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Free Speech Fundamentalism—Justice Linde's Lasting Legacy

HANS Linde published two articles in 1970, the contents of which figured prominently in his work on the Oregon Supreme Court from 1977 through 1989. One was principally directed to Oregon attorneys and courts. It sought to identify the logical sequence to be followed in analyzing whether state or local governmental action is lawful.[1]

The other was directed to constitutional scholars and, ultimately, to the United States Supreme Court. It sought to establish a defensible, absolutist analysis of the first amendment guarantee of freedom of speech.[2]

Ironically, the analysis embodied in the article for Oregon attorneys and courts has had a profound effect on the development of state constitutional law throughout the country, not just in Oregon, while, to date, the analysis directed to constitutional scholars and the Supreme Court has had an effect only in Oregon. On reflection, this should not be surprising.

Notwithstanding recent experience, the Supreme Court generally does not make dramatic shifts in the methodology by which it ana-

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[1] *See* Linde, *Without "Due Process"—Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970) [hereinafter Linde, *Without "Due Process"*].

[2] *See* Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1183 n.66 (1970) [hereinafter Linde, *"Clear and Present Danger"*]; *see also* Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U.L. REV. 937, 940 & n.10 (1983).

lyzes constitutional issues. Stare decisis, coupled with an extensive body of cases, serves to discourage dramatic change.

In addition, the Supreme Court's preferred approach to deciding civil liberties questions, such as those involving the first amendment, is to balance the interests of the government against those protected by the relevant constitutional guarantees to determine which interests are, in the Court's view, more weighty.[3] The appeal of this approach is understandable because it leaves the Court free to adjust the balance over time without being unduly constrained by prior cases.[4] In contrast, the absolutist analysis of the first amendment proposed by then Professor Linde, if adopted, would impose greater constraints on the Court's ability to make policy choices about the wisdom of particular governmental restrictions on expression. This is because it would establish a categorical approach that would hold laws directed at expression invalid without regard to their importance, that is, without regard to whether the perceived need for the restrictions outweighs the harm to free expression.[5]

Whatever the appeal of this approach, which will be discussed at length in this Article, the current Court is not likely to be interested in exploring it. Although the Court appears eager to reexamine settled doctrine in a number of areas of constitutional law, the members of the Court who share this interest also share a basic antipathy toward constitutional constraints on government.[6] Consequently, they are not likely to be interested in an analytical approach to the first amendment that would significantly limit the government's ability to choose as a policy the restriction of expression.

Although the Court's shift toward a less generous view of constitutional protection for civil liberties has effectively foreclosed Supreme Court consideration of Linde's proposed first amendment analysis, the shift has led to widespread acceptance by state courts of Linde's methodology for analyzing the legality of state govern-

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[3] *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 76 (1976) (Powell, J., concurring); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1941).

[4] Under a balancing approach, stare decisis does not significantly limit the choices available to the Court because it is possible to reexamine balances previously struck in light of changing conditions, or in light of differences in the record between earlier and later decided cases. Paradoxically, the consistent use of a balancing approach makes it difficult for the Court to adopt a completely new methodology, such as that proposed by Linde.

[5] *See* Linde, *"Clear and Present Danger," supra* note 2, at 1184.

[6] *See, e.g.*, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991); Employment Div. v. Smith, 110 S. Ct. 1595 (1990). *See generally* Wohl, *Whose Court Is It?*, A.B.A. J., Feb. 1992, at 40.

mental action. This methodology, which requires state courts to determine whether challenged governmental actions comply with state statutes and constitutions before determining whether they comply with the Federal Constitution, has freed state courts to analyze their constitutions independently of the Supreme Court's interpretation of the Federal Constitution.

The logic behind the analysis is compelling, and logic alone should lead all state courts to adopt it.[7] Nevertheless, the Supreme Court's increasingly constricted view of civil liberties under the Constitution has encouraged litigants and state courts to use the analysis to secure greater protection for civil liberties under state constitutions than that recognized by the Court under the federal Constitution. Had the Supreme Court continued to expand civil liberties protection during the past twenty years, rather than to restrict it, the analysis might not have been as widely accepted as it has.[8]

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[7] *See, e.g.*, Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 380-84 (1980) [hereinafter Linde, *First Things First*]; Linde, *Without "Due Process," supra* note 1, at 129-35.

> Just as rights under the state constitutions were first in time, they are first also in the logic of constitutional law. . . . Whenever a person asserts a particular right, and a state court recognizes and protects that right under state law, then the state is not depriving the person of whatever federal claim he or she might otherwise assert. There is no federal question.

Linde, *First Things First*, *supra*, at 383. It follows, then, that state constitutional claims must be decided before reaching federal claims in order to determine whether a state *has* violated the federal Constitution. *See id.* Of course, claims for damages for deprivation of federal constitutional rights can survive a favorable state law decision if the deprivation causes injuries that cannot be redressed by the state law decision. *Cf.* Oregon State Police Officers Ass'n v. State, 308 Or. 531, 537-39, 783 P.2d 7, 10-11 (1989) (by implication), *cert. denied*, 111 S. Ct. 44 (1990).

Moreover, since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), people generally have assumed that the judicial power includes the obligation to determine whether governmental action violates the relevant constitutions. With limited exceptions, this means that courts cannot defer to other branches of government to determine what the constitutions require or prohibit. It follows, then, that state courts cannot defer to Supreme Court decisions interpreting comparable federal constitutional provisions in interpreting their state constitutions, any more than they can defer to other state supreme courts or their own legislatures or executives. They are obliged to determine for themselves what their state constitutions mean. The oath of office taken by many state judges requires no less. *See, e.g.*, OR. CONST. art. VII, § 7 (amended).

[8] Without getting drawn into a discussion of legal realism, it is fair to assume that practical considerations, more than the intrinsic logic of a particular mode of analysis, influence litigants and courts to act as they do. *See, e.g.*, Linde, *First Things First*, *supra* note 7, at 387-92. Whatever the logical sequence of analysis, many people would not bother to litigate or decide a case on state law grounds if federal law provided a ready answer favorable to their position. *See id.* at 387-88. Conversely, as federal constitutional law has become less favorable to civil liberties claimants, people seeking to

Predictably, the analytical approach espoused by Linde has had a significant effect in Oregon. With few exceptions, since Justice Linde joined the court in 1977, the Oregon Supreme Court has made an independent determination whether a challenged governmental action violates Oregon statutes or the Oregon Constitution before determining whether it violates the federal Constitution.[9]

The effect of this approach has been particularly pronounced in the area of free expression. Through Justice Linde's influence, the Oregon Supreme Court adopted his proposed absolutist analysis as the analysis that it uses to determine whether governmental action violates article I, section 8 of the Oregon Constitution, Oregon's constitutional guarantee of free expression.[10] Under this analysis, Oregon courts have held invalid a number of restrictions on expression that federal courts have upheld under the first amendment.[11]

This Article will trace the analysis from its development in 1970 to its application in a series of Oregon cases and legislative enactments. It will show that an absolutist approach to the constitutional guarantee of free expression works, that is, it protects the right of people to speak, write, and print freely on any subject whatever, as the constitution intended, but leaves the government

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challenge state governmental action have increasingly turned to state statutes and constitutions for protection.

[9] *See, e.g.*, Nelson v. Lane County, 304 Or. 97, 743 P.2d 692 (1987) (search and seizure); Salem College & Academy, Inc. v. Employment Div., 298 Or. 471, 695 P.2d 25 (1985) (religious liberty); State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983) (double jeopardy); Hewitt v. SAIF, 294 Or. 33, 653 P.2d 970 (1982) (gender-based discrimination); State v. Robertson, 293 Or. 402, 649 P.2d 569 (1982) (free expression); State v. Clark, 291 Or. 231, 630 P.2d 810, *cert. denied*, 454 U.S. 1084 (1981) (equal treatment); Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981) (treatment of prisoners); State v. Scharf, 288 Or. 451, 605 P.2d 690 (1980) (access to counsel).

[10] *Compare* Linde, *"Clear and Present Danger,"* *supra* note 2, at 1179-86 & nn.66 & 70 (proposed absolutist analysis) *with* State v. Robertson, 293 Or. 402, 412, 416-17, 649 P.2d 569, 576, 578-79 (1982) (modern analysis of article I, section 8). As will be explained below, the analysis proposed by Professor Linde in *"Clear and Present Danger,"* *supra* note 2, was modified when it was adopted by the court as the analysis used under article I section 8. See *infra* text accompanying notes 72-79. Article I, section 8, provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

[11] *Compare, e.g.*, City of Portland v. Tidyman, 306 Or. 174, 759 P.2d 242 (1988) *with* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (adult bookstore zoning); State v. Henry, 302 Or. 510, 732 P.2d 9 (1987) *with* Miller v. California, 413 U.S. 15 (1973) (obscenity); Sekne v. City of Portland, 81 Or. App. 630, 726 P.2d 959 (1986), *review denied*, 302 Or. 615, 733 P.2d 450 (1987) *with* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (nude dancing); State v. Harrington, 67 Or. App. 608, 680 P.2d 666, *review denied*, 297 Or. 547, 685 P.2d 998 (1984) *with* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting words").

free to deal with the harmful effects of expression. The success of the Oregon analysis should commend it to courts in other states, because it is superior to the ad hoc, balancing analysis used by the Supreme Court under the first amendment.

I

THE ORIGINS OF OREGON'S ABSOLUTIST ANALYSIS

The modern Oregon analysis of article I, section 8, can be traced to Professor Linde's 1970 *Stanford Law Review* article[12] on *Brandenburg v. Ohio*,[13] but its roots go deeper. Professor Linde's experience growing up in the 1920s and 1930s, in which his family first fled Germany and then Denmark to escape the Holocaust, certainly led him to take civil liberties and constitutional constraints on government seriously. His experience clerking for Justice Douglas on the Supreme Court in the 1950 Term also influenced his thinking about constitutional guarantees of civil liberties, particularly the first amendment.

During his clerkship, the Supreme Court decided *Dennis v. United States*.[14] In *Dennis*, the Court affirmed the convictions of the leaders of the Communist Party of the United States for violating the Smith Act, which forbade advocating the overthrow of governments in the United States by force and violence, organizing a group or party to advocate such action, and conspiring or attempting to accomplish either one of these goals.[15]

Justices Black and Douglas dissented from the decision in separate opinions.[16] In his dissent, Justice Douglas accepted the proposition that the government could enact and enforce a law that prohibits revolutionary advocacy, but only if conditions in the country were such that that advocacy could lead to imminent revolutionary violence.[17] In his view, there was no evidence in the record, and no basis on which the Court could take judicial notice, that the necessary conditions existed.[18] His opinion did not make clear, however, whether the failure to establish the existence of these conditions meant that the Smith Act was invalid, or that the convic-

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[12] Linde, "*Clear and Present Danger*," *supra* note 2.

[13] 395 U.S. 444 (1969) (per curiam).

[14] 341 U.S. 494 (1951).

[15] *See id.* at 495-97.

[16] *Id.* at 579 (Black, J., dissenting), 341 U.S. at 581 (Douglas, J., dissenting).

[17] *Id.* at 585-91 (Douglas, J., dissenting).

[18] *Id.* at 587-90 (Douglas, J., dissenting).

tions under it could not be sustained.[19]

Eighteen years later, in *Brandenburg v. Ohio*,[20] the Court held that Ohio's criminal syndicalism law violated the first and fourteenth amendments.[21] This statute was similar to those that had been enacted in many states, including Oregon, during the early twentieth century.[22] It prohibited advocating the use of violence to effect "industrial or political reform" or joining a group formed to teach or advocate this principle.[23] A similar California statute had been upheld against a first and fourteenth amendment challenge forty-two years earlier in *Whitney v. California*.[24] *Brandenburg* expressly overruled *Whitney*.[25]

Justices Black and Douglas wrote separate concurring opinions in *Brandenburg*.[26] In his concurrence, Justice Douglas stated that he no longer believed that the "clear and present danger" test had a role to play in first amendment analysis.[27] This represented an evolution of his thinking from his dissent in *Dennis*, because he had assumed in that dissent that this was the appropriate test to be used to determine whether a particular restraint on revolutionary advocacy was valid.[28]

Although this evolution in thinking led Justice Douglas to conclude that the first amendment prohibits the government from prosecuting people for revolutionary advocacy, he did not attempt to expand on this conclusion to state a general principle to be used by lawmakers to determine whether a proposed law would violate the first amendment. In other words, while his views on the first amendment continued to evolve in the direction of absolutism,[29] he

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[19] *See id.* at 585-91 (Douglas, J., dissenting); Linde, "*Clear and Present Danger*," *supra* note 2, at 1173.

[20] 395 U.S. 444 (1969) (per curiam).

