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Freedom of Speech and the Press

FREEDOM OF SPEECH AND THE PRESS

N.Y. CONST. art. I, § 8:

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

U.S. CONST. amend. I:

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

COURT OF APPEALS

Immuno AG. v. Moor-Jankowski[373]
(decided Jan. 15, 1991)

On remand from the United States Supreme Court, the New York Court of Appeals reconsidered its previous decision in *Immuno AG. v. Moor-Jankowski*.[374] The United States Supreme Court had granted *certiorari*, vacated the judgment and remanded *Immuno* for further consideration in light of its recent decision in *Milkovich v. Lorain Journal Co.*[375] The New York Court of Appeals adhered to its determination and reaffirmed its previous holding that Dr. Moor-Jankowski's motion for summary judgment was properly granted because Immuno AG. failed to show that factual assertions within the letter were false.[376] The court concluded that the remainder of the statements were

373. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 111 S. Ct. 2261 (1991).

374. 74 N.Y.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938 (1989), *vacated and remanded*, 110 S. Ct. 3266 (1990), *on remand*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 111 S. Ct. 2261 (1991).

375. 110 S. Ct. 2695 (1990).

376. *Immuno*, 77 N.Y.2d at 246-48, 567 N.E.2d at 1275-77, 566 N.Y.S.2d at 911-13.

opinions that were entitled to protection under article I, section 8 of the New York State Constitution.[377]

The libel action arose out of the publication of a letter by the editor in the *Journal of Medical Primatology* (Journal). The defendant, the editor, published the letter prefaced by an editorial note. The subject of the letter was a critical evaluation of a decision by the plaintiff, Immuno AG., a multi-national manufacturer of biologic products, to establish a facility in Sierra Leone, West Africa. The author of the letter, Dr. Shirley McGreal, was the chairwoman of the International Primate Protection League (IPPL), an organization recognized "for its vigorous advocacy on behalf of primates, particularly those used for biomedical research."[378] The defendant, the co-founder and editor of the Journal, is a professor of medical research at New York University School of Medicine and director of the Laboratory for Experimental Medicine and Surgery in Primates at New York University Medical Center.[379]

Immuno AG. commenced a libel action against Dr. Moor-Jankowski and seven other defendants. The other seven defendants had previously settled with the plaintiff. The Supreme Court of New York County denied the defendant's motion for summary judgment as to the defamation claim. The supreme court's ruling was reversed by the appellate division, whose ruling was affirmed by the New York Court of Appeals. Upon grant of *certiorari* by the United States Supreme Court, the decision of the New York Court of Appeals was vacated and the case was remanded for further consideration in light of *Milkovich*.[380]

The court of appeals began its analysis with the federal constitutional claim, focusing on the *Milkovich* decision. In *Milkovich*, the United States Supreme Court rejected the "misperception -- traceable to the dictum in *Gertz v. Robert Welch, Inc.*[381] that . . .

377. *Id.* at 255-56, 567 N.E.2d at 1281-82, 566 N.Y.S.2d at 917-18; N.Y. CONST. art. I, § 8.

378. *Immuno*, 77 N.Y.2d at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

379. *Id.*

380. 110 S. Ct. 2695 (1990).

381. 418 U.S. 323, 339-40 (1974).

there is a 'wholesale defamation exemption'" for any statements labeled as opinion.[382] The "key inquiry" in determining whether speech is actionable or protected opinion is "whether [the] challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact."[383] This is not a literal evaluation, rather a court should "consider the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person."[384] The majority recognized protection for statements that can not reasonably be interpreted as stating actual facts about an individual, thus ensuring "that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation."[385]

The court of appeals examined the *Milkovich* "type of speech" test which separates actionable fact from protected opinion. It found that the majority in *Milkovich* "resolved 'type of speech' considerations in two sentences: 'This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.'"[386]

The court of appeals noted that the majority's analysis failed to address the conjectural language of the article at issue, or the place where the article appeared, namely the sports page. Both considerations were the subject of primary occupation by the Ohio Supreme Court and the dissent in *Milkovich*.[387] Indeed, it

382. *Immuno*, 77 N.Y.2d at 242, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909 (quoting *Milkovich*, 110 S. Ct. at 2705). The court noted that *Milkovich* did not change the federal standard but, rather, clarified it. *See id.* at 242-43, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909.

