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Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: The Demise of New York’s Son of Sam Law and the Decision that Could Have Been

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COMMENTS

SIMON & SCHUSTER, INC. v. MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD: THE DEMISE OF NEW YORK'S SON OF SAM LAW AND THE DECISION THAT COULD HAVE BEEN*

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INTRODUCTION

A system of free expression can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest possible basis for exceptions. And any such exceptions must be clear-cut, precise and readily controlled.  

On December 10, 1991, the United States Supreme Court struck down New York Executive Law section 632-a as "inconsistent" with the First Amendment of the Constitution. The decision marked the end of over two years of litigation and extensive debate among commentators. The statute had required that income the criminals received for telling their stories be held in an escrow account. The funds were held to guarantee payment of civil judgments to their victims. Simon & Schuster, the publishing giant, had challenged the law as an unconstitutional restriction on freedom of speech. Simon & Schuster contended that criminals who could not receive immediate compensation would be deterred from publishing their...
This Comment reviews the Supreme Court's decision and urges the Court to recognize the protection of expression related to issues of public debate, "political speech," as the primary objective of the First Amendment. This Comment further suggests that the guarantee of public debate would be strengthened by reserving the application of the strict scrutiny standard exclusively to viewpoint-based restrictions. A limitation upon strict scrutiny is necessary because continued application of strict scrutiny review via the general determination that a regulation is content-based creates the possibility that the strength of the protection afforded by the standard will be "diluted." Part I describes the factual background and legislative history of the "Son of Sam" law, as well as how it operated. Part II reviews the creation of Wiseguy: Life of a Mafia Family, the book that was the basis of the case, presents the procedural history of the case and examines the arguments before the Supreme Court. Part III discusses the Supreme Court's decision. Part IV describes viewpoint-based restrictions and argues that the New York statute was the equivalent of such restriction. Further it contends that the Court should recognize that the prime purpose of the First Amendment is to protect "political speech" and that strict scrutiny should be reserved for reviews of viewpoint-based restrictions. This Comment concludes that freedom of expression is the guardian of our democratic system of government and requires the greatest safeguards as well as substantial sacrifices.

I. NEW YORK’S "SON OF SAM" LAW

In recent years, the public's interest in crime and criminals has resulted in the enormous success of books such as Mayflower Madam and Trading Secrets and films such as The Godfather Part III, Goodfellas, and The Silence of the Lambs. This fascina-

6. See infra notes 127-31 and accompanying text.
tion is not a new phenomenon; writings and movies about and by criminals are a staple of our literary heritage and cinematic tradition. The sheer volume of works available illustrates the public's insatiable curiosity. In order to feed this curiosity, the media has courted criminals with substantial financial incentives. Objection to the enrichment of one such criminal produced the backdrop for the Court's recent decision.

A. The "Son of Sam"

In the spring and summer of 1977, New York City was terrorized by a series of random shootings of young women and their escorts. At the time of his arrest, serial killer David Berkowitz was known and Television Arts. Michael Blowen, And the Winner is ..., Boston Globe, Mar. 19, 1991, at 54.


15. Because of the confidentiality of agreements, it is difficult to determine precisely how much criminals have received; however, reported figures are hefty, to say the least. Macmillan, Inc. paid Jean Harris, the murderer of Dr. Herman Tarnower, a prominent diet doctor, a $50,000 advance for her book STRONG TWO WORLDS. Children of Bedford, Inc. v. Petromelia, 573 N.E.2d 541, 545 (N.Y. 1991). See also Martin S. Goldberg, Note, Publication Rights Agreements in Sensational Criminal Cases: A Response to the Problems, 68 Cornell L. Rev. 686, 687 n.4 (1983) (discussion of compensation in various publication agreements for crime stories); USA Today, Jan. 9-11, 1987, at 1A, 2A (convicted murderer Rosewell Gilbert and his attorney received $50,000 for the rights to Mercy Or Murder? What The Hell's A Guy Gonna Do?); Jonathan Yardley, Mass Media Murder Mania, Wash. Post, Sept. 22, 1986, at C2 (The attorney for Robert E. Chambers, Jr., who murdered Jennifer Levin in New York's Central Park in 1986, received over one hundred offers for movies and television films within one month of the murder.); Wallace Turner, Patricia Hearst Drops Attempt to Win New Trial, N.Y. Times, Jan. 7, 1982, at A15 (reporting that Patricia Hearst was paid $700,000 for her story).
only by his alias: "Son of Sam."16 His senseless and brutal spree left six people dead and seven wounded. However, even before Berkowitz's arrest, rumors spread that the rights to his story would make the "Son of Sam" a wealthy man.17 The New York legislature, repulsed by the possibility of a vicious murderer making millions by exploiting the pain and suffering of his victims,18 decided to take action.19

B. Legislative History

On August 11, 1977, one day after the arrest of David Berkowitz, Executive Law section 632-a, entitled "Distribution of moneys received as a result of the commission of crime," was signed by Governor Hugh Carey and enacted into law.20 The law was a direct

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16. The nickname "Son of Sam" was coined by the press, for the anonymous murderer, after a note signed "Son of Sam" was found at the scene of an April 17, 1977, murder. See Goldberg, supra note 4, at 686 n.2. (citing Winfrey, "Son of Sam" Case Poses Thorny Issues for Press, N.Y. Times, Aug. 22, 1977, at 1, 38. David Berkowitz's arraignment in the late summer of 1977 was the culmination of the "most intensive manhunt in the New York City Police Department's history." Wash. Post, Aug. 11, 1977, at A1; N.Y. Times, Aug. 11, 1977, at A1. The public's fascination with crime is further illustrated by the massive interest in the arrest of David Berkowitz. The New York Post's issue covering the capture of the "Son of Sam" killer sold one million copies, compared to normal daily sales of 600,000; similarly, the New York Daily News sold 350,000 copies more than its regular daily sales. Fedler, supra note 13, at 15.

17. See In re Berkowitz, 103 Misc. 2d 823, 824 (Sup. Ct. 1979).


20. N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1991); N.Y. Laws of 1977, ch. 823, reprinted in, McKinney's 1977 Session Laws of New York at 1321-22. Ironically, the law enacted to prevent the Son of Sam from profiting from his atrocities and which is commonly referred to by his alias never applied to him because David Berkowitz was found incompetent to stand trial, and the statute at that time applied only to convicted criminals. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (citation omitted). McGraw-Hill purchased the rights to Berkowitz's story in an agreement that included, "a $250,000 advance, $150,000 profit to the ghost writer, and $75,000 to Berkowitz through his court-appointed conservator, Doris Johnsen." See Okuda, supra note 4, at 1354. However, at Berkowitz's request, his royalties in the amount of $118,443.36 from the book Son of Sam, were distributed, in accordance with a settlement agreement, to twelve of his victims or their estates. Brief for Respondents
response to the lucrative offers that would be available to the "Son of Sam." Senator Emanuel R. Gold, the author of the bill, indicated his rationale in proposing it:

It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four calibre killer, can expect to receive large sums of money for his story once he is captured while five people are dead, other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.

The Legislature's justification for the law was to ensure that moneys received by criminals who publicize their crimes first be made available to their victims. The statute strengthened New York's existing legislative efforts to assist crime victims.


23. The legislature's justification for the statute was stated as follows:

Currently a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity. This bill will 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. The Requirement of a civil action will prevent the abuse of this privilege.

Assembly Bill Memorandum Re: A9019 (July 15, 1977), reprinted in Legis. Bill Jacket 1977 N.Y. Laws 823. The Division of Criminal Justice Services also supported the bill in a letter to the Governor's counsel:

Though hardly a new phenomenon, there has been a recent realization by the general public that where a defendant is a well-known personality or the crime with which he is charged is one that has aroused a high degree of public interest, he is in a position to make a considerable amount from articles, books or television accounts of his life, times and crimes. . . . [T]he bill takes cognizance of the situation and seeks to redirect the money flow from the criminal to his victims. As an expression of the concept of simple justice it cannot be faulted. It is merely another facet of the oft-repeated maxim that crime does not (or should not) pay.

Memorandum from Robert Schlanger, Division of Criminal Justice Services (Aug. 3, 1977), reprinted in Legis. Bill Jacket N.Y. Laws 823. But see In re Johnsen, 430 N.Y.S.2d 904, 906 (Sup. Ct. 1979) ("[632-a was] conceived in haste, written in haste, and declared under the cry of the public for the Legislature to exact retribution . . . ").

24. In 1966, the New York Legislature in recognition that crime victims and their dependents often suffer devastating injuries and insurmountable debts enacted Article 223 of the Executive Law. See Children of Bedford, Inc. v. Petromelia, 573 N.E.2d 541, 543 (N.Y. 1991). The statute established a general victims compensation scheme which sought to secure compensation for victims and their families regardless of whether the perpetrator was ever apprehended. See N.Y.
C. The Operation of N.Y. Exec. Law Section 632-a

Executive Law section 632-a was either the inspiration or model for in excess of forty state statutes and a federal statute which also seek to compensate the victims of notorious criminals who attempt to profit from the exploitation of their crime stories. The statute required that "any legal entity" contracting with an accused or convicted person for work amounting to a "reenactment" of his crime "by way of movie, book, magazine article, tape recording, phonograph record, radio or television presentation, [or] live entertainment of any kind" or a recollection of his "thoughts, feelings, opinions or emotions regarding such crime," to submit the contract to the Crime Victims Board. Upon a determination that the con-

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The Legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts. Such persons or their dependents may thereby suffer disability, incur financial hardships or become dependent upon public assistance. The legislature finds and determines that there is a need for government financial assistance for such victims of crime. Accordingly, it is the legislature's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.


25. See Ecker & O'Brien, supra note 4, at 1075 n.6.


27. See Loss, supra note 4, at 1334. For a comparison of the specific provisions of the New York statute with various other state statutes see id. notes 13-32 and accompanying text.

28. N.Y. Exec. Law § 632-a(1) (McKinney 1982) states in the most pertinent part:

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 persons 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. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of
tract was subject to the statute, the legal entity was required to turn over all moneys owed the criminal under the contract. The board would then deposit the money in an escrow account. Before a victim or his family could receive payments from the account, they would have to obtain a civil judgment against the criminal within five years of the creation of the escrow account. Also, victims could not gain access to the funds unless the criminal figure came under the definition of "convicted person" as established by the statute. The statute created a mechanism that significantly increased the chances of recovery for this unique class of victims.

Section 632-a(9) nullified any attempts by the accused or convicted to shield media money through devices such as the "execution of a power of attorney." Such actions were declared against the "public policy" of the state. Section 632-a(7) expanded the statute of limitations on recovery for this class of victims by not beginning the running of the five-year period until an escrow account had been established. This extension was a substantial advantage over the statute of limitations on a typical recovery, which is only three years long and begins at the time of the injury.

