

Brunetti case attempts to further determine 'unprotected speech'

For over 50 years the U.S. Supreme Court has wrestled with defining what speech is "obscene," "immoral" or "pornographic" under law. Such grappling led to one of the most famous phrases uttered by a Supreme Court justice: "I know it when I see it." It appears in Justice Potter Stewart's concurring opinion in the 1964 case of *Jacobellis v. Ohio*, in which the Court heard the case of a theatre owner convicted for showing "The Lovers," a cinematic drama involving a wife in a calamitous marriage who rediscovers her love through an adulterous affair. In his memorable quote, Justice Stewart tries to explain what is "hard-core pornography," but in doing so summarizes the irony and difficulty in trying to define obscenity.

So why is the definition so important? Well, the Court has consistently ruled that "obscene" speech is "unprotected speech." "Unprotected speech" is not afforded the protection of the First Amendment. In fact, in some instances "unprotected speech" is a criminalized form of expression.

The challenge in clearly defining what is "obscene" and thus "unprotected speech" continues to current day. Just last month, the Court held in *Iancu v. Brunetti* that the prohibition in the Lanham Act (the U.S. federal statute governing trademarks and unfair competition) on registering federal trademarks that are "immoral" or "scandalous" violates the First Amendment. Justice Elena Kagan wrote the six-person majority opinion, which was joined by Justices Clarence Thomas, John Bader Ginsburg, Samuel Alito, Neil Gorsuch and Brett Kavanaugh. The remaining justices agreed that the First Amendment requires the government to register immoral marks, but argued that at least some scandalous marks can be properly prohibited. In the minority viewpoint, the court should have narrowly construed that aspect of the statute to a Constitutional scope while retaining some of its effectiveness.

The majority rejects the government's proposal to limit application of this provision to "vulgar" marks, i.e. those that are "lewd," "sexually explicit or profane." Although such a construction would avoid any viewpoint discrimination, the majority holds that the "immoral or scandalous" bar "stretches far beyond the [g]overnment's proposed construction." The majority concludes that such a construction would amount to the court rewriting the statute because the plain meaning of the statutory language is broader and ensnares marks that offend because of the ideas they express, not just by their mode of expressing ideas.

This case involves the mark "FUCTION" that Brunetti has been using for many years in association with his high-end skater product line. The United States Patent and Trademark Office (PTO) rejected his application as directed toward immoral or scandalous matter as required by the Lanham Act. Brunetti appealed.

The big question in the case was whether the court would see these re-



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strictions as viewpoint-based—it did. The Court explains:

"So the key question becomes: Is the 'immoral or scandalous' criterion in the Lanham Act viewpoint-neutral or viewpoint-based?"

In its opinion, the majority of the Court concluded "it is viewpoint-based. . . . [T]he Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. . . . [T]he Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation."

Once the limitation is defined as viewpoint based, the result was easy for the Court—invald as unconstitutional.

In *Brunetti*, four justices expressed a view that scandalous modes of expression should be barred trademark registration. In addition to the three dissenters, Justice Alito stated in his concurring opinion that the court's opinion would not "prevent Congress from adopting a [] statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas." He went on to note that the mark in question in this case—"FUCTION"—is not needed to express any idea and, in fact, as commonly used today, generally signifies nothing except emotion and a severely limited vocabulary." Chief Justice Roberts flatly states that "refusing registration to obscene, vulgar [] or profane marks does not offend the First Amendment." Justice Stephen Breyer goes so far as to suggest that "an applicant who seeks to register a mark should not expect complete freedom to say what she wishes, but should instead expect linguistic regulation."

Perhaps the most striking rebuttal of registration as speech comes in this passage in Chief Justice Roberts' dissent where he states: "Whether such marks can be registered does not affect the extent to which their owners may use them in commerce to identify goods. No speech is being restricted; no one is being punished. The owners of such marks are merely denied certain additional benefits associated with federal trademark registration. The [g]overnment, meanwhile, has an interest in not associating itself with trademarks whose content is obscene, vul-

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Using personality assessments to elevate culture and communication

Personality tests continue to grow in popularity as a workplace tool—not only in how they're used, but also in the number of assessments available. The more common ones include DISC Behavior Inventory, the Big Five, Myers-Briggs Type Indicator (MBTI), Occupational Interest Inventories and Situational Judgment Tests.

