151. *Id.*

152. *Id.* at 39; *see also id.* tbl.10, at 40.

153. *Id.* at 41; *see also id.* tbl.10, at 40.

154. CAL. DEP'T. OF CORR., ARTS IN CORR. RES. SYNOPSIS ON PAROLE OUTCOMES FOR PARTICIPANTS PAROLED, attachment A, B (1987), *available at* http://www.williamjamesassociation.org/reports/CDC-AIC_recitivism_research_synopsis.pdf. This research was compiled from December 1980 through February 1987. *Id.*

155. *Id.* attachment A.

156. *Id.*

157. *See* BREWSTER, *supra* note 133, at 42.

158. *Id.* tbl.10, at 40.

3. Personal Stories

While statistical data reflects the numerical benefits towards inmates, correctional facilities, and citizens, the personal stories are what humanize the dramatic results that accompany implementation of art programs within institutions. However, a juxtaposition of emotion swells within the reader when a story provides glimpses into these unknown souls. Such feeling is shared by more than the novice reader; Judith Tannenbaum, a literature instructor at San Quentin State Prison, cried upon hearing that prisoners would not be allowed to write back to child poets who had responded to their poems.¹⁵⁹ She also embraced a harrowing reality:

[M]y time at San Quentin had taught me that my heart, though wholly right in its sight, saw only part of the picture. Already, my time had taught me to remember that some men whom I knew as kind and caring had also caused great harm to other people. Already, my time had taught me I didn't know everything. In the unambiguous world of my heart's sight, I could always respond with moral assurance. In the more ambiguous world of San Quentin, there was always another point of view.¹⁶⁰

But in these conflicting emotions arises thought and discussion. While some inmates undoubtedly reflect distaste in growth and healing, others seek direction. In an aboriginal Canadian community, elders apologize to a youth before determining his sentence: "we did . . . something wrong in raising you, or you would not be before us. [You are] before [us] because [we] need [you] in the community."¹⁶¹ Similarly, these stories represent the incarcerated that seek to be acknowledged, directed, and heard.

Richard Shelton, a professor at the University of Arizona and poet, has been working with inmates in the Rincon Unit at the Arizona State complex outside Tucson since the early seventies.¹⁶² His original interest in working within the prison developed after a then death-row inmate contacted him for feedback on his poems.¹⁶³ Shelton now meets with inmates in a weekly class setting teaching the intricacies of poetic and literary writing.¹⁶⁴ Fifty-seven-year-old inmate Andrew Jaicks expresses his gratitude for the program:

I could not live without the reading and the writing. . . . One of the worst things about being in prison is not just the helplessness and the powerlessness; it's the fact that you feel like you're living a purposelessness existence. And

159. Alexander, *supra* note 1, at xii.

160. *Id.* at xii–xiii.

161. *Id.* at xiii.

162. *Poetry Program Gives Prisoners Unexpected Voice* (PBS television broadcast June 16, 2008), available at http://www.pbs.org/newshour/bb/entertainment/jan-june08/prisonpoetry_06-16.html.

163. *Id.*

164. *Id.*

one of the things that writing does for me, is give me purpose, serious purpose.¹⁶⁵

In response to the interviewer's question about viewers reacting to a poetry class for a convicted criminal, Jaicks states:

It's not a matter of giving something to the convicts, it's a matter of opening up people's lives so they do have an avenue for understanding compassion through the things that we read, and hearing other people read, and learning to take criticism and have that be for some other reason than just to degrade you.¹⁶⁶

Jaime Omar Meza, a thirty-year-old serving time since he was seventeen, adds that poetry class gives him direction and that know he knows what he wants to do with himself.¹⁶⁷ However, he stated that "I don't write about prison . . . because I don't think that our families should know what prison life is. . . . [I]t's not a pretty world we've put ourselves in."¹⁶⁸

A Connecticut prison system has received similar praise. Wally Lamb, an award-winning author known for the novels, *I Know This Much is True* and *She's Come Undone*, agreed, somewhat unwillingly, to volunteer time at the York Correctional Institution teaching female inmates writing techniques.¹⁶⁹ The plea for assistance came from a prison school librarian concerned after an epidemic of suicide attempts and cutbacks in educational and rehabilitative services.¹⁷⁰ After a year at the institution, Lamb began gathering the women's personal stories, unrelated to the crimes committed, to compose a book, *Couldn't Keep It to Myself*.¹⁷¹ The book has had modest commercial success, selling 27,000 copies.¹⁷²

The stories, however, portray the women's lives before prison—the abuse and neglect, the families they left behind—but also the insight into their

165. *Id.* Andrew Jaicks is a former heroin addict serving time for armed robbery. *Id.*

166. *Id.*

167. *Id.*

168. *Poetry Program Gives Prisoners Unexpected Voice*, *supra* note 162. Jaime Omar Meza was convicted for armed robbery, murder, and assault and is serving a one hundred and four year sentence. *Id.* Meza works in the prison library and spends several hours a day painting and writing. *Id.*

169. LAMB, *supra* note 34, at 2–3. For more information on a similar writing workshop, PBS produced a documentary about playwright and activist Eve Ensler's experience with women inmates at New York's Bedford Hills Correctional Facility. *What I Want My Words to Do to You* (PBS television broadcast Dec. 16, 2003). The film documents the personal journeys undertaken by the inmates to find a voice of communication and culminates in a performance of the women's writings by acclaimed actresses Mary Alice, Glenn Close, Hazelle Goodman, Rosie Perez, and Marisa Tomei. *Id.*

170. LAMB, *supra* note 34, at 2; *60 Minutes*, *supra* note 36.

171. LAMB, *supra* note 34, at 13.

172. *60 Minutes*, *supra* note 36.

