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Viewpoint Discrimination in Law School Clinics: Teaching Students When and How to Just Say No

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Viewpoint Discrimination in Law School Clinics: Teaching Students When and How to "Just Say No"

Wishnatsky v. Rovner[1]

I. INTRODUCTION

In 1996, the American Bar Association ("ABA") amended its law school accreditation standards and required that all ABA-approved law schools offer "live-client or other real-life practice experience."[2] In doing so, the ABA confirmed the increasingly important role of law school clinics in legal education.[3] This unique teaching environment moves students and professors out of the classroom and into real-world courtrooms. As these "student-lawyers" work on behalf of live clients, they "experience the legal ethics issues lawyers face every day, such as client confidentiality, conflict of interest, and competency issues."[4]

Not surprisingly, with these ethical issues come difficult decisions for the student-lawyer, as well as the clinical directors and faculty. Given that public law school clinics are funded by the government through the law schools, and "provid[e] legal assistance to traditionally under-represented individuals and groups," these ethical considerations take a rather unique position in case and client selection.[5] The Eighth Circuit addressed these issues in *Wishnatsky v. Rovner*.[6]

Ultimately, the case turns on the court's analysis of government benefits and viewpoint discrimination in the law school clinic setting.[7] This Note will explore the case history leading up to this decision and point out that, although the Eighth Circuit likely comes to the correct holding, its analysis of the legal background and policy implications of viewpoint discrimination and government benefits is lacking in substance. In addition to missing an opportunity to elaborate on what educational deference should be given to law school clinics, the court also failed to clarify and distill the increasingly confusing and misunderstood legal concept of viewpoint discrimination.

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1. 433 F.3d 608 (8th Cir. 2006).
2. Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 1972 (2003).
3. *Id.*
4. *Id.* at 1974.
5. *Id.* at 1972.
6. *Id.*
7. *Id.*

II. FACTS AND HOLDING

In 2002, Laura Rovner, director of the Clinical Education Program at the University of North Dakota School of Law,[8] advised law students enrolled in the school's clinical programs.[9] Prior to the instant case, the students and Rovner represented professors from North Dakota State University.[10] The professors sought the removal of a Ten Commandments monument that was placed on city property.[11] In response to this representation, and after an appearance by Rovner and her students at a city council meeting, appellant Martin Wishnatsky, a resident of Fargo, North Dakota, criticized the law clinic's involvement in the case.[12]

Wishnatsky sent a letter to the editor of the *Grand Forks Herald*, in which he criticized the representation as an inappropriate use of public funds.[13] He further stated that Rovner and her students were "engag[ing] in . . . ideological warfare" and that the clients were "parlor atheists who delight in attacking the faith of millions."[14]

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8. The Clinical Education Program operates two projects: The Civil Rights Project and The Civil Litigation Project. Rovner directed the Civil Rights Project, which was engaged in representing clients who had been unable to find representation elsewhere in matters of civil rights and liberties. Brief of Appellee at 5, Wishnatsky v. Rovner, 433 F.3d 608 (8th. Cir. 2006) (No. 04-3503).

9. *Id.*

10. Wishnatsky v. Rovner, 433 F.3d 608, 609 (8th. Cir. 2006). Ms. Rovner was no longer employed as Clinic Director at the time of the decision, however, as the action was filed against her in her official capacity, it continued in her successor. *Id.* at 610 n.1.

11. *Id.* at 609.

12. Brief of Appellee, *supra* note 8, at 6.

13. *Wishnatsky*, 433 F.3d at 609-10. Specifically, Wishnatsky stated:

> The suspicion therefore arises that Rovner is abusing her position as head of the Clinical Education Program at UND to further her own political agenda. The ungodliness of Bill Clinton is well known. Less well-known is that Rovner signed a petition sent to Congress by law school professors arguing against Clinton's impeachment by the U.S. House of Representatives.
>
> For the state government via its law school to call the Ten Commandments lawsuit "education" seems far from the mark. As the Herald stated in an editorial, it smacks of "indoctrination," especially in light of Rovner's statement applauding the "courage" of these atheistic professors in asserting their "religious freedom."

Brief of Appellee, *supra* note 8, at 6.

14. *Id.* at 5-6 (alternation in original).

