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IN COLD TYPE: STATUTORY APPROACHES TO THE PROBLEM OF THE OFFENDER AS AUTHOR

INTRODUCTION

The disposition by a criminal offender of the rights to the story of his crime has been a subject of public controversy for several years.[1] Because of public curiosity about infamous crimes, publishers occasionally offer criminals lucrative contracts for the tales of their offenses.[2] However, many people feel that allowing criminals to retain the revenues from the stories of their crimes results in unjust enrichment.[3] In response, several states have passed laws to prevent such profiteering by criminals.[4] For example, New York enacted its literary profits

[1] *See, e.g., Checkbook Journalism*, NEWSWEEK, Dec. 29, 1969, at 45; *Taking a Criminal to Civil Court*, NEWSWEEK, Apr. 23, 1979, at 22D; *Selling a Client's Story*, TIME, Jan. 19, 1970, at 62.

[2] A number of reported cases and newspaper articles illustrate the amount of funds which can be placed at the disposal of a criminal offender for the story of his crime. For example, in 1970, Susan Atkins, a member of the "Manson family," directed payment of $52,500 to her attorney and $131,250 to a trust for the benefit of her son for an interview detailing her involvement in the Sharon Tate murder case. *See* articles listed in note 1 *supra*. At the same time, the attorney for Charles Watson, who was also implicated in the murders, was seeking $50,000 in exchange for the right to interview his client. *Id.* James Earl Ray, the convicted murderer of Martin Luther King, directed payment of at least $40,000 in royalties to his attorneys for the story of his crime. Ray v. Rose, 535 F.2d 966, 971 (6th Cir.), *cert. denied*, 429 U.S. 1026 (1976). *See also* Ray v. Foreman, 441 F.2d 1266 (6th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).

In the only reported case decided under the New York statute considered in this note, Warner International Corporation paid approximately $43,000 to the New York Crime Victim's Compensation Board. These funds represented the earnings of John Wojtowicz for the release of his rights to the motion picture reenactment of a bank robbery he had committed in 1972. The film was entitled, "Dog Day Afternoon" (1975). The court in that case held, *inter alia*, that a bank manager who was held hostage during the robbery could bring suit in 1978 against Wojtowicz for grounds of assault and battery and false imprisonment and recover any judgment in his favor out of the proceeds of the film rights. Barrett v. Wojtowicz, 94 Misc. 2d 379, 404 N.Y.S.2d 829 (1978), *aff'd*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (1979). *See also* note 24 *infra*.

[3] A number of people have expressed concern that the widespread publicity surrounding a crime can result in the criminal wrongdoer receiving lucrative fees for books, articles, interviews and the like. These people see such income on the part of the wrongdoer as unjust enrichment and have proposed that such income be held in escrow by the State in order to pay claims made against the wrongdoer by the victims of the crimes which led to the unjust enrichment.

Victims of Crime Compensation, H.R. REP. No. 95-1762, 95th Cong., 1st Sess. 10 (1977), *reprinted at* 124 CONG. REC. 12366, 12368 (1978). *See also* note 1 *supra*.

In 1977, a bill submitted in the House of Representatives would have provided federal funding for state crime victims' compensation programs. It established several requirements for the eligibility of states:

> There is in effect in the state a law or rule requiring any person contracting directly or indirectly with an individual formally charged with or convicted of a qualifying crime for any rendition, interview, statement, or article, relating to such crime to deposit any proceeds owing to such individual under the terms of the contract into an escrow fund for the benefit of any victims of such qualifying crime or any surviving dependents of any such victim, if such individual is convicted of that crime, to be held for such period of time as the state may determine is reasonably necessary to perfect the claims of such victims or dependents.

H.R. 7010, 95th Cong., 1st Sess. (1977).

The conference committee on this bill rejected this provision on several grounds, noting that it raised serious constitutional questions. This conclusion was based on the modeling of this provision upon the New York statute and the finding of the American Law Division of the Library of Congress' Congressional Research Service that "serious constitutional issues are raised by [the New York] legislation: The main constitutional issues raised concern the due process clause of the 14th Amendment and the 1st Amendment protection for freedom of speech and press."

H.R. 7010, as amended, was defeated in the House of Representatives on October 14, 1978. 124 CONG. REC. 13030 (1978). There are, however, currently on the floor of the House at least two bills to provide federal funding for crime victims compensation programs with provisions which are identical to that in the original version of H.R. 7010 requiring a qualifying state to have a law attaching the offender's profits from the story of his crime. H.R. 99, 96th Cong., 1st Sess. (1979) and H.R. 4257, 96th Cong., 1st Sess. (1979). On February 13, 1980, the House Judiciary Committee recommended the passage of H.R. 4257. H.R. REP. No. 753, 96th Cong., 2d Sess. (1980).

[4] ALASKA STAT. § 18.67.165 (Supp. 1979); ARIZ. REV. STAT. § 13-4202 (Supp. 1978); GA. CODE ANN. § 27-3401 (Rev. 1978); IDAHO CODE § 19-5301 (Supp. 1979); ILL. REV. STAT. ch. 70, § 401 *et seq.* (1979); MASS. GEN. LAWS. ANN. ch. 258A, § 8 (West Supp. 1979); MINN. STAT. § 299 B.17 (Supp. 1979); and NEB. REV. STAT. § 81-1836 *et seq.* (Supp. 1979.).

statute, Executive Law § 632-a, to prevent the "Son of Sam" killer from profiting from his murders.[5] The majority of the statutes curbing criminal rewards are modeled after New York's law.[6] Under that statute, anyone who contracts for the story of a person accused or convicted of a crime must deposit the proceeds of the contract with a crime victims' compensation board. The board holds the funds in escrow for five years, during which it releases amounts only for attorneys' fees and for restitution to the victims of the offender's crime. At the conclusion of the five-year period, the offender receives any funds remaining in the account.

Many commentators charge that the New York statute is unconstitutional.[7] They allege that it

[5] N.Y. EXEC. LAW § 632-a (McKinney Supp. 1979). The author of the legislation specifically noted his motivation in writing this bill:

> It is abhorrent 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, 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.

Memorandum of Senator Emanuel R. Gold, 1977 New York State Legislative Annual. *See also* N.Y. Times, Aug. 13, 1977, at 20, col. 3.

[6] The New York statute, N.Y. EXEC. LAW § 632-a (McKinney Supp. 1979), provides:

> 1. Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by: (i) such convicted persons; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representatives.
>
> 2. The board, at least once every six months for five years from the date it receives such moneys, shall cause to have published a legal notice in newspapers of general circulation in the county wherein the crime was committed and in counties contiguous to such county advising such victims that such escrow moneys are available to satisfy money judgments pursuant to this section. For crimes committed in a county located within a city having a population of one million or more, the notice provided for in this section shall be in newspapers having general circulation in such city. The board may, in its discretion, provide for such additional notice as it deems necessary.
>
> 3. Upon dismissal of charges or acquittal of any accused person the board shall immediately pay over to such accused person the moneys in the escrow account established on behalf of such accused person.
>
> 4. Upon a showing by any convicted person that five years have elapsed from the establishment of such escrow account and further that no actions are pending against such convicted person pursuant to this section, the board shall immediately pay over any moneys in the escrow account to such person or his legal representatives.
>
> 5. For purposes of this section, a person found not guilty as a result of the defense of mental disease or defect pursuant to section 30.05 of the penal law shall be deemed to be a convicted person.
>
> 6. Whenever it is found, pursuant to article seven hundred thirty of the criminal procedure law . . . that a person accused of a crime is unfit to proceed as a result of mental disease or defect because such person lacks capacity to understand the proceedings against him or to assist in his own defense, the board shall bring an action of interpleader pursuant to section one thousand six of the civil practice law and rules to determine disposition of the escrow account.
>
> 7. Notwithstanding any inconsistent provision of the civil practice law and rules with respect to the timely bringing of an action, the five year period provided for in subdivision one of this section shall not begin to run until an escrow account has been established.
>
> 8. Notwithstanding the foregoing provisions of this section the board shall make payments from an escrow account to any person accused or convicted of crime upon the order of a court of competent jurisdiction after a showing by such person that such moneys shall be used for the exclusive purpose of retaining legal representation at any stage of the proceedings against such person, including the appeals process.
>
> 9. Any action taken by any person accused or convicted of a crime, whether by way of execution of a power of attorney, creation of corporate entities or otherwise, to defeat the purpose of this section shall be null and void as against the public policy of this state.

[7] Am. Law Division, Cong. Research Service, Lib. of Congress, Constitutional Analysis of a New York Statute Requiring Funds Received by Alleged Criminals for Certain Purposes to be Given to Their Victims, Sept. 8, 1977 (hereinafter Constitutional Analysis). *See* Note, *Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech*, 54 IND. L.J. 443 (1979) (hereinafter *Criminals-Turned-Authors*), and Note, *Compensating the Victim from the Proceeds of the Criminal's Story—The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROB. 93 (1978) (hereinafter *Compensating the Victim*).

violates the first amendment because it chills the offender's right to speak and infringes upon the public's right to know because it immediately eliminates all of the offender's profit.[8] It is also attacked under the due process clause of the fourteenth amendment as requiring an unconstitutional prejudgment seizure.[9]

One state has departed from New York's model. That state, Florida, places a statutory lien on the proceeds of a convicted felon's account of his crime.[10] Once this lien has been perfected, the funds are distributed in the following manner: 25% of the money to the dependents of the offender; up to 25% to the victims of the crime or their dependents to the extent of their damages as determined by the court; up to 50% to the state for its costs in prosecuting and incarcerating the offender. Any remaining funds are paid to the offender upon his release or parole.

Because of the number of states which have adopted statutes based on the New York provisions and because of the importance of preventing unjust enrichment by the offender, it is crucial to examine the criticisms of the New York statute. In addition, the Florida statute must be examined as an alternative for achieving the same goals through more constitutional means.

