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NOTES


I. Facts

In 1980, Henry Hill was arrested and charged with conspiring to sell drugs. In exchange for immunity from prosecution, Hill agreed to assist the Government and testify against several of his former colleagues. As a result, Hill was placed in the Federal Witness Protection Program.

In 1981, Simon & Schuster contacted Hill about publishing a book that would focus on organized crime in New York City. The Sterling Lord Agency ("Sterling Lord"), a New York literary agency, was hired by Simon & Schuster to find an author to write the book. Sterling Lord was able to obtain the services of a well-known author, Nicholas Pileggi. On September 1, 1981, a publishing agreement was entered into between Simon & Schuster, Pileggi, and Hill. Under the

6. Id. Nicholas Pileggi was well known for several articles that he had previously written on organized crime. Id.
7. Id.
terms of the agreement, Simon & Schuster was obligated to make payments to Sterling Lord who in turn was to divide the money between Hill and Pileggi. Sterling Lord was to retain ten percent of the money as its compensation. At the time of the agreement, there seemed to be no indication that Hill would have agreed to publish the book absent the understanding that he would be paid for his efforts. The result of Hill and Pileggi's collaboration was *Wiseguy: Life in a Mafia Family*, which was published in January of 1986. In 1990, the movie *Goodfellas* was created from Pileggi's novel.

In January of 1986, the New York State Crime Victims Board ("Board"), pursuant to section 632-a of the Executive Law, directed Simon & Schuster to provide the Board with copies of all agreements between Hill and Simon & Schuster. In its reply letter, Simon & Schuster provided the Board with "the dates and amounts of payments" to the Sterling Lord Agency for Hill's account. At the Board's request, further payments to Hill were suspended.

The Board served Simon & Schuster with a Proposed Determination and Order on June 15, 1987. The Board ordered Hill to relin-
quish all the money he had received to date, plus interest, less commissions paid to Sterling Lord. In addition, if Hill failed to turn over the money to the Board, Simon & Schuster would be held liable to the Board for any money "wrongfully distributed to Hill." The Board also determined that payments made to Nicholas Pileggi, the author, were not subject to section 632-a. The agent, Sterling Lord, was permitted to keep its ten percent literary fee.

On August 3, 1987, Simon & Schuster brought an action against the members of the New York State Crime Victims Board seeking an order declaring that section 632-a of New York's Executive Law violated the First and Fourteenth Amendments. The district court found no First Amendment violation upon concluding that section 632-a did not directly affect expressive activity.

The Second Circuit Court of Appeals found that the statute imposed a content-based restriction on speech. The court held that the

hearing was requested and a final order was issued on July 15, 1987. "The order concluded that Wise Guy was subject to the regulations promulgated in § 632-a, because the book contained Hill's thoughts, feelings, opinions and emotions about and admissions to his participation in criminal activities." at 172.

Simon & Schuster, Inc. v. Fischetti, 916 F.2d at 780.

21. Id.

22. Id.

23. Id.

24. Ecker & O'Brien, supra note 4, at 1080.


26. Simon & Schuster, 724 F. Supp. at 178. The district court found that the statute was directed at regulating the proceeds of the contract, a nonspeech activity. Id. at 179. Therefore, the court held that the state's interest in compensating crime victims was important enough to allow incidental burdens on the freedom of speech. Id. Simon & Schuster's Fourteenth Amendment claim that the statute was overbroad and vague was also rejected by the court. Id. at 180. The court concluded that § 632-a provided fair notice, provided adequate guidelines for the Board to follow, and did not burden Simon & Schuster's "basic constitutional freedoms." Simon & Schuster, 724 F. Supp. at 180. Simon & Schuster did not advance the Fourteenth Amendment claim on appeal. Simon & Schuster, Inc. v. Fischetti, 916 F.2d at 781.

27. 916 F.2d at 781-82. See infra notes 65-66 and accompanying text.
statute survived strict scrutiny since it was narrowly tailored to accomplish the state's compelling interest in "denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated for all losses arising out of their victimization."28 As a result, the Court of Appeals upheld the constitutionality of section 632-a.29

The Supreme Court granted certiorari30 to determine whether section 632-a of New York's Executive Law was inconsistent with the First Amendment's protection of free expression.31 The Court agreed with the Second Circuit that the statute imposed a financial burden on speakers based on the content of their speech32 and thus, the appropriate standard of review was strict scrutiny.33 However, the Court disagreed with the Second Circuit's application of this standard.34 The Court ultimately concluded that the State of New York had a legitimate interest in compensating victims of crime but that the Son of Sam law was not narrowly tailored to advance this interest.35 Therefore, the Court declared New York's Son of Sam law unconstitutional.36 Simon & Schuster, Inc. v. New York State Crime Victims Bd., 112 S. Ct. 501 (1991).

