Simon and Schuster, Inc. v. Members of the New York State Crime Victims Board: How the Characterization of a Speech Regulation Can Effectively Destroy a Legitimate Law

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The age-old expression that crime does not pay has lost most of its validity in today’s society. In an effort to make crime less profitable, Congress and forty-three states have passed legislation to prevent criminals from earning proceeds from their crimes. The Son of Sam law and other criminal antiprofit laws are intended to “ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.” Simon & Schuster v. Fischetti, 916 F.2d 777, 782 (2d Cir. 1990), rev'd, 112 S. Ct. 501 (1991).


Order of Special Forfeiture

(a) . . . the court shall . . . order such defendant to forfeit all or any part of proceeds received or to be received by that defendant . . . from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of that defendant’s thoughts, opinions, or emotions regarding such crime.

Id. § 3681; see also 42 U.S.C.A. §§ 10601-607 (West Supp. 1992) (establishing a fund for victims into which specified convicted criminals must pay the proceeds from their crimes).

joying the proceeds of their crimes by allowing victims to recover civil damages from any profits the criminal has generated through the exploitation of the crime. A principal example of this type of legislation is New York's Son of Sam law.\textsuperscript{3}

The 1977 Son of Sam law required that an entity contracting for the rights to the story of a person accused or convicted of a crime surrender all proceeds from that contract to the New York State Crime Victims Board.\textsuperscript{6} The law required the Board to deposit the money in an escrow account from which the victim could recover his or her civil judgment against the criminal.\textsuperscript{7} The purpose of the Son of Sam law was to help ensure that criminals did not profit at their victims' expense,\textsuperscript{8} not to prevent the telling of the

\textsuperscript{3} See Assembly Bill Memorandum, supra note 5.
The Son of Sam law attempted to redress the unfairness of criminals profiting from their crime story before their victims are compensated for any damages sustained. When the Son of Sam law was challenged, the law with regard to First Amendment issues was relatively clear. Government actions can abridge speech in two ways. First, government regulations can aim at ideas or information, either by targeting the specific message or viewpoint such actions express or by monitoring the effects produced by the dissemination of the information or ideas. Examples include government discharge of public

9. Id. The memorandum of the bill's sponsor, Senator Emmanuel R. Gold, stated:

It is abhorrent 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 bill would make it clear that in all criminal situations, the victim must be more important than the criminal.

Id. The statute was designed to simply provide a means for a victim to be compensated directly from the criminal who caused the harm. The Son of Sam law does not prohibit a criminal from speaking about his crime nor does it preclude a publisher from printing any work in conjunction with an accused or convicted offender. N.Y. EXEC. LAW § 632-a.

New York's Governor Mario M. Cuomo reiterated the purpose of the original Son of Sam law in a March 23, 1992 press release announcing the "revised" Son of Sam law. March 23, 1992 Press Release, State of New York Executive Chamber, Mario M. Cuomo, Governor. Governor Cuomo stated, "No law can fully restore an individual's peace of mind once it has been shattered by crime, but this legislation can ease the victim's burden by providing a mechanism for restitution and reparation, and preventing criminals from profiting from their crimes." Id.

10. The procedures in the statute were designed to address the special problems a victim of a highly publicized crime encounters. Most crime victims do not sue criminals for their injuries and suffering because the criminal usually does not have any significant assets from which a civil judgment may be satisfied. Even "[i]f the defendant does have money or property at the time of the offense, it is quickly exhausted on bail and/or legal expenses." LeRoy G. Schultz, The Violated: A Proposal to Compensate Victims of Violent Crime, 10 ST. LOUIS U. L.J. 238, 243 (1965); see also LeRoy L. Lamborn, The Propriety of Governmental Compensation of Victims of Crime, 41 GEO. WASH. L. REV. 446, 451 n.20 (1973). "Only 15 percent of the victims even consider suing; five percent consult a lawyer; slightly fewer actually try to collect, and only two percent collect anything." Id. (citing ALLEN M. LINDEN, THE REPORT OF THE OSGOODE HALL STUDY OF COMPENSATION FOR VICTIMS OF CRIME 21 (1968)).

The primary problem under the current system is that victims are usually unable to recover anything from the criminal because any profit the criminal may receive from discussing his or her crime may not be acquired until several years after the actual commission of the crime. As a result of this time lag, the tort and wrongful death action statutes will have most likely run. See Joel Rothman, Comment, In Cold Type: Statutory Approaches to the Problem of the Offender as Author, 71 J. CRIM. L. & CRIMINOLOGY 255, 267 (1980).


employees found in possession of subversive literature\textsuperscript{13} and government punishment of publications critical of the state.\textsuperscript{14}

Second, without aiming at ideas or information directly, the government can constrict the flow of information and ideas while pursuing other goals, either by limiting an activity through which information and ideas might be conveyed or by enforcing rules that might discourage the communication of ideas and information.\textsuperscript{15} Illustrative cases include government restrictions against loudspeakers in residential areas,\textsuperscript{16} government demands for testimony before a grand jury despite the desire of informants to remain anonymous,\textsuperscript{17} and ceilings on campaign contributions.\textsuperscript{18}

The United States Supreme Court has developed two general approaches to the resolution of First Amendment claims.\textsuperscript{19} If a government regulation is aimed at the communicative impact of an act, the regulation is unconstitutional unless the government can show that there is a compelling state interest that outweighs the restriction on speech and that the regulation is narrowly tailored to achieve this objective.\textsuperscript{20} Because the content-based reg-

\textsuperscript{13} See, e.g., Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967) (invalidating statute barring teachers from employment in schools solely on the basis of membership in "subversive" organizations).

\textsuperscript{14} See, e.g., New York Times v. Sullivan, 376 U.S. 254, 270 (1964); NAACP v. Button, 371 U.S. 415, 444-45 (1963) (invalidating statutes aimed only at subject matter that was considered offensive or consisting of unpopular viewpoints).

\textsuperscript{15} Tribe, supra note 12, § 12-2 at 790.

\textsuperscript{16} See, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding restrictions on loudspeakers).

\textsuperscript{17} See, e.g., Branzburg v. Hayes, 408 U.S. 665 (1972) (upholding government demands that reporters testify before a grand jury).


\textsuperscript{19} Tribe, supra note 12, § 12-2 at 789-91. The court must first determine whether the effect of section 632-a is to restrict expressive activity or whether its effect is merely to regulate the proceeds of that expressive activity. Simon & Schuster v. Members of New York State Crime Victims Bd., 724 F. Supp. 170 (S.D.N.Y. 1989), aff'd, 916 F.2d 777 (2d Cir. 1990), rev'd, 112 S. Ct. 501 (1991). Once this determination is made, the court must then apply the appropriate standard of review, either strict scrutiny or a lesser standard. Id.; see also Konigsberg v. State Bar of Cal., 366 U.S. 36, 49-51 (1961) (recognizing that government may abridge speech in distinct ways requiring distinct judicial methods); infra notes 116-32 and accompanying text (illustrating the Court's use of a "limited categorical analysis" for certain types of expression).

\textsuperscript{20} Tribe, supra note 12, § 12-8 at 833. The Court requires an especially close nexus between the ends, the legislative objective of the law, and the means, the vehicle it implements to achieve that objective. The statute must be narrowly aimed at permissible and significant government objectives so as not to restrict more expressive conduct than absolutely necessary. The Court holds content-based regulations constitutional only if they are a narrowly drawn means of serving compelling state interests. Id. State interests must meet two criteria to receive "compelling" status. First, the state must have a strong interest in realizing the statute's underlying policies. Id. Second, the magnitude of the state interests achieved must outweigh the restriction's chilling effect on speech. Id. A statute fails the constitutional test of narrowly
ulations carry this presumption of unconstitutionality, the level of scrutiny is extremely high and difficult to meet. If a government regulation is aimed at the noncommunicative impact of an act, the regulation is considered constitutional so long as it does not unduly constrict the flow of information and ideas.\textsuperscript{21} This "balance" between the value of freedom of expression and the government's regulatory interests is struck on a case-by-case basis.\textsuperscript{22}

The Supreme Court in \textit{Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board},\textsuperscript{23} struck down New York's Son of Sam law as violative of the First Amendment of the United States Constitution.\textsuperscript{24} The Court's characterization of this law as a content-based speech regulation\textsuperscript{25} could possibly invalidate all criminal anti-profit statutes and thus undermine the compelling government interest of compensating victims of crime and ensuring that criminals do not profit from their crimes.\textsuperscript{26}

In April 1980, police arrested Henry Hill and charged him with six counts of conspiracy to sell narcotics.\textsuperscript{27} In exchange for immunity from prosecution, Hill cooperated with the government and entered the Federal Witness Protection Program.\textsuperscript{28} In 1981, Simon & Schuster, Inc. contracted with Hill to publish a non-fiction work based on his life of organized crime in New

tailored means if an alternative structure would achieve the state interests with less of a deterrent effect on speech.

