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Son Of Sam Laws: A Victim Of The First Amendment?

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SON OF SAM LAWS: A VICTIM OF THE FIRST AMENDMENT?

I. INTRODUCTION

The public's schizophrenic demands regarding information about crimes have created a dilemma for legislatures, courts, and commentators, who attempt to balance the public interest, the constitutional rights of criminal authors, and the privacy rights of crime victims. The persistent growth in the national crime rate,[1] the corresponding increase in the number of crime victims, and the spectacle of notorious criminals profiting from selling their crime stories—often at the emotional and physical expense of their victims—throw this dilemma into stark relief.[2] Indeed, there is a clear incongruity between the public's repulsion at criminals profiting from the stories of their crimes and the public's unabated appetite for these stories.[3] On the one hand, because of significant public interest in the nonfiction crime

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1. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 9-31 (1990) (reporting steady increase in numbers of violent crimes). From 1989 to 1990, overall violent crime increased by 10.4%; during this period the rate of murders increased 8%, rape increased 8.10 %, robbery increased 10.30 %, and aggravated assault increased 10.60 %. *Id.* Overall the number of crimes committed nationwide rose to 14.48 million in 1990. *Id.*

2. *See, e.g.*, David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 PEPP. L. REV. 35, 36 (discussing lack of focus on victims' rights in United States Constitution) (1989); PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, 114 (1982) (recommending that Sixth Amendment be amended to incorporate right of victims of crimes "to be present and to be heard at all critical stages of the judicial proceedings"); NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, VICTIM RIGHTS AND SERVICES: A LEGISLATIVE DIRECTORY 8 (1987) (proposing addition of Twenty-Sixth Amendment to United States Constitution providing victims of crimes with certain basic rights).

3. *Compare infra* notes 4-5 and accompanying text (discussing public interest in criminal authors' product), *with infra* note 6 and accompanying text (describing public outrage at spectacle of criminals profiting from commercial exploitation of their crime stories). *See also* Sam Roberts, *Criminals, Authors, and Criminal Authors*, N.Y. TIMES, Mar. 22, 1987, § 7, at 1 (stating that "[Son of Sam laws] were conceived in an attempt to resolve the conflict between the marketplace and a widely accepted clause in the social contract: that crime shouldn't pay"). Roberts also reports that, in response to the public's "ostensible revulsion" at criminals who exploit their crimes, one publisher printed a disclaimer on the memoirs of a notorious murder indicating that the criminal was to receive no money from the book. *Id. Cf. Florida Official Wants "Serial Killer" Cards Banned*, Propriety to the United Press International, Apr. 22, 1992 (noting Florida law enforcement official's efforts to ban trading cards, similar to baseball cards, featuring criminals like executed Ted Bundy and convicted mass murderer Jeffrey Dahmer).

That Son of Sam laws are triggered in situations where a criminal generates profits from speaking about his crimes, and that a criminal can profit from speaking about his crime only if there is substantial public interest in hearing the criminal's story, further illustrates the dichotomy of interests implicated by Son of Sam laws.

genre,[4] criminals often profit from the notoriety surrounding their crimes by selling their crime stories to the media.[5] On the other hand, public dismay over notorious criminals commercially exploiting their criminal behavior by selling their crime stories has prompted Congress and many state legislatures to enact so-called "Son of Sam" laws.[6]

Simply stated, Son of Sam laws represent a legislative attempt to codify the maxim "crime does not pay."[7] A diversity of opinions exists regarding

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4. *See* Lisa W. Foderaro, *Crimes of Passion, Deals of a Lifetime*, N.Y. TIMES, Feb. 10, 1991, § 4, at 6 (commenting on public's seemingly insatiable appetite for crime narrative). Foderaro explored the public's interest in the nonfiction crime genre:

> 'Pop culture devoured itself, and now even crummy true crimes are getting developed into books—just because somebody killed somebody,' said Joe Sharkey [author of two true crime books]. The more shocking the crime, the greater the notoriety—or advanced publicity—it produces. The public is primed, already familiar with the events and the narrative, which needs no justification since it's factual. The proliferation of cable channels and the rise of the Fox network have also inspired some literary ambulance-chasing. 'The film production companies read the newspapers and jump on these cases from day one,' Mr. Sharkey said. 'It's nothing more than a hunger for the product.'

Id. See also Alessandra Stanley, *When Gangsters Become the Gangster Movie*, N.Y. TIMES, Feb. 21, 1992, at B2 (discussing Hollywood's "irresistible" attraction to crime figures and commercial success of true stories about gangsters and crime families).

5. *See, e.g.*, Roberts, *supra* note 3, at 1 (reporting that in recent years marketplace has been willing to pay handsomely for written, filmed, or televised chronicles of crime); Meg Cox, *'Sam' Ruling Likely to Spark Media Scramble*, WALL ST. J., Dec. 11, 1991, at B1 (reporting that popularity of true-crime genre makes story of Jeffrey Dahmer, who has admitted to killing and dismembering 17 people, potentially lucrative).

6. *See infra* note 36 and accompanying text (listing state and federal Son of Sam laws). Since 1977, 44 states and the federal government have enacted Son of Sam laws. *Id.* Son of Sam laws have also been contemplated abroad. *See* Nicholas C. Katsoris, Note, *The European Convention on the Compensation of Victims of Violent Crimes: A Decade of Frustration*, 14 FORDHAM INT'L L.J. 186, 214 (1990/1991) (discussing London press organization's adoption of uncodified version of U.S. Son of Sam laws).

The appellation "Son of Sam" was derived from the so called "Son of Sam" killer, David Berkowitz, who murdered six people in New York City in 1976-77. *See* Carey Winfrey, *"Son of Sam" Case Poses Thorny Issues for Press*, N.Y. TIMES, Aug. 22, 1977, at 1, 38 (discussing origin of "Son of Sam" moniker). Berkowitz sent notes to the press and the police signed "Son of Sam." *Id.*

7. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 630 (1989) (recognizing governmental interest in depriving criminal of economic power derived from crime); Riggs v. Palmer, 22 N.E. 188, 190-91 (N.Y. 1889) (holding that beneficiary who murdered to inherit is precluded from realizing inheritance). The *Riggs* Court proclaimed:

> No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong . . . or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been suspended by statute.

Id. at 190. *See also* Garrett Epps, *Wising Up: "Son of Sam" Laws and the Speech and Press Clauses*, 70 N.C. L. REV. 493, 522-23 (1992) (explaining that Son of Sam laws underscore wrenching social dilemma). Epps succinctly captures the impetus behind Son of Sam laws:

> The impulse behind these [Son of Sam] laws—the desire of the community that hateful criminals not profit from selling their stories-is a very real one. No one with a thoughtful concern for the future health of our society can fail to be appalled by a situation in which media and public alike focus vast and lucrative concern on the stories

these laws. Some commentators commend Son of Sam laws as a step in the right direction towards greater recognition and protection of victims' rights;[8] other commentators criticize these laws for unduly burdening First Amendment rights.[9]

Recently, the United States Supreme Court in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*[10] ruled that New York's Son of Sam law violated the First Amendment.[11] Several observers were quick to characterize the *Simon & Schuster* decision as a broad defense of First Amendment rights.[12] However, a careful reading of the opinion reveals that the current Supreme Court may not be as solicitous of First Amendment rights as many may think.[13]

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of violent criminals, without a corresponding regard for the interests, and suffering, of those harmed by crime.

Id.

8. *See* Sue S. Okuda, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 CAL. L. REV. 1353, 1375 (1988) (stating that California's Son of Sam law presents sound solution to unequal rewards given criminal by our mass-media society).

9. *See, e.g.*, Epps, *supra* note 7, at 543-51 (arguing that Son of Sam laws are repugnant to First Amendment rights); Thomas F. Doherty & Sharon A. Lepping, Note, *Crossfire: "Son of Sam" Law v. A Wiseguy's Freedom of Speech*, 2 SETON HALL CONST. L.J. 211, 295 (1991) (hereinafter *Crossfire*) (concluding that New York's Son of Sam law is unconstitutional); John Timothy Loss, Note, *Criminals Selling their Stories: The First Amendment Requires Legislative Reexamination*, 72 CORNELL L. REV. 1331, 1354 (1987) (arguing that Son of Sam laws currently in force "achieve their underlying policy goals" but nonetheless violate First Amendment); Jason S. Pomerantz, Note, *Have Courts Intruded on First Amendment Guarantees in their Zeal to Ensure that Crime Does Not Pay?*, 11 LOY. ENT. L.J. 505, 507 (1991) (arguing that section 632-a violates First Amendment).

10. 112 S. Ct. 501 (1991).

11. *See infra* notes 181-94 and accompanying text (discussing the Supreme Court's holding in *Simon & Schuster*). The First Amendment provides in pertinent part: "Congress shall make no law abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The First Amendment was made applicable to the states by virtue of the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 664 (1925) (holding that First Amendment applies to states through Fourteenth Amendment).

12. *See* Kirk Victor, *Reluctant Dragons*, NAT'L L.J., Feb. 8, 1992, at 333 (reporting that following *Simon & Schuster* decision President of Association of American Publishers praised Court's strong defense of First Amendment rights); Paul J. Sleven, *'Son of Sam' Laws Following High Court's Simon & Schuster Ruling*, N.Y.L.J, Dec. 27, 1991, at 1 (suggesting that Supreme Court's seemingly conservative direction in other areas of law is not reflected in core First Amendment cases); *Crime Profits*, NAT'L L.J., Dec. 23, 1991, at 32 (quoting law professor: "I think the community of opinion says this [C]ourt is rather firm in using basic doctrine to protect core speech activities, that is traditional speech or speech without frills like nude dancing."); *Tax the Criminal, Not the Right*, L.A. TIMES, Dec. 14, 1991, at B5 (congratulating Supreme Court for stoutly upholding First Amendment over law with broad conservative support); David G. Savage, *Laws Denying Criminals Profits from Stories Voided; Supreme Court: The Victims Can No Longer Automatically Get Proceeds of a Felon's Book or Movie Deal. But They May Still Sue to Obtain the Funds*, L.A. TIMES, Dec. 11, 1991, at A16 (praising *Simon & Schuster* decision as "broad defense of the right to free speech"); Ruth Marcus, *Law Against Felons Profiting from Books, Movies is Voided*, WASH. POST, Dec. 11, 1991, at A1 (reporting that civil liberties lawyers viewed *Simon & Schuster* decision as significant and "far-reaching" defense of First Amendment rights).

13. *Compare supra* note 12 (reporting praise for Supreme Court's *Simon & Schuster* decision

The Supreme Court decided the *Simon & Schuster* case on narrow and familiar First Amendment principles[14] without pausing to comment on the broader implications of Son of Sam laws. *Simon & Schuster* did little to clarify the troublesome constitutional issues surrounding Son of Sam laws. Most importantly, the Court did not conclusively determine whether New York's Son of Sam law, the prototype for similar laws in other jurisdictions,[15] imposed a content-based burden on protected speech—leaving unsettled the appropriate level of constitutional scrutiny for assaying Son of Sam laws.[16] However, the *Simon & Schuster* Court hinted that Son of Sam laws could be considered content-neutral under the secondary effects test, an unorthodox and seldom utilized First Amendment test.[17] Under the secondary effects test, the Court considers facially discriminatory restrictions on speech to be content-neutral (and thus subject to deferential scrutiny) if the government's purpose in effecting the restriction is to regulate the secondary effects of speech rather than the content of the speech itself.[18]

Applying the secondary effects test to Son of Sam laws would stamp constitutional imprimateur on governmental censorship[19] and drastically reduce the quantum of First Amendment protection traditionally accorded free speech rights.[20] This extension of the secondary effects test would impact heavily upon criminal speech. And as Henry Hill's recollections in *Wiseguy* illustrate, criminal speech may be replete with important political information, such as widespread corruption of public officials.[21] This speech pierces the core of First Amendment concerns.[22]

Although the Son of Sam laws' purported goals are meritorious, the Supreme Court should not apply the secondary effects test to Son of Sam laws

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for defending First Amendment rights) *with Don't Stop at Royalties*, WALL ST. J., Dec. 12, 1991, at A14 (arguing that *Simon & Schuster* decision should not be construed as helping criminals avoid having to compensate their victims, and that legislatures can constitutionally reach proceeds of criminal's speech about crime through laws that garnish all of criminal's post-crime income). *But cf.* Savage, *supra* note 12, at A16 (discussing praise for *Simon & Schuster* decision as "broad defense" of First Amendment rights).

14. *See infra* notes 181-94 and accompanying text (discussing *Simon & Schuster* decision).

15. *See infra* note 36 (listing state and federal Son of Sam laws enacted after New York enacted section 632-a in 1977).

16. *See infra* notes 73-135 (describing First Amendment doctrine regarding level of scrutiny applied to laws abridging speech rights).

17. *See infra* notes 119-35 and accompanying text (describing secondary effects test).

18. *Id.*

19. *See infra* notes 260-64 and accompanying text (explaining Son of Sam laws' impact on political speech).

20. *See* Ward v. Rock Against Racism, 491 U.S. 781, 804 n.1 (1989) (Marshall, J., dissenting) (stating that secondary effects test poses serious threat to free expression); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 56 (1986) (Brennan, J., dissenting) (arguing that simply because regulation was aimed at secondary effects of speech does not make law content-neutral).

21. *See infra* note 260 and accompanying text (describing Henry Hill's recollections of political corruption).

22. *See infra* notes 260-61 and accompanying text (discussing possible political and social value of criminal's speech).

because these laws target speech with high political value.[23] Because Son of Sam laws target high-value speech on the basis of content,[24] they trigger strict First Amendment scrutiny.[25] And in order for a content-based law to pass constitutional muster under strict First Amendment scrutiny, it must be narrowly tailored to serve a compelling governmental interest.[26]

Son of Sam laws are a knee-jerk political response to the public's dismay over the spectacle of criminals profiting from selling their crime stories.[27] Although Son of Sam laws serve compelling governmental interests, they are insufficiently tailored to pass constitutional muster under the First Amendment.[28] Indeed, the legislative approach that New York has taken in response to the *Simon & Schuster* decision indicates that the goals underlying Son of Sam laws are achievable through means that are less offensive to established First Amendment principles.[29]

II. HISTORY OF SON OF SAM LEGISLATION

New York enacted the first Son of Sam law in 1977 after David Berkowitz, also known as the "Son of Sam" killer,[30] terrorized the residents of New York City with his .44 caliber revolver.[31] In response to public outcry that the "Son of Sam" killer would profit by selling his crime story to the media,[32] the New York legislature enacted a victim compensation

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23. *Id.*

24. *See infra* notes 88-95 and accompanying text (discussing significance of content-based distinction).

25. *See infra* notes 91-94 and accompanying text (describing strict scrutiny test applied to content-based laws).

26. *Id.*

27. *See infra* notes 32 and accompanying text (discussing catalyst behind enactment of New York's Son of Sam law).

28. *See infra* notes 216-30 and accompanying text (explaining that Son of Sam laws are inherently underinclusive).

29. *See infra* notes 69, 231-35 and accompanying text (discussing proposed alternative law to New York's Son of Sam law).

30. *See* Linda Greenhouse, *The High Court Will Decide if "Son of Sam" Law is Legal*, N.Y. TIMES, Feb. 20, 1991, at B1 (discussing derivation of "Son of Sam" appellation); Roberts, *supra* note 3, at 1 (reporting that Son of Sam law was never applied to Berkowitz because he was declared mentally incompetent). The New York City press fashioned the moniker "Son of Sam" for the then unknown murder suspect after police detectives found a note signed "Son of Sam" at the scene of an April 17, 1977 murder. Ironically, New York's Son of Sam law was never applied to its namesake. *Id.* at 1.

31. *See* Felder, *When Headlines Are Bought*, BARRISTER, at 15 (Fall 1980) (rehearsing that during 1977 Berkowitz stalked residents of New York City with his .44 caliber revolver and that random shootings attributed to him left six people dead and seven wounded).

32. *See* 1977 N.Y ST. LEGIS. ANN. 267 (memorandum of Sen. Emanuel Gold, bill's sponsor). Senator Gold proclaimed:

> It is abhorrent [sic] to one's sense of justice and decency that an individual, such as ["son of sam"], can expect to receive large sums of money for his story once he is captured—while five people are dead, [and others] were injured as a result of his conduct.

Id.

See also Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541, 548 (N.Y. 1991), *vacated*, 112 S. Ct. 859 (1992) (explaining history of N.Y. EXEC LAW § 632-a (McKinney 1982 & Supp. 1990)).

scheme enabling the State to garnish a criminal's proceeds from the commercial exploitation of his crimes. The proceeds received by the criminal are placed into an escrow account to compensate his victims.[33] Before the Supreme Court decided the *Simon & Schuster* case, the New York State Crime Victims Board had custody of six escrow accounts created pursuant to New York Executive Law Section 632-a.[34] Section 632-a inspired a proliferation of Son of Sam laws in other jurisdictions.[35] Since 1977 the federal government and forty-four states have enacted Son of Sam legislation.[36]

A. Description of Son of Sam Legislation

A typical Son of Sam law sequesters payments made to criminals pursuant to a contract, usually between the criminal and a media outlet, for the commercial use of the criminal's crime story.[37] "Criminal" is a broadly defined term in most Son of Sam laws.[38] The majority of Son of

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33. N.Y. EXEC LAW § 632-a (McKinney 1982 & Supp. 1990).

