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Kari M. Dahlin

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Note

Actions Speak Louder than Thoughts: The Constitutionally Questionable Reach of the Minnesota CLE Elimination of Bias Requirement

*Kari M. Dahlin**

Submission to elimination of bias training is a precondition to the licensed practice of law in Minnesota.[1] The Minnesota Supreme Court requires that all lawyers attend two hours of elimination of bias training every three years to fulfill their continuing legal education (CLE) requirements.[2] The requirement exists to "educate attorneys to identify and eliminate from the legal profession and from the practice of law, biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation."[3] Failure to attend a prescribed number of sessions results in the loss of one's license to practice law in Minnesota.[4]

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* J.D. Candidate, 2001, University of Minnesota Law School; B.A., 1998, University of Minnesota-Twin Cities. I would like to thank my mother, Annette Dahlin, for her love and support, and my brother, Brian Dahlin, for his friendship and sense of humor. I would also like to thank Professor Jim Chen for helpful comments and suggestions. Finally, I especially wish to thank Jordan Lorence for his advice and encouragement.

1. The Minnesota Supreme Court's June 28, 1996 Order, *Promulgation of Amendments to the Rules for Continuing Legal Education of Members of the Bar*, mandated that lawyers receive continuing legal education "elimination of bias" training. *Promulgation of Amendments to the Rules for Continuing Legal Education of Members of the Bar*, Minnesota Supreme Court Order C2-84-2163, FIN. & COM. APP. COURTS ED., July 5, 1996, at 26-28 [hereinafter Bias Order].

2. *See id.* at 26 (explaining the rules for reporting continuing education).

3. *Id.* at 27 (defining the requisite purpose of a "[c]ourse in the elimination of bias in the legal profession and in the practice of law").

4. *See id.* at 26 (noting that "[e]ach registered attorney duly admitted to practice in this state desiring active status must make a written report to the Board in such manner and form as the Board shall prescribe"). The Report of Continuing Education must provide "evidence of attendance at a minimum of two hours of courses in the elimination of bias in the legal profession and in the practice of law." *Id.*

The elimination of bias requirement has created a number of controversies in the Minnesota legal community.[5] Proponents of the requirement partly base their allegations of bias on the Racial Bias Task Force Report[6] and the Hennepin County Bar Association Gay and Lesbian Issues Subcommittee Report.[7] Scholars and attorneys have objected to the accuracy of these reports, arguing that they fail to prove the existence of bias in the legal profession. Opponents contend that methodological and interpretive flaws cast doubt on the validity of conclusions contained in the reports.[8] In addition to the technical flaws of these studies, the mere existence of an elimination of bias requirement raises constitutional questions about the right to speak as well as negative free speech rights—the right not to speak, and the right not to listen.

This Note evaluates the constitutionality of the elimination of bias requirement in the context of negative free speech rights. Part I explains the character of negative free speech rights and traces the methods used by the Supreme Court to evaluate compelled speech cases. Part II applies the Supreme Court's negative free speech analytical methods to the elimination of bias requirement and details the requirement's constitutional difficulties. Finally, Part III concludes that the broad reach of the elimination of bias requirement unconstitutionally infringes on lawyers' negative free speech rights and advocates

5. *See* Peter A. Swanson, *Do Lawyers Need Sensitivity Training?*, LAW & POL., July 1996, at 17-18 (criticizing the addition of the elimination of bias course requirement).

6. TASK FORCE ON RACIAL BIAS, MINNESOTA SUPREME COURT, FINAL REPORT (April 30, 1993). Former Minnesota Supreme Court Chief Justice A.M. (Sandy) Keith created the task force in December of 1990 to study racial bias in the Minnesota court system and propose reforms to eliminate it. *See id.*

7. HENNEPIN COUNTY BAR ASS'N DIVERSITY COMM., LESBIAN & GAY ISSUES SUBCOMM., LEGAL EMPLOYERS' BARRIERS TO ADVANCEMENT AND TO ECONOMIC EQUALITY BASED UPON SEXUAL ORIENTATION (1995) [hereinafter SEXUAL ORIENTATION REPORT].

8. For example, the self-selection of interviewees in the Sexual Orientation Report could have predetermined some of the report's conclusions. *See infra* note 26 and accompanying text; *see also* David Peterson, *Accuracy or Advocacy? Bias Report Challenged*, STAR TRIB., June 27, 1993, at 2B (quoting University of Minnesota Law School professor Richard Frase's comment that the racial bias task force report is "not only not scholarly, it's not even even-handed" and University of Minnesota sociologist David Ward's comment that "[i]t's the most biased report I've seen in a long time"); *infra* note 25 and accompanying text.

that it be replaced with measures solely targeting overt discriminatory actions.

I. THE LAW SURROUNDING THE ELIMINATION OF BIAS REQUIREMENT

A. THE MINNESOTA CONTINUING LEGAL EDUCATION ELIMINATION OF BIAS REQUIREMENT

The State Board of Continuing Legal Education[9] oversees the implementation of the elimination of bias rule. The Board controls the content of the seminars since all potential elimination of bias course providers must apply to the Board for accreditation.[10] The Board bases its decision to grant credit on whether the course fulfills the "learning goals" of the elimination of bias program.[11] These learning goals seek to educate

9. The Minnesota Supreme Court Order founded the State Board of Continuing Legal Education. *See* Bias Order, *supra* note 1, at 26.

10. *See id.* The Board, directly answerable to the court, "accredit[s] courses and programs which will satisfy the educational requirements of these rules" and "discover[s] and encourage[s] the offering of such courses and programs." *Id.* The Special Continuing Legal Education Advisory Committee on Elimination of Bias requires that CLE providers seeking elimination of bias credit review the goals of the elimination of bias program and explain how their proposed seminar fulfills them. *See* SPECIAL CONTINUING LEGAL EDUCATION ADVISORY COMM., MINNESOTA SUPREME COURT, FINAL REPORT EX. A, 7 (May 21, 1996) (File No. C2-84-2163).

11. *See* Bias Order, *supra* note 1, at 28. The Supreme Court Order establishes guidelines, or "learning goals," for acceptable elimination of bias courses. *See id.* The requirements are as follows:

> Courses approved as "elimination of bias" must be at least 60 continuous minutes in duration, must be directly related to the practice of law, must meet all other requirements of Rule 101 of the Rules of the CLE Board, and must be designed to meet one or more of the following goals:
>
> 1. to educate attorneys about the elimination of bias or prejudice in the legal profession, in the practice of law, and/or in the administration of justice;
> 2. to educate attorneys regarding barriers to hiring, retention, promotion, professional development and full participation of lawyers of color, women, and those persons referenced in the "elimination of bias" definition (I.) of the Rules of the CLE Board, both in the public and private sector of the legal profession and in the practice of law;
> 3. to educate attorneys about the problems identified in the Supreme Court's Race Bias and Gender Fairness Task Force Reports, as well as in other studies, reports or treatises which describe bias and prejudice in the legal profession, in the practice of law, and/or in the administration of justice.

Id.

lawyers about studies of race, gender, and sexual orientation bias in the practice of law.[12] Thus, in order to meet these learning goals, a course must disseminate the results of these reports. Unfortunately, an examination of the bias order and the contents of the reports casts doubt on whether the seminars are merely means of educating lawyers about biases.

The language of the bias order evinces the potential of this rule to attempt to change lawyers' belief systems, presenting possible constitutional difficulties despite the purportedly educative objectives of the courses. The Board defines an acceptable elimination of bias course as one "designed to educate attorneys to identify and eliminate . . . biases."[13] Attorney Mark Greenberg argues that this characterization "is not dispositive of the constitutional question."[14] Rather, he describes elimination of bias courses as "[m]andatory classes for adults on subjects that depend more on the formation of character, the inculcation of norms, and the assessment of broad personal experience, rather than on the examination of a well-defined body of knowledge."[15] Cloaking the elimination of bias requirement in the guise of "education" does not remove its constitutional difficulties.

The Racial Bias Task Force report reaches conflicting conclusions about the effects of alleged racial bias in the criminal justice system and therefore does not demonstrate a compelling

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12. *See id.* Although the learning goals do not specifically mention the sexual orientation report, it would be covered under the language "other studies . . . which describe bias." *Id.*

13. *Id.* at 26.

14. Appellants' Reply Brief at 22, Greenberg v. State Bar, 92 Cal. Rptr. 2d 493 (Ct. App. 2000) (No. 682931-9). The State Bar of California requires its lawyers to attend mandatory elimination of bias courses. *See* CALIFORNIA MINIMUM CONTINUING LEGAL EDUCATION RULES AND REGULATIONS § 2.1.3 (1996). Objecting attorneys filed suit against the requirement, claiming violations of First Amendment rights and asking for declaratory and injunctive relief. *See* Appellants' Petition for Review at 2, *Greenberg*, 92 Cal. Rptr. 2d 493, *petition for cert. filed* (Feb. 25, 2000) [hereinafter Petition]. A California appellate court recently upheld the constitutionality of the elimination of bias program, holding the requirement "germane" to "the apparent consumer protection goals of the [mandatory continuing legal education] program." *Greenberg*, 92 Cal. Rptr. 2d at 496. Although the Minnesota elimination of bias requirement has yet to face constitutional scrutiny, at least one commentator has anticipated a challenge to the rule. *See* Swanson, *supra* note 5, at 17 (expressing his confidence that "one of the lawyers who is forced to sit through two hours of political indoctrination contrary to his beliefs will bring a constitutional challenge to the rule").

15. Appellants' Reply Brief at 22, *Greenberg*, 92 Cal. Rptr. 2d 493.

need for elimination of bias training. For example, the Hennepin County Misdemeanor Processing Analysis, a sub-report of the task force report, does not point to a pattern of racial discrimination in the Minnesota court system.[16] The report finds that nonwhites are more likely to be arrested rather than ticketed, yet acknowledges that the relationship between race and arrests is "weak."[17] Additionally, when bail is set as a condition of release from custody, there is no relationship between race and bail amount.[18] Nonwhites are more likely than whites to have public defenders,[19] but this disparity may have more to do with defendants' financial circumstances, which exist independently of any alleged bias in the legal system. Furthermore, cases against nonwhite defendants are more likely to be dismissed than cases against white defendants.[20] The report states that there are not enough samples to reach a conclusion regarding a possible relationship between the defendant's race and whether his or her case goes to trial, however.[21] Regarding probation rates, the report concedes that "[r]acial differences . . . are very minimal."[22] While nonwhites are more likely to receive jail sentences than whites, those nonwhites and whites sentenced receive approximately the same amount of jail time.[23] This study provides no proof of a compelling interest in eliminating racial bias in the Minnesota judicial system.

