

SECOND THOUGHTS ON *RUST v. SULLIVAN* AND THE FIRST AMENDMENT

Preliminary comment on *Rust v. Sullivan* has expressed serious misgivings on its first amendment implications. The majority of comment has suggested that *Rust* is in error, even as the dissent suggested, as a violation of freedom of speech. It is less clear to me than it is to others that either the dissent or the critics are correct.¹ I have modeled the following comparison to try to gain some distance from the problem. The effort is to propose a rival case (and have the reader judge the adequacy of the comparison to his or her own critical satisfaction). Here is the comparison I want to suggest.

1. Suppose the Supreme Court has held that while a state law forbidding "child abuse" as ordinarily understood (to forbid varieties of harsh treatment of one's child) is valid as against a parental claim of right to provide for the rearing and discipline of his or her own child as he or she thinks best, and the Court has also held that the fourteenth amendment does protect a parent's interest in respect to the care, discipline, control, and rearing of children to the extent that the mere spanking of one's own child in one's own home *cannot* be criminalized by the state.²

2. Suppose Congress funds "family counseling" centers as part of its concern with the terrible general problem of poor child care in America, and that these centers will operate in much the same fashion as Title X projects currently do. Let us call these Title XI projects.

3. Suppose the question arises in Congress, in drafting the family counseling assistance act, whether there should be any limitations on eligibility for federal funds, and it is quickly resolved that

1. There were other issues also presented in *Rust*, of course. The O'Connor dissent seemed to me well reasoned (that the Court should not have deemed the restrictive regulation to be consistent with the act under the circumstances, notwithstanding *Chevron*), but here I am not seeking agreement or comment on that point. Rather, I want to eliminate that kind of issue to examine the more basic criticism that has been ventured of the case (i.e., that assuming the regulation were exactly faithful to the act of Congress then the act as applied is invalid under *Roe* and under the first amendment, contrary to the position taken by Rehnquist for five members of the Court).

2. I need not elaborate the foundation for that opinion here, but it would have strong grounding in a number of family privacy cases—from *Meyer*, *Skinner*, *Yoder*, *Griswold*, *Moore v. City of East Cleveland*, etc.—that suggest a fundamental right to have children and direct their upbringing at home as a parent, consistent with reasonable limitations essential for their fair protection.

there should be—that not just any kind of “counselling” is worthy of federal tax support. While recognizing that parents may have a constitutional right (so to speak)³ to spank their own children, and while recognizing that some child psychologists believe that there are circumstances in which spanking is the preferred course for a parent to pursue, Congress nevertheless concludes that the use of spanking is nothing taxpayers should be asked to support.

The case that emerges, then, is essentially this: federal funds are available on application to help defray expenses in operating local family counseling centers willing and interested in providing counselling on affirmative means of child rearing, but exclusive of “aversive” conditioning as a means of child rearing—counselling the use of spanking cannot be provided by a Title XI project. A grant applicant acknowledges that the counselling *it* believes to be suitable to provide those seeking its services *must* include counselling inclusive of spanking. In *its* view, moreover, and in the view of the child psychologists *it* uses in *its* facilities, *failure* to mention spanking as a parentally responsible action would be professionally irresponsible.⁴ Unable (or unwilling) to limit its counselling exclusive of such advice, its application for becoming a Title XI project is returned as failing the eligibility limitations Congress has expressly provided.

One may modify this case to bring it more nearly parallel to *Rust v. Sullivan*. One may do this by supposing that a Title XI project is *not* itself a “family counseling” agency as such; rather, it is an agency that will furnish a list of family counseling agencies, but, to be eligible for federal funds, insofar as Congress does not approve of spanking children, the list an agency receiving federal funds uses in its capacity as a Title XI project⁵ may not include counseling agencies that recommend spanking as among the alternatives parents should consider as appropriate to do. (Actually, this is not a very subtle hypothetical. Rather, it has been selected

3. Actually, not a “right” in the correct sense, but rather a “liberty” they may exercise within limits otherwise validly set by each state (pursuant to its anti-child-abuse laws).

