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## Constitutional Law - First Amendment - Freedom of Speech - Content-Based Restrictions

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# Recent Decisions

CONSTITUTIONAL LAW—FIRST AMENDMENT—FREEDOM OF SPEECH—CONTENT-BASED RESTRICTIONS—“SON OF SAM” LAWS—A content-based financially burdensome speech restriction that is not narrowly tailored to achieve a compelling state interest is inconsistent with the First Amendment.

*Simon & Schuster, Inc. v Members of the New York State Crime Victims Board, et al.*, US \_\_\_, 112 S Ct 501, (1991).

In 1977, in response to public outrage over the sale of rights to the story concerning the crimes of serial killer David Berkowitz,<sup>1</sup> the New York Legislature enacted New York Executive Law section 632-a<sup>2</sup> (“Son of Sam Law”).<sup>3</sup> The law requires those who contract with an accused or convicted person for the rights to publish or produce a story of the crime to submit, to the Crime Victims Board (“Board”), a copy of the contract.<sup>4</sup> The accused or convicted

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1. *Simon & Schuster, Inc. v Members of the New York State Crimes Victims Board*, 724 F Supp 170 (SDNY 1989). Citing New York legislative history, the district court noted the statement of New York State Senator Emmanuel R. Gold, the bill’s sponsor:

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.

*Simon & Schuster, Inc.*, 724 F Supp at 174.

2. 1977 NY Laws 823, 1978 NY Laws 417, 1986 NY Laws 74, 1991 NY Laws 379, NY Exec Law §632-a (McKinney 1982 & Supp 1992).

3. *Simon & Schuster, Inc.*, 724 F Supp at 173-4. The law’s popular name is derived from the name given to serial killer David Berkowitz, the “Son of Sam,” who sold the rights to the story concerning his crimes. *Id.*

4. NY Exec Law §632-a(1) (McKinney 1982 & Supp 1992). Section 632-a(1) provides:

Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or

person cannot directly receive any payments that he is entitled to under the contract, however, because the statute requires that such income payments must be made to the Board.<sup>5</sup> The Board is required to deposit the payment in an escrow account, with said funds to be made available to both the victims of the crime who have recovered money judgments in civil actions against the criminal and to the criminal's other creditors.<sup>6</sup> The Son of Sam Law defines "persons convicted of a crime" in terms broad enough to include within the statute's coverage persons who, in a book or other work, merely admit to a crime but are not convicted of that crime.<sup>7</sup>

In 1981, Simon & Schuster sought to publish a book detailing organized crime in New York City.<sup>8</sup> As a result, in August 1981, Henry Hill,<sup>9</sup> an admitted organized crime figure, contracted with

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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 representative.

NY Exec Law §632-a(1).

5. *Id.*

6. NY Exec Law §632-a(11) (McKinney 1982 & Supp 1991). Subparagraphs (c) and (d) read as follows:

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

NY Exec Law §632-a(11)(c), (d).

7. NY Exec Law §632-a(10)(b) (McKinney 1982 & Supp 1992). Subparagraph (b) reads:

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.

NY Exec Law §632-a(10)(b).

8. *Simon & Schuster, Inc.*, 724 F Supp at 172.

9. In 1980, Henry Hill, after being arrested on charges of conspiracy to sell drugs, cooperated with the federal government and was placed in the Federal Witness Protection Program. *Id.*

author Nicholas Pileggi for a book about Hill's life.<sup>10</sup> Subsequently, a publishing agreement between Hill and Pileggi and Simon & Schuster, providing for payments to be made to both Hill and Pileggi, was signed.<sup>11</sup> Hill and Pileggi's collaboration resulted in the January 1986 publication of the book entitled *Wiseguy: Life in a Mafia Family* ("Wiseguy").<sup>12</sup> The book describes Henry Hill's involvement with organized crime in New York City and throughout the book Hill admits to having participated in a variety of crimes.<sup>13</sup>