[21] *Id.* at 447-49.

[22] *Compare id.* at 447 (discussion of Ohio Criminal Syndicalism statute) *with* State v. Boloff, 138 Or. 568, 4 P.2d 326 (1931) *and* State v. Laundy, 103 Or. 443, 452-53, 204 P. 958, 961-62 (1922) (discussion of Oregon Crimnal Syndicalism statute).

[23] *Brandenburg*, 395 U.S. at 448.

[24] 274 U.S. 357 (1927).

[25] *Brandenburg*, 395 U.S. at 449.

[26] *Id.* at 449 (Black, J., concurring), 395 U.S. at 450 (Douglas, J., concurring).

[27] *Id.* at 454-57 (Douglas, J., concurring).

[28] *See Dennis*, 341 U.S. at 584-91 (Douglas, J., dissenting).

[29] *Compare Dennis*, 341 U.S. at 581 (Douglas, J., dissenting) ("The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality.") *with Brandenburg*, 395 U.S. at 455-57 (Douglas, J., concurring) (speech immune from prosecution unless "brigaded with action").

did not develop an analytical framework by which to give that absolutism effect.

It fell to Professor Linde to supply the analytical structure. He did this by shifting the focus from an effort to identify expression that is protected by the first amendment to an effort to identify the laws that can be enacted under it.[30]

The former focus is the one traditionally used to analyze first amendment issues. Justice Douglas's concurrence in *Brandenburg* exemplifies this. In it, he spoke of speech which could be prosecuted, not of laws which could be enacted.[31] This is also the focus from which people so readily assail absolutism as a way of viewing the first amendment. Because it is possible to identify expression that almost all would agree should be subject to prosecution, such as falsely shouting "Fire!" in a crowded theater,[32] it is argued that the first amendment cannot be absolute in its protection of expression.

However, by shifting the focus from protected expression to the adoption of laws that restrict expression, it is possible to see the first amendment as legitimately absolute. From this perspective, the first amendment can be understood to prohibit lawmakers from enacting laws directed against expression, rather than against the harmful effects of expression about which they legitimately can be concerned.

Professor Linde used the Court's experience with laws against revolutionary advocacy to illustrate this point.[33] It is not necessary to recapitulate that discussion here. It is sufficient to note that it confirmed that the first amendment could be understood to prohibit lawmakers from enacting laws directed against the content of expression, requiring them, instead, to enact laws that focus on the

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[30] *See* Linde, "*Clear and Present Danger*," *supra* note 2, at 1174-76. This shift in focus appears deceptively simple, but it eluded most people. It is the ability to look at things from a different perspective that is one of Justice Linde's greatest gifts. Former Oregon House Speaker Hardy Myers put the point this way: "There is about him a feeling that you're seeing a much deeper reality being penetrated. . . . Things are turned over and looked at from a standpoint that most people simply don't think of. Suddenly a light goes on, and you wonder, "Why didn't I think of that?" Witt, *Hans A. Linde—The Unassuming Architect of an Emerging Role for State Constitutions*, GOVERNING, July 1989, 56, 57.

[31] *See* 395 U.S. at 456-57 (Douglas, J., concurring).

[32] *See, e.g., id.* at 456 (Douglas, J., concurring); *see also* Linde, "*Clear and Present Danger*," *supra* note 2, at 1182-83 & nn. 65, 66.

[33] *See* Linde, "*Clear and Present Danger*," supra note 2, at 1174-86.

harm that supposedly motivates their desire to restrict it.[34]

The rule proposed by Professor Linde was intended to give lawmakers clear direction about the types of laws they were prohibited by the first amendment from enacting. He explained the point this way in his article, and incidentally demonstrated how the rule addresses the classic challenge to an absolutist understanding of the first amendment:

> A clear rule that the first amendment does not permit a law directed in terms against speech, irrespective of clear and present danger, will better serve the legislator's task. It is not too much to ask lawmakers, if they believe that hateful expression actually causes identifiable harm, to direct their laws against the causing of such harm . . . rather than to vent the public indignation by outlawing the expression itself.
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> The first time someone causes a panic by shouting "Fire!" in a crowded theater, some lawmaker's impulse will be to make a law against shouting "Fire!" in crowded theaters, and to leave it to some future court to declare that it cannot constitutionally be applied to censor an actor's lines in a play. The first amendment can tell him before enactment that the law had better be directed against causing panics or substantial risks of panics, under whatever conditions of intent, negligence, or probability may seem appropriate, and leave it to the court whether that law constitutionally applies to some particular shout of "Fire!"[35]

As this discussion indicates, Professor Linde's proposed first amendment analysis was an absolutist analysis. Although his defense of the analysis was persuasive, he certainly recognized that it came at a time when the Supreme Court was expected to become less libertarian, an expectation that has been borne out.[36]

Because of the Court's movement away from a libertarian orientation, it fell to state courts to consider the proposed analysis. This is just as well because it is doubtful that the Court would have been able to overcome its institutional inertia to consider the analysis, even if the Court had remained libertarian in its outlook.

II

APPLICATION OF THE ANALYSIS IN OREGON

Governor Robert Straub's appointment of Justice Linde to the Oregon Supreme Court in January 1977 set the stage for the adoption in Oregon of Linde's proposed absolutist analysis. Had the ap-

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[34] *See id.*

[35] *Id.* at 1182 (footnote omitted).

[36] *See id.* at 1163; Wohl, *supra* note 6.

pointment not been made, it is doubtful that the analysis would have been adapted for use in Oregon under article I, section 8 of the Oregon Constitution.

Prior to the appointment, however, some work already had been done on the development of an independent analysis of article I, section 8. In 1975 in *Deras v. Myers*,[37] the court had held that state statutory restrictions on the expenditure of funds on behalf of candidates for public office violated article I, sections 8 and 26 of the Oregon Constitution. In so doing, the court recognized that a determination that the legislative scheme violated the Oregon Constitution made it unnecessary to determine whether it violated the federal Constitution.[38]

The *Deras* court did not attempt, however, to develop a different methodology for analyzing freedom of expression issues under article I, section 8, from that used by the Supreme Court under the first amendment. It simply applied the Court's balancing test and determined that the benefits from the challenged restrictions did not outweigh the harm to the rights protected by article I, sections 8 and 26.[39]

Although the court applied a balancing test, it acknowledged the existence of an alternative analysis proposed by Professor Linde in an amicus curiae brief in *Deras*.[40] This alternative analysis was not stated in detail in the amicus brief, but it was based on the absolutist analysis he had proposed by in his *Stanford Law Review* article.[41]

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[37] 272 Or. 47, 535 P.2d 541 (1975).

[38] *Id.* at 53, 535 P.2d at 544. In other words, the court acknowledged the logical sequence of analysis that Professor Linde had argued should be followed in addressing whether state actions violate the Federal Constitution. *Compare id. with* Linde, *Without "Due Process," supra* note 1, at 131-35. As it turns out, Professor Linde had submitted an amicus curiae brief for the Oregon Newspaper Publishers Association in *Deras* in which he had restated his argument about the analytical sequence to be followed by a court. *See* Brief of Oregon Newspaper Publishers Association at 5-10, *Deras*. Of course, the court had in the past addressed state constitutional issues before reaching federal issues, and certainly was conscious of its authority to interpret the state constitution independently of the federal. *See, e.g.*, State v. Brown, 262 Or. 442, 453, 497 P.2d 1191, 1196 (1972); Dickman v. School Dist. No. 62C, 232 Or. 238, 245-46, 366 P.2d 533, 537 (1961), *cert. denied*, 371 U.S. 823 (1962). Nevertheless, the court's willingness to state this point directly in *Deras* is likely attributable, in part, to Linde's influence.

[39] *See Deras*, 272 Or. at 54-67, 535 P.2d at 544-51.

[40] *See id.* at 54 & n.6, 535 P.2d at 544 & n.6; Brief of Oregon Newspaper Publishers Association, *Deras*, 272 Or. 47, 535 P.2d 541.

[41] *Compare* Brief of Oregon Newspaper Publishers Association at 9-14 *Deras*, (proposed article I, section 8 analysis); *with* Linde, *"Clear and Present Danger," supra* note 2, at 1183-84 (proposed absolutist analysis).

The court expressed some interest in Professor Linde's proposed analysis, which suggested for the first time that the court might be prepared to develop an analysis under article I, section 8 that was distinctly different from that used by the Supreme Court under the first amendment.[42]

Three years later, in *Davidson v. Rogers*,[43] Justice Linde wrote a concurring opinion in which he renewed the effort that he had begun in *Deras* to promote the adoption of his absolutist analysis by the court. *Davidson* involved a challenge to a statute that limits damage awards for defamation, depending on whether the defamatory statement is published or broadcast, and whether the person who publishes or broadcasts the statement publishes a retraction.[44] The court upheld the statute against a contention that it violates article I, section 10 of the Oregon Constitution,[45] which guarantees a "remedy by due course of law for injury done [one] in his person, property, or reputation."[46]

In his concurrence, Justice Linde suggested that article I, section 10 has to be construed together with article I, section 8, in defamation cases in order to establish the proper scope of each.[47] Article I, section 10 guarantees a remedy to people injured by defamatory statements. Article I, section 8, in turn, provides that people shall be "responsible for the abuse of [the] right" of free expression. Defamation constitutes an historically recognized "abuse" of the right of free expression. Hence, laws that remedy injuries caused by defamation are laws permitted by article I, section 8.[48]

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[42] *See Deras*, 272 Or. at 65, 535 P.2d at 550. Prior to *Deras*, the Oregon Supreme Court "had occasion to recognize the independent significance of the Oregon Bill of Rights," Brief of Oregon Newspaper Publishers Association at 7, *Deras*, 272 Or. 47, 535 P.2d 541, but continued to apply a federal analysis. *See, e.g.*, State v. Childs, 252 Or. 91, 99, 447 P.2d 304, 308 (1968) (refusing to "construe the freedom of expression provision of the Oregon Constitution, [a]rticle I, [section] 8, as providing greater freedom of expression than that of the First Amendment"), *cert. denied*, 394 U.S. 931 (1969); State v. Jackson, 224 Or. 337, 349-53, 356 P.2d 495, 501-02 (1960) ("unnecessary to determine whether obscene material enjoys a protection from restraint under the Oregon Constitution, [a]rticle I, [s]ection 8, that is not extended to it by the due process guarantees of the Fourteenth Amendment of the federal Constitution," *id.* at 352-53, 356 P.2d at 502).

[43] 281 Or. 219, 574 P.2d 624 (1978).

[44] *See id.* at 221 & n.2, 574 P.2d at 624 & n.2.

[45] *Id.* at 221-22, 574 P.2d at 624-25. A similar challenge had been rejected seventeen years earlier in Holden v. Pioneer Broadcasting Co., 228 Or. 405, 365 P.2d 845 (1961), *cert. denied*, 370 U.S. 157 (1962).

[46] OR. CONST. art. I, § 10.

[47] *Davidson*, 281 Or. at 224, 574 P.2d at 626 (Linde, J., concurring).

[48] *See id.* at 224-25, 574 P.2d at 626 (Linde, J., concurring).

These propositions are uncontroversial. But Justice Linde gave them an added twist. He asserted that the "responsibility for abuse" language in article I, section 8 serves solely to preserve the right of people to recover for injuries caused by expression constituting an "abuse" of the right of free expression. In other words, its sole purpose is to permit the government to do that which article I, section 10 guarantees people that it will do: give them a remedy for injuries to their person, property, or reputation. It does not allow the government to punish people for expression, even expression constituting an "abuse" of the right.[49]

Justice Linde's effort to tie the "abuse" language in article I, section 8 to the article I, section 10 guarantee of a remedy for injury to one's reputation was an important step toward the adoption in Oregon of the absolutist analysis he had proposed in his *Stanford Law Review* article.[50] If responsibility for abuse were understood to include criminal responsibility, the constitutional guarantee of free expression could be understood to be completely hortatory. Expression would be free except to the extent that lawmakers and courts determine that it constitutes an abuse, in which case it would not be free. This would not be much of a guarantee.[51]

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[49] *See id*. Of course, that the "abuse" language was intended to preserve the right of people to recover damages for defamation and similar torts does not necessarily mean that the language was adopted solely for this purpose. It could have been adopted to serve other purposes as well, such as preserving the ability to punish people for expression that was considered to be an abuse of the right of free expression. *Cf*. Wheeler v. Green, 286 Or. 99, 118-19, 593 P.2d 777, 789 (1979) (court noted that article I, section 8 "does not by its terms limit the extent of a defendants' 'responsibility' for defamation to that which is required to satisfy the protection which a plaintiff is guaranteed by [a]rticle I, [section] 10"). Nevertheless, Justice Linde was right to suggest that the guarantee in article I, section 10 sheds light on the intended function of the "abuse" language in article I, section 8. Construing them together does "yield a coherent view of freedom and responsibility." *Davidson*, 281 Or. at 224, 574 P.2d at 626 (Linde, J., concurring). This was not a new thought for him. He had made the same point in his amicus brief in *Deras*. *See* Brief of Oregon Newspaper Publishers Association at 10 n.2, *Deras*, 272 Or. 47, 535 P.2d 541.