34. Cox, *supra* note 5, at B1.

35. *See infra* note 36 (listing 43 state and federal Son of Sam statutes enacted after section 632-a).

36. 18 U.S.C. § 3681 (1988); ALA. CODE § 41-9-80 to -84 (1982 & Supp. 1990); ALASKA STAT. § 12.61.020 (1990); ARIZ. REV. STAT. ANN. § 13-4202 (1989); ARK. CODE. ANN. § 16-90-308 (Michie 1987); CAL. CIV. CODE § 2225 (Deering 1991); COLO. REV. STAT. § 24-4.1-201 (1989); CONN. GEN. STAT. § 54-218 (West 1985); DEL. CODE ANN. tit. 11 § 9103 (1987 & Supp. 1990); FLA. STAT. ANN. § 944.512 (West Supp. 1991); GA. CODE ANN. § 17-14-31 (Michie 1991); HAW. REV. STAT. §§ 351-81 to -88 (1988 & Supp. 1990); IDAHO CODE § 19-5301 (1987); ILL. ANN. STAT. ch. 70, para. 403 (Smith-Hurd 1989 & Supp. 1991); IND. CODE ANN. § 16-7-3.7-1 to -6 (Burns 1990); IOWA CODE § 910.15 (West Supp. 1991); KAN. STAT. ANN. § 74-7319 to-7321 (Supp. 1990); KY. REV. STAT. ANN. § 346.165 (Baldwin 1986); LA. REV. STAT. ANN §§ 46:1831-46:1838 (West 1982 & Supp. 1991); MD. ANN. CODE art. 27, § 764 (1987 & Supp. 1991); MASS. ANN. LAWS ch. 258A, §§ 1,8 (Law. Co-op. 1980 & Supp. 1991); MICH. COMP. LAWS § 780.768 (West 1982 & Supp. 1991); MINN. STAT. ANN. § 611A.68 (West 1987 & Supp. 1991); MISS. CODE ANN. § 99-38-1 to -11 (Supp. 1990); MO. REV. STAT. § 595.045 (Vernon Supp. 1991); MONT. CODE ANN. § 539-104(1)(d) (1989); NEB. REV. STAT. § 81-1836 (1987); NEV. REV. STAT. § 217.265 (1985); N.J. REV. STAT. § 52:4b-27 to -33 (West 1986 & Supp. 1990); N.M. STAT. ANN. § 31-22-22 (Michie 1990); N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991); OHIO REV. CODE ANN §§ 2969.01-06 (Baldwin 1987); OKLA. STAT. tit 22, § 17 (West Supp. 1991); OR. REV. STAT. § 147.275 (1989); 71 PA. CONS. STAT. § 180-7.18 (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 to -14 (1988); TENN. CODE ANN. § 29-13-201 to -208 (1980 & Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 8309-1 (Vernon Supp. 1991); UTAH CODE ANN. §78-11-12.5 (Supp. 1991); VA. CODE ANN. § 19.2-368.20 (Michie 1991); WASH. REV. CODE ANN. § 7.68.200 (West Supp. 1991); WIS. STAT. ANN. § 949.165 (West Supp. 1990); WYO. STAT. § 1-40-112(d) (1988).

37. *See, e.g.*, OKLA. STAT. ANN. TIT. 22, § 17(A) (1991) (garnishing any money or thing of value received as result of commercial exploitation of crime); PA. STAT. ANN. TIT. 71, § 180-7.18 (1990) (sequestering moneys received as result of commercial exploitation of crime); S.C. CODE ANN. § 15-59-40 (Law. Co-op. Supp. 1990) (same).

38. *See, e.g.*, ALASKA STAT. § 12.61.020 (1990) (applying to non-convicted offender whose crime has been proved by "a preponderance of the evidence"); COLO. REV. STAT. § 24-4.1-201 (1989) (applying to persons "accused or convicted of crimes"); DEL. CODE ANN. TIT. 11, § 9103 (1987 & Supp 1990) (same). Because a person must only express thoughts, feelings or opinions

Sam laws target moneys earned by criminals through the sale of books, movies, magazine articles and other forms of commercial expression that refer to the criminal authors' thoughts, feelings or opinions regarding their crimes.[39] Any proceeds that criminal authors receive under a contract for their stories are typically placed into an escrow or crime compensation account to ensure that an identifiable asset is preserved for victim compensation.[40]

Because applicable tort statutes of limitations typically expire before criminal authors untertake to exploit the commercial value of their crime stories,[41] most Son of Sam laws provide for an extended statute of limitations for tort actions brought by crime victims against their assailants. The statutes generally toll until the formation of escrow or victim compensation accounts.[42] Upon expiration of the statute of limitations, the laws require payment of the remaining moneys either back to the criminal or into a crime victims' compensation fund.[43]

Although Son of Sam laws are generally patterned on the New York statute, differences exist.[44] Some of these differences are conspicuous, others are subtle.[45] For example, although many Son of Sam laws sequester one

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about a crime he committed to become subject to a Son of Sam law, some states find a conviction unnecessary. *See supra* note 148 (discussing application of New York's Son of Sam law to Henry Hill notwithstanding fact that Hill was never convicted of any crimes described in *Wiseguy*). Only eleven states and the federal government confine the application of their Son of Sam statutes to convicted criminals. 18 U.S.C. § 3681 (1991); ARK. CODE. ANN. § 16-90-308(a)(1) (Michie 1987); CAL. CIV. CODE § 2225 (Deering 1991); FLA. STAT. ANN. § 944.512(1) (West Supp. 1991); IOWA CODE ANN. § 910.15 (West Supp. 1991); MASS. ANN. LAWS CH. 258A, § 8 (West 1989); MICH. COMP. LAWS ANN. § 780.768(1) (West 1982 & Supp. 1990); MINN. STAT. ANN. § 611A.68(b) (West 1987 & Supp. 1991); NEV. REV. STAT. § 217.265 (1985); OHIO REV. CODE ANN. § 2969.01(A) (Baldwin 1987); TENN. CODE ANN. § 29-13-202(a) (1980 & Supp. 1990); WYO. STAT. § 1-40-112(d) (1988). This Note will use the term "criminal" for purposes of identifying the person whose profits are subject to Son of Sam laws.

39. *See, e.g.*, NEB. REV. STAT. § 81-1836 (1987) (covering reenactment of criminal's crimes or criminal's thoughts, feelings, opinions, or emotions regarding the commission of crime occurring in movie, book, magazine article, radio, or television presentation, live entertainment of any kind.); N.J. STAT. ANN. § 52:4B-28 (West 1986 Supp. 1990) (same); OKLA. STAT. ANN. TIT. 22, § 17(a) (West Supp. 1991) (same).

40. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 724 F. Supp. 170, 173 (S.D.N.Y. 1989) (describing operation of section 632-a and its subsequent history).

41. Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541, 544 (N.Y. 1991), *vacated*, 112 S. Ct. 859 (1992).

42. *But see* 3 ALASKA STAT. § 12.61.020 (1990) (allowing victims to bring civil action within 10 years from date of crime or from discovery of perpetrator, which ever occurs later).

43. *See, e.g.*, ALASKA STAT. § 12.61.020 (1990) (requiring that all proceeds remaining at end of escrow period be released from escrow and paid into Crime Victims Fund); ALA. CODE § 41-9-82 (1982 & Supp. 1990) (requiring that moneys remaining in fund after escrow period shall revert back to state); GA. CODE ANN. § 17-14-31 (Michie 1991) (providing that after expiration of five year escrow period moneys shall be paid back to criminal).

44. *See infra* notes 45-53 and accompanying text (discussing differences between various Son of Sam laws).

45. *See id.* (highlighting distinguishing features of various Son of Sam laws). Some argue that the variations among Son of Sam legislation make certain Son of Sam laws more susceptible

hundred percent of the criminal author's proceeds received from the expression of crime-related activity, Indiana requires only ninety percent of the applicable moneys to be paid into its crime compensation division.[46] In another variation, Nevada provides for a complete forfeiture of three-quarters of a criminal's crime-related revenues or property.[47] Certain Son of Sam laws require total forfeiture of the proceeds received by criminals from the commercial exploitation of their crimes.[48] Other laws return the proceeds to the criminal author upon a showing that the statute of limitations has elapsed and that no actions are pending against the criminal author.[49] In addition, some states have enacted Son of Sam laws allowing the criminal to retain a percentage of the moneys remaining in the escrow account after the expiration of the statute of limitations.[50]

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to constitutional challenge than others. *See* Brief of the United States as Amicus Curiae, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (No. 90-1059) (discussing differences between federal Son of Sam law (18 U.S.C. § 3681) and N.Y. EXEC. LAW § 632-a). The authors of this brief argued, *inter alia*, that the federal law was devoid of the possible constitutional infirmities inherent in the New York law. *Id.* The authors of this brief also argued that 18 U.S.C. § 3681 is distinguishable from N.Y. EXEC. LAW § 632-a because 18 U.S.C. § 3681 is an integral part of the federal sentencing process and is triggered not by the decision of an administrative board, but only by judicial order. *Id.*

46. IND. CODE. ANN. §§ 16-7-3.7-1 to 16-7-3.7-6 (Burns 1990).

47. NEV. REV. STAT. § 217.265 (1985).

48. *See, e.g.*, 18 U.S.C. § 3681(c)(2) (1991) (providing that any portion of escrowed moneys may be paid into federal crime victims' fund); ALA. CODE § 41-9-80 to -84 (1982 & Supp. 1990) (providing that five years after escrow account is established moneys shall revert to state); ARIZ. REV. STAT. ANN. § 13-4202(E) (1989) (providing that moneys left over in escrow account after five-year period are paid into state's general fund); ARK. CODE ANN. § 16-90-308 (1990) (providing that any money remaining after five years shall be paid into any state supported victim reparation or assistance program); CONN. GEN. STAT. § 54-218 (1985) (providing that if no victim brings civil action within five years of date of crime, moneys in escrow account shall be paid into criminal injuries compensation fund); ILL. REV. STAT. ch. 70, para. 406(c) (Smith-Hurd 1989 & Supp. 1991) (providing that any remaining moneys after escrow period are paid into Violent Crime Victims' Assistance Fund); IND. CODE ANN. § 16-7-3.7 (Burns 1989) (same); KAN. STAT. ANN. § 74-7319 (Supp. 1990) (same); LA. REV. STAT. ANN. § 46:1835(B) (West 1982 & Supp. 1990) (providing that upon termination of escrow period all moneys in escrow account are to be transferred into any crime victims' reparations fund); MD. CODE ANN., § 764 (1987 & Supp. 1991) (providing for distribution of left over money to Maryland Victims of Crime Fund); MISS. CODE ANN. § 99-38-9(3) (Supp. 1990) (providing for total forfeiture unless defendant has minor children in need of financial support); MO. REV. STAT. § 595.045 (14)(5) (Vernon Supp. 1991) (providing that after five year period, escrowed moneys shall immediately be paid into crime victims' compensation fund); N.J. STAT. ANN. § 52-4b-30 (West 1986 & Supp. 1991) (requiring that moneys remaining in escrow account be paid into Violent Crimes Compensation Board Treasury). O

49. *See, e.g.*, DEL. CODE ANN. tit. 11, § 9103 (1987 & Supp. 1990) (providing that remaining escrowed moneys shall be paid to convicted person or his legal representative); NEB. REV. STAT. § 81-1837 (1987) (same); OHIO REV. CODE ANN §§ 2969.05 (Baldwin 1987) (providing that remaining moneys in escrow account after escrow period shall be paid to "persons from whom the moneys in the account were obtained" provided that all judgments against such persons have been paid and no further actions are pending against such persons); S.C. CODE ANN. § 15-59-60 (Law Co-op. 1990) (same); S.D. CODIFIED LAWS ANN. § 23A-28A-8 (1988) (same); TENN. CODE ANN. § 29-13-203 (1980 & Supp. 1990) (same).

50. *See* MICH. COMP. LAWS ANN. § 780-768 (1991) (providing that 50% of balance remaining

Perhaps the most important variation among Son of Sam laws is the subject matter of the speech required to trigger their application. Typically, Son of Sam laws sweep very broadly by covering any speech by criminal authors regarding their crimes.[51] However, several laws apply only to speech regarding felonies,[52] and others are limited to speech regarding crimes that involve violence, personal injury, or property damage.[53]

B. Controversy Surrounding Son of Sam Laws

The controversy surrounding Son of Sam laws flows from a profound conflict between what some accept as compelling public policies of providing compensation to crime victims and preventing criminals from profiting from their crimes,[54] and what others accept as a fundamental right to free speech guaranteed by the United States Constitution.[55] The debate over Son of Sam laws is further animated because these laws are usually applied to the most violent and notorious criminals;[56] and most criminal stories that are

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in escrow account at end of statutory period shall be paid to defendant and remaining 50% shall remain with victims compensation board for future compensatory purposes); R.I. GEN. LAWS § 12-25.1-3 (Supp. 1990) (same); VA. CODE ANN. § 19.2-368.21(c) (Michie 1991) (providing that 75% of funds shall be paid into Criminal Injuries Compensation Fund); WASH. REV. CODE ANN. § 7.68.240 (West Supp. 1992) (providing that upon expiration of statutory period, 50% of escrowed moneys left in account shall be paid to convicted person or his legal representatives).

51. *See, e.g.*, ALASKA STAT. § 12.61.020 (1990) (providing that any crime committed in state triggers statute); ARIZ. REV. STAT. ANN., § 13-4202 (1989) (same); ARK. CODE. ANN. § 16-90-308 (Michie 1987) (same).

The ostensibly broad application of Son of Sam laws, apparently recognized as problematic by some courts, has been reined in by subsequent judicial gloss. *See In re* Halmi, 128 A.D.2d 411 (N.Y. App. Div. 1987) (affirming unreported trial court decision that held section 632-a inapplicable to victimless crimes such as prostitution); Fasching v. Kallinger, 546 A.2d 1094, 1097 (N.J. 1988) (holding that New Jersey's Son of Sam law does not apply to authors and publishers of criminal's works), *cert. denied*, 555 A.2d 623 (N.J. 1989).

52. *See, e.g.*, ALA. CODE § 41-9-80 (1982 & Supp. 1990) (covering only moneys paid to convicted or indicted felon resulting from commercial exploitation of convicted criminal's crimes); CAL. CIV. CODE § 2225(b) (Deering 1991) (garnishing moneys received by convicted felons for commercially exploiting specific felony for which they are convicted); MINN. STAT. ANN. § 611A.68 (West 1987 & Supp. 1991) (defining "crime" as "an offense which is a felony under the laws of Minnesota or that would have been a felony if committed within Minnesota . . . .").

53. *See, e.g.*, 18 U.S.C. § 3681(a) (1991) (limiting scope of law to offense against United States resulting in physical harm to individual . . . ."); CONN. GEN. STAT. ANN. § 54-218 (West 1985) (limiting scope of law to profits derived as result of crime of violence); MD ANN. CODE ART. 27, § 764 (1987 & Supp. 1991) (applying to only persons charged with or convicted of crime in state involving or causing personal injury, death, or property loss as direct result of the crime . . . ."); WIS. STAT. § 949.165 (1990) (confining scope of law to "[s]erious crime[s]").

54. *See* Okuda, *supra* note 8, at 1375 (justifying burden that Son of Sam laws place on speech). Okuda states: "Victimized once at the hands of the wrongdoer, the victim should not be victimized again by the financial rewards paid to the criminal for the story of his crime." *Id.*

55. *See* Epps, *supra* note 7, at 528 (stating that issue of Son of Sam laws "pits two powerful principals against each other: freedom of speech versus the natural moral revulsion against those who break the law and then profit by writing or speaking about it").

