

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: SIMON AND SCHUSTER, INC., Petitioner

V. MEMBERS OF THE NEW YORK STATE CRIME  
VICTIMS BOARD, ET AL.

CASE NO: 90-1059

PLACE: Washington, D.C.

DATE: October 15, 1991

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1                   IN THE SUPREME COURT OF THE UNITED STATES

2       - - - - -X

3       SIMON AND SCHUSTER, INC.                   :

4                   Petitioner                   :

5               v.                                       :   No. 90-1059

6       MEMBERS OF THE NEW YORK                   :

7           STATE CRIME VICTIMS BOARD,           :

8           et al.                                   :

9       - - - - -X

10                                   Washington, D.C.

11                                   Tuesday, October 15, 1991

12               The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 10:02 a.m.

15 APPEARANCES:

16 RONALD S. RAUCHBERG, ESQ., New York, New York; on behalf  
17 of the Petitioner.

18 HOWARD L. ZWICKEL, ESQ., New York, New York; Assistant  
19 Attorney General of New York; on behalf of the Respondent.

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1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 90-1059, Simon & Schuster, Inc.  
5 v. the Members of the New York State Crime Victims Board.

6 Mr. Rauchberg.

7 ORAL ARGUMENT OF RONALD S. RAUCHBERG

8 ON BEHALF OF THE PETITIONER

9 MR. RAUCHBERG: Mr. Chief Justice, and may it  
10 please the Court:

11 The Petitioner, Simon & Schuster, is here today  
12 challenging the constitutionality of section 632(a) of New  
13 York's Executive Law, commonly known as "the Son of Sam"  
14 law. The challenge is both to the facial validity of the  
15 statute and to its application to Simon & Schuster on the  
16 facts of this case.

17 Section 632(a) was enacted in 1977 and applies  
18 to works of expression and only to works of expression.  
19 It applies to books, movies, magazine articles, and the  
20 other expressive works that are specified in the statute.

21 Whenever a publisher --

22 QUESTION: Mr. Rauchberg, are there other laws  
23 in New York that apply to other assets of someone who has  
24 committed a crime; not this statute, but other statutes  
25 that would make other assets subject to reach under a



1 scheme like this?

2 MR. RAUCHBERG: There are two sets of statutes  
3 that might be responsive to your question. First, there  
4 is the statutes that provide tort remedies for all victims  
5 of tort, which of course apply to crime victims as well,  
6 and second, it bears mentioning that New York has a law,  
7 as I would guess, most jurisdictions do that have laws  
8 like this, New York has a law providing for the forfeiture  
9 of the proceeds of crime.

10 Of course, there has never been any contention  
11 that the forfeiture provision would pertain to the  
12 proceeds of a book or other expressive work or to  
13 royalties for the authorship of a book.

14 But other than that, no. Other than that there  
15 is only this statute selecting speech-related assets for  
16 special treatment.

17 QUESTION: Of course, the forfeiture statute  
18 does not turn over the forfeited proceeds to any  
19 particular victim.

20 MR. RAUCHBERG: That's correct. The forfeiture  
21 statute provides for forfeiture to the State, but the  
22 point I wanted to make is that it never occurred to the  
23 legislators in New York that the forfeiture statute would  
24 pertain to the proceeds of a book contract, and therefore,  
25 any suggestion that these are somehow crime proceeds I

1 think is simply not correct.

2 QUESTION: Mr. Rauchberg, does the forfeiture  
3 statute, is its reach limited to items that were used in  
4 the commission of the crime?

5 MR. RAUCHBERG: It applies to both  
6 instrumentalities of the crime and the proceeds of the  
7 crime.

8 QUESTION: And proceeds too?

9 MR. RAUCHBERG: Yes, absolutely.

10 QUESTION: So that in the example given in one  
11 of the briefs, under the forfeiture statute New York could  
12 have proceeded against any profits derived by Mr. Milken  
13 from his illegal trading?

14 MR. RAUCHBERG: No, I don't think it could  
15 because -- oh, I am sorry, I misunderstood the question.  
16 Profits from illegal trading, assuming that they violated  
17 State laws as well as Federal laws, would be presumably  
18 within the forfeiture provisions of the New York statute,  
19 yes.

20 The statute has an extremely broad definition of  
21 the phrase criminal. In fact, it uses the term person  
22 accused or convicted of a crime, and in addition to  
23 applying to persons who are accused of crime, it applies  
24 to persons convicted, whether of State crimes or of  
25 Federal crimes, but it goes beyond that to include in its

1 application persons who are acquitted of crimes by reason  
2 of insanity, and it also applies to persons who are never  
3 charged with crime at all, but who are deemed by the Crime  
4 Victims Board to have admitted crimes.

5 All of these various types of authors are  
6 treated as persons --

7 QUESTION: Is it your understanding that under  
8 this particular statute that an author who admitted in the  
9 course of a book that 20 years before he had stolen a pack  
10 of cigarettes, that that would bring him under this  
11 statute?

12 MR. RAUCHBERG: Absolutely. It absolutely  
13 would. The law has been interpreted by the State Courts  
14 in New York to contain a special statute of limitations  
15 provision that starts the limitations period running anew  
16 for any crime victim who wishes to begin a proceeding,  
17 collect a judgment, and obtain access to the proceeds of  
18 the book, first of all, so the 20-year period would not be  
19 a barrier.

20 And second of all, the statute does apply not  
21 only to those who are convicted, but to those who are  
22 found to have admitted crimes in their book. And in this  
23 case, in this case, Henry Hill, the criminal whose  
24 activities triggered the application by the Crime Board of  
25 the statute to Simon & Schuster is somebody who was

1 cooperating with Federal and State prosecutors, was in the  
2 witness protection program, and had been immunized rather  
3 than being charged with the various activities described  
4 in his book.

5 And he was found to be within the description of  
6 a convicted person because his book was deemed to contain  
7 admissions of crime.

