Wising Up: Son of Sam Laws and the Speech and Press Clauses

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"Son of Sam" laws aim to compensate victims of crime by awarding them the income earned when the criminals who injured them sell the stories of their illegal exploits to the media. The prevalence of these statutes, which forty-three states and the federal government have enacted, reflects overwhelming popular approval of their underlying policy: "the victim must be more important than the criminal." The broad reach of "Son of Sam" provisions, however, raises the question whether this well-meaning social legislation impermissibly burdens constitutionally protected rights of free expression.

In this Article, Garrett Epps relates the tale of New York mobster Henry Hill, the writing of his autobiographical book Wiseguy, and the litigation it spawned. The Hill saga illustrates the conflict between preventing criminals from profiting at the expense of their victims and protecting the First Amendment rights of criminal authors. Mr. Epps first surveys the breadth of "Son of Sam" statutes, identifying the complex issues of free speech and press they create. He then recounts the history of the Wiseguy case, pointing out the confused approaches that state and lower federal courts have taken when analyzing the constitutionality of "Son of Sam" statutes. Mr. Epps resolves this confusion by noting that "Son of Sam" laws are targeted at the content of expressive activity, and therefore are subject to the strict-scrutiny analysis required by Supreme Court precedent. He asserts that although the sweeping "Son of Sam" statutes further a legitimate governmental interest in compensating victims of crime, they are not narrowly tailored to achieve that goal because they do not attach to a criminal's assets generally, but only to the proceeds from his literary ventures. Mr. Epps argues further that, even if "Son of Sam" laws are not unconstitutional per se, the overbreadth of many such statutes violates the Speech and Press Clauses. In particular, he contends that sequestering the proceeds of publishers and others who contract with criminal authors constitutes both a prior restraint and a licensing of publishers in violation of the First Amendment. Mr. Epps concludes...
that the rights of even criminal authors are firmly rooted in the Constitution. He thus calls for a “wising up” with regard to the constitutional issues raised by the Wiseguy case and for the striking down of “Son of Sam” laws as unjustifiable restrictions on free speech and a free press.

I. AN AMERICAN LIFE: HENRY HILL, THE AUTOBIOGRAPHY

Here is a classic American story.¹

A young man of worthy family, ambitious and intelligent but poor, finds himself adrift on the streets of a great city. He accepts a menial job in the lowest level of the business organization of a rich and powerful man. Through devotion to duty, creativity, and good luck, he attracts the favor of the proprietor. His patron offers him greater and greater responsibility. He excels in his work and soon amasses substantial means of his own, as well as the love of a faithful woman. Children are born; business affairs prosper. All is not smooth: there is domestic unhappiness, public tribulation. At last, however, he turns to public service and emerges from the trials of midlife wiser, happier, and more prosperous than ever, a pillar of his community and a source of guidance for the nation.

1. The autobiography is a recognized American art form:

Mythic autobiography, the major indigenous narrative form in American literature, originates in the Puritan diaries, where divine intent regarding an individual’s spiritual destiny is sought amid the obscure omens of personal events within the physical world. Melville generalized this focus upon the juncture where the divine manifests itself through nature into a theory of art when he asserted that art is a meeting and mating of opposites. But this theory and such inside narratives as Billy Budd and Moby Dick issuing from it had been preceded by Emerson’s Transcendental version of the Puritans’ symbolic drama within the single, separate person; and they were later philosophically justified by William James’ vigorous defense of the “I”, the interior life, as the only place where we can find real fact in the making. As James saw it, then, the American imagination grabs hold at the precise moment where the transformational event takes place, which occurs from the inside out, so its truth can only be observed there, inside, while, miraculously, existence erupts from being. It bears witness to and exemplifies creation, the individuating process whereby, having gathered its powers at its source, purified of whatever would weigh it down, whether matter, guilt, or egotism, the imagination leaps free. Thus, whether practiced by Cotton Mather, Thoreau, Whitman, Hemingway, Henry Miller, or William Carlos Williams, to mention only the established literary figures, this form affirms as the supreme value for man the individual liberated from necessity and free to act joyfully and for good in the world. Without a doubt, and vigorously, it celebrates fact in the making.

This story has been told, in one fashion or another, since before the American Revolution. Usually the protagonist is a humble printer, or follows some other lawful trade. But the story may be the same in many of its essentials even when it recounts the *cursus honorum* of an assiduous foot soldier for organized crime.

The litigation that is the subject of this Article, embodied in the decision of the U.S. District Court for the Southern District of New York in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board* and its affirmation by the U.S. Court of Appeals for the Second Circuit in *Simon & Schuster, Inc. v. Fischetti*, concerns the autobiography of such a figure—Henry Hill, a former member of New York's prominent Lucchese crime family.

The story told in *Wiseguy* is of a figure remarkable in part for his

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2. See, e.g., BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN (Modern Library ed. 1944). For archetypal fictional versions, see, e.g., HORATIO ALGER, JR., MARK MASON'S VICTORY: THE TRIALS AND TRIUMPHS OF A TELEGRAPH BOY (1899); HORATIO ALGER, JR., PHIL, THE FIDDLER: OR, THE STORY OF A YOUNG STREET MUSICIAN (1872); HORATIO ALGER, JR., SLOW AND SURE: OR, FROM THE STREET TO THE SHOP (1872); and others by the same author. A slightly darker version of the Alger story is told in NATHANIEL DIANA, A COOL MILLION: THE DISMANTLING OF LEMUEL PITKIN (1934). Two nineteenth-century versions worth reading are FREDERICK DOUGLASS, NARRATIVE OF FREDERICK DOUGLASS: THE LIFE OF AN AMERICAN SLAVE (1845), and BOOKER T. WASHINGTON, UP FROM SLAVERY (1901). More modern versions of the story can be found in JIMMY CARTER, WHY NOT THE BEST? (1975); LEE IACOCCA, IACOCCA: AN AUTOBIOGRAPHY (1984); MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X (1965); NORMAN PODHORETZ, MAKING IT (1980); RONALD REAGAN, AN AMERICAN LIFE (1990); and many others. Readers may protest that the author is permitting a slightly puckish tone to creep into his selection of bibliographical references; however, the inclusion of works by admired figures in this context is not totally whimsical. One of the subtexts of this Article is a suggestion that the boundary between speech by criminals and speech by those whom we find more admirable may be less easy to find than it seems. A careful reading of autobiographies by criminals or those who admit to crimes, whether the work is by Malcolm X, Eldridge Cleaver, Jack Henry Abbott, or Henry Hill, will reveal that these writings fulfill many of the conditions set by critics for excellence in the category of autobiography. See, e.g., Robinson letter, supra note 1.


5. NICHOLAS PILEGGI, WISEGUY: LIFE IN A MAFIA FAMILY (1985). For Henry Hill's family identification, see, e.g., *id.* at 18. The title comes from an underworld term for "gangster." *Id.* at 19.

To me being a wiseguy was better than being president of the United States. It meant power among people who had no power. It meant perks in a working-class neighborhood that had no privileges. To be a wiseguy was to own the world. I dreamed
energy and determination, in part for his simple ordinariness. If Sher-
lock Holmes's Professor Moriarty was the "Napoleon of Crime," Henry
Hill might be denominated its Everyman. Without achieving promi-
nence in his crime organization, he was nonetheless involved in many of
its most sensitive and profitable operations:

It wasn't that Henry was a boss. And it had nothing to do with
his lofty rank within a crime family or the easy viciousness with
which hoods from Henry's world are identified. Henry, in fact,
was neither of high rank nor particularly vicious; he wasn't
even tough . . . . What distinguished Henry from most of the
other wiseguys . . . was the fact that he seemed to have total
access to all levels of the mob world.  

Born on June 11, 1943, Hill went to work at the age of eleven as an
errand boy at a taxi stand in Brownsville-East New York owned by Paul
Vario, "a rising star in one of the city's five organized-crime families and
the man who ran most of the rackets in the area at the time." While
working for Vario, Hill was introduced to, among other activities, coun-
terfeiting, Christmas-tree fraud, gambling, labor union corrup-
tion, and arson. By the time he was twenty-two, Hill was a trusted
member of Vario's crime organization. He married Karen Freid, a
young woman from Long Island, and the couple had children. Hill's
career horizons subsequently widened to include hijacking of cargo
shipped in and out of New York's Kennedy Airport. Hill and his asso-
ciates also began exporting stolen securities. In 1972, he was sentenced
to ten years in prison for extortion. He was paroled six years later and

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6. SIR ARTHUR CONAN DOYLE, The Final Problem, in 2 THE ANNOTATED SHERLOCK
7. PILEGGI, supra note 5, at 217.
8. Id. at 35.
9. Id. at 16.
10. Id. at 23-24.
11. This heartwarming organized-crime holiday ritual involves creating apparently salea-
able but actually worthless Christmas trees out of discarded tree limbs, trunks, and glue. Once
at home, the trees fall apart. Id. at 24.
12. Id. at 25.
13. Id. at 28.
14. Id. at 30-31.
15. Id. at 61.
16. Id. at 71.
17. Id. at 88-89.
18. Id. at 92.
19. Id. at 142-43.
returned to his crime career.\textsuperscript{20} Hill began selling drugs and firearms,\textsuperscript{21} and distributing liquor to bars and restaurants illegally.\textsuperscript{22}

Henry Hill’s story is striking for its squalid moral atmosphere. Murder was a common business technique for him and his associates:

> It didn’t take anything for these guys to kill you. They liked it. They would sit around drinking booze and talk about their favorite hits. They enjoyed talking about them. They liked to relive the moment while repeating how miserable the guy was. He was always the worst sonofabitch they knew. He was always a rat bastard, and most of the time it wasn’t even business. Guys would get into arguments with each other and before you knew it one of them was dead. They were shooting each other all the time. Shooting people was a normal thing for them. It was no big deal.\textsuperscript{23}

Not long after his release on parole, Hill scored one of his most notorious coups, convincing two Boston College basketball players to shave points during the 1978-79 season.\textsuperscript{24} He also began to use drugs and alcohol heavily.\textsuperscript{25} In 1978, he participated in a robbery of the Lufthansa cargo terminal at Kennedy Airport that netted $5,000,000 in cash and $875,000 in jewels, “[t]he single most successful cash robbery in the nation’s history.”\textsuperscript{26} However, the Lufthansa robbery and the wave of assassinations that followed in a squabble over profits\textsuperscript{27} brought Hill to the attention of New York law enforcement authorities, who arrested him in the spring of 1980 on narcotics conspiracy charges.\textsuperscript{28} In May of 1980, Hill signed an agreement providing him with immunity from prosecution in return for his testimony against his former associates, and entered the federal Witness Protection Program.\textsuperscript{29} He and his family were relocated and given new identities; as of the writing of \textit{Wiseguy}:

\begin{itemize}
\item \textsuperscript{20} Id. at 166.
\item \textsuperscript{21} Id. at 167-69.
\item \textsuperscript{22} Id. at 169.
\item \textsuperscript{23} Id. at 117. “They have no respect for human life at all, no respect for human life whatsoever. I mean, that’s their ultimate weapon, you know, is, you know, the fear, the brutality and murder.” 48 Hours: Badfellas (CBS television broadcast, May 29, 1991) (transcript on file with the North Carolina Law Review) [hereinafter 48 Hours]. Henry Hill steadfastly insists that he himself never killed anyone, although he admits to having “cracked someone in the head with a baseball bat.” Id. He says he was present when others were killed, but “[m]ost of the time, I dug the holes.” Id.
\item \textsuperscript{24} PILEGGI, supra note 5, at 169-70.
\item \textsuperscript{25} Id. at 205.
\item \textsuperscript{26} Id. at 181.
\item \textsuperscript{27} Id. at 199.
\item \textsuperscript{28} Id. at 224.
\item \textsuperscript{29} For the text of the agreement, see id. at 241-42.
\end{itemize}
Henry Hill and his wife live somewhere in America. . . . [H]e has a successful business and lives in a $150,000 two-story newcolonial house in an area with such a low crime rate that garden-shed burglaries get headlines in the weekly press. His children go to private schools. He and Karen have their own cars, and she has embarked on a small business of her own. He has a Keogh plan. One of his few complaints is that he cannot get good Italian food in the area where he has been assigned to live by the witness program. . . . Henry gets fifteen hundred dollars a month as a government employee, travels to New York eight or nine times a year with all expenses paid, and has food from Little Italy sent in to him at the courts where he testifies and the hotels where he stays. He is always accompanied to New York by armed marshals to make sure he doesn't get murdered or mugged. In fact, Henry is so carefully guarded by the U.S. Marshal Service that even the Internal Revenue had to whistle when they tried to dun the old Henry Hill for his back taxes. Thanks to the government for which he works, Henry Hill has turned out to be the ultimate wiseguy.  

One of Henry Hill's minor sidelights is literary. He sold the story of his point-shaving exploits to Sports Illustrated for $10,000.  

Thereafter, he negotiated, through his lawyer, a contract with Nicholas Pileggi, a veteran true-crime writer, to shape taped oral interviews about his life into a book. Pileggi decided that a book about Henry Hill "might provide an insider's look at a world usually heard about either from the outside or from the capo di tutti capi, top."  

Pileggi traveled to undisclosed locations under federal escort to conduct the interviews. He also interviewed federal prosecutors and law enforcement personnel to flesh out the story of Hill's career.  

Wiseguy, according to recent court figures, sold ninety thousand copies in hardcover and as many as one million copies in paperback. The project also inspired a popular television series and a wildly successful movie, GoodFellas, directed by Martin

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30. Id. at 246. Since Wise Guy was published, Hill apparently has been dropped from the Witness Program because he has continued to abuse alcohol and drugs. He also has divorced and remarried. He is at work on another book and continues to keep his new name and location secret. His post-Witness Program career is rather elliptically treated in 48 Hours, supra note 23.

31. Pileggi, supra note 5, at 245.

32. Id. at 12.

33. Id. at 11-12.

34. See Author's Note to id.

35. Fischetti, 916 F.2d at 779.

Scorsese. Under Hill’s contract with Pileggi and Simon & Schuster, the book’s publisher, the resulting royalties were divided between Pileggi and Hill.

These profits attracted the attention of the New York Crime Victims Board, which in 1986 demanded that Simon & Schuster pay to the Board a sum equal to the amount the publisher had already paid to Hill, as well as Hill’s share of any further proceeds from the book. The Board’s order was entered pursuant to New York’s “Son of Sam” law—a statute that permits the State to seize monies paid to criminals as payment for their stories of crime, the money to be used to recompense victims of those crimes. Simon & Schuster challenged the Board’s order in federal district court; after the district court granted the Board’s motion for summary judgment, the publisher appealed to the Court of Appeals for the Second Circuit, which rejected its First Amendment challenge to the law. Upon petition by the publisher, the United States Supreme Court granted certiorari early in 1991.

This Article considers the issue the Court must ponder—the constitutionality under the First and Fourteenth Amendments of the New York law and other laws like it, not only as applied to the facts of Henry Hill’s case but also generally. Part II of the Article examines the range of state statutes enacted with the same purpose as the New York law, paying special attention to features that implicate First Amendment interests. Part III analyzes the language, history, and operation of the New York law and its accompanying administrative scheme, and recounts briefly the litigation that has transpired since the law’s enactment. Part IV discusses the opinions below in the Hill case. Parts V through VII consider the case in the posture in which it arrives at the Supreme Court, and set out three of the Court’s options: (1) a holding, extending the Court’s opinion in Snepp v. United States, that statutes such as New

38. Fischetti, 916 F.2d at 779.
39. Id. at 780.
40. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991). The term “Son of Sam” law derives from the fact that New York’s statute, the first of its kind, was introduced in response to the prospect that David Berkowitz, the serial killer then at large and authoring letters to newspapers under that name, would benefit financially from selling his story to the media after he had been apprehended. See infra notes 74-80 and accompanying text.
42. Id. at 180.
43. Fischetti, 916 F.2d at 784. The district court and circuit court opinions are discussed in detail below. See infra notes 147-86 and accompanying text.
45. 444 U.S. 507, 514-16 (1980) (imposing a constructive trust for the benefit of the Gov-
York's are permitted under the First Amendment; (2) a narrow holding invalidating the New York scheme and others like it on the grounds of overbreadth, prior restraint, and general violation of the Press Clause of the First Amendment; and (3) a broad holding invalidating even such statutes as avoid the features that would bring them under the narrow holding outlined above. Part VIII concludes that the Court's previous First Amendment jurisprudence, when considered together with the history of the First Amendment and the values it embodies, impels the Court to invalidate the New York statute and all statutes, however carefully drawn, that, in pursuit of the stated governmental interest of compensation for victims of crime, single out for special treatment the profits received by criminal authors in the sale of their stories.

II. WHO IS THE TARGET?: STATE AND FEDERAL "SON OF SAM" STATUTES ANALYZED

Since 1977, the federal government and forty-three states have enacted "Son of Sam" laws.\textsuperscript{46} Read together, these statutes help frame analysis of the constitutional issues in the \textit{Wiseguy} case. Though many are modeled on New York's law, most states have varied the scheme in

one way or another. Virtually all the statutes claim as their purpose compensating the victims of crime. The means of achieving that end are special provisions sequestering the proceeds of contracts between persons convicted or accused of crime and media outlets that provide compensation to the defendants in exchange for access to their point of view in the story of the crime. Usually, though not always, the funds are to be held (and, if necessary, distributed) by an administrative board, typically already in existence, that supervises the compensation of crime victims.

