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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

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**Bill No:** AB 538                      **Hearing Date:** June 30, 2015  
**Author:** Campos  
**Version:** May 13, 2015  
**Urgency:** No                              **Fiscal:** Yes  
**Consultant:** JM

**Subject:** *Actions for Damages: Felony Offenses: Victim Notification*

## HISTORY

Source: Crime Victims United of California

Prior Legislation: SB 1565 (Schiff) - Ch. 226, Stats. 2000  
SB 1330 (Calderon - Ch. 556, Stats. 1994)

Support: California Police Chiefs Association; California State Sheriffs' Association

Opposition: Association of American Publishers; California Broadcasters Association; Legal Services for Prisoners with Children; Motion Picture Association of America

Assembly Floor Vote: 75 - 0

## PURPOSE

*The purposes of this bill are to 1) extend the statute of limitations for a civil suit by the victim against a criminal offender who was convicted of any of a list of serious felonies from 10 years to 15 years from the date that the offender is discharged from parole; and 2) require any person or entity that contracts with a criminal offender for the offender's story about any of a list of serious felonies to inform the Office of Victim and Survivor Rights and Services in the Department of Corrections and Rehabilitation.*

### *Existing law:*

Provides that all crime victims have the right under the California Constitution to seek and secure restitution from the perpetrators of these crimes. Restitution must be ordered in every case without exception. Where a defendant has been ordered to pay restitution, all money, or property collected from the defendant must be first applied to satisfy restitution orders. (Cal. Const. Art. 1 § 28, subd. (b)(13)(A)-(C).)

Includes a statutory requirement for the sentencing court to order the defendant to pay the victim or victims *full restitution for all economic damages*. A restitution order is enforceable as a civil judgment. There is no statutory limit on the amount of a restitution order. (Pen. Code §§ 1202.4, subds. (a)(B), (f) and (i).)

Requires a defendant, in addition to direct restitution to the victim, to pay a restitution fine of between \$300 and \$10,000 for a felony and \$150 and \$1,000 for a misdemeanor. This money is deposited in the Victims of Crime Fund, not provided to the victim in a particular crime. (Pen. Code § 1202.4, subd. (b)(1).)

Requires a defendant who has been ordered to pay restitution to “prepare and file a disclosure identifying all assets, income, and liabilities in which the defendant held or controlled a present or future interest as of the date of the defendant’s arrest. The financial disclosure statements shall be made available to the victim and the [Victims Compensation and Government Claims Board] pursuant to Section 1214. (Pen. Code § 1202.4, subd. (f)(5).)

Provides that, unless a longer period is prescribed, the time for commencement of any civil action for damages against a defendant based upon that person's commission of a felony offense for which the defendant has been convicted is within one year after judgment is pronounced. (Code of Civ. Proc. § 340.3, subd. (a).)

Provides that the time for commencement of an action for damages against a defendant based upon the defendant's commission of specified felony offenses for which the defendant has been convicted is within 10 years of the date on which the defendant is discharged from parole. Specified offenses include: murder or attempted murder, mayhem, rape and other specified sexual assault crimes, any felony punishable by death or imprisonment in the state prison for life, or an attempt to commit such a crime, exploding a destructive device so as to cause bodily injury, mayhem, exploding a destructive device with intent to commit murder, or kidnapping. (Code of Civ. Proc. § 340.3, subd. (b)(1).)

Provides that the extended statute of limitations for a civil action against a convicted criminal defendant does not apply if:

- The defendant has received a certificate of rehabilitation or a pardon;
- The defendant has been paroled, following a conviction for murder or attempted murder, based on evidence presented to the Board of Prison Terms that the defendant committed the crime because he or she was the victim of intimate partner battering; or
- The defendant was convicted of murder or attempted murder in the second degree in a trial at which substantial evidence was presented that the defendant committed the crime because he or she was the victim of intimate partner battering. (Code of Civ. Proc. § 340.3, subd. (b)(2).)

Requires that any restitution paid by the defendant to the victim shall be credited against any civil judgment, award or settlement based on the defendant’s criminal conduct. (Code of Civ. Proc. § 340.3(e).)