II. HISTORICAL DEVELOPMENT

The underlying policy concerns relating to New York's Son of Sam law can be traced back to Riggs v. Palmer,37 where the New York Court of Appeals recognized the common law principle that no person should be allowed to profit from his own wrongdoing.38 Almost eighty

28. Id. at 783.
29. Id. at 784.
31. Simon & Schuster, Inc. v. New York State Crime Victims Bd., 112 S. Ct. 501, 508 (1991). The Court was compelled to grant certiorari because several states and the federal government have enacted legislation similar to New York's Son of Sam law. See infra notes 44-45 and accompanying text.
32. Id. at 508.
33. Id. at 508-12.
34. Id.
35. Id. at 511-12.
36. Id. at 512.
37. 22 N.E. 188 (N.Y. 1889).
38. Id. at 190. In Riggs, the New York Court of Appeals stated: "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong. . . . These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes." Id.
years later, the New York Legislature enacted Article 22 of the Executive Law.\textsuperscript{39} The purpose of Article 22 was to provide governmental financial assistance to victims of crime.\textsuperscript{40} Section 632-a was added in 1977.\textsuperscript{41} Under section 632-a, proceeds earned by a criminal are redi-


\textsuperscript{40} Barrett v. Wojtowicz, 414 N.Y.S.2d 350, 352 (N.Y. App. Div. 1979). Section 620 states that “many innocent persons suffer personal physical injury or death as a result of criminal acts” and that “there is a need for government financial assistance for such victims of crime. Accordingly, it is the legislature’s intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.” N.Y. EXEC. LAW § 620 (McKinney 1982 & Supp. 1992).

\textsuperscript{41} N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1992). This section is entitled “Distribution of moneys received as a result of the commission of crime.” *Id.* Section 632-a was enacted in response to the notorious “Son of Sam” killer, David Berkowitz, who terrorized New York City with his random killings of young women and their escorts. Sue S. Okuda, Comment, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 CALIF. L. REV. 1353, 1354-55 (1988). “McGraw-Hill Book Company later bought the rights to Berkowitz’s [Son of Sam] story in a deal that included a $250,000 advance, $150,000 profit to the ghost writer, [10 percent to the literary agent] and $75,000 to Berkowitz through his court-appointed conservator Doris Johnsen.” *Id.* at 1354. Oddly enough, the Son of Sam law was never applied to Berkowitz’s profits. Ecker and O’Brien, *supra* note 4, at 1077 n.12. The statute, when originally enacted, only pertained to convicted criminals and Berkowitz was declared mentally incompetent to stand trial. Dennis Hevesi, *Cases Under “Sam” Law: Notorious but Few*, N.Y. TIMES, Feb. 20, 1991, at B8. Thus, these statutes have been referred to as Son of Sam laws. The purpose of the New York legislation was summarized in a memorandum by the bill’s sponsor, Senator Emanuel R. Gold, who stated:

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


Section 632-a provides, in relevant part:

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 pro-
rected so that they are used to compensate the victims of their crime. Since its enactment in 1977, section 632-a has been amended several times in an effort to strengthen its scope, expand its coverage, and set forth the priorities for payment of the monies held in escrow. Most state legislatures and the federal government have followed New York's lead and enacted similar Son of Sam legislation.

Section 632-a requires that any legal entity that contracts with a criminal regarding the re-enactment or discussion of a crime that was committed by the criminal must submit a copy of the contract, together with any money owed to the criminal under the contract, to the New York State Crime Victims Board. The Board holds this money in an escrow account for five years, and during that time the crime victim or the crime victim's estate can bring a civil lawsuit against the criminal. The statute requires the Board to publicize the availability of the money to satisfy any judgments received by victims of the crime. Once these judgments are satisfied, the money is then

vided 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. N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1992).

42. Barrett v. Wojtowicz, 414 N.Y.S.2d at 352.


46. The statute applies to "every person, firm, corporation, partnership, association or other legal entity" that contracts with a criminal or the representative or assignee of a criminal. N.Y. Exec. Law § 632-a(1) (McKinney 1982 & Supp. 1992).

47. A criminal is defined to include a person convicted of a crime committed in New York as well as any person who voluntarily and intelligently admits committing a crime. N.Y. Exec. Law § 632-a(10)(b).

48. The statute applies to the re-enactment of a 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 the criminal's "thoughts, feelings, opinions or emotions regarding such crime." N.Y. Exec. Law § 632-a(1).


50. N.Y. Exec. Law § 632-a(1). The regular statute of limitations for a tort or wrongful death action does not bar these suits. Section 632-a creates its own cause of action with its own five year statute of limitations that begins to run when the escrow account is established. N.Y. Exec. Law § 632-a(7).

51. N.Y. Exec. Law § 632-a(2).
made available to satisfy any other judgment creditors. Claims on the escrow account are satisfied in accordance with the priorities set forth in the statute.

Prior to Simon & Schuster, the Supreme Court had not had an occasion to rule on the constitutionality of the Son of Sam laws. However, two state courts had considered the issue. Although different

52. See generally N.Y. Exec. Law § 632-a(11)(a-e). Section 632-a(9) prohibits criminals from attempting to transfer their legal interest in the profits. See Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541 (N.Y. 1991) (invalidating an attempt by Jean Harris, the woman convicted of murdering the "Scarsdale Diet" doctor, to assign a portion of her profits from the book Stranger in Two Worlds to a foundation that she had helped establish).