By and large, these statutes are a loosely drawn lot, seemingly drafted with little thought about the constitutional issues they raise. Though they are often given unexceptionable titles, such as "Limiting

47. See, e.g., ALA. CODE § 41-9-80 (1982) (stating that board of adjustment should deposit monies obtained pursuant to "Son of Sam" statute in escrow account "for the benefit of and payable to any victim of crimes committed by" a convicted felon); CONN. GEN. STAT. ANN § 54-218 (stating that clerk of court should deposit funds obtained pursuant to statute in escrow account "for the benefit of and payable to such accused person for the expenses of his or her defense and any victim of a crime of violence committed by such person"); KY. REV. STAT. ANN. § 346.165 (stating that monies obtained pursuant to "Son of Sam" statute should be deposited into accounts "for the benefit of and payable to any victim" of the convicted person's crimes); MINN. STAT. § 611A.68(4b) (West Supp. 1991) (authorizing crime victims to make "claims for reparations and damages").

48. For convenience, this Article uses the term "media outlet" to represent anyone who may wish to buy criminals' stories for later expressive use in any form. New York Executive Law § 632-a defines its targets as

[e]very 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 . . . .

N.Y. EXEC. LAW § 632-a(1) (McKinney 1982). Obviously, such sweeping language takes in not only newspaper and magazine companies and film and broadcast producers, but also all agents and intermediaries who may attempt to buy up the story rights and resell them.

49. See, e.g., ARIZ. REV. STAT. ANN. § 13-4202B (stating that state commission is required to deposit monies received pursuant to statute for distribution as determined by the commission to any victim of the convicted person's crime); GA. CODE ANN. § 17-14-31 (stipulating that state board "shall deposit" monies obtained pursuant to "Son of Sam" statute "in an escrow account for the benefit of and payable to any victim"); NEB. REV STAT. § 81-1836 (stating that state committee "shall deposit [funds obtained pursuant to the "Son of Sam" statute] . . . in the Victim's Compensation Fund").

50. See, e.g., N.M. STAT. ANN. §§ 31-22-3C, 31-22-4 (creating "crime victims reparation commission" to receive and invest funds obtained pursuant to Crime Victims Reparation Act); WYO. STAT. §§ 1-40-103(a), -112(d) (authorizing "Wyoming victims of crime compensation commission" to invest in escrow account monies received pursuant to Crime Victims Compensation Act). But see ARK. CODE ANN. § 16-90-308(a)(2) (requiring the circuit court to deposit funds in escrow account for the benefit of crime victims).
Commercial Exploitation of Crimes" or "Confiscation of Criminal Royalties; they are clearly aimed at speech, not at the proceeds of crime generally; furthermore, to a remarkable extent, they do not create or enforce liability upon criminals at all, but rather upon the owners of media outlets who might buy crime stories from them. Lastly, they have been drawn with little regard to procedural safeguards that might protect the rights of those who become enmeshed in their operations.

To begin with, the seriousness of the crime required to trigger application of the law varies widely. Only five states limit the laws' applicability to felonies. Ten others and the federal government define the predicate crime as one involving violence or personal injury. In the remaining states, the statute's operation is triggered by any "crime," presumably including mail fraud, tax evasion, or even failure to pay parking tickets.

All of the statutes contain language confining their operation to monies received as a result of specific expressive activity by the individual accused or convicted of the crime; this expressive activity is defined in terms of its content. The most prevalent construction of triggering activities is that originated by the New York statute: "the reenactment of such crime, by way of a movie, book, magazine article, tape recording,

53. Some of the statutes' titles are refreshingly frank about this speech-related aim. See, e.g., IND. CODE ANN. § 16-7-3.7-2, which is entitled "Contracts with responsible party for publication or broadcast of crime story."
54. See, e.g., OHIo REV. CODE ANN. § 2969.02(A) ("[A]ny person that enters into a contract with an offender ... shall pay any money ... due under the contract ... for deposit in the recovery of offender's profits fund" if contract terms provide for a reenactment or publication whose value arises from the notoriety brought by the commission of an offense); S.C. CODE ANN. § 15-59-40 ("Every person ... contracting with any person ... accused of crime in this State, with respect to the reenactment of such crime ... shall pay over ... any monies" gained thereby); TENN. CODE ANN. § 29-13-202(a) (same).
55. ALA. CODE § 41-9-80; CAL. CIV. CODE § 2225(b); FLA. STAT. ANN. § 944.512(1); IND. CODE ANN. § 16-7-3.7-2; MINN. STAT. ANN. § 611A.68.1(b) (West Supp. 1991).
56. See 18 U.S.C. § 3681(a) (offense against the United States resulting in physical harm); CONN. GEN. STAT. ANN. § 54-218(a) (crime of violence); ILL. ANN. STAT. ch. 70, para. 402.3 (Smith-Hurd 1989) (crime in which someone is killed or injured); LA. REV. STAT. ANN. § 46:1831(2)-(3) (crime of violence resulting in injury, death, or catastrophic property damage); MD. ANN. CODE art. 27, § 764(a)(2)(i) (1987) (crime resulting in injury, death, or property loss); MO. ANN. STAT. § 595.010(1) (crime of violence or driving while impaired); MONT. CODE ANN. § 53-9-103(3)(b) (crime resulting in bodily injury or death); N.M. STAT. ANN. § 31-22-22A (violent crime); OR. REV. STAT. § 147.005(4) (crime resulting in serious bodily injury or death); R.I. GEN. LAWS § 12-25.1-2(d) (felony resulting in personal injury or property loss); WIS. STAT. ANN. § 949.165(1)(a) (serious crime).
57. See, e.g., N.Y. EXEC. LAW § 832-a(1) (McKinney 1982) (providing for distribution of monies to the victims of persons "convicted of a crime in this state"; for discussion of what is covered by the term "convicted of a crime," see infra note 83 and accompanying text).
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."

Though such language is quite broad, a few states go even further. Montana's law applies to all expression "relating to" the predicate crime; Ohio's applies to "any part of [the defendant's] life story . . . if the publication value results in part from notoriety brought by commission of an offense." Rhode Island's, by its terms, applies to any paid expression, while Wyoming's applies only to reenactments.

The vast majority of the laws, like New York's, make the publisher, not the felon, the target of their language. Only six state laws and the federal statute are unambiguously drawn so as not to subject media outlets to their litigation and penalty provisions. At least eleven of the laws require that media outlets contracting with accused or convicted criminals who fall within their predicate submit contracts for review before executing or paying on such contracts. Others do not require submission of the contracts, but require outlets entering into such contracts to notify state officials of their existence. Only six states and the federal government have laws requiring an individualized court or ad-
ministrative proceeding before any given media project can be brought within the compensatory scheme. Only nine states and the federal government restrict the operation of their statutes to persons who have already been convicted; most of the rest provide that those accused shall have their revenues sequestered, but that they shall be refunded by the state if they are not convicted. Three states, however, provide mechanisms by which victims can seize such monies even from defendants who are acquitted, and one state includes a standard deduction, which may be substantial, from such monies even in crimes where there is no identifiable victim and no conviction. Perhaps the most striking feature of these laws, in view of their stated goal of furthering the compensation of the crime’s victims, is that fully twenty-six state statutes and the federal law provide that all or a substantial part of the monies sequestered under their provisions shall be forfeited even if no victims come forward to make demands for compensation.

67. 18 U.S.C. § 3681(a); CAL. CIV. CODE § 2225(3); FLA. STAT. ANN. § 944.512(5); IDAHO CODE § 19-5301(7); MICH. COMP. LAWS ANN. § 780.768(2); NEV. REV. STAT. § 217.265; WASH. REV. CODE ANN. § 7.68.200. Special mention should be made of the procedural care the Washington statute provides. No monies can be taken under its provisions unless a court determines that the statute applies to them upon motion of the prosecutor and after notice to the parties and a hearing. See id.

68. 18 U.S.C. § 3681(a); ARK. CODE ANN. § 16-90-308(a)(1); CAL. CIV. CODE § 2225(B); FLA. STAT. ANN. § 944.512(1); IOWA CODE § 910.15; MASS. ANN. LAWS ch. 258A, § 8; MICH. COMP. LAWS ANN. § 780.768(1); MINN. STAT. ANN. § 611A.68.1(c) (West Supp. 1991); NEV. REV. STAT. § 217.265; R.I. GEN. LAWS § 12-15.1-3(A).

69. See, e.g., IOWA CODE § 910.15(3) (“Upon disposition of charges favorable to any person accused of committing a crime, . . . the attorney general shall immediately pay over any money in the escrow account to the person.”); MD. ANN. CODE art. 27, § 764(e)(3)(i), (ii) (1987) (“[T]he Attorney General shall pay over to the defendant all of the funds from the escrow account if . . . [t]he charges are dismissed or . . . [t]he defendant is acquitted. . . .”); MASS. ANN. LAWS ch. 258A, § 8 (Law Co-op 1980) (“Upon disposition of charges favorable to any person convicted of committing a crime, . . . the treasurer shall immediately pay over any moneys in the escrow account to such person.”); WASH. REV. CODE ANN. § 7.68.230 (“Upon dismissal of charges or acquittal of any accused person the department shall immediately pay over to such accused person the moneys in the escrow account established on behalf of such accused person.”).

70. ALASKA STAT. § 12.61.020 (allowing alleged victim to recover monies from fund even if defendant acquitted upon proof of injury by a preponderance of evidence); DEL. CODE ANN. tit. 11, § 9103(a)(2) (allowing alleged victim to obtain civil judgment even if defendant acquitted); TENN. CODE ANN. § 29-13-109(a) (Supp. 1990) (allowing victim to obtain funds from defendant’s proceeds by means of administrative proceeding under preponderance standard of proof).

71. COLO. REV. STAT. § 24-4.1-201(3) (requiring defendant, even if acquitted, to repay state for its expenses incurred in incarcerating him from monies received for expressive activity concerning crime).

72. Total forfeiture is provided by 18 U.S.C. § 3681(c)(2); ALA. CODE § 41-9-82; ALASKA STAT. § 12.61.020(a); ARIZ. REV. STAT. ANN. § 13-4202(E); ARK. CODE ANN. § 16-90-308(c)(2); CONN. GEN. STAT. ANN. § 54-218(b); ILL. ANN. STAT. ch. 70, para. 406, § 6(e) (Smith-Hurd 1989); IND. CODE ANN. § 16-7-3.7-5; KAN. STAT. ANN. § 74-7320(3); MD.
Also potentially important in assessing whether these laws fulfill their stated purpose of compensating victims, and whether in attempting to do so they chill or reduce the volume of speech by those accused or convicted of crime, is the fact that very few cases (in most jurisdictions, none) have been brought under their provisions. The only statute under which a significant body of case law has accumulated is New York’s; the statute and cases arising thereunder are examined in the next section.

III. **The Scheme of New York Executive Law Section 632-a**

For the purposes of this Article, New York’s “Son of Sam” law is of preeminent importance for a number of reasons. First, it was the first such statute enacted and provided a model that was followed by a number of states. Second, it is the law of the state where, for better or worse, the nation’s print-publishing and broadcast-news industries are centered. Third, it is the only one of these statutes under which a significant body of case law has accumulated. And, finally, it is the legislation at issue in the *Wiseguy* case. Accordingly, it is worthwhile to examine the wording and legislative history of the statute, as well as the administrative regulations and case law it has spawned.

New York Executive Law section 632-a was passed in 1977 and went into effect in August of that year. August was also the month in

ANN. CODE art. 27, § 764(e), (f) (allowing defendant to use some money for legal representation for criminal trial); MINN. STAT. ANN. § 611A.68.4, .4a (Supp. 1991) (allowing dependents to get 10% as long as offender will reap no benefit); MISS. CODE. ANN. § 99-38-9(3)-(4) (providing for forfeiture unless defendant has minor children in need of financial support); MO. ANN. STAT. § 595.045(14)(5); MONT. CODE ANN. § 53-9-104(1)(d); N.J. STAT. ANN. § 52:4B-30(a)(5); OHIO REV. CODE ANN. § 2969.05; OKLA. STAT. ANN. tit. 22, § 17C; WASH. REV. CODE ANN. § 7.68.240; WYO. STAT. § 1-40-112(f). Partial forfeiture is provided for by COLO. REV. STAT. § 24-4.1-201; FLA. STAT. ANN. § 944.512(2); GA. CODE ANN. § 17-14-31(b)-(f); LA. REV. STAT. ANN. § 46:1832B; MICHC. COMP. LAWS. ANN. § 780.768(3)(c); NEV. REV. STAT. § 217.265; R.I. GEN. LAWS § 12-25.1-3(c); S.D. CODIFIED LAWS ANN. § 23A-28A-5 (providing that state may recover costs of imprisonment of defendant but must first bring a civil action). The other statutes provide for the return to defendants of monies not given to identifiable victims of their misconduct.


which David Berkowitz, a twenty-five-year-old psychopath, was arrested for shooting thirteen young victims in Brooklyn, Queens, and the Bronx, killing six and severely wounding seven over a period of many months.\textsuperscript{75} Berkowitz, originally known as "the .44-caliber killer" because of the handgun he used, became known as "Son of Sam" while still at large because of the signature he used on a series of letters to New York newspapers.\textsuperscript{76} The killings spurred New York's dailies, not known for their restraint even in placid times, into a frenzy of sensationalism. The fact that the slayer seemed to enjoy writing for publication—even though his letters were incoherent—and the obsession of the press with the details of his crimes combined to convince the legislation's sponsor that, if and when the killer was caught, attempts would be made to purchase his story from him. Accordingly, the legislature moved to amend a state statute, originally enacted in 1966, that created a scheme to compensate the victims of crime and created an administrative agency to carry it out.\textsuperscript{77} The sponsor of the new provision placed in the legislative history a memorandum explaining the reasoning behind the law:

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.\textsuperscript{78}

Another legislative memorandum noted that "[c]urrently a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity. This bill will ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime . . . ."\textsuperscript{79}

The New York Division of Criminal Justice Services recommended that Governor Hugh Carey sign the bill because there has been a recent realization by the general public that

\textsuperscript{75} Peter Bowles, Recalling a Serial Killer, \textit{NewSDay}, June 20, 1990, at 7.

\textsuperscript{76} Id.


\textsuperscript{78} 1977 N.Y. LEGIS. ANN. 267 (memorandum of Sen. Gold).

where a defendant is a well-known personality or the crime with which he is charged is one that has aroused a high degree of public interest, he is in a position to make a considerable amount of money from articles, books or television accounts of his life, times and crimes . . . .

[T]his bill takes cognizance of the situation and seeks to redirect the money flow from the criminal to his victims. As an expression of the concept of simple justice it cannot be faulted. It is merely another facet of the oft-repeated maxim that crime does not (or should not) pay.80

Not everyone involved in the bill's passage agreed that the proposed law was not to be faulted. Included in the bill's history is a memorandum from an official of the state budget division summarizing constitutional arguments against the proposed measure. A final handwritten comment states: "This bill is terribly drafted! Its intent & objectives should be praised but it should be vetoed with a promise to resubmit a bill which will (1) be clear [and] (2) have a chance of surviving a constitutional attack."81 Despite the latter recommendation, Governor Carey signed the bill.

In its present form, the statute requires any person or company contracting with any person "accused or convicted of a crime in this state" to provide payment for "the reenactment of such crime . . . or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime" to submit a copy of the contract for review by the Crime Victims Board.82 Significantly for the Wiseguy case—and potentially important in assessing the constitutionality of the statute's breadth—the statute defines a person "convicted of a crime" to include, along with those actually convicted in court, "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted."83 The person or company also must pay to the Board all monies owed to the defendant under the covered contract.84 The Board is to deposit the funds in an escrow ac-

82. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).
83. Id. § 632-a(10)(b). The statute purports to include within its ambit also persons merely accused of crimes, but provides that a victim cannot receive payment until the accused has been "convicted." Id. § 632-a(1).
84. Id. § 632-a(1).
count. The funds may be used to pay victims of the defendant's crime or crimes if the victims obtain a civil judgment against the defendant in state court.

If a defendant is acquitted, or charges are dismissed, the escrowed funds are paid to the defendant. A defendant found not guilty by reason of insanity, however, does not receive such an automatic refund; rather, such a defendant is "deemed to be a convicted person." After five years, a convicted defendant can request the Board to refund any surplus monies not claimed by victims, provided no civil actions are still pending. The Board must comply with such a request, but must first seek to pay off subrogation claims of the State for amounts paid to victims by the Board before a civil judgment was rendered as well as all other creditors who present "lawful claims, including state or local government tax authorities." The five-year period runs from the establishment of the fund, and the statute of limitations for civil actions seeking compensation from the fund runs for the same five-year period. The defendant may, however, draw upon the funds in escrow to pay her lawyers, but only to a maximum of twenty percent of the funds.

