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# Have Courts Intruded on First Amendment Guarantees in Their Zeal to Ensure That Crime Does Not Pay?

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# CASENOTES

## HAVE COURTS INTRUDED ON FIRST AMENDMENT GUARANTEES IN THEIR ZEAL TO ENSURE THAT CRIME DOES NOT PAY?

### I. INTRODUCTION

The enormous success of the book *Wiseguy: Life in a Mafia Family*<sup>1</sup> (“*Wiseguy*”) led to the creation of a film version entitled *GoodFellas*.<sup>2</sup> Both the novel and the movie resulted from publisher Simon & Schuster’s hiring convicted organized crime figure, Henry Hill (“Hill”), and exploiting the notoriety of his various crimes.<sup>3</sup> Among the more infamous crimes Hill took part in “were the theft of nearly six million dollars in cash and jewelry from the Lufthansa terminal at Kennedy Airport and the bribery of Boston College basketball players.”<sup>4</sup> Although Hill served brief prison terms, he was prosecuted for only a few of the crimes he admitted committing.<sup>5</sup> Instead, Hill entered the Federal Witness Protection Program, became an informant, and in return, was given a new identity.<sup>6</sup>

Allowing criminals to financially profit from the notoriety of their crimes has frequently generated considerable public hostility.<sup>7</sup> In 1977, residents of New York City were disturbed at the likelihood that killer David Berkowitz, better known as “The Son of Sam,”<sup>8</sup> would profit from his crimes by selling the rights to his story to publishers for a large sum of money.<sup>9</sup> Consequently, citizens persuaded a sympathetic New York

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1. N. PILEGGI, *WISEGUY: LIFE IN A MAFIA FAMILY* (1985).

2. (Warner Bros. 1990); *Court Upholds Curbs on Criminal’s Profits*, Wall St. J., Oct. 4, 1990, at B5, col. 1. See also N.Y.L.J., Oct. 4, 1990, at 1, col. 5.

3. N.Y.L.J., Oct. 4, 1990, at 1, col. 5.

4. *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 779 (2d Cir. 1990), cert. granted, 59 U.S.L.W. 3546 (U.S. Feb. 19, 1991)(No. 90-1059) [hereinafter “*Simon & Schuster II*”].

5. *Id.*

6. *Id.*

7. Wall St. J., Oct. 4, 1990, at B5, col. 1.

8. David Berkowitz terrorized New York City for over a year with random shootings of young women and their escorts that left six people dead and seven people wounded. Fedler, *When Headlines Are Bought*, BARRISTER, Fall 1980, at 14.

9. See Memorandum of Emmanuel Gold, the law’s sponsor, *infra* note 53. As the capture of David Berkowitz became imminent, it became public knowledge that publishers were offering large sums of money for the rights to his story. N.Y. Times, Aug. 11, 1977, at 1, col. 6.

state legislature to act to prevent such an injustice.<sup>10</sup> New York was thus the first state to institute such a statute, New York Executive Law section 632-a ("section 632-a"), commonly known as the "Son of Sam" law.<sup>11</sup> In response to the growing legislative concern over criminals profiting from their crimes, thirty-nine states,<sup>12</sup> as well as the federal government,<sup>13</sup> have enacted similar statutes. Most of this legislation was modeled after New York's section 632-a.<sup>14</sup> The objective of these Son of Sam statutes is clear and unambiguous: when criminals derive profits from recounting their crimes in books, films, magazine articles, or other expressive media, these profits should be made available to the victims as a source of compensation.<sup>15</sup>

Many people agree with the purposes behind the Son of Sam law and those statutes modeled after it. However, these statutes in their current form restrict speech based on content. Because there are available alternatives which could accomplish the legislative goal without focusing on the content of the criminal's speech, these laws in their present form violate the first amendment to the United States Constitution.<sup>16</sup> Any mi-

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10. *Simon & Schuster II*, 916 F.2d at 782-83.

11. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1990), *infra* note 50. The constitutionality of section 632-a was upheld by a New York state court in the matter involving David Berkowitz. Matter of Johnson, 103 Misc. 2d 823, 825, 430 N.Y.S. 2d 904, 909 (1979).

12. See *e.g.*, ALA. CODE §§ 41-9-80 to 84 (1982); ALASKA STAT. § 12.61.020 (1989); ARIZ. REV. STAT. ANN. § 13-4202 (1989); ARK. STAT. ANN. § 16-90-308 (1987); CAL. CIV. CODE § 2225 (West 1990); COLO. REV. STAT. §§ 24-4.1-202 to 207 (1988); CONN. GEN. STAT. ANN. § 54-218 (West 1985); DEL. CODE ANN. tit. 11, §§ 9101 to 9106 (1987); FLA. STAT. ANN. § 944.512 (West 1985); GA. CODE ANN. § 27-3401 (1983); HAW. REV. STAT. §§ 351-81 to 88 (Supp. 1989); IDAHO CODE § 19-5301 (1987); ILL. ANN. STAT. ch. 70, para. 411 (Smith-Hurd 1989); IND. CODE ANN. § 16-7-3.7-2 (Supp. 1988); IOWA CODE ANN. § 910.15 (West Supp. 1989); KAN. STAT. ANN. §§ 74-7319 to 73-21 (Supp. 1990); KY. REV. STAT. ANN. § 346.165 (Baldwin 1983); LA. REV. STAT. ANN. §§ 46:1831 to 1839 (West 1982); MD. ANN. CODE ART. 27, § 764 (1988); MASS. GEN. LAWS ANN. ch. 258A, § 8 (West 1989); MINN. STAT. ANN. § 611A.68 (West 1987); MIS. CODE ANN. §§ 99-38-1 to 11 (Supp. 1989); MO. ANN. STAT. § 595.050 (Vernon Supp. 1990); MONT. CODE ANN. § 53-9-104(1)(d) (1989); NEB. REV. STAT. §§ 81-1836 to 1842 (1987); NEV. REV. STAT. § 217.265 (1986); N.J. STAT. ANN. § 52:4B-26 (West 1986); N.M. STAT. ANN. § 31-22-22 (1987); OHIO REV. CODE ANN. §§ 2969.01 to 2969.06 (1987); OR. REV. STAT. § 147.275 (1989); PA. STAT. ANN. tit. 71, § 180-7.18 (Purdon Supp. 1989); R.I. GEN. LAWS §§ 12-25.1-1 to 12 (Supp. 1988); S.C. CODE ANN. §§ 15-59-40 to 80 (Law. Co-op. Supp. 1989); S.D. CODIFIED LAWS ANN. § 23A-28A-1 (1988); TENN. CODE ANN. §§ 29-13-201 to 208 (1980); TEX. CIV. CODE ANN. art. 8309-1, §§ 1 to 18 (Vernon Supp. 1990); WASH. REV. CODE ANN. § 7.68.200 (Supp. 1988); WIS. STAT. ANN. § 949.165(2) (West Supp. 1989); WYO. STAT. § 1-40-112(d) (1988).

13. Special Forfeiture of Collateral Profits of Crime Act, 18 U.S.C.A. §§ 3681-3682 (West Supp. 1989).

14. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 724 F. Supp. 170, 174 (S.D.N.Y. 1989) [hereinafter "*Simon & Schuster P*"].

15. *Simon & Schuster II*, 916 F.2d at 779.

16. U.S. CONST. amend I. The first amendment provides, in relevant part, "Congress shall

nor intrusion on free expression is probably acceptable to the majority of people at any given time. The problem, however, is that these minor intrusions have a cumulative effect and foster a chilling effect on expression generally.

When presented with a statute which bases its criteria for application on the content of speech, courts must search for all possible alternative means of achieving a compelling purpose without restricting speech based on its content.<sup>17</sup> If a court determines that less restrictive alternatives exist or are plausible, it must strike down the statute in its existing form.<sup>18</sup> The state, of course, remains free to modify the statute so as to cure its constitutional defects.

Because of Henry Hill's involvement with the novel *Wiseguy*, the New York State Crime Victims Board ("the Board"), the agency charged with administering section 632-a, determined that Hill's profits were subject to New York's Son of Sam law.<sup>19</sup> Simon & Schuster challenged the constitutionality of section 632-a in federal court.<sup>20</sup> The district court and the court of appeals upheld the act.<sup>21</sup> However, the courts, influenced by the belief that criminals should not profit from their crimes, failed to scrutinize the statute carefully enough to determine whether altering section 632-a was the least restrictive means for achieving its purpose. Had the court done so, it would have discovered flaws in the current statute, reversed the lower court, and forced the New York State Legislature to amend the statute to better conform to the requirements of the first amendment.

This note examines the court's decision in *Simon & Schuster v. Fischetti*, in which the Second Circuit Court of Appeals upheld the district court's finding that section 632-a is constitutional.<sup>22</sup> Although the social policy of section 632-a is admirable, the Second Circuit should not have allowed the statute to remain in its current form because it violates the first amendment guarantees in the United States Constitution.

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make no law . . . abridging the freedom of speech . . ." *Id.* The first amendment applies to the states through the fourteenth amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

17. *Members of the City Council of the City of Los Angeles v. Taxpayers For Vincent*, 466 U.S. 789, 801 (1983); *see also* *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1307 (1983).

18. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960).

19. *Simon & Schuster II*, 916 F.2d at 780.

20. *Simon & Schuster I*, 724 F. Supp. at 173.

21. *Simon & Schuster II*, 916 F.2d at 778.

22. *Id.* at 777.

## II. STATEMENT OF THE CASE

*Wiseguy* was on best-seller book lists across the country for several weeks during 1986.<sup>23</sup> The widely-acclaimed<sup>24</sup> novel resulted from a combination of the efforts of Simon & Schuster, a well-known publishing company, the Sterling Lord Agency ("Sterling Lord"), a literary agency, Nicholas Pileggi ("Pileggi"), an author known for his organized crime articles, and Henry Hill, a former organized crime figure.<sup>25</sup> Hill had been involved with organized crime for many years.<sup>26</sup> He participated in crimes such as bribery, assault, extortion, theft, burglary, arson, drug dealing, credit card fraud and murder.<sup>27</sup> In 1981, Simon & Schuster learned that Hill was assisting state and federal prosecutors under the Federal Witness Protection Program.<sup>28</sup> Simon & Schuster began efforts to persuade Hill to cooperate with them in publishing a novel about organized crime in New York City.<sup>29</sup> Simon & Schuster contacted Sterling Lord and together they obtained the services of Pileggi to help Hill create *Wiseguy*.<sup>30</sup> The publishing agreement ("the contract") between Simon & Schuster and Sterling Lord allocated ten percent of the proceeds to Sterling Lord and evenly divided the remainder between Pileggi and Hill.<sup>31</sup> It is undisputed that Hill would not have agreed to participate in the project without an assurance that he would be paid.<sup>32</sup>

In 1986, the Board directed Simon & Schuster to provide it with a copy of the publishing agreement and ordered Simon & Schuster to suspend payments to Sterling Lord.<sup>33</sup> On June 15, 1987, the Board issued a Notice and a Proposed Determination and Order to Simon & Schuster concluding that *Wiseguy* was subject to the regulations promulgated in section 632-a because it contained Hill's thoughts, feelings, opinions and emotions about participating in criminal activities.<sup>34</sup> The Board found

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23. *Simon & Schuster I*, 724 F. Supp. at 172; see also N. Y. Post, Oct. 5, 1990, at 4, col. 5.

24. According to Simon & Schuster, more than 90,000 copies of *Wiseguy* in its trade edition were sold, and more than one million copies of the soft cover edition are in print. *Simon & Schuster II*, 916 F.2d at 779.

25. *Simon & Schuster I*, 724 F. Supp. at 172.

26. *Simon & Schuster II*, 916 F.2d at 779.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Simon & Schuster II*, 916 F.2d at 779.

32. *Id.*

33. *Simon & Schuster I*, 724 F. Supp. at 172.

34. *Id.* at 172-73. In the Notice and Proposed Determination and Order issued to Simon & Schuster, the Board made these additional findings: first, that a copy of the contract should have been submitted to the Board in 1981 at the time of execution; second, that Nicholas Pileggi is a co-author, not a representative of Hill, and that payments due him are therefore not

that Simon & Schuster had failed to submit a copy of the publishing agreement at the time of its execution for a determination of the applicability of section 632-a.<sup>35</sup> Moreover, the Board determined that Pileggi was a co-author of *Wiseguy*, not a representative of Hill, and was therefore not subject to the mandate of section 632-a.<sup>36</sup> However, because Simon & Schuster made payments to Sterling Lord for the account of Henry Hill, the Board found that Sterling Lord was an agent of Hill and thus a representative under section 632-a.<sup>37</sup> Consequently, Sterling Lord was ordered to surrender its ten percent share of Hill's proceeds to the Board.<sup>38</sup> The Board also ordered Hill to remit the \$96,250 previously paid to him by Simon & Schuster.<sup>39</sup> In the event that Hill refused to pay the money, Simon & Schuster would be required to pay that amount to the Board.<sup>40</sup> In addition, Simon & Schuster was ordered to turn over to the Board all outstanding monies payable to Hill, including \$27,958 held by Simon & Schuster, as well as any future royalties payable to him or his representatives under the publishing agreement.<sup>41</sup> Because neither Simon & Schuster nor any other person requested any fact-finding, the Proposed Determination and Order became the Final Determination and Order of the Board on July 15, 1987, in conformity with the Notice served by the Board.<sup>42</sup>

In response to the Board's order, Simon & Schuster brought an action under 42 U.S.C. § 1983<sup>43</sup> in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief.<sup>44</sup> Simon & Schuster asserted that section 632-a violated the first

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subject to the mandate of section 632-a; and finally, that Sterling Lord may apply to the Board for payment of necessary expenses for the production of monies paid into the escrow account to be established by the Board. *Simon & Schuster II*, 916 F.2d at 780.

35. *Simon & Schuster I*, 724 F. Supp. at 173.

36. *Simon & Schuster II*, 916 F.2d at 780.

37. *Simon & Schuster I*, 724 F. Supp. at 173. Payments made to a representative of an accused or a criminal under a contract subject to section 632-a must also be deposited into the escrow account. N.Y. EXEC. LAW § 632(a)(1) (McKinney 1982 & Supp. 1990). See *infra* note 50.

38. *Simon & Schuster I*, 724 F. Supp. at 173.

39. *Id.*

40. *Id.*

41. *Simon & Schuster II*, 916 F.2d at 780. At this time, the Board is still investigating whether Hill received any payments in connection with the film version of the book, entitled *GoodFellas* (Warner Bros. 1990). Wall St. J., Oct. 4, 1990, at B5, col. 1. See also N.Y.L.J., Oct. 4, 1990, at 1, col. 5.

42. *Simon & Schuster II*, 916 F.2d at 780.

43. *Id.*

44. Simon & Schuster sought an order declaring section 632-a violative of the first and fourteenth amendments "on its face and as applied," and an injunction prohibiting the Board "from taking any steps to apply or enforce" section 632-a. *Id.*

amendment guarantee of freedom of expression and the fourteenth amendment because it was unnecessarily vague and overbroad.<sup>45</sup> Simon & Schuster claimed that section 632-a "imposes a direct restriction on speech, is therefore subject to strict scrutiny, and cannot survive" under such a standard.<sup>46</sup>

After the Board filed an answer, both sides filed cross-motions for summary judgment.<sup>47</sup> The district court granted the Board's motion for summary judgment and denied Simon & Schuster's motion for the same relief.<sup>48</sup> Simon & Schuster appealed to the United States Court of Appeals for the Second Circuit.<sup>49</sup>

### III. BACKGROUND: THE SON OF SAM LAW

New York Executive Law section 632-a,<sup>50</sup> commonly referred to as

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45. Brief for Appellees at 2, 19, *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 779 (2d Cir. 1990) (No. 89-9192).

46. *Simon & Schuster II*, 916 F.2d at 778. Specifically, Simon & Schuster asserted that section 632-a has a chilling effect on books about crime because their authors, as well as those whose cooperation is necessary to complete the books, will fear that their profits will be subject to section 632-a. *Simon & Schuster I*, 724 F. Supp. at 173 (Profits may be either depleted or completely dissipated by one or more civil judgments against them or, at the very least, withheld for five years). Simon & Schuster further alleged that section 632-a affects editorial decisions resulting in self-censorship of certain subject matter covered by section 632-a. *Id.* The Board contended that section 632-a does not burden free speech in any way, imposes only an incidental burden if it burdens free speech at all, and, in any event, furthers a compelling state interest in a narrowly tailored manner. *Simon & Schuster II*, 916 F.2d at 778.

47. *Id.* at 780.

48. *Id.* at 778.

49. *Id.*

50. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1990) (Entitled "Distribution of Moneys Received as a Result of the Commission of Crime"):

1. Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives. 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 crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representatives.

2. The board, at least once every six months for five years from the date it receives such moneys, shall cause to have published a legal notice in newspapers of general circulation in the county wherein the crime was committed and in counties contiguous to such county advising such victims that such escrow moneys are avail-

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able to satisfy money judgments pursuant to this section. For crimes committed in a county located within a city having a population of one million or more, the notice provided for in this section shall be in newspapers having general circulation in such city. The board may, in its discretion, provide for such additional notice as it deems necessary.

3. Upon dismissal of charges or acquittal of any accused person the board shall immediately pay over to such accused person the moneys in the escrow account established on behalf of such accused person.

4. Upon a showing by any convicted person that five years have elapsed from the establishment of such escrow account and further that no actions are pending against such convicted person pursuant to this section, the board shall immediately pay over any moneys in the escrow account to such person or his legal representatives.

5. For purposes of this section, a person found not guilty as a result of the defense of mental disease or defect pursuant to section 30.05 of the penal law shall be deemed to be a convicted person.

6. Whenever it is found, pursuant to article seven hundred thirty of the criminal procedure law, that a person accused of a crime is unfit to proceed as a result of mental disease or defect because such person lacks capacity to understand the proceedings against him or to assist in his own defense, the board shall bring an action of interpleader pursuant to section one thousand six of the civil practice law and rules to determine disposition of the escrow account.

