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COMMENTS

PLAY IT AGAIN SAM: NEW YORK'S RENEWED EFFORT TO ENACT A "SON OF SAM" LAW THAT PASSES CONSTITUTIONAL MUSTER

I. INTRODUCTION

From 1976-1977, New York neighborhoods were terrorized by serial killer David Berkowitz who killed or severely injured more than a dozen people over the course of an eighteen month crime rampage.[1] In August of 1977, Berkowitz, known as the "Son of Sam,"[2] was finally arrested.[3] After his arrest, Berkowitz sold the exclusive rights to the story of his crimes. The public became outraged, and the New York legislature vowed to devise a way to prevent criminals from profiting from their crimes.[4]

On August 11, 1977, the New York legislature enacted section 632-a of the Executive Law, commonly referred to as the "Son of Sam" law.[5] This law required criminals to forfeit any earnings from the sale of their criminal stories to the New York State Crime Victims Board.[6] The money collected would then be placed into an escrow account, used to compensate the criminals' victims. This money was only available to victims who obtained civil judgments against the wrongdoer within a period of five years from the time the account was established.[7] Ironically, the law was never actually applied to Berkowitz. He was declared incompetent to stand trial and, at that time, the law only applied to convicted criminals.[8]

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1. Mark Conrad, *The Demise of New York's 'Son of Sam' Law—The Supreme Court Upholds Convicts' Rights to Sell Their Stories*, N.Y. ST. B.J., Mar./Apr. 1992, at 28.

2. Berkowitz was known as the "Son of Sam" because of the way he signed letters to various New York area newspapers. Peter Bowles, *Recalling a Serial Killer*, NEWSDAY, June 20, 1990, at 7.

3. *Id.* at 7.

4. Conrad, *supra* note 1, at 29.

5. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991).

6. *Id.*

7. N.Y. EXEC. LAW § 632-a(7) (McKinney 1982 & Supp. 1991); The statute of limitations for victims who seek civil judgments against the criminal is also five years. *Id.* at § 632-a(1).

8. Dennis Hevesi, *Cases Under "Sam" Law: Notorious but Few*, N.Y. TIMES, Feb. 20, 1991, at B8.

The validity of the Son of Sam law was challenged in *Simon & Schuster v. New York Crime Victims Board*.[9] The New York State Crime Victims Board applied the Son of Sam law to publisher Simon & Schuster, requiring the publisher to surrender payments owed to reputed mobster Henry Hill for the rights to publish a book detailing his criminal exploits.[10] The Court applied a strict scrutiny test[11] and found the law unconstitutional because it was not "narrowly tailored," although it served a "compelling" state interest.[12] In doing so, the Court not only struck down New York's Son of Sam law, but also placed in doubt the constitutional validity of similar laws in forty other states[13] as well as a similar federal law.[14]

This Comment will review the different tests applied to laws restricting speech,[15] the procedural history of *Simon & Schuster*,[16] and

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9. Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501 (1991).

10. *See infra* notes 64-66 and accompanying text.

11. *See infra* text accompanying note 87.

12. 112 S. Ct. at 512.

13. *See, e.g.*, ALA. CODE §§ 41-9-80 (1982 & Supp. 1990); ALASKA STAT. § 12.61.020 (1990); ARIZ. REV. STAT. ANN. § 13-4202 (1989); ARK. STAT. ANN. § 16-90-308 (1987); CAL. CIV. CODE § 2225 (West Supp. 1991); COLO. REV. STAT. § 24-4.1-201 (1988); CONN. GEN. STAT. ANN. § 54-218 (West 1985); DEL. CODE ANN. tit. 11, §§ 9101-06 (1987 & Supp. 1990); FLA. STAT. ANN. § 944.512 (West Supp. 1991); GA. CODE ANN. § 17-14-31 (1982); HAW. REV. STAT. §§ 351-81 to -88 (1988); IDAHO CODE § 19-5301 (1987); ILL. ANN. STAT. ch. 70, para. 403 (Smith-Hurd 1989 & Supp. 1990); IND. CODE §§ 16-7-3.7-2 to -6 (1988); IOWA CODE ANN. § 910.15 (West Supp. 1991); KAN. STAT. ANN. § 74-7319 (Supp. 1990); KY. REV. STAT. ANN. § 346.165 (Baldwin 1986); LA. REV. STAT. ANN. §§ 46:1831 to 1839 (West 1982 & Supp. 1991); MD. ANN. CODE art. 27, § 764 (1988); MASS. ANN. LAWS ch. 258A, § 8 (Law Co-op. 1980 & Supp. 1991); MICH. COMP. LAWS ANN. § 780.768 (West Supp. 1988); MINN. STAT. ANN. § 611A.68 (West 1987 & Supp. 1991); MISS. CODE ANN. §§ 99-38-1 to -11 (Supp. 1990); MO. ANN. STAT. § 595.045 (Vernon Supp. 1991); MONT. CODE ANN. § 53-9-104(1)(d) (1989); NEB. REV. STAT. §§ 81-1836 to -1840 (1987); NEV. REV. STAT. ANN. § 217.265 (Michie 1986); N.J. STAT. ANN. § 52:4b-28 (West 1986 & Supp. 1990); N.M. STAT. ANN. § 31-22-22 (1990); OHIO REV. CODE ANN. §§ 2969.01-.06 (1987); OKLA. STAT. ANN. tit. 22, § 17 (West Supp. 1990); OR. REV. STAT. § 147.275 (1990); PA. STAT. ANN. tit. 71, § 180-7.18 (Purdon 1990); R.I. GEN. LAWS §§ 12-25.1-3 (Supp. 1990); S.C. CODE ANN. § 15-59-40 (Law. Co-op. Supp. 1990); S.D. CODIFIED LAWS ANN. § 23A-28A-1 (1988); TENN. CODE ANN. § 29-13-202 (1980 & Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 8309-1, §16 (Vernon Supp. 1991); UTAH CODE ANN. § 78-11-12.5 (1987); WASH. REV. CODE ANN. § 7.68200 (Supp. 1991); WIS. STAT. ANN. § 949.165 (West Supp. 1990); WYO. STAT. § 1-40-112(d) (1988) (cited in Karen M. Ecker & Margot J. O'Brien, Note, *Simon & Schuster, Inc. v. Fischetti: Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 NOTRE DAME L. REV. 1075, 1075 n.6 (1991)).