First Amendment Analysis

A full analysis of the impact of the New York and Florida statutes on first amendment rights is a multistep process. First, it is necessary to determine whether the literary works involved in the statutes are subject to first amendment protection.[11] Second, if the works are protected, consideration must be given to whether the statutes deter the offender from exercising his rights to produce them.[12] If deterrence occurs, the manner in which it operates raises constitutional questions.[13] In addition, the possibility that the publisher is being deterred from informing the public regarding the offender's views must be analyzed.[14] Finally, even if the statute does interfere with the offender telling his story, such interference may be constitutional if the restrictions are not content-based and the statute's purpose is not solely to prevent the offender from telling his story.[15]

EVIDENCE OF DETERRENCE

The first amendment fully protects an offender's right to tell the circumstances surrounding the commission of his crime or to tell his thoughts and feelings about the crime. The fact that the subject matter of the speech may include offensive details

[8] *See* note 7 *supra*. A question was raised as to whether the statute also violates the publishing media's right of access. It was correctly concluded, however, that the Supreme Court in Pell v. Procunier, 417 U.S. 817 (1974), and Saxbe v. Washington Post Co., 417 U.S. 843 (1974), found that the press does not have any greater right of access to information than that of the general public. 14 COLUM. J.L. & SOC. PROB. at 112–13. *See also* Branzburg v. Hayes, 408 U.S. 665, 684 (1972), "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." (Citations omitted).

[9] *See* Constitutional Analysis and *Compensating the Victim*, *supra* note 7.

[10] The relevant Florida Statutes state:

(1) A lien prior in dignity to all others shall exist in favor of the state upon royalties, commissions, proceeds of sale, or any other thing of value payable to or accruing to a convicted felon or a person on his behalf, including any person to whom the proceeds may be transferred or assigned by gift or otherwise, from any literary, cinematic, or other account of the crime for which he was convicted.

(2) The proceeds of such account shall be distributed as follows:

(a) Twenty-five percent to the dependents of the convicted felon.

(b) Twenty-five percent to the victim or victims of the crime or to their dependents, to the extent of their damages as determined by the court in the lien enforcement proceedings.

(c) An amount equal to pay court costs, which shall include jury fees, and expenses, court reporter fees, and reasonable per diem for the prosecuting attorneys for the state, shall go to the General Revenue Fund. Additional costs shall be assessed for the computed per capita cost of imprisonment in the state correctional institution. Such costs shall be determined by the Auditor General.

(d) The rest, residue, and remainder to the convicted felon upon his or her release or parole or [upon the expiration of his or her sentence].

(3) The Department of Offender Rehabilitation is hereby authorized and directed to report to the Department of Legal Affairs the existence or reasonably expected existence of circumstances which would be covered by this section. Upon such notification, the Department of Legal Affairs is authorized and directed to take such legal action as is necessary to perfect and enforce the lien created by this section. Bracketed language substituted by the division of statutory revision for "expiration."

FLA. STAT. § 944.512 (Supp. 1979).

The Department of Legal Affairs shall be the legal advisor of the Department of Offender Rehabilitation.

FLA. STAT. § 944.52 (Supp. 1979).

[11] *See* note 16 and accompanying text *supra*.

[12] *See* notes 17–49 and accompanying text *supra*.

[13] *See* notes 50–78 and accompanying text *supra*.

[14] *See* notes 79–85 and accompanying text *supra*.

[15] *See* notes 86–125 and accompanying text *supra*.

of an infamous crime is inconsequential. The Supreme Court has emphatically stated that "the Constitution protects expression and association without regard to . . . the truth, popularity, or social utility of the ideas and beliefs which are offered."[16] The proper starting point for an analysis of the constitutionality of the New York and Florida statutes is to determine whether they deter the offender from telling about his offense. Neither statute directly prohibits an offender from telling the story of his crime.[17] However, the first amendment also prohibits indirect governmental interference with protected speech. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."[18]

Several of the provisions of the New York statute clearly would reduce any profit-making incentive for the offender to sell his story to a publisher. First, the offender cannot get the funds for five years. Instead, the funds which he would otherwise receive are remitted to the Crime Victims' Compensation Board where they are held in escrow for a minimum of five years.[19] Although the funds are paid over immediately to the offender if he is acquitted of the charges against him,[20] an acquittal by reason of mental defect is considered a conviction under the statute.[21] If a court finds mental defect, the statute requires the Board to bring an interpleader action to determine the disposition of the escrow account.[22]

Not only does the statute deprive the offender of the money for five years, it also allows the state to deplete the funds during the escrow period by using them to pay victims. The statute provides that victims may bring civil suits, generally tort actions,[23] in courts of competent jurisdiction. During this period these actions can be brought even if the original statute of limitations has expired on the causes of action.[24] The possibility of a victim

[16] N.A.A.C.P. v. Button, 371 U.S. 415, 444-45 (1963). *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wide-open . . . .") and Konigsberg v. State Bar, 366 U.S. 36, 49 n.10 (1961) (indicating that unprotected speech includes, "libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy and the like . . . .") *But see* Young v. American Mini Theatres, 427 U.S. 50, 70 (1976) (Justice Stevens, with the concurrence of Burger, C.J. and Justices White and Rehnquist, concluding that society's interest in protecting sexually explicit films, which are not obscene, "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . .").

[17] *Cf.* First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (Massachusetts criminal statute prohibiting corporations from expressing their views on referendum questions if such issues are not directly related to their business interests); Linmark Assoc. v. Willingboro, 431 U.S. 85 (1977) (community prohibited the posting of "For Sale" signs); Erznozik v. City of Jacksonville, 422 U.S. 205 (1975) (statute prohibiting drive-in movie theaters from showing films containing nudity); Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) (ordinance prohibiting non-labor picketing in the vicinity of a school).

[18] Bates v. Little Rock, 361 U.S. 516, 523 (1960). *See, e.g.*, Grosjean v. American Press Co., 297 U.S. 233 (1936), which found a license tax imposed on the owners of newspapers having a circulation greater than 20,000 copies per week unconstitutional because it had "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." *Id.* at 251. The Court stated:

> The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

Id. at 250. *See also* Healy v. James, 408 U.S. 169, 181 (1972) (infringement of first amendment to deny Students for a Democratic Society chapter recognition as a campus organization); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (holding unconstitutional a municipal tax on door-to-door solicitation as applied to evangelists distributing literature). *Cf.* Branzburg v. Hayes, 408 U.S. 665, 693-95 (1972) (upheld requirement that newspaper reporter respond to grand jury subpoena despite potential deterrence of source of information).

[19] N.Y. EXEC. LAW § 632-a (McKinney Supp. 1979) at § 1. The escrow period could be longer than five years if a victim brings a civil action which is still pending at the end of the five year period. *Id.* at § 4.

[20] *Id.* at § 3.

[21] *Id.* at § 5.

[22] *Id.* at § 6.

[23] *See, eg.*, Barrett v. Wojtowicz, 66 A.D.2d 604, 414 N.Y.S.2d 350 (1979).

[24] N.Y. EXEC. LAW § 632-a(7) (McKinney Supp. 1979).

It is not clear from the statute whether a victim of the same offender can bring an action to recover from the proceeds of the story of a crime other than the one during which he was injured. In Barrett v. Wojtowicz, 66 A.D.2d 604, 414 N.Y.S.2d 350 (1979), the court held, *inter alia*, that this statute creates a new *in rem* cause of action with its own statute of limitations running for five years from the creation of the escrow account. It concluded that because the civil judgment will not be *in personam*, the recovery under the new cause of action is limited to the extent of the funds in the escrow account and the victim cannot use that judgment to recover other assets of the offender. The court also recognized that one of the central premises of the statute is that the victim bears a special relation to the funds because he was the victim of the

bringing suit within the five-year period, thereby dissipating the funds, is enhanced by the statutory requirements that the Board regularly publicize the availability of the escrow funds.[25] Thus, these provisions have a tendency to deter an offender from selling the story of his crime to a publisher by withholding the proceeds of that arrangement for at least five years and by maximizing the probability that the funds will be expended by the end of that period.

However, the New York statute also offers incentives for the offender to sell his story. For example, the offender may use the escrow account to pay reasonable attorneys' fees.[26] Because the typical indigent defendant would prefer private counsel over publicly appointed counsel, the statute encourages him to tell his story. Studies have shown that such an indigent defendant is not likely to trust the public defender because he believes the defender is an agent of the state.[27] The defendant perceives that paying for a private lawyer secures several benefits. It provides a lawyer who is "on his side;" he has greater control in the relationship than that of a supplicant; the lawyer will be more knowledgeable about the criminal law and will have better legal skills in general.[28] Therefore, even if the criminal never receives any personal profit, the statute still provides all the perceived benefits of having retained private counsel rather than appointed counsel or a public defender.[29]

The New York statute also encourages a nonindigent defendant to sell the rights to his story. He is likely to feel that the more money he can expend for representation, the better lawyer he can employ. If he already has a lawyer, the funds will provide better representation since he can pay the attorney to spend more time on his case, conduct more research, and hire expert support which he may not otherwise be able to afford. A lawyer is never allowed to take a direct interest in publication rights as payment for his services.[30] Under the New York statute, however, he is likely to encourage his client to enter into such an agreement to generate an escrow fund account to be used for better representation.[31]

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crime which indirectly generated the proceeds. "It would be ironic to hold that a victim who may have been killed, maimed, or otherwise injured is to be left remediless while the felon could reap the 'fall-out' rewards of the victim's injuries." *Id.* at 615, 414 N.Y.S.2d at 357. Victims of other crimes committed by the offender do not bear the special relation to the proceeds and should not be entitled to the benefit of the statute under the rationale of the court in *Barrett*.

[25] N.Y. EXEC. LAW § 632-a(2) (McKinney Supp. 1979).

[26] *Id.* at § 8.

[27] J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 107 (1972). This study found that, "[n]early 80 percent of those represented by public defenders felt that their lawyer was not on their side. All those who had private attorneys felt that their lawyer was on their side." *Id.* at 105-06. Another study reported: "Retained counsel generally are considered to be superior to both assigned counsel and public defenders. On twenty-three of the twenty-four lawyering values rated by the inmates, retained counsel received the highest score." O'Brien, Pheterson, Wright, & Hostica, *The Criminal Lawyer: The Defendant's Perspective*, 5 AM. J. CRIM. L. 283, 299 (1977).

[28] *Id.*

[29] In none of the reported cases of criminals selling the stories of their crimes does the offender actually write a story or article. He at most submits to one or more interviews. More frequently, he just allows a writer to be present during the preparation and presentation of his defense or waives any rights which he may have to the dramatization of his offense. *See* note 2 *supra*.

