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Freedom of Speech and the Press

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maintained, and they [had] an apparent basis in fact.”⁴²¹

Both standards make clear what most courts have nonetheless assumed, that merely because a statement is characterized as opinion does not render it as such. The difference is that the Supreme Court looks only to see if the language is “loose, figurative or hyperbolic” in order to determine if the writer was in fact, not seriously trying to convey fact. The New York Court of Appeals looks not only to the language of the statement, but also to the context of the publication as a whole in order to determine if the reader would construe the statements as factual assertions. The New York Court of Appeals declared that the “narrow exemption” in *Milkovich* means that “insufficient protection may be accorded to central values protected by the law of this State.”⁴²² The court expressly noted the history and tradition of providing broader protection of freedom of expression in this state than is provided by the federal courts.

*Children of Bedford, Inc. v. Petromelis*⁴²³
(decided May 7, 1991)

The plaintiff, Children of Bedford, Inc., a nonprofit organization, challenged the constitutionality of New York Executive Law, section 632-a.⁴²⁴ The organization, which was receiving royalties from Jean Harris’ book, *Stranger in Two Worlds*, asserted that: 1) the book was not subject to the statute; 2) the statute violated federal⁴²⁵ and state⁴²⁶ guarantees of free speech; and 3) the proceedings conducted by the crime victims

421. *Id.* at 246, 567 N.E.2d at 1276, 566 N.Y.S.2d at 912.

422. *Id.* at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

423. 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453, *overruled in part*, 112 S. Ct. 501 (1991).

424. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1992). This statute, commonly known as the “Son of Sam” law, was enacted in order to give crime victims financial assistance from the monetary benefits convicted criminals receive for their written works. *Children of Bedford*, 77 N.Y.2d at 719, 573 N.E.2d at 543, 570 N.Y.S.2d at 455.

425. U.S. CONST. amend. I.

426. N.Y. CONST. art. I, § 8.

board violated federal due process⁴²⁷ guarantees. The New York Court of Appeals held “that the book [was] subject to the statute and that the proceedings did not violate the [plaintiff’s] due process rights.”⁴²⁸ The court found that the statute serves a compelling state interest and is narrowly tailored to accomplish that purpose.⁴²⁹ Hence, the statute was not violative of free speech under either the Federal or New York State Constitution. However, on December 10, 1991, in *Simon & Schuster, Inc. v. Member of the New York State Crime Victims Board*, the United States Supreme Court declared New York Executive Law section 632-a, the “Son of Sam” law, unconstitutional.⁴³⁰ The Supreme Court held that while the statute serves the state’s compelling state interest in compensating victims from the fruits of the crime, the statute was not narrowly tailored to achieve this interest.⁴³¹

As stated above, the plaintiffs were a nonprofit organization who were assigned the royalties from the publication of a book entitled *Stranger in Two Worlds*. The book was written by Jean Harris after her conviction and imprisonment in the Bedford Hills Correctional Facility. Harris was convicted of the second degree murder of Dr. Herman Tarnower. *Stranger in Two Worlds* is a compilation of Harris’ experience at the prison’s children’s center with imprisoned mothers who were trying to maintain bonds with their children. It is also the story of her life, including her life with Tarnower, his murder, and her prison experiences. Before publication, the publisher submitted a copy of its contract with Harris and a copy of the book to the Crime Victims (Board).⁴³² The Board has the express duty of determining whether a book is

427. U.S. CONST. amend. XIV, § 1.

428. *Children of Bedford*, 77 N.Y.2d at 718-19, 573 N.E.2d at 543, 570 N.Y.S.2d at 455.

429. *Id.* at 729, 573 N.E.2d at 550, 570 N.Y.S.2d at 462.

430. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 112 S. Ct. 501 (1991).

431. *Id.* at 509.