8 QUESTION: If there had been an earlier judgment  
9 in favor of the victim that had been satisfied, a judgment  
10 for damages caused by the crime, I take it, no new cause  
11 of action would arise by reason of the publication?

12 MR. RAUCHBERG: The State courts haven't treated  
13 that question, and so I suppose there is possibly some  
14 room for argument. But I think that is a likely  
15 interpretation of the statute. The New York Court of  
16 Appeals has interpreted the statute as not being  
17 applicable to victimless crimes.

18 And so it would seem not a great step for the  
19 statute to be interpreted as not applying to those crimes  
20 with victims where the victims have been fully compensated  
21 as well, but I really don't know.

22 QUESTION: In your view, could a State court,  
23 through the exercise of their common law jurisdiction,  
24 make it an independent tort for a perpetrator of a crime  
25 to recount the crime for profit?



1 MR. RAUCHBERG: I think not. I think that such  
2 a statute, making a tort out of speech, would be so  
3 inconsistent with the concepts of the First Amendment that  
4 it would absolutely have to be --

5 QUESTION: Well, suppose in a rape case where  
6 the victim is suing for damages there has been a book  
7 recounting the lurid details of the crime. Could the jury  
8 be instructed, ladies and gentlemen of the jury, not only  
9 has the victim suffered anguish, but there was a book  
10 about this and you are entitled to take that into account  
11 in giving your damages?

12 MR. RAUCHBERG: I think not. I think not. I  
13 think this Court has held that truthful speech,  
14 nondefamatory speech may be outrageous, may be offensive,  
15 and is nonetheless protected by the First Amendment.

16 For example, in the Hustler case.

17 QUESTION: But in the Hustler case there was no  
18 antecedent criminal act.

19 MR. RAUCHBERG: I don't think the antecedent  
20 criminal act is relevant to the question of whether the  
21 speech ought to be protected or not.

22 QUESTION: So in your view, a rapist could break  
23 into the victim's apartment, rape the victim, and then  
24 write a lurid account of it. In the act of writing or the  
25 collection of proceeds from the writing, that could not be

1 independently actionable?

2 MR. RAUCHBERG: I say that is right. I say that  
3 is correct.

4 QUESTION: Because that is a far cry from  
5 Falwell, because here there is an antecedent crime.

6 MR. RAUCHBERG: There is an antecedent crime,  
7 but the crime is a separate act from the authorship of a  
8 book. The authorship of a book is an act to be  
9 encouraged, not an act to be suppressed.

10 QUESTION: Your position is that we should  
11 encourage books of the kind I just described?

12 MR. RAUCHBERG: My position is that the First  
13 Amendment encourages the writing of all books, and it is  
14 not for this Court to distinguish between which books  
15 should be encouraged and which books should not. And more  
16 to the point, it is not for the State of New York to  
17 decide that books on a specified subject, namely crime, by  
18 a specified class of authors, namely criminals as defined,  
19 are books to be discouraged as opposed to encouraged.

20 QUESTION: Well, the First Amendment doesn't  
21 encourage the writing of libelous books, certainly, does  
22 it?

23 MR. RAUCHBERG: It does not.

24 QUESTION: Well, why isn't this maybe another  
25 category of books that the First Amendment doesn't

1 encourage?

2 MR. RAUCHBERG: There isn't any issue of false  
3 statements raised here. The concern that I have about the  
4 content-based discriminations that this law creates is  
5 that it brings about exactly the kind of distortion in the  
6 marketplace of ideas that content-based laws are capable  
7 of doing, and for that reason are abhorrent.

8 There are abortion protesters in Wichita, Kansas  
9 who are committing crimes based on their view of human  
10 life. There are animal rights activists in Connecticut  
11 who disrupt medical experimentation at U.S. Surgical  
12 through sabotage and other criminal acts.

13 There are terminally ill patients whose doctors  
14 and whose family members assist them in suicide or  
15 sometimes even take action themselves and face criminal  
16 charges.

17 There are battered women who respond to violence  
18 with violence in return who find themselves indicted, and  
19 this law says to Simon & Schuster that if it wants to  
20 publish books on the issues of abortion or euthanasia or  
21 animal rights or women's issues, it can't commission books  
22 by these authors.

23 QUESTION: By these authors.

24 MR. RAUCHBERG: It can't commission these  
25 authors to tell their stories, which can be an important

1 part of the public debate on those four issues, and that  
2 is four examples.

3 New York State says no to Simon & Schuster.  
4 Commission books from the victims, from the prosecutors,  
5 from the police officers, but not from the victims, who  
6 have --

7 QUESTION: It can commission books from the  
8 victims, Simon & Schuster just has to put the money in  
9 escrow, doesn't it, and pay it ultimately not to the  
10 criminal defendant, but to the victim.

11 MR. RAUCHBERG: What we have in this case is a  
12 garden-variety publishing contract. We have the  
13 activities of the press carried on in the way the press  
14 has carried on its activities for decades, in which a  
15 contract is made to provide for payment in order to get  
16 the work.

17 Now it is the rare author who is able to work  
18 without the assurance of timely compensation. This  
19 author, the record shows, expected timely compensation and  
20 got it because the statute was not complied with.

21 The record shows that most authors require  
22 timely compensation. If you can't compensate an author,  
23 you will get less authorship.

24 QUESTION: Well, Mr. Rauchberg, could a State  
25 pass a law making all income of a convicted criminal



1 subject to escrow to pay victims of his crimes?

2 MR. RAUCHBERG: I think the answer to that is  
3 yes, because then we wouldn't have a content-based  
4 selection of speech for special treatment that results in  
5 a distortion of the flow of ideas.

6 QUESTION: This is kind of a curious case  
7 because all the payment restriction cases that we have  
8 had, I think, stand for the proposition that the State  
9 can't limit payments by the speaker to a messenger.

10 And yet in this case, we have payments to the  
11 speaker by the publisher. So we have not had that  
12 situation, have we?