\textsuperscript{21} \textit{Id.} § 12-2 at 792.

\textsuperscript{22} \textit{Id.} The Court, in essence, strikes a balance between the value of the freedom of expression being infringed and the government's regulatory interests. This balance "is struck on a case-by-case basis, guided by whatever unifying principles may be articulated." \textit{Id.; see also} Laurent B. Frantz, \textit{The First Amendment in the Balance}, 71 \textit{Yale L.J.} 1424 (1962) (discussing First Amendment balancing).


\textsuperscript{24} \textit{Id.} at 512.

\textsuperscript{25} \textit{Id.} at 508. The Supreme Court classifies laws that regulate speech as content-based if they restrict public discussion of an entire topic. \textit{See} Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980) (invalidating a prohibition against the inclusion by public utility companies in monthly bills of inserts that discussed controversial issues of public policy as a content-based regulation). \textit{But see} City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986) (narrowing the test for content-based regulations to one where regulations have the "predominent intent" and not the "secondary effects" of regulating speech on the basis of content).

\textsuperscript{26} \textit{Simon and Schuster}, 112 S. Ct. at 504.

\textsuperscript{27} \textit{Id.} Henry Hill admitted to a life of crime spanning over 25 years. His most notorious crimes included the theft of six million dollars from Lufthansa Airlines in 1978 and the 1978-79 Boston College point-shaving scandal. \textit{Id.}

York City. Learning of the agreement, the New York State Crime Victims Board concluded that the contract was subject to the Son of Sam law because the book contained Hill's thoughts, feelings and opinions about his involvement in criminal activity. The Crime Victims Board ordered Simon & Schuster to turn over all monies owed to Hill to be held in escrow for the victims of Hill's crimes. Subsequently, Simon & Schuster filed suit under 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York. Simon & Schuster contended that the Son of Sam law violated the First and Fourteenth Amendments. The district court held that the Son of Sam law did not violate the First Amendment because the law was directed at regulating the proceeds of the contract, a nonspeech element.

The United States Court of Appeals for the Second Circuit upheld the statute under a strict scrutiny standard of review and affirmed the district court's decision. The court of appeals determined that the Son of Sam law imposed a direct burden on free expression and therefore constituted a content-based restriction on speech. The court concluded, however, that the


30. Id. at 506; see Nicholas Pileggi, WiseGuy: Life in a Mafia Family 19 (1985) (discussing day-to-day life as a mobster, primarily in Hill's first-person narrative and recounting Hill's conviction for extortion and his subsequent prison term).

31. Simon & Schuster, 112 S. Ct. at 507. The Board ordered Simon & Schuster to transfer to the Board all payments due Hill, including the $27,958 held at that time, as well as all future royalties. Id. at 507.

32. Id. 42 U.S.C. § 1983 entitles a United States citizen to sue for damages in a civil action if a law of any State or Territory of the U.S. causes that person to be subjected "to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (1982).

33. Simon & Schuster v. Members of N.Y. State Crime Victims Bd., 724 F. Supp. 170, 178 (S.D.N.Y. 1989), aff'd, 916 F.2d 777 (2d Cir. 1990), rev'd, 112 S. Ct. 501 (1991). The district court was satisfied that the incidental restriction on First Amendment freedom was no greater than essential to achieve the state's important interest in compensating crime victims. Id.


35. Simon & Schuster, 916 F.2d at 781-82.
statute was narrowly tailored to accomplish New York's compelling interest in ensuring that victims receive compensation directly from the assets of their assailants.\textsuperscript{36}

The Supreme Court reversed the Second Circuit's decision.\textsuperscript{37} The Court held that because the law placed a financial burden on speech based on its content, the law was presumptively inconsistent with the First Amendment.\textsuperscript{38} The majority reasoned that the statute, burdened with the presumption of unconstitutionality, could stand only if it "serve[d] a compelling state interest and [was] narrowly drawn to achieve that end."\textsuperscript{39} The majority characterized the state interest as ensuring that criminals did not profit from \textit{selling their stories} before their victims had an opportunity to recover civil judgments. The Court held that this state interest was not compelling.\textsuperscript{40} However, the majority believed that a broader interest in not profiting \textit{from their crimes} was legitimate,\textsuperscript{41} and thus rejected the state's focus on only proceeds of storytelling.\textsuperscript{42}

The majority determined the law to be overinclusive for two reasons. First, the statute applied to all works, regardless of subject matter, as long as the material contained some recollection of the criminal offense.\textsuperscript{43} Second, the statute covered convicted criminals, as well as those authors who admitted to having committed a crime, but were never convicted.\textsuperscript{44}

In his concurrence, Justice Blackmun agreed with the majority opinion that the law was overinclusive, but criticized the majority for not explicitly

\textsuperscript{36} Id. at 782.
\textsuperscript{37} Simon & Schuster v. Members of N.Y. State Crime Victims Bd., 112 S. Ct. 501, 512 (1991). Justice O'Connor wrote the majority opinion and was joined by Chief Justice Rehnquist and Justices White, Stevens, Scalia and Souter. Justices Blackmun and Kennedy each wrote opinions concurring in the judgment. Justice Thomas was not involved in the consideration or decision of the case.

\textsuperscript{38} Id.

\textsuperscript{39} Id. at 509 (citing Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

\textsuperscript{40} Id. at 510. Justice O'Connor held that the Board failed to show why New York had a greater interest in compensating victims from the proceeds of storytelling over any of the criminal's other assets. Id.

\textsuperscript{41} Id. at 510. The Court concluded only that the state's interest in "depriving criminals of the profits of their crimes, and in using these funds to compensate victims" was legitimate. Id.

\textsuperscript{42} Id. at 509-10.

\textsuperscript{43} Id. at 511. Because New York's Son of Sam law applied to works on any subject, regardless of the quantity or relevance of the criminal's thoughts on his crime to the work, the Court held the law to be overinclusive. Id.

\textsuperscript{44} Id. The statute included in its definition of a "person convicted of a crime," "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted." N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1982 & Supp. 1991).
stating that the statute was underinclusive as well. In a separate opinion, Justice Kennedy concurred only in the judgment. Justice Kennedy believed the Court should have struck down the statute as a pure censorship measure.

This Note examines how the Supreme Court's characterization of the Son of Sam law as a content-based regulation has made it virtually impossible for criminal antiprofit laws to pass constitutional muster. This Note first traces the traditional and alternative analyses applied to First Amendment issues. Next, this Note reviews the United States Supreme Court's decision in Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board and determines that the Court should have characterized the Son of Sam law as a combined speech and nonspeech regulation and applied a less exacting standard of review. This Note evaluates the reasons behind the suggested characterization of the Son of Sam law as a combined speech and nonspeech regulation, including several public policy issues that support the use of a lower standard of review. Finally, this Note analyzes the Son of Sam law under the alternative standard and concludes that the statute passes constitutional examination.

I. TRADITIONAL FIRST AMENDMENT ANALYSIS

The Supreme Court applies different standards of review depending upon the particular type of free speech issue. The Court has recognized that government regulations can chill free speech directly, indirectly or incidentally. Under traditional First Amendment analysis, a court must first

45. Simon & Schuster, 112 S. Ct. at 512 (Blackmun, J., concurring). While Justice Blackmun's concurrence does not state the reasons why he believes the statute is underinclusive, presumably this flaw results from the reach of the statute to only criminals who profit from storytelling rather than all criminals.

46. Id. (Kennedy, J., concurring in judgment).

47. Id. Justice Kennedy believed it was unnecessary and incorrect to apply a balancing test to determine if the statute could withstand strict scrutiny under the First Amendment. Id. Justice Kennedy stated that the compelling state interest test is derived from equal protection jurisprudence and has no legitimate role in determining the constitutionality of content-based speech regulations. Id.

48. If a regulation is found to directly regulate speech, the statute will be subject to strict scrutiny. See, e.g., Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (holding that Arkansas' tax on certain types of magazines was a content-based speech regulation and invalid under the First Amendment); Regan v. Time, Inc., 468 U.S. 641, 648-649 (1984) (invalidating a law making it a crime to photograph any obligation or other security of the United States because "[a] determination as to the newsworthiness or educational value of a photograph cannot help but be based on the content of the photo and the message it delivers."); see also Geoffrey R. Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81, 81-82 (1978) (stating that except for "low value" speech, such as fighting words or obscenity, the United States Supreme Court has employed standards that are strongly speech protective).
classify whether the statute directly regulates the protected speech,\textsuperscript{49} whether it is based on other content-neutral factors,\textsuperscript{50} or whether it combines speech and nonspeech elements.\textsuperscript{51}

Incidental burdens and time, place and manner restrictions on speech do not require exacting scrutiny as long as they are content-neutral, not aimed at the communicative effect of the conduct and allow for alternative avenues of communication. \textit{See, e.g.}, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986); United States v. O'Brien, 391 U.S. 367, 377 (1968) (regulations that indirectly effect expression and are neutral in regard to the type of speech affected are constitutional); \textit{see also} Konigsberg v. State Bar of Cal., 366 U.S. 36, 50-51 (1961).