dynamic character. Diane Bartholomew, serving twenty-five years for homicide in the first, wrote a card to Lamb for Christmas:

So many times, I wanted to throw in the towel and give up, but you, more than anyone, know my character by now. I wasn't a pest all my life for nothing. Wally, we all look forward to Thursday afternoon like children waiting for a treat. The treat is the opportunity to share our stories and to get feedback that makes our work worthwhile. To say thanks sounds so hollow, and you always say, "Show it, don't tell it." So let me put it this way. You have become the umbilicord for a rebirth of home in me. Please thank your wife and boys for sharing you with us women here at the prison.¹⁷³

Deborah Parsons Lane, a former housewife who is serving ten years on manslaughter due to emotional duress charges for killing her husband after years of abuse, wrote her short stories about her initial reaction to prison life, childhood memories of her mother, and anguish about her mother's 1990 suicide.¹⁷⁴ She speaks of frustration over rehashing the details of her past while finding herself now in prison for taking her husband's life after he molested their granddaughter.¹⁷⁵ When Lane entered York, she was on suicide watch and barely spoke for two years.¹⁷⁶ However, through the writing program, she became a model prisoner and accomplished writer. Lamb nominated Lane for the prestigious PEN award in absentia for fighting to safeguard the right to self-expression.¹⁷⁷

While critics have valid reasons for finding prison art programs and artistic creations by the incarcerated distasteful, the misguided focus is often centered on the narrow media limelight regarding the infamous criminal who seeks to gain from his newfound notoriety. In reality, half of the 1,305,253 currently incarcerated are serving time for non-violent offenses and will re-enter society in the future.¹⁷⁸ Those inmates, and the general public upon their release, seek to gain reformation with therapeutic outlets, increased mood improvements, idle-time management, and occupational skills. However, the remaining one million inmates stand to benefit from prison arts as well—for confidence, encouragement, guidance, and a voice. Despite the reason, the studies clearly demonstrate advantages to inmates, correctional employees, taxpayers, and society. Despite proven effects, prison art programs continue to lack funding and support. The next section will highlight the history and current state of

173. LAMB, *supra* note 34, at 12.

174. *60 Minutes*, *supra* note 36; LAMB, *supra* note 34, at 216–18.

175. LAMB, *supra* note 34, at 214.

176. *60 Minutes*, *supra* note 36.

177. *Id.* Proceeds from this book were protected from Connecticut lawmakers through the assistance of International PEN, an organization devoted to taking up the causes of persecuted writers around the world. *Id.*

178. *See supra* text accompanying note 63.

anti-profit statutes. Again, this discussion will provide context for the contention that the laws are an ineffective means towards achieving the legitimate goal of victim-protection.

II. THE HISTORY OF SAM

A. *Path to Victim Protection*

David Berkowitz, the self-proclaimed “Son of Sam,” terrorized New York City from 1976 through 1977 when he killed six young people at point-blank range and wounded seven others with a 44-caliber revolver.¹⁷⁹ Explicating his demons in hand-written letters to authorities, Berkowitz attributed the murders to a fictional father “Sam” that instructed him to go out and kill.¹⁸⁰ The letters were published in major news outlets increasing Berkowitz’s local and national notoriety. Robert Lipsyte, a then tabloid reporter covering the killings during what is now famously known as the “Summer of Sam,”¹⁸¹ recalled the fear within city dwellers, “We lived inside a slasher movie with a demonic monster who heard voices and wrote letters to the tabloids.”¹⁸² Both the city and country were distinctly familiar with Berkowitz by the time he was apprehended by police after a parking ticket violation, some thirteen months from his initial murder.¹⁸³

After Berkowitz was sentenced to 300 years, Robert Lipsyte was recruited by a reputable publishing house to co-author a book with Berkowitz to capitalize on the rights to his story.¹⁸⁴ Outraged at the serial murderer’s attempt to profit from the crime, the New York Legislature enacted Executive Law § 632-a in 1982, also known as the Son of Sam law.¹⁸⁵ The statute was designed to “ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.”¹⁸⁶ As the statute progressed through the

179. 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, 438 (2004).

180. *The Letters of Son of Sam*, N.Y. MAG., Sept. 10, 2006, <http://nymag.com/news/crimelaw/sonofsam/20333/>.

181. SUMMER OF SAM (Touchstone Pictures 1999). *Summer of Sam* is a crime-drama based on the Son of Sam serial murders and was widely received for accurately depicting the city’s state of decay by highlighting the events of the summer of 1977. See Roger Ebert, *Lee’s ‘Summer of Sam’ a sizzling look at ‘70s N.Y.*, CHI. SUN-TIMES, May 23, 1999, at 24.

182. Robert Lipsyte, *Coping: The Enigma of Murder*, N.Y. TIMES, Dec. 21, 1997, § 14, at 1.

183. *Id.*

184. *Id.*

185. *Simon & Schuster v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 108 (1991).

186. *Id.* (citing Assembly Bill Memorandum Re: A 9019, *supra* note 22). Senator Emanuel R. Gold, author of the statute, provided further explanation: “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

Legislature, Lipsyte and the contracting publisher backed out of the contract and were replaced by another publisher.¹⁸⁷

In application, the original version of the statute required any “person, firm, corporation, partnership, association, or other legal entity” that contracted with an accused or convicted person for a depiction of the crime to submit a copy of the contract to the New York State Crime Victims Board and relinquish any income from that contract to the Board.¹⁸⁸ The Board was then required to deposit the money in an escrow account for five years, during which time any victim, legal representative, or creditor could bring a civil action to recover a judgment for damages against the accused or convicted.¹⁸⁹ Functioning as the first anti-profit law of its time, New York’s statute was adopted as a model for forty-seven states and the federal government.¹⁹⁰ To New York’s dissatisfaction, the statute was implemented only ten times before falling under Constitutional scrutiny.¹⁹¹

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

In 1981, Henry Hill contracted with publisher Simon & Schuster for the production of a book detailing Hill’s life of organized crime as a then participant in the Federal Witness Protection program for profit.¹⁹² Author Nicholas Pileggi’s completed work, *Wiseguy*,¹⁹³ based on Hill’s accounts, was well received, both in literary and commercial circles.¹⁹⁴ However, because the book contained Hill’s depictions of crimes for which he had been convicted, the contract fell directly under New York’s Son of Sam law. After

once he is captured—while five people are dead, [and] other people were injured as a result of his conduct.” *Id.* (alteration in original) (citing Assembly Bill Memorandum Re: A 9019, *supra* note 22).