7. Notwithstanding any inconsistent provision of the estates, powers and trusts law or the civil practice law and rules with respect to the timely bringing of an action, the five year period provided for in subdivision one of this section shall not begin to run until an escrow account has been established.

8. Notwithstanding the foregoing provisions of this section the board shall make payments from an escrow account to any person accused or convicted of crime upon the order of a court of competent jurisdiction after a showing by such person that such moneys shall be used for the exclusive purpose of retaining legal representation at any stage of the criminal proceedings against such person, including the appeals process. The board may in its discretion and after notice to the victims of the crime make payments from the escrow account to a representative of any person accused or convicted of a crime for the necessary expenses of the production of the moneys paid into the escrow account, provided the board finds that such payments would be in the best interests of the victims of the crime and would not be contrary to public policy. The total of all payments made from the escrow account under this subdivision shall not exceed one-fifth of the total moneys paid into the escrow account and available to satisfy civil judgments obtained by the victims of the crime.

9. Any action taken by any person accused or convicted of a crime, whether by way of execution of a power of attorney, creation of corporate entities or otherwise, to defeat the purpose of this section shall be null and void as against the public policy of this state.

10. For purposes of this section:

(a) Victim shall mean a person who suffers personal, physical, mental, or emotional injury, or pecuniary loss as a direct result of the crime.

(b) A person convicted of a crime shall include any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted.

11. Notwithstanding any other provision of law, claims on moneys in the escrow account shall have the following priorities:

(a) Payments ordered by the board or a court pursuant to subdivision eight of this section;

(b) Subrogation claims of the state pursuant to section six hundred thirty-four of this article in an amount not exceeding one-half of the net amount of the civil



the Son of Sam law,<sup>51</sup> was enacted to prevent criminals from profiting from a reenactment of their crimes in the media<sup>52</sup> without first assuring the victims of such crimes adequate compensation for their injuries.<sup>53</sup> Prior to the enactment of New York Executive Law section 632-a, crime victims had no effective means of redress against a criminal who profited by reenacting, in some form of media, the crimes they committed.<sup>54</sup> Section 632-a requires that if a person accused or convicted of a crime enters into a contract relating to the reenactment of the person's thoughts, feelings, opinions or emotions regarding such crime, a copy of the contract must be submitted to the Board.<sup>55</sup> If the Board determines that the con-

judgment obtained by a victim which is payable directly to the victim from the escrow account;

(c) Civil judgments of the victims of the crime;

(d) Other judgment creditors or persons claiming moneys through the person accused or convicted of a crime who present lawful claims, including state or local government tax authorities;

(e) The person accused or convicted of the crime.

No payment shall be made out of the escrow account where such payment would be in derogation of claims, either presented or pending, entitled to a higher priority under this subdivision. The board may bring an action of interpleader pursuant to section one thousand six of the civil practice law and rules or an action for a declaratory judgment where it cannot determine the priority of claims and the proper disposition of the escrow account.

Moneys in the escrow account shall not be subject to execution, levy, attachment or lien except in accordance with the priority of claims established in this subdivision.

12. Notwithstanding any other provisions of law, the board shall have exclusive jurisdiction and control, as escrow agent, over any moneys subject to this section. No distribution of moneys in such escrow accounts shall be made except by determination and order of the board, pursuant to the provisions of this section and the board's rules and regulations. Any party aggrieved by a final determination and order of the board under this section may seek judicial review of such decision pursuant to article seventy-eight of the civil practice law and rules.

51. Section 632-a was passed in response to the large monetary offers made to David Berkowitz and his attorney for the rights to Berkowitz's story. Fedler, *When Headlines Are Bought*, BARRISTER, Fall 1980, at 15.

52. See N.Y. EXEC LAW § 632-a (McKinney 1982 & Supp. 1990), *supra* note 50.

53. Senator Emmanuel R. Gold, the law's sponsor, stated:

It is abhorrent to one's sense of justice and decency that an individual, such as [Berkowitz,] the forty-four caliber 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.

Memorandum of Senator Emmanuel R. Gold, *reprinted in* 1977 NEW YORK STATE LEGISLATIVE ANNUAL 267. It is clear from section 632-a's title, "Distribution of Monies Received as a Result of the Commission of a Crime," and its structure, that the main objective of the statute is assuring victims adequate compensation. See *supra* note 50.

54. Note, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 CALIF. L. REV. 1353, 1355 n.12 (1988).

55. Section 632-a also applies to people who "voluntarily admit" the commission of a crime, as well as people who are found not guilty by reason of "mental disease or defect." N.Y. EXEC. LAW §§ 632-a(5), (10)(b) (McKinney 1982 & Supp. 1990).

tract is subject to section 632-a, all proceeds due to the criminal under the contract must be paid to the Board.<sup>56</sup> The Board then places the money in an escrow account for five years, and publishes notices advising victims that such money is available to them.<sup>57</sup> Victims or their estates have five years from the date of the establishment of the escrow account to bring a civil tort action against the criminal and obtain a judgment.<sup>58</sup> If a victim secures a civil judgment against the criminal,<sup>59</sup> the Board may satisfy the judgment by paying the victim<sup>60</sup> out of the funds in the escrow account.<sup>61</sup> If a civil action is not brought within five years from the date the escrow account is established, the money in the account is then returned to the criminal.<sup>62</sup>

By alerting victims to the existence of the escrow account established by the Board,<sup>63</sup> section 632-a apprises a victim, before filing suit, as to whether there will be money available to satisfy a civil judgment.<sup>64</sup> Moreover, the criminal is prevented from spending the money before a

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56. *Simon & Schuster II*, 916 F.2d at 778-79.

57. *Id.*; see also N.Y. EXEC. LAW § 632-a(1) & (2) (McKinney 1982 & Supp. 1990). Section 632-a "does not increase the substantive rights of the victim but ensures the presence of a fund from which the victim's money judgments" may be satisfied. Note, *Compensating the Victim from the Proceeds of the Criminal's Story: The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROBS. 93, 95 (1978).

58. Section 632-a creates a new *in rem* cause of action with a five-year statute of limitations, but limits recovery of any monetary judgment in an action that otherwise would have been barred by the statute of limitations to the proceeds from the escrow account. *Barrett v. Wojowicz*, 66 A.D.2d 604, 612, 414 N.Y.S.2d 350, 355 (1979).

59. Civil judgments rank third in the order of priority of claims that can be paid out of the escrow account. The order of priority of claims that may be paid out of the escrow account is as follows: (1) attorney's fees granted by a court of competent jurisdiction for representation of the accused at any stage of the criminal proceedings and expenses allowed by the Board for the production of moneys paid into the escrow account, the total of which may not exceed one-fifth of the escrow account; (2) subrogation claims of the state for payments made to a victim, not to exceed one-half of the civil judgment obtained by a victim; (3) victims' civil judgments; (4) judgments of other creditors and claims of persons presenting lawful demands through the person accused or convicted of the crime, including the demands of tax authorities; and (5) the claims of the person accused or convicted of the crime. N.Y. EXEC. LAW § 632-a(11)(a)-(e) (McKinney 1982 & Supp. 1990); *Simon & Schuster II*, 916 F.2d at 779.

60. Or by paying the victim's family or estate, if either one brings a suit. N.Y. EXEC. LAW § 632-a(10)(a) (McKinney 1982 & Supp. 1990).

61. *Simon & Schuster II*, 916 F.2d at 779; see also N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1990) *supra* note 50.

62. N.Y. EXEC. LAW § 632-a(4) (McKinney 1982 & Supp. 1990). See *supra* note 50.

63. The Board shall cause to have published a legal notice in newspapers of general circulation in the county wherein the crime was committed as well as in counties contiguous to that county, advising victims that the escrow monies are available to them to satisfy money judgments. The Board must publish these notices at least once every six months for five years from the date it receives the money. N.Y. EXEC. LAW § 632-a(2) (McKinney 1982 & Supp. 1990).

64. *Id.*

judgment is rendered.<sup>65</sup>

In its first eleven years of operation, the Board has invoked the Son of Sam law ten times.<sup>66</sup> Of those ten proceedings, only five resulted in the creation of escrow accounts.<sup>67</sup> Three of the five proceedings involved the same criminal.<sup>68</sup>

#### IV. THE LAW PERTAINING TO THE RESTRICTION OF SPEECH

Before the court analyzes the restriction imposed on speech, it must first decide if the speech being regulated has been found by the Supreme Court to be within the area of speech protected by the first amendment.<sup>69</sup> Several well-defined and narrowly limited classes of speech such as fraudulent misrepresentation, obscenity and advocacy of imminent lawless behavior are examples of such unprotected classes of speech.<sup>70</sup> If the speech falls into one of these categories of unprotected speech, the court's analysis ends.<sup>71</sup> If the court finds that the speech in question does not fall into one of these unprotected categories, the court must then decide what level of scrutiny to apply to it.<sup>72</sup>

The principal inquiry in deciding what level of scrutiny to apply to section 632-a is whether the regulation is content-neutral or content-based.<sup>73</sup> Content-based restrictions are subject to a higher level of scru-

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65. The defendant does have the ability to use money held by the Board in the escrow account for retaining legal representation. N.Y. EXEC. LAW § 632(a)(8) (McKinney 1982 & Supp. 1990). "Such costs might easily consume the larger part of an escrow account, leaving little for the satisfaction of a victim's money judgment." Note, *Compensating the Victim from the Proceeds of the Criminal's Story-The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROB. 93, 95 n.9 (1978).