[50] Linde, "*Clear and Present Danger*," *supra* note 2.

[51] Some courts had interpreted comparable guarantees of free expression to work just this way. *See, e.g.*, State *ex rel*. Olson v. Guilford, 174 Minn. 457, 219 N.W. 770 (1928), *rev'd sub nom.* Near v. Minnesota, 283 U.S. 697 (1931); State v. Pioneer Press Co., 100 Minn. 173, 110 N.W. 867 (1907); State v. Haffer, 94 Wash. 136, 162 P. 45 (1916); State v. Fox, 71 Wash. 185, 127 P. 1111 (1912), *aff'd*, 236 U.S. 273 (1915). These cases are discussed in Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 173-76 (1981).

The absolutist analysis ultimately adopted by the Oregon Supreme Court in State v. Robertson, 293 Or. 402, 649 P.2d 569 (1982), could, in fact, work if responsibility for abuse were understood to include criminal responsibility. The analysis would simply be modified to provide that expression cannot constitute an abuse of the right and, hence,

Within a year of Justice Linde's *Davidson* concurrence, the court adopted his construction of the "abuse" language in article I, section 8 in *Wheeler v. Green*.[52] *Wheeler* was a defamation action in which the plaintiff recovered both general and punitive damages at trial. On appeal, the supreme court rejected the award of punitive damages, holding that a party injured by defamatory statements can recover only compensatory damages.[53] This decision had far-reaching implications for the development of Oregon constitutional law on freedom of expression, as the author of the court's opinion came to appreciate.[54]

Wheeler v. Green was followed by *State v. Spencer*.[55] In *Spencer*, the court held that a disorderly conduct statute that prohibited people from using abusive or obscene language, or making obscene gestures, in a public place violated article I, section 8.[56] *Spencer* is significant because in it the court began the effort to develop a framework for analyzing claims under this section.

The court began its analysis by focusing on the text of the provision:

> [Article I, section 8] is a prohibition on the legislative branch. It prohibits the legislature from enacting laws restraining the free expression of opinion or restricting the right to speak freely on any subject. If a law concerning free speech on its face violates this prohibition, it is unconstitutional; it is not necessary to consider what the conduct is in the individual case . . . .
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> . . . There may be types of "expression" that would not be within the protection of [article I, section 8] under any imaginable circumstances. But when the terms of a statute as written

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be excepted from the protection afforded free expression, unless its status as an abuse was well established by the time the early American guarantees of free expression were adopted, and the guarantees then or in 1859 demonstrably were not intended to affect that status.

[52] 286 Or. 99, 593 P.2d 777 (1979).

[53] *Id.* at 118-19, 593 P.2d at 788-89. It is worth noting that the Supreme Court has held that the first amendment, as applied to the states through the fourteenth amendment, does not prohibit states from permitting people to recover punitive damages for defamation. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346-50 (1974); *id.* at 370, 395-98 (White, J., dissenting).

[54] Justice Lent wrote the court's opinion. He later expressed uncertainty about the correctness of the decision in view of the court's reliance on it to deny an award of punitive damages to an employee whose supervisor had intentionally caused her to suffer emotional distress by browbeating her. *See* Hall v. May Dep't Stores Co., 292 Or. 131, 150-51 & n.2, 637 P.2d 126, 138 & n.2 (1981) (Lent, J., concurring in part and dissenting in part).

[55] 289 Or. 225, 611 P.2d 1147 (1980).

[56] *Id.* at 227, 231, 611 P.2d at 1147, 1149.

> prohibit or restrain expression that does come within this protection, the statute is a law forbidden by [article I, section 8].[57]

Within this framework, the state argued that abusive and obscene language is expression that is wholly outside the protection of article I, section 8, but the court held otherwise.[58]

Spencer established that laws that, by their terms, restrain or restrict expression violate article I, section 8, unless the expression that is restricted is not protected by the provision.[59] Stated this way, it is rather apparent that *Spencer* did not address a major aspect of what an independent state analysis of the constitutional guarantee of free expression must accomplish: it did not explain how one determines what expression is protected by article I, section 8, and what expression is not.

The missing component of the state freedom of expression analysis was supplied by the court in *State v. Robertson*.[60] In *Robertson*, the court held that a criminal coercion statute violated article I, section 8. In so doing, the court established the modern Oregon analysis by which to determine whether an existing or proposed law violates this provision.

The *Robertson* analysis is the absolutist analysis proposed by Professor Linde in his *Stanford Law Review* article, adapted to reflect developments in Oregon law since *Deras*, and to resolve issues that had not been addressed in the article.[61] This is not too surprising, given that the *Robertson* opinion was written for the court by Justice Linde, and he had been involved beginning with his amicus curiae brief in *Deras* in a systematic effort to promote the adoption of this analysis by the court.

The analysis is succinctly stated in the following passage from the case:

> Article I, section 8, . . . forbids lawmakers to pass any law "restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever," beyond

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[57] *Id.* at 228-30, 611 P.2d at 1148-49.

[58] *Id.* at 230-31, 611 P.2d at 1149.

[59] *See id.* at 228-30, 611 P.2d at 1148-49. As paraphrased in the text above, this statement of the principle established in *Spencer* is virtually identical to the statement of the principle embodied in Professor Linde's proposed first amendment analysis in his *Stanford Law Review* article. *See* Linde, *"Clear and Present Danger," supra* note 2, at 1183.

[60] 293 Or. 402, 649 P.2d 569 (1982).

[61] *Compare* Linde, *"Clear and Present Danger," supra* note 2, at 1179-86 & nn.66 & 70 (proposed absolutist analysis) *with Robertson*, 293 Or. at 412, 416-17, 649 P.2d at 576, 578-79 (modern analysis of article I, section 8).

> providing a remedy for any person injured by the "abuse" of this right. This forecloses the enactment of any law written in terms directed to the substance of any "opinion" or any "subject" of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants. Only if a law passes that test is it open to a narrowing construction to avoid "overbreadth" or to scrutiny of its application to particular facts.[62]

The analysis has two principal features. First, it states the basic, absolutist principle from the *Stanford Law Review* article that the government cannot choose to enact laws that, by their terms, restrain or restrict expression.[63] Second, it modifies this principle to reflect the fact that there are laws which must be understood to be permitted by article I, section 8, even though they otherwise violate the absolutist principle established by the analysis.

For example, a law that prohibits perjury is a law that, by its terms, restricts expression. Nevertheless, it is a law that must be understood to be permitted under article I, section 8, because no one reasonably could believe that this section was intended to prevent the government from making it a crime to commit perjury, or to engage in any of the other acts listed in the quotation from *Robertson* above.

The operation of the analysis is well illustrated by its application in *Robertson*. In relevant terms, the coercion statute at issue in *Robertson* prohibited a person from using various threats to compel or induce another person to engage in conduct from which the other person had a right to abstain, or to abstain from conduct in which the other person had a right to engage.[64]

The statute was directed at a forbidden effect: coercing a person "into a nonobligatory and undesired course of conduct."[65] Reasonably understood, however, it prohibited expression used to achieve the forbidden effect.[66] It therefore imposed a restraint or restriction on expression. The issue, then, was whether the restriction came

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[62] *Robertson*, 293 Or. at 412, 649 P.2d at 576 (citations omitted; footnotes omitted).

[63] *See* Linde, "*Clear and Present Danger*," *supra* note 2, at 1183-84.

[64] *See Robertson*, 293 Or. at 413-14, 649 P.2d at 577.

[65] *Id.* at 417, 649 P.2d at 579.

[66] *See id.*

within a well-established, historical exception to the protection afforded free expression by article I, section 8.

To resolve this issue, the court reviewed common-law crimes similar to the coercion statute, such as laws against blackmail and extortion, to determine whether the restraints on expression imposed by the coercion statute were equivalent to those imposed by well-established crimes involving expression. This comparison was important for two reasons.

First, the court considered common-law crimes such as blackmail and extortion to be "conventional crimes" involving expression that survived the adoption of article I, section 8.[67] If the coercion statute were equivalent in its reach to these crimes, it would not violate this section.

Second, the court emphasized that the restrictions on expression that the state may impose are not strictly defined by the restrictions that existed in the mid-nineteenth century that survived adoption of the constitutional guarantee. The court explained the point this way:

> [B]lackmail or analogous forms of extortion by threats are among the conventional crimes that survive article I, section 8, despite being committed by verbal means. The legislature, of course, may revise these crimes and extend their principles to contemporary circumstances or sensibilities. . . . Constitutional interpretation of broad clauses locks neither the powers of lawmakers nor the guarantees of civil liberties into their exact historic forms in the 18th and 19th centuries, as long as the extension remains true to the initial principle. When extending an old crime to wider "subjects" of speech or writing, however, there is need for care that the extension does not leave its historical analogue behind and, perhaps inadvertently, reach instances

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[67] *See id.* at 421, 433 & n.28, 649 P.2d at 581, 588 & n.28. The court identified these crimes as "conventional" to distinguish them from other common-law crimes involving expression, such as seditious libel and criminal libel, that did not survive adoption of the constitutional guarantee. *Id.* at 433 n.28, 649 P.2d at 588 n.28. Conventional crimes generally focus on an effect, such as taking a person's money. In contrast, crimes such as seditious and criminal libel focus only on the content of the proscribed expression, and prohibit that content in an effort to prevent people from getting "incorrect" ideas about the government or other people. As the court explained, the guarantee of free expression was intended, among other things, to prohibit the enactment and enforcement of laws that restrain public disclosure and debate. Laws against seditious and criminal libel exist to prevent public disclosure and debate. *Cf., e.g.*, State v. Kerekes, 225 Or. 352, 357 P.2d 413 (1960) (prosecution for criminal libel for statements made about the official conduct of a police chief); State *ex rel.* Mays v. Mason, 29 Or. 18, 43 P. 651 (1896) (attorney disciplined for conviction for criminal libel for publishing defamatory article in newspaper of which he was the editor).

of privileged expression.[68]

Viewed this way, the issue for the court was whether the restrictions imposed by the coercion statute had gone beyond the principles embodied in conventional crimes such as blackmail and extortion to reach privileged expression.[69]

The court concluded that the statute had. The court identified a number of examples of expression that would be prohibited by the statute, but which could not be understood to be subject to restriction under an extension of the principles embodied in recognized conventional crimes involving expression.[70] The court was unable to supply a principled construction of the statutory language that would avoid its application to these examples of privileged expression. Hence, it held that the statute violated article I, section 8.[71]

The analysis established in *Robertson* differs in several respects from that described by Professor Linde in his *Stanford Law Review* article. First, the *Stanford Law Review* analysis was principally concerned with laws which prohibit expression without regard to its effect.[72] It did not address whether laws directed against a forbidden effect, but which expressly prohibit expression used to achieve

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[68] *Robertson*, 293 Or. at 433-34, 649 P.2d at 588-89 (citations omitted).

[69] *See id.* at 433-36, 649 P.2d at 588-90.

[70] *See id.* at 418-19, 435-36, 649 P.2d at 580, 589-90. The examples included a situation

> in which one man tells another: "If you don't quit making love to my wife, I'm going to tell your wife," or someone proposes to disclose . . . a politician's embarrassing past if he does not withdraw his candidacy [for] office[,] . . . or in which "one appellate judge might tell another, 'Change your opinion, or I shall dissent and expose your complete ignorance of this area of the law.' " Indeed . . . a prosecutor's plea-bargaining attempts to induce a defendant to plead guilty to one charge in order to avoid prosecution on other charges literally violates [Or. Rev. Stat. §] 163.275(1)(d).

Id. at 418-19, 649 P.2d at 580 (quoting State v. Page, 550 Or. App. 519, 524, 638 P.2d 1173, 1176 (1982) (Gillette, J., dissenting), *rev'd*, 293 Or. 453, 649 P.2d 569 (1982)) (citations omitted).

[71] *Id.* at 435-37, 649 P.d at 589-90.