[General regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.]

\textit{Id.} at 50-51.

\textsuperscript{49} \textit{See} Arkansas Writers' Project, 481 U.S. at 234 (invalidating as content-based a statute that taxes magazines containing general interest articles while exempting religious, professional, trade and sports journals); Regan, 468 U.S. at 648-49 (invalidating as content-based a statute prohibiting photographic reproductions of currency while allowing educational, historical, or newsworthy reproductions); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (invalidating as content-based a statute forbidding peaceful picketing near a school while allowing picketing that involves a labor dispute); cf Renton, 475 U.S. at 47-48 (narrowing the test for content-based regulations to one where regulations have the "predominant intent" and not the "secondary effects" of regulating speech on the basis of content).

\textsuperscript{50} Incidental burdens and time, place, and manner restrictions on speech do not require strict scrutiny as long as they are content-neutral, not aimed at the communicative effect of the conduct, and leave open ample alternative channels of communication. \textit{Renton}, 475 U.S. at 46-47; \textit{see} Leathers v. Medlock, 111 S. Ct. 1438, 1445 (1991) (holding a statute extending Arkansas' generally applicable sales tax to cable and satellite services, while exempting the print media, valid as a content-neutral tax differential regulation as it in no way regulates the content of mass media communications); \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 803 (1989) (holding that New York City's sound-amplification guideline was a valid content-neutral time, place and manner restriction because the city had a substantial interest in avoiding excessive sound volume for the community living in the vicinity of the concert ground); \textit{Renton}, 475 U.S. at 54 (holding that a city ordinance prohibiting adult movie theaters from locating near residential areas, churches, parks or schools was a valid content-neutral time, place and manner restriction because the city had a substantial interest in preserving the quality of urban life); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298-99 (1984) (holding that a regulation denying protestors the right to sleep overnight in specified parks was a valid content-neutral time, place and manner restriction because the city had a substantial interest in maintaining its parks in an attractive and intact condition).

\textsuperscript{51} \textit{See} United States v. Albertini, 472 U.S. 675, 687-90 (1985) (holding that a statute making it unlawful to reenter a military base after being barred from the base by an officer in command or charge was valid as a content-neutral regulation that was necessary to maintain base security); City Council v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (holding an ordinance prohibiting the posting of signs on public property valid as a content-neutral regulation that was justified by the city's substantial interest in advancing esthetic values); \textit{O'Brien}, 391 U.S. at 376 (holding that a statute prohibiting the burning of draft cards, an action with combined speech and non-speech elements, was only an incidental burden on speech).
A. Content Based Regulations

If a court finds that a statute treats one class of publication differently than another solely because of the publication's content, the court will most likely conclude that the statute violates the First Amendment. Courts use a strict standard of review to determine the validity of such a law. A content-based regulation is constitutional only if it is a narrowly-tailored means of serving a compelling state interest. A statute is not narrowly tailored if a less restrictive structure would achieve the identical state interest.

In Arkansas Writers' Project, Inc. v. Ragland, the Supreme Court held that even though there was no evidence of an improper censorial motive, an Arkansas tax burdened rights protected by the First Amendment by discriminating against a select group of magazines. Arkansas imposed a tax on revenue derived from the sale of tangible property, but exempted a variety of items, including newspapers and various journals. The Arkansas Commissioner of Revenue, however, assessed a tax on the sale of the Arkansas Times magazine. Arkansas Writers' Project, the publishers of the magazine, argued that the magazine was exempt from the tax because it fell within one of the statutory exceptions.

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53. See supra note 20 and accompanying text.

54. See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (holding a regulation granting exclusive access of certified teacher union to interschool mail system valid as a narrowly tailored means of enabling the union to perform effectively its statutory obligations as representative of all township teachers); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980) (invalidating a prohibition against the inclusion by public utility companies in monthly bills of inserts that discussed controversial issues of public policy as a content-based regulation not narrowly drawn to protect a captive audience since customers could escape exposure to the material in several different ways, i.e., throwing inserts into trashcan upon receipt); First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978) (holding a criminal statute which prohibits corporations from making contributions for the purpose of influencing voters, on issues other than with which it is materially affected by, invalid as not narrowly tailored because the statute only applies to banks and corporations and exempts not-for-profit agencies and labor unions); see also, TRIBE, supra note 12, § 12-3 at 797-804.


56. Id. at 234.

57. 1935 ARK. GEN. ACTS 233, § 4 at 593, 594 (codified at ARK. STAT. ANN. § 84-1903(a) (1980 & Supp. 1985)). Arkansas exempted specialty journals such as professional, religious, and sports magazines. Id.


59. Id. at 225. Arkansas Writers' Project argued that the Arkansas Times published articles on a variety of subjects, including religion and sports, both of which were subjects exempt from the tax. Id.
it placed an economic burden on speech based solely on the content of the speech.  

The Supreme Court found that the Arkansas tax was a content-based speech regulation because it selectively imposed a tax on some magazines and not others, solely on the basis of the magazines' subject matter. Accordingly, the Court applied a strict standard of review and invalidated the content-based regulation. The Court concluded that Arkansas was unable to justify the means chosen to pursue its compelling interest of raising revenue, because Arkansas could have raised revenues by an overall tax adjustment on all businesses.

In certain circumstances, however, the Court will uphold content-based regulations if the compelling state interest justifies the speech restriction. In *Lehman v. City of Shaker Heights*, the Court held that a Cleveland suburb could prohibit the posting of political or public issue advertisements on its city buses. Shaker Heights purposely limited access to its transit system advertising space in order to minimize abuses, such as favoritism to particular parties and imposing upon a captive audience. The Court did not view this statute as within the forum of the First Amendment because "car cards" are not considered to be a public forum and therefore First Amendment freedoms do not extend to them. The Court reasoned that the legislative objective of curbing abuse was legitimate, and that the statute treated equally all persons or organizations seeking advertising space. Thus, the Court found no First Amendment violation. In contrast, a statute that does not limit, and is justified without reference to, the content of expression constitutes content-neutral speech regulation and is subjected to a less exacting level of review than strict scrutiny.

60. *Id.* at 229.

61. *Id.* "[T]his case involves a . . . disturbing use of selective taxation . . . because the basis on which Arkansas differentiates between the magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content." *Id.*

62. *Id.* at 234.

63. *Id.* at 231 (citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 586 (1983)).

64. 418 U.S. 298 (1974).

65. *Id.* at 303.

66. *Id.*

67. *Id.*

68. *Id.*; see also United States v. Albertini, 472 U.S. 675, 687 (1985) (holding re-entry statute valid as applied to all persons receiving a valid bar letter); Greer v. Spock, 424 U.S. 828, 839 (1976) (upholding a prohibition of partisan political activities on a military post because the policy was "objectively and evenhandedly applied" and did not discriminate among candidate's political views).

B. Content-Neutral Regulations

The Supreme Court has adopted a lower standard of review for statutes that indirectly burden speech while regulating a legitimate state interest. The Court defines content-neutral speech regulations as those that are "justified without reference to the content of the regulated speech." In contrast to its harsh treatment of content-based regulations, the Court has upheld numerous content-neutral regulations reasoning that the regulations were aimed at restricting the secondary effects that accompany a particular kind of speech rather than suppressing the speech itself. The controlling consideration is the government's purpose in enacting the regulation.

In Renton v. Playtime Theatres, Inc., the Supreme Court held that a zoning ordinance restricting the location of adult movie theaters was compatible with the First Amendment. The City of Renton passed an ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, school, church or park. Two owners of adult theaters filed suit seeking declaratory and injunctive relief blocking enforcement of the ordinance.

The Court established a three-prong test to determine the validity of a content-neutral statute aimed at the secondary effects of speech. First,
the city must have a substantial interest at stake. Second, the law must be narrowly tailored to further that interest, but need not be the least intrusive means of regulating the speech. Third, the statute must allow for alternative avenues of communication. Although the law singled out only adult movie theaters, the Court held that the City's interest in perpetuating the quality of living was sufficiently compelling to justify the law. The Court also found the statute to be narrowly tailored because it affected only those theaters that threatened the quality of urban life. Finally, the Court determined that by allowing adult theaters to operate on several hundred acres of land, the city provided a reasonable alternative means of communication.

