CASE NOTE

SON OF SAM LAWS

SIMON & SCHUSTER INC v. MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD. Supreme Court of the United States. No. 90-1059.

In the *APC News*, Vol 4, No 2, May 1992, Prof Arie Freiburg of the University of Melbourne argued that blanket confiscation laws, without balancing provisions, run the risk of indiscriminately suppressing all criminal expression, whether good or bad. The extent to which such legislation breaches the First Amendment to the US Constitution was in issue in a recent case.

On 10 December 1991, the US Supreme Court ruled on a challenge against the New York "Son of Sam" legislation (NY Exec. Law: 632-2 [McKinney 1982 and Jupp 1991]). This provided that an "entity" contracting with a person "accused or convicted of a crime" for the production of a book or other work describing the crime must pay to the Crime Victims Board any monies owed to that person under the contract. The Board was to deposit such funds in an account for payment to any victim who within five years obtained a civil judgment against the accused or convicted person and to the criminal's other creditors. A "person convicted of a crime" included "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted".

In this case, Simon and Schuster Inc signed an agreement with an author who had contracted with an admitted organised crime figure, Henry Hill, for the production of a book about Hill's life. The Crime Victims Board determined that Simon and Schuster had violated the "Son of Sam" Law and ordered it to turn over all money payable to Hill; Simon and Schuster sought a declaration that the law violated the First Amendment, and an injunction barring the law's enforcement. Both the District Court and the Court of Appeals held that the law was consistent with the First Amendment.

However, in a unanimous decision, the Supreme Court held that the "Son of Sam" legislation was inconsistent with the First Amendment. The law had singled out speech on a particular subject for a financial burden that it placed on no other speech and no other income. Therefore, it was presumptively inconsistent with the First Amendment. The Court rejected an assertion that discriminatory financial treatment is suspect only when legislation tends to suppress certain ideas. The Court recalled that it had long recognised that even regulation aimed at proper governmental concerns can restrict unduly the exercise of rights under the First Amendment. A response that the law focussed generally on an "entity" rather than specifically on the media failed on semantic grounds and on constitutional grounds - the Government had been shown to impose content-based financial disincentives on speech which vary with the identity of the speaker. To justify the differential treatment imposed by the law the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.

While accepting that the State had a compelling interest in compensating victims though the fruits of crime, the Court held that the State had little interest, if any, in limiting compensation to the proceeds of the wrongdoer's speech about the crime. The New York statute had not been tailored to achieve the objective of compensating the victims from the profits of crime. The law was significantly over-inclusive. It applied to works on any subject, provided that they expressed the author's thoughts or recollections about his or her crime, however tangentially or incidentally. It extended to the income of an author who admitted in his or her work to having committed a crime, whether s/he had ever been convicted or indeed accused.

The Court did not say that the proceeds of a biographical work by a criminal could never be seized to compensate a victim of crime. But such compensation must not be limited to literary work: it should be extended indiscriminately to all assets and income of the wrongdoer. At the same time, any such law should not be over-inclusive: it should not, for example, extend to persons neither accused nor convicted of a crime but who admit to crime in their works.

Once again, the Supreme Court has demonstrated the value of the judicial review of well-intentioned, but sometimes hasty, legislation, drawn without adequate consideration of basic human rights. Why after all should a criminal's literary income be sequestered unless one also takes his or her other assets and income? Why not indeed? A law sequestering the criminal's profits from "chequebook journalism" discriminates against free speech.

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WHISTLEBLOWER CONFERENCE

A two-day conference on intellectual suppression and whistleblowing will be held at the National Library, Canberra, on 27-28 March 1993.

Information on the conference is available from:
Whistleblowers Anonymous
PO Box 1466, Tuggeranong, ACT 2900

CLARIFICATION

In the introduction to two articles about the police 'raid' on the Canberra Times, printed in the previous issue of the *News*, it was stated that the Canberra Times had suggested that Mr Greg Ellis, a senior adviser to the ACT Government Whip, submit an edited version of an article he had sent it. Mr Ellis states that at no time was he asked for such a version and that he submitted such a version of his own volition. The *APC News* did not intend to imply that Mr Ellis' article was not printed because of his unwillingness to supply an edited version.