In an attempt to advance his own First Amendment lawsuit, Wishnatsky sent a letter dated October 29, 2003 to the Clinic seeking assistance.[15] In this letter, Wishnatsky stated that he wanted to bring suit against "Grand Forks County and other relevant parties for having a statue of the goddess Themis on top of the Grand Forks County courthouse."[16] Additionally, he requested assistance "developing a lawsuit on the same basis as that granted to the atheistic North Dakota State University professors."[17]

Rovner responded to Wishnatsky and denied his request for representation.[18] In the letter, Rovner explained that, "due to the high demand for our legal services coupled with our current caseload and limited resources, the Civil Rights Project is unable to accept any new cases at this time."[19] The letter went on to state that, "even if the lack of resources did not preclude the Clinic from representing you, our ethical obligations under the North Dakota Rules of Professional Conduct would prohibit us from doing so."[20] Rovner explained, "[o]ur independent, professional judgment is that your persistent and antagonistic actions against the Clinical Education Program and faculty involved would adversely affect our ability to establish an effective client-attorney relationship with you and would consequently impair our ability to provide legal representation to you."[21]

Immediately after receiving Rovner's letter, Wishnatsky filed a *pro se* complaint with the United States District Court for the District of North Dakota, alleging that Rovner's denial of representation based on his past criticisms violated the Free Speech and Equal Protection Clauses of the United States Constitution.[22] Rovner filed an answer, followed by a motion for judgment on the pleadings, which the court granted.[23] Subsequently, the court denied Wishnatsky's motion to alter or amend the judgment.[24]

On January 5, 2006, the Eighth Circuit Court of Appeals reversed the decision of the North Dakota District Court and remanded for further proceedings.[25] In holding that dismissal of Mr. Wishnatsky's complaint at the

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15. *Wishnatsky*, 433 F.3d at 610. This letter, aside from being sent to Rovner and the Clinic, was sent to various media outlets around the state. Brief of Appellee, *supra* note 8, at 6

16. Brief of Appellee, *supra* note 8, at 6. Wishnatsky stated that he was "distressed" by the display and that it made him feel "like a second-class citizen when he encountered such pagan religious figures in public places." *Wishnatsky*, 433 F.3d at 610.

17. *Id.*

18. *Id.*

19. Brief of Appellee, *supra* note 8, at 7.

20. *Id.*

21. *Id.*

22. *Wishnatsky*, 433 F.3d at 610.

23. *Id.*

24. *Id.*

25. *Id.* at 613.

pleading state was premature, the court stated that, although lack of resources, ethical considerations, and "academic freedom" to choose learning instruments may be factual defenses as to why a law school clinic would refuse a particular case, doing so based on the past criticisms and beliefs of the prospective client clearly supported a First Amendment viewpoint discrimination claim.[26]

III. LEGAL BACKGROUND

At first glance, the court's reasoning in *Wishnatsky* appears to be a straightforward application of the First Amendment principle that a government entity cannot discriminate based on viewpoint when providing government benefits to the public. However, a look at the progression of cases in this area demonstrates that over time, the Supreme Court has interpreted this rather uncomplicated maxim in such a way that this principle no longer encompasses the entire area of viewpoint discrimination law. After examining the historical basis for the decision in *Wishnatsky*, it will be helpful to explore how, under a "traditional model" of client selection, lawyers have nearly unfettered discretion to accept and reject clients for any multitude of reasons.[27] Furthermore, this section will look at how the courts have treated law clinics with regards to their academic freedom to choose clients based on educational value.[28]

A. Viewpoint Discrimination

Early in American jurisprudence, courts offered little protection against government discrimination.[29] In the mid-1900s, the Supreme Court reversed its stance on this issue and recognized the need to protect individuals from government viewpoint discrimination.[30] However, as the case law developed, the Supreme Court increasingly confused the issue by providing "exceptions" and varying interpretations of "government discrimination." Currently, lower courts are left with very little in the way of concise precedent and must handle cases with a patchwork of seemingly contradictory and confusing Supreme Court statements.

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26. *Id.* at 612-13.

27. *See* Robert T. Begg, *Revoking the Lawyers' License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275, 278 (1993).

28. *See* Kuehn & Joy, *supra* note 2, at 1975.

29. *See, e.g.*, McAuliffe v. City of New Bedford, 29 N.E. 517 (Mass. 1892) (holding that although the petitioner had a "constitutional right to talk politics," there was no constitutional right to keep his job should he choose to do so).

30. *See* Speiser v. Randall, 357 U.S. 513 (1958) (holding that petitioners were not required to sign an oath declaring their non-advocacy of government overthrow as a condition precedent to receiving a tax exemption).

