CONSTITUTIONAL LAW—New York's "Son of Sam" Law, Which Requires an Accused or Convicted Criminal's Income from Works Depicting His Crime Be Held in an Escrow Account for the Victims and Creditors of the Criminal, Is a Content-Based Restriction of Speech Violative of the First and Fourteenth Amendments—*Simon & Schuster, Inc. v. Members of the New York Crime Victims Board*, 112 S. Ct. 501 (1991).

I. INTRODUCTION

Henry Hill is an admitted mobster who testified against many of his former Mafia colleagues in 1980 under a grant of immunity.[1] Hill committed several notorious crimes, including the Boston College basketball "point-shaving" scandal, in which he arranged for two basketball players to shave points during the 1978-1979 season.[2] Hill also participated in the largest successful cash robbery in American history—the theft of six million dollars from Lufthansa Airlines.[3] Hill's other crimes included extortion, narcotics distribution, and robbery.[4] In August 1981, Hill contracted with author Nicholas Pileggi to compose a book about Hill's life of crime.[5] Hill and Pileggi spent an estimated three hundred hours together to complete the work.[6]

In September 1981, Simon & Schuster, Inc. entered into a contract with Hill and Pileggi to publish the book entitled *Wiseguy*, which was eventually published in January 1986.[7] In *Wiseguy*, Hill admitted participating in numerous crimes and discussed his extortion conviction and subsequent imprisonment.[8] *Wiseguy* was a great success, selling more than one million copies within nineteen months of publication.[9] In 1990, the book was made into an award-winning film entitled *GoodFellas*.[10]

In 1986, prior to the making of *GoodFellas*, the New York State Crime Victims Board ("Board") notified Simon & Schuster of its possible violation of

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1. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501, 506 (1991). Hill testified in order to avoid prosecution for his own involvement in narcotics trafficking. *Id.* Hill is currently in the Federal Witness Protection Program under an assumed name in an unknown location. *Id.*
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*; *see* NICHOLAS PILEGGI, WISEGUY: LIFE IN A MAFIA FAMILY (1985). *Wiseguy* was not Hill's first publication of his criminal activities. *Id.* at 245. In the early 1980s, he sold the story of the point-shaving scandal to *Sports Illustrated* for $10,000. *Id.*
8. Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd., 112 S. Ct. at 506; *see* NICHOLAS PILEGGI, WISEGUY: LIFE IN A MAFIA FAMILY (1985).
9. Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd., 112 S. Ct. at 507.
10. *Id.*; *see* GOODFELLAS (Warner Bros. 1990).

New York law by failing to pay directly to the Board monies due Hill for *Wiseguy*.[11] Simon & Schuster, complying with a Board order, furnished copies of applicable contracts it had with Hill and suspended future payments to Hill pending a Board investigation.[12] Simon & Schuster had already paid Hill's agent $96,250 in advances and royalties on his behalf with an additional $27,958 yet to be paid.[13]

In 1987, the Board found the arrangement between Hill and Simon & Schuster violated New York's Son of Sam law.[14] Although Hill was never tried or convicted of the crimes depicted in *Wiseguy*, the Board ordered all money derived from the book to be held in escrow for the benefit of the victims of his crimes.[15]

The Son of Sam law was enacted to ensure victims can obtain money in satisfaction of civil judgments against criminals before the depletion of the funds.[16] In addition, forfeiture statutes, prejudgment attachment procedures, and orders of restitution imposed at sentencing seek to accomplish this purpose.[17]

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11. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. at 507.

12. *Id.*

13. *Id.*

14. *Id.* The New York Legislature enacted the Son of Sam law in 1977 after a public outcry that serial killer David Berkowitz, known as the "Son of Sam," potentially could profit by exploiting his notorious crimes while his victims remained uncompensated. *Id.* at 504. The resulting law provided:

> Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives.

N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1992).

The statute has been employed against Jean Harris, the convicted killer of Herman Tarnower, the "Scarsdale Diet" doctor; Mark David Chapman, the assassin of John Lennon; and R. Foster Winans, a *Wall Street Journal* columnist convicted of insider trading. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. at 506. Ironically, the statute was not applied to David Berkowitz who voluntarily paid his royalties from his book, *Son of Sam*, to his victims or their estates. *Id.*

15. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. at 507.