66. *Simon & Schuster II*, 916 F.2d at 787.

67. *Id.*

68. *Id.*

69. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (footnote omitted). The Supreme Court has stated that "it is well understood that the right of free speech is not absolute at all times and under all circumstances." *Id.* at 571.

70. *Konigsberg v. State Bar of Calif.*, 366 U.S. 36, 49 n.10 (1961); *Chaplinsky*, 315 U.S. at 571-72 (footnote omitted). "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Id.* at 572 (footnotes omitted). Those areas are excluded from first amendment protection because they do nothing to advance the goal of the speech clause of first amendment: "to assure a society in which 'uninhibited, robust, and wide open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (citations omitted).

71. *Chaplinsky*, 315 U.S. at 571-72 (footnote omitted).

72. *Id.*

73. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

tiny than other restrictions on speech.<sup>74</sup> The controlling consideration in determining the level of scrutiny to apply is the government's purpose in enacting the regulation.<sup>75</sup> The court must determine "whether [or not] the government has adopted a regulation because of disagreement with the message it conveys."<sup>76</sup> To qualify as content-neutral, speech restrictions must be "*justified* without reference to the content of the regulated speech."<sup>77</sup> A regulation which serves purposes unrelated to the content of expression is deemed neutral, even though it has the incidental effect of interfering with some speakers or messages.<sup>78</sup> To qualify as content-based, speech restrictions must be the result of the ideas or information contained in the regulation.<sup>79</sup>

There is no question that the speech regulated by section 632-a is protected.<sup>80</sup> In addition, section 632-a is obviously a content-based restriction because its application depends on the subject matter of the speech.<sup>81</sup> Therefore, section 632-a must withstand strict scrutiny to be constitutional.<sup>82</sup>

For New York to enforce section 632-a, the state must first prove that the interest sought to be furthered by section 632-a is compelling<sup>83</sup> and not merely legitimate.<sup>84</sup> Secondly, it must demonstrate that the means used to achieve that goal are necessary to accomplish that interest. The state must also show that an alternative form of regulation which imposes less of a hindrance on first amendment rights would not serve the same interest.<sup>85</sup> Content-based regulations are subjected to the highest scrutiny to ensure the strictest adherence to the underlying values of the first amendment.

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74. *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Elrod v. Burns*, 427 U.S. 347, 362 (1976).

75. *Ward*, 109 S. Ct. at 2754.

76. *Id.* (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

77. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986) (citing *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (emphasis added)). *See also Boos v. Barry*, 485 U.S. 312, 320-21 (1988).

78. *See Renton*, 475 U.S. at 47-48.

79. *Texas v. Johnson*, 109 S. Ct. 2533, 2536 (1989).

80. *Simon & Schuster II*, 916 F.2d at 782.

81. *Id.*

82. *Id.*

83. *NAACP v. Button*, 371 U.S. 415, 438 (1963); *see also Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

84. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (citing *NAACP v. Alabama*, 357 U.S. 449, 463 (1958)).

85. *Sherbert*, 374 U.S. at 407; *Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960).

## V. THE COURT OF APPEALS' DECISION

In a two-to-one decision, the United States Court of Appeals for the Second Circuit upheld the constitutionality of New York Executive Law section 632-a.<sup>86</sup> The majority agreed that section 632-a imposes a direct burden on speech and therefore is subject to strict scrutiny.<sup>87</sup> Applying the requirements of strict scrutiny to section 632-a, the court found that the statute survived the test and was therefore constitutional.<sup>88</sup> In his dissent, Judge Newman concluded that section 632-a did not meet the strict scrutiny test and that it should therefore have been declared unconstitutional.<sup>89</sup>

### A. *The Majority Opinion*

The majority held that section 632-a should be subjected to strict scrutiny because the governmental interest advanced by the statute bears a direct relation to speech.<sup>90</sup> Section 632-a "burdens directly the speech of those who wish to tell (and sell) the stories of their crimes."<sup>91</sup> The court relied on *Meyer v. Grant*,<sup>92</sup> in which the United States Supreme Court found that a denial of payment for expressive activity constituted a direct burden on that activity.<sup>93</sup> Addressing *Meyer*, the majority stated:

The statute examined in *Meyer* allowed proposals to amend the Colorado constitution to be placed on the ballot at a general election if a sufficient number of people signed an initiative petition. The same statute made it a felony to pay petition circulators. The Supreme Court, after concluding that *Meyer* involved a restriction subject to "exacting scrutiny," held that "[t]he Colorado statute prohibiting the payment of petition circulators imposes a burden on political expression that the State

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86. *Simon & Schuster II*, 916 F.2d at 784.

87. *Id.* at 781-82.

88. *Id.* at 784.

89. *Id.* at 784-87 (Newman, J., dissenting).

90. *Id.* at 781.

91. *Simon & Schuster II*, 916 F.2d at 781. This rejects the standard the district court applied to section 632-a. The district court tested section 632-a under the standards established in *United States v. O'Brien*, 391 U.S. 367 (1968), which involved a statute aimed at prohibiting the destruction of draft cards and therefore was not directed at speech, although it imposed an incidental burden on speech. The district court applied this standard despite the Supreme Court's requirement "that the governmental interest in question be unconnected to expression in order to come under *O'Brien's* less demanding rule." *Simon & Schuster II*, 916 F.2d at 781 (citing *Texas v. Johnson*, 109 S. Ct. 2533, 2541 (1989)).

92. 486 U.S. 414 (1988).

93. *Id.* at 422-24.

has failed to justify.”<sup>94</sup>

The majority found that section 632-a has the effect of excluding from circulation the expression of criminals who would write about their crimes if they were assured of payment.<sup>95</sup> Thus, the majority considered section 632-a a content-based exclusion.<sup>96</sup> The majority also determined that section 632-a singles out the media for differential treatment based on expressive content, because no assets other than those derived from the recounting of the criminal’s story are subject to attachment in the manner provided by the statute.<sup>97</sup> The court reasoned that such differential treatment must also survive strict scrutiny, demonstrating both a compelling state interest and legislation narrowly constructed to achieve its purpose.<sup>98</sup>

In order for the state to enforce such a restriction it must therefore show that its regulation is necessary to serve a compelling state interest and that the regulation is narrowly drawn to achieve that goal.<sup>99</sup> The majority found that New York had a compelling state interest in assuring that a criminal does not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation due to their victimization.<sup>100</sup> The majority reasoned that a compelling social interest is served by preventing criminals from profiting at the expense of victims who are in need of compensation and seek restitution.<sup>101</sup>

In order to support its determination that a compelling state interest brought about the enactment of section 632-a, the majority referred to the statute’s legislative history:

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.<sup>102</sup>

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94. *Simon & Schuster II*, 16 F.2d at 781 (quoting *Meyer v. Grant*, 486 U.S. 414, 420, 428 (1988)).

95. *Id.* at 782.

96. *Id.*

97. *Id.* (citing *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 227-31 (1987)).

98. *Id.* at 782 (citing *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).

99. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

100. *Simon & Schuster II*, 916 F.2d at 782.

101. *Id.*

102. *Id.* at 782 (citing Assembly Bill Memorandum Re: A 9019, July 15, 1977, *reprinted in* Legislative Bill Jacket, 1977 N.Y. LAWS 823).

For additional support, the majority referred to the Division of Criminal Justice Services as proof of the compelling state interest section 632-a was enacted to serve:

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 of money from articles, books or television accounts of his life, times and crimes. . . . [T]his 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.<sup>103</sup>

The majority found that section 632-a serves a compelling state interest.<sup>104</sup> Specifically, the statute assures that money is set aside out of the profits derived by criminals from the exploitation of their crimes and made available to pay off judgments recovered by the victims of the crime they exploited.<sup>105</sup>

Next, the majority examined whether section 632-a is narrowly tailored to New York's interest in preventing criminals from profiting from their publications until their victims have had a chance to bring an action for restitution.<sup>106</sup> The majority concluded that section 632-a is narrowly tailored to meet the state's interest.<sup>107</sup> The majority found that the statute correctly recognizes that the only way for a criminal to profit from his or her crime, other than by the proceeds directly from it, is to reenact it through some form of the media.<sup>108</sup> Additionally, the majority stated that the sole asset of most criminals is the right to recount the story of their crime.<sup>109</sup> Therefore, the majority concluded that the criminal's first amendment right to speak is restricted only as a consequence of his or her inability to profit until the victim has had a chance to make a claim for restitution.<sup>110</sup> However, the majority merely examined the benefits

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103. *Id.* at 783 (citing Memorandum from Robert Schlanger, Division of Criminal Justice Services, to Judah Gribetz (August 3, 1977)), reprinted in Legislative Bill Jacket, 1977 N.Y. LAWS 823).

104. *Simon & Schuster II*, 916 F.2d at 783.