Various members of the Minnesota legal community have questioned the Task Force's interpretation of its findings. For example, CLE elimination of bias faculty member Scott Johnson argued that "[s]horn of its purported statistical support, the

16. *See generally* TASK FORCE ON RACIAL BIAS, MINNESOTA SUPREME COURT, HENNEPIN COUNTY MISDEMEANOR PROCESSING ANALYSIS (Jan. 28, 1993) [hereinafter MISDEMEANOR PROCESSING ANALYSIS]. Greg Pulles's presentation at the June 29, 1999 Minnesota Family Council Elimination of Bias CLE offered a complete analysis of the Racial Bias Task Force Report. This seminar, entitled "Bias in the Legal Profession? What Bias?," was documented on videotape. *See* Videotape: Bias in the Legal Profession (Northstar Legal Center 1999) (on file with the Minnesota Family Council) [hereinafter Bias in the Legal Profession]. For a discussion of the First Amendment issues surrounding the Board's approval of the Minnesota Family Council's course, see *infra* notes 168-77 and accompanying text.

17. *See* MISDEMEANOR PROCESSING ANALYSIS, *supra* note 16, at 4.

18. *See id.* at 5-6.

19. *See id.* at 8.

20. *See id.* at 11-12.

21. *See id.* at 7.

22. *Id.* at 13.

23. *See id.* at 14-15.

report . . . stands revealed as a shoddy, ideological tract. If, in fact, the Minnesota judicial system were permeated with racial bias it would be a scandal, calling for serious remedial measures beyond our sitting here for two hours once every three years."[24] Attorney and CLE elimination of bias faculty member Roger Magnuson simply stated that "the data and the conclusions don't match."[25]

The rule's reliance on the sexual orientation report is troublesome because the report employs untrustworthy methodologies and proposes questionable remedies for the problems it purports to document. This report, based on interviews conducted with local attorneys, may stem from a biased viewpoint because the interviewees selected themselves.[26] Moreover, the questions the Subcommittee posed to interviewees presupposed the existence of sexual orientation bias in the legal system.[27] In addition to these methodological flaws, the report is problematic because it prescribes "right" and "wrong" attitudes about sexual orientation in order to encourage lawyers to adopt "right" attitudes. The report disclaims an intent to change personal opinions regarding sexual orientation, recognizing that "[s]ome members of the legal community have sincere and

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24. Bias in the Legal Profession, *supra* note 16 (statement of faculty member Scott Johnson).

25. *Id.* (statement of faculty member Roger Magnuson); *see also* Ian Maitland, *Pork-Barrel Politics Can Masquerade as True Science*, STAR TRIB., July 14, 1995, at 19A (explaining that the racial bias task force report's findings do not lead to the conclusion that Minnesota lawyers harbor racial biases, but instead reveal that Minnesota's high black-to-white imprisonment ratio is due to extremely low imprisonment rates for whites, and that blacks are less likely to be imprisoned in Minnesota than in other states); Peterson, *supra* note 8, at 2B (quoting University of Minnesota scholars critical of the report for its sharply biased conclusions). *But see id.* (quoting Federal District Judge Michael Davis's rejoinder that the task force was unbiased and "brought in people with different views").

26. The Subcommittee recruited interviewees by "plac[ing] advertisements for the interview sessions in legal and community periodicals most likely read by lesbian and gay legal professionals." SEXUAL ORIENTATION REPORT, *supra* note 7, at 12.

27. The Subcommittee posed the following questions to interviewees:

> (1) Is there a glass ceiling for lesbian, gay, bisexual and transgender lawyers and law office personnel in the Twin Cities legal community? (2) Are lesbian, gay, bisexual and transgender lawyers and law office personnel hired, retained and promoted at the same pace as their heterosexual counterparts? (3) What are Twin Cities lawyers doing to correct problems that exist? (4) Which programs have worked and which have not?

Id.

deeply held religious and moral convictions that proscribe same-sex sexual behavior," and that "[a]n employer can fully respect an individual's religious beliefs and moral convictions while at the same time requiring that that individual's behavior comply with human and civil rights laws."[28] The contents of the report do not comport with this statement, however.

The inconsistency is subtly apparent throughout the report. First, it recommends that law firms condition lawyers' professional advancement opportunities on participation in diversity training sessions.[29] Second, the Subcommittee suggests viewing *Inside Out*,[30] a popular videotape, as an appropriate activity for these programs.[31] This recommendation is disconcerting because some elements of *Inside Out* may offend some lawyers' personal and religious beliefs. All of the production's statements about same-sex sexual orientation are positive.[32] In contrast, all of the production's statements about "intolerance" of same-sex sexual orientation are negative.[33] For example, one interviewee explains that he had trouble coming to terms with his same-sex sexual orientation because "[he] was into this thing that lots of Christians are into that if you pray hard enough about this it's going to get well, right, and you're going to get better."[34] In addition, the production contains a still photograph of protestors holding placards that state "Fags burn in hell" and "God's given fags up."[35] The production's depiction of the protestors is objectionable because it implies that it is "wrong" to share the sentiments expressed on the placards.[36] Further, it implies that all people who have religious objections to same-sex sexual behavior necessarily share these sentiments. Some lawyers who object to same-sex sexual behavior on religious grounds might disagree with these opinions, however. Their disagreement could leave them with no choice but to publicly disassociate themselves from the protestors' views.

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28. *Id.* at 9-10.

29. *See id.* at 43.

30. Videotape: Inside Out (Ron Albers & Abby Ginzberg 1994) (on file with the William Mitchell College of Law Career Services Library).

31. *See* SEXUAL ORIENTATION REPORT, *supra* note 7, at 43.

32. *See* Inside Out, *supra* note 30.

33. *Id.*

34. *Id.* (statement of attorney Randy Rice).

35. *Id.*

36. The author merely defends the right of lawyers to hold these sentiments without defending the sentiments themselves.

The report's appendices also contain material that targets lawyers' personal beliefs. Appendix B reprints a letter to employees of a major Twin Cities law firm in which the managing partner speaks of the "challenge" of dealing "with . . . homophobia."[37] The letter pledges support to employees who may have difficulties accepting a co-worker's same-sex sexual orientation, stating that "just as the Firm will be supportive of those who make the difficult decision to come out, it will also be supportive of those who may struggle with the decisions of their coworkers. The challenges of homosexuality and homophobia will be met . . . ."[38] Although this statement implies tolerance of initial bias against same-sex sexual orientation, it seems to indicate a long-term goal of completely eliminating the bias. Similarly, Appendix C offers a sample employer equal opportunity statement that "challenges all employees to recognize the value of diversity in the workplace," and to "identify practices, attitudes or systems which undermine our commitment to diversity in the workplace."[39] The hypothetical firm includes sexual orientation in its definition of "diversity" and specifically states that lawyers must examine their personal beliefs so as not to undermine the firm's commitment to its conception of diversity.[40]

These examples may seem trivial, but their significance cannot be discounted. Some lawyers might resent the implication that they harbor racial biases, while other lawyers might resent the implication that any biases they may have are "wrong." Likewise, some lawyers may consider it a violation of their personal and religious beliefs to be required to listen to speech that paints biases against same-sex sexual behavior in a bad light. Attorney and CLE elimination of bias faculty member Greg Pulles explains that he opposes the requirement because he "[doesn't] like anybody telling [him] what [he] ought to think."[41] An attendee at one seminar expressed dissatisfaction with the requirement, stating that "[a]ll of the presenters promoted the same political agenda . . . ."[42] Although this speech

37. *See* SEXUAL ORIENTATION REPORT, *supra* note 7, app. B.

38. *Id.*

39. *Id.* app. C.

40. *See id.*

41. Telephone Interview with Greg Pulles, Attorney and CLE Elimination of Bias Faculty Member (Nov. 16, 1999).

42. MINNESOTA BD. OF CONTINUING LEGAL EDUC., REPORT OF THE BOARD OF CONTINUING LEGAL EDUCATION ON ELIMINATION OF BIAS CLE 6 (1998)

may not be objectionable to many lawyers, courts cannot judge the reasons why some lawyers, albeit a minority, would find these ideas objectionable.[43] These examples, part of the body of research from which course providers may draw, indicate that the rule permits attempts to change individual attitudes, a practice that the First Amendment forbids. .

B. THE RIGHT NOT TO SPEAK

The First Amendment guarantees both affirmative and negative free speech rights.[44] Affirmative free speech rights refer to an individual's right to engage in expressive activity, such as leafleting on public streets,[45] staging protest marches,[46] and burning the United States flag.[47] The Court guards affirmative free speech rights for a number of reasons, including protecting the marketplace of ideas, promoting intelligent self-government, and preserving "individual dignity and choice."[48] The compelling nature of these interests means that the government may curtail an individual's affirmative right to free expression only in limited circumstances.[49]

[hereinafter ELIMINATION OF BIAS REPORT].

43. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 575, 580-81 (1995) (holding that the Court could not evaluate the parade organizers' reason for wanting to exclude a gay, lesbian, and bisexual group from their parade, and noting that "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control").

44. *See* U.S. CONST. amend. I; *see also Hurley*, 515 U.S. at 573 ("[O]ne who chooses to speak may also decide 'what not to say.'"); Riley v. National Fed'n for the Blind, Inc., 487 U.S. 781, 796-97 (1988) ("'[F]reedom of speech' . . . necessarily compris[es] the decision of both what to say and what *not* to say."); Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . [These rights] are complementary components of the broader concept of 'individual freedom of mind.'" (citation omitted)); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) ("[T]he right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all . . . .").

45. *See* Schneider v. New Jersey, 308 U.S. 147, 165 (1939).

46. *See* Cox v. Louisiana, 379 U.S. 559, 574-75 (1965).

47. *See* Texas v. Johnson, 491 U.S. 397, 420 (1989).

48. *See* Cohen v. California, 403 U.S. 15, 24 (1971).

49. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 521-22 (1972) ("[Government statutes] must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. 'Because First Amendment freedoms need breathing space

The government may limit affirmative expression in the contexts of obscenity, advocacy of imminent and likely illegal conduct, and fighting words. In *Chaplinsky v. New Hampshire*, the Court upheld a speaker's conviction for standing on a public sidewalk in the presence of the city marshall and calling the marshall a "Fascist" and a "racketeer."[50] The Court held that Chaplinsky's speech constituted fighting words, "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[51] In *Miller v. California*, the Court held that the appellant's mailing unsolicited obscene pictures did not warrant First Amendment protection because the pictures lacked "serious literary, artistic, political, or scientific value."[52] Furthermore, in *Brandenburg v. Ohio*, the Court held that the government could restrict affirmative expression when it incites imminent illegal conduct.[53] Applying this principle, the Court granted protection to a Ku Klux Klan leader's statements organizing a Fourth of July march on Congress, deeming the words "mere advocacy" and noting the unlikelihood that the march would occur.[54]

Just as citizens are free to speak, they are also free to refrain from speaking.[55] Negative free speech rights refer to the inability of government to coerce its citizens into speaking.[56] The government cannot require a person to disseminate,[57] associate himself with,[58] or listen to a message with which he dis-

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to survive, government may regulate in the area only with narrow specificity.'" (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))).