56. *See* Dennis Hevesi, *Cases Under "Sam" Law: Notorious but Few*, N.Y. TIMES, Feb. 20, 1991, at B8 (discussing section 632-a's application to projects involving violent and scandalous crimes).

capable of generating media contracts, and thus triggering Son of Sam laws, involve recollections of the most gruesome and sensational crimes.[57]

Many legal commentators criticize Son of Sam laws as inimical to the First Amendment guarantee of free speech.[58] The dominant chord in the argument against Son of Sam laws is that they violate the First Amendment by exclusively targeting assets derived from speech rather than all of the criminal's assets.[59] Similarly, members of the publishing industry argue that Son of Sam laws are tantamount to censorship because they withdrawal the financial incentive from authorship.[60] Critics of Son of Sam laws also point to the laws' inefficacy.[61] Defenders of Son of Sam laws, however, insist that the laws do not target speech, but only the profits derived from a criminal's speech,[62] and that the laws further important governmental interests in preventing criminals from profiting from their crimes and in providing compensation for crime victims.[63]

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57. *See, e.g.*, JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST: LETTERS FORM PRISON (1981) (describing criminal author's stabbing man to death); JEAN HARRIS, STRANGER IN TWO WORLDS (1986) (recounting Jean Harris' murder of ex-lover Herman Tarnover, author of "The Scarsdale Diet"); NICHOLAS PILEGGI, WISEGUY: LIFE IN A MAFIA FAMILY (1985) (containing copious references to gratuitous violence); *see also* Cox, *supra* note 5, at B1 (contemplating effect of Son of Sam statute on accused serial killer Jeffrey Dahmer). Dahmer has admitted to killing and dismembering 17 people and is subject to Wisconsin's Son of Sam law which is similar to New York Executive Law Section 632-a. *Id.*

58. *See supra* note 9 (listing commentators who conclude that Son of Sam laws violate First Amendment).

59. *See* Epps, *supra* note 7, at 501 (noting that Son of Sam laws have "speech-related aim[s]" and are unconstitutional under First Amendment); Loss, *supra* note 9, at 1331 (arguing that current Son of Sam laws are unconstitutional); Pomerantz, *supra* note 9, at 525-33 (arguing that section 632-a is unconstitutional).

60. *See, e.g.*, Joint Appendix, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (No. 90-1059), Aff. of Sterling Lord, literary agent, at 115, 117-18 (stating that "[N]o literary agent is likely to agree to represent any convicted felon in connection with literary works or other materials where the proceeds may be payable to the escrow fund of the crime victims board."); *Id.* Aff. of Michael Korda, editor and chief and senior vice-president of Simon & Schuster, Inc., Joint Appendix, p. 18, 20 (arguing that by forbidding payments to certain writers and sources section 632-a necessarily results in some books not being published); *Id.* Aff. Nicholas Pileggi, author, Joint Appendix, p. 25, 27 (claiming that section 632-a has severely interfered with his freedom to write and publish because of its prohibition on payment of primary sources).

61. *See* Cox, *supra* note 5, at B1 (stating that there have been only three payments, totalling $75,000, made under section 632-a since its enactment in 1977). These payments were all made from the same escrow account. *Id.*

62. *See* Doherty & Lepping, *Crossfire*, *supra* note 9, at 237-39 (arguing that New York's Son of Sam law effects merely incidental burden on free speech); 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, 1090-94 (1991) (same).

63. *See* Doherty & Lepping, *Crossfire*, *supra* note 59, at 257-63 (arguing that state's interest in compensating victims is sufficiently compelling to justify section 632-a's burden on free speech rights under strict scrutiny test); Jeanne E. Dugan, Note, *Crime Doesn't Pay—Or Does it?: Simon & Schuster, Inc. v. Fischetti*, 65 ST. JOHN'S L. REV. 981, 991 (1991) (reasoning that section 632-a does not trigger strict scrutiny because it regulates non-expressive activity of receiving profit

Notwithstanding their pervasiveness,[64] Son of Sam laws have spawned little case law. However, courts reviewing Section 632-a prior to *Simon & Schuster* were sympathetic to the interests underlying the original Son of Sam law. Indeed, prior to *Simon & Schuster*, all constitutional challenges to New York's Son of Sam law were unsuccessful.[65] For example, in *Children of Bedford, Inc. v. Petromelis*,[66] the New York Court of Appeals upheld section 632-a under constitutional challenge, observing that the Son of Sam law encourages respect for the law by restricting a criminal's ability to profit from his crimes.[67] The *Petromelis* court reasoned that in addition to compensating for crime victims, section 632-a serves the community's interest in castigating criminal activity by saddling the criminal with a punishment

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from sale of expressive material); *see also* Susan Beck, *Making Sure Crime Doesn't Pay*, AM. LAW., Dec. 1989, at 80. (arguing that Son of Sam laws target profits from crime not speech).

64. *See supra* note 36 (identifying federal and 44 state Son of Sam laws).

65. *See* Simon & Schuster, Inc. v. Members of the N.Y State Crime Victims Bd., 724 F. Supp. 170, 180 (S.D.N.Y. 1989) (holding that section 632-a was constitutional), *aff'd sub nom.*, Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990), *rev'd sub nom.* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 111 S. Ct. 501 (1991); Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 784 (2d Cir. 1990) (upholding district court's determination that section 632-a was constitutional), *rev'd sub nom.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 111 S. Ct. 501 (1991); Barrett v. Wojtowicz, 414 N.Y.S.2d 350, 356-57 (N.Y. 1979) (upholding New York's Son of Sam statute under constitutional challenge); Children of Bedford, Inc. v. Petromelis, 573 N.E. 2d. 541, 551 (N.Y. 1991) (holding that N.Y. EXEC. LAW § 632-a does not violate federal or state constitutional rights), *vacated*, 112 S. Ct. 859 (1992).

Because New York is the primary situs of the publishing industry, almost all of the case law spawned by Son of Sam statutes involve challenges to New York's Son of Sam. *See* Roberts, *supra* note 3 (explaining that New York's Son of Sam law is most visible Son of Sam law because publishing industry is concentrated in New York State). *But see* Fasching v. Kallinger, 510 A 2d. 694, 701 (N.J. 1986) (holding New Jersey's Son of Sam law inapplicable to profits earned by authors or publishers), *cert. denied* 555 A 2d. 623 (N.J. 1989); Angela Cartwright, Note, *Crime Doesn't Pay: Authors and Publishers Cannot Profit From a Criminal's Story*, 55 U. CIN. L. REV. 831, 838-44 (1987) (discussing constitutional issues posed by New Jersey's Son of Sam in light of litigation arising under statute).

66. Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541 (N.Y. 1991), *vacated*, 112 S. Ct. 859 (1992). In *Petromelis* the N.Y. Court of Appeals considered whether royalties due on a book written by convicted murderer Jean Harris, describing the killing of her victim, fell within the purview of N.Y. Exec. Law § 632-a. *Id.* at 543. First, the *Petromelis* court found that because the book contained Harris's recollections of her crime it was subject to § 632-a. *Id.* Second, the court considered whether § 632-a violated Harris's state and federal rights to free speech. *Id.* at 546-51. The court rejected the State's argument that § 632-a effects only an incidental burden on free speech because the burdens imposed do not prohibit criminal's from speaking, or publishers from publishing, the criminal's expressions about his crimes. *Id.* at 547. Rather, the court found that § 632-a is content based and imposes a direct burden on speech by singling out speech based on a certain subject matter and by imposing special burdens on speech. *Id.* Last, the court found that because section 632-a is content based, it triggers strict scrutiny. *Id.* Despite finding § 632-a content based and directly burdening a specific form of speech, however, the court held that §632-a served a compelling governmental interest and was narrowly tailored. *Id.* at 547-51.

67. *Id.* at 548.

that reflects "the nature and extent of the community's denunciation of particular conduct."[68]

Because most Son of Sam laws were modeled after section 632-a, several commentators predicted that the *Simon & Schuster* case would determine conclusively whether these ostensibly content-based laws were repugnant to First Amendment principles. However, the narrow holding in *Simon & Schuster* leaves the difficult First Amendment questions posed by Son of Sam laws unanswered. Indeed, if states with more narrowly tailored Son of Sam laws leave these laws on the books,[69] in a future case the Court may ultimately have to address the more difficult constitutional issues presented by Son of Sam laws.[70] The outcome of this litigation, if it occurs, could determine the extent to which the Court is willing to extend the secondary effects test to content-based regulations of "high-value"[71] speech, and whether Son of Sam laws are, as Justice Blackmun suggested in *Simon & Schuster*, unconstitutionally underinclusive.[72]

III. Law Governing First Amendment Challenges

A brief summary of the standards of review for First Amendment challenges is helpful to understanding the history of the *Simon & Schuster* case and the constitutional issues surrounding Son of Sam laws.

The First Amendment right of freedom of speech has long been considered one of the most important rights guaranteed by the United States Constitution.[73] The government is circumscribed in its power to regulate speech.[74] However, although the First Amendment seems to speak in absolute

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68. *Id.*

69. *Cf.* Proposal from Senator Emanuel R. Gold; New York State Senate, Jan. 14, 1992, on file with the *Washington and Lee Law Review*, (proposing amendment to civil practice law and rules, in light of *Simon & Schuster* decision, as alternative to Son of Sam Law). In lieu of a revised Son of Sam law, Senator Gold proposed amending the existing civil practice law creating an extended statute of limitations for crime victims to recover from their assailants. *Id.* The proposed section 211-a would allow:

> [A] crime victim or their representative to maintain an action to recover damages against an individual convicted of such crime. This measure sets a new statute of limitations to allow a crime victim, for a twenty year time period from the date of their assailant's conviction, a cause of action.

Id.

70. *See infra* notes 207, 239, 247-48 and accompanying text (discussing possibility that Supreme Court could, consistent with *Simon & Schuster*, find more narrowly tailored Son of Sam laws constitutional).

71. *See infra* notes 254-64 and accompanying text (discussing implications of extending secondary effects test to high-value speech).

72. *See infra* notes 216-30 and accompanying text (discussing underinclusiveness inherent in Son of Sam laws).

73. *See* Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) (explaining that freedom of speech is fundamental personal right).

74. *See* Spence v. Washington, 418 U.S. 405, 411 n.4 (1974) (proscribing, on First Amendment grounds, government's authority to punish offensive expression); Cohen v. California, 403 U.S. 15, 25 (1971) (same).

terms,[75] the Supreme Court has never completely barred legislatures from passing laws abridging speech, press, or peaceful assembly. Some situations call for the subordination of an individual's First Amendment rights to important societal interests.[76] And some speech falls wholly without the First Amendment's panoply.[77]

Through the process of developing a First Amendment jurisprudence, the Supreme Court has erected some guideposts to assist courts in analyzing First Amendment problems.[78] As a threshold matter, a court must determine whether the contested governmental action abridges First Amendment rights. Laws that may have a chilling effect on certain speech or expression do not necessarily trigger any First Amendment protection.[79] After a court deter-

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75. *See* U.S. CONST. amend. I (providing in pertinent part that "Congress *shall* make no law . . . abridging the freedom of speech") (emphasis added).

76. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (stating that it is well understood that right of free speech is not absolute at all times and under all circumstances); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1020 (5th Cir. 1987) (enumerating exceptions to First Amendment's prohibition against laws abridging speech), *cert. denied*, 485 U.S. 959 (1988).

77. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is not within area of constitutionally protected speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (concluding that fighting words do not receive full panoply of First Amendment protection because "such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"). The *Chaplinsky* Court explained:

> [C]ertain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72. *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 16.12, at 957 (4th ed. 1991) (discussing areas in which Supreme Court permits restrictions on speech).

78. *See* NOWAK & ROTUNDA, *supra* note 77, at 957-77 (chronicling various tests that Supreme Court has applied to First Amendment cases); *see also* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 905-907 (1963) (discussing Supreme Court's role in resolving constitutional issues).

79. *See* Branzburg v. Hayes, 408 U.S. 665, 708-709 (1972) (holding that requiring newspaper reporters to testify before grand jury about information obtained from confidential sources, even though sources supplied information upon condition of anonymity, does not violate First Amendment). In *Branzburg* the Supreme Court considered a reporter's challenge to validity of grand jury subpoenas that required him to implicate his sources for a drug related newspaper article he had written. *Id.* The reporter argued that compliance with the subpoenas would deter criminals from speaking with reporters. *Id.* The *Branzburg* Court rejected the challenge, noting that the subpoenas themselves did not prohibit or limit what the sources could say to the reporters or what the press could publish. *Id.* Consequently, the *Branzburg* Court held that, despite the incidental effect of deterring criminals from speaking to the press, the subpoenas "involve no intrusion upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." *Id.* at 681. *See also* New York v. Ferber, 458 U.S. 747, 774 (1982) (determining that law proscribing child pornography is constitutional because child pornography is without First Amendment protection); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973) (recognizing that First Amendment protection does not extend to obscene speech); Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (explaining that riot inciting speech is not protected under First Amendment); Chaplinsky v. New Hampshire, 315

mines that First Amendment rights are implicated, the court must then determine the level of protection to be afforded the activity at issue.[80] Usually, if the burdened speech does not occupy a "subordinate position in the scale of [F]irst [A]mendment values,"[81] courts will accord the speech the highest level of protection. The extent to which a law burdens protected speech controls the level of scrutiny under which the court will review the law.[82]

There are two ways that speech can be burdened or chilled: through direct or content-based regulation,[83] or through incidental or content-neutral regulation.[84] Whether a government's interest in suppressing free speech is related to the content of the speech is central to First Amendment jurisprudence.[85] Under traditional First Amendment doctrine, the dispositive factor in determining whether a particular law violates the First Amendment is whether the challenged law burdens speech because of its content; discriminatory legislative purpose or intent is not an essential element of the

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U.S. 568, 572 (1942) (holding that "fighting words" is not protected speech under First Amendment); Connick v. Meyers, 461 U.S. 138, 154 (1983) (allowing government employer to impose employment related sanctions on public employees for statements made in their capacity as government employees not related to matters of public concern).

80. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 n.2 (1987) [hereinafter Stone, *Content Neutral Restrictions*] (listing cases in which Supreme Court has accorded particular types of speech less than full panoply of First Amendment protection); *Id.* at 47 n.4 (discussing factors that Court considers in determining protection accorded to low-value speech).

81. *See id.* (discussing different categories of speech that occupy subordinate position on scale of First Amendment values).

82. *See* Ashton v. Kentucky, 384 U.S. 195, 201 (1966) (explaining that when government passes law that effectively regulates speech, Court will carefully scrutinize law to ensure that, by regulating conduct that is reachable by government's police powers, government does not unduly burden free speech rights). *But see infra* notes 112-18 and accompanying text (discussing blurring of lines of distinction between First Amendment tests as evidenced by recent Supreme Court cases).

83. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101-102 (1972) (holding that statute proscribing nonviolent picketing regarding specific subjects unconstitutional).

84. *See* United States v. O'Brien, 391 U.S. 367, 384-86 (1968) (holding that law proscribing burning of draft card effects only incidental burden on speech).

85. *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 616 (1991) (describing distinction between content-based and content-neutral regulations of speech as one of most important organizing principles in First Amendment jurisprudence); *see generally* Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980) (discussing relevance of content regulation regarding First Amendment law); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (same); Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29 (1973) (same); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981) (same); Paul B. Stephen, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Stone, *Content-Neutral Restrictions*, *supra* note 80; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) [hereinafter Stone, *Content Regulation*]; Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978); Note, *Content Distinction in Free Speech Analysis After Renton*, 102 HARV. L. REV. 1904 (1989).

traditional First Amendment doctrine.[86] As one commentator has observed, "whether applying an 'absolute protection' approach, a 'clear and present danger' test, a 'compelling governmental interest' standard, or some other formulation, the Court almost invariably reaches the same result: content-based restrictions of "high-value speech are unconstitutional."[87]

A. Content-Based Restrictions

Laws that restrict speech because of its content are subject to strict judicial scrutiny.[88] When considering content-based restrictions on high value speech, the Court employs a strict, "speech-protective analysis."[89] The concern over content-based governmental regulations flows from the fear that the government, by enacting a content-discriminatory laws, is attempting to regulate speech because of its communicative impact.[90]

The First Amendment forbids governmental suppression of speech because the content of the speech is unpopular, offends listeners, or creates a controversy in the community.[91] Under traditional First Amendment

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86. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983) (stating that illicit legislative intent is not *sine quo non* of violation of First Amendment); Stone, *Content-Neutral Restrictions*, *supra* note 80, at 48 (noting that outside realm of low-value speech, Supreme Court has invalidated almost every content-based restriction it has considered in last thirty years).

87. Stone, *Content-Neutral Restrictions*, *supra* note 80, at 48.

88. *See infra* notes 91-97 and accompanying text (describing strict scrutiny test for content-discriminatory regulations of speech); Stone, *Content-Neutral Restrictions*, *supra* note 80, at 55 (stating that Court "tests virtually all content-based restrictions of high-value speech with a single, strict standard of review").

89. Stone, *Content Regulation*, *supra* note 85, at 196.

90. Karst, *supra* note 85, at 24-26. *See also* Leathers v. Medlock, 111 S. Ct. 1438, 1450 (1990) (stating that discriminatory law regulating speech raises concerns of censorship of critical information and opinion); *Minneapolis Star*, 460 U.S. at 591-92 (striking down discriminatory tax on newspapers). Explaining the importance of principle of content neutrality, the Court stated "[w]e need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." *Id.* at 585. For an analysis of why the Court distinguishes between content-neutral and content-discriminatory laws, see Stone, *Content Regulation*, *supra* note 85.