105. *Id.*

106. *Id.* at 783-84.

107. *Id.* at 784.

108. *Id.* at 783.

109. *Simon & Schuster II*, 916 F.2d at 783.

110. *Id.*

New York would receive with and without section 632-a in existence.<sup>111</sup> Absent from the majority's opinion was any significant exploration of possible alternatives New York might have used.

Finally, the majority rebutted Simon & Schuster's argument that New York already has adequate means to provide restitution to victims of crimes through New York Civil Practice Law & Rules article 62, a general statutory provision for attachment in New York.<sup>112</sup> The majority responded by claiming that article 62 is too limited to provide the same remedies afforded by section 632-a.<sup>113</sup>

Simon & Schuster then claimed that section 632-a is underinclusive<sup>114</sup> as applied in this case "because it is addressed to only one kind of book and the royalties derived therefrom."<sup>115</sup> The majority responded by restating that section 632-a is narrowly tailored to the state's compelling interest in compensating crime victims from the criminals' proceeds derived from the sale of their stories.<sup>116</sup> The majority added that payments "for expertise, royalties from books that do not describe crime victims, and any other income and assets of criminals may be reached in other ways."<sup>117</sup>

Simon & Schuster's final claim was that section 632-a is overinclusive<sup>118</sup> in its application to publications which constitute only a small portion of the subject matter and in reaching payments constituting the entire compensation for the "labors of authorship rather than the property of the victim or the fruits of unjust enrichment."<sup>119</sup> The majority responded by claiming that criminals are not prohibited from speaking

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Simon & Schuster II*, 916 F.2d at 783. A statute is underinclusive if it burdens more speech than is necessary to achieve its goals. *Carey v. Brown*, 447 U.S. 455, 465 (1980) (statute which prohibits picketing of residences while exempting peaceful labor picketing was underinclusive because it made no attempt to distinguish among the various sorts of nonlabor picketing on the basis of the harms they would cause on the privacy interest). The Court in *Carey* based its analysis on the equal protection clause rather than on the first amendment. However, as the concurring opinion recognizes, this is essentially another way of articulating the content-neutrality requirement of the first amendment. *Id.* at 471-72 (Stewart, J., concurring).

115. *Simon & Schuster II*, 916 F.2d at 784.

116. *Id.* at 783.

117. *Id.* at 784.

118. *Id.* A statute is overinclusive if it unnecessarily reaches protected areas of speech beyond what is necessary to achieve its purpose. *Carey v. Brown*, 447 U.S. 455, 465 (1980) (statute overinclusive because it broadly permits all peaceful labor picketing notwithstanding the disturbances it would likely cause).

119. *Simon & Schuster II*, 916 F.2d at 784.



about their crimes.<sup>120</sup> Section 632-a merely ties up the criminal's proceeds until the victims have had a chance to claim compensation.<sup>121</sup> Furthermore, the majority added that the criminals' income is derived from the notoriety of their crimes rather than from their labors.<sup>122</sup>

### B. *The Dissenting Opinion*

In his dissent, Judge Newman approved of section 632-a's purpose and stated his belief that the New York legislature had good intentions when it enacted the statute.<sup>123</sup> However, he concluded that section 632-a violates the first amendment and deprives the public of "valuable writings about activities of high public interest."<sup>124</sup>

Judge Newman agreed with the majority in its conclusion that the constitutionality of section 632-a should be subjected to strict scrutiny because it "imposes such a direct burden on free expression."<sup>125</sup> He also agreed that, under a standard of strict scrutiny, the challenged statute must be "narrowly tailored to advance important governmental interests and that any distinction made by the statute concerning speech in general or speech of particular content must be 'necessary to serve a compelling state interest' and 'narrowly drawn to achieve that end.'"<sup>126</sup> However, Judge Newman concluded that section 632-a failed to meet these requirements.<sup>127</sup>

Judge Newman agreed that section 632-a was content-based.<sup>128</sup> Rather than requiring that all payments made to criminals be placed in escrow for the benefit of crime victims, the statute applies only to payments made to those criminals who re-create their crimes in books or other forms of media.<sup>129</sup> Moreover, section 632-a does not apply to all criminals who write books.<sup>130</sup> Rather, it only applies to those criminals whose books express their thoughts, feelings, opinions or emotions regarding their crimes.<sup>131</sup>

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Simon & Schuster II*, 916 F.2d at 784 (Newman, J., dissenting).

124. *Id.*

125. *Id.* (citing *Meyer v. Grant*, 486 U.S. 414, 422-24 (1988)).

126. *Simon & Schuster II*, 916 F.2d at 784-85 (Newman, J., dissenting) (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).

127. *Simon & Schuster II*, 916 F.2d at 785 (Newman, J., dissenting).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* According to Judge Newman, someone like John Ehrlichman could write a novel which would sell more because of his connection with the "Watergate" crimes, without con-

Judge Newman illustrated section 632-a's content-based application by citing *Children of Bedford, Inc. v. Petromelis*.<sup>132</sup> In *Children of Bedford*, two chapters of Jean Harris's autobiography contained references to her crime for which the Board held her to be subject to section 632-a.<sup>133</sup> Judge Newman remarked that if Harris' book had contained only commentary regarding her conditions in prison, then her royalties, although enhanced by the crime, would not have been subject to section 632-a.<sup>134</sup>

The dissent disagreed with the majority's two responses to the content-based discrimination of section 632-a.<sup>135</sup> First, Judge Newman claimed that the majority's response was circular in that it "defines the state interest being advanced in terms of the statute's [section 632-a] scope, thereby reaching the circular result that the statute is precisely tailored to the state's objectives."<sup>136</sup> The dissent argued that the court should focus specifically on whether New York can achieve its purpose only by withholding payments to criminals who write books about their crimes rather than focusing merely on whether crime victims are benefited by the statute.<sup>137</sup>

Judge Newman disagreed with the factual ground upon which the majority upheld the content-based discrimination of section 632-a; namely, that the sole asset of most criminals is the right to tell the story of their crimes.<sup>138</sup> Judge Newman believed that "very few criminals have a crime story worth selling and that their number is far less than the sum of criminals with assets independent of their crime proceeds plus impoverished criminals in possession of such proceeds when arrested."<sup>139</sup> Furthermore, even if the sole asset of most criminals is the right to tell the

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cern that his royalties would be held for five years in order to pay victims or other creditors. *Simon & Schuster II*, 916 F.2d at 785 (Newman, J., dissenting).

132. *Children of Bedford, Inc. v. Petromelis*, 143 Misc. 2d 999, 541 N.Y.S.2d 894 (N.Y. Sup. Ct., 1989), *aff'd*, 556 N.Y.S.2d 483 (1st Dept. 1990).

133. *Simon & Schuster II*, 916 F.2d at 785 (Newman, J., dissenting). Jean Harris, the former headmistress at the prestigious Madeira School, was convicted in 1981 of second-degree murder for the killing of diet doctor Herman Tarnower, her lover of ten years. Harris is currently serving fifteen years to life at the Bedford Hills Correctional Facility. Harris was permitted to keep \$35,000 for granting *Good Housekeeping* the serialization of her book, "*Stranger in Two Worlds*," about her life in prison. The few sentences from the approximately 5,000 word article, entitled "*My Life in Prison*" which refer to Harris' thoughts and feelings regarding her crime were determined by the New York State Supreme Court to be "merely incidental and de minimus and do not 'make up the core of the work around which the narrative is structured.'" N.Y.L.J., April 2, 1990, at 25, col. 3.

134. *Simon & Schuster II*, 916 F.2d at 785 (Newman, J., dissenting).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Simon & Schuster II*, 916 F.2d at 785 (Newman, J., dissenting).

story of their crimes, that observation, according to Judge Newman, would not validate New York's content-based regulation of speech.<sup>140</sup> Judge Newman relied on *Arkansas Writer's Project, Inc. v. Ragland*<sup>141</sup> to support his view that New York cannot select speech of a particular content for regulation just because it has not chosen to regulate all profits criminals make from telling the story of their crimes.<sup>142</sup>

Like the majority, the dissent recognized that a content-based restriction will be invalidated if the legitimate state objective can be achieved by a reasonably available alternative means which is not based on the content of the speech.<sup>143</sup> New York has attachment laws<sup>144</sup> which could be used by crime victims to secure the profits realized by criminals.<sup>145</sup> The majority found that such attachment laws are too limited because they apply only to defendants who meet numerous criteria.<sup>146</sup> Judge Newman concluded that rather than selecting books about crime for special regulation the attachment laws should be broadened as required by the first amendment.<sup>147</sup>

Judge Newman refuted the majority's reliance on New York's interest in relieving victims of the discomfort from knowing that criminals are profiting from their crimes.<sup>148</sup> He noted that the first amendment does not permit government to alleviate public outrage or victim outrage by regulating books and other forms of expression.<sup>149</sup> Furthermore, although section 632-a may deter publications by criminals recounting their crimes, it does not prevent such writings.<sup>150</sup> Criminals, and those who facilitate their writing, may still publish accounts of their criminal activities so long as they are willing to wait five years to receive their profits.<sup>151</sup>

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140. *Id.*

141. 481 U.S. 221 (1987).

