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ON THE BRINK: THE FIRST AMENDMENT IN THE REHNQUIST COURT, 1990-91 TERM

Hon. Leon Lazer:

Our next speaker is very prominent in the field of First Amendment jurisprudence. I am referring, of course, to Professor Joel Gora of Brooklyn Law School. He is a graduate of Columbia Law School and was a *Pro Se* Clerk for the Second Circuit Court of Appeals. From 1969 to 1978, Professor Gora served as Staff Counsel for the ACLU and he presently serves as General Counsel for the New York ACLU.

*Professor Joel M. Gora:**

We United States Supreme Court watchers, particularly those of us who came of constitutional age during the liberal Warren Court era,[1] tend to get a little overheated when assessing the current Supreme Court's handiwork, especially in the First Amendment area. Ever since the beginning of the Burger Court era,[2] we have been sure that each year would be a "disaster" for constitutional rights and particularly the freedoms of speech and press. Well, the Burger Court turned out not to be so bad, a prominent book of essays once described that Court's era as "the counterrevolution that wasn't."[3] But with the commencement of the Reagan/Rehnquist Court in the 1980's, we have been perennially certain we will not be disappointed in our glum expectations. This year, finally, Chicken Little may be right: the First Amendment sky may be falling. A little bit.

This year's *ABA Journal* roundup of the First Amendment docket of the Court was entitled: "Skeptical About Speech."[4] In-

* Professor Gora would like to acknowledge that work on this article was supported by the Brooklyn Law School Summer Research Stipend Fund.

1. Chief Justice Warren presided from 1953-1969.

2. Chief Justice Burger presided from 1969-1986.

3. VINCENT BLASI, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (ed. 1983).

4. David O. Stewart, *Skeptical About Speech*, A.B.A. J., Oct. 1991, at 50-52.

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deed, the Court was. Likewise, a recent issue of *Human Rights* was devoted to the topic: "The Diminishing of the First Amendment,"[5] and, indeed, the First Amendment may be. We may now truly be at a watershed moment in the history of First Amendment law. Free speech rights, which flourished in the Warren and Burger Court eras,[6] are under siege on a number of fronts. Sexual speech has been attacked by puritans on the right

5. HUMAN RIGHTS, Fall 1991, Vol. 18, No. 3.

6. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Buckley v. Valeo, 424 U.S. 1 (1976); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969). In *Brandenburg*, a Ku Klux Klan leader was convicted of violating an Ohio statute outlawing the advocacy of sabotage, violence and terrorism for the purpose of bringing about political change. *Id.* at 444-45. The Supreme Court held the state statute in contravention of the First and Fourteenth Amendments on the grounds that a state may only prohibit free speech advocating the use of force where it is directed at, and likely to produce, lawless action. *Id.* at 449. In *Cohen v. California*, a draft opponent was given a thirty day jail sentence for violating a California disturbing the peace statute when he wore a jacket bearing expletive language in a municipal courthouse. 403 U.S. at 16. The Supreme Court held that the state could not make a public display of expletive language a criminal offense, reasoning that there was a significant likelihood of unconstitutionally suppressing ideas in the process, *id.* at 21, and that anyone who was offended could always avert their eyes. *Id.* at 26. In *Pruneyard Shopping Center v. Robbins*, the Supreme Court held that high school students could exercise their free speech rights by distributing pamphlets in a public mall, and that in doing so, they had not violated the owner's property nor First Amendment rights. 447 U.S. at 88. In *Buckley v. Valeo*, the Supreme Court held that expenditure limits in the 1971 Federal Election Campaign Act, as amended in 1974, 18 U.S.C. § 608(c), (e) (limiting political expenditures by candidates for federal office), violated the First Amendment. 424 U.S. at 58. The Supreme Court reasoned that the restriction placed substantial restraints upon the quantity and diversity of political speech. *Id.* at 58-59. For freedom of the press cases, see Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (asserting that there is a constitutional right in the public to access in criminal proceedings); Bigelow v. Virginia, 421 U.S. 809 (1975) (recognizing that First Amendment extends to paid commercial advertisements); New York Times v. United States, 403 U.S. 713 (1971) (denying federal government request to enjoin the New York Times and the Washington Post from publishing a classified study on the history of decision-making process during the Vietnam War); New York Times v. Sullivan, 376 U.S. 254 (1964) (requiring a showing of "actual malice" before a public official may recover damages for a defamatory falsehood).

and feminists on the left.[7] "Hate speech" has been outlawed by dozens of local laws and ordinances,[8] and hundreds of college campuses have imposed "speech codes" punishing expression that demeans or denigrates people on the basis of race, gender, religion, ethnic origin, sexual orientation, etc.[9] College professors have been sanctioned for racially and ethnically offensive writings.[10] The protection of commercial speech has diminished,[11] and there have been legislative proposals abound to ban the advertising of harmful, but otherwise lawful products such as

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7. *See, e.g.*, American Booksellers Ass'n v. Hudnot, 771 F.2d 323 (7th Cir. 1985).

8. *See University of Wisconsin Rewrites 'Hate Speech' Rule*, CHICAGO TRIBUNE, Feb. 24, 1992 at 3 zone M; Marcia Coyle, *Hate Laws Scrutinized by Justices; Are Social Goals and the Constitution At Odds?*, NAT'L L.J., Dec. 2, 1991 at 1 (describing the St. Paul, Minnesota Ordinance § 292.02).

9. *See, e.g.*, Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (finding university's policy on discriminatory speech overbroad and vague such that enforcement of the policy would violate Due Process Clause). *See also* Daniel Harris, *Whose Culture Is It Anyway?; Debating P.C.; The Controversy Over Political Correctness on College Campuses*, LOS ANGELES TIMES, Mar. 1, 1992 at 3 ("Many universities have adopted ordinances requiring the expulsion or reprimand of students who use sexist, racist or homophobic epithets . . . ."); GERALD GUNTHER, CONSTITUTIONAL LAW 1134-37 (12th ed. 1991) (noting how the debate "about appropriate regulations engendered widespread attention and controversy" on campuses at the University of Michigan, Stanford University and the University of Texas).

10. *See, e.g.*, Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y. 1991) (holding that college had violated professor's First and Fourteenth Amendment rights where it had warned students that the professor's views were controversial and permitted a voluntary switch into another section; and where it had begun an investigation of his writings, but not his conduct, in an alleged attempt to revoke his tenure), *aff'd in part and vacated in part*, 966 F.2d 85 (2d Cir. 1992).

11. *See, e.g.*, Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986) (upholding ban on advertising of lawful activities); Board of Trustees of SUNY v. Fox, 492 U.S. 469 (1989) (rejecting absolute least restrictive means test and requiring only a reasonable fit between the means and ends when deciding whether government restrictions upon commercial speech are constitutional); Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990) (states may require disclaimer where attorney advertises certification or specialization if perceived to be potentially misleading).

cigarettes.[12] Campaign speech has been subject to greater regulation through measures and proposals that limit the funding of such speech.[13] And, in a similar vein, significant restrictions on the speech of those who receive federal and other public subsidies for their activities have been proposed, imposed and upheld.[14] That is why this past Term's cases, as well as critical ones currently pending, are significant measures of the direction the Court's First Amendment jurisprudence will take in the face of all of these assaults on the First Amendment freedoms.

First, some statistical measurements of the past Term: quantitatively, the Court had a relatively small First Amendment docket, deciding five significant free speech cases[15] and handing down two notable free press rulings.[16] A few years ago there were twice as many First Amendment cases on the Court's plate in a typical year.[17] This year, the First Amendment claimants

12. H.R. 4350, 102d Cong., 2d. Sess. (1992); H.R. 2781, 102d Cong., 1st. Sess. (1991); H.R. 2779, 102d Cong., 1st. Sess. (1991); S. 1088, 102d Cong., 1st. Sess. (1991); S. 556, 102d Cong., 1st. Sess. (1991); H.R. 1443, 102d Cong., 1st. Sess. (1991); S. 557, 102d Cong., 1st. Sess. (1991); H.R. 440, 102d Cong., 1st. Sess. (1991).

13. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). In *Austin*, the Supreme Court held a Michigan statute prohibiting corporations from using corporate treasury funds for state political elections valid, finding a legitimate state objective and that the statute was narrowly tailored to achieve such objective. *Id.* at 660. The Court further rejected equal protection arguments claiming nonprofit and for-profit corporations were treated differently under the law than labor unions, unincorporated associations and news media corporations. *Id.* at 668.

14. *See* Rust v. Sullivan, 111 S. Ct. 1759 (1991), discussed *infra* notes 89-130 and accompanying text.

15. Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991); Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991); Lenhert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991); Rust v. Sullivan, 111 S. Ct. 1759 (1991); Leathers v. Medlock, 111 S. Ct. 1438 (1991).

16. Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991); Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991).

17. *See* Joel M. Gora, *Supreme Court Report: Five Wins and Nine Losses for Free Speech Fans*, 71 A.B.A. J., Nov. 1985, at 116.

basically "lost" four[18] of the seven cases and partially lost the others.[19] Only two First Amendment claimants left the Supreme Court better off than when they got there.[20] There was a good deal of disarray in those seven cases, three of which were decided by various divided pluralities.[21] Most First Amendment claims were deflected or rejected; and the hand of government, federal, state and local, to tax, spend and regulate in the First Amendment area seemed significantly more strengthened at the end of the Term than it was at the beginning. As one commentator put it:

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18. Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991); Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991); Rust v. Sullivan, 111 S. Ct. 1759 (1991); Leathers v. Medlock, 111 S. Ct. 1438 (1991).

19. Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991); Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991); Lenhert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991).

20. Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991); Lenhert v. Ferris Faculty Ass'n., 111 S. Ct. 1950 (1991).

21. Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991) (Justice Kennedy announced the judgment of the Court in Parts III and VI and delivered an opinion for Parts I, II, IV and V. Justices Marshall, Blackmun, Stevens and O'Connor joined with respect to Parts III and VI. Justices Marshall, Blackmun and Stevens joined with respect to Parts I, II, IV and V. Chief Justice Rehnquist wrote the judgment of the Court for Parts I and II. Justices White, O'Connor, Scalia and Souter joined. Chief Justice Rehnquist also wrote a dissenting opinion for Part III which was joined by Justices White, Scalia, and Souter. Justice O'Connor filed a concurring opinion.); Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (Chief Justice Rehnquist announced the judgment of the Court and delivered an opinion joined by Justices O'Connor and Kennedy. Justice Scalia filed an opinion concurring in the judgment, as did Justice Souter. Justice White filed a dissenting opinion which was joined by Justices Marshall, Blackmun and Stevens.); Lenhert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991) (Justice Blackmun announced the Court's opinion for Parts I, II, III-B, III-C, IV-B (except final paragraph), IV-D, IV-E and IV-F. Chief Justice Rehnquist and Justices White, Marshall and Stevens joined. Justice Blackmun also wrote an opinion for Parts III-A, IV-A, final paragraph of IV-B, IV-C and V. Chief Justice Rehnquist and Justices White and Stevens joined. Opinions concurring and dissenting in part were written by Justices Marshall, Scalia and Kennedy. Justices O'Connor and Souter joined in all but Part III-C of Justice Scalia's opinion, which Justice Kennedy joined.).