91. *See* Texas v. Johnson 491 U.S. 397, 420 (1989) (holding that defendant's conviction for flag burning violates First Amendment rights). In *Johnson* the Supreme court considered whether a defendant's conviction under a Texas statute proscribing the desecration of venerated objects violated the defendant's First Amendment rights. *Id.* at 399-400. The *Johnson* Court first determined that burning the national flag was protected expressive activity under the First Amendment. *Id.* at 402-6. In addition, the Court considered whether Texas's justification for the statute, preventing breaches of peace, was unrelated to the suppression of expressive activity. *Id.* at 407-20. As a an initial proposition, the Court explained that expression cannot be prohibited simply because an audience is seriously offended by the expression. The Court determined that the challenged statute erroneously assumed that every expression of provocative ideas will incite riots and that the State's interest in preserving respect for the flag was related to the defendant's expressive activity and thus fell outside the *O'Brien* test. *Id.* at 406-10, 418-20. Because the Texas statute was designed to prevent the offensiveness of flag burning to others, according to the Court, the statute was subject to "the most exacting scrutiny". *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)). The Court concluded that the Government can not, consistent with the First Amendment, prohibit the expression of an idea simply because society finds the idea offensive or distasteful. *Id.* at 414-20.

doctrine[92] differential regulation of speech is presumed unconstitutional,[93] and the government may rebut this presumption only by showing compelling justification for treating protected speech differentially.[94] This presumption obviates troublesome inquiries into legislative motive and deters legislatures from enacting laws out of hostility to particular speech.[95]

B. *Content-Neutral Restrictions*

According to the Supreme Court, the First Amendment is considerably more tolerant of content-neutral burdens than of content-based burdens on

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92. *See infra* notes 113-35 and accompanying text (noting recent inconsistencies in Supreme Court's analysis of First Amendment cases involving content-based statutes).

93. *See* Leathers v. Medlock, 111 S. Ct. 1438, 1443-444 (1991) (declaring that statute is presumptively violative of First Amendment if it imposes burden on speakers because of content of their speech); *see also* Note, *Content Distinction*, *supra* note 88, at 1904-05 (explaining that Supreme Court has long relied on content distinction in selecting appropriate level of scrutiny for laws that restrict speech).

94. *See* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1986) (holding content discriminatory law unconstitutional even though Court found "no evidence of an improper censorial motive"). In *Arkansas Writers'* the Supreme Court considered whether Arkansas's sales tax scheme that taxed general interest magazines, but exempted newspapers and religious, professional, trade and sports journals, violated the First Amendment freedom of press guarantee. *Id.* at 228. The Court initially noted that "'[the state's] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected.'" *Id.* (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 n.7 (1983)). The Court found that the Arkansas tax was discriminatory because it was not evenly applied to all magazines. *Id.* at 229. The Court further noted that the discriminatory tax was especially repugnant in the case *sub judice* because "a magazine's tax status depends entirely on its content." *Id.* The Court determined that such a discriminatory tax based on a magazine's content suggested a censorial motive and was therefore subject to strict scrutiny under the First Amendment. *Id.* at 231. The Court next considered whether Arkansas's content based approach to taxation of magazines served a compelling governmental interest and was narrowly tailored to realize that interest. *Id.* The Court rejected the state's arguments that the tax scheme serves the important governmental interest in raising revenue. The Court noted that while raising revenue is an compelling governmental interest, it does not, standing alone, justify selective taxation of certain magazines. *Id.* The Court also rejected the State's argument that the tax exemptions further a compelling governmental interest through "foster[ing] communication" in the state. *Id.* at 232. The Court observed that such an interest does not justify selective taxation of certain publishers because it fosters only communication on religion, sports and professional and trade matters. Consequently the Court held that Arkansas tax scheme was not narrowly tailored to achieve a compelling governmental interest and was thus unconstitutional under the First Amendment. *Id.* at 233-34. *See also* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 591-93 (1983) (holding unconstitutional Minnesota law that taxed paper and ink used in production of newspapers); Grosjean v. American Press Co., 297 U.S. 233, 251 (1936) (invalidating tax imposed on gross advertising revenue of newspapers with circulation of more than 20,000 copies per week).

95. *See Leathers*, 111 S.Ct. at 1444 (explaining that Government's ability to impose content based burdens on speech enables Government to suppress certain ideas and viewpoints); *see also* Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) (stating that "regulations which permit the government to discriminate [against speech] on the basis of the content of the message cannot be tolerated under the First Amendment); *cf. Minneapolis Star*, 460 U.S. at 595 (stating that differential treatment, unless justified by some special characteristic of press, suggests that goal of regulation is not unrelated to suppression of expression).

speech.[96] Content-neutral restrictions burden expression regardless of the content or communicative impact of the message conveyed[97] and, by restricting particular communicative resources, significantly impair effective and meaningful public communication.[98] After a court determines that a particular law effects a content-neutral burden on speech,[99] the court then applies a balancing test to assay the law's constitutionality.[100] The objective of this balancing test is to determine whether the restrictions on speech are excessive in comparison with the governmental interests at stake.[101] Some-

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96. *See supra* notes 88-95 and accompanying text (discussing more exacting standard of review that Supreme Court applies to laws which restrict speech on basis of content).

97. Stone, *Content-Neutral Restrictions*, *supra* note 80, at 48. The rationale behind treating content-neutral restrictions differently from content-based restrictions was articulated in U.S. v. O'Brien, 391 U.S. 367, 377 (1968). The Supreme Court explained 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." *Id.*

98. Stone, *Content Regulation*, *supra* note 85, at 192-93.

99. *See infra* notes 100-06 and accompanying text (discussing concept of content-neutral burden on speech). There is no sliding scale for weighing burdens on written or spoken speech as contrasted with expressive conduct. The crucial inquiry, regardless of whether the expression is conveyed through words or conduct, is whether a governmental regulation targets expressive conduct because of the content of the message or because of idea being conveyed. *But cf.* Texas v. Johnson 491 U.S. 397, 406 (1989) (stating that "government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word"). However, when a government regulates the written or spoken word it is more likely that the regulation is aimed at the content of the speech. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 100-102 (1972) (finding city law that prohibited some picketing while allowing other picketing is inconsistent with First Amendment); Boos v. Barry, 485 U.S. 312, 329 (1988) (striking down city law that outlawed displaying within 500 feet of any foreign embassy any sign that tends to bring foreign government into "public odium" or "public disrepute"). The *Boos* Court noted that the display clause operated at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech. *Id.* at 318. Regulations of conduct, on the other hand, are concerned with the non-expressive elements of conduct than the expressive elements of the conduct. *See infra* notes 104-11 and accompanying text (discussing *Barnes* case in which Supreme Court upheld ordinance that proscribed all public nudity even though law incidentally burdened expressive activity).

100. *See* Stone, *Content Regulation*, *supra* note 85, at 193 (describing different standards of review that Supreme Court uses to determine constitutionality of content-neutral restrictions of expression). Stone characterizes the Courts content-neutral balancing test as a "sensible response" to the First Amendment issues engendered by content neutral restrictions. *Id.* at 193. According to Stone:

> Unlike a consistently deferential approach, which would uphold every content-neutral restriction that rationally furthers legitimate governmental interests, the Court's approach critically examines restrictions that seriously threaten significant [F]irst [A]mendment interests. And unlike the rigid clear and present danger" or "compelling interest" approach, which would invalidate almost all content-neutral restrictions, the Court's analysis does not sacrifice legitimate governmental interests when significant [F]irst [A]mendment interests are not at issue.

Id.

101. *See id.* at 190 (stating that Supreme Court tests constitutionality of content-neutral restrictions with essentially open-ended form of balancing). Stone explains that when the Court considers a content-neutral restriction, the Court examines "the extent to which the restriction

times the court is highly deferential in reviewing content-neutral restrictions;[102] at other times the court applies more searching scrutiny to content-neutral restrictions.[103] The main thrust of the content-neutral characterization is that it allows the reviewing court considerable discretion in determining whether a content-neutral law is constitutional.

Recently, in *Barnes v. Glen Theatre, Inc.*,[104] the Supreme Court applied a content-neutral test to Indiana's public indecency statute.[105] The public indecency statute effectively proscribed nude dancing.[106] The respondents in *Barnes* argued that nude dancing was protected expressive activity under the First Amendment.[107] The *Barnes* Court found a content-neutral test appropriate because the regulated activity involved both speech and nonspeech elements.[108] According to the Court, Indiana's interest in proscribing the nonspeech element of the expressive activity, public indecency, indirectly affected the speech element of the activity, nude dancing.[109]

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limits communication, 'the substantiality of the government interests' served by the restriction, and 'whether those interests could be served by means by less intrusive activity protected by the First Amendment.'" *Id.* (quoting Schad v. Borough of Mount Ephraim, 452 U.S. 61, 70 (1981)). This balancing of interests explains why in some cases the content-neutral test is highly deferential, whereas in other cases the test is more demanding.

102. *See* Wayte v. United States, 470 U.S. 598, 611 (1985) (holding that use of passive enforcement policy to decide who to prosecute for failing to register for draft serves "a nation's need to ensure its own security"); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298-99 (1984) (holding that regulation prohibiting people from sleeping in public parks as applied to political protestors serves governmental interest in maintaining aesthetic appeal of public parks).

103. *See, e.g.*, United States v. Grace, 461 U.S. 171, 183-84 (1983) (suggesting that government's interest in preventing appearance of improper influence on Court that would be caused by lone picketer is too insubstantial to justify restriction on speech); Schad v. Mount Ephriam, 452 U.S. 61, 73-74 (1981) (striking down content-neutral regulation because government failed to demonstrate that restricted speech posed problems more significant than those associated with various unrestricted non-speech activities); Schaumburg v. Citizens for Better Environment, 444 U.S. 620, 637-38 (1980) (reasoning that city should protect against fraud by requiring solicitors to inform public of uses made of their contributions, rather than by prohibiting all solicitation).

104. 111 S. Ct. 2456, 2463 (1991) (holding that Indiana public indecency statute banning nude dancing does not violate First Amendment rights). In *Barnes* the Supreme Court considered whether a law which prohibits total nudity in public places violated the First Amendment. *Id.* at 2459-60. Applying a mid-level scrutiny test, the Court first found that the law was clearly within the State's constitutional power and that it furthered a substantial government interest in protecting societal order and morality. *Id.* at 2460-61. The Court next determined the State's interest in protecting societal order and morality was unrelated to the suppression of free expression because the statute proscribed public nudity regardless of whether it is combined with expressive activity. *Id.* Finally, the Court determined that the incidental restriction of First Amendment freedoms was no greater than necessary to further the state's important governmental interest. *Id.* at 2463. Accordingly, the *Barnes* Court held that Indiana's public indecency statute passed constitutional muster under mid-level scrutiny. *Id.*

105. *Id.* at 2460-61.

106. *Id.* at 2460.

107. *Id.*

108. *Id.* at 2460.

109. *See id.* at 2460 (stating that "Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board").

The Court noted that the burden imposed on nude dancing was incidental to the State's interest in proscribing public indecency.[110] Consequently, the Court found that the challenged public indecency statute furthered a substantial state interest and was constitutional under content-neutral specifications.[111]

Barnes is illustrative because it shows the Court's most recent application of a lenient scrutiny test to a content-neutral law.[112] However, in some First Amendment cases, the Supreme Court has evinced a willingness to analyze as content-neutral, and thus apply more lenient scrutiny to, laws that facially and operationally restrict speech on the basis of content and subject matter.[113] The Supreme Court has, in certain contexts, upheld laws that facially and effectively discriminate against speech on the basis of content.[114] The emergence of the secondary effects test[115] indicates that, at least in some contexts,[116] the test for determining content-neutrality is not whether a law facially discriminates against particular speech, but whether the restriction on speech flows from the government's interest in regulating the secondary effects[117] of that speech.[118]

C. *Secondary Effects Test*

In *City of Renton v. Playtime Theaters, Inc.*,[119] the Supreme Court applied the secondary effects test in upholding a statute that facially

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110. *Id.*

111. *Id.* at 2463.

112. *See id.* (finding Indiana's interest in proscribing public indecency unrelated to suppression of free expression because public nudity was "evil" that State sought to proscribe regardless of whether nudity was connected with expressive activity such as nude dancing).

113. *See infra* notes 119-35 and accompanying text (discussing secondary effects doctrine).

114. *Id.*

115. *id.*

116. *But see* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 511 n. (1991) (implying that Son of Sam laws may be content-neutral under *Ward* and *Renton*); Boos v. Barry, 485 U.S. 312, 320-21 (1988) (suggesting that *Renton*'s secondary effects test is applicable to fully protected political speech). Justices Stevens and Scalia joined Justice O'Connor in this part of the opinion. *Boos*, 485 U.S. 312, at 338-39 (Rehnquist, C.J., concurring in part, dissenting in part) (endorsing application of *Renton* analysis to fully protected political speech). Justices White and Blackmun joined the Chief Justice in this part of the opinion. *Id.*

117. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976) (plurality opinion) (describing as constitutionally permissible government's attempt to regulate "secondary effects" of adult movies rather than content of movies). In *American Mini Theatres* the Supreme Court upheld a Detroit ordinance banning adult movie theaters from operating within 500 feet of residential areas. *Id.* at 72-73. The plurality of the Court determined that the Detroit ordinance was content neutral although the movies' content triggered the ordinance because the ordinance was deemed viewpoint neutral. *Id.* at 67, 70-71. *Contra* Williams, *supra* note 86, at 630 n.55 (criticizing Court's use of "secondary effects" concept).

118. *See infra* notes 119-35 (discussing *Renton* and secondary effects test).

119. 475 U.S. 41 (1986).

discriminated against certain categories of protected speech.[120] In *Renton*, the Supreme Court upheld a zoning ordinance that banned adult movie theatres from locating within 1,000 feet of any residential zone, church, park, or school.[121] The Court determined that the ordinance targeted the secondary effects of adult movie theaters on the surrounding community,[122] rather than the content of the films shown at the theaters. According to the *Renton* Court, because the governmental interest in proscribing the secondary effects of adult movie theaters was unrelated to the suppression of free expression, deferential scrutiny was appropriate.[123] Consequently, the Court applied deferential scrutiny and upheld the ordinance as a valid governmental regulation of speech in public fora.[124]

Renton represents a deviation from the established content-neutrality principles.[125] Traditionally the Court focused on whether a particular law effectively burdened speech of a particular content.[126] Prior to *Renton*, the Court avoided troublesome inquiries into legislative motives. Under the traditional analysis, a neutral legislative motive could not divest a statute of its discriminatory effect for constitutional purposes.[127] This is because it

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120. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54-55 (1986).

121. *Id.* at 52-55.

122. *See id.* at 47-48 (noting that assorted criminal behavior is concomitant with adult movie theaters).

123. *Id.* at 50, 52, 55.

124. *Id.*

125. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 420 (1989) (striking down law that prohibited burning American flag because flag burning was form of expressive activity); Meyer v. Grant, 486 U.S. 414, 426-28 (1988) (striking down law that differentially burdened expressive activity); Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) (same); Carey v. Brown, 447 U.S. 455 (1980) (same). These decisions invalidated content-based statutes without considering whether the legislators were concerned with regulating the content of the speech. *Cf.* Stone, *Content Distinction*, note 85, at 1904 (noting that *Renton* revises First Amendment doctrine).

126. *See supra* notes 88-111 and accompanying text (discussing traditional First Amendment test for content-based/content-neutral restrictions). The traditional content-based/content-neutral approach presumed that content-discriminatory laws flowed from unconstitutional legislative motives. Under the traditional First Amendment approach, courts subjected all content-discriminatory legislation, regardless of whether such legislation flowed from improper legislative motive, to the strictest judicial scrutiny. *See supra* notes 92-5 and accompanying text (explaining that traditionally Court looked at face of statute to determine appropriate level of scrutiny).

127. *See* Williams, *supra* note 85, at 628 (inferring that "[Police Department v. Mosley, 408 U.S. 92, 96 (1972)] suggests that content discrimination can occur even when the government's purpose is noncommunicative, simply because a regulation operates by singling out a certain content category of speech for different treatment"). The Supreme Court has recently suggested that content discrimination can occur even absent a discriminatory legislative purpose. *See* Leathers v. Medlock, 111 S. Ct. 1438, 1442-43 (1991) (interpreting holding in Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) as resolving any doubts about whether direct evidence of improper legislative motive is required in order to invalidate differential tax on First Amendment grounds). According *Leathers*, a content discriminatory may be unconstitutional even if it is not tainted with an improper legislative motive. *Id. Cf. id.* at 1440 (stating that "there is no indication in this case that [the State] has targeted [speech] in purposeful attempt to interfere with First Amendment rights").

is exceedingly difficult to identify legislative motive.[128] Before *Renton*, when faced with a law that facially discriminated against protected speech on the basis of content, the Court presumed an improper censorial motive and subjected the law to strict constitutional scrutiny.[129] Under strict scrutiny the government had the onus of showing that the law was narrowly tailored to further a compelling state interest. The *Renton* approach, however, focuses on governmental motive.[130] Under *Renton*, as long as the government can show[131] that a law is not targeting protected expression itself, but rather the secondary effects of expression,[132] the law evades strict scrutiny review.[133] *Renton*'s secondary effects approach to ascertaining content-neutrality greatly diminishes the protection traditionally afforded to free speech under the First Amendment.[134] Moreover, dicta in Supreme Court opinions following *Renton* suggests that the Court is willing to apply the highly deferential secondary effects test to high-value political speech.[135]

D. Application of First Amendment Doctrine to Son of Sam Laws

Most commentators writing on the topic of Son of Sam laws argue that these laws are content-based and, thus, trigger strict First Amendment

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128. *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217 (1970) (recognizing difficulty in ascertaining legislative intent); Andrea Oser, *Motivation Analysis After Renton* 87 COLUM. L. REV. 344, at 359-61 (conceding that ascertaining legislative motivation is extremely difficult).

