Crime Doesn't Pay—or Does It?: Simon & Schuster, Inc. v. Fischetti

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The extensive public demand for graphic depictions of crime has created a marketplace in which criminals can sell their stories for the right price.\(^1\) However, allowing a criminal to profit from the sale of his crime story conflicts with the fundamental public policy that a criminal should not benefit in any way from his crime.\(^2\) In


\(^2\) See Riggs v. Palmer, 115 N.Y. 506, 511-12, 22 N.E. 188, 190 (1889). In holding that a legatee who murdered the testator was not permitted to inherit the estate, the court concluded:

> No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong . . . or to acquire property by his own crime. 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by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.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. This principle continues to be relied upon by the courts. See, e.g, In re Estate of Laspy, 409 S.W.2d 725, 730 (Mo. Ct. App. 1967) (widow convicted of manslaughter of husband not entitled to statutory widow’s allowance); Petrie v. Chase Manhattan Bank, 33 N.Y.2d 846, 848, 307 N.E.2d 253, 253, 352 N.Y.S.2d 194, 194 (1973) (murderer disqualified from receiving trust benefits). In proposing a federal “Son of Sam” law, Congress has also recognized that “it is against public policy for a criminal to profit from the glorification of his crime. . . .” S. Rep. No. 98-497, 98th Cong., 2d Sess. 5, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3610.

A related public policy consideration is that victims of crime should be compensated for their injuries. See R. Meiners, Victim Compensation 7-24 (1978). There is a notable distinction between “compensation” and “restitution.” See S. Schaffer, Victimology: The Victim and His Criminal 112 (1977). Compensation is a societal remedy that seeks to “counterbalance[e] the victim’s loss” caused by the criminal’s acts, whereas restitution is a corrective remedy that would restore to the victim rights and property destroyed or damaged by the crime. Id. at 112-13. The American trend is toward compensation “no matter what the cause of the loss or the injury . . . the claim (for compensation) . . . is considered a civil matter only and is not to be connected with the disposition of the criminal case . . . .” Id. at 113.
order to resolve this conflict, Congress and thirty-nine states have enacted legislation to prevent criminals from receiving profits from such sales until their victims have been compensated. New York was the first state to enact such a statute, spurred by the distaste of enriching David Berkowitz, a serial killer known as “Son of Sam” who terrorized New York City during the spring and summer of 1977. New York Executive Law section 632-a (“section 632-a”) provides that a criminal must deposit into escrow for the benefit of his victims any proceeds from the sale of descriptions of the crime or stories containing “thoughts, feelings, opinions or

At early American law, a thief, in addition to being subject to corporal punishment, was forced to pay the victim treble damages, and, if unable to pay, was required to be at the victim’s disposal for a period of time. Id. at 10-11. Restitution as a theory of criminal justice has evolved to justify recompense to victims from an ethical perspective. The criminal’s violation of a victim’s rights creates an imbalance between them that must be equalized. See Glitter, Expanding the Role of the Victim in Criminal Actions: An Overview of Issues and Problems, 11 PEPPERDINE L. REV. 117, 117 (1984).

Recently, state and federal legislation has been enacted and various organizations have been formed to further these policies. See id. at 120 n.8. One indication of the greater awareness of victims’ rights was President Reagan’s designation of the week of April 19, 1982 as Crime Victims Week and his establishment of a Task Force on Victims of Crime. See id. at 118 n.2. Among the organizations formed to advance victims’ rights are the National Organization for Victim Assistance (“NOVA”), the Victim’s Assistance Legal Organization (“VALOR”), and the Crime Victims Compensation Boards established in various states. See id. at 118 n.3, 120 n.8. The American Bar Association has developed model legislation and recommendations for public policymakers aimed at protecting the victim as a witness and promoting fair treatment of victims. See id. at 123 n.13. The Victims Crime Act was introduced in Congress in March of 1984 at the request of the Reagan administration as part of the Comprehensive Crime Control Act of 1984. See S. REP. No. 98-497, 98th Cong., 2d Sess. 5, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3607.

See Wash. Post, Aug. 11, 1977, at Al. “Son of Sam” was the media appellation for David Berkowitz. Id. His arraignment in the late summer of 1977 was the culmination of the “most intensive manhunt in the New York City Police Department's history.” Id. The federal “Son of Sam” law is codified at 18 U.S.C. § 3671(a)-(d) (1988). For a list of states that have enacted “Son of Sam” laws, see Children of Bedford, Inc. v. Petromelis, 77 N.Y.2d 713, 573 N.E.2d 541, 548 n.3, 570 N.Y.S.2d 453, 460 n.3 (1991).

See N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991). Senator Emanuel Gold in proposing the bill indicated his rationale:

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

Memorandum of Senator Gold, 1977 N.Y. STATE LEGIS. ANN. 267. Since the enactment of § 632-a, ten cases have been brought before the New York State Crime Victims Board—but the Son of Sam case was not among them. See Hevesi, Cases Under “Sam” Law: Notorious But Few, N.Y. Times, Feb. 20, 1991, at B8, col.4.
emotions regarding such crime." The constitutionality of these "Son of Sam" statutes has been challenged on first amendment grounds in the courts of New York and other states. Recently, in *Simon and Schuster, Inc. v. Fischetti*, the Second Circuit held that section 632-a does not violate the first amendment, even though the statute imposes a content-based restriction on speech.