1. Government Benefit

In 1892, in a case dealing with a policeman who had been dismissed for violating a regulation which limited his political activity, the Court made a clear statement about the lack of protection individuals would receive when alleging a denial of a benefit as the cause of a First Amendment violation.[31] Justice Holmes succinctly wrote, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[32] As one commentator has pointed out, "Holmes's rationale makes sense only if we accept a second, unspoken, premise: that an unconstitutional infringement of speech occurs only if the sanction for exercising free speech is the deprivation of some other right, such as the right to liberty or property, rather than just the denial of a government benefit."[33] At this point in history, courts found very little to criticize where rights were denied as a cost for being granted a government privilege.

Eventually, the constitutional absurdities that came as a result of distinguishing between that which is a "right" and that which is a "privilege" were recognized by the Supreme Court.[34] In *Speiser v. Randall*, a case dealing with the denial of veterans' tax exemptions for individuals choosing not to take an oath,[35] the Court rejected the argument that, because the tax exemption was a "privilege," its denial was not a penalty on the individual's freedom of expression.[36] The Court stated that the denial's "deterrent effect is the same as if the State were to fine them for this speech. The appellees were plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech."[37]

In recent decades, this framework has become even more intricate, with distinctions being drawn across very thin lines. In 1972, the Supreme Court continued to encourage the idea that, although one may be denied a government benefit for a multitude of reasons, certain infringements on constitutional rights will not be allowed in the course of these withdrawals.[38] In *Perry*

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31. *McAuliffe*, 29 N.E. at 517. Justice Holmes goes on to say, "The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here." *Id.* at 518.

32. *Id.* at 517.

33. Patricia M. Wald, *Government Benefits: A New Look at an Old Gifthorse*, 65 N.Y.U. L. REV. 247, 251 (1990).

34. For more analysis of the evolution of the Court's "rights" vs. "privileges" analysis, see *id.* at 247-64.

35. 357 U.S. 513 (1958). The oath stated that those receiving the benefit did not advocate the overthrow of the government by violent means. *Id.* at 515.

36. *Id.* at 518.

37. *Id.*

38. Perry v. Sindermann, 408 U.S. 593 (1972).

v. Sindermann, the issue under scrutiny was the termination of a non-tenured professor who had been very critical of his employer, the Odessa Junior College Board of Regents.[39] The Court held that the Board "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech."[40] In *Perry*, it seemed clear that, where the government "penalizes" an individual on account of his or her speech, the regulation or decision will be found unconstitutional. However, as discussed below, the argument can be made that the Supreme Court has implicitly justified varying forms of discrimination in a number of cases involving "subsidized speech" or "government conduct."

2. Government Subsidized "Speech"

Even though it introduced a significant amount of confusion into this area of First Amendment law, one of the most significant decisions in this area occurred in *Rust v. Sullivan*.[41] *Rust* involved Title X of the Public Health Service Act, which allowed the Secretary of Health and Human Services to administer grants to "assist in the establishment and operation of voluntary family planning projects."[42] Specifically, the Act stated that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."[43]

The regulations stated that a "Title X 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."[44] They went on to state that Title X projects were prohibited from "activities" that "encourage, promote or advocate abortion as a method of family planning."[45] In response to these regulations, the petitioners, Title X grantees and doctors, brought suit alleging that the regulations "impermissibly discriminat[e] based on viewpoint because they prohibit all discussion about abortion as a lawful option."[46]

In a rather complicated analysis, the *Rust* majority found no viewpoint discrimination, despite the seemingly explicit discrimination found in a pro-

39. *Id.* at 594-95.

40. *Id.* at 597.

41. 500 U.S. 173 (1991).

42. *Id.* at 178.

43. 42 U.S.C. § 300a-6 (2000). Later, in an attempt to clarify the Act, the Secretary set out a number of regulations relating to abortion counseling. *Rust*, 500 U.S. at 179.

44. 42 CFR § 59.8(a)(1) (1989).

45. *Rust*, 500 U.S. at 180 (quoting 42 C.F.R. § 59.10(a)). It is quite interesting that the court phrased this regulation in terms of a prohibition on "activities." *See infra* note 53 and accompanying text.