New York state administrative regulations provide that the Board may investigate contracts not submitted to it voluntarily and may, after a hearing, enter a final decision bringing a contract under its authority. The Board also may make an emergency determination that there is "substantial danger . . . that moneys [subject to the statute] may be concealed, wasted, converted, assigned, encumbered, disposed of, or removed from the State" before a determination; in such cases, or where the paying party is not a resident of New York or a corporation registered in the state, the Board may issue an emergency order sequestering

85. Id.
86. Id.
87. Id. § 632-a(3).
88. Id. § 632-a(5).
89. Id. § 632-a(4).
91. Id. § 632-a(11)(d). For an argument that subjecting the escrowed monies to claims that have no relation to victim compensation vitiates the State's claim that its interest in compensating victims justifies any intrusion on First Amendment rights, see Brief for the Petitioner at 6, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., No. 90-1059 (U.S. filed Apr. 19, 1991).
93. Id. § 632-a(1).
94. Id. § 632-a(8).
96. Id.
funds until a hearing can be held.\textsuperscript{97}

Since its enactment, the section 632-a scheme has been used against only ten projects.\textsuperscript{98} Not all of these cases have given rise to litigation, and only two have provided substantial tests of the law’s constitutionality. The first decision held simply that the law should be read to extend the statute of limitations so that an action against sequestered funds could be maintained, even though this had the effect of reviving a cause of action previously extinguished by the normal operation of the statute and even though the predicate crime had been committed before the passage of the law.\textsuperscript{99} The holding allowed a suit by a plaintiff who had been held hostage by the defendant during a bank robbery that led to a police standoff.\textsuperscript{100} The crime was later depicted in the successful film \textit{Dog Day Afternoon}.\textsuperscript{101} The law operated on monies contracted for before the passage of the statute.\textsuperscript{102}

The “Son of Sam” killer’s affairs came before the courts shortly afterwards, in a case that permitted the court-appointed conservator for Berkowitz, who had been declared incompetent, to take possession for transfer to the Board of funds due the killer from a book contract.\textsuperscript{103} Although the court pronounced the law constitutional as applied, the conservator had challenged its operation only alternatively, and the court upheld its constitutionality without elaboration.\textsuperscript{104}

The Board fared less well when it attempted to move against the substantial funds paid to Sydney Biddle Barrows, the aristocratic

\textsuperscript{97} \textit{Id.} \textsuperscript{§} 526.2.


\textsuperscript{99} Barrett v. Wojtowicz, 66 A.D.2d 604, 614, 414 N.Y.S.2d 350, 356 (1979). In the only case concerning the federal “Son of Sam” law, by contrast, a federal district judge held that under the ex post facto provisions of the Constitution, U.S. CONST. art. I, \textsuperscript{§} 9, cl. 3, the law could not be applied to proceeds from the successful book and movie \textit{Fatal Vision}, which depicted the killings of Jeffrey MacDonald’s wife and children in 1970, a crime for which MacDonald was later convicted. United States v. MacDonald, 607 F. Supp. 1183, 1185 (E.D.N.C. 1985). Though the book and movie recounted a version of events indicating that MacDonald was guilty of the crimes, they did so under a financial arrangement by which the author, Joe McGinniss, reimbursed MacDonald with a percentage of the proceeds from the project. MacDonald, however, continues to assert his innocence of the crimes and has sued McGinniss for the portrayal of him in the book and movie. See generally \textit{Janet Malcolm, The Journalist and the Murder} 7-8, 19, 120-30 (1990) (reviewing, from a point of view sympathetic to MacDonald, the relationship and litigation between McGinniss and MacDonald).

\textsuperscript{100} Barrett, 66 A.D.2d at 605, 414 N.Y.S.2d at 351.

\textsuperscript{101} \textit{Id.} at 606, 414 N.Y.S.2d at 352.

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} \textit{In re} Johnson, 103 Misc. 2d 823, 830, 430 N.Y.S.2d 904, 909 (Sup. Ct. 1979).

\textsuperscript{104} \textit{Id.} at 826, 430 N.Y.S.2d at 906.
"Mayflower Madam" whose expensive call-girl business provided juicy scandal when revealed in 1985. A state trial court ruled that, because prostitution is a "victimless crime," the funds could not be sequestered.105 The Board itself held that the funds paid to New York "Subway Gunman" Bernhard Goetz were not subject to its reach because Goetz's crime was also victimless: Goetz, though convicted of violating state firearms laws, had not been convicted of assaulting the four youths he shot.106 In another case raising the same argument, however, Justice Sherman declined to hear an argument by R. Foster Wynans, the Wall Street Journal reporter convicted in federal court of insider trading, that his crime was also victimless, and rejected constitutional and ex post facto challenges to section 632-a as well.107

The first substantial challenge to the scheme's constitutionality was brought by Jean Harris, the prep school headmistress who was convicted of killing her former lover, Dr. Herman Tarnower, originator of the popular "Scarsdale Diet."108 In her book, Stranger in Two Worlds, Harris had sought to avoid the law's ban on accounts of a criminal's "thoughts,

105. The unreported decision is reviewed in Esther Pessin, Domestic News, UPI, June 3, 1986, available in LEXIS, Nexis Library, Wires File. See also No Victim, So "Madam" Free to Kiss and Tell All, CHI. TRIB., June 4, 1986, at C4 (discussing the judge's decision that no person suffered injury from Barrows's actions). The idea that prostitution is a victimless crime is one that might be hotly disputed by feminists and other analysts of criminal law. The victim apparently contemplated by the judge in the Barrows case was the male patron of Barrows's enterprise, while a case could be made that the young women whose sexual services were bartered are victims. The judge dismissing the Board's action was Justice Hortense Gabel, herself later involved in an unrelated scandal regarding favorable treatment granted to former Miss America Bess Myerson in a divorce proceeding in return for a job with Myerson's New York municipal department for Gabel's daughter. See SHANA ALEXANDER, WHEN SHE WAS BAD: THE STORY OF BESS, HORTENSE, SUKHREET AND NANCY 17 (1990). The Barrows decision was summarily affirmed by the appellate division. In re Halmi, 128 A.D.2d 411, 411, 512 N.Y.S.2d 650, 650 (1987).

106. In re Goetz, slip op. at 7-8 (State of New York Crime Victims Board, March 17, 1988). The Board noted, however, that a particular type of crime will not be excluded absolutely from the statute's application by being deemed a "victimless crime." Rather, the Board will evaluate each case to determine if identifiable victims exist. Id. at 5-6. For an argument that the holding in the Goetz case proves that the Board exercises political discrimination in its determinations, see Brief of PEN American Center and New York Civil Liberties Union, amici curiae, at 29, Fischetti (No. 89-9192).


108. Children of Bedford, 143 Misc. 2d at 1001, 541 N.Y.S.2d at 896.
feelings [and] opinions"\textsuperscript{109} about his or her crime by discussing her entire life story, including her life behind bars, and describing the crime for which she was convicted only by means of quotations from the transcript of her trial.\textsuperscript{110} In \textit{Children of Bedford, Inc. v. Petromelis}, the trial court held that even use of public records brought the contract within the reach of section 632-a.\textsuperscript{111} The court brushed aside Harris's challenge to the statute's constitutionality under the First Amendment to the U.S. Constitution\textsuperscript{112} and the speech and press clauses of the New York Constitution\textsuperscript{113} on the grounds that the statute does not \textit{prohibit} expressive activity, but "affects only the rights of the perpetrator to receive any profit from communications concerning the crime unless and until all proceeds have been held in escrow for five years and made available to satisfy any civil judgment obtained against the wrongdoer."\textsuperscript{114} Thus, the court concluded that the law was not subject to strict First Amendment review because "[w]hat the law regulates . . . is not speech but disposition of property (viz. royalties) derived from specified expressive activity by a particular type of speaker."\textsuperscript{115} A contrary holding, the court hinted, would make it a violation of the First Amendment to garnish a writer's salary—proceeds from expressive conduct—for child support.\textsuperscript{116}
Although the Board was even then seeking to obtain from the publisher a
duplicate payment of the $45,000 already paid to Harris in advance roy-
alties, the court also turned back a Press Clause challenge, holding that
"the legislation . . . places no burden on the press."

The court also endorsed an argument the law's defenders often re-
sort to in concrete cases: the law could not be voided for its potential
chilling effect on First Amendment protected expression, since, in the
case at bar, the book had been written. Since some books will be written
despite the statute, "the potential inhibiting effect of the statute on the
willingness of criminal-authors to write about their crimes . . . is clearly
without foundation." Because the court found that the statute did not
violate the First Amendment or the speech and press clause of the New
York Constitution, it upheld the Board's order that all funds due Harris
be paid into the fund.

The New York Appellate Division summarily upheld the decision in
Children of Bedford. In an opinion rendered after the Supreme Court
granted certiorari in the Wiseguy case, the New York Court of Appeals
also affirmed the trial court's decision. The court of appeals, however,
applied a more rigorous standard in examining the law than the lower
courts had used, and its affirmance hinted that Executive Law section
632-a, while constitutional in the case of the Harris book, might be un-
constitutional in other applications. After finding that Harris's book
works espousing certain points of view. This distinction among generally applicable economic
regulations, economic regulations aimed only at First Amendment protected activities, and eco-
nomic regulations aimed only at certain First Amendment protected activities based on their
content is the crux of much of the argument in the "Son of Sam" cases.

117. Id. at 1005, 541 N.Y.S.2d at 899.
118. Id. at 1006, 541 N.Y.S.2d at 899. For evidence suggesting that the statute in fact has
chilled publishers and authors from undertaking projects potentially within its scope, see Brief
for the Petitioner at 17-21, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Vic-
119. Children of Bedford, 143 Misc. 2d at 1009, 541 N.Y.S.2d at 901.
121. Children of Bedford, Inc. v. Petromelis, 77 N.Y.2d 713, 573 N.E.2d 541, 570
206).
122. Id. at 719, 573 N.E.2d at 543, 570 N.Y.S.2d at 455. The narrower reasoning of the
court of appeals follows precisely the same course as that applied by the U.S. Court of Appeals
for the Second Circuit to the federal district court decision in the Wiseguy case, moving the
discussion from that of an "incidental" burden on speech, Crime Victims Board, 724 F. Supp.
at 177, to that of a "direct" burden on speech, Fischetti, 916 F.2d at 781. This result is plainly
more fully defensible than the "incidental" burden analysis. For a detailed discussion of this
analysis, see infra note 161.
123. See Children of Bedford, 77 N.Y.2d at 731, 573 N.E.2d at 551, 570 N.Y.S.2d at 463; infra text accompanying note 145.
was properly within the statute\textsuperscript{124} and rejecting Harris's procedural due process claim,\textsuperscript{125} the court turned to the First Amendment question. Relying on \textit{Meyer v. Grant},\textsuperscript{126} the court "conclude[d] that the statute is content-based and imposes a direct burden on speech"\textsuperscript{127} because, "[a]lthough the law does not foreclose the speaker's message, it imposes an economic disincentive or penalty for delivering it."\textsuperscript{128} Because of its direct impact upon protected speech, the court reasoned, the law's proponents "must demonstrate that it serves a compelling State interest and is narrowly tailored to achieve that purpose."\textsuperscript{129} The court found several such interests served by the statute: "facilitating compensation for victims" of crime by criminals rather than the public;\textsuperscript{130} "preserv[ing] the victim's equitable right to assets earned by a criminal as a result of the victimization";\textsuperscript{131} and "embody[ing] the community's belief that it is not only wrong for criminals to commit crimes and profit from them but also wrong for criminals to salt their victims' wounds by profiting from the victimization without recompense to the victims."\textsuperscript{132}

\textsuperscript{124} \textit{Children of Bedford}, 77 N.Y.2d at 722, 573 N.E.2d at 545, 570 N.Y.S.2d at 457.

\textsuperscript{125} \textit{Id.} at 722-24, 573 N.E.2d at 545-46, 570 N.Y.S.2d at 457-58.

\textsuperscript{126} 486 U.S. 414 (1988).

\textsuperscript{127} \textit{Children of Bedford}, 77 N.Y.2d at 724, 573 N.E.2d at 545, 570 N.Y.S.2d at 459.

\textsuperscript{128} \textit{Id.} at 725, 573 N.E.2d at 547, 570 N.Y.S.2d at 459 (citations omitted). This mode of reasoning is a more rigorous, and preferable, application of the "abridgment" test of whether an enactment implicates First Amendment interests. \textit{See supra} note 114 and accompanying text.

\textsuperscript{129} \textit{Children of Bedford}, 77 N.Y.2d at 725, 573 N.E.2d at 547, 570 N.Y.S.2d at 459 (citations omitted).

\textsuperscript{130} \textit{Id.} at 725-26, 573 N.E.2d at 547, 570 N.Y.S.2d at 459.

\textsuperscript{131} \textit{Id.} at 726, 573 N.E.2d at 548, 570 N.Y.S.2d at 460.

\textsuperscript{132} \textit{Id.} at 726-27, 573 N.E.2d at 548, 570 N.Y.S.2d at 460. Schoolchildren sometimes play a prank that involves offering another child some handsome reward if he or she will simply not think about green alligators for five minutes. The court's discussion of "salting wounds" underscores that a similarly all-but-hopeless mental exercise is involved in defending a "Son of Sam" statute while maintaining with logical consistency that its intention relates to victim compensation or to general equitable principles rather than to an intent to punish or suppress speech. The court is at pains later to deny that other profits earned by a criminal as a result of notoriety gained through his or her crime should be regarded as fair game for this asserted interest. \textit{See id.} at 729, 573 N.E.2d at 549-50, 570 N.Y.S.2d at 461-62; \textit{infra} text accompanying note 139. Apparently such profits do not "salt the wounds" inflicted by the crime. If so, however, what distinguishes these profits from profits earned by paid speech and makes the latter subject to the asserted interest while the former are not? Only one thing distinguishes profits derived from speech from other profits—the expressive content of the speech from which they are derived. The court may be regarded as having dropped this shoe in the language above. It immediately attempts to muffle the sound, by insisting that "[t]he statute's purpose is to compensate crime victims[,] not to protect their sensibilities or those of the public, by restricting offensive speech." \textit{Children of Bedford}, 77 N.Y.2d at 727 n.2, 573 N.E.2d at 548 n.2, 570 N.Y.S.2d at 460 n.2 (citations omitted). This logic is difficult to follow. If expressive activity, and only expressive activity, salts the victims' wounds, then the salting must take place through the perception of the activity—that is, through its expressive impact.
Having identified the interests to be served by the statute, the court then proceeded to find it "narrowly tailored" to achieve those interests.\textsuperscript{133} The tort laws "do not satisfactorily address the need" for victim compensation, the court held, because of the three-year statute of limitations they impose.\textsuperscript{134} Likewise, civil attachment statutes do not solve the problem,\textsuperscript{135} because they impose restrictive conditions as to which defendants may be subject to them.\textsuperscript{136}

The court rejected Harris's arguments that the statute is underinclusive because "it does not reach income earned from writing generally, income earned from other crime-related activities such as wages received by a convicted computer expert who subsequently obtains profitable employment as a result of illegally 'bugging' computer networks, or after-acquired property of the criminal."\textsuperscript{137} This argument, the court said, "misses the point. The statute was never intended to reach profits received solely as a result of the criminal's notoriety."\textsuperscript{138} The difference between the two types of profits, the court reasoned, is that the computer expert's financial reward "is the result of [the criminal's] newly adver-

\begin{itemize}
  \item If the mere fact of profiting were the salt in the wound, then profit gained through other activity made possible by criminally gained notoriety would surely provide as much salt; but since it is expression that provides the salt, it must be the victim's (or the public's) \textit{sensibilities} that are being protected. As the court correctly notes, \textit{id.}, such an intent would bring the statute into conflict with Texas v. Johnson, 491 U.S. 397, 399 (1989) (holding unconstitutional statute that forbids flag-burning for the purpose of conveying specified ideas) and with Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (disallowing tort claim for intentional infliction of emotional distress when protection of public figure's emotional sensibility would require penalizing protected, albeit highly offensive, speech).
  \item \textit{Children of Bedford}, 77 N.Y.2d at 728-29, 573 N.E.2d at 549-50, 570 N.Y.S.2d at 461-62.
  \item \textit{Id.} at 728, 573 N.E.2d at 549, 570 N.Y.S.2d at 461.
  \item \textit{Children of Bedford}, 77 N.Y.2d at 713, 573 N.E.2d at 549, 570 N.Y.S.2d at 461. Nowhere, however, does the court address the question of why these civil attachment statutes could not be amended to provide for an extended limitations period in the case of tort actions brought by victims of crime. The argument that the "Son of Sam" law is narrowly tailored because other laws are not so tailored can be seen thus as a circular ratification of legislative choice: a law impinging on First Amendment interests must be upheld, according to this argument, because the legislature did not choose to vindicate the interests involved by pursuing them in ways that would not abridge free speech. To put it even more baldly, the law is narrowly tailored because the legislature passed it. The court does state that "[e]ven if the attachment laws were expanded to provide a remedy for crime victims, the provisions necessarily would operate much like Executive Law § 632-a." \textit{Id.} This reasoning is strained: a neutral attachment procedure would operate unlike § 632-a in the crucial area of differentially targeting speech, a highly significant difference, even if other parts of the statute were similar to § 632-a.
  \item \textit{Id.} at 728-29, 573 N.E.2d at 549, 570 N.Y.S.2d at 461.
  \item \textit{Id.} at 728, 573 N.E.2d at 549, 570 N.Y.S.2d at 461.
\end{itemize}
tised prominence or expertise, not their illegal act. By contrast, criminals covered by the statute had no marketable asset before the crime: they create, by illegal activity, a new product—a story which becomes profitable in the retelling.  

Other types of gains "do not come within the purpose of Executive Law section 632-a which is intended to protect the victim's equitable claim to profits earned by a criminal from speech made possible by reason of their [sic] victimization."  