Provides that the Department of Corrections and Rehabilitation (CDCR) or Board of Parole Hearings (BPH) shall, at least 60 days prior to release of an inmate imprisoned for a violent felony, notify the sheriff or chief of police and the district attorney of the community of conviction and in the community in which the person is scheduled to be released. (Pen. Code § 3058.6, subd. (a)-(b).)

Provides that whenever any person confined to state prison is serving a term for the conviction of specified child abuse offenses or any sex offense perpetrated against a minor, as specified, or as

ordered by any court, the BPH or CDCR shall, at least 45 days prior to release, notify the sheriff or chief of police, or both, and the district attorney having jurisdiction over the community in which the person was convicted and the community in which the person is scheduled to be released on parole or re-released following a period of confinement pursuant to a parole revocation without a new commitment. (Pen. Code § 3058.9.)

Provides that the sheriff or the chief of police, when notified as to the pending release of a violent felon may, without incurring any liability, notify any person they deem appropriate of the pending release. (Penal Code § 3058.7(a).)

Requires the CDCR or BPH to send a notice to a victim or witness who has requested notification that a person convicted of a violent felony is scheduled to be released. (Penal Code § 3058.8(a).)

Provides that a prison inmate retains those civil rights that need not be restricted to for penological interests. Specifically, an inmate may inherit, own, sell real or personal property, including all written and artistic material produced or written by the person during the period of imprisonment, except as provide in Civil Code Section 2225 (Pen. Code § 26001, subd. (a).)

Provides through the decision in *Keenan v. Superior Court* (2002) 27 Cal.4<sup>th</sup> 413 that the requirement in Civil Code Section 2225 that any proceeds from convicted criminal's sale of the story of his crime be placed in an involuntary trust violates the constitutional guarantees of freedom of speech.

*This bill:*

Extends the statute of limitations for filing an action for damages against a defendant, based upon the defendant's commission of specified felony offenses for which he or she has been convicted, from within ten years to within 15 years of the date on which the defendant is discharged from parole.

Provides that no civil action for damages may be filed against a person who was unlawfully imprisoned or restrained but has been released from prison after successfully prosecuting a writ of habeas corpus (i.e. falsely convicted and later released.)

Provides that any person or entity that enters into a financial contract with a criminal offender for the sale of the story of a crime for which the offender was convicted shall notify the Office of Victim and Survivor Rights and Services (OVS) within the California Department of Corrections and Rehabilitation (CDCR) that the parties have entered into such a contract, if the following are true:

- The contract is based on a story about a murder, attempted murder, mayhem, rape and other specified sexual assault crimes, any felony punishable by death or imprisonment in the state prison for life, or an attempt to commit such a crime, exploding a destructive device so as to cause bodily injury, mayhem, exploding a destructive device with intent to commit murder, or kidnapping for which the offender was convicted.
- An action for damages against the offender is authorized by statute. (See, Code of Civ. Proc. § Section 340, subd. (b).)

Requires OVS to notify the victim and members of the victim's immediate family, as defined, that it has received notification that a contract has been entered into for the sale of the offender's story, if the victim or immediate family member has previously requested to receive notifications provided by OVS.

#### RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity." (Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

## COMMENTS

### 1. Need for This Bill

According to the author:

Violent criminals should not profit from their crimes. Unfortunately, existing law does not adequately protect victims and their surviving loved ones from the commercial exploitation of violent crimes for entertainment purposes. AB 538 would increase the statute of limitations from ten years to fifteen to ensure ample time for the victim to pursue civil damages.

Additionally, the bill would make use of the existing victim notification systems under the jurisdiction of the California Department of Corrections & Rehabilitation (CDCR) to notify the victim or victim's next of kin when such contractual agreements are taking place. This is intended to be modeled after the media access law whereby the victim or victim's next of kin should be notified that a media representative has requested to interview the individual, but in no way inhibits their ability to enter in to a contractual agreement with compensation for the sale of the offender's story about the crime.

With the increased statute of limitations and notification about the contractual agreement where financial gain is provided to the offender, a victim or victim's next of kin can make an informed decision about whether to pursue civil damages.