Sections 632-a(5) and (10)(b) further increased the victims likelihood of recovery by expanding the definition of a convicted person. Section 632-a designated persons found not guilty as a result of a mental defect or those found incompetent to stand trial as convicted and their publication money subject to the statute. Section 632-a(10)(b) included persons who "voluntarily and intelligently admitted the commission of a crime" within the definition.

The distribution of funds from the escrow account was subject to a five level priority scheme under section 632-a(11). First, the criminal was able to obtain payment of up to twenty percent of the monies in the escrow account for the purpose of retaining legal

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29. Id.
30. Id.
31. See id.
32. Id.
33. N.Y. Exec. Law § 632-a(9) (McKinney 1982).
34. See id.
representation at any stage of his criminal proceedings. Also, a representative of the criminal was entitled to be paid his expenses in producing the work. Second, the Victims Board was able to receive reimbursement, not to exceed fifty percent of any civil judgment obtained by a victim, for previous awards made to crime victims or their families. Third, victims could satisfy any money judgment they earned. Fourth, other judgment creditors of the criminal, including tax authorities, were entitled to any remaining moneys. Finally, after five years or a showing that all pending actions are completed, the convicted or accused person was entitled to any funds in the account. Section 632-a was not complete in its coverage of criminals’ publication contracts as it did not apply to victimless crimes. Also, the statute provided for judicial review of the decisions of the Victims Board. Under section 632-a(12), any party objecting to the final determination and order of the Board was free to seek judicial relief under article seventy-eight of the Civil Practice Law and Rules.

II. BACKGROUND

A. The Making of Wiseguy

In 1981, Richard E. Snyder and Michael Korda—respectively, the president and the editor-in-chief of Simon & Schuster—conceived the idea of publishing a book about Henry Hill, a foot-soldier in the Luccese crime family. At the time, Hill was assisting state and federal prosecutors under the Federal Witness Protection Program. The career criminal had been arrested in 1980 and charged with six counts of conspiracy to sell drugs. In return for testifying against

41. Id.
47. N.Y. Exec. Law § 632-a(12) (McKinney 1982).
49. Simon & Schuster, 916 F.2d at 779. Among the crimes that the law enforcement agencies were investigating was the six million dollar Lufthansa Airlines robbery at Kennedy International Airport. Brief for Respondents, supra note 20, at 11.
his mafia former employers, he received immunity and a new identity.\(^{51}\)

In searching for an author, Simon & Schuster consulted Sterling Lord, a prominent New York literary agent.\(^{52}\) Lord contacted Nicholas Pileggi, a recognized crime writer.\(^{53}\) On August 21, 1981, Lord, Hill and Pileggi entered into an agreement which covered the division of payments to be received from the publisher.\(^{54}\) On September 1, 1981, Simon & Schuster, Pileggi and Hill signed a publishing agreement by which the latter two sold exclusive rights to an autobiographical non-fiction work\(^{56}\) about organized crime in New York City.\(^{56}\) Sterling Lord received ten percent of the moneys paid to Pileggi and Hill.\(^{57}\)

For more than two years, Pileggi and Hill undertook an extensive collaboration.\(^{58}\) The two spent over three hundred hours together on the project.\(^{59}\) During that period, Hill provided in-depth information on his career in organized crime;\(^{60}\) this information formed the basis of *Wiseguy: Life in A Mafia Family*.\(^{61}\)

In January 1986, publication of *Wiseguy* brought immediate success and acclaim.\(^{62}\) *Wiseguy* was praised for its deglamorizing of organized crime.\(^{63}\) *New York Daily News* columnist Jimmy Breslin, called it "the best book on crime in America ever written."\(^{64}\) Professor G. Robert Blakey, draftsman of the RICO statute, "highly rec-
Wiseguy, "primarily in Hill's first-person narrative," described in detail the daily existence of organized crime. In reviewing his twenty-five year criminal career, Hill admitted to participation in a variety of offenses, including involvement in the Boston College basketball point-shaving scandal and the 1978 theft of $6 million from the Lufthansa terminal at Kennedy airport, the largest successful cash robbery in American history. Wiseguy also revealed the identity of many of Hill's victims. Within a year, over a million copies were in print. Furthermore, Wiseguy became the basis for the equally successful motion picture *Goodfellas* by Martin

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Pileggi, fortunately, had the cooperation of Hill and his wife, Karen, so his story reflects a substantial amount of insight into the personalities of the protagonist . . . . *Wiseguy* is . . . a welcome addition to the popular literature on organized crime, and, fortunately, it does not unnecessarily contribute to the sensationalism, glamorizing or romanticizing of organized crime or the mob. *Id.*

66. *Simon & Schuster*, 112 S. Ct. at 506. In *Wiseguy*, Hill reflected: "[A]t the age of twelve my ambition was to be a gangster. To be a wiseguy. To me being a wiseguy was better than being president of the United States." *Id.* (quoting N. Pileggi, *Wise Guy: Life in A Mafia Family* 19 (1985)).

67. In its recent decision the Supreme Court highlighted Hill's reflections on his prison term for an extortion conviction, and the preferred treatment that members of the mafia received:

The dorm was a separate three-story building outside the wall, which looked more like a Holiday Inn than a prison. There were four guys to a room, and we had comfortable beds and private baths. There were two dozen rooms on each floor, and each of them had mob guys living in them. It was like a wiseguy convention—the whole Gotti crew, Jimmy Doyle and his guys, "Ernie Boy" Abbamonte and "Joe Crow" Delvecchio, Vinnie Aloi, Frank Cotroni . . . .

We had the best food smuggled into our dorm from the kitchen. Steaks, veal cutlets, shrimp, red snapper. Whatever the hacks could buy, we ate. It cost me two, three hundred a week. Guys like Paulie spent five hundred to a thousand bucks a week. Scotch cost thirty dollars a pint. The hacks used to bring it inside the walls in their lunch pails. We never ran out of booze, because we had six hacks bringing it in six days a week. Depending on what you wanted and how much you were willing to spend, life could be almost bearable.


68. *Simon & Schuster*, 916 F.2d at 779. At least one of Hill's victim's heirs expressed an intent to make a claim against the escrow account. *See* Brief for Respondents, supra note 20, at 18. After reading *Wiseguy*, Patricia Eisenberg, wife of William Bentvana a/k/a Billy Batts, discovered that her husband who had disappeared fifteen years earlier, had been murdered and that Hill had been an accessory. *Id.*


Scorsese.\textsuperscript{71}

On January 31, 1986, the New York State Crime Victims Board wrote to Simon & Schuster: "It has come to our attention that you may have contracted with a person accused or convicted of a crime for the payment of monies to such person."\textsuperscript{72} The counsel directed the publishing company to provide the Victims Board with copies of contracts it entered into with Henry Hill,\textsuperscript{73} and to freeze all payments to Sterling Lord on behalf of Hill.\textsuperscript{74} In response to the Board's directive,\textsuperscript{75} Simon & Schuster, on May 22, 1986, furnished the Board with the relevant documents.\textsuperscript{76} Simon & Schuster also informed the Board that it had paid Hill $96,250 via the Sterling Lord Agency and would suspend the $27,958 due him.\textsuperscript{77}

On May 21, 1987, the Board issued a Proposed Determination and Order in which it concluded that the contract, "is of the type regulated by Executive Law § 632-a."\textsuperscript{78} The Board further determined that a copy of the publishing contract should have been submitted to the Board at the time of its execution in 1981. The Board found that Wiseguy contained "thoughts, feelings, opinions and emotions regarding crimes committed by Hill as well as his admission to involvement in such crimes."\textsuperscript{79} The Board also found that Hill had to pay to the Board all profits he had received and that Simon & Schuster was responsible for turning over all monies it had "wrongfully distributed" to him, in the event Hill failed to tender his prof-


The screenplay for Goodfellas was an adaptation of Wiseguy. See MPAA Brief, supra note 13, at 21. Furthermore, Warner Bros. retained Henry Hill as a consultant and Robert De Niro, the leading actor in the film conferred with him regularly. See id. at 22. Also, Nicholas Pileggi and Hill held the film rights, which Warner Bros. acquired for an estimated $550,000. See id. at 21-22. Goodfellas' awards include being chosen best film of 1990 by the Los Angeles Film Critics Association, the New York Film Critics Circle, the National Society of Film Critics, the Chicago Film Critics and being nominated as best film by the Academy of Motion Picture Arts and Sciences. See Brief for Petitioner, supra note 48, at 8 n.8. See also sources cited supra note 4.

\textsuperscript{72} Simon & Schuster, 112 S. Ct. at 507.

\textsuperscript{73} But see Brief for Petitioner, supra note 48, at 8. The New York State Crime Victims Board began its inquiry by requesting all contracts that either Simon & Schuster or Nicholas Pileggi may have entered into with any person accused or convicted of a crime. Id. The sweeping demand forced the publisher to review thousands of contracts. Id. Contra Brief for Respondent, supra note 20, at 12 n.19.

\textsuperscript{74} Simon & Schuster, 916 F.2d at 780.

\textsuperscript{75} See Brief for Respondent, supra note 20, at 12. Simon & Schuster's compliance with the Board's request was in response to a subpoena issued by the Board. Id.

\textsuperscript{76} Simon & Schuster, 916 F.2d at 780.

\textsuperscript{77} Id.

\textsuperscript{78} See id.

\textsuperscript{79} Id.
its. The monies were to be placed in an escrow account for the benefit of the victims of Hill's crimes.

On July 15, 1987, the Board's Order became final as Simon & Schuster opted not to object to the Board's decision and did not request a fact-finding hearing available to it. Instead, the publisher brought suit on August 3, 1987.

B. The Procedural History

1. The District Court Decision

Simon & Schuster sought an order from the Southern District of New York declaring section 632-a unconstitutional under the First and Fourteenth Amendments. The publisher claimed that the statute was unconstitutional on its face as applied in this case and asked for an injunction preventing its application.

On October 26, 1989, Judge John F. Keenan granted the Victims Board's cross-motion for summary judgment and declared New York Executive Law section 632-a constitutional under the First and Fourteenth Amendments. Regarding the statute as only a "procedural

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80. The Board directed Henry Hill to turn over all monies received, plus interest, less commissions paid to the Sterling Lord Agency. Simon & Schuster, in addition to being responsible if Hill did not comply, was ordered to turn over the $27,958 then due Hill as well as any future royalties. Id. The Board, however, determined that payments made to Nicholas Pileggi, the author, were not subject to section 632-a. Id.