187. Lipsyte, *supra* note 182. Despite backing out of the deal, Simon & Schuster’s lawyers nonetheless collected their fees from the book. *Id.*

188. *Simon & Schuster*, 502 U.S. at 109.

189. *Id.*

190. Yager, *supra* note 179, at 435.

191. *Id.* at 439; *Simon & Schuster*, 502 U.S. at 111 (noting that the individuals whose profits the Board has sought to place in escrow all involve well-known criminals that have gained considerable notoriety such as Mark David Chapman, the man convicted of killing John Lennon).

192. Rochelle Cooper Dreyfuss, *A Wiseguy’s Approach to Information Products: Muscling Copyright and Patent into a Unitary Theory of Intellectual Property*, 1992 SUP. CT. REV. 195, 198–99 (1992).

193. See generally NICHOLAS PILEGGI, *WISEGUY: LIFE IN A MAFIA FAMILY* (1985).

194. *Simon & Schuster*, 502 U.S. at 114 (quoting New York Daily News Columnist Jimmy Breslin’s opinion of *Wiseguy* as, “the best book on crime in America ever written”). The book was later adapted into *Goodfellas*, the Academy Award nominated film for Best Picture by Martin Scorsese. *The Official Academy Awards Database*, *supra* note 54 (search as Good Fellas); see Linda Greenhouse, *High Court Upsets Seizing Of Profits On Convicts’ Books*, N.Y. TIMES, Dec. 11, 1991, at A1.

Pileggi failed to comply with the statute, the Crime Victims Board initiated suit ordering Simon & Schuster to report and submit any profits to be held for five years in escrow. Simon & Schuster subsequently brought a federal action under 42 U.S.C. § 1983 challenging the law under the First and Fourteenth Amendments.¹⁹⁵

The District Court applied an intermediate level of scrutiny and reasoned that the statute was not intended to affect expressive conduct thereby finding the statute constitutional.¹⁹⁶ The Court of Appeals for the Second Circuit affirmed the majority finding the statute to be narrowly drawn to the state's compelling interest in punishing criminals and preventing their unjust enrichment.¹⁹⁷ However, Judge Newman's dissent addressed the overwhelming concern against the law's application, "if nothing else, the statute might lead publishers of books tangentially related to crime to purge manuscripts of all material arguably within the scope of the statute."¹⁹⁸

The Supreme Court reversed. In the context of financial regulation, 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."¹⁹⁹ Because the Son of Sam law "single[d] out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content," it effectively worked to disincentivize the production of expression and speech of a particular content.²⁰⁰ The Court noted "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."²⁰¹

The Court held that despite the State's compelling interest in compensating and protecting victims by ensuring that criminals did not profit from their wrongdoings, the law was not necessary to achieve such interests.²⁰² Because the Board failed to explain why the State should have greater interest in compensating victims from the proceeds of their expression compared to any other assets, the Court reasoned that the "Son of Sam law has nothing to do

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

196. *Simon & Schuster v. N.Y. Crime Victims Bd.*, 724 F. Supp. 170, 178–79 (S.D.N.Y. 1989).

197. *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 783 (2d Cir. 1990).

198. *Id.* at 787 (Newman J., dissenting).

199. *Simon & Schuster*, 502 U.S. at 116 (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)).

200. *Id.*

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

202. *Id.* at 118–19, 123.

with the State's interest in transferring the proceeds of crime from criminals to their victims."²⁰³

The Court further determined that the law, as written, was overinclusive for two reasons. First, the statute applied to works on any subject so long as the criminal references any thoughts or recollections of the crime. Second, the statute applied to a "person convicted of a crime," a definition which included anyone admitting to commit a crime, despite whether such person was ever accused or convicted.²⁰⁴ For these reasons, the statute would likely have detrimental effects on a wide variety of works including but not limited to: "The Autobiography of Malcolm X" and Henry David Thoreau's "Civil Disobedience."²⁰⁵ For example, the Court notes that even a prominent figure's decision to write an autobiography toward the end of his life with a minimal recollection of a decision to steal a "nearly worthless item as a youthful prank" would be subject to asset forfeiture with that income available to any of the author's creditors.²⁰⁶

Simon & Schuster v. Members of New York State Crime Victims Board enabled the Court to vividly analyze the power of financial incentives to decrease the collection of whole classes of intellectual efforts. The Court reasoned that in spite of the State's strong interest to protect victims from rehashing the atrocities of their suffering by providing means to attain their perpetrator's profit, the First Amendment's policy of protecting not only the individual's ability to speak but also protection for the public's receipt of all information, whether offensive or not, holds greater weight. Because production is ultimately affected by financial incentive, the removal of such motivation would ultimately deter the production of such works thereby neglecting the Court's duty to ensuring the public's access to varieties of artistic expression.²⁰⁷

After the Supreme Court held the Son of Sam law unconstitutional, New York repealed its statute.²⁰⁸

203. *Id.* at 119–20.

204. *Id.* at 121.

