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Freedom of Speech and Press

FREEDOM OF SPEECH AND 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

People v. Shack[1]
(decided November 2, 1995)

The issue in this case was whether section 240.30(2) of the New York Penal Law[2] violated the United States[3] and New York State[4] Constitutions because it impinged upon defendant's constitutionally protected rights of freedom of expression and due

1. 86 N.Y.2d 529, 658 N.E.2d 706, 634 N.Y.S.2d 660 (1995).

2. N.Y. PENAL LAW § 240.30(2) (McKinney 1996). This section provides in pertinent part: "A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she . . . [m]akes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication . . . ." *Id.*

3. U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.* U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

4. N.Y. CONST. art. I, § 8. Section eight provides in pertinent part: "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." *Id.* N.Y. CONST. art. I, § 6. This section states in pertinent part: "No person shall be deprived of life, liberty, or property without due process of law." *Id.*

process.[5] The New York Court of Appeals first analyzed the issue of freedom of speech and determined the statute was not facially unconstitutional and not overbroad because it does not limit the right to free speech of the defendant "nor chill the exercise of free speech rights by others."[6] The court then examined the due process claim and found the statute was not unconstitutionally vague and, therefore, not violative of the Due Process Clause.[7]

The defendant in this action, Julian Shack, was living in New York and had a history of mental illness.[8] The complainant was his first cousin, Diane Buffalin, a psychologist who resided in Michigan.[9] Shack had not been in contact with Buffalin for at least twelve years prior to a telephone conversation initiated by him in June of 1990.[10] In this conversation Shack indicated that he was contacting Buffalin in order to obtain information regarding the treatment of his mental illness and his prescribed medications.[11] Buffalin subsequently agreed to an arrangement with the defendant whereby he could continue to telephone her provided he "remained in treatment with his psychiatrist and continued taking his medication."[12] This arrangement continued on from June through October with the defendant telephoning Buffalin approximately twice a week.[13] During this period, she also met with the defendant in New York and arranged for him to receive treatment at an anxiety clinic which was affiliated with a New York City Hospital.[14]

Towards the end of October 1990, the defendant told Buffalin that he had stopped taking his medication.[15] Responding to this,

5. *Shack,* 86 N.Y.2d at 532-33, 658 N.E.2d at 709, 634 N.Y.S.2d at 663.

6. *Id.* at 535-38, 658 N.E.2d at 710-12, 634 N.Y.S.2d at 664-66.

7. *Id.* at 538-39, 658 N.E.2d at 712-13, 634 N.Y.S.2d at 666-67.

8. *Id.* at 533, 658 N.E.2d at 709, 634 N.Y.S.2d at 663.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 533-34, 658 N.E.2d at 709, 634 N.Y.S.2d at 663.

she requested that he please stop calling her.[16] Shack then proceeded to tell Buffalin that "if he ever got angry with her, he could burn down the house of her elderly father (his uncle), who lived in New York City."[17] He then continued to telephone Buffalin through November and into December of 1990 and she continued to request that the phone calls cease until he began taking his medication again.[18]

Toward the end of November, Buffalin notified the defendant that she was to be undergoing major surgery and requested that he not disturb her during her two week recovery period.[19] Shack, however, telephoned her three times on the day of her surgery and then repeatedly telephoned her on a regular basis thereafter.[20] Between December 12 and the end of that month, he placed eighty-eight phone calls to Buffalin, at times phoning her as many as seven times in one day and leaving threatening messages on her answering machine.[21] Buffalin, finally, wrote Shack a letter in which she stated that she no longer welcomed his telephone calls and if they continued she would file a criminal complaint against him.[22]

The calls did not stop and in fact telephone records indicated that there were 185 calls made from Shack's residence in Queens County to Buffalin between December 12, 1990 and May 20, 1991.[23] He telephoned her and left numerous messages in which he threatened her if she refused to speak with him.[24] Buffalin telephoned him once in January to ask him to stop calling her and also called him at other times to replay tape recordings of his phone calls in order to show him that she was gathering evidence against him.[25] This did not appear to affect him as he continued