432. *Children of Bedford*, 77 N.Y.2d at 721, 573 N.E.2d at 544-45, 570 N.Y.S.2d at 456-57.

subject to Executive Law section 632-a.⁴³³ Executive Law section 632-a, provides:

[Those] contracting with any person or the representative or assignee of any person accused or convicted of a crime in [New York], with respect to the reenactment of such crime . . . or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of [the] contract to the [Crime Victims] [B]oard⁴³⁴

The court in *Children of Bedford* stated: "If the board determines that the criminal's work comes within the statute, any moneys owing under the contract must be paid to the Board. The funds are deposited in escrow for the benefit of the victims or legal representatives of the victims of the crime."⁴³⁵

The New York Court of Appeals agreed with the lower court's determination that the book was covered by the statute. The court found that despite the fact that only two chapters of the book contain Harris' version of the reenactment of her crime, "these two chapters make up the core of the work around which the narrative of Harris's life story is structured."⁴³⁶ The court stated that "[i]ndeed, it is apparent from the preliminary negotiations between MacMillan and Harris and from the publicity surrounding publication that MacMillan believed the book's commercial value rested on subject matter within the statute."⁴³⁷

Addressing the plaintiff's procedural due process claim, the court stated that due process mandates reasonable notice and an opportunity to be heard.⁴³⁸ Applying this standard, the court concluded that the preliminary findings of the Crime Victims Board were made available to the plaintiff prior to the hearings, thereby satisfying the notice requirement of the Due Process Clause. The plaintiff's other procedural due process claim rested

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

434. *Id.*

435. *Children of Bedford*, 77 N.Y.2d at 720, 573 N.E.2d at 544, 570 N.Y.S.2d at 456.

436. *Id.* at 722, 573 N.E.2d at 545, 570 N.Y.S.2d at 457.

437. *Id.*

438. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313-14 (1950).

on the assertion that the Board acted improperly when it functioned as both the prosecutor and judge. The court stated that “[t]he [plaintiff] must demonstrate that because of this practice the Board has been prejudiced by its investigation or for some reason is disabled from hearing and deciding the matter on the basis of the evidence.”⁴³⁹ On this issue, the court found that the evidence in the case did not support the plaintiff’s contention.

The court then addressed the plaintiff’s free speech claim under both the Federal and New York State Constitutions. Addressing the free speech claim under the Federal Constitution first, the court found that the book was protected speech under the First Amendment.⁴⁴⁰ In determining the standard of judicial review to be applied to the governmental regulation of the speech, the court first determined that the statute was a content based regulation. The statute singles out speech on a particular subject, and then imposes a financial burden on the speech. This is a direct burden placed on this type of speech, and not placed on any other. The court analogized the present case to *Meyer v. Grant*,⁴⁴¹ a case in which the United States Supreme Court concluded that a Colorado statute was subject to strict scrutiny because it imposed a financial burden on political speech by placing a limitation on the number of people who could convey the political message.⁴⁴² Similarly, the New York Son of Sam law imposes an economic disincentive for the publication of the criminal’s reenactment or depiction of the crime.

Accordingly, in order to justify the differential treatment imposed by the statute, the state must demonstrate that the statute is necessary to serve a compelling state interest and is narrowly

439. *Children of Bedford*, 77 N.Y.2d at 723-24, 573 N.E.2d at 546, 570 N.Y.S.2d at 458 (citing *Withrow v. Larkin*, 421 U.S. 35, 55 (1975)).

440. *Id.* at 724-25, 573 N.E.2d at 546-47, 570 N.Y.S.2d at 458-59 (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (“the Commission of Crime(s) . . . are without question events of legitimate concern to the public”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (defining the limited classes of speech “the prevention and punishment of which have never been thought to raise any constitutional problem”)).

441. 486 U.S. 414 (1988).

442. *Id.* at 422-23.

tailored to achieve that state purpose.⁴⁴³ The court of appeals found that the state has a compelling interest in ensuring that criminals do not profit from their crimes, as well as ensuring that victims of crimes are compensated by those who harm them. The court found that the Son of Sam law serves the state's compelling interest by not only providing a method for victims to obtain compensation, but also by reflecting the community's belief that it is unacceptable for criminals to profit from their own wrong.⁴⁴⁴

The court then examined whether the statute was narrowly tailored to achieve this compelling state interest.⁴⁴⁵ The concern in this part of the analysis is to ensure that the means or methods chosen by the government are not substantially broader than necessary to carry out the governmental interest. It is at this stage of the analysis that the New York Court of Appeals and the United States Supreme Court arrived at different conclusions.