53. N.Y. Exec. Law § 632-a(11). The priorities are set up to ensure that the victims are paid before the criminal or other judgment creditors. However, a small percentage of the money in the escrow account is available to the criminal to pay legal fees in his criminal case. Furthermore, the state is entitled to be reimbursed for any money it paid the victims and the representative who assisted the criminal in producing the work is entitled to be compensated. N.Y. Exec. Law § 632-a(8), (11). Several cases have already come before the Board for review. E.g., (1) Mark David Chapman, the man who killed John Lennon, received $8,626 for allowing a magazine to interview him. These funds are currently being held in escrow. (2) $15,818 has been collected from Jack Henry Abbott after authoring two books. Abbott was convicted of murder for stabbing a young actor to death in 1981. (3) R. Foster Winans wrote a book about his conviction for insider trading. The Board is currently holding $20,029 of Winans' money. (4) The only case in which any victims were paid involved John Wojtowicz, the bank robber, who was portrayed in the movie Dog Day Afternoon. The Board collected $75,062. Of that, approximately $71,000 has been paid out. The Board has collected an additional $14,411 from continued showings of the movie. (5) Jean Harris, convicted of killing the famed "Scarsdale Diet" doctor, Dr. Herman Tarnower, wrote a book detailing this murder. This case is currently being adjudicated. (6) Michele Sindona cooperated in writing a book about his involvement in the collapse of several banks. Sindona was imprisoned in prison in 1986. This case is currently being adjudicated. Hevesi, supra note 41, at B8.

54. The New York Court of Appeals upheld the constitutionality of the State's Son of Sam law. Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541, 551 (N.Y. 1991). In this case, the New York Crime Victims Board sought to escrow the royalties due to Jean Harris, the author of a book entitled Stranger in Two Worlds. Id. at 543. The book contained her "thoughts, feelings, opinions, or emotions" regarding the killing of the famed "Scarsdale Diet" doctor, Herman Tarnower. Id. (quoting N.Y. Exec. Law § 632-a(1)). The Court of Appeals, applying strict scrutiny, concluded that the New York law serves a compelling state interest. Id. at 549-50. Not only does the statute compensate the victims of crime, it also advances the State's interest in not allowing a criminal to profit from his own wrongdoing. The law was also held to be narrowly tailored to meet this compelling interest because it only sought to regulate the receipt of money and not the contents of the criminal's speech. Id. at 550. Furthermore, it does not necessarily result in a complete forfeiture of the funds but only delays payment. Id. Moreover, the New York Son of Sam law does not prevent others from publishing the criminal's story. Id. See also Fasching v. Kallinger, 510 A.2d 694 (N.J. Super. Ct. App. Div. 1986), rev'd on other grounds, 546 A.2d 1094 (N.J. Super. Ct. App. Div. 1988). In Fasching, the state trial court upheld New Jersey's Son of Sam law against First Amendment challenge from the author and publisher of a book about the life and crimes of Joseph Kallinger. Id. at 704. The appellate division did not address the First Amendment claims by the author and publisher because it held that the law did not reach their respective profits. For procedural reasons, the appellate division also did not address the criminal's First Amendment challenge either. Id. at 696. See generally Flora Schreiber, The Shoemaker:
paths were taken, most commentators have concluded that the Son of Sam laws violate the freedom of speech that the First Amendment seeks to protect.55

The First Amendment provides, in relevant part, that: “Congress shall make no law . . . abridging the freedom of speech, or of the press.”56 Although the language of the First Amendment appears to speak in absolute terms, the Supreme Court has never taken this view.57 Rather, in determining the appropriate standard of review, the

The Anatomy of a Psychotic (1983). Other cases have considered the nuances of the Son of Sam laws but have not dealt with their First Amendment constitutionality. See, e.g., United States v. MacDonald, 607 F. Supp. 1183 (E.D.N.C. 1985) (interpreting the federal Son of Sam law, the plaintiff's First Amendment claim was not addressed because the court concluded that the forfeiture provision was unconstitutional as an ex post facto law); In re Halmi, 12 Media L. Rep. (BNA) 2388 (N.Y. Sup. Ct. 1986), aff'd, 512 N.Y.S.2d 650 (N.Y. App. Div. 1987) (holding that New York's Son of Sam law does not reach victimless crimes); Barrett v. Wojtowicz, 414 N.Y.S.2d 350 (N.Y. App. Div. 1979) (examining the statute of limitation provision of the New York law); In re Johnsen, 430 N.Y.S.2d 904 (N.Y. Sup. Ct. 1979) (examining the appointments of conservators under the New York "Son of Sam" law). In Johnsen, the court stated: "This court declares Executive Law section 632-a constitutional..." Id. at 909. However, the court reached this conclusion without any analysis.