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6 See *Fasching v. Kallinger*, No. L-069197-83 (N.J. Super. Ct. Law Div. July 24, 1985), rev'd on other grounds, 211 N.J. Super. 26, 510 A.2d 694 (App. Div. 1986); *Children of Bedford, Inc. v. Petromelis*, 143 Misc. 2d 999, 1004-07, 541 N.Y.S.2d 894, 898-900 (Sup. Ct. N.Y. County), aff'd, 161 A.D.2d 503, 556 N.Y.S.2d 483 (1st Dep't 1989), aff'd, 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453 (1991). In examining § 632-a on due process and first amendment grounds, the supreme court in *Children of Bedford* concluded that the statutory restrictions would not prevent the free dissemination of information of public interest. *Id.* at 1004, 541 N.Y.S.2d at 898. The court did recognize, however, that the statute might have some inhibiting effect on the free exchange of information, but noted that "any such impact results not from curtailment of the expression of a particular idea or viewpoint but from compliance with a scheme for attachment which may have the affect of discouraging the flow of information." *Id.* at 1006, 541 N.Y.S.2d at 899-900. In light of these considerations, to determine the statute's constitutionality, the *Children of Bedford* court chose to apply a balancing test, weighing governmental concern to be advanced by § 632-a against any infringement it had on the first amendment. *Id.* at 1006-07, 541 N.Y.S.2d at 900. In upholding the constitutionality of the statute, the court determined that the state interest in compensating crime victims and preventing unjust enrichment outweighed any minimal restraint on the distribution of information. *Id.* at 1006-07, 541 N.Y.S.2d at 900. However, upon review, the New York Court of Appeals determined that § 632-a is subject to the "strict scrutiny" standard of review because it is content-based and imposes a direct burden on a category of speech based on the subject matter. *Children of Bedford*, 77 N.Y.2d at 719, 573 N.E.2d at 543, 570 N.Y.S.2d at 455 (1991). Applying the "strict scrutiny" standard, the New York Court of Appeals in *Children of Bedford* concluded that § 632-a satisfied this standard and thus is constitutional. *Id.*


7 916 F.2d 777 (2d Cir. 1990), cert. granted, 111 S. Ct. 950 (1991) [hereinafter *Simon & Schuster*].

8 See *id.* at 782-84.
Applying a "strict scrutiny" test to the contract between an admitted criminal, Henry Hill, and a publisher, Simon & Schuster, the court found that the state had a compelling interest in preventing a criminal from profiting from his crimes until his victims were first compensated for any injuries arising from their victimization.9

In 1981, Simon & Schuster commissioned a biography of Henry Hill, a low level member of a New York City organized crime syndicate, who was apprehended for drug trafficking and subsequently became an FBI informant.10 Simon & Schuster hired Nicholas Pileggi to write the book with Hill's cooperation.11 In return for his participation, Hill was offered a share in the proceeds earned from the book.12 The collaboration between Pileggi and Hill resulted in *Wiseguy: Life in a Mafia Family*, a book containing descriptions of Hill's crimes and many of his victims.13 Shortly after the book's publication, the Crime Victims Board ("Board") served Simon & Schuster with a Proposed Determination and Order stating that the book was covered by section 632-a.14 Accordingly, the Board ordered Hill to turn over all royalties he had received and Simon & Schuster to pay any future royalties it owed to Hill to the Board to be placed in escrow for the benefit of Hill's

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9 See id. at 782-83. The circuit court applied a strict scrutiny analysis for content-based restriction, stating that "the State . . . must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Id. at 782 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).


11 Simon & Schuster, 916 F.2d at 779. Simon & Schuster engaged literary agent, Sterling Lord, who proposed author Nicholas Pileggi for the project. Id. A contract for the production of a book was signed between Hill, Pileggi, and Simon & Schuster. Id. In a separate contract, Sterling Lord agreed to receive the entire payment from Simon & Schuster, to keep ten percent, and to divide the remainder between Hill and Pileggi. Id.

12 Id. The circuit court concluded that "[t]here seem[ed] to be no question that Hill would not have agreed to participate in the project without the assurance he would be paid." Id.

13 Id. *Wiseguy: Life in a Mafia Family* describes Hill's crimes in detail, including the theft of approximately six million dollars in jewelry and cash from the Lufthansa terminal at Kennedy airport. See id. Hill was not prosecuted for most of the crimes admitted to in the book, and he only served brief terms for the others. See id.

14 Id. at 780. *Wiseguy: Life in a Mafia Family* was described by the Board as "a veritable catalog of crimes in which Henry Hill admits to the commission of various crimes and expresses his feelings, opinions or emotions, regarding such crimes." State Crime Victims Bd., 724 F. Supp. at 172-73 (quoting plaintiff's notice of motion, Exh. 2, Para. 11).
victims. In response, Simon & Schuster brought an action seeking declaratory and injunctive relief, claiming that section 632-a violated its first amendment right of free speech and was vague and overbroad in violation of the fourteenth amendment. The district court granted the Board’s cross-motion for summary judgment and thus upheld the constitutionality of section 632-a, reasoning that the statute merely targeted nonexpressive activity and had only an incidental effect on free speech.