205. *Simon & Schuster*, 502 U.S. at 121–22. In afterthought, the Court considered works of the following authors, cited within the Amicus Curiae Brief on behalf of the Association of American Publisher's Inc., which would have been applicable to the Son of Sam law had it been in affect at the time: Malcolm X; Alex Haley; Henry David Thoreau; The Confessions of Saint Augustine; Emma Goldman; Martin Luther King, Jr.; Sir Walter Raleigh; Jesse Jackson; and Bertrand Russell. *Id.*

206. *Id.* at 123.

207. See Opinion, 'Son of Sam' Laws, Rightly Reversed, N.Y. TIMES, Dec. 12, 1991, at A30.

208. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1992), repealed by 1992 N.Y. Laws ch. 618, § 10 (McKinney).

C. *Current State of Laws*

Following the decision of *Simon & Schuster*, many states amended their Son of Sam statutes in an attempt to follow the Court's guidance in narrowing the law. Five states went so far as to repeal their versions without enacting a replacement.²⁰⁹ In 2001, New York enacted a different means of protection by extending the statute of limitations for tort actions when the convicted received profit from their crimes or the receipt of money from any source.²¹⁰ This modification modified the original anti-profit crime by acting as a general tort law; however, in exchange, provided for an indeterminate statute of limitations.²¹¹

Despite numerous amendments, the states continued to face constitutional challenge and opposition. California's Son of Sam law was held unconstitutional in 2002.²¹² *Keenan v. Superior Court of Los Angeles* determined that the statute contained the same fundamental defect present in *Simon & Schuster* even though the law had been tailored to felony convictions only—"it reaches beyond a criminal's profits from the crime or its exploitation to reach all income from the criminal's speech or expression on any theme or subject, if the story of the crime is included."²¹³

209. 725 ILL. COMP. STAT. 145/4-14 (1989), *repealed by* Pub. Act No. 87-1157, 1992 Ill. Legis. Serv. 3236 (West) (effective Sept. 18, 1992); LA. REV. STAT. ANN. §§ 46:1831-1839 (West 1992 & Supp. 1993), *repealed by* 1997 La. Acts 888, § 1; MASS. GEN. LAWS ch. 258A, §§ 1-9 (1989), *repealed by* 1993 Mass. Acts 478, § 3 (effective Jan. 1, 1995); MO. REV. STAT. § 595.045(14) (1991), *repealed by* 1993 Mo. Laws 19, § A; S.C. CODE ANN. § 15-59-40 (1999), *repealed by* 2000 S.C. Act 306, § 3. A total of nine states amended their Son of Sam laws with active statutes. CAL. CIV. CODE § 2225 (West 2007); MD. CODE ANN., CRIM. PROC. § 11-622 (West 2010); NEV. REV. STAT. § 217.007 (2005); N.J. STAT. ANN. § 52:4B-61 (West 2003); N.Y. EXEC. LAW § 632-a (McKinney 2008); 42 PA. CONS. STAT. § 8312 (2010); TENN. CODE ANN. § 29-13-403 (2005); TEX. CODE CRIM. PROC. ANN. art 59.01 (West 2006); UTAH CODE ANN. § 77-18-8.3 (Lexis Nexis 2008). Three states never enacted Son of Sam statutes: New Hampshire, North Carolina, and Vermont. 'Son of Sam' statutes: federal and state summary, FREEDOM FORUM, <http://www.freedomforum.org/templates/document.asp?documentID=13495> (last visited Feb. 2, 2011).

210. 2001 N.Y. Laws 1383 (McKinney).

211. *See* Yager, *supra* note 179, at 445-49 for a complete discussion of the intricacies of the updated N.Y. EXEC. LAW § 632-a. Despite amendment, the new statute has fallen under constitutional scrutiny in three cases: *Doe v. Cusack*, 02 Civ. 9610 (DAB) (RLE) (S.D.N.Y. filed Dec. 3, 2002); *Snuszki v. Wright*, 751 N.Y.S.2d 344, 346 (N.Y. Sup. Ct. 2002); *N.Y. Crime Victims Bd. v. Majid*, 749 N.Y.S.2d 837, 837 (N.Y. Sup. Ct. 2002).

212. *Keenan v. Super. Ct. of L.A. Cnty.*, 40 P.3d 718, 722 (Cal. 2003).

213. *Id.* Stephen Rohde, the attorney who challenged the California law on behalf of Keenan, was quoted on the aftermath of the opinion:

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

The current state of the law reflects a majority of statutes closely modeled after the original New York Son of Sam law despite constitutional challenges. Today, twenty-eight states have laws that permit the seizure of proceeds from certain forms of expression including: books, magazines articles, movies, phonograph records, radio, television presentations, or the convicted person's expressions of thoughts, feelings, emotions, or opinions.²¹⁴ In an effort to comply with *Simon & Schuster's* concern that the law might be applied to works on any subject including incidental thoughts about a crime,²¹⁵ five of the twenty-eight states refer to specific types of expressive works.²¹⁶ The standard in Oklahoma and Virginia provides that a work violates the standard if an integral portion of it refers to the crime.²¹⁷

In comparison to statutes that target means of expression, eleven states have revised their laws to target profits obtained as a result of committing a crime.²¹⁸ In application, these laws do not reference expression and are therefore less likely to be analyzed with strict scrutiny. Tennessee adopted a different approach from the other states through the enactment of a broad

protesters 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.

Stephen F. Rohde, *The Demise of California's Son of Sam Law*, 26 L.A. LAW. 14, 20 (2003), available at <http://www.lacba.org/Files/LAL/Vol26No3/1320.pdf>; see also *Seres v. Lerner*, 102 P.3d 91, 99–100 (Nev. 2004) (holding that the Nevada Son of Sam statute was content-based and therefore unconstitutional).