When the Crime Victims Board learned of *Wiseguy* soon after it was published, they ordered Simon & Schuster to furnish copies of any contracts it had entered into with Hill, to provide information regarding the payments it had made to Hill, and to cease making any further payments to Hill.<sup>14</sup> Simon & Schuster complied with the Board's order; however, they had already paid Hill's literary agent \$96,250 in advances and royalties on Hill's behalf, and were holding \$27,958 for eventual payment to Hill.<sup>15</sup> The Board reviewed the book and contract, and determined (1) the book was covered by section 632-a of the Executive Law, and (2) Simon & Schuster violated the law when they failed to submit their contract with Hill to the Crime Victims Board and made payments directly to Hill.<sup>16</sup> When the Board ordered Hill to turn over the payment he had already received, and ordered Simon & Schuster to turn over all money payable to Hill at the time or in the future,<sup>17</sup> Simon & Schuster brought suit against the members of the Board under 42 USC section 1983,<sup>18</sup> seeking a declaration that New York Exec-

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10. *Simon & Schuster, Inc. v Members of the New York State Crime Victims Board*, 112 S Ct 501, 506 (1991).

11. *Simon & Schuster, Inc.*, 112 S Ct at 506.

12. Nicholas Pileggi, *Wiseguy: Life in a Mafia Family* (Simon & Schuster 1986) ("*Wiseguy*"). The book was produced into the movie, *Goodfellas* (Warner Bros. 1990).

13. *Simon & Schuster, Inc. v Fischetti*, 916 F2d 777, 779 (2d Cir 1990). In *Wiseguy*, Hill describes, among other crimes, a nearly six million dollar theft from the Lufthansa terminal at Kennedy Airport and the bribery of college basketball players. *Id* at 779.

14. *Simon & Schuster, Inc.*, 112 S Ct at 507.

15. *Id.*

16. *Id.*

17. *Simon & Schuster, Inc.* 916 F2d at 780. Simon & Schuster was notified of the Board's findings on June 15, 1987 via a Notice and Proposed Determination and Order issued by the Board. *Id.* The order became a Final Determination and Order on July 15, 1987 after Simon & Schuster failed to challenge the Notice and Order issued by the Board. *Id.*

18. 42 USC §1983 (1982) provides:

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

utive Law section 632-a violated the First Amendment<sup>19</sup> and an injunction barring its enforcement.<sup>20</sup> In the United States District Court, Southern District New York, Simon & Schuster moved for summary judgment<sup>21</sup> and defendant Crime Victims Board cross-motivated for same.<sup>22</sup> The district court, in granting summary judgment in favor of the defendant Crime Victims Board, concluded that New York Executive Law section 632-a regulates only the author or publisher's non-expressive activity, and that any incidental effect that the Son of Sam Law may have on First Amendment rights is outweighed by the important interest the New York Legislature has in compensating victims of crimes.<sup>23</sup> The United States Court of Appeals, Second Circuit, affirmed the lower court's decision, concluding that section 632-a was constitutional because it was narrowly tailored to fit the compelling state interest of compensating victims of crime.<sup>24</sup>

The United States Supreme Court, after granting certiorari, reversed the decision of the court of appeals.<sup>25</sup> The Supreme Court determined that the Son of Sam Law was a content-based statute, and, as such, the First Amendment presumptively placed the type

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other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC § 1983.

19. US Const, Amend I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Id.

20. *Simon & Schuster, Inc.*, 112 S Ct at 507-08.

21. Summary judgment is a motion requested by a party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56(c).

22. *Simon & Schuster, Inc.*, 724 F Supp at 180.

23. Id at 179.

24. *Simon & Schuster, Inc.*, 916 F2d at 784-87. Of note is the dissenting opinion of Judge Jon O. Newman. Judge Newman concluded that the Son of Sam Law does not withstand the strict scrutiny test. Id at 784. He objected to the majority's conclusion, via their analysis that equated the state interest with the statute's scope, that the statute is narrowly tailored to achieve the State's objective. Id at 785. In addition, he rejects victim outrage and victim compensation as compelling interests. Id at 786. Further, Judge Newman contended that the statute is underinclusive. Id. Finally, he suggested that the solution to insuring restitution to crime victims may lie in broadening New York's already existing attachment remedies. Id.