16. *Id.* at 505 (citing Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541, 548 (N.Y. 1991) (holding the Son of Sam law did not apply to victimless crimes), *vacated*, 112 S. Ct. 859 (1992) (vacating judgment due to Court's decision in Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd., 112 S. Ct. 501 (1991)). To obtain funds from the escrow account, the victims must first obtain civil judgments. *Id.*

17. *Id.*

The Son of Sam law required any entity contracting with a person accused or convicted of a crime to submit a copy of the contract to the Board.[18] The contracting entity was required to relinquish to the Board any income resulting from that contract.[19] The Board held this income in an escrow account for five years, during which time it made disbursements in the order of priority established by the statute.[20]

The Son of Sam law required disbursements from the escrow account be made in the following order: (1) for the payment of the criminal's legal representation; (2) for expenses accrued as a result of the production of the artistic work depicting the crime, such as payments to literary agents;[21] (3) for State subrogation claims for payments made to the crime victims; (4) for civil judgments victims of the crime obtained; and (5) for any other creditors, including taxing authorities.[22] The first two items in this schedule, taken together, could not exceed one-fifth of the total amount in the account.[23] If any funds remained at the end of the five year period, they were to be returned to the criminal.[24]

The law was very broad in several ways. The law applied not only to convicted criminals, but to any individual who admitted committing a crime—whether or not a prosecution ever occurred.[25] The law also applied to any work only tangentially describing a crime.[26] Additionally, the law superseded other applicable statutes of limitations by providing victims with five years from the date the escrow account was established to obtain a judgment against the author and levy against the account.[27]

In 1987, Simon & Schuster brought suit against the New York State Crime Victims Board, under 42 U.S.C. § 1983 seeking a declaratory judgment that the law violated the First Amendment and an injunction preventing the law's enforcement.[28] The United States District Court for the Southern District of New York found the statute constitutional,[29] and the Court of Appeals for the Second Circuit affirmed.[30]

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18. *Id.* at 504.
19. *Id.*
20. *Id.* at 505 (citing N.Y. EXEC. LAW § 632-a(11) (McKinney 1982 & Supp. 1992)).
21. *Id.* The statute was unclear as to whether the contracting entity was entitled to money under this priority and thus could get its money off the top, or whether as the potential speaker at which the statute is aimed, it also would have to wait until the lapse of five years. *Id.* at 507.
22. *Id.* at 505 (citing N.Y. EXEC. LAW § 632-a(11) (McKinney 1982 & Supp. 1992)).
23. *Id.* (citing N.Y. EXEC. LAW § 632-a(8) (McKinney 1982 & Supp. 1992)).
24. *Id.* (citing N.Y. EXEC. LAW § 632-a(4) (McKinney 1982 & Supp. 1992)).
25. *Id.* (citing N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1982 & Supp. 1992)).
26. *Id.* at 511.
27. *Id.* at 505 (citing N.Y. EXEC. LAW § 632-a(7) (McKinney 1982 & Supp. 1992)).
28. *Id.* at 507.
29. *Id.* at 507-08.
30. *Id.* at 508.

The Supreme Court granted certiorari to consider the statute's constitutionality in order to provide guidance in light of a federal law and numerous state laws sharing similar objectives.[31] The Supreme Court *held*, reversed.[32] New York's "Son of Sam" law, which requires an accused or convicted criminal's income from works depicting his crime be held in an escrow account for the victims and creditors of the criminal, is a content-based restriction of speech violative of the First and Fourteenth Amendments. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991).

II. MAJORITY OPINION

Justice O'Connor wrote the majority opinion.[33] She began by noting that *Wiseguy* was Henry Hill's frank narration of his day-to-day existence in organized crime.[34]