13 MR. RAUCHBERG: I think it is correct to think  
14 of Henry Hill as a speaker. But it is also correct to  
15 think of Simon & Schuster as a speaker.

16 Simon & Schuster resolved to put out a book that  
17 would have a particular kind of anti-crime message that  
18 would be an antidote to romanticized versions of crime  
19 like The Godfather. Simon & Schuster resolved to utter  
20 that speech. Simon & Schuster is a member of the press.  
21 Simon & Schuster is a speaker.

22 And in order for Simon & Schuster to have  
23 engaged in the speech of publishing this book, which it  
24 wished to do, it had to make the payment. You can't say  
25 to a publisher, you are free to publish, but you're not

1 free to pay for manuscripts. There won't be any  
2 manuscripts, or there will be precious few, if they cannot  
3 pay for them.

4 So we have two speakers here, Hill and Simon &  
5 Schuster.

6 QUESTION: Suppose in Justice O'Connor's  
7 situation where there is a statute that affects oral  
8 income, it is shown that 90 percent of the recovery is  
9 from people who author books after committing crimes, or  
10 produce movies?

11 MR. RAUCHBERG: I suppose it is possible that at  
12 some point an apparently general statute could be shown to  
13 be, in fact, aimed at speech. But I don't think that is  
14 what would happen here. The instances of criminals  
15 profiting from crimes through the authorship of books are  
16 nil. It is not the kind of thing that happens.

17 This law has been in effect since 1977. And in  
18 its 14 years, the State of New York has established  
19 exactly six escrow accounts, one of which was returned to  
20 the criminal because no victims came forward, four of  
21 which are still there waiting to see, and only one of  
22 which has produced any payments to a victim. So there has  
23 been the victims of precisely one criminal who have been  
24 advantaged by the statute.

25 So a general statute, if there were a general

1 statute enacted that would help victims obtain  
2 compensation through enhancing their ability to get at all  
3 the assets of the criminals, we see there would be  
4 precious few examples of books, but all of the assets that  
5 criminals have, the millions of a Michael Milken or an  
6 Ivan Boesky, and whatever assets criminals have, would all  
7 be better reached by victims under such a statute..

8 So I don't think we would find that 90 percent  
9 figure suggested by Your Honor's hypothetical.

10 QUESTION: But would not such a law also  
11 discourage the writing of books, although it would do lots  
12 of other things, too?

13 MR. RAUCHBERG: Well, it wouldn't specifically  
14 discourage the authorship of books, just as tax laws  
15 generally applied don't discourage the authorship of  
16 books. The general tax laws don't encourage people to  
17 engage in remunerative activities other than authorship.  
18 They make the playing field equal.

19 And a statute like this -- let me say it this  
20 way. The New York statute says to any criminal in need of  
21 funds, don't try to support yourself by writing a book,  
22 support yourself by getting a job. If you had -- if you  
23 had a statute of general applicability, you would not have  
24 that impact.

25 I gave before examples of criminals whose voices

1 should be heard in the debate on public issues concerning  
2 abortion and other subjects. Not all of those people have  
3 independent means that permit them to write books without  
4 compensation. Most of them, presumably, need to earn a  
5 living. And a statute of general applicability wouldn't  
6 encourage them one way or another.

7 The New York statute says to those people, you  
8 have to go to work and you can't spend your efforts  
9 writing a book. The New York statute says to Simon &  
10 Schuster that you cannot compensate those people for books  
11 that you want to publish that you deem valuable and  
12 results in our not having those books.

13 QUESTION: Counsel, can I ask you a question  
14 that maybe is covered in the briefs, but I forget it if it  
15 is. It is generated by Justice O'Connor's earlier  
16 question.

17 Has section 10(b) of the act been construed, the  
18 part that refers to any person who has voluntarily and  
19 intelligently admitted the commission of a crime, for  
20 such -- which such person is not prosecuted? Has that  
21 been construed by the State court?

22 MR. RAUCHBERG: It was applied in this case. It  
23 was that definition that was invoked by the Crime Board to  
24 apply the statute to this book, but without any particular  
25 discussion elaborating on the meaning.



1           So we don't have any learning beyond what is on  
2     the face of the --

3           QUESTION: Do you understand that provision to  
4     require that the author admit that what he did was in fact  
5     against the law or merely must admit facts which this  
6     commission may determine violated the law?

7           MR. RAUCHBERG: I would understand it to be the  
8     latter.

9           QUESTION: So if a businessman described a lot  
10    of business activities that were arguably violations of  
11    the antitrust laws, the commission would decide whether in  
12    fact that was a violation of law or not, even though he  
13    thought he was innocent?

14          MR. RAUCHBERG: That is right. I would  
15    understand the -- I would understand the definition to  
16    mean that one who admits to having committed acts that --

17          QUESTION: Which the Board determines to be  
18    criminal.

19          MR. RAUCHBERG: That is right. Because Henry  
20    Hill in his book does not say that I engaged in acts A, B,  
21    C, and D, and thereby violated section so-and-so of the  
22    New York penal law. He says what he did. It may not have  
23    presented very difficult questions about whether or not it  
24    was a crime; but nonetheless, he says what he did, he  
25    describes his behavior. And his behavior as described in

1 his words was held to be the trigger that led to the  
2 application of the statute.

3 Now, the interests that New York advances in an  
4 effort to justify this content-based law that, in fact,  
5 inhibits speech are, first, the interest in victim's  
6 compensation. But I think it is clear that that interest  
7 can't save this statute.

8 If the existing remedies available to plaintiffs  
9 in civil actions in New York are inadequate to meet the  
10 needs of crime victims, it is incumbent upon New York to  
11 enhance them generally so that crime victims generally can  
12 do better in reaching the assets of criminals. And not  
13 just enhance them for this one asset that is speech-  
14 related.