83. Simon & Schuster, 916 F.2d at 780.

84. Id.


86. See Brief for Petitioner, supra note 48, at 14. Simon & Schuster also sought an award of costs and attorney fees pursuant to 42 U.S.C. § 1988 (1988). Simon & Schuster specifically alleged that "[t]he Board's enforcement of Section 632-a against publishers, including [Simon & Schuster], interferes with the publication of biographies, autobiographies and other works of non-fiction on some of the most pressing social issues of the day by effectively prohibiting the compensation of a class of authors, sources, and literary agents." Brief for Defendants-Appellees at 13, Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990) (No. 89-9192) [hereinafter Brief for Appellees].

87. Simon & Schuster, 724 F. Supp. at 180. But see Brief for Appellant, supra note 48, at 19 (claiming that the district court erred, under the standards of Fed. R.
hurdle,” the court held that section 632-a did not restrict expressive activity.\textsuperscript{88} The court determined that although section 632-a applies where speech and nonspeech elements are combined, the law was aimed at regulating the profits of the contracts—a nonspeech element—and did not have a direct effect on expressive activity.\textsuperscript{89} The court concluded that any burden caused by the temporary diversion of a criminal's proceeds to guarantee the compensation of victims, was “merely incidental” to the speech element involved.\textsuperscript{90}

The court decided that the \textit{O'Brien}\textsuperscript{91} test for incidental limitations on First Amendment rights was the appropriate standard of review.\textsuperscript{92} The \textit{O'Brien} test has four requirements: (1) that the governmental regulation be enacted within the constitutional power of the government; (2) that the regulation further an important or substantial governmental interest; (3) that the governmental interest be unrelated to the suppression of free expression; and (4) that the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.\textsuperscript{93} First, the district court found that the New York State Legislature acted within its authority.\textsuperscript{94} Second, both parties agreed that compensating crime victims was an important governmental interest.\textsuperscript{95} Third, in determining that the interest was unrelated to the suppression of speech, the court emphasized that the statute merely attached the proceeds from speech and that it involved a “purely objective inquiry” without any evaluation of the expressions of criminal speakers.\textsuperscript{96} Finally, the court held that any incidental burden on first amendment freedoms was not greater than was essential for the government's interest in compensating victims—section 632-a was not drawn to ban speech, but “to garnish the proceeds so that they will be used in a productive manner.”\textsuperscript{97} The district court also rejected Simon & Schuster's claim that section 632-a violated due process under the Fourteenth Amendment; the court found this claim to be

\textsuperscript{88} Simon & Schuster, 724 F. Supp. at 176-77.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} United States v. O'Brien, 391 U.S. 367 (1968).
\textsuperscript{92} Simon & Schuster, 724 F. Supp. at 178. See also Texas v. Johnson, 491 U.S. 397, 407 (1989) (citing United States v. O'Brien, 391 U.S. 367, 376 (1968) (“where speech and nonspeech are combined in the same course of conduct a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on the First Amendment freedoms”)).
\textsuperscript{93} O'Brien, 391 U.S. at 376.
\textsuperscript{94} Simon & Schuster, 724 F. Supp. at 178.
\textsuperscript{95} Id. at 178-79.
\textsuperscript{96} Id. at 178.
\textsuperscript{97} Id. at 179.
Finally, Judge Keenan, while observing that freedom of speech "presupposes a willing speaker,"99 stressed that "although it may be more difficult for publishers and authors to create books with the cooperation of a criminal, it is not impossible nor is such cooperation proscribed by section 632-a."100

2. The Circuit Court Decision

On October 3, 1990, a divided panel of the Second Circuit affirmed the district court's judgment, but not its reasoning.101 The court unanimously agreed that Executive Law section 632-a imposed a direct burden on first amendment freedoms and was a content-based restriction on speech, thus requiring the application of a "strict scrutiny" standard.102

The majority, consisting of Judges Roger J. Miner and John W. Walker, Jr., further justified its imposition of the more demanding test by pointing out that the statute "serves to single out the media..."
for differential treatment," and that such treatment resulted in "ex-
cluding from circulation the expression of criminals who would
write about their crimes if the price were right."\textsuperscript{103}

The strict scrutiny standard of constitutional review requires that
the state satisfy two requirements: (1) that its regulation serves a
compelling state interest; and (2) that the legislation is narrowly tai-
lored to achieve its purpose.\textsuperscript{104} Based largely on section 632-a's
legislative history,\textsuperscript{105} the court of appeals found that New York had
a compelling interest in "assuring that a criminal not profit from the
exploitation of his or her crime while the victims of that crime are in
need of compensation by reason of their victimization."\textsuperscript{106} Writing
for the majority Judge Miner emphasized that the purpose of the stat-
ute is "not to suppress speech" but to assure victim compensa-
tion.\textsuperscript{107} The court concluded that section 632-a was "narrowly tailo-
red"\textsuperscript{108} to the state's interest because, "[i]t provides a specialized
form of attachment and is designed to freeze the proceeds of
storytelling by criminals" for the benefit of their victims.\textsuperscript{109}

In his dissenting opinion, Judge Jon O. Newman refused to join in
an opinion that found that a content-based, restrictive statute passed
"strict scrutiny."\textsuperscript{110} Judge Newman observed that the majority justi-
fied upholding the New York statute on the theory that "escrowing
this narrow category of payments benefits crime victims, an objec-
tive New York is anxious to achieve . . . ."\textsuperscript{111} He contended, how-

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{103}] Simon \& Schuster, 916 F.2d at 782.
\item[\textsuperscript{104}] Id. (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45
(1983) (content-based regulation must meet strict scrutiny to survive); Arkansas
Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227-31 (1987) (differential treat-
ment must survive "strict scrutiny")).
\item[\textsuperscript{105}] See Simon \& Schuster, 916 F.2d at 782-83 (citing Assembly Bill Memorandum
823, and Memorandum from Robert Schlanger, Division of Criminal Justice Serv-
Laws 823).
\item[\textsuperscript{106}] Simon \& Schuster, 916 F.2d at 782-83.
\item[\textsuperscript{107}] Id. at 783.
\item[\textsuperscript{108}] In holding the statute to be "narrowly tailored," the court rejected Simon \&
Schuster's claim that section 632-a was underinclusive and overinclusive. See id.
at 784.
\item[\textsuperscript{109}] Id. at 783. In the court's opinion the statute recognized that, "[t]he sole asset
of most criminals is the right to tell the story of their crimes." Id. at 783. But see id.
at 785-86 (Newman, J., dissenting) ("[E]ven if it were true that the sole asset of most
criminals is the right to tell the story of their crime, that observation would not
validate New York's content-based regulation of speech.").
\item[\textsuperscript{110}] Judge Newman drew on the case of Jean Harris's autobiography, Stranger in
Two Worlds, to illustrate the content-based nature of section 632-a. See id. at 783.
The Victims Board had determined that the statute applied to her book because two
chapters referred to her crime, but had those chapters been eliminated her royalties
would not have been escrowed. Id.
\item[\textsuperscript{111}] Id.
\end{itemize}
\end{footnotesize}
ever, that such justification "eliminates the entire inquiry concerning the validity of content-based discriminations." Further, he argued that section 632-a, a content-based discrimination, did not meet the "narrowly tailored" element of the strict scrutiny test because the state's interest could be achieved by a reasonable alternative. Judge Newman suggested that if New York's attachment laws were too limited, then what the First Amendment required was a broadening of remedies. Also, he noted that the statute had a pronounced "chilling effect" on the publication of valuable writings about activities of high public interest. Judge Newman's insightful opinion foreshadowed what was in store for New York's Son of Sam law.

C. Arguments before the Supreme Court

On February 19, 1991, the United States Supreme Court granted certiorari to hear Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board. In this case the established first amendment theory that content-based restrictions on speech are presumptively invalid clashed with the fundamental legal concept that criminals should not profit from their crimes.

112. Id.
113. Simon & Schuster, 916 F.2d at 786. Judge Newman considered the majority's conclusion that section 632-a was "narrowly tailored" to be "circular" reasoning because it defined the state's interest in terms of the statute's scope and thereby held the statute to be precisely tailored to the interest. Id. at 785. The Supreme Court adopted Judge Newman's analysis. See Simon & Schuster, 112 S. Ct. at 511 (citing Simon & Schuster, 916 F.2d at 785 (Newman, J., dissenting)).
114. Simon & Schuster, 916 F.2d at 785-86. Judge Newman suggested that a statute that did not single out payments for speech could pass constitutional muster. Id. at 785 ("New York is entitled to escrow for the benefit of crime victims all payments to criminals.") (emphasis in original).
115. Id. at 784. Judge Newman was concerned that holding publishers retroactively liable for payments later found to be subject to section 632-a, would result in their either not publishing or "purging manuscripts." Id. at 786-87.
116. The dissent demonstrated one of the weaknesses of the statute by pointing out that in the first eleven years of its existence it had produced only five escrow accounts, three of which involved the same criminal. See id. at 787.
119. See Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889). In Justice Cardozo's explanation of the reasoning underlying Riggs, he described the roots of the principle that no man should profit from his own wrong as, "deeply fastened in universal sentiments of justice. . . ." See Brief for Respondents, supra note 20, at 2 (quoting B. Cardozo, The Nature of the Judicial Process 40-41 (1921)).
1. The Petitioner and Amici

a. New York's "Son of Sam" law should be subject to strict scrutiny

Simon & Schuster asserted that any law that directly burdens speech,\(^1\) that is a content- or speaker-based regulation,\(^2\) or that singles out the media for adversely differential treatment\(^3\) so impairs speech that it is presumptively invalid.\(^4\) Under Meyer v. Grant\(^5\) such laws are subject to "strict scrutiny" and pass constitutional muster only if the government proves that the law serves a compelling governmental interest and is narrowly tailored to achieve that interest.\(^6\)

i. Section 632-a's payment restriction deters the publication of protected speech

The Court in Meyer determined that statutory restrictions on expenditures for speech have the "inevitable effect of reducing the total quantum of speech."\(^7\) In Meyer the Supreme Court unanimously struck down a Colorado statute that prohibited paying people to circulate initiative petitions.\(^8\) It held the law to be a direct

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120. On October 15, the Court heard oral argument. Simon & Schuster was represented by Ronald S. Rauchberg (Counsel of Record) and Charles S. Sims of Proskauer Rose Goetz & Mendelsohn and Mark C. Morril of Simon & Schuster, Inc. Amicus Curiae briefs in support of the petitioner were filed by the American Civil Liberties Union, the Association of American Publishers Inc., and the Motion Picture Association of America. See Deborah Pines, Son-of-Sam Law Challenge Argued Before High Court, N.Y. L.I., Oct. 16, 1991, at 1, 2.