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31. *Id.* (citing Karen M. Ecker & Margot J. O'Brien, Note, Simon & Schuster, Inc. v. Fischetti: *Can New York's Son of Sam Law Survive First Amendment Challenge?* 66 NOTRE DAME L. REV. 1075, 1075 n.6-7 (1991)). There is a similar federal law, the Special Forfeiture of Collateral Profits of Crime Act, 18 U.S.C. §§ 3681-3682 (1988), and approximately 40 similar state laws. *See* Ecker & O'Brien *supra* (citing ALA. CODE § 41-9-80 (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 (West Supp. 1991); COLO. REV. STAT. § 24-4.1-201 (1989); CONN. GEN. STAT. ANN. § 54-218 (West 1985); DEL. CODE ANN. tit. 11, § 9103 (1987); FLA. STAT. ANN. § 944.512 (West Supp. 1991); GA. CODE ANN. § 17-14-31 (Harrison 1982); HAW. REV. STAT. § 351-81 to -88 (Supp. 1990); IDAHO CODE § 19-5301 (1987); ILL. ANN. STAT. ch. 70, para. 401-14 (Smith-Hurd 1989 & Supp. 1991); IOWA CODE § 910.15 (1993); KAN. STAT. ANN. § 74-7319 (Supp. 1990); KY. REV. STAT. ANN. § 346.165 (Baldwin 1986); LA. REV. STAT. ANN. § 46:1831 to :1839 (West 1982 & Supp. 1991); MD. ANN. CODE art. 27, § 764 (1988); MASS. ANN. LAWS ch. 258A, § 8 (Law. Co-op. 1980 & Supp. 1991); MICH. COMP. LAWS ANN. § 780.768 (West Supp. 1988); MINN. STAT. ANN. § 611A.68 (West 1987 & Supp. 1991); MISS. CODE ANN. § 99-38-1 to -11 (Supp. 1990); MO. ANN. STAT. § 595.045 (Vernon Supp. 1991); MONT. CODE ANN. § 53-9-104(1)(d) (1989); NEB. REV. STAT. § 81-1836 to -1840 (1987); NEV. REV. STAT. ANN. § 217.265 (Michie 1986); N.J. STAT. ANN. § 52:4B-28 (West 1986 & Supp. 1990); N.M. STAT. ANN. § 31-22-22 (Michie 1990); N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991); OHIO REV. CODE ANN. § 2969.01-.06 (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 17 (West Supp. 1990); OR. REV. STAT. § 147.275 (1990); PA. STAT. ANN. tit. 71, § 180-7.18 (Purdon 1990); R.I. GEN. LAWS § 12-25.1-3 (Supp. 1990); S.C. CODE ANN. § 15-59-40 (Law. Co-op. Supp. 1990); S.D. CODIFIED LAWS ANN. § 23A-28A-1 (1988); TENN. CODE ANN. § 29-13-202 (1980 & Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 8309-1, § 16 (West Supp. 1991); UTAH CODE ANN. § 78-11-12.5 (1987); 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)).

32. Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd., 112 S. Ct. at 512.

33. *Id.* at 504. The majority included six justices. *Id.* Justice Thomas took no part in the consideration of the case. *Id.* at 512. Justices Blackmun and Kennedy wrote concurring opinions as well. *Id.*

34. *Id.* at 506. The Court included several quotes from the book, which give a feel for the quality and poignant truthfulness of the novel. The quotes may indicate that the Court was as

Justice O'Connor utilized a balancing approach in a reaffirmation of First Amendment rights—even for "criminals." Relying on *Leathers v. Medlock*,[35] she wrote, "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."[36] In *Leathers*, the Court upheld an Arkansas sales tax law, finding no content-based restriction in the law that taxed cable television while exempting the print media.[37] The Arkansas statute was constitutional because it did not target a medium of communication, did not apply to a small group of speakers, and was not content-based.[38]

In *Leathers*, the Court discussed the presumptive invalidity of content-based restrictions.[39] It noted a statute imposing a financial burden on speakers based on the content of their speech is presumptively violative of the First Amendment.[40] The Court found the prohibition against content-based regulation to be so obvious as to require no explanation.[41] It emphasized the market should decide what views should be voiced; to do otherwise would jeopardize the "'premise of individual dignity and choice upon which our political system rests.'"[42] Content-based statutes place the government in the position of deciding what ideas should be available on the marketplace, thus

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curious about the book as the general public: The Court began by noting Hill achieved his childhood dream of being a gangster. *Id.* In support of this observation, the Court quoted a passage in *Wiseguy* in which Hill remarked: "At the age of twelve my ambition was to be a gangster. To be a wiseguy. To me being a wiseguy was better than being president of the United States." *Id.* (quoting PILEGGI, *supra* note 7, at 19). The Court also noted in describing how the Mafia received preferential treatment in prison, Hill wrote:

> It was like a wiseguy convention—the whole Gotti crew, Jimmy Doyle and his guys, "Ernie Boy" Abbamonte and "Joe Crow" Delvecchio, Vinnie Aloi, Frank Cotroni.
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> It was wild. There was wine and booze . . . . When there was an inspection, we stored the stuff in the false ceiling, and once in a while, if it was confiscated, we'd just go to the kitchen and get new stuff.
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> We had the best food smuggled into our dorm from the kitchen. Steaks, veal cutlets, shrimp, red snapper. Whatever the hacks could buy, we ate. It cost me two, three hundred a week. Guys like Paulie spent five hundred to a thousand bucks a week. Scotch cost thirty dollars a pint. The hacks used to bring it inside the walls in their lunch pails. We never ran out of booze, because we had six hacks bringing it in six days a week. Depending on what you wanted and how much you were willing to spend, life could be almost bearable.