15 I think the State recognizes that. And so it  
16 goes on into what is a more sophisticated effort to  
17 justify the statute. It says it is wrong for a criminal  
18 to be able to profit from a description of his crime in a  
19 book while the victim of the same crime remains  
20 uncompensated.

21 Now I think that that is an interest that at  
22 bottom rests on the same concerns about victim's  
23 compensation. Yes, it is wrong for the victim to go  
24 uncompensated while the criminal has the assets from a  
25 book. But it is also wrong for the victim to go

1 uncompensated while the criminal has his wages not subject  
2 to a wage garnishment or while the criminal enjoys any  
3 other assets that he may own.

4 The victim's claim for damages is a claim that  
5 enables him to seize any and all assets of a criminal  
6 except to whatever extent a State passes exemptions for  
7 homestead or the like. But with those exceptions, the  
8 victim's claim on the criminal's assets extends to all of  
9 his assets.

10 And it is offensive when the victim fails to  
11 have that claim satisfied in all of its instances. It is  
12 not offensive only when criminals get to keep the proceeds  
13 of speech and no other proceeds.

14 QUESTION: What if the State -- I mean, maybe  
15 their problem is making the law too narrow. What if they  
16 just took out the requirement, until the victim is totally  
17 compensated? What if they just said, we don't think  
18 people should profit from crimes, and nobody should make  
19 money from the commission of a crime by getting a big  
20 royalty for describing it, describing his emotions, the  
21 emotion of the victim, and all of that.

22 Would that law be better in your estimation? It  
23 wouldn't have the problem you just described.

24 MR. RAUCHBERG: It wouldn't have the problem I  
25 just described, but it would have different problems.

1 That would be a law that would declare all of these  
2 payments, these royalties, to be crime proceeds.

3 QUESTION: Right.

4 MR. RAUCHBERG: And I don't think the  
5 legislature can turn them into crime proceeds just by  
6 declaration. There has to be an independent consideration  
7 because of the First Amendment interests of whether they  
8 really are crime proceeds.

9 QUESTION: Well, they're certainly proceeds in  
10 the but for sense. But for his commission of the crime,  
11 he wouldn't have this knowledge that he's making money on  
12 it.

13 MR. RAUCHBERG: That's correct, but they're not  
14 proceeds of crime in the sense of any proximate cause  
15 sense. The -- the -- let me give you an example. The one  
16 book that this law would have applied to had it been  
17 enacted earlier is the autobiography of Malcolm X.

18 Now, that is a book that recounts Malcolm X's  
19 early life of crime as a -- as a stick-up artist, as a  
20 dope peddler, as a burglar, and then proceeds to describe  
21 how he overcame that to become an important leader of the  
22 black community, and it is a book that earned royalties  
23 because Malcolm X put in the effort to create a compelling  
24 account of his life because of his position and fame as a  
25 political leader and because of the ideas that he stood



1 for that were of great interest to people at the time.

2 Now, I -- I would suggest that the royalties  
3 paid by the publisher to Malcolm X are not crime proceeds.  
4 They are instead the earnings of an author in the typical  
5 way that authors earn money, through being who they are  
6 and through the sweat of their brow.

7 This law says that those are all crime proceeds,  
8 and I suggest that that's -- that that's not correct.  
9 They're not crime proceeds, and the law that Your Honor is  
10 hypothesizing would also treat them as crime proceeds when  
11 in fact they're not crime proceeds.

12 If New York seriously thought they were crime  
13 proceeds, it might have tried to proceed against them  
14 under a forfeiture statute. I might add that the New York  
15 Court --

16 QUESTION: Would it be possible, in your mind,  
17 to narrow the law somehow to cover only those cases that  
18 are crime -- I mean, can you envision no case in  
19 which -- in which those royalties are crime proceeds?

20 MR. RAUCHBERG: Well --

21 QUESTION: Somebody recounting a gory rape just  
22 for the sensationalism of it?

23 MR. RAUCHBERG: I have difficulty ever  
24 considering the proceeds to be proceeds of crime because  
25 of the intervening act of authorship, but even if -- even

1 if such -- even if such a -- such a work could be  
2 imagined, there is the question of whether, in order to  
3 protect all of the works, we need -- we need to tolerate  
4 that work as well in the service of the First Amendment.

5 I -- I don't know how a statute could be written  
6 without vagueness problems that would single out that kind  
7 of a book, assuming it were right to do so.

8 In any event, that's not before us, because this  
9 law in its breadth takes in every mention of crime.  
10 Violent crime, nonviolent crime, State, Federal -- they're  
11 all in there -- felonies and misdemeanors, and so it is so  
12 far beyond what we're talking about.

13 QUESTION: There -- there used to be a  
14 hypothetical in law school, as I recall, about the person  
15 who steals -- indeed, it's in the -- the -- the  
16 autobiography of Benvenuto Cellini. He steals gold or  
17 bronze or something and then crafts a beautiful statue out  
18 of it, and does the statue belong to the person from whom  
19 the bronze was stolen?

20 I forget what the answer was.

21 (Laughter.)

22 QUESTION: Do you know what the answer was?

23 MR. RAUCHBERG: I brought some books with me  
24 today.

25 (Laughter.)

1 MR. RAUCHBERG: I have Malcolm X's  
2 autobiography, but not Benvenuto Cellini's.

3 QUESTION: But I think that's the same problem  
4 we're talking about here, as far as, you know, someone who  
5 embellishes by his artistry the account of the crime.

6 MR. RAUCHBERG: Well, the -- one does more than  
7 embellish by artistry the account of a crime in a book  
8 like the autobiography of Malcolm X.

9 Or another example would be Jean Harris' book  
10 about prison conditions in Bedford Hills, where the point  
11 of the book is to discuss the effect of prison on the  
12 relationships between women and their -- and  
13 their -- prisoner women and their children, and  
14 they're -- because -- because in 2 chapters of the 14  
15 chapters in the book there's mention of the crime for  
16 which she was convicted, the whole book gets treated as  
17 though it's crime proceeds.