14. 18 U.S.C. §§ 3681-82 (West Supp. 1993).

15. *See infra* notes 31-44 and accompanying text.

16. *See infra* notes 70-84 and accompanying text.

the test applied by the Court in *Simon & Schuster*.[17] This Comment then argues that the Court applied an overly strict standard to the law and should have applied a more relaxed standard as with indirect burdens on speech.[18] This Comment will argue, alternatively, that the Court should have denied this form of speech First Amendment protection altogether—as is done with obscene speech, "fighting words," and other undeserving areas.[19] Finally, this Comment will analyze recent efforts by the New York legislature to enact a new Son of Sam law that would address the Court's concerns,[20] and whether this new law can clear the high hurdle set by *Simon & Schuster*.[21]

II. CONSTITUTIONAL BACKGROUND

A. *The First Amendment*

The First Amendment of the United States Constitution[22] provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[23] Although this appears to be a complete prohibition of restrictions on speech, the U.S. Supreme Court has held that there are limitations on this seemingly absolute right to free speech.[24] Some types of speech receive no First Amendment protection whatsoever; these include obscenity,[25] child pornography,[26] "fighting words,"[27] and advocacy of

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17. *See infra* notes 88-102 and accompanying text.

18. *See infra* notes 113-34 and accompanying text.

19. *See infra* notes 25-28 and accompanying text.

20. *See infra* notes 141-47 and accompanying text.

21. *See infra* notes 148-54 and accompanying text.

22. U.S. CONST. amend. I.

23. The First Amendment provides in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Id.

24. RONALD ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 20.7, at 19 (1986).

25. For a discussion of the obscenity exception, see Miller v. California, 413 U.S. 15 (1973) (defining obscenity as material, that taken as a whole, the average person, applying contemporary community standards, would find appeals to the prurient interest in sex; depicts in a patently offensive way, sexual conduct specifically defined by the state law; and lacks serious literary, artistic, political, or scientific value).

26. For a discussion of the child pornography exception, see New York v. Ferber, 458 U.S. 747, 763 (1982) ("classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions").

illegal conduct.[28] In all other areas of speech, the Court considers the "strength of the [F]irst [A]mendment rights in relation to the other individual rights."[29] To evaluate the validity of laws restricting these other areas of speech, the Court utilizes various standards of judicial review.[30]

B. Standards of Review

In determining the appropriate standard of review, the Court must first determine whether the speech at issue falls within the protected classes of speech.[31] As mentioned earlier, if a law restricting speech is aimed at the lewd and obscene, the libelous, misrepresentations, advocacy of illegal conduct, or "fighting words," it will be upheld because these categories of speech are not protected by the First Amendment.[32] However, if a law applies to speech not falling within one of these narrow categories, the speech is afforded First Amendment protection. Thus, the Court must decide what level of scrutiny to apply.[33]

The appropriate standard of review is determined by whether the law directly and intentionally suppresses speech or merely incidentally suppresses speech.[34] If a statute is directly aimed at suppressing protected speech, precedent requires that such statute be subjected to "strict scrutiny."[35] To survive this level of scrutiny, a law must serve a compelling state interest and be narrowly tailored to achieve that interest.[36] To

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27. For a discussion of the "fighting words" exception, see Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining "fighting words" as words that "inflict injury or tend to incite an immediate breach of the peace").

28. For a discussion of advocacy of illegal conduct, see Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that speech "directed to inciting or producing imminent lawless action [that] is likely to incite or produce such action" is unprotected speech).

29. ROTUNDA, *supra* note 24, at 20.

30. ROTUNDA, *supra* note 24, § 20.6, at 14.

31. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

32. *Id.*; *see supra* notes 25-28 and accompanying text.

33. *Chaplinsky*, 315 U.S. at 571-72.

34. Karen M. Ecker & Margot J. O'Brien, *supra* note 13, at 1083.

35. *See* Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (imposing strict scrutiny to invalidate a content-based magazine tax); Leathers v. Medlock, 111 S. Ct. 1438 (1991) (stating that strict scrutiny will be applied to direct burdens on speech for fear that allowing the Government to directly burden speech may allow it to drive certain ideas from the marketplace); *see also* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 583 (1983) (holding strict scrutiny applicable to a special tax on the press because it indirectly regulates speech).

36. Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

qualify as a "compelling state interest," the state must have a strong interest in actually achieving the underlying policies of the statute.[37] In addition, the state's interests must outweigh the statute's chilling effect on speech. The law must not unduly discourage people from exercising their speech rights for fear that the law is applicable to them.[38]

However, if the restriction is "content-neutral"[39] and only incidentally burdens speech, it is subjected to the less rigorous "mid-level scrutiny" identified in *United States v. O'Brien*.[40] To pass this standard, the burden on speech must further an important or substantial governmental interest. Additionally, the incidental restriction on the First Amendment freedoms must be no greater than is essential to further that governmental interest.[41] Strict scrutiny is not applied to content-neutral restrictions because such laws are not aimed at suppressing expression.[42]

The initial determination of the correct standard of review is crucial because the Court rarely upholds a statute that is subjected to strict scrutiny.[43] Indeed, when the Court applies strict scrutiny, the government's burden to justify the law "is well-nigh insurmountable."[44]

III. NEW YORK'S SON OF SAM LAW

New York's Son of Sam law, section 632-a of the Executive Law, was enacted in 1977.[45] This law was intended to "ensure that monies received by the criminal under such circumstances shall first be made

37. Widmar v. Vincent, 454 U.S. 263, 276 (1981); John Timothy Loss, Note, *Criminals Selling Their Stories: The First Amendment Requires Legislative Reexamination*, 72 CORNELL L. REV. 1331, 1340 (1987).

38. John Timothy Loss, *supra* note 37 at 1340.

39. A law aimed at speech is content-neutral if it is one that is "justified without reference to the content of the regulated speech." Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748, 771 (1976).

40. United States v. O'Brien, 391 U.S. 367 (1968). The *O'Brien* Court refused to apply strict scrutiny to a law forbidding the destruction of draft cards. O'Brien maintained that he was expressing his objection to the draft and the Vietnam War by burning his draft card. *Id.* at 370.

41. *Id.* at 377.

42. *Id.* The purpose of the law at issue in *O'Brien* was to preserve the draft system—a non-communicative purpose. *Id.*

43. Meyer v. Grant, 486 U.S. 414 (1988).

44. *Id.* at 425.

45. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991).

available to the victims of that crime for losses and suffering."[46] As the author of the law stated:

> [I]t is abhorrent to one's sense of justice and decency that an individual . . . can expect to receive large sums of money for his story once he is captured—while five people are dead, [and] 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.[47]

To address this sense of injustice, the law provided that:

> Every person, firm, . . . or other legal entity contracting with any person . . . accused or convicted of a crime in this state, with respect to the reenactment of such crime . . . or from the expression of such accused or convicted person's thoughts . . . regarding that crime, shall submit a copy of such contract to the board and pay over . . . any moneys . . . owing to the person so accused or convicted or his representatives.[48]

According to the law, a convict is a person who is "convicted of a crime . . . either by trial, guilty plea, or voluntary admission."[49]

The statute required the New York State Crime Victims Board (the "Board") to review any such publishing contracts and consider the

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46. *See* Assembly Bill Memorandum at 9019, July 22, 1977, *reprinted in* Legislative Bill Jacket, 1977 N.Y. Laws, ch. 823.

47. Memorandum of Senator Emanuel R. Gold, *reprinted in* 1977 NEW YORK STATE LEGISLATIVE ANNUAL 267.

48. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991). The statutory text provides in pertinent part:

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

Id. at 632-a(1).

49. *Id.* § 632-a(10).

following factors: (1) whether the speaker was an accused or convicted criminal; (2) whether the published work mentioned the crime; (3) whether the work contained any admissions of the commission of a crime, if the speaker had not been accused or convicted of such; and (4) whether there existed a victim of the crime mentioned.[50] If all of the aforementioned factors were determined to exist, the law required that all money derived from the work be deposited into an escrow account and held for five years from the date the fund was established.[51] This money would be made available to victims who had been awarded judgments in civil suits against the criminal.[52] After this five year period, the convicted criminal could request that the Board refund any monies not claimed by victims, so long as no civil actions were pending at that time.[53]

IV. STATEMENT OF THE CASE

A. *Factual Background*

In 1985, Simon & Schuster published a book written by Nicholas Pileggi entitled *Wiseguy: Life in a Mafia Family*.[54] It was an autobiographical, nonfiction story based on the criminal exploits of Mafia member Henry Hill which was later made into the movie *Goodfellas*.[55] The book was based on over two years of interviews in which Hill told Pileggi of the many crimes he had committed, including murder, assault, extortion, theft, burglary, arson, drug dealing and credit card fraud.[56] Some of Hill's more infamous crimes included the bribery of Boston College basketball players in the point-shaving scandal of 1978-79 and the theft of six million dollars from the Lufthansa Airlines terminal at Kennedy Airport in 1978.[57] Hill was granted immunity from prosecution for most of these crimes because he cooperated with federal authorities by testifying against his former colleagues.[58]

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50. *Id.* § 632-a(4).

51. *Id.*

52. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1991).

53. *Id.* § 632-a(4). The State must indeed refund the monies after paying creditors who present "lawful claims, including state or local government tax authorities." *Id.* § 632-a(11).

54. NICHOLAS PILEGGI, WISEGUY: LIFE IN A MAFIA FAMILY (1985).

55. *Goodfellas* (Warner Bros. 1990).

56. Mark Conrad, *The Demise of New York's "Son of Sam" Law—The Supreme Court Upholds Convicts' Rights to Sell Their Stories*, N.Y. ST. B.J., Mar./Apr. 1992, at 29.

57. Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 506 (1991).

58. *Id.*

Through the Son of Sam law, New York's legislators sought to address the sense of injustice caused by crime victims' loss of money (due to lost property, lost wages and enormous medical bills) while criminals blatantly reaped the benefits of the crimes they committed.[59] As an illustration of this injustice, Hill bragged about the lavish lifestyle he and other Mafia members enjoyed while within the confines of a federal prison.[60] He said their cells, which were within a three story building that was outside the prison wall, "looked more like a Holiday Inn than a prison."[61] He explained how they were able to pay the dishonest prison guards to smuggle in everything from liquor to fine foods.[62] These conditions caused Hill to state that "[d]epending on what you wanted and how much you were willing to spend, life could almost be bearable."[63]

Shortly after the publication date of Pileggi's story, the Board notified Simon & Schuster of the applicability of the Son of Sam law and demanded a copy of the contract between the publisher and Hill.[64] The Board then ordered Simon & Schuster to suspend payments to Hill's literary agent and ordered Hill to turn over $96,250 in payments that he had already received.[65] The Board asserted that the book contained "Hill's thoughts, feelings, opinions and emotions about and admissions to his participation in criminal activities."[66]

In response to the Board's order, Simon & Schuster filed an action under 42 U.S.C. § 1983[67] in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief for alleged violations of its constitutional rights.[68] Simon & Schuster claimed

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59. Gold, *supra* note 47.