### 2. First Amendment Issues Generally

The three standards of review for determining the validity of a law challenged on First Amendment grounds of freedom of speech are strict scrutiny, intermediate scrutiny and rational basis. While some laws clearly fall into one category or another - banning peaceful protests against a military action is clearly invalid as a content-based restriction - a First Amendment issue can be layered and difficult to determine, as the issues touch virtually every facet of government regulation and contact with citizens. Complicating First Amendment analysis, courts do not always use consistent terms in describing the applicable interests and standards.

A regulation based on the content of speech receives strict scrutiny, regardless of whether the speech is contrary to accepted standards of morality or propriety. While strict scrutiny is certainly applied to political speech, protection of the content of speech is much broader than that. (*Kingsley Corp. v. Regents of the Univ. of the State of N.Y.* (1959) 360 U.S. 684, 688–889; *Citizens United v. FEC* (2010) 558 U.S. 310.) “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” (*Texas v. Johnson* (1989) 491 U.S. 397, 414.) A restriction on the “content” of expression, must promote a “compelling state interest” by the “least restrictive means” to achieve the compelling interest. (*Sable Communications v. FCC* (1989) 492 U.S. 115, 126.)

A content-based restriction will be struck down as unconstitutionally “overbroad if it prohibits clearly protected speech although the law may also concern conduct that may validly be prohibited. (*U.S. v. Stevens* (2010) 130 S.Ct. 1577, 1587.) *Stevens* considered a federal statute

that criminalized the sale or possession of “depictions of animal cruelty,” in order to prohibit fetishistic “crush videos” of the killing of animals for sexual gratification. Stevens was prosecuted for distribution of videos of dog fights and the government argued that the law was limited in intent to such depictions. The Supreme Court found that the statute was overbroad in that it might reach videos depicting hunting, arguably inhumane treatment of livestock, or activities legal in some jurisdictions but not others, such as cockfighting. (*Id.*, at pp. 1588-1592.) The fact that speech is disturbing cannot be the determinant of whether it can be restricted or not.

Intermediate scrutiny requires that a law be substantially related to, or necessary to achieve, an important or substantial governmental interest. The most common category of speech subject to intermediate scrutiny is commercial speech. Commercial speech is protected, but the state can prohibit or punish false or misleading speech. (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 762, 770-773.) In the *Virginia Pharmacy Board* case, the court held that the state could not prohibit pharmacies from advertising the prices of prescription drugs. Intermediate scrutiny applies to a facially content neutral regulation (no direct regulation of the content of speech in the provisions of the law) that has an indirect impairment of speech. Restrictions on the time, place and manner of speech are subject to intermediate scrutiny. (*United States v. O'Brien* (1968) 391 U.S. 367; *United States v. Albertini* 1985) 472 U.S. 675. *O'Brien* upheld a conviction under a federal law prohibiting the burning of a draft card and *Albertini* upheld the conviction of a man who had entered a military base nine years after the base commander had barred him from returning because he had entered the base and destroyed documents in the first entry.

Complicating First Amendment analysis is the apparently growing consideration of whether a law targets a particular class of speakers. Strict scrutiny may be required if the government distinguishes among classes based on the substance of the speech by members of the classes. (*Turner Broadcasting v. FCC* (1994) 512U.S. 622, 658; *Citizens United v. FCC* (2010) 558 U.S. 310, 340.) If the class is not regulated based on the content of the speech, it appears that the proper standard of review is intermediate scrutiny. (*Doe v. Harris* (2014) 772 F.3d 563, 575-576.)

Unprotected speech or expressive conduct - such as obscenity - is not protected by the First Amendment. A regulation concerning unprotected speech will be upheld under any rational basis. (*Miller v. California* (1973) 413 U.S. 15.)