While each has its strengths and limitations, they all can provide actionable value for businesses, helping enhance company culture, communication and collaboration. (However, I'm not a fan of using them to screen job applicants, and thankfully only 13% of companies use them for that purpose, according to a study by the Society for Human Resource Management and Mercer.)

I prefer to use personality assessments to help us understand each other and work together better—in other words, for team-building. Because when team members understand each other's communication styles, approaches to work, and how they're alike and different, they respect, appreciate and interact with each other better and are more productive and collaborative.

For example, knowing each other's "MO" can help make partnerships more effective—and more joyful and pleasant, as well, because it allows us to plan for how we'll partner with each other. It can be as simple as being aware that you're what the MBTI identifies as a "thinker" and you're teaming up with a "feeler."

It also helps to remember that even though we're looking at the same information, we might interpret and understand it in different ways. Keeping this in mind can help mitigate potential conflicts and clashes. As Isabel Briggs Myers, author of *Introduction to Type and the MBTI Manual*, said, "When people differ, a knowledge of type lessens friction and eases strain. In addition, it reveals the value of differences. No one has to be good at everything."

So if you're a manager, when you understand each team member's interaction style and personality type as it relates to being part of a team, you can assign roles in a way that harnesses strengths and shores up gaps. Who's going to review the work? Perhaps someone whose personality score suggests they're an "analyst" or "decision maker." Who's going to keep the project on track? Perhaps the person identified as a "motivator" or "coach." Who should present the work to your customer or client? Most likely the person who ranks high as an "actor" or "persuader."

Results should empower

Clearly there's a business value to using personality tests in the workplace. But what about for the individuals taking them? Are there any caveats? Is there anything we should be concerned about when asking our team members to take them? Well, yes. We certainly don't want people worrying about their responses and results. And we don't want them to think their results will limit or cause them to lose opportunities.

While it would be ludicrous to dismiss someone based on the results of a personality test, the host of the TED podcast "Work Life with Adam Grant" cautions those who take personality tests not to "fire yourself for having the wrong per-



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sonality."

What Grant means is that he knows people who have written off entire careers because of the outcome of their personality test. Like a self-fulfilling prophecy, based on how their score defined their personality, they figured they weren't analytical or gregarious or judgmental enough to work in accounting or sales or law. Or that they were too emotional, intuitive or "thinking" to be a physician or judge or artist. Basically, they ruled out anything that required characteristics that didn't fit into their personality "type." Not only is that crazy, it's dangerous, frankly.

To avoid that self-limiting outcome, I encourage team members to use their results to understand their tendencies, traits, communication style and working preferences, and to become aware of who they are in a deeper sense. And then they can decide when it makes sense to push themselves beyond their natural traits and when it makes sense to stay within their comfort zone, maximizing their innate gifts.

Because even though we have certain characteristics, thought patterns, behaviors and ways of being, we also have the power to adapt and stretch. In fact, most people who are successful in the workplace do just that: They monitor situations and adapt to "rise to the occasion" or provide what is necessary to be effective and perform at a higher level.

I think we don't give ourselves or each other enough credit. I mean, we're not locked into our personality type. We have the power to flex. We can stretch and grow and act in ways that don't come naturally. It doesn't mean we have to change who we are or alter our personality. It just means we have the opportunity to expand our capabilities and areas of comfort.

Sure, it may never feel natural, perhaps, for an introvert to go out and drum up new business, but we can get used to and comfortable with practicing and adopting different personality traits for periods of time to get the job done.

Susan Cain, author of the book "Quiet: The Power of Introverts in a World That Can't Stop Talking," says introverts often don't land leadership positions or apply for them in the first place because of the simple fact that they're introverts. Even though introverts can make great leaders—often getting better results than extroverts because of the way they allow the people around them to showcase alternative ideas.