25. *Simon & Schuster, Inc.*, 112 S Ct at 512. Justice O'Connor delivered the unanimous (8-0) decision of the Court. Justice Thomas did not participate in the decision. Id.

of restrictions it imposed beyond the legislative power of Congress.<sup>26</sup> The Court stressed the importance of avoiding a restriction that causes a "chilling effect," driving viewpoints or ideas from the marketplace.<sup>27</sup>

Further, the Supreme Court addressed several specific arguments raised by the Board. First, the Court rejected the Board's attempt to distinguish the Son of Sam Law, which escrows the speaker's income for a limited amount of time (five years), from an Arkansas statute, reviewed by the Court in *Arkansas Writers' Project, Inc v Ragland, Commissioner of Revenue of Arkansas*,<sup>28</sup> that imposed an outright percentage tax on receipts from sales of tangible personal property.<sup>29</sup> The Board sought to make such a distinction because the Supreme Court, in *Arkansas Writers' Project*, concluded that the subject tax violated the First Amendment free press guarantee.<sup>30</sup> The Supreme Court, however, rejected this particular argument of the Board, recognizing the statutes in both cases as financial regulations operating as disincentives to speak.<sup>31</sup>

Second, the Board argued that for discriminatory financial treatment to be considered suspect under the First Amendment, illicit legislative intent to suppress certain ideas is a requisite.<sup>32</sup> The Court, quoting *Minneapolis Star & Tribune Co. v Minnesota Commissioner of Revenue*,<sup>33</sup> reiterated that "illicit legislative intent is not the sine qua non of a violation of the First Amendment."<sup>34</sup>

Additionally, the Board asserted that because the Son of Sam Law did not target the media, but instead applied to any "entity," it did not violate the First Amendment protection granted the media from content based financial regulation.<sup>35</sup> The Court, however, dismissed this contention, stating, "[t]he Government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker."<sup>36</sup>

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26. Id at 508.

27. Id.

28. 481 US 221 (1987).

29. Id at 224. The statute in question, the Arkansas Gross Receipts Act, specified exemptions that included, in part, newspapers and "religious, professional, trade and sport journals and/or publications printed and published within this State." Id.

30. Id at 233.

31. *Simon & Schuster, Inc.*, 112 S Ct at 508.

32. Id at 509.

33. 460 US 575 (1983).

34. *Simon & Schuster, Inc.*, 112 S Ct at 509 citing *Minneapolis Star*, 460 US at 592.

35. *Simon & Schuster, Inc.*, 112 S Ct at 509.

36. Id.

Before reaching the conclusion that the provisions of section 632-a were inconsistent with the First Amendment, however, the Court applied a "compelling interest" analysis to the facts of the case.<sup>37</sup> The Court conceded that although the state's interests in ensuring both that criminals do not profit from their crimes and that crime victims receive compensation from those who do them harm are compelling, classifying a criminal's assets (i.e. attaching the profits from "storytelling" to the exclusion of all other forms of income) does not achieve that objective.<sup>38</sup> The Court reasoned that the State's interest in assigning the proceeds of crime to the victim is unrelated to the distinction between income from storytelling and other income.<sup>39</sup> In addition, the wording of the statute<sup>40</sup> regarding the works to which it applies, combined with the statute's broad definition of "person convicted of a crime"<sup>41</sup> results in a statute that is overinclusive.<sup>42</sup>

Thus, the Supreme Court concluded that:

[I]n the Son of Sam Law, New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income. The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam Law is not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment.<sup>43</sup>

Justice Blackmun concurred in the opinion, but thought it necessary for the Court, because most other states have similar legislation, to provide future guidance by stating that the statute was underinclusive as well as overinclusive.<sup>44</sup>

In a separate concurring opinion, Justice Kennedy, while agreeing with the decision of the Court, excepted to the "compelling in-

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37. *Id.* at 509-11.

38. *Id.* at 510. In *Arkansas Writers' Project*, the Supreme Court refused to accept as "compelling" such interests as raising revenue, fostering communication, and encouraging fledgling publishers because those interests were unrelated to a press/non-press categorization. *Arkansas Writers' Project*, 481 US at 231-32.

39. *Simon & Schuster, Inc.*, 112 S Ct at 510.