### 3. Public Fascination with Serial Killers and Notorious Criminals

Criminals who commit bizarre or horrific crimes have long been the subject of a wide range of books, films and other forms of popular culture and academic analysis. Jack the Ripper is an early example of wide public fascination with, and mass media coverage about, serial killers. Jack the Ripper killed women in the East End of London in the 1880s. Fascination with this killer remains today.<sup>1</sup>

The crimes of Charles Manson and his so-called family have created a virtual sub-genre of crime media. The most notable book - *Helter Skelter* - was written by the investigating detective, but Manson's writings, statements and musical compositions have been widely distributed. A Manson follower - Tex Watson - wrote a book about the crimes Manson and his followers committed and also described his conversion to Christianity. Richard Chase, the so-called

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<sup>1</sup> [http://www.bbc.co.uk/history/historic\\_figures/ripper\\_jack\\_the.shtml](http://www.bbc.co.uk/history/historic_figures/ripper_jack_the.shtml)

vampire killer of Sacramento, was reported to have drunk the blood of victims. Chase gave a long interview with an FBI investigator who is credited with coining the term, “serial killer,” and became an author about his cases and serial killers generally.<sup>2</sup> The fascination with many members of the public with notorious criminals creates a very large demand for books, movies, television shows, on-line content. Victims and the family members of victims are confronted with such material for their rest of their lives.

#### 4. Background on “Son of Sam” Laws and Related Issues

The “Son of Sam” laws arose in response to the case of notorious serial killer David Berkowitz. Berkowitz - who was known as the Son of Sam before his arrest - killed six people, wounded many more and terrorized New York City in the late 1970s.

Concerns that Berkowitz could profit from his story brought New York State to enact a statute - commonly called the “Son of Sam” law. Under the law, a contract for a criminal’s story about his or her crime must have been disclosed to the state. All proceeds of the contract were placed in an involuntary trust for the benefit of the criminal’s victims. Similar statutes in other states were also described as Son of Sam laws.

The New York Son of Sam law was overturned in *Simon & Schuster v. New York Crime Victims Board* (1991) 502 U.S. 105.<sup>3</sup> The case concerned Henry Hill, a lifelong mobster who was arrested on drug trafficking charges in New York in 1980. In exchange for immunity from prosecution and a new identity, Hill testified at great length about his former mafia associates. Subsequently, Hill signed a contract with Simon & Schuster to publish a book recounting his life as a mobster. The book, *Wiseguy*, was a commercial success, and was later made into the movie *Goodfellas*, another huge commercial success. The State of New York moved to place an involuntary trust on Hill’s income. The publisher, Simon & Schuster, filed a lawsuit challenging the constitutionality of the “Son of Sam” law as an illegal restraint on speech. The U.S. Supreme Court struck down the law as an unconstitutional, content-based financial burden on free speech rights. (*Simon & Schuster v. New York Crime Victims Board, supra*, 502 U.S. 105.)

#### 5. The California Son of Sam Laws

California passed its own “Son of Sam” law in 1986 to prevent those convicted of notorious crimes from profiting by selling stories about their crimes. The statute did so by imposing an involuntary trust on the proceeds a felon receives from the sale of the story of his or her crime. However, the California Supreme Court, following the U.S. Supreme Court’s decision in *Simon & Schuster v. New York Crime Victims Board*, invalidated the law, as amended in 1994 to cover all things of value derived by the perpetrator from the crime. (*Keenan v. Superior Court* (2002) 27 Cal.4th 413). The court in *Keenan* quoted *Simon & Schuster* thus: “[T]he state has a compelling interest in compensating victims for the fruits of the crime, but little if any interest in

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<https://books.google.com/books?id=8avgBwAAQBAJ&pg=PA18&dq=Whoever+Fights+Monsters+richard+chase&hl=en&sa=X&ei=pUKIVaulMMnaoASg04OQAw&ved=0CB4Q6AEwAA#v=onepage&q=Whoever%20Fights%20Monsters%20richard%20chase&f=false>

<sup>3</sup> Ironically, the Son of Same law was never applied against Berkowitz. At the time of his prosecution, the applied only convicted criminals, and Berkowitz was found incompetent to stand trial. Berkowitz voluntarily paid his share of book royalties to his victims or their estates. (*Simon & Schuster, supra*, 502 U.S. 105, 111.)

limiting such compensation to the proceeds of the wrongdoer's speech about the crime." (*Simon & Schuster, supra*, 502 U.S. 105, 120-121.)