In Ward v. Rock Against Racism, the Supreme Court utilized the standard of review adopted in Renton and held that New York City's sound-amplification guideline was valid under the First Amendment as a reason-

that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. "Id.

In Renton, the Court stated that "[t]he appropriate inquiry . . . is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." Renton, 475 U.S. at 50. Under the Renton test, once a regulation is determined to be content-neutral, the Court determines if it is designed to serve a vital governmental objective, whether the regulation is narrowly tailored to affect only the targeted class shown to produce the unwanted secondary effects, and whether there is an alternative forum from which the speech may be lawfully expressed. See Andrea Oser, Note, Motivation Analysis in Light of Renton, 87 COLUM. L. REV. 344, 346-50 (1987).

81. Renton, 475 U.S. at 50. See generally Stephen E. Gottlieb, Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication, 68 B.U. L. REV. 917 (1988) (providing an analysis and overview of "interests asserted by the government in support of restricting an individual's constitutional rights").

82. Renton, 475 U.S. at 50. The standard to be applied under Renton is not a least-restrictive analysis test. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Ward, 491 U.S. at 800 (applying the Renton content-neutral speech regulation test to determine the validity of a sound-amplification guideline).

A "less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation." Regan v. Time, Inc., 468 U.S. 641, 657 (1984); cf. supra note 54 (indicating that the strict scrutiny "narrowly tailored" requirement employs a "least-restrictive" analysis test).

83. Renton, 475 U.S. at 50. The Court has applied this requirement to mean whether any alternative arenas are available that would lawfully permit the regulated speech to be expressed. Specifically, in Renton, the Court addressed the plausibility of the alternative theater sites, i.e., whether they were remote, accessible by car, occupied by well-established businesses, or unsuited for development. Renton, 475 U.S. at 53-54; see Oser, supra note 80, at 350.

84. Renton, 475 U.S. at 51 (citing Young v. American Mini Theaters, 427 U.S. 50, 71 (1976)).

85. Id. at 52.

86. Id. at 53. The ordinance left more than five percent of the entire land area of Renton available for use as adult theater sites. Id.

able regulation of protected speech. After receiving numerous complaints from citizens regarding the excessive noise level from concerts held in Central Park by the musical association Rock Against Racism (RAR), New York City adopted a volume control regulation, which specified that the City would furnish high quality sound equipment and retain an independent and experienced sound technician for all performances. RAR sued New York City, arguing that the guideline was invalid under the First Amendment.

Determining that the regulation was content-neutral because it was justified without reference to the content of the speech, the Court applied the Renton three-part test. First, the Court found that the City had a substantial interest in protecting citizens from unwelcome and excessive noise. Second, the City's interest in limiting sound volume is served in a direct and effective way by the requirement that the City's sound technician control the mixing board during performances. Third, the regulation allowed for ample alternative channels of communication because it did not attempt to ban any particular manner or type of music at a given place and time.

The Supreme Court has acknowledged that, despite an indirect effect on speech, certain regulations do not warrant First Amendment protection if there is a valid reason for their existence. If the regulation is aimed at a nonspeech activity, with the purpose of raising specific tax revenues for example, the Court may remove the regulation from First Amendment analysis altogether. In Leathers v. Medlock, the Court held that Arkansas' extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, did not violate the First Amendment. A cable television subscriber, a cable operator, and a cable trade organization brought suit contending that the extension of the tax to cable services and the exemption from the tax of

88. Id. at 803.
89. Id. at 784. Each year Rock Against Racism, an association dedicated to the espousal and promotion of antiracist views, sponsors a program of speeches and rock music at the Bandshell. Id.
90. Id. at 787-88. The Appellant argued that the guideline violated the First Amendment because it restricted the group's free expression of music. Id.
91. Id. at 792. The Court stated that the city's desire to control noise "in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park" was not content based. Id.
92. Id.
93. Id. at 800.
94. Id. at 783. While the law did regulate the volume of the protected speech, it continued to permit expressive activity and had no effect on the quantity or content of that speech. Id.
96. Id. at 1447.
newspapers and magazines violated their First Amendment rights. The Court determined that even though cable television was engaged in "speech," the fact that the government taxed cable television differently from other media did not by itself raise First Amendment concerns. The Court held that the tax was one of general applicability, covering all tangible personal property and a broad range of services, which included more than the press. Instead of developing legislation that regulates speech itself, based either on its content (content-based) or on other factors (content-neutral), the government may attempt to regulate the nonspeech elements of certain expressive conduct.

C. Regulating the Noncommunicative Impact of Expressive Conduct

The government may incidentally regulate speech by attempting to restrict a nonspeech activity. This type of speech regulation, while aimed at the non-communicative conduct, has the effect of regulating corresponding speech elements.

The Supreme Court, in United States v. O'Brien, held that when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. O'Brien burned his Selective Service registration certificate as a symbol of his opposition to the Vietnam War. O'Brien was arrested and subsequently convicted of violating the Universal Military Training and Service Act, which made it a crime for any person to knowingly destroy or alter a registration certificate. O'Brien argued affirmatively that the Act violated the First Amendment because it abridged free speech and served no legitimate legislative purpose.

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97. Id. at 1441.
98. Id. at 1442; cf. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (holding that Arkansas' tax on certain types of magazines was a content-based speech regulation and invalid under the First Amendment).
100. United States v. O'Brien, 391 U.S. 367 (1968); see also Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986) (stating that the conduct regulated had no communicative element and the regulation was not aimed at suppressing speech indirectly, thus, the First Amendment provided no protection).
102. Id. at 375.
103. Id. at 367.
104. Id. at 369; see 50 U.S.C. § 462(b) (1988) (making it illegal to forge, alter, knowingly destroy or mutilate any military certificate).
105. O'Brien, 391 U.S. at 367. O'Brien's argument was that the freedom of expression which the First Amendment guarantees included all modes of communication of ideas by conduct. Id.
The Court upheld the statute and formulated a four-part test for determining whether a government regulation is sufficiently justified in this context. First, the regulation must be within the constitutional power of the government. Second, the regulation must further an important or substantial governmental interest. Third, the governmental interest must be unrelated to the suppression of free expression. Fourth, the incidental restriction on alleged First Amendment freedoms must not be greater than is essential to the furtherance of the governmental interest.

The O'Brien Court found that the government had both the power to regulate and a substantial interest in assuring the continuing availability of issued Selective Service Certificates. The Court found 50 U.S.C. § 462 to be an appropriately narrow means of protecting this interest because only the independent noncommunicative impact of conduct within the Act's reach was regulated. Because the noncommunicative impact of O'Brien's

106. Id. at 376. The O'Brien test applies where "'speech' and 'nonspeech' elements are combined in the same course of conduct." Id. The Court has held that where a statute imposes only an incidental limitation on speech, i.e., it only regulates non-expressive conduct, a less exacting standard of review is applied. Id.

107. Id. at 377. The starting point for the Court in assessing the validity of an incidental burden on speech is determining whether the legislature had the power to pass the law in the first place. Id. With regard to federal statutes, Congress has the authority to regulate an array of areas, including monetary policies, commerce, immigration, the military and others deemed necessary and proper. U.S. CONST. art. I, § 8.


109. O'Brien, 391 U.S. at 377, 381-82. After determining what particular governmental interest the statute is designed to achieve, the court must evaluate whether this interest relates to the suppression of free speech or to other non-expressive conduct. See, e.g., United States v. Albertini, 472 U.S. 675, 689 (1985) (holding that the government had a substantial interest in prohibiting persons perviously banned from re-entering military bases in an effort to minimize destruction of government property).

110. O'Brien, 391 U.S. at 377, 382. The final prong of the O'Brien test requires the regulation to achieve the required result (i.e., the substantial governmental objective). Id.; see Albertini, 472 U.S. at 689 (stating this fourth element as the determination that the substantial governmental interest "would be achieved less effectively absent the [statute]"); see also supra note 82 (indicating that the least-restrictive-means test is not to be applied with the Renton test or with the O'Brien test).

111. O'Brien, 391 U.S. at 377. "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." Id.

112. Id. at 377-78. The availability of the certificates for display to prove a young man's registration with the Selective Service relieved the system "of the administrative burden it would otherwise have in verifying the registration and classification of all suspected delinquents." Id. at 378.