142. *Simon & Schuster II*, 916 F.2d at 786 (Newman, J., dissenting). In *Arkansas Writers' Project*, the United States Supreme Court invalidated as violative of the first amendment an Arkansas tax statute which discriminated among the types of publications which could be taxed to raise revenue. *Arkansas Writers' Project*, 481 U.S. at 234.

143. *Simon & Schuster II*, 916 F.2d at 786 (Newman, J., dissenting).

144. N.Y. CIVIL PRACTICE LAW & RULES art. 62 (McKinney 1980 & Supp. 1990). See *infra* note 158.

145. *Simon & Schuster II*, 916 F.2d at 786 (Newman, J., dissenting).

146. *Id.* The majority viewed New York's attachment laws as too restrictive, making recovery by many crime victims who would otherwise recover under section 632-a virtually impossible. *Simon & Schuster II*, 916 F.2d at 783.

147. *Id.* at 786 (Newman, J., dissenting).

148. *Id.* at 784.

149. *Id.* at 786 (Newman, J., dissenting).

150. *Id.*

151. *Simon & Schuster II*, 916 F.2d at 783.

Judge Newman found other aspects of section 632-a “highly offensive” to the first amendment.<sup>152</sup> Requiring publishers to submit contracts which involve those accused of crimes will deter publishers from making advance payments to accused authors in order to avoid the possibility that the author claiming to be innocent will later be convicted.<sup>153</sup> In short, prohibiting monetary advances deters innocent people falsely accused of crimes from writing books.<sup>154</sup> Also, the threat of holding a publisher liable for any payments later determined to be covered by section 632-a, where the author declines to turn such payments over to the Board, may keep publishers from advancing funds to authors.<sup>155</sup> Holding publishers liable could lead to decisions not to “publish books of high public interest.”<sup>156</sup> Moreover, Judge Newman claimed that the statute’s broad coverage of contracts and payments for books “that include only a brief reference to an author’s crime or even to his ‘thoughts’ about his crime will inevitably tend to impel publishers to purge manuscripts of all material arguably within the scope of the statute in order to escape its coverage and the risk of retroactive liability.”<sup>157</sup>

Additionally, Judge Newman stated that New York already has crime-restitution laws<sup>158</sup> which provide crime victims with a means to

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Simon & Schuster II*, 916 F.2d at 787. Hill would not have participated in the publishing of *Wiseguy* had he not been assured payment. *Id.* at 779.

157. *Simon & Schuster II*, 916 F.2d at 787 (Newman, J., dissenting). Not all works containing a brief reference to the criminal’s thoughts have been held subject to section 632-a. The few sentences from the approximately 5,000 word article containing Jean Harris’ thoughts and feelings regarding her crime were determined by the New York State Supreme Court to be “merely incidental and de minimus and do not ‘make up the core of the work around which the narrative is structured.’” N.Y.L.J., April 2, 1990, at 25, col. 3. *See supra* note 133.

158. N.Y. PENAL LAW § 60.27 (McKinney 1987 & Supp. 1990) (Entitled “Restitution and Reparation”) states:

1. In addition to any of the dispositions authorized by this article [article 60 “Authorized dispositions of offenders”], the court shall consider restitution to the victim of the crime and may require restitution as part of the sentence imposed upon a person convicted of an offense, and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to make restitution of the fruits of his offense or reparation for the loss or damage caused thereby. The district attorney shall where appropriate advise the court at the time of sentencing that the victim seeks restitution, the extent of injury or economic loss or damage of the victim, and the amount of restitution sought by the victim in accordance with his responsibilities under subdivision two of section 390.50 of the criminal procedure law and article twenty-three of the executive law. The court shall hear and consider the information presented by the district attorney in this regard.

2. Whenever the court requires restitution or reparation to be made, the court must make a finding as to the fruits of the offense or the loss or damage caused by the

receive restitution from their perpetrators.<sup>159</sup> As in the case of New York's attachment law, Judge Newman contended that if the restriction needs strengthening to increase its effectiveness, the New York legislature should adopt such reforms, rather than enacting a statute which violates the first amendment.<sup>160</sup>

Finally, Judge Newman questioned the effectiveness of section 632-a. He noted that in the first eleven years of its operation, the statute had produced only five escrow accounts, three of which involved the same criminal.<sup>161</sup> Judge Newman concluded that the societal benefit from the books which would have been published were it not for section 632-a outweighs any benefit to the "handful of victims" who have received

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offense. If the record does not contain sufficient evidence to support such finding or upon request by the defendant, the court must conduct a hearing upon the issue in accordance with the procedure set forth in section 400.30 of the criminal procedure law.

3. The provisions of sections 420.10, 420.20 and 420.30 of the criminal procedure law shall apply in the collection and remission of restitution and reparation.

4. For purposes of the imposition, determination and collection of restitution or reparation, as provided in this chapter, the term "offense" shall include the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to an offense.

5. (a) Except upon consent of the defendant or as provided in paragraph (b) of this subdivision, or as a condition of probation or conditional discharge as provided in paragraph (g) of subdivision two of section 65.10 of this chapter, the total amount of restitution or reparation required by the court shall not exceed ten thousand dollars in the case of a conviction for a felony, or five thousand dollars in the case of a conviction for any offense other than a felony.

(b) The court in its discretion may impose restitution or reparation in excess of the amounts specified in paragraph (a) of this subdivision, provided however that the amount in excess must be limited to the return of the victim's property, including money, or the equivalent value thereof; and reimbursement for medical expenses actually incurred by the victim prior to sentencing as a result of the offense committed by the defendant.

6. Any payment made as restitution or reparation pursuant to this section shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment.

7. In the event that the court requires restitution or reparation to be made to a person and that person dies prior to the completion of said restitution or reparation, the remaining payments shall be made to the estate of the deceased.

8. The court shall in all cases where restitution or reparation is imposed direct as part of the disposition that the defendant pay a designated surcharge of five percent of the entire amount of a restitution or reparation payment to the official or organization designated pursuant to subdivision eight of section 420.10 of the criminal procedure law. The designated surcharge shall not exceed five percent of the amount actually collected.

159. *Simon & Schuster II*, 916 F.2d at 787 (Newman, J., dissenting). Section 60.27 authorizes sentencing judges to give redress in every case. See N.Y. PENAL LAW § 60.27 (McKinney 1987 & Supp. 1990) *supra* note 157.

160. *Simon & Schuster II*, 916 F.2d at 787 (Newman, J., dissenting).

161. *Id.*

funds from escrow accounts set up by the Board.<sup>162</sup> The existing restitution statutes of New York could have sufficiently provided victims with compensation without burdening speech.<sup>163</sup>

## VI. ANALYSIS

### A. *The Court Correctly Applied Strict Scrutiny to Section 632-a*

The Supreme Court has held that statutes which restrict payment for expressive activities, thereby reducing the amount of speech, substantially burden speech and require strict scrutiny.<sup>164</sup> The Court has noted that "regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the first amendment."<sup>165</sup> By limiting its reach to certain types of expression which "reenact" crimes or express "thoughts, feelings, opinions or emotions" about crimes, section 632-a is content-based.<sup>166</sup> Section 632-a's application to a particular contract depends entirely on the content of the speech to be published.<sup>167</sup>

Section 632-a may prevent a criminal from speaking or writing about their crimes due to the possibility that any monies earned from such expression may be usurped by civil actions brought against the criminal.<sup>168</sup> In examining section 632-a, the Second Circuit recognized that without a "financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write."<sup>169</sup> Section 632-a clearly has "the effect of excluding from circulation the expression of criminals who would write about their crimes."<sup>170</sup> By placing special burdens on criminal authors, or criminals who aid authors in retelling their story and publishers willing to engage in such expression, section 632-a deters expression based on its content.<sup>171</sup> Once a court finds that speech is regulated based on its content or subject matter, strict scrutiny must be applied.<sup>172</sup>

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162. *Id.*

163. *Id.*

164. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 788-89 (1988); *Meyer v. Grant*, 486 U.S. 414, 422-24 (1988).

165. *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

166. *Simon & Schuster II*, 916 F.2d at 782.

167. *Id.*

168. *Id.*

169. *Id.* at 781.

170. *Id.* at 782.

171. *Simon & Schuster II*, 916 F.2d at 781-82.

172. *See Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230-31 (1987) (government scheme that exempts religious, profes-

In addition, section 632-a is subject to strict scrutiny because it singles out those engaged in expressive activities by applying only to gains from such activities, and not to gains from any other activities.<sup>173</sup> Section 632-a, which applies only to persons contracting with respect to "a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, [or] live entertainment of any kind," and not to any other contracts, assets or monies owed to accused or convicted persons, singles out persons engaged in expressive activity.<sup>174</sup> Only persons who contract to publish or create expression are subject to the statute's burdens; businesses that contract to make payments to accused and convicted persons for any other purposes are not affected by the statute.<sup>175</sup> By singling out expression for special treatment, section 632-a creates a disincentive to write books that will be subject to its terms, thereby deterring individuals from creating speech of specified content in ways that generally applicable measures do not.<sup>176</sup> No assets, other than those derived from the retelling of the criminal's story, are subject to attachment under the statute.<sup>177</sup> Such differential treatment must also survive strict scrutiny,<sup>178</sup> for that treatment is based on both the subject matter of the proposed speech and the identity of the proposed speaker.<sup>179</sup> Such regulations are subject to strict scrutiny.<sup>180</sup>

### *B. Section 632-a Does Not Withstand Strict Scrutiny*

#### 1. Section 632-a Serves a Compelling State Interest

As previously mentioned, section 632-a serves the compelling objective of "barring criminals from profiting at the expense of victims who are in need of compensation and press their demands for restitution."<sup>181</sup>

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sional, trade or sports journals from sales tax is a regulation based on content since officials must scrutinize the content of the publications as a basis for imposing the tax).