123. See id. (citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 582 (1983)).


126. See id. at 420 (Meyer "exacting scrutiny" is commonly known as "strict scrutiny"). See also Brief for Petitioner, supra note 48, at 15-16. Below, Simon & Schuster emphasized that subjecting a law to strict scrutiny "almost always presages invalidation." Brief for Appellant, supra note 48, at 20; see also Reply Brief for Petitioner at 1-5, Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (No. 90-1059) (counter argument to the Board's contention that Strict Scrutiny is not the appropriate standard of review) [hereinafter Reply Brief for Petitioner].

127. See Brief for Petitioner, supra note 48, at 17-18 (quoting Meyer, 486 U.S. at 423). Petitioner noted that the court has held on seven separate occasions in the last fifteen years that restrictions on payments for speech are invalid unless they survive strict scrutiny. See id. at 17, 18 n.15.

128. Id. at 18 (citing Meyer, 486 U.S. at 428).
burden on the initiative proponents' first amendment rights.\textsuperscript{129} Describing the burden on speech as "well-nigh" impossible to justify, the Court struck down the law.\textsuperscript{130}

Petitioner Simon & Schuster argued that section 632-a was like the statute in\textit{Meyer}: It was a prohibition on making payments necessary for speech; it had resulted in the elimination of some speech; and thus, it should likewise be struck down under strict scrutiny review.\textsuperscript{131}

ii. Section 632-a differentially regulates expressive activity

Simon & Schuster argued that under the rule of\textit{Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue},\textsuperscript{132} a statute that "singles out the press" requires "a heavier burden of justification on the State" than does a generally applicable economic regulation; and further, such a statute is invalid unless "the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential" regulation.\textsuperscript{133} Simon & Schuster maintained that under this rule section 632-a is subject to strict scrutiny.\textsuperscript{134} It pointed out that section 632-a singles out expressive activity in precisely the way\textit{Minneapolis Star} and its progeny\textsuperscript{135} have condemned, because it applied only to those contracting to publish or create expression.\textsuperscript{136} Simon & Schuster further contended that the statute deprives only those engaged in expressive

\textsuperscript{129} Id.
\textsuperscript{130} Id. (citing Meyer, 486 U.S. at 423, 425.) \textit{See also} Riley v. National Fed'n of the Blind, 487 U.S. 781, 793-94 (1988) (speaker's uncertainty about payment "must necessarily chill speech in direct contravention of the First Amendment's dictates").
\textsuperscript{131} \textit{See} Brief for the Petitioner, supra note 59, at 18-19. Simon & Schuster stressed that "the incentive of economic gain is the engine that drives free expression." \textit{Id.} at 20 (citing Harper & Row, Publishers, Inc., v. Nation Enters., 471 U.S. 539, 558 (1985); Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); Mazer v. Stein, 347 U.S. 201, 219 (1954). The publisher also reminded the Court of its observation that "[B]eing free to engage in... expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often on a single tank of gasoline. ..." \textit{Id.} at 20-21 (citing Buckley v. Valeo, 424 U.S. 1, 19 n.18).
\textsuperscript{132} Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983). For a further discussion of\textit{Minneapolis Star} see Brief for Appellant, supra note 126, at 31-34.
\textsuperscript{133} Id.
\textsuperscript{134} \textit{See} Brief for the Petitioner, supra note 48, at 21. \textit{See also} Reply Brief for Petitioner, supra note 126, at 5-6 (criticizing Board's contention that differential treatment requires strict scrutiny only if it is directed at suppressing particular ideas).
\textsuperscript{136} \textit{See} Brief for Petitioner, supra note 48, at 22.
activity from receiving payments and subjects only the media's contracts to inspection.\textsuperscript{137}

iii. Section 632-a's restrictions are content-based

The petitioner noted that under \textit{Texas v. Johnson},\textsuperscript{138} any content-based regulation of expression was subject to strict scrutiny.\textsuperscript{139} Simon & Schuster asserted that the application of section 632-a depended specifically on the content of the speech.\textsuperscript{140} Simon & Schuster emphasized the Court's consistent holdings\textsuperscript{141} that regulations on speech that are content- or speaker-based pose special dangers to free speech and that such regulations demand "the most exacting scrutiny."\textsuperscript{142}

Previously, the Victims Board had argued that under \textit{City of Renton v. Playtime Theatres, Inc.},\textsuperscript{143} strict scrutiny is inappropriate because section 632-a is "justified without reference to the content of the regulated speech."\textsuperscript{144} In response, Simon & Schuster pointed out that this was inconsistent with Respondent's repeated justification of section 632-a which stressed the nature of the speech that the statute affected. Simon & Schuster emphasized the inapplicability of \textit{Renton}\textsuperscript{145} to direct regulations of speech.\textsuperscript{146} Simon & Schuster

\textsuperscript{137} Id. at 22. Simon & Schuster argued that section 632-a's exhaustive listing of all of the expressive media to which the statute applies, including every "movie, book, magazine article, tape recording, phonograph recording, radio or television presentation, [and] live entertainment," was targeting the media.

\textsuperscript{138} 491 U.S. 397 (1989) (anti-flag burning statute held unconstitutional).

\textsuperscript{139} See Brief for the Petitioner, supra note 48, at 22.

\textsuperscript{140} See id. at 22 (citing Texas v. Johnson, 491 U.S. at 412). For a counter-argument to respondents contention that section 632-a is not content based see Reply Brief for Petitioner, supra note 126, at 6. See also Brief Amicus Curiae of the American Civil Liberties Union, New York Civil Liberties Union, and PEN American Center, in Support of Petitioner at 12-14, Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (hereinafter ACLU Brief).


\textsuperscript{142} See id.

\textsuperscript{143} 475 U.S. 41 (1986).

\textsuperscript{144} See Brief for Appellees, supra note 86, at 54-55. The Board would also advance this argument before the Supreme Court, and Simon & Schuster would again address it. Compare Brief for Respondents, supra note 20, at 37-39 with Reply Brief for Petitioner, supra note 126, at 7-8.

\textsuperscript{145} For a discussion of the background and application of Renton, see Com-
highlighted the Board's justification of section 632-a as necessary because the depiction of the crime in the press causes a "second" or "additional" harm or violation to victims or their families. The publisher contended that Senator Gold's comment in sponsoring the statute, "[i]t is abhorrent to one's sense of justice and decency that an individual, such as [Son of Sam], can expect to receive large sums of money for his story," along with the other justifications for the statute demonstrated that it was hostile to the speech it regulated and, therefore, was not content-neutral. It further argued that the Renton standard should not apply because that decision had never been determinative and because it had never applied to regulations that restricted speech on their faces nor to regulations that gave differential treatment of speech.

iv. United States v. O'Brien is inapplicable

Simon & Schuster contended that an O'Brien analysis is inappropriate where a statute regulates expression "on its face." It asserted that O'Brien is correctly applied where a regulation is aimed at a broad range of behavior and affects speech only incidentally. According to Simon & Schuster, the Supreme Court in Arcara v. Cloud Books, Inc. observed that the first inquiry under the O'Brien test was whether the statute on its face regulated speech or an activity that was "necessarily expressive" and that Minneapolis
Star, not O'Brien, applied to a statute that singled out speech. Simon & Schuster argued that the application of section 632-a could not be considered an incidental burden on speech because the only function of the statute was to prohibit payments for certain kinds of speech. Further, Simon & Schuster pointed out that the Court in Buckley v. Valeo held that restrictions on payment for speech are not "comparable to the restrictions on conduct upheld in O'Brien." Additionally, the publisher stressed that O'Brien was inapplicable to content-based regulations.

The State interest furthered by section 632-a was to compensate victims for alleged additional harm caused by the media's depiction of the crime. Simon & Schuster contended that that interest was related to the suppression of first amendment rights and therefore was completely outside the O'Brien test.

b. N.Y. Exec. Law section 632-a does not survive review under strict scrutiny

Petitioner Simon & Schuster noted that the First Amendment's direction that "no law" shall abridge free speech is so powerful that the Court has at times rejected the power of government to regulate expression based on its content. For example, in Police Department of the City of Chicago v. Mosley, the Court observed that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Simon & Schuster emphasized that the holding of the Second Circuit below ignored how unusual, if not unprecedented, it was for a statute to survive review under strict scrutiny. In fact, the Court in Bernal v. Feiner stated, "strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact." Additionally, in Meyer v. Grant, the Court

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156. See Brief for Petitioner, supra note 48, at 26.
157. See id.
159. See Brief for Petitioner, supra note 48, at 26 (quoting Buckley v. Valeo, 424 U.S. at 16).
160. Id. at 27 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984)).
161. See id.
162. Reply Brief for Petitioner, supra note 126, at 9.
163. 408 U.S. 92 (1972).
164. See Reply Brief for Petitioner, supra note 126, at 9.
165. Id.
167. Id. at 219 n.6.
recently labeled "strict scrutiny" a "well-nigh insurmountable" test.\footnote{Reply Brief for Petitioner, supra note 126, at 9 (quoting Meyer v. Grant, 486 U.S. at 425).}

c. The statute is not necessary and not narrowly tailored to serve a compelling state interest

Although conceding that New York could make payments received by criminals available to their victims, Simon & Schuster argued that the Victims Board had failed to prove that it was necessary for section 632-a to single out only certain speakers and certain expression in order to achieve the compelling state interest.\footnote{See Brief for Petitioner, supra note 48, at 30.}\footnote{Id.}

i. Victim compensation

Petitioner noted that the Board had admitted that the State's interest was not to compensate victims in general, but rather only to benefit the victims of criminals who profit by telling the story of their crime.\footnote{See id. at 31.} However, Simon & Schuster contended, victim compensation cannot explain the restriction of payment only for speech of specific content, when criminals are left free to receive payments for non-expressive activity.\footnote{See Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541, 549 (N.Y. 1991), vacated, 112 S. Ct. 859 (1992).} For example, the Board failed to explain why the statute would not compensate the estate of murder victim Dr. Herman Tarnower had his killer Jean Harris written exclusively about prison life without discussing her crime.\footnote{See Brief for Petitioner, supra note 48, at 31.} Additionally, petitioner pointed out that the state interest in victim compensation did not justify section 632-a reviving an expired claim where a criminal earned monies through writing about his past crime, but did not revive a claim where a criminal acquired assets in some other way.\footnote{See Brief for Petitioner, supra note 48, at 32.}

Simon & Schuster also noted that the Board had determined that section 632-a was inapplicable to subway gunman Bernhard Goetz.\footnote{See Brief for Petitioner, supra note 48, at 31.} It directed his victims to the "procedural safeguards contained in the [New York Civil Practice Law and Rules] that can be used to insure that any assets of Goetz will be available to satisfy any

\footnote{169. Reply Brief for Petitioner, supra note 126, at 9 (quoting Meyer v. Grant, 486 U.S. at 425).}