113. Id. at 377. The law simply prevented the destruction of the certificates which was precisely its intent. Id. at 380. There appears to be no more narrowly tailored means to achieving this end then the subject regulation. Id. at 381.
burning of his registration certificate frustrated the government's interest,\textsuperscript{114} the Court found the interest sufficient to justify O'Brien's conviction.\textsuperscript{115}

II. A Categorical Approach — Alternative Analyses in Infringement on Free Speech Cases

Although the Supreme Court has not formally set forth an alternative standard of review for alleged speech infringement cases that fall outside traditional First Amendment analysis, the Court has rendered decisions in such cases based on non-traditional norms. Rather than utilizing the traditional tests for content-based,\textsuperscript{116} content-neutral\textsuperscript{117} and combined speech and nonspeech regulations,\textsuperscript{118} the Court has employed a “limited categorical approach” as part of its First Amendment analysis.\textsuperscript{119}

In \textit{Arcara v. Cloud Books, Inc.},\textsuperscript{120} the Supreme Court held that the First Amendment did not bar enforcement of a statute that authorized closure of a building utilized for both an adult bookstore and solicitation of prostitution.\textsuperscript{121} An investigation of the subject adult bookstore uncovered the operation of a prostitution ring on the premises.\textsuperscript{122} The New York statute authorized the closure of a building found to be a public health nuisance because prostitutes used the building as their place of business.\textsuperscript{123} The Court held that the First Amendment did not bar enforcement of the closure statute because legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity.\textsuperscript{124}

In \textit{Branzburg v. Hayes},\textsuperscript{125} the Court held that the judiciary could require newspaper reporters to testify before a grand jury as to the identity of their sources, even if the reporter had guaranteed anonymity to the informant.\textsuperscript{126}

\textsuperscript{114} \textit{Id.} at 382. The purpose of the law was not to prevent protestors from demonstrating against the war, but to prevent the willful mutilation and destruction of the certificates.

\textsuperscript{115} \textit{Id.} at 377, 386.

\textsuperscript{116} \textit{See supra} notes 52-69 and accompanying text.

\textsuperscript{117} \textit{See supra} notes 70-99 and accompanying text.

\textsuperscript{118} \textit{See supra} notes 100-115 and accompanying text.

\textsuperscript{119} \textit{R.A.V. v. City of St. Paul, Minnesota}, 112 S. Ct. 2538, 2543 (1992) (stating that certain categories of expression do not receive full First Amendment protection). The new categories of less protected speech include “commercial speech, near-obscene and offensive speech ... defamation, and possibly the speech of public employees.” \textit{TRIBE, supra} note 12, § 12-18, at 930.

\textsuperscript{120} 478 U.S. 697 (1986).

\textsuperscript{121} \textit{Id.} at 707.

\textsuperscript{122} \textit{Id.} at 699.

\textsuperscript{123} \textit{See N.Y. PUB. HEALTH LAW} §§ 2320, 2329 (McKinney 1985).

\textsuperscript{124} \textit{Arcara}, 478 U.S. at 707.

\textsuperscript{125} 408 U.S. 665 (1972).

\textsuperscript{126} \textit{Id.} at 708.
The journalists contended that the refusal to apply Kentucky's reporters' privilege statute would deter future informants from providing information, and in turn would preclude reporters from publication due to lack of relevant information. The Court held that because it was impossible to determine the extent of deterrence on informers and reporters, the public interest in prosecuting crimes outweighed the public interest in possible future news about crime from undisclosed, unverified sources. The Court held that the evidence indicated that some of the informers would still be motivated to speak despite the risk of exposure because of the desire to publicize their viewpoints.

_Arcara_ and _Branzburg_ illustrate that with respect to certain categories of expression, the Supreme Court has indicated a greater willingness to uphold regulations that affect speech when the underlying public policy objectives outweigh the possible infringement of freedom of expression. The Court has identified other categories of speech that require special consideration of the policy reasons behind the speech regulation to determine the level of scrutiny to be applied. The utilization of a more flexible standard of review in specific types of First Amendment issues is in the best interest of

127. _Id._ at 680.
128. _Id._ at 693-94. The Court found estimates of the impact of such subpoenas on the willingness of informants to come forward "widely divergent and to a great extent speculative." _Id._
129. _Id._ at 695, 700.
130. _Id._ at 693-95; see also Sue S. Okuda, Comment, Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality, 76 CAL. L. REV. 1353, 1363-64 (1988) (emphasizing the _Branzburg_ Court's observation that "the informer is often a member of a minority political or cultural group [which] relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public." (quoting _Branzburg_, 408 U.S. at 694-95)).
131. _Arcara_, 478 U.S. at 707 (asserting that "[b]ookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises"); _Branzburg_, 408 U.S. at 695 (holding that the public interest in obtaining information relating to prosecution of crime outweighs the burden on news gathering resulting from requiring reporters to disclose confidential information). The _Branzburg_ Court, quotes Wigmore's statement that "[n]o pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice." _Id._ at 682 n.21 (quoting 8 JOHN H. WIGMORE, EVIDENCE § 2286 (1961)).
132. While a detailed discussion of these areas is beyond the scope of this Note, the Court's application of the commercial speech and fighting words doctrine highlights its willingness to apply a more relaxed standard of review in certain circumstances. For example, the Supreme Court has indicated a desire to uphold profit-motivated speech regulations that infringe on free speech but serve legitimate purposes. _See_, e.g., _Ohralik v. Ohio State Bar Ass'n_, 436 U.S. 447, 456 (1978) (holding that the Constitution affords "commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values").

Further, the theory of the regulation of "fighting words" is not contrary to the theory of the free marketplace of ideas because this category of speech triggers an automatic, unthinking reaction, rather than a consideration of an idea. _See Tribe, supra_ note 12, § 12-18 at 928-29.
 justice and society overall. The policy concerns underlying the Son of Sam law certainly deserve this type of consideration.


In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the Supreme Court reversed the decision of the United States Court of Appeals for the Second Circuit upholding the Son of Sam law. The Court struck down the criminal antiprofit law as inconsistent with the First Amendment. Although a six member majority found the state's compelling interest in compensating victims from the proceeds of a crime legitimate, the Court held that the law was unconstitutional because it placed a financial burden on particular speech based solely upon the content of that speech. Because of the number of states that have adopted legislation similar to the Son of Sam law, it is crucial to examine why the Supreme Court invalidated the Son of Sam law and to determine what steps can be taken to remedy this inequitable result. An analysis of the *Simon & Schuster* opinion is the appropriate starting point.

A. **Majority Opinion: Son of Sam Law Unable to Withstand Strict Scrutiny When Characterized as a Content-Based Regulation**

The Supreme court reversed the decision of the United States Court of Appeals for the Second Circuit. The majority began by reviewing the history of the Son of Sam law and laying out the precise operation of the statute. Focusing on the First Amendment challenge, the Court stated that a regulation carries a presumption of unconstitutionality if it economically burdens speakers because of the content of their speech. The Court emphasized the importance of this principle by noting that the government can readily dictate the ideas and viewpoints of the marketplace by imposing content-based speech regulations.

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134. *Id.* at 507-08.
135. *Id.* at 512.
136. *Id.* at 509-10.
137. *Id.* at 512.
138. *Id.*
139. *Id.* at 504-06.
140. *Id.* at 508 (citing Leathers v. Medlock, 111 S. Ct. 1438 (1991)).
141. *Id.* at 508 (citing *Leathers*, 111 S. Ct. at 1444).
Reasoning that the law singled out income derived from expressive activity and thereby placed a burden on that income that the law placed on no other income, the Court explicitly labeled the Son of Sam law as a content-based regulation. The necessary result, that Simon & Schuster could only publish books about crime if the criminal-turned-author would be willing to forgo payment for five years, plainly imposed a financial disincentive on speech with a particular content.

The Court rejected the State Crime Victims Board’s attempt to distinguish the Son of Sam law from the discriminatory tax at issue in Arkansas Writers’ Project. The Court stated that the statute’s procedure of escrowing the criminal’s proceeds from storytelling rather than taxing it outright as in Arkansas Writers’ Project was not sufficient to differentiate the Son of Sam law to obtain different review under the First Amendment.

The majority next rejected the Board’s argument that the statute should not be subjected to strict scrutiny because Simon & Schuster failed to show that the New York legislature intended to suppress particular ideas. In an attempt to have the Son of Sam law reviewed under a lower standard, the Board argued that only statutes that intend to suppress certain ideas are considered suspect and examined under strict scrutiny. The Court rejected this argument and held that regulations aimed at proper governmental objectives can also violate the First Amendment. The Court also disagreed with the Board’s final argument, which was an attempt to differentiate a content-based regulation aimed specifically at the media from the Son of Sam law, which imposed a general burden on any “entity” contracting

142. Id. at 508.
143. Id. The Court stated:
   Whether the First Amendment “speaker” is considered to be Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive only on speech of a particular content.
144. Id.; see supra notes 55-63 and accompanying text. The Court said that the difference between holding funds in an escrow account for five years and taxing a percentage of it outright is unimportant. Simon & Schuster, 112 S. Ct. at 508. Both forms of financial burden act as disincentives to speak. Id.
145. Id. The majority believed that “[b]oth forms of financial burden operate as disincentives to speak.” Id. But see infra notes 182-84 and accompanying text.
146. See Simon & Schuster, 112 S. Ct. at 509. The majority stated that “’[i]llicit legislative intent is not the sine qua non of a violation of a the First Amendment.’” Id. (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575, 592 (1983) (holding that an improper censorial motive need not be present to invalidate a speech regulation under the First Amendment)).
147. Id.
with a convicted person to tell his story. The Court stated that any "entity" that contracts with a criminal-turned-author becomes a medium of communication and is therefore entitled to First Amendment protection.