46. *Rust*, 500 U.S. at 192.

hibition on abortion-related medical opinions and advice.[47] The Court reasoned that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[48]

As one scholar has pointed out, *Rust* "appears to be a straightforward decision."[49] After all, the Court is merely pointing out that Congress's "discretion is limited so that it may not condition the acceptance of funds on the recipients' willingness to espouse a particular viewpoint; and that the regulations in *Rust* did not do so and were, therefore, constitutional."[50] Yet, as this scholar went on to state, a closer look at *Rust* revealed that the "regulations sought to silence only one side of the discussion concerning legitimate family planning alternatives" in addition to forcing Title X projects to supply only certain administration-approved counseling services.[51] Essentially, the Court found that the event of family planning counseling was an "activity," rather than "speech," which need not be funded nor supported if it did not further the goals of Title X.[52]

After *Rust*, the series of First Amendment discrimination cases only continued to spiral in complexity. In *Rosenberger v. Rector and Visitors of University of Virginia*, a case heavily relied upon by the *Wishnatsky* court, the Supreme Court struck down an argument by the University of Virginia that was similar to the basic proposition set forth in *Rust*.[53] At issue was a University policy that prohibited the university from making payments to outside contractors for printing costs for any student publication that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."[54] Citing *Rust* for support, the University argued that it "must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission," and that the challenged policy was reasonably

47. *Id.* at 194-95.

48. *Id.* at 193.

49. Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1730 (1995).

50. *Id.*

51. *Id.*

52. For a critical analysis of the court's decision to characterize family planning counseling as an "activity" see Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724 (1995); Nicole B. Caserz, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501 (2000).

53. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

54. *Id.* at 823.

designed to serve the permissible goal of preserving the separation of Church and State.[55]

The Court rejected this reasoning as being inconsistent with the holding in *Rust*.[56] The Court noted that it had "permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."[57] However, it distinguished *Rust* by suggesting that under those facts, "the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program."[58] Thus, the distinction seemed to turn on situations when the government provided funding and was "speaking" on its own behalf, versus instances, as in *Rosenberger*, when the Government provided funding for others to speak.

This distinction, though perhaps arbitrary, was again the focus in the recent case of *Legal Services Corporation v. Velazquez*.[59] This case dealt with Legal Services Corporation ("LSC"), an entity created by Congress, who was to distribute funds to "eligible local grantee organizations 'for the purpose of providing financial support for legal assistance in noncriminal proceedings . . . to persons financially unable to afford legal assistance.'"[60] The suit arose due to a congressionally-imposed restriction which prohibited the LSC attorneys from "challenging the legality or constitutionality of existing welfare laws."[61]

In a five-to-four decision, the Court held that the restriction was unconstitutional, but in doing so, distinguished *Rust*, which seemed to uphold similar restrictions on the abilities of government funded entities.[62] The Court articulated, "[w]e have said that viewpoint-based funding decisions can be sustained . . . [where] the government is itself the speaker, [or] . . . the government 'used private speakers to transmit information pertaining to its own program.'"[63] However, the Court distinguished the operations of the LSC by stating that it was not established to promote a government message, but rather facilitate private speech.[64] Thus, the Court concluded that "'it does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but

55. *Id.* at 832.
56. *Id.* at 833
57. *Id.*
58. *Id.*
59. 531 U.S. 533 (2001).
60. KATHLEEN SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW, 352 (2nd ed. 2003).
61. *Id.*
62. *Legal Services Corp.*, 531 U.S. at 540-41.
63. *Id.* at 541 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (citation omitted).
64. *Id.* at 542.

instead expends funds to encourage a diversity of views from private speakers.'"[65]

LSC demonstrated that, in the area of viewpoint discrimination, there is very little in the way of absolute answers. In a strong dissent, Justice Scalia[66] pointed out that, "[i]n *Rust v. Sullivan*, the Court [upheld] a statutory scheme that is in all relevant respects indistinguishable from [the challenged provisions of the LSC act].[67] He noted that "[t]he LSC Act, like the scheme in *Rust*, does not . . . . discriminate on the basis of viewpoint, since it funds neither challenges to nor defenses of existing welfare law. The provision simply declines to subsidize a certain class of litigation."[68] Further, to show that the two cases were indistinguishable, Justice Scalia argued that "[i]f the private doctors' confidential advice to their patients at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would not be government speech."[69]

LSC demonstrated that, even with a long line of viewpoint discrimination cases, the Supreme Court, and thus the lower courts, still find themselves trying to distinguish facts and conclusions on a case-by-case analysis between acceptable and unacceptable forms of viewpoint discrimination. With this as its backdrop, the Eighth Circuit attempted to extract some simple principles from the cases in order to come to a reasonable result.

B. The Law School Clinic and Lawyer Discretion

Much like the Legal Services Corporation in *LSC*, law school clinics are unique in that they are not private entities like a typical law firm. Many of the clinics, run through law schools at state schools, are government funded and thus, those that "hold[] themselves out as open to the public, may be viewed as places of public accommodation and subject to various federal and state anti-discrimination laws."[70]

However, the question remains as to what degree the law school clinic is subjected to those anti-discrimination law. Under the traditional view of a lawyer's discretion in picking his or her client, the lawyer "may reject potential clients for purely personal reasons."[71] Legal ethicist Charles Wolfram described the lawyer's discretion concisely in stating that "a lawyer may re-

65. *Id.* (quoting *Rosenberger*, 515 U.S. at 834) (omission in original) (alteration in original).