129. *See* Note, *Content Distinction*, *supra* note 88, at 1906 (noting that prior to *Renton*, courts generally deemed facially discriminatory ordinances content specific).

130. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54-55. Because the ordinance in *Renton* was designed to regulate the secondary effects of adult theaters—the attraction of crime and other desirable elements into the vicinity of such theaters—the Court was able to conclude that the city's predominant intent behind the ordinance was sufficiently unrelated to the suppression of free expression. *Id.*

131. *See Renton*, 475 U.S. at 50-51 (indicating highly deferential approach towards determining whether government was motivated by desire to regulate "secondary effects" of speech). The City of Renton, Washington, did not offer any evidence of the effects of adult movie theaters within its jurisdiction. *Id.* Instead, Renton relied on evidence produced by Seattle, Washington, regarding the effects of adult movie theaters in the Seattle community. *Id.* The Supreme Court was satisfied, based on the studies produced by Seattle, that the City of Renton was not targeting protected expression but the secondary effects of speech. *Id.*

132. *See* Boos v. Barry, 485 U.S. 312, 334 (1988) (Brennan, J. concurring) (criticizing expansion of secondary effects doctrine).

133. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 54-55 (1976) (upholding law that restricted location of movie theaters and bookstores purveying sexually explicit materials, while leaving other movie theaters and bookstores unregulated). The Supreme Court upheld the restriction because the state's goal in regulating the speech was not to suppress any viewpoint or subject matter, but to prevent crime accompanying such establishments.

134. *See supra* notes 119-33 and accompanying text (discussing *Renton*'s effect on First Amendment protection).

135. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 511-12 n. (1991) (suggesting that *Renton* may apply to criminal's speech regarding crime); *Boos v. Barry*, 485 U.S. at 315 (suggesting that plurality would extend *Renton*'s secondary-effects test to high-value political speech).

scrutiny.[136] However, some commentators argue that Son of Sam laws are content-neutral and should be examined under mid-level scrutiny.[137] The *Simon & Schuster* Court clearly implied that, under traditional First Amendment doctrine, New York's Son of Sam law imposed a content-based burden on speech.[138] Unfortunately the *Simon & Schuster* Court left unanswered the question of whether Son of Sam laws may be deemed content-neutral under the secondary effects doctrine.[139] Significantly, however, the very act

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136. *See, e.g.*, Epps, *supra* note 7, at 541-43 (arguing that strict scrutiny applies to Son of Sam laws and that Son of Sam laws fail under this test); Doherty & Lepping, *supra* note 9, at 277-95 (arguing that section 632-a imposes content-based burden on speech and that law cannot withstand strict scrutiny); Pomerantz, *supra* note 9, at 527, 530-33 (arguing that New York's Son of Sam law should be struck down under strict scrutiny because less restrictive alternatives exist); Loss, *supra* note 9, at 1354-55 (concluding that states should amend Son of Sam laws because they constitute content-based regulations and are not narrowly tailored to achieve compelling state interests).

137. *See* Dugan *supra* note 63, at 996 (concluding that section 632-a should be analyzed under mid-level scrutiny because statute targets non-expressive activity and only incidentally burdens speech); Doherty & Lepping, *supra* note 9, at 221-22 (arguing that section 632-a imposes incidental burden on exercise of free speech); Ecker & O'Brien, *supra* note 62, at 1110 (concluding that New York Executive Law Section 632-a should be treated as content-neutral, incidental burden on speech); Okuda, *supra* note 8, at 1366 (arguing that California's Son of Sam law is constitutional because, *inter alia*, it is directed only at secondary effects of speech and not at speech itself).

138. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 508 (1991) (concluding that Son of Sam law is content-based because it targets income derived solely from expressive activity). *But see id.* at 511 n. (leaving open possibility that Son of Sam laws could be deemed content-neutral under Supreme Court's decisions in Ward v. Rock Against Racism, 491 U.S. 781 (1989) and City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)).

139. *See Simon & Schuster*, 112 S. Ct. at 511 n. (leaving unresolved whether Son of Sam laws could be deemed content-neutral under secondary effects test articulated in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)).

In *Renton* the Supreme court considered whether a city ordinance proscribing the location of adult movie theaters violated the First Amendment. The dispositive question was whether the ordinance was content-based and thus triggered strict scrutiny. *Id.* at 43-47. The Court acknowledged that the ordinance treats theaters that specialize in adult films differently from other adult theaters. *Id.* at 47. However, Justice Rehnquist, writing for the majority, determined that although the statute was on its face content based, the city ordinance was designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life." *Id.* at 48. According to Justice Rehnquist, the ordinance was not content-based because it was not aimed at the content of the films shown at the theaters, but rather at the "secondary effect" of the theaters on the surrounding community. Justice Rehnquist then determined that because the Government's predominant concern for enacting the law was with the secondary effects of adult movie theaters and not the content of the films themselves, the ordinance was a content-neutral regulation. *Id.* at 47-50. Thus, Justice Rehnquist applied mid-level scrutiny and found the ordinance narrowly tailored to affect only that category of theaters shown to produce the unwanted secondary effects. *Id.* at 52. Consequently, Justice Rehnquist concluded that the ordinance passed First Amendment muster. *Id.* at 54-55. Justices Brennan and Marshall dissented. They argued that the majority mischaracterized the ordinance as content-neutral and suggested that the ordinance was designed to suppress the content of protected expression. *Id.* at 55-65. The dissent emphasized that the majority's content-based analysis "is limited to cases involving 'businesses that purvey sexually explicit materials' (citation omitted), and thus does not affect our holdings in cases state regulation

of mentioning *Renton* in *Simon & Schuster* (a case involving high value speech)[140] portends a possible diminution of First Amendment rights.[141]

IV. History of *Simon & Schuster, Inc. v. Members of the* New York State Crime Victims Board

The case that Simon & Schuster appealed to the United States Supreme Court, *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,[142] involved the story of Henry Hill, a career criminal.[143] The facts in this case were undisputed.[144] In 1980, after being charged with six counts of conspiracy to sell drugs, Hill agreed to cooperate with federal law enforcement officials and was placed into the Federal Witness Protection program.[145] In 1981, Simon & Schuster commissioned a book that would chronicle the experiences of Hill as a career criminal and mafia foot-soldier.[146] The book was intended to provide an inside account of the life of a low level member of a mafia organization and to disabuse the general public of commonly held romantic notions about organized crime.[147] Simon & Schuster employed Nicholas Pileggi, an accomplished writer with experience in writing about crime, to write the autobiography[148] of Henry Hill.[149] In January 1986, Simon & Schuster published *Wiseguy: Life in a Mafia Family*, a book describing in detail the crimes in which Hill participated.[150] As the Second Circuit pointed out, Hill identified many of his victims in *Wiseguy*.[151] In a letter dated January 31, 1986, the New York State Crime Victims Board ("the Board") requested from Simon & Schuster a copy of

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of other kinds of speech." *Id.* at 56; *see also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 72-73 (1976) (upholding statute that facially and operationally placed burden on certain speech because of its content and because government did not intend to regulate content of speech but only non-communicative aspects of speech).

140. *See infra* notes 260-64 (explaining why Son of Sam laws implicate high-value speech).

141. *See id.* (discussing implications of extending *Renton*'s secondary effects test beyond context of adult movie theaters).

142. 112 S. Ct. 501 (1991).

143. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 724 F. Supp. 170, 172 (S.D.N.Y. 1989).

144. *Id.*

145. *Id.*

146. *Id.*

147. *See* Michael Rudell, *Appeal of the Son of Sam Law*, N.Y.L.J., at 3 (1991) (discussing *Wiseguy*).

148. Nicholas Pileggi, Wiseguy: Life in a Mafia Family (1985). *Wiseguy* inspired the critically acclaimed movie Goodfellas (Warner Bros. 1990) directed by Martin Scorsese.

149. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 724 F. Supp. 170, 172 (S.D.N.Y. 1989). On August 21, 1981, Simon & Schuster, Pileggi and Sterling Lord, Pileggi's literary agent, entered into a written agreement for the creation of the book. *Id.* On September 1, 1981 Simon & Schuster, Pileggi, and Hill signed a contract for "an autobiographical non-fiction work based on organized crime in New York City." *Id.*

150. Rudell, *supra* note 147, at 3.S

151. Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 779 (2d Cir. 1990), *rev'd sub nom.*, Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991).

the contract with Hill and Pileggi. The Board also directed Simon & Schuster to suspend payments to Sterling Lord, Pileggi's literary agent.[152] Simon & Schuster complied with the Board's directives.[153] On June 15, 1991 the Board issued a Proposed Determination and Order which stated that Simon & Schuster had violated section 632-a by failing to turn over to the Board the publishing agreement for *Wiseguy* when the agreement was signed in September 1981.[154] The Board found that *Wiseguy* was subject to section 632-a because it contained Hill's admissions[155] to crimes and his "thoughts, feelings, opinions and emotions regarding [those] crimes."[156] Upon this determination the Board ordered Simon & Schuster to relinquish the $96,250 it had paid Hill pursuant to the *Wiseguy* contract.[157] The Board allowed Simon & Schuster to subtract from this figure fees paid to the author's literary agent; however, the Board required Simon & Schuster to pay interest on the moneys it paid to Hill.[158]

A. The Simon & Schuster Case in the Lower Courts

Although both of the lower federal courts upheld section 632-a under constitutional challenge, they reached the same conclusion from different directions.[159] Indeed, the disparate application of First Amendment law to section 632-a by the district court[160] and court of appeals[161] in the *Simon & Schuster* case exemplifies the difficult First Amendment issues posed by Son of Sam laws.

After the Board issued its order requiring Simon & Schuster to submit all moneys due Hill under the contract for *Wiseguy*, Simon & Schuster filed suit in federal district court. Simon & Schuster sought an injunction against enforcement of the Board's order and a declaratory judgment that section 632-a was unconstitutional.[162] Both parties filed motions for summary judg-

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152. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 724 F. Supp. 170, 172 (S.D.N.Y. 1989).

153. *Id.* at 172.

154. *Id.* at 173.

155. *See* Joint Appendix, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (No. 90-1059), at 25 (chronicling Henry Hill's criminal career). Henry Hill was never prosecuted for the crimes written about in *Wiseguy*. *Id.* Hill was given immunity by state and federal law enforcement officials in return for his cooperation under the Federal Witness Protection Program. *Id.*

156. *Id.* at 53.

157. *Id.* at 51-53.

158. *Id.*

159. *See supra* notes 88-103 (discussing importance of content-neutral distinction).

160. *See* Simon & Schuster, Inc. v. Members of the N.Y State Crime Victims Bd., 724 F. Supp. 170 (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, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (finding section 632-a content-neutral and thus subject to mid-level scrutiny).

161. *See* Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990), *rev'd sub nom.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (finding that section 632-a was content-based and was thus subject to strict judicial scrutiny).

162. 724 F. Supp. 170 (S.D.N.Y. 1989).

ment.[163] Judge Keenan of the Southern District of New York determined that section 632-a did not abridge political speech, but merely prevented criminals from commercially exploiting their crimes.[164] Rejecting Simon & Schuster's argument that strict scrutiny applied under *Meyer v. Grant*,[165] Judge Keenan determined that "the state's interest in compensating crime victims is unrelated to the suppression of free expression and that any burden on free expression is merely incidental."[166] Judge Keenan further found the deferential mid-level scrutiny test articulated in *United States v. O'Brien*[167] controlling and proceeded to apply the lesser standard of review as dictated in that case. After applying *O'Brien* to section 632-a, Judge Keenan concluded that the New York State legislature acted within its authority in enacting section 632-a and that section 632-a was sufficiently crafted to further important governmental interests.[168]

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163. *Id.* at 172.

164. *Id.* at 177.

165. 486 U.S. 414, 427-28 (1988) (holding that Colorado statute which proscribed payment to petition circulators violated First Amendment). In *Meyer* the Supreme Court concluded that because the circulation of political petitions constitutes core political speech, "an area in which the importance of First Amendment protections is at its zenith," and was subject to the exacting scrutiny standard of judicial review. *Id.* at 425. The Court explained that the contested statute was subject to the exacting scrutiny standard of judicial review which imposed upon the state the "well-nigh insurmountable" burden to justify the statute. *Id.* The Court found that the Colorado statute burdened protected First Amendment speech in two ways. *Id.* at 421-22. First, the statute limited the number of voices that could convey appellees' message and therefore also limited the size of the audience that appellees' could reach. *Id.* at 422. Second, under the statute it was less likely that the appellees' would garner the necessary number of signatures to achieve their political objective, thus limiting their ability to promote statewide discussion of their message. *Id.* The Court concluded that the state's argument that it had an interest in assuring that an initiative had sufficient grass roots support to be placed on a ballot failed to sustain its burden of justifying the statutory prohibition. *Id.* at 426.

166. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 724 F. Supp. 170, 177 (S.D.N.Y. 1989).

167. 391 U.S. 367, 386 (1968) (upholding defendant's conviction for burning his selective service registration certificate in violation of federal law). In *O'Brien* the Supreme Court considered whether the defendant's act of burning his draft card in front of a crowd in order to influence others to adopt his anti-war beliefs was protected under the First Amendment. The Court first considered the defendant's argument that the law that he was convicted under violated his First Amendment right of freedom of expression. *Id.* at 376. The court explained that "when 'speech' and 'non-speech' 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." *Id.* The Court further stated that a government regulation is constitutional if it is made within the constitutional power if the government; if is advances an "important or substantial" governmental interest; if the governmental interest is unrelated to the suppression of first amendment rights; and if the incidental restriction on alleged First Amendment rights does not extend beyond the furtherance of the governmental interest. *Id.* at 377. The Court determined that the registration certificate was a "legitimate and substantial administrative aid" and served a substantial governmental interest because "it furthers the smooth and efficient functioning of the Selective Service System" and that there were no apparent alternatives that would vindicate the governmental interest of assuring the continuing availability of Selective Service certificates. *Id.* at 381-82. The Court concluded that both the governmental interest and the operation of the contested law were limited to the noncommunicative aspect of the defendant's conduct. *Id.*

168. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 724 F. Supp.

The Second Circuit affirmed the district court's holding, but, unlike the district court, gave the First Amendment issues raised by section 632-a heightened scrutiny.[169] The Second Circuit found *O'Brien* inapposite because section 632-a imposed a direct, rather than an incidental, burden on speech.[170] Judge Minor, writing for a divided panel, noted that "it cannot be said that the governmental interest advanced by [section 632-a] bears no relation to expression, since the statute burdens directly the speech of those who wish to [tell or sell] the stories of their crimes."[171] Accordingly, the Second Circuit unanimously agreed that section 632-a imposed a direct burden on speech and, therefore, must meet the specifications of strict scrutiny.[172] Under strict scrutiny the state must show that a law which regulates speech content is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.[173] The Second Circuit held that section 632-a served a compelling governmental interest. First, Judge Minor reasoned that section 632-a furthered the compelling state interests of denying criminals the profits from their crimes and of "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."[174] Next, Judge Minor determined that section 632-a was narrowly tailored.[175] Ac-

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170, 179 (S.D.N.Y. 1989). Judge Keenan also rejected Simon & Schuster's Fourteenth Amendment argument. *Id.* at 179-80.

169. Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 778 (2d Cir. 1990), *rev'd sub nom.*, Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991).

170. *Fischetti*, 916 F. 2d at 781.

171. *Id.*

172. *Id.* at 781-84.

173. *See* Meyer v. Grant, 486 U.S. 414, 422-24 (1988) (finding that denial of payment for expressive activity constitutes direct burden on speech).

174. *Fischetti*, 916 F.2d at 782. Judge Minor reasoned:

> The state has a . . . compelling interest in assuring that a criminal not profit from the exploitation of his or her crime while the victims need compensation by reason of their victimization . . . [o]ur society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for financial loss occasioned by the crime.

Id.