After characterizing the Son of Sam law as a content-based regulation, the majority applied a strict scrutiny standard of review. This stringent standard requires that the state objective, sufficiently vital to justify an infringement of free speech, be achieved by a regulation designed to include only persons in the subject class. The Court held that New York had a dual compelling interest, first in ensuring that victims of crime received compensation from those who harmed them and second, that criminals not profit from their crimes. The Court, however, rejected the Board's attempt to narrow this dual interest of protecting a victim's opportunity to recover from his or her assailant before the criminal profits from the proceeds of his crime. The majority stated that the Board was unable to show why New York had a greater interest in compensating victims from the proceeds of the "storytelling" than from any of the criminal's other assets. Accordingly, the Court concluded that the state's compelling inter-

149. Simon & Schuster, 112 S. Ct. at 509.

150. Id. The Court held that the "argument falters on both semantic and constitutional grounds," id., and concluded that the identity of the speaker was irrelevant in the consideration of the validity of a content-based speech regulation. Id.; see Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2518 (1991) (stating that "enforcement of... general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.").

151. See Simon & Schuster, 112 S. Ct. at 509. The Court held that in order to justify the financial disincentive to create or publish works about a criminal's thoughts, feelings, opinions, or beliefs about a particular crime, New York had the burden to show that the Son of Sam law could survive a strict scrutiny standard of review. Id.

152. Id. The majority stated that to justify differential treatment for works with a specified content, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Id. (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231).

153. Id. at 509-10. It is important to note that the majority opinion expressly acknowledged that New York's interest clearly was not to curtail Henry Hill from telling his story.

154. Id. at 509. The majority acknowledged that every state has a body of tort law that is designed to compensate crime victims. The Court also cited the existence of prejudgment remedies and orders of restitution as further evidence of this compelling interest. Id. at 509-10.

155. Id. at 510. This interest is further protected by New York's statutory provisions for the forfeiture of the proceeds and instrumentalities of crime. See N.Y. CIV. PRAC. L. & R. §§ 1310-1352 (McKinney Supp. 1993).

156. Simon & Schuster, 112 S. Ct. at 510. Specifically, the proceeds from the offender's crime in this instance is the asset created by selling the rights to his or her story.

157. Id. The Board was also unable to offer any justification for a distinction between storytelling and any other activity with respect to its interest of transferring the proceeds of crime from an offender to his victim. Id.
est was simply aimed at compensating victims from the proceeds of the crime committed against them.\textsuperscript{158}

In deciding whether the Son of Sam law was narrowly tailored to advance New York's compelling interest, the majority examined the authors and works covered by the law.\textsuperscript{159} First, the law's broad definition of "person convicted of a crime" enabled the Board to escrow the income of any author who admitted committing a crime, whether or not the criminal-turned-author was ever convicted.\textsuperscript{160} In addition, the statute applied to any work that contained the "thoughts, feelings, [and] opinions" of the author's crime.\textsuperscript{161} The Court held that these two provisions served to make the statute overinclusive and therefore invalid as not narrowly tailored utilizing a strict scrutiny standard of review.\textsuperscript{162} The majority provided several examples of works that would be covered by the Son of Sam law, including \textit{The Autobiography of Malcolm X}, the \textit{Confessions of Saint Augustine}, and works by Martin Luther King.\textsuperscript{163}

The majority concluded by reiterating the Court's position that the Son of Sam law singled out speech on a particular subject for a financial burden the law placed on no other speech,\textsuperscript{164} and that while New York's interest in compensating victims from the proceeds of crime was compelling, the statute was not tailored narrowly enough to withstand strict scrutiny review.\textsuperscript{165}

\textbf{B. Concurring Opinions: Son of Sam Law Judged Underinclusive and a Pure Censorship Measure}

Writing separately, two Justices concurred in the judgment. Justice Blackmun asserted that the statute was underinclusive\textsuperscript{166} and Justice Kennedy stated that the balancing test the Court utilized should be reserved for equal protection jurisprudence and not for free speech issues.\textsuperscript{167} In a three sentence concurrence, Justice Blackmun stated that the Son of Sam law was

\begin{itemize}
  \item 158. \textit{Id.} at 511.
  \item 159. \textit{Id.} at 511-12. The Court believed that the regulation covered far too many authors and works. \textit{Id.} at 511. The majority cited, for example, \textit{The Autobiography of Malcolm X} and Thoreau's \textit{Civil Disobedience} as works falling under the Son of Sam law. \textit{Id.}
  \item 161. \textit{Id.} § 632-a(1).
  \item 162. \textit{Simon & Schuster}, 112 S. Ct at 511-12.
  \item 163. \textit{Id.} at 511. The Court acknowledged that a statute like the Son of Sam law would not prevent the publication of all of these works, because some would have been written without compensation. The main flaw, the majority asserted, was that the regulation reached a wide range of literature that did not enable a criminal to profit from his crime while a victim remained uncompensated. \textit{Id.}
  \item 164. \textit{Id.} at 512.
  \item 165. \textit{Id.}
  \item 166. \textit{Simon & Schuster}, 112 S. Ct. at 512 (Blackmun, J., concurring).
  \item 167. \textit{Id.} at 512-13 (Kennedy, J., concurring).
\end{itemize}
underinclusive as well as overinclusive and that the Court should have stated
so in order to provide guidance to other states who have enacted similar
legislation.168

In a separate concurrence, Justice Kennedy stated that it was unnecessary
and incorrect for the majority to use a balancing test to render the content-
based regulation unconstitutional.169 Justice Kennedy argued that, instead,
the Court should have invalidated the Son of Sam law as a pure censorship
measure in that it imposed restrictions on authors and publishers solely on
the basis of the content of the literature.170 Justice Kennedy stated that the
use of a compelling justification standard was dangerous in that states might
infer that they may censor speech whenever they believe there is a legitimate
reason for doing so that outweights the interference with free speech.171 Just-
ice Kennedy asserted that the Son of Sam law "amount[ed] to raw censor-
ship" forbidden by the First Amendment and should have been struck
down.172

IV. CRIMINAL ANTI-PROFIT LAWS: INVALIDITY UNDER THE FIRST
AMENDMENT VIRTUALLY GUARANTEED AFTER
Simon & Schuster

The Supreme Court's characterization of the Sam of Sam law as a content-
based regulation has made it virtually impossible for criminal antiprofit laws
to pass constitutional muster. Reviewing the Son of Sam law under strict
scrutiny, the Court determined the statute to be overinclusive and therefore
not narrowly tailored.173 Only if the law is characterized as a regulation
aimed at conduct containing both speech and nonspeech elements, and con-

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168. Id. at 512 (Blackmun, J., concurring).
169. Id. at 512 (Kennedy, J., concurring). Justice Kennedy stated that the balancing for-
mulation is derived from equal protection analysis and is not applicable when deciding
whether a state may place a restriction on speech based only on content. Justice Kennedy did
allude to the fact that the balancing test may be appropriate when reviewing a content-neutral
or time, place, and manner speech regulation. Id.
170. Id. at 515. Justice Kennedy concluded that the Son of Sam law was directed at speech
that was not obscene, defamatory or otherwise criminal and therefore no further inquiry was
necessary to determine that the statute was invalid as a content-based speech regulation. Id. at
514-15.
171. Id. at 513.
172. Id. at 515.
173. Id. at 511 (majority opinion). The Court determined the law to be overinclusive be-
cause it covered such a large number of works. Thus, even under the more lenient tailoring
standards of Renton and Ward, a regulation is deemed not narrowly tailored if "'a substantial
portion of the burden on speech does not serve to advance [the State's content-neutral]
goals'". Id. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

Had the majority applied the Renton three-part test for content-neutral regulations, it would
probably have agreed that New York had a compelling interest in compensating victims from
the proceeds of crime and that the statute allowed for alternative avenues of communication.
sequently analyzed under *O'Brien*,174 can states who have adopted antiprofit statutes based on the Son of Sam law achieve their goal of compensating victims from the proceeds of crime.

A. **Characterizing the Son of Sam Law as a Regulation of Conduct Containing Speech and Nonspeech Elements Rather Than a Content-Based Speech Regulation**

A key consideration in determining the validity of the Son of Sam law is the level of First Amendment protection to be afforded to a criminal’s literary work.175 Courts must determine whether the challenged statute deters criminals from telling their stories by regulating the content of their speech.176 Then, even if deterrence occurs, such interference may be constitutional if the restrictions are classified as either content-neutral or are aimed at combined speech and nonspeech elements and the law’s purpose is not solely to prevent the criminal from telling his story.177

An argument can be made that the Son of Sam law is directed not at the content of speech, but at the financial transaction between the criminal and some entity, and therefore has only an incidental effect on speech.