[30] ABA Code of Professional Responsibility, DR5-104(B), reads:

> Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

In Maxwell v. Superior Court of Los Angeles County, 101 Cal. App. 736, 161 Cal. Rptr. 849 (1980) the court upheld a trial court order removing the lawyers retained by the defendant. The retainer agreement had provided for assignment of all literary rights to the life story of the defendant murder suspect in return for legal representation. The court found that, "[t]he conflict of interest that arises from the fee-interest potential of the retainer agreement here is so inherently conducive to divided loyalties as to amount to a denial of the right to effective representation as a matter of law." *Id.*

Similarly, in People v. Corona, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978), the court reversed the conviction of accused mass murderer Juan Corona on the grounds, *inter alia*, that he was denied effective counsel because his trial counsel had secured the literary and dramatic rights to his client's story as compensation. *But see* Ray v. Rose, 535 F.2d 966 (6th Cir.), *cert. denied*, 429 U.S. 1026 (1976) (requiring a showing of some actual prejudice before finding denial of effective counsel due to potential conflict of interest situation).

[31] However, it was held in People v. Berkowitz, 97 Misc. 2d 277, 411 N.Y.S.2d 164 (1978), that if there has been an agreement between the defendant and the attorney for a fixed fee and the defendant cannot pay it because of a failure of the literary rights to produce the expected proceeds, the attorney cannot then seek appointment as his counsel by the state. This case ironically involved the same defendant whose potential profiteering spurred the passage of the New York act.

Even the defendant who can afford a good lawyer will want to sell his story because he can use the literary proceeds to pay his attorney.[32] This is particularly true if the defendant has property or income which is exempt from tort judgments but which he would otherwise need to pay his legal fees.[33]

Experience shows that offenders will contract for their stories in order to pay legal fees. In all of the reported cases of offenders selling or assigning the rights to the story of their crimes, the proceeds were applied in whole or in part to the payment of legal fees.[34] Such a longstanding relationship between literary proceeds and attorneys' fees is likely to continue in the foreseeable future.

The other inducement for the offender to contract for the rights to his story under the New York statute is to receive whatever funds remain in the escrow account at the close of the statutory period or upon acquittal.[35] Because of these provisions, the offender will not necessarily forfeit all of the funds.[36] He is encouraged to enter into the most lucrative agreement possible since the marginal funds produced will be returned to him.

However, since most criminals are not paid enormous sums for their stories, in most if not all situations, the payments to victims will exhaust the funds before the five-year period is completed. The stories which are published involve enough tortious conduct to exhaust these payments completely,[37] even when the amounts received are substantial.[38]

The opportunity to provide restitution also may provide offenders with an incentive to tell their stories. Often the offender desires to compensate his victims for the injuries he has caused them. According to a study of inmates in Florida correctional institutions, "the overwhelming majority of those who have committed a form of criminal homicide also wish that they could make some reparation."[39] This desire decreases as the seriousness of the crime drops to aggravated assault, robbery, and burglary.[40] The sale of the rights to the story of his crime provides an opportunity for the offender to provide restitution to his victims with little effort on his own part. As a result, even the restitution feature of the New York statute may provide offenders with an incentive to contract.

Thus, the New York statute, while creating several disincentives for the offender to sell the story of his crime, retains distinct incentives. These incentives include the use of the funds for the payment of attorneys' fees, the possibility of receiving any funds remaining in the account at the conclusion of the escrow period, and the opportunity to provide restitution to the offender's victims. Whether these incentives outweigh the disincentives depends upon the individual offender.

The differing provisions of the Florida statute do not clearly result in any greater net disincentive. By placing a statutory lien on the proceeds the Florida statute creates a disincentive similar to that of the New York statute. Furthermore, while the New York act remits any remaining funds to the offender after five years,[41] the Florida legislation withholds these proceeds until the offender's release or parole,[42] generally a considerably longer period.

[32] Of the states which have passed statutes modeled on the New York act, only Alaska has interposed the additional requirement in paying his legal fees that the offender have "insufficient assets, other than funds in the escrow account, and assets which could be claimed as exempt from execution under state law, to provide for payment of expenses of legal representation." ALASKA STAT. § 18.67.165 (Supp. 1975).

[33] *See* N.Y. CIV. PRAC. LAW § 5205 (McKinney 1979) ("Personal property exempt from the satisfaction of money judgments").

[34] *See* note 2 *supra.*

[35] N.Y. EXEC. LAW § 632-a(3), (4) (McKinney Supp. 1979).

[36] Such a forfeiture is effected by the variation of the N.Y. statute adopted in Arizona which pays over any remaining money to the state general fund. ARIZ. REV. STAT. § 13-4202 (Supp. 1979). The Georgia statute is contradictory as to the ultimate disposition of any funds remaining in the escrow account at the conclusion of the statutory period. Subsection (f) provides for a refund to a convicted person if no actions are pending against him after five years and subsection (i) mandates payment into the state treasury of any excess remaining in the escrow account or deposited into it after all money judgments have been satisfied as compensation for the establishment, administration, and execution of the provisions of the statute.

[37] For example, of the documented cases discussed in note 2 *supra*, only John Wojtowicz was not accused of one or more murders. Even this crime, the holding of several hostages for a period of several hours, also may have caused enough tortious injuries to exhaust the $43,000 in the escrow account.

[38] To date almost all the amounts reportedly received have been in the five-figure range. *See* note 2 *supra.*

[39] Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243, 251 (1965). This conclusion is supported by the reported request of convicted murderer Gary Gilmore before his execution that the proceeds from any books about his story should be distributed to the families of his victims. N.Y. Times, Jan. 18, 1977, at 21 col. 4.

[40] Schafer, *supra* note 39. The offender also may desire to sell his story to pay tort judgments.

[41] N.Y. EXEC. LAW § 632-a (McKinney Supp. 1979).

[42] FLA. STAT. § 944.512(2)(d) (Supp. 1979).

In addition, the Florida statute eliminates the major incentive of the New York act by failing to provide payment of attorneys' fees out of the literary proceeds. The impact of this omission is not as great as it appears on its face. Unlike the New York act under which the state confiscates the proceeds of both the accused and the convicted offender,[43] the Florida statute only mandates confiscation of proceeds payable to a convicted felon.[44] Because the Florida act fails to confiscate any funds payable to the offender before his conviction, an accused felon may sell his story to pay his legal expenses prior to conviction. In fact, the publicity surrounding the offender's apprehension and prosecution is likely to make the time prior to conviction the most profitable time for him to sell his story.

The Florida statute reduces the other incentives provided under the New York act. The New York act provides that the offender will receive all of the proceeds if no victims bring claims,[45] but the Florida provisions guarantee that up to 50% of the funds will be used to compensate the state for its costs in prosecuting and incarcerating the offender.[46] In addition, the Florida statute requires that 25% of the funds go to the offender's dependents.[47] The victims' claims are limited to a maximum of 25% of the funds.[48] Once the victims, the state, and the dependents are paid, the offender in Florida is less likely to profit from the agreement than is an offender subject to the New York statute.

Nevertheless, the Florida act does provide incentives for the offender to sell his story. Most significantly, it distributes 25% of the proceeds to the offender's dependents. Because he has no other opportunity to provide support for his family, the convicted felon can benefit them only by selling his story. For example, in 1969, Susan Atkins, an alleged accomplice in the Tate-LaBianca murder case, granted an exclusive interview to an entrepreneur who sold her story to a number of newspapers around the world. Atkins provided that her 45% share of the $175,000 gross profits be put in trust for the benefit of her son.[49]

The Florida statute does not foreclose the possibility of the offender directly receiving some of the profits from his story. Under its provisions, the victims' share of the proceeds is limited to 25%. If the restitution owed to the state does not consume the remaining fifty percent of the funds, the state will pay the residue to the offender upon his release. The interaction of these two provisions means that an offender can obtain some of the literary proceeds under the Florida statute even though the victims' claims would have completely consumed the funds under the New York act.

Like New York, Florida presents the possibility that the offender will contract for his story out of a desire to recompense his victims. This incentive may be limited because the maximum benefit to victims is one-quarter of the total revenues. Most offenders, however, probably dislike seeing the state compensated for its expenses in prosecuting and incarcerating them.

Thus, while the major incentive under the New York act is the availability of the proceeds for the payment of attorneys' fees, the primary incentive in Florida is the guaranteed distribution of one-quarter of the funds to the offender's dependents. Again, the balancing involved depends on the individual offender, but the Florida statute provides significant incentives for the offender to sell his story which may outweigh the disincentives.

REMOVAL OF THE PROFIT MOTIVE

Even if the statutes deter the offender from selling his story, this does not necessarily mean that they unconstitutionally burden his expression of protected speech. Since the statutes only affect the profits from the sale of his story, they arguably do not infringe on either the offender's right to speak or the public's right to know.

The argument that the statutes violate the first amendment because they deter the offender from publishing the story of his crime centers on the withdrawal of the proceeds as the source of the deterrent effect. This does not, however, allege the affirmative assertion of a barrier to his expression but rather involves the withdrawal of an incentive for him to express himself. The publishers who are willing to pay him for his story would be equally if not more willing to accept his statements free of charge. The payments to the offender induce him to tell his story but do not relate to the willingness of publishers to print it. The Court has stated that "[f]reedom of speech presupposes a willing speaker."[50] The argument against these statutes

[43] N.Y. EXEC. LAW § 632-a(1).
[44] FLA. STAT. § 944.512(1).
[45] N.Y. EXEC. LAW 632-a(4).
[46] FLA. STAT. § 944.512(2).
[47] *Id.* at § 944.512(2)(b).
[48] *Id.*
[49] *See* note 2 *supra.*

[50] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

seems to presuppose an *unwilling* speaker who must be induced to communicate by monetary payments. The mere removal of this inducement should not rise to the level of a constitutional violation.