Judge Minor also noted additional state interests served by section 632-a. According to Judge Minor, section 632-a served several state interests: (1) decreasing the likelihood that society will have to shoulder the burden of providing for crime victims; (2) satisfying the victims' sense of justice and desire for retribution; and (3) increasing the criminal's awareness of the consequences of his crimes" (citing Sue S. Okuda, *supra* note 8, at 1367)). *Id.* at 783.

175. 916 F.2d at 782. Both Judge Newman, dissenting in *Fischetti*, and Justice O'Connor, writing for the *Simon & Schuster* majority, criticized the Second Circuit's conclusion that section 632-a was narrowly tailored to a compelling state interest. 916 F.2d at 785, 112 S. Ct. 501, 510-11. Judge Newman, dissenting in *Fischetti* argued that the Second Circuit majority applied a legal analysis that defined the state interest being advanced in terms of the law's scope, thereby reaching the circular reasoning that the scope of the statute is narrowly tailored to the state's objective. *Fischetti*, 916 F.2d 785. Similarly, Justice O'Connor, writing for a unanimous Supreme Court noted "[this conceptualization of the State's interest takes] the effect of the statute and posit[s] that effect as the State's interest. *Simon & Schuster*, 112 S. Ct. at 510. If accepted, this sort of circular defense can side step judicial review of almost any statute because it makes all statutes look narrowly tailored." *Id.*

cordingly, Judge Minor, joined by Judge Walker, concluded that section 632-a passed strict First Amendment scrutiny.[176]

In a dissenting opinion, Judge Newman strenuously argued that section 632-a unconstitutionally burdened First Amendment rights.[177] Judge Newman faulted the majority for erroneously concluding that section 632-a was narrowly tailored to a compelling state interest.[178] Judge Newman argued that, whereas the State is entitled to escrow all payments made to a criminal in order to compensate the criminal's victims,[179] New York had not justified section 632-a's discrimination against particular speech.[180]

B. The Supreme Court's Decision

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*[181] the Supreme Court unanimously concluded that section 632-a was unconstitutional under the First Amendment. Initially, the Court determined that because section 632-a placed a financial disincentive on speech of a particular content, it was subject to strict scrutiny under the First Amendment.[182] According to the Court, section 632-a was not distin-

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176. 916 F.2d at 782.

177. *Id.* at 784. According to Judge Newman, because section 632-a was aimed at speech of a specific content rather than at all speech, the law encountered insuperable First Amendment obstacles. *Id.* at 787. Judge Newman noted that, section 632-a singled out speech of a particular content solely because such speech comprised "a major part of an area of relevant activity that the state has elected not to regulate in full." *Id.* at 786 (relying on Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987)). According to Judge Newman, section 632-a was not sufficiently tailored to pass constitutional muster under the principles enunciated in *Arkansas Writers'*. *Id.* at 787.

178. *Id.* at 785-87. Judge Newman noted that under strict scrutiny any distinction made by a law concerning speech of a particular kind, as opposed to speech in general, must be "'necessary to serve a compelling state interest' and 'narrowly drawn to achieve that end.'" *Id.* at 785 (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

179. *Id.* at 785.

180. *Id.* Judge Newman criticized the majority for not probing more carefully into the State's justification for section 632-a's content based discrimination. *Id.* Judge Newman explained that a criminal's ability to sell books that do not specifically mention his crimes, and thus fall outside the scope of section 632-a, is enhanced by the notoriety resulting from his crime. *Id.* Judge Newman observed that under section 632-a, criminal authors who are willing to have their payments escrowed for five years will profit from their crimes stories and that "victims will still be distressed by knowing that [notwithstanding section 632-a] criminals have pocketed all profits remaining after claims of victims and other creditors." *Id.* at 786.

181. 112 S. Ct. 501 (1991).

182. *See id.* at 508 (citing Leathers v. Medlock, 111 S. Ct 1438, 1443 (1991), which recognized that laws that impose financial burdens on speakers because of content of their speech are presumptively inconsistent with the First Amendment); *see also* Arkansas Writers' Project v. Ragland, 481 U.S. 221, 233 (1987) (striking down content-based magazine tax under First Amendment); *cf.* Minneapolis Star & Tribune Co. v. Minnesota Comm'r. of Revenue, 460 U.S. 575, 592 (stating that laws aimed at proper governmental concerns can unduly restrict exercise of First Amendment rights).

Responding to arguments raised in amicus briefs, the *Simon & Schuster* Court summarily dispensed with the notion that the level of First Amendment protection may be reduced by virtue

guishable from the content-based discriminatory tax that the Supreme Court struck down in *Arkansas Writers' Project, Inc. V. Ragland.*[183] As in the *Arkansas Writers'* case, where the Court determined that a State's general interest in raising revenue could not justify placing a special tax burden on the press,[184] the *Simon & Schuster* Court noted that the State's undisputed interest in transferring the proceeds of crime from criminals to their victims does not justify the discriminatory burden that the Son of Sam law placed on expressive activity.[185] Consequently, the Court concluded that because section 632-a "established a financial disincentive to write or publish works with a particular content," section 632-a could be justified only if it were narrowly tailored to serve a compelling governmental interest.[186]

The *Simon & Schuster* Court next considered whether section 632-a was sufficiently tailored under strict scrutiny criteria.[187] The Court observed that while states have an "undisputed compelling interest" in both compensating crime victims and preventing criminals from profiting from their crimes,[188] "[states have] little if any interest in limiting such compensation to the proceeds of the [criminal's] speech about crime."[189]

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of the speaker's criminal status: finding that an author's criminal status is extraneous to the legal issue presented by the Son of Sam law. *See id.* at 508 (reasoning that whether speaker is considered Henry Hill or Simon & Schuster is inconsequential to level of First Amendment protection afforded speech). *See also* Pacific Gas and Elec. Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1, 8 (1986) (explaining that identity of speaker is not decisive in determining whether speech is protected); First National Bank v. Bellotti, 435 U.S. 765, 794-95 (1978) (invalidating state statute that prohibited corporations from responding to merits of questions put to voters by referendum on proposed constitutional amendments). The *Bellotti* Court explained that "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.* at 777. *But see* Phillip Goldstein, *Times Yearns to Read Books by Crooks*, WASH. TIMES, Jan. 12, 1992, at B2 (arguing that criminals are not entitled to enjoy full panoply of First Amendment protection because of criminal status). Defenders of New York's Son of Sam argued that the law was justified under the fundamental common law principles enunciated in Riggs v. Palmer, 115 N.Y. 506, 513-15 (1889) (holding that beneficiary who murdered to inherit is precluded from realizing inheritance) and in Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 630 (1989) (recognizing governmental interest in depriving criminal of economic power derived from crime). *Id.*

183. 481 U.S. 221 (1987). *See supra* note 94 (indicating significance of *Arkansas Writers'* to *Simon & Schuster* case).

184. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1982).

185. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 510-11 (1991).

186. *Id.* at 509. In the only footnote to the opinion, the Court suggested that section 632-a could be construed as content-neutral under recent Supreme Court cases. *See infra* notes 238-41 and accompanying text (discussing implications of footnote for future First Amendment cases). However, the Court found it unnecessary to resolve this issue because the law was too poorly tailored to pass constitutional muster even under the more lenient tailoring standards applied to content-neutral laws. *Id.* at 511-12, n.

187. *See supra* notes 91-94 and accompanying text (discussing strict scrutiny test).

188. *Simon & Schuster*, 112 S. Ct. at 509-10.

189. *Id.* at 511. This language suggests that the court viewed section 632-a as underinclusive. *But see id.* at 511-12 n. (stating that "in light of our conclusion in this case [that section 632-a is unconstitutionally overinclusive], we need not decide whether, as Justice Blackmun suggests, the Son of Sam law is underinclusive as well as overinclusive").

The *Simon & Schuster* Court was particularly disturbed by section 632-a's overinclusiveness. During oral arguments in *Simon & Schuster*, most of the Justices criticized the overinclusiveness of the Son of Sam law.[190] The Court was clearly impressed by the petitioner's examples of literary classics that could have been subject to section 632-a.[191] The Court found that because section 632-a would have encompassed the works of Malcolm X, Thoreau, and even Saint Augustine, New York's Son of Sam law was *ipso facto* overinclusive.[192] The Court further noted that section 632-a was so overinclusive that it could not even pass First Amendment muster under the more forgiving mid-level scrutiny applied to content-neutral laws.[193] The Court, therefore, did not need to make the more difficult determinations of whether the Son of Sam law was also underinclusive or content-neutral under the secondary effects doctrine.[194]

Both Justices Blackmun and Kennedy wrote concurring opinions. Justice Blackmun argued that the majority should have explicitly determined that section 632-a was underinclusive as well as overinclusive.[195] According to

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190. *See Arguments Before the Court*, 60 U.S.L.W. 3303, 3304 (U.S. Oct. 22, 1991) (reporting *Simon & Schuster* hearing). At one point during state's argument Justice Scalia exclaimed "that's ridiculous!" after New York's assistant state attorney general who was defending section 632-a asserted that section 632-a as written would theoretically apply to St. Augustine's *Confessions* because the St. Augustine admitted in his book to have once stolen an apple. *Id.*

191. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501, 511 (1991) (illustrating over-inclusiveness of section 632-a by invoking famous authors who would have been susceptible to that law).

Under the Court's analysis, section 632-a was not over- inclusive as applied to Henry Hill. Because the state has a compelling interest in denying criminal's the profit from their crimes and using the criminal's profits to compensate crime victims, sequestering Henry Hill's royalties from *Wiseguy* (which was predominately about Hill's criminal activities) was not inconsistent with the First Amendment. The reason why the Court found New York's Son of Sam law unconstitutionally over-inclusive was not because of its particular application to Henry Hill, but because of its hypothetical application to authors such as Martin Luther King and Henry David Thoreau. *See supra* note 195-96 and accompanying text (discussing Court's concern over section 632-a's applicability to other than Henry Hill). In focusing on section 632-a's application to hypothetical cases, rather than to Henry Hill, the Court implicitly relied on the overbreadth doctrine which allows an individual to challenge a facially over-broad law because of its overbreadth, even though the statute's application to the complaining individual is constitutionally unobjectionable. *See* Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (applying overbreadth doctrine); *see also* John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 425-26 (1983) (discussing overbreadth doctrine).

192. *See Simon & Schuster*, 112 S. Ct. at 511 (explaining that "[section 632-a would have escrowed payments for important literary works). These works included: ALEX HALEY and MALCOM X's, THE AUTOBIOGRAPHY OF MALCOM X (1964), which describes crimes committed by the civil rights leader before he became a public figure; HENRY D. THOREAU's CIVIL DISOBEDIENCE 18-22 (1849, reprinted 1969), in which Thoreau acknowledges his refusal to pay taxes and recalls his experiences in jail; and the CONFESSIONS OF SAINT AUGUSTINE (Franklin Library ed. 1980), in which the Saint Augustine laments 'my past foulness and the carnal corruptions of my soul,' one instance of which involved the theft of pears from a neighboring vineyard"). *Id.*

193. *Id.* at 511-12.

194. *See supra* notes 91-94 and accompanying text (discussing strict scrutiny).

195. *Simon & Schuster*, 112 S. Ct. at 512.

Justice Blackmun, that determination would have helped guide those states which have similar Son of Sam legislation.[196] Although dictum in the majority opinion suggested that the majority also viewed section 632-a as underinclusive,[197] the single footnote in the opinion belies that assumption.[198]

Justice Kennedy also wrote a concurring opinion in which he argued that any law that regulates protected[199] speech because of its content is unconstitutional *per se*.[200] It is interesting that Justice Kennedy, a "conservative" Reagan appointee, adopted this highly solicitous approach to First Amendment free speech rights—especially in a quasi criminal context.[201] At least in the arena of the First Amendment,[202] Justice Kennedy appears to be the Hugo Black of the Rehnquist Court.[203]

V. ANALYSIS

Contrary to the apprehensions expressed in several articles and editorials preceding the *Simon & Schuster* decision, the Supreme Court did not give states broad license to pass laws restricting First Amendment rights.[204]

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196. *Id.*

197. *Id.* at 511. Expressing concern over the scope of section 632-a, the majority opinion aptly reasoned: "In short, the State has a compelling interest in compensating victims from the fruits of crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about crime." *Id.*

198. *See id.* at 511-12 n. (stating that "in light of our conclusion in this case, we need not decide whether, as Justice Blackmun suggests, the Son of Sam law is underinclusive as well as overinclusive").

199. *Id.* at 512-13. Justice Kennedy recognized certain categories of speech that are not constitutionally protected and thus could be regulated based upon the content of the speech. According to Justice Kennedy defamation, obscenity, incitement, and situations presenting some grave and imminent danger to the government are susceptible to content based regulation. *See id.* (citing Supreme Court cases recognizing or contemplating that certain types of speech do not receive full panoply of First Amendment protection because of content of speech).

200. *Id.* at 512-15.

201. *See* Marshall Ingwerson, *Supreme Court Nominee Seen as Risk-Free Choice*, CHRISTIAN SCIENCE MONITOR, July 25, 1990, at 1 (reporting that conservatives hope, and liberals fear, that Justice Souter will follow same pattern as Justice Kennedy and that Justice Kennedy is considered as stalwart conservative as Robert Bork would have been); Christopher Schroeder, *Kennedy and Bork: Different Courses, Same End*, MANHATTAN LAWYER, Aug. 8-14, 1989, at 13 (reporting that Justice Kennedy has evinced hostility towards, *inter alia*, civil liberties).

202. *See* Simon & Schuster, Inc. V. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 512-15 (1991) (suggesting *per se* rule of invalidity for content-based discriminations in free speech context); Texas v. Johnson, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring) (voting to strike down Texas statute outlawing burning American flag). In *Johnson*, Justice Kennedy noted that "[i]t is poignant but fundamental that the [national] flag protects those who hold it in contempt." *Id.* at 421.

203. *See* Paul M. Barrett, *Kennedy's High Court Tenure Fails to Console Bork-Smitten Conservatives*, WALL ST. J., Feb, 5, 1992, at B5 (reviewing Justice Kennedy's tenure on Supreme Court and reporting that many conservatives are especially dismayed over Justice Kennedy's opinions regarding First Amendment rights).

204. *See* Richard Willing, *Court Test for 'Son of Sam' Law*, NEWSDAY, Oct. 13, 1991, at 17 (reporting that some legal experts expect Supreme Court to allow states to reach into formerly protected areas, such as free speech, while pursuing government interest); Martin Garbus, *Wiseguy v. Son of Sam*, NEWSDAY, Oct. 15, 1991, at 82 (predicting that Rehnquist Court will not hesitate to whittle away at First Amendment rights).

However, the *Simon & Schuster* decision was by no means a "broad defense"[205] of First Amendment rights. The *Simon & Schuster* decision has a very narrow application[206] and leaves open the possibility that the Court could limit the scope of First Amendment protection in a subsequent Son of Sam case.[207]

A. Compelling Governmental Interest

The *Simon & Schuster* Court recognized that government has a compelling interest "in depriving criminals of the profits of their crimes, and using these funds to compensate victims."[208] The characterization of the state's interest as "compelling" leaves open a window for upholding a more narrowly drawn Son of Sam law under strict scrutiny review.[209] The Court's criteria for determining whether a governmental interest is "compelling" is ambiguous at best.[210] Nonetheless, the Court's characterization of the state's interests as "compelling"[211] suggests that a narrowly tailored content-based statute, designed to achieve these "compelling" interests, could pass constitutional muster under the strict scrutiny test.[212] For example, under *Simon & Schuster*, a content-based Son of Sam statute—applicable only to books predominately devoted to the author's criminal activities—could pass First Amendment muster.[213] Some of the Son of Sam statutes currently in effect

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205. *See* Savage, *supra* note 12, at A16 (praising *Simon & Schuster* decision as "a broad defence of First Amendment rights").

206. *See Simon & Schuster*, 112 S. Ct. at 511 (holding section 632-a's overinclusiveness rendered it unconstitutional under narrowly tailored prongs of both mid-level and strict scrutiny First Amendment tests). Thus, the *Simon & Schuster* Court did not conclusively determine whether Son of Sam laws are content-neutral. *Id.* at 511-12 n.

207. *See* 112 S. Ct. at 511-12 n. (implying that Son of Sam laws could be deemed content-neutral). The single footnote in the *Simon & Schuster* opinion suggests that the Court could, if faced with a more narrowly tailored law than section 632-a, construe a Son of Sam law as content neutral under Ward v. Rock Against Racism, 491 U.S. 781 (1989) and City of Renton v. Playtime Theatres, Inc, 475 U.S. 41 (1986). *See infra* notes 240-65 and accompanying text (discussing possible implications of extending rationale of *Renton* to Son of Sam laws).

208. *Simon & Schuster*, 112 S. Ct. at 510.

209. *See* Sleven, *supra* note 12, at 2 (stating that *Simon & Schuster* Court's determination that interest is "compelling" suggests that, under certain circumstances, particular state interests could justify deviation from facially absolute language of First Amendment); *but see infra* notes 221-40 and accompanying text (noting that Son of Sam laws can not pass constitutional muster under strict scrutiny because Son of Sam laws are too underinclusive to pass strict tailoring requirements for content-based statutes).