In *Keenan*, the court found that the law violated the constitutional guarantee of free speech; by imposing a content-based financial penalty on protected speech and that the law chilled the speech rights of the author or creator and the right of the public to receive the communications. Specifically, the law, in seeking to compensate victims, impermissibly went beyond confiscating the proceeds of the crime to reach all income from speech of the criminal that included the story of the crime. (*Id.*, at pp. 417-418.) However, the opinion in *Keenan* is so wide-ranging that it is difficult to summarize.

## 6. Factors for Analyzing Laws that Affect a Contract for a Convicted Criminal's Story

*Simon & Schuster, Keenan* and other cases demonstrated the extreme constitutional barriers to drafting a law that directly targets the profits made by a felon from selling the story of his or her crime. This bill does not impose an involuntary trust and directly take the profits from convicted criminals who have sold their stories to publishers and other media entities. Rather, this bill requires any person or entity that enters into a contract for a convicted criminal's story to inform the Office of Victim and Survivor Services in the Department of Corrections and Rehabilitation of the contract.

If enacted, defenders of the law defined by this bill would likely first argue that the bill simply does not regulate or prohibit speech or expressive conduct. The bill only allows victims and the state to discover sources of income for a convicted criminal who owes restitution or to the victims or has been found civilly liable for those crimes and ordered to pay damages to the victim

Opponents would likely argue that the bill does target the content of speech. That is, the bill targets a contract about a certain kind of speech. If the bill is found to regulate or limit the content of speech, the bill would be subject to strict scrutiny. The bill could only withstand challenge if it upheld a compelling state interest. In light of the history of challenges to content-based speech, the state could have great difficulty establishing the validity of the law. The decisions in *Simon and Schuster* and *Keenan* struck down laws that imposed a "financial burden" or "direct financial disincentive" on speech about the perpetrator's crime. (See, *Keenan* at p. 427.)

An argument that the bill only seeks to discover sources of income due a convicted criminal, not to limit speech, face challenges. The bill only applies to contracts involving a convicted criminal's story about his or her crime. It does not apply to any other contract under which he or she is due money - the sale of a house, for example. As in this bill, the New York law required a media entity to report any contract with a criminal for his or her story to the New York Crime Victims Board, but New York took the extra step of requiring that money due under the contract be placed in an escrow account for the benefit of victims. (See, *Keenan* at p. 423.)

Opponents would likely argue that the bill simply breaks the process of paying the proceeds of a convicted criminal's speech into steps, rather than requiring the money due under the contract to be directly paid to a trust to benefit the victim. In most cases, the victim will hold the equivalent of a civil judgment in an award or order of restitution. This bill also extends the statute of limitation for a civil action against the convicted criminal based on specified serious and violent crimes. Thus, it can be argued that the bill essentially funnels the proceeds of a contract for the speech or expression of a perpetrator to the victim of his or her crime.

## 7. Prior Restraint Issues

Persons and entities subject to reporting requirements will also argue that the bill is an unconstitutional prior restraint on speech, as the bill requires disclosure of a contract for a story or account about a crime incident by the perpetrator before the story is stated or written. Prior restraint is a companion concept to that of a “chilling effect” on expressive conduct because of a regulation or limitation concerning speech.<sup>4</sup>

The Motion Picture Association of America, Association of American Publishers and California Broadcasters Association have argued that the bill will have a chilling effect on protected speech. Arguably, publications and other forms of media could forgo seeking the story of a convicted offender to avoid negative publicity and criticism when it is revealed that the entity contracted with a notorious criminal’s story. The bill also raises the issue of the speech and contracting rights of a publisher, audio-visual media entity, or agent. That is, the contract that must be reported includes the speech of the other party to a contract with the criminal. The contract would likely otherwise remain confidential from competitors. The resolution of this issue is not clear.