The government may curtail affirmative free expression with reasonable, content-neutral time, place, or manner restrictions. *See* Ward v. Rock Against Racism, 491 U.S. 781, 802-03 (1989) (sustaining a requirement that city officials operate the Central Park sound system in the interest of limiting noise); Grayned v. City of Rockford, 408 U.S. 104, 115-18 (1972) (upholding a regulation prohibiting protests on school grounds during school hours).

50. 315 U.S. 568, 569 (1942).

51. *Id.* at 572.

52. 413 U.S. 15, 24 (1973).

53. 395 U.S. 444, 448-49 (1969) (per curiam).

54. *See id.*

55. *See supra* note 44 (citing cases in which the Supreme Court affirmed the right to refrain from speaking).

56. Negative First Amendment rights become an issue when "[o]ne party is compelled to subsidize or facilitate the speech of another, rather than literally to speak." Robert D. Kamenshine, *Reflections on Coerced Expression*, 34 LAND & WATER L. REV. 101, 102 (1999).

57. *See* Wooley v. Maynard, 430 U.S. 705, 713 (1977).

58. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 575 (1995).

agrees.[59] The Court protects negative free speech rights to preserve the individual's interest in self-determination.[60] Just as the values of "individual dignity and choice"[61] are prominent in affirmative First Amendment jurisprudence, they are central to negative First Amendment analysis. Government-compelled speech is constitutionally questionable because it deprives individuals of autonomy over their speech.[62] This deprivation exists in two forms: it prevents individuals from choosing the manner in which they present themselves to their communities[63] and it prevents individuals from enjoying freedom of conscience.[64]

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59. *See* Lehman v. Shaker Heights, 418 U.S. 298, 304 (1974) (holding that political candidates did not have the right to advertise on streetcars for fear of making passengers a captive audience to political campaign literature). *But cf.* Planned Parenthood v. Casey, 505 U.S. 833, 883 (1992) (plurality opinion) (allowing states to require that a woman seeking an abortion "be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term"). *Casey* is distinguishable from the situation at hand because it involved a measure designed to ensure that a woman's decision to have an abortion is fully informed. *See id.* The requirement is not meant to change a woman's opinion on abortion; rather, it "furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Id.* at 832. The elimination of bias requirement presents no issues of physical or mental health.

60. *See* David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 1004 (1982) (arguing that compelled recitation of the Pledge of Allegiance "infringe[s] upon what may be called the individual's interest in selfhood").

61. Cohen v. California, 403 U.S. 15, 24 (1971).

62. *See* Gaebler, *supra* note 60, at 1004.

63. Because individuals have an autonomy interest in determining how others will perceive them, they have the right to control their own speech. *See id.* at 1004-05; *cf.* City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (noting that signs placed on private residences "provide information about the identity of the 'speaker'").

64. *See* Gaebler, *supra* note 60, at 1004-05. The Court has upheld freedom of conscience and privacy of the mind in several cases. *See* Wooley v. Maynard, 430 U.S. 705, 707 n.2, 714 (1977) (noting George Maynard's statement that the motto requirement "conflict[ed] with [his] conscience" and therefore upholding his 'individual freedom of mind'" (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943))); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (holding that private possession and viewing of pornographic material warrants First Amendment protection); Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (recognizing a privacy interest in personal thoughts); *Barnette*, 319 U.S. at 642 (striking the requirement that all students salute the United States flag and recite the Pledge of Allegiance).

C. THE SUPREME COURT'S TREATMENT OF COMPELLED SPEECH LAW

Although the Supreme Court has analyzed and developed a relatively coherent body of affirmative First Amendment law, it has failed to articulate a clear standard of review for violations of negative First Amendment rights.[65] The Court's limited review of negative First Amendment rights cases[66] has not conclusively defined the level of constitutional protection afforded to negative First Amendment rights.[67] Confusion surrounding this area of law is due in part to the difficulty in determining what constitutes an unacceptable violation of an individual's negative free speech rights.[68] A finding that a government

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65. The Supreme Court has applied a varying, fact-based approach to compelled speech cases rather than making "principled distinctions" based on the "varying first amendment interests at stake in the different factual situations encountered." Leora Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817, 913, 902 (1986).

66. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 581 (1995) (holding that the South Boston Allied War Veterans Council could not be compelled to grant the Irish-American Gay, Lesbian and Bisexual Group of Boston a permit to march in their annual St. Patrick's Day-Evacuation Day parade); Keller v. State Bar, 496 U.S. 1, 13-14 (1990) (holding that integrated state bar associations could not use mandatory member dues to fund ideological activities unrelated to the goals of "regulating the legal profession and improving the quality of legal services"); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (holding that a private mall owner could not exclude protestors from his mall due to the unlikelihood that third parties would attribute the protesters' message to the mall owner); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977) (holding that use of mandatory union dues for ideological purposes unrelated to collective bargaining violated teachers' negative First Amendment rights); *Wooley*, 430 U.S. at 713 (holding that New Hampshire could not compel its citizens to display the state motto on the license plates of their cars); *Barnette*, 319 U.S. at 642 (holding that the West Virginia Board of Education could not compel students to salute the United States flag and recite the Pledge of Allegiance).

67. Absent countervailing factors, *see supra* notes 50-54 and accompanying text, the presumptive standard of review for affirmative First Amendment rights cases is strict scrutiny. *See* Widmar v. Vincent, 454 U.S. 263, 270 (1981). Conversely, the Court's fact-based approach in negative First Amendment analysis leaves the standard of review for these cases in doubt. The Court and legal scholars have suggested that negative free speech violations vary along a spectrum of severity and should be evaluated accordingly. *See Wooley*, 430 U.S. at 715; Harpaz, *supra* note 65, at 902-04 (suggesting a two-tier approach for compelled speech cases, with severe violations receiving strict scrutiny, and comparatively minor violations receiving intermediate scrutiny).

68. *See Wooley*, 430 U.S. at 717 & n.15 (1977) (holding that requiring New Hampshire drivers to display the state motto on their license plates unconsti-

regulation implicates negative First Amendment issues does not necessarily mean the regulation is unconstitutional. The Court has upheld restrictions on negative free speech rights when those restrictions were supported by a compelling government interest.[69] Doctrinal uncertainty also permeates compelled speech cases because the Court applies a variety of analytical methods in reaching negative free speech decisions. These methods are the freedom of conscience test, the traceability test, and the ends-means balancing test.

1. The Freedom of Conscience Test: Protecting Autonomy Over One's Mind

The freedom of conscience test asks whether the contested government regulation interferes with an individual's freedom of mind. The First Amendment guarantees personal mental autonomy and the right to self-determination.[70] The Supreme Court has held that the government infringes on an individual's freedom of conscience when it denies his First Amendment right to contemplate anything.[71] Some scholars argue that if an individual is forced to disseminate or fund a message with which he disagrees, he loses control over his mind.[72] If an individual is compelled to express or listen to speech with which he disagrees, he:

> is likely to view compliance as acquiescence in, if not as outright affirmation of, the views involuntarily expressed. Consequently one who submits to such compulsion is likely to feel humiliated and ashamed that he did not stand up for his own beliefs. Thus, for the state to compel expression constitutes a direct and powerful affront to

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tutionally violated petitioners' negative free speech rights, but recognizing that the presence of the United States' motto on currency did not).

69. *See, e.g.*, *Abood*, 431 U.S. at 235-36 (noting the ideological nature of collective bargaining, yet upholding the use of mandatory teachers' union dues to promote smooth labor negotiations).

70. *See* cases cited *supra* note 64 (documenting the Court's recognition of the right to freedom of conscience and explaining its importance for the individual).

71. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969).

72. Victor Brudney argues:

> [T]he thwarting of the individual's will and the intrusion on the individual's conscience by the group's expression that the individual is forced to enable is as present in the case of restricting individual speech as in the case of "compelling" speech.... [T]he intrusion on the individual's will to speak is real, and the jurisprudence of the First Amendment is properly invocable.

Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL OF RTS. J. 1, 15 (1995).

> the individual as an individual because it requires a denial of the self and represents the ultimate submission of the individual—submission of mind.[73]

Thus, individuals unwillingly face an internal conflict between their own beliefs and those of the state, thereby losing the right to hold opinions in the quiet of their minds. Accordingly, the Supreme Court has carefully scrutinized regulations that invade freedom of mind.

West Virginia State Board of Education v. Barnette contains a forceful defense of freedom of mind.[74] In *Barnette*, the Court held that the West Virginia School Board could not compel students, under threat of expulsion,[75] to salute the United States flag or recite the Pledge of Allegiance.[76] The plaintiffs, practicing Jehovah's Witnesses, had refused to comply with the Board's resolution, claiming that saluting the flag and reciting the Pledge violated their faith's prohibition against bowing to graven images.[77] According to the Court, the students' choice not to participate was based on their "right of self-determination in matters that touch individual opinion and personal attitude."[78] Writing for the Court, Justice Jackson stated, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[79] Thus, requiring students to participate in a ceremony contrary to their personal beliefs deprived the students of their right to exercise autonomy over their minds.[80]

2. The Traceability Test: Protecting Autonomy Over One's Image

The traceability test protects an individual's interest in determining how he will represent himself to others.[81] Trace-

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73. Gaebler, *supra* note 60, at 1005.
74. 319 U.S. 624, 642 (1943).
75. *See id.* at 629.
76. *See id.* at 642.
77. *See id.* at 629.
78. *Id.* at 631.
79. *Id.* at 642.
80. *See id.*
81. *See* Gaebler, *supra* note 60, at 1005; *see also* Shelton v. Tucker, 364 U.S. 479, 485-86 (1960) (holding that teachers could not be compelled to disclose their organizational affiliations because disclosure would "impair that teacher's right of free association, a right closely allied to freedom of speech

ability analysis asks whether a third party will interpret the coerced speech as an expression of the individual's personal beliefs.[82] Since an individual's public speech defines how others perceive him, imputing speech to the individual deprives him of autonomy over his public image. Consequently, he may have to affirmatively represent himself to the world in a different light.[83]

The Court analyzes this interest on a case-by-case basis, and the strength of the connection between the message and the speaker bears on the Court's determination of the magnitude of the violation. The Court is more likely to find a constitutional violation if the message appears to come directly from the coerced speaker.[84] Conversely, the Court is less likely to find a violation when the connection between the coerced speaker and the message is comparatively remote.[85] The Court's traceability analysis demonstrates that varying degrees of proximity between the speaker and the message affect its treatment of coerced speech cases.