Id. at 507 (quoting PILEGGI, *supra* note 7, at 150-51).

35. Leathers v. Medlock, 111 S. Ct. 1438 (1991).

36. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. at 508 (citing Leathers v. Medlock, 111 S. Ct. at 1443-44).

37. Leathers v. Medlock, 111 S. Ct. at 1447.

38. *Id.* at 1443-44.

39. *Id.*

40. *Id.* at 1444-45.

41. *Id.* at 1444.

42. *Id.* at 1444-45 (quoting Cohen v. California, 403 U.S. 15, 24 (1971)).

taking this decision from the public.[43]

The New York Crime Victims Board made several arguments in defense of the statute. First, the Board argued the financial burden imposed by the Son of Sam law was distinguishable from the sales tax imposed in *Arkansas Writers' Project, Inc. v. Ragland*.[44] Arkansas law provided for a four percent sales tax from which it exempted numerous items, including the sale of newspapers and "religious, professional, trade and sports journals and/or publications printed and published within [Arkansas]."[45] The effect of the law was to tax general interest magazines while exempting newspapers and religious, professional, trade, or sports journals.[46] The Court held such a content-based application of the tax was unconstitutional.[47] The Court in *Simon & Schuster* flatly rejected the Board's assertion that the escrow account device was distinguishable from the sales tax in *Ragland*.[48] The Court found the argument meritless, noting a financial burden on speech chills the speech, regardless of the form.[49]

The Board next argued the statute did not violate the First Amendment because the legislature did not intend to suppress speech.[50] The Court, making short shrift of this argument, held "'[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'"[51] Simon & Schuster need not have produced evidence of an illicit legislative intent to regulate speech content in order to prevail.[52]

Finally, the Board claimed that even if the statute were content-based, it did not offend the First Amendment because it was aimed at the entity contracting with a convicted criminal (Simon & Schuster), and not the convicted criminal (Hill) directly.[53] The Court found it irrelevant under First Amendment analysis whether Simon & Schuster or Hill was considered the speaker.[54] It noted that under the Son of Sam law, Simon & Schuster would be relegated to publishing only books written by criminals willing to forego compensation for at least five years.[55] Thus, the law imposed a substantial

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43. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. at 508.

44. *Id.*; *see* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

45. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. at 224.

46. *Id.*

47. *Id.* at 233.

48. Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd., 112 S. Ct. at 508.

49. *Id.* at 508-09.

50. *Id.* at 509.

51. *Id.* (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983)).

52. *Id.* (citing Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987)).

53. *Id.*

54. *Id.*

55. *Id.* at 508.

content-based financial disincentive on speech.[56] The Court found such disincentives were the same regardless of whether the statute was enforced against Simon & Schuster or against Hill directly.[57] Any entity so contracting is by definition a medium of communication.[58] First Amendment protection does not vary with the identity of the speaker.[59]

The Court, finding a content-based restriction, next inquired whether the statute was narrowly drawn to achieve a compelling state interest, as required by the First Amendment.[60]

The Court found two compelling state interests: (1) "ensuring that victims of crime are compensated by those who harm them,"[61] and (2) "ensuring that criminals do not profit from their crimes." [62] The Board disclaimed any interest in protecting readers' sensibilities.[63] The Court noted that even offensive speech merits First Amendment protection.[64] Additionally, a state has little or no interest in compensating victims from the profits of criminal works rather than from the criminal's overall assets.[65]

The Court held although there was a compelling interest in compensating victims from the fruits of the crime, the statute was not narrowly tailored to advance that objective.[66] The Board failed to assert any justification for accomplishing this interest by limiting the source of the compensation to profits earned from storytelling rather than to all fruits of the crime.[67] Furthermore, if such an interest existed in classifying illegally obtained assets in this manner, it did not reach a compelling level.[68] The Court relied on *Ragland* as well as *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[69] in which the important interest of taxation did not justify selective taxation of the press when the tax was "completely unrelated to a press/non-press distinction."[70]

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56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id. But see, infra* text accompanying notes 87-96. In his brief concurrence, Justice Kennedy stated once a statute is found to be content-based, the analysis should stop and the statute should be declared unconstitutional. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. at 512 (Kennedy, J., concurring).
61. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. at 509.
62. *Id.* at 510.
63. *Id.* at 509.
64. *Id.* (citing Texas v. Johnson, 491 U.S. 397, 414 (1989)).
65. *See generally id.* at 509-10.
66. *Id.* at 512.
67. *Id.* at 510.
68. *Id.*
69. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).
70. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S.