[72] *See* Linde, "*Clear and Present Danger*," *supra* note 2, at 1169-86. To say that a law restrains or restricts expression without regard to its effect means that the law does not require the state to establish that the targeted expression produces a prohibited effect in order for the restriction to be imposed. The state need only establish that the expression is of the type that the law intends to suppress. For example, laws directed against so-called "obscene" expression define the expression by its sexual content, and then simply prohibit it. *See, e.g.*, WASH. REV. CODE §§ 7.48A.010, 9.68.140 (1989). To punish someone for distributing obscene materials, it is not necessary for the state to establish that the materials produced any prohibited effect. *See, e.g., id.* The laws to which the *Stanford Law Review* analysis was addressed were laws of this type. *See* Linde, "*Clear and Present Danger*," *supra* note 2, at 1169-86.

that effect, can violate the relevant constitutional guarantees of free expression.[73]

In *Robertson*, Justice Linde necessarily had to incorporate into the analysis a means to determine the validity of such laws, because the coercion statute at issue in *Robertson* was such a law. It was this need that led to the exception for laws involving expression that were well established at the time the constitutional guarantees were adopted, and that the guarantees demonstrably were not intended to displace.[74]

Second, the addition of a historical exception to the basic, absolutist analysis required the *Robertson* court to explore the limits of this exception. This exploration led the court to distinguish between conventional crimes involving expression, such as perjury, fraud, and blackmail, and other crimes involving expression. The former are understood to have survived the adoption of article I, section 8, and the latter are understood not to have survived, absent a convincing demonstration that they were intended to do so.[75]

The addition of a historical exception also led the court to recognize that conventional crimes involving expression could not be considered to be locked into the form they took in the mid-nineteenth century. The basic principles embodied in these laws had to be understood to be able to be modified and extended to reflect changing social conditions. However, as the court emphasized, any extension of these principles had to remain true to them, and could not intrude on historically privileged expression.[76]

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[73] It is not entirely clear whether Professor Linde recognized in his *Stanford Law Review* analysis that there might be circumstances in which laws directed against forbidden effects would have to be written expressly to prohibit expression used to produce the effects. In a discussion of obscenity in a footnote in the article, he suggested that the analysis would require lawmakers to focus on effects arguably related to the production and distribution of sexually explicit expression, rather than on the expression itself, and to address these effects by laws written in " 'nonspeech' " terms. *See* Linde, *"Clear and Present Danger," supra* note 2, at 1184 n.70. Whether or not this suggests that the analysis was expected to require all laws directed against forbidden effects to be written in "nonspeech" terms, the court in *Robertson* certainly came to understand that there were circumstances in which laws directed against forbidden effects would have to be written in "speech" terms.

[74] *See Robertson*, 293 Or. at 412, 649 P.2d at 576.

[75] *See id.* at 433-34 & n.28, 649 P.2d at 588-89 & n.28.

[76] *See id.* The court's historical approach recognizes that a balance already has been struck by the constitution in favor of free expression. The constitution does not leave it to the legislature, the executive, or the courts to strike a new balance between the costs and benefits of free expression. *See, e.g.*, State v. Harrington, 67 Or. App. 608, 613-14, 680 P.2d 666, 670, *review denied*, 297 Or. 547, 685 P.2d 998 (1984).

In other words, the costs and benefits of free expression are no more open to reexami-

Finally, the *Stanford Law Review* analysis had said nothing about the role of civil remedies for harm caused by expression. Given the language in article I, section 8 on responsibility for the "abuse" of the right of free expression, and the interpretation given this language in *Wheeler v. Green*,[77] it was necessary for the *Robertson* analysis to address this issue. The court added little, however, to what had already been established in *Wheeler v. Green*. It simply noted that lawmakers and courts can provide remedies to people for injuries to their person, property, or reputation resulting from an "abuse" of the right of free expression.[78] It did not explore whether there are limits on the state's ability to define what constitutes an "abuse" of the right, or on its ability to recognize new injuries for which damages can be awarded.[79]

The *Robertson* analysis has been remarkably successful on several levels. With one exception, it has been applied by the supreme court in a series of unanimous decisions involving sensitive and contentious free speech issues.[80] This record stands in distinct contrast

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nation than are the costs and benefits of the right to trial by jury. There might well be very good reasons why the cost of jury trials in some settings now outweighs the benefits derived from them, but neither the legislature nor the court is free to strike a new balance regarding this right to reflect this change. Only a constitutional amendment can effect such a change. Moreover, the scope of the right is determined by history in much the same way that history is used under the Oregon analysis to determine whether a particular restraint on expression is permitted by the constitution. Whether one has a right to a jury trial turns on the extent to which the claims at issue are claims that would have been tried at law, as opposed to in equity, at the time the constitution was adopted. The right remains tied to the circumstances that existed at the time the constitution was adopted, yet it is possible to apply it to new types of claims as the law evolves, again in the way that the Oregon analysis permits historically established crimes involving expression to be adapted to reflect contemporary circumstances. *See Robertson*, 293 Or. at 433-34, 649 P.2d at 588-89.

[77] 286 Or. 99, 593 P.2d 777 (1979).

[78] *See Robertson*, 293 Or. at 412, 433 n.29, 649 P.2d at 576, 588 n.29.

[79] The court presumably did not address these issues because the case did not present them. Any statement about them would have been dictum. Nevertheless, the court can expect eventually to be faced with them. The analysis used by the court should be similar to the historical analysis used to determine the validity of direct restrictions on expression. That is, it should focus on whether the expression was understood to constitute an abuse at the time the constitutional guarantees were adopted. *Cf.* State v. Moyle, 299 Or. 691, 700, 705 P.2d 740, 746 (1985) (dictum). As with historical exceptions involved in direct restrictions of expression, the concept of abuse can evolve over time, so long as it remains true to the principles on which it is based. *Cf. Robertson*, 293 Or. at 433, 649 P.2d at 588-89 (by implication).

[80] *See, e.g.*, Oregon State Police Officers Ass'n v. State, 308 Or. 531, 783 P.2d 7 (1989); City of Hillsboro v. Purcell, 306 Or. 547, 761 P.2d 510 (1988); City of Portland v. Tidyman, 306 Or. 174, 759 P.2d 242 (1988); State v. Ray, 302 Or. 595, 733 P.2d 28 (1987); State v. Henry, 302 Or. 510, 732 P.2d 9 (1987); State v. Moyle, 299 Or. 691, 705 P.2d 740 (1985); State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984); *In re* Lasswell,

with that of the United States Supreme Court in deciding comparable cases under the first amendment.[81]

The reason the court has been able to apply the analysis without apparent difficulty or controversy is that the analysis establishes an intelligible standard for determining whether a law violates the constitutional guarantee of free expression. This standard is intelligible not just to courts, but, more importantly, to local officials, legislators, and other lawmakers who must decide whether to enact proposed laws that raise freedom of expression concerns. It focuses their attention on whether the proposed law, by its terms, restrains or restricts expression. If it does, the law will violate article I, section 8, unless it comes within a historically established exception to the guarantee of free expression, or it serves only to give people a remedy for injuries caused by an abuse of the right of free expression.[82]

This situation contrasts even more starkly with that presented by the Supreme Court's free speech analysis under the first amendment. The balancing approach used by the Court in this area pro-

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296 Or. 121, 673 P.2d 855 (1983) (per curiam). The exception is *In re* Fadeley, 310 Or. 548, 802 P.2d 31 (1990). *In re* Fadeley will be discussed later in this article. *See infra* notes 157-184 and accompanying text. The Oregon Court of Appeals has also applied the *Robertson* analysis in a number of significant cases, although its decisions have not always been unanimous. *See, e.g.*, Sekne v. City of Portland, 81 Or. App. 630, 726 P.2d 959 (1986), *review denied*, 302 Or. 615, 733 P.2d 450 (1987); Ackerley Communications, Inc. v. Multnomah County, 72 Or. App. 617, 696 P.2d 1140 (1985), *review dismissed*, 303 Or. 165, 734 P.2d 885 (1987); State v. Harrington, 67 Or. App. 608, 680 P.2d 666, *review denied*, 297 Or. 547, 685 P.2d 998 (1984); State v. House, 66 Or. App. 953, 676 P.2d 892 (en banc), *modified*, 68 Or. App. 360, 681 P.2d 173 (1984) (en banc), *aff'd on other grounds*, 299 Or. 78, 698 P.2d 951 (1985); Marks v. City of Roseburg, 65 Or. App. 102, 670 P.2d 201 (1983), *review denied*, 296 Or. 536, 678 P.2d 738 (1984).

[81] Compare the cases cited in note 80 above with, for example, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); and Miller v. California, 413 U.S. 15 (1973).

[82] The determination whether the first exception applies can require a careful review of history, and an evaluation whether the principles embodied in the recognized historical exceptions are being faithfully applied in the proposed law. While this review may not always yield an obvious answer, the lawmakers' focus remains limited to manageable criteria, that is, criteria that do not require the lawmakers to speculate about whether their policy choice will be acceptable to a court. *See* City of LaGrande v. Public Employes Retirement Bd., 284 Or. 173, 184-85, 586 P.2d 765, 771 (1978) (Linde, J.) (same principle applied to interpretation of "home rule" amendments to the Oregon Constitution); *see also* Linde, "*Clear and Present Danger*," *supra* note 2, at 1184-85; note 125 *infra*. The second exception does not give lawmakers unfettered discretion to create civil remedies for expression. The analysis to be applied to determine whether a proposed law comes within this exception should be similar to the historical analysis used to determine whether a law comes within the first exception. *See* note 79 *supra*.

vides little guidance to lawmakers about whether a proposed restriction on expression will violate the first amendment.

For the most part, it leaves them to speculate whether the restriction will be considered to advance a sufficiently important governmental interest, or to do so by the least restrictive means, or to impose only a nominal or incidental restriction on expression, or to affect a category or form of expression that is not highly valued.[83] At bottom, lawmakers often will not know the answer until the Court has expressly addressed the particular restriction, which means that they will feel free to do whatever they want because no lawyer will be able to tell them with any degree of assurance that they cannot.[84]

This is perhaps best illustrated by the Court's experience with zoning restrictions on adult businesses. The issue was first presented to the Court in *Young v. American Mini Theatres, Inc.*[85] In *Young*, the Court in a 4-1-4 decision upheld, against a first and fourteenth amendment challenge, a Detroit zoning ordinance that controlled where bookstores and theaters offering sexually explicit expression could be located.[86]

Justice Powell provided the necessary fifth vote to uphold the ordinance, so his concurring opinion established the analysis under which the ordinance was allowed to stand.[87] Not atypically, this analysis focused on whether the restriction was necessary to protect neighborhoods against deterioration caused by a concentration of adult bookstores and theaters, and whether the burden that it imposed on the dissemination of sexually explicit expression was too

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[83] *See, e.g.*, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). *See generally* Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978).

[84] In the face of indeterminate standards, it is difficult for a lawyer for a local government or similar law-making body to advise her client that a proposed restriction violates the first amendment. Unless the answer is clear, she presumably will feel obliged to tell her client that the restriction may be permitted, which means that the governmental officials will feel free to act in accordance with popular sentiment. Popular sentiment, in turn, usually will favor imposition of the proposed restriction. If it dependably would not, it presumably would not be necessary to have a constitutional prohibition against laws that abridge, restrict, or restrain expression. That we do should be telling.

[85] 427 U.S. 50 (1976).

[86] *See id.* at 52-53, 63-73; *id.* at 75-83 (Powell, J., concurring).

[87] Until the Court next spoke on the subject, lawmakers and lower courts properly understood that they would have to apply the criteria identified in Justice Powell's concurring opinion in order to determine whether a zoning restriction imposed on adult bookstores and theaters by any other local government was valid.

great.[88]

As applied by lower courts over the next ten years, this analysis had absolutely no predictive value. Whether a particular zoning restriction was upheld turned on the factual record that could be developed about the need for the ordinance in the local community, juxtaposed against the extent to which the ordinance restricted the availability of sexually explicit materials.[89]

Justice Powell's analysis in *Young* was effectively swept aside by the decision in *City of Renton v. Playtime Theatres, Inc.*,[90] in which the Court held that local governments could restrict the location of adult bookstores and theaters without regard to the actual effect of these businesses on a community, so long as some opportunity to locate such a business in the community theoretically remained.[91] The *Renton* decision certainly made it easier to determine, in advance, whether a proposed zoning restriction on adult bookstores and theaters was valid under the first amendment, because it effectively authorized local governments to impose the restrictions at will.[92] Of course, in so doing, the case compounded the constitutional objections raised against the validity of such restrictions.[93]

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[88] *See Young*, 427 U.S. at 75-83 (Powell, J., concurring). In other words, it turned on a balance between the importance of the governmental policy advanced by the restriction and the degree to which the restriction affected expression. A balancing approach of this kind is stacked against the interest of the individual because the individual's interest is necessarily abstract and somewhat ephemeral, while the state interest is viewed in terms that are much more direct and concrete, such as an interest in promoting public safety, protecting property values, or preserving social order and morality. A value-laden approach of this kind also makes it much more difficult to develop a consistent and coherent body of case law because the assessment of values can change depending on the manner in which a case is presented, on changes in court personnel, on changes in public attitudes, and even on the evolution of social attitudes among existing court personnel. It also makes the process by which decisions are reached little different from that of a legislative, policy-making body. In contrast, an approach like Oregon's that eschews balancing of competing values, and that is tied to the text and history of the free expression guarantee, avoids many of the problems with which the United States Supreme Court has struggled in this area.