16. *Id.* at 534, 658 N.E.2d at 709, 634 N.Y.S.2d at 663.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 534, 658 N.E.2d at 709-10, 634 N.Y.S.2d at 663-64.
25. *Id.* at 534, 658 N.E.2d at 710, 634 N.Y.S.2d at 664.

making these unwanted calls until May of 1991 when Buffalin filed a criminal complaint against him in New York.[26] Shack was subsequently "convicted on one count of aggravated harassment in the second degree and sentenced to three years of probation."[27]

Shack challenged the constitutionality of Penal Law section 240.30(2) on several grounds; first, as infringing upon his right to freedom of expression and second, as violating his right to due process.[28] Shack alleged that Penal Law section 240.30(2) is violative of his right to freedom of expression as provided under the First and Fourteenth Amendments of the Federal Constitution and article I, section 8 of the New York Constitution because it is facially unconstitutional.[29] The court first addressed the freedom of expression claim.

The court found that Penal Law section 240.30(2) is not facially unconstitutional because it contains specific limiting language.[30] The court found that this statute differs from those that have "impose[d] criminal liability for 'pure speech'. . . or expressive conduct.'"[31] The court concluded that the statute

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26. *Id.*

27. *Id.*

28. *Id.* at 535-38, 658 N.E.2d at 710-12, 634 N.Y.S.2d at 664-66. The court, in deciding the scope of this analysis, stated: "Defendant does not contend that the Free Speech or Due Process Clauses of the New York State Constitution afford greater protection than those of the Federal Constitution. Accordingly, our analysis assumes the requirements of both documents are the same." *Id.* at 535 n.1, 658 N.E.2d at 710 n.1, 634 N.Y.S.2d at 664 n.1.

29. *Id.* at 535, 658 N.E.2d at 710, 634 N.Y.S.2d at 664.

30. *Id.*

31. *Id.* (citation omitted). *See, e.g.*, Spence v. Washington, 418 U.S. 405, 405-06 (1974) (stating that a Washington statute prohibiting the "exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material" constituted an unconstitutional burden on the right to free speech); Cohen v. California, 403 U.S. 15, 16-17 (1971). In *Cohen*, the Court was asked to determine the legality of a statute prohibiting "offensive conduct." *Id.* at 16. The Court examined the statute while considering a case where an individual was prosecuted for wearing a jacket expressing an offensive phrase, "Fuck the Draft," and held that the statute was overbroad because it served to "punish . . . the fact of communication." *Id.* at 18. *See also* Walker v. Dillard, 523 F.2d 3, 4-6 (4th Cir.) (finding a statute

"proscribes only conduct and expressly removes from its application 'legitimate communication . . . .'"[32] Therefore, Shack's claim that the statute is facially unconstitutional because it violates the First Amendment and article I, section 8 of the State Constitution failed.[33]

Next, the court addressed Shack's claim that the statute was overbroad. The court stated that even if the statute was found to limit the exercise of free speech, this alone would not automatically cause the court to find the statute to be overbroad.[34] The court specifically stated that:

> Constitutional free speech protections "have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses;" a person's right to free expression may be curtailed "upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[35]

The right of a person to exercise his freedom of speech must be balanced against the listener's right 'to be let alone' in those places where the latter has a right to privacy[36] or "where it is impracticable for an unwilling listener to avoid exposure to the

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prohibiting expressive conduct over the telephone to be facially overbroad), *cert. denied*, 423 U.S. 906 (1975); People v. Dietze, 75 N.Y.2d 47, 50, 549 N.E.2d 1166, 1167, 550 N.Y.S.2d 595, 596 (1989) (stating that a statute prohibiting "the use of 'abusive' language with the intent to 'harass' or 'annoy' another person" is too limiting of constitutionally protected speech under both the New York State and Federal Constitutions); People v. Hollman, 68 N.Y.2d 202, 204, 500 N.E.2d 297, 298-99, 507 N.Y.S.2d 977, 979 (1986) (holding that defendant's arrest for nude sunbathing is not a violation of his constitutional right to freedom of expression).