\footnote{170. See Brief for Petitioner, supra note 48, at 30.}

\footnote{171. Id.}

\footnote{172. See id. at 31.}


\footnote{174. See Brief for Petitioner, supra note 48, at 31. Simon & Schuster noted the Board's concession that the statute had benefitted only victims of a single criminal since 1977. Id.}

\footnote{175. See Brief for Petitioner, supra note 48, at 32.}
money judgment obtained against him.”176

ii. Preventing criminals from profiting from or exploiting their crimes

Petitioner contended that New York’s interest in preventing criminals from profiting from their crimes cannot justify section 632-a because the speech for which payment is restricted is not the “profit” of crime, and because the statute is both underinclusive and overinclusive.177

Simon & Schuster asserted that payments for expression are not “profits” from crime and cited as support a recent comment by the Court that “writings . . . are the fruits of intellectual labor.”178 Petitioner argued that the creation of Wiseguy was not a situation where the financial rewards of publication motivated the crime.179 The Victims Board contended that the speech regulated by section 632-a constituted an “exploitation” of crime which caused an additional harm and offended the public’s “sense of decency.”180 In response, Simon & Schuster argued that this could not justify the statute under strict scrutiny because neither offensiveness nor suffering from non-defamatory speech are valid bases for restrictions upon expression.181 Petitioner also pointed out that the statute dictated that prior criminal conduct by an author transformed payment for expression into fruit of the crime.182 Simon & Schuster contended that labeling payment for expression as a fruit of the crime improperly concentrates on the character of the speaker and ignores the constitutional mandate that the focus be on “whether [the law] abridges expression that the First Amendment was meant to protect.”183 Finally, Simon & Schuster emphasized that the creation of fully protected speech depended on the payments received for such speech and that prohibitions on such payments were forbidden by the First Amendment.184

176. Id. Simon & Schuster also argued that section 632-a with its differential treatment and content-basis was underinclusive. Id. at 33 (citing Arkansas Writers’ Project, 481 U.S. at 230); Minneapolis Star, 460 U.S. at 583; Carey, 447 U.S. at 465; Police Dep’t of the City of Chicago v. Mosley, 408 U.S. 92, 100 (1972)).
177. Id. at 34.
179. See id. at 35.
180. Brief for Petitioner, supra note 48, at 35.
182. See id. at 36.
184. Id. Simon & Schuster noted that if a law similar to section 632-a were in effect at the time and place of publication payments would have been restricted on works such as: The Autobiography of Malcolm X; Martin Luther King, Jr’s Where Do We Go From Here; Narrative of the Life of Frederick Douglass, An American
Assuming arguendo that payments for speech could be considered as the profits of crime, petitioner argued that the crime-should-not-pay rationale does not justify section 632-a because at the end of the escrow period the law provides that any remaining monies be turned over to the criminal.\textsuperscript{185} Simon & Schuster further contended that the statute was ill-suited to prevent criminals from profiting from their crime because it was underinclusive and overinclusive.\textsuperscript{186}

Petitioner asserted that the statute was underinclusive because the crime-should-not-pay maxim\textsuperscript{187} did not explain the legislature’s failure to attach all the payments that constitute criminal “profits.”\textsuperscript{188} For example, Simon & Schuster raised the question of why payments to Willie Sutton, a career bank robber engaged as a bank security consultant after years in prison, were not subject to escrow.\textsuperscript{189} His employment and salary clearly could have been considered “fruits” of his crime because they arose out of his criminal notoriety. Also, the statute did not address situations in which a criminal profited from the fictionalization of his criminal experiences.\textsuperscript{190} Simon & Schuster claimed that the statute was overinclusive because all payments were subject to the reach of section 632-a even if the crime were only referred to briefly.\textsuperscript{191} Simon & Schuster contended, for example, that had the statute been in place at the time of the publication of Martin Luther King’s Where Do We Go From Here?—which included a description of his arrest in Birmingham—all payments to Dr. King would have been subject to the statute.\textsuperscript{192}

\begin{itemize}
\item Slave: Written by Himself; Jean Genet’s A Thief’s Journal; Jack London’s How I Became A Socialist; John Dean’s Blind Innocence; and Henry David Thoreau’s On Civil Disobedience. \textit{Id.} For an excellent discussion and presentation of the almost inexhaustible scope of written works by criminals in America between 1789 and 1988, see Bruce Franklin, Prison Literature In America (Oxford University Press, expanded ed. 1989).
\item 185. Brief for Petitioner, supra note 48, at 38. Petitioner noted that the Court has recognized that “[A] law cannot be regarded as protecting an interest ‘of the highest order,’ and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interests [sic] unprohibited.” \textit{Id.} (quoting Florida Star v. BIF, 491 U.S. 524, 541-42 (1989) (citation omitted in original); \textit{see also} N.Y. Exec. Law § 632-a(4) (McKinney 1982)).
\item 186. Brief for Petitioner, supra note 48, at 37-38, 40.
\item 188. \textit{See} Brief for Petitioner, supra note 48, at 38. \textit{See also} Reply Brief for Petitioner, supra note 126, at 11-12.
\item 189. \textit{Id.}
\item 190. \textit{See} Brief for Petitioner, supra note 48, at 39. Specifically, the petitioner illustrated its contention by noting the novels of Herman Melville, Omoo and Typee, where he drew on his experiences as a mutineer and deserter. \textit{Id.}
\item 191. \textit{Id.} at 40.
\item 192. \textit{See} Brief for Petitioner, supra note 48, at 40. For a further discussion of the overinclusiveness of the statute see Reply Brief for Petitioner, supra note 126, at 12-13. Simon & Schuster advanced its argument by pointing out the failing of section 632-a by making a comparison to the federal statute, 18 U.S.C. § 3681. \textit{Id.}
\end{itemize}
2. The Respondents

a. N.Y. Exec. Law section 632-a does not directly or substantially burden free speech

The Crime Victims Board conceded that first amendment protection extended to a criminal's right to speak, his means of communicating, and the public's right to receive his message. The Board contended, however, that the First Amendment did not prohibit government from enacting legislation that might reduce a speaker's financial incentive to speak.

i. N.Y. Exec. Law section 632-a does not prevent criminals from freely expressing their thoughts and ideas

The Crime Victims Board argued that the effect of section 632-a on a criminal's incentive to speak was not a violation of the First Amendment. In support of this argument, the Board emphasized that the Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. recognized that "[f]reedom of speech presupposes a willing speaker." The Board contended therefore that someone who speaks only in return for cash is not a willing speaker. Respondent noted that if Simon & Schuster had originally complied with section 632-a, and if Henry Hill had decided not to cooperate with Nicholas Pileggi—because he wanted an immediate payment—the decision would have been Hill's and not one mandated by the statute.

Respondents analogize section 632-a's reduction of financial incentive to other situations where the Court had denied constitutional protection for speech discouraged by the government's refusal to provide a monetary incentive to speak. First, the Board noted that the Court had rejected first amendment challenges to provisions in the federal tax laws and in government benefit programs that tended to reduce individuals' incentive to speak by reducing the

193. Amici Curiae briefs in support of the Respondents were submitted by: the United States, the National Organization for Crime Victim Assistance, the Crime Victims Legal Clinic, the Council of State Governments, the Washington Legal Foundation, and several states in a joint brief. Counsel of Record for the Respondents was Mr. Howard L. Zwicki, Chief of the New York State Attorney General's Litigation Bureau. He was assisted by Susan L. Watson, an Assistant Attorney General. See Brief for Respondents, supra note 20, at 50.
194. Id. at 23.
195. Id.
197. See Brief for Respondents, supra note 20, at 23 (quoting Virginia State Board of Pharmacy, 425 U.S. at 756).
198. Id.
199. Id. at 24.
200. Id. at 25.
total amount of money they had to spend. Second, the Board noted that in *Caplin & Drysdale Chartered v. United States*, the Court rejected a similar challenge to the Federal Comprehensive Forfeiture Act of 1984. The Court recognized that the Act did not violate a criminal defendant's Sixth Amendment right to counsel because, even with the retaining of assets subject to forfeiture, a criminal was not necessarily prevented from retaining an attorney of his choosing. In denying a Sixth Amendment exception to the statute, the Court specifically rejected the possibility of a first amendment exception.

Respondents emphasized the similarity of section 632-a to the laws the Court had previously upheld because it argued that like them, section 632-a did not prevent the exercise of free speech by criminals and therefore did not violate the First Amendment. Since the legislation was aimed at profits and not expression, the Board contended that *O'Brien* was the proper standard of review.

ii. N.Y. Exec. Law section 632-a does not prevent the media from communicating or profiting from the criminal's message

The Board argued that section 632-a did not affect the media's role as the means by which criminals communicate their message. The Board stressed that the First Amendment protects a speaker's message and his ability to convey it, but not his ability to maximize profits.

Respondents illustrated their argument by examining political speech and charitable solicitation cases in which the Court’s empha-

203. See Brief for Respondents, supra note 20, at 25-26 (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989)).
204. Id. at 26 (citing *Caplin & Drysdale*, 491 U.S. at 626).
205. Id. (citing *Caplin & Drysdale*, 491 U.S. at 628).
206. Id. The Victims Board contended that the statute was not intended to suppress speech and, in fact, did not. The Board asserted that the First Amendment did not guarantee a criminal’s right to profit by selling his story; further, it argued that speech was not prevented simply because a criminal could not immediately profit. *Id.* at 26-27 (quoting *St. Martin’s Press v. Zweibel* (Sup. Ct.), N.Y. L.J., Feb. 26, 1990, at 25 (involving R. Foster Winans’s book, *Trading Secrets*).)
207. Id. at 27.
209. Id. at 28 (emphasis in original). See also David A. Strauss, *Persuasion, Autonomy and Freedom of Expression*, 91 Colum. L. Rev. 334, 335-38 (1991) (contending that the primary purpose of the First Amendment is to prohibit the government from limiting speech “on the ground that the speech is likely to persuade people to do something that the government considers harmful”).
sis was on the speaker's ability to speak and not upon his financial incentive.\textsuperscript{210} The Board emphasized, for instance, that in \textit{Buckley v. Valeo},\textsuperscript{211} the Court struck down expenditure ceiling provisions in the Federal Election Campaign Act because they infringed upon the speaker's \textit{means} of communication.\textsuperscript{212} Further, the Board pointed to \textit{Meyer v. Grant} in which the Court struck down a Colorado law that prohibited paid petition circulators,\textsuperscript{213} because the petition circulators were the \textit{means} by which the proponents communicated their ideas.\textsuperscript{214} Respondents also pointed out that the Court had recognized that because charities often use professional fundraisers, any legislation restricting the amount a charity can spend in fund-raising activity restricts its \textit{means} of disseminating its message.\textsuperscript{215} The Board contended, therefore, that such laws violate the First Amendment because of their restrictions upon the means of communicating not because of any effect upon the speakers financial incentive.\textsuperscript{216}

iii. Petitioner failed to produce any evidence that N.Y. Exec. Law section 632-a prevents willing speakers or the media from communicating\textsuperscript{217}