The New York Court of Appeals found that the New York Son of Sam law was narrowly tailored to serve the compelling state interest.⁴⁴⁶ The court reasoned that the statute

creates a unique and identifiable resource and preserves it for the benefit of victims directly injured by a crime to compensate them for the damages sustained, gives them priority over the criminal's other creditors and extends the time within which a claim to the proceeds may be asserted by a victim. The statute regulates only the criminal's receipt of money, not the right to speak about the crime and it does not impose a forfeiture of all profits — it merely delays payment (632-a[11][c]).⁴⁴⁷

The court noted that the statute provides an incentive for the

443. See, e.g., *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987).

444. *Children of Bedford*, 77 N.Y.2d at 725-26, 573 N.E.2d at 547-48, 570 N.Y.S.2d at 459-60; see also *Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889) ("No one shall be permitted to profit by his own fraud, or to the advantage of his own wrong.").

445. *Children of Bedford*, 77 N.Y.2d at 728, 573 N.E.2d at 549, 570 N.Y.S.2d at 461.

446. *Id.* at 729, 573 N.E.2d at 550, 570 N.Y.S.2d at 462.

447. *Id.* at 729-30, 573 N.E.2d at 550, 570 N.Y.S.2d at 462.

criminal to speak because the proceeds from the speech will pay for his or her legal fees. Additionally, the statute does not impose a limitation on others who may be interested in telling the criminal's story. Thus, the court concluded that the reach of the statute was limited to its purpose.⁴⁴⁸

Nearly five months after *Children of Bedford*, the United States Supreme Court, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*,⁴⁴⁹ reviewed the Son of Sam law and concluded that although the statute serves the state's compelling interest of ensuring that victims are compensated from the proceeds of the crime, the statute is not narrowly tailored to achieve the state's purpose.⁴⁵⁰ The United States Supreme Court held that the New York Son of Sam law was significantly over inclusive.⁴⁵¹ Thus, it found that "the statute [was] inconsistent with the First Amendment."⁴⁵² Unlike the New York Court of Appeals, the Supreme Court found the New York Son of Sam law encompassed a potentially large number of works by its express language. The statute's broad definition of "person convicted of a crime" enables the Crime Victims Board to escrow the income of any author who admits to having committed a crime.⁴⁵³ The majority opinion, authored by Justice O'Connor, cited several examples of the statute's broad provision. This list included works such as the autobiography of Malcolm X, which describes crimes committed by the civil rights leader prior to his involvement in the movement; the Confessions of Saint Augustine, in which the author admits to the theft of pears from a neighboring vineyard; and a reference to a bibliography submitted to the Court by the Association of American Publishers, listing hundreds of works by prominent figures whose autobiographies, if written, would be subject to the statute.⁴⁵⁴ These authors included:

448. *Id.* at 730, 573 N.E.2d at 550, 570 N.Y.S.2d at 462.

449. 112 S. Ct. 501 (1991).

450. *Id.* at 512.

451. *Id.*

452. *Id.*

453. *Id.* at 511.

454. *Id.*

Sir Walter Raleigh, who was convicted of treason after a dubiously conducted 1603 trial; Jesse Jackson, who was arrested in 1963 for trespass and resisting arrest after attempting to be served at a lunch counter in North Carolina; and Bertrand Russel, who was jailed for seven days at the age of 89 for participating in a sitdown protest against nuclear weapons.⁴⁵⁵

Justice O'Connor noted that the Son of Sam law clearly reached a wide range of speech that would not compensate the criminals or the victims. Because the statute could include such a wide range of speech, the majority concluded that the New York statute was not narrowly tailored to achieve the state's objective of compensating crime victims from the profit of crime. Accordingly, the Supreme Court declared the New York Son of Sam law inconsistent with the First Amendment of the Federal Constitution.⁴⁵⁶

Finally, the plaintiff, Children of Bedford, Inc., had also asserted that the New York Son of Sam law violated the free speech provision of the New York State Constitution. The New York Court of Appeals acknowledged that New York's free speech clause is more expansive than its federal counterpart. However, it appears that because the court concluded that the New York statute satisfied the strict scrutiny required by the Federal Constitution, the statute would meet the broader requirement of article I, section 8 of the New York State Constitution that requires some type of "genuinely close fit"⁴⁵⁷ between the statute and its purpose. The court stated that "this requirement is no more burdensome than requiring that the statute be narrowly tailored to meet its objective and section 632-a satisfies this test."⁴⁵⁸

455. *Id.*

456. *Id.* at 512.

457. *Children of Bedford*, 77 N.Y.2d at 731, 573 N.E.2d at 551, 570 N.Y.S.2d at 463.

458. *Id.* at 732, 573 N.E.2d at 551, 570 N.Y.S.2d at 463.