60. NICHOLAS PILEGGI, WISEGUY: LIFE IN A MAFIA FAMILY 150-51 (1985).

61. *Id.*

62. *Id.*

63. *Id.*

64. Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 724 F. Supp. 170, 172 (S.D.N.Y. 1989), *aff'd sub nom.*, Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990), *rev'd sub nom.*, Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501 (1991).

65. Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 724 F. Supp. at 173.

66. *Id.* at 172.

67. 42 U.S.C. § 1983 (1982) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, . . . for redress.

68. Simon & Schuster, Inc. v. New York State Crime Victims Bd., 724 F. Supp. 170 (S.D.N.Y. 1989).

that section 632-a violated the First Amendment's protection of speech and of the press by "interfer[ing] with . . . decisions of publishers and writers" thereby decreasing the amount of expression reaching the public.[69]

B. Procedural History

1. Lower Court Decision

The district court upheld the Son of Sam law. Specifically, it ruled that section 632-a did not directly infringe on speech; rather, it merely prevented criminals from receiving the profits of that speech.[70] Thus, the court applied *O'Brien's* mid-level scrutiny[71]—which only requires that the statute be narrowly drawn and the state interest be substantial, instead of compelling.[72] The court found that New York's Son of Sam law met this standard because it was narrowly drawn—not to prohibit expressive activity, but merely "to garnish the proceeds so that they will be used in a productive manner."[73] The state articulated its interest as denying criminals any gain from the stories of their crimes until the victims of those crimes were fully compensated for all losses arising out of their victimization.[74] Finding this interest to be substantial, the district court held that the Son of Sam law was constitutional.[75]

2. Second Circuit Decision

a. Holding

The Second Circuit Court of Appeals, in a two to one decision, affirmed the district court's holding that the Son of Sam law was constitutional but relied upon much different reasoning.[76] The majority first stated that the statute directly affected a criminal's speech. The court relied upon

69. *Id.* at 175-76.
70. *Id.* at 177.
71. United States v. O'Brien, 391 U.S. 367, 377 (1968).
72. Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 724 F. Supp. at 178-79.
73. *Id.* at 179.
74. *Id.* at 174.
75. *Id.* at 178-79.
76. Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990), *rev'd sub nom.*, Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501 (1991).

the Supreme Court's holding in *Meyer v. Grant*[77] to support its conclusion that New York's Son of Sam law was a direct restriction on speech.[78] The Second Circuit explained that the Meyer Court had held "that the denial of payment for expressive activity constitutes a direct burden on that activity."[79]

Next, the court noted that since the law directly restricted speech, it was subject to a strict scrutiny test.[80] Therefore, the law was required to further a *compelling*, not merely substantial, state interest. In addition, the law had to be "narrowly tailored" to achieve the state's interests in denying criminals the opportunity to profit from their crimes and in compensating the victims.[81] The majority of the court found that the state had a "compelling . . . interest in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of their victimization."[82] The court then concluded that the law was narrowly tailored to accomplish the state's interest and thus held that the Son of Sam law was constitutional.[83] In contrast, the dissent found that the law was not "narrowly drawn" and should not have been upheld.[84]

b. Analysis of the Second Circuit's Decision

The Second Circuit's decision illustrates the confusion caused by the application of differing standards of review to various forms of speech. The Second Circuit misinterpreted and misapplied the holding of *Meyer*. The court erroneously interpreted the Supreme Court's language to stand for the broad proposition that any denial of payment for expressive activity directly burdens that activity and thus subjects the law imposing the denial to strict scrutiny. *Meyer* involved a Colorado statute that prohibited paying solicitors to circulate initiative petitions. The Court found that the statute interfered with the opportunities of the initiatives' sponsors to disseminate their views to the public in two ways. First, the statute "limit[ed] the number of voices who [would] convey appellees' message and the hours

77. 486 U.S. 414 (1988).
78. Simon & Schuster, Inc. v. Fischetti, 916 F.2d at 781-82.
79. *Id.* at 781.
80. *Id.* at 782.
81. *Id.*
82. *Id.*
83. Simon & Schuster, Inc. v. Fischetti, 916 F.2d at 784.
84. *Id.* at 785.

they [could] speak and, therefore, limit[ed] the size of the audience they [could] reach."[85] Second, the statute made it "less likely that appellees [would] garner the number of signatures necessary . . . thus limiting their ability to make the matter the focus of statewide discussion."[86] The Court classified the statute as a direct restriction on expression and therefore, applied strict scrutiny.[87]

To correctly apply *Meyer* to the First Amendment claims of Henry Hill or the publisher Simon & Schuster, the position of these parties would have to be analogous to the position of the appellee political groups in *Meyer*. Unlike in *Meyer*, however, neither Hill nor the publisher attempted to pay anyone to project their message. Rather, the publisher attempted to pay the speaker himself, not to amplify the publisher's message, but to compensate the speaker for the sale of his story. The Court was concerned with protecting the speakers' ability to disseminate their message rather than guaranteeing a source of income for the solicitors. Nothing in the Son of Sam law prohibits or limits the criminal from projecting his message. Therefore, the Second Circuit clearly misapplied *Meyer*.