40. NY Exec Law §632-(a)(1) (McKinney 1982 & Supp 1992) (cited in note 4).

41. NY Exec Law §632-a(1) (McKinney 1982 & Supp 1991) (cited in note 7).

42. *Simon & Schuster, Inc.*, 112 S Ct at 511. By way of illustration, the Court cites, *inter alia*, *The Autobiography of Malcolm X*, *The Confessions of St. Augustine*, and *Civil Disobedience*, by Henry David Thoreau, as works which would be subject to the restrictions imposed by the Son of Sam Law. *Id.* See also *Appendix to Brief Amicus Curiae on Behalf of the Association of American Publishers, Inc.* for a comprehensive list of titles that the Association of American Publishers maintains would be subject to the law's restrictions.

43. *Simon & Schuster, Inc.*, 112 S Ct at 512.

44. *Id.* (Blackmun concurring).

terest" analysis utilized by the Court as unnecessary and incorrect.<sup>45</sup> He asserted that the First Amendment protection of speech and the press forbids such restrictions as those imposed by section 632-a,<sup>46</sup> that the statute's provisions "amount[s] to raw censorship,"<sup>47</sup> and consequently, is inconsistent with the First Amendment.<sup>48</sup>

The First Amendment, together with the nine other amendments comprising the Bill of Rights, became effective on December 15, 1791.<sup>49</sup> It was not until 1925, however, that First Amendment guarantees were applicable to the states through the Fourteenth Amendment's Due Process Clause.<sup>50</sup> Since that time, the Court, when reviewing a governmental action that restricts a First Amendment freedom, has distinguished between those statutes that are content-neutral but which in some way affect the right of free speech,<sup>51</sup> and those statutes that are content-based.<sup>52</sup> Content-based restrictions are those that have a direct communicative impact.<sup>53</sup> For example, in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*,<sup>54</sup> a statute banning pharmacists' advertising of prescription drug prices was held by the Court to

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45. Id at 512 (Kennedy concurring). Justice Kennedy stated:

The New York statute we now consider imposes severe restrictions on authors and publishers, using as its sole criterion the content of what is written. The regulated content has the full protection of the First Amendment and this, I submit, is itself a full and sufficient reason for holding the statute unconstitutional. In my view it is both unnecessary and incorrect to ask whether a State can show that the statute "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."

Id.

46. Id at 512.

47. Id at 515.

48. Id.

49. Joseph J. Hemmer, *The Supreme Court and the First Amendment* at 1 (Praeger, 1986).

50. *Gitlow v People of New York*, 268 US 652, 666 (1925).

51. Laurence H. Tribe, *American Constitutional Law*, §12-2, (The Foundation Press, Inc. 2d ed 1988). Tribe categorizes this form of abridgement as governmental actions that adversely affect communication, but are aimed at non-communicative impact. Id at 789. For example, in *Schneider v State*, 308 US 147 (1939), the plaintiff was barred from distributing religious literature door-to-door because of a municipal ordinance, enacted to control littering, that prohibited the distribution of literature within the town unless a license was obtained in advance. In *Schneider*, the Court held that even though the aim of the ordinance was the control of littering, the ordinance acted as a form of censorship because it restricted the dissemination of ideas. *Schneider*, 308 US at 147. See also *Martin v Struthers*, 319 US 141 (1943) and *Kovacs v Cooper*, 336 US 77 (1949).

52. Tribe, *Constitutional Law*, §12-2 at 789-90 (cited in note 51).

53. Id at 790.

54. 425 US 748 (1976).



violate the First Amendment because the Virginia Statute “. . . singles out speech of a particular content and seeks to prevent its dissemination completely.”<sup>55</sup>

In some cases, the categorization of a restriction as content-based or content neutral is in itself an arguable issue. In *City of Renton et al v Playtime Theaters, Inc. et al*,<sup>56</sup> a zoning ordinance that restricted adult movie theaters from locating near residential zones was determined to be content-neutral because the ordinance targeted not the content of the films, but the “secondary effects” of the films on the community.<sup>57</sup> Further, the Court concluded that the ordinance was not being used by the City of Renton to suppress expression.<sup>58</sup> Similarly, in *Ward et al v Rock Against Racism*,<sup>59</sup> a New York City regulation, enacted to control noise levels by requiring performers using the Central Park bandshell to utilize sound amplification equipment and a sound technician provided by the city, was ascertained to be content-neutral because the city’s desire to control the level of noise at an event had nothing to do with content.<sup>60</sup> In *Ward*, the Court declared that “the principal inquiry in determining content-neutral speech cases generally, and time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>61</sup> Thus, the analysis the Court applies to test the validity of a statute that burdens free speech depends upon how the Court has first classified the restriction.<sup>62</sup>