66. Joined by Chief Justice Rehnquist, and Justices O'Connor and Thomas. *Legal Services Corp.*, 531 U.S. 533.

67. *Id.* at 553

68. *Id.* (citation omitted).

69. *Id.* at 554.

70. Kuehn & Joy, *supra* note 2, at 1997.

71. Robert T. Begg, *Revoking the Lawyer's License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275, 278 (1993).

fuse to represent a client for any reason at all—because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral."[72]

Even the rules governing the practice of law recognize this wide deference given the lawyer in client selection. The Model Code of Professional Responsibility states that "[a] lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client."[73] Furthermore, the Restatement of the Law Governing Lawyers sets out that "[a] lawyer, although required to work for the client's benefit, has considerable independence in doing so. Except when appointed as counsel by a tribunal, a lawyer need not accept representation of a client."[74]

Historically, attacks on a law school clinic's discretion to choose clients came not in the form of enforcing anti-discrimination law, such as in *Wishnatsky*, but rather, in political moves that limited the type and manner of representation.[75] In situations similar to that of *LSC* and *Rust*, law school clinics have often come under the radar of various legislators concerned about the unpopular clients the clinic represented.

For example, at the University of Connecticut law school clinic, professors and students represented a group of war protestors.[76] Then Governor Meskill, along with the Connecticut legislature, threatened to cut off state funding for the clinic and proposed that the Dean and a law school faculty committee screen each potential client and case.[77] After an informal ABA opinion, which found that the case-by-case oversight system would violate professional ethical codes, the law school dropped the review process.[78]

As some commentators have pointed out, "[s]tate-funded law schools have been the predominant target for such interference. This is due to their vulnerability to the political view of elected officials, . . . disagreement with the use of taxpayer money to fund legal services for the poor, or a desire to avoid 'taking sides' on controversial social or political issues."[79] Rather pointedly, these scholars have suggested that "[a]ny law school clinic is just one controversial case, one unpopular client, one angry legislator, alumnus or

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72. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.2, at 573 (1986).

73. MODEL CODE OF PROFESSIONAL CONDUCT EC 2-26 (1980). However, the rules do go on to state that this decision should not be taken lightly and that a lawyer will often need to accept employment "which may be unattractive to him and the bar generally." *Id.*

74. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § SCOPE (2000).

75. Specifically, "[s]ince at least the late 1960s, politicians, attorneys, business interests, and university officials have attacked law school clinics for their choices of clients and cases." Kuehn & Joy, *supra* note 2, at 1976.

76. *Id.* at 1977.

77. *Id.*

78. *Id.*

79. *Id.* at 1900.

opposing attorney, or one unsupportive dean or university official away from attempts to interfere in its case and client selection."[80]

Though the courts have often dealt with the issue of actual interference by third-party legislators and school officials in client selection, in *Wishnatsky*, the Eighth Circuit was faced with a set of facts for which there was little in the way of precedent. Though the traditional model generally allows the lawyer a great deal of deference in client selection, it is still not settled to what degree the law school clinic is afforded the same discretion and how this is affected by anti-discrimination laws.

In crafting its decision, the Eighth Circuit seemed to ignore the complexity of the First Amendment precedent and broadly stated the law as it relates to viewpoint discrimination. Further, the court quickly dismissed the discretion due to law school clinics without a full discussion of the unique position of the clinic and how this differs from the traditional model of lawyer discretion.

IV. INSTANT DECISION

As previously discussed, the Eighth Circuit Court of Appeals reversed and remanded the judgment of the district court for further proceedings.[81] Judge Colloton wrote the opinion in which Judges McMillian and Benton joined.[82]

After dealing with the initial requirements of *de novo* review and judgment on the pleadings, the court took up the parties' main arguments.[83] First, the court examined the issue of proper pleading in a *pro se* complaint.[84] Recognizing that Wishnatsky's claims were properly pled, the Eighth Circuit stated that *pro se* complaints must "be construed even more liberally than counseled pleadings" and thus, Rovner's argument that Wishnatsky did not properly allege that the Clinics stated reasons for denial of representation were pretextual, was flatly rejected.[85]

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80. *Id.* at 1992.

81. *See supra* notes 25-26 and accompanying text.