18 What -- what -- what I also wanted to say about  
19 the subject of crime proceeds is that the State of New  
20 York -- excuse me, the New York Court of Appeals dealt  
21 with the other ways in which persons who are criminals  
22 arguably can capitalize on their expertise. There are  
23 criminals who gain notoriety and as a result of their  
24 notoriety are able to appear on talk shows to sell books,  
25 to sell magazine articles, and if they don't mention their

1 crime New York permits them to have earnings as a result  
2 of the notoriety that they gain through crime, and doesn't  
3 make any effort to get at those earnings.

4 There are also criminals who develop expertise  
5 through their criminal activities, like the bank robber  
6 Willie Sutton who was in fact retained as a consultant to  
7 banks on bank security. New York has no interest in that,  
8 either.

9 If New York were interested in a very broad  
10 novel expansive definition of crime proceeds it should do  
11 it comprehensively and not single out speech. What the  
12 New York Court of Appeals said in dealing with that issue  
13 is that it recognized that criminals in fact can profit in  
14 that way, but it -- it -- it said that that's not the  
15 point of the law. The point of the law is to seize the  
16 proceeds of speech, and it doesn't really explain why, and  
17 in effect what the New York Court of Appeals is saying is  
18 that the law is narrowly tailored to seize precisely the  
19 proceeds of this speech.

20 I don't think that's a defense of the law, I  
21 think that's an admission that the law is targeted at  
22 speech, and since laws targeted at speech inevitably will  
23 deter some of the speech at which they're targeted, it's  
24 what condemns the law under the First Amendment.

25 QUESTION: Did Hill, in this book, write about



1 anything except his crimes?

2 MR. RAUCHBERG: Well, yes, he did. He wrote  
3 about many things. He wrote about how the mob -- and when  
4 I say the mob, I mean to talk about activities of  
5 organized crime figures other than himself, crime figures  
6 that he observed or heard about in his years of leading a  
7 life of crime. But he -- he wrote about how crime  
8 figures -- figures corrupt politicians. He wrote about a  
9 specific judge in the New York State court system who  
10 handed out ludicrously low sentences to organized crime  
11 figures. He wrote about how crime figures in prison are  
12 able to continue to conduct their prison  
13 activities -- excuse me, their criminal activities, and  
14 lead a quality of life that --

15 QUESTION: So I -- I suppose that if the -- who  
16 helped him write the book?

17 MR. RAUCHBERG: Nicholas Pileggi.

18 QUESTION: I suppose if -- if that writer had  
19 just been the sole author, that Hill had been perfectly  
20 willing to sit down for him, with him for 100 hours just  
21 to be interviewed, there wouldn't -- the author could have  
22 said the same thing in these books -- in this book without  
23 any problem with the law?

24 MR. RAUCHBERG: That's right. This book -- this  
25 book depended on hundreds of hours of interviews by

1 Pileggi of Hill, and had Hill been willing to spend those  
2 hundreds of hours without any compensation whatever, this  
3 law wouldn't have applied. There wouldn't have been any  
4 payment to Hill that triggered the application of the law.

5 But Hill was not -- Hill was not willing to do  
6 that. The record shows that Hill wanted to be paid. Hill  
7 wanted a publishing contract, and so in this case, this  
8 book, which is a valuable book, which is being called the  
9 best crime -- book about crime written in America could  
10 only have been written as a result of making payments to  
11 the person whose information was essential to its  
12 creation. The book doesn't exist without payments to  
13 Hill, and the book is a valuable book.

14 I'd like to save the few minutes I have  
15 remaining for rebuttal.

16 QUESTION: Very well, Mr. Rauchberg.  
17 Mr. Zwickel, we'll hear now from you.

18 ORAL ARGUMENT OF HOWARD L. ZWICKEL

19 ON BEHALF OF THE RESPONDENTS

20 MR. ZWICKEL: Mr. Chief Justice, and may it  
21 please the Court:

22 This case and this statute is about criminals  
23 profiting directly from their crime.

24 Mr. Hill, who is a convicted criminal as well as  
25 an admitted criminal, his book is not simply a book about

1 discussion of admissions of crime, but it is a book about  
2 his convictions as well. And the statute applies in his  
3 case for both reasons.

4 Mr. Hill and the other people to whom this  
5 statute has been applied have committed crimes and have  
6 created, by that crime directly, an asset. An asset which  
7 for some of these people is profitable in the retelling.  
8 This statute is directed against that asset because that  
9 asset is directly attributable to their wrongful conduct.

10 The statute has a compelling purpose because the  
11 story here is a story which flows from the wrongful  
12 conduct.

13 QUESTION: What -- this book told about crimes  
14 other than crimes committed by Hill, I suppose?

15 MR. ZWICKEL: Yes, it did, Your Honor.

16 QUESTION: And what is the justification for,  
17 what if he had not written about any crimes by himself,  
18 just about crimes of his colleagues? He says, I was a  
19 member of the Mafia but I never committed a single crime  
20 and I know about all these others?

21 MR. ZWICKEL: The purpose of this statute is --

22 QUESTION: This statute would not have covered  
23 it?

24 MR. ZWICKEL: No, it would not. The purpose of  
25 this statute is New York's conclusion that when the

1 criminal discusses his crime and is paid money for that  
2 discussion --

3 QUESTION: You mean a crime that he committed?

4 MR. ZWICKEL: That he committed, that's correct,  
5 that the criminal is then profiting directly from his  
6 victimization.