Two factors, taken together, made the Son of Sam law overinclusive. First, the statute defined a "person convicted of a crime" so broadly that it included anyone who admitted having committed a crime in the work, regardless of whether the person was ever actually accused or convicted.[71] Thus, although Henry Hill was never convicted of a crime, the statute applied because he mentioned his crimes in the book. Second, the statute also applied to a work even if it mentioned the author's criminal acts only incidentally.[72]

The danger of such overinclusiveness is that it prevents authors from freely writing about their lives for fear that a brief mention of an earlier criminal transgression may result in the income from the work being escrowed for the "victims" of the crime.[73]

The statute was so overinclusive that numerous works of historical value, such as *The Autobiography of Malcom X*,[74] Thoreau's *Civil Disobedience*,[75] and *Confessions of Saint Augustine*[76] would have required escrowed payment.[77] Authors Emma Goldman, Martin Luther King, Jr., Sir Walter Raleigh, Jesse Jackson and Bertrand Russell would have been subject to the statute as well.[78]

The Court refrained from deciding various questions, including whether book royalties constituted profits of a crime.[79] Finding the statute overinclusive, the Court did not address the Board's contention that when a regulation affects some speakers only incidentally, it is content-neutral.[80] Further, the Court did not consider the appropriateness of the balancing approach, namely whether the statute was narrowly drawn to accomplish a compelling state interest, as Justice Kennedy raised in his concurrence, because the parties did not argue this matter.[81] The Court also refused to address Justice Blackmun's concurrence that the law may be underinclusive as well.[82] Justice Blackmun thought it was necessary to express this concern

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Ct. at 510 (citing Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. at 586).

71. *Id.* at 511.

72. *Id.*

73. *Id.* at 512.

74. MALCOM X, THE AUTOBIOGRAPHY OF MALCOM X (1973).

75. HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (1970).

76. SAINT AUGUSTINE, BISHOP OF HIPPO., THE CONFESSIONS OF SAINT AUGUSTINE (Edward B. Pusey trans. 1949).

77. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 112 S. Ct. at 511.

78. *Id.*

79. *Id.* at 510.

80. *Id.* at 511 n.**. In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court held statutes were content-neutral when their purpose was unrelated to content and had only an incidental effect on the speech. *Id.* at 798.

81. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. at 512 n.**.

82. *Id.* at 512 n.**.

because other states would be seeking guidance from the Court's decision.[83] In holding the New York law unconstitutional, the Court noted it had no occasion to determine the constitutionality of other similar laws.[84] The Court invalidated the law by simply concluding the state's interest in compensating victims from the fruits of crime was not narrowly tailored to accomplish that interest.[85]

III. KENNEDY'S CONCURRENCE

Justice Kennedy asserted the Court incorrectly applied a balancing test to determine whether the statute was contrary to the First Amendment.[86] Instead, Kennedy reasoned when a statute is determined to be content-based, the regulated speech has the full protection of the First Amendment, and any further analysis merely weakens this protection.[87]

Justice Kennedy asserted the balancing test the majority employed is derived from an equal protection analysis that has been wrongly applied to First Amendment cases.[88] The misapplication began with *Carey v. Brown*.[89] In *Carey*, the Court held a statute that prohibited the picketing of residences and dwellings but exempted peaceful labor picketing at a place of employment was a denial of equal protection because it discriminated based on the subject matter of expression.[90] Justice Kennedy explained *Carey* was decided on equal protection principles, stating, "[a] principle of equal protection [was] transformed into one about the government's power to regulate the content of speech in a public forum, and from this to a more general First Amendment statement about the government's power to regulate the content of speech."[91] After *Carey*, the Court misapplied the equal protection standard to First Amendment analysis in a series of cases, and thus adopted the balancing standard "by accident."[92]