[89] *See, e.g.*, Playtime Theatres, Inc. v. City of Renton, 748 F.2d 527 (9th Cir. 1984), *rev'd*, 475 U.S. 41 (1986); CLR Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983); Alexander v. City of Minneapolis, 698 F.2d 936 (8th Cir. 1983); Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982). *See generally* Weinstein, *The Renton Decision: A New Standard for Adult Business Regulation*, 32 WASH. U.J. URB & CONTEMP. L. 91, 97-102 (1987).

[90] 475 U.S. 41 (1986).

[91] *See id.* at 50-55; *id.* at 62-65 (Brennan, J., dissenting).

[92] *See id.* at 62-65 (Brennan, J., dissenting). *But cf.* Woodall v. City of El Paso, 950 F.2d 255 (5th Cir. 1992) (suggesting that there are limits on the authority of local governments to restrict the location of adult bookstores and similar business).

[93] The objections to the validity of these restrictions relate to objections about the

Nevertheless, the Court's methodology continues to leave lawmakers with little guidance about whether other proposed restrictions on expression will be valid under the first amendment.[94]

The *Robertson* analysis is also successful because, while protecting expression against restriction as the constitution intended, it still leaves the government free to deal with the harmful effects of expression. The experience with adult bookstore zoning serves to illustrate this point, too.

Following Detroit's Supreme Court-approved lead, the City of Portland adopted a zoning ordinance that restricted where adult bookstores could be located within the city. In an enforcement action by the city, *City of Portland v. Tidyman*,[95] the ordinance was challenged by several bookstore owners in state court under article I, section 8, and under the first amendment.[96]

The trial court held that the ordinance violated article I, section 8, based on the *Robertson* analysis, thereby making it unnecessary for the court to determine whether it violated the first amendment.[97] On appeal, the court of appeals affirmed the decision by an equally divided court.[98]

On supreme court review, in an opinion by Justice Linde, the court affirmed the trial court decision. With regard to the merits, the court had little difficulty concluding that a restriction that controlled where bookstores could be located in Portland, based on the content of the books that they sold, was a restriction on expression that did not come within a well-established historical exception to

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soundness of the analysis used by the Court to uphold them. *See, e.g.*, *Young*, 427 U.S. at 84-88 (Stewart, J., dissenting); *Renton*, 475 U.S. at 55-65 (Brennan, J., dissenting). *See generally* Stone, *supra* note 83. Of course, from the perspective of judicial realism, the restrictions are valid under the first amendment because the Court has said that they are.

[94] See, by way of further illustration, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991). In other words, *Renton* only provides guidance about the validity of zoning restrictions affecting adult bookstores and theaters. As Justice Powell put the point in *Young*, the situation presented by ordinances of this kind is "unique," calling, "as cases in [the first amendment] area so often do, for a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression." 427 U.S. at 76 (Powell, J., concurring). The balance ultimately struck by the Court was also unique, which meant that it added little to public understanding of the circumstances under which restrictions on expression can be imposed by the government.

[95] 306 Or. 174, 759 P.2d 242 (1988).

[96] *E.g.*, Answer and Affirmative Defenses of Defendant Tidyman, *City of Portland v. Tidyman*, No. A8305-03194 (Multnomah County, Or., Cir. Ct. July 6, 1983).

[97] *See* Judgment, *id.* (Dec. 17, 1984).

[98] *Tidyman*, 306 Or. at 177, 759 P.2d at 243.

the constitutional protection afforded free expression.[99]

More importantly, however, the court emphasized that the decision did not prevent the city from adopting restrictions that would deal with the alleged harmful effects of adult bookstores operating in certain areas within the city, if the bookstores, in fact, produced the alleged effects.[100] The key is that the restrictions would have to focus on the forbidden effects, and not on the expression itself.[101] If the city could establish that a particular adult bookstore produced these effects, or was very likely to do so at its proposed location, it could prevent the bookstore from operating so long as the effects were present or realistically threatened.[102]

In summary, if adult bookstores, in fact, produce harmful effects against which the government legitimately can act,[103] the Oregon analysis does not prevent the government from doing so. It only prevents the government from acting to restrict the sale of sexually explicit materials without regard to their effect.[104]

The Oregon approach to this issue can profitably be compared with the Supreme Court's approach under the first amendment. Under *Renton*, local governments are allowed to assume that adult bookstores and theaters will produce harmful "secondary" effects in the areas in which they are located, such as late night traffic, litter, noise, and crime. So long as these assumptions are correct, both the

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[99] *See id.* at 185-91, 759 P.2d at 247-51.

[100] *See id.* at 188-91, 759 P.2d at 249-51.

[101] *See id.*

[102] *See id.*

[103] Not all the effects of adult bookstores about which people might complain can properly provide a basis on which the government can act. For example, adult bookstores might lower property values in a residential area because people do not like to live next to them, while Christian and children's bookstores would not have this effect. Nevertheless, this would not provide a basis for the government to treat the different kinds of bookstores differently. This is because the restriction would turn on public acceptance of the expression, which is not a basis on which the government can act to restrict expression. The same principle would apply, of course, to Nazi and Ku Klux Klan bookstores.

[104] Equally importantly, the Oregon analysis requires that the government actually be concerned about the harmful effects that supposedly motivate the desire to restrict the location of adult bookstores. This is because the restrictions adopted by the government must focus on the forbidden effects, and they must be enforced against all businesses that produce them, not just against adult bookstores. Consequently, if late night traffic, litter, and noise are the harmful effects against which the restrictions are directed, the restrictions may result in the removal of late night convenience stores, taverns, pizza parlors, and gas stations from residential areas, because all of these businesses can produce these kinds of effects.

Oregon and Supreme Court approaches will produce the same result.

Critically, however, the results will diverge if the assumptions are not correct. This is because the Oregon approach will prevent the government from restricting the location of adult bookstores if they do not produce the claimed harmful effects, while the Supreme Court approach will allow the restrictions to continue without regard to whether the bookstores, in fact, produce such effects. In other words, the latter approach allows the government to restrict the expression solely because it is objectionable to people, and not because it produces harmful effects.[105]

Finally, the *Robertson* analysis is sound because it is true to the text of the Oregon constitutional guarantee of free expression. This text, by its terms, prohibits the enactment of laws that restrain or restrict expression.[106] It does not say that such laws can be enacted if they serve important or compelling governmental interests. The text also states that it protects the right to "speak, write, or print freely on any subject whatever." Hence, it does not suggest that the state can treat different categories of expression differently, and the *Robertson* analysis does not.[107] Finally, the text states that people remain responsible for the abuse of the right of free expression, and *Robertson* establishes that this responsibility is limited to civil responsibility to people harmed by expression constituting an abuse.[108]

In distinct contrast, again, the Supreme Court's first amendment analysis cannot reasonably be reconciled with the text of the first amendment, let alone with the text of article I, section 8.[109] Its analysis allows the government to restrict or abridge expression if

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[105] *See Tidyman*, 306 Or. at 187-88, 759 P.2d at 248.

[106] Article I, section 8 provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." OR. CONST. art. I, § 8.

[107] *See Robertson*, 293 Or. at 431, 435, 649 P.2d at 587, 589; *see also* Ackerley Communications, Inc. v. Multnomah County, 72 Or. App. 617, 696 P.2d 1140 (1985), *review dismissed*, 303 Or. 165, 734 P.2d 885 (1987); Marks v. City of Roseburg, 65 Or. App. 102, 670 P.2d 201 (1983), *review denied*, 296 Or. 536, 678 P.2d 738 (1984).

[108] *See Robertson*, 293 Or. at 412, 433 n.29, 649 P.2d at 576, 588 n.29; *see also* State v. Moyle, 299 Or. 691, 710 n.2, 705 P.2d 740, 752 n.2 (1985) (Linde, J., concurring).

[109] The language used in article I, section 8 is not unique. It, or a variant of it, can be found in the constitutions of many other states. *See, e.g.*, ARIZ. CONST. art. 2, § 6; CAL. CONST. art. 1, § 2(a); IND. CONST. art. I, § 9; MINN. CONST. art. I, § 3; N.Y. CONST. art. 1 § 8; PA. CONST. art. I, § 7; VA. CONST. art. I, § 12; WASH. CONST. art. I, § 5.

the restriction serves a sufficiently important governmental interest, notwithstanding the constitutional prohibition against the enactment of laws that abridge free expression.[110] It also establishes differing degrees of protection for expression based on the subject of the expression,[111] a concept difficult to reconcile with the language in article I, section 8 protecting expression "on any subject whatever."

As the foregoing discussion suggests, the Oregon analysis of article I, section 8, forged by Justice Linde has been remarkably successful. It raises interesting issues, however, about the function of a court in interpreting constitutional constraints on government.

Not surprisingly, Justice Linde has had occasion to analyze the manner in which courts should decide constitutional issues. In a 1972 article in the *Yale Law Journal*,[112] then Professor Linde raised questions about whether courts were well served to adopt the principles of legal realism for use in deciding cases.[113]

The article identified two distinct principles to which legal realists expect courts to adhere.[114] One is that courts should identify the pragmatic goals to be achieved by their decisions, and should fashion their decisions to achieve these goals. A related principle is that the decisions should be written to candidly identify "the 'real' reasons supporting [the courts'] judgments."[115]

The second is that courts must use care to select the issues on which they act and the policies that they choose to pursue. They must do this in order to ensure that their institutional power is preserved. In other words, they should take care to ensure that they are successful in achieving the policies that they set out to achieve.[116]

Among the questions raised by Professor Linde about the realist

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[110] *See, e.g.*, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

[111] *See generally* Stone, *supra* note 83.

[112] Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972) [hereinafter Linde, *Realist Tradition*].

[113] *See id.* at 229.

[114] To avoid any misunderstanding, it is important to note, as did Professor Linde in his article, that legal scholars do not hold uniform views about the principles on which legal realism is based. *See id.* at 227-28. The discussion in the text above is based on Professor Linde's summary of the principles that he identified as coming within the realist tradition.

[115] *Id.* at 228.

[116] *See id.* at 228-29.

prescription was whether opinions written to identify the considerations that lead courts to strike the balance they do between competing policies give governmental officials guidance on how to conform their actions to the constitutional commands. As he put the point, "[t]oo often our Court-centered constitutional jurisprudence produces formulations . . . that articulate no directive for government but only the balance to be struck by judges on judicial review."[117]

This is certainly true with regard to current first amendment jurisprudence. The Court's approach nicely identifies the policies that its decisions seek to achieve, but it provides little guidance to those who, in the first instance, must apply the Constitution to their work: the lawmakers who must decide whether to enact restrictions on expression.

In response, Professor Linde proposed an alternative principle for courts to apply in deciding constitutional cases. This principle is

> that a judge-made rule of constitutional law must articulate criteria with which a government conscientious about its constitutional duties could know how to comply (since in retrospect it should have known) even without judicial review. If a court is to set aside an act of government on the ground that government should have obeyed the Constitution but failed, the court should elucidate the Constitution in terms that could, if heeded, make such judicial intervention theoretically unnecessary. The principle implies a First Amendment standard, for instance, that could inform lawmakers whether they had before them a bill "abridging the freedom of speech, or of the press" when they were called upon to enact it, not only a standard by which judges can subsequently refuse application of the law to the facts in a concrete case.[118]

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[117] *Id.* at 253.

[118] *Id.* (footnote omitted). In his critique of the use of realist principles to decide cases, Professor Linde identified one other principle which is worth noting. It is that

> the judicial responsibility begins and ends with determining the present scope and meaning of a decision that the nation [or state], at an earlier time, articulated and enacted into constitutional text—a different responsibility from that of explaining why society would benefit from a judicial change in the common law.

Id. at 254. In other words, constitutional text matters. It does not exist merely to provide "more or less suitable pegs on which judicial policy choices [can be] hung." *Id.* Justice Linde restated this principle twelve years later from his perspective as a judge:

> In my view, what matters to the legitimacy of judicial review is not whether judges are elected for short terms or appointed for life. What matters is whether they act in a judicial mode rather than in a legislative mode, whether the court's decision plausibly can stand as applying a constitutional premise, however generously, rather than as a new choice among social values.

Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 199 (1984). The analysis of article I, section 8, forged by Justice Linde, is true to this princi-

Justice Linde applied this principle in *Robertson*. The *Robertson* opinion does not attempt to identify the policies that the constitutional rule it states is intended to further.[119] The policies are implicit in the rule, not explicit.[120] The rule, in turn, states a standard that lawmakers can be expected to follow with little need for further judicial guidance.[121]

Although the *Robertson* decision did not follow the realist prescription about the form of constitutional decisions, the analysis it established has been successful. Armed with it, Oregon courts and lawmakers have had little difficulty determining whether existing or proposed laws violate article I, section 8.

A brief review of some of the court and legislative applications of the analysis should illustrate this point. In *State v. Garcias*,[122] the court upheld a menacing statute on the ground that it constituted a legitimate extension of the conventional crime of assault.[123] Similarly, in *State v. Moyle*,[124] the court upheld an harassment statute by narrowly construing it to bring it within the reach of historically recognized crimes against threats of personal injury or harm to property.[125]

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ple. *See also* C.E. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 272-83 (1989) (suggesting a similar approach to judicial interpretation of constitutional text).

[119] *See Robertson*, 293 Or. at 412, 421, 431-37, 649 P.2d at 576, 581, 587-90. The court made passing references to freedom of public disclosure and debate and the importance of free expression to people, *see id.* at 433 n.28, 435, 649 P.2d at 588 n.28, 589, but these were not central to the court's discussion, nor were references to policies of this kind included in the rule established in the case.

[120] *See id.* at 412, 649 P.2d at 576.

[121] *See id.* In this respect, the constitutional standard adopted in *Robertson* has been more successful than the standards adopted by the Supreme Court under the first amendment, if success is measured by compliance with the judicial command. This is because the *Robertson* standard provides clear guidance to lawmakers about the laws that they can enact, thereby enabling them to comply with the constitutional command. The federal standards provide little guidance, so lawmakers are left to decide for themselves whether proposed laws will violate the Constitution. In other words, if the Court's function is to tell lawmakers which laws they can enact, the Court's standards fail in this task. By rejecting the realist prescription to identify the policy goals to be advanced by its decision, the *Robertson* court has better met the realist goal of institutional effectiveness.

[122] 296 Or. 688, 679 P.2d 1354 (1984).

[123] *See id.* at 699-700, 679 P.2d at 1360. This makes sense. The only change from the common-law crime was elimination of a requirement that a person make threatening gestures at the time she makes a threat to cause serious physical harm. *See id.* at 696, 679 P.2d at 1357-58. The expressive element is the same in both crimes; the change only reflects greater sensitivity to the fear perceived by the person to whom the conduct is directed. It does not represent a change in the focus of the crime.

[124] 299 Or. 691, 705 P.2d 740 (1985).

[125] *See id.* at 695-705, 705 P.2d at 743-49; *see also id.* at 709-10, 705 P.2d at 751-52

One of the more celebrated cases to apply the analysis was *State v. Henry*.[126] In *Henry*, the court held that a state statute that prohibited the dissemination of "obscene" materials to willing adult recipients violates article I, section 8. The court held that an absolute prohibition against this form of expression, however defined, did not come within an historical exception that was demonstrably intended to survive adoption of the constitutional guarantee.[127] Of course, the Supreme Court long ago reached a different conclusion under the first amendment,[128] which has left our country in the curious position of having more restrictive laws on sexually explicit expression than do some of the countries now emerging from totalitarian rule.[129]

Henry was followed by *City of Portland v. Tidyman*,[130] which has

(Linde, J., concurring). *Moyle* also made clear that laws directed at the effects of expression need not be based on specific historical exceptions, so long as the laws do not affect privileged expression. Whether expression is privileged against restriction, in turn, is determined by history. *See id.* at 695-705, 705 P.2d at 743-49.

126 302 Or. 510, 732 P.2d 9 (1987). With regard to its "celebrity" status, see *A Victory for Freedom*, The Oregonian, Jan. 23, 1987, at E14; *Beneficial Obscenity Decision*, The Register-Guard (Eugene, Or.), Jan. 24, 1987, at 16A; Robert W. Chandler, *Porn/Henry Case at an End*, The Bulletin (Bend, Or.), Jan. 25, 1987, at B2, Col. 3; *Court Rejects Censorship*, Statesman-J. (Salem, Or.), Jan. 25, 1987, at 2G; Nat Hentoff, *Free Expression: The View from Oregon*, Wash. Post, Apr. 4, 1987, at A21, col. 1; James J. Kilpatrick, *Oregon Case Example of True Federalism*, The Oregonian, Feb. 1, 1987, at B3; Fred Leeson, *Obscene Speech Protected, Oregon High Court Rules*, Nat'l L.J., Feb. 16, 1987, at 13.

127 *See Henry*, 302 Or. at 515-25, 732 P.2d at 11-18. Given that article I, section 8 protects expression "on any subject whatever," it is difficult to see how a law prohibiting expression on the subject of sex, which is what an obscenity law is, could be constitutional. Obscenity laws are enacted to prevent people from obtaining books and pictures that provoke prurient thoughts, presumably because people who read or view such material might act on such thoughts. Redrafting obscenity laws to focus on a result — provoking prurient thoughts — would make it obvious that these laws are designed to control what people think. It is this type of thought control that the constitutional guarantees were certainly intended to prohibit. *See, e.g.*, *Robertson*, 293 Or. at 412, 416-17, 649 P.2d at 576, 579; Linde, *"Clear and Present Danger," supra* note 2, at 1183-86 & n.70. In this respect, obscenity laws are not different from laws against seditious and criminal libel. They all predated the adoption of the constitutional guarantees, and they all were swept aside by them. For an extended discussion of this issue, see Response to Petition for Review, State v. Hutchinson, 302 Or. 593, 731 P.2d 1045 (1987).

128 *See* Roth v. United States, 354 U.S. 476 (1957); *see also* Miller v. California, 413 U.S. 15 (1973). It is ironic that Justice Brennan, who had recently been appointed to the Court by President Eisenhower, wrote the opinion in *Roth*. *See Roth*, 354 U.S. at 479. Justice Brennan later disavowed the correctness of the decision, but it was too late. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 47, 83-87 & n.9, 103-14 (Brennan, J., dissenting).

129 *See, e.g.*, Strafgesetzbuch § 189 (F.R.G.); Telephone Interview with Milan Jezoviea, Assistant to the Consul, Czechoslovakian Embassy (Apr. 13, 1992).

130 306 Or. 174, 759 P.2d 242 (1988).

been discussed extensively above.[131] What is interesting about *Tidyman* is the state's response to it. At the request of the chair of the Senate Judiciary Committee, State Senator Joyce Cohen, the Oregon Attorney General produced an opinion that discussed the import of *Tidyman*, and that proposed model ordinances that local governments could enact to address the effects of adult bookstores and theaters, if these businesses, in fact, produce deleterious effects. To date, at least one Oregon city has adopted an ordinance equivalent to one of the model ordinances developed by the Attorney General.[132] If adult bookstores and theaters produce the harmful effects that are claimed as a basis for regulating them, local governments have the means to deal with these effects.

Another group of cases has applied the *Robertson* analysis to the regulation of commercial expression. In *City of Hillsboro v. Purcell*,[133] *Ackerley Communications, Inc. v. Multnomah County*,[134] and *Marks v. City of Roseburg*,[135] Oregon courts have confirmed that commercial expression is subject to the same protection under article I, section 8 as is any other "subject" of expression. Again, it would be hard to conclude otherwise in light of the text of this section. In contrast, the Supreme Court has had great difficulty developing a coherent view of the status of commercial expression under the first amendment.[136]

Perhaps the most significant application of the *Robertson* analysis concerns its use in discriminating between laws directed at expres-

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131 See *supra* notes 95-109 and accompanying text.

132 *Compare* Gresham, Or., Ordinance 1162 (Feb. 6, 1990) (Gresham, Oregon adopted ordinance to address adult businesses) *with* Letter Opinion from Attorney General Dave Frohnmayer to Sen. Joyce Cohen (Jan. 3, 1990) (model ordinance developed to address problems allegedly associated with adult businesses). *See also* 46 OR. ATT'Y GEN. OP. 278 (1989); Letter Opinion from Assistant Attorney General Donald C. Arnold to Sen. Joyce Cohen (June 1, 1990). The Gresham ordinance was adopted to address a business that presents nude dancing. Telephone Interview with Joseph Sahli, Owner of CJ's (Jan. 30, 1992). To date, the ordinance has not been enforced against this business, which suggests that the city has been unable to establish that the business produces the harmful effects that the city must show in order to require the business to relocate. *Id.*

133 306 Or. 547, 761 P.2d 510 (1988).

134 72 Or. App. 617, 696 P.2d 1140 (1985), *review dismissed*, 303 Or. 165, 734 P.2d 885 (1987).

135 65 Or. App. 102, 670 P.2d 201 (1983), *review denied*, 296 Or. 536, 678 P.2d 738 (1984).

136 *See Purcell*, 306 Or. at 551-53, 761 P.2d at 512-13 (court notes that Supreme Court has had difficulty settling on a rationale for the conclusion that "governments can regulate [commercial speech] to a greater degree and for different purposes than other protected speech") (citing cases).

sion and those directed at "conduct." This has been a durable problem in first amendment jurisprudence, particularly with regard to the concept of an "absolutist" analysis.[137]

The absolutist analysis embodied in *Robertson* focuses on the law-making function. It does not attempt to address how one determines whether particular expression is immune from punishment under laws that were enacted for a purpose other than the suppression of expression.[138] So focused, it readily allows a court to determine whether a law ostensibly directed at conduct is, in fact, a law directed against expression, and whether it is permitted under article I, section 8.

These principles are well illustrated by *State v. House*.[139] *House* involved a male dancer who was convicted of violating a state statute that prohibits sexual conduct in a live public show.[140] Applying *Robertson*, the Oregon Court of Appeals held that the statute violates article I, section 8.[141] On review in the Oregon Supreme Court, the court overturned the dancer's conviction on the ground that his conduct did not violate the statute. Consequently, the court did not reach the constitutional issue.[142]

The court of appeals was correct to conclude that the statute violates article I, section 8, absent a showing that it comes within a recognized historical exception to the protection afforded free expression that was demonstrably intended to survive adoption of the constitutional guarantee. Sexual conduct, as conduct among consenting adults in Oregon, is not criminal.[143] Consequently, a statute that makes this conduct criminal when it is presented live before an audience of willing adults is a statute directed against expression. This is because the only feature that distinguishes lawful from unlawful conduct is that it is presented to an audience, which is to say,

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[137] *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7 (2d ed. 1988).

[138] *See* Linde, *"Clear and Present Danger," supra* note 2, at 1183 & n.66.

[139] 66 Or. App. 953, 676 P.2d 892 (en banc), *modified*, 68 Or. App. 360, 681 P.2d 173 (1984) (en banc), *aff'd on other grounds*, 299 Or. 78, 698 P.2d 951 (1985).

[140] *House*, 66 Or. App. at 955-56, 676 P.2d at 893-94. The court of appeals opinions in *House* were written by the late Judge Jonathan Newman. The case was singled out at a memorial service for Judge Newman as one of the cases for which Judge Newman should be remembered, and it is.

[141] *See id.* at 957-58, 676 P.2d at 894-95.

[142] Justices Campbell and Linde concurred in the court's decision, contending that the constitutional challenge should have been decided before proceeding to decide whether the dancer's conduct violated the statute, and the challenge should have been upheld. *House*, 299 Or. at 82-83, 698 P.2d at 953 (Campbell & Linde, JJ., concurring).

[143] *See* OR. REV. STAT. §§ 163.305-.465 (1991).

that it is presented for expressive purposes.[144]

Of course, the *Robertson* analysis does not resolve how one determines whether particular expressive conduct is immune from punishment under laws that are not directed at expression.[145] But it does identify for lawmakers the laws involving expression that they can enact, which, after all, is what the constitutional language is intended to do without the need for judicial review.[146]

Other court applications of the *Robertson* analysis were collected earlier in this article.[147] Several legislative enactments in response to the analysis also bear brief mention. In 1985, the Oregon legislature repealed the state criminal defamation statute, a statute which

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[144] Another illustration should confirm this point. It is illegal in Oregon to kill a person, except when justified or excused under state law. *See, e.g.*, OR. REV. STAT. §§ 161.190-.275, 163.005 (1991). A person cannot claim immunity from prosecution for killing someone in a theatrical production on the ground that she killed the person for expressive reasons, that is, to make the play more "real" to the audience. However, if killing people were otherwise legal in Oregon, the state would violate article I, section 8, if it enacted a statute that prohibits killing a person in a theatrical or film production, because the only thing that would make the conduct illegal is that it was engaged in for an expressive purpose. Of course, even under these circumstances, the law still could be upheld if it were based on an historical exception to the protection afforded free expression. *See also* Linde, "*Clear and Present Danger*," *supra* note 2, at 1182 & n.65 (discussion of scene from Stoppard's *Rosencrantz & Guildenstern Are Dead* in which Rosencrantz yells "Fire!" in a presumably crowded theater).