I. "*The Strangler—Sally’s Story*: An Illustration

Sally the Strangler is a serial killer who has been arrested and convicted. Sally’s best friend contracts with Publisher A to write a book entitled "The Strangler—Sally’s Story," which will trace Sally’s life of crime and will include several reenactments of actual strangulations. A world-renowned criminologist contracts with Publisher B to write the same story, hypotheti-
cally word for word. Sally contracts with Publisher C to sell the rights of her story to be written by a ghost writer, also the same story, hypothetically word for word. Applying the Son of Sam law, the statute would only be applicable to the contract between Sally and Publisher C. Both Sally's best friend and the criminologist can write and publish the same story Sally would contract to write, without giving a penny to the State Victim's Crime Board. Further, if Sally opts to write her story without receiving any compensation, the Son of Sam law is completely circumvented. As a result, the public has not been deprived of Sally's story—Sally has simply been prevented from profiting from her crimes before her victims have had the opportunity to be compensated.

The Son of Sam law does not vest the Board with discretion to examine the content of the criminal's speech to determine if the story is offensive or if the reenactment of the crime is a major or minor part of the story. As the district court determined, the Board's inquiry is an objective one which evaluates whether a contract exists under which the criminal will be paid for a story that includes reenactment or discussion of the crime. Thus, it is not the content of the story that is being subjected to the regulation, it is the receipt of profits by the criminal at the expense of his or her victim.

2. The Incidental Effect of Deterrence on Speech is Too Speculative to Label the Son of Sam Law Content-Based

The second point addresses the majority's contention that the Son of Sam law places a financial burden on the criminal speaker based on the content of his speech that it places on no other speaker. As has been illustrated above, since the statute aims to regulate the criminal's profits and not the content of his speech, the law places only an incidental burden on the crimi-

178. The Son of Sam law applied only to a representative or agent of the criminal-turned-author if that person stood in a legal relationship to the criminal by acting as a "straw man" through which funds from the literary work would flow to the criminal. N.Y. Exec. Law § 632-a(1) (McKinney 1982 & Supp. 1991); see also John T. Loss, Note, Criminals Selling Their Stories: The First Amendment Requires Legislative Reexamination, 72 Cornell L. Rev. 1331, 1334-36 (1987).

179. The statute only referenced the proceeds of a literary work written by a criminal-turned-author that expressed his opinions, beliefs, thoughts and feelings about a particular crime. See N.Y. Exec. Law § 632-a(1). If no proceeds flow from the work to the criminal, the Son of Sam law is not applicable. Id.

180. Id. at § 632-a.


nal's speech if he or she chooses not to speak. The First Amendment protects the speaker's message and his ability to convey that message to the public, not his ability to maximize his own profits. Thus, the Son of Sam law survives the Court's concerns about preventing infringement of the criminal's right to speak, rather than protecting his right to profit from that speech.

B. Public Policy Provides Additional Support for the Use of a Lower Standard of Review

Reviewing the Arcara and Branzburg decisions, as well as the commercial speech and fighting words doctrines, it appears that the Court has historically considered the public policy reasons behind a regulation affecting speech and has adjusted its standard of review accordingly. Like Simon & Schuster, these cases concerned statutes that infringed on protected speech, yet which nonetheless were found to be compatible with the First Amendment. The Son of Sam law, a vital component in an overall victim compensation scheme, should be given similar consideration.

183. "[E]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend . . . [on protected activities], yet no one would suggest that such liability gives rise to a valid First Amendment claim." Arcara v. Cloud Books, Inc., 478 U.S. 697, 706 (1986).

The Son of Sam law does not directly or substantially burden free speech since it does not prevent a willing criminal from speaking. Only a criminal who refuses to speak if he does not profit from that speech is effectively deterred by the Son of Sam law. There are many reasons, besides money, which motivate criminals to speak. For example, Charles Manson spent "hundreds of hours" telling his life story, and "although it is his story, Charles Manson receives no royalties or other renumeration from [the] book. His only recompense will be the chance to have his story heard." NuEl EmmONS, Manson In His Own Words 17 (1986). Mark David Chapman, whose story entitled "The Man Who Shot John Lennon" appeared in PEOPLE MAGAZINE, "agreed that he did not wish to profit from his crime story." Respondents' Brief, supra note 29, at n.34.

184. In several decisions, the Supreme Court has held that the Constitution does not provide special protections to people who are discouraged from exercising their constitutional right by the government's withdrawal of a financial incentive which is not aimed at suppressing speech. See, e.g., Caplin & Drysdale v. United States, 491 U.S. 617, 628 (1989) (recognizing that a denial of an exception to a forfeiture statute for a criminal defendant's right to counsel of his choice under the Sixth Amendment would also preclude the criminal from asserting a First Amendment challenge); Lyng v. International Union, 485 U.S. 360, 369 (1988) (rejecting a challenge under the First Amendment that denial of food stamp benefits to families where a member is on strike reduces the amount of money people had to spend which in turn could reduce their incentive to speak under the First Amendment). These decisions illustrate that a law which affects a speaker's financial incentive to speak but does not prevent him from communicating his thoughts and ideas, does not directly or substantially burden speech.

185. 478 U.S. 697 (1986); see also supra notes 120-24 and accompanying text.
186. 408 U.S. 665 (1972); see also supra notes 125-30 and accompanying text.
187. See supra note 132 and accompanying text.
A commonly held belief is that no person should be permitted to profit from his or her own wrongdoing.\textsuperscript{188} It is not only wrong for a criminal to commit a crime and profit from it, but also wrong for offenders to add insult to injury by profiting from the victimization without recompense to their victim.\textsuperscript{189} In order to remedy this situation, Congress and state legislators have enacted restitution\textsuperscript{190} statutes.\textsuperscript{191} Restitution serves many purposes, such as providing redress for victims, rehabilitating offenders, reducing the need for vengeance by the victim, allowing less severe and more humane sanctions for offenders, and reducing demand upon the criminal justice system.\textsuperscript{192}

Critics of the Son of Sam law contend that the existing restitutionary legislation in New York is sufficient to compensate victims of criminals who seek to profit from their crimes.\textsuperscript{193} While an appropriate start, such restitution programs are often an ineffective aid to crime victims.\textsuperscript{194} A major problem with the restitutiorary laws is that convicted criminals usually do not have
sufficient assets to compensate their victims due to asset dissipation prior to judgment or indigence.\textsuperscript{195}

New York's general attachment provision provides an example of how the pervasive nature of these problems has thwarted victim restitution laws.\textsuperscript{196} New York's attachment remedy neither notifies a victim of the existence and location of attachable property, nor ensures that such property will be secured until the victim seeks an order of attachment.\textsuperscript{197} Further, New York's

\textsuperscript{195} Under the current system, a criminal has the opportunity to dissipate profits between the time he receives them and before a restitution order is entered. The Son of Sam law, in contrast, removes this avoidance technique by securing funds in a state run escrow account. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

Similarly, although restitution orders may be imposed on a convicted indigent defendant, they will be extremely difficult to enforce because courts and probation departments do not have the time nor the resources to serve as collection agencies for victims. Lorraine Slavin & David J. Sorin, Project, Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982, 52 FORDHAM L. REVIEW 507, 572 (1984) (expressing the difficulty for courts and probation departments to effectively perform their functions in addition to serving as debt collectors).

\textsuperscript{196} Article 62 of the New York Civil Practice Law and Rules is an attempt to provide a victim the means of satisfying a judgment by attaching the criminal's property. N.Y. CIV. PRAC. L. & R. § 6201 (1)(2)(3) (McKinney 1990). However, in order for the victim to get an order of attachment, the court must conclude that the victim is likely to succeed on the merits and that the criminal is a nondomiciliary, a resident who cannot be served or someone who has attempted to assign or dispose of property with the intent to frustrate the judgment. Id.; see also N.Y. EXEC. LAW §§ 620-635 (McKinney 1982). New York's Crime Victims Compensation Act, enacted 11 years prior to the Son of Sam law, allows a victim to apply to the Board for compensation from funds provided by the state, rather than from the criminal. This contention fails in two ways. First, the Son of Sam law is applicable only to those cases in which a criminal would be unjustifiably enriched from the proceeds of crime committed against a particular victim. New York has repeatedly stated its substantial interest as ensuring that criminals do not profit from the proceeds of crime before their victims have an opportunity to be compensated from those proceeds. Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Bd., 112 S. Ct. 501, 510 (1991); Simon & Schuster, Inc. v. Fishchetti, 916 F.2d 777 & 783 (2d Cir. 1990), rev'd, 112 S. Ct. 501 (1991). The Son of Sam statute does not purport to compensate all victims for their injuries. Secondly, a victim is limited under CVCA to a maximum recovery of $20,000, an amount which may be less than a victim's recoverable injuries. N.Y. EXEC. LAW § 631(3). Thus, it is possible that a victim would need to look to the escrow account established under the Son of Sam law, in addition to CVCA, to be fully compensated.