7 What the statute does at that point is it  
8 doesn't look at the criminal's speech. It turns its  
9 attention to the victims of that crime, the people who  
10 have been harmed and the people who have been injured.  
11 And it says --

12 QUESTION: The underlying premise is that this  
13 speech ought to be discouraged.

14 MR. ZWICKEL: The underlying premise of this  
15 statute, Your Honor, no, is that -- in fact, if that were  
16 the case --

17 QUESTION: Well, isn't the underlying premise  
18 that the speech is wrong?

19 MR. ZWICKEL: No, it is not. In fact, the only  
20 premise is that --

21 QUESTION: The underlying premise is that this  
22 speech is right?

23 MR. ZWICKEL: The statute -- The statute is  
24 neutral with respect to the speech.

25 What the statute says is that if the criminal



1 wants to discuss his story and say anything he wants, but  
2 doesn't make a dollar on that discussion, this statute  
3 does not apply.

4 But the second --

5 QUESTION: I thought the whole justification for  
6 this statute is that the public is outraged by the  
7 spectacle of someone profiting by recounting a crime. It  
8 is simply unjust. It is outrageous. Isn't that the whole  
9 premise of the act?

10 MR. ZWICKEL: Part of what you said is true, I  
11 think.

12 QUESTION: But if that's true, then you are  
13 discouraging the speech, are you not?

14 MR. ZWICKEL: No, you are not, because there  
15 certainly may be outrage. That may exist. But that was  
16 not the purpose of the statute.

17 The text of the statute and the legislative  
18 history shows that the only thing that the legislature  
19 focused upon was the unfairness, the inequity. In fact,  
20 the statute contains provisions which one might say could  
21 encourage criminals to speak. There are incentives in  
22 this statute.

23 QUESTION: Well, Mr. Zwickel, the State has  
24 certainly singled out speech for a financial burden in  
25 this statute. Is that not true?

1 MR. ZWICKEL: It has singled out the story of  
2 the speech.

3 QUESTION: And it has imposed the burden only on  
4 speech of a particular content.

5 MR. ZWICKEL: That is true, Your Honor.

6 QUESTION: And so how do you distinguish this  
7 case, then, from taxes, such as in Minneapolis Star or  
8 Arkansas Writers Project?

9 MR. ZWICKEL: In those cases, Your Honor, first  
10 of all, there was a tax directed against the press' means  
11 of publication, which because of the history of taxation  
12 in this country is presumptively a burden.

13 But here, what --

14 QUESTION: You're saying this isn't a financial  
15 burden?

16 MR. ZWICKEL: Well, it is an incidental burden.  
17 It is a burden because some people will chose not to speak  
18 because they are not getting the profits. But that is not  
19 the same sort of burden on the means of communicating your  
20 message.

21 This statute, you have to understand, is  
22 directed at a financial incentive. It is directed at one  
23 of the reasons why people chose to speak. We all know --  
24

25 QUESTION: Why does it not -- why should it not

1 have to extend to other ways of profiting from criminal  
2 behavior, then? Why just publishing a book?

3 MR. ZWICKEL: I think the reason it extends  
4 there is because the legislature felt that the story of a  
5 crime with victims is a direct victimization. And that  
6 other profits which may be dealt with in other ways did  
7 not create the same sort of inequity.

8 When the criminal -- when Berkowitz sits down  
9 for an interview and talks about why he killed these five  
10 people, and then is paid \$100,000 for that, it seems to me  
11 that New York and the other States can say, well, we can't  
12 stop his speech. In fact, he has a right to speak. But  
13 he does not have a right to profit before his victims.

14 QUESTION: Mr. Zwickel, you speak as though the  
15 law very nicely cuts out the profits that he is making  
16 because of his recount of the crime. But in fact, it does  
17 not. It says whatever amount he gets from the whole book.  
18 So, you know, there is Confessions of St. Augustine, he  
19 recounts how he stole an apple. I assume that, you know,  
20 whatever St. Augustine got for that book, the whole --

21 (Laughter.)

22 QUESTION: -- the whole amount, right, the whole  
23 thing would be considered proceeds of the apple-stealing?

24 MR. ZWICKEL: Your Honor, that's absolutely  
25 correct. This statute --

1 QUESTION: But that's ridiculous.

2 MR. ZWICKEL: What this statute does, of course,  
3 is it doesn't ask the Board to sit down and look at the  
4 work and evaluate how much speech is in the work  
5 attributable to the crime or what the reasons were.

6 QUESTION: The whole thing is presumed to be the  
7 product of the crime.

8 MR. ZWICKEL: For purposes of attachment, that  
9 is correct.

10 What the statute does is it applies neutral and  
11 objective criteria. It simply says that if you are  
12 profiting from this asset, your victims have a right to do  
13 what we would like victims in this country to do more  
14 often, to go to court and bring a civil action. And if  
15 they recover a judgment, you now have this asset placed in  
16 escrow, you have an identifiable asset. The victim now  
17 has a reason to sue the criminal because he knows that the  
18 State is holding the money.

19 All the victim is doing under this statute, Your  
20 Honor, is that he is filing a civil action for his damages  
21 and injury. If he recovers for that action based on his  
22 harm that the criminal has caused him, it shouldn't matter  
23 what part of the book is based on the actual crime.

24 The critical component here is that we are not  
25 dealing with speech. This is not a statute which is aimed



1 at publishers to try and stop the publishers from  
2 publishing the book. The record in this case shows that  
3 many criminals will speak and will continue to speak with  
4 these statutes. The publishers keep their profit. The  
5 publishers are not compelled to edit material out of the  
6 book.

7 But yes, there is a financial aspect to this.  
8 We don't deny that. And we don't deny the fact that some  
9 criminals will say, if you can't guarantee me my profits,  
10 I'm not going to tell my story.

11 But the critical issue for this case and for  
12 this Court is whether or not New York has appropriately  
13 balanced the competing interests and arrived at a statute  
14 which is narrowly tailored and targeted to this compelling  
15 purpose.

16 QUESTION: The purpose is, again, Mr. Zwickel?

17 MR. ZWICKEL: The purpose, Your Honor, is to  
18 ensure that people who commit wrongful acts do not profit  
19 directly from their victimization.