173. *Simon & Schuster II*, 916 F.2d at 782.

174. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1990); see *supra* note 50.

175. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1990).

176. *Simon & Schuster II*, 916 F.2d at 782; see *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

177. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1990); see *supra* note 50.

178. *Arkansas Writers' Project*, 481 U.S. at 231.

179. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1990); see *supra* note 50.

180. See *e.g.*, *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) (citation omitted) ("As a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (strict scrutiny for a law prohibiting certain speakers from spending corporate money for certain purposes, since the "legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.").

181. *Simon & Schuster II*, 916 F.2d at 782.

Rather than suppressing speech, section 632-a serves the purpose of assuring "that funds are set aside out of profits derived by criminals from the exploitation of their crimes and made available for the payment of judgments later recovered by the victims of the crimes exploited."<sup>182</sup> Not only does section 632-a prevent the unjust enrichment of criminals, it also decreases the likelihood that society will have to support victims of crime through social programs, satisfies victims' sense of justice and desire for retribution, and increases the criminal's awareness of the consequences of his crime.<sup>183</sup> As previously stated, finding a compelling interest is only one factor in allowing a content-based restriction to survive strict scrutiny.<sup>184</sup> Once the court determines that section 632-a serves a compelling state interest, it must then decide whether the statute is necessary to achieve that interest.<sup>185</sup>

## 2. The Second Circuit Failed to Adequately Explore the Existence of Less Restrictive Alternatives

In determining whether section 632-a withstands strict scrutiny, New York must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."<sup>186</sup> Having found that the statute serves a compelling state interest,<sup>187</sup> the court's evaluation of the constitutionality of section 632-a must then turn on whether the statute is narrowly tailored towards achieving that interest.<sup>188</sup> Where, as here, the state has imposed a content-based restriction on speech, the least restrictive alternative requirement is extremely strict; alternatives which are less restrictive of speech must be used if they would accomplish the state's objective equally well.<sup>189</sup>

In order to evaluate the Second Circuit's application of the least restrictive alternative requirement in this case, a review of previous Supreme Court decisions is necessary. In *Boos v. Barry*,<sup>190</sup> the Supreme Court examined the constitutionality of District of Columbia Code sec-

182. *Id.* at 783.

183. *Id.* (citing Note, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 CALIF. L. REV. 1353, 1367 (1988) (footnotes omitted)).

184. NAACP v. Button, 371 U.S. 415, 438 (1963); see also *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

185. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (citing NAACP v. Alabama, 357 U.S. 449, 463 (1958)).

186. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

187. *Simon & Schuster II*, 916 F.2d at 782-83.

188. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

189. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960).

190. 485 U.S. 312 (1988).



tion 22-1115 which made it unlawful, within five hundred feet of a foreign embassy, to display any sign that tends to bring the foreign government into "public odium" or "public dispute."<sup>191</sup> To determine whether this content-based measure was narrowly tailored, the court looked beyond existing District of Columbia law in its search for possible less restrictive alternatives.<sup>192</sup> The Court compared the law with an analogous statute passed by Congress, which applied inside the District of Columbia, but which was not directed at the content of the speech.<sup>193</sup> Rather, the federal statute was aimed at any activity having the prohibited effects.<sup>194</sup> The Court concluded that the availability of a Congressional-type approach amply demonstrated that section 22-1115 was not crafted with sufficient precision to withstand first amendment scrutiny.<sup>195</sup> Although New York's section 632-a serves a compelling interest, it, like the District of Columbia law struck down in *Boos*, is not narrowly tailored because less restrictive alternatives exist.<sup>196</sup>

Reviewing the Court's application of the least restrictive alternative requirement in other contexts illustrates the strictness with which it is applied in content-based cases. Both time, place, or manner restrictions and restrictions of symbolic speech must be "narrowly tailored" to serve legitimate government interests.<sup>197</sup> However, the content-neutral limitation on speech need not be the least restrictive means of achieving that interest.<sup>198</sup> As long as the means chosen are not substantially broader than necessary to achieve the government's purpose, a time, place, or manner regulation will not be invalidated simply because a court concludes that the government's interest could be adequately served by some alternative less restrictive of speech.<sup>199</sup>

In *Ward v. Rock Against Racism*,<sup>200</sup> the Court emphasized the higher degree of tailoring required for content-based regulations, as com-

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191. *Id.* at 316.

192. *Id.* at 324.

193. *Id.*

194. The court found that Title 18 U. S. C. § 112 was "not narrowly directed at the content of the speech but at any activity, including speech, that has the prohibited effects. Moreover, section 112, unlike section 22-1115, does not prohibit picketing; it only prohibits activity undertaken to 'intimidate, coerce, threaten, or harass.'" *Boos v. Barry*, 485 U.S. 312, 326 (1988).

195. *Id.* at 329.

196. *Id.*

197. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2756-57, 2758 n.6 (1989).

198. *Id.* at 2757-58.

199. *Id.* at 2758.

200. 109 S. Ct. 2746 (1989) (upholding the constitutionality of a noise regulation requiring musical performers to use a sound system and sound technician provided by the City of New York, in order to avoid disturbing surrounding residents).

pared with mere time, place, or manner restrictions.<sup>201</sup>

While time, place, or manner regulations must also be 'narrowly tailored' in order to survive first amendment challenge, we have never applied strict scrutiny in this context. As a result, the same degree of tailoring is not required of these [time, place, or manner] regulations, and least-restrictive-alternative analysis is wholly out of place.<sup>202</sup>

*Ward* also noted that the degree of tailoring required for judging the validity of symbolic conduct under *United States v. O'Brien*<sup>203</sup> is little, if any, different from the standard applied to time, place, or manner restrictions.<sup>204</sup> Both have far less stringent standards than the standard applied to content-based restrictions.

The *Ward* Court implicitly recognized that the "narrowly tailored" requirement in content-based cases calls for a sifting through of all conceivable alternative means that might be less burdensome on speech.<sup>205</sup> Examining all possible viable alternatives may seem impractical, yet the task is one which a court must conscientiously seek to perform. Government restriction of speech based on its content is tolerated in only the rarest circumstances. The first amendment is designed to ensure "uninhibited, robust, and wide-open" debate, creating a genuine marketplace of ideas.<sup>206</sup> Content-based regulations, by eliminating or chilling speech, hamper the dissemination of information, reduce the impact of this marketplace, and cause the public to engage in less informed decision making.<sup>207</sup> Such regulations therefore threaten the essence of a democratic society. For this reason, statutes such as section 632-a, which restrict speech based on its content, must be subjected to the very strictest scrutiny in an attempt to discover any less restrictive alternative that may serve the state's goal equally well.

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201. *Id.* at 2757-58.

202. *Id.* at 2758, n.6.

203. 391 U.S. 367 (1968) (upholding a statute which prohibited destruction of draft cards).

204. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757 (1989) (citing *Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984)). In order to come under *O'Brien's* less demanding rule, the Supreme Court has required "that the governmental interest in question be unconnected to expression." *Simon & Schuster II*, 916 F.2d at 781 (citing *Texas v. Johnson*, 109 S. Ct. 2533, 2541 (1989)).

205. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757 (1989).

206. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). See also *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (citations omitted) (purpose of the first amendment is "to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'").

207. Note, *Criminals Selling Their Stories: The First Amendment Requires Legislative Re-examination*, 72 CORNELL L. REV. 1331, 1341 (1986-87).

The court of appeals in *Simon & Schuster v. Fischetti*<sup>208</sup> neglected to use this approach in determining whether section 632-a was the least speech restrictive alternative. The court correctly rejected application of *O'Brien*, holding that strict scrutiny, rather than *O'Brien*'s lesser standard of scrutiny, had to be applied.<sup>209</sup> However, it appears that the court there proceeded to employ *O'Brien*'s weaker standard with regard to less restrictive alternatives. The majority's less restrictive alternative analysis consisted principally of the observation that New York would be better off with section 632-a in effect than without it.<sup>210</sup> The only alternative the majority considered was the situation as it would exist without section 632-a.<sup>211</sup> However, the majority did respond to alternatives that the dissent suggested and claimed would be less restrictive of speech than section 632-a.<sup>212</sup> The court failed to take into account other possibilities a criminal might receive by participating in a witness protection program. Such monies are outside of section 632-a's reach, yet are fully available to victims seeking compensation.