Respondents argued that Simon & Schuster had not satisfied the burden required for a claim that a statute is facially invalid under the First Amendment.\textsuperscript{218} Under \textit{New York State Club Ass'n, Inc. v. City of New York},\textsuperscript{219} the Board urged that petitioner "must demonstrate that the challenged law... 'could never be applied in a valid manner.'\textsuperscript{220}

To strengthen this argument, respondents offered motives, other than profit, to explain why criminals communicate their messages. They noted for instance that Charles Manson received only the "chance to have his story heard" as compensation for the book, \textit{Manson: In His Own Words}.\textsuperscript{221} The Board also asserted that some criminals speak or write in response to what they have learned in

\textsuperscript{210} See Brief for Respondents, supra note 20, at 29-30 (emphasis in original).
\textsuperscript{211} 424 U.S. 1 (1976) (per curiam).
\textsuperscript{212} See Brief for Respondents, supra note 20, at 29 (emphasis in original).
\textsuperscript{213} 486 U.S. 414 (1988).
\textsuperscript{214} See Brief for Respondents, supra note 20, at 29-30 (emphasis in original).
\textsuperscript{216} Id.
\textsuperscript{217} See Brief for Respondents, supra note 20, at 31.
\textsuperscript{218} Id. at 34.
\textsuperscript{219} 487 U.S. 1 (1988).
\textsuperscript{220} See Brief for Respondents, supra note 20, at 34 (quoting \textit{New York Club Ass'n}, 487 U.S. at 11 (quoting Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984) (emphasis added))).
\textsuperscript{221} See id. at 31 (quoting N. Emmons, \textit{Manson: In His Own Words} 15, 17 (1986)). Respondents also noted that the record suggested that Hill might have
prison and as part of the rehabilitation process. Finally, respondents emphasized that since the enactment of section 632-a, works involving the cooperation of criminals continued to be produced, and there has been no record of any statements by criminal speakers claiming to be discouraged.

b. N.Y. Exec. Law section 632-a does not single out or impose differential burdens on the press

In response to petitioner's argument that section 632-a violates the First Amendment because of its differential treatment of the press or media, respondents distinguished those cases that had struck down specialized taxes directed at the press. Respondents argued that those cases held as they did because the taxes were directed at, or presented the danger of suppressing particular ideas.

For example, in Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, the Court struck down a tax on the cost of paper and ink used by newspapers. The tax applied disproportionately to the Minneapolis Star, because the newspaper paid roughly two-thirds of all revenues collected under the tax. The Court concluded that while a general tax on the press could be valid; "differential treatment" it suggested that the goal of the regulation was related to the suppression of speech and therefore was unconstitutional.

On the other hand, respondents argued that section 632-a was not aimed at the press, but was rather an attachment provision affecting only the profits of criminals, and thus unrelated to the suppression of speech.

Also, in Minneapolis Star and Arkansas Writers' Project, Inc. v. Ragland the Court was troubled by the differential treatment of small segments of the press because it inferred that the government's specific goal was to restrict publication by those entities.
Therefore, the Board analogized section 632-a's application to an entity that contracted with a criminal to the general sales tax upon cable television companies in *Leathers v. Medlock*.232

c.  *N.Y. Exec. Law section 632-a is neither content-based nor speaker-based*

Respondents contended that under *Ward v. Rock Against Racism* 233 "[t]he principal inquiry in determining content neutrality... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."234 Respondents emphasized that section 632-a did not restrict the discussion of crimes or the viewpoints of criminals, rather its purpose was to compensate victims.235 Further, the Board noted that objective factors governed the application of the statute and that the statute "d[id] not employ a sliding scale to determine if the crime spoken of is more horrible than another."236 The Board argued that the objective nature of its determination and the absence of any evaluation of the criminal’s message distinguished section 632-a from the content-based statutes in the cases cited by the petitioner.237

Furthermore, respondents asserted that the statute was not speaker-based, because it does not prevent the criminal’s message but rather only requires that he not profit at the expense of his victims.238 Accordingly, the Board argued that section 632-a did not contradict the fundamental principle behind the distaste for content-based regulations: "[T]hat 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'"239

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235. *Id.* at 37-38.
238. *Id.*
239. *Id.* (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-49 (1986) (citation omitted)). Respondents also argued that section 632-a was content-neutral because under *Renton* it could be "justified without reference to the content of the regulated speech." *Id.* at 38 (quoting *Renton*, 475 U.S. at 48) (citations omitted) (emphasis in original)). They further stressed that in *Ward v. Rock Against Racism*, the Court, while applying *Renton* analysis to uphold sound-amplification guidelines, had noted that "[t]he government’s purpose is the controlling consider-
d. N.Y. Exec. Law section 632-a’s minimal impact on the freedom of speech and the press is outweighed by the substantial state interest it promotes

Respondents contended that the district court properly held that section 632-a imposed only an incidental burden on speech and therefore the O'Brien test was the proper standard of review.240

First, the Board noted that Simon & Schuster conceded that New York had the constitutional authority to enact laws which enabled victims to obtain compensation from criminals by attaching their profits.241 Second, the Board stressed that section 632-a advanced a compelling or substantial governmental interest in ensuring that criminals do not profit by telling their crime stories to the media, before victims are compensated.242 Third, respondents contended that the regulation was content-neutral and furthered interests unrelated to the suppression of speech.243 Respondents stressed that the Second Circuit correctly concluded that the purpose of the law was to guarantee that the criminal's profits would be placed in escrow.244 Finally, the Victims Board asserted that the governmental interest behind the legislation, "would be achieved less effectively absent the [statute]."245 The Board further argued that the Ward standard and not a least-restrictive means standard was appropriate. Under Ward, as long as the means selected to achieve the government.
Son of Sam

mental interest are not "substantially broader than necessary," the statute will not be held invalid merely "because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Respondents stressed that section 632-a was not substantially overbroad because its reach was limited to the profits the criminal derives from discussing or reenacting his crime, and those profits were attached only for the benefit of the victims of that crime.

Also, the Board attacked the argument that the statute is unnecessary because New York's existing victim compensation remedies are adequate to satisfy the government's compelling interest, and if inadequate, the solution is to expand them. The Board contended that expanding Article 62 of the New York Civil Practice Law and Rules would not effectively provide victims with the opportunity to be compensated before the criminal received his profits. The Board argued that a general remedy would not notify victims of the existence of attachable assets nor would it guarantee that such assets would be held in escrow until the victim could take action to enforce an attachment. A broader Article 62 would be unable to provide the cause of action, statute of limitations, and priority features contained in section 632-a.

e. N.Y. Exec. Law section 632-a is also necessary to serve and necessarily tailored to achieve New York's compelling interest in ensuring that criminals do not profit from their crimes before their victims are compensated

Respondents contended that even if the statute imposed a direct and substantial burden on speech it nevertheless should be upheld under a strict scrutiny standard, as it had been twice before been
cause it advanced a compelling state interest. Respondents maintained that New York's compelling interest was to ensure that criminals do not profit from "storytelling" about their crimes before their victims are compensated. The Board argued that the law was narrowly tailored because its "reach...[was] limited to its purpose." In response to the argument that the statute was not narrowly tailored because it was both underinclusive and overinclusive, respondents emphasized that section 632-a did not reach the profits a criminal received as a result of notoriety, as there were other methods of attaching such profits. Petitioner argued that section 632-a was underinclusive because relatively few victims benefited from it and because criminals could still profit from "storytelling" under its provisions. It also argued that the statute was overinclusive because it attached all the profits from a work even where the crime was only an incidental part. In response, respondents reasserted what the district court had stressed, that the Victims Board had no discretion to inquire subjectively into the contents of the work. Unfortunately, for the Board, the Court could not agree with its arguments.

III. SIMON & SCHUSTER, INC. v. MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD

On December 10, 1991, the United States Supreme Court unanimously struck down New York Executive Law section 632-a, rev'd sub nom. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991); Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541, 550 (N.Y. 1991), vacated, 112 S. Ct. 859 (1992). See Brief for Respondents, supra note 20, at 45-46. Responding to Simon & Schuster's argument that New York could not define its interest in terms of what the statute actually does, the Board asserted that section 632-a was created to benefit a unique class of victims, the victims of criminals who profit by storytelling about their crimes, and aimed to ensure that they were compensated before the criminals received any such profits. Id. at 47. It contended that the compelling interest stood on its own footing. Id. Austin v. Michigan Chambers of Commerce, 110 S. Ct. 1391, 1397-98 (1990). Id. at 47 (quoting Children of Bedford, Inc., 573 N.E.2d at 550). See Brief for Respondents, supra note 20, at 48 (quoting Simon & Schuster, 916 F.2d at 784). Id. at 48. See id. at 40-41. See Brief for Respondent, supra note 20, at 48 (citing Simon & Schuster, 724 F. Supp. at 177-78). The Board also asserted that "[the state's] interest requires that the entire proceeds due the criminal be available to the victim, whether or not the victim's story is a small or large part of the book." Id. at 49 (quoting Simon & Schuster, 916 F.2d at 784). 112 S. Ct. 501 (1991). Justice O'Connor's majority opinion was joined by Chief Justice Rehnquist and Justices White, Stevens, Scalia and Souter. Justices Blackmun and Kennedy
holding it to be "inconsistent with the First Amendment." The decision recognized that a statute which "single[d] out" the income from expression of specific content for a financial burden that New York imposed on no other income could not survive review under the strict scrutiny standard. The Court justified exacting review of the statute on the general proposition that content-based regulations on expression are presumptively unconstitutional.

Writing for the Court, Justice Sandra Day O'Connor reaffirmed the fundamental incompatibility of content-based regulations with the freedom of expression, "a notion so ingrained in our first amendment jurisprudence that . . . it [is] so 'obvious' as not to require explanation." Justice O'Connor identified the danger of allowing the imposition of financial burdens on expression based on content as the "rais[ing] [of] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." The Court recognized that section 632-a was such a content-based regulation, because it placed a "financial disincentive" only on expression of a specific content.