The Second Circuit agreed that section 632-a was constitutional, but determined that the statute imposed a direct burden on speech and thus applied a “strict scrutiny” standard. Writing for the majority, Judge Miner, relying on the Supreme Court’s decision in Meyer v. Grant, maintained that the denial of payment for expressive activity imposed a direct burden on that activity. However, the court determined that the state interest in preventing a criminal from capitalizing on the sale of his crime story while his victims lacked necessary compensation for their injuries was sufficiently compelling to satisfy the “strict scrutiny” standard. In further support of its determination, the Second Circuit stressed that section 632-a is narrowly tailored in that it does not deprive criminals of all compensation but merely prevents them from profiting from the sale of their crime stories until their victims have been compensated.

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19 Id.
20 Id. at 178. In upholding the constitutionality of § 632-a, the district court found that the statute was not subject to strict scrutiny because it did not directly infringe on first amendment rights. Id. As a result, the court determined that “[t]he state’s interest in compensating crime victims is unrelated to the suppression of free expression and [that] any burden on free expression [was] merely incidental.” Id. at 177. In reaching its decision, the court cited Arcara v. Cloud Books, Inc. to show how the statute is directed at nonexpressive activity rather than expressive activity. Id. (citing Arcara, 478 U.S. 697 (1986)). The court distinguished the case at bar from Meyer v. Grant, in which the Supreme Court declared a statute prohibiting compensation of individuals for circulating petitions to qualify state ballot initiatives for state elections to be unconstitutional as directly restricting political speech. Id. (citing Meyer, 486 U.S. 414 (1988)). The district court held that § 632-a passed constitutional muster on its face and as applied to Simon & Schuster. Id. at 180.
21 Simon & Schuster, 916 F.2d at 778.
23 Simon & Schuster, 916 F.2d at 781. Judge Miner stressed that “[w]ithout a financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write.” Id. Furthermore, he held that it is well settled that this financial restriction acts as a direct burden on speech itself. Id.
24 Id. at 782. The court relied on the legislative history of § 632-a. Id. at 782-83.
25 Id. at 783. The court rejected Simon & Schuster’s argument that § 632-a was under-
In a dissenting opinion, Judge Newman argued that section 632-a violated the first amendment in that the statute involves content-based discrimination and chills publication of matters of legitimate public interest.\textsuperscript{23} Although Judge Newman agreed that the statute should be subject to “strict scrutiny,” he contended that section 632-a could not meet this exacting test and was therefore unconstitutional.\textsuperscript{24}

This Comment will analyze the first amendment challenges to New York’s “Son of Sam” law and will suggest that while the Second Circuit reached the correct result, it erred in applying a “strict scrutiny” standard to determine the constitutionality of section 632-a. As an alternative, a less stringent standard will be proposed. Additionally, the effects on future amendments to the “Son of Sam” statute resulting from the characterization of the activity as expressive by the \textit{Simon & Schuster} court will be considered.

I. \textbf{FIRST AMENDMENT CHALLENGES}

A. \textit{Standards of Constitutional Review}

Although the first amendment prohibits Congress from enacting laws “abridging the freedom of speech, or of the press,”\textsuperscript{25} these inclusive and overinclusive and therefore “not well tailored.” \textit{Id.} Instead, the court found that the statute was narrowly tailored in that it provided a specialized form of attachment “designed to tie up the proceeds until victims have had an opportunity to make their claims for compensation.” \textit{Id.}

\textsuperscript{23} \textit{Id.} at 787 (Newman, J., dissenting). Judge Newman was concerned that § 632-a would restrict the publication of material of public interest. \textit{Id.} (Newman, J., dissenting). Furthermore, Judge Newman argued that such a restriction would hinder the public understanding of crime. \textit{Id.} (Newman, J., dissenting).

\textsuperscript{24} \textit{Id.} at 784-85 (Newman, J., dissenting). Judge Newman argued that § 632-a failed the “strict scrutiny” test because New York’s attachment laws provided a reasonable alternative to the content-based discrimination of the “Son of Sam” law. \textit{Id.} at 786 (Newman, J., dissenting). Judge Newman also contended that the state’s interest in assuaging victim outrage regarding a criminal profiting from his crime was unavailing because “alleviating public outrage is not an interest that the First Amendment permits government to advance by regulating books and other forms of expression.” \textit{Id.} at 786 (Newman, J., dissenting) (citations omitted). Thus, Judge Newman felt that § 632-a, a content-based regulation that had a chilling effect on speech, could not withstand constitutional scrutiny. \textit{Id.} at 787 (Newman, J., dissenting).