The majority's only discussion of alternatives to section 632-a was in response to *Simon & Schuster*'s and the dissent's suggestion that means less restrictive of speech were available.<sup>213</sup> In response to the suggestion that less restrictive alternatives were available because New York already had laws allowing victims to attach a criminal's assets of criminals including profits from a recounting of their crime, the court simply claimed that such attachment laws were too limited.<sup>214</sup> The majority stopped its investigatory process at this point and failed to explore the possibility of altering section 632-a to make it less speech restrictive.<sup>215</sup> For example, the court appeared unwilling to acknowledge the possibility that victims may reach *any* of a criminal's assets in order to satisfy a civil judgment.

In contrast, dissenting Judge Newman believed that section 632-a was not narrowly tailored to achieving its goal.<sup>216</sup> He identified in general terms a few alternatives that would be less restrictive of speech than section 632-a.<sup>217</sup> The existence of these alternatives was enough to invalidate section 632-a. Judge Newman did not examine in detail how they

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208. 916 F.2d 777 (2d Cir. 1990), *cert. granted*, 59 U.S.L.W. 3546 (U.S. Feb. 19, 1991)(No. 90-1059).

209. *Simon & Schuster II*, 916 F.2d at 781.

210. *Id.* at 781-84.

211. *Id.* at 783-84.

212. *Id.*

213. *Id.*

214. *Simon & Schuster II*, 916 F.2d at 783-84.

215. *Id.*

216. *Id.* at 786 (Newman, J., dissenting).

217. *Id.* at 786-87.

might work, nor did he probe for still other possible solutions.<sup>218</sup>

The dissent suggested, for example, using existing attachment laws to secure for crime victims all profits realized by criminals, including but not limited to profits from book publications.<sup>219</sup> Realizing that the majority might have had a legitimate concern that such attachment laws are too limited, Judge Newman noted that, "If that is so, the answer required by the first amendment is to broaden the remedies, not to select books about crime for special regulation."<sup>220</sup>

A less restrictive alternative offered by the dissent was to use New York's comprehensive restitution statute,<sup>221</sup> which authorizes sentencing judges in every case to order restitution.<sup>222</sup> Although the dissent recognized that a modification of New York's restitution statute might be in order to assure that it achieves the same purpose as section 632-a, the fact that the alternative existed was enough to invalidate the Son of Sam law:

Nothing in the Constitution prevents [the] enactment of such a comprehensive statute providing for restitution to crime victims. If that statute needs strengthening to increase its effectiveness, New York is free to adopt needed reforms. The issue of how best to secure restitution for crime victims involves policy judgments for the state legislature.<sup>223</sup>

The dissent correctly recognized that the judiciary is to decide whether section 632-a employs a technique permitted by the first amendment.<sup>224</sup>

Unlike Judge Newman, the majority failed to carry out its responsibility to search for possible less restrictive alternatives. The majority merely affirmed that victims of crime would be better served with section 632-a in effect than without it.<sup>225</sup> This was never in doubt. The majority made no attempt to consider whether the statute could be altered or amended to make it less speech restrictive. In contrast, the dissent suggested less speech restrictive alternatives.

218. *Id.* at 785-87.

219. *Simon & Schuster II*, 916 F.2d at 786.

220. *Id.*

221. N.Y. PENAL LAW § 60.27 (McKinney 1987 & Supp. 1990). See *supra* note 158 and accompanying text.

222. *Simon & Schuster II*, 916 F.2d at 787 (Newman, J., dissenting).

223. *Id.*

224. *Id.* The court's job is to ensure that the least speech restrictive alternative is used. In our governmental scheme, courts have final authority in interpreting constitutional controversies. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

225. *Simon & Schuster II*, 916 F.2d at 781-84.

C. *Alternatives Less Restrictive of Speech Available to the Court*

There are several alternatives less restrictive of speech that exist which may achieve New York's goal equally well, some of which are content-neutral. As previously mentioned, the dissent recognized that New York's attachment and restitution laws could achieve section 632-a's goal.<sup>226</sup> Addressing such laws, the majority noted that New York's general statutory scheme for attachment in its present form is too limited to fulfill the state's objective, for article 62:

is restricted to situations where the defendant: is a nondomiciliary residing outside New York or a foreign corporation not qualified to do business in New York; is a resident or domiciliary who cannot be served despite diligent efforts to do so; has disposed of, removed or secreted property or is about to do so, with the intent to defraud creditors or frustrate a possible judgment; or is defending an action based on a judgment entitled to full faith and credit.<sup>227</sup>

These defects, however, can easily be cured by broadening article 62 so that its application, at least in lawsuits by victims of crime against the criminal who wronged them, is not limited to one of these categories. Strengthening New York's attachment or restitution statutes may increase their effectiveness, enabling them to achieve the same objectives as section 632-a in a content-neutral manner.

Another content-neutral suggestion is to seize *all* of a criminal's assets for five years in the same manner as section 632-a. Necessities of life such as money for food, transportation and housing would be exempt from seizure. Although somewhat more severe than section 632-a, this alternative achieves the statute's goals of providing compensation for victims and preventing criminals from profiting from their crimes while not focusing on the content of the criminal's speech.

A further alternative to these legislative actions exists which serves section 632-a's goal to the extent that it is to prevent criminals from profiting from their crimes. That objective can be fulfilled without chilling speech merely by people refusing to purchase criminal works, thereby discouraging publishers from subsidizing them. If the people of New York are truly offended by criminals profiting by the exploitation of their crimes through the media and wish to deter such action from occurring, let them make the decision individually and collectively. The first

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226. *Id.* at 786-87 (Newman, J., dissenting).

227. *Id.* at 783. See also N.Y. PENAL LAW § 60.27 (McKinney 1987 & Supp. 1990) *supra* note 157.

amendment does not allow the government to make these decisions for the people. In a free society, those decisions are properly left to the people themselves. It is important to note that to the extent that the goal of section 632-a is to provide victims with compensation, the above suggestion fails. No specific statutory mechanism would be left in place to provide compensation for victims of crimes.<sup>228</sup>

In addition to these content-neutral alternatives, a less restrictive content-based alternative exists; allow New York to impound a small percentage of the criminal's profits for five years. Criminals deterred from writing about their crimes if *all* of their profits would be seized to satisfy possible civil judgments would be more likely to write about their crimes if they could have immediate access to *some* of their money. Under this proposal, even though publishers would not receive the same amount of money they would have had the statute not been in effect, they still have a viable financial incentive. They might thus publish works such as *Wiseguy* in order to further public knowledge of criminal's thoughts and motivations. This would be consistent with the communication industry's historic role in public debate and would also generate publicity, both likely to lead to profits in future enterprises. Although still focusing on the content of the criminal's speech, such statutes are less speech restrictive than section 632-a. This is a compromise, but it better preserves the first amendment and still substantially accomplishes the goal of section 632-a.

## VII. CONCLUSION

The Second Circuit's failure to invalidate section 632-a by adequately searching for alternatives less restrictive of speech has potentially grave consequences for a free society dependent on vigorous, robust debate. The underlying principle of the first amendment invites discussion of any and every topic, including crime.<sup>229</sup> Criminals, no less than other members of society, have a right to free expression. That right encompasses communications about their crimes, motivations, and intended objectives. Society is well served when it learns about crime, how it is committed, and what circumstances enhance its likelihood. That knowledge enables the public to better cope with one of the most troublesome social problems of our times.

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228. Existing New York statutes, such as those involving wrongful death or other tort action, may still provide adequate compensation to victims.

229. The goal of the first amendment is "to assure unfettered interchange of ideas for the bringing about of social changes desired by the people." *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (citation omitted).

However repugnant criminals such as Henry Hill and David Berkowitz may be, it is in our best interest to learn as much about them as possible. Simply reading the memoirs of criminals may not provide definitive answers to the crime problem, yet it may help us to alleviate its impact. To deny the public that opportunity through restrictive legislation such as section 632-a only ensures an even lesser understanding of criminal conduct. First-hand accounts provide excellent source material for more critical social analysis.

The public interest is thus best served by allowing criminals to express themselves. It is not only mass murderers whose expression is chilled by statutes such as section 632-a. Had section 632-a been in effect, the statute might have deterred publication of *On Civil Disobedience* by Henry David Thoreau, who refused to pay taxes for moral and political reasons.<sup>230</sup> It may have also kept from publication works such as *Witness* by Whitaker Chambers, a Communist party member who later became a government informer, and *Where Do We Go From Here?* by Martin Luther King, Jr., a civil rights leader who was often jailed by authorities for protesting segregation in the south.<sup>231</sup>

It is encouraging that on February 19, 1991, the Supreme Court granted certiorari to the *Simon & Schuster* case.<sup>232</sup> Hopefully, the Court will uphold the guarantees of the first amendment by invalidating section 632-a. This will send a clear message to legislatures, that should they desire to enact laws with the same worthwhile purpose as section 632-a, they will ensure that it is done in the least restrictive fashion possible.

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230. *Simon & Schuster II*, 916 F.2d at 787 (Newman, J., dissenting).

231. *Id.*

232. *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777 (2d Cir. 1990), cert. granted, sub nom. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 59 U.S.L.W. 3546 (U.S. Feb. 19, 1991) (No. 90-1059).

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