32. *Shack*, 86 N.Y.2d at 535, 658 N.E.2d at 710, 634 N.Y.S.2d at 664.

33. *Id.*

34. *Id.*

35. *Id.* at 535, 658 N.E.2d at 710, 634 N.Y.S.2d at 664 (quoting *Cohen*, 403 U.S. at 19, 21).

36. *Id.* (citing Rowan v. Post Office Dep't, 397 U.S. 728, 736 (1970)). The Court in *Rowan* determined that a statute "under which a person may require that a mailer remove his name from its mailing lists and stop all future mailings to the householder" is constitutional. *Rowan*, 397 U.S. at 729, 731, 740.

objectionable communication."[37] Furthermore, the *Shack* court noted that "[u]nder some circumstances the privacy right may 'plainly outweigh' the free speech rights of an intruder."[38]

The court examined the instant case in light of the *Rowan* decision.[39] Specifically, the court found that the *Rowan* analysis is also applicable to Penal Law section 240.30(2).[40] In *Rowan*, the court found that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee" because to find otherwise would in fact result in the court permitting a trespass upon an unwilling recipient.[41] The court analogized this situation with that of a person's telephone.[42] A person has a right to a substantial privacy interest in their telephone as it is considered the "functional equivalent of the mailbox."[43] Thus, the court in the current case determined that Penal Law section 240.30(2) permissibly subordinates a person's right to free speech to a recipient's right to be free from unwanted telephone calls.[44] The court further held that the statute is narrowly tailored and because its purpose is to protect citizens against persons using the

37. *Shack*, 86 N.Y.2d at 636, 658 N.E.2d at 710, 634 N.Y.S.2d at 664 (citing Lehman v. City of Shaker Heights, 418 U.S. 298, 302-03 (1974)). In *Lehman*, the Court noted that in an examination of the right to freedom of speech, "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." *Lehman*, 418 U.S. at 302-03 (citation omitted).

38. *Shack*, 86 N.Y.2d at 836, 658 N.E.2d at 710, 634 N.Y.S.2d at 664 (citing Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 748 (1978)). In the *Pacifica Foundation* case, popularly known as the "Seven Dirty Words" case, the Court made the point that an individual's right to privacy in his or her own home is paramount to that of an intruder using the airwaves to deliver "offensive" messages to the home. *Pacifica Found.*, 438 U.S. at 748.

39. *Shack*, 86 N.Y.2d at 636, 658 N.E.2d at 710-11, 634 N.Y.S.2d at 664-65.

40. *Id.* at 636, 658 N.E.2d at 711, 634 N.Y.S.2d at 665.

41. *Id* at 636, 658 N.E.2d at 710-11, 634 N.Y.S.2d at 664-65 (citing *Rowan*, 397 U.S. at 736-37).

42. *Shack*, 86 N.Y.2d at 636, 658 N.E.2d at 711, 634 N.Y.S.2d at 665.

43. *Id.*

44. *Id.*

telephone for reasons other than communication, it furthers a compelling state interest .[45]

The court also examined Shack's assertion that Penal Law section 240.30(2) was unconstitutional as applied to him.[46] The record indicates that Shack telephoned Buffalin "with the intent to harass, annoy, threaten or alarm her and that his calls were made with no legitimate communicative purpose."[47] In light of these facts the court found that Shack was engaging in a pattern of harassment against Buffalin and not engaging in the exercise of any communication that was protected by the constitution.[48]

Shack also asserted that the statute "may impair or chill" the lawful exercise of free speech by others because it may be interpreted as limiting the expression of constitutionally protected speech.[49] Thus, Shack asserted that the statute is overbroad.[50] The court, however, determined that in order for the defendant to have a valid claim he must prove that the statute is "substantially overbroad."[51] The court stated that because the defendant did not personally suffer an infringement of his right to free speech he