56. The First Amendment reads: “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.” U.S. Const. amend. I.

57. Ecker & O'Brien, supra note 4, at 1082. A variety of standards have been used by the Court in dealing with different types of speech protected by the First Amendment. First, when dealing with political speech the Court has formulated such standards as: (1) the “clear and present danger” test. See Schenck v. United States, 249 U.S. 47 (1919); (2) the “Learned Hand” test. See Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917); and (3) what is probably the modern approach where the Court has combined the “clear and present danger” test and the “Learned Hand” test. See Brandenburg v. Ohio, 395 U.S. 444 (1969). For a general discussion of these varying standards, see William W. Van Alstyne, Interpretations of the First Amendment 21 (1984). Second, when dealing with “Time, Place and Manner” restrictions the Court has developed a three part test. In order for the restriction on speech to withstand constitutional scrutiny it must be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open alternative channels of communication. See Ward v. Rock Against Racism, 491 U.S. 781 (1989). If the speech is deemed to be within the "public forum," the Court has typically interpreted the second prong of this test more stringently. See Hague v. Committee of Ind. Org., 307 U.S. 496 (1939). Third, when placing restrictions on non-verbal actions, the Court has applied a four prong test: (1) the restriction must be within the constitutional power of the government; (2) it must further an important governmental interest; (3) the government's interest must be unrelated to the suppression of free expression; and (4) the restriction must not be greater than is necessary to serve the governmental interest. See United States v. O'Brien, 391 U.S. 367 (1968); see also infra notes 81-86 and accompanying text. This is not an exhaustive list of the various standards developed by the Court. However, it does illustrate the difficulty the Court has
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Court has distinguished between those restrictions that are content-based\textsuperscript{58} and those that are content-neutral.\textsuperscript{59}

To test the constitutionality of content-based speech, the Court has generally started its analysis by deciding whether the restricted speech is of "low" or "high" First Amendment value.\textsuperscript{60} The Court has recognized four classes of speech that are not afforded First Amendment protection.\textsuperscript{61} Other speech receives only limited protection under the First Amendment.\textsuperscript{62} If the Court concludes that the speech is of "low"

had in adopting a standard for First Amendment analysis.

58. Content-based restrictions are those that "limit communication because of the message conveyed." Geoffrey R. Stone, \textit{Content Regulation and the First Amendment}, 25 \textit{WM. & MARY L. REV.} 189, 190 (1983). See Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976). In \textit{Virginia Pharmacy} the Court invalidated a Virginia statute that prohibited pharmacists from advertising prescription drug prices. \textit{Id.} at 770. The state maintained that it had an interest in protecting the general public from lower quality goods which could result from competitive pricing of drugs. \textit{Id.} at 755. The statute was reviewed as a content-based restriction. \textit{Id.} at 770-71. See also Cohen v. California, 403 U.S. 15 (1971). The defendant in Cohen was arrested and convicted for wearing a jacket that displayed the words "Fuck the Draft." \textit{Id.} at 16. He was convicted under a statute that prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct." \textit{Id.} The Court concluded that the statute was content-based. \textit{Id.} at 26 (quoting Cal. Penal Code § 415 (West 1988)).

59. Content-neutral restrictions are those that "limit communication without regard to the message conveyed." Stone, supra note 58, at 189. See also Schneider v. State, 308 U.S. 147 (1939). In Schneider, a city attempted to prohibit the distribution of leaflets. \textit{Id.} at 148. The Court concluded that this was a content-neutral restriction since the harm sought to be prevented (littering) was independent of the content of the leaflets. \textit{Id.} at 160. The development of the content-based or content-neutral distinction will not be discussed in this note. For a general discussion, see Paul B. Stephan III, \textit{The First Amendment and Content Discrimination}, 68 \textit{VA. L. REV.} 203 (1982).

60. Stone, supra note 58, at 194. The "low" value theory was first mentioned in the famous dictum of Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("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 problem. 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 the peace."). One commentator has referred to this approach as the "defining out" approach. Frederick Schauer, \textit{Categories and the First Amendment: A Play in Three Acts}, 34 \textit{VAND. L. REV.} 265, 280-81 (1981). By "defining out," Schauer suggests that the Court begins by presuming that the First Amendment protects all speech and then excludes speech that does not sufficiently further the purposes of the First Amendment. \textit{Id.} Applying this approach, the Court looks at several factors "including the relative value of the speech and the risk of inadvertently chilling 'high' value expression." Geoffrey R. Stone, \textit{Content-Neutral Restrictions}, 54 \textit{U. CHI. L. REV.} 46, 47 n.4 (1987).


First Amendment value, then it will apply the applicable standard to that classification of speech.  

The area that has received the most attention is where the Court concludes that the speech is of "high" value. Content-based restrictions of "high" value speech are strictly scrutinized by the Court and are constitutional only if they are narrowly tailored means of serving compelling state interests. This low value or high value distinction is important because the Court has stated that the government's burden to justify a statute subject to strict scrutiny "is well-nigh insurmountable." Strict scrutiny was applied in *Arkansas Writers' Project, Inc. v. Ragland* where the Supreme Court invalidated a tax scheme that exempted sales of religious, professional, trade, and sports magazines, but not general interest magazines. The Court noted that the magazine's tax status was clearly dependent upon its content. In order for a con-

(Commercial speech is entitled to First Amendment protection; however, that protection is less extensive than for other types of speech).

63. *See, e.g.*, Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980) (stating that commercial speech may be suppressed if it is false or misleading, or if the restriction directly advances a substantial governmental interest and is "not more extensive than is necessary" to achieve that interest); Miller v. California, 413 U.S. 15 (1973) (stating that obscenity may be suppressed whenever the government shows that some undemanding scienter requirement is met); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that express excitement may be suppressed only if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

64. *See* *supra* note 58, at 196. *See supra* note 60 and accompanying text for the analysis the Court uses to determine whether restricted speech is of "low" or "high" First Amendment value.

65. The Court considers less burdensome alternatives when determining whether a particular law is narrowly tailored. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 19 (1986) (concluding that the state's interest can be served by a means that does not violate the utilities' First Amendment rights).