Justice Kennedy acknowledged that some categories of speech justify

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83. *Id.* at 512 (Blackmun, J., concurring).
84. *Id.*
85. *Id.*
86. *Id.* (Kennedy, J., concurring).
87. *Id.* at 512-13 (Kennedy, J., concurring).
88. *Id.* at 512 (Kennedy, J., concurring).
89. *Id.* at 513 (Kennedy, J., concurring) (citing Carey v. Brown, 447 U.S. 455 (1980)).
90. Carey v. Brown, 447 U.S. at 471.
91. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. at 513 (Kennedy, J., concurring).
92. *Id.* (Kennedy, J., concurring) (discussing Texas v. Johnson, 491 U.S. 397 (1989) (holding act of burning American flag was expressive conduct protected by First Amendment); Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (holding differential access to nontraditional limited public fora did not violate equal protection); Boos v. Barry, 485 U.S. 312 (1988) (holding statute distinguishing between nonlabor and labor activities did not violate equal protection)).

content-based regulation, including obscenity, incitement, or speech presenting a clear and present danger.[93] Use of this traditional categorical approach to areas of speech in which content may be regulated is preferable to the equal protection balancing approach.[94] Under this rationale, content-based regulations are per se violative of the First Amendment unless they fall into a category of unprotected speech, such as obscenity, incitement or speech presenting a clear and present danger.

Justice Kennedy found a series of issues that must be resolved to determine the constitutionality of a regulation affecting speech: (1) whether the regulated speech is included in an unprotected category; (2) whether another constitutional right is affected; (3) whether the regulated speech combines expressive and nonexpressive activity; (4) whether the regulation is a time, place, or manner restriction; and (5) whether the regulation is content-based.[95] Justice Kennedy asserted that with these difficult issues already in the First Amendment arena, the Court should "adhere to a surer test for content-based cases and . . . avoid using an unnecessary formulation, one with the capacity to weaken central protections of the First Amendment."[96]

IV. CONCLUSION

New York's Son of Sam law is overinclusive in that it applies to any medium referring to even a slight legal transgression committed several years ago.[97] In finding the New York law unconstitutional, the Court refrained from determining the constitutionality of similar laws adopted by other states.[98]

Iowa also has enacted a law, which unlike New York's, applies only to works depicting a crime for which a conviction was obtained.[99] Thus, Iowa's statute does not suffer the extreme overbreadth of New York's law. In *Simon & Schuster* the Court rested its holding on both content-based and overbreadth rationales, while withholding judgment on the constitutionality of statutes such as Iowa's, which may not suffer from such overbreadth. A

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93. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. at 514 (Kennedy, J., concurring). These categories are not the only ones that have or ever will exist, as evidenced by the possible addition of depictions of child-sexual conduct. *Id.* (Kennedy, J., concurring) (citing New York v. Ferber, 458 U.S. 747 (1982)).

94. *Id.* (Kennedy, J., concurring).

95. *Id.* at 514-15 (Kennedy, J., concurring).

96. *Id.* at 515 (Kennedy, J., concurring).

97. *See supra* text accompanying notes 74-78.

98. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 112 S. Ct. at 512. The Court observed, "The Federal Government and many of the states have enacted statutes designed to serve purposes similar to that served by the Son of Sam law. Some of these statutes may be quite different from New York's, and we have no occasion to determine the constitutionality of these other laws." *Id.* *See supra* note 31.

99. *See* IOWA CODE § 910.15 (1993).

challenge to a law like Iowa's would require the Court to focus solely on a content-based First Amendment rationale. Based on the Court's strong pronouncements regarding prohibitions against content-based restrictions, all Son of Sam laws should be invalidated as content-based restrictions if they seek to escrow income derived solely from a form of speech, rather than from all sources of the criminal's income.

In condemning content-based laws, the Court emphasized the principles at the core of the First Amendment: "'[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'"[100]

Regardless, Henry Hill's story does not seem offensive, if the million copies sold and the awards for the movie *GoodFellas* are any indication. The public apparently has a genuine curiosity about Hill's story. The *Washington Post* described it as an "amply detailed and entirely fascinating book that amounts to a piece of revisionist history,"[101] and the *New York Daily News* called it "the best book on crime in America ever written."[102]

The Supreme Court's holding ensures that future literary and artistic works such as *Wiseguy* and the movie *GoodFellas* will not be censored by government regulation, thus "'putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.'"[103]

Debra L. Scorpiniti

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100. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. at 508 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).

101. *Id.* at 507.

102. *Id.*

103. *Id.* at 508 (quoting Leathers v. Medlock, 111 S. Ct. 1438, 1444 (1991)).