4. Of course, it also concedes that not everyone agrees that counselling spanking is either necessary or desirable—it concedes (as it must) that there is a range and difference of opinion among professionals as among lay persons as well. Still, it holds firmly to its view that such persons are seriously mistaken and not really competent psychologists; in its view, no competent psychologist would fail to urge spanking at least in some circumstances. On the other hand, it also acknowledges (as it must) that while the Supreme Court has upheld parental rights (including spanking), the Court has never suggested that a parent has some kind of constitutional “duty” to use spanking.

5. Such lists the same agency may provide *elsewhere*, on the other hand, may of course include agencies that do encourage the use of child spanking (i.e., *nothing in confining its activity as a Title XI project in any way requires that it alter or abandon any other service or activity it is currently engaged in*).

merely to gain distance and perspective on the basic issue. I choose "spanking" rather than "abortion" because not all who feel deeply about abortion may feel equally deeply about the right to spank—or the unconstitutionality of legislation limiting tax support money to agencies not making referrals to those who will counsel the desirability of spanking.)

To stimulate some interest in this comparison, I sent a few preview copies to a few first amendment buffs for their own first reaction. Geoffrey Stone sent back the following provocative response, which with his permission is republished here. Perhaps others will see alternative ways of sorting it out as well. What does one think is the key?⁶

*William W. VanAlstyne*⁷

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Dear Bill:

Thanks for sending me your mock problem concerning *Rust v. Sullivan*. It is, indeed, intriguing. Let me, however, pose a counter hypothetical.

Suppose the government decides to provide legal assistance for poor but non-indigent criminal defendants. Suppose also that attorneys who are funded through this program must agree not to inform their clients of their right to exclude evidence under the fourth amendment. I suggest that this hypothetical also duplicates *Rust*, but that our intuitions in this hypothetical run in exactly the opposite direction from your hypothetical.

I can think of two possible explanations. First, it may be that we "rank" the constitutional rights at issue in these situations as follows: 1. fourth amendment, 2. abortion, 3. spanking. Thus, we think it legitimate for the government to discourage spanking, illegitimate for the government to discourage enforcement of the exclusionary rule, and we are apparently divided over whether it is legitimate for the government to discourage abortion (an issue, however, that has been resolved for us by the Supreme Court in *Harris* and *Maher*). The problem with this

6. Is there a denial of equal protection to the ineligible applicant? (But no one is made ineligible because of who they are, rather, they are ineligible only to the extent that they would admittedly presume to spend the funds for which they make application in a manner no applicant would be permitted to do. And if that is so, wherein does the denial of equal protection of the law, differentiating them from anyone else, inhere?) Is it, rather, that the restriction abridges the constitutional rights of parents (to spank their children)? (But no sanction is threatened by this law for any such activity, so wherein is the infringement of that right?)

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explanation, of course, is that it would seem to return us to the realm of “preferred freedoms.”

A second explanation, suggested to me by Elena Kagan, one of my younger colleagues, is that the difference lies in our intuitions about the extent to which the “counselor” in each of the three situations would effectively determine the individual’s decisions for him or her. In the spanking hypothetical we know that individuals are well aware of the option of spanking. The mere fact that it is not recommended by a family counselling advisor would not seriously interfere with the individual’s opportunity to exercise the right. In the abortion context, people are well aware of the right to abortion, but they may place more weight on the advice they receive from a family planning advisor because the decisions involved are so much more difficult. Finally, in the defense counsel hypothetical, it’s clear that individual defendants will have little knowledge of their constitutional rights and will therefore make their decisions almost entirely on the advice they receive from their attorneys. Hence, our intuitions may be explained by the extent to which we think the government is effectively “trumping” the individual’s decisions about the exercise of these rights.

In any event, that’s the best I can do at the moment.

Sincerely yours,

Geoffrey R. Stone