> The First Amendment's Free Speech Clause proved vulnerable when matched against obligations and restrictions imposed by other laws in several cases decided by the U.S. Supreme Court . . . . It did not exempt family planning clinics from the Reagan administration's ban on the expenditure of federal funds for clinics that provide abortion counseling. It did not shield nude dancers from the enforcement of a state indecency statute. It did not protect newspapers from liability for breach of a promise of confidentiality for a news source. Nor did it help an attorney who was disciplined for taking his client's case before the press . . . . Finally, it afforded only limited protection in a libel action to a journalist alleged to have fabricated quotations.[22]

Last year was also the first full Term without Justice Brennan the foremost First Amendment theorist and activist of modern times. And it showed. Justice Brennan's presence would have clearly changed the result in two of the most significant cases: the abortion counseling "gag rule" case[23] and the nude dancing decision.[24] His departure also deprived the Court of its master consensus builder, who could coalesce a majority better than anyone.[25] This year the Court also lost its most consistent spokesman of the dissenting voices, Justice Marshall.[26] The hallmark of both Justices Brennan and Marshall in assessing First Amendment claims was not just their concern with formal free speech doctrine and analysis, but as well their sensitivity to the practical effects of legislative restrictions on speech as they impact real people and real speakers in the real world. It is certainly not clear whether and how Justices Souter and Thomas will fill those respective shoes.

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22. *Review of Supreme Court's Term*, 60 U.S.L.W. 3069 (U.S. Aug. 6, 1991).

23. *See* Rust v. Sullivan, 111 S. Ct. 1759 (1991).

24. *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

25. *See* Mary C. Daly, *Some Runs, Some Hits, Some Errors - Keeping Score In the Affirmative Action Ballpark From Weber to Johnson*, 30 B.C. L. REV. 1, 51-52 (1988).

26. Justice Thurgood Marshall retired on June 27, 1990, the last day of the 1990 Supreme Court Term.

In my remarks today, I will discuss the significant First Amendment cases, try to identify some themes and trends, and hazard some predictions about cases pending on the Court's docket this coming Term.[27] The Court's seven relevant cases fall into three categories: three cases involved the intersection between free speech rights and the government's taxing and spending powers;[28] two concerned the rights of the press;[29] and the final two involved key areas of local regulation: public decency and morality[30] and proper conduct by the legal profession.[31]

TAXING, SPENDING AND THE FIRST AMENDMENT

Constitutional law has long recognized a distinction between government as regulator and government as taxer and spender. Though Chief Justice Marshall once warned that "the power to tax involves the power to destroy,"[32] and though oppressive taxation was one of the battle cries of the American Revolution and one of the reasons for the framing of the First Amendment, the Court has been more deferential to the fiscal power than to regulatory power.[33] In three cases involving speech activity that the government clearly could not prohibit, punish or control, the Court broadly upheld government authority to reach such speech through the exercise of powers over taxing and spending.[34]

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27. *See* R.A.V. v. St. Paul, Minn., 112 S. Ct. 2538 (1992); Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501 (1991).

28. *See* Lenhert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991); Rust v. Sullivan, 111 S. Ct. 1759 (1991); Leathers v. Medlock, 111 S. Ct. 1438 (1991).

29. *See* Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991); Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991).

30. *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

31. *See* Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991).

32. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

33. *See* Leathers v. Medlock, 111 S. Ct. 1438 (1991); Lenhert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991); Rust v. Sullivan, 111 S. Ct. 1759 (1991).

34. Leathers v. Medlock, 111 S. Ct. 1438 (1991); Lenhert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991); Rust v. Sullivan, 111 S. Ct. 1759 (1991).

Leathers v. Medlock

It has long been settled that the First Amendment does not give the press an exemption from general regulations or tax laws.[35] It is equally well-settled, however, that government cannot single out the press, or particular members of the press, for special or punitive taxation.[36] That latter principle, fashioned in a 1930s case involving Louisiana Governor Huey Long's attempt to tax his major newspaper critics,[37] was expanded in a 1983 Minnesota case when the Court held that the press was protected not just against corruptly motivated and suppressive taxes, but also against *any* tax whose structure singled out the press for special taxation.[38] In 1987, the Court likewise threw out an Arkansas sales tax scheme that exempted religious, professional, trade and

35. *See* Swaggart Ministries v. Board of Equalization of Cal., 493 U.S. 378, 389 (1990) (Court found general sales and use tax was not a tax on right to disseminate information, but a tax on retail sales or consumption of tangible personal property); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987) (Arkansas sales tax scheme which exempted newspapers and religious, professional, trade, and sports journals violated the First Amendment because it was a selective tax); Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 460 U.S. 575, 586 n.9 (1983) (Minnesota "use tax" on the cost of paper and ink products consumed in the production of a publication, exempting periodic publications, held in violation of the First Amendment because it singled out the press for special treatment. However, the tax clearly would have been constitutional if it were a generally applicable tax.); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (Louisiana license tax on newspaper owners for the privilege of selling advertising space held unconstitutional; however, the Court warned, "it is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation . . . .").

36. *See Arkansas Writers' Project, Inc.* 481 U.S. at 227 (state's enactment of tax scheme which levied sales tax solely on general interest magazines declared unconstitutional because it was based upon content of those magazines); *Grosjean*, 297 U.S. at 250 (Court declared unconstitutional an advertisement tax on newspapers with a circulation greater than 20,000 copies per week because it was designed to limit the circulation of such newspapers).

37. *See Grosjean*, 297 U.S. at 240.

38. *See Minneapolis Star & Tribune*, 460 U.S. at 592-93.

sports journals, but taxed political magazines.[39] The flaw there was that the tax was based solely on the content of the periodical,[40] and a tax on the content was a tax on the message.[41]

But what about a tax not on the *message*, but on the *medium*? That was the issue in *Leathers v. Medlock*.[42] The Arkansas legislature, apparently still desperate for cash, specifically extended its general sales tax to include cable and satellite broadcast services, while most print media were exempted.[43] The eighty or so cable operators in the state challenged the scheme on the ground that it violated the First Amendment by singling out one *particular medium* for disparate taxation treatment.[44]

Justice O'Connor, writing for a seven Justice majority,[45] rejected the claim.[46] She reasoned that this was not an attempt to suppress the expression of particular ideas or viewpoints.[47] Nor was it targeted on a small, vulnerable or controversial group of speakers.[48] There was no evidence that the tax was corruptly motivated by a purpose to cripple the press and its vital watchdog function as a check on government.[49] Finally, the tax was not structured in a way which raised the suggestion or risk of censorship.[50]

Central to her analysis were the assumptions that cable as a medium did not have a distinctive voice, that all cable operators were treated alike and that eighty of them were politically potent.[51] Given that no attempt, overt or covert, at censorship of ideas was discerned, the Court then fell back to the general

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39. *See Arkansas Writers' Project, Inc.*, 481 U.S. at 234 .
40. *Id.* at 233.
41. *See* Leathers v. Medlock, 111 S. Ct. 1438, 1445 (1991); Rust v. Sullivan, 111 S. Ct. 1759, 1773 (1991).
42. 111 S. Ct. 1438 (1991).
43. *Id.* at 1441.
44. *Id.*
45. *Id.* at 1441 (Justices Marshall and Blackmun dissented).
46. *Id.*
47. *Id.* at 1443-44.
48. *Id.*
49. *Id.* at 1444.
50. *Id.* at 1445.
51. *Id.*

deference to the power of state and local government to classify and differentiate among different groups and entities in the taxation area.[52] Accordingly, virtually no justification for the disparate treatment of cable was required or suggested.[53]

Critical to her analysis was the proposition that a taxing arrangement that discriminates among speakers, taxing some while exempting others, does not *per se* violate the First Amendment unless it discriminates on the basis of the ideas being expressed.[54] This principle, derived from a 1983 case which upheld adverse federal tax treatment of lobbying expenses in general, while according favorable tax benefits to lobbying by veterans organizations,[55] would play a pivotal role in upholding the funding restrictions in the abortion counseling case as well.[56]

Missing from Justice O'Connor's analysis, however, as noted by the two dissenters, Justices Marshall and Blackmun, was any effort to explain *why* cable operators were being treated differently,[57] and more significantly, a failure to appreciate that cable does, in general, convey a different kind of message than other communications media.[58] Of positive significance, however, was the fact that Justice O'Connor's opinion extolled the virtues and values of a vigorous press as a check on government wrongdoing[59] and made clear, in studied dictum, that the Court would remain particularly vigilant against schemes which singled out the press for special taxation or other financial burdens imposed on the basis of the content or viewpoint being expressed.[60]

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52. *Id.* at 1446 (citing Regan v. Taxation With Representation of Wash., 461 U.S. 540, 547 (1983)).

53. *Id.* at 1447.

54. *Id.* at 1445.

55. *See* Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983).

56. *See* Rust v. Sullivan, *infra*, notes 89-130 and accompanying text.

57. *Leathers*, 111 S. Ct. at 1447 (Marshall, J., dissenting).

58. *Id.* at 1451 (Marshall, J., dissenting).

59. *Id.* at 1442 (citing Grosjean v. American Press Co., 297 U.S. 233, 246-51 (1936)).

60. *Id.* at 1443.

Lenhert v. Ferris Faculty Association

Just as the First Amendment limits the power of government to tax me on the basis of my ideas,[61] so too does it limit the power of government to tax me to subsidize the ability of someone else to express ideas which I oppose.[62]

In 1977, in *Abood v. Detroit Board of Education*,[63] the Court ruled that while public sector unions could make non-members within a collective bargaining unit pay for their fair share of collective bargaining costs,[64] such objectors could not be made to pay for the union's political and ideological advocacy.[65] This rule was derived from the older, venerable principle, that the First Amendment right to speak presupposes a right *not* to speak and not to be forced to espouse ideas that you do not share.[66] That is why school children cannot be compelled to pledge allegiance even to the nation's flag.[67]

The *Abood* principle is easy to state, but devilishly difficult to apply, and the Court has wrestled ever since with two problems: (1) how to differentiate between impermissible ideological and

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61. *See* Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983).