210. *See* Minneapolis Star v. Minnesota Comm'n of Revenue, 460 U.S. 575, 585 n.7 (1983) (defining, vaguely, standard for determining "compelling" governmental interest). In *Minneapolis Star*, the Court stated that a law which selectively burdens constitutionally protected speech can survive constitutional challenge only if the governmental interest outweighs burden on protected speech. Thus, it appears that "compelling" is measured on a sliding scale: the more narrowly tailored the statute the less "compelling" the governmental interest need be. *Id.*

211. *Simon & Schuster*, 112 S. Ct. at 510.

212. *See supra* note 91-94 and accompanying text (discussing strict scrutiny).

213. *See* Sleven *supra* note 12, at 2 (suggesting that ambiguity in *Simon & Schuster* majority opinion leaves open possibility that redrafted section 632-a, covering only books predominately

may be sufficiently tailored under *Simon & Schuster* to justify their discriminatory effect on protected speech. Nevada's Son of Sam law, for example, sequesters only proceeds earned because of the criminal's notoriety as a

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about author's crimes, could pass constitutional muster under *Simon & Schuster*).

A constitutional defense of a more narrowly tailored Son of Sam law, one that only covered works principally devoted to the author's crime, would be more compelling if teamed with a more precise and thoughtful articulation of the governmental interest at stake. For example, the State could argue that, in addition to serving the State's interest in victim compensation, Son of Sam laws also prevent the undermining of public faith in the efficacy of the criminal justice system. This argument was raised in a brief submitted to the Court for consideration in the *Simon & Schuster* case. *See* Brief for the United States as Amicus Curiae, Simon & Schuster, Inc. V. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (No. 90-1059) (stating that public confidence in criminal justice system is undermined by "spectacle of criminals profiting from books or movies recounting their unlawful actions"). Under this characterization of the interest served by Son of Sam laws: removing the spectacle of criminals profiting from their crimes by selling their crime stories—which undermines confidence in the criminal justice system—there is no need to consider whether a criminal's book royalties can be properly be considered "the profits of crime." *See* Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (noting debate over whether book royalties can properly be considered the profits of crime); Brief for Petitioner at 15, Simon & Schuster, Inc. V. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (No. 90-1059) (arguing that book royalties should not be considered proceeds of crime); Sleven, *supra* note 12, at 2, 10 (same). This articulation of the State's interest could also defeat the argument that Son of Sam laws are underinclusive because it justifies treating books about crimes differently. *See Simon & Schuster*, 112 S. Ct. at 511 (stating that Crime Victims Board cannot explain why State should have any greater interest in compensating victims from proceeds of criminal's "storytelling" than from any of criminal's other assets). However, this argument collides with Supreme Court precedent which mandates that speech can not be suppressed solely because of its offensive nature. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (stating that fact that society may find speech offensive is not sufficient reason for suppressing it) (quoting FCC v. Pacifica Found., 438 U.S. 726, 745 (1978)); U.S. v. Eichman, 110 S. Ct. 2404, 2410 (1990) (stating that bedrock principal underlying First Amendment is that Government may not prohibit expression of idea simply because society finds idea offensive or disagreeable) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)); Cox v. State of La., 379 U.S. 536, 551-52 (1965) (explaining that function of free speech under our system of government is to invite dispute, and that free speech may best serve its high purpose when it induces condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (same).

However, in light of the Supreme Court's willingness to characterize as "compelling" the state's interest in "depriving criminals of the profits of their crimes and using the funds to compensate victims," the Court may be willing to accept the argument that: Son of Sam laws are concerned not with protecting peoples sensibilities, but with ensuring that the criminal justice system retains its integrity. This rationale certainly has much intuitive appeal, especially when viewed against the backdrop of the escalating numbers of violent crimes. *See supra* note 1 (discussing increase in violent crimes). Indeed, a criminal justice system which allows criminals to profit from their crimes without concurrently ensuring that the criminal compensate his victim undercuts public confidence in its laws and undermines the integrity of the criminal justice system. As the author of section 632-a declared:

> It is abhorent[sic] to one's sense of justice and decency that an individual, such as the forty-four caliber killer, can expect to receive large sums of money for his story once he is captured—while five people are dead, [sic] 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.

1977 N.Y. LEGIS. ANN. 267 (memorandum of Sen. Gold).

criminal offender.[214] However, even the more narrowly tailored Son of Sam laws—laws that are less overinclusive than section 632-a—are still constitutionally defective under strict First Amendment scrutiny because they are inherently underinclusive.[215]

B. Underinclusiveness

Although the *Simon & Schuster* Court hinted that New York's Son of Sam law was underinclusive,[216] the Court did not, despite Justice Blackmun's urging,[217] resolve whether section 632-a was underinclusive. If faced with a revised Son of Sam law that applied only to books principally about crime—a law that clears the overinclusive hurdle—the Court would have to address squarely the underinclusive issue.[218] If the Supreme Court revisits the constitutional issues posed by Son of Sam laws, it should determine that all Son of Sam laws are unconstitutionally underinclusive.[219]

The governmental interest served by Son of Sam laws, "depriving criminals of the profits of their crimes, and in using these funds to compensate victims,"[220] does not require differential treatment of speech

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214. *See* NEV. REV. STAT. § 217.265 (1985) (sequestering three-fourths of proceeds that criminal receives for books, serialization rights, rights for movies and television programs and other payments which he receives based on notoriety as criminal); *see also* ARIZ. REV. STAT. ANN. § 13-4202 (1989) (garnishing moneys paid to criminal for information regarding criminals crime story); WYO. STAT. § 1-40-122(d) (1988) (affecting only profits derived from reenactment of crime); CAL. CIV. CODE § 2225 (Deering 1991) (garnishing criminal's proceeds from depiction, portrayal, or reenactment of felony). California's Son of Sam law exempts materials that contain only "a passing mention of [a] felony, as in a footnote or bibliography," and thus avoids the pitfalls of Justice Scalia's St. Augustine hypothetical. *See supra* notes 190-92 (discussing hypothetical question asked to illustrate section 632-a overinclusiveness).

215. *See infra* notes 216-20 (explaining that Son of Sam laws are constitutionally defective because of their inherent underinclusiveness).

216. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 511 (1991). The Court observed:

> In short, the State has a compelling interest in compensating victims from the fruits of crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime. We must therefore determine whether the Son of Sam law is narrowly tailored to advance the former, not the latter, objective.

Id.

The Court proceeded to find that New York's Son of Sam law was overinclusive and thus did not reach the issue of whether the law was also underinclusive. *Id.* at 511-12, n.

217. *See Simon & Schuster*, 112 S. Ct. at 512 (Blackmun, J., dissenting) (arguing that Court should explicitly state that section 632-a is both underinclusive and overinclusive).

218. *See* 112 S. Ct. at 510. (determining that State's interest in preventing criminals from profiting from their crimes and compensating victims from criminal's proceeds from crime are sufficiently compelling to warrant some interference with First Amendment rights).

219. *See infra* notes 226-30 (explaining that Son of Sam laws are unconstitutionally underinclusive under established First Amendment principles).

220. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 510 (1991).

about crime.[221] The authenticity of the states' interest in victim compensation is undermined because Son of Sam laws function only to compensate the victims of criminals who write about their crimes.[222] Had the legislators genuinely been concerned with victim compensation and depriving criminals of the fruits of their crimes, rather than suppressing speech, they would have drafted legislation that sequestered all of the criminal's profits derived from his crime.[223] There are certainly ways that a criminal can profit from his crimes other than through selling his crime stories.[224] As Justice Rehnquist observed during the *Simon & Schuster* hearing, if Billy the Kid wrote a book about his travels in the Southwest and omitted references to any crimes he committed during his travels, the profits from this book would not be sequestered under section 632-a.[225]

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221. *Id.* at 510. As the Supreme Court aptly noted in *Simon & Schuster*:

> The board cannot explain why the state should have any greater interest in compensating victims from the proceeds of [the criminal's storytelling] than from any of the criminal's other assets. Nor can the board offer any justification between this expressive activity and any other activity in connection with its interest in transferring the fruits of crime from criminals to their victims.

Id.

222. *See* Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 785 (2d Cir. 1990) (Newman, J., dissenting) (pointing out that New York Executive Law Section 632-a applies only to payments made to those criminals who re-create their crimes in books or in other forms of media; and that New York Executive Law Section 632-a does not apply to all criminals who write books but to only those criminals whose books express their thoughts feelings, opinions or emotions regarding their crimes), *rev'd sub nom.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991).

223. *See infra* notes 231-35 (noting New York State Senator Gold's proposed alternative to section 632-a which enhances content-neutral means by which crime victim can reach all of criminal's assets); *see also* Daniel Wise, *Passage of New Son of Sam Law Seen Unlikely; Statute Netted Paltry Sum From Convicted Authors*, N.Y. L.J., Dec. 12, 1991, at 1 (quoting First Amendment expert Floyd Abrams). Abrams stated that "the real purpose of [New York's Son of Sam] law was not to compensate crime victims. Instead, it was to prevent the writing of books that offend the notion that someone who committed a crime might profit from it." *Id.*

224. *See* Brief for Petitioner, Simon & Schuster, Inc. V. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (No. 90-1059), at 31 (arguing that section 632-a is underinclusive because would not apply to criminal for writing book about prison conditions if criminal author did not mention crime that led to her imprisonment); *Id.* at 39 (arguing that "crime-should-not-pay rationale" does not account for why section 632-a fails to reach payments to career bank robber who was employed as security consultant after imprisonment or authors who fictionalize their experiences).

225. *See* 60 U.S.L.W. 3303-3304 (U.S. Oct. 22, 1991) (reporting on oral arguments before Supreme Court in *Simon & Schuster*). In response to the apparent inconsistency between the State's purported goal of victim compensation and the underinclusiveness of section 632-a, the Assistant Attorney General of New York, Howard L. Zwickel, argued that the distinction between speech about crime and speech about other subjects is justified because of the "offensiveness" of speech that allows a criminal to profit from his crime. *Id.* at 3303. However, the fact that the content of the criminal's speech about crime is made offensive because the criminal is profiting from such speech does not distinguish section 632-a from the content-based statute that the Supreme Court struck down in *Texas v. Johnson*. *See supra* note 91 (discussing *Texas v. Johnson* decision).

The weight of Supreme Court precedent regarding underinclusive laws urges the conclusion that Son of Sam laws are unconstitutionally underinclusive. The Court consistently strikes down laws that fail to achieve the State's purported interest.[226] Accordingly, any law that sequesters only a portion of a criminal author's assets—those derived solely from the criminal's storytelling—fails to achieve the state's interest in preventing criminals from profiting from their crimes.[227] Son of Sam laws do not sufficiently fulfill the state's compelling interest in compensating crime victims from the proceeds of crime because Son of Sam laws limit the scope of recovery to the proceeds from speech about crime.[228]

The underinclusiveness inherent in all Son of Sam laws suggests that the state's purported interests may be pretextual, and that the true goal of Son of Sam legislation is suppression of particularly distasteful speech.[229] Consequently, even if a more narrowly tailored Son of Sam law meets the overinclusiveness requirements under *Simon & Schuster*, it would still be

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226. *See* Florida Star v. BJF, 491 U.S. 524, 541-42 (1989) (stating that law cannot be regarded as protecting an "interest of the highest order," and thus justifying restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited); Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 20-21 (1986) (striking down law because alternative means would achieve governmental interest and would have less of deterrent effect on utility's First Amendment rights); FCC v. League of Women Voters, 468 U.S. 364, (1984) (holding regulation proscribing editorializing far exceeds what is necessary to achieve state's interest in disabusing public of notion that editorials by public broadcasting stations do not reflect official government views). The *League of Women Voters* Court observed that the overinclusiveness and underinclusiveness of the contested law undermined the likelihood of an important governmental interest. *Id. See also* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 77 (1981) (voiding defendants' convictions for violating ordinance restricting uses permitted in commercial zone because ordinance did not achieve alleged governmental interest).

227. *See* Brief for Petitioner at 43, Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (No. 90-1059) (arguing section 632-a is underinclusive because does not deny criminals enjoyment of all profits from their crimes rather than just payments received for speech about crime).

228. *See* Brief for Petitioner at 43, Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (No. 90-1059) (arguing that section 632-a is underinclusive because crime victims' needs extend to all of [the criminal's] assets, not just those arising from speech); Florida Star v. BJF, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring) (stating that "a law cannot be regarded as protecting a [compelling interest], and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited").

The underinclusive issue also ties into the issue of whether Son of Sam laws are content-neutral under *Renton*'s secondary effects test. Because Son of Sam laws focus only on the proceeds of a particular type of speech, the governments' real motivation behind the laws is suspect. By targeting solely the proceeds of specific speech, Son of Sam laws raise the concern that the government is discriminating against speech because of distaste for its content. However, the Supreme Court has previously stated that concern over public revulsion is insufficient justification for restricting First Amendment rights. *See* U.S. v. Eichman, 110 S. Ct. 2404, 2410 (1990) (holding that public's distaste for flag burning does not justify content-based discrimination against protected expressive activity); Texas v. Johnson, 491 U.S. 397, 419-20 (1989) (same).

229. *See supra* note 229 and accompanying text (noting that underinclusiveness of section 632-a suggests that legislature, in enacting Son of Sam law, was concerned with suppressing content of particular speech).

unconstitutionally underinclusive, under traditional strict scrutiny analysis, so long as it focuses exclusively on the criminal's proceeds from speaking about his crimes.[230]

Criminals may have many assets other than proceeds from the sale of their stories, some of which may have been derived from their criminal activities. As New York now recognizes, the criminals' assets, both those flowing from the sale of their crime stories and those derived from other sources, may be made available to victims through a properly drawn statute. In response to *Simon & Schuster*, New York State Senator Emanuel R. Gold proposed an amendment to the existing State tort law that would achieve a remedial effect similar to section 632-a.[231] Senator Gold's proposed amendment would creates a twenty-year window in which a crime victim could bring a tort action against his assailant.[232] The statute of limitations would run from the date of the assailant's conviction.[233] The proposed amendment states in pertinent part that: "[a]n action to recover damages as a result of the crime may be maintained by the victim or the legal representatives of the victim against any individual convicted of such crime. Such action must be commenced within twenty years of the date of conviction for such crime."[234] Because Senator Gold's proposed amendment sweeps within its purview all assets of criminals who have left victims suffering, it is unobjectionable on First Amendment grounds.[235]

C. *Content-Neutrality*

Perhaps the most important question left unanswered by the *Simon & Schuster* Court is whether Son of Sam laws qualify as content-neutral[236] under the secondary effects test applied by the Supreme Court in *Ward v. Rock Against Racism*[237] and *City of Renton v. Playtime*

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230. *See supra* notes 226-30 and accompanying text (discussing underinclusiveness of Son of Sam approach to victim compensation and preventing criminals from profiting from their crimes renders Son of Sam laws unconstitutional under strict scrutiny test applied to content-based laws).

231. *See supra* note 69 (noting Senator Gold 's proposed amendment to existing tort law in lieu of revising state's Son of Sam law).

232. *Id.*

233. *Id.*

234. *Id.*

235. *See supra* notes 73-135 and accompanying text (discussing First Amendment principles).

236. *See id.* (describing importance of content-neutrality). The issue of content-neutrality is essential to the disposition of future challenges to Son of Sam laws. If Son of Sam laws are deemed content-neutral under *Renton*, then it is likely that the Court would uphold these statutes under the less exacting tailoring requirements applicable to content-neutral regulations. Whereas underinclusiveness would be a fatal flaw to a content-based Son of Sam, underinclusiveness may be permissible under the content-neutral tailoring requirements. Therefore, the issue of whether Son of Sam laws are content-neutral under *Renton*'s secondary effects test is essential to the future of Son of Sam laws.

237. 491 U.S. 781 (1989). The implications of *Ward* are not as significant as those of *Renton*. In *Ward*, the Supreme Court considered whether New York City's sound amplification guidelines for activities occurring at a bandshell in a public park violated free speech rights. *Id.* at 784-90.