66. *See* *supra* note 58, at 196-97. In order to receive the "compelling" label, a statute must meet two criteria. John T. Loss, *Note, Criminals Selling Their Stories: The First Amendment Requires Legislative Reexamination*, 72 Cornell L. Rev. 1331, 1340 (1987). First, the state must show that it has a strong interest in the underlying policies of the statute. *Id.* Second, the possible chilling effect of the statute must be sufficiently outweighed by the state's interest. *Id.*


68. 481 U.S. 221 (1987). In this case, an Arkansas publisher sought a refund of state taxes it had paid on sales of its magazine. The publisher challenged a state statute that taxed the sales of its general interest magazine, but exempted sales of religious, professional, trade and sports magazines. *Id.* at 224-25.

69. *Id.* at 234.

70. *Id.* at 229. The Court stated that: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amend-
tent-based regulation to withstand constitutional scrutiny, the State must show that the "regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." The Court ultimately concluded that, standing alone, the State's interest in raising revenue was an insufficient governmental interest. Furthermore, the Court concluded that the statute was not narrowly tailored to achieve the State's interest in encouraging "fledgling" publishers.

The Court reaffirmed the *Arkansas Writers'* analysis in *Leathers v. Medlock*. In *Leathers*, the Court found that a tax that extended to cable television services but specifically exempted other media was not an unconstitutional differential taxation. The rationale behind this holding was that the legislative intent was not to restrict speech based upon its content. However, the Court recognized that a restriction which was determined to be content-based would be presumptively inconsistent with the First Amendment. Since the Court concluded that the tax was not content-based, it applied a much less stringent standard of review.

Content-neutral restrictions differ from content-based restrictions...
in that they do not regulate speech based upon the content of the message being conveyed.\(^7\) As such, the Court has adopted less stringent standards of review to deal with their constitutionality.\(^8\) In *United States v. O'Brien*\(^8\) the Court established a less demanding test to be applied in situations where the burden on speech is only incidental.\(^8\) In *O'Brien*, the Court took into consideration a law that prohibited the destruction of draft cards.\(^8\) O'Brien claimed that the burning of his draft card was in response to his dissatisfaction with the draft and the Vietnam War.\(^8\) The Court concluded that the First Amendment is aimed at protecting expressive conduct.\(^8\) However, strict scrutiny was not applied because the Court found that the law was aimed at preserving the draft system and not at suppressing expression.\(^8\)

The *O'Brien* analysis was subsequently applied in *City of Renton v. Playtime Theatres, Inc.*\(^8\) In *City of Renton* the Court upheld a city zoning ordinance that prohibited adult movie theatres from being located within 1,000 feet of residential areas or various public accommodations.\(^8\) In this case, the Court concluded that the ordinance was aimed at the secondary effects of adult movie theatres in these communities\(^9\) and not at the content of the films that were shown.\(^9\) The

\(^{79}\) Stone, supra note 60, at 48.

\(^{80}\) Stone, supra note 60, at 48. For a general discussion of the different standards of review adopted by the Court for content-neutral analysis, see Stone, supra note 60, at 48-50.

\(^{81}\) 391 U.S. 367 (1968).

\(^{82}\) Ecker & O'Brien, supra note 4, at 1084-85.

\(^{83}\) 391 U.S. at 369-70.

\(^{84}\) Id.

\(^{85}\) Id. at 376.

\(^{86}\) Id. at 376-77. According to the Court in *O'Brien*, incidental infringements on the First Amendment can be justified by the state upon a showing that: it is within the constitutional power of the Government; if it further an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 377.

\(^{87}\) 475 U.S. 41 (1986).

\(^{88}\) Id. at 54. The city zoning ordinance prohibited adult movie theatres from being located within “1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.” Id. at 43. Theatre owners challenged this ordinance arguing that it impermissibly violated their First Amendment rights in that it was aimed at suppressing the content of the films shown. *Id.* at 47.

\(^{89}\) Id. at 47. The secondary effects that the ordinance intended to remedy included preventing “crime, protect[ing] the city’s retail trade, maintain[ing] property values,” and preserving the quality of life within the community. *Id.* at 48.

\(^{90}\) Id. at 47. The Court rejected the holding by the Court of Appeals that “if ‘a motivating factor’ in enacting the ordinance was to restrict respondents’ exercise of First Amendment rights
Court went on to find that the City had a sufficient interest in preserving the quality of life and that the City was not suppressing expression because the ordinance allowed adult theatres to be built in certain designated areas. In fact, the Court noted that the City had set aside a portion of land to be used for these adult theatres.

The traditional distinction between content-based and content-neutral restrictions can sometimes be difficult to define. However, once the Court concludes that speech is regulated based upon the content of its message, it will apply a strict scrutiny standard of review. If, on the other hand, the Court concludes that the restriction on speech is content-neutral, it will apply a much less stringent standard of review.

III. REASONING OF THE COURT IN SIMON & SCHUSTER, INC.

In Simon & Schuster, Inc. v. New York State Crime Victims Board the Supreme Court addressed the issue of whether New York's Son of Sam law violated the First Amendment. The Court, in reversing the Second Circuit Court of Appeals, concluded that the Son of Sam law regulated speech based upon its content and thus, the ordinance would be invalid. The Court noted that this rationale was specifically rejected in United States v. O'Brien, 391 U.S. 367, 382-86 (1968). The Court, quoting O'Brien, stated: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive..." City of Renton, 475 U.S. at 48. The Court went on to say that: "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." Id. (quoting O'Brien, 391 U.S. at 383-84).