45. *Id. See* Gormley v. Director Conn. State Dep't of Probation, 632 F.2d 938, 941 (2d Cir.) (applying the analysis used by the court in United States v. Lampley to determine the constitutionality of a similar Connecticut telephone harassment statute), *cert. denied*, 449 U.S. 1023 (1980). *See* United States v. Lampley, 573 F.2d 783, 787 (3d Cir. 1978). In examining a similar statute, the federal telephone harassment statute, the court found that "[n]ot all speech enjoys the protection of the first amendment." *Id.* The court further stated that "Congress had a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives." *Id.*

46. *Shack,* 86 N.Y.2d at 636, 658 N.E.2d at 711, 634 N.Y.S.2d at 665.

47. *Id.* at 537, 658 N.E.2d at 711, 634 N.Y.S.2d at 665. *See* People v. Smith, 89 Misc. 2d 789, 790, 392 N.Y.S.2d 968, 969-70 (2d Dep't) (finding no legitimate communicative purpose in a case where the defendant repeatedly dialed the White Plains Police Department's telephone number twenty-seven times during a period of three hours and twenty minutes regarding a civil matter), *cert. denied*, 434 U.S. 920 (1977).

48. *Shack*, 86 N.Y.2d at 537, 658 N.E.2d at 711, 634 N.Y.S.2d at 665.

49. *Id. See* Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972) (stating that a person may have standing to challenge an overbroad statute even if it is not overbroad as applied to him).

50. *Shack*, 86 N.Y.2d at 537, 658 N.E.2d at 711, 634 N.Y.S.2d at 665.

51. *Id.*

may only challenge the constitutionality of the statute if he can show that it "is so broadly worded that it may reach a substantial amount of constitutionally protected expression."[52]

In examining this issue, the court determined that a distinction exists between Penal Law section 240.30(2) and other telephone harassment statutes which in the past have been found to be constitutionally overbroad.[53] The court stated that the language contained within the statute limiting its application to those telephone calls made "with no purpose of legitimate communication" is sufficient to limit the possibility of it being considered overbroad.[54] The court further stated that even if they were to consider the possibility that on rare occasions the statute could constitutionally restrict protected speech, they would still be unable to conclude that this overbreadth would be

52. *Id. See* Houston v. Hill, 482 U.S. 451, 458-59 (1987) (noting that in examining a criminal statute for overbreadth, particular care must be used because "those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application"); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (stating that a statute must be substantially overbroad in order to be held facially invalid); People v. Hollman, 68 N.Y.2d 202, 208-09, 500 N.E.2d 297, 301-02, 507 N.Y.S.2d 977, 981-82 (1986) (holding that a defendant may challenge a statute for overbreadth, in the interest of others, provided the "unconstitutional reach [of the statute] is substantial and the statute is incapable of a reasonable limiting construction").

53. *Shack*, 86 N.Y.2d at 537, 658 N.E.2d at 611, 634 N.Y.S.2d at 655. *See* Walker v. Dillard, 523 F.2d 3, 5 (4th Cir.) (finding "[n]early every operative word" of a Virginia telephone harassment statute to be overly broad), *cert. denied*, 423 U.S. 906 (1975); Radford v. Webb, 446 F. Supp. 608, 611 (W.D.N.C. 1978) (stating that a telephone statute is overbroad because it "makes no distinction between language which is abusive but merely hyperbolic and that which can be construed as expressing an actual intention of inflicting injury"), *aff'd*, 596 F.2d 1205 (1979). *See also* People v. Klick, 362 N.E.2d 329, 331 (Ill. 1977) (holding that an Illinois telephone harassment statute is overly broad because it is not limited to any specific type of conduct and "makes criminal [such] conduct [that is] protected by the first amendment[,]" including the right to communicate to another in a reasonable manner).