In *Wooley v. Maynard*, the Court's application of the traceability test led it to find an impermissible link between the message and the coerced speakers.[86] The plaintiffs in *Wooley*

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and a right which, like free speech, lies at the foundation of a free society").

82. *See* Gaebler, *supra* note 60, at 1005.

83. Coerced speech denies an individual the right to shape his public persona:

> If compelled expression is perceived as sincere it communicates either the individual's true views or alternatively, and perhaps even worse, a misimpression of the individual's views .... When one is thus deprived of the right to remain silent the essence of the injury to individual negative first amendment interests is the deprivation of the individual's freedom to decide how he will present himself to the world.

Id.; *see also* Brudney, *supra* note 72, at 15 n.38 (providing an additional example of the right to tailor one's public image).

84. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 575 (1995) (finding that third persons could associate the message of parade participants with the beliefs of parade organizers); Wooley v. Maynard, 430 U.S. 705, 717 n.15 (1977) (finding that third persons could associate a state motto on a license plate with the owner of the car); *cf.* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 15-16 (1986) (holding that a private electric company did not have to allow a private group access to its billing envelopes because the electric company could be associated with a message with which it disagreed).

85. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (concluding that third persons would not trace the views of protestors in a public mall to the mall owner).

86. *See* 430 U.S. at 717.

were practicing Jehovah's Witnesses who refused to comply with a New Hampshire regulation requiring car owners to display the state motto, "Live Free or Die," on their license plates.[87] The Court reasoned that because third parties could reasonably connect car owners with messages on their license plates,[88] the regulation denied the Maynards the right to control the image they presented to the public.[89] Consequently, the Maynards appeared as willing draftees in the dissemination of an ideological message with which they disagreed.[90] Thus, the Court ruled that New Hampshire could not require its citizens to display the motto on their license plates.[91]

In *Wooley*, the Court explicitly recognized that violations of negative First Amendment rights are matters of degree.[92] For instance, an individual would not be allowed to object to the presence of the United States' motto, "In God We Trust," on currency since currency "passe[s] from hand to hand" and is not associated with single individuals.[93] However, the Court found that cars, unlike currency, are associated with their owners, and outsiders could attribute the motto's message to the Maynards.[94] Nevertheless, Justice Rehnquist proposed in his dissent that the Maynards could attach a bumper sticker to their car that explained their disagreement with the state motto.[95]

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87. The Maynards objected to the motto on political and religious grounds. *See id.* at 707. George Maynard explained that "Jehovah's Kingdom . . . offers everlasting life" and that "[i]t would be contrary to that belief to give up [his] life for the state, even if it meant living in bondage." *Id.* at 707 n.2.

88. *See id.* at 715.

89. *See id.* at 717.

90. "Dissemination" accurately characterizes the state's purpose behind the requirement, and the Court noted that this requirement had the "express purpose that [the motto] be observed and read by the public." *Id.* at 713. The Court also noted the ideological nature of the motto. *See id.* Mr. Maynard stated that he "refuse[d] to be coerced by the State into advertising a slogan which [he found] morally, ethically, religiously and politically abhorrent." *Id.* (citation omitted).

91. *See id.* at 713, 717.

92. The Court implicitly recognized that some links between speakers and messages are so tenuous that third parties will not attribute the coerced speech to the speaker. *See id.* at 715. This recognition did not control in *Wooley* because the Court found a sufficiently close connection between the message and the Maynards' autonomy to trigger First Amendment protections. *See id.* at 717.

93. *See id.* at 717 n.15.

94. *See id.*

95. *See id.* at 722 (Rehnquist, J., dissenting). Thus, Justice Rehnquist

The Court applied the same traceability analysis in *Prune-Yard Shopping Center v. Robins* as it did in *Wooley*, but reached the opposite conclusion.[96] *PruneYard* held that a private mall owner could not constitutionally prohibit all "publicly expressive activity, including the circulation of petitions, that is not directly related to commercial purposes."[97] Plaintiffs, a group of high school students, had set up a table in the mall courtyard to distribute literature and obtain petition signatures in an effort to oppose a United Nations' Zionism resolution.[98] In striking the prohibition, the Court reasoned that it was unlikely third persons would connect the views of mall protestors with those of the owner.[99] In this case, the alleged link between the owner and the students' message did not exist because the mall was "open to the public to come and go as they please."[100] Moreover, *PruneYard* involved no government-prescribed message, thus eliminating the concern in *Wooley* that the government was discriminating in favor of a particular viewpoint.[101] The mall owner could post signs that "disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law."[102]

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, the Court also used traceability analysis to find an impermissible nexus between the objectionable speech and the coerced messenger.[103] *Hurley* asked whether Massachusetts could use its public accommodations law to force the South Boston Allied War Veterans Council (Council) to include the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) in its annual St. Patrick's Day-Evacuation Day Parade.[104] A unanimous Court found that parade viewers would associate the ideologies of the marchers with the parade organizers.[105]

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concluded that the regulation did not implicate First Amendment concerns because the Maynards retained autonomy over their speech. *See id.*

96. 447 U.S. 74, 88 (1980).

97. *Id.* at 77.

98. *See id.*

99. *See id.* at 87.

100. *Id.*

101. *See id.*

102. *Id.* The merits of this solution depend on the facts of the individual case.

103. 515 U.S. 557, 575, 581 (1995).

104. *See id.* at 561.

105. *See id.* at 572-73.

Justice Souter explained that "every participating unit affects the message conveyed by the private organizers,"[106] and that GLIB's presence in the parade could reasonably lead parade viewers to conclude that the Council thought GLIB's "message was worthy of presentation and quite possibly of support as well."[107] Consequently, it allowed the Council to exclude GLIB from its parade.[108]

3. The Court's Application of the Ends-Means Balancing Test to Coerced Speech Cases

In addition to applying the freedom of conscience and traceability tests, the Court will also evaluate a negative free speech regulation by balancing the state's interests in regulating speech against individuals' free speech rights.[109] The Court subjects negative free speech violations to a type of heightened scrutiny requiring that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[110] This language does not set forth a clear standard of review, but seems to indicate that negative free speech violations must at least be narrowly tailored to meet a legitimate state goal. The requirement of narrow tailoring illustrates the relatively high value the Court places on negative free speech rights, because neither commercial speech[111] nor time, place, or manner restrictions[112] trigger such a requirement. Thus, if a regulation serves a valid state objective and imposes only a slight infringement on negative free speech rights, the Court will likely uphold the regula-

106. *Id.* at 572.

107. *Id.* at 575.

108. *See id.* at 581.

109. The *Wooley* Court determined that negative First Amendment analysis extends past the mere realization that a government regulation infringes upon negative free speech rights. *See* Wooley v. Maynard, 430 U.S. 705, 716 (1977). The Court continued its analysis to "determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates." *Id.*

110. *Id.* (citing Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

111. *See, e.g.*, Board of Trustees v. Fox, 492 U.S. 469, 477, 480-81 (1989) (holding that commercial speech laws need not be the least restrictive means of furthering the government's interest in regulating such speech).

112. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (establishing that time, place and manner restrictions "need not be the least restrictive or least intrusive means" of furthering the government's interest in regulation).

tion. Conversely, a major imposition or an illegitimate purpose will not pass constitutional scrutiny.

Barnette, *Wooley*, and *Hurley* all failed the ends-means balancing test. The *Barnette* Court concluded that the asserted state interests of "teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government" did not justify compelling students to recite the Pledge.[113] The Court relied on affirmative First Amendment law, holding that states could restrict free expression only if a "clear and present danger" existed.[114] Significantly, the Court determined that the government must present even stronger interests to justify infringing negative free speech rights than affirmative free speech rights.[115] The Court did not establish a clear standard to determine when circumstances warranted infringement of an individual's negative First Amendment rights, however.[116]

Although the infringement of negative free speech rights in *Wooley*, displaying a motto on a license plate, was less severe than the required recitation of the Pledge of Allegiance in *Barnette*, *Wooley* shared *Barnette*'s fate under the balancing test.[117] The Court weighed the state interest in vehicle identification against the Maynards' free speech rights and found that the motto requirement did not further the goal of vehicle identification because passenger vehicle license plates already bore distinct number and letter patterns.[118] Furthermore, New Hampshire's interest in fostering "appreciation of history, state pride, and individualism" did not justify the regulation, because "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such [a] message."[119]

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113. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 625 (1943).

114. *See id.* at 633.

115. *See id.* (reasoning that "[i]t would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence").

116. *See id.* at 642 (holding that no circumstances exist that would justify a governmental decree of "what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein").

117. *See* Wooley v. Maynard, 430 U.S. 705, 715-17 (1977).

118. *See id.* at 716.

119. *Id.* at 717.

The *Hurley* decision also placed more value on negative First Amendment rights than on the objectives behind Massachusetts' anti-discrimination law.[120] The Massachusetts legislature designed the anti-discrimination statute as a means of ensuring equal access to public accommodations for gays and lesbians.[121] The application of the anti-discrimination statute to expressive activity had the practical effect of "requir[ing] speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own."[122] Thus, the state interest in applying the statute to expressive activity required citizens to modify their political speech. The Court found this interest uncompelling because it deprived the Council of autonomy over its speech.[123] In fact, Justice Souter, writing for the court, hypothesized that an additional justification for applying the statute to private expressive activity existed: to eliminate bias toward gays and lesbians.[124] Souter, however, dismissed this interest as "decidedly fatal":[125]

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.[126]

Thus, *Hurley* failed the balancing test on all grounds, and states cannot require individuals to modify their speech for the purpose of eliminating biases deemed politically incorrect.[127]

The Court has, however, upheld some regulations found to further compelling state interests. For instance, in *Abood v. Detroit Board of Education*, the Court found a compelling state interest in maintaining labor peace.[128] The case involved a bal-

120. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 580-81 (1995).

121. *See id.* at 578.

122. *Id.*

123. *See id.* (stating that requiring citizens to modify their speech "allow[s] exactly what the general rule of speaker's autonomy forbids").

124. *See id.* at 578-79.

125. *Id.* at 579.

126. *Id.* (citations omitted).

127. *See id.* at 578-79.

128. *See* 431 U.S. 209, 231 (1977) (noting that "[t]here can be no quarrel

ancing of negative free speech rights and smooth labor relations with a teachers' union.[129] The Detroit Federation of Teachers, the exclusive representative of Detroit teachers' interests,[130] required mandatory dues payments to fund collective bargaining and other activities.[131] The plaintiffs objected to the union's use of their fees for collective bargaining and other ideological purposes.[132] The Court found that collective bargaining implicates First Amendment interests because employees might disagree with the ideological positions of the union's negotiators.[133] For example, a pro-life teacher's abortion position might not comport with that of the union negotiators.[134] Despite this infringement on negative free speech rights, the Court ruled that the union could constitutionally compel teachers to fund its collective bargaining activities because promoting collective bargaining is a valid state interest.[135] *Abood* still protected free speech rights because it distinguished between two types of forced funding: constitutional funding for collective bargaining activities and unconstitutional funding for ideological activities unrelated to collective bargaining.[136] In turn, the Court ruled that funding for ideological activities was only acceptable if the activities related to collective bargaining purposes.[137]

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with the truism that because public employee unions attempt to influence governmental policymaking, their activities—and the views of members who disagree with them—may be properly termed political"). Although the Court recognized the political nature of collective bargaining, it still required members to pay union dues for collective bargaining purposes. *See id.* at 236-37.