When a content-neutral time, place, or manner restriction is at issue, the Court will assess the regulation to determine if it is narrowly tailored to achieve a significant governmental interest and if alternative channels of communication have remained open.<sup>63</sup> When a content-based restriction is implicated, the Court recognizes several distinct classifications of speech: 1) a pre-established unprotected area of speech;<sup>64</sup> 2) speech given limited First Amend-

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55. *Virginia State Board of Pharmacy*, 425 US at 771. See also *Consolidated Edison v Public Service Commission*, 447 US 530 (1980); *Cohen v California*, 403 US 15 (1971); and *Debs v United States*, 249 US 211 (1919).

56. 475 US 41 (1985).

57. *Playtime Theaters, Inc.*, 475 US at 47.

58. *Id* at 54.

59. 491 US 781 (1989).

60. *Ward*, 491 US at 784-92.

61. *Id* at 791 citing *Clark v Community for Creative Non-Violence*, 468 US 288, 295 (1984).

62. Tribe, *Constitutional Law*, §12-2 at 791-92 (cited in note 51).

63. *Metromedia, Inc. v San Diego*, 453 US 490 (1981).

64. *Chaplinsky v New Hampshire*, 315 US 568 (1942). In *Chaplinsky*, in sustaining a

ment protection;<sup>65</sup> and 3) speech that is given full First Amendment protection.<sup>66</sup>

The Supreme Court has consistently implied that content-based restrictions are presumptively unconstitutional,<sup>67</sup> hence, regulations impacting speech that has full First Amendment protection are subject to exacting or strict scrutiny.<sup>68</sup> In *Carey v Brown*, the Court, addressing a challenge to an Illinois statute that prohibited residential picketing, applied the same standard of careful scrutiny they utilize when reviewing an Equal Protection issue, i.e., requiring that the regulation be narrowly tailored to achieve a substantial governmental interest.<sup>69</sup> In a later case, *Boos v Barry*,<sup>70</sup> the Court required a strict scrutiny analysis for a content-based restriction on political speech in a public forum when they addressed a challenge to a Washington, DC statute that prohibited the dis-

breach of the peace conviction based on the "fighting words" doctrine, the Court maintained:

There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words--those which by their very utterance inflict injury or tend to incite an immediate breach of peace.

*Chaplinsky*, 315 US at 571-72.

The categories of speech recognized as unprotected by the First Amendment include: (1) advocacy of illegal conduct, see *Cohen v California*, 403 US 15 (1971), *Brandenburg v Ohio*, 395 US 444 (1969); (2) obscenity, see *Miller v California*, 413 US 15 (1973), and child pornography, see *New York v Ferber*, 458 US 747 (1982); and (3) "fighting words," see *Chaplinsky*.

65. The categories of speech afforded limited First Amendment protection include: (1) commercial speech, see *Bigelow v Virginia*, 421 US 809 (1975), *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748 (1976); (2) near obscene speech, see *Erznoznik v Jacksonville*, 422 US 205 (1975), *Young v American Mini Theatres, Inc.*, 427 US 50 (1976); (3) private speech of employees, see *Connick v Myers*, 461 US 138 (1983); and (4) defamation, see *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.*, 472 US 749 (1985).

66. Note, *Simon & Schuster, Inc. v Fischetti: Can New York's Son of Sam Law Survive First Amendment Challenge*, 66 Notre Dame L Rev 1075, 1082-84 (1991).

67. *Police Dept. of Chicago v Mosley*, 408 US 92 (1972) ("But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") *Mosley*, 408 US at 95, and *Regan v Time Inc.*, 468 US 641 (1984) ("Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.") *Regan*, 468 US at 648-49.

68. *Carey v Brown et al*, 447 US 455, 461-62 (1980).

69. *Carey*, 447 US at 461-62. However, see Justice Kennedy's concurring opinion in *Simon & Schuster, Inc. v Members of the New York State Crime Victims Board*, 112 S Ct 501, 512, objecting to a strict scrutiny analysis when a content-based regulation is at issue. *Id* at 512. See also note 45 and accompanying text.