The court also rejected the argument that section 632-a unconstitutionally inhibits publishers and other contracting parties from participating in protected activities.  

Publishers and writers may still "write and publish about crime in general or from the perspective of the perpetrator" and nothing in the statute "prevents publishers from profiting in full from publishing any work about the crime."  

The court concluded that "section 632-a is narrowly tailored to meet the state's compelling interest in securing a victim's equitable right to be compensated from moneys earned by a criminal as a result of the victimization." It rejected a challenge that the law is vague, but its language left a glimmer of hope that an attempt at overreaching by the Board—attempting to apply the law's provisions, for example, to a book by an author who has never been charged or convicted of crime but who, like Malcolm X, admits briefly to previously unknown crimes or to crimes of conscience in the course of a larger work—might be struck down at a later time: "Such questions are matters for interpretation.... The Constitution does not require that a law be drafted with such speci-

139. Id. at 729, 573 N.E.2d at 549-50, 570 N.Y.S.2d at 461-62.
140. Id. at 729, 573 N.E.2d at 550, 570 N.Y.S.2d at 462 (emphasis added). Once again, the Children of Bedford court defined the statute's scope in terms of its admittedly speech-related intent. The law is narrowly tailored to achieve its end, because the end is that of seizing the fruits of speech. Since other assets acquired by a criminal as a result of the crime are not the result of speech, they do not fall within the narrowly tailored scheme. Arguably, this contention proves the opposite of the court's conclusion—i.e., that the legislature wished to penalize speech and speech only, and thus had no neutral aim in mind. Had it had a neutral aim, the legislature would surely have sought to attain it by sequestering assets that come to criminals who sell their expertise as criminals—expertise gained, no less than is compensation for paid speech about the crime, by victimizing those whom § 632-a claims to be seeking to compensate and protect.
141. Id.
142. Id.
143. Id. The above is a slight case of judicial overstatement; the law potentially subjects a publisher to double liability if it mistakenly pays an author who is later found by the Board to be within the statutory scheme and from whom the sums paid cannot be recovered. This potential liability may not be considered a crippling disincentive to contract for and publish criminals' stories about their crimes, but it is, nonetheless, a genuine one, and should not be brushed aside as "nothing."
144. Id.
ficity that it leaves no room for interpretation nor is it void for vagueness merely because situations may exist in which it should not be applied." 145

Whatever the prospects for a later decision excepting a specific project from the scheme of section 632-a, the court of appeals decision makes clear that the New York courts are prepared to uphold the statute in the majority of cases. The remaining substantial challenge to section 632-a's constitutionality—and to the other laws like it around the country146—is the case of Henry Hill, currently pending before the United States Supreme Court.

IV. HENRY HILL IN THE LOWER COURTS

The decisions of the lower federal courts illustrate the slipperiness of the First Amendment issues posed by the *Wiseguy* case and by "Son of Sam" laws in general. The federal district court that initially ruled on the law's constitutionality held that the law did not directly abridge speech.147 The Second Circuit panel that reviewed that decision correctly grasped that the law operated directly on protected speech, but applied such a narrow balancing test to the interests involved that a victory for the Board was all but assured.148 A persuasive dissent in the court of appeals argued that the law was unconstitutional.149

After receiving the Board's order imposing liability on Simon & Schuster for sums already paid to Henry Hill, the company filed suit in federal district court seeking a declaratory judgment that Executive Law section 632-a was unconstitutional and an injunction against enforcement of the Board's order.150 Both sides moved for summary judgment.151 Judge Keenan of the Southern District of New York rejected the publisher's arguments that section 632-a violated the First and Fourteenth Amendments on grounds of prior restraint, content-based restrictions on speech, and overbreadth.152

The court analyzed the First Amendment issues and concluded that the law does not abridge protected speech. First, it noted that "although

145. *Id.* at 731, 573 N.E.2d at 551, 570 N.Y.S.2d at 463 (citations omitted).
146. *See supra* note 46.
148. *Fischetti*, 916 F.2d at 782-84. For a discussion of the court of appeals decision, see *infra* notes 167-86 and accompanying text.
149. *Fischetti*, 916 F.2d at 784-87 (Newman, J., dissenting). For an examination of Judge Newman's dissenting opinion, see *infra* notes 180-86 and accompanying text.
152. *Id.* at 179.
it may be more difficult for publishers and authors to create books with the cooperation of a criminal source, it is not impossible nor is such cooperation proscribed by section 632-a.\textsuperscript{153} The prior review of contracts mandated by the law "does not prohibit expression"\textsuperscript{154} and the law does not "prohibit speech."\textsuperscript{155} The court distinguished the statute's regulation of payment from the regulation the Supreme Court held unconstitutional in \textit{Meyer v. Grant}\textsuperscript{156} because that "statute operated directly to affect political speech" while section "632-a has no abridging effect on political speech."\textsuperscript{157} In fact, the court held that section 632-a's effect "is limited to the nonexpressive elements of the [expressive] activity: receiving a profit,"\textsuperscript{158} just as the law upheld in \textit{United States v. O'Brien}\textsuperscript{159} was limited to the nonexpressive act of destroying a draft card, an identification document whose existence and availability would be necessary in the event of national emergency. Because "[t]he state's interest in compensating crime victims is unrelated to the suppression of free expression... any burden on free expression is merely incidental."\textsuperscript{160} Thus, "the Court need not apply a test of strict scrutiny to the statute," but instead might apply the lesser standard dictated by \textit{O'Brien}.\textsuperscript{161} The statute survived

\begin{itemize}
\item \textsuperscript{153} Id. at 176.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} 486 U.S. 414 (1988). For details of the holding in \textit{Meyer}, see infra notes 297-99 and accompanying text.
\item \textsuperscript{157} \textit{Crime Victims Bd.}, 724 F. Supp. at 177. For an analysis of the argument that burdening speech does not abridge it, see supra note 114 and accompanying text.
\item \textsuperscript{158} \textit{Crime Victims Bd.}, 724 F. Supp. at 177.
\item \textsuperscript{159} 391 U.S. 367, 378-82 (1968); see infra note 161.
\item \textsuperscript{160} \textit{Crime Victims Bd.}, 724 F. Supp. at 177.
\item \textsuperscript{161} Id. at 178. Litigation of the constitutional issues posed by § 632-a has followed the same conceptual course in the New York and federal systems. The trial courts have analyzed the law as falling under \textit{O'Brien} and imposing only an "incidental" burden on speech. \textit{See}, e.g., \textit{id.} at 177; \textit{Children of Bedford, Inc. v. Petromelis}, 143 Misc. 2d 999, 1005, 541 N.Y.S.2d 894, 899 (Sup. Ct. 1989), \textit{aff'd}, 161 A.D.2d 503, 556 N.Y.S.2d 483 (1990) (mem.), \textit{aff'd}, 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453 (1991). Appellate courts, while affirming the result below, have in both systems held that \textit{O'Brien} is not applicable and that the law directly burdens speech. \textit{See}, e.g., \textit{Fischetti}, 916 F.2d at 781; \textit{Children of Bedford, Inc. v. Petromelis}, 77 N.Y.2d 713, 724, 573 N.E.2d 541, 545, 570 N.Y.S.2d 453, 459 (1991). The second result—that § 632-a cannot be understood as an extension of \textit{O'Brien}'s "symbolic speech" analysis—seems clearly the better view. \textit{O'Brien} concerned a defendant who burned his draft registration card as part of an antiwar protest. The Supreme Court considering his appeal noted that the law forbidding destruction or mutilation of a draft registration card for any reason "plainly does not abridge free speech on its face," and not even \textit{O'Brien} himself argued to the contrary. \textit{O'Brien}, 391 U.S. at 375. In the case of § 632-a, this is plainly not so. By preventing criminal authors from receiving payment, this law does, on its face, \textit{abridge} freedom of speech. \textit{See} supra note 114. It singles out expressive conduct—and expressive conduct with specific content—for its regulation, just as a statute making it illegal to burn a draft card as \textit{part of a protest} would do. As the \textit{O'Brien} Court noted, the test in that decision is to be applied when
such scrutiny because

any incidental restriction of First Amendment freedom imposed by section 632-a is no greater than is essential for the government interest in compensating crime victims. The law is drawn not to prohibit expressive activity, but to garnish the proceeds so that they will be used in a productive manner. The statute reaches only proceeds from expressive activity for the purpose of preventing a criminal from directly profiting from his or her crime. The Court thus finds that section 632-a withstands the O'Brien test and that it is not unconstitutional on its face nor as applied to plaintiff.162

The district court opinion ignored some crucial questions about a law regulating the profits from speech. Even though the law admittedly makes it more difficult for media outlets to find speakers and produce protected speech, it held that such a result was not forbidden because it does not prohibit speech. Such a distinction dodges the textual prohibition within the First Amendment on laws that “abridg[e]” freedom of the law is facially not aimed at expression and “‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct.” O'Brien, 391 U.S. at 376. When considering the issue of paid free speech, it requires a highly formalistic analysis to separate “speaking” from “receiving payment for speaking,” akin to separating “practicing law” from “billing clients,” and declaring that someone forbidden to do the latter remains free to do the former. Such a fine parsing was plainly not within the intention of the O'Brien Court.

Even if the O'Brien test is applied to this case, it is highly problematic whether § 632-a can pass it. The fourfold test of O'Brien requires that, to be constitutional, an “incidental” burden on speech must: 1) be within the constitutional power of government; 2) further an important or substantial governmental interest; 3) be unrelated to suppression of free expression; and 4) impose an incidental restriction on First Amendment freedoms no greater than is essential to further that interest. Id. at 377. The third prong is the crucial part of the O'Brien test—what Professor Rodney A. Smolla calls the “gatekeeper.” Rodney A. Smolla, Academic Freedom, Hate Speech, and the Idea of a University, LAW & CONTEMP. PROBS., Summer 1990, at 195, 210 n.55. As Professor Smolla points out, this prong can have two different interpretations. The first is simply that the rationale, the stated aim of the law, must be unrelated to speech. Id. That is the case here—the stated aim of the “Son of Sam” laws is victim compensation, which has nothing to do with limiting speech. However, as Professor Smolla notes, “all laws restricting freedom of speech are passed because of some ‘interest unrelated to [. . .] free expression.’ . . . No law abridging freedom of speech is ever promoted as a law abridging freedom of speech.” Id. (quoting O'Brien, 391 U.S. at 377). Professor Smolla points out that “[t]he sound interpretation of the phrase ‘unrelated to free expression’ focuses not upon the ultimate goal of the legislation, but rather upon whether the justifications for the law advanced by the government have nothing to do with the communicative aspects of the conduct be regulated.” Id. Section 632-a cannot pass part 3) because it is plainly related to suppression of free expression, as it is aimed at certain expressive conduct because it is expressive. It may not be aimed solely at such suppression (though it is hard not to suspect that it and many of its sister statutes are not at least primarily so intended), but it is very hard for courts to explain the statute's aim without including some discussion of the distaste felt by the public and the victim for expression by criminal authors. See supra note 132 and accompanying text.

162. Crime Victims Bd., 724 F. Supp. at 179. The court also rejected the overbreadth challenge on grounds that the law “sets forth its scope in readily discernible language.” Id.
speech, not merely on those that prohibit it.\textsuperscript{163} Further, the court divided expressive activity into two segments: first, actually speaking (protected) and, second, receiving payment for it (unprotected).\textsuperscript{164} Such a division cannot survive logical or historical\textsuperscript{165} scrutiny. By this division, the court was able to avoid examining the statute as a restriction on speech. In its review of the statute as an incidental regulation, it steered past the test of narrowness by holding that, having been designed to deprive criminals of the proceeds of speech, the statute was narrowly drawn because it did exactly what it set out to do. As the Second Circuit dissent made clear,\textsuperscript{166} such an analysis is classic question-begging: a regulation designed to restrict speech is by definition narrowly drawn if it restricts only the speech it is drawn to restrict. The proper question is whether the decision to impose a restriction on speech is a narrowly drawn means of pursuing the statute's nonspeech-related aim.

The First Amendment issues in the \textit{Wiseguy} case received more careful consideration by the Court of Appeals for the Second Circuit.\textsuperscript{167} Although a divided panel upheld the judgment of the district court, even the judges who voted to affirm rejected the district court's reasoning.\textsuperscript{168} Writing for the majority, Judge Miner began by holding that "the statute . . . imposes a direct, rather than an incidental, burden on speech and . . . therefore must meet the requirements of the strict scrutiny test to survive the constitutional challenge."\textsuperscript{169} The statute required such scrutiny because it "burdens directly the speech of those who wish to tell (and sell) the stories of their crimes . . . Without a financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write," and this burdening of speech implicated the First Amendment.\textsuperscript{170} Thus the court considered itself required to inquire whether the statute furthered "a state interest that is compelling" by means of "legislation narrowly constructed to accomplish its purpose."\textsuperscript{171}

The court of appeals reasoned that the statute furthered two such interests: "preventing criminals from profiting from their crimes"\textsuperscript{172} and "assuring that a criminal not profit from the exploitation of his or her

\begin{itemize}
    \item [163.] See supra note 114.
    \item [164.] \textit{Crime Victims Bd.}, 724 F. Supp. at 177-78.
    \item [165.] See infra notes 310-11 and accompanying text.
    \item [166.] See infra notes 180-86 and accompanying text.
    \item [167.] \textit{Fischetti}, 916 F.2d at 781-84; \textit{id.} at 784-87 (Newman, J., dissenting).
    \item [168.] \textit{Id.} at 781.
    \item [169.] \textit{Id.} at 778.
    \item [170.] \textit{Id.} at 781 (citing Meyer v. Grant, 486 U.S. 414, 422-24 (1988)).
    \item [171.] \textit{Id.} at 782.
    \item [172.] \textit{Id.} (citing Riggs v. Palmer, 115 N.Y. 506, 511-12, 22 N.E. 188, 190 (1889)). For a discussion of the relevance of Riggs, see infra notes 205-17 and accompanying text.
\end{itemize}
crime while the victims of that crime are in need of compensation by reason of their victimization." The court held that the statute was "narrowly tailored to the State's interest in denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated." The requisite narrowness existed because "the only way a criminal can profit directly from a specific crime involving a particular victim, other than by obtaining any proceeds of the crime itself, is by writing or talking about or reenacting it" and because "as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes." Such an asset is "derived from the notoriety of the criminal rather than from his or her labors." The court brushed aside an objection by the publisher that criminals can profit in other ways, such as by selling their expertise as crime prevention consultants, because "[t]he general expertise derived by a thief from a series of thefts is not the same as the tale of a specific theft committed against an identifiable victim."

Thus, the court of appeals concluded that "if the compelling state interest is to compensate victims of crimes out of the proceeds of the sale of stories of their victimization before anyone else benefits, the statute narrowly is drawn to do just that."

The majority opinion sparked a careful dissent by Judge Newman. The dissent's main focus was the majority's conclusion that the statute is narrowly tailored to serve a compelling state interest. To this question, Judge Newman wrote,

the Court applies a legal analysis that defines the state interest being advanced in terms of the statute's scope, thereby reaching the circular result that the scope of the statute is precisely tailored to the state's objective. But the question in all such cases is whether a state, consistent with the First Amendment, can pursue its objective by focusing on speech of particular content. . . . Every content-based discrimination could be upheld by simply observing that the state is anxious to regulate the

173. Fischetti, 916 F.2d at 782. The court also cited academic comment to support other purposes: preventing unjust enrichment; making victims less likely to need public assistance; satisfying victims' needs for retribution; and increasing the criminal's awareness of the consequences of his crime. Id. at 783.
174. Id. at 783.
175. Id.
176. Id.
177. Id. at 784.
178. Id. Note, however, that the admission in an expressive project would be enough to activate § 632-a, even without a "specific theft" or an "identifiable victim." See supra note 83.
179. Fischetti, 916 F.2d at 784.
designated category of speech. 180

Judge Newman also questioned the majority's reasoning that expressive proceeds are the only assets criminals are likely to have: "Of all criminals who might be liable for restitution, many have assets independent of the proceeds of their crimes." 181 These assets would be available to a non-content-based restitutio nary scheme. Judge Newman also argued that the statute should be invalidated because it imposed a restriction on expressive activity based on content, 182 and because it imposed double liability 183 on publishers and would lead them to "purge" their books of all material "arguably within the scope of the statute." 184 He argued that the aim of victim compensation could and should plausibly be pursued by strengthening state restitution and attachment statutes applicable to criminals' assets generally, rather than by singling out assets generated by speech; such a measure would be more effective in providing general victim compensation, he argued, because section 632-a "[i]n the first eleven years of its operation . . . has produced just five escrow accounts, three of which involved the same criminal." 185

Judge Newman concluded by defending the free speech interests involved in any legislative measure that chilled speech by persons accused or convicted of crime:

*Wiseguy*, the book at issue in this case, and its film adaptation, *GoodFellas*, may not be profound additions to public understanding of crime, but they are significant contributions. . . . [Simon & Schuster] does not engage in hyperbole by inviting us to consider whether it or any other firm would have published *Where Do We Go From Here?* by Martin Luther King, Jr., *Witness* by Whittaker Chambers, or *On Civil Disobedience* by Henry David Thoreau, had the crimes of these authors been committed in New York State while section 632-a was in effect. 186

It must respectfully be noted that the dissent seems to have the better of this exchange. The majority avoided the conceptual pitfall of viewing the statute as only incidentally affecting speech, but it fell into the trap, cited by Judge Newman, of analyzing the statute's narrowness of

180. *Id.* at 785 (Newman, J., dissenting).
181. *Id.* (Newman, J., dissenting).
182. *Id.* at 786 (Newman, J., dissenting).
183. *Id.* at 786-87 (Newman, J., dissenting). This happened in the *Wiseguy* case. See *supra* text accompanying note 39.
184. Fischetti, 916 F.2d at 786-87 (Newman, J., dissenting).
185. *Id.* at 787 (Newman, J., dissenting).
186. *Id.* (Newman, J., dissenting).
purpose only in terms of its speech-related intention rather than of its legitimate nonspeech-related aim.