20 QUESTION: And I take it, in New York, supposing  
21 Billy the Kid had lived in New York when this statute was  
22 in effect. If he had written about the 21 men that he  
23 killed, he would be subject to this statute. If he wrote  
24 about travels in the Southwest and said nothing about  
25 these 21 men, he would not be subject to this statute.

1           Yet, ordinarily a victim should be able to get  
2   of hold of either of those proceeds.

3           MR. ZWICKEL: Your Honor, you are absolutely  
4   right. And we certainly are not saying that victims  
5   should not have opportunities to get at notoriety.

6           But this statute focuses -- notoriety is --

7           QUESTION: Why does New York distinguish between  
8   those two kinds of books written by a criminal?

9           MR. ZWICKEL: I believe that the essential  
10   reason is because New York saw the story, the asset from  
11   the story as a direct relationship to the victimization.

12          QUESTION: Kind of inflicting injury on the  
13   victims all over again, so to speak?

14          MR. ZWICKEL: Well, we talk about injury on the  
15   victims, but the injury this statute addresses -- and  
16   there is obviously a temptation to say, the statute is  
17   based upon the offensiveness of what the criminal is  
18   saying.

19          But that's not what this statute was talking  
20   about. The statute was targeted at --

21          QUESTION: If Billy the Kid wasn't writing about  
22   his crimes, but about travels in the West, and he made a  
23   lot of money out of it, I suppose if he had hurt some  
24   victims, the victims could sue him, but they very likely  
25   would have to prove their case before they could attach

1 the money.

2 MR. ZWICKEL: That's correct.

3 QUESTION: Well, the State of New York here  
4 takes it in advance.

5 MR. ZWICKEL: Well, it certainly does, but the  
6 key factor here, you also have to recognize, is the plight  
7 of victims, Your Honor. We have a situation where there  
8 are two critical components of this statute.

9 First of all, it preserves the asset at the time  
10 that the money is paid. In many of these cases, the money  
11 is paid to the criminal years before the story is  
12 produced. That money might very likely be dissipated.  
13 This statute ensures that it is held in escrow.

14 The second thing that is critical about this  
15 statute is that this statute extends the statute of  
16 limitations. So that we all know about the story that  
17 comes years after the criminal is released and after the  
18 statute of limitations has expired.

19 The victims in that situation have no remedy.  
20 Under this statute, they do have a remedy, but the remedy  
21 is limited to the in rem proceeding against the proceeds.

22 The third critical component as to why this  
23 statute serves New York's purpose so well is that it gives  
24 victims' judgments a priority over the judgments of other  
25 creditors.

1 QUESTION: Do you agree that it is fair to say  
2 that the object is not to preclude the criminal from  
3 directly profiting, the object is simply to preclude him  
4 from profiting before the victims get paid? It is a  
5 victim compensation justification, not a nonprofit  
6 justification.

7 MR. ZWICKEL: That is absolutely right.

8 QUESTION: So everything you said really about  
9 directly profiting is essentially beside your point?

10 MR. ZWICKEL: Well, it is a combined interest.  
11 It is directly profiting before your victims, Your Honor.  
12 If the victim's judgments are less than the money in the  
13 account, the criminal gets what remains in the account,  
14 which is another reason --

15 QUESTION: May I interrupt you with a slightly  
16 different question. I would like to focus a little more  
17 precisely on the State's interest involved here. One, of  
18 course, is to compensate victims and you have talked about  
19 that mostly today.

20 But in your brief you start out with the  
21 principal argument that a wrongdoer should not profit from  
22 his or her wrong. If that were a sufficient  
23 justification, the statute should be applied to victimless  
24 crimes as well as those that have victims, should it not?

25 MR. ZWICKEL: That is correct, Your Honor, and



1 it does not.

2 QUESTION: Do you think it could? Do you think  
3 it could constitutionally be applied to victimless crimes?

4 MR. ZWICKEL: Yes, I do. I think that --

5 QUESTION: Why didn't the State do it, do you  
6 suppose?

7 MR. ZWICKEL: Because I think the interest that  
8 the State focused upon which is the critical interest here  
9 is the unfairness of the criminal profiting before his  
10 victims.

11 This is not a statute designed simply to tell  
12 criminals, you can't profit at all. In fact --

13 QUESTION: If you think the interest in  
14 preventing the criminal from profiting from his wrong  
15 would be sufficient, which would mean, as I understand it,  
16 that no matter how trivial the wrong, no matter how great  
17 the reward from writing the book, you could still  
18 appropriate the entire reward?

19 MR. ZWICKEL: I do. I think States and the  
20 Federal Government have valid interests in stopping  
21 criminals from profiting from crime, but this statute is a  
22 more narrowly tailored statute in that respect.

23 This statute allows the criminal to obtain any  
24 money that is left in the account. What this statute  
25 does, as Justice Souter pointed out --

1           QUESTION: It just isn't victims, though, that  
2     have access to the escrow. It is judgment creditors, any  
3     judgment creditor.

4           MR. ZWICKEL: That's true, but there is a  
5     critical reason for that. What the statute does --

6           QUESTION: But also the State can get unpaid  
7     taxes out of the escrow.

8           MR. ZWICKEL: Your Honor, that's true. But what  
9     this statute does -- first of all, with respect to other  
10    judgment creditors, it doesn't extend the statute of  
11    limitations. But more importantly, the unsatisfied  
12    judgment creditor who normally stands in line before the  
13    victim, under this statute stands in line after the  
14    victim.

15           The reason why the statute discusses judgment  
16    creditors is to make sure that the judgment creditor comes  
17    after the victims' judgment. That is the only reason why  
18    the statute discusses. It establishes a priority.

19           QUESTION: Well, it certainly reduces the chance  
20    that the writer is going to have anything left over.