The Court has repeatedly shown greater willingness to accept government regulations which only restrict profit-motivated speech. For example, in *Breard v. Alexandria*[51] the Court upheld a local "Green River ordinance" prohibiting the door-to-door solicitation of magazine subscriptions. While recognizing that the distribution of periodicals is protected by the first amendment, the Court concluded that, "[t]he selling, however, brings into the transaction a commercial feature."[52] This commercial aspect distinguished *Breard* from the earlier case of *Martin v. Struthers*,[53] in which the Court invalidated a statute prohibiting Jehovah's Witnesses from the door-to-door distribution of leaflets advertising a religious meeting. The Court in *Breard* specifically noted that, "no element of the commercial entered into this free solicitation... [in *Martin*]."[54] In this way, *Breard* clearly demonstrates the Court's reduced concern for commercial speech *vis-a-vis* other protected activities.[55]

More recently, in *In re Primus*,[56] the Court reiterated the distinction for first amendment purposes between profit motivated speech and speech which seeks to advance beliefs and ideas. In that case, an American Civil Liberties Union (ACLU) attorney was charged with solicitation for offering to represent without charge a woman who had been sterilized as a condition to her receipt of public assistance funds. The Court contrasted the situation of the attorney in *Primus* with that of the appellant in the companion case of *Ohralik v. Ohio State Bar Association*.[57] The attorney in *Ohralik* had been charged with illegally offering to represent the victims of an automobile accident for his personal gain. The *Primus* Court held that the activities of the ACLU lawyer constituted expressive and associational conduct which were fully protected by the first and fourteenth amendments.[58] The Court noted that ACLU sponsorship of litigation is not motivated by considerations of pecuniary gain but rather, "by its widely recognized goal of vindicating civil liberties."[59] The Court distinguished *Ohralik* because there the attorney was motivated solely by the desire for financial gain.[60] This motivation-based distinction was justified in a footnote which stated that:

> "[n]ormally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is 'an associational aspect of "expression"..., and other activity subject to plenary regulation by government.... The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw ..., but that is no reason for avoiding the undertaking."[61]

The *Primus* and *Ohralik* decisions demonstrate that the Supreme Court continues to accord commercial speech less protection than other forms of speech.[62]

One critic of the New York statute, however, analogizes[63] it to a Louisiana statute which was held unconstitutional in *Grosjean v. American Press Co.*[64] The invalid statute in that case taxed the gross receipts of any newspaper or periodical with a circulation of more than 20,000 copies per week. The tax violated the first amendment because it had "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers."[65] The unconstitutional restraints

[51] 341 U.S. 622 (1951).

[52] *Id.* at 642.

[53] 319 U.S. 141 (1943).

[54] 341 U.S. at 643.

[55] According to Professor Redish: "[T]he opinion (in *Breard*)... demonstrates the Court's general lack of enthusiasm for the commercial element in first amendment questions. This is so even where that lack of enthusiasm is in no way justified by the nature of the communication for which protection is sought." Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 454-57 (1971). The Court in Virginia Pharmacy Board v. Virginia Consumer Council noted that, "[s]ince the decision in *Breard*... the Court has never denied protection on the ground that the speech in issue was 'commercial speech.'" 425 U.S. 748, 759 (1975). However, this distinction does not conflict with the conclusion that the extent of protection is reduced when commercial interests are the subject of the regulation. *See, e.g.*, Ohralik v. Ohio State Bar Association, 436 U.S. 447, 457 (1978).

[56] 436 U.S. 412 (1978).

[57] 436 U.S. 447 (1978).

[58] 436 U.S. at 432.

[59] *Id.* at 430.

[60] *Id.* at 422. *See also id.* at 438n.32 ("the lawyer [in Ohralik] was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests.").

[61] *Id.* at 438n.32 (citations omitted).

[62] *See* note 55 *supra* and Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. L. REV. 372, 406 (1979). *See also* J. NOWAK, HANDBOOK ON CONSTITUTIONAL LAW 770 (1978).

[63] *See* Compensating the Victim, *supra* note 7, at 106.

[64] 297 U.S. 233 (1936).

[65] *Id.* at 251. Professor Redish states:

> At the time of the Louisiana Legislature's action, Governor Huey Long effectively controlled the legislative as well as executive branches. It was gener-

in *Grosjean* were the reduction of the amount of advertising revenues and the tendency to restrict circulation.[66] These restraints seem to be analogous to the effect of the New York statute in reducing the offender's revenues and the tendency of the offender to want to sell his story.

While this comparison is attractive, it is misplaced. The newspaper depends upon its advertising revenues and its circulation for its existence. A reduction in its revenues causes deficits and may put the paper out of business.[67] By contrast, the channels of communciation offered by publishers remain even if the offender's profit is withdrawn.

A better analogy, showing the nominal impact of the statutes in withdrawing the profit motive, can be drawn from *Branzburg v. Hayes*.[68] In that case, the Court held that a newspaper reporter is subject to grand jury subpoena despite his assertion that such a ruling will discourage informants from communicating with him. The Court found that estimates of the impact of such subpoenas on the willingness of informants to make disclosures were "widely divergent and to a great extent speculative."[69] In fact such inhibition was considered unlikely since "quite often, such informants are members of a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public."[70] Similarly, the offender must rely on the publisher to communicate his story to the public.

The argument that any deterrent effect of the New York and Florida statutes is constitutionally irrelevant because it is based on the mere withdrawal of a profit motive is less effective against an asserted violation of the public's right to know.

Under the right to know doctrine, the right of members of the public to receive information and ideas is independent of the right of the speaker to communicate those ideas.[71] For example, in *Kleindienst v. Mandel*[72] the Court held that university professors had standing on first amendment grounds to challenge the denial of an entry visa to a foreign journalist whom they had invited to speak at universities and other forums in the United States.[73] The Court recognized this right despite the appellees' concession that the journalist himself could assert no constitutional rights.[74] Similarly, in *Procunier v. Martinez*[75] the Court did not consider the rights of prisoners to claim first amendment freedom against censorship of their mail, because it concluded that such actions also infringed upon the noninmate addressees' rights to know.[76] The right to know doctrine thus gives recipients of communications a right to object to any barrier between the speaker and themselves, regardless of the speaker's inability to challenge the infringement.

The right to know doctrine requires an objective analysis of whether the statutes deter the speaker from communicating. The offender's right to object to such a deterrent effect is irrelevant in determining the presence of such a deterrent effect.

The analysis of the profit-making element can be split into two parts. One aspect is the lower level of concern shown by the Court for restrictions on the commercial aspects of otherwise protected speech. This argument relates to whether the offender can legally object to such a deterrence because only his profits are involved. The public's right to know should not be subject to this objection if the withdrawal of the profits effects a real deterrence to the offender.

An assertion of the public's right to know is, however, susceptible to the objection already raised

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ally known that the larger papers had been by far the more critical of the Long administration. Although the Court never detailed these facts in its opinion, it did note that the form of the tax was suspicious in its emphasis upon the circulation level, concluding that the plain legislative intent was to curtail the circulation of a selected group of newspapers.

Redish, *supra* note 55, at 456–57.

[66] 297 U.S. at 244–45.

[67] However, the Court explicitly noted that,

> [i]t is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

Id. at 250.

[68] 408 U.S. 665 (1971).

[69] *Id.* at 693–94. *See also* Zurcher v. Stanford Daily, 436 U.S. 547, 566 (1978).

[70] *Id.* at 694–95.

[71] Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972).

[72] *Id.*

[73] The Court ultimately held that Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden," cannot be overridden by first amendment considerations. *Id.* at 766 (quoting Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118, 123 (1967).

[74] *Id.* at 762.

[75] 416 U.S. 396 (1974).

[76] *Id. See also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756–57 (1976) (holding that consumers of prescription drugs had standing to challenge a statute prohibiting price advertising of prescription drugs); Note, *The Right to Know in First Amendment Analysis*, 57 TEX. L. REV. 505 (1979).

that, "[f]reedom of speech presupposes a willing speaker."[77] If the withdrawal of an affirmative inducement to speak, here the payment of money, is the only deterrence alleged, it suggests that the speaker is not in fact a "willing speaker" who is being prevented from speaking. A strong argument can be made that the channels of communication remain freely available to the offender who wishes to express his thoughts or feelings.[78] The right to know only asserts the right not to have a barrier placed between the source and the recipient of the communication. If there is no barrier, it follows that the recipient has no basis to challenge the government's actions.

DETERRENCE OF THE PUBLISHERS

It also is argued that the public's right to know is infringed by the tendency of the New York statute to discourage publishers from entering into contracts which may be subject to the provisions of the statute. A disincentive allegedly results because the publisher must follow the statute, and he will fear that he will be liable if he pays the funds to the wrong party.[79] The statute itself, however, refutes the argument that the statute burdens the publisher. The New York act only obligates the publisher to pay funds which he owes under a contract to the Crime Victims' Compensation Board rather than to the offender. Presumably, if he is willing to pay an offender for his story, this burden will not deter him from that action.

The publisher also need not fear that he will be subject to double liability for paying an offender when he should have paid the funds to the Board or for paying the Board when he should have paid the offender. Such an argument depends upon the statute being vague. The statute, however, is very specific. It is limited to situations in which two easily observable conditions are met. First, the publisher must be contracting for the reenactment of a crime or the expressions of an accused or convicted person's thoughts, feelings, opinions, or emotions regarding the crime. Second, the contract must provide for payment to the offender who is charged or convicted of committing the crime which is the subject of the reenactment or expressions, or his representative or assignee.[80] Similarly, the Florida statute only places a lien upon payments to a convicted felon or anyone on his behalf for any accounts of the crime for which he was convicted.[81] A publisher should know when he is buying the story of a crime directly or indirectly from the perpetrator of that offense.

The consequences to a publisher for improperly paying the proceeds to the offender are not stated in the New York act.[82] Florida law, however, provides that disposal of property which is subject to a statutory lien without the written consent of the lien holder, the state in this case, constitutes a misdemeanor of the first degree.[83] The maximum penalty for such an offense is one year in jail and a $1,000 fine.[84] Therefore if the publisher has any doubt as to the applicability of the statute to a particular contract, he could withhold the funds and contact the Department of Legal Affairs for either authorization to release them or to commence legal proceedings to perfect the lien.[85]

CONTENT-BASED RESTRICTIONS

If it is found that the statutes do deter the offender from publishing the story of his crime or his thoughts and feelings about it, there are two tests which can be applied to invalidate them under the first amendment. The first test questions whether the statutes impose a content-based restriction. Instead of attaching the profits from all communications by the offender, the New York and Florida statutes are limited in scope to those which flow from the story of his crime. By doing this, the statutes treat one class of publication differently because of its subject matter. The Court has criticized content-based classifications, reasoning that,

[77] 425 U.S. at 756.

[78] *See* text accompanying notes 17-49 *supra*.