It was in this posture that the case came before the Supreme Court, with Simon & Schuster seeking reversal of the Second Circuit's decision.

V. GODSON OF SNEPP: A HOLDING APPROVING "SON OF SAM" LAWS

First Amendment speech and press debates often tend to be characterized by a large degree of missed communication. Opponents of restrictive government actions under review are too frequently given to insisting, on the strength of little more than ipse dixit, that the particular measure at issue involves the very heart of the First Amendment and free expression generally, that its proponents are ill-intentioned and deceitful advocates of censorship, and that an adverse decision will place the republic upon a "slippery slope" whose only conceivable destination is a nightmare totalitarianism indistinguishable from that of Airstrip One, the antiutopia portrayed in George Orwell's Nineteen Eighty-Four.187

On the other side, proponents of the measure under review respond in soothing, even soporific tones. They are likely to insist that the restriction involved does not really restrict speech at all, and further that, even if it does, the restriction is so small and insignificant that no one will ever even notice the gap in expressive freedom it creates.188

As a matter of First Amendment jurisprudence, the Court's prior decisions suggest that it should invalidate the New York statute and all such attempts to attach the proceeds of speech by criminal defendants. However, I do not wish to add to the rhetorical fog surrounding these issues by suggesting that the social dilemma addressed by "Son of Sam" laws is not one that courts quite properly may find wrenching. The impulse behind these 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


188. This soothing rhetorical tone is adopted by the district court in the Wiseguy case. Crime Victims Board, 724 F. Supp. at 176; see supra notes 153-66 and accompanying text. An acute legal analysis of this type of rhetoric as used by the Supreme Court in the context of the First Amendment's Establishment Clause is found in William Van Alstyne, Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall: 4 Comment on Lynch v. Donnelly, 1984 DUKE L.J. 770. For a discussion in parable, see GARRETT EPPS, THE SHAD TREATMENT 333 (1977) ("Lie still, little shad. . . . I'm not going to do a thing to you but cut all your bones out!").
lucrative concern on the stories of violent criminals, without a correspond- ing regard for the interests, and suffering, of those harmed by crime. An oversimplified analysis of American popular culture might divide its consumers into those who sympathize with the cops and those who sympathize with the crooks. Precious few stories focus on the ordinary people whose lives are shattered and destroyed by violent crime.

It is possible that a majority of the present Supreme Court might conclude that the First Amendment should permit the legislature to intervene and alter this state of affairs by burdening and penalizing the speech of criminals. Such a majority would find at least one recent precedent that explicitly approves the sequestration—in fact, the confiscation—of proceeds of expressive activity when they are earned by someone who has stepped outside society's rules. This case, *Snepp v. United States*, 189 might form the nucleus of a holding permitting states and the federal government to enforce their "Son of Sam" laws.

*Snepp* concerned a book by a former case officer for the Central Intelligence Agency who had signed an agreement promising not to reveal classified information learned in the course of his employ and to submit for prepublication review anything he wrote after leaving the CIA. 190 After leaving the agency, Snepp wrote a book, *Decent Interval*, 191 which, the Government stipulated, revealed no classified information. 192 However, he did not submit the book for review. 193 The district court then subjected all Snepp's proceeds from the book to a constructive trust for the benefit of the agency, 194 a remedy the Court of Appeals for the Fourth Circuit disallowed 195 but the Supreme Court upheld by a vote of six to three. 196 The Court upheld this remedy because of a compelling interest it found in protecting "both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." 197 A constructive trust is more typically used to recover sums gained by an employee who actually breaches a fiduciary obligation by revealing classified

190. *Id.* at 507-08.
192. *Snepp*, 444 U.S. at 510; *id.* at 516 (Stevens, J., dissenting).
193. *Id.* at 507.
194. *Id.* at 509.
197. *Id.* at 509 n.3 (emphasis added).
But in contracts affecting foreign intelligence, the strong interest in the appearance of confidentiality allowed the use of the remedy even though there had been no breach of the actual obligation. The Court held that a suit for punitive damages, which might be a more normal remedy for such a breach, would not suffice in this context because such a suit might require further revelations of government secrets during the course of litigation. The Court's per curiam opinion recognized that the constructive trust was being imposed more for its deterrent effect on future oath-breakers than as a remedy for the Government's actual damage.

_Snepp_ is an odd decision, one that has been much criticized. Perhaps because the case was decided on a conditional cross-petition for certiorari, without full briefing of the issues, the opinion seems to take little notice of the weighty First Amendment interests involved. The case might be read as having narrow application to the area of foreign intelligence and national security secrecy; under such a reading, its application would be restricted to former government employees who have signed secrecy agreements. However, there is evidence that the executive branch has read it more broadly, as permitting a wide range of restraints on employee expression, whether imposed by agreement or otherwise. Certainly the language of _Snepp_ is broad enough that a subsequent Court could use it as the basis for a holding favorable to "Son of Sam" laws—particularly when combined with the venerable legal principle embodied

198. _Id._ at 515.

199. _Id._ at 514.

200. "[A]s a practical matter, [the Fourth Circuit's decision allowing tort recovery rather than constructive trust] may well leave the Government with no reliable deterrent against similar breaches of security. . . . Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk." _Id._ at 514-15 (emphasis added).


202. Certiorari was granted in the per curiam opinion. _Snepp_, 444 U.S. at 507.

203. For a defense of "the free flow of unclassified information," see _id._ at 520 (Stevens, J., dissenting).

204. See Cheh, _supra_ note 201, at 695-96 (commenting that President Reagan's directive in the wake of _Snepp_ "extend[ed] the use of prepublication review agreements to the entire executive branch"). For a discussion of recent federal legislation imposing sweeping financial restrictions on public employee expression, see _infra_ note 320.
in *Riggs v. Palmer.*

*Riggs* was cited by the Second Circuit majority in the *Wiseguy* case as a major precedent for the proposition that "the state has a very strong interest in preventing criminals from profiting from their crimes." *Riggs* is also one of the most cited cases in the history of American law. *Riggs* concerned a sixteen-year-old youth who, learning that his grandfather was considering disinheriting him, killed the old man before he could change his will. The boy then claimed his legacy, and the New York Court of Appeals could find no explicit provision in the statute disallowing the explicit bequest. The court nevertheless held that the statute involved should be read in terms of its purpose: "to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed." The court reasoned that

it could never have been [the drafters'] intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it. It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers. The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called rational interpretation . . . .

Applying "rational interpretation" to the statutes governing wills, the court reasoned that laws that were designed to further the "orderly, peaceable and just devolution of property" could not have been intended to reward those who brought them into operation by violence. The court added:

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205. 115 N.Y. 506, 22 N.E. 188 (1889).
206. *Fischetti,* 916 F.2d at 782 (citing *Riggs,* 115 N.Y. at 511-12, 22 N.E. at 190).
209. Id. at 509, 22 N.E. at 189.
210. Id.
211. Id.
212. Id. at 511, 22 N.E. at 190.
213. Id.
Besides, all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.\textsuperscript{214}

The bequest to the defendant only became operative because "by his crime [he] made it speak and have operation. . . . Shall he acquire title by murdering [the victim]?"\textsuperscript{215} Accordingly, the court held, "by reason of the crime of murder committed upon the grandfather [Riggs] is deprived of any interest in the estate left by him."\textsuperscript{216}

Riggs, although a century old, remains good law and is an important precedent in the law of constructive trusts.\textsuperscript{217} It is powerful in part because it embodies an intuitively appealing idea of natural justice. The other case relied upon by the Second Circuit Court of Appeals in the Wiseguy case, Caplin & Drysdale, Chartered v. United States,\textsuperscript{218} is exactly 100 years younger. Though the court cited Caplin only as authority for the general principle of Riggs,\textsuperscript{219} it in fact provides powerful evidence that the current Supreme Court is prepared to apply the principle that no one should profit by his own wrong even when such application burdens explicit constitutional guarantees.

\textit{Caplin} challenged the constitutionality of a federal statute authorizing forfeiture to the government of "property constituting, or derived from . . . proceeds . . . obtained" from violations of federal drug laws.\textsuperscript{220} The defendant in a drug case paid his lawyers with funds later subjected to an order of forfeiture; the attorneys challenged the order on grounds that it impermissibly burdened the Sixth Amendment right to counsel. The Court granted the argument that such a forfeiture did burden that right, but rejected the constitutional challenge nonetheless.\textsuperscript{221} The burden on the right was tolerable, the Court held, because the forfeiture advanced three specific important governmental interests: first, it raised "substantial" sums of money for the use of law enforcement authorities;\textsuperscript{222} second, it permitted assets to be held for claims of restitution;\textsuperscript{223}

\textsuperscript{214} \textit{Id.}
\textsuperscript{215} \textit{Id.} at 512-13, 22 N.E. at 190.
\textsuperscript{216} \textit{Id.} at 515, 22 N.E. at 191.
\textsuperscript{217} See, e.g., \textit{GEORGE T. BOGERT, TRUSTS} \textsection{} 82, 296 n.4 (6th ed. 1987).
\textsuperscript{218} 491 U.S. 617 (1989).
\textsuperscript{219} \textit{Fischetti}, 916 F.2d at 782 (citing \textit{Caplin}, 491 U.S. at 629).
\textsuperscript{221} \textit{Caplin}, 491 U.S. at 625.
\textsuperscript{222} \textit{Id.} at 629.
\textsuperscript{223} \textit{Id.} at 629-30.
and, third, it furthered the government’s “legitimate interest in depriving criminals of economic power.”

Perhaps most interesting for its bearing on the *Wiseguy* case, *Caplin* explicitly rejects the idea that the First Amendment has a higher status as a protected liberty than does the Sixth Amendment right to counsel:

> [T]here is no ... distinction between, or hierarchy among, constitutional rights. If defendants have a right to spend forfeitable assets on attorney’s fees, why not on exercises of the right to speak, practice one’s religion, or travel? The full exercise of these rights, too, depends in part on one’s financial where-withal; and forfeiture, or even the threat of forfeiture, may similarly prevent a defendant from enjoying these rights as fully as he might otherwise. Nonetheless, *we are not about to recognize an antiforfeiture exception for the exercise of each such right* ... 225

These precedents can easily combine to create a basis on which a Court majority could uphold the principle embodied in “Son of Sam” laws. After all, is not Henry Hill “profiting from” his crimes when he receives funds for the use of his story in books, on television, and in the movies? If the government’s interest in the appearance—not the substance—of confidentiality in its foreign intelligence operation is substantial enough to justify imposition of a constructive trust on the proceeds of a book that does not contain any classified material, is not the substantial interest in victim compensation sufficient to trigger a similar remedy against proceeds of expressive activity by criminals, even where (as in Jean Harris’s case, and many others), those expressions contain no material that invades victims' privacy, or defames them, or violates any other specific interest generally protectable in the law governing First Amendment speech? If the law has an interest in preventing drug lords from using wealth acquired by their illegal conduct, does it not have a similar interest in preventing murderers and other criminals from amassing wealth from the sale of their stories? And if that interest can trump the Sixth Amendment right to retain counsel, why can it not likewise trump the First Amendment right of speech, or even of press?

Accordingly, it is possible to imagine the Court holding roughly as

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224. *Id.* at 630.

225. *Id.* at 628 (emphasis added). The *Caplin* holding sparked a bitter dissent by Justice Blackmun, with whom Justices Brennan, Marshall, and Stevens joined. *Id.* at 635-56 (Blackmun, J., dissenting). The dissenters insisted that the law should have been construed to avoid burdening the right to counsel, *id.* at 636-43 (Blackmun, J., dissenting), and that the majority had inadequately measured the extent of that right, *id.* at 644-55 (Blackmun, J., dissenting).

226. Or the identical one. See *CAL. CIV. CODE § 2225(b)* (West 1991) (subjecting proceeds of expressive activity by convicted felons to an involuntary trust for the benefit of victims).
follows: Because a “Son of Sam” law is narrowly tailored to compensate victims and to prevent criminals from profiting from their crimes and accumulating economic power because of their criminal activity, a carefully drawn statute providing adequate due process safeguards that sequesters the proceeds to the criminal of expressive activity and under certain circumstances forfeits them to the state does not violate the First Amendment’s guarantee of freedom of speech and press.

But that such a holding is possible does not mean that it is correct or wise. In fact, the Court’s own precedents in the First Amendment area suggest that, even after confronting the conflicting appeal of the moral issues involved in criminal speech, it should most logically choose to vindicate the free speech interests involved in the *Wiseguy* case. Faced with the necessity of choosing between the broader principles implied by the language and history of the First Amendment and those implied by *Riggs* and *Caplin*, the Court would do better to favor the former.

**VI. FLAWS IN THE NEW YORK LAW: ELEMENTS OF A NARROW HOLDING**

As mentioned above, the general question of “Son of Sam” laws pits two powerful principles against each other: freedom of speech, on the one hand, against the moral revulsion felt by society against those who break the law and then profit by writing or speaking about it. Because of the necessity of framing the case around a specific statute, these issues may be explored only obliquely during the *Wiseguy* litigation. It is entirely foreseeable that, faced with a specific case challenging a specific “Son of Sam” statute, the Supreme Court might wish to issue as narrow a holding as possible, so that the broader issues could await a later decision and more useful briefing. In this section, I argue that the circumstances of the *Wiseguy* case and the defects of the New York law combine to offer the Court ample grounds on which to base such a narrow holding if it chooses to do so. I argue that the New York statute is overbroad. Further, it impermissibly burdens interests protected by the Press Clause of the First Amendment—specifically, by imposing a form of prior restraint or impermissible licensing on publishers. It also violates clear Supreme Court precedents invalidating financial regulations aimed either at the press generally or at specific segments of the press distinguished from others by the content of the material they convey.

Overbreadth is a doctrine the Court uses to permit challenges to laws that infringe on First Amendment interests even by those whose conduct might validly be regulated under more stringently drawn stat-
The Court in recent years has required that overbreadth be "substantial" before it can invalidate statutes that restrict "conduct [that]—even if expressive—falls within the scope of otherwise valid criminal laws." Nevertheless, the Court recognizes that overbreadth analysis is appropriate when applied to laws that target speech, even when such speech is sought to be limited in the interest of criminal law enforcement. Thus, in *City of Houston v. Hill*, the Court held that Houston police had violated the civil rights of the plaintiff when they arrested him for attempting to distract a police officer, who was questioning another man, by shouting, "Why don’t you pick on somebody your own size?" The plaintiff had been charged under a statute making it an offense to "willfully or intentionally interrupt[ ] a policeman . . . by verbal challenge during an investigation." The Court invalidated the statute, not because the city could not prevent individuals from obstructing police officers, but because this formulation vested police officers with too much discretion, and because no limiting construction could be found that would prevent it from being "susceptible of regular application to protected expression."

The *Wiseguy* case also concerns a very broad statute restricting the ability of individuals to engage in a number of expressive activities, ranging from the most salacious exploitation of vile crimes to the measured and sober defense of civil disobedience. Charles Manson, if he were in New York, would indeed be prevented from collecting proceeds derived from selling his story of slaughtering Sharon Tate; however, the statute by its terms also would restrict not only Thoreau and King but also Gandhi and Socrates from discussing their illegal activities. Indeed, while the State could not punish the defendant in *City of Houston* for interrupting a police officer who was trying to make an arrest, it might, had it had a "Son of Sam" law at the time, have been able to sequester funds earned by him for writing an article defending his decision to do so.

Moreover, the New York statute by its terms applies to all revenues

230. Id. at 453-54.
231. Id. at 454.
232. Id. at 465-67.
233. Id. at 467.
234. See supra text accompanying note 186. Note also that § 632-a invests the Board with broad discretion to apply the statute to specific projects or to exempt them from its operation. See supra note 106 and accompanying text.
from a media project, no matter how little of its content might concern the crime that triggered the statute's application. It is difficult to imagine a limiting judicial construction that would obviate these problems; a judicial construction that required, for example, that the predicate crime be a serious or violent one would not prevent the law from chilling protected expression, since much political advocacy involves discussion of crimes deemed violent by society.235 Similarly, a construction that required that discussion of the predicate crime occupy the majority or a substantial part of the work's content before the statute could apply would simply enmesh the Crime Victims Board, and the courts, more deeply in content-based judgments about specific expressive projects. The Court would be well within its own precedents if it struck down the law as overbroad.

Secondly, Supreme Court precedent suggests that section 632-a violates the First Amendment's Press Clause specifically.236 To begin with, the statute subjects media outlets, which are protected by the Press Clause as well as the Speech Clause of the First Amendment, to a form of regulation that combines elements of classic prior restraint with elements of the licensing system abandoned in England in 1694.237 Those who do not comply, either intentionally or inadvertently, then find themselves subject to economic penalties that resemble the special taxes on the press that the Court has repeatedly invalidated.238

The prior restraint part of the statutory scheme, of course, is its requirement that media outlets contracting with criminal defendants sub-

235. See, e.g., infra note 326 and accompanying text (discussing self-defense claims of abused wives who harm or kill their abusers).