129. *See id.* at 233-37.

130. *See id.* at 211-12.

131. Teachers who failed to join the union within 60 days of being hired were required to pay the union a service charge equal to the amount of union dues. *See id.* at 212.

132. *See id.* at 213.

133. *See id.* at 222.

134. *See id.* Justice Stewart wrote that "[t]o be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." *Id.*

135. *See id.* at 225-26. The Union's exclusive representation of teachers' interests expedited collective bargaining and avoided the confusion of varying employment contracts. *See id.* at 220, 224. In addition, the Court found that those who did not pay dues, but still received the benefits of collective bargaining, could not "freeload" off of those who contributed. *See id.* at 222.

136. *See id.* at 236-37.

137. *See id.* at 235.

The Court reasoned that the union's status as the exclusive representative of teachers' interests simplified collective bargaining issues. Maintaining the status quo avoided the problem of varying teacher employment contracts.[138] Moreover, the mandatory dues system prevented the "free rider" problem.[139] The Court defined "free riders" in the context of unions in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks* as "employees who obtain[] the benefit of the union's participation [in activities on their behalf] without financially supporting the union."[140] In other words, a "free rider" problem arises when union members receive the benefits of collective bargaining, such as higher salaries, without paying for the collective bargaining activities that made these benefits possible. Failure to pay union dues effectively amounts to "freeloading" off of one's paying colleagues.

In *Keller v. State Bar*, the Court applied *Abood*'s free rider analysis.[141] Members of the California Bar sued the organization, claiming it used mandatory dues to fund political and ideological speech,[142] objecting mainly to the bar's public support for gun control and nuclear freeze plans.[143] The Court determined that the bar could collect dues to avoid the free rider problem, because all members benefited from the bar's standards for attorney discipline and admittance to practice.[144] The bar could not, however, use dues for ideological or political purposes unrelated to the improvement of the State's legal services or the regulation of the legal profession.[145] Thus, under *Keller*, forced funding of ideological speech unrelated to legitimate bar functions violates the First Amendment. Although *Abood* and *Keller* both involved forced financial support of ideological mes-

138. *See id.* at 220.

139. *See id.*

140. 466 U.S. 435, 446 (1986).

141. 496 U.S. 1, 12 (1990).

142. *See id.* at 4.

143. The California Bar used member dues to fund speech targeting a wide array of controversial political issues. *See id.* at 5 n.2.

144. *See id.* at 12-14.

145. *See id.* at 14 (citing Lathrop v. Donohue, 367 U.S. 820, 843 (1961) (plurality opinion)). Questions persist, however, regarding which activities are ideological and which activities are not. *See id.* at 15. *Keller* concretely establishes the "germaneness/relatedness" test as a means of determining which activities private organizations may fund with mandatory dues. *See id.* at 13-14. The Court held that "disciplining members of the Bar or proposing ethical codes for the profession" were constitutional uses of mandatory dues, but the promotion of gun control and nuclear freeze initiatives were not. *Id.* at 16.

sages, First Amendment violations can also exist in other circumstances.

D. THE CAPTIVE AUDIENCE PROBLEM

Just as there is no right to compel an individual to fund another's ideological speech, there is no right to compel an individual to listen to another's ideological speech.[146] The Supreme Court has allowed restrictions of affirmative expression if the intended audience is "captive," or has no way to avoid hearing a potentially objectionable message.[147]

The Court is therefore less likely to protect speech that audiences cannot avoid. For example, in *Frisby v. Schultz*, the Court barred pro-life demonstrators from protesting outside a particular abortion provider's residence on the grounds that the doctor's home was a sanctuary.[148] It found that "a special benefit of privacy all citizens enjoy within their own walls . . . is an ability to avoid intrusions," and that "[o]ne aspect of residential privacy is protection of the unwilling listener."[149] Similarly, in *Madsen v. Women's Health Center, Inc.*, the Court restricted the methods of communication available to pro-life protestors who stationed themselves outside abortion facilities.[150] The Court allowed the protestors to display pictures because those inside the facility could close the drapes and avoid the message.[151] On the other hand, the Court restricted the protestors' noise level because those inside the facility could not avoid the protestors' sounds.[152]

In contrast, if an unwilling listener can avoid receiving the message, the regulation will not be upheld. For instance, in *Cohen v. California*, the Court held that the petitioner's display of potentially offensive words regarding the United States draft constituted protected speech because those around him could avoid the message simply by averting their eyes.[153] The Court

146. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (holding that political candidates did not have a constitutional right to advertise on streetcars because passengers are a captive audience to such political campaign literature).

147. *See id.* at 302.

148. 487 U.S. 474, 484, 488 (1988).

149. *Id.* at 484-85.

150. 512 U.S. 753, 776 (1994).

151. *See id.* at 773.

152. *See id.*

153. 403 U.S. 15, 21-22 (1971).

reached the same result in *Erznoznik v. City of Jacksonville*, ruling that a drive-in movie theater could show nude pictures because passing motorists could avert their eyes and thereby avoid viewing the pictures.[154] Finally, in *Bolger v. Youngs Drug Products Corp.*, the Court held that individuals who found the appellee's mailings about contraceptives offensive could simply throw them in a garbage can.[155]

An individual must, however, have a realistic chance to avoid receiving the message. For example, proposing that students who do not want to listen to religious invocations at their graduation ceremonies simply not attend permits avoidance of the message only at a great personal cost and is therefore contrary to First Amendment protections.[156] In *Lee v. Weisman*, a student's father sought to prevent the school board from conducting a religious invocation at his daughter's high school graduation because he felt she should not be forced to listen to the prayer.[157] The school district contended that students could avoid the prayer because district regulations did not require attendance at graduation ceremonies.[158] The Court noted that the attendance rule did not provide the student with a genuine opportunity to avoid what she considered objectionable speech, concluding "[e]veryone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point."[159] In sum, one who chooses to avoid a particular message cannot be deprived of some greater benefit or suffer unduly as a result of exercising autonomy over speech. Such a result violates the First Amendment.[160]

154. 422 U.S. 205, 212 (1975).

155. 463 U.S. 60, 72 (1983).

156. *See* Lee v. Weisman, 505 U.S. 577, 586, 594-95 (1992). Although the Court decided the case on Establishment Clause grounds, it noted that the safeguards for religion in the First Amendment "embrace[] a freedom of conscience . . . that has close parallels in the speech provisions of the First Amendment . . . ." *Id.* at 591.

157. *See id.* at 581, 584.

158. *See id.* at 594-95.

159. *Id.* at 595.

160. *See id.* at 595-96.

II. THE ELIMINATION OF BIAS REQUIREMENT VIOLATES LAWYERS' FIRST AMENDMENT RIGHTS AND IS NOT NARROWLY TAILORED TO A COMPELLING GOVERNMENT INTEREST

The Minnesota CLE elimination of bias requirement raises a number of First Amendment concerns. The ideological nature of race and sexual orientation issues, the captive audience situation, and the dubious statistical underpinnings of the asserted state interest indicate that any type of judicial review will at least find that the elimination of bias requirement implicates First Amendment issues. Whether a reviewing court will find a constitutional violation depends on how it views the magnitude of the violation and how compelling it finds the state interests.

This Note argues that the elimination of bias requirement is unconstitutional because it seriously interferes with individual free speech rights and is not narrowly tailored to further the asserted state interests. This Note will evaluate the requirement according to the Supreme Court's methods of analyzing negative free speech cases. It will address freedom of conscience, freedom of association, and the ends-means balancing test separately, concluding that the elimination of bias requirement fails each of these tests.

A. THE ELIMINATION OF BIAS RULE MUST BE JUDGED ON ITS FACE, NOT ITS IMPLEMENTATION

The seemingly benign implementation of the elimination of bias rule belies the deeper dangers inherent in government regulation that targets private attitudes. The rule allows government regulation of private opinion from a particular viewpoint and is therefore facially invalid, regardless of how it is implemented.

The argument that the elimination of bias courses do not target private attitudes is correct but incomplete. The elimination of bias seminars present workshop-type sessions in which facilitators encourage attendees to treat their colleagues with respect.[161] For example, co-workers should not avoid each

161. *See* Videotape: Eliminating Bias: Why Bother (Minnesota Continuing Legal Education & David Hunt 1998) (on file with Minnesota Continuing Legal Education). In this video of an elimination of bias CLE, attorney and private diversity trainer David Hunt prefaces his presentation with a caveat that the term "elimination of bias" is a misnomer, and that it is unrealistic to ex-

other at the office and should not unduly criticize each others' mistakes.[162] Proponents of the rule would be correct in asserting that as thus far implemented, many of the elimination of bias seminars are little more than training in manners and etiquette.

Training in etiquette and common courtesy, however, is not the outer limit of what the rule allows. If the rule's authors merely desired that lawyers attend courses about manners and civility, it seems odd that they would name the program "elimination of bias." The program's name, along with its express goal of educating attorneys about the "elimination of bias or prejudice in the legal profession,"[163] show that the rule allows seminars to attempt to change personal attitudes. The videotaped courses are not particularly objectionable, but they barely tap into the more objectionable resources of the race and sexual orientation reports. The agenda and course materials of the October 26, 1999 elimination of bias course, entitled "Homophobia and Sexual Orientation Issues in the Workplace," demonstrate that other courses do draw on these questionable reports.[164]

Elimination of personal bias has been declared a suspect government interest. The *Hurley* Court ruled that in the context of free expression, elimination of personal bias could never be a legitimate state interest.[165] The analysis undertaken by the Supreme Court in *Hurley* applies to the elimination of bias requirement because attending classes is expressive activity in that it facilitates Board-approved speech.[166] The Court characterized parades as expressive activities because they promulgate messages.[167] If no one watches a parade, the parade is

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pect all biases to be eliminated. *See id.* He adds the caveat that people will walk out of the seminar with their biases intact. *See id.*

162. *See id.*

163. Bias Order, *supra* note 1, at 7.

164. *See generally* Robert W. Sykora, *Homophobia and Sexual Orientation Issues in the Workplace* (on file with author) (including excerpts from the sexual orientation report in the CLE course materials); SEXUAL ORIENTATION REPORT, *supra* note 7. The course materials encouraged law firms to require employees to view *Inside Out*, *supra* note 30. *See* Sykora, *supra*, at 6.

165. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 578-79 (1995). *Hurley* held that a private group of parade organizers could not be compelled to include a gay and lesbian group in their parade. *See id.* at 580-81.

166. Facilitation of speech can be considered expressive activity. *See* Kamenshine, *supra* note 56, at 102.

167. *See Hurley*, 515 U.S. at 568-69.

pointless. If no one attends a political candidate's campaign speech, the candidate might as well go home without saying a word. Likewise, if no one attends elimination of bias seminars, the State will be unable to communicate its message. Just as the government cannot compel individuals to facilitate a group's communication by watching its parade, the State cannot compel lawyers to facilitate its speech by listening to elimination of bias seminars. The elimination of bias requirement is unconstitutional on its face because its objective is to influence lawyers' private biases and prejudices, areas that are not subject to governmental regulation.

The elimination of bias rule allows not only regulation of private opinion but also regulation from a particular viewpoint, which creates an additional First Amendment problem.[168] The Board decides which elimination of bias courses to accredit. If the Board's decisions were viewpoint-neutral, it would have to approve courses dedicated to the *furtherance* of bias in the legal system.[169] It is highly unlikely that the Board would accredit an elimination of bias course that promoted private biases.[170] For example, the course materials from an elimination of bias CLE about "homophobia" in the workplace advocate that firms encourage employees to write about sexual orientation issues.[171] A viewpoint-neutral interpretation of this suggestion would allow lawyers to write about such issues from the perspective that same-sex sexual behavior is "wrong," but this re-

168. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391-92 (1992) (striking a viewpoint-based regulation of speech); *cf.* Board of Regents of the Univ. of Wis. System v. Southworth, 120 S. Ct. 1346, 1349 (2000) (holding that "the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle"); Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 829 (1995) ("[W]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." (citations omitted)).

169. *See* Appellants' Reply Brief at 18-19, Greenberg v. State Bar, 92 Cal. Rptr. 2d 493 (Ct. App. 2000) (No. 682931-9).

170. The single instance in which the Board approved the Minnesota Family Council's June 29, 1999 elimination of bias seminar is insufficient to support a possible claim of viewpoint-neutrality for the Board. *See Bias in the Legal Profession? What Bias?*, 5 PRO-FAMILY NEWS (Minnesota Family Council, St. Anthony, MN), June 1999 (noting the seminar and listing among included faculty Tom Pritchard of the Minnesota Family Council, Roger Magnuson of Dorsey and Whitney, and Greg Pulles and Scott Johnson, both of TCF Corp.); *see also infra* notes 176-77.

171. *See generally* Sykora, *supra* note 164.

sult would be inconsistent with the express purpose of the elimination of bias rule.

A hidden constitutional danger lies in the fact that the Board has unchecked authority to pick and choose which courses to accredit. Such discretion is constitutionally relevant because the Supreme Court has consistently held that making "the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official" is unconstitutional.[172] In *Kunz v. New York*, the Court ruled that the New York City Police Commissioner's sole discretion to grant or deny permits for public religious gatherings operated as an unconstitutional prior restraint on free speech.[173] In *Shuttlesworth v. City of Birmingham*, the Court held that giving the Birmingham City Commission "unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration'" amounted to an unconstitutional prior restraint.[174] Also, in *Saia v. New York*, the Court determined that requiring individuals to obtain permits from the police chief in order to use amplifiers also constituted a prior restraint.[175] These rulings apply to the situation at hand because the Board has full discretion to determine the viewpoints of the ideological messages attorneys must listen to in order to retain their licenses to practice law. Thus, Minnesota lawyers may suffer freedom of conscience and freedom of association violations at the will of an administrative body.

The alternative to allowing the Board discretion to accredit courses is directing the Board to "rubber stamp" all proposed elimination of bias courses. If the Board blindly approved all elimination of bias courses from both sides of the ideological spectrum, however, lawyers would attend seminars that reinforced their own viewpoints, thwarting the rule's purpose. The Minnesota Family Council's course provided just such an instance.[176] As Peter Swanson observes, "[i]n order to change attitudes, the Board of Continuing Legal Education would have to ascertain each attorney's bias and send him or her to the appropriate diversity trainer."[177] This approach would render the

172. Staub v. City of Baxley, 355 U.S. 313, 322 (1958).

173. 340 U.S. 290, 290-91, 293 (1951).

174. 394 U.S. 147, 150-51 (1969).

175. 334 U.S. 558, 560 (1948).

176. *See* Bias in the Legal Profession, *supra* note 16.

177. Statement of Peter A. Swanson at 6, *In re* Amendment of Rules for Continuing Legal Education of Members of the Bar (1995) (C2-84-2163) (on

entire elimination of bias program unworkable. It would not only create an administrative nightmare, but also provoke strong disapproval—the State would need to classify lawyers according to their private biases and send them to the "appropriate" seminars. The Board will necessarily violate lawyers' First Amendment rights no matter how it implements the elimination of bias rule. The Board can either make the rule so effective that it suffocates freedom of conscience, or so dilute the rule that it loses all coherent criteria. Either approach is defective under the First Amendment.

The arguments directed toward the rule's implementation are not tenable because they avoid confronting the rule itself. The unobjectionable nature of a handful of seminars and the approval of a solitary course criticizing the rule do not make the rule constitutional. The fact remains that the status quo allows the Board to approve courses designed to change lawyers' attitudes regarding important social issues.

B. THE ELIMINATION OF BIAS REQUIREMENT VIOLATES LAWYERS' FREEDOMS OF CONSCIENCE AND ASSOCIATION

1. Freedom of Conscience

The elimination of bias rule violates lawyers' freedom of conscience because it allows the State to prescribe "acceptable" attitudes regarding controversial social issues and compels lawyers to listen to these prescriptions. State prescription of particular viewpoints is a violation of freedom of conscience in and of itself,[178] whereas neither coerced affirmation of a belief nor actual agreement with a belief are essential elements of freedom of conscience violations.[179] For instance, it was uncertain in *Barnette* whether the flag salute ceremony required the students to change their views, or whether the students could simply perform the ritual while retaining their opinions.[180] In other words, the Supreme Court realized that reciting the Pledge would not necessarily change the students' views about the flag.[181] Thus, even though the students in *Barnette* had the

file with author).

178. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the school board could not compel objecting Jehovah's Witnesses to salute the United States flag).

179. *See id.*

180. *See id.* at 633.

181. *See id.*

freedom to remain unconvinced, the Court still upheld their negative free speech rights.[182] Likewise, although lawyers need only attend seminars and need not agree with the ideas the seminars express,[183] they still suffer freedom of conscience violations due to the government prescription of orthodox views.[184]

Furthermore, the Court has struck down regulations as violations of freedom of conscience even though the objecting individual did not have to utter potentially objectionable speech. For example, in *Lee v. Weisman*, the student only objected to having to listen to an invocation at her graduation ceremony.[185] The Court rejected that requirement, even though the school did not compel the student body to join the recitation of the prayer.[186] Thus, neither required recitation of objectionable speech nor required adoption of an objectionable idea are prerequisites for freedom of conscience violations. The mere existence of government prescription of "correct" attitudes violates lawyers' First Amendment rights.[187]

The right to conscience extends beyond matters of religious faith to encompass matters of personal opinion. For example, although the coercion in *Barnette* dealt with personal religious issues, the Court broadened its holding to recognize that individuals who did not share the plaintiffs' faith could also raise legitimate objections to required participation in the ceremony.[188] Freedom of conscience necessarily encompasses the subordinate right of basing one's opinions on any foundation.[189] An individual lawyer may therefore object to elimination of bias training on any freedom of conscience grounds; objections need not stem solely from an individual's religious beliefs.[190] Mat-

182. *See id.* at 633-34.

183. *See* Bias Order, *supra* note 1, at 7. The learning goals do not state that the lawyers must agree with the ideas presented at the seminars. *See id.*

184. *See Barnette*, 319 U.S. at 642.

185. 505 U.S. 577, 584 (1992).

186. *See id.*

187. *See Barnette*, 319 U.S. at 642.

188. *See id.* at 634.

189. The standard for determining whether an individual's freedom of conscience has been violated is subjective. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 574-75 (1995) (accepting as constitutionally sufficient the Council's reasons for excluding the homosexual group from the parade).

190. *See Barnette*, 319 U.S. at 634-35.

ters of personal opinion are sufficient to trigger First Amendment violations.[191]

The First Amendment violations of the elimination of bias rule are compounded by the fact that the seminars make lawyers a captive audience to Board-approved speech. Lawyers may only take approved elimination of bias courses and can only avoid the courses at great personal cost.[192] Granted, individuals receive constant exposure to diverse messages simply by virtue of venturing out in public and cannot claim violations of constitutional rights every time they see or hear something they find objectionable. As the Court reasoned in *Erznoznik*, "[t]he plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.'"[193] Lawyers do not find themselves at elimination of bias seminars by chance, however. Rather, they attend elimination of bias seminars because they need to keep their licenses to practice law.[194] Thus, the rule's constitutionality is questionable because lawyers have no realistic option to avoid the training.

2. Freedom of Association

The elimination of bias requirement violates lawyers' freedom of association because third parties may link Board-approved ideas with individual lawyers, thereby denying lawyers the right to represent themselves to the world in the man-

191. *See id.* at 642.

192. The Court's line of patronage cases presents some analogous situations. The Court has held that individuals cannot be deprived of their jobs for holding political opinions contrary to those of a certain party. *See* Elrod v. Burns, 427 U.S. 347, 355 (1976) (holding that public employees could not be threatened with the loss of their jobs for not espousing the views of the Democratic Party, noting that "[t]he cost of the practice of patronage is the restraint it places on freedoms of belief and association," and that "[t]he financial and campaign assistance that [the employee] is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs"); *cf.* Rutan v. Republican Party, 497 U.S. 62, 74 (1990) (finding that stagnant wages and decreased job satisfaction as a result of maintaining one's political beliefs are "significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment").

193. Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1974) (quoting Rowan v. Post Office Dep't, 397 U.S. 728, 736 (1970)).

194. The elimination of bias requirement is mandatory. *See* Bias Order, *supra* note 1, at 1-3 (citing the minimum requirements for CLE courses).

ner they desire. Lawyers are then left without any viable means to correct this misperception.

The Supreme Court's distinction in *Keller* between union dues and tax dollars illustrates why third parties might reasonably attribute Board-approved speech to lawyers, thus denying lawyers control of their public personas. The *Keller* Court ruled that California lawyers could opt out of funding their bar's political and ideological speech,[195] noting that the California Bar resembled a labor union rather than an elected government.[196] This distinction is important because the government serves the entire population.[197] Government speech funded by tax dollars is unlikely to be attributed to taxpayers because the government serves people as a whole.[198] Because labor unions serve narrow segments of the population, however, third parties will be more likely to attribute their speech to union members.[199] In *Keller*, the Court solved this problem

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195. *See* Keller v. State Bar, 496 U.S. 1, 14 (1990).