[79] *See Criminals-Turned-Authors*, *supra* note 7, at 454-55.

[80] N. Y. Exec. Law § 632-a (1) (McKinney Supp. 1979).

[81] Fla. Stat. § 944.512 (1) (Supp. 1979).

[82] While the New York statute does not define the publisher's liability for wrongly paying the proceeds over to the Board, he will presumably be liable to the extent of the funds which should have been paid over. *See, e.g.*, *Criminals-Turned-Authors*, *supra* note 7, at 454.

Other states which have adopted statutes modeled on the New York act have, however, provided sanctions for the failure of the publisher to pay the proceeds to the state. In Georgia, the contracting party is guilty of a misdemeanor for each day he violates the statute by failing to pay over the proceeds to the Board of Offender Rehabilitation. Ga. Code Ann. § 27-3401(c) (Rev. 1979). Illinois makes the failure to abide by the statutory requirements a business offense punishable by a fine of no less than $5,000. Ill. Rev. Stat. ch. 70 § 409 (Supp. 1979). Finally, Arizona provides the same sanction which is presumed to exist under the New York act: liability to the state to the extent of the monies which should have been remitted to the State Industrial Commission under the statute. Ariz. Rev. Stat. § 13-4202 (L) (Supp. 1979).

[83] Fla. Stat. § 818.01 (1976).

[84] Fla. Stat. §§ 775.082, 775.083 (1976).

[85] Fla. Stat. § 944.512 (Supp. 1979).

"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."[86] For this reason, the Court in *Police Department of Chicago v. Mosley*[87] invalidated a Chicago ordinance which prohibited all peaceful picketing near schools, except labor picketing. The Court explained, "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."[88]

Although the Court in *Mosley* vehemently attacked content-based classifications, there are two ways in which the statutes can survive scrutiny as content-based restrictions. First, the basis of the *Mosley* rule is that expression on one subject is restricted, while expression on other subjects is permitted. Therefore, to find the statutes unconstitutional under *Mosley*, one must first show that some speech is excluded from the public forum on the basis of its content. In fact, the statutes allow the offender to express his thoughts and feelings about his crime. The *Mosley* rule has thus far only been applied to situations in which a direct prohibition of protected speech is involved. For example, in *Mosley*, the Court found the statute unconstitutional because it *excluded* certain expressive activity from a public forum on the basis of content alone by making that activity illegal.[89] The freedom of the offender to tell the story of his crime under the instant statutes eliminates any *Mosley*-based objection.

Another argument in favor of the statutes is that they are unrelated to the viewpoint taken by the offender. Thus, even if they are content-based, they are still viewpoint neutral. The statutes could attach only the profits from publications in which the offender expresses no remorse for his actions. However, they apply to all publications involving the story of the offender's crime regardless of the viewpoint which he expresses. In *Lehman v. City of Shaker Heights*,[90] the Court held in a five-to-four decision that a city could constitutionally prohibit political or public issue advertisements from its buses. A plurality of the Court noted that, during the prior twenty-six years of service, no political or public service advertising had ever been permitted.[91] The Court further observed that, "[h]ere, the city has decided that '[p]urveyors of goods and services saleable in commerce may purchase advertising space on an equal basis, whether they be house builders or butchers.'"[92] Despite its previous strong statement against all restrictions based on content,[93] the Court in *Lehman* upheld a content-discriminating statute in part because the statute treated those within the classes equally.[94] Similarly, in *Greer v. Spock*,[95] the Court upheld a prohibition of partisan political activities on a military post because the policy was, "objectively and evenhandedly applied" and did not discriminate among candidates for public office based upon the candidate's political views.[96]

Like the rules in *Lehman* and *Greer*, the New York and Florida statutes are free from content-based criticism because they are not concerned with the specific viewpoint which the offender takes in the publication. The statutes distribute the profits from the stories regardless of whether the stories express remorse or obduracy for the offenses.

TEST OF PURPOSE

Even if the statutes deter the offender from communicating the story of his crime they are not automatically unconstitutional. One must next determine whether they attempt directly to restrict the expression of an offender's views regarding his crime or whether the infringement indirectly results from an attempt to affect some other activity.[97]

[86] Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[87] *Id.*

[88] *Id.* at 96.

[89] *Id.* at 92–93.

[90] 418 U.S. 298 (1974).

[91] Justice Blackmun's opinion for the plurality was joined by Chief Justice Burger and Justices White and Rehnquist; Justice Douglas, the fifth vote, wrote a separate opinion concurring on the ground that the riders constitute a captive audience justifying the rule. *Id.*

[92] *Id.* at 303–34 (quoting Lehman v. City of Shaker Heights, 34 Ohio 2d 143, 196, 296 N.E.2d 683, 688 (1973)).

[93] The dissenting opinion reasoned that the city, by accepting any advertising on buses, had created a public forum for communication, and once that was done, "both free speech and equal protection principles prohibit discrimination based *solely* upon subject matter or content." *Id.* at 315 (Brennan, J., dissenting) (footnote omitted).

[94] *See also* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81, 91 (1978).

[95] 424 U.S. 828–29 (1976).

[96] *Id.* at 838–39.

[97] [G]eneral regulatory statutes, *not intended to control the content of speech* but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a pre-requisite to constitutionality which

Infringement directed at the speech itself is presumed to be unconstitutional, and the government can overcome this presumption only by "showing a subordinating interest which is compelling" for suppressing that speech.[98] The determination of whether an infringement is primarily intended to restrict the expression of speech may be made by analyzing the statute on its face to determine whether "any other purpose could be involved" and by inquiring into the intent of the legislature.[99]

The face of the New York statute shows its primary purpose to be unrelated to the abridgment of the offender's right to express himself on the subject of his crime. The act primarily prevents the offender from avoiding liability to his victims for the physical injuries which he has inflicted. In doing this, the statute isolates the proceeds from the story of the crime since they result from the crime in which the victim was injured. The victim can then receive restitution from these funds for his injuries no matter how long the offender waits before "earning" them. Without such an avoidance mechanism, the victim would have to bring a tort action within a one or three year statute of limitations.[100] Only a wrongful death action is not subject to any statute of limitations.[101] In many situations the victim cannot ascertain within the necessary time whether he should undergo the time, expense, and mental strain of a tort action against an otherwise impecunious and "judgment proof" offender merely on the remote possibility that the offender may one day sell his memoirs.[102]

The statute also prevents the offender from dissipating the proceeds before the vicim can commence a timely action and secure court jurisdiction over the funds. The concern is that the offender will sell his story and spend or give away the money before the victim, who presumed his attacker was judgment proof, learns about the contractual arrangement. The New York act prevents this dissipation by requiring the publisher to pay the proceeds directly to the Board.[103]

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has necessarily involved a weighting of the governmental interest involved.

Konigsburg v. State Bar of California, 366 U.S. 36, 50–51 (1961) (footnotes omitted) (emphasis added). *See also* Speiser v. Randall, 357 U.S. 513, 527 (1958), and TRIBE, AMERICAN CONSTITUTIONAL LAW 580 (1978).

This is actually a search for the third of the four requirements established in United States v. O'Brien for the justification of a regulation having a collateral effect upon free speech, the furtherance of a governmental interest unrelated to the suppression of free expression. 391 U.S. 367, 377 (1968). *See* notes 100–102 and accompanying text *infra*.

[98] First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960)).

[99] Supreme Court precedents are unclear about the role of legislative intent in this type of analysis. In United States v. O'Brien, 391 U.S. 367 (1968), the Court ostensibly refused to consider the legislative intent behind a law prohibiting the destruction of draft cards. The Court stated that, "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* at 383. Despite this admonition, the Court went ahead in *O'Brien* and considered the legislative motivation finding no illicit intent was evidenced. *Id.* at 385–86. *See also* TRIBE, *supra* note 97, at 594.

The refusal to consider legislative motivation in *O'Brien* was later contradicted in Washington v. Davis where Justic White stated for the majority: "To the extent that some of our cases suggest a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases... are to the contrary." 426 U.S. 229, 244 n.11 (1976). The difference may be one of quantity and quality of proof. Professor Tribe concluded that, "[i]f there is persuasive proof that a purpose to penalize or control rights of expression or association was a motivating factor in the enactment of a law, such proof should... trigger the demand for an extraordinary justification of the government's departure from neutrality." TRIBE, *supra* note 97, at 598.

[100] The following actions shall be commenced within one year:

3. an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right to privacy under section fifty-one of the civil rights law; ...."

N.Y. CIV. PRAC. LAW § 215 (McKinney 1979).

The following actions must be commenced within three years:

2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215;

5. an action to recover damages for a personal injury except as provided in section 215.

N.Y. CIV. PRAC. LAW § 214 (McKinney 1979).

[101] "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." N.Y. CONST. art. I, § 16.

[102] Clearly it is not for lack of merit that the victim of a crime does not at once sue for the tortious injury. In fact the criminal conviction would be conclusive proof of most of the elements necessary to recover on an analoguous claim in tort. The obvious reason that a victim ordinarily withholds suit is that he believes that the defendant is indigent, so that the expenditure of the time and money involved in a civil litigation would be of no avail. Barrett v. Wojtowicz, 66 A.D.2d 604, 614–15, 411 N.Y.S.2d 350, 356–357.

[103] Arguably, however, the New York statute is unnecessary because prior New York law already prevents the

The New York statute represents a significant improvement over prior state law and evidences the statute's anti-avoidance goals. Under preexisting New York law, a victim who recovered a tort judgment was not assured that the offender would not legally escape liability to him for the proceeds of the story of his crime. The victim could only enforce that judgment for twenty years. At the end of the twenty years the state irrebuttably presumed that the offender/judgment debtor had satisfied the judgment unless he acknowledged his indebtedness in writing or made a payment during that period. In the latter circumstances, the twenty years are measured from the date of acknowledgment or payment.[104] Since an offender can, intentionally or unintentionally, delay selling the story of his crime until an unfulfilled judgment lapses, the prior law can leave even a judgment-holding victim remediless. For example, several people who robbed the Boston office of Brink's Inc., of $1.5 million in cash and checks in 1950 cooperated in a 1977 book and 1978 film about their exploits.[105] Under prior New York law Brink's would be unable to satisfy any pre-1957 judgment from those proceeds.

