

THIRD THOUGHTS ON *RUST v. SULLIVAN* AND THE FIRST AMENDMENT—DEAN STONE'S SUPPOSED KILLER HYPO

Professor Van Alstyne had it right the first time, when he defended the Supreme Court's decision in *Rust v. Sullivan* on the ground that it is no offense to the first amendment for government to fund one kind of professional consulting service but not another, and to insist upon that choice by directing what kind of consultive service it is paying for and to refuse to allow some other program to be furthered "on its nickel." It had seemed to me that if the preferred and disadvantaged messages had been more closely aligned with standard predilections, this would have been better appreciated. (Some suggestions: high school anti-smoking counseling or programs promoting racial tolerance.)

But Van Alstyne seemed to be stumped by a counter example offered by Dean Stone: government funds legal assistance to poor but non-indigent criminal defendants, and precludes advice about fourth amendment rights in a way thought to be analogous to the Title X preclusion of advice about abortion rights. The distinctions between the two cases offered by Dean Stone both involve judgments so complex, fancy and controversial as to put in doubt whether the two cases really can be distinguished and that therefore the *Rust* rationale must fail. But there is a ready and straightforward distinction that condemns the fourth amendment case and leaves the Court's (and Van Alstyne's) reasoning quite intact.

In addition to the fourth amendment right (which is the analogue to the *Roe* right) there are independent constitutional rights to due process of law and assistance of counsel. Government interference with a defendant's criminal defense in the way suggested in the hypothetical offers an argument that one or both of these constitutional rights have been violated in any ensuing trial and conviction. But in the Title X case there is no independent constitutional right apart from the *Roe* right (which analogizes to the fourth amendment right). To invoke *Roe* again is double counting. Or it is to posit an affirmative right to government assistance in the exercise of *Roe* rights—which is just what *Harris v. McRae* settled to the contrary, and it was the real purpose of this litigation to unsettle. Or it is to suggest that there is some right to uninterfered with med-

ical advice, to a doctor-patient relation that satisfies the canons of the AMA, or some other such thing. There may be such rights as a matter of morality or of professional ethics, but they are not constitutional rights. And to argue that the right in the counselling situation is just the first amendment free speech right is to argue in a circle.

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