21           MR. ZWICKEL: That is possible, but there are  
22    two aspects of that --

23           QUESTION: It is possible, if there is a  
24    judgment creditor, he is going to get paid.

25           MR. ZWICKEL: He might not, but we are talking

1 in some of these cases about substantial sums of money.  
2 We hear reports of criminals making \$500,000 or \$1 million  
3 or more, but what this statute addresses is that the money  
4 is held in escrow and the criminal brings his civil tort  
5 action for his injury and suffering.

6 It is very hard for us to see that the victims  
7 who have been injured by the crime, who have suffered from  
8 this crime, should not have the right to pursue a tort  
9 remedy and know that there is an asset which flows  
10 directly from their victimization, which the Board is  
11 holding.

12 That is why this statute is such a meaningful  
13 statute, and frankly --

14 QUESTION: Excuse me, you keep saying an  
15 accent -- an asset that flows directly from their  
16 victimization.

17 MR. ZWICKEL: That's correct.

18 QUESTION: But you acknowledged before that the  
19 entire amount of that asset doesn't flow directly from  
20 their victimization. The entire advance is covered, even  
21 though there is only one minor incident addressed in the  
22 book, isn't that right?

23 MR. ZWICKEL: Your Honor, that's right.

24 QUESTION: Indeed, even if some of the advance  
25 covers expenditures for paper, pencils, for expenditures

1 for production of the book, that would still be swept up  
2 into the escrow, right?

3 MR. ZWICKEL: Well, yes --

4 QUESTION: So it is not just the direct product  
5 of the crime that is covered at all.

6 MR. ZWICKEL: Well, Your Honor, it is because  
7 the crime is in the story. But you are right, the statute  
8 does apply an objective neutral criterion. It does not  
9 seek to look at the work and say how much of this work is  
10 related to the crime.

11 The reason again for that, let me try to  
12 emphasize, is that the statute simply attaches the asset.  
13 If the victim sues and recovers a very limited judgment,  
14 then there will be a substantial sum of money available  
15 for this person.

16 QUESTION: But it seems to me that a better way  
17 to describe it, instead of constantly referring to it as  
18 the product of the crime, is to say that it is an asset  
19 tainted by the crime. Isn't that quite a bit more  
20 accurate?

21 MR. ZWICKEL: Well, I don't think New York looks  
22 at this asset in terms of what taint might suggest. I  
23 think it really does look at it in a very neutral way, and  
24 I do want to emphasize again that this statute is not  
25 simply limited to one type of book or one type of speech.



1           It is a broad-based statute which applies in any  
2     context where a criminal is profiting from the story of  
3     his crime. It applies to magazine publishers. It applies  
4     to interviews. It applies to any situation, and all the  
5     statute says is that if you have victimized someone and if  
6     someone is paying you for that victimization, whether or  
7     not it is a small part or a large part, then your victims  
8     come first. They have a right to go against this asset.

9           We will preserve this asset for your victims and  
10    we will take steps so that the victims can go ahead and  
11    sue the criminal. That is why this statute, we believe,  
12    meets Strick scrutiny as well as O'Brien scrutiny.

13          The statute is targeted precisely to its purpose  
14    and its purpose is both a legitimate purpose and a  
15    compelling one.

16          For these reasons, Your Honors, we ask that the  
17    judgment of the 2nd Circuit Court of Appeals be affirmed  
18    for the reasons set forth in our brief.

19          There will be no further questions. Thank you  
20    very much.

21          CHIEF JUSTICE REHNQUIST: Very well, Mr.  
22    Zwickel. Mr. Rauchberg, do you have rebuttal? You have 2  
23    minutes remaining.

24          REBUTTAL ARGUMENT OF RONALD S. RAUCHBERG

25          ON BEHALF OF THE PETITIONER

1 MR. RAUCHBERG: Thank you. I wanted to say a  
2 word about the statement that Hill had been convicted of  
3 crimes. The book makes a reference to conviction for  
4 attempted larceny, and since it's an attempt by definition  
5 I suppose it was unsuccessful and there was no victim. It  
6 makes a reference to a gambling conviction which the Board  
7 also might hold to be victimless crimes.

8 The Board placed its judgment below only on the  
9 admission of crimes. There wasn't a word about any  
10 convictions, and if it addressed convictions it might well  
11 hold them irrelevant.

12 QUESTION: I take it that your argument would  
13 be -- would be the same or almost the same even if in this  
14 book only crimes that Hill committed were described?

15 MR. RAUCHBERG: Yes, it would be about the same,  
16 and if Hill -- if Hill had in fact been convicted of  
17 crimes and that were the basis for the law being applied  
18 here, then one of the interests that the Court of Appeals  
19 of New York has identified, namely punishment, might be  
20 triggered.

21 I did want to emphasize the fact that the New  
22 York State Court of Appeals says that this statute is  
23 designed to punish. I don't think it's well-tailored to  
24 do that, as our brief states, but in any event New York  
25 cannot determine to punish the mentally ill, those who are

1 never charged, like Hill, who were not convicted. He --

2 QUESTION: You -- I take -- earlier I think you  
3 said that if -- if a person has committed a very brutal  
4 crime, perfectly sane, and he just makes some money out  
5 of -- out of writing about it while he's in prison, you  
6 say the First Amendment forbids the application of this  
7 law to him?

8 MR. RAUCHBERG: Yes. Yes, I do say that, and I  
9 say we have to tolerate whatever offense we take in that  
10 circumstance in order -- in order to have the valuable  
11 speech that we have when other criminals like Henry David  
12 Thoreau, Malcolm X, Martin Luther King, and many others  
13 named in our briefs, have written books that make  
14 reference to their crimes.

15 CHIEF JUSTICE REHNQUIST: Thank you,  
16 Mr. Rauchberg. The case is submitted.

17 (Whereupon, at 10:52 a.m., the case in the  
18 above-entitled matter was submitted.)  
19  
20  
21  
22  
23  
24  
25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

#90-1059 - SIMON AND SCHUSTER, INC., Petitioner V. MEMBERS OF T  
NEW YORK STATE CRIME VICTIMS BOARD, ET AL.

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