70. 485 US 312 (1988).

play, within a specified distance of foreign embassies, of signs criticizing foreign governments.<sup>71</sup> In *Boos v Barry*, the Court, citing *Perry Education Assn. v Perry Local Educator's Assn.*,<sup>72</sup> stated: ". . . Thus, we have required the State to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'"<sup>73</sup>

Further, in a line of cases including *Minneapolis Star v Minnesota Commissioner of Revenue*,<sup>74</sup> the Court has strictly scrutinized content-based regulations that financially burden free speech. The *Minneapolis Star* case concerned a Minnesota regulation that imposed a use tax on the cost of paper and ink products used in the production of periodic publications.<sup>75</sup> The Court required the state to show an overriding governmental interest that necessitated the tax.<sup>76</sup> Later, in *Arkansas Writers' Project*, it was determined that the statute at issue (taxing general interest magazines while exempting newspapers, religious, professional and sports journals, among others) failed to satisfy the strict scrutiny test because the state did not satisfy its heavy burden of proving a compelling state interest, narrowly drawn to achieve the desired end.<sup>77</sup> Thus, in order for a content-based speech restrictive statute to survive a First Amendment challenge, it is apparent that the Supreme Court requires that the statute be shown to be necessary to achieve a compelling state interest and be narrowly drawn to achieve that end.<sup>78</sup>

In spite of the varied arguments advanced in the subject case by both the petitioner (Simon & Schuster) and the respondent (Crime Victims Board), as well as those raised in amicus briefs, the Supreme Court kept its decision within narrow confines. It concluded, with very little discussion or explanation, that the restrictions imposed by the New York statute were content-based, and as such, were subject to strict or exacting scrutiny. Thus, the Supreme Court relegated to one footnote a major portion of the Board's argument that the New York statute was subject to a less exacting standard of review than strict scrutiny because it was content-neu-

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71. *Boos*, 485 US at 321.

72. 460 US 37 (1983).

73. *Boos v Barry*, 485 US at 321.

74. 460 US 575 (1983).

75. *Minneapolis Star*, 460 US at 578.

76. *Id.* at 584. The Court concluded that the State did not meet its burden. *Id.* at 593.

77. *Arkansas Writers' Project*, 481 US at 234. See notes 28-30 and accompanying text.

78. *Widmar v Vincent*, 454 US 263, 270 (regulation must be narrowly drawn and necessary to serve a compelling state interest) *Widmar*, 454 US at 270.

tral under the decisions in *Ward v Rock* and *Renton v Playtime Theatres*.<sup>79</sup> Further, the Court overlooked an interesting argument, in support of the Crime Victims Board, raised by the Crime Victims Legal Clinic in their amicus brief. The brief for the legal clinic proposed, as was recently done in the area of child pornography,<sup>80</sup> that a new category of unprotected speech (“pernicious profiteering”) be established.<sup>81</sup> Placing the criminal’s speech in an unprotected category would compel the Court to apply the standard of review established in *United States v O’Brien*,<sup>82</sup> a more relaxed standard than strict scrutiny, thus allowing for some regulation of criminal speech.<sup>83</sup>

In the text of its opinion, the Supreme Court indicated that they granted certiorari in the subject case because, evidenced by the fact that most states as well as the federal government have enacted statutes similar in content and objective to the New York laws, this case addressed a significant issue that was likely to recur.<sup>84</sup> In addition, within the text of the opinion, the Court expressly refrained from determining the constitutionality of those similar state statutes.<sup>85</sup> By so firmly declaring (i.e., an unanimous 8-0 decision) that the New York regulation was content-based, however, the Court has effectively neutralized most, if not all, of the other state statutes because those statutes are aimed at criminal speech.<sup>86</sup>

Further, by holding that the Son of Sam Law is a content-based statute not narrowly drawn to achieve its objective, the Court has

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79. *Simon & Schuster, Inc.*, 112 S Ct at 511 n 1.

80. *New York v Ferber*, 458 US 747 (1982).