Theatres, Inc.[238] Although the *Simon & Schuster* Court concluded that section 632-a's overinclusiveness obviated the need to determine whether the statute was content-neutral, the Court ostensibly treated section 632-a as a content-based statute. In the only footnote to the opinion, the Court explicitly reserved the discretion to construe Son of Sam laws as content-neutral under the secondary effects test.[239] Son of Sam laws provide an ample opportunity for the Supreme Court to apply the secondary effects test to political speech. That the Court endorses the goals behind Son of Sam laws[240] suggests that it may be willing to apply the lenient secondary effects test in order to uphold these laws under future constitutional challenge.[241]

Applying the secondary effects test beyond the narrow context in which it was originally applied[242] to cases involving high-value political speech would allow a state to censor effectively speech concerning a particular topic as long as the state could articulate a content-neutral justification for a facially discriminatory law. This application of the secondary effects test would divest First Amendment rights of any meaningful protection.[243] The very mentioning of *Renton* and *Ward* in the *Simon & Schuster* opinion suggests that publishers' praise for the conservative Court's restraint in the First Amendment area may be, at best, premature.[244]

The respondent, Rock Against Racism (RAR), argued that the sound's volume was an essential aesthetic element of Rock music and that the city sought to "assert artistic control over performers at the bandshell by enforcing a bureaucratically determined, value-laden conception of good sound." *Id.* at 792. The City's principal justification for the regulation was the desire to regulate the secondary effects of the speech related activities occurring in a public park: limiting excessive noise and maintaining order in a public park and to avoid intrusion into other residential areas. *Id.* at 792. The Court determined that the city's interest in controlling sound volume in public areas was unrelated to the content of the regulated speech—even though the "mix" of sound is an essential element of rock music. *Id.* The Court concluded that the city's regulation was content-neutral, stating that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers of messages but not others." *Id.* at 791. The statute that the Supreme Court upheld in *Ward* did not on its face discriminate against speech on the basis of content or subject matter. *Ward* is more analogous to *Barnes* than to *Renton* because the regulation at issue in *Ward* regulated volume across the board and did not single out volume associated only with rock music. *Cf. Barnes v. Glen Theatre*, 111 S. Ct. 2456, 2463 (1991) (holding that statute that regulated all public nudity, rather than just public nudity associated with expressive activity—nude dancing—was constitutional). Accordingly, the following discussion of the single footnote in the *Simon & Schuster* opinion focuses on the implications of *Renton* in the context of Son of Sam laws.

238. 475 U.S. 41 (1986).

239. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 112 S. Ct. 501, 511-12 n. (1991).

240. *See id.* at 510 (identifying as "compelling" governmental interests served by Son of Sam law).

241. *See id.* at 511-12 n. (suggesting that *Renton* could be applied in context of Son of Sam laws).

242. *See supra* notes 122-38 and accompanying text (discussing *Renton*).

243. *But see* Oser, *supra* note 128, at 367 (suggesting that *Renton*'s motivation approach yields more rational First Amendment law than does content-based/content neutral approach).

244. *See supra* note 12 and accompanying test (describing praise for *Simon & Schuster* decision as indication of Court's solicitous approach towards free speech rights).

VI. Implications of the Secondary Effects Doctrine for Son of Sam Laws

While the characterization of a law as content-based almost inexorably leads to the conclusion that the law is unconstitutional,[245] laws deemed content-neutral are often upheld under First Amendment scrutiny.[246] Whether the Supreme Court in a future case determines that *Renton*'s secondary effects test applies to Son of Sam laws is significant. The purported state interests behind Son of Sam laws, "compensating victims from the fruits of crime,"[247] can clearly be characterized as the secondary effects of speech. Under the secondary effects test, Son of Sam laws would qualify as content-neutral and thus evade the strict scrutiny review that traditionally applies to laws which facially discriminate against speech.[248] Unlike the tailoring requirements applied under strict scrutiny to content-based statutes,[249] content-neutral restrictions on speech need not be the least restrictive means of achieving an "important governmental interest."[250]

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245. *See* Meyer v. Grant, 486 U.S. 414, 425 (1988) (stating that government's burden to justify law under strict scrutiny is "well-nigh insurmountable").

246. *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2463 (1991) (upholding Indiana public indecency law banning nude dancing); U.S. v. O'Brien, 391 U.S. 367, 385-86 (1968) (upholding law banning burning of draft cards).

247. Simon & Schuster, Inc. V. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 511 (1991). *But see* Brief for The United States at 10-11 n. 15, Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (No. 90-1059) (conceding that federal government's reason for singling out criminal's speech is because of concern that dissemination of speech is particularly likely to aggravate harms suffered by victims of crimes committed by speaker).

248. *See* Ward v. Rock Against Racism, 491 U.S. 791, 798-99 n.6 (1988) (distinguishing tailoring requirement for content-neutral laws). The *Ward* Court explained the different tailoring standards for content-neutral laws:

> In [*Boos v. Barry*] we concluded that the government regulation at issue was "not narrowly tailored; a less restrictive alternative is available."(citations omitted). In placing reliance on *Boos* however, respondent ignores a crucial difference between that case and this. The regulation we invalidated in *Boos* was a content-based ban on displaying signs critical of foreign governments; such content based restrictions on political speech "must be subjected to the most exacting scrutiny."(citations omitted). While time, place, or manner regulations must also be "narrowly tailored" in order to survive First Amendment challenge, we have never applied strict scrutiny in this context. As a result, the same degree of tailoring is not required of these regulations, and least restrictive-alternative analysis is wholly out of place.

Id.

249. *See* Boos v. Barry, 485 U.S. 312, 329 (1988) (striking down law banning political protest within vicinity of foreign embassy because law was content-based and not narrowly tailored to achieve compelling governmental interest). The *Boos* Court noted that there were less restrictive alternatives to the law banning protests. *Id.* According to the *Boos* Court, the existence of less restrictive alternatives rendered the law unconstitutional under the narrowly tailored prong of the strict scrutiny test. *Id.*

250. *Id.* Another important basis for distinguishing content-neutral laws from laws that discriminate against speech because of its content, is that content-neutral laws need only serve an "important" or "substantial" governmental interest. This is a lower threshold than the "compelling" standard required of content-based laws. Because the Supreme Court has already recognized

A content-neutral regulation of speech is narrowly tailored "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[251] Under the more deferential tailoring requirement for content-neutral laws,[252] the underinclusiveness inherent in all Son of Sam laws would not necessarily render Son of Sam laws unconstitutional. By contrast, under strict scrutiny[253] the inherent underinclusiveness of Son of Sam statutes would be constitutionally fatal.

The secondary effects test that emerged from *Renton* directly contradicts both prior and subsequent decisions involving content-discriminatory statutes.[254] Because *Renton* is an anomaly in First Amendment jurisprudence, it should be distinguished on its facts.[255] The Supreme Court has traditionally excepted pornography and obscenity from the full panoply of First Amendment protection.[256] *Renton*'s secondary effects test was adopted to assay

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as "compelling" the governmental interest in depriving criminals of the profits of their crimes and making these funds available to compensate crime victims, Simon & Schuster, Inc. v. Members of the N.Y. Crime Victims Bd., 112 S. Ct. 501, 510 (1991), the state interests served by Son of Sam laws could pass muster under the lesser standard of judicial scrutiny applicable to content-neutral laws. *But cf.* 112 S. Ct. at 512-15 (Kennedy, J., concurring) (asserting that speech about crime has the full protection of First Amendment and therefore it is both unnecessary and incorrect to ask whether State can show that Son of Sam law ". . . is necessary to serve a compelling state interest and is narrowly drawn to acheive that end."). According to Justice Kennedy the balancing test derives from the Supreme Court's equal protection jurisprudence and has no legitimate place in the consideration of whether states may restrict speech solely because of its content, apart from considerations related to time. place and manner or the use of public forums. *Id.* at 512-23.

251. *Ward*, 491 U.S. at 799 (quoting U.S. v. Albertini, 472 U.S. 675, 689 (1985)).

252. *See supra* notes 236-44 and accompanying text (discussing deferential standard of review applied to content-neutral laws).

253. *See supra* notes 91-94 and accompanying text (discussing strict scrutiny).

254. *See supra* notes 125-34 and accompanying test (noting Court's anomalous First Amendment reasoning in *Renton* and *Ward*).

255. *See* Reply Brief for Petitioner at 7, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (No. 90-1059) (arguing that *Renton* reasoning should be confined to content-based statutes involving sexually oriented materials).

256. *See* New York v. Ferber, 458 U.S. 747, 763 (1982) (asserting that child pornography is category of material without scope of First Amendment protection is not inconsistent with earlier precedent); Young v. American Mini Theatres, Inc., 427 U.S. 50, 71-73 (1976) (upholding ordinance that required adult theaters to be widely dispersed, thereby making it more difficult and costly to find suitable site for such theaters). The plurality in *Young* concluded that the ordinance was not an "impermissible restraint" on First Amendment rights, even though it involved a content-based determination. *Id.* at 62. While suggesting that an absolute prohibition on erotic materials would be unconstitutional, the plurality stated:

> [I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment [that he might deplore a speakers words but would defend to the death the speakers right to say them] . . . few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

Id. at 70. According to the *Young* plurality, some types of speech, although not wholly unprotected by the First Amendment, may receive a lesser amount of protection depending upon its content. The *Young* plurality reasoned that speech concerning sexual activity deserves less protection than speech falling under the rubric of "untrammeled political debate." *Id.*

time, place, and manner restrictions in the context of pornography regulation. Son of Sam laws, however, impose a direct burden on high-value political speech.[257]

Under established First Amendment jurisprudence, political speech receives the highest solicitude, even in the context of time, place, and manner regulations.[258] Son of Sam laws can burden high-value speech. Henry Hill's recollections in *Wiseguy*, for example, underscore the political import of the criminal's speech. Although Justice O'Connor, author of the majority opinion in *Simon & Schuster*, characterized Hill's crimes as "banausic,"[259] much of the criminal activity that Hill recounted was abetted by corrupt judges and politicians.[260] Such speech goes to the heart of the First Amend-

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257. *See infra* notes 260-64 and accompanying text (noting that Son of Sam laws may burden speech concerning significant political issues).

258. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98-99 (1972) (striking down ordinance that differentially regulated speech). In *Mosley*, the Supreme Court considered whether the Seventh Circuit correctly determined that a city ordinance prohibiting all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute was unconstitutionally overinclusive. *Id.* at 94. The Court determined that because the city treated some picketing differently from others, the Equal Protection Clause of the Fourteenth Amendment was controlling. *Id.* at 94-95. Because the city's ordinance described permissible picketing in terms of its subject matter, according to the *Mosley* Court, the "operative distinction [was] the message on a picket sign." *Id.* at 95. The Court determined that under the Equal Protection Clause a government can not prohibit some views while allowing others and that "'there is an equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Id.* at 96 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE, 27 (1948)).

In *Mosley* the city purported that the ordinance advanced a substantial governmental interest by preventing school disruption ordinance. The *Mosley* Court observed, however, because the city permitted peaceful labor picketing during school hours, its purported interest in preventing school disruption was suspect. *Id.* at 100. Accordingly, the *Mosley* Court determined that the city advanced no justification for its unequal treatment of peaceful nonlabor picketing and that because the ordinance imposed a selective restriction on expressive conduct in excess of what was necessary to further an important governmental interest, the ordinance was unconstitutional under the Equal Protection Clause. *Id.* at 101-102. *See also* Carey v. Brown, 447 U.S. 455, 470-71 (1980) (voiding ordinance declaring unlawful "picket[ing] before or about the residence or dwelling of any person" but which excepted "peaceful picketing of a place of employment involved in labor dispute). *But see* Boos v. Barry, 485 U.S. 312, 315-18 (1988) (considering constitutionality of statute that proscribed political protest within certain proximity of foreign embassy). In *Boos*, the plurality of the Court (Justices Scalia and Stevens joined this part of Justice O'Connor's plurality opinion) suggested that *Renton*'s secondary-effects test is not limited to the pornography context, but applies also to core political speech. *Id.* at 320-21. The *Boos* Court distinguished *Renton* from the case *sub judice* because the statute in *Boos*, unlike the statute in *Renton*, was not aimed at secondary effects of speech but at the content of the speech itself). *Id.*

259. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 506 (1991). *See* William Safire, *On Language; Seize the Hour, Day or Moment*, N.Y. TIMES, Feb. 2, 1992, at § 6, at 10. (lampooning Justice O'Connor's word-choice).

260. *See* PILEGGI, *supra* note 58, at 16 (naming corrupt State judges who gave lenient sentences to gangsters); *id.* at 55-56 (discussing prevalence of bribing politicians with payoffs); *id.* at 146-47 (describing payoffs to prison officials for officials acquiesce in organized crime activities). Henry Hill has also alleged that Senator Alfonse D'Amato (R-NY) was involved in organized crime. *See also* Sydney H. Schanberg, *Its Time for D'Amato to Cut the Comedy*, NEWSDAY, Apr. 30, 1991, at 79 (noting Senator D'Amato's alleged ties to mafia).

ment's protection of "core" political speech.[261] As one commentator observed:

> A common sense reading of the First Amendment further indicates caution about any holding that suggests that speech by criminals about crime is subject to a lesser standard of protection. As every American knows, crime is currently (and has been for at least twenty-five years) an important public issue with broad political implications. Speech about crime in general, even when distasteful, is too close to the so-called 'core' of political speech to make its excision from the body of protected speech a risk-free operation. This is true even—or perhaps particularly—when the speech is uttered by those whom society has adjudged criminal. As the cases . . . from the prehistory of the First Amendment suggest, the decision of what behavior a society will call "criminal" is a key political decision—indeed, in some senses, the primal political decision.[262]

Because of the burden that Son of Sam laws place on criminals' speech,[263] society is denied the benefit of the criminal author's message or insight.[264] The content based burden that Son of Sam laws place on high-value speech militates strongly in favor of confining the secondary effects test to the pornography context.[265]

CONCLUSION

The Supreme Court's decision in *Simon & Schuster* did little to clarify the constitutional issues surrounding Son of Sam laws. Most importantly, the *Simon & Schuster* Court did not conclusively determine the appropriate level of scrutiny for Son of Sam laws. In fact, the *Simon & Schuster* Court

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261. *Cf.* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (declaring that publication of truthful accounts of political corruption "lies near the core of the First Amendment").

262. Epps, *supra* note 7, at 549-50.

263. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 508 (1991) (noting that Son of Sam laws impose financial disincentive on speech because of its content or subject matter).

264. *See* Loss, *supra* note 9, at 1341-1342 (stating that chilling effect of content-based laws upset free dissemination of information to public and subsequently cause public to engage in less informed decision making); Pomerantz, *supra* note 9, at 533 (arguing that "[s]ociety is well served when it learns about crime, how it is committed, and what circumstances enhance its likelihood"); *see also* Cox, *supra* note 5, at B1 (quoting Nicholas Pileggi, author of *Wiseguy*, "[because Son of Sam laws gag valuable insiders] we'll never know who didn't come forward . . . [m]aybe some guy who was the accountant for a narcotics operation that bribed congressmen, or some guy who was behind the scenes of a major insider trading scheme").

265. *See supra* notes 119-34 and accompanying text (discussing *Renton* and secondary effects test).

added to the confusion by implying that Son of Sam laws could be considered content-neutral under *Renton*'s secondary effects test.[266] *Renton*'s lenient standard for determining content-neutrality should be confined to time, place, and manner restrictions in the context of pornography.[267] Applying *Renton*'s secondary effects test to Son of Sam laws would effectively allow the government to stifle speech that it finds disagreeable.[268]

Because Son of Sam laws discriminate against speech on the basis of content, Son of Sam laws must be narrowly tailored to achieve a compelling governmental interest.[269] Compensating crime victims and preventing criminals from reaping profits from their crimes undoubtedly are important and legitimate governmental interests. Even authors and publishers concede that the goals behind Son of Sam laws are meritorious.[270] However, although Son of Sam laws serve compelling governmental interests, they are not narrowly tailored to achieve these interests.[271] Consequently, if faced with another Son of Sam law—one that is more narrowly tailored than section 632-a[272]—the Supreme Court should invalidate the law under the tailoring requirements of the strict scrutiny test.[273]

Jon Allyn Soderberg

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266. *Id.*

267. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 55-56 (1986) (Brennan, J., dissenting) (emphasizing that majority's content-based analysis "is limited to cases involving 'businesses that purvey sexually explicit materials' (citation omitted), and thus does not affect our holdings in cases state regulation of other kinds of speech").

268. *See supra* notes 254-65 (explaining that *Renton*'s secondary effects test should not be applied to Son of Sam laws.

269. *See supra* notes 91-94 and accompanying test (discussing strict scrutiny standard applicable to content-based restrictions on speech).

270. *See* Roberts *supra* note 3, at 1 (quoting author of convicted killer's autobiography who was involved in protracted litigation involving New Jersey's Son of Sam law: "As an abstract principal ["Son of Sam" laws] may be correct . . . ."); *id.* (quoting president of New York publishing company that was involved in Son of Sam litigation: "I think the [Son of Sam] law was understandable . . . the question of Berkowitz (the Son of Sam law's namesake) doing what he did and then writing a book and making money is appalling . . . ."). *Id.*

271. *See supra* notes 216-30 and accompanying text (discussing inherent underinclusiveness of Son of Sam laws).

272. *See supra* note 214 and accompanying text (discussing Son of Sam laws that are less overinclusive than section 632-a).

273. *See supra* notes 215, 230 and accompanying text (explaining how inherent underinclusiveness of Son of Sam statutes makes Son of Sam laws constitutionally defective under tailoring prong of strict scrutiny test).