This reasoning also led the court of appeals to hold invalid a City of Portland ordinance that forbade nude dancing where liquor was sold. *See* Sekne v. City of Portland, 81 Or. App. 630, 726 P.2d 959 (1986), *review denied*, 302 Or. 615, 733 P.2d 450 (1987). Of course, the Supreme Court earlier had held that the first amendment is not an impediment to the enactment of such laws, California v. La Rue, 409 U.S. 109 (1972), and recently has held that laws that prohibit nude "barroom" dancing are valid without regard to whether liquor is sold, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991). At least the Court acknowledged in *Barnes* that the statute at issue was directed at expression and, hence, that it presented a first amendment issue. *See id.* at 2460. Oregon is not the only state that has held that restrictions on nude dancing violate state constitutional guarantees of free expression. *See* Mickens v. Kodiak, 640 P.2d 818 (Alaska 1982); Morris v. Municipal Court, 32 Cal. 3d 553, 652 P.2d 51, 186 Cal. Rptr. 494 (1982); Harris v. Entertainment Sys., Inc., 259 Ga. 701, 386 S.E.2d 140 (1989); Cabaret Enters., Inc. v. Alcoholic Beverages Control Comm'n, 393 Mass. 13, 468 N.E.2d 612 (1984); Bellanca v. New York State Liquor Auth., 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981), *cert. denied*, 456 U.S. 1006 (1982).

[145] *See, e.g.*, People v. Freeman, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988) (en banc) (prostitution laws unenforceable against producer of X-rated film), *cert. denied*, California v. Freeman, 489 U.S. 1017 (1989); City of Portland v. Gatewood, 76 Or. App. 74, 79, 708 P.2d 615, 618 (1985) (dictum) (public indecency law unenforceable against people appearing nude to express ideas), *review denied*, 300 Or. 477, 713 P.2d 1058 (1986).

[146] *See, e.g.*, Linde, *Realist Tradition*, *supra* note 112, at 251-55.

[147] See note 80 *supra*.

had been in effect in Oregon since 1864.[148] The repeal was prompted by the *Wheeler v. Green* and *Robertson* decisions.[149] It eliminated a statute that had been used to penalize people for making public comments about public officials and for reporting about public affairs.[150]

Also in 1985, the legislature amended the state harassment statute to correct the constitutional defect identified by the court of appeals in *State v. Harrington*,[151] which had held that the state could not criminalize "fighting words." Similarly, in 1987, the legislature again amended the harassment statute and enacted a statute on telephonic harassment to address the supreme court's ruling in *State v. Ray*,[152] which dealt with a state statute on "obscene" telephone calls.

The cases and legislative enactments confirm that the modern Oregon analysis of article I, section 8, for which Justice Linde was responsible, has been singularly successful. With Justice Linde's retirement from the court in 1989, however, it is appropriate to consider the future of the analysis.

III

THE FUTURE OF THE OREGON ANALYSIS

Notwithstanding the merits of the modern Oregon analysis of article I, section 8, the analysis has not been met with uniform approbation. Legislators have submitted proposed constitutional amendments to the legislature over the past three legislative sessions designed to modify court decisions under the analysis, principally decisions involving sexually explicit expression.[153] Although hear-

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[148] *See* Act of Oct. 19, 1864, § 625, 1845-64 Or. Gen. Laws 557 (Deady ed. 1866) (formerly codified at OR. REV. STAT. 163.605), *repealed by* Act of July 3, 1985, ch. 366, 1985 Or. Laws 759.

[149] *See Hearings on H.B. 2453 Before Subcomm. No. 1 of the House Judiciary Comm.*, 65th Or. Legis. Ass'y (Mar. 14, 1985), Minutes at 2 & Ex. B.

[150] *See* State v. Kerekes, 225 Or. 352, 357 P.2d 413 (1960) (prosecution for criminal libel for statements made about the official conduct of a police chief); State *ex rel.* Mays v. Mason, 29 Or. 18, 43 P. 651 (1896) (attorney disciplined for conviction for criminal libel for publishing defamatory article in newspaper of which he was the editor).

[151] *Compare* State v. Harrington, 67 Or. App. 608, 680 P.2d 666, *review denied*, 297 Or. 547, 685 P.2d 998 (1984) (held portion of harassment statute unconstitutional) *with* Act of July 10, 1985, ch. 498, 1985 Or. Laws 971 (amended harassment statute).

[152] *Compare* State v. Ray, 302 Or. 595, 733 P.2d 28 (1987) (held portion of harassment statute unconstitutional) *with* Act of July 18, 1987, ch. 806, 1987 Or. Laws 1663 (repealed portion of harassment statute and enacted telephone harassment statute).

[153] *See, e.g.*, H.J. Res. 45, 66th Or. Legis. Ass'y (1991); H.J. Res. 20, 65th Or. Legis. Ass'y (1989); H.J. Res. 27, 64th Or. Legis. Ass'y (1987).

ings have been held on some of the proposed amendments, the legislature has not chosen to submit them to the electorate for a vote.[154]

In addition, an initiative campaign was begun in 1990 to submit a proposed constitutional amendment to eliminate constitutional protection for child pornography, obscenity, and expression involving nudity.[155] The proponents of the amendment failed, however, to get the necessary number of signatures to place it on the ballot.[156]

The failure of these efforts to amend the constitution suggests that Oregonians have come to appreciate that the modern Oregon analysis of the constitutional guarantee of free expression works. There does not appear to be strong sentiment to secure for Oregon the right to restrict expression, even expression on the subject of sex, to the extent allowed by the Supreme Court under the first amendment.

More troubling to the future of the analysis is the court's decision in *In re Fadeley*.[157] *In re Fadeley* was a disciplinary proceeding in which a member of the court, Justice Fadeley, was charged with making direct requests for campaign contributions in violation of the Code of Judicial Conduct. Justice Fadeley did not dispute that he had engaged in the conduct for which he was charged. He contended, however, that the restriction imposed by the Code on the ability of judges to solicit campaign contributions violates article I, section 8.[158]

The court disagreed, over the dissent of two justices. The court upheld the Code campaign solicitation restriction on two, independent grounds. The first was that a 1976 constitutional amendment that authorized the court to discipline judges impliedly repealed article I, section 8 as it relates to disciplinary rules for judges.[159] The

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[154] *See, e.g., Hearings on H.J. Res. 20 Before the House Judiciary Comm.*, 65th Or. Legis. Ass'y (Apr. 4, 1989). The interest in these proposed amendments appears to have waned. Only one was submitted during the last legislative session, and it did not emerge from committee. *See* H.J. Res. 45, 66th Or. Legis. Ass'y (1991); OR. FINAL LEGIS. CALENDAR, June 30, 1991, at H-294.

[155] Telephone Interview with Jennifer Bergren, Public Service Representative, Oregon Elections Division (Jan. 30, 1992); *see* Petition to Review Ballot Title, Remington v. Roberts, 309 Or. 642, 789 P.2d 662 (1990) (petition to review ballot title dismissed).

[156] Telephone Interview with Jennifer Bergren, Public Service Representative, Oregon Elections Division (Jan. 30, 1992).

[157] 310 Or. 548, 802 P.2d 31 (1990) (per curiam).

[158] *Id.* at 552, 802 P.2d at 34. Justice Fadeley raised a number of other objections to the proceedings and the charge, but they do not bear on the objection raised under article I, section 8. *See id.*

[159] *See id.* at 559-61, 802 P.2d at 38. In other words, because of the amendment, article I, section 8 is not an impediment to the enactment of rules governing judicial

second was that disciplinary rules of this kind constitute an exception to article I, section 8, independently of the 1976 amendment.

As to the first ground, it is difficult to accept the proposition that the electors understood, when they approved the 1976 amendment, that it would repeal article I, section 8 as applied to disciplinary rules. It is one thing to assume that legislators are aware of extrinsic information about proposed legislation, such as the construction given the legislation by courts in other states;[160] it is quite another to attribute such knowledge to the electorate. Unless information was generally circulated to the electorate that indicated that the amendment would affect article I, section 8, and nothing suggests that it was,[161] it is unrealistic to attribute to the voters an intention to affect this provision when they adopted the 1976 judicial amendment.[162]

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conduct. Of course, taken literally, this means that the court could adopt rules that prohibit judges from speaking altogether, and the Oregon Constitution would not present an impediment to the restriction. Although the court presumably would qualify the effect of the amendment to allow only "reasonable" or "necessary" rules, it is precisely this indeterminate standard of constitutionality that Justice Linde sought to eliminate, except where the constitutional text requires it. *See* Linde, *Realist Tradition*, *supra* note 112, at 252-53; Linde, *"Clear and Present Danger,"* *supra* note 2, at 1182.

Admittedly, the indeterminacy of the standard is less troubling when the officials who must apply it are the ones who ultimately must determine whether it has been properly applied. *See* Linde, *Realist Tradition*, *supra* note 112, at 852-53; Linde, *"Clear and Present Danger,"* *supra* note 2, at 1182. But this points up the serious threat to civil liberties that the court's analysis creates. The governmental body that adopts the restrictions on expression is the same body that will determine whether the restrictions are reasonable or necessary. It is doubtful that the court would find that rules that it adopts were unreasonable or unnecessary. Hence, the court is effectively free to adopt whatever restrictions it chooses, constrained only by its sense of self-restraint. Guarantees of civil liberties were placed in constitutions precisely because people were unwilling to rely on self-restraint as an adequate check on governmental power. Of course, the court is likely to exercise self-restraint, given its personnel, but that is not the point. Court personnel change, and there is no guarantee of progressive advances in freedom. *See, e.g.*, Linde, *Courts and Censorship*, *supra* note 51, at 172-78; Linde, *Fair Trials and Press Freedom—Two Rights Against the State*, 13 WILLAMETTE L.J. 211, 219 (1977) [hereinafter, Linde, *Fair Trials and Press Freedom*].

[160] *See, e.g.*, Joseph v. Lowery, 261 Or. 545, 549-50, 495 P.2d 273, 275-76 (1972).

[161] There is nothing in the record of the case that suggests that information of this kind was contained in the voters' pamphlet or in newspaper articles, editorials, or similar public media. Similarly, nothing in the legislative history of the proposed amendment, which was referred to the people by the legislature, suggests an understanding that the amendment would affect article I, section 8, or was intended to do so. *See, e.g.*, *In re* Fadeley, 310 Or. at 607-11, 802 P.2d at 65-69.

[162] *See also id.* at 591-98, 802 P.2d at 56-61 (Unis, J., concurring in part and dissenting in part) (explains further why the 1976 amendment cannot be understood to circumvent the protection provided by article I, section 8). Of course, the conclusion reached by the court on this issue is troubling in terms of constitutional theory as well. *See* note 159 *supra*.

As to the second basis for the *Fadeley* decision, the court's reasoning cannot be squared with the *Robertson* analysis. In fact, the reasoning used by the court is the antithesis of that on which *Robertson* is based.

In its opinion, the court states that the guarantee of free expression in article I, section 8 is not absolute.[163] It then identifies two exceptions to its sweep: "certain rules of professional conduct . . . [and] certain historical exceptions."[164] It then explains that *In re Lasswell*,[165] a prior decision involving rules of professional conduct, involved a court-struck balance between competing constitutional rights in which the court upheld a restriction on expression "because of the relatively minimal burden it placed on the District Attorney's ability to speak."[166] Finally, the court explains that the restriction imposed on judges by the disputed rule is valid because the restriction represents an appropriate balance between the right of free expression and an offsetting societal "interest in judicial integrity and the appearance of judicial integrity."[167] The court's analysis could not be more off the mark.

The whole point of the *Robertson* analysis is that article I, section 8 *is* absolute, in the sense that it bars the government from choosing to restrict expression as a means to advance some social policy.[168] This principle applies no matter how worthy the objective sought to be achieved by the restriction. The analysis simply does not allow the government, including the courts, to balance the right of free expression against the interests sought to be served by restricting it to determine which is more weighty.[169] Authority to restrict expression must be found in historical restrictions on expression that

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[163] *See In re* Fadeley, 310 Or. at 559, 561, 802 P.2d at 38.

[164] *Id.* The court identifies these exceptions as being "among" the recognized exceptions, suggesting that there are or may be others. *See id.* This suggestion is, itself, troubling.