C. The Supreme Court's Decision

1. Holding

Like the Second Circuit, the Supreme Court applied a strict scrutiny test.[88] However, the Court reached the same conclusion as the Second Circuit's dissent—finding that as a content-based discrimination on speech, the Son of Sam law was presumptively unconstitutional.[89] The Court stated:

> A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. . . . The Son of Sam law is such a content-based statute. . . . In short, the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime.[90]

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85. Meyer v. Grant, 486 U.S. 414, 422-23 (1988).
86. *Id.* at 423.
87. *Id.* at 420.
88. Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. at 509.
89. *Id.* at 508.
90. *Id.* at 508-11.

The Court was concerned that "[t]he 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."[91] Therefore, because the statute was not narrowly tailored, the Supreme Court held that the Son of Sam law was unconstitutional.[92]

2. Reasoning

Justice O'Connor, writing for the Court, did not address whether the statute was content-neutral by serving purposes unrelated to the content of the regulated speech. This would have justified the application of the less onerous *O'Brien* standard.[93] Rather, she hastily stated that the law was "content-based,"[94] and thus subjected the law to strict scrutiny.[95] In so doing, O'Connor conceded that a compelling state interest for such a law existed.[96] However, O'Connor criticized the law for singling out a criminal's proceeds from published works as opposed to compensation from a criminal's assets in general.[97] O'Connor added that she could not see, nor did the Board attempt to explain, why the state should have any greater interest in compensating victims from the proceeds of such criminal stories than from any of the criminal's other assets.[98]

In applying the second part of the strict scrutiny test—whether the statute was narrowly tailored—the Court found the law to be "over-inclusive"[99] by including those merely *accused* of a crime.[100] Thus, the Court determined that the law was not "narrowly tailored" to meet its objectives.[101] However, in reaching its decision, the Court never fully

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91. *Id.* at 510.

92. *Id.* at 512.

93. *See supra* notes 40-41 and accompanying text.

94. O'Connor found the statute to be "content-based" because it "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content." Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. at 508.

95. *Id.* at 509.

96. "There can be little doubt . . . that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them." *Id.*

97. *Id.* at 510.

98. *Id.*

99. A speech regulation that is overinclusive is one which restricts speech more than is necessary to serve a particular compelling state interest. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 407 (1963); Shelton v. Tucker, 364 U.S. 479, 488-90 (1960).

100. Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. at 511.

101. *Id.* at 512.

addressed whether the statute was "content-based," much to the lament of Justice Kennedy.[102]

3. Kennedy's Concurrence

Justice Kennedy criticized the use of the strict scrutiny test applied by the majority.[103] He argued that the statute should have been invalidated solely on the ground that it was a content-based restriction on speech.[104] The Board examined the challenged work to see whether it contained a particular type of speech before the statute was applied to the author. They determined that the speech in question was not in one of the areas excluded from First Amendment protection[105] and therefore, the statute should have been invalidated simply because it was aimed at a particular form of speech.[106] As Kennedy stated:

> Here a law is directed to speech alone where the speech is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the state has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld.[107]

Therefore, Kennedy maintained that the majority erred in applying the strict scrutiny test.[108]

Kennedy acknowledged that the strict scrutiny test had been applied to First Amendment cases in the past.[109] However, he also stated that "the Court appear[ed] to have adopted this formulation in First Amendment cases by accident."[110] The genesis of the test, as he pointed out, was actually in the Equal Protection area. It then was mistakenly applied to First Amendment cases.[111] Kennedy objected to any use of the strict

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102. Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. at 512 (Kennedy, J., concurring).

103. *Id.* at 513.

104. *Id.*

105. *See supra* notes 25-28 and accompanying text.

106. Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. at 515 (Kennedy, J., concurring).

107. *Id.* at 512-13.

108. *Id.* at 513.

109. *Id.*

110. *Id.*

111. Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. at 513.

scrutiny test because "[b]orrowing the compelling interest and narrow tailoring analysis is ill-advised when all that is at issue is a content-based restriction, for resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so."[112]

V. ANALYSIS OF THE COURT'S DECISION

In applying the strict scrutiny test to New York's Son of Sam law, the Supreme Court applied the same flawed analysis used by the Second Circuit Court of Appeals. In determining the proper standard of review, the Second Circuit considered whether the statute imposed a direct or merely incidental burden on speech.[113] The court quickly determined that the law was a direct burden on speech and thus subjected it to strict scrutiny.[114] The Second Circuit inappropriately upheld the law under the same standard that had been determined to be nearly insurmountable—the strict scrutiny standard.[115]

The Supreme Court did nothing to correct the appellate court's flawed analysis. In fact, presumably because it did not even consider the possibility that the statute may have been an indirect burden on speech, the Court ignored *O'Brien* completely.[116] The Court then hastily subjected the law to strict scrutiny. This analysis was erroneous because the proper focus should have been on the purpose behind the regulation rather than the regulation itself.[117] As the Court stated in *Ward v. Rock Against Racism*, "[t]he government's purpose is the controlling consideration."[118] The New York legislature's purpose behind the Son of Sam law was not to control criminals' speech because the legislature viewed the speech as undesirable. In fact, the statute was applicable whether the criminal bragged about his crimes or expressed remorse. The law's purpose was merely to prevent criminals from spending the profits gained from their speech until they compensated their victims for the harm they caused.[119]

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112. *Id.*

113. Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 781 (2d Cir. 1990).

114. *Id.* at 782.

115. *See supra* note 83 and accompanying text.

116. *See supra* notes 90-102 and accompanying text.

117. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (where the Court repeatedly stresses that it is *the State's interest* that must be *thoroughly* examined).

118. 491 U.S. 781, 791 (1989).

119. Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 724 F. Supp. 170, 173 (1989).

After focusing on the regulation's purpose, the Court should have followed the district court's analysis[120] by carefully considering whether the statute met the *O'Brien*[121] prerequisites necessary to apply mid-level scrutiny. That is, if the restriction imposed an incidental burden on speech, the restriction would be scrutinized under the less rigorous *O'Brien* test so long as it was content-neutral, not aimed at the communicative effect of the conduct, and left open ample alternative channels of communication.[122] If these prerequisites are met, the *O'Brien* test dictates that an incidental infringement on speech can be justified if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[123] In other words, *O'Brien* allows regulations that inhibit speech to be scrutinized under its less demanding standard so long as the government's interest is not related to the suppression of speech.[124]

In passing the statute at issue in *O'Brien*, Congress was not interested in suppressing speech.[125] Similarly, New York's legislature also was not interested in suppressing speech. Its Son of Sam law does not prevent a criminal from speaking about his criminal exploits. However, the criminal would have to compensate eligible victims with the funds earned from such speech. Therefore, the prerequisites of *O'Brien* were met because the law was not aimed at the communicative effect of the speech. Rather, the law was aimed at the distribution of proceeds from criminal exploits and only required distribution to victims who had recovered civil judgments against the criminals within five years. Thus, the law was aimed at the non-communicative element of the criminal's conduct—the expenditure of his profits.

Furthermore, the Son of Sam law left open not only ample *alternative* channels of communication, but also left open the very channel by which the criminal sought to express himself. The Court should have considered whether the criminal was *able* to speak rather than whether the financial disincentive would dissuade him from speaking. The criminal is not restricted from speaking, and the media is not prohibited from publishing

120. *Id.* at 178.
121. United States v. O'Brien, 391 U.S. 367 (1968).
122. *Id.* at 377.
123. *Id.*
124. *Id.*
125. *See supra* note 42.

these views. Rather, if he is compensated, the criminal simply must give victims first priority to his proceeds. Additionally, as an accomplished writer has stated, "you don't have to pay these scumbags—they'll tell you anyway, if you're a hardworking honest journalist."[126] Failure to compensate a criminal for his story raises no constitutional issues in itself because the Court has never recognized a constitutional right to earn money from speech.[127]

City of Renton v. Playtime Theaters[128] lends further support to a reading of New York's Son of Sam law as an incidental, content-neutral restriction on speech. In *City of Renton,* the Court upheld a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, church, park or school.[129] The Court stated that the ordinance was not aimed at the content of the films shown, even though "the ordinance treat[ed] theaters that specialize in adult films differently from other kinds of theaters."[130] Rather, the Court explained that the ordinance was aimed at the "*secondary effects* of such theaters on the surrounding community."[131] The Court found that the city of Renton's pursuit of its zoning interests was unrelated to the suppression of free expression and applied *O'Brien*'s mid-level scrutiny.[132] Similarly, the Son of Sam law was aimed at the secondary effects of the criminal's speech—the distributions of the profits gained by its dissemination.[133]

Because the Board was interested in the compensation of victims and not the suppression of speech, the Court erred by focusing primarily on the regulation itself rather than closely considering the State's interest. Viewed in its proper light, the statute imposed only an incidental burden on speech, and thus should have been subjected only to the mid-level scrutiny of the *O'Brien* test.[134] Applying mid-level scrutiny, the Court should have found the Son of Sam law constitutional because the law furthered the important governmental interest of compensating victims of crime. Furthermore, the effect on the criminals' speech as a result of the law, such as the diminished economic incentive to speak, was purely incidental. This

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126. Robert M. Snider, *Coming Soon to a Theater Near You,* 7 CAL. LAW., April 1987 at 28, 31-32.

127. GERALD GUNTHER, CONSTITUTIONAL LAW 1107-08 (10th ed. 1980).

128. 475 U.S. 41 (1986).

129. *Id.* at 51.

130. *Id.* at 47.

131. *Id.* (emphasis in original).

132. *Id.* at 50.

133. *See supra* note 46 and accompanying text.

134. *See supra* note 119 and accompanying text.

incidental restriction on the criminals' First Amendment freedoms was no greater than necessary to further the governmental interest. Access to these types of profits could be gained more readily and efficiently than by trying to locate and seize the criminals' general assets, if any.

VI. IMPLICATIONS OF THE CASE

A. *Requirements for a Law to Pass the Strict Scrutiny Test*

The Court erred in refusing to apply the less demanding *O'Brien*[135] test. Rather, the Court held that the victim compensation law would be subjected to strict scrutiny. Although the Court unanimously struck down the law, it did not explicitly rule that all such compensation laws were per se unconstitutional.[136] Since the Court did not categorically deny the right to the seizure of royalties, it is possible that an amended version of the law could pass the Court's application of strict scrutiny. To be considered constitutional, this new law must be limited in applicability to those *actually* convicted, not merely *accused*, of crimes. Furthermore, to address the Court's concern with the singling out of a specific asset of the criminal, the statute must be applicable to *all* of a criminal's assets, not just proceeds of a criminal's stories about his crimes. This requirement would actually place potential victims seeking to recover at an advantage by maximizing the available pool of assets.[137]

B. *Requirements for a Law to Pass Kennedy's Stringent Test*

Future cases of this type may be decided, as Justice Kennedy suggested, solely on the basis of whether the law at issue is a content-based restriction on speech.[138] If such cases were decided on this basis, and it was determined that the law was not content-neutral, the inquiry would end altogether because the law would be per se unconstitutional. In such a situation, proponents of the statute could argue that criminals' stories about their exploits should simply be another area not deserving of any First

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135. United States v. O'Brien, 391 U.S. 367 (1968).