## 8. Intermediate Scrutiny if the Bill is Content-Neutral; and Requirement that Laws that affect Speech be Tailored or Necessary to Advance an Important Government Interest

The bill could also be found to be content-neutral on its face, but nevertheless imposes a burden on speech. The bill would enter the rather slippery and uncertain world of intermediate scrutiny. In this context, the state would need to show that it advances an important state interest in a way that is narrowly tailored to do so. As noted, courts will review any law that prohibits burdens or regulates speech to determine if the law is narrowly tailored to promote the state’s interest.

Recently, the Federal 9<sup>th</sup> Circuit Court of Appeals ruled on the constitutionality of the California law that requires each registered sex offender to disclose his internet identifiers as part of registration information. The court held that the law does not directly regulate the content of speech, but is subject to intermediate scrutiny because it affects the First Amendment rights of the class of persons:

Although California clearly has a legitimate interest, the more difficult question is whether the means California has chosen “burden[s] substantially more speech than is necessary to further the government’s legitimate interests.” *Turner*, 512 U.S. at 662<sup>5</sup> (quoting *Ward*, 491 U.S. at 799). “The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). The concern that an overbroad statute deters protected speech is especially strong where, as here, the statute imposes criminal sanctions. See *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003). (*Doe v. Harris* (2014) 722 F.3d 563, 578.)

The sponsor argues that the bill is narrowly and reasonably focused or tailored to serve the substantial governmental interest in assisting crime victims in obtaining recompense from criminal offenders. In particular, before a crime victim files a civil suit against the perpetrator of the crime, he or she would generally need to know whether the perpetrator has any assets or

<sup>4</sup> [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3761&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3761&context=fss_papers)

<sup>5</sup> *Turner Broadcasting v. FCC* (1994) 512 U.S. 92,

source of income. A judgment against someone who is judgment proof is of little economic value and the process of the lawsuit could be very emotionally painful. The lawsuit would examine the crime again and likely require the victim to engage in depositions about the crime and the harm it caused the victim or the victim's family.

A crime perpetrator who was convicted of one of the crimes covered by the civil action statute - and covered by the notice requirement in this bill - likely served a long prison term. He or she would not likely have any assets or income, except perhaps a contract for a story about the crime the perpetrator committed. This bill would require notice that the perpetrator has made such a contract, informing the victim that there could be assets to seize from the perpetrator through a judgment in a civil suit. It appears unlikely that a victim or a victim's family would exercise the right to sue without some expectation of collecting any judgment. Thus, it can be argued that the bill does not provide for notice of other sources of income or assets because they are not likely to exist.

### **9. Extent of Required Disclosure of a Contract for a Convicted Criminal's Story**

This bill requires a person or entity that enters into a contract with a criminal offender convicted of specified serious felonies for the story of the crime to notify the Office of Victim and Survivor Rights and Services within CDCR "that the parties "have entered into a contract for the sale of the offender's story." It is not entirely clear what must be disclosed. Does an agreement to pay a relatively small fee for a limited-time option on a story about the crime constitute a contract for the story? Does an agreement by the offender to discuss the crime with a publisher or media entity, without a promise that the offender would control the content of the story, constitute a contract for the story? Could CDCR demand to view the contract to determine the nature of the agreement. Further, as noted above, there is no enforcement mechanism for the requirement that a person or entity disclose that a contract has been made with the offender has been made. Arguably, the requirement simply serves as a disincentive for a publisher or media entity to enter into a contract to avoid the negative publicity or notice that could come with the disclosure.

### **10. This Bill Extends The Statute Of Limitations For a Suit against a Convicted Criminal for the Harm caused by Specified Serious Felonies From Ten Years To 15 Years**

*Simon & Schuster, Keenan* and other cases demonstrated the daunting constitutional barriers to drafting a law that directly targets the profits made by a felon from selling the story of his or her crime. In 2002, the Legislature took an alternative approach and extended the statute of limitations to allow a victim more time to file a tort action against a defendant seeking damages based on the commission of the crime. SB 1887 (McPherson), Ch. 633, Stats. 2002, greatly extended the statute of limitations for a civil action brought by a crime victim (which had been within one year of conviction of the crime), allowing the victim to bring a civil action any time up to ten years after the defendant is discharged from parole if the conviction is one of a number of specified offenses. The specific offenses include murder or attempted murder, mayhem, rape, kidnapping, any felony punishable by death or imprisonment in the state prison for life, and any attempt to commit such a felony.