62. *See* Lenhert v. Ferris Faculty Ass'n., 111 S. Ct. 1950 (1991).

63. 431 U.S. 209 (1977). In *Abood*, a Michigan statute authorizing "agency shops" was challenged by a group of teachers who opposed collective bargaining in the private sector as well as some of the non-collective bargaining activities of the union. *Id.* at 212-13.

64. *Id.* at 236.

65. *Id.* at 234-36.

66. *See, e.g.*, 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."); Elrod v. Burns, 427 U.S. 347, 363-64 n.17 (1976) (state may not require membership in a political party as a condition of employment); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (state may not compel an individual to affirm his belief in God).

67. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (school children whose attendance was mandatory could not be compelled to pledge allegiance to national flag).

political activities and proper collective bargaining costs,[68] and (2) what procedures must be used to enforce that distinction[69] and safeguard the right of dissenting employees not to pay for the latter.[70] In *Lehnert v. Ferris Faculty Ass'n*,[71] the Court dealt once again with the question of how to enforce the differentiation between political or ideological activities and collective bargaining activities in an effort to protect the rights of dissenting employees. The case produced such a confusing lineup of concurring opinions as to require a calculator to determine exactly which Justices formed a majority on each of the various specific issues.[72]

In *Lenhert,* a local college professor objected that his "service fee" paid to the union in lieu of union dues was being used to support a variety of improper local, state and national activities of the union, the National Education Association (NEA).[73] He was particularly upset about two things: (1) subsidizing expenses of the state and national unions for activities not directly related to support of his local bargaining unit[74] and (2) having to support a wide variety of union activities not explicitly related to collective bargaining and statutory duties of representation.[75]

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68. *See* Lenhert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1956 (1991).

69. *Id.*

70. *Id.*

71. 111 S. Ct. 1950 (1991).

72. Blackmun, J., announced the opinion of the Court and delivered the opinion with respect to Parts I, II, III-B, III-C, IV-B (except for final paragraph), IV-D, IV-E, IV-F in which Rehnquist, C.J., and White, Marshall, and Stevens, JJ., joined. Marshall, J., filed an opinion concurring in part and dissenting in part. Scalia, J., filed an opinion concurring in the judgment in part and dissenting in part, in which O'Connor and Souter, JJ., joined, and in all but Part III-C of which Kennedy, J., joined. Kennedy, J., filed an opinion concurring in the judgment in part and dissenting in part.

73. *Lenhert*, 111 S. Ct. at 1955-56. The union charged them for (1) lobbying and electoral politics; (2) bargaining, litigation and other activities on behalf of persons not in Lenhert's unit; (3) public relations efforts; (4) miscellaneous professional activities; (5) meetings and conventions of the parent unions; and (6) preparation for a strike which, had it materialized, would have violated Michigan law. *Id.*

74. *Id.*

75. *Id.*

Justice Blackmun announced the Court's judgment and his prevailing plurality opinion applied what Justice Scalia's opinion mockingly called "a proverbial three-part test"[76] to determine which activities the objectors could properly be made to help support.[77] The elements of the test were as follows: (1) whether the activities were "germane" to collective bargaining; (2) whether they were justified by the government interest in promoting labor peace and preventing non-union "free riders;" and (3) whether the challenged activities had not *added* significantly to the abridgment of the free speech already inherent in allowing an agency or union shop arrangement to begin with, a kind of First Amendment harmless error test.[78]

The plurality's application of this test produced one relatively clear and categorical rule: dissenters can be made to pay for otherwise chargeable costs of state and national unions,[79] even for activities not being used for the direct and immediate benefit of the specific local bargaining unit.[80] Beyond that, the plurality opinions produced, in a very ad hoc fashion, a series of specific do's and don'ts: objectors can be made to pay for union programs, information on professional development, the costs of sending local delegates to state and national conventions and strike preparations.[81] However, objectors cannot be made to defray the costs of lobbying, nor political or electoral work not related to contract ratification or implementation, general public propaganda about the importance of teachers nor the costs of litigation not connected to the local unit.[82]

Obviously, these details are of considerable interest and importance to local government and municipal labor counsel. But what is troubling about the case is that the Court's flexible and subjective approach to what is "germane," compels the Court to rum-

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76. *Id.* at 1975 (Scalia, J., dissenting).

77. *Id.* at 1959.

78. *Id.*

79. *Id.* at 1961.

80. *Id.* at 1959 (citing Lenhert v. Faculty Ass'n, 881 F.2d 1388, 1392 (6th Cir. 1989)).

81. *Id.* at 1964-66.

82. *Id.* at 1960-61.

mage through union literature, newsletters, public education materials, and the like in an effort to separate the political and ideological from the economic and legitimate.[83] And the Court does so in a disturbingly ad hoc, subjective and conclusory manner.[84] That is why Justice Scalia's approach, in a partial dissent joined by Justices O'Connor, Kennedy and Souter,[85] seems more attractive. He would rule that dissenting employees can only be made to pay for the cost of discharging "the union's statutory duties as exclusive bargaining agent."[86] That more categorical approach would keep the Court from having so closely to scrutinize and parse the minute content of union speech.[87]

In any event, the bottom line is that most of the Court remains considerably antagonistic to mandatory charges for union activities that can even remotely be characterized as political and significantly protective of the rights of dissenting unit members not to subsidize union political speech they do not support nor approve.[88]

Rust v. Sullivan

The principle that dissenting unit employees cannot be made to subsidize speech they disapprove seems to hold true for government as well.[89] It, too, can refuse to subsidize speech of which it disapproves, or at least speech that goes beyond the scope of the

83. *Id.* at 1959. In *Lenhert*, the Court examined various union literature including a newsletter which "concern[ed] teaching and education generally, professional development, unemployment, job opportunities, award programs of the NEA, and other miscellaneous matters." *Id.* at 1964.

84. *Id.* at 1967 (Marshall, J., dissenting).

85. *Id.* at 1975.

86. *Id.*

87. *Id.* at 1976 (Justice Scalia described his proposed test as "much more administrable.").

88. *Id.* at 1960-61.

89. *See* Rust v. Sullivan, 111 S. Ct. 1759, 1775 (1991) ("The employees' freedom of expression is limited during the time that they actually were employed for the [federally funded] project; but this limitation is a consequence of their decision to accept employment [,] . . . the scope of which is permissibly restricted by the funding authority.").

project or activity that the government is funding.[90] That, of course, is the broad teaching of the Court's most controversial and criticized decision of the year in the abortion counseling "gag rule" case.[91] In *Rust v. Sullivan*,[92] the Court upheld, by a 5 to 4 margin, federal regulations prohibiting projects that receive federal family planning grants from using any of those funds to advise particular clients about the abortion option or more generally to advocate or promote abortion.[93] Chief Justice Rehnquist wrote the Court's opinion for himself and Justices White, Kennedy, Scalia and Souter.[94] Justices Blackmun, Marshall, Stevens and O'Connor dissented.[95] The Court's ruling prompted a great deal of public outrage and massive efforts to have Congress overturn the regulations. But the efforts fell short of the votes required to override a presidential veto.[96]

In 1970, Congress passed Title X of the Public Health Service Act[97] to provide federal funding for family planning services. Congress proscribed, however, that none of the funds could be

90. *Id.* at 1772.

91. *Id.*

92. 111 S. Ct. 1759 (1991).

93. *Id.* at 1778.

94. *Id.* (majority opinion begins at 1764).

95. *Id.* (dissenting opinion begins at 1778).

96. After the *Rust* decision, both the House and Senate voted to negate the ruling. The House voted 276-156 and the Senate 75-25. However, the President's veto was sustained by the one-third-plus-one minority in just one chamber, the House. The abortion counseling/advocacy regulations are just some of the most visible examples of a long-running campaign by conservatives starting in the early days of the Reagan Administration to "defund the left." The theme of this campaign was that numerous recipients of various kinds of federal grants were impermissibly using those funds to subsidize offensive or impermissible political and social advocacy and activities. Other examples of the campaign include: promulgating rules to ban grantees from engaging in "political advocacy" broadly defined, restrictions on the kind of litigation that can be brought by legal services organizations, *see* Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685 (D.C. Cir. 1991), and withholding of art funding from artists whose work the government considers obscene. *See* Bella Lewitsky Dance Found. v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991).

97. Public Health Service Act, 84 Stat. 1506, *amended by*, 42 U.S.C. §§ 300 - 300a-6 (1989).

used "in programs where abortion is a method of family planning."[98] In other words, a grantee can use the funds for family planning services and activities, but not for performing abortions.[99]

In 1988, the Reagan Administration promulgated regulations intended to enforce this limitation[100] by restricting how Title X grantees could use the federal project funds:

1. The project "may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning";[101]
2. The project may not engage in activities that "encourage, promote or advocate abortion as a method of family planning"[102] and
3. Title X projects must be organized so that they are "physically and financially separate" from the prohibited abortion activities of the grantee.[103]

In other words, family planning organizations receiving Title X family planning money could not use those funds to counsel or advise individual women concerning abortion or more generally promote or advocate abortion.[104] Even though they remained free to use their own funds and resources as they saw fit, they had to insure a hermetical seal between the Title X projects and other activities.[105]

From a statutory interpretation perspective, the portion of the opinion holding that these regulations, promulgated almost two decades after the statute they were purportedly implementing, were authorized by the Congressional ban on using federal funds

98. *See Rust*, 111 S. Ct. at 1764-65; 42 U.S.C. §§ 300a-6, 1008.

99. *Rust*, 111 S. Ct. at 1765. In Maher v. Roe, 432 U.S. 464 (1977), and Harris v. McRae, 448 U.S. 297 (1980), the right of the government to refuse to subsidize abortions had been upheld against constitutional challenges based on privacy and equal protection grounds.

100. 42 C.F.R. § 59.2 (1991).

101. 42 C.F.R. § 59.8(a)(1) (1991).

102. 42 C.F.R. § 59.10(a) (1991).

103. 42 C.F.R. § 59.9 (1991).