91. Id. The second prong of the O'Brien test requires that the government's interest be unrelated to suppression of expression. See Texas v. Johnson, 491 U.S. 397, 412 (1989).

92. City of Renton, 475 U.S. at 50-54. For a discussion of City of Renton's effect on content classification, see Note, The Content Distinction In Free Speech Analysis After Renton, 102 Harv. L. Rev. 1904 (1989). The City of Renton holding was subsequently reaffirmed in Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). For further discussions of content-neutral restrictions, see Stone, supra note 60, at 48. See also Stone, supra note 58, at 196.

93. See generally Stone, supra note 58, at 189.
94. Stone, supra note 58, at 196.
95. Stone, supra note 60, at 48-50.
98. Justice O'Connor delivered the opinion of the Court in which Chief Justice Rehnquist, and Justices White, Stevens, Scalia, and Souter joined. 112 S. Ct. at 504. Justices Blackmun and Kennedy filed opinions concurring in the judgment. Justice Thomas took no part in the consideration or decision of the case. Id. at 512.
100. See infra notes 108-09 and accompanying text.
appropriate standard of review was strict scrutiny. Applying this standard, the Court agreed that the State of New York had a compelling interest "in compensating victims from the fruits of crime," but the Court determined that the statute was not "narrowly tailored to advance that objective." Therefore, the Court concluded that the statute was in violation of the First Amendment.

Relying upon Leathers v. Medlock and Arkansas Writers' Project, Inc. v. Ragland, the Court concluded that when a statute burdens a person's speech based upon the content of that speech, a presumption is raised that the statute is inconsistent with the First Amendment. The Court voiced its concern that the Government, by imposing content-based restrictions on speech, could ultimately prevent certain ideas or viewpoints from ever reaching the "marketplace." The Court concluded that New York's Son of Sam law was a content-based statute because it singled out only the income from Hill's collaboration in publishing Wiseguy but no other income. Furthermore, the statute was only directed at the content of Hill's speech.

The Court rejected the Board's attempt to distinguish the Son of Sam law from the tax that was invalidated in Arkansas Writers'. The Board argued that the Son of Sam law was distinguishable because it singled out only the income from Hill's collaboration in publishing Wiseguy but no other income. The statute was only directed at the content of Hill's speech. The Court cited Arkansas Writers', wherein it concluded that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." The marketplace-of-ideas model has been "long recognized in First Amendment jurisprudence." Frederick Schauer, Comment, Speech and "Speech" - Obscenity, and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L. J. 899, 915 (1979). See also Red Lion Broadcasting Co. v. FCC, 395 U.S. 395 (1969) ("purpose of First Amendment is to preserve uninhibited marketplace of ideas in which truth will ultimately prevail").

The Court stated that it was irrelevant whether the First Amendment speaker was determined to be: Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, [because] the statute plainly imposes a financial disincentive only on speech of a particular content.


Id. at 512.

Id.


Simon & Schuster, 112 S. Ct. at 508. The Court cited Arkansas Writers', wherein it concluded that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." (quoting Arkansas Writers', 481 U.S. at 230 (1987)).

Id. at 508. The marketplace-of-ideas model has been "long recognized in First Amendment jurisprudence." Frederick Schauer, Comment, Speech and "Speech" - Obscenity, and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L. J. 899, 915 (1979). See also Red Lion Broadcasting Co. v. FCC, 395 U.S. 395 (1969) ("purpose of First Amendment is to preserve uninhibited marketplace of ideas in which truth will ultimately prevail").

Simon & Schuster, 112 S. Ct. at 508.

Id. at 508. The Court stated that it was irrelevant whether the First Amendment speaker was determined to be: Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, [because] the statute plainly imposes a financial disincentive only on speech of a particular content.

Id.

Simon & Schuster, 112 S. Ct. at 508.

Id. See supra notes 68-73 and accompanying text.
cause it escrowed the income for at least five years rather than taxing a percentage of the writer's speech-derived income outright.\footnote{111} The Court concluded that both situations "operate as disincentives to speak."\footnote{112}

The Board also attempted to persuade the Court that discriminatory financial treatment does not run afoul of the First Amendment unless the legislative intent was to suppress certain ideas.\footnote{113} The Court, citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue\footnote{114} and Arkansas Writers', concluded that suppressive legislative intent is not necessary to invalidate a statute under the First Amendment.\footnote{115}

The Court was equally unpersuaded by the Board's attempt to differentiate the Son of Sam law from "content-based financial regulation specifically of the media."\footnote{116} The Board argued that the Son of Sam law was different because it covered any "entity" that attempted to transmit the speech of a convicted person.\footnote{117} The Court concluded that this argument failed on "both semantic and constitutional grounds."\footnote{118} First, the Court noted that once an entity enters into a contract with a convicted person, it "becomes by definition a medium of communication."\footnote{119} Secondly, the Court held that content-based disincentives on speech are invalid regardless of whom the speaker is determined to be.\footnote{120} Citing Arkansas Writers', the Court ruled that in order to justify a law that attempts to regulate speech based upon its content, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."\footnote{121}