82. Wishnatsky v. Rovner, 433 F.3d 608 (8th Cir. 2006).

83. As the court notes, all factual allegations in the complaint must be accepted as true and the complaint must be read in a way most favorable to the plaintiff. Furthermore, a case should only be decided by a judgment on the pleadings where there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 610.

84. *Id.* at 610.

85. *Id.* The court goes on to articulate the actual allegations contained in Wishnatsky's complaint. Wishnatsky alleged that he criticized the program in the Grand Forks newspaper and also stated that the "refusal of legal representation to [Plaintiff] on the basis of criticism of the Clinical Education Program and its director violates the Free Speech and Equal Protection Clauses of the United States Constitution." *Id.* at 610-11.

The court then examined the allegations that the Clinic denied service to Wishnatsky because of "his previously expressed views about the Clinic, its director, and its lawsuit challenging a public display of the Ten Commandments."[86] In accepting this allegation as true, the court held that the district court erred in dismissing the complaint.[87]

The heart of the court's opinion came in its analysis of Rovner's argument that the Clinic "*may* exclude persons from the program solely on the basis of their viewpoint."[88] In rejecting this argument, the Eighth Circuit pointed to the possibility that "a public law school could announce that its clinical program will accept as clients only persons who belong to one political party or espouse particular views on controversial issues of the day." [89] The court flatly rejected this outcome and stated that this logical conclusion is "inconsistent with the First Amendment."[90]

In support of its holding, the court, citing *Rosenberger*, stated that "'[d]iscrimination against speech because of its message is presumed to be unconstitutional,' and viewpoint discrimination is an 'egregious form of content discrimination.'"[91] It went on to examine the claim in light of state-sponsored programs and denial of participation in those programs based on belief or advocacy.[92] Citing a 2000 decision, *Cuffley v. Mickes*, the court noted that, although one does not have a "right" to valuable government benefits, and although the government may deny for any number of reasons, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech."[93] The court supported this proposition by pointing to a decision in which the State was not allowed to "deny access to an Adopt-A-Highway program or a vanity license plate program based on an applicant's views."[94]

The court also refuted the Clinic's argument that, because there was no "pre-existing commercial relationship" with Wishnatsky, it was free to discriminate based on past criticisms.[95] The Eighth Circuit pointed out that the question of whether "a public entity may exclude bidders or applicants for government contracts based solely on their views" has never been decided by

86. *Id.* at 611.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-39 (1995)).

92. *Id.* at 611.

93. *Id.* (citing *Cuffley v. Mickes*, 208 F.3d 702, 707 (8th Cir. 2000)). It should be noted that *Cuffley* relies heavily on the analysis found in *Perry v. Sindermann*.

94. *Id.* at 611. *See* Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004); Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001).

95. *Wishnatsky*, 433 F.3d at 612.

the court.[96] It went on to articulate that the open question of public contractors and government contracts should not signal "that a law school clinical program may discriminate against applicants for services based on their private speech."[97] It reasoned that in other government programs, it has not required pre-existing relationships to stop viewpoint discrimination.[98]

Near the end of the opinion, the court quickly dismissed Rovner's remaining arguments supporting denial of Wishnatsky's application for representation.[99] The court recognized that "insufficient resources, [and] the 'academic freedom' of a clinical professor to determine which cases and clients are best for a clinical curriculum" may both be "legitimate reasons to decline representation of a particular applicant."[100] However, the court seemed to reject the proposition that "personal conflict" can give rise to an attorney being "prohibited by ethical rules as a matter of law from representing a person who previously criticized the attorney."[101] The court suggested that "a fresh start, common purpose, and agreement to bury the hatchet might overcome previous discord."[102]

The Eighth Circuit concluded its analysis by stating that, although it agreed professors should be given considerable deference in deciding cases and clients in the academic environment, viewpoint discrimination was not within the purview of this academic freedom.[103] However, this deference was a factual defense that related to whether "any such motivation was a substantial factor in the denial of [Wishnatsky's] opportunity to participate in the program"[104] Thus, the Eighth Circuit Court of Appeals held that on a motion for judgment on the pleadings, justifications for denial of representation, such as academic deference, are factual questions and are not enough to justify dismissal.[105] In reversing the district court's dismissal and remanding for further proceedings, the court held that although lack of resources, ethical considerations, and "academic freedom" may be factual defenses as to why a law school clinic would refuse a particular case, rejection based on the past

96. *Id.*

97. *Id.*

98. *Id.* (citing Robb v. Hungerbeeler, 370 F.3d 735, 743-44 (8th Cir. 2004); Cuffley v. Mickes, 208 F.3d 702, 712 (8th Cir. 2000)). The court advances the idea that even if a pre-existing relationship rule "were to develop in the area of government contracts, it likely would be motivated by concerns about the judiciary 'intrud[ing] itself into such traditional practices as contract awards by the government's executive.'" *Id.* at 612 (quoting McClintock v. Eichelberger, 169 F.3 812, 817 (3d Cir. 1999) (alteration in original).