196. As the unanimous Court explained:

> The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as "governmental agencies." Its principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors. Only lawyers admitted to practice in the State of California are members of the State Bar, and all 122,000 lawyers admitted to practice in the State must be members.

Id. at 11. The Court also held that the State Bar of California had "very specialized characteristics." *Id.* at 12.

197. *See id.* at 11.

198. The dues paid to bar associations are not "homogenized" the way government taxes are. *See* Brudney, *supra* note 72, at 16. Similarly, the PruneYard mall was open to the general public. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 89 (1980).

199. In his concurrence in *Abood*, Justice Powell argued that members of private organizations had the constitutional right to refuse to pay dues which funded activities they considered objectionable:

> Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring), *cited in* James B. Lake, *Lawyers, Please Check Your First Amendment Rights at the Bar: The Problem of State-Mandated Bar Dues and Compelled Speech*, 50 WASH. & LEE L. REV. 1833, 1857 n.185 (1993). *But cf.* Bates

by allowing lawyers to refuse to pay dues to bar associations when the dues fund ideological activities unrelated to the regulation or improvement of legal services in the state.[200] Although no financial issues exist in the controversy surrounding the elimination of bias requirement, the comparison with *Keller* applies in the present case because the Minnesota court's order resembles the actions of the California Bar rather than those of an elected government. The narrower the organization, the more likely its speech will be attributed to its members. Third parties might attribute Board-approved speech to lawyers because the Board exclusively controls elimination of bias seminars.

In addition, the characteristics of the elimination of bias requirement demonstrate that the public is likely to attribute Board-approved speech to Minnesota lawyers. In *Keller*, the bar's most objectionable activities were lobbying and publicly supporting certain controversial initiatives.[201] The bar did not encourage lawyers to agree with its positions. Instead of compelling lawyers to attend classes directing them to support nuclear freezes and gun control, the California Bar merely required lawyers to fund its speech in favor of these initiatives.[202] The elimination of bias rule, on the other hand, not only compels lawyers' physical presence at sessions for the purpose of expressing approved views, it also encourages lawyers to agree with these views.[203] When a group that represents a narrow segment of the population tells its members what to think, its speech is reasonably attributable to those members.[204] This attribution results in lawyers losing their right to tailor their public images as they see fit.

The connection between Board-approved speech and individual lawyers is as strong as other connections the Court has found between coerced speakers and perceived objectionable messages. For example, even though all New Hampshire drivers had to display the state motto on their license plates, the

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v. State Bar, 433 U.S. 350, 369-72 (1977) (invalidating a rule prohibiting attorney advertising, reasoning that the advertising would not negatively affect the quality of legal services or attorney professionalism).

200. *See Keller*, 496 U.S. at 14.

201. *See id.* at 5-6 n.2.

202. *See id.* at 5.

203. *See supra* notes 168-71 and accompanying text.

204. *See Keller*, 496 U.S. at 11; *see also Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring).

Wooley Court still considered the motto traceable to each individual driver.[205] Likewise, third parties may attribute Board-approved speech to individual lawyers even though the requirement does not single out certain lawyers as being in particular need of having their biases eliminated. In *Keller*, the Court found that California lawyers could refuse to fund their bar's non-germane, ideological speech despite the fact that the general public was likely unaware of the bar's activities.[206] A general lack of public awareness about the elimination of bias requirement does not remove the danger of another lawyer attributing Board-sanctioned opinions to an associate who attended a seminar. Similarly, a prospective client could request that a lawyer provide a list of professional development activities he has attended and could thereby discover that the lawyer attended an elimination of bias session. The client could then attribute Board-approved views to the lawyer, consequently putting the lawyer in the position of having to correct the client's understandable misperception.

Lawyers who lose control over their public images have two avenues of recourse: remain silent, or publicly disavow the elimination of bias training. Neither option will restore autonomy to lawyers. The choice to remain silent undermines autonomy over speech because the public has already attributed the bar's speech to its members.[207] Failure to correct the misrepresentation will perpetuate it, thus depriving lawyers of the right to represent themselves to the world.[208] Disavowal is

205. *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977).

206. *See Keller*, 496 U.S. at 17.

207. "Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'. . . ." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

208. The concurring justices in *PruneYard* would likely agree with this point. In his opinion, Justice Powell, joined by Justice White, argued that "[t]o require a landowner to supply a forum for causes he finds objectionable also might be an unacceptable 'compelled subsidization' in some circumstances." PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 98 n.2 (1980) (Powell, J., concurring) (citing *Abood*, 431 U.S. at 237). Powell's and White's concurrence highlights the connection between freedom of association analysis and freedom of conscience analysis—to avoid association with a message, an individual must disavow it. The act of disavowal, however, deprives the individual of the opportunity to exercise the right not to speak:

> The property owner or proprietor would be faced with a choice: he either could permit his customers to receive a mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he has been forced to speak when he would pre-

not an appropriate solution because it is *itself* coerced speech.[209] An individual must disavow the message out of necessity, not free will.[210] The disavowal of elimination of bias training has negative consequences for attorneys because it places them in the vulnerable position of having others know their personal opinions when they would rather have kept them private.[211]

Although the *PruneYard* Court held that disavowal was an appropriate remedy,[212] *PruneYard* is a fact-driven case that does not apply to this situation. A mall such as the one in *PruneYard* is similar to an elected government in that both "represent" the public as a whole.[213] The government represents the general public, and the mall caters to the general public.[214] Because the mall was open to protestors of all messages and viewpoints, a disavowal of all protestors' messages would not trace the mall owner to any particular cause or initiative. On the other hand, if only one ideological group protested at the mall, then disavowal would expose the owner's personal biases.

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fer to remain silent. In short, he has lost control over his freedom to speak or not to speak on certain issues.

Id. at 99. Powell and White offer the example of minority-owned businesses that might be forced to allow the American Nazi Party to disseminate its views on their private property and church-based businesses that might be forced to allow pro-choice protests on their property. These circumstances would be unacceptable because they would virtually compel a business owner to disavow them. *See id.* at 99-100.

209. *See PruneYard*, 447 U.S. at 99 (arguing that "[t]he mere fact that he is free to dissociate himself from the views expressed on his property . . . cannot restore his 'right to refrain from speaking at all.'" (citing Wooley v. Maynard 430 U.S. 705, 714 (1977))) (Powell, J., concurring).

210. Forced disavowal, by definition, is not a voluntary act. *See id.* at 99.

211. Forced disavowal has the negative effect of placing the individual in the vulnerable position of having personal biases disclosed to the world. As Justice Powell wrote in his concurrence in *Abood*:

> Disclosure of the specific causes to which an individual employee is opposed (which necessarily discloses, by negative implication, those causes the employee does support) may subject him to "economic reprisal, . . . threat of physical coercion, and other manifestations of public hostility," and might dissuade him from exercising the right to withhold support "because of fear of exposure of [his] beliefs . . . and of the consequences of this exposure."

Abood, 431 U.S. at 241 n.42 (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1958)).

212. *See PruneYard*, 447 U.S. at 88.

213. *See id.* at 87 (noting that the mall was open to the public).

214. *See id.*; *see also Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring).

The suggestion that an offended lawyer simply disavow all continuing legal education will not weaken the link between the lawyer and elimination of bias training. Unlike the presumably diverse ideological messages promulgated by protestors in the *PruneYard* mall, elimination of bias seminars are the only ideological component of the continuing legal education program. The elimination of bias seminars stand in stark contrast to the rest of the continuing legal education curriculum, which deals with non-ideological subjects like contracts, torts, or trial practice. It would be absurd for a lawyer to disavow training in trial practice techniques or recent developments in insurance law. As a result, the public will connect the lawyer's full-scale disavowal of continuing legal education with the elimination of bias requirement. The lawyer's opinions will still be publicly known.

C. THE ELIMINATION OF BIAS REQUIREMENT FAILS THE ENDS-MEANS BALANCING TEST

The elimination of bias requirement is an unduly restrictive means of improving the quality of justice in Minnesota. The alleged compelling interests supporting the rule do not justify violating lawyers' First Amendment rights, even for a short time period.[215] Narrower means are available that target lawyers' overt actions instead of their private thoughts.

Although the Supreme Court allowed infringements of negative free speech rights in *Abood* and *Keller*, the elimination of bias rule is distinguishable. *Abood* allowed infringement of negative free speech rights to foster smooth labor relations and avert the free rider problem.[216] Similarly, *Keller* partially justified infringement of negative free speech rights to avoid the same issue.[217] The elimination of bias requirement does not raise questions of free ridership or collective bargaining. Minnesota's lawyers are not deriving any collective bargaining benefits from attending these seminars, whereas the members

215. A mere two hours of training every three years is arguably a negligible First Amendment violation. Indeed, as attorney Mark Greenberg notes, "there has been a tendency . . . to dismiss the complaints here as a sort of legal hypochondria, given the nugatory imposition and the beneficent purposes involved." Petition, *supra* note 14, at 13. *But see* Elrod v. Burns, 427 U.S. 347, 373 (1976) (holding that the "[l]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

216. *See Abood*, 431 U.S. at 225.

217. *See* Keller v. State Bar, 496 U.S. 1, 12 (1990).

of the California Bar benefited from its administrative actions on their behalf.[218] The rationale for upholding the regulations in *Abood* and *Keller* does not apply to the elimination of bias requirement.

The elimination of bias rule fails both prongs of the ends-means balancing test applied in *Barnette*, *Wooley*, and *Hurley*. The strict scrutiny version of the balancing test should apply because the free speech violations inherent in the elimination of bias requirement are worse than those in *Keller*. The California Bar merely used mandatory dues to fund its ideological speech.[219] The Minnesota Board not only takes lawyers' CLE admissions fees and uses them to fund ideological speech, but also mandates that lawyers, in order to maintain their licenses, submit to a course that has the goal of changing their attitudes about important social issues. These weighty restrictions were not present in *Keller*. The Board does not have a compelling interest that justifies the elimination of bias requirement because the criticisms of the race and sexual orientation bias studies diminish the government's claim that there is an overwhelming need for elimination of bias training.[220] Moreover, the Court has specifically held that manipulation of private opinion, regardless of the social desirability of the message, is a "decidedly fatal" objective.[221]

One gray area surrounding the elimination of bias requirement and the balancing test is *Keller*'s germaneness test.[222] *Keller* held that the only ideological activities lawyers must fund are those that are related to the regulation of the legal profession or the improvement of the quality of legal services in the state.[223] Germaneness analysis does not validate the elimination of bias requirement because it is only one part of a multi-step inquiry. Although courts recognize that "germane-

218. *See id.*

219. *See id.* at 6.