104. Rust v. Sullivan, 111 S. Ct. 1759, 1765 (1991).

105. *Id.* at 1766.

for abortion services themselves, has also been extremely controversial.[106] The Court's tests for whether Executive Branch regulations are consistent with Congressional purpose were extremely deferential to administrative interpretation and gave the Executive Branch broad power to frustrate congressional intent.[107] Moreover, it has long been a staple of constitutional analysis that legitimate doubts about the meaning of a statute or the authority of implementing regulations should be resolved in a manner that avoids unnecessary constitutional adjudication.[108] Had the Court not strained to find the challenged regulations authorized, it could have avoided the difficult and troubling constitutional rulings that ensued, at least until Congress forced the constitutional question by legislating more explicitly.[109] Indeed, that was the basis of Justice O'Connor's dissent, namely, that the statutory authority for the regulations was sufficiently doubtful that they should have been thrown out on that ground alone, thus sparing the bloody constitutional First Amendment battle that resulted.[110]

At the constitutional level, the case required the Court to choose between two parallel lines of precedent. One doctrine holds that government has no obligation to fund or subsidize speech and that the refusal to do so is not a penalty on speech.[111] Moreover, government can choose to subsidize some kinds of speakers, such as veterans' organizations, but not others.[112]

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106. *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 573-74 (1991).

107. *Rust*, 111 S. Ct. at 1767 (citing Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984)).

108. *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 157-58 (1984); Alexander v. Louisiana, 405 U.S. 625, 633 (1972); Burton v. United States, 196 U.S. 283, 295 (1905); Liverpool, New York and Philadelphia S.S. Co. v. Commissioner of Emigration, 113 U.S. 33, 39 (1885).

109. *Rust*, 111 S. Ct. at 1789 (O'Connor, J., dissenting).

110. *Id.* at 1788-89 (O'Connor, J., dissenting).

111. *Id.* at 1767 (citing Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983)).

112. *See* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 546-49 (1983) (sustaining tax deduction for contributors to veterans' organiza-

Government can also say how its funds are to be spent within the appropriate scope of the funding program.[113] The other line of cases holds that government cannot use its fiscal powers to try to suppress dangerous ideas, and that government may not withhold an otherwise available benefit from a recipient who engages in otherwise protected speech unrelated to that benefit. That would be an "unconstitutional condition" on speech, and the financial sanction would become transformed from the withholding of a subsidy to the imposing of a penalty.[114]

Despite basic geometry principles, these two parallel lines met in *Rust*. The Court's resolution was clear: the Title X regulations fell on the subsidy side of the line, not on the penalty side.[115]

Most importantly, the Court emphasized, the regulations were not a direct restriction on the grantees' use of their own funds and resources to advocate anything they want with respect to abortion, outside of the scope of the funded project:

> The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide

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tions); Buckley v. Valeo, 424 U.S. 1, 97-98 (1976) (per curiam) (sustaining funding of general election expenses of major party candidates).

113. *See Regan*, 461 U.S. at 545-46 (1983) (upholding I.R.C. § 501(c)(3) (1954) which did not permit tax exempt status for lobbying activities); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (upholding subsidies for presidential campaign under Congress' power to decide which expenditures promote the general welfare); Cammarano v. United States, 358 U.S. 498 (1959) (holding I.R.S. regulations prohibiting ordinary and necessary business deduction for lobbying activities were a valid exercise of Commissioner's rule making power).

114. *See, e.g.*, F.C.C. v. League of Women Voters of Cal., 468 U.S. 364 (1984) (Court held public broadcasting stations could not be denied public funds because they used their own funds to editorialize); Perry v. Sindermann, 408 U.S. 593, 597-98 (1972) (reaffirming position that renewal of nontenured public school teacher's contract may not be based on individual's exercise of a constitutional right); Speiser v. Randall, 357 U.S. 513, 528-29 (1958) (finding California statute requiring subscription to an oath as a condition to tax exempt status was a discriminatory provision which placed a limitation on free speech).

115. Rust v. Sullivan, 111 S. Ct. 1759, 1780 (1991) (Blackmun, J., dissenting).

> abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.[116]

According to the majority, the government was simply trying to make sure that project funds are kept within the scope of the project's purpose: family planning, not abortion.[117] Since the government is not constitutionally required to fund abortion,[118] it is not required to fund abortion speech, counseling nor advocacy.[119] The refusal to do so is not a discrimination on the basis of viewpoint, but just a definition of the scope of the grant.[120]

The dissenters, led by Justice Blackmun, the author of *Roe v. Wade*,[121] bitterly complained that this was clearly a penalty case designed to punish the expression of the pro-choice point of view: "Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds."[122] In his view, the regulations were *content*-based, since they turned on what was said by personnel of the Title X project.[123] Worse, they were *viewpoint*-based since they require the giving of prenatal advice, while prohibiting the provision of abortion advice.[124] The repression is imposed as a condition of receiving public funds, which will be withdrawn as a penalty for violating that condition by counseling abortion. In short, the government clearly cannot outlaw abortion counseling and advocacy, and

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116. *Id.* at 1774.

117. *Id.* at 1772.

118. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 511 (1989) ("[T]he State need not commit any resources to facilitating abortions . . . . "); Harris v. McRae, 448 U.S. 297, 316 (1980) ("[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.").

119. *Rust*, 111 S. Ct. at 1772-73.

120. *Id.*

121. 410 U.S. 113 (1973).

122. *Rust*, 111 S. Ct. at 1780 (Blackmun, J., dissenting).

123. *Id.* at 1781 (Blackmun, J., dissenting).

124. *Id.* at 1781-82 (Blackmun, J., dissenting).

should not be permitted to achieve that prohibited result indirectly through its power of the purse.[125]

Rust v. Sullivan is, indeed, a difficult case. The decision has been condemned in epic and frequently apocalyptic terms.[126] But whether it deserves such unlimited condemnation is not all that clear to me. It is, after all, a funding case, not a prohibition case. It does not control, at least directly, what groups can do with their own funds and resources. It does make it burdensome to erect a wall of separation between restricted and unrestricted funds, but non-profit groups have long known how to separate, at least financially, their lobbying and political activities from their charitable and educational functions, in order to take advantage of the tax laws. Finally, there is a bit of sauce for the gander here in that, as Chief Justice Rehnquist noted, Congress has long attached civil rights stipulations and requirements to various federal funding programs, and, of course, liberal groups have applauded and defended those requirements.[127]

Having said that, however, I remain very troubled by the ruling. First, of course, the ruling operates most harshly on vulnerable women who require the services of publicly funded family planning clinics;[128] women able to afford private medical atten-

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125. *Id.* at 1782 (Blackmun, J., dissenting).

126. *See, e.g.*, Gary A. Winters, Note, *Unconstitutional Conditions As "Nonsubsidies": When Is Deference Inappropriate?*, 80 GEO. L.J. 131, 134-35 (1991) ("[T]he Court's new approach to rights-affecting benefit allocations reflects a fundamental misconception of the role of the state in the modern constitutional order."). *See also* Stephen F. Rohde, *Rust v. Sullivan: Subverting the Constitution and Abusing Judicial Power?*, 25 BEVERLY HILLS B.A. J. 155, 169 (1991) ("[T]he majority in *Rust* subverted the Constitution and abused its judicial powers . . . [by] distort[ing] settled constitutional principles; ignor[ing] stare decisis; conceal[ing] conflicting precedents and misstat[ing] the record.").

127. *Rust*, 111 S. Ct. at 1775-76 n.5 (citing Grove City College v. Bell, 65 U.S. 555 (1984)).

128. *See* Rohde, *supra* note 126 at 156 ("[A]pproximately ninety percent of the women served [by Title X projects] have incomes below 150 percent of the poverty line."). *See also* Peter Linzer, *Is the First Amendment A Middle-Class Luxury?*, 29 DEC HOUS. LAW 18 (1991) ("[I]t is [the] poor, young, and all-too-often non-white women who use publicly funded clinics . . . [who] do not hear about abortion alternatives . . . . ").

tion will receive unrestricted medical advice and information. More generally, public funding of private groups to perform public services is pervasive in our society, and the Court is allowing otherwise impermissible restrictions on speech to be imposed in the interests of keeping the grantee within the "scope" of the funded project.[129] I also worry about the application of the "gag rule" approach to other professionals who are publicly funded, especially lawyers who are public defenders or legal aid attorneys. It is one thing to stipulate what kinds of cases they can handle; but it is quite another to prevent them from at least advising their clients about other legal rights and remedies available to them. Finally, how will the Court apply these principles to funded projects which themselves are First Amendment enterprises? I am speaking here, of course, of funding of the arts, the National Endowment for the Arts and Senator Jesse Helms. Notwithstanding the old adage, can we really tell our artists and writers: if you want us to pay the piper, we get to call every note of the tune.[130]

FREEDOM OF THE PRESS

The Court decided two Free Press cases,[131] both involving the extent to which the First Amendment protects the press against damage actions, in one case for tortious defamation, and in the other for breach of contract.

Masson v. New Yorker Magazine

This was the case of the fabricated quotations.[132] Jeffrey Masson, a psychoanalyst, was the subject of a *New Yorker Magazine*

129. *See generally Rust*, 111 S. Ct. 1759 (1991).

130. Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 777 (C.D. Cal. 1991) (a recipient of a National Endowment for the Arts award was required to sign a Terms and Conditions Agreement which provided "submission of a request for funds constitutes agreement to comply with all terms and conditions").

131. Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991); Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991).

132. Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991).

piece[133] by Janet Malcolm, concerning Masson's dismissal as projects director of the Sigmund Freud Archives, located at a stately manor outside of London.[134] The article was based on extensive interviews with Masson and revealed much of the behind-the-scenes pettiness at the top of the psychoanalytic hierarchy.[135] The article, later turned into a book,[136] included numerous statements by Masson, in quotation marks, which made him appear to be insufferably pompous, or, as one reviewer put it: "[A] grandiose egotist -- mean-spirited, self-serving, full of braggadocio, impossibly arrogant . . . ."[137] Most provocative were quotes that purported to have Masson describe himself as "an intellectual gigolo,"[138] but one whose exposé of the Freud Archives would mark him as, next to Freud, "the greatest analyst who ever lived."[139]

Masson sued Malcolm and *The New Yorker* for defamation, claiming the quotes were fabricated and defamatory.[140] Of course, since the landmark ruling of *New York Times v. Sullivan*,[141] in order to recover damages for defamation, public figures like Masson must show the defamatory statements or meanings were made with knowledge that they were false or with reckless disregard of the truth.[142] The doctrine was fashioned to protect the press and public speakers from being punished

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133. Janet Malcolm, *Annals of Scholarship: Trouble in the Archives - II*, THE NEW YORKER, December 12, 1983, at 60 .