[165] 296 Or. 121, 673 P.2d 855 (1983) (per curiam).

[166] *In re* Fadeley, 310 Or., at 563, 802 P.2d at 40.

[167] *Id.* at 564, 802 P.2d at 40.

[168] *See Robertson*, 293 Or. at 416-17, 649 P.2d at 579.

[169] *See, e.g.*, State v. Harrington, 67 Or. App. 608, 613-14, 680 P.2d 666, 670 (Gillette, J.) (neither lawmakers nor courts can balance away right of free expression), *review denied*, 297 Or. 547, 685 P.2d 998 (1984). A principal goal of the *Robertson* analysis was to eliminate the policy-based balancing test used by the Supreme Court to determine whether restrictions on expression are constitutional. The analysis sought to substitute a determinate test of constitutionality for the Supreme Court's indeterminate, balancing test. The Oregon and federal analyses could not be more different, yet the court in *In re Fadeley* treats them as if they are the same, at least with regard to the so-called exception for rules of professional conduct. *See In re* Fadeley, 310 Or. at 561-64, 802 P.2d at 38-40.

were intended to survive adoption of the constitutional guarantee,[170] not in a search for a contemporary balance between competing social values.

In re Lasswell does not suggest otherwise. It upheld a restriction on the right of a district attorney to discuss publicly a pending criminal case to the extent such a discussion would be incompatible with her constitutional obligation to afford the defendant a fair trial. The decision did not involve a contemporary "balance" between competing constitutional rights, and was not based on a determination that the restriction imposed a "minimal" burden on the district attorney's right to speak.[171] Instead, it involved an historically based exception for restrictions on expression by public employees to the extent the expression is incompatible with their public function.[172]

For example, a court bailiff can be prohibited from communicating with jurors except to the extent necessary to enable the jurors to fulfill their duties.[173] Similarly, a state police officer can be prohibited from communicating with a criminal suspect about a pending criminal investigation. Or an employee charged with preserving confidential information received by a state agency can be prohibited from publicly disclosing this information.[174]

Under *Robertson*, the validity of these restrictions does not turn on whether the right of the employees to free expression is outweighed by the public interest served by the restrictions. That is, it does not turn on whether an appropriate balance has been struck between these "competing" interests. It turns, instead, on whether the restrictions are based on a historically recognized exception for public employees for expression that is incompatible with their pub-

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[170] Of course, as noted above, the principles embodied in the historically recognized restrictions can be extended to address changing social conditions, so long as the extension remains true to those principles. *See supra* note 76 and accompanying text; *Robertson*, 293 Or. at 433-34, 649 P.2d at 588-89.

[171] *See In re* Lasswell, 296 Or. at 124-25, 673 P.2d at 856-57. Based on the style of the opinion, it appears that the per curiam decision in *Lasswell* was written for the court by Justice Linde. A complete prohibition on communicating certain information at a certain time is a significant prohibition on expression. Such a prohibition can be characterized as "minimal" only by assuming that the speaker does not believe it important to communicate the information sought to be communicated at the time she wishes to communicate it, or in the manner in which she seeks to do so.

[172] *Cf. id.* (by implication); Oregon State Police Officers Ass'n v. State, 308 Or. 531, 540-41, 783 P.2d 7, 11-12 (1989) (Linde, J., concurring), *cert. denied*, 111 S. Ct. 44 (1990).

[173] *See* State v. Rathbun, 287 Or. 421, 423-25, 600 P.2d 392, 393-94 (1979).

[174] *See* Oregon State Police Officers Ass'n v. State, 308 Or. 531, 540-41, 783 P.2d 7, 11-12 (1989) (Linde, J., concurring), *cert. denied*, 111 S. Ct. 44 (1990).

lic function, and on whether the restrictions are wholly confined within this exception.[175]

Under this historical exception, expression that is incompatible with the public employee's function is expression that prevents the employee from performing the function for which she is employed. Against this standard, it is difficult to see how the restriction at issue in *In re Fadeley* fits within the exception.

Judicial offices in Oregon are elective offices, and have been since statehood.[176] Unless a candidate for judicial office is independently wealthy, the candidate presumably must solicit campaign contributions in order to conduct a campaign.[177] Given this, it is difficult to see how it can be incompatible with the office for a judicial candidate to solicit campaign contributions. The fact that the judicial system functioned for more than 100 years without apparent difficulty under this regime suggests that it is not.[178]

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[175] This is not the place to attempt to delineate the contours of this historical exception. It should be noted, however, that it does not permit the imposition of restrictions on expression by public employees during the time in which they are not performing their public duties, even if the expression causes the public to feel less supportive of government. For example, if a government employee becomes publicly identified with the Ku Klux Klan, it may prompt a large segment of the public to think less well of her government employer. That it might would not provide a basis for the government to censor her speech, or terminate her employment. *See* Oregon State Police Officers Ass'n v. State, 308 Or. 531, 539-42, 783 P.2d 7, 11-12 (1989) (Linde, J., concurring), *cert. denied*, 111 S. Ct. 44 (1990). In this vein, the solicitation of campaign contributions by a judicial candidate will necessarily take place when the candidate is not performing her judicial functions. Although the solicitation may cause the public to think less well of the judicial system, this should not provide a basis for the state to restrict the expression.

[176] *See* OR. CONST. art. VII, §§ 1, 2, 2a (amended), art. VII, §§ 2, 10, 11 (original).

[177] Although the Code prohibits judicial candidates from soliciting campaign funds, it permits campaign committees to do so on behalf of the candidates. Of course, requests to serve on campaign committees can produce the same pressure that the prohibition on direct solicitation of campaign funds is intended to prevent, and campaign contributions must be publicly reported, so judicial candidates can identify contributors to their campaigns, if they so choose. Moreover, members of a campaign committee are simply agents of the candidate, so fund-raising requests by committee members will be understood, and properly so, to be requests from the candidate. Consequently, it is difficult to see how the restriction can achieve the goals it purportedly was enacted to achieve. *See In re* Fadeley, 310 Or. at 563-66, 802 P.2d at 40-41. The restriction also requires a judicial candidate to recruit a committee of people willing to raise funds on her behalf. This means that a candidate who is unable to find people willing to do this cannot run for judicial office unless she is wealthy enough to do so on her own. This may present a constitutional question independently of article I, section 8.

[178] It appears that the Canons of Judicial Ethics were first adopted by the Oregon Supreme Court in 1952. *See In re* Jordan, 290 Or. 303, 319 n.8, 622 P.2d 297, 306 n.8 (1981). The Canons did not purport to restrict the ability of judges and judicial candidates to solicit contributions to their campaigns. *See* McCoy, *Judicial Selection and*

Furthermore, a historical exception based on incompatibility between particular expression and one's public function is limited to people who perform official functions. Whatever the authority of the state to control the expressive conduct of people who perform official functions, it does not extend to those who do not. Hence, it cannot apply to expression by candidates for public office.

A further illustration of these principles may help clarify the critical difference between the *Robertson* analysis and the analysis used by the court in *In re Fadeley*. Judges have authority to control the expressive activity that occurs within their courtroom. Under *Robertson*, the restrictions on expression imposed by judges during court proceedings, including the imposition of penalties for contempt, are historically based exceptions to the protection afforded free expression by article I, section 8. In contrast, under a balancing analysis such as that employed in *In re Fadeley*, the restrictions would be upheld on the ground that the societal interest in conducting judicial proceedings outweighs the interests of participants and observers to speak freely on any subject.[179]

Leaving aside all the other objections to balancing as a mode of constitutional analysis, the issue becomes more interesting when the focus shifts to efforts to control expressive activity that takes place outside the courtroom. Under current first amendment analysis, there has been an ongoing debate about the limits on court authority to control press reports of judicial activity. This debate has been framed in terms of whether the societal interest in affording a criminal defendant a fair trial, an interest fairly described as fundamental, can, under appropriate circumstances, outweigh the interest of

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Judicial Conduct, 24 S. CAL. L. REV. 1, 17-21 (1950). The Code of Judicial Conduct was adopted in Oregon in 1975. *See In re* Fadeley, 310 Or. at 592, 802 P.2d at 57 (Unis, J., concurring in part and dissenting in part). It introduced the idea that judges should not directly solicit campaign contributions, although the restriction was stated as an admonition rather than a direct prohibition. *See* ABA Special Comm. on Standards of Judicial Conduct, Code of Judicial Conduct 28-30 (1972); *In re* Fadeley, 310 Or. at 593-94, 802 P.2d at 57-58 (Unis, J., concurring in part and dissenting in part). As this history indicates, there was no restriction on the solicitation of campaign funds by judicial candidates for the first 115 years of statehood. For a further discussion of this issue, see Linde, *The Judge as Political Candidate*, 39 CLEV. ST. L. REV. (forthcoming June 1992).

[179] In other words, because court proceedings must be conducted in an orderly manner, a judge can require members of the audience to be quiet, and can punish people for contempt if they are not. The public interest in conducting judicial proceedings would be said to outweigh the interest of a member of the audience in expressing her views about the judicial system while the court is in session.

the press and public to communicate about a criminal trial.[180]

Under an open-ended balancing analysis, there is nothing intrinsically objectionable to exploring this issue and, depending on how one values the respective interests, striking a balance that restricts expression in order to preserve a defendant's right to a fair trial. The mode of analysis used in *In re Fadeley* would permit a court to do just that.[181]

Significantly, however, the *Robertson* analysis would not. There is no historically based exception to the protection afforded free expression, at least not one that was demonstrably intended to survive the adoption of article I, section 8 that would authorize a court to restrict public reporting or comments about judicial proceedings. Whatever social benefits a court could believe would be achieved by such a restriction, *Robertson* makes clear that restriction of expression is not available as a means to achieve these benefits. There is no new balance to be struck between free expression and other social policies.[182]

The court will soon face other cases that will require it to apply the *Robertson* analysis, including cases involving a challenge to the state intimidation statute[183] and to portions of a state child pornography statute.[184] These cases present analytical problems that can be addressed in terms of the *Robertson* analysis, and one can hope that the court will not have the difficulty it did in *In re Fadeley* applying the analysis.

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[180] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Linde, *Fair Trials and Press Freedom*, *supra* note 159, at 214-18. For an extended discussion of this issue, see *Symposium*—Nebraska Press Association v. Stuart, 29 STAN. L. REV. 383 (1977).

[181] *See In re* Fadeley, 310 Or. at 561-64, 802 P.2d at 38-40.

[182] Justice Linde explored the relationship between fair trials and restrictions on the press in Linde, *Fair Trials and Press Freedom*, *supra* note 159. In this article, he noted the basic fallacy of viewing the issue as one in which there are competing constitutional rights. The constitutional provisions at issue impose obligations on the state; they do not serve as a source of authority for the state to impose restrictions on criminal defendants or the public. *See id.* at 214-18. While logical, his view of the issue depends on analyzing the free speech issue in terms of the *Robertson* analysis. If, instead, it is analyzed in terms of the current first amendment balancing analysis, there is nothing illogical about using the constitutional right to a fair trial as a source of authority to restrict free expression. This is because, under this analysis, *any* competing social policy can be balanced against the right of free expression to determine whether it is necessary or appropriate to restrict the right.

[183] *See* State v. Plowman, 107 Or. App. 782, 813 P.2d 1114, *review allowed*, 312 Or. 525, 822 P.2d 1194 (1991); State v. Hendrix, 107 Or. App. 734, 813 P.2d 1115, *review allowed*, 312 Or. 525, 822 P.2d 1194 (1991).

[184] *See* State v. Stoneman, No. A70085 (Or. Ct. App. June 7, 1991).

CONCLUSION

Justice Linde's contribution to the development of Oregon constitutional law was profound and profoundly beneficial for civil liberties. This is particularly true with regard to freedom of expression, as recognized by Professor Burt Neuborne in a recent essay on state constitutional law. Professor Neuborne said of Oregon:

> [It is] where Hans Linde and an extraordinary group of judges on the supreme court have enunciated a vision of broad individual rights that has gone beyond the United States Supreme Court in a number of settings. The Oregon Supreme Court has come closer to putting into practice the Black-Douglas absolutist view of the First Amendment than any other institution in American life, based on Article I, section 8, of the Oregon Constitution, which is its free speech clause. One of the interesting things to see is whether we can use the federalism laboratory that we like to talk about so much and take a look and see what a society is like over time that is going to be living under the vision of the First Amendment that libertarians have sought for years but have never been able to put into practice anywhere.[185]

We all can hope that the Oregon Supreme Court will preserve that vision for us, and that the analysis that Justice Linde helped forge of Oregon's constitutional guarantee of free expression will be included among his lasting legacies.

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[185] B. Neuborne, *The Search For a Usable Present*, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 299 (1991) (footnote omitted).