Before applying the strict scrutiny analysis to the statute, Justice O'Connor addressed and dismissed several of the Crime Victims Board's arguments. First, she rejected the Board's attempt to distinguish section 632-a from the tax in Arkansas Writers' Project v. Ragland by pointing out that the regulation in that case took a percentage of the speaker's income outright while section 632-a only placed the speaker's money in escrow. Second, the Court dis-
missed the Board's claim that discriminatory financial treatment is only suspect when the legislature's intention is to suppress certain ideas. Justice O'Connor specifically stressed that "[illicit legislative intent is not the sine qua non of a violation of the First Amendment." Finally, she recognized the weakness of the Board's argument that section 632-a was not directed specifically at the media, but rather at any "entity" contracting with a convicted person and that the law therefore should not be subject to strict scrutiny. Justice O'Connor noted that any "entity" contracting with a convicted person "becomes by definition a medium of communication, if it wasn't one already." The Court pointed out that the "Government's power to impose content-based financial disincentives on speech does not vary with the identity of the speaker." Next, the Court recognized that because of the Son of Sam law's differential treatment of expression, the proper standard of constitutional review was the strict scrutiny test. In examining New York's interest behind the statute, Justice O'Connor found undisputed compelling interests in ensuring that victims of crime are compensated by those who harm them and in ensuring that criminals do not profit from their crimes. However, she rejected the contention that the State had a compelling interest in "‘ensuring that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for

271. Id. at 509.
272. Id. (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983). Furthermore, Justice O'Connor noted that it has been "‘long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.'" Id. (quoting Minneapolis Star, 460 U.S. at 592).
273. Id.
274. Simon & Schuster, 112 S. Ct. at 509.
275. Id.
276. Id. The Court stated that "‘the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'” Id. (quoting Arkansas Writers' Project, 481 U.S. at 231).
277. Id. Justice O'Connor considered the existence of New York's statutory provisions for prejudgment remedies and orders of restitution to be illustrations of its interest in "preventing wrongdoing from dissipating their assets before victims can recover." Id. at 509-10 (citing N.Y. Civ. Prac. L. & R. 6201-6226 (McKinney 1980 & Supp. 1991); N.Y. Penal Law § 60.27 (McKinney 1987)). The Court noted that it had previously "recognized the importance of this interest [ ] in the Sixth Amendment context." Id. at 510 (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 629 (1989)).
278. Id. The Court recognized this interest to be a "‘fundamental equitable principle.'” Id. (quoting Children of Bedford, Inc. v. Petromelis, 573 N.E.2d at 548). It further considered the interest to be demonstrated by New York's provisions for the forfeiture of the proceeds and instrumentalities of crime. Id. (citing N.Y. Civ. Prac. L. & R. 1310-1352 (McKinney Supp. 1991). Also, the Court declined to address the issue of whether publication royalties can be considered the profits of crime, it proceeded on the assumption that such monies were the fruits of crime. Id.
The Court could not find any justification for a distinction between the criminal's income from such "storytelling" and any of his other assets.280 Also, the Court questioned limiting the sources for compensation to speech income.281

Turning to the second element of the test, Justice O'Connor reaffirmed Judge Newman's rejection of the Board's circular defense that portrayed the statute as "narrowly tailored" by positing its objective as New York's interest.282 Furthermore, she agreed with Newman's dissent that the danger of this argument is that it could "eliminate[ ] the entire inquiry concerning the validity of content-based discriminations."283 Justice O'Connor held that section 632-a was "significantly overinclusive" as a method of ensuring that victims are compensated from the proceeds of crime.284 She found that the scope of the statute and the broad definition of "person convicted of a crime" enabled the statute to reach a wide range of literature and prevented criminals from profiting from expression but left victims uncompensated.285 The Court emphasized that since section 632-a regulates "works on any subject, [which] express the author's thoughts or recollections about his crime, however tangentially or incidentally," it could have resulted in placing the royalties for works of prominent figures such as Malcolm X, Henry Thoreau, Saint Augustine, Martin Luther King, Jr., Sir Walter Raleigh, and Jesse Jackson in escrow.286

280. Id. Justice O'Connor emphasized that the Court in Arkansas Writers' Project and Minneapolis Star had previously rejected such differential treatment. Id. (citing Arkansas Writers' Project, 481 U.S. at 231, and Minneapolis Star, 460 U.S. at 586). She also stressed that section 632-a's distinction between a criminal's speech income and other assets has no relationship to New York's interest in compensating victims from their wrongdoers' assets. Id. Further, the Court compared the Son of Sam law to the privacy statute it struck down in Carey v. Brown, 447 U.S. 455, 467-69 (1980) ("nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy."). Id.
281. Id. at 511.
282. Id. at 510-11 (quoting Simon & Schuster, 916 F.2d at 785 (Newman, J., dissenting)).
283. Id. at 510.
284. In recognizing the statute to be overinclusive, the Court noted that it need not address Respondents' argument that section 632-a is content neutral under its decisions in Ward v. Rock Against Racism, 491 U.S. 781 (1989), and Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). It came to this determination because the test under both those cases, like strict scrutiny, requires that the statute be "narrowly tailored." See Simon & Schuster, 112 S. Ct. at 511-12.
285. Id.
286. Id. The Court, in referring to the bibliography submitted by the Association of American Publishers, Inc. as Amicus, also expressed concern about the infinite number of works which could be affected by the statute. Id. Further, in reflecting on the dangers of the scope of the statute and its overinclusiveness, it speculated on the hypothetical situation, where the royalties from the memoirs of a prominent fig-
Justice O'Connor concluded by limiting the Court's holding that section 632-a was not "narrowly tailored" and therefore was invalid under the First Amendment. Justice O'Connor limited the Court's holding exclusively to the New York statute, thus leaving the question of the constitutionality of similar statutes enacted by other states and by the federal government. Having determined that the statute was overinclusive, Justice O'Connor declined to address Justice Harry A. Blackmun's contention that the statute was also underinclusive. She also declined to address Justice Anthony M. Kennedy's contention that content-based regulations of expression should be per se unconstitutional.

Although it reached the correct result, the Court failed to distinguish officially between the two distinct forms of content-based restrictions on expression; subject-matter discrimination and viewpoint discrimination. The Court also failed to establish strict scrutiny as the appropriate standard of review for viewpoint discrimination or its equivalent.

IV. RECOGNIZING VIEWPOINT-BASED DISCRIMINATION: AVOIDING THE "DILUTION" OF THE STRICT SCRUTINY STANDARD

In framing a theory of free speech the first obstacle is the insistence of many very intelligent people that the "First Amendment is an absolute." As previously discussed, Justice O'Connor based her application of the strict scrutiny standard upon the determination that section

287. Id. (Blackmun, J., concurring).
288. See id. at 512 (Blackmun, J., concurring). In his concurring opinion, Justice Blackmun argued that the Court should provide the states with guidance in this area by addressing the underinclusiveness of the statute. Id. at 512. Providing such guidance, however, would border on the rendering of an advisory opinion and the fact remains that "[t]he core of Article III's limitation on federal judicial power is that federal courts cannot issue advisory opinions." ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.2, at 43 (1989). The prohibition against advisory opinions involves an enforcement of the separation of powers and a recognition that cases require concrete questions in order to be adjudicated. See, e.g., Flast v. Cohen, 392 U.S. 83, 96-97 (1968). For a further discussion of this topic see JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW § 2.12, at 56-59 (3d ed. 1986).
290. See infra notes 302-27 and accompanying text.
291. See infra notes 338-55 and accompanying text.
632-a was a content-based regulation of expression. The Court failed to see the danger of relying on such a general proposition to base the application of strict scrutiny. The author of this Comment contends that such reliance creates the possibility that the protection of strict scrutiny will be "diluted." The notion of content-based regulations can be more precisely divided into subject-matter restrictions and viewpoint-based discriminations. It is the latter that is the most inconsistent with the fundamental purpose of the First Amendment and therefore requires the most stringent review.

This Part will review the distinction between the two forms and discuss how the New York statute was the equivalent of viewpoint discrimination. It will argue that the Court should expressly recognize the danger of viewpoint discrimination by limiting the use of strict scrutiny review to cases involving viewpoint-based discrimination or its equivalent.

The author of this Comment contends that the limitation is necessary in order to prevent the "dilution" of the protection that strict scrutiny review provides for the guarantee of the First Amendment.

296. "[T]he amendment in principle protects only 'political' speech—speech that participates in the processes of representative democracy . . . ." Lillian R. BéVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 Stan. L. Rev. 299, 300 (1978). See also New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964) ("the central meaning of the First Amendment is the protection of the debate of public issues"); A. Meiklejohn, Free Speech and its Relation to Self-Government (1948); see Bork, supra note 292, at 27. But see Thomas I. Emerson, Toward A General Theory of the First Amendment, 72 Yale L.J. 877, 878 (1963). This Comment does not contend that the protection of "political speech" was necessarily the primary goal of the Framers. Rather it recognizes quite the opposite. See Bork, supra note 292, at 22 ("The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject."). For a detailed discussion of the early history of the First Amendment, see David Yassky, Eras of the First Amendment, 91 Colum. L. Rev. 1699, 1704-17 (1991).
298. In his concurrence, Justice Kennedy argued that the holding of the statute to be content-based was "full and sufficient reason" to find it unconstitutional. Simon & Schuster, 112 S. Ct. 501, 512 (Kennedy, J., concurring). However, the ultimate danger of imposing a per se standard is the same as applying too general a test. An absolute test results in absolute exceptions, which in turn water-down the protection afforded the speech deserving stringent review. Justice Kennedy himself recognizes the permissibility of restrictions being placed on certain categories of speech. See id. at 514 (obscenity, defamation, incitement, and grave and imminent danger).
299. It is well-established that there is no coherent theory of first amendment jurisprudence. See Paul B. Stephen, III, The first amendment and Content Discrimi-
A. The Distinction Between Subject-Matter Restrictions and Viewpoint-Based Discrimination

In recent years the Court has determined the level of scrutiny applicable to government actions effecting expression by distinguishing between content-based and content-neutral regulations. Within the realm of content-based discriminations, however, the Court has not officially recognized its tendency to impose more demanding scrutiny upon viewpoint-based discrimination as opposed to subject-matter restrictions. On the other hand, commentators have approved of applying stringent scrutiny to viewpoint-based discriminations.