\textsuperscript{25} \textit{See} U.S. Const. amend. I. The first amendment is applied to the states through the fourteenth amendment. \textit{See} Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). The fourteenth amendment provides in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend.
protections are not absolute.\textsuperscript{26} In addition to recognizing that certain classes of expression are excluded from the protection of the first amendment,\textsuperscript{27} the Supreme Court has also recognized that a direct burden on otherwise protected expression may be justified if there is a compelling governmental interest and it is achieved by legislation narrowly tailored to achieve its goals.\textsuperscript{28} Furthermore, incidental burdens on speech may be upheld when justified by an important governmental interest in regulating nonexpressive activity.\textsuperscript{29}

The \textit{Simon \& Schuster} court adopted a "strict scrutiny" standard, finding that section 632-a imposes a direct burden on expres-

\textsuperscript{26} See Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942). In \textit{Chaplinsky} the defendant, a Jehovah's Witness, called the city marshall "a God damned racketeer" and "a damned Fascist." \textit{Id.} at 569. The defendant was convicted of violating a state statute which prohibited anyone from addressing "any offensive, derisive or annoying word to any other person who is lawfully in any... public place [or] call[ing] him by any offensive or derisive name...." \textit{Id.} The Supreme Court upheld the conviction and noted:

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. \textit{Id.} at 571-72 (footnotes omitted).

The state’s right to regulate speech also depends on the circumstances surrounding the speech. See \textit{Schenck v. United States}, 249 U.S. 47, 52 (1919). In \textit{Schenck}, the Supreme Court upheld defendants’ conviction for conspiracy to violate the 1917 Espionage Act. \textit{Id.} at 53. During World War I, defendants printed and distributed documents encouraging men to oppose the draft. \textit{Id.} at 49. The Court concluded that many statements made in peacetime would not be constitutionally protected during wartime. \textit{Id.} at 52.

\textsuperscript{27} See, e.g., \textit{Chaplinsky}, 315 U.S. at 572. The Supreme Court upheld the constitutionality of a statute prohibiting the use of words likely to cause an average addressee to fight. \textit{Id.} The Court has also held that "obscenity is not within the area of constitutionally protected speech or press." Roth v. United States, 354 U.S. 476, 485 (1957). See also \textit{New York Times Co. v. Sullivan}, 376 U.S. 254, 279-80 (1964) (Court concluded that first amendment protections for speech and press place some limits on state rules for defamation actions).

\textsuperscript{28} See \textit{Arkansas Writers’ Project, Inc. v. Ragland}, 481 U.S. 221, 231 (1987) (applying "strict scrutiny" test to state statute that imposed content-based tax on certain magazines). The \textit{Ragland} Court noted that "[i]n order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." \textit{Id.} (citation omitted); see also \textit{Perry Educ. Ass’n v. Perry Local Educators’ Ass’n}, 460 U.S. 37, 45 (1983) (content-based restriction subject to "strict scrutiny" test).

\textsuperscript{29} See \textit{United States v. O'Brien}, 391 U.S. 367, 377 (1968). In \textit{O'Brien}, the Court noted that "governmental regulation is sufficiently justified... if it furthers an important governmental interest... unrelated to the suppression of free expression; and if the incidental restriction... is no greater than is essential...." \textit{Id.}
sive activity. Applying the analysis of *Meyer*, the court found that section 632-a directly burdens the speech of those who wish to sell their crime stories. The *Simon & Schuster* court further determined that section 632-a excludes from circulation criminals’ stories based on their content. Finally, the court noted that because a criminal’s publication right may be his only asset subject to attachment, the statute singles out the media for differential treatment based on expressive content. In light of these factors, the Second Circuit applied a “strict scrutiny” test in determining the constitutionality of New York’s “Son of Sam” law.

B. Meyer Distinguished

While the Second Circuit relied heavily upon *Meyer* in its examination of section 632-a, it is suggested that that case is distinguishable and thus inapplicable to the facts of *Simon & Schuster*.

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30 *Simon & Schuster*, 916 F.2d at 782.
31 See id. at 781. The district court distinguished *Meyer* from *Simon & Schuster* in that the former involved political speech. *Id.* at 781-82. However, the Second Circuit concluded that the district court’s finding that *Meyer* is distinguishable from *Simon & Schuster* was unfounded. *Id.* at 782. The Second Circuit cited *Meyer* for the proposition that “[i]t is now settled that the denial of payment for expressive activity constitutes a direct burden on that activity.” *Id.* at 781.
32 See id. at 782. Section 632-a only applies to the sale of a criminal’s story containing thoughts, feelings, or emotions regarding the crime. *Id.* at 782. The Second Circuit determined that § 632-a effectively excludes the expression of a criminal that would be motivated primarily by financial gain. *Id.* A criminal who, for example, writes a cookbook and greatly profits from the sale of it because of his notoriety is not covered by the statute because the book does not contain thoughts, feelings, or emotions regarding the crime. See *id.* at 785 (Newman, J., dissenting).

A governmental actor may be deemed to have “abridged” speech if the governmental action, neutral on its face, was motivated by an intent to single out constitutionally protected speech for control or penalty. L. Tribe, *American Constitutional Law* § 12-3, at 794 (2d ed. 1988). “[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited ‘merely because public officials disapprove the speaker’s views.’” Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530, 536 (1980) (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result)).