134. *Masson*, 111 S. Ct. at 2424.

135. *Id.*

136. Janet Malcolm, IN THE FREUD ARCHIVES (Alfred A. Knopf, Inc. 1984).

137. Robert Coles, *Freudianism Confronts Its Malcontents*, BOSTON GLOBE, May 27, 1984, at 58, 60.

138. *Masson*, 111 S. Ct. at 2425.

139. *Id.* at 2427.

140. *Id.* at 2425.

141. 376 U.S. 254 (1964). In *New York Times v. Sullivan*, the New York Times ran a full page advertisement implying that law enforcement officials had improperly arrested and harassed Dr. Martin Luther King, Jr. and other civil rights protesters on several occasions. The Court held that the First and Fourteenth Amendments required a privilege of criticism of official conduct, even where unintentionally false statements were made. *Id.*

142. *Masson*, 111 S. Ct. at 2429.

through civil damages for honest mistakes and to encourage full and vigorous reporting and discussion about government as well as public affairs.[143]

The issue in *Masson* was how to apply this protection to a charge of fabricated and out-of-context quotations which, since they purported to be the subject's own words, were particularly damning.[144] Three possible approaches were available to the Court.[145]

Masson argued that, apart from correcting grammar or syntax, publication of a quotation, with knowledge that it does not contain the exact words of the subject, is enough to constitute falsity in the *New York Times* sense.[146] Justice Kennedy, writing for the Court, thought this was too stringent a rule, given the realities of interviews, reporting and interpretation:

> [W]riters and reporters by necessity alter what people say, at the very least to eliminate grammatical and syntactical infelicities. If every alteration constituted the falsity required to prove actual malice, the practice of journalism, which the First Amendment standard is designed to protect, would require a radical change, one inconsistent with our precedents and First Amendment principles.[147]

The Court of Appeals for the Ninth Circuit, on the other hand, had concluded that so long as the altered quotations were at least a "rational interpretation" of what the subject actually said, there could be no liability.[148] Justice Kennedy rejected this position as

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143. *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("[An] honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech . . . ."); Curtis Publishing Co. v. Butts, 388 U.S. 130, 152 (1967) ("[W]e have rejected . . . the argument that a finding of falsity alone should strip protections from the publisher.").

144. *Masson*, 111 S. Ct. at 2430-31.

145. The first approach was to make a distinction based upon correcting grammar or syntax and some greater level of alteration. *Id.* at 2432. The second was the common law approach to libel. *Id.* at 2432-33. The third was a test of "substantial truth." *Id.* at 2433.

146. *Id.* at 2431.

147. *Id.*

148. Masson v. New Yorker Magazine, 895 F.2d 1535, 1539 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991).

too protective of the press and granting "near absolute constitutional protection" by allowing excessive "interpretation" by journalists of what interview subjects actually say.[149] Justice Kennedy also suggested that newsworthy figures would become wary of speaking to the press if their actual words could be so flexibly reconfigured.[150]

Avoiding both extremes, the Court steered a middle path, holding that: "If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation."[151] Applying this new "material change in meaning" rule, the Court concluded that all but one of the disputed quoted passages differed materially in meaning from Masson's actual statements;[152] accordingly, the Court overturned the grant of summary judgment and remanded the matter for trial.[153] Justices White and Scalia partially dissented from giving *any* protection for misquotes and complained that the Court was permitting reporters to "lie a little, but not too much."[154]

In effect, both sides emerged victorious from the *New Yorker* case which represented an opinion respectful of and sensitive to free press concerns. Masson got the right to prove his case and the press got the right to deliberately alter quotes to some degree.

Cohen v. Cowles Media Company

The press fared less well in its other case before the Court.[155] Dan Cohen, a Republican political operative in Minnesota, leaked damaging information to the press about a Democratic candidate for Lieutenant Governor.[156] Reporters promised Cohen confi-

149. *Masson*, 111 S. Ct. at 2434.
150. *Id.*
151. *Id.* at 2432.
152. *Id.* at 2435-37.
153. *Id.* at 2437.
154. *Id.* at 2438 (White, J., dissenting).
155. *Id.* at 2513.
156. *Cohen*, 111 S. Ct. at 2516.

dentiality in exchange for the information, as reporters are wont to do.[157] But the editors countermanded that pledge, deciding that the identity of the leaker/source was especially newsworthy, and the paper revealed his name as part of the story.[158] Cohen was fired from his political consulting job and sued the newspaper for breach of their pledge of confidentiality.[159] The Minnesota Supreme Court threw out a two hundred thousand dollar jury verdict in Cohen's favor, concluding that First Amendment interests outweighed Cohen's rights.[160]

In a 5-4 ruling, the United States Supreme Court, speaking through Justice White, reversed and remanded the case for further proceedings.[161] The case raised two important, but distinct, issues of First Amendment doctrine. The press argued that it could not be punished for publishing truthful, lawfully-acquired information of public importance, absent a compelling government interest.[162] But Justice White preferred "an equally

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157. *Id.*

158. *Id.*

159. *Id.* Cohen alleged fraudulent misrepresentation and breach of contract. *Id.*

160. Cohen v. Cowles Media Co., 457 N.W.2d 199, 205 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991). The Minnesota Supreme Court found that Cohen had not established a fraudulent misrepresentation claim. *Id.* at 202. Upon consideration of the breach of contract claim, the court found the claim to be inappropriate. *Id.* at 203. The court also entertained a claim of promissory estoppel which was not previously argued nor briefed by the parties. *Id.* The court performed a balancing test between the common law right and the First Amendment and concluded that the First Amendment interests outweighed the interests in protecting persons who had detrimentally relied on a promise. *Id.* at 204-05.

161. Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2516 (1991). Justices White, Stevens, Scalia, Kennedy and Chief Justice Rehnquist joined in the majority, while Justices Marshall, Souter, Blackmun and O'Connor dissented. *Id.*

162. *Id.* at 2518. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (publications about "confidential" reports concerning public officials and their duties are held immune from criminal sanctions under the First Amendment); *see also* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101 (1979) (statute bore a heavy presumption of unconstitutionality since it acted in the form of a prior restraint, and the state's interest in protecting the identity of a juvenile offender could not overcome this presumption); *accord*

well-settled line of decision that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has an incidental effect on the ability to gather and report the news."[163] If Minnesota contract law requires that people, including reporters, must keep their promises, the First Amendment does not require otherwise.[164] Accordingly, the majority declined to engage in any careful balancing of the competing interests in this particular case.

Justices Blackmun, Marshall, O'Connor and Souter dissented.[165] Justice Blackmun's dissent saw the issue in terms of the strict rules against imposition of liability based on the content of speech, which would impose a direct, not an incidental, burden on political communication.[166] An interesting dissent was also written by Justice Souter, who spoke glowingly of the role of the press in fostering the democratic dialogue.[167] He noted that First Amendment rights cannot be analyzed by reference to the interests of the press alone without considering the importance of the information to public discourse: "[F]reedom of the press is ultimately founded on the value of enhancing such discourse for the sake of a citizenry better informed and thus more prudently self-governed."[168] Indeed, his opinion was somewhat reminiscent

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Florida Star v. B.J.F., 491 U.S. 524, 531 (1989) (press held entitled to publish truthful information from a police report).

163. *Cohen*, 111 S. Ct. at 2518. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 689-90 (1972) (Court refused to extend "testimonial privilege" against compelled self-incrimination to news reporters not enjoyed by other citizens because "consequential, but uncertain, burden on news gathering" is insufficient to override fundamental function grand jury plays in law enforcement process).

164. *Id.* at 2518-19.

165. *Id.* at 2520 (Blackmun, J., dissenting).

166. *Id.* at 2520-22 (Blackmun, J., dissenting). Justice Blackmun relied on Hustler Magazine v. Falwell, 485 U.S. 46 (1988), as supplying the controlling principle that common law claims of tort or contract could not be routinely used to penalize press reporting and editorial commentary by subjecting the press to civil damages. *Id.* at 2521.

167. *Id.* at 2522-23 (Souter, J., dissenting).

168. *Id.* at 2523 (Souter, J., dissenting).

of his predecessor, Justice Brennan,[169] which may augur well for the press in future cases.

Observers have commented that in both these cases the press may have lost the battle, but won the war.[170] Preventing the press from fabricating quotes or "turning" confidential sources may make people much more willing to be subjects and sources in the future. The free flow of information to the public will thereby be enhanced.

FREE SPEECH, PUBLIC DECENCY AND PROFESSIONAL ETHICS

Well, I have saved the best for last: nude dancers[171] and criminal lawyers.[172] And I cannot decide which to do first.

What links these two cases is that they each involve interesting issues not directly confronted before by the Court. In both cases, there were sharp threshold disagreements about the essence of the cases and what doctrinal handles to attach to them. Consequently, each case produced a divided Court with no clear and consistent majority.[173]

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169. *See*, Kathleen M. Sullivan's remarks, Constitutional Law Conference, of United States Law Week (Sept. 6-7, 1991), *synopsized and quoted in* 60 U.S.L.W. 2253, 2266 (Oct. 22, 1991).

170. At the United States Law Week's Constitutional Law Conference, Jesse H. Choper, Dean at the University of California at Berkeley, discussed both *Masson* and *Cohen* and argued that they did not create a major limitation on the freedom of the press. *Id.* at 2253. Similarly, Kathleen Sullivan, a professor of criminal and constitutional law at Harvard Law School, stated that the outcome of the "two press cases should not be regarded as true defeats for freedom of the press." *Id.* at 2266.

171. *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

172. *See* Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991).

173. *See Barnes*, 111 S. Ct. at 2458 (Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia and Souter joined in the majority, while Justices White, Marshall, Blackmun and Stevens dissented); *Gentile*, 111 S. Ct. at 2723 (Justices Kennedy, Marshall, Blackmun, Stevens and O'Connor joined in the majority, while Chief Justice Rehnquist and Justices White, Scalia, Souter, and O'Connor concurred and dissented in part).

Barnes v. Glen Theatre, Inc.