1. Subject-Matter Restrictions

Subject-matter restrictions are targeted at entire topics of expression. Since subject-matter restrictions are not directed at particular ideas, viewpoints or items of information, they are less likely to distort public debate. Nonetheless, subject-matter restrictions have been a source of great confusion for the Supreme Court. In certain cases, the Court has labelled subject-matter restrictions as viewpoint-based and has applied exacting scrutiny, while in other cases the Court has treated them as content-neutral and has applied a flexible balancing test. It has been argued that base-
cause subject-matter restrictions appear viewpoint-neutral, they should be treated differently than other content-based regulations.\textsuperscript{310} Classic examples of subject-matter restrictions are the obscenity cases.\textsuperscript{311} The Court has repeatedly held\textsuperscript{312} that, even though obscenity requires subject-matter categorization, it receives no first amendment protection.\textsuperscript{313}

For example, in \textit{Kingsley International Pictures Corp. v. Regents},\textsuperscript{314} the Supreme Court held that New York Education Law section 122-a was unconstitutional because the law restricted the expression of a particular viewpoint.\textsuperscript{315} The statute proscribed the licensing of the film \textit{Lady Chatterley's Lover}, because the movie presented "'acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior.'"\textsuperscript{316} It can be argued from this decision that the primary concern of the content distinction is viewpoint discrimination and not subject-matter restrictions.\textsuperscript{317}

\begin{footnotesize}
310. In \textit{American Mini Theatres}, Justice Stevens held that strict scrutiny was not the appropriate standard of review where a Detroit zoning ordinance required theatres exhibiting sexually explicit—but not obscene—movies to be dispersed throughout the city; this remained so even though the restriction was content-based. \textit{See American Mini Theatres}, 427 U.S. at 71. He contended the basis of the rule against content-based regulations is "the need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." \textit{Id.} at 67. Accordingly, he applied a more lenient standard of review. However, several commentators have pointed out that regulations that are facially subject-matter-oriented are viewpoint discriminatory in effect. \textit{Richard L. Barnes, Regulations of Speech Intended to Affect Behavior}, 63 \textit{Duq. U. L. Rev.} 37, 53-54 (1985); \textit{Frederick Schauer, Categories and the First Amendment: A Play in Three Acts}, 34 \textit{Vander. L. Rev.} 265, 285 (1981); \textit{Stone}, \textit{supra} note 294, at 109-11.


313. \textit{See Redish}, \textit{supra} note 305, at 117.


315. \textit{Id.} at 688.

316. \textit{Id.} at 685 (quoting \textit{N.Y. Educ. Law} § 122-a (McKinney Supp. 1958)).

317. \textit{See Redish}, \textit{supra} note 305, at 118. Although it is beyond the scope of this Comment, a proposed test for subject-matter restrictions is the intermediate scrutiny standard of \textit{City of Renton v. Playtime Theatres, Inc.}, 475 U.S. 41, 47-48 (1986) (regulation can be "justified without reference to the content of the regulated speech"). For a full discussion of this proposal see \textit{Comment}, \textit{supra} note 295, at 1912-23.
\end{footnotesize}
2. Viewpoint-Based Discrimination

Viewpoint discriminatory statutes seek to restrict particular ideas, viewpoints or sources of information and thus contradict the core of first amendment guarantees. They are presumptively unconstitutional because they distort the thought processes of the community. They proscribe the expression of a specific message "at all times, in all places in all manners." First Amendment jurisprudence is driven by a fear of viewpoint-based discriminations. Subject-matter restrictions distort the process of self-government by regulating discussion about particular issues; on the other hand, viewpoint-based discrimination results in far greater distortion because by favoring one side of a debate, it can determine the outcome of the debate. Moreover, it is a fundamental first amendment precept that the government may not restrict speech merely because it disagrees with the speaker's views, nor may it provide preferential treatment for views with which it agrees. Therefore, it is no wonder commentators urge that strict scrutiny be limited to reviews of viewpoint-based discrimination.

3. N.Y. Exec. Law Section 632-a: A Subject-Matter Restriction that is Speaker-Based is the Equivalent of a Viewpoint-Based Discrimination

The threat that viewpoint-based discrimination poses to first amendment values is that it significantly distorts public debate by eliminating or favoring one side of an argument. Such distortion of public debate is an attack upon "core" first amendment protection. Although subject-matter restrictions are recognized as less of a threat to freedom of expression, when such restrictions target specific speakers, they skew public discussion as effectively as viewpoint-based regulations. Therefore, these restrictions require the

318. "'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.'" Simon & Schuster, 112 S. Ct. at 509 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).


320. Id. at 224.

321. See Comment, supra note 295, at 1917.

322. See id. at 1913-14. See also Williams, supra note 302, at 655 (viewpoint-based discrimination is the most biased regulation of expression).

323. See Stone, supra note 297, at 227-28 n.133.


325. See Comment, supra note 295, at 1917.

326. See infra notes 338-54 and accompanying text.

327. See id.

328. Another possible argument is that New York's Son of Sam law was in fact a viewpoint-discriminatory statute. This argument is based on the contention that
same stringent scrutiny applicable to pure viewpoint-based discriminations.

Section 632-a is such a regulation. First, it is on its face a subject-matter restriction.\textsuperscript{329} It restraining the dissemination of expression on the subject of crime. The statute is not a pure viewpoint-based restriction because it restricts a broad category of speech and not speech expressing a specific view on a particular issue.\textsuperscript{330} Moreover, section 632-a has the added dimension of being a speaker-based restriction.\textsuperscript{331} Its restrictions are targeted exclusively at "convicted persons."\textsuperscript{332} The singling out of certain specific groups produces an inequality in first amendment protection.\textsuperscript{333} Additionally, there is usually a strong correlation between speaker identity and viewpoint, and therefore speaker-based restrictions can have viewpoint discriminatory effects.\textsuperscript{334} Accordingly, such restrictions, because of their ability to distort public debate significantly, should receive the same stringent scrutiny applied to viewpoint discriminatory regulations.\textsuperscript{335}

B. Reserving Strict Scrutiny for Review of Viewpoint-Based Restrictions or Its Equivalent: The Justification

Presently, first amendment doctrine is in a state of dangerous confusion.\textsuperscript{336} The presumption against the constitutionality of content-based regulations generally influences whether strict scrutiny is the appropriate standard of review for restrictions on expression.\textsuperscript{337} The Court has not expressly recognized an elevated standard of review for "core"\textsuperscript{338} first amendment speech.\textsuperscript{339} The danger of applying strict scrutiny under the general content-based classification is that such a broad-sweeping application of the standard might "di-
lute” the protection that scrutiny affords the most valued expression. This “dilution effect” can be avoided by reserving the application of strict scrutiny exclusively to reviews of viewpoint-based discriminations or their equivalent.

Admittedly, it is well established that there is no “adequate or comprehensive theory of the First Amendment.” Some of the most prominent scholars, however, have recognized that the paramount objective of the First Amendment is to guarantee that “political speech” receives the greatest possible protection. Even the Supreme Court has agreed with this proposition; in Carey v. Brown it declared that debate on public issues “has always rested on the highest rung of the hierarchy of First Amendment values.”

The late Professor Alexander Meiklejohn, the foremost first amendment philosopher, stressed that the denial of information or opinions concerning a public issue is the “mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.” Further, he added that “[t]he principle of freedom of speech springs from the necessities of the program of self-government” and “[i]t is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.” Similarly, Judge/Professor Robert H. Bork contended that the Constitution created “a form of government that would be meaningless without freedom to discuss government and its poli-

340. See Stephen, supra note 299, at 206; Comment, supra note 295, at 1918-19.
341. Emerson, supra note 1, at 877.
342. See A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Alexander M. Bickel, The Morality of Consent (1975); Bork, supra note 292.
343. The contention that the primary goal of the First Amendment is the protection of “political speech” is a result of contemporary first amendment jurisprudence. The Framers made no such explicit declarations. In fact they often acted and wrote in quite the opposite manner. For example, in regards to the attacks of the Federalist press, Thomas Jefferson wrote to Governor McKean of Pennsylvania suggesting that “a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses.” Emerson, supra note 1, at 888 (quoting 8 The Writings of Thomas Jefferson 216, 218 (Ford ed. 1897)) (letter to Governor McKean, Feb. 19, 1803).
344. See BeVier, supra note 296, at 300. Alexander Meiklejohn went so far as to contend that the First Amendment had no concern with protecting private speech. Meiklejohn, infra note 347, at 94. To maintain the protection afforded political speech, Meiklejohn stressed that “we [must] draw sharply and clearly the line which separates the public welfare of the community from the private goods of any individual citizen or groups of citizens.” Id.
346. Id. at 467.
348. Id.
cies." It follows that there is a dependent relationship between the exchange of diverse viewpoints and the functioning of a representative democracy.

Therefore, in order to secure the protection afforded to "political speech," the Court, which has noted a hierarchy of first amendment values, should recognize a hierarchy of categories of expression. Since viewpoint-based discriminations cause the greatest distortion of public debate, they should be subject to the most stringent scrutiny available. True strict scrutiny should be applied exclusively to viewpoint-based discriminations, because the expression of particular views, opinions and ideas is essential to effective "political speech." The standard of review should reflect the fact that viewpoint-based restrictions strike at the "core" of first amendment guarantees.

CONCLUSION

"The First Amendment is not, primarily, a device for the winning of new truth ... its [primary] purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal." Public debate is the essence and foundation of our representative democracy. Unfortunately, there can be an extraordinarily high cost to maintaining our unique form of government vis-a-vis the First Amendment. Americans since the time of the Framers have been willing to make the ultimate sacrifice. Although crime victims deserve all the assistance available,

349. Bork, supra note 292, at 23.
350. "[T]hough citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous." Meiklejohn, supra note 347, at 27. Professor Meiklejohn further contended that, "no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another." Id. at 26-27. See also Stephen, supra 299, at 206-09. The application of a middle tier test to subject-matter restrictions would not result in a reduction of the freedom of expression. See Farber, supra note 328, at 760. For example, the ordinance in Mosley would have still been struck down under such a review. Id.
351. See Comment, supra note 295, at 1917.
352. "It requires careful examination of the structure and functioning of our political system as a whole to see what part the principle of the freedom of speech plays, here and now, in that system." Meiklejohn, supra note 347, at 20.
353. Id. at 75.
354. "The unabridged freedom of public discussion is the rock on which our government stands." Id. at 77.
355. However, during its existence the New York Son of Sam law was of little assistance to victims. Since its enactment in 1977, Executive Law section 632-a froze only $164,994. See Daniel Wise, The New York Son of Sam Law Seems Unlikely; State Netted Paltry Sum From Convicted Authors, N.Y. L.J., Dec. 12, 1991, at 1 [hereinafter Passage Unlikely]. But see Brief Amicus Curiae of the National Organization for Victims Assistance, Security on Campus, Inc., the National
such aid can not conflict with the "core" of first amendment protections. In the instant case, there is no conflict between the First Amendment or compensating victims. The answer for victims can be provided by the New York legislature, which is free to draft an improved compensation statute that does not "single out" speech. Relief lies in the functioning of the very political system that the Simon & Schuster decision guarantees by assuring public debate. One can only hope that strict scrutiny will continue to protect representative democracy.

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356. The Court concluded that the problem with the New York statute was that it "singled out" speech. See Simon & Schuster, Inc., 112 S. Ct. at 512. Also, Ronald S. Rauchberg who represented Simon & Schuster stated that he felt the first amendment defect, the statute's singling out income generated from speech-related activity, could easily be remedied. *Passage Unlikely*, supra note 355.