33 *Simon & Schuster*, 916 F.2d at 782. (citing Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 227-31 (1987)). The Supreme Court in *Arkansas Writers’ Project* applied the “strict scrutiny” standard to a content-based statute involving differential taxation of magazines. 481 U.S. at 227-31.
34 See *Simon & Schuster*, 916 F.2d at 782.
35 See *State Crime Victims Bd.*, 724 F. Supp. at 177 (distinguishing *Meyer*).
1. Colorado's Statute in *Meyer*

Unlike section 632-a, which does not completely eliminate monetary gain, the Colorado statute at issue in *Meyer* prohibited and criminally punished the payment of individuals circulating petitions proposing amendments to the state constitution. Moreover, the Colorado statute had the effect of restricting political speech. It did so by limiting the number of people who could be employed circulating petitions and the hours during which signatures could be solicited, effectively reducing the audience reached. The financial restrictions imposed by the statute made it more difficult to obtain the necessary number of signatures to put the initiative on the ballot, thus limiting the proponent's ability to bring matters to statewide attention and in effect restricting speech.

2. New York's Statute in *Simon & Schuster*

   a. Deterrent effect caused by financial restriction

   In contrast to Colorado, the New York statute does not prohibit expression or restrict the criminal's right to free expression but merely curtails his financial incentive to speak. It is suggested that the Second Circuit's speculation that section 632-a will have a deterrent effect on speech is not enough to implicate the

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29 *Id.* at 421-22. The speech at issue involved political change and was described as "core political speech." *Id.* When the expression involves the electoral process it is "an area of public policy where protection of robust discussion is at its zenith." *Id.* at 425 (citations omitted).
30 *Id.*
31 *Id.* at 422-23.
32 *Id.* at 422-24. The denial of payment to petition circulators restricts the most effective means of conveying the political message: direct one-on-one communication. *Id.* In effect the financial restriction deprives the speaker from employing petition circulators to convey the speaker's political message. *See id.* at 424. However, § 632-a is distinguishable in that the avenues of communication (i.e., film, television or print) remain available to the speaker. The publisher's or film maker's financial incentive remains undisturbed, and these media remain accessible for the criminal's speech. It is only the proceeds from the criminal's sale that may be withheld from the criminal.
33 *Id.* The prohibition against paying petitioners restricts political expression for two reasons: "First, it limits the number of voices who will convey . . . [a] message and therefore, limits the size of the audience they can reach." *Id.* Secondly, this restriction will place a greater burden on the party trying to obtain the necessary signatures and thus "limit their ability to make the matter the focus of statewide discussion." *Id.*
Some criminals may be willing to publish their stories for reasons other than financial remuneration; thus, in such instances the statute does not restrict the free circulation of ideas. Furthermore, the first amendment "presupposes a willing speaker"; it does not provide that a speaker is entitled to compensation for his speech. Moreover, not all financial incentive is eliminated by section 632-a because the criminal writer is allotted up to one-fifth of the funds in the escrow account to pay reasonable attorneys' fees. Also available to the criminal writer are any funds remaining at the expiration of the five year statutory period. Thus, although the "Son of Sam" law may decrease a criminal writer's immediate economic incentive to publish his account, it does not eliminate all potential for compensation.

42 See Branzburg v. Hayes, 408 U.S. 665, 693-94 (1972). In Branzburg, newspaper reporters were required to testify before a grand jury regarding information from a confidential source. Id. The Court noted that a speculative deterrent effect was not enough to implicate the first amendment. Id. However, a showing of "a significant constriction of the flow of news to the public" would afford a constitutional testimonial privilege. Id. at 693.

43 See Snider, Coming Soon to a Theater Near You, 7 CAL. L. 28, 31-32 (April 1987) (some criminals eager to tell their stories despite absence of financial compensation); N.Y. Times, Jan. 18, 1977, at 21, col. 4 (convicted murderer on death row requested that portion of proceeds from his crime stories be given to victims' families); see also Comment, Criminal Antiprofit Laws, supra note 6, at 1364-65 (motivations include conveyance of criminal's side of story and raising money for defense attorney).

44 See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976). When there is a willing speaker, first amendment protection extends to the source and recipient of the communication. Id.

45 See Comment, Alabama's Anti-Profit Statute, supra note 6, at 128 ("historical background of the first amendment offers little support for the claim that the amendment confers a right to be compensated for expression").

46 See N.Y. EXEC. LAW § 632-a(8) (McKinney 1982 & Supp. 1991). According to § 632-a, the criminal may retain 20% of the proceeds from the sale of his crime story for reasonable attorney's fees. Id. This serves as an incentive to a criminal storyteller because studies have shown that criminals much prefer private counsel to public defenders. Id.; see also J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 105-06 (1972) ("[n]early 80 percent of those represented by public defenders felt that their lawyer was not on their side. All those who had private attorneys felt their lawyer was on their side"); O'Brien, Pheterson, Wright & Hostica, The Criminal Lawyer: The Defendant's Perspective, 5 AM. J. CRIM. L. 283, 299 (1977) (inmates consider retained counsel superior to assigned counsel and public defenders).

47 N.Y. EXEC. LAW § 632-a(4) (McKinney 1982 & Supp. 1991) ("[u]pon a showing . . . that five years have elapsed . . . the board shall immediately pay over any moneys in the escrow account to such person or his legal representatives").