The Board conceded that it had no interest in protecting speech

\footnote{111. Simon & Schuster, 112 S. Ct. at 508.}
\footnote{112. Id. In fact, as the Court noted, "in many cases it will be impossible to discern in advance which type of regulation will be more costly to the speaker." Id. at 509.}
\footnote{113. Id.}
\footnote{114. 460 U.S. 575 (1983).}
\footnote{115. 112 S. Ct. at 509. Minneapolis Star was cited for the proposition that "[w]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." Id. (quoting Minneapolis Star, 460 U.S. at 592).}
\footnote{116. 112 S. Ct. at 509.}
\footnote{117. Id. The Board attempted to analogize Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991), where the Court stated that "enforcement of . . . general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." Simon & Schuster, 112 S. Ct. at 509 (quoting Cohen, 111 S. Ct. at 2518).}
\footnote{118. 112 S. Ct. at 509.}
\footnote{119. Id.}
\footnote{120. Id.}
\footnote{121. Id. (quoting Arkansas Writers', 481 U.S. at 231).}
which it might consider to be offensive or disagreeable to the general public.\textsuperscript{122} However, the Board maintained that the state did have a compelling interest in compensating victims of crime,\textsuperscript{123} as well as a compelling state interest in ensuring that criminals do not profit\textsuperscript{124} from the crimes they commit.\textsuperscript{125} The Court agreed that these were legitimate state interests.\textsuperscript{126} However, the Court disagreed with the Board's attempt to limit these interests to selective assets and activities.\textsuperscript{127} Again relying on Arkansas Writers' and Minneapolis Star, the Court reiterated its previous holdings that although a state certainly has an interest in raising revenue through taxation, this interest is not properly served by selective taxation of the press.\textsuperscript{128} Similarly, the Court concluded that the state has a legitimate interest in compensating victims of crime, but that this interest could hardly be justified by limiting compensation solely "to the proceeds of the wrongdoer's speech about the crime."\textsuperscript{129}

The Court next addressed whether the Son of Sam law was narrowly tailored to achieve the State's compelling interest in compensat-

\textsuperscript{122} 112 S. Ct. at 509. The Court stated that "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." \textit{Id.} (quoting United States v. Eichman, 110 S. Ct. 2404, 2410 (1990)).

\textsuperscript{123} 112 S. Ct. at 509. The Court was primarily concerned with the possibility that criminals might dissipate their assets before crime victims had a chance to recover. \textit{Id.} at 509-10. As the Court noted, this concern also serves to justify New York's "statutory provisions for pre-judgment remedies and orders of restitution." \textit{Id.} See N.Y. Civ. Prac. L. & R. §§ 6201-6226 (McKinney 1980 & Supp. 1991); N.Y. Penal Law § 60.27 (McKinney 1987).

\textsuperscript{124} The parties to this suit disagreed as to "whether book royalties can properly be termed the profits of crime." 112 S. Ct. at 510. The Court chose not to address this issue and assumed, for the purpose of this case, "that the income escrowed by the Son of Sam law represents the fruits of crime." \textit{Id.}

\textsuperscript{125} \textit{Id.} The state's interest in ensuring that criminals do not profit from their crimes is also evidenced by New York's "statutory provisions for the forfeiture of the proceeds and instrumentalities of crime." \textit{Id.} See N.Y. Civ. Prac. L. & R. §§ 1310-1352 (McKinney Supp. 1991).

\textsuperscript{126} 112 S. Ct. at 509-10.

\textsuperscript{127} \textit{Id.} at 510. The Court was concerned by the fact that the Board could not explain "why the State should have any greater interest in compensating victims from the proceeds of such 'storytelling' than from any of the criminal's other assets." \textit{Id.} Nor could the Board "offer any justification for a distinction between this expressive activity and any other activity in connection with its interest in transferring the fruits of crime from criminals to their victims." \textit{Id.}

\textsuperscript{128} \textit{Id.} The Court was also persuaded by the holding in Carey v. Brown, 447 U.S. 455 (1980). In Carey the Court recognized the state's interest in preserving privacy by prohibiting residential picketing, but could hardly see how prohibiting only nonlabor picketing served this interest. \textit{Id.} at 465.

\textsuperscript{129} Simon & Schuster, 112 S. Ct. at 511.
ing victims from the fruits of the crime. Two provisions in the Son of Sam law were determined to be "significantly overinclusive." First, the law was found to be overinclusive in that it applied to all works that expressed the criminal's "thoughts or recollections about his crime, however tangentially or incidentally." Secondly, the statute defined a convicted person to include any person that admits in his work to having committed a crime regardless of whether that person is ever accused or convicted. Because the Court concluded that the statute was overinclusive, it did not address the Board's position that the statute was content-neutral. Citing Ward v. Rock Against Racism and City of Renton v. Playtime Theatres, Inc., the Court found that even under content-neutral analysis it is still necessary to show that the regulation on speech is narrowly tailored. Likewise, the Court felt it unnecessary to decide if the statute was also underinclusive as Justice Blackmun suggested in his concurrence.