According to the author, the current ten-year statute of limitations does not provide sufficient time for a crime victim to pursue damages from an offender who may be compensated by a book, movie or other arrangement for the sale of the story of the crime they committed more than ten years after they are paroled.

Opponents of the bill, including Legal Services for Prisoners with Children (LSPC), contend that there is no need to extend the statute of limitations because crime victims already have the entire time of trial, incarceration, and parole to file suit—plus an extra ten years, because the statute of limitations does not start running until the date when the offender is discharged from parole.

It is not known how many occasions arise each year in which a crime victim is barred by the current ten-year statute of limitations from filing a civil action for damages against the person who committed the crime for the sale of a story about the crime. Because of the long opportunity that the victim or family already have to file a suit before the statute of limitations bars such an action, it is thought that the vast majority of cases are likely served by the current limitation's period of ten years from the date of perpetrator's discharge from parole.

#### **11. This Bill Exempts Persons Released from Prison pursuant to a Habeas Corpus Petition From Being Sued For Damages Based On the Person's Conviction**

Existing law specifically exempts from suit any defendant who has been pardoned or received a certificate of rehabilitation, as well as victims of domestic violence who killed or attempt to kill their abusers. This reflects the Legislature's deliberate decision to exempt groups from liability because of their reduced culpability or rehabilitation. This bill would also exempt from suit any person who was "unlawfully imprisoned or restrained but has been released after successfully prosecuting a writ of habeas corpus pursuant to" Penal Code Section 1473 and related statutes.

While this provision would apply to innocent persons who were wrongly convicted, it would appear to apply in other cases. Penal Code Section 1473 specifically refers to cases where false evidence was used against a defendant at trial. However, the writ is not limited to such cases. It appears that a person could prevail in a habeas corpus action because he or she was held beyond the maximum sentence for the crime of conviction, not that the person was innocent. The granting of the writ would not affect the conviction itself, and thus the grounds for suit against the offender based on the crime.

Further, the fact that false evidence was used at trial or some other factor requires reversal of a conviction through a habeas corpus petition does not establish a person's innocence. An inmate could prevail in a habeas corpus petition, have the conviction reversed and then be retried and convicted. It is not entirely clear how the civil action statute would be applied in such a case, as the statute arguably contains conflicting provisions. The bill could provide that an innocent person who was wrongly convicted is immune from suit, regardless of whether the victim accepts that the person is innocent, while still allowing suit in circumstances where a habeas corpus petition was granted on grounds other than innocence.

#### **12. Utilizing the Existing Victim Notification Program for Notice that an Offender has Contracted to tell His or Her Story of the Crime**

Currently, crime victims, their family members, and certain witnesses in a criminal matter may provide their contact information to OVS and request that OVS notify them in the case of certain future events related to criminal offender. For example, one form allows a person to be notified of the release, escape, or death of the offender; a criminal appeal by the offender; the parole hearing date for an offender sentenced to life imprisonment; and the scheduled execution of an offender sentenced to death. The form is also used to inform OVS about the existence of a restitution order, as well as any request for special conditions of parole or community supervision when the offender is released from incarceration.

According to the author, this bill would simply require OVS to modify its current victim notification process to provide notification of an additional event related to the criminal offender—namely, a contractual relationship with another party for the sale of the story of the crime for which he or she was convicted.

It has been asserted that an inmate could not enter into a contract to sell his or her story about the crime of conviction because an inmate cannot conduct a business or profession in prison. However, there appears to be no statutory bar to an inmate entering into contracts, including for the sale of his or her story. Penal Code Section 2600 provides that inmates lose only those civil rights necessary for legitimate penological purposes. Penal Code Section 2601 specifically provides that an inmate may sell...all written and artistic material produced or created by the person during the period of imprisonment. The only exceptions to this specific rule appear to be the provisions in Civil Code Section 2225 concerning sale of an inmate's story about his or her crime. Those provisions were found to be unconstitutional in the *Keenan* case.

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