99. *Id.* at 612-13.

100. *Id.*

101. *Id.* at 612.

102. *Id.*

103. *Id.* at 613.

104. *Id.*

105. *Id.*

criticisms and beliefs of the prospective client supported a First Amendment viewpoint discrimination claim and thus, should not be dismissed at the early pleading stages.[106]

V. COMMENT

One would hope that the Eighth Circuit, in analyzing the facts of *Wishnatsky*, took the tangled mess of background cases and wove a tightly reasoned decision in which it was able to determinatively say that the government may *never* discriminate against an individual on account of their viewpoint. Although the court certainly attempted to articulate that this is the current state of the First Amendment law in a rather convenient format from the above discussed cases, the truth is that the analysis is rather underdeveloped in addressing the multiple layers and complexities that accompany these issues. The court failed to articulate that although it may disagree, there are in fact multiple ways in which individuals may be "discriminated" against in public benefit programs. Further, the court did not elaborate on what deference the law school clinic really should have in client selection and why the standards for discretion differ so greatly from that of lawyers operating under the "traditional view."

First, instead of explaining, the court simplified the current state of law in viewpoint discrimination cases. It broadly stated that "in light of fifty years of Supreme Court precedents, that denial of participation in a state-sponsored program based on the party's beliefs or advocacy is unconstitutional."[107] However, a look at the Supreme Court cases of the last fifty years would suggest that this is not really an accurate statement. For example, in *Rust*, the court was able to characterize what would normally be considered an act of speaking or advocating as an "activity" promoting a government message, and thus, the government was allowed to only fund those programs which did not promote abortion counseling services.[108]

As one scholar has noted, "the problem with the [Court's analysis in *Rust*] is that it allows the government to define its subsidization programs in a wholly unchecked, self-referential manner."[109] Though the Court in *Rust* easily could have examined the Title X regulations as a discrimination against those seeking legal abortion counseling, it chose to characterize the advice of the doctors in a different light, namely a physical activity in apposite to the government's intended message. Thus, the Court in *Rust* effectively established a loophole which the *Wishnatsky* court failed to recognize when it broadly stated that government "may not deny a benefit to a person on a basis

106. *Id.* at 612-13.

107. *Id.* at 611.

108. *See supra* notes 47-52 and accompanying text.

109. Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 575-76 (1996).

that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[110]

The complexity that the court dodged was not just found in the *Rust* case. As one scholar has suggested, the whole area of subsidized speech presents troubling issues.[111] He suggested that in *Rosenberger*, the court established that, "when the state itself speaks it may adopt a determinate content and viewpoint, even 'when it enlists private entities to convey its own message.'"[112] Within "[managerial domains] the state can regulate speech within public educational institutions so as to achieve the purposes of education; it can regulate speech within the judicial system so as to attain the ends of justice; it can regulate speech within the military so as to preserve the national defense; it can regulate the speech of public employees so as to promote the 'efficiency of the public services.'"[113] The "Court in *Rust* in effect stated that [even 'viewpoint discriminatory'] regulations within managerial domains would not be deemed [unconstitutional] so long as they were necessary to accomplish legitimate managerial ends."[114]

The ideas presented in *Rosenberger* and *Rust* suggest to the reader that in *Wishnatsky*, the court truly did not embrace the reality of viewpoint discrimination law. It may be a lofty goal to articulate that government "may not deny a benefit to a person on a basis that infringes . . . [on] his interest in freedom of speech," but these cases and the exceptions and analysis of the Supreme Court suggest that this simply is not true.[115] Quite simply, there are ways for an individual to be a denied a benefit when he or she says the wrong thing because the determination turns on the classification of the government's role in subsidizing that particular speech.