The New York statute therefore establishes significantly improved methods of preventing avoidance of liability by the offender to his victim. These methods are tailored to the unique circumstances of an impecunious offender who may at any time sell the literary rights to the tale of his offense.

The public notice provisions also help prevent the offender from avoiding liability by notifying his victims of the availability of the funds.[106] These provisions benefit both the victim who investigated the offender's circumstances at the time of the crime and found him to be judgment proof, and the victim who holds an unsatisfied judgment but would not otherwise be aware of the offender's "windfall."

The statute also effectively prevents any one victim or the offender's attorney from gaining an improperly large share of the proceeds merely by obtaining a prior judgment. Under the statute as interpreted in *Barrett v. Wojtowicz*,[107] the funds in the escrow account are for the benefit of all the victims of the offender's crime and therefore, each victim is only entitled to recover a pro rata share of the funds if they are insufficient to fulfill all of their claims. Similarly, the requirement that legal fees be paid out of the fund only pursuant to a court order limits the attorney to a reasonable fee. This assures that the victim's interests in the funds will be protected. If the statute was not in effect, the attorney could obtain a judgment against the

offender from avoiding liability in this way. Section 5202 of the New York Civil Practice Law grants a judgment creditor a limited priority over transferees of any debt or property against which a judgment may be enforced. N.Y. CIV. PRAC. LAW § 5202 (McKinney 1979). Also, sections 276 and 278 of the Debtor Creditor Law give a judgment creditor the right to set aside conveyances made for other than fair consideration and meant to defraud future creditors. N.Y. DEBT. & CRED. LAW § 276 (McKinney 1979). *See generally* §§1 270–281. Under either of these provisions, the victim holding a tort judgment could recover funds from transferees of the offender who did not give fair consideration for them. If the transferee did give fair consideration the victim could satisfy his judgment from the property given to the offender as consideration.

While these provisions provide some protection, the new provisions are more extensive. For example, the new act avoids any chance that an unidentifiable transferee receives the money or that an identified one dissipates it. In addition, the prior law penalizes the offender who is already subject to a heavy criminal sentence and therefore, likely to disobey the civil law freely. The new act, subjects the publisher to liability, thereby ensuring adherence to the provisions of the statute. *See* note 64 *supra.*

The New York statute does not specify the liability of a publisher for failure to comply with its requirements. It is at least likely that he would remain liable to the Board for the amount wrongly paid over to the offender. *See, e.g., Criminals-Turned-Authors, supra* note 7, at 453–54.

Three states, Arizona, Georgia and Illinois, define the penalty for the publisher's failure to abide by their mandates. *See* note 5 *supra.* In Georgia, the publisher is guilty of a misdemeanor for each day he violates the statute by failing to pay over the proceeds to the Board of Offender Rehabilitation. It is the only state which provides a criminal penalty. Illinois makes the failure to abide by the statutory requirements a business offense punishable by a fine of no less than $5,000. *Id.*

Arizona establishes that a publisher who fails to comply with its statute is liable to the state to the extent of the monies which should have been remitted to the State Industrial Commission under the statute. This would also be the extent of the liability which would arise in Idaho where the statute specifically authorizes the Attorney General or any other person to bring an action to require the deposit of the proceeds into the escrow account. *Id.*

[104] "A money judgment is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recovering it was first entitled to enforce it." N.Y. CIV. PRAC. LAW § 211(b) (McKinney 1979).

[105] *A Cool Million*, TIME, Jan. 30, 1950 at 18; Gehn, *Big Stick-up at Brink's 1977*; TIME, Dec. 11, 1978 at 109.

[106] Under these provisions the Crime Victims Compensation Board must advertise the availability of the escrow account. *See* note 15 *supra.*

[107] *See* note 24 *supra.* Provisions directly on this point have been adopted in Georgia and Illinois. *See* note 4 *supra.*

offender which would give him a priority over any victims who obtain later judgments.[108]

Finally, the statute adds further vitality to its anti-avoidance goals by generally providing that any actions taken by an offender to avoid application of the statute, although not specifically anticipated by it, are null and void as against the public policy of the state.[109] For example, this would prevent the offender from creating a corporation which would own the rights to his story and in which third parties, perhaps his family members, would be shareholders. This provision is supplemented by the statutory requirement that, in addition to paying over the proceeds, the publisher must submit a copy of the contract.[110] Thus the state is able to scrutinize the contract for any sophisticated attempts to avoid liability in violation of the statute.

In examining the statute, it is important to establish what purposes it does not seek to achieve. Mistaking the purpose of the statute may lead to the conclusion that the act does not achieve that purpose and, consequently, has the effect of only suppressing speech.

One critic contends that the purpose of the New York statute is to secure compensation for innocent victims of violent crimes,[111] and that the general Crime Victims Compensation Act[112] more effectively pursues this goal. Under the compensation program, a victim may apply to the Board for compensation from funds provided by the state. The Board then determines whether an award should be granted and the amount to be paid, up to a $20,000 limit.[113] The victim may receive an award even if the offender is never apprehended, prosecuted, or convicted.[114] By contrast, Section 632-a only pays a victim in the very rare circumstance when the convicted offender has been paid for the story of the crime in which the victim was injured.

The objectives of section 632-a differ from the general crime victims compensation scheme. Instead of compensating all victims for their injuries, the statute is limited to those cases in which the offender would be unjustifiably enriched as a result of the crime in which the victim was injured. If a victim already has received payments from the state in compensation for his injuries, the state is subrogated to his claims to the extent of those payments.[115] Because the victim is limited under the Crime Victims Compensation Act to a maximum of $20,000, it is possible that those funds will not fully compensate him for his injuries and he will need to look to the escrow account for the difference. In this way the statute has the effect of compensating the victim for his injuries. However, the statute does not attempt to compensate victims in general. The victim is allowed to raise his claims to the escrow account, not out of legislative grace as in the case of the compensation monies, but through an equitable right to them as the victim of the crime which generated them. In this way, the statute is concerned with the special nature of the funds being attached rather than the needs of victims in general.[116]

The conclusion that the purpose of the New York statute is to ensure liability from the profits which the offender indirectly receives from his crime is confirmed by the legislative history which is available on the act. Emmanuel Gold, the state senator who authored the statute, stated in a legislative memorandum that, "[t]his bill would make it clear that in all criminal situations, the victim must be more important than the criminal."[117]

[108] *See* N.Y. CIV. PRAC. LAW § 5234 (McKinney 1979) (Distribution of proceeds of personal property; priorities).

The court in *Barrett* concluded that under the statute the funds in the escrow account are for the benefit of all the victims of the defendant's crime and, therefore, each victim is only entitled to recovery of a pro rata share of the amount. This result is not, however, clearly mandated on the face of the statute.

[109] N.Y. EXEC. LAW § 632-a(9) (McKinney Supp. 1979).

[110] *Id.* at 632-a (1).

[111] *See Criminals-Turned-Authors*, *supra* note 7, at 460–62.

[112] N.Y. EXEC. LAW § 620 *et. seq.* (McKinney 1979). This act was adopted 11 years before § 632-a.

[113] *Id.* at § 631(3).

[114] *Id.* at § 627(3).

[115] N.Y. EXEC. LAW § 634 (McKinney 1975).

[116] Critics of the statute have suggested other purposes for the statute. One which has been offered is an interest in deterring the commission of crimes under a theory that the possible revenues from the story of the crime may encourage its perpetration. Another is a desire to punish the offender for his offense by subjecting the profits to the provisions of the statute. Neither of these purposes is suggested either on the face of the statute or by its legislative history. Admittedly, if either was the primary purpose of the statute, its means could not be found rationally related to them. *See Criminals-Turned-Authors*, *supra* note 7, at 456–59.

[117] Memorandum of Emanuel R. Gold on S. 6923, 200th Sess. (1977), *reprinted in* NEW YORK STATE LEGISLATIVE ANNUAL 267 (1977).

Similarly, in the adoption of a statute based on the New York model in Illinois, Representative Hanrahan stated, "[T]he whole idea of the bill is... to insure the fact that a victim of the crime has some recourse and some compensation to pay medical bills and other kinds of expenses that are brought about by the crime out of that kind of publication." Proc. Ill. General Assembly, House of Representatives, June 24, 1979.

Thus, the intent was not to prevent the sale of the offender's story but to assure the victim's rights to those funds.

Although seeking other goals than the New York act, the Florida act also does not intend primarily to prevent the offender from expressing himself. While it does allow a victim to receive payments from the literary proceeds, it limits them to a maximum of twenty-five percent of the total revenues. It distributes twenty-five percent of the proceeds to the dependents of the offender, and retains up to fifty percent of the money for the state for the expenses of prosecuting and incarcerating the offender.[118] This redistribution suggests different conclusions about the equitable rights of this unjust enrichment. If the rationale for withholding the funds is that the funds are an indirect result of the crime and the victim therefore should be entitled to them, one must ascertain the victim of the crime. The Florida statute finds, as the New York statute does, that the people who were injured by the offender in the course of his crime are the victims and possess equitable rights to the proceeds. However, Florida also finds that the dependents of the convicted offender are victims of his offense[119] because the conviction deprives them of his support. The taxpayers who must bear the costs of prosecuting and incarcerating him are also victims. In this manner, the Florida statute redistributes the "windfall" profits of the offender to a broader class of victims than the New York act does. In doing so, however, the Florida act shows no more intent to interfere with the offender's self-expression than does the New York statute.

O'BRIEN TEST

Because these statutes are not primarily intended to regulate the offender's speech, they are subject to the *O'Brien* test to establish whether their collateral effects on the offender's speech are constitutional. In *United States v. O'Brien*,[120] the Court held that a federal law prohibiting the knowing destruction or mutilation of draft cards met the constitutional mandates of the first amendment right of expression. The Court established a test to determine when governmental interests in regulating the "non-speech" elements of a course of conduct justify incidental limitations on first amendment freedoms.[121] The regulation is justified if it meets four requirements. First, the regulation must be within the constitutional power of the government. Second, it must further an important or substantial governmental interest. Third, the governmental interest furthered by the regulation must be unrelated to the suppression of free expression. Finally, the incidental restriction on first amendment freedoms cannot be greater than is essential to the furtherance of that interest.[122]

These statutes clearly meet the first part of the *O'Brien* test. The state power to regulate commerce within its borders and its police powers provide adequate authority for the state to enact this legislation.[123] Indeed, restitution is an ancient right which has generated interest among the public, commentators, and state legislators in recent years.[124]

[118] *See* note 9 *supra*.