\textsuperscript{197} N.Y. CIV. PRAC. L. & R. § 6201; cf. N.Y. EXEC. LAW § 632-a(1). Under the Son of Sam law, a criminal's profits from a contract for his story can be secured by the state before a victim even learns of the contract, thereby preventing the dissipation of funds. See also N.Y. EXEC. LAW § 632-a(9) (providing that any actions taken by an offender to avoid application of the statute, although not specifically anticipated by it, are null and void as against the public policy of the state).

The Hill situation is a clear example of the inadequacy of New York's attachment statute with reference to profits made by a criminal's storytelling. By the time WISEGUY, supra note 30, was published in 1985, Henry Hill had already received, and may have dissipated, approximately $100,000 from Simon & Schuster. Respondent's Brief, supra note 29, at n.41. One of Hill's victims, Patricia Eisenberg, who learned of Hill's involvement in her husband's murder as a result of the book, had no knowledge of the existence of attachable property until a considerable time after Hill received the money. Id. Without the Son of Sam law, Ms. Eisenberg
attachment statute does not provide the statute of limitations and priority features contained in the Son of Sam law.\textsuperscript{198}

The Son of Sam law attempts to remedy these problems by preventing dissipation of funds by maintaining a secured escrow account, by notifying victims of the availability of funds, by expanding the statute of limitations to five years, and by prioritizing the distribution of funds with preference to the victim.\textsuperscript{199} The Son of Sam law aids criminals and encourages them to tell their stories.\textsuperscript{200} For example, the criminal is granted first priority to use escrow funds to pay his legal fees.\textsuperscript{201} The Son of Sam law also establishes a mechanism for a criminal to provide restitution to the victims of his crime if he so desires.\textsuperscript{202}

\textit{C. Son of Sam Law Withstands Constitutional Examination Under the O'Brien Test}

Rather than being viewed as a content-based regulation, the Son of Sam law should be seen as a statute that regulates conduct containing both speech and nonspeech elements.\textsuperscript{203} The Court has acknowledged that regulations are constitutional if they serve to regulate some type of behavior and by

\textsuperscript{198} The Son of Sam law gives a crime victim five years in which to bring suit against his or her assailant. N.Y. EXEC. LAW § 632-a(1); cf. N.Y. CIV. PRAC. L. & R. 214-15.

Section 215 of New York's Civil Practice Law and Rules states "[t]he following actions shall be commenced within one year: . . . an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right to privacy under section fifty-one of the civil rights law." N.Y. CIV. PRAC. L. & R. § 215. "The following actions must be commenced within three years: . . . an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215; . . . an action to recover damages for a personal injury except as provided in Section[ ] . . . 215." \textit{Id.} § 214.

The Son of Sam law prioritizes the distribution of escrow funds as follows: Payments ordered by the Board, subrogation claims of the state, civil judgments of crime victims, other judgment creditors, and the criminal himself. N.Y. EXEC. LAW § 632-a(11); cf. N.Y. CIV. PRAC. L. & R. § 5234. Where two or more orders of attachment are issued against the same judgment debtor, they shall be satisfied out of the proceeds of personal property in the order in which they were issued.

\textsuperscript{199} N.Y. EXEC. LAW § 632-a.

\textsuperscript{200} \textit{Id.}

\textsuperscript{201} \textit{Id.} § 632-a(8). The statute allows the criminal to receive a portion of the escrowed money to pay legal fees, thereby permitting him, if he has insufficient assets, to afford private counsel.

\textsuperscript{202} \textit{Id.} § 632-a(11), (c), (d). Under the Son of Sam law, victim's judgments take priority over unsatisfied judgments of other creditors.

\textsuperscript{203} \textit{See supra} notes 101-15 and accompanying text. The Son of Sam law regulates conduct in that it monitors the financial transactions entered into by a criminal from which he stands to profit.
doing so incidentally affect free speech. The Son of Sam law in no way regulates the criminal's means of communication—he is free to tell his story to whomever, whenever and through whatever medium he chooses. The incidental limitation on First Amendment freedoms may be justified by New York's important governmental interest of compensating victims from the proceeds of the crime.

The Son of Sam law withstands the O'Brien four-part test. First, it is within New York's constitutional power to compensate its citizens who have fallen victim to crime. Second, the Supreme Court established that New York has a substantial and compelling governmental interest in ensuring that criminals do not profit from discussing or reenacting their crimes before their victims have an opportunity to be compensated from those profits. Third, compensating victims from the proceeds of crime and making sure that criminals do not profit at the expense of their victims is indeed unre-
lated to the suppression of free expression. The fact that postponement of financial renumeration could possibly deter a few criminals-turned-authors from telling their stories is an incidental result of the primary purpose of the regulation. Finally, the substantial governmental interest supporting the Son of Sam law "would be achieved less effectively absent the [statute]." The tailoring standard required under O'Brien is not a least-restrictive analysis test. Instead, the statute may not be substantially broader than necessary to achieve the compelling interest. There appears to be no plausible way that the statute can provide for differentiation between works containing a vast amount of crime recollection and those with only a minimal amount of recollection. In doing so, the statute would give the Board power to apply the law at its discretion using a subjective and arbitrary measurement. Accordingly, the Son of Sam law is arguably not substantially broader than necessary to effectively compensate victims from the proceeds of crime.

208. The Second Circuit correctly determined that "[t]he purpose of the statute . . . is not to suppress speech but to assure that funds are set aside out of profits." Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 783 (2d Cir. 1990), rev'd, 112 S. Ct. 501 (1991); see also supra notes 200-02 and accompanying text (discussing incentives inherent in the Son of Sam law that encourage a criminal's speech).


210. Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989). "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Id.

211. The district court concluded that any restriction on speech is no greater than is essential to promote the government's interest in compensating crime victims because "[t]he law is drawn not to prohibit expressive activity, but to garnish the proceeds so that they will be used in a productive manner. The statute reaches only proceeds from expressive activity for the purpose of preventing a criminal from directly profiting from his or her crime." Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 724 F. Supp. 170, 179 (S.D.N.Y. 1989), aff'd, 916 F.2d 777 (2d Cir. 1990), rev'd, 112 S. Ct. 501 (1991).

An argument can be made that the Son of Sam law should be re-written to cover only the profits of convicted criminals because "admitted criminals" may not be considered criminals in the eyes of the law. This would eliminate the overinclusiveness claim from the "convicted persons" provision.

212. Any differential device would constitute content-based discrimination and would be absolutely contrary to the dictate of the First Amendment. For example, a work containing 50 percent recollected material is subject to the law, but a work with only 49 percent recollected material is not. Also, there is no practical way to measure the quantity of recollection material—counting the number of words used to discuss the crime compared to the total number of words of the literary work would be administratively impossible and would open the door to deceit and political pressure to allow certain works to bypass the statute and other works to be covered.

213. By limiting the reach of the statute and then only attaching the profits for the benefit of the particular victims of that crime, the statute achieves New York's compelling interest in a manner that is most effective and does not unduly burden free speech. The priorities for paying money out of the escrow account are also essential to achieving the state's objective since
V. CONCLUSION

The Son of Sam law, like the forty-two other existing criminal antiprofit statutes, was designed to provide relief for victims of crime. By requiring a criminal to postpone collection of the proceeds from literary works that recount his crime, victims stand a better chance of recovering some kind of compensation from the person who violated their peace of mind. In *Simon & Schuster, Inc. v. Members of the New York Crime Victims Board*, the Court disallowed even this kind of nominal relief.

By applying a strict scrutiny standard of review to the Son of Sam law, the Court has, in effect, condemned this form of restitution to victims nationwide. A better view, which has been adopted by the Court in several analogous situations, is to apply a lower standard of review. The Son of Sam law should be viewed as a combined speech and nonspeech regulation. The law's incidental effect on a criminal's speech can certainly be justified by the nationwide policy of compensating innocent crime victims before wrongdoers profit from their crimes. The public policy issues underlying the Son of Sam law further substantiate the use of a less exacting standard of review.

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the victim is given priority over the criminal and other judgment creditors. N.Y. EXEC. LAW § 632-a(8) (McKinney 1982); see also supra notes 193-99 and accompanying text (discussing the Son of Sam law as a necessary addition to New York's overall victim compensation scheme).