236. "Congress shall make no law ... abridging the freedom ... of the press ... ." U.S. CONST. amend. I. It has been argued that the separate mention of the press in the Amendment's text represents "an acknowledgment of the critical role played by the press in American society." Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (Stevens, J., concurring). This textual acknowledgment, it is suggested, requires "sensitivity" to the "special needs" of the institutional press. Id. (Stevens, J., concurring). Others, however, have contended that the Constitution does not mandate any special institutional privilege for the press. See, e.g., First Nat'l Bank v. Bellotti, 435 U.S. 765, 798 (1978) (Burger, C.J., concurring).


238. See Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 223, 234 (1987) (invalidating sales tax imposed on general interest magazines but not applied to newspapers or to religious, professional, trade, or sports journals), discussed infra notes 245-48 and accompanying text; Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 577-79 (1983) (holding that tax on publications was invalid even though the tax was based not on content but rather on the revenues of the publications within its purview), discussed infra notes 249-55 and accompanying text; Grosjean v. American Press Co., 297 U.S. 233, 245-48 (1936) (recounting the history of special taxation of the press in England and America, and suggesting that such taxation was an abuse the framers of the First Amendment intended to prevent).
mit the contracts for review by the Board.239 Such review, particularly when prolonged, might delay arrangements to publicize a criminal's story until it was no longer timely. The Court has held that "prior restraints on speech and publication are the most serious and the least tolerable infringement[s] of First Amendment rights,"240 particularly when applied to "reporting of criminal proceedings."241 The presumption against prior restraint applies even when the restraint is temporary.242

Advance review by an administrative body with broad powers to make content-based determinations that may impose costs on both parties to the contract also smacks of systems that require publishers to obtain a license before publishing or circulating a work or publication. Such schemes have been struck down where, as here, the scheme is "directed narrowly at expression or conduct commonly associated with expression" and "creates an agency . . . charged particularly with reviewing speech . . . breeding an 'expertise' tending to favor censorship over

239. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982). In the case before the Court, [the Board commenced its inquiry by delivery of letters to Simon & Schuster and author Pileggi which sought, inter alia, copies of "all . . . contracts or agreements" either Simon & Schuster or Pileggi may have entered into with any person "who has been accused or convicted of a crime," the name of any such person, a "description, location, and dates of crimes committed," and any amounts paid to such person. These sweeping demands required Simon & Schuster to review all of its thousands of contracts, and sought to conscript Simon & Schuster into laying bare any information it might have on the past criminal activity of any of its authors or primary sources, and were not limited to *Wiseguy.*

Brief for the Petitioner at 8-9, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., No. 90-1059 (U.S. filed Apr. 19, 1991). Such administrative demands for media self-policing plainly entail, at the least, the imposition of an economic disincentive imposed on media outlets who engage in certain expressive activities. Such disincentives were disapproved in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256-57 (1974) (holding law requiring newspapers to print replies to unfavorable articles invalid under the First Amendment because, inter alia, it "exacts a penalty on the basis of the content of a newspaper . . . in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print").


In addition to the possibility that the Board might exercise impermissible prior restraint, the New York scheme also has the potential, as shown in the *Wiseguy* case, of subjecting certain media outlets to double liability—when the Board rules that a contract not submitted to it should be covered by section 632-a, it may order the publisher to pay to the Board an amount equal to all sums previously paid to the defendant if such sums are not recoverable from the defendant. Such a liability provision contravenes the Court's established precedent that the press may not be singled out for taxation.244 This doctrine has been applied both when (as in the New York scheme) the financial liability is imposed on certain media outlets because of the content they convey and when the tax is applied to the press, but only the press, as a whole.

Thus, in *Arkansas Writers' Project, Inc. v. Ragland*245 the Court invalidated a sales tax imposed on general interest magazines but not applied to newspapers or to religious, professional, trade, or sports journals.246 In an opinion by Justice Marshall, the Court held that the tax must fall even though the record showed "no evidence of an improper censorial motive."247 The tax was flawed because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content. . . . Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press.248

243. Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 760 (1988). *Lakewood* involved an ordinance requiring newspapers to reapply annually for permission to place vending machines on municipal property, *id.* at 753, thus making the case one where the stated aim was, as in victim compensation schemes, not to censor speech but to further a nonspeech-related aim. See *id.* at 753-54 (ordinance focused on machines' design and indemnification of the city for any liability incident to the presence of machines). *Lakewood* was a 4-3 decision; Chief Justice Rehnquist and Justice Kennedy did not take part. *Id.* at 752.


246. *Id.* at 223, 234.

247. *Id.* at 228.

248. *Id.* at 229-30 (citations omitted). *Ragland* was a 6-1-2 decision. Justice Stevens concurred in the judgment, but argued that government has broader power to restrict expression than the majority would allow. *Id.* at 234-35 (Stevens, J., concurring in part and concurring in judgment). Justice Scalia, joined by Chief Justice Rehnquist, dissented, arguing that, absent a "significant coercive effect," or a legislative intent to produce such an effect, the case should have been considered as a governmental refusal to grant an exemption to a generally applicable
The Court also has invalidated a tax aimed at publications even though it was not based on content but rather on the revenues of the publications within its purview. At issue in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* was a state use tax on ink and paper used in the production of publications. These items were the only components of retail goods taxed in Minnesota, and the tax was further structured to exempt all but large newspapers from any actual liability. The Court declined to rule such a tax automatically invalid, but held that such a tax could not be sustained unless justified by "a counterbalancing interest of compelling importance" that could not be realized by "alternative means of achieving the same interest without raising concerns under the First Amendment." In *Minneapolis Star* such an interest could not be shown, and the tax fell even though the record did not disclose improper legislative motives. In her opinion for the Court, Justice O'Connor relied heavily on arguments by opponents of the ratification of the Constitution that a bill of rights would be needed to protect the press from ruinous taxation by the federal government.

The New York law does not single out the press as a whole for a definite but potentially punitive tax, but instead imposes contingent financial penalties on certain media outlets based on their editorial decisions. Those that do not contract to pay defendants to explain their "thoughts, feelings, . . . or emotions" are free to express whatever, and as much as, they choose about the subject of crimes within the Board's

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250. Id. at 577-78.
251. Id. at 579-80. In Grosjean v. American Press Co., 297 U.S. 233 (1936), Justice Sutherland's opinion for a unanimous Court rehearses much of the history of special taxation of the press in England and the colonies, suggesting that such taxation was an abuse the framers of the First Amendment must have intended to prevent. Id. at 245-48. Nevertheless, the *Minneapolis Star* Court declined to invalidate all taxes on the press on the strength of *Grosjean*, arguing that the Court's holding in the latter case was shaped by the fact that the tax invalidated had been imposed by the machine of Louisiana Senator Huey P. Long for the purpose of penalizing daily newspapers that opposed his radical political program. *Minneapolis Star*, 460 U.S. at 579-80.
252. Minneapolis Star, 460 U.S. at 585.
253. Id. at 586.
254. Id. at 592.
255. See id. at 584 (citing writings of Richard Henry Lee and Melancton Smith). Both the partial concurrence by Justice White, id. at 593 (White, J., concurring in part and dissenting in part), and the dissent by then-Justice Rehnquist, id. at 596 (Rehnquist, J., dissenting) (focusing on the majority's refusal to examine how much actual burden the tax imposed on the press.
256. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).
jurisdiction—including reenactments or recreations of the most sanguinary and distasteful kind. Those outlets that present the defendant's point of view may find themselves with significant and unpredictable financial liability to the State, depending on the Board's discretion and their own skill in interpreting the statute. Under such circumstances, the statute certainly seems to constitute a selective, content-based financial penalty directed at the press, bringing it within the ambit of *Ragland* and *Minneapolis Star*.

Thus, the manifest sloppiness of the New York drafters affords the Court many options for invalidating this statute as applied in this case without prejudging the larger question of whether the general run of statutes aimed at criminal expression for profit should be constitutionally tolerated. The flaws in the New York scheme—in particular, its targeting of publishers rather than criminals themselves—might be considered to have muddied the issues sufficiently that briefing and argumentation of the case had not engaged the central issue. A narrow holding would permit the nation's publishing industry to operate free of sweeping restrictions, while preserving for another time the question of whether a more narrowly drawn statute can survive judicial scrutiny.

However, there is also ample precedent from which to argue that all such laws, even those more carefully drafted than New York's, are unconstitutional and should be declared so.

VII. SPEECH BY CRIMINALS: A BROAD FIRST AMENDMENT HOLDING

To understand the full constitutional implications of the *Wiseguy* case, it is necessary to imagine a statute drawn as scrupulously as possible to avoid overbreadth and Press Clause problems. First, such a statute would have a narrow regulatory predicate: it would be aimed only at those convicted of crime, not those merely accused, and its application would not be triggered by any criminal conviction, but only by conviction of a truly heinous crime, that is, say, by a violent felony. Second, the law would be aimed solely at such criminals, and would not impose or imply financial or criminal liability on publishers. Third, the law's sequestration of profits could not be applied ex post facto or by administrative action, but only after an individualized determination, made by a court upon the motion of an adverse party and with notice to all interested parties, that the statute's terms applied to monies from a specific expressive project by a specific criminal. Finally, the bill would sequester profits from an affected project only for the purpose of compensating
individual victims who obtained civil judgments; there would be no forfeiture of profits to the state treasury or to a general crime victims' fund.

Such a statute would pose the constitutional question in its sharpest terms: is it permissible for a legislative body to enact a law that targets the profits from expressive activity for differential, and harsher, treatment as part of a scheme of victim compensation? Put more simply, may the state target the profits of First Amendment activities, \textit{and those profits only}, to further that aim?

The Court's First Amendment precedents most strongly suggest that the answer to these questions is no. In brief, the Court has repeatedly held that speech about crime and criminal justice is protected by the First Amendment. Consequently, statutes like "Son of Sam" laws that restrict or unfavorably treat speech based on its content are subject to strict scrutiny. The Court has also held that speech may not be suppressed because the speaker is someone whom the state asserts a special interest in regulating; thus, the state does not have more freedom to restrict the speech of criminals about their crimes simply because they are criminals. And the Court's precedents suggest that the fact that the law does not prohibit speech by criminals, but only subjects it to content-based economic burdens, does not exempt the measure from full First Amendment scrutiny.

Under this analysis, a "Son of Sam" law cannot survive unless it is narrowly tailored to further its legitimate nonspeech-related purpose—compensation of victims, not compensation of victims solely from the proceeds of expressive activity. If the scrutiny is applied in those terms, the law cannot survive, because it is so ineffective in pursuing that pur-

257. See infra notes 270-79 and accompanying text.

258. See, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975) (barring state from making it a tort for journalists to disclose the names of rape victims when those names were learned from court records), discussed infra notes 270-76 and accompanying text; Winters v. New York, 333 U.S. 507, 508 (1948) (voiding on vagueness grounds state statute that made it a misdemeanor to sell or possess publications principally composed of crime stories), discussed infra notes 277-79 and accompanying text. The "strict scrutiny" test means that courts must determine whether a content-based restriction on speech is "necessary to serve a compelling state interest and ... is narrowly drawn to achieve that end." Widmar v. Vincent, 454 U.S. 263, 270 (1981). In such an examination, the burden is on the government to prove the legitimacy of the state interest asserted. First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978). Courts must scrutinize carefully the government's asserted justification for a content-based restriction. Carey v. Brown, 447 U.S. 455, 461-62 (1980). The presumption is against an asserted interest, though some interests may be found "so compelling that where no adequate alternatives exist" a content-based restriction may be upheld. \textit{Id.} at 465.

259. See infra notes 280-82 and accompanying text.

260. See infra notes 296-99 and accompanying text.
pose as to raise the question of whether the stated purpose is a mere pretext for a speech-suppressing law.

Though the Supreme Court has never had occasion to decide the constitutionality of a law aimed directly at limiting criminals from selling commercial rights to reenact their crimes, the Court has, remarkably enough, considered a case that centered on the power of states to restrict commercial reenactments of crime. The case, decided in 1967, was *Time, Inc. v. Hill*. In that case, a family sued *Life* magazine under a New York privacy statute that forbade invading the privacy of individuals by commercial appropriation of name or likeness. The family had been held hostage by escaped convicts some years before, and their experience had been fictionalized by a playwright under the title *The Desperate Hours*. When the play opened, *Life* editors decided to take actors from the cast to the house where the family had lived and have them "reenact" the family's ordeal by posing in scenes of brutality from the play. However, *Life* negligently failed to check its own files, which would have shown that the real convicts, unlike the fictional ones, had not brutalized and degraded the hostages they held. Despite the magazine's negligence, the Court held that the First Amendment, and the principles of *New York Times Co. v. Sullivan*, precluded the application of the statute to invasions of privacy unless they were committed with actual knowledge of their falsity or recklessness as to falsity. The *Time* majority called the events depicted in the play "matter[s] of public interest" and stated that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government."

More recently, in *Cox Broadcasting Corp. v. Cohn*, the Court has been even more solicitous of speech about "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions." In *Cox Broadcasting*, the Court barred the state of

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264. *Id.*
265. *Id.* at 378.
268. *Id.* at 388.
269. *Id.* Justice Fortas dissented on the grounds that speech reenacting crimes is "not within the specially protected core of the First Amendment." *Id.* at 420 (Fortas, J., dissenting).
271. *Id.* at 492.
Georgia from making it a tort for journalists to disclose the name of rape victims when those names were learned from court records.\textsuperscript{272} The statutory tort was disallowed because it "imposes sanctions on pure expression—the content of a publication—and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition."\textsuperscript{273} Though the case turned largely on the need for free dissemination of information in public records,\textsuperscript{274} the Court explicitly considered restrictions on speech in relation to the rights of crime victims: in \textit{Cox Broadcasting}, the protected victim interest was privacy, an interest the Court strongly endorsed\textsuperscript{275} but did not allow to trump the rights protected by the First Amendment.\textsuperscript{276}

The Court protected speech about crime even at a time when it was generally less solicitous about the rights of speech and press than it is today. In \textit{Winters v. New York}\textsuperscript{277} Justice Reed, writing for the majority, voided on vagueness grounds a New York statute that made it a misdemeanor to sell or possess publications "’principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime.’ "\textsuperscript{278} Though the case did not turn on First Amendment grounds, the Court noted that, even though states had an important interest in minimiz[ing] all incentives to crime . . . . [w]e do not accede to [the State’s] suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine. Though we can see nothing of any possible value to society in these magazines,

\begin{itemize}
  \item \textsuperscript{272} \textit{Id.} at 491.
  \item \textsuperscript{273} \textit{Id.} at 495.
  \item \textsuperscript{274} \textit{See id.} at 495; \textit{see also id.} at 497 (Powell, J., concurring) ("[T]he First Amendment proscribes imposition of civil liability in a privacy action predicated on the truthful publication of matters contained in open judicial records."). Then-Justice Rehnquist dissented, but only on the issue of whether the decision below represented a final action ripe for appellate review. \textit{Id.} at 501 (Rehnquist, J., dissenting).
  \item \textsuperscript{275} \textit{See id.} at 487-89.
  \item \textsuperscript{276} \textit{Id.} at 485.
  \item \textsuperscript{277} 333 U.S. 507 (1948). A plurality of the Court recently cited \textit{Winters} as authority that "First Amendment protection is in no way limited to controversial topics or emotionally charged issues." \textit{Lehnert v. Ferris Faculty Ass’n}, 111 S. Ct. 1950, 1960 (1991) (plurality opinion).
  \item \textsuperscript{278} \textit{Winters}, 333 U.S. at 508 (quoting N.Y. PENAL LAW § 1141(2) (Thompson 1939)). Odd as such a statute may seem today, at the time of \textit{Winters} at least 20 states had these laws, \textit{id.} at 522-23 (Frankfurter, J., dissenting), and they were a much more clearly accepted part of the legal system than are "Son of Sam" laws today.
\end{itemize}
they are as much entitled to the protection of free speech as the best of literature.\textsuperscript{279}

Thus, a holding by the present Court that speech is less strongly protected because it concerns crime would represent a significant departure from its own precedent. Is there, then, any reason to protect speech less strongly because it comes from a criminal? The Court has often rejected the idea that First Amendment protections weaken depending on the identity of the speaker. In \textit{First National Bank v. Bellotti}\textsuperscript{280} the Court invalidated a state statute that banned corporations from publicly addressing the merits of questions put to the public by referendum on possible constitutional amendments.\textsuperscript{281} That the speaker was a corporation—a creature of the state and subject to a variety of controls not applicable to individuals—did not mean that its First Amendment interests could be outweighed by less weighty interests than would have to be asserted to trump an individual’s First Amendment right of free speech, the Court held: “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.”\textsuperscript{282} Thus, that the writer is a criminal, or that the writing is about crime, does not necessarily reduce the level of First Amendment scrutiny to be applied to a model “Son of Sam” law. Indeed, precedent suggests that the scrutiny should be even higher in “Son of Sam” cases because the restriction in

\textsuperscript{279} Id. at 510 (citations omitted). The present debate is illuminated by comparing the majority opinion with Justice Frankfurter’s dissent, which heatedly argues that all such magazines may be banned as “incitements to crime.” \textit{Id.} at 527 (Frankfurter, J., dissenting). Justice Frankfurter, without using the term, judged the law under the more or less pure “bad tendency” test: “No one would deny, I assume, that New York may punish crimes of lust and violence. Presumably also, it may take appropriate measures to lower the crime rate.” \textit{Id.} at 526 (Frankfurter, J., dissenting). The First Amendment would protect the magazines if they were “[w]holly neutral futilities,” but did not protect those adjudged by the legislature as capable of “mischief.” \textit{Id.} at 528 (Frankfurter, J., dissenting).