48 See Comment, In Cold Type: Statutory Approaches to the Problem of the Offender as Author, 71 J. CRIM. L. & CRIMINOLOGY 255, 259-60 (1980). The availability of one-fifth of the escrowed proceeds to pay reasonable attorneys' fees offers incentive to indigent as well as nonindigent offenders to sell their crime stories. Id. at 259. The possibility of receiving any funds remaining at the expiration of the five year statutory period may also encourage the
Section 632-a targets the profit earned by a criminal flowing from his wrong rather than the content of his expression. The attachment of only the criminal’s proceeds from the sale of his story is in keeping with the purposes of the statute. It is suggested that the Second Circuit, relying on a readily distinguishable precedent, mischaracterized the reach of section 632-a in concluding that it directly burdens expressive activity, since it merely targets the nonexpressive activity of receiving a profit from the sale of expressive material. Although the court reached a just re-

criminal to sell his story. Id. at 260. A third incentive is the opportunity for a criminal to provide restitution to his victim. Id.

See State Crime Victims Bd., 724 F. Supp. at 176. The district court determined that § 632-a did not exclude speech based on content but rather acted as a “procedural hurdle” to publication in that it forced publishers to exert greater efforts to obtain a criminal’s story in the absence of immediate compensation to the criminal. Id.

See supra note 2 and accompanying text (criminal should not benefit from crime). The publication of a criminal’s story often causes additional emotional injury to his victims. See Children of Bedford, Inc. v. Petromelis, 77 N.Y.2d 713, 727, 573 N.E.2d 541, 548, 570 N.Y.S.2d 453, 460 (1991) (noting it is “wrong for criminals to salt their victims’ wounds by profiting from the victimization without recompense to the victims”); Comment, Criminal Antiprofit Laws, supra note 6, at 1354. Usually a victim is left uncompensated for his unfortunate role in helping a criminal achieve notoriety. Id. The victim and his family often suffer due to the news media’s constant reminders of the crime. Id. The publication by a criminal of his story intensifies this suffering. Id.; cf. Time Inc. v. Hill, 385 U.S. 374, 377 (1964) (family held hostage by escaped convicts and falsely portrayed by Time magazine as subject of Broadway thriller were granted relief under New York right of privacy law). Thus, attachment of the criminal’s proceeds serves to compensate victims for this additional injury to them.

See Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986). The Second Circuit chose not to follow the district court’s application of Arcara to § 632-a. In Arcara, the Supreme Court upheld a statute that forced the closure of a bookstore in which prostitution was being practiced. See id. The statute in Arcara was aimed at regulating the nonexpressive activity of prostitution, but as applied, it had the effect of closing a bookstore and thus burdened expressive activity. Id. However, the Court concluded that the statute was not violative of the first amendment and the booksellers were free to relocate and sell their books elsewhere. Id. However, the Arcara Court noted that when a statute based on nonexpressive activity has the effect of singling out those engaged in expressive activity, then it should be subjected to the higher standard of “least restrictive means” scrutiny. Id. at 706-07. To illustrate this, the Arcara Court cited Minneapolis Star and Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575, 592-93 (1983), in which the Supreme Court struck down a tax on newsprint and ink which fell disproportionately on newspaper publishers exercising their freedom of the press. Arcara, 478 U.S. at 704. The tax in Minneapolis Star had the effect of restricting freedom of the press by unduly burdening a small group of newspapers so that they could not afford to print and were forced to shut down. Minneapolis Star, 460 U.S. at 591-92. The higher standard requiring that the statute’s purpose must be achieved through the means that are the least restrictive on first amendment freedoms was applied. See id. at 591-93. Arguably, the New York “Son of Sam” statute singles out
sult, it failed to recognize that in enacting section 632-a, New York's legislature was not motivated by an intent to control or penalize content-based speech. 52

C. O'Brien Test

The Supreme Court has reiterated that when expressive and nonexpressive activity are interrelated, a sufficiently important governmental interest for regulation of nonexpressive activity justifies incidental limitations on first amendment freedoms. 53 Thus, the Simon & Schuster court should have followed the district court's lead in applying the test established in United States v. O'Brien. 54 The O'Brien test requires that: (1) the governmental regulation be enacted within the constitutional power of the government, (2) the regulation further an important governmental interest, (3) the governmental interest be unrelated to free expression, and (4) the incidental restriction on free speech be no greater than necessary for the furtherance of that interest. 55 As the district court determined in applying the O'Brien test, section 632-a passes constitutional muster in that it regulates nonexpressive activity and only incidentally limits expressive activity. 56 Additionally, the government's substantial interest in preventing a criminal from profiting from his crime until his victims are compensated is directly related to attachment of the proceeds earned by a criminal from his crime and is unrelated to the expressive activity. 57 Therefore, although the attachment of a criminal's proceeds in compliance with section 632-a, a nonexpressive activity, incidentally affects a criminal's telling of his story, an expressive activity, it satisfies the test enunciated in O'Brien. 58

In rejecting the applicability of the O'Brien test to section

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expressive activity, and thus Arcara may not be applicable.