81. Brief, Amicus Curiae in Support of Respondent: The Crime Victims Legal Clinic, at LEXIS 169, *Simon & Schuster, Inc. v Members of the New York State Crime Victims Board*, 112 SCt 501, No 90-1059, October Term 1990 (1991).

82. 391 US 367 (1965). The *O’Brien* case (addressing a regulation prohibiting the destruction of draft cards) distinguished between speech and non-speech activities. The case held that a law that places an incidental burden on free speech may be adjudged constitutional if: 1) its enactment is within the legislative power of the government; 2) it furthers an important government interest; 3) it is unrelated to the suppression of free expression; and 4) the restriction is no greater than necessary to achieve the governmental interest. *O’Brien*, 391 US at 376.

83. Brief, Amicus Curiae for Respondent, at LEXIS 166, *Simon & Schuster, Inc.*, 112 SCt 501 (1991). Cited in note 81.

84. *Simon & Schuster, Inc.*, 112 S Ct at 508.

85. *Id* at 512.

86. Garrett Epps, *Wising Up: “Son of Sam” Laws and the Speech and Press Clauses*, 70 NC L Rev 493 (1992). The author has summarized the various and common characteristics of the “Son of Sam” laws of the federal government and the forty-three states. Epps, 70 NC L Rev at 496.

implied that a more narrowly drawn statute that is not based on speech content will be an acceptable alternative. Indeed, Ronald S. Rauchberg, the Counsel of Record for Simon & Schuster who argued the case before the Supreme Court, conceded that a general law, attaching all income of a convicted criminal for the benefit of the victim, would be content-neutral, and thus, might be able to survive a First Amendment challenge.<sup>87</sup> If this, then, is the course that the states follow, a new set of issues will be generated that may require review by the Supreme Court. For instance, even under a less exacting standard of scrutiny, a regulation must still be shown to be necessary to achieve the state's goal.<sup>88</sup>

Questions arise as to the necessity of a Son of Sam Law where other laws, already proven effective, are available to protect victims' interests<sup>89</sup> and when the record clearly shows that the Son Sam of Laws have had a very limited effect.<sup>90</sup> Further, it may be argued that the statutes are still either underinclusive<sup>91</sup> or overinclusive,<sup>92</sup> or both. It may also be argued that statutes that are written to make the funds in the accounts available to creditors of the criminal, other than his victims, lessen the importance of the government's interest in compensating victims of crime.

Following the decision in the instant case, the Supreme Court granted certiorari, vacated the judgment and remanded to the Court of Appeals of New York for further consideration, the case of *Children of Bedford, Inc. v Petromelis*.<sup>93</sup> Like the *Simon & Schuster* case, *Children of Bedford* addressed a First Amendment challenge to section 632-a. In this case, the object of the Crime

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87. Lyle Denniston, "Son of Sam" Law Under Fire, *American Lawyer* 106 (January/February 1992).

88. See notes 82 and 83 and accompanying text.

89. The State of New York has enacted both post- and pre-judgment remedies to insure the availability of a criminal's assets, provides for financial aid to crime victims, permits orders for restitution at sentencing, and allows for "forfeiture of proceeds and instrumentalities of crime." Brief for the Petitioner, at LEXIS 22, *Simon & Schuster, Inc. v Members of the New York State Crime Victims Board*, 112 S Ct 501, No. 90-1059, October Term, 1990 (1991).

90. From the enactment of the statute in 1977 through October 1988 five escrow accounts were established (the same victim accounting for three of the accounts) with the Board actually paying escrow funds to the victims of only one criminal. "Brief for Petitioner at LEXIS 11."

91. A revised statute may still be considered underinclusive because it does not aid all victims of crime, but is limited to only those that happen to be the victims of a criminal who profits from his crimes. Id at LEXIS 21.

92. A statute may still be considered overinclusive if that statute is not sufficiently specific in defining "criminal." Id at LEXIS 24. See also note 42 and accompanying text.

93. 112 S Ct 859 (1992).