220. *See supra* notes 16-40 and accompanying text (criticizing the bias studies).

221. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 579 (1995).

222. *Keller* established principles for evaluating the legitimacy of bar expenditures, holding that "the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of legal service available to the people of the state.'" *Keller*, 496 U.S. at 14 (citations omitted).

223. *See id.* at 13-14.

ness" has its limits,[224] a designation of germaneness is, admittedly, not particularly hard to obtain. Indeed, phrases like "in the legal profession" and "the practice of law" could justify virtually any regulation touching on lawyers' professional lives.[225] For instance, the elimination of slovenly dressing "in the legal profession" would be germane to improving the quality of justice in the state because well-dressed lawyers would make better impressions on judges, jurors, and clients. Likewise, the elimination of tardiness "in the legal profession" would be germane to improving the quality of justice in the state because it would further judicial efficiency.[226] As one attorney said of the elimination of bias requirement, "[t]he bar should not be mandatory on this. What is next?"[227] Even if a reviewing court finds that elimination of bias seminars are germane to improving the quality of justice in the state, First Amendment analysis also requires the elimination of bias rule to satisfy the least restrictive means requirement.

The wide breadth of germaneness is constitutionally relevant because, strictly applied, it would allow for violations of First Amendment rights. As the court noted in *Gibson v. State Bar*, using such a broad standard to "determine permissible bar activity would be tantamount to a complete abdication of the court's duty to protect dissenting attorneys' First Amendment rights."[228] For example, a finding that elimination of Communist ideology from the legal profession would improve the quality of legal services in the state would ostensibly justify mandatory continuing legal education classes disparaging communism and lauding capitalism.

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224. The Court adopted an elastic definition of germaneness in *Lehnert v. Ferris Faculty Ass'n*. *See* 500 U.S. 507, 524 (1991) (holding that the Ferris Faculty Association "may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities . . . even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit"). *But cf. Keller*, 496 U.S. at 13, 16 (holding certain bar expenditures were unrelated to the regulation of California lawyers).

225. *See* Petition, *supra* note 14, at 10.

226. Greenberg provides further examples of the wide breadth of germaneness, asking whether the perception that attorneys are unscrupulous warrants mandatory "classes on rectitude and moral virtue 'in the legal profession,'" or whether "the amount of paper wasted by lawyers" would "justify a mandatory class on environmental abuse 'in the legal profession.'" *Id.*

227. ELIMINATION OF BIAS REPORT, *supra* note 42, at 6.

228. Gibson v. State Bar, 798 F.2d 1564, 1569 (11th Cir. 1986), *cited in* Petition, *supra* note 14, at 10.

The least restrictive means requirement does not permit violations of First Amendment rights in the name of "germaneness." As the First Circuit stated in *Schneider v. Colegio de Abogados de Puerto Rico*:

> One can hardly conceive of loftier goals in a democratic society than creating a strongly pluralistic society and improving the administration of justice. And yet broad statements such as these cannot form the basis for an infringement of First Amendment rights. If used at all they must be narrowly tailored.[229]

The court in *Gibson* recognized this two-part requirement, noting that "[a]ll first amendment challenges are analyzed under a two-part test that requires a 'compelling interest' and the 'least restrictive means' of achieving that interest."[230] The elimination of bias requirement is not the least restrictive means of eliminating discriminatory behavior in the legal system because it attempts to preemptively change lawyers' biases before they commit discriminatory acts.[231] The elimination of bias requirement fails the strict scrutiny ends-means test because there are less restrictive alternatives available that solely regulate attorneys' overt behavior and do not enter the realm of private thought.

III. ALTERNATIVE MEANS EXIST TO COMBAT DISCRIMINATION IN THE MINNESOTA LEGAL COMMUNITY

There are a variety of alternative superior ways to combat discrimination in the legal system short of attempting to influence lawyers' attitudes. The state should strive to eliminate discrimination in the legal profession by relying on existing measures that punish discriminatory actions. These measures satisfy the First Amendment requirement of narrow tailoring.

A number of current laws already serve the bar's aim of eliminating discrimination in the legal system. The state should seek aggressive enforcement of the Minnesota Human Rights Act (MHRA), which protects virtually the same classes

229. Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 638 (1st Cir. 1990), *cited in* Petition, *supra* note 14, at 10.

230. *Gibson*, 798 F.2d at 1569, *cited in* Petition, *supra* note 14, at 10.

231. *Cf.* Near v. Minnesota 283 U.S. 697, 720 (1931) ("The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy . . . .").

that the elimination of bias rule endeavors to protect.[232] The MHRA is relevant to legal services because it operates in an employment context, forbidding discrimination in hiring, promotion, and retention.[233] Similarly, Rules 8.4(g) and (h) of the Minnesota Rules of Professional Conduct prohibit harassment and other discriminatory acts.[234] The Board should also encourage lawyers to follow Rule 8.4(d)'s prohibition of "conduct that is prejudicial to the administration of justice,"[235] and comply with the mandatory reporting requirement if they witness discriminatory behavior.[236] Finally, the effectiveness of these rules could be enhanced by advocating more severe consequences for those who violate them. If existing rules do not adequately deal with discrimination, the State should work to change them, not lawyers' private thoughts.

In addition, the Board should increase awareness of the requirements of the Model Rules of Professional Conduct, which target behavior rather than private attitudes. For example, the Model Rules do not prevent a lawyer from thinking that it is acceptable to engage in unethical behavior. Rule 1.15(b) states that "a lawyer shall promptly deliver to the client . . . any funds or other property that the client or third person is entitled to receive."[237] Thus, a lawyer may believe that it is acceptable to steal client funds, but as long as the lawyer

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232. The MHRA provides employment protection regardless of "race, color, creed, religious, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age . . . ." MINN. STAT. § 363.03 (1998).

233. *See* MINN. STAT. § 363.03(1)(c).

234. Minnesota Rules 8.4(g) and (h) prohibit discriminatory actions:

> It is professional misconduct for a lawyer to:
>
> . . . .
>
> (g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities;
>
> (h) commit a discriminatory act, prohibited by federal, state or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer.

MINN. RULES OF PROFESSIONAL CONDUCT Rules 8.4(g) & (h) (1998).

235. *See id.* Rule 8.4(d). The Comment to the Model Rules counterpart of 8.4(d), amended in 1998, states that a lawyer violates Rule 8.4(d) if the lawyer "in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status" and "when such actions are prejudicial to the administration of justice." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 cmt. (1998).

236. *See* MINN. RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1998).

237. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15(b) (1983).

does not actually commit the act of stealing, no violation of the rule occurs. The Model Rules are less restrictive than the elimination of bias rule because they have little potential for restricting personal thought and do not make private biases the target of state regulation.

These solutions will still allow the legal community a wide range of methods to combat discrimination. Although the State may not require attendance, lawyers who enjoy elimination of bias seminars are free to take them as often as they wish, and the bar remains free to speak its own mind regarding matters of bias and discrimination in the legal profession.[238] For example, the bar could publish and distribute statistics of the percentages of minorities working at law firms and publicly honor firms that make strides in hiring lawyers from diverse backgrounds.[239] Indeed, the bar might even be able to use mandatory dues for this purpose.[240] Mentoring relationships will help firms retain minority attorneys without dictating to other lawyers what they ought to be thinking. Additionally, firms should be encouraged rigorously to enforce strict policies against racial and sexual harassment.

Many of the same solutions apply to the Minnesota court system and individual attorney-client relationships. Firms should exhort their lawyers to treat clients equally, regardless of their private biases. Likewise, the State should encourage its court personnel to treat everyone equally, making all defendants aware of their rights under the MHRA.

The State could also fix the rule's constitutional difficulties by amending the rule itself. Some Minnesota lawyers object to the fact that the court mandates attendance at the seminars. As one attorney stated, "I strongly disagree that the Supreme Court has mandated this course. I already believe that all peo-

238. *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest . . . ."). As the Court noted in *Gertz v. Robert Welch, Inc.*, "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 U.S. 323, 339-340 (1974).

239. For example, the law firm of Gray, Plant, Mooty, Mooty, and Bennett recently received a diversity award. *See* Gray Plant Mooty (visited March 28, 2000) <http://www.gpmlaw.com/cgi-bin/navobjs?template=templatehome.htm&recno=38template=template.htm>.

240. *See supra* note 145 and accompanying text.

ple should be treated with respect and dignity . . . ."[241] If the State does not intend the rule to target private biases, it should clarify the rule's purpose and replace references to elimination of personal bias with references to politeness and civil tolerance. On the other hand, assuming the State genuinely wants to target private biases, it could make elimination of bias seminars voluntary.

The bar should commission more studies of discriminatory behavior in the legal system and take care to avoid even the appearance that those conducting the studies allowed their individual biases to influence the results. The groups of people conducting the studies should exhibit a wide variety of viewpoints, affiliations, and ideological interests. The studies will not then be so easily subject to allegations of bias. Even with accurate studies, however, the State must still satisfy the constitutional requirement that any remedy be narrowly tailored to eliminate discriminatory behavior.

Despite good intentions behind the rule, it is not the least restrictive means of eliminating discrimination in the legal community. Personal bias is an area of individual autonomy that the law may not constitutionally control,[242] even if changing those biases might change some discriminatory behavior. The elimination of bias rule violates the principle that the government may punish wrong actions, but not "wrong" thoughts. The moment "wrong" thoughts and biases manifest themselves through discriminatory actions the law may clamp down with impunity,[243] but "short of malfeasance, [a lawyer's] thoughts are his own."[244] The State should invoke current antidiscrimination law to combat discrimination in the legal community rather than rely on a program that unduly burdens lawyers' free speech rights. Punishing bigoted behavior is the least restrictive means of encouraging lawyers, at least in their professional roles, to treat all groups of people with respect.

CONCLUSION

The elimination of bias requirement is unconstitutional because of its potential to violate lawyers' First Amendment

241. ELIMINATION OF BIAS REPORT, *supra* note 42, at 7.

242. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 579 (1995).

243. *See* Wisconsin v. Mitchell, 508 U.S. 476, 490 (1993) (upholding a state law enhancing sentences for crimes motivated by racial bias).

244. *See* Petition, *supra* note 14, at 12.

rights. It interferes with lawyers' freedom of conscience because it dictates what they ought to be thinking about important social issues. The narrow membership of the Minnesota Bar effectively credits Board-approved speech to its member lawyers, thus interfering with their right to free association and their ability to control their public personas. The First Amendment protects the right of individuals to think as they wish and forbids government interference with personal opinions and belief systems. The elimination of bias requirement, though well intentioned, invades the protected area of private though and is therefore repugnant to the First Amendment. Instead, the state should apply the full force of anti-discrimination law to eliminate discriminatory behavior in the legal profession.