\textsuperscript{280} 435 U.S. 765 (1978).

\textsuperscript{281} \textit{Id.} at 795.

\textsuperscript{282} \textit{Id.} at 777. \textit{Bellotti} was a 5-4 decision. Justices White, Brennan, and Marshall would have upheld the statute as a valid exercise of the state’s power to supervise corporate stewardship of the shareholders’ assets and because speech by a corporation is not a “manifestation of individual freedom or choice.” \textit{Id.} at 804-05 (White, J., dissenting). Justice Rehnquist dissented separately, arguing that, having created a corporation by legislative act, a state should be free to restrict its speech to matters necessary for the corporation’s function. \textit{Id.} at 823-25 (Rehnquist, J., dissenting).

question is directed at some, but not all, speech by criminals, and because
the law discriminates on the basis of the content of the speech. Works
of autobiography that do not mention crime, works of social advocacy
purged of any mention of the criminal's own misdeeds, volumes of verse,
moral theology, or fiction do not fall within the law's restrictions; only
expressive projects that reenact the crime or discuss the criminal's reac-
tions to it are affected. Such content-based restrictions have received a
very cold reception from the Court in previous cases. In Regan v. Time, Inc. the Court invalidated a federal statute that allowed the reproduc-
tion of U.S. currency "for philatelic, numismatic, educational, historical,
or newsworthy purposes," while denying permission to publications whose purposes were considered to be otherwise. Justice White wrote that "[r]egulations which permit the Government to discrimi-
nate on the basis of the content of the message cannot be tolerated
under the First Amendment."

Similarly, in FCC v. League of Women Voters the Court set aside
a ban by the Federal Communications Commission on editorializing by
broadcast stations funded by the Corporation for Public Broadcasting because the "ban [was] defined solely on the basis of the content of the
suppressed speech" and attempted to "limit discussion of controversial
topics and thus to shape the agenda for public debate." In Consolidated Edison Co. v. Public Service Commission the Court struck down
a state administrative rule banning regulated utilities from inserting into
their bills mailings about political matters. This regulation, like the
one in "Son of Sam" laws, was viewpoint neutral; neutrality did not save
it, however, because to allow "prohibition of public discussion of an en-

283. See infra notes 285-95 and accompanying text.
284. The content restrictions in New York's law are broad enough, however, that John
Ehrlichman's first novel, THE COMPANY (1976), which seems to present his own view of how
the Watergate scandal took place, might be affected. Of course, his nonfiction work, WITNESS
to POWER: THE NIXON YEARS (1982), would likely be affected by such a law. Works by
participants who admit crimes are, of course, a major, if not the major, source of historical
information about the Watergate scandal.
286. Id. at 644 (quoting 18 U.S.C. § 504(1) (1958)).
287. Id. at 650, 652.
288. Id. at 648-49 (citations omitted).
290. Id. at 366-73.
291. Id. at 383.
292. Id. at 384. The content basis of the regulation was one of "two central features" on
which the Court based its holding; the other was that the ban targeted editorial opinion. Id. at
381.
293. 447 U.S. 530 (1980).
294. Id. at 532-33.
tire topic . . . would be to allow [the] government control over the search for political truth."

Thus, the First Amendment case law looks harshly at such restrictions and does not relax its presumptive disapproval merely because they restrict speech by criminals about crime. But most of the cases cited above concern government attempts to stop or ban speech altogether. Can the "Son of Sam" law nonetheless claim a more lenient standard of review on the ground that it does not ban speech, but merely alters its profit-making potential? The recent case of Meyer v. Grant suggests that it cannot.

*Meyer* concerned a Colorado statute that made it a criminal offense to pay solicitors for seeking signatures on petitions aimed at placing proposed amendments to the state constitution on the ballot. The Supreme Court invalidated the statute because it "limit[ed] the number of voices who will convey appellees' message . . . and, therefore, limit[ed] the size of the audience they can reach," thus producing "the inevitable effect of reducing the total quantum of speech on a public issue."  


above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."  


296. The district court in the *Wiseguy* case relied on this distinction in holding that § 632-a does not "abridge" protected speech. See *supra* notes 153-60 and accompanying text.


298. *Id.* at 415-16.

299. *Id.* at 422-23. The Court quoted the Colorado Supreme Court's admission, while considering a different challenge to the statute, that "[w]e can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay." *Id.* at 423 (quoting *Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983)). It is similarly more difficult to get criminals, agents, ghost writers, and other literary professionals to work when payday may be delayed for five years—or may never come at all. Many other cases recognize the intimate relationship between speaking freely and being able to pay or receive money for speech. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (recognizing that federal restrictions on expenditure of personal funds by political candidates and by independent organizations violate First Amendment). However, a number of the justices, led by Justice Stevens, have advanced an argument that speech can, in essence, be "graded" in degree
Thus, the Court's previous cases suggest that the proponents of any "Son of Sam" law—even one narrowly drawn to avoid offending the Press Clause—must meet an exacting test: the law must be narrowly tailored to advance a compelling governmental interest. In this case, content-based, expression-selective statutes cannot pass such a test when the question is properly posed.

The interest asserted is the compensation of victims. But the statutes do little to advance that interest, and arguably retard it. Return of First Amendment protection for purposes of economic regulation that burdens but does not prohibit the speech. In Young v. American Mini Theatres, 427 U.S. 50 (1976), Justice Stevens wrote a plurality opinion upholding the constitutionality of a Detroit ordinance that ordered "adult" theaters to be widely dispersed, thereby making it more difficult and costly to find a suitable site for such a theater. Id. at 72-73 (plurality opinion). The plurality found this not to be an "impermissible restraint," id. at 62 (plurality opinion), even though it involved a content-based determination, id. at 66 (plurality opinion). While noting that erotic material could not be suppressed entirely, the plurality said that it 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 speaker's words but would defend to the death the speaker's right to say them]. . . . [F]ew 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 (plurality opinion). On the other hand, Justice Powell, who provided the fifth vote to uphold the ordinance, did so on the grounds that the ordinance was not content-based at all, but was motivated by concern for the "effects" (such as urban blight and crime) of concentration of "adult" theaters. Id. at 81 n.4 (Powell, J., concurring). The "effects" rationale seemed important in the reasoning of the six-member majority that upheld a similar ordinance in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). Intriguingly, Justice Souter adopted the same rationale in his concurrence with the Court's judgment upholding Indiana's state law banning public nudity as applied to nude dancing. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2468-71 (1991) (Souter, J., concurring).

The American Mini Theatres analysis might be applied to speech by criminals about their crimes—protecting such speech probably would not, at first impression, strike anyone as the reason why the United States fought the Persian Gulf War. Even if the "lesser protection" rationale is adopted, however, speech by criminals about their crimes is significantly closer to "untrammeled political debate" than are most commercial X-rated films. See infra notes 324-27 and accompanying text. Further, the test of whether we would, at any given moment, sacrifice a son or daughter to defend a specific liberty, despite a certain brass-tacks analytical rigor, surely cannot exhaust the constitutional inquiry about the vitality of a guaranteed freedom (after all, one of the functions of the First Amendment, as contemporaneously interpreted, is to protect the rights of those who do not wish to march off to whatever war popular enthusiasm may currently embrace). Many additional tests for First Amendment protection leap to mind; one among them—though only one—is whether the Founders themselves marched off to war to secure the threatened liberty or one analogous to it. The right of those accused or convicted of crime to speak about their alleged offenses and the process by which their guilt was adjudged is in fact quite close to a liberty for which the Founders fought and which the framers of the Bill of Rights meant quite consciously to secure. See infra notes 310-11 and accompanying text.

300. See Fischetti, 916 F.2d at 787 (Newman, J., dissenting) (arguing that actual operation of § 632-a produces much less in revenue than would permissive publishing policy coupled with neutral attachment statute). In First Amendment cases, the Court has not been loath to
briefly to the facts of this case. Henry Hill emerged from his life of crime with a new home, two cars, a business, and a tidy annual salary as a government employee.\textsuperscript{301} Despite its professed zeal to compensate the victims of Hill's crimes,\textsuperscript{302} the Board has made no attempt to secure a lien on these assets. Instead, it has focused its efforts exclusively on the proceeds from his literary venture. Admittedly, because Hill is protected by the Federal Witness Program, reaching his assets might be difficult,\textsuperscript{303} but the larger point is nonetheless vividly illustrated by the example: criminals may have many assets other than proceeds from sale of their stories; indeed, many of these assets may be direct results of their criminal activities.\textsuperscript{304} Some portion of such assets would be reachable by properly drawn restitution and attachment statutes, and no reasonable person would object to a broad but properly drawn law sweeping within its purview all assets of those whose criminal acts have made victims suffer. If such statutes also cause some interference with a criminal's right to enjoy literary proceeds, there could be little ground for First Amendment complaint. That the legislatures have taken another route—burdening expressive activity, and only such activity, with restrictions that seem likely to chill or extinguish it—suggests that the stat-

\textsuperscript{301} See supra note 30 and accompanying text.

\textsuperscript{302} No one has yet come forward to make a claim from the proceeds of Hill's escrow accounts. See Hevesi, supra note 98, at B8.

\textsuperscript{303} The proper cure for this difficulty is not imposing liability on publishers, but adopting rules that permit the satisfaction of judgments against federal witnesses while protecting their anonymity. See generally Karen S. Cooperstein, Note, Enforcing Judgments Against Participants in the Witness Protection Program, 36 STAN. L. REV. 1017, 1019 (1984) (proposing changes to Witness Protection Program that would make satisfying civil judgments against protected defendants easier). To put it more simply, it will not do for government to adopt policies that make it difficult for citizens to vindicate their rights, and then to argue that these very policies make it necessary that the constitutional rights of other citizens must be abridged in order to rectify the state of affairs.

\textsuperscript{304} In his Fischetti dissent, Judge Newman reasoned that

[o]f all criminals who might be liable for restitution, many have assets independent of the proceeds of their crimes. Crime is not exclusively an activity of the poor. And many poor criminals whose crimes involve the taking of property have at least some of that property available for restitution when they are arrested. Thus, I think it unlikely that the opportunity to write about their crimes is the sole or even principal asset of most criminals. My guess is that very few criminals have a crime story worth selling and that their number is far less than the sum of criminals with assets independent of their crime proceeds plus impoverished criminals in possession of such proceeds when arrested.

\textit{Fischetti}, 916 F.2d at 785-86 (Newman, J., dissenting). Newman argued that, if New York's attachment statutes currently do not reach assets of criminals, "the answer required by the First Amendment is to broaden the remedies, not to select books about crime for special regulation." \textit{Id.} at 786 (Newman, J., dissenting).
utes are not narrowly tailored. Indeed, reviewing the record, it is hard to escape the suspicion that the victim compensation rationale is in fact at least partly pretextual—that the real purpose of “Son of Sam” laws is the constitutionally impermissible one of preventing distasteful books by criminals from being written or published. That the laws’ provisions and application raise such a suspicion gives the Court ample reason to rule that laws singling out expressive activity for stricter application of victim compensation schemes are barred under the First Amendment.

VIII. CONCLUSION: THE CASE FOR EXTENDING PROTECTION TO THE PROCEEDS OF SPEECH BY CRIMINALS ABOUT THEIR CRIMES

Even though “Son of Sam” laws raise difficult and painful issues, the right of Henry Hill and other, even less savory, criminal authors to the proceeds of their speech is firmly rooted in the First Amendment. The history and importance of the First Amendment suggest that it should not be trumped by the common law interpretive principle of *Riggs*. Further, sweeping as the precedent in *Caplin* may seem, it does not carry far enough to justify statutes that single out the proceeds of speech. Lastly, speech by criminals, though it may at first glance seem to be a minor and singularly distasteful subcategory of speech, in fact cannot be defined in a way that would not sweep within its definition much speech that is socially important and, indeed, close to the heart of any principled definition of “core political speech.” Accordingly, a seemingly small criminal-speech exception to the Amendment’s protections of speech might in reality injure the Amendment’s function in our constitutional system.

To begin with, the First Amendment’s guarantee of speech and press freedom is a constitutional guarantee. As such, we should be extremely wary of varying its effect on the basis of principles of the common law. As Chief Justice Marshall wrote, “it is a constitution we are expounding,” not a statute or a precedent; the framers of the Constitution *did* intend that it should in many areas vary or supersede the common law. Recall that the *Riggs* court considered that it was simply

305. See supra notes 205-17 and accompanying text.
306. See supra notes 218-25 and accompanying text.
308. See, e.g., U.S. CONST. art. III, § 3, cls. 1, 2 (setting forth the limits of what conduct may be made treasonous by statute and the evidentiary requirements for proving treason in federal courts). “The framers of the Constitution had deliberately defined treason narrowly, in reaction against the practice in Britain and in many European countries, where the offense had been loosely defined to include a variety of political acts against the state.” ALFRED H.
giving effect to the legislature's constructive intention—that is, that the legislators, had they thought of it and considered it important, would certainly have written their statute so that it stated explicitly that, under the provisions, no one could take property whose title he would otherwise acquire by operation of law as a direct consequence of a crime he committed.\textsuperscript{309} Thus, the question in the \textit{Wiseguy} case should be framed in a different way: whether the framers of the First Amendment could actually have intended it to read, "Congress shall make no law abridging the freedom of speech, or of the press, \textit{except in cases in which those accused or convicted of crime wish to write or speak for money about their alleged crimes and their trials.}" The history of the struggle for free speech and press in this country suggests strongly that they would have been wary of such a formulation.

The growth of a free press was sparked by the growth of the ability of those who ran it to profit by its operation.\textsuperscript{310} The framers of the First Amendment surely understood that to permit government to attack the press's ability to generate and control its own proceeds would vitiate severely the freedom it granted. At the time of its framing, the Amendment was "intended and understood to prohibit any congressional regulation of the press, whether by means of censorship, a licensing law, a tax, or a sedition act."\textsuperscript{311}

In addition, the concept of a free press arose in the context of repeated criminal prosecutions of writers and publishers.\textsuperscript{312} It was not un-

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\textsuperscript{309} \textit{Ex parte} Bollman, 8 U.S. (4 Cranch) 75, 127 (1807).

\textsuperscript{310} See supra notes 211-16 and accompanying text.

\textsuperscript{311} LEVY, supra note 310, at 269-70.

\textsuperscript{312} See, e.g., \textit{id.} at 40 (discussing the prosecution of John Peter Zenger).
common, in fact, during the prerevolutionary era for printers to be charged with seditious libel and jailed—and then to challenge before the court of public opinion the validity of their imprisonment by publishing discussions of their cases.\textsuperscript{313} Thus, it is hard to credit that the framers—and the Jeffersonian Republicans whose interpretation of the Amendment during the Sedition Act crisis has proved so important to our modern jurisprudence\textsuperscript{314}—would have agreed to a blanket exemption permitting the legislatures to beggar those accused or convicted of crimes. The \textit{interpretive} principle of Riggs, though important, thus lacks the historical force to overcome the categorical speech and press guarantees of the First Amendment.

What about the \textit{general} principle of Riggs that no one should profit from one’s own crime? It has a seductive appeal: having committed a ghastly crime, should criminals profit by that act by basking in publicity and receiving money from media outlets? The appeal is reflected in the decision of the New York legislature to title its “Son of Sam” law “Distribution of moneys received as a result of the commission of crime.”\textsuperscript{315}

\begin{enumerate}
\item See, e.g., id. at 52-56. William Smith, an Anglican divine, arranged for publication of a broadside by a judge defending his record against an attack by the Pennsylvania Assembly. \textit{Id.} at 52. Both author and printer were jailed by the Assembly, \textit{id.}, and denied a writ of habeas corpus, \textit{id.} at 53. After a “mock trial” by the legislative body itself, Smith was sentenced and denied the right to appeal. \textit{Id.} at 54-55. “In jail Smith proved his mettle by attacking the Assembly in a series of articles . . . published in [the] \textit{Pennsylvania Journal.”} \textit{Id.} at 56. In another example, the Virginia House of Burgesses in 1767 ordered James Pride, for the offense of serving a writ upon a member of the House, jailed “until discharged by Order of the House.” \textit{Id.} at 72. Pride then “wrote an account of his case, revealing to the public the harsh treatment he was receiving.” \textit{Id.} However, when the publisher to whom it was sent consulted the Assembly, the latter “resolved that their prisoner’s act was a seditious insult.” \textit{Id.} After censoring him before the bar of the house, the lawmakers ordered that he be kept “in close confinement, without the Use of Pen, Ink, or Paper.” \textit{Id.} For a discussion of the role of jailed speakers in the growth of the modern theory of the First Amendment after the Revolution, see \textit{id.} at 294-96. An example is William Keteltas, a Jeffersonian Republican who in 1796 published a newspaper article denouncing the juryless trial of two Irish ferrymen who had been convicted of insulting an alderman by refusing to row him on a special ferry trip at his demand. \textit{Id.} at 294. Keteltas was summoned before the New York Assembly and, when he refused to apologize, ordered jailed. \textit{Id.} at 295. “[W]hile in prison he published five articles protesting the ‘unconstitutional, tyrannical, and illegal’ proceedings of the Assembly.” \textit{Id.} The articles led to Keteltas’s freedom on a writ of habeas corpus and to an unsuccessful suit for false imprisonment against the speaker of the House. \textit{Id.} at 296.