Victims Board was the proceeds from the book "Stranger in Two Worlds."<sup>94</sup> The book, written by convicted murderess Jean Harris, describes, in addition to her life in prison, her recollections of the death of Dr. Herman Tarnower, the Scarsdale Diet Doctor. Jean Harris had assigned the proceeds of the book to the non-profit corporation, Children of Bedford.<sup>95</sup> The New York Court of Appeals had concluded, following a strict scrutiny analysis, that Section 632-a was narrowly tailored to achieve the compelling interest of a victim's right to compensation from profits earned by the criminal.<sup>96</sup> Upon remand from the Supreme Court and subsequent reargument, the Court of Appeals of New York reversed their decision.<sup>97</sup>

In reaction to the Supreme Court's decision in the subject case, the New York Legislature enacted, and Governor Mario Cuomo signed into law on August 13, 1992, Senate Bill 21017,<sup>98</sup> an act that provides for the repeal and replacement of the "Son of Sam" law in effect at the time of the instant decision.<sup>99</sup> In contrasting the two acts, it is apparent that the New York Legislature made significant changes to section 632-a in the hope that the new act will survive constitutional challenges. First, the newly enacted law expands to encompass profits of crime, rather than being limited to the proceeds of "storytelling."<sup>100</sup> The new act then defines "profits from the crime."<sup>101</sup> Also, the act narrows the scope of application

94. Jean Harris, *Stranger in Two Worlds* (MacMillan, Inc. 1986).

95. *Children of Bedford, Inc. v Petromelis*, 77 NY2d 713, 721, 573 NE2d 541 (1991).

96. *Children of Bedford*, 573 NE2d at 545.

97. *In the Matter of Children of Bedford Inc. et. al. v Angelo Petromelis, et. al.*, 79 NY2d 972, 592 NE2d 796 (1992).

98. Senate Bill No 21017, 1992 Regular Session, Ch 618 (1992).

99. Senate Bill No 21017, Ch 618 (cited in note 98).

100. Senate Bill No 21017, Ch 618 (to be codified at §632-a(2)(a))(cited in note 98). Every person, firm, corporation, partnership, association or other legal entity which knowingly contracts for, pays, or agrees to pay, any profit from a crime, as defined in subdivision one of this section, to a person charged with or convicted of that crime shall give written notice to the Crime Victims Board of the payment, or obligation to pay as soon as practicable after discovering that the payment or intended payment is a profit from a crime.

Id.

See note 4 for the corresponding provision in the 1977 law.

101. Id at a(1)(b). §632-a(1)(b) reads:

'Profits from the crime' means (I) any property obtained through or income generated from the commission of a crime of which the defendant was convicted; (II) any property obtained by or income generated from the sale, conversion or exchange of proceeds of a crime, including any gain realized by such sale, conversion or exchange; and (III) any property which the defendant obtained or income generated as a result of having committed the crime, including any assets obtained through the use of

by defining of the term "crime,"<sup>102</sup> while expanding the definition of "crime victim."<sup>103</sup> Additionally, the new section 632-a provides for restitution in criminal suits, extends the one year statute of limitations for bringing suit for damages against the criminal to seven years, and creates a three year statute of limitations, running from the time the profit-making is discovered, for victims to sue for crime profits.<sup>104</sup>

In light of the *Simon & Schuster* decision, other states are likely to follow suit and re-draft their current laws. With the Court leaving so little room for argument on the issue of content-based restrictions, any renewed effort to restrict and control those profits earned by criminals solely from the sales of their stories appears futile. This futility appears to have been acknowledged by the New York Legislature; they chose to proceed by defining profits of crime and then attaching all such profits. Thus, the next "Son of Sam" controversy the Supreme Court faces will likely be over interpreting the definition of "profits of crime."

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unique knowledge obtained during the commission of, or in preparation for the commission of the crime, as well as any property obtained by or income generated from the sale, conversion or exchange of such property and any gain realized by such sale, conversion or exchange.

Id.

102. Id at a(1)(a). " 'Crime' means any felony defined in the penal law or any other chapter of the consolidated laws of the state." Id. See note 7 to contrast the two sections.

103. Senate Bill No 21017, Ch 618 §632-a(1)(c) (cited in note 98).

'Crime victim' means (I) the victim of the offense; (II) the representative of a crime victim as defined in subdivision six of section six hundred twenty-one of this article; (III) a good samaritan as defined in section six hundred twenty-one of this article; (IV) the Crime Victims Board or other governmental agency that has received an application for or provided financial assistance or compensation to the victim.

Id.

104. Id.