52 See [1977] N.Y. LEGIS. ANN. 267 ("bill would make it clear that in all criminal situations, the victim must be more important than the criminal"); see also State Crime Victims Bd., 724 F. Supp. at 177.


55 See id. at 377.


57 See supra notes 17 & 22 and accompanying text.

632-a, the Second Circuit in *Simon & Schuster* found that the requirement "that the governmental interest in question be unconnected to expression" was not satisfied. However, the governmental interest, which is to prevent criminals from profiting from their crimes until their victims have been compensated, is unrelated to the criminal’s right to free expression. The criminal storyteller is free to express his account; he is merely not entitled to the profit flowing from his crime until his victims have been compensated.

II. Effects of Strict Scrutiny Standard

As victims’ rights come to the forefront of public concern, the scope of attachment of a criminal’s assets should be expanded to provide adequate compensation to victims. However, the application of a “strict scrutiny” standard to the “Son of Sam” law may discourage legislators from expanding the scope of section 632-a in the future. By virtue of a requirement that the statute be narrowly tailored to achieve a compelling governmental interest, few amendments will withstand constitutional scrutiny.

A. Notoriety

A suggested amendment to section 632-a that may be impeded is expansion of the statute’s application to all proceeds that a criminal receives based on his notoriety as an offender. Such an amendment would prevent criminals from profiting from their notoriety as criminals while their victims remain uncompensated, a result that is possible under the current version of New York’s

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69 See *Simon & Schuster*, 916 F.2d at 781.
60 See id. at 783.
61 See supra note 2 and accompanying text.
62 See *Children of Bedford, Inc. v. Petromelis*, 143 Misc. 2d 999, 1007, 541 N.Y.S.2d 894, 900 (Sup. Ct. N.Y. County 1989), aff’d, 161 A.D.2d 503, 556 N.Y.S.2d 483 (1st Dep’t 1990), aff’d, 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453 (1991) (objection to § 632-a as only applicable to income derived from communication regarding crime “indicates that the law may not go far enough in subjecting future income of the perpetrator to the claims of the victim although, as a practical matter, most criminals will possess no other source of income”).
64 See NEV. REV. STAT. § 217.265 (1989). Nevada’s “Son of Sam” law provides that three-quarters of the compensation an offender receives from “books, serialization rights, rights for movies and television programs and other payments which he receives based on his notoriety as an offender” must be paid into a fund for the benefit of his victims. Id. (emphasis added).
"Son of Sam" law. For example, section 632-a would be inapplicable to a criminal’s autobiography if it excluded references to his crime, even though sales of the book are bolstered by his notoriety as a criminal.

The experience of Jean Harris, convicted murderer of Scarsdale Diet author Dr. Herman Tarnower, provides an illustration of the ease with which a convicted criminal can circumvent section 632-a. Harris, the author of A Stranger in Two Worlds, a book containing two chapters with references to her crime, was ordered to comply with section 632-a. However, Harris was permitted to retain the profits from the sale of an excerpt of her book to a magazine because references to her crime were omitted. The sale apparently resulted from her notoriety as a criminal, not her reputation as an author. To better serve justice, the proceeds should have been placed in escrow for the benefit of the victim’s family.

See Simon & Schuster, 916 F.2d at 785 (Newman, J., dissenting). “The opportunity to sell books on a variety of . . . topics, enhanced for many criminals by the fame resulting from their crimes, is not disturbed by . . . [§ 632-a].” Id.


See Children of Bedford, Inc. v. Petromelis, 143 Misc. 2d 999, 1009, 541 N.Y.S.2d 894, 901 (Sup. Ct. N.Y. County), aff’d, 161 A.D.2d 503, 556 N.Y.S.2d 483 (1st Dep’t 1990), aff’d, 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453 (1991). The New York “Son of Sam” law does not prohibit a criminal “from engaging in conduct designed to communicate the details of the crime.” Id. at 1004, 541 N.Y.S.2d at 898. The law does not prevent the press from serving as the instrument for a criminal’s communication, or from earning a profit on the publication. Id. The statute only affects the perpetrator’s right to receive proceeds until the victims have had an opportunity to recover a civil judgment against the wrongdoer. Id.

See Adams, Son of Sam Law Held No Bar to Jean Harris Keeping Fee, N.Y.L.J., Apr. 2, 1990, at 1, col. 3, at 2, col. 1 (section 632-a held no bar to Harris keeping $35,000 for magazine serialization of her book because even though part of article within purview of statute, “core of the article is solely about her life and experiences in prison”).

See Simon & Schuster, 916 F.2d at 785 (Newman, J., dissenting). “Had [her] book concerned exclusively conditions [in] prison, Harris’s royalties, though enhanced by the notoriety of her crime, would not have been escrowed for the family of her victim.” Id.