214. ALA. CODE § 41-9-80 (LexisNexis 2008); ALASKA STAT. § 12.61.020 (2006); ARIZ. REV. STAT. ANN. § 13-4202 (2010); ARK. CODE ANN. § 16-90-308 (2006); CONN. GEN. STAT. § 54-218 (2009); DEL. CODE ANN. tit. 11, §§ 9101, 9103 (2007); FLA. STAT. § 944.512 (2009); GA. CODE ANN. § 17-14-31 (2008); HAW. REV. STAT. § 351-81 (2010); IDAHO CODE ANN. § 19-5301 (2004); IND. CODE § 5-2-6.3-3 (2008); KAN. STAT. ANN. § 74-7319 (2006); KY. REV. STAT. ANN. § 345.165 (LexisNexis 2005); MD. CODE ANN., CRIM. PROC. § 11-622; MICH. COMP. LAWS § 780.786 (2007); MINN. STAT. § 611A.68 (2003); MISS. CODE ANN. § 99-38-5 (2006); MONT. CODE ANN. § 53-9-104 (2007); NEB. REV. STAT. § 81-1836 (2008); N.M. STAT. ANN. § 31-22-22 (2010); OHIO REV. CODE ANN. § 2969.01 (LexisNexis 2006); OKLA. STAT. tit. 22, § 17 (2010); S.D. CODIFIED LAWS § 23A-28A-1 (2010); TEX. CODE CRIM. PROC. ANN. art.59.01; UTAH CODE ANN. § 77-18-8.3; VA. CODE ANN. § 19.2-368.20 (2008); WASH. REV. CODE § 7.68.200 (2007); WIS. STAT. § 949.165 (2005).

215. *Simon & Schuster v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

216. DEL. CODE ANN. tit. 11, §§ 9101, 9103; KAN. STAT. ANN. § 74-7319; OKLA. STAT. tit. 22, § 17; VA. CODE ANN. § 19.2-368.20; WIS. STAT. § 949.165.

217. OKLA. STAT. tit. 22, § 17; VA. CODE ANN. § 19.2-368.20.

218. COLO. REV. STAT. § 24-4.1-201 (2007); IOWA CODE § 910.15 (2007); ME. REV. STAT. tit. 14, § 752-E (2003); N.J. STAT. ANN. § 52:4B-61 (West 2003); N.Y. EXEC. LAW § 632-a (McKinney 2008); N.D. CENT. CODE § 32-07.1-01 (2004); OR. REV. STAT. § 147.275 (2005); 42 PA. CONS. STAT. § 8312 (2010); R.I. GEN. LAWS § 12-25.1-18 (2002); W. VA. CODE § 14-2B-2 (2008); WYO. STAT. ANN. § 1-40-301 (2007).

statute that permits the attorney general to collect all income, from any source, which is owed to the defendant after the date of the crime.²¹⁹

However, despite modifications in text, the majority of these laws remain closely modeled after the original New York statute and thus, will continue to face substantial vulnerability in future challenges. Moreover, while the Son of Sam laws were intended to compensate victims and prevent criminals from gaining notoriety from their crimes, the reality is that these laws create exceptions that direct the forfeited funds in a variety of locations—at times never reaching the victim. After contracts are formed and the proceeds have been submitted to the state escrow account, victims generally have three to five years to bring civil actions to recover their damages.²²⁰ But victims are not the only protected interest—the public defender, the state, and even the criminal are permitted to receive distributions from the funds.²²¹ Currently, only eight states name victims as the sole beneficiaries of forfeited proceeds under Son of Sam laws.²²²

In sum, the reality of criminal anti-profit statutes is that they fail in two regards: first, insufficient amendments to a majority of state statutes leave them open to constitutional attack; and second, procedural intricacies prevent the statutes from achieving their legislative intent—the victims right to attach any financial gain by their perpetrator. While emerging trends to broaden a minority of laws suggest they will succeed in the face of constitutional attack, the statutes lose their original appeal and begin to imitate the alternative courses of action available to victims under civil tort suits.

D. Alternatives to Anti-Profit Legislation

Perhaps as evidence of the confusion and constitutional uncertainty surrounding the Son of Sam statutes in such decisions as *Simon & Schuster* and *Keenan*, state authorities have devised ways to circumvent the law to reach similar, if not matching, results. The Arizona Appellate Court case of *State of Arizona v. Gravano* exemplified such trend.²²³ “Sammy the Bull” Gravano, a high-ranking member of the Gambino family and FBI informant against crime boss John Gotti, had served time in federal prison for organized drug activities

219. TENN. CODE ANN. § 29-13-403 (2005).

220. See, e.g., Anthony Annucci, New York's Expanded Son of Sam Law and other Fiscal Measures to Deter Prisoners' Suits While Satisfying Outstanding Debts, 24 PACE L. REV., 631, 650 (2004).

221. See The Nat'l Center for Victims of Crime, *Notoriety for Profit/Son of Sam* Legislation, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32469>.