[119] The problem of the support of the family left behind by the offender has been recognized as a potential problem in mandating restitution to the victim which may otherwise have been applied to the support of the offender's dependents. *See, e.g.*, Note, *The Minnesota Crime Victims Reparations Act: A Preliminary Analysis*, 2 WM. MITCHELL L. REV. 187, 191 (1976).

[120] 391 U.S. 367 (1968).

[121] *Id.* at 376. The cases cited by *O'Brien* demonstrate that the application of the rule delineated in that case is not limited to "symbolic" speech, but extends to any regulation of non-speech elements of a course of conduct which may have a collateral impact on protected speech. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963) (right of Seventh-Day Adventist to collect unemployment compensation where her dismissal was due to her refusal to work on Saturdays); NAACP v. Button, 371 U.S. 415, 444 (1963) (regulation of the legal profession does not justify prohibiting civil rights organization from advising individuals of their rights and referring them to a particular attorney for assistance); Bates v. Little Rock, 361 U.S. 516, 524 (1960) (insufficient justification for requirement that all organizations submit a list of their members where the requirement has the effect of interfering with first amendment rights); NAACP v. Alabama, 357 U.S. 449, 464 (1958) (state could not compel disclosure of membership lists). *See also* Buckley v. Valeo, 424 U.S. 1, 15–17 (1976) (per curiam) (distinguishing conduct intertwined with expression, to which *O'Brien* applies, from pure forms of expression involving free speech alone) and Young v. American Mini Theatres, 427 U.S. 50, 79–80 (1976) (Powell, J., concurring) (applying *O'Brien* test to justify zoning ordinances which restrict the location of adult movie theatres).

[122] *Id.* at 377.

[123] *See, e.g.*, Home Bldg. & Loan v. Blaisdell, 290 U.S. 398 (1937), and Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963) ("It is now settled that States have power to legislate against what are found to be injurious practices in their internal communal and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." (quoting Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949)).

[124] *See, e.g., Restitution: Attention for Forgotten Victims of Crime*, 90 AM. CITY AND COUNTY 50 (1977); Jacob, *Reparation or Restitution by the Criminal Offender to his Victim: Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. CRIM. L. & C. 152 (1970); Mikua, *Victimless*

Second, the statutes further the substantial governmental interest in preventing unjust enrichment of criminal offenders.[125] This interest in preventing unjust enrichment is clearly unrelated to the suppression of protected speech. The statutes seek to assure the proper distribution of the proceeds of the story.

The New York statute may fail the final part of the *O'Brien* test, the requirement that the alleged incidental restriction on first amendment freedoms not be greater than is essential for the furtherance of the state's legitimate interests. The escrow account withholds the proceeds from the offender for five years. This holding period may be more than is necessary to fulfill the statute's anti-avoidance motives. Except for wrongful death actions, the statute of limitations established by the state for tort claims is one or three years. This seems to assume that three years should be adequate for victims to perfect their claims. If this assumption is true, the extra two years would simply penalize the offender for selling the story of his crime.

However, the five year escrow period arguably can meet the reasonableness test. The statute specifically benefits those victims who failed to bring a tort action during the original statutory period because the costs outweighed the potential for satisfaction of a judgment. These victims may have lost interest in the offender and will be difficult to reach with the news of the unexpectedly available resources. This five-year period gives the state a reasonable opportunity to locate and notify the victims of their rights to the escrow proceeds and for the victims to perfect their rights by filing tort actions.

The Florida statute avoids any problem of unnecessary broadness by placing a statutory lien on the proceeds as soon as they become payable or accrue to the offender. The Department of Legal Affairs then must take the necessary legal action to perfect and enforce the lien.[126] The Florida provisions provide no fixed holding period but rather dispose of the proceeds as soon as the Department of Legal Affairs becomes aware of their availability. While its greater speed makes this approach preferable, New York cannot adopt it because of the differences in how that state distributes the funds. In New York, there is no way of knowing how much, if any, of the funds can be paid over to the offender until all victims have had a reasonable opportunity to be notified and perfect their claims. By contrast, Florida is less concerned about maximizing the rights of victims to the proceeds. It limits their interest in the funds to a maximum of twenty-five percent of the proceeds. Further, it does not provide any special holding period to give them time to raise their claims, nor does it require any attempt to notify them of the availability of the funds as the New York statute does. Thus, the different goals of the Florida act allow an immediate determination of all interests in the funds, victims, dependents, and the state while the narrower New York focus on victims alone requires a holding period to allow them to perfect their rights.

USE OF THE FUNDS TO COMMUNICATE

One commentator argues that the New York statute works a major infringement on first amendment rights by deterring the offender from telling his story and the publisher from buying it.[127] He believes that the statute denies the offender access to the funds which he could use to communicate his ideas in violation of *Buckley v. Valeo*.[128] In *Buckley*, the Supreme Court invalidated provisions of the Federal Election Campaign Act of 1971 which placed ceilings on expenditures by persons for a clearly identified candidate, on a candidate's expenditures from his own personal funds, and on overall campaign expenditures. The provisions "place[d] substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the first amendment cannot tolerate."[129]

The decision in *Buckley* is inapposite to the provisions of the New York and Florida statutes. The Federal Election Campaign Act placed direct restrictions on the use of funds for specified campaign speech. By contrast, the New York and Florida acts merely attach specified funds without regard for how they would otherwise have been spent. To find that the funds cannot be placed in escrow because the offender could use the money to buy advertisements protesting his innocence would prohibit any fine or forefeiture of monies as a result of a criminal conviction. Indeed, it would invalidate attachment statutes of any kind since the debtor could have used those funds to express protected speech.

Furthermore, there is no indication that offend-

Justice, 71 J. CRIM. L. & C. 189 (1980); 1978 Conn. Pub. Acts No. 78-188, "Restitution to Victims by Criminal Defendants"; 1979 La. Acts No. 734, "Restitution of Victim as Condition of Parole."

[125] *See* text accompanying notes 117-18 *supra*.

[126] FLA. STAT. § 944.512 (Supp. 1979).

[127] *See Criminals-Turned-Authors*, *supra* note 7, at 452.

[128] 424 U.S. 1 (1976).

[129] *Id.* at 58-59 (footnote omitted).

ers have ever used the proceeds from the stories of their crimes to express protected speech. The most common, and only recorded, use of such funds has been to pay attorneys' fees and to support dependents.[130]

Finally, the very publication which provided the attached funds will contain expressions of the offender's thoughts and feelings concerning the crime. Once the offender has sold his story, the proceeds of that sale, like any other assets of the offender, are subject to attachment for restitutionary purposes.

Due Process

Procedural due process constitutes the other major area of constitutional concern regarding the New York statute. Due process is implicated because the funds are held for the benefit of victims of the offender without any preliminary determination, before or after the funds are attached, that there are victims with sufficient claims to justify holding the funds.[131]

Due process of law requires that a meaningful opportunity to be heard, appropriate to the nature of the case, must precede any final deprivation of an individual's property.[132] In the case of the New York statute, such an opportunity is provided by the requirement that any payment out of the escrow account to a victim or to an attorney must be pursuant to a judgment of a court of competent jurisdiction.[133]

However, in addition to a hearing before a final deprivation of property, a hearing must be given before any temporary, non-final deprivation or, in extraordinary circumstances, immediately following the commencement of the deprivation.[134] The Court in *Sniadach v. Family Finance*[135] first established this rule by holding Wisconsin prejudgment garnishment procedures invalid because they denied the employee/debtor an opportunity to be heard before the *in rem* seizure of her wages.[136]

Although *Sniadach* involves the prejudgment deprivation of employee wages which could impose severe hardships upon the wage earner and his family, it has not been limited to the protection of a particular type of property interest. Courts have expanded the rule to prevent any temporary deprivation of property including household appliances[137] and corporate bank deposits.[138] In rejecting an attempt to distinguish the early prejudgment lien cases on the grounds that they represented the deprivation of household necessities, the Court held that it will not distinguish among different kinds of property in applying the due process clause.[139]

Withholding the offender's funds pursuant to the New York statute is encompassed by the *Sniadach* rule. Like the garnishment provision ruled unconstitutional in *Sniadach*, the New York statute fails to provide any opportunity for a hearing before the attachment of the funds to determine "the validity, or at least the probable validity, of the underlying claim."[140] Under the terms of the New York statute, there are several possible situations whereby an offender can be deprived wrongfully of the use of the funds for the five-year period because of the failure of the statute to provide any preliminary determination of possible claims to the proceeds. First, a wrongful deprivation is certain to occur under the statute where the offender has committed a "victimless" crime which involved no tortious conduct, such as fraud, prostitution, or gambling. This is possible because section 632-a requires the attachment of literary proceeds payable to "any person accused or convicted of a crime in this state,"[141] while the funds may only be

[130] *See* note 2 *supra*.

[131] *See Compensating the Victim*, *supra* note 7, at 99. The statute has also been criticized on the due process ground of impermissible vagueness. *See Criminals-Turned-Authors*, *supra* note 7, at 462–65.

[132] *See, e.g.*, Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950). Although "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause, there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 313. *See also* Mitchell v. W. T. Grant, 416 U.S. 600, 611–12 (1974); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Hammond Packing Co. v. Arkansas, 212 U.S. 322, 351 (1909); Windsor v. McVeigh, 93 U.S. 274, 277 (1876).

[133] N.Y. Exec. Law § 632-a (1), (8) (McKinney Supp. 1979).

[134] North Georgia Finishing v. DiChem, 419 U.S. 601 (1975); Mitchell v. W. T. Grant, 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972) (4-3 ruling).

[135] 395 U.S. 337 (1969).

[136] Under the Wisconsin statute a creditor could have a portion of the wages of the debtor frozen until the trial of the garnishment action. The Court noted that although the wage earner could eventually recover the funds by winning the main suit on the merits, in the interim he is "deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise." *Id.* at 339.

[137] Fuentes v. Shevin, 407 U.S. 67 (1972) (4-3 decision).

[138] North Georgia Finishing v. DiChem, 419 U.S. 601 (1975).

[139] *Id.* at 608.

[140] 395 U.S. at 343 (Harlan, J., concurring).