383. *Id.* at 243, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909.

384. *Id.* at 243, 567 N.E.2d at 1273-74, 566 N.Y.S.2d at 909-10.

385. *Milkovich*, 110 S. Ct. at 2706 (citing Hustler Magazine v. Falwell, 485 U.S. 46 (1988)).

386. *Immuno*, 77 N.Y.2d at 244, 567 N.E.2d at 1274-75, 566 N.Y.S.2d at 910-11 (quoting *Milkovich*, 110 S. Ct. at 2707).

387. *Id.* at 244-45, 567 N.E.2d at 1275, 566 N.Y.S.2d at 911 (citing *Milkovich*, 110 S. Ct. at 2710-13 (Brennan, J., dissenting)).

was this focus on the above two considerations that persuaded the dissent, as it had the Ohio Supreme Court, that "no reasonable reader would have regarded the challenged assertions, *in their context*, as factual."[388] Thus, the New York Court of Appeals concluded that the majority in *Milkovich* struck the following balance between "First Amendment protection for media defendants and protection for individual reputation: [E]xcept for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable."[389]

Applying the *Milkovich* standard to this case, the New York Court of Appeals determined that the plaintiff failed to meet its burden of showing the falsity of the two assertions of fact discerned by the court. The court vehemently noted that "we did not, and do not, hold that the assertions of verifiable fact . . . were overridden . . . by the broader context and . . . automatically . . . protected as opinion."[390] It further asserted that "a libel plaintiff has the burden of showing the falsity of factual assertions."[391] Relying on the factual review, conducted by the appellate division, the court found that what the plaintiff characterized as the "core libel" contained one express and one implied fact. The express fact was the assertion that in the statement "there is no scientific method for determining if a chimpanzee exposed to the non-A, non-B virus is not a carrier of the disease."[392] The implied fact was the assertion "that plaintiff will release possible carrier-chimpanzees who may endanger the wild population."[393] The court found that both assertions were verifiable. Thus, they are actionable facts, if proved false. However, the court found that although the "core premise" could be actionable, the plaintiff nonetheless failed to show its falsity. The court affirmed summary judgment for the defendant under the First Amendment.

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388. *Id.* at 245, 567 N.E.2d at 1275, 566 N.Y.S.2d at 911.
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.* at 246, 567 N.E.2d at 1276, 566 N.Y.S.2d at 912.
393. *Id.*

The court of appeals also resolved the case independently, based on state law analysis, and determined that the motion for summary judgment also was properly granted under state law. The court found bases under both "interpretive" and "non-interpretive" analyses to decide the case on independent state grounds.

As to the "interpretive"[394] analysis, the court relied on the "expansive language of [the] State Constitutional guarantee . . . [and] its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States . . . ."[395] The court noted that the text of the state provision, that "[e]very citizen may freely speak, write and publish . . . sentiments in all subjects," reflects the "choice of the New York State Constitutional Convention not to follow the language of the First Amendment[,] . . . but . . . to set forth our basic democratic ideal of liberty of the press in strong affirmative terms."[396] The court further noted that its determination was based on the long tradition of common law in the state.

As to the "non-interpretive"[397] analysis, the court noted the long tradition of New York State as a "cultural center for the Nation,"[398] which has "long provided a hospitable climate for the free exchange of ideas."[399]

State law may expand and broaden the federal minimum required by the Federal Constitution, and courts may decide cases on independent state grounds. The court began its state law analysis by referring to the current state standard for evaluating defamation actions. The current state standard requires "published articles [to be read] in context to test their effect on

394. Interpretive analysis refers to text and history. *Id.* at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

395. *Id.* at 248, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913 (citations omitted).