The Crime Victims Board determined that § 632-a was inapplicable to Bernhard Goetz. See Goetz Can Keep Any Profits From His Story, Board Rules, Chi. Tribune, Apr. 23, 1988, at 2 [hereinafter Goetz Can Keep Any Profits]; State OKs Goetz Profits, Newsday, Apr. 23, 1988, at 2. Goetz had been charged with assault, attempted murder, and reckless endangerment, but was only convicted of gun possession. See People v. Goetz, 73 N.Y.2d 751, 751, 532 N.E.2d 1273, 1273, 536 N.Y.S.2d 45, 45 (1988), cert. denied, 489 U.S. 1053 (1989). Goetz was convicted of criminal possession of a weapon in the third degree and acquitted of four counts of attempted murder and of assault in the first degree. Id. The Board ruled § 632-a inapplicable because Goetz was convicted of a victimless crime. See Goetz Can Keep Any Profits, supra; State OKs Goetz Profits, supra. However, were it not for the commission of criminal possession of a handgun, Goetz would have been incapable of shooting four youths...
B. Victimless Crimes

New York's "Son of Sam" law codifies two separate fundamental governmental interests: "criminals should not be permitted to profit from their wrongs and also ... victims expect and are entitled to 'retributive satisfaction' from our criminal justice system." However, the Second Circuit in Simon & Schuster held that "[i]t cannot be gainsaid that the state has a very strong interest in preventing criminals from profiting from their crimes." Thus, any proposed amendment to section 632-a that is based solely on the interest in preventing criminals from profiting from their crimes—for example, an amendment to attach the proceeds of "victimless crimes"—would also be unconstitutional under the

in a New York City subway. See id. at 3. William Kunstler, the attorney for an injured youth, commented, "Without that gun, we wouldn't have had this terrible tragedy." Id. The sale of Goetz's story was bolstered by his notoriety as a vigilante, which could not have occurred but for his illegal possession of a handgun. In order to eliminate an unjust result, § 632-a should be amended to include "payments [an offender] receives based on his notoriety." See supra note 64 and accompanying text.


71 Simon & Schuster, 916 F.2d at 782; see also id. at 785 (Newman, J., dissenting) ("[c]ourt applies a legal analysis that defines the state interest being advanced in terms of the statute's scope, thereby reaching the circular result that the scope of the statute is precisely tailored to the state's objective").


The Crime Victims Board and New York courts have reached divergent decisions regarding the applicability of § 632-a to victimless crimes. See In re Halmi, Sr., 128 A.D.2d 411, 411, 512 N.Y.S.2d 651. The New York statute was found not to apply to Sydney Biddle Barrows's book, Mayflower Madam, because promoting prostitution, the misdemeanor she was convicted of, was a "victimless" crime. See id.; see also Goetz Can Keep Any Profits, supra note 69 (section 632-a inapplicable to individual convicted of criminal possession of handgun, a victimless crime); Roberts, Criminals, Authors, and Criminal Authors, N.Y. Times, March 22, 1987, § 7, at 1, col. 1 (discussing applicability of § 632-a in several cases). Section 632-a was held to apply to R. Foster Winans's book, Trading Secrets: Seduction and Scandal at the Wall Street Journal, which includes facts concerning Winans's actions resulting in his federal conviction for insider trading. See N.Y.L.J., Feb. 26, 1990, at 21. Winans, a columnist for the Wall Street Journal, leaked contents of his future columns to a stockbroker in exchange for a share of the profits from trading on this market-sensitive information. Id. Winans was convicted in 1985 of wire fraud, mail fraud, and conspiracy to defraud in federal court for the Southern District of New York. Id. The Second Circuit
Second Circuit's brand of "strict scrutiny."

IV. CONCLUSION

While upholding the constitutionality of section 632-a, the Second Circuit applied an unnecessarily stringent standard. To withstand the "strict scrutiny" that is applied under this standard, a statute must be narrowly tailored to achieve a compelling governmental interest. Amendments aimed at broadening the scope of section 632-a may be inhibited or, if enacted, struck down because of this overly exacting standard. In February 1991, the United States Supreme Court granted certiorari to review the Second Circuit's decision. It is urged that the Supreme Court apply the standard enunciated in *O'Brien* to determine the constitutionality of section 632-a because the statute targets nonexpressive activity and only incidentally burdens expressive activity.

*Jeanne E. Dugan*

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affirmed, except for the conspiracy conviction which was reversed. *Id.* Winans authored a book that included facts concerning his actions which resulted in his conviction. *Id.* Several states' "Son of Sam" laws provide that a criminal convicted of a felony is subject to the provisions of the statute. *See, e.g.,* CAL. CIV. CODE § 2225(a)(1) (Deering Supp. 1991) (attaches proceeds earned by "convicted felons"); FLA. STAT. § 944.512 (1985) (same). Felonies include victimless crimes such as prostitution, possession of a controlled substance, and certain "white collar" crimes. *See, e.g.,* 15 U.S.C. § 78(b) (1988) (Securities Exchange Act of 1934 enacted to "insure honest markets"); CAL. PENAL CODE § 266 (Deering 1985) (prostitution); CAL. HEALTH & SAFETY CODE § 11350 (Deering 1985) (unlawful possession of a controlled substance); FLA. STAT. § 796.01 (1989) (keeping house of ill fame is felony); FLA. STAT. § 790.065(d) (1989); see also O'Connor, *Toward a More Efficient Deterrence of Insider Trading: The Repeal of Section 16(b)*, 58 FORDHAM L. REV. 309, 309-311 (1989).