Justice Kennedy, in his concurrence, agreed with the majority that the Son of Sam law attempted to regulate speech based upon its content. Kennedy argued, however, that once the determination is made that the law is content-based, the inquiry should end and the speech should be afforded the full protection of the First Amendment. The test adopted by the majority, Kennedy argued, was derived from the Court's Equal Protection analysis in Carey v. Brown and has no place in First Amendment jurisprudence.
IV. ANALYSIS AND SIGNIFICANCE

The significance behind the decision in *Simon & Schuster* is two-fold. First, it will be necessary for the states and the federal government to re-evaluate the constitutionality of their Son of Sam legislation in light of the decision in *Simon & Schuster*. Secondly, as Justice Kennedy’s concurrence suggests, the Court seems willing to allow the government to place content-based restrictions on speech provided these restrictions are narrowly drawn means of serving compelling state interests.143

Most states and the federal government have enacted legislation designed to remedy the same problems that confronted the State of New York when it enacted section 632-a.144 The relevant Arkansas statute contains some of the same provisions that were found to be unconstitutional in *Simon & Schuster*.145 As a result of the decision in *Simon & Schuster*, the Arkansas statute may have constitutional problems for two reasons. First, the Court found that New York’s Son of Sam law was overinclusive because it applied “works on any subject, provided that they express the author’s thoughts or recollections about his crime, however tangentially or incidentally.”146 Likewise, the Arkansas statute appears to be overinclusive since it applies to reenactments of a crime where the criminal expresses his “thoughts, opinions, or emotions regarding the crime.”147

Second, the Arkansas statute attempts to compensate crime victims from the proceeds of the criminal’s speech about the crime but not

(quoted *Carey*, 447 U.S. at 461-62). Thus, as Kennedy argues, it appears as though the two-pronged test used by the majority derived from the Equal Protection analysis and not from First Amendment analysis.

143. See supra notes 65-66 and accompanying text.
144. See supra notes 44-45 and accompanying text.
145. The Arkansas Statute reads, in pertinent part, as follows:
    (a)(1) Any person, referred to as the defendant in this section, who has been convicted of, or has pled guilty or nolo contendere to, any crime, who contracts to re-enact the crime by use of any book, motion picture, magazine article, radio or television presentation, live entertainment, or any live or recorded presentation, or from the expression of his thoughts, opinions, or emotions regarding the crime, shall pay to the circuit court wherein the charges were filed any money or thing of value contractually to be paid to the defendant, his spouse, heirs, assigns, and transferees.

147. See supra note 145.
from other assets of the criminal.\textsuperscript{148} For this reason, the Court found that New York’s interest was not compelling. Arkansas’ statute may be directly related to its interest in preventing criminals from profiting from the crimes they commit. However, if Arkansas is truly interested in compensating crime victims, the scope of the statute should be broadened to include other assets of the criminal.

The Court’s decision is also significant in that it allows the government to place content-based restrictions on speech whenever it feels a compelling justification to do so and the regulation is narrowly drawn to meet the state’s justification. This rationale runs contrary to a host of cases which have concluded that states cannot restrict expression “because of its message, its ideas, its subject matter, or its content.”\textsuperscript{149} In fact, as Justice Kennedy pointed out, the majority’s test seems to have reached First Amendment jurisprudence “by accident rather than as a result of a considered judgment.”\textsuperscript{150}

Kennedy’s approach to First Amendment analysis would do away with the Court’s need to balance the competing interests, and instead, would focus on whether or not the restriction on speech is content-based or content-neutral.\textsuperscript{151} On its face, this approach would seem to provide some much needed consistency in First Amendment jurisprudence. The Court would no longer be confronted with the sometimes subjective determination as to whether the statute in question serves a compelling state interest and is narrowly drawn to achieve that end. Rather, under Kennedy’s approach, if the Court finds that a particular restriction is content-based, the inquiry would end and the speech would be afforded First Amendment protection.

Kennedy’s analysis could also provide greater First Amendment protection. Not even a compelling state interest would justify content-based restrictions. This would be in accord with the majority’s own statement that content-based restrictions “cannot be tolerated under

\textsuperscript{148} See supra note 145.

\textsuperscript{149} See, e.g., Police Dept. of Chicago v. Mosely, 408 U.S. 92 (1972). In Mosely, the Court stated: “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.” Id. at 95. The Court has also stated the broad principle that “[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.” Simon & Schuster, Inc. v. New York State Crime Victims Bd., 112 S. Ct. 501, 508 (1991) (quoting Regan v. Time, Inc. 468 U.S. 641, 648-49 (1984)).

\textsuperscript{150} 112 S. Ct. at 513 (Kennedy, J., concurring).

\textsuperscript{151} Kennedy would still recognize that certain content-based speech is afforded little if no protection. Id. at 514 (Kennedy, J., concurring). See supra notes 58-59 and accompanying text.
Kennedy's approach would not alleviate all the problems associated with deciding cases under the First Amendment. The Court would still be confronted with having to initially determine whether the restriction on speech is content-based or content-neutral. Furthermore, even if the restriction is determined to be content-based, the Court will still have to determine whether the speech falls within one of the limited or unprotected categories. Although Kennedy's approach would not eliminate all the subjective determinations of the Court, it does fall in line with the Court's prior decisions prohibiting content-based restrictions.

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153. See supra notes 61-63 and accompanying text for a discussion of the limited and unprotected categories.

154. See supra note 149 and accompanying text.