54. *Shack*, 86 N.Y.2d at 537, 658 N.E.2d at 711, 634 N.Y.S.2d at 665.

substantial.[55] Therefore, the court concluded that "Penal Law § 240.30(2) is not overbroad because it does not infringe upon protected rights of defendant nor chill the exercise of free speech rights by others."[56]

Another constitutional issue raised by Shack was whether the statute violated due process.[57] Shack asserted that "the statute is unconstitutionally vague, i.e., that it violates the constitutional right to due process because it fails to give a citizen adequate notice of the nature of proscribed conduct, and permits arbitrary and discriminatory enforcement."[58] The term which Shack argued was vague and indefinable was the word "legitimate" as it is used in the clause "no purpose of legitimate communication."[59] In addressing this issue the court determined that a defendant whose conduct falls within the scope of a

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55. *Id. See* People v. Hollman, 68 N.Y.2d 202, 209, 500 N.E.2d 297, 302, 507 N.Y.S.2d 977, 982 (1986) (stating that "the requirement that overbreadth be substantial is properly used to save a statute which may reach some protected conduct while prohibiting a whole range of easily identifiable and constitutionally proscribable conduct") (citations omitted).

56. *Shack,* 86 N.Y.2d at 537, 658 N.E.2d at 711-12, 634 N.Y.S.2d at 665-66.

57. *Id.* at 538, 658 N.E.2d at 712, 634 N.Y.S.2d at 666. *See supra* notes 3 and 4.

58. *Shack,* 86 N.Y.2d at 538, 658 N.E.2d at 712, 634 N.Y.S.2d at 666. *See* Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) (stating that there is an analogy to be made between the effect of an overbroad statute and a vague one); United States v. Harriss, 347 U.S. 612, 617 (1954) (holding that "[t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute"). *See also* People v. Bright, 71 N.Y.2d 376, 382, 520 N.E.2d 1355, 1358, 526 N.Y.S.2d 66, 69 (1988) (restating this two-pronged analysis applicable to an assertion of statutory vagueness); People v. Nelson, 69 N.Y.2d 302, 307, 506 N.E.2d 907, 908-09, 514 N.Y.S.2d 197, 199 (1987) (holding that a vagueness challenge requires a two-part analysis in that first, it must be "sufficiently definite" and second, it "must provide explicit standards for those who apply them") (citations omitted); People v. Illardo, 48 N.Y.2d 408, 413, 399 N.E.2d 59, 61-62, 423 N.Y.S.2d 470, 472 (1979) (finding the constitutional requisite that a statue not be vague serves two purposes in that it informs the citizens of their expected conduct and it also provides a guide for those who will be enforcing the law).

59. *Shack,* 86 N.Y.2d at 538, 658 N.E.2d at 712, 634 N.Y.S.2d at 666.

criminal statute "may not assert a due process challenge on the grounds that the statute may be vague when applied to the potential conduct of others."[60] Therefore, the court only addressed the issue of vagueness with regard to the defendant's own conduct.[61]

The court held that the determination of "[w]hether a statute is unconstitutionally vague is measured by whether it provides notice to 'a person of ordinary intelligence that his contemplated conduct is forbidden by the statute.'"[62] Refining this rule, however, the court stated that the mere use of imprecise language within the statute will not render it "fatally vague if that language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'"[63] In applying these principles, the court concluded

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60. *Id. See* Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973) (stating that a claim for vagueness has little relevance where the conduct of the claimant "falls squarely within the 'hard core' of the statute's proscriptions") (citations omitted); *Nelson*, 69 N.Y.2d at 308, 506 N.E.2d at 909, 514 N.Y.S.2d at 199 (1987) (finding that "if the actions of the defendants are plainly within the ambit of the statute, the court will not strain to imagine marginal situations in which the application of the statute is not so clear") (citations omitted).

61. *Shack,* 86 N.Y.2d at 538, 658 N.E.2d at 712, 634 N.Y.S.2d at 666.