136. Mark Conrad, *The Demise of New York's 'Son of Sam' Law—The Supreme Court Upholds Convicts' Rights to Sell Their Stories*, N.Y. ST. B.J., Mar./Apr. 1992, at 28, 32.

137. *Id.* at 32.

138. *See supra* note 102 and accompanying text.

Amendment protection. As with obscenity[139] and other types of speech not granted any protection,[140] the recounts of a criminal's exploits are of little value to society in relation to the harm that the recounts cause to other societal interests, such as the interest in preventing the harm caused to crime victims. Therefore, due to the gravity of the potential harm, this type of speech should be denied First Amendment protection altogether.

VII. NEW DEVELOPMENT: NEW YORK'S REVISED SON OF SAM LAW

A. *The Retailored Statute*

On July 24, 1992, the New York state legislature approved an amended version of the Son of Sam law that addressed the concerns expressed by the Court in *Simon & Schuster*.[141] The new law broadens

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139. *See supra* notes 25-28 and accompanying text.

140. *Id.*

141. Act of July 24, 1992, 1992 N.Y. A.L.S. 618. Pertinent provisions of the new law read as follows:

> [A]n action by a crime victim, or the representative of a crime victim, . . . may be commenced to recover damages from a defendant *convicted* of a crime which is the subject of such action, for any injury or loss resulting therefrom within seven years of the date of the crime.

Id. sec. 1, § 213(b) (emphasis added). "'Crime' means any felony defined in the penal law or any other chapter of the consolidated laws of the state." *Id.* sec. 10.1(a), § 632(a).

> "Profits from the crime" means (i) *any property* obtained through or income generated from the commission of a crime of which the defendant was convicted; (ii) any property obtained by or income generated from the sale, conversion or exchange of proceeds of a crime, including any gain realized by such sale, conversion or exchange; and (iii) any property which the defendant obtained or income generated as a result of having committed the crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, the crime, as well as any property obtained by or income generated from the sale, conversion or exchange of such property and any gain realized by such sale, conversion or exchange.

Id. sec. 10.1(b), § 632(a) (emphasis added).

> Every person, firm, corporation, . . . or other legal entity which knowingly contracts for, pays, or agrees to pay, *any profit* from a crime, . . . to a person charged with or convicted of that crime shall give written notice to the crime victims board of the payment, or obligation to pay as soon as practicable after discovering that the payment or intended payment is a profit from a crime.

Id. sec. 10.2(a), § 632(a) (emphasis added).

> [T]he court shall consider restitution to the victim of the crime and may require restitution as part of the sentence imposed upon a person convicted of an offense, and after providing the district attorney with an opportunity to be heard . . . ,

the old statute by subjecting all of a criminal's crime-related assets to seizure, whether they are stolen or gained by any other commission of a crime.[142] The law gives judges in criminal cases discretion to order reparation by defendants, regardless of whether they have sold the rights to their stories and regardless of their ability to pay.[143] The restitution order is similar to a lien that gives victims priority to collect from convicts any assets they may acquire after commission of a crime.[144] In order to structure this new statute to resemble a restitution order, the New York legislature limited the victim's reparation to actual out-of-pocket expenses.[145] Thus, by eliminating "pain and suffering" damages, which are often viewed suspiciously, New York has made a further effort to shield the law from being attacked as a direct burden on speech. The new statute also extends the maximum time a victim has to file for civil damages against a criminal from five to seven years after the date of the crime.[146] However, the statute limits the amount a victim can recover from a criminal to $15,000 for a felony and $10,000 for a misdemeanor.[147]

B. Analysis of the New Statute

In finding the old Son of Sam law unconstitutional, Justice O'Connor questioned why the law was aimed merely at the criminal's assets from his stories about crime rather than the criminal's assets in general.[148] If O'Connor was implying that a broader seizure of assets would survive strict scrutiny, the new law has effectively met this concern by allowing authorities to seize any profits made by criminals relating to their crimes, not just profits from movies and books about their crimes. The new Son

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> require the defendant to make restitution of the fruits of his offense or reparation for the *actual out-of-pocket loss* caused thereby.

Act of July 24, 1992, sec. 12.1, § 60.27(1), 1992 N.Y. A.L.S. 618 (emphasis added).

> Except upon consent of the defendant . . ., the amount of restitution or reparation required by the court shall not exceed fifteen thousand dollars in the case of a conviction for a felony, or ten thousand dollars in the case of a conviction for any offense other than a felony.

Id. sec. 16(a), § 60.27(5)(a).

142. *Id.* sec. 10, § 632(a).

143. *Id.*

144. *Id.* sec. 8, § 420.10(6).

145. Act of July 24, 1992, sec. 12, § 60.27(1), 1992 N.Y. A.L.S. 618.

146. *Id.* sec. 1, § 213(b).

147. *Id.* sec. 16, § 60.27(a).

148. Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 510 (1991).

of Sam law also excludes those merely accused of crimes from its ambit.[149] Thus, in limiting its application to convicted criminals, this aspect of the law should also pass constitutional muster. Furthermore, the distinction between writings of actual crimes and past crimes is no longer an issue because the law now speaks of criminal profits in general terms and not in relation to the distribution of profits from stories about crime.[150] However, because the new law applies only to proceeds the criminal earns from actual crimes committed by him for which he was convicted, the concern the Court expressed regarding the old law's application to writings of past crimes[151] is eliminated. Therefore, this aspect of the law should also withstand scrutiny.