396. *Id.* at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913 (citing Morris D. Forkosch, *Freedom of the Press: Crowell's Case*, 33 FORDHAM L. REV. 415 (1965)).

397. Non-interpretive analysis includes an examination of tradition and policy. *Id.* at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

398. *Id.* at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

399. *Id.*

the average reader, not to isolate particular phrases but to consider the publication as a whole."[400] The court then reaffirmed this standard which was drawn from state common law and articulated in *Steinhilber v. Alphonse*.[401] Under *Steinhilber*, the court must analyze "the content of the whole communication, its tone and apparent purpose."[402] In the court's view, this standard is clear and familiar and "properly balances the interests involved."[403] The court expressly declared: "[W]e believe that an analysis that begins by looking at the content of the whole communication, its tone and apparent purpose better balances the values at stake than an analysis that first examines the challenged statements for express and implied factual assertions, and finds them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances."[404]

Applying the *Steinhilber* standard, the court analyzed the case in much the same way as the *Milkovich* dissent construed the standard adopted by the *Milkovich* majority. In both cases, the broader social setting was taken into consideration. Here, from the point of view of the broader social setting, the court declared that "'the common expectation of a letter to the editor is not that it will serve as a vehicle for the rigorous and comprehensive presentation of factual matter but as one principally for the expression of individual opinion.'"[405] The court also noted that it is generally understood that readers may give the view of an author of a letter to the editor any weight the reader chooses. The court found letters to the editor important because they provide a forum "for persons or groups with views on a subject of public

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

401. 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986).

402. *Immuno*, 77 N.Y.2d at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

403. *Id.*

404. *Id.* at 254, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917 (citation omitted).

405. *Id.* at 253, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916 (quoting Immuno AG. v. Moor-Jankowski, 145 A.D.2d 114, 129, 537 N.Y.S.2d 129, 138 (1st Dep't 1989), *aff'd*, 74 N.Y.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938, *vacated and remanded*, 110 S. Ct. 3266 (1990), 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 111 S. Ct. 2261 (1991)).

interest to reach and persuade the broader community."[406] The court found that "[t]he public forum function of letters to the editor is closely related in spirit to the 'marketplace of ideas' and oversight and informational values that compelled recognition of the privileges of fair comment, fair report and the immunity accorded expression of opinion."[407] A publication that provides such a forum helps foster the premises of democratic government. The court then moved from the broader social context of letters to the editor in general to the immediate context of this letter and the common expectation of the readers of a scientific journal such as Moor-Jankowski's. It found that the journal had a highly specialized group of readers and that the average reader of this journal is likely to have "'a well-developed understanding of the issues facing bio-medical researchers using primates as research subjects.'"[408] Thus, the court concluded that "it would be plain to the reasonable reader of this scientific publication that McGreal was voicing no more than a highly partisan point of view" when the letter is viewed in its context.[409]

Judge Simons, in a concurring opinion, disagreed with the majority's decision to decide this case on independent state grounds. Judge Simons first stated that "the majority has rendered an interpretation of *Milkovich* which is narrower than necessary to resolve the matter before us and one which appears, from statements in the *Milkovich* opinions, to be far more constricted than the Supreme Court intended."[410] The more important concern, according to Judge Simons, was that the majority unnecessarily relied on independent state law and, thus, insulated the analysis from review by the Supreme Court and precluded a determination by the Court as to whether the New York Court of Appeals correctly interpreted *Milkovich*.

According to Judge Simons, the majority's unnecessary re-

406. *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

407. *Id.*

408. *Id.* at 253, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916 (quoting *Immuno*, 145 A.D.2d at 129, 537 N.Y.S.2d at 138).