62. *Id.* (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)) (alteration in original). The *Harriss* Court reasoned that no one should be "held criminally responsible for conduct which he could not reasonably understand to be proscribed." 347 U.S. at 617. *See also* People v. Cruz, 48 N.Y.2d 419, 423-24, 399 N.E.2d 513, 514, 423 N.Y.S.2d 625, 626-27 (1979) (stating that a "criminal statute must be stated in terms which are reasonably definite so that a person of ordinary intelligence will know what the law prohibits or commands") (citations omitted).

63. *Shack,* 86 N.Y.2d at 538, 658 N.E.2d at 712, 634 N.Y.S.2d at 666 (quoting United States v. Petrillo, 332 U.S. 1, 7-8 (1947)). In *Petrillo*, the Court held that the Constitution does not require more than this, and that it does not impose impossible standards in proving a statute unconstitutionally vague. *Petrillo*, 332 U.S. at 8. *See also* Miller v. California, 413 U.S. 15, 27-28 n.10 (1973) (quoting Roth v. United States, 354 U.S. 476, 491-92 (1957) (stating that "'the constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices'")); People v. Illardo, 48 N.Y.2d 408, 414, 399 N.E.2d 59, 62, 423 N.Y.S.2d 470, 472 (1979) (indicating that the constitution is "[r]ecognizing

that the phrase in question "would be understood to mean the absence of expression of ideas or thoughts other than threats and/or intimidating or coercive utterances."[64]

The court then went further in its analysis of the challenged clause, stating that despite Shack's claim that it does not provide adequate notice to citizens of what they may not do, the statute should be viewed as a whole, and not in isolation.[65] The clause when read in the context of the entire statute, was found to be simply one element of a definition setting forth certain proscribed conduct.[66] The statute specifically applies to anyone making such telephone calls "with intent to harass, annoy, threaten or alarm another person."[67] The court concluded that the specific inclusion by the legislature of the intent element eliminates the possibility that a defendant could engage in this criminal conduct without specific knowledge of the nature of his acts.[68] Additionally, the court found that this "intent element also

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reality" by not requiring impossible standards and finding that "common understanding and practices" may even be used to assist in the interpretation of a statute); City of Albany v. Lee, 53 N.Y.2d 633, 634-35, 420 N.E.2d 974, 974, 438 N.Y.S.2d 782, 782 (1981) (holding that the application of statute must be measured by a "common understanding and practices," not by impossible standards) (citations omitted).

64. *Shack,* 86 N.Y.2d at 538, 658 N.E.2d at 712, 634 N.Y.S.2d at 666.

65. *Id.* at 538-39, 658 N.E.2d at 712, 634 N.Y.S.2d at 666.

66. *Id.*

67. *Id.* at 539, 658 N.E.2d at 712, 634 N.Y.S.2d at 666 (quotation omitted).

68. *See* Screws v. United States, 325 U.S. 91, 101-02 (1945) (holding that the addition of an intent element to a statute can sometimes render an otherwise vague statute valid); United States v. Lampley, 573 F.2d 783, 787 (1978) (finding that the inclusion of a specific intent element in a statute may avoid a claim of constitutional vagueness); People v. Bright, 71 N.Y.2d 376, 383-84, 520 N.E.2d 1355, 1359, 526 N.Y.S.2d 66, 70 (1988). In *Bright*, the court determined that a statute which prohibited loitering was unconstitutionally vague because it failed to distinguish between harmful and innocent conduct and, therefore, failed to inform the citizens of what action is expected of them. *Id.* In addition the statute also failed because it did not limit the discretion of those capable of enforcing it. *Id.*

removes the possibility that criminal liability would be imposed based on the unascertainable sensitivities of the victim."[69]

The court also determined that there is no possibility of arbitrary enforcement of the statute by police officers, judges and juries.[70] First, the statute itself contains a clear and understandable description of the elements and standards defining the appropriate criminal conduct.[71] Second, because of the nature of the acts covered under the statute, enforcement of the statute is unlikely unless the victim files a complaint with the authorities.[72] The court, therefore, concluded that Penal Law section 240.30(2) sufficiently "describes an element of the proscribed conduct, and provides sufficient notice to potential offenders and sufficient guidelines to those who would enforce the statute and that defendant has failed to overcome the presumption of validity which attaches to legislative enactments."[73]