Like most states, Indiana has a public decency statute which bans nudity in public places.[174] A bar and an adult entertainment center, wanting to have live, totally nude dancers performing, challenged the enforcement of the statute.[175] A lower federal court, finding that nude dancing was non-obscene and embodied significant expressive content, ruled that the First Amendment shifts the burden of justification to the state, which, in this case, failed to sustain that burden.[176] Accordingly, the issue before the Court was whether the application of the public nudity statute violated the First Amendment.[177] Five Justices held it did not, but they could not agree on a rationale.[178] The case produced four opinions with sharply differing perspectives.[179]

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174. IND. CODE § 35-45-4-1 (1988). The statute provides:

Public Indecency

1(a) A person who knowingly or intentionally, in a public place:

(1) engages in sexual intercourse;

(2) engages in deviate sexual conduct;

(3) appears in a state of nudity; or

(4) fondles the genitals of himself or another person; commits a public indecency, a class A misdemeanor.

(b)"Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

175. *Barnes*, 111 S. Ct. at 2458-59.

176. Miller v. Civil City of South Bend, 887 F.2d 826, 830 (7th Cir. 1989).

177. *Barnes*, 111 S. Ct. at 2458.

178. Chief Justice Rehnquist announced the judgment of the Court and delivered an opinion joined by Justices O'Connor and Kennedy. Justices Scalia and Souter filed separate opinions concurring in the judgment. *Id.* at 2458.

179. Chief Justice Rehnquist conceded that the nude dancing was a form of expressive conduct protected by the First Amendment, albeit marginally. *Id.* at 2460. However, he upheld Indiana's public indecency statute, despite its incidental limitations on some expressive activity, because the statute was clearly within the constitutional power of the state and furthered substantial governmental interests. *Id.* at 2461. The Chief Justice found that the statute reflected moral disapproval of people appearing nude in public places. *Id.*

Chief Justice Rehnquist announced the Court's judgment, but only spoke for three members of the Court.[180] He assumed that live nude dancing was "expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so."[181] Finding that the law involved a general prohibition on conduct, public nudity, and was not directed at nude dancing and its expressive features,[182] he applied the lower scrutiny test formulated in the draft-card burning case, *United States v. O'Brien*.[183] That formula inquires whether the challenged law is within the power of the government, furthers an important governmental interest unrelated to the suppression of free expression, and imposes an incidental restriction on speech no greater than needed to achieve that interest.[184]

Accordingly, the state had a "substantial governmental interest in protecting order and morality" which was "unrelated to the suppression of free expression." *Id.* at 2462.

Justice Scalia upheld the regulation "not because it survives some lower level of First-Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First-Amendment scrutiny at all." *Id.* at 2463. Justice Souter agreed with the plurality that nude dancing was a form of expressive conduct warranting some form of First Amendment protection, but found that Indiana had a substantial interest in combating the secondary effects that appear to accompany such activity, most notably prostitution and sexual assaults. *Id.* at 2468-69.

Lastly, Justice White's dissent agreed that nude dancing was protected conduct under the First Amendment. *Id.* at 2474. However, Justice White rejected the notion that the statute was a generally proscriptive law. *Id.* at 2473 ("No arrests have ever been made for nudity as part of a play or ballet."). Instead he found the purpose of applying the statute was to "prevent . . . customers from being exposed to the distinctive communicative aspects of nude dancing." *Id.* at 2476. Consequently, Justice White would strike down the statute because it targeted the expressive nature of the conduct. *Id.*

180. Chief Justice Rehnquist was joined by Justices O'Connor and Kennedy. *Id.* at 2458.

181. *Barnes*, 111 S. Ct. at 2460.

182. *Id.*

183. 391 U.S. 367 (1968).

184. *Id.* at 377.

Although the specific governmental purpose of the Indiana statute was unknown,[185] the Chief Justice took judicial notice that, as far back as Adam and Eve, there has been "moral disapproval of people appearing in the nude among strangers in public places."[186] (I guess he must have missed the original Olympic Games in ancient Greece.) Accordingly, the statute was found to further a substantial governmental interest in protecting order and morality.[187] Moreover, the ban was no more an effort to suppress expression than was the general prohibition on nudity in the streets.[188] Finally, the law, effectively requiring the wearing of pasties and a G-string, did not deprive nude dancing of whatever erotic message it may present, but simply made that message slightly less graphic, a concern easily overcome by the interest in societal disapproval of public nudity.[189]

To my mind, the real danger of the plurality opinion is not the result, I think the Bill of Rights will survive at least another two hundred years without live nude dancing, but the reasoning. Having treated this as a First Amendment case, the Chief Justice then let speech interests be easily and casually overridden by the most vague and amorphous community interest in "moral disapproval" of public nudity.[190] Many key free speech cases would have come out the other way under such a lax standard.[191]

That is why Justice Scalia's concurring opinion does far less damage to First Amendment interests. To Justice Scalia, this was

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185. *Barnes*, 111 S. Ct. at 2461 ("It is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted this statute, for Indiana does not record legislative history, and the state's highest court has not shed additional light on the statute's purpose.").

186. *Id.*

187. *Id.* at 2462.

188. *Id.* at 2463.

189. *Id.*

190. *Id.* at 2463-68.

191. *See, e.g.*, Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (Court struck down ordinance which prohibited drive-in movie theatres with screens visible from street from showing films containing nudity); Cohen v. California, 403 U.S. 15 (1971) (state cannot punish an individual for wearing a jacket with explicative words written on it in the courthouse).

not even a First Amendment case at all. Rather it was one involving a general law regulating conduct: "In my view . . . the challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all."[192] Thus, so long as the government is not targeting expression or communication, it is free to legislate on the basis of community morality.[193] If, however, the government is targeting expression by words or deeds, all the First Amendment heavy artillery must be wheeled out.[194] According to Justice Scalia, that is why he voted to overturn convictions for burning the American flag where the whole purpose of such laws was to suppress symbolic dissent.[195]

Much more worrisome, unfortunately, was Justice Souter's dispositive concurrence.[196] His opinion took the reverse of Justice Scalia's position. First, he found that live nude dancing *did* have substantial expressive force, and therefore, was entitled to significant First Amendment protection.[197] But then, he voted to sustain the law, nonetheless, not because these free speech interests were overcome by society's moral sensibilities, but because of the government's substantial interests in combating "secondary effects," such as prostitution, assault and the like of adult

192. *Barnes*, 111 S. Ct. at 2463 (Scalia, J., concurring). Here, Justice Scalia played the theme he fashioned in a free exercise of religion case, Employment Division, Oregon Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990), to the effect that general laws not specifically targeted at religious (or, as here, expressive) practices do not require heightened scrutiny. *Id.* at 1603.

193. *Barnes*, 111 S. Ct. at 2461-62 (Scalia, J., concurring).

194. *Id.* at 2465-66 (Scalia, J., concurring).

195. *Id.* at 2466 (Scalia, J., concurring). *See, e.g.*, United States v. Eichman, 110 S. Ct. 2404 (1990) (court held that prosecution for flag burning in violation of flag burning act of 1989 was inconsistent with First Amendment); Texas v. Johnson, 491 U.S. 397 (1989) (conviction for flag desecration held in violation of the First Amendment).

196. *Barnes*, 111 S. Ct. at 2468-71 (Souter, J., concurring).

197. *Id.* at 2468 (Souter, J., concurring).

entertainment establishments like these.[198] But there was no evidence in the record to sustain such a finding.[199] And ironically, the "secondary effects" doctrine is one that Justice Souter's predecessor, Justice Brennan, had consistently condemned.[200]

It was left to Justice White, for the four dissenters, to take the more traditional line of First Amendment analysis.[201] Nude dancing has a powerful expressive message and content.[202] Justice White noted that the nudity prohibition is *not* of general application; it does not apply, for example, at home, or in connection with ballet or legitimate theater productions.[203] Therefore, it is clear that Indiana's purpose was to suppress this particular message and the ideas the state thought the message contained.[204] Once it is assumed that the law was thus targeted on the message and its impact, rigorous First Amendment scrutiny and justification were required.[205] As Justice White put it:

> It is only because nude dancing performances may generate emotions and feelings of eroticism that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication. The nudity element of nude dancing

198. *Id.* at 2468-69 (Souter, J., concurring).

199. *See* Marianne Wesson, *Sex, Lies and Videotape: The Pornographer As Censor*, 66 WASH. L. REV. 913, 929 n.79 (1991).

200. *See* Boos v. Barry, 485 U.S. 312, 334 (1988) (Brennan, J., concurring) ("I write separately . . . to register my continued disagreement with the proposition that an otherwise content based restriction on speech can be recast as 'content neutral' if the restriction 'aims' at 'secondary effects' of speech."); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 56 (1986) (Brennan, J., dissenting) (Justice Brennan argued that the Court's focus on secondary effects was "misguided" since it did not support the conclusion that content-based regulations are thus rendered content-neutral because they purport to address such secondary effects).

201. Justice White wrote the dissent which was joined by Justices Marshall, Blackmun, and Stevens.

202. *Barnes*, 111 S. Ct. at 2471 (White, J., dissenting).

203. *Id.* at 2472-73 (White, J., dissenting).

204. *Id.* at 2473-74 (White, J., dissenting).

205. *Id.* at 2474 (White, J., dissenting).

> performances cannot be neatly pigeonholed as mere 'conduct' independent of any expressive component of the dance. That fact dictates the level of First Amendment protection to be accorded the performances at issue here.[206]

The law failed that strict test because, even if compelling interests are conceded, the state had many more narrow alternatives by which to secure those interests.[207]

I think the dissenters have the better of it. There was no real assessment of the *harm* from live nude dancing in a controlled context.[208] The very casual way that the plurality let the "moral disapproval" of the community trump expressive activity is a troubling invitation to local government to return to the days of broad regulation of speech found immoral, offensive or obnoxious to community standards, which would overturn long settled First Amendment understandings.[209]

Gentile v. State Bar of Nevada

This case was the Term's other "gag rule" case, involving not health care providers, but criminal defense lawyers. The case provided the first occasion for the Court to confront broadly the question of controlling the extrajudicial comments of lawyers in an asserted effort to protect the integrity of the adjudicatory process.[210] The Court has decided numerous cases involving attempts

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206. *Id.* (White, J., dissenting).

207. *Id.* at 2475 (White, J., dissenting).

208. I also found it surprising that the Court made no mention of two cases which had struck down bans on the display of nudity in controlled settings. Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (Jacksonville ordinance making exhibition of movies with nudity a punishable public nuisance held in violation of the First Amendment); Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975) (Court held that denial by City of Chattanooga of use of municipal theater, a public forum, for showing of musical "Hair" constituted an unlawful prior restraint).

209. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (conviction for flag desecration held inconsistent with First Amendment); Cohen v. California, 403 U.S. 15 (1971) (conviction for wearing jacket bearing profane words held inconsistent with the First Amendment).

210. Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991).

to secure a fair trial by imposing gag orders on the *press*,[211] as well as several cases involving restraints on attorney speech that consisted of advertising or soliciting legal services.[212] But this was the Court's initial major encounter with "gag rule" restrictions on attorney speech in the fair trial context.[213] And the result in the case reflects the difficulties of the issue.

The facts that gave rise to the issue came straight out of *The French Connection*.[214] In *Gentile*, police discovered large amounts of cocaine and travelers' checks missing from the privately-owned vault they utilized for the purpose of conducting undercover operations.[215] The contraband had been kept in a vault at the privately-owned Las Vegas Vault Company and simply disappeared.[216] There were months of press speculation and leaks about whether any members of the narcotics detective squad had been involved.[217] Ultimately, however, the focus of suspicion in the press reports shifted to the Vault Company owner, who was represented by Dominic Gentile, a prominent member of the criminal defense bar.[218] When Gentile got a tip

211. *E.g.*, Florida Star v. B.J.F., 491 U.S. 524 (1989) (civil sanctions imposed upon newspaper for publishing a rape victim's identity violated the First Amendment); Oklahoma Publishing Co. v. District Ct. for Okla. County, 430 U.S. 308 (1977) (pretrial order enjoining press from naming juvenile or publishing his picture abridged freedom of press); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (presumption against prior restraint has particular force in reporting of criminal proceedings).

212. *See, e.g.*, Peel v. Attorney Reg. and Disciplinary Comm'n, 496 U.S. 91 (1990) (attorney's First Amendment rights, with respect to professional advertising, was subject to commercial speech standards); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (direct mailing to clients with particular legal problems protected); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (attorney could constitutionally advertise that ACLU would represent client without a fee); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (attorney's advertisement offering services at "very reasonable" prices not misleading and was protected by First Amendment).

213. 111 S. Ct. 2720 (1991).

214. *Id.* at 2729 n.1. News reports of the conference reported that Gentile compared his case with the French Connection case. *Id.*

215. *Id.* at 2727.

216. *Id.*

217. *Id.*

218. *Id.* at 2728.

that his client was about to be indicted for stealing the drugs and money, he called a press conference which was held a few hours after the indictment was returned.[219] At the conference, Gentile read a prepared statement in which he said his client was being framed and set up as a fall guy and that the real culprits were some of the specific detectives in the narcotics unit.[220] In response to reporters' questions, he refused to provide more detailed information or speculation.[221]

Six months later, Gentile's client was acquitted by a jury which, concededly, had not been influenced at all by the attorney's earlier press conference and statements.[222] Nonetheless, state bar authorities commenced disciplinary proceedings charging Gentile with having made statements that reasonably might have posed "*a substantial likelihood of materially prejudicing an adjudicative proceeding,*"[223] even though, in fact, they had not.[224] That provision in the Nevada Professional Conduct Code was based on the American Bar Association Model Rule of Professional Conduct 3.6,[225] and thirty-one states,[226] including

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219. *Id.*

220. *Id.* at 2724, 2729.

221. *Id.* at 2731-32.

222. *Id.* at 2730-31.

223. *Id.* at 2723 (emphasis added).

224. *Id.* at 2730 ("[N]ot a single juror indicated any recollection of [Gentile] or his press conference.").

225. *Id.* at 2741 (Rehnquist, C.J., dissenting in part). Nevada Supreme Court Rule 177 provides:

> Trial Publicity
>
> 1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
>
> 2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
>
> (a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
(c) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
(d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
(e) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or
(f) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

3. Notwithstanding subsection 1 and 2(a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
(a) the general nature of the claim or defense;
(b) the information contained in a public record;
(c) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
(d) the scheduling or result of any step in litigation;
(e) a request for assistance in obtaining evidence and information necessary thereto;
(f) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(g) in a criminal case:
(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and length of the investigation.

Id. at 2737 (app. B).

226. *Id.* at 2741 n.1. States that have adopted Model Rule 3.6 verbatim include Arizona, Arkansas, Connecticut, Idaho, Indiana, Kansas, Kentucky,

New York,[227] have a similar provision.[228] The Nevada Disciplinary Board and the Nevada Supreme Court found that Gentile had violated the rule and imposed a private reprimand.[229]

Maryland, Mississippi, Missouri, New Mexico, Pennsylvania, Rhode Island, South Carolina, West Virginia and Wyoming. *Id.* States adopting it with minor modification include Delaware, Florida, Louisiana, Montana, New Hampshire, New Jersey, New York, Oklahoma, South Dakota, Texas and Wisconsin. *Id.* Utah's statute employs a test of "substantial likelihood of materially influencing." *Id.* Other states have adopted parts of the Model Rule such as Michigan, Washington and Minnesota. *Id.* A number have adopted American Bar Association Code of Professional Responsibility Disciplinary Rule 7-107 (1991), including Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, Ohio, Tennessee, and Vermont. *Id.* at n.2. North Carolina employs a "reasonable likelihood of prejudice" test. *Id.*

227. *Id.* at n.1. New York has adopted it with minor modification. The New York Rule DR 7-107 provides:

> Trial Publicity
>
> A. A lawyer participating in or associated with a criminal or civil matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
>
> B. A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
>
> 1. The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness.
>
> 2. In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by the defendant or suspect or that person's refusal or failure to make a statement.
>
> 3. The performance or results of any examination or test of the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented.
>
> 4. Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration.
>
> 5. Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial jury.

The Supreme Court reversed.[230] The major issue was whether to apply a "clear and present" or "imminent" danger test to the lawyer's comments about the pending proceedings.[231] That, of course, is the rigorous standard utilized when members of the press or citizens are sought to be sanctioned for reports or statements that impact a judicial proceeding,[232] and Gentile argued

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6. The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

C. Provided that the statement complies with DR 7-107(A), a lawyer involved with the investigation or litigation of a matter may state the following without elaboration:

1. The general nature of the claim or defense.
2. The information contained in a public record.
3. That the investigation of the matter is in progress.
4. The scheduling or result of any step in litigation.
5. A request for assistance in obtaining evidence and information necessary thereto.
6. A warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest.
7. In a criminal case:
   a. The identity, age, residence, occupation and family status of the accused.
   b. If the accused has not been apprehended, information necessary to aid in apprehension of that person.
   c. The fact, time and place of arrest, resistance, pursuit, use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.
   d. The identity of investigating and arresting officers or agencies and the length of the investigation.

N.Y. JUD. LAW APPENDIX CODE OF PROF. RESP. DR 7-107 (McKinney 1992).

228. *Gentile,* 111 S. Ct. at 2741.

229. Gentile v. State Bar of Nev., 787 P.2d 386, 387 (Nev. 1990).

230. *Gentile,* 111 S. Ct. at 2736.

231. *Id.* at 2732-33.

232. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (judicial order prohibiting news reporting or commentary on public judicial proceedings invalid); Craig v. Harney, 331 U.S. 367 (1947) (invalidated contempt citation issued for publication of editorial critical of judge's ruling on pending motion

that lawyers are entitled to the same high level of First Amendment protection.[233] Five Justices disagreed, ruling that for attorneys the lesser "substantial likelihood" standard contained in the disciplinary rule is constitutionally sufficient.[234] Chief Justice Rehnquist noted the greater power courts have over behavior in the courtroom and with respect to participants in judicial proceedings, especially lawyers.[235] He also observed that lawyers have been characterized as "officers of the court," with greater obligations to the fairness of the adjudicatory process.[236] Accordingly, as the rule only controlled lawyers' speech directly impacting on the judicial process, it was narrowly confined and satisfied the First Amendment.[237]

Justice Kennedy wrote for four Justices[238] who took a sharply different view. In his estimation, the lawyer's comments were classic political speech at the very "core of the First Amendment:"[239] they were critical comments about government officials charged with misconduct and wrongdoing.[240]

> Unlike other First Amendment cases this Term in which speech is not the direct target of the regulation or statute in question . . . this case involves punishment of pure speech in the political forum. Petitioner engaged not in solicitation of clients or advertising for his practice . . . . [Instead,] [h]is words were directed at public officials and their conduct in office . . . . There is no question that speech critical of the exercise of the

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for new trial); Pennekamp v. Florida, 328 U.S. 331 (1946) (contempt citation for publication of editorials and cartoon critical of judge during pending trial unwarranted); Bridges v. California, 314 U.S. 252 (1941) (contempt citation unwarranted for publication of editorial on pending litigation).

233. *Gentile*, 111 S. Ct. at 2732-33.

234. *Id.* at 2738, 2748 (Rehnquist, C.J., joined by White, Scalia, Souter and O'Connor, JJ. concurring).

235. *Id.* at 2743.

236. *Id.* (quoting *In re* Sawyer, 360 U.S. 622, 666, 668 (1959) (Frankfurter, J., dissenting)).

237. *Id.* at 2745.

238. *Id.* at 2723 (Kennedy, J., joined by Marshall, Blackmun and Stevens, JJ.).

239. *Id.* at 2724 (quoting Butterworth v. Smith, 110 S. Ct. 1376, 1381 (1990)).

240. *Id.* at 2724.

> State's power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of information relating to alleged governmental misconduct . . . . The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations.[241]

For that reason Justice Kennedy viewed the "substantial likelihood" formulation as inadequate protection for such vital public speech by lawyers or anyone else.[242] Moreover, under even a more watered-down test, there was no evidence whatsoever that Gentile's remarks had a deleterious impact on the proceedings.[243]

As she has in critical cases in the past, Justice O'Connor occupied the pivotal position which determined the outcome of the case. Having supplied the fifth vote to sustain the basic thrust of the disciplinary rule as written, in other words, the "substantial likelihood of material prejudice" formulation, she then supplied the fifth vote to overturn Gentile's reprimand.[244] The reason was the vagueness of a "safe harbor" provision in the Nevada rule which permitted an attorney to "state without elaboration . . . [t]he general nature of the claim or defense."[245] Justice O'Connor agreed that Gentile had tried to stay within the boundaries of this exemption, and therefore it was sufficiently uncertain in meaning as to invite the risk of content-based discriminatory enforcement.[246]

I think Justice Kennedy's approach is the better one. The criminal justice system has become one of the most vital and controversial areas of our public life. Think of the numerous and notorious criminal proceedings that appear on the front pages,

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241. *Id.* at 2724 (citations omitted).

242. *Id.* at 2725-27.

243. *Id.* at 2731.