222. *Id.* at n. 119. The states that name victims as the sole beneficiaries of forfeited proceeds are Alabama, Maine, New Jersey, New York, North Dakota, Pennsylvania, Texas, and Wyoming. *Id.*

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

in New York.²²⁴ After co-authoring a book, *Underboss: Sammy the Bull Gravano's Story of Life in the Mafia*, the State of Arizona sought forfeiture of his assets including profits from his book.²²⁵

Gravano argued that the seizure of his royalties violated the First Amendment under *Simon & Schuster*.²²⁶ The courts disagreed. Because the State of Arizona prosecuted Gravano through the forfeiture statute provided under RICO (Racketeer Influences and Corrupt Organizations Act), the action was appropriate.²²⁷ The court held that the forfeiture statute, unlike the Son of Sam law, was targeted at profit, not content. It noted, "the *Underboss* royalties owed to Gravano may be subject to forfeiture regardless of the message conveyed in the book if a causal connection between racketeering and the proceeds exists. Accordingly, the forfeiture statutes as applied here are content-neutral."²²⁸ Both the Arizona Supreme Court and U.S. Supreme Court declined review.²²⁹

Legal commentator Julie Hilden has noted another alternative route to bypass the Son of Sam laws while still aiming at criminal forfeitures—civil tort suits.²³⁰ Considered "Son of Sam law(s) in disguise," these suits are tailored to permit crime victims and/or their families to file multimillion-dollar suits going after the convicted criminal for damages.²³¹ Unlike Son of Sam laws, civil tort actions are not intended to target free speech and therefore withstand constitutional scrutiny. The obvious downside to such a suit is the relatively short statute of limitations; however some states have made progress in extending such statutory periods in an effort to provide victims restitution.²³²

The history of Son of Sam statutes reflects a tangled web of legal amendments and modifications. While the New York statute was devised with the intent to protect victims' interest in ensuring their perpetrators were prohibited from profiting from the criminal action, the Supreme Court was

224. *Id.* at 248.

225. *Id.* at 249–51.

226. *Id.*

227. 18 U.S.C. §§ 1961–68 (2006).

228. *Gravano*, 60 P.3d at 253. A regulation is content-neutral if it "intended to serve the purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers but not others." *Id.* (quoting *Simon & Schuster v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 122 (1991)).

229. *Id.*; *Gravano v. Arizona*, 540 U.S. 1161 (2004).

230. Hilden, *supra* note 14. Hilden is a lawyer, author, and legal commentator with degrees from Harvard College, Yale Law School, and Cornell University. *About the Author*, JULIE HILDEN, <http://www.juliehilden.com/about.html> (last visited Feb. 2, 2011). Following law school, she clerked for then Chief Judge Stephen Breyer of the U.S. Court of Appeals for the First Circuit and was employed as a litigation associate at the Washington D.C. firm of Williams & Connolly where she focused on First Amendment violations. *Id.*

231. *Id.*

232. *See Yager, supra* note 179, at 472–77.

quick to criticize the method taken. Although victims' rights remain a legitimate concern, financial disincentives have the effect of imposing speech-based burdens which "raise the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."²³³ As a result, the states were left with unconstitutional statutes and minimal guidance from the Court. Subsequently, some states took immense measures to meet future constitutional scrutiny while others stood stagnant. Today, the majority of statutes contain unconstitutional language and no longer work to effectively provide victims the protection that was intended. The next section will evaluate the current state of the Department of Corrections and propose a solution that includes the development of prison art programs through the removal of the Son of Sam laws.

III. A COMPROMISING SOLUTION

A. *Dismal State: The Department of Corrections*

The United States prison population currently exceeds any other country—1 in 100 adults are now behind bars.²³⁴ One and a half million people are currently in prison and 800,000 are in jail.²³⁵ Reports suggest that the incarceration rate has increased sevenfold between 1978 and 2008.²³⁶ This growth in population is costing state governments nearly \$50 billion a year and the federal government \$55 billion.²³⁷ The State of California is addressing its deficit through lay-offs including five percent of its prison guards and parole officers;²³⁸ Michigan is closing three state prisons and five prison camps;²³⁹ Illinois released seventeen hundred inmates in the fall of 2009 in an early-release program to settle immediate budget woes;²⁴⁰ and New York's sentencing commission released a report calling for the reconsideration of

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

234. John Pfaff, *Reform School: Five Myths About Prison Growth Dispelled*, SLATE (Feb. 19, 2009), <http://www.slate.com/id/2211585/>.

235. *Id.*

236. *Id.* The Illinois Department of Corrections reported an annual cost of incarcerating an individual in 2008 was \$23,394. IL DEP'T OF CORR., FINANCIAL IMPACT STATEMENT (2008), available at http://www.idoc.state.il.us/subsections/reports/financial_impact_statements/Financial%20Impact%20Statement-FY2008.0001.pdf.

237. Aizenman, *supra* note 26.

238. Jon Ortiz, *California Corrections Agency to Take Biggest Layoff Hit*, SACRAMENTO BEE, May 14, 2009.

239. David Eggert, *Michigan Closing 8 Prison Facilities to Save Money*, THE STREET (June 5, 2009), <http://www.thestreet.com/story/10510396/michigan-closing-8-prison-facilities-to-save-money.html>.

240. Monique Garcia, *Gov. Pat Quinn Admits Mistake on Early Release of Prisoners, Blames Corrections and Chief*, CHI. TRIB. (Dec. 31, 2009), http://articles.chicagotribune.com/2009-12-31/news/chi-quinn-parole-program-31dec31_1_early-release-major-state-agency-michael-randle.

tough drug sentences.²⁴¹ The Department of Corrections has reached its breaking point.