[141] N.Y. Exec. Law § 621(3) (McKinney 1972) defines crime as an act commited in New York state which would

claimed by victims or their legal representatives. "Victim" is defined by the Crime Victims Compensation Act, in which section 632-a is incorporated, as "a person who suffers personal physical injury as a direct result of a crime."[142] Because of the interaction of these provisions, it is clearly foreseeable that the profits of many authors[143] may be subject to the attachment provisions of the New York act without any opportunity to challenge the appropriateness of the deprivation.

The New York statute also fails to provide an opportunity to challenge the correctness of the publisher's determination to place the specific funds into the hands of the Board. It is likely that the publisher will mistakenly pay over funds which are not payable to an offender or which are not the proceeds of the story of a crime for which the offender has been charged. Finally, a preliminary determination is necessary to see whether even in a violent crime it is likely that there are enough victims who have large enough claims to justify the withholding of the full amount of the profits.

The offender's possible status as a convicted criminal does not impair him from raising due process objections to the withholding of his literary profits. Prisoners may not be deprived of life, liberty or property without due process of law.[144] Although states may deny offenders physical possession of money while they are in prison, they cannot affect the constructive possession by prisoners of their funds without fulfilling the requirements of procedural due process.[145] Any action by the state under the New York act to attach and hold funds which are owed to the offender must therefore comport with the *Sniadach* standards because it prevents him from assigning the funds to other parties while he is in prison and of their immediate use if he is not in prison.

Although *Sniadach* established the need for a hearing before any temporary, non-final deprivation of property, it also suggested that there may be "extraordinary situations" in which such a procedure is not required.[146] This exception was specifically delineated in *Fuentes v. Shevin*[147] where the Court found that under limited circumstances, a balancing of the interests of the creditor and the debtor will justify delaying the hearing until *immediately* after the seizure of the property. To come within this exception for delaying the hearing, the state must meet three conditions. First, the seizure must be directly necessary to secure an important governmental or general public interest. Second, there must be a special need for very prompt action. Finally, the state must keep strict control over its monopoly of legitimate force—the person initiating the seizure should be a governmental official responsible for determining, under the standards of a narrowly drawn statute, that the seizure is necessary and justified in the particular case.[148]

A prompt post-deprivation hearing would be constitutional under the provisions of the New York act according to the *Fuentes* rule.[149] This conclusion is demonstrated by comparing the provisions of the New York act to the facts in *Calero-Toledo v. Pearson Yacht Leasing Co.*[150] In *Calero-Toledo*, the Court applied the *Fuentes* test to uphold a Puerto Rican statute which provided for the forfeiture of vessels used for unlawful purposes without any prior hearing.[151]

First, the important governmental interest furthered by the Puerto Rican statute was the need to assert *in rem* jurisdiction over the property in order to conduct full forfeiture proceedings. This was held to foster the public interest in preventing continued illicit use of the property and in enforcing the criminal sanction of forfeiture.[152] Under the New York statute, the state interest in preventing unjust enrichment by the offender necessitates the assertion of *in rem* jurisdiction over the funds.[153]

Secondly, the *Calero-Toledo* Court held that prompt action is necessary because a preseizure hearing might frustrate the interests served by the statute because the property involved, a yacht,

if committed by a mentally competent criminally responsible adult, who has no legal exemption of defense, constitute a crime as defined in and proscribed by the penal law..."

[142] N.Y. EXEC. LAW § 621(5) (McKinney 1972).

[143] *See, e.g.*, J. DEAN, BLIND AMBITION (1976); H. HALDEMAN, THE ENDS OF POWER (1978); X. HOLLANDER, THE HAPPY HOOKER (1972); J. MAGRUDER, AN AMERICAN LIFE, ONE MAN'S ROAD TO WATERGATE (1974).

[144] Wolff v. McDonnell, 418 U.S. 539, 554, 556 (1974).

[145] Sell v. Parratt, 548 F.2d 753, 757 (8th Cir. 1977), *cert. denied*, 434 U.S. 873 (1978).

[146] 395 U.S. at 339.

[147] 407 U.S. 67 (1972) (4-3 decision).

[148] The need for an immediate postseizure hearing where the circumstances justify the attachment without a prior hearing was affirmed by the court in Mitchell v. W. T. Grant, 416 U.S. 600 (1974). There the Court sustained a Louisiana sequestration statute because, *inter alia*, "[t]here is far less danger [under the Louisiana statute] that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing which will be *immediately available* in any event." 416 U.S. at 618 (emphasis added).

[149] 407 U.S. at 91.

[150] 416 U.S. 663 (1974).

[151] *Id.*

[152] *Id.* at 679.

[153] *See* notes 6-10 and accompanying text *supra*.

could be destroyed, concealed, or removed to another jurisdiction if advance warning of confiscation were given.[154] Similarly, since the New York statute attaches funds at the time they become payable to the offender,[155] the publisher would have to pay them over to the offender during the course of the preseizure hearing or render himself liable under the contract. This would give the offender an opportunity to take the possible courses of conduct suggested in *Calero-Toledo.*

Finally, the *Calero-Toledo* Court held that self-interested private parties may not initiate the seizure mandated under the Puerto Rican statute, but rather that Puerto Rican officials determine whether the seizure is appropriate.[156] Although New York officials are not involved in the determination to pay the proceeds over to the Crime Victims Compensation Board, the publisher is a disinterested party with respect to the disposition of the funds as required by *Fuentes* and can be construed to be acting as an agent of the state in initiating the seizure because the statute mandates payment.

Although New York is allowed to delay the necessary hearing until after the payment of the funds into the escrow account, it must provide one at that time. The requirements of such a hearing have not been delineated specifically by the Court except that it must provide a "real test" consistent with the goal of preventing unfair and mistaken deprivations of property by establishing the validity or at least the probable validity, of the underlying claim.[157]

In this case, due process would require a hearing immediately after the establishment of the escrow account to determine that there are likely to be claimants, either attorneys or victims, to the funds in the account and that those claims are likely to encompass all of the money which has been seized. If the offender has been convicted of the offense, this determination would be relatively simple since it could be based upon the findings of the criminal case.[158]

[154] 416 U.S. at 679.

[155] *See* N.Y. EXEC. LAW § 632-a (1) (McKinney Supp. 1979).

[156] 416 U.S. at 679.

[157] 407 U.S. at 96–97.

[158] Although the criminal conviction would not be sufficient as a matter of law to establish the offender's liability to the victims, it does constitute prima facie evidence of the tortious actions. Vzenski v. Fitzsimmons, 10 A.D.2d 890, 201 N.Y.S.2d 358 (1960); Silverman v. Abraham, 22 Misc. 2d 707, 198 N.Y.S.2d 514 (1960); *Cf.*, Montalvo v. Morales, 18 A.D.2d 20, 239, N.Y.S.2d 72 (1963).

The Florida statute, by operating through a lien procedure, apparently avoids the due process problems present under the operation of the New York statute. Because only a statutory lien is created under the Florida act, the offender will not be deprived of the funds until the Department of Legal Affairs brings a civil action to perfect the lien and order the payment of the funds to the parties entitled to final distribution. The offender therefore has an opportunity to challenge the propriety of any deprivation through the hearing to perfect the lien before any deprivation is effected.

Although the Florida statute provides a means of avoiding the due process problem present under the New York act, it is not necessarily the best way for New York and other states with statutes based on the New York model to eliminate the problem. The statutory lien procedure in Florida requires a much quicker determination of the proper distribution of the funds. This may be acceptable because the victims' share is limited to twenty-five percent of the monies. However, the New York act demonstrates a greater interest in maximizing the opportunities for victims to bring claims to the funds. For New York, a simpler solution would be to provide an immediate post-seizure hearing to determine the validity of the deprivation based extensively upon the record of the criminal case.

CONCLUSION

An important balance must be maintained between the first amendment rights of offenders and equitable notions that a person should not be allowed to profit as the result of his own wrongdoing. The offender may provide a valuable primary source of information on many subjects of public concern, such as crime prevention and capital punishment. The provision of material incentives for the offender to sell his story, as provided by the New York act, fulfills both the goal of encouraging dissemination of information and providing restitution to the victim.

The Florida statute provides a significant alternative to the New York act. Florida has expanded the class of victims entitled to the distribution of these funds to include the dependents of the offender and the state. Of the two statutes, the new York act is superior. Both statutes attach funds which can be attributed directly to the crime in which the victim was injured. The New York statute provides the victim with a first claim to the proceeds to the extent of his actual damages. The Florida statute may give the victim considerably

less than actual damages even when adequate funds are available. Because victims should have first rights to the funds to the extent of their injuries, the Florida statute is inadequate.

The New York approach is preferable in other ways also. Although there is evidence that an offender will be motivated to sell his story by the possibility that some of the proceeds will go to his dependents, the availability of the literary proceeds to pay the offender's legal expenses under the New York statute provides the better incentive. Unlike the Florida payments to dependents, it applies to all offenders. The Florida statute may be attractive because it distributes fifty percent of the offender's profits to the state. The New York act is, however, financially beneficial to the state because it may save the state the expense of providing legal representation. Historically, literary proceeds have been most frequently used to pay legal expenses. The New York approach employs this strong incentive but protects it from abuse by requiring judicial approval of any payment to attorneys from the funds.

The adoption of a statute based on the New York model fulfills equitable needs which might otherwise go unmet, and does not violate the public's right to know or the offender's right to speak. The statute however, must not extend beyond these narrow goals. The statute only should attach funds necessary to compensate victims for their injuries and to pay attorneys' fees. A preliminary hearing immediately following the attachment would protect against excessive attachment and satisfy due process.

The statute should not become a tool for the punishment of the offender. Such a statute would be unfair not only because it is limited to those offenders who sell their stories but also because it is likely to deter the offender from ever telling his story. Such a statute would block an important channel of communication in violation of the first amendment and effectively would eliminate funds to compensate the victim. If the statute is used for punitive purposes, neither the offender, nor society, nor the victim is benefited.

It may offend the sensibilities of many individuals to allow government to intervene as deeply into the arena of protected communications as does the New York statute. However, it is more offensive to allow perpetrators of crimes of violence to profit from their crimes while their victims go uncompensated. The New York statute shows it is possible for the equitable rights of the victim to be advanced while safeguarding the constitutional rights of the offender.

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