\item N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991). At oral argument in the
Receiving such payments, however, is not the equivalent of the profit that was to accrue to the defendant in Riggs. His act of murdering his grandfather also made him his grandfather’s heir, and the operation of law, if not stayed by the court, would have brought him the property. Inheriting was, thus, part and parcel of the crime; it involved no other lawful act.

By contrast, the payments criminals receive for their stories are not results of their crime in that sense; they are, instead, results of activities that the criminals engage in after the crime—making and signing contracts, writing, giving interviews, to name a few—many of which are not only lawful but are affirmatively protected by the Constitution. To call these funds monies “received as a result of crime” elides and conceals an important interpretive step. In fact, they are received as a result of a criminal’s own desire, drive, and articulacy, coupled with the public’s interest in a specific crime. Without the latter, of course, the criminal would receive nothing; when posed as one involving money received as a result of the desire of the public to read or hear about crime from the criminals’ point of view, the issue appears different than the one in Riggs and allied cases. One may deplore the public’s desire to revel in stories of crimes and to know the inner thoughts of those who commit them, but

Wise Guy case, Justice Scalia challenged the State’s characterization of expressive proceeds as the fruits of crime. He noted that St. Augustine of Hippo, in his autobiographical Confessions, admitted that he had once stolen an apple. “So whatever St. Augustine got for the book is the “proceeds” of apple-stealing?” Justice Scalia asked. ‘Your Honor, that’s absolutely correct,’ [Counsel for New York Howard] Zwickel replied. ‘That’s ridiculous!’ Justice Scalia exclaimed.” Linda Greenhouse, Supreme Court Roundup: Justices Question Broad Reach of “Son of Sam” Law, N.Y. TIMES, Oct. 16, 1991, at B-8.

316. See supra text accompanying note 209.

317. Besides the First Amendment’s protection for speech, the ability to enter into contracts is protected against state interference in the body of the Constitution. See U.S. CONST. art. I, § 10, cl. 1.

318. Deplorable or not, the public appetite for crime narrative is all but insatiable: “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 advance 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 product.”

Lisa W. Foderaro, Crimes of Passion, Deals of a Lifetime, N.Y. TIMES, Feb. 10, 1991, § 4, at 6. “Son of Sam” laws, of course, will not prevent publishers from flooding the market with distasteful crime stories if they discern a popular demand for such. The only effect will be that such books and films will not reflect the criminals’ point of view. In the case discussed in the New York Times article, film and book rights were sold by a local reporter covering the trial. Id. However, Penthouse has offered cash to the defendant, a Westchester teacher accused of
a general regard for the principles of the First Amendment would surely suggest that there is a presumption against laws that have the effect—and perhaps the intent—of constricting the public’s ability to make that choice.

As to Snepp,\textsuperscript{319} it seems unwise to extend the precedent further. Already it shows promise of enough flexibility to swallow significant parts of the First Amendment.\textsuperscript{320} It may have been advisable to create this

murdering her lover’s wife, in return for nude photographs. Penthouse editors apparently told the New York Times that a conviction would prevent this transaction and deprive the world of this intimate glimpse of the accused killer. \textit{Id.} Their reasoning is unclear, since my reading of the statute suggests that—assuming their photographer could get access to a willing subject—the photos and payment for them would not be subject to attachment unless they were accompanied by the defendant’s account of the crimes or of her emotions concerning it. This should be true even if the photos were juxtaposed next to a salacious account of the crimes written by someone else without the victim’s cooperation. One may earnestly hope that the reading public, so to speak, will be spared the sight of the accused killer in the pages of Penthouse without accepting that preventing it is worth putting the First Amendment at risk.

\textsuperscript{319} See supra notes 189-200 and accompanying text.

\textsuperscript{320} Federal executive agencies are attempting to make use of Snepp agreements to muzzle many of those who work in the executive branch, or even simply make use of classified documents. See Cheh, supra note 201, at 695-98. However, the appetite of the government as employer for prior restraint is unappeased even by the wide use of imposed contracts on employees. The latest restriction on government employee speech is the Ethics Reform Act. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 601, 1989 U.S.C.C.A.N. (103 Stat.) 1716, 1760 (to be codified at 5 U.S.C. §§ 501-505). As part of an attempt to limit honoraria that may be paid to members of Congress and senior federal executives, the act provides that “[a]n individual may not receive any honorarium while that individual is a Member, officer, or employee.” \textit{Id.} (to be codified at 5 U.S.C. § 501(b)). The Act defines “Member” as a member of Congress. \textit{Id.} at 1761 (to be codified at 5 U.S.C. § 505(1)). “Officer or employee means any officer or employee of the Government” except those paid by the secretary of the Senate (excluding the vice president) or certain temporary employees. \textit{Id.} at 1761-62 (to be codified at 5 U.S.C. § 505(2)). “Honorarium” is defined to mean, among other things, “a payment of money or anything of value for an . . . article by a Member, officer or employee.” \textit{Id.} at 1762 (to be codified at 5 U.S.C. § 505(3)). Thus by its terms the act forbids any regular federal employee, no matter how lowly, from writing any article for money, no matter on what subject. The act is interpreted by regulations issued by the Office of Government Ethics (OGE). Limitations on Outside Employment and Prohibition of Honoraria; Confidential Reporting of Payments to Charities in Lieu of Honoraria, 56 Fed. Reg. 1721 (1991) (to be codified at 5 C.F.R. § 2636). The OGE interprets the law to permit government employees to work part-time for publications on a salaried basis, but to prohibit them from “accept[ing] compensation for newspaper or magazine articles,” whether written as freelance writers or pursuant to nonemployee contracts. \textit{Id.} at 1725 (to be codified at 5 C.F.R. § 2636.203(a)(12) example 6). Examples specifically cited include a review of a book about the New York Yankees written by an employee of the Office of Personnel Management for the sum of $50. \textit{Id.} at 1726 (to be codified at 5 C.F.R. § 2636.203(d) example 1). The Act has attracted strong opposition from federal employees and their unions. See Peter G. Crane, \textit{Arrest Me, Officer, I'm Writing! The Case of Congress's Crazy Ban on Paid Free Speech}, WASH. POST, Jan. 6, 1991, at C5; see also Bill McAllister, \textit{Bill Would Relax Rules on Honoraria}, WASH. POST, Sept. 13, 1991, at A23 (discussing congressional proposal to allow most federal workers to accept money for writings and speeches outside their government expertise, but to retain such restrictions for the most senior government officials). The groups sued in United States District Court for the District of Columbia
extraordinary contractual remedy in the admittedly exceptional context of foreign intelligence, where the fate of nations may (sometimes) ride on secrecy; it is more alarming to regard it as a general exception to the principle that speech should not be burdened or prohibited except in the narrowest of circumstances.

Similarly, the Caplin holding,\(^{321}\) broad as it is, may not extend far enough to insulate the "Son of Sam" law. What Caplin says, in effect, is that a generally applicable forfeiture statute, directed at seizing without discrimination all funds that are fruits or proceeds of crime, is not barred from operating upon funds otherwise within its scope just because those funds are intended to be used to pay for counsel whose availability is guaranteed by the Sixth Amendment.\(^{322}\) By exactly the same principle, opponents of the "Son of Sam" law would not argue that the First Amendment requires that proceeds from speech be placed beyond the reach of tort or restitutionary judgements validly obtained against criminal defendants. It is far less clear, however, that the statute in Caplin would have passed muster if it had been written so as to target and seize the funds used by the defendant to pay his counsel, only those funds, and no other funds. In other words, the government's interest in preventing criminals from amassing economic power is sufficient to overcome the seeking invalidation of the law. The district court refused their request for a permanent injunction, and then-Judge Clarence Thomas of the Court of Appeals for the District of Columbia upheld the district court action. National Treasury Employees Union v. United States, 927 F.2d 1253, 1256 (D.C. Cir. 1991), aff'd, 111 S. Ct. 664 (1991) (mem.). Judge Thomas denied the request for the temporary injunction because "'temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.'" \(^{323}\) Id. (quoting Sampson v. Murray, 415 U.S. 61, 90 (1974)). Judge Thomas suggested that the employees continue their paid writing but "put their compensation into escrow during the pendency of this litigation. If they succeed on their constitutional challenges, they can recover any honoraria paid into those accounts." \(^{324}\) Id. The Supreme Court summarily affirmed. National Treasury Employees Union v. United States, 111 S. Ct. 664 (1991) (mem.). It is tempting to believe that such a sweeping burden on employee speech, regardless of subject, forum, or amount of compensation, will be speedily struck down. But a certain cavalier tone seems to be creeping into federal adjudications about the right to write and to be paid for it. Judge Thomas's assurance that a well-constructed escrow agreement will prevent irreparable injury may not be convincing to an underpaid civil servant eking out his or her earnings by writing articles while off duty. It could be a substantial or even prohibitive burden to maintain these funds in escrow for the pendency of a potentially long litigation. And, because success at the far end is by no means assured, the employee is faced with the prospect of putting valuable labor into projects that may never repay the investment. If the interest in the appearance of confidentiality can be used to suck the economic vitality from one branch of employee speech, why can the government's interest in the appearance of propriety by all its employees not be similarly used to do the same for all employee speech? (Judge Thomas was confirmed as an associate justice of the Supreme Court on October 15, 1991, a few hours after the eight members of the Court had heard oral argument in the Wiseguy case.)

321. See supra notes 218-25 and accompanying text.

322. See supra notes 221-24 and accompanying text.
right of defendants to use illegal proceeds to pay for lawyers; it might not be sufficient to justify a statute taking funds because such funds pay for lawyers. Similarly, the "Son of Sam" law does not target all of a defendant's assets to further the interests in victim restitution and preventing unjust enrichment, but only those generated by protected speech; and Caplin, properly read, is not broad enough to permit that.

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 cited above from the prehistory of the First Amendment suggest, the decision of what behavior a society will call

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323. Exactly this distinction between unexceptionable uses of the police power and uses of the same power to penalize disapproved speech was involved in the Supreme Court's two recent flag-burning decisions. In the first decision, Texas v. Johnson, 491 U.S. 397 (1989), the Court struck down a state statute that made it a crime to "desecrate" a state or national flag, which the statute defined as meaning to "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." Id. at 400 n.1. Writing for the majority, Justice Brennan said that while the state could forbid a wide range of conduct, it "may not . . . proscribe particular conduct because it has expressive elements." Id. at 406. After the Johnson decision, Congress responded by enacting a statute outlawing the burning of a flag for any purpose other than disposal; regardless of the intention behind it or its effect on onlookers. The Supreme Court also affirmed a lower court decision striking this law down. United States v. Eichman, 110 S. Ct. 2404, 2410 (1990). The Court noted that, unlike the Texas statute, the federal law did not "target expressive conduct on the basis of the content of its message." Id. at 2408. The Court nonetheless held the law unconstitutional because it "suppress[ed] expression out of concern for its likely communicative impact." Id. at 2409.

Though strongly worded and generally approved by scholars (if not by the public or politicians), both these cases were decided by a vote of 5-4. Justice Brennan, who wrote both opinions, is no longer on the Court; Justice Marshall, who also voted with the majority in both cases, also has retired. 324. The personification by Republican campaign advertisements of "the crime issue" as a frightening and (not by coincidence) black rapist is credited by many with having swayed the 1988 presidential election. See, e.g., David Corn, Congressional Follies: The Great Crime-Bill Show of '91, THE NATION, Apr. 29, 1991, at 550 ("Willie Horton. Willie Horton. Willie Horton. Have a friend shout those words at you a few hundred times, and then you may have some sense of what the average Democratic member of Congress hears when politics turns toward the subject of crime. It's one of those issues—a wedge issue, the Republicans gleefully call it—that drive Democrats mad."). Almost every Congress struggles to turn the public outrage over crime into legislation. See Haunted by Crime, ECONOMIST, Apr. 13, 1991, at 23 ("Crime policy has become what Washington likes to call a 'mature' issue—one that members of Congress deem worthy of legislative action.").
“criminal” is a key political decision—indeed, in some senses, the primal political decision. Nor is this true only of so-called “speech crimes” like seditious libel. Three important political figures who might have been silenced or burdened by Executive Law section 632-a are Henry David Thoreau, Mohandas K. Gandhi, and Martin Luther King. None of them was imprisoned for a “speech crime”—Thoreau refused to pay taxes, Gandhi led “defiance campaigns” against British rule, and King was accused of disorderly conduct and riotous behavior. Nor would a law drawn only to penalize speech about “violent crime” suffice to protect the political interests implicated in speech about crime. The decision of what acts to call violent, and of what violent acts to punish as crimes (as opposed to, for example, acts of justified or excused self-defense) is an important political decision. It is being fought quite intensely in the contemporary American polity, for example, in relation to battered spouses who kill their abusers. Would it be just, or prudent, to conduct this debate under laws that muffle the voices of these women?

As to the political nature of speech about crime, it is illustrated by turning from the overtly politicized question of self-defense by battered women to the more ordinary, and seemingly apolitical, villainy of Henry Hill. An integral part of Hill’s story is the way in which organized crime survives by and feeds upon massive, sustained corruption within government generally and the system of justice in particular. Such information is, though perhaps not surprising, nonetheless a significant confirmation of public suspicion about the courts and police of New York—the state that is attempting to sequester Hill’s proceeds and thereby to make less likely that another “reformed” hoodlum will share

325. Judge Newman, in his dissent in Fischetti, raises the question whether King’s Where Do We Go From Here? would have been published under New York Executive Law § 632-a. Fischetti, 916 F.2d at 787 (Newman, J., dissenting). It is also cogent to ask whether Letter from Birmingham Jail would have seen print if Alabama authorities had obtained a conviction against King and then brought into play their present statute, with its 10-year prison term for publishers who violate it. If a future King arises in Alabama, it may be significantly harder for him to be heard outside prison. Indeed, if a future publisher in Alabama falls afoul of the law, it will be extremely hard for him to alert the rest of us to what has happened.


327. See PILEGGI, supra note 5, at 16 (discussing lenient sentences given to mobster by named New York State judges); id. at 55-56 (widespread use of payoffs to politicians); id. at 146-47 (acquiescence of prison authorities in organized crime activities in return for bribes). The possible direct connection between criminal speech and protected political speech is illustrated by recent charges by Henry Hill that mob influence reached Senator Alfonse D’Amato (R-NY). See Sydney H. Schanberg, It’s Time for D’Amato to Cut the Comedy, NEWSDAY, Apr. 30, 1991, at 79.
with the public the story of how the system and the mob feed on each other or that a publisher will print another such account.

Perhaps nothing in *Wiseguy* is more outrageous, in the end, than the astounding story of how, thanks to the bounty of the federal Witness Protection Program, Henry Hill and his family profited from his crimes—profits derived far more directly from crime than Henry Hill’s literary proceeds. While Hill remained in the Witness Protection Program, the public paid Hill’s handsome monthly salary; the public fisc bought Hill a new home, a business, two cars, and special food from Little Italy. Having unwittingly and involuntarily footed the bill for all this profit from crime, the public is then told in indignant tones that it must be prevented from voluntarily rewarding Henry Hill for telling it what he has done. If Executive Law section 632-a had worked as it was probably intended to, Henry Hill would still have emerged from his years in the mob as the ultimate wiseguy, but the public would be none the wiser.

Editor’s note: On December 10, 1991, shortly before this issue went to press, the Supreme Court unanimously overturned New York’s “Son of Sam” law on First Amendment grounds. In an opinion written by Justice O’Connor, a majority of the Court found that the statute was a content-based restriction on speech and thus “presumptively inconsistent with the First Amendment.” The majority acknowledged that the State has compelling interests in “ensuring that victims of crime are compensated by those who harm them” and in “ensuring that criminals do not profit from their crimes.” It concluded, however, that, due to the breadth of its application in two different respects, the statute was not “narrowly tailored” to advance those interests. Specifically, it identified the statute’s applicability “to works on any subject, provided that they express the author’s thoughts or recollections about his crime, however, tangentially or incidentally,” and the “statute’s broad definition of ‘person convicted of a crime,’ ” which allowed the State “to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted.”

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328. See supra note 30 and accompanying text.
330. Id. at *7.
331. Id. at *6.
332. Id. at *8.
333. Id. at *9.
334. Id.
expressly declined to comment on the constitutionality of other “Son of Sam” laws:

We conclude simply that in the Son of Sam law, New York has singled out speech on a particular subject for a financial burden it places on no other speech and on no other income. The State’s interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment. 335

In a brief opinion concurring in the judgment, Justice Blackmun argued that the statute was “underinclusive as well as overinclusive,” and that in the interests of giving other states guidance the Court should have addressed this issue. 336 In a longer concurrence, Justice Kennedy argued that it was “both unnecessary and incorrect” for the Court to apply the “narrowly tailored” analysis to the statute:

That test or formulation derives from our equal protection jurisprudence and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only, apart from any considerations of time, place, and manner or the use of public forums. 337

335. Id. at *10.
336. Id. at *11 (Blackmun, J., concurring in judgment).
337. Id. (Kennedy, J., concurring in judgment).