The swelling growth in prison population is largely blamed on increased sentencing laws incorporated in the mid-1980s.²⁴² Although, this cause has attributed some benefit—studies generally find that increased prison populations correlate with reduced crime. The 1990s experienced a thirty percent drop in crime rates and a twenty-five percent drop in violent crime.²⁴³

However, time served in prison and tougher sentences do not purport lower recidivism rates. According to the National Institute of Justice, of the 105,580 prisoners released from prison in eleven states in 1983, nearly sixty-three percent were re-arrested within three years, forty-seven percent were convicted of a new crime, and forty-one percent returned to prison or jail.²⁴⁴ Of the nearly three hundred prisoners released in 1994, sixty-eight percent were re-arrested within three years, forty-seven percent were convicted of a new crime, and twenty-five percent were recommitted to prison with a new sentence.²⁴⁵

Studies attribute these high rates to the lack of incarcerated individuals' low academic achievement and limited job skills. The U.S. Bureau of Justice Statistics reports that only fifty-nine percent of state prison inmates had a high school diploma, only two-thirds were employed during the month prior to arrest, and inmates averaged only \$1,200 to \$2,000 a year in the workforce prior to incarceration.²⁴⁶ There is strong empirical evidence that suggests an individual's criminal behavior is related to their lack of gainful employment.²⁴⁷

These harrowing statistics demand citizens to acknowledge that current measures in incarceration are not solving the problem. A substantial amount of criminals will re-enter society and it is in the interest of the public to ensure that their entrance will not equate to similar, if not increased, illegal activity. For these reasons, a substantially reformed system is necessary.

241. Ortiz, *supra* note 238.

242. Aizenman, *supra* note 26; see also Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, 3 PUNISHMENT & SOC'Y 9, 10–11 (2001).

243. See Aizenman, *supra* note 26; Mauer, *supra* note 242, at 12. But see Mauer, *supra* note 242, at 13 (discussing an assessment of crime statistics compared to rates of incarceration with differing results); Craig Haney, *Prison Crowding: Harmful Consequences and Dysfunctional Reactions*, 2–3 (unpublished manuscript), available at http://www.prisoncommission.org/statements/haney_craig.pdf.

244. A.J. BECK & B.E. SHIPLEY, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., RECIDIVISM OF PRISONERS RELEASED IN 1983, at 1–2 (1989), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr83.pdf>.

245. P.A. LANGAN & D.J. LEVIN, BUREAU OF JUST. STAT., RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>.

246. Shawn Bushway, *Reentry and Prison Work Programs* (paper presented at the Urb. Inst. Reentry Rountable, May 2003), available at http://www.urban.org/UploadedPDF/410853_bushway.pdf.

247. See *id.*

B. *Considering Federal Regulation*

Evident from the discussion above, the state of corrections within the United States reflects a broken system rapidly growing without funds to support its expansion. The incarcerated have high degrees of tension and aggression that subsequently weaken the work conditions of prison staff and administration. Even more, inmates demonstrate high recidivism rates upon returning to society and therefore continue to drain the system. As a result, states have scrambled to alleviate their strained budgets with lay-offs, early-release programs, and prison closings. The last consideration on their mind is providing financial means for prison art programs. But it should be their first—the answer, fittingly, lies in profit.

By eliminating the Son of Sam laws, the federal government and states could devise a regulatory system that *allows* prisoners to profit from their artistic endeavors in order to fund the implementation of arts in corrections. In application, the programs would pay for themselves. In theory, they might pay for much more—allowing inmates to fund their artistic opportunities would likely result in decreased violence, increased morale, instruction in career and occupational skills, improved living conditions, and management of idle time while subsequently lowering recidivism and the financial burden on the taxpayer.²⁴⁸

The substantial benefits gained by prison art program participants are conclusive. They assist the inmate by serving as therapeutic outlets, means of expression in a void existence, and measures of success and achievement. They provide purpose and sense of direction.²⁴⁹ As evidenced in David Gussak's Florida study, art program participants demonstrated leadership and social skills and a decrease in unconscious defenses including pervasive dishonesty.²⁵⁰ The art symbolizes an accomplishment and achievement—that for many, is a new experience. And with these accomplishments come confidence and self-worth. Long-term studies suggest these skills greatly assist in finding meaningful employment after prison that substantially lowers recidivism rates. Art programs additionally benefit prison conditions by improving the grounds and the work environment of correctional employees.

However, these statistics suggest benefits to more than the incarcerated and correctional staff. Brewster's cost-benefit analysis demonstrated a significant return on the investment of prison art programs within four correctional institutions.²⁵¹ Decreased incident rates, improved grounds, and utilizing the prison art participants for otherwise budget-allotted community service projects all contribute to financial state of correctional departments. The

248. See discussion *supra* Part I.C.1–3.

249. *Id.*

250. See discussion *supra* Part I.C.1.

251. See discussion *supra* Part I.C.2.

Brewster study concluded with a total institutional gain of \$65,732 in one fiscal year.²⁵² With the implementation of a self-funded system, corrections would stand to gain even more. The overhead costs of providing supplies and artists-in-residence would be paid for by the profits through prison art and its relative activities. Therefore, the institution would continue to financially benefit through grounds restoration, decreased incident cost, and less need for additional over-time guards and administration. Federal and state prison systems would likely see a decreased cost per inmate and gradual decreased prison populations. Moreover, a better functioning prison system indirectly benefits citizen taxpayers. As mentioned before, states often allocate close to, if not equal, portions of the budget to correctional service as education.

The success of the regulation would require a demand for prison art—however, regardless of whether it's purchased for intrigue or aesthetic value, prison art has established a strong market in society.²⁵³ An internet search for “purchasing prison art” creates a result of over fifty thousand postings. Despite the current Son of Sam laws in place, the internet provides a host of opportunities for inmates to circumvent the system and sell their art through an underground market. After all, nothing prohibits the inmate from sending art to a friend or family member for purchase.²⁵⁴ Today, an interested buyer has the resources to purchase an inmate-created piece from a non-profit organization, ebay.com, third-party dealer, auctioneer, gallery, or through a local community effort.

Through government regulation, the interested buyer would instead purchase the goods in a federally mandated market that works in collaboration with non-profit organizations, education systems, and agencies such as the National Endowment for the Arts. Such entities would work directly with prison administration in arranging artists-in-residence and program implementation. In addition, the regulation could be applied to all forms of artistic exploration including popular theater and literature programs.