Cain mentions Eleanor Roosevelt, Rosa Parks and Gandhi as examples of introverts who pushed themselves outside their comfort zones when the job at hand required them to do so. And she tells a story I absolutely love about her grandfather, who was a rabbi and an extreme introvert. He lived alone and loved nothing

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will have better lives. Their families will have better lives. They will finally, finally have the same protections that other workers have had for 80 years."

Farm owners had continued to argue against this bill and others like it for years by saying that farm work just doesn't conform to the kind of conditions and economics governing other kinds of work. Crops ripen all at once, requiring lengthy working days until the harvest is in. Cows require milking two, three or four times a day on a schedule more attuned to their individual eating patterns and biorhythms than a standard work shift.

Advocates, meanwhile, had argued that workers deserve job protection and a day of rest just like anyone else, perhaps more so, given the physical nature of the work. Librada Paz of Brockport, a former farmworker who is a nationally recognized advocate for workers, said many farmworkers don't see doctors because they have no provisions to take time off for a medical appointment.

Paz is a board member of the Rural Migrant Ministries agency and attended the governor's signing of the bill into law. She said organizations like RMM will have to help educate farmworkers about their new rights.

"A lot of the places don't give breaks," Paz said. "We have to really go after this. People have their right to have their breaks. We have to teach them this new law."

The impact of the law remains to be seen, with many farmers claiming it will be yet another factor pushing them out of business. And advocates for farmworkers say it's a great first step, but additional measures are needed.

"Who's going to be most hard hit is going to be folks who produce more labor-intensive product," such as milk, fruits and vegetables, said John Sorbello, of Scottsville, Ontario County, and Region 3 director of the New York State Farm

Bureau. Some farms may elect to move from those types of farming to commodity crops such as soybeans because they can do so with less hired help, he said.

Sorbello said the Farm Bureau and other organizations moved the needle on overtime so that it doesn't kick in until 60 hours, 20 hours later than most other workers. Collective bargaining doesn't worry him so much, he said, as the failure to include a no-strike clause in the law. Without it, he said, a strike could endanger milking cows, or destroy a crop.

He also was disappointed that the new law's definition of a family farm — there are some exemptions for family farms — was limited to a nuclear family unit rather than groups of close relatives including nephews or cousins.

Many farmers have been arguing that the requirement to pay overtime will now force them to limit their employees' hours to 60 a week, making up for the extra hours by hiring additional laborers at straight time.

"The first answer is we'll hire more people. If the people are not available that could be a real issue," Sorbello said. While many migrant farmworkers are uneducated, he said, they're still smart; They will choose to work in a state where they can have unlimited hours.

If farmers are required to pay overtime, bringing pay rates to about \$20 an hour, Sorbello said, they won't be able to price their products competitively with states that are only required to pay a minimum wage that's much lower. The prices growers can command for vegetables and fruits are often set by processors whose headquarters are out of state, Sorbello noted, and dairy prices are set nationally in a complicated formula that won't take into account rising labor costs in New York.

Sarah Dressel, an apple grower in New Paltz, Ulster County, and chairwoman of the New York Apple Association's board of directors, said in a statement that "the massive increase in labor costs coming down the pike because of this new law will make it difficult to sustain the busi-

ness that has lasted for generations....I'm afraid this could be the breaking point for our orchard and many like ours across the state."

Advocates suggest farm owners might be crying wolf.

"At the same time that farm owners are saying that agricultural industry is on the brink and it's very difficult, there's been

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— John Marsella, senior attorney with Workers Justice Center of New York in Rochester

huge growth and profit in the last few years," said John Marsella, senior attorney with Workers Justice Center of New York in Rochester. "It's important for our laws to protect some of the most marginalized individuals who participate in this economy."

Paz said the new law will take some getting used to on both sides. "The problem is that farmers were so used to working the way they were working," she said. "They're going to have to find a way to adjust." She predicted larger operations, those with 100 or more employees, will feel the most impact.

Marsella said a recent state appellate court ruling found exempting farmworkers from labor protections others enjoyed was a violation of the state constitution. That paved the way for the Farmworker Bill to finally win approval.

"We're really leaders in many areas of agriculture across the country," Marsella said. "New York serves as leaders in the protection of the most vulnerable workers. I'm proud of the state of New York and proud of the politicians who made this happen."