The provision limiting the amount of a crime victim's recovery is a curious one, especially since the Court did not discuss the limitations on recovery in the prior law.[152] Rather, the Court seemed mainly concerned with the underinclusiveness of the prior law's applicability only to criminals' assets from storytelling. Therefore, since the new statute is not limited to assets derived from criminals' storytelling, there seems to be no need to impose a limit on recovery, especially since an individual victim's losses may well exceed those limits. Perhaps, the New York State legislature, by continuing the limits imposed by the prior Son of Sam law, is attempting to ensure that the new law will not be subjected to the same fate as its predecessor. The extension of the statute of limitations seems to give victims something in return for the continued ceiling on amounts of recovery. The New York legislature probably felt more confident in taking this minimal action because state statutes of limitations and other procedural rules are given great deference.

It is likely that the new Son of Sam law will be upheld should it be reviewed by the Court. The Court has rarely ruled in favor of a criminal defendant based on an alleged violation of the Constitution,[153] except for

149. "[A]n action by a crime victim . . . may be commenced to recover damages from a defendant *convicted* of a crime which is the subject of such action . . . ." Act of July 24, 1992, sec. 1, § 213(b), 1992 N.Y. A.L.S. 618 (emphasis added).

150. "'Profits from the crime' means (i) *any* property obtained through or income generated from the commission of a crime of which the defendant was convicted . . . ." *Id.* sec. 10(b), § 632(a) (emphasis added).

151. Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 512 (1991).

152. The old law limited the amounts of recovery to $10,000 for a felony and $5,000 for a misdemeanor. 1992 N.Y. A.L.S 618 at § 16.

153. David G. Savage, *Pornography Case to Test Federal Racketeering Law*, L.A. TIMES, Jan. 7, 1993, at A5 (noting the infrequency with which the Court rules in favor of a criminal defendant's Constitutional challenge when a First Amendment violation is not alleged).

violations of the First Amendment, as illustrated in *Simon & Schuster*. However, now that this new Son of Sam law is generally applicable to all of a criminal's crime-related assets, not just those derived from storytelling, the First Amendment should not be implicated at all. Therefore, New York's new Son of Sam law should be used as a model for other states' similar laws.

One caveat should be noted: the *Simon & Schuster* Court never definitively decided whether criminals' profits from stories of their crimes would be considered to be crime-related assets.[154] Nevertheless, the Court should not hesitate to hold that these profits are indeed crime-related; after all, the criminal would be in no position to profit from his story had there not been a crime committed in the first place.

VIII. CONCLUSION

A criminal who commits a series of brutal killings and who is later convicted need not despair. He may soon become a millionaire as hungry Hollywood producers pursue him for the rights to his story. New York's Son of Sam law, as originally enacted, sought to avoid this unconscionable result. However, the Court's decision in *Simon & Schuster* forced the New York state legislature to go back to the drawing board.

An examination of First Amendment background indicates that freedom of speech and of the press are by no means absolute.[155] Furthermore, there is no one standard the Court uses to analyze alleged restrictions on speech or expression.[156] However, if it is determined that the speech is within one of the areas of protected speech and the restriction directly burdens that speech, the regulation will be subjected to a most exacting level of scrutiny.[157]

The Supreme Court erred in finding that New York's Son of Sam law was the type of law that should fall under this strict scrutiny standard. The Court should have carefully analyzed the New York statute to find that, at

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154. The Court stated that:

> [t]he parties debate whether book royalties can properly be termed the profits of crime, but that is a question we need not address here. For the purposes of this case, we can *assume without deciding* that the income escrowed by the Son of Sam law represents the fruits of crime.

Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 510 (1991) (emphasis added).

155. *See supra* notes 24-30 and accompanying text.

156. *See supra* notes 31-44 and accompanying text.

157. *See supra* note 35 and accompanying text.

best, it imposed a mere incidental burden on speech—one that should be properly analyzed under *O'Brien's* less demanding mid-level scrutiny.[158] Under this analysis, the Court should have found the law constitutional. Alternatively, the Court should have announced that recounts of a criminal's exploits are so lacking in social value compared to the harm they cause to other societal interests—such as ensuring that victims of crime are adequately compensated—that this type of speech should be added to those areas of speech and expression found undeserving of First Amendment protection.[159] Under this alternative analysis, the Court also should have found the law constitutional.

However, since the Court decided to apply a strict scrutiny standard to these laws, future state or Congressional legislation of this type should increase the scope of assets subject to seizure to *all* of a criminal's crime-related assets to prevent First Amendment challenges. Future legislation should also limit its application to *convicted* criminals, not those merely accused of crimes. In addition, the law must be limited to writings of actual crimes committed by the criminal against the victim seeking recovery, and not to past crimes unrelated to the victim.

Indeed, the revised Son of Sam law recently enacted by the New York legislature[160] limits its application in accordance with the concerns expressed by the *Simon & Schuster* Court.[161] If O'Connor's statements imply that a statute addressing the Court's concerns would survive the seemingly insurmountable hurdle set by strict scrutiny, the revised Son of Sam law appears to do so. In fact, the legislators, forced to be overly careful to meet the Court's concerns, have risked serious under-compensation of victims by continuing to set low limits on recovery. Hopefully, the Court will use any litigation resulting from this new legislation as a vehicle for putting such desirable and necessary laws on stronger footing.

Amr F. Amer[*]

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158. *See supra* note 40 and accompanying text.

159. *See supra* notes 25-28 and accompanying text.

160. 1992 N.Y. A.L.S. 618.

161. 112 S. Ct. 501 (1991).

* This Comment is dedicated to my family: Nellie, Fadel and Alaa, and to Sherrill, Joe and Kimberly ("Boo") McCluskey for their love, dedication, and support.