409. *Id.*

410. *Id.* at 257, 567 N.E.2d at 1283, 566 N.Y.S.2d at 919 (Simons, J., concurring).

liance on state law violated established rules of judicial restraint. In this case, context was not controlling. The "plaintiff's claims fail[ed] regardless of the 'circumstances' or 'context' . . . ."[411] The court found that the assertions of fact were not proven to be false by the plaintiff. That was the extent of the federal constitutional analysis. Yet, "the majority proceed[ed] to examine the context of the statements under the State Constitution because a different conclusion could conceivably emerge under *Milkovich*."[412]

Judge Simons concluded that "[t]he inevitable consequence of dual reliance is that the Supreme Court, charged with ultimate authority in the area, loses a measure of control over the law it has created."[413] The Supreme Court will not review the matter because it no longer has control over the litigation. The result, according to Judge Simons, "of reaching both state and federal grounds is that the discussion of Federal law, under Supreme Court precedent, is dictum because we have relied on independent State grounds. Conversely, the discussion of State grounds is largely dictum because context is not controlling in this case."[414]

Judge Titone, joined by Judges Simons and Hancock, was concerned regarding "the propriety and wisdom of deciding this appeal on alternative State and Federal constitutional analyses."[415] However, Judge Titone maintained that the controlling legal principles should be derived from state law rather than federal law.

Judge Titone reasoned that *Milkovich* merely established the minimum standard below which the state law may not fall. However, Judge Titone stated that "[t]here is nothing in *Milkovich* or any of the related cases that impairs the States'

411. *Id.* at 260, 567 N.E.2d at 1284, 566 N.Y.S.2d at 920 (Simons, J., concurring).

412. *Id.* (Simons, J., concurring).

413. *Id.* at 262, 567 N.E.2d at 1285, 566 N.Y.S.2d at 921 (Simons, J., concurring).

414. *Id.* at 263, 567 N.E.2d at 1286, 566 N.Y.S.2d at 922 (Simons, J., concurring).

415. *Id.* at 263, 567 N.E.2d at 1287, 566 N.Y.S.2d at 923 (Titone, J., concurring).

power to impose additional limitations, based on either their own Constitutions or the traditions underlying their previously established common-law doctrines."[416] Judge Titone proposed that the issues in this case should have been decided solely based on New York State law, specifically the common law doctrine of "fair comment."[417]

Judge Titone justified the focus on the common law principle of "fair comment" on the grounds that "courts should avoid passing upon constitutional questions when the case can be disposed of in another way."[418] Indeed, according to Judge Titone, the common law principle of "fair comment" demands the same standard for evaluation of actionable facts as does the constitutional standard. "[F]air comment" demands a consideration of "the context, tone and character of a statement challenged as defamatory when determining whether it constitutes a privileged 'fair comment' or an actionable assertion of fact."[419] Thus, Judge Titone agreed with the majority's analytical framework with regard to the "context" standard.

The New York Court of Appeals' reaffirmation of its clear and familiar standard of looking to the context of a statement when applying the opinion exemption could have national significance in the wake of *Milkovich*. Under *Milkovich*, the United States Supreme Court declared that there was no wholesale exemption for defamatory statements couched as opinion and that a statement could be actionable if it appeared to state or imply an assertion of fact, regardless of its context.[420] Under the federal standard, the letter to the editor in *Immuno* could have been actionable had the implied facts been proven false because they were "restrained, [and] the statements [were] seriously

416. *Id.* at 264, 567 N.E.2d at 1287, 566 N.Y.S.2d at 923 (Titone, J., concurring).

417. *Id.* at 265, 567 N.E.2d at 1288, 566 N.Y.S.2d at 924 (Titone, J., concurring).

418. *Id.* at 267, 567 N.E.2d at 1289, 566 N.Y.S.2d at 925 (Titone, J., concurring).

419. *Id.* at 266, 567 N.E.2d at 1288, 566 N.Y.S.2d at 924 (Titone, J., concurring).

420. *See supra* text accompanying notes 9-12.

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 federal[425] and state[426] 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 process[427] 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]oard . . . .[434]

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

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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]

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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.