There is little doubt that in the end, the court came to the right conclusion. The *Wishnatsky* decision tracks closely with the analysis in *Legal Services Corporation v. Velazquez*, in which the court struck down a restriction on what types of challenges the attorney's may bring against the state.[116] The Court explained that where the "program [is] designed to facilitate private speech, not to promote a governmental message," viewpoint discrimination will not be tolerated.[117] Yet, the *Wishnatsky* court did not even attempt to articulate this difference or alert the reader to the distinction's existence. One reading the court's analysis could simply assume that any type of discrimination, whether through government subsidized speech, or not, would be a vio-

110. *Wishnatsky*, 433 F.3d at 611.
111. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 151-52 (1996).
112. *Id.* at 155.
113. *Id.* at 164.
114. *Id.* at 170.
115. *Wishnatsky*, 433 F.3d at 611.
116. Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).
117. *Id.* at 542.

lation of the First Amendment. But as we have seen, this is simply not an accurate statement of the current state of the law.

The second shortcoming of the *Wishnatsky* analysis is in the court's failure to further articulate why the clinic should not be afforded the same deference as a private sector lawyer operating under the "traditional view" of client choice discretion. The court "recognize[d] . . . that a clinical education program is not the equivalent of a public legal aid program."[118] It went on to state that "decisions of a clinical program about which cases and clients to accept in an academic environment should be entitled to substantial deference."[119]

Although the court recognized the unique position of law school clinics, it failed to consider this in the context of the "traditional view" of lawyer client-selection discretion. Under this view, short of a specific ethical code or statute governing the practice of lawyers, those in the legal community are entirely free to discriminate based on the viewpoints of their clients.[120] In fact, the "lawyer's freedom to select clients is qualified only by an unenforceable aspirational responsibility to provide pro bono service and by mandated acceptance of court appointments."[121] While certainly it would not be the case that the law school clinic, a public sector entity, may run amok with one's constitutional rights, it does seem that there are cases where the conflict of interest may be so genuine as to warrant viewpoint-based "discrimination."

Unfortunately, the Eighth Circuit dismissed any discussion of when a conflict of interest would warrant great discretion in client selection by suggesting that "a fresh start, common purpose, and agreement to bury the hatchet might overcome previous discord."[122] This rather optimistic, if not naïve, hope would seem to place a great burden on the lawyer-client relationship. It seems to be a waste of resources to initiate the relationship for fear of a discrimination claim, only to have to terminate at a later date because the lawyer and client could not "bury the hatchet." By ignoring the basic principles of academic freedom and lawyer discretion, the court potentially opened the door to a wide ranging number of unintended burdens within the law clinic setting.

One of the most unintended burdens is what the court's opinion implicitly says to law school clinic directors who are trying to set a good example for law students. The Eighth Circuit holds that there are any number of reasons by which the clinic could have denied Wishnatsky representation.[123] And, although Rovner lists all of these reasons in her letter,[124] the inclusion of

118. *Wishnatsky*, 433 F.3d at 612.
119. *Id.* at 613.
120. Begg, *supra* note 71, at 278-79.
121. *Id.* at 279 (footnotes omitted).
122. *Wishnatsky*, 433 F.3d at 612.
123. *Id.* at 613.
124. Lack of resources, "academic freedom," insincerity of request, etc. *Id.* at 610.

an *honest* remark regarding the clinic's ability to forgive and forget forces them to defend a viewpoint discrimination suit.[125] The implicit recommendation to law clinics across the country is to stick with those reasons for refusal you know the court will uphold, despite whether these justifications are the truth or not. As a clinical director, you may not like the client, or their beliefs, but if you continue to state that there are simply not enough resources for every client, or that it would not be a good learning case, then the viewpoint discrimination claim can be avoided.

VI. CONCLUSION

As demonstrated by the evolution of First Amendment cases, viewpoint discrimination in government benefits and subsidies is an incredibly difficult and complex area of law. Certainly, Mr. Wishnatsky was refused service by a government entity on account of his past criticisms, and for this, he should not have had his First Amendment claims so easily dismissed by the district court. Yet, the Eighth Circuit's analysis, though leading to a correct reversal, leaves the reader wondering why the court chose to drastically simplify the difficult, nuanced analysis that is required in viewpoint discrimination cases. Certainly, the government should not discriminate in handing out benefits, but this statement by the court fails to reach the unique position of the law school clinic. Whereas typically lawyers have great discretion in client selection, it seems under the *Wishnatsky* reasoning, the law school clinical director, who perhaps should have even greater deference considering the academic environment, is bound to resort to a pre-defined list of excuses rather than deny for a conflict of interest.

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125. Specifically, Rovner stated, "[o]ur independent, professional judgment is that your persistent and antagonistic actions against the Clinical Education Program and faculty involved would adversely affect our ability to establish an effective client-attorney relationship with you and would consequently impair our ability to provide legal representation to you." Brief of Appellee, *supra* note 8, at 7.