Victims' rights, however, would not be ignored. To date, the Son of Sam laws do not effectively address compensation to victims nor do they tailor to the legislative intent noted in anti-profit statutes.²⁵⁵ The removal of the Son of

252. See BREWSTER, *supra* note 133, tbl.10, at 40.

253. See *supra* notes 39–41 and accompanying text; Adam Liptack, *Behind Bars, He Turns M&M's Into an Art Form*, N.Y. TIMES, July 21, 2006, <http://www.nytimes.com/2006/07/21/us/21artist.html>. While the average cost of a painting by an inmate may cover supplies and minimal compensation, other inmates have sold pieces for significant amounts. Donny Johnson, serving time for murder, has gained public attention for his paintings created by melted M&Ms and grape jelly. *Id.* During one gallery opening, Johnson sold six postcard paintings for \$500 each. *Id.* Since the prison will not let him keep the proceeds from his sales, Johnson intended to donate the money to the Pelican Bay Prison Project, a nonprofit group that assists children of prisoners. *Id.*

254. See Chang, *supra* note 61.

255. See discussion *supra* Part II.3.

Sam laws would not deny the victim and/or their families from utilizing an effective course of action such as attaching profits through a civil tort cause of action.²⁵⁶ By allowing alternative methods of recourse, the victim or its representative would still have the power and authority to prevent the convicted criminal's gain, especially in the case of the truly heinous criminal whose story strikes at moral rectitude of citizens. Nothing would prevent the victims of Colin Pitchfork, David Berkowitz, or the like from initiating a civil suit.

Allowing prisoners to create and sell artistic pieces for interested buyers will further the development, growth, and support of prison art programs. Currently, the United States prison system focuses the majority of its resources on the routine administration of generic penal measures (prison, probation, parole) that have proven ineffective at reforming a failed system. Instead, reforming correctional rehabilitation measures of the incarcerated demands attention to innovative strategies. But it is apparent from the discussion above that state departments do not have the financial capacity to take on additional programs.

Accordingly, the enticement in this regulation is the absence of financial overhead. Assuming the results repeat themselves, it is certain that long-term savings on taxpayers would increase since the cost of program implementation would be eradicated. Moreover, the regulation would encourage incentives with universities and volunteers, collaborations with art organizations, and in time, gain public support. University graduate students and faculty could work within the prison system to continue testing and conducting studies to conform the United States prison art program into a model for other countries addressing similar difficulties.

In sum, this solution aims to please both proponents and critics of anti-profit statutes and prison art programs. Regarding the Son of Sam laws, critics contend that the financial disincentive works to inhibit free speech and content while proponents argue for victims' rights. Here, the financial incentive returns and victims are offered alternative and more effective methods of recourse. Critics of prison art programs maintain that an inmate is in prison for punishment and taxpayers should not be funding their extracurricular pastimes. Proponents suggest that inmate rehabilitation should be the focus and the naïve creations benefit the artistic community. The regulation would serve to both decrease taxpayer responsibility while demonstrating cost-benefit results with continuing program growth.

Most importantly, the consideration of implementing a federal regulation system reflects a step towards reforming the United States correctional system and its incarcerated criminals. Dr. Rachel Williams, Assistant Professor of Art

256. See discussion *supra* Part II.4.

Education at the University of Iowa is a nationally known expert in the field of prison art.²⁵⁷ Her book, *Teaching the Arts Behind Bars*, offers the following reflection:

Correctional facilities are traditionally devoid of programs that contribute to individual, emotional expression, which is essential to our humanity. The culture within correctional institutions facilitates punishment, control, order, and correctional rehabilitation. Yet in an environment where individual expression is not encouraged, the arts result in therapeutic benefits for students. Many of the inmates I have researched during the program evaluations say that making art or participating in arts activities has helped them cope with prison life and given them a sense of confidence that they never possessed before.²⁵⁸

CONCLUSION

It is undisputed that the purpose of enacting the original Son of Sam statute was well intended. A notorious murderer had plagued the city of New York wreaking havoc upon its citizens in fear that they would be the next victim from what appeared to be random acts of violence. After lives were taken, lawmakers worked to ensure David Berkowitz would not continue his legacy of fear and violence through the opportunity to publish and profit from his story. Similarly, it is understandable why the United Kingdom is facing the same issue. It appears unfair to allow a criminal to gain from their time in punishment.

However, these laws contain shortfalls—they are ineffective at providing a timely and efficient means for victims to claim financial gain from their perpetrator and have historically failed in constitutional scrutiny. For these reasons, the Son of Sam laws should be abolished because they stand in the way of a potential solution to one of the many problems facing our state of corrections. Permitting incarcerated criminals to profit from their marketable art would allow for a federal regulatory scheme that pays for itself. The economic argument is compelling—the cost of housing one inmate currently costs the system \$20,000 to \$40,000 annually. Studies on the benefits of art programs demonstrate dramatic results on the inmate, correctional employee, government budget, and taxpayer. The success of one criminal from the rehabilitative effects of creating art could potentially save the public a quarter-million to half-million dollars.²⁵⁹

News outlets nationwide depict the Department of Corrections in a failing light. From an historical perspective, the problems continue to grow; the rate

257. Dr. Rachel Marie-Crane Williams, *available at* <http://www.education.uiowa.edu/html/people/facstaffs/rwilliams.htm>.

258. RACHEL MARIE-CRANE WILLIAMS, *TEACHING THE ARTS BEHIND BARS* 3 (2003).

259. Interview by Steven Durland, *supra* note 97.

of incarcerated criminals increases while state and federal funds shrink. The only apparent surety is reforming the system by addressing the root of the problem. The implementation of a federally supported prison art program provides fuel to the discussion and encourages the consideration of innovative approaches by legislature and political organizations.

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