As noted,[74] the *Shack* court did not attempt to apply an expansive interpretation of the New York Constitution.[75] However, the cases cited in this purview make it somewhat clear that an expansive interpretation of the New York Constitution in this case would be unprecedented. On virtually every issue raised by Shack, the New York and federal decisions appear consistent. Nevertheless, the *Shack* court makes the point that the New York

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69. *Shack*, 86 N.Y.2d at 539, 658 N.E.2d at 712, 634 N.Y.S.2d at 666. Coates v. City of Cincinnati, 402 U.S. 611, 613 (1971) (stating that a statute is unconstitutionally vague if it does "not indicate upon whose sensitivity a violation does depend-the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man").

70. *Shack*, 86 N.Y.2d at 539, 658 N.E.2d at 712-13, 634 N.Y.S.2d at 666-67.

71. *Id.* at 539, 658 N.E.2d at 713, 634 N.Y.S.2d at 667.

72. *Id.*

73. *Id.* People v. Bright, 71 N.Y.2d 376, 382, 520 N.E.2d 1355, 1358, 526 N.Y.S.2d 66, 69 (1988) (stating that a legislative act is "presumed to be valid and the heavy burden of demonstrating that a statute is unconstitutional rests with the one seeking to invalidate the statute").

74. *See supra* note 28.

75. *Shack*, 86 N.Y.2d at 535 n.1, 658 N.E.2d at 710 n.1, 634 N.Y.S.2d at 664 n.1 (stating that the court will assume the New York State Constitution is no broader than the Federal Constitution in this case because the defendant did not raise the issue).

Constitution goes no further than the constitutional minimum provided under federal precedent.

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Jay-Jay Cabaret, Inc. v. State[76]
(decided April 4, 1995)

Plaintiff, Jay-Jay Cabaret, Inc., brought this action seeking a declaratory judgment that one of the rules promulgated by the New York State Liquor Authority (hereinafter "SLA") was unconstitutional either on its face or as it was being applied to the plaintiff.[77] Plaintiff contend[ed] that the "six-foot" provision of SLA Rule 36.1(s)[78] "violate[d] the freedom of expression of dancers employed by plaintiff"[79] and was, therefore, violative of both the United States[80] and the New York State Constitutions.[81]

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76. 164 Misc. 2d 673, 629 N.Y.S.2d 937 (1st Dep't 1995).

77. *Id.* at 675, 629 N.Y.S.2d at 939. Plaintiff also raised another claim in its original complaint, seeking a declaratory judgment that Alcoholic Beverage Law section 106(6) was unconstitutional, or in the alternative, a declaration that "table dancing" did "not constitute a 'disorderly' condition" for the purposes of section 106(6). *Id.* Plaintiff also sought a declaration that the use of "liquid latex bras" did not violate SLA Rule 36.1(s). *Id.* In its proposed amended complaint, plaintiff raised two additional theories: 1) "that Rule 36.1(s) was promulgated by the SLA without . . . or in excess of its authorized power," and 2) "that Rule 36.1(s) violated Article III, [section] 1 of the New York State Constitution." *Id.* at 676, 629 N.Y.S.2d at 939. The court granted plaintiff's motion to amend. *Id.* at 676, 629 N.Y.S.2d at 940.

78. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 53.1(s) (McKinney 1987). The "six-foot" provision provides that topless performers must be on a platform eighteen inches above the floor level or higher and no less than six feet from the nearest patron. *Id.*

79. *Jay-Jay Cabaret*, 164 Misc. 2d at 680, 629 N.Y.S.2d at 942.

80. U.S. CONST. amend I. The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.*

81. N.Y. CONST. art. I, § 8. This provision provides in pertinent part: "[N]o law shall be passed to restrain or abridge the liberty of speech . . . ." *Id.*