244. *Id.* at 2748-49. Justices Marshall, Blackmun and Stevens joined in the opinion written by Justice Kennedy. Chief Justice Rehnquist wrote a dissenting opinion which was joined by Justices White, Scalia and Souter. Justice O'Connor filed an opinion concurring in part with Justice Kennedy and in part with Chief Justice Rehnquist. *Id.* at 2723.

245. *Id.* at 2749 (O'Connor, J., concurring) (discussing Subsection (3) of Nevada Supreme Court Rule 177).

246. *Id.* at 2749.

and more potentially on the television screens of America, every day. The deck already often appears heavily stacked against prominent defendants, whose indictments have usually been preceded by days and weeks of leaks about guilt. In this milieu, the right of the defendant, through counsel, to counter this publicity is vital to safeguard not only First, but Fifth and Sixth Amendment protections as well.[247]

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247. *See* Levine v. United States Dist. Ct., 775 F.2d 1054 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986). The court wrote:

> Suppose, for example, the accused wishes to charge that the indictment was politically or religiously motivated. The freedom to make such a charge against the state is surely paramount among the freedoms protected by the First Amendment. To deprive the accused of his most valuable resource in criticizing the government, his lawyer, is to restrict, and restrict severely, his First Amendment rights.

Id. at 1055. *Cf.* United States v. Ford, 830 F.2d 596 (6th Cir. 1987) (overturning gag order on defendant congressman in mail and bank fraud case).

The issue of sanctioning attorneys for criticizing the criminal justice system or the courts will not soon go away. Four days after the Court's decision in the *Gentile* case, the New York Court of Appeals upheld a letter of reprimand issued to former Brooklyn District Attorney Elizabeth Holtzman for having "made a false allegation of specific wrongdoing" about a criminal court judge's conduct in presiding over a sexual assault case. *In re* Holtzman, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39, *cert. denied*, 112 S. Ct. 648 (1991). Just as the Supreme Court rejected the more protective *Nebraska Press* rule, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), against gag orders in *Gentile*, the New York Court of Appeals rejected the more protective *Times v. Sullivan* press rule, New York Times v. Sullivan, 376 U.S. 254 (1964), for false charges against public officials in *Holtzman*. The Court feared that such a rule would "immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth." *Holtzman*, 78 N.Y.2d at 192, 577 N.E.2d at 34, 573 N.Y.S.2d at 43.

A Missouri court likewise upheld a reprimand against a prosecutor who called an appellate court judge's ruling in a case "illogical" and "a little bit less than honest," and who made other disparaging remarks about the bench. *In re* Westfall, 808 S.W.2d 829, 831 *cert. denied*, 112 S. Ct. 648 (1991). The Court's refusal to hear these cases will likely encourage bar disciplinary authorities to be even more aggressive in prosecuting lawyers who make disparaging comments about the judiciary.

CONCLUSION

In the few moments remaining let me try to make some overall observations and hazard a few predictions. First, there was not one case last Term where a clear majority stood for a powerful and uncompromising view of First Amendment rights.[248] Second, there was a pattern of broader deference to governmental choices regarding taxing,[249] spending,[250] preservation of moral sensibilities[251] and regulation of the legal profession.[252] Third, as a result, more and more First Amendment rights will have to be sought, in effect, in the legislature and with executive agencies. That is where the gag rules on doctors and lawyers will have to be overturned. The problem is this is a bad habit to get into, namely, looking to legislative majorities and politically-accountable executive officials to protect individual rights and to be the final guardians of individual liberties.

Having sounded that somewhat gloomy note, I still have some optimism about the immediate future in the Court. Two benchmark cases are currently pending, *sub judice*, at this writing.[253] Each will be significant bellwethers as to the Court's future First Amendment path.

One case involves the well-known New York "Son of Sam" law,[254] enacted to prevent criminals from profiting from the fruit of their crimes by selling their stories to the media. The law allows a state agency to impound such funds for a period of five years so that victims of the wrongdoing can seek compensation.[255] Pending before the Court is a challenge to the law

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248. *See supra* note 21 and accompanying text.

249. *See supra* notes 61-88 and accompanying text.

250. *See supra* notes 79-126 and accompanying text.

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

252. *See supra* notes 171-209 and accompanying text.

253. *See* Simon & Schuster, Inc. v. New York Crime Victims Bd., 112 S. Ct. 501 (1991); R.A.V. v. St. Paul, Minn., 112 S. Ct. 2538 (1992). These cases have since been decided. *See infra* note 261.

254. N.Y. EXEC. LAW § 632a (McKinney 1982).

255. The "Son of Sam Law" provides in pertinent part:

brought by a publisher who contracted for the book that became *Wiseguy*[256] (and later the movie, *GoodFellas*).[257] I think the Court may throw out the Son of Sam Statute. If you look at Justice Kennedy's opinion in *Gentile* urging the vital need to speak about issues of law and order,[258] Justice O'Connor's concern in the cable tax case about financial penalties against media based on the content of their publications,[259] and Justice Souter's dissent in the confidential source case showing sensitivity to the journalist's craft,[260] you may find the core of a majority to overturn the law.[261]

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1. Every . . . corporation . . . contracting with any person . . . accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of movie [or] book, . . . shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted . . . . The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim . . . of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person . . . .

4. Upon a showing by any convicted person that five years have elapsed from the establishment of such escrow account and further that no actions are pending against such convicted person pursuant to this section, the board shall immediately pay over any moneys in the escrow account to such person . . . .

Id.

256. NICHOLAS PILEGGI, WISEGUY: LIFE IN A MAFIA FAMILY (Simon & Schuster 1986).

257. Simon & Schuster, Inc. v. New York Crime Victims Bd., 112 S. Ct. 501 (1991).

258. *See supra* notes 238-242 and accompanying text.

259. *See supra* notes 54-60 and accompanying text.

260. *See supra* notes 167-68 and accompanying text.

261. Happily, this prediction turned out to be accurate. On December 10, 1991 the Supreme Court *unanimously* invalidated New York's Son of Sam law on First Amendment grounds. *See Simon and Schuster, Inc.*, 112 S. Ct. at 501. Justice O'Connor did indeed write the majority opinion, finding the law impermissibly imposed a financial disincentive on the speech at issue, singling it out from among all speech engaged in by individuals who have committed

The other major pending case[262] involves a local "hate speech" ordinance,[263] applied to penalize a late night cross-burning on the lawn of the home of a Black family that recently arrived in the neighborhood.[264] From a free speech perspective, the facts are not great; but neither is the ordinance, which sweepingly condemns hurtful, bigoted speech by making it a crime to display any symbol or writing "which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender."[265] Though the Minneapolis ordinance was narrowed by the state court,[266] its reach remains troubling, as the oral argument before the Court indicated.[267] And the case has powerful implications for all the anti-bias "speech codes" enacted on so many of our campuses.[268]

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crimes. *Id.* at 508. Justice O'Connor relied on the press tax cases to find, in effect, a tax on particular speech. *Id.* Justice Kennedy wrote a very strong concurring opinion concluding that the law was inherently defective as a purely content-based penalty on speech. *Id.* at 515 (Kennedy, J., concurring).

262. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

263. *See* ST. PAUL, MINN., LEG. CODE § 292.02 (1990) (Bias-Motivated Crime Ordinance).

264. *R.A.V.*, 111 S. Ct. at 2541.

265. ST. PAUL, MINN. LEGIS CODE §292.02 (1990). The St. Paul Bias Motivated Crime Ordinance provides:

> Whoever places on a public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id.

266. *See In re* Welfare of R.A.V., 464 N.W.2d at 510-11. *See also* Brief for Petitioner at 6, R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) (Minnesota Supreme Court tried to narrow ordinance by limiting application to "fighting words" or "imminent lawless action").

267. Brief for Petitioner at 5, R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) ("Section 292.02 is neither supported by a compelling interest nor narrowly tailored to meet such an interest. The City of St. Paul has no legitimate objective in regulating politically unpopular or upsetting expressive conduct. To the extent such expression merely causes discomfort or is unsettling to its audience, it is fully protected by the First Amendment.").

268. *See supra* note 9 and accompanying text.

Since perfectly valid laws, like trespass and assault, are available to deal with most bias crime, I hopefully predict that the Court will feel that punishing speech is not the way to combat bigotry and prejudice.[269]

These are both victims' rights cases, victims of crime and victims of hate, and government understandably seeks to protect such victims in order to preserve public morality and decency.

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269. This prediction also proved accurate. On June 22, 1992, the Supreme Court, with all Justices concurring in the judgment, invalidated the ordinance on First Amendment grounds. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy, Souter and Thomas, delivered the opinion of the Court and held that the ordinance was facially invalid under the First Amendment because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id.* at 2542.

The Court accepted the Minnesota Supreme Court's construction that the ordinance was narrowly tailored, and reached only expressions constituting "fighting words." *Id.* at 2541-42. The Court also acknowledged that fighting words, like other limited categories of speech, such as obscenity or defamation, may be "regulated *because of their constitutionally proscribable content.*" *Id.* at 2543. However, the Court noted that these categories of speech are not "entirely invisible to the Constitution," *id.*, thus the "government may not regulate [their] use based on hostility or favoritism towards the underlying message expressed." *Id.* at 2545. The Court found that not all "[d]isplays containing abusive invective" are covered, *id.* at 2547, and concluded that this selective proscription "create[d] the possibility that the city is seeking to handicap the expression of particular ideas." *Id.* at 2549.

Justice White, joined by Justices Blackmun, O'Connor and Stevens, agreed with the judgment, but would hold the ordinance in violation of the First Amendment because it is "fatally overbroad," criminalizing both protected and unprotected speech. *Id.* at 2550 (White, J., concurring). Justice White objected that the Court's approach placed fighting words on "equal constitutional footing with political discourse and other forms of speech . . . deemed to have the greatest social value, [thus] . . . devalu[ing] the latter." *Id.* at 2554. (White, J., concurring) (Stevens, J., did not join in this part of the opinion).

Justice Stevens, joined by Justices White and Blackmun declared that the Court turned First Amendment law on its head, thus entitling fighting words "greater protection than commercial speech--and possibly greater protection than core political speech." *Id.* at 2564 (Stevens, J., dissenting).

Finally, Justice Blackmun, writing alone, found the Court's decision disheartening because it hampered the ability of society to cope with bias and prejudice; he hoped it would be regarded as an aberration because of the Court's strained use of settled doctrine. *Id.* at 2560 (Blackmun, J., dissenting).

That is precisely when the need for the First Amendment is the greatest.