It was downstate politicians who led the charge this time around, with two legislators from Queens filing the bill some months ago. Upstate legislators largely opposed it, saying it would harm rural economies.

"It should be named the Farmworkers Flee New York Act because it is simply more job-killing regulation, unrealistic for our small and large farms," said state Sen. Pamela Helming, R-Canandaigua. "This is what happens when New York City, a place that enjoys farmers markets but not farms, tries to legislate a business that they do not understand."

Assemblyman Brian Manktelow, R-Lyons, declared he was "outraged" when the bill passed the state legislature in June, and predicted it will "drive more families out of New York and businesses to close."

Paz said the bill was a matter of human rights and dignity, and if farmers respect their workers as they often say they do, they should be willing to shoulder the true costs of operating a business.

Earning the right to bargain collectively to improve work conditions is just one step in the process of improving work conditions, Marsella noted. Farm owners have no reason to worry about a labor shortage if they're treating their employees well, he said.

"The people who stay or are happy are ones who feel they're treated with dignity and respect and get a fair wage," Marsella said. "Far too often we see instances of discrimination, unpaid wages, housing violations and unsafe working conditions."

The new law, he said, "is an important step in the right direction, that more individuals are able to participate in success of this booming agricultural industry."

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more than being alone in his apartment reading. But he also loved his congregation and gave brilliant, engaging sermons throughout his 62-year career.

Cain says people came from all over to hear him speak; he was such a popular, riveting public speaker. And yet he was so introverted he had difficulty making eye contact with his congregation both on and off the podium. But when he passed away, so many people came to the services they had to close down the streets!

So I think of that story every time a team member tells me, "Oh I could never be a leader (or presenter, manager, director or account executive) because I'm too much

of an introvert."

Baloney. Most of the time, I think they're selling themselves short. Which is why we need to make sure our team members understand that our scores on personality assessments are merely lenses to help us see where we might focus our energy as we continually grow and improve.

We all can continue to evolve and explore while remaining grounded in our true selves. In fact, the more we understand about who we are, the freer we are to jump off from there saying "OK, this is my personality. Am I going to fall back on it or spring forward from it?"

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ous." Applicants, however, should be cautious of upending legislation that will attempt to instill a constitutional form of linguistic regulation.

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Pouya: I don't disagree with you on the role that absence of key players may have in success of a cryptocurrency such as Libra. I would go so far as adding excessive fragmentation to the mix. Currently, there are cryptocurrencies popping up left and right and jumping into the mix. But I think there is a greater factor here at play that is going to be the anchor that is going to leverage in favor of cryptocurrencies: the strategic imperative to be more efficient.

For decades, we have observed the growth of businesses through innovative business models and products. We have witnessed local economies become more integrated in a global web of relationships. Two things have lagged behind: currencies used to govern transactions and models to ensure higher efficiency. The global economy opened doors for creativity and innovation, which are not substantially exhausted. No matter how much we argue for blue oceans and opportunities for incremental innovation, the overwhelming majority of businesses will be looking for ways to separate themselves from the competition through being more efficient.

Now what has the cryptocurrency have to do with that? Remember the old Kanban system that emerged out of Japanese manufacturing? What did it represent other than efficiency? The blockchain technology is essentially the same mechanism. But it needs a vessel, and that is cryptocurrency. It is a tool to keep track of what has happened, without all of the restrictions that come with central bank-backed currencies. That's why I think this has a future. Companies such as Walmart are already using blockchain to pinpoint mishaps and use their own internal cryptocurrencies. It is only a matter of time before it goes global one way or another.

David: I agree that there will be a future for blockchain in currency transactions, but will it be a multitude of currencies or one accepted standard? And is it a national or international standard?

Pouya: That is a good point you raise. Maybe a new paradigm in transactions? I guess time will tell.

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gar[] or profane. The First Amendment protects the freedom of speech; it does not require the [g]overnment to give aid and comfort to those using obscene, vulgar[] and profane modes of expression."

For the foreseeable future, applicants aren't faced with the Lanham Act's prohibition on registering federal trademarks that are "immoral" or "scandal-