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In *Price v. State*,[1] the Indiana Supreme Court adopted a novel, and potentially far-reaching, interpretation of the Indiana Constitution's free speech provision, found in article I, section 9.[2] According to Chief Justice Shepard's opinion for a three-justice majority,[3] section 9 protects political speech as a core constitutional value, such that the State cannot materially burden this speech, not even through content-neutral laws. Elaborating and applying this reasoning, the court ruled that the "unreasonable noise" provision of Indiana's disorderly conduct statute[4] could not constitutionally be applied to a person shouting profanities at an arresting police officer, this despite factual circumstances clearly favoring the State: The incident occurred at 3:00 a.m. in a residential neighborhood, and, even at that late hour, the defendant's voice apparently was loud enough to draw neighbors from their homes.[5]

The court's speech-protective stance is important in its own right, as is the court's reliance on state constitutional law.[6] As a student of the First Amendment, however, I am especially intrigued by the court's general analytical framework, which differs dramatically from that which informs the First Amendment doctrine of the United States Supreme Court. In this brief commentary, I first will sketch some of the basic tools of First Amendment analysis. I then will compare the section 9 approach of the Indiana Supreme Court, offering some critical observations on *Price* and noting some questions that remain unanswered.

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1. *Price*, 622 N.E.2d 954 (Ind. 1993).

2. "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." IND. CONST. art. I, § 9.

3. Chief Justice Shepard's opinion was joined by Justices DeBruler and Krahulik. Justices Givan and Dickson dissented.

The court's membership has changed since *Price* was decided, with Justice Krahulik being replaced by Justice Sullivan. (By coincidence, Justice Sullivan took his oath of office on the very day of the *Price* decision.) On the possible implications of this change in the court's membership, see *infra* note 49.

4. "A person who recklessly, knowingly, or intentionally . . . makes unreasonable noise and continues to do so after being asked to stop . . . commits disorderly conduct, a Class B misdemeanor." IND. CODE ANN. § 35-45-1-3(2) (West Supp. 1993).

5. *Price*, 622 N.E.2d at 956-57, 964-65. According to the court of appeals, moreover, the officer twice asked the defendant to quiet down, but to no avail. Price v. State, 600 N.E.2d 103, 105, 115 (Ind. Ct. App. 1992). Instead, the defendant "continued to scream loud enough to attract the attention of the neighbors, and drew them from their houses at 3:00 a.m." *Id.* at 115.

6. For a discussion of the court's reliance on state constitutional law, see Patrick Baude, *Has the Indiana Constitution Found Its Epic?*, 69 IND. L.J. 849 (1994).

Of the various tools employed in First Amendment analysis, two are perhaps most prominent: first, the distinction between content-based and content-neutral laws; and second, the balancing of free speech interests against the competing interests supporting regulation. Thus, when a speaker is prosecuted for speech in a public forum, as in *Price*,[7] a critical first question is whether the law regulates the content of speech. If it does, the specter of censorship renders the law presumptively unconstitutional. In such cases, the government cannot prevail unless the speech falls within an unprotected category, such as incitement,[8] fighting words,[9] or obscenity,[10] or unless the government can satisfy strict judicial scrutiny, which requires that the law be "necessary to serve a compelling state interest."[11] This content-based analysis is extremely demanding, and, as a result, content-based laws are usually invalidated. By contrast, if the government is regulating speech for reasons unrelated to content, it need only establish that the law serves a substantial interest and does not unduly restrict free speech.[12] Under this standard, the government generally prevails. As a result, whether a law is content-based or content-neutral often determines whether the constitutional challenge will be successful.

The First Amendment's content-neutral analysis clearly requires an ad hoc balance, weighing the government's interests against the speaker's on a case-by-case basis. The strict scrutiny applied to content-based laws also amounts to an ad hoc balancing test, albeit one that is heavily weighted to the free speech side of the scales. By contrast, the content-based prosecution of unprotected categories of speech does not require this sort of case-by-case judicial balancing. Even so, the judicial *definition* of unprotected categories is almost inevitably based upon a more abstract balancing process, one that evaluates an entire type or category of speech and weighs the value of this speech against the governmental interests that might support its regulation. For example, in determining the extent to which sexually explicit materials can be banned on the basis of their content, the Supreme Court, viewing the matter in the abstract, has weighed the expressive value of this speech against the competing governmental interests of public safety and morality. The end result of this abstract "definitional balancing" is the legal definition of unprotected "obscenity," which provides a general rule of law to govern

7. The defendant's speech concededly "occurred on a public street, a forum which has 'immemorially been held in trust for the use of the public.'" *Price*, 622 N.E.2d at 965 (quoting Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) (plurality opinion)).

8. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

9. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

10. *See* Miller v. California, 413 U.S. 15 (1973).

11. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

12. This content-neutral standard is met "'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800.

prosecutions for sexually explicit speech.[13] Thus, First Amendment doctrine depends heavily on the weighing of competing interests, whether in the form of definitional or ad hoc balancing.

Under First Amendment doctrine, the Indiana Supreme Court's determination in *Price* that the statutory prohibition on "unreasonable noise" was content-neutral—that the law was aimed at "the volume of the expression and not its substance"[14]—would have been virtually fatal to the defendant's free speech challenge. Accepting this determination,[15] the proper First Amendment test would be the relatively lenient ad hoc balancing test, which the State could readily satisfy on the facts of *Price*. The State certainly has a substantial interest in preventing unreasonable noise, especially at night in a residential neighborhood, and the prohibition does not unduly restrict free speech. Under this analysis, the First Amendment challenge would properly be rejected.[16]

The First Amendment is one thing, however, and article I, section 9, is something else. According to Chief Justice Shepard's opinion in *Price*, moreover, the analysis under section 9 bears little resemblance to that conducted under the First Amendment. Rather than focusing first on the law and whether it is content-based or content-neutral, section 9 analysis focuses first on the type of speech in question and whether it implicates a "core value" under the Indiana Constitution.[17] In *Price*, the court concluded that verbally protesting an arrest, even by profane insults directed to the officer, constitutes political speech,[18] and that political speech is a core constitutional value.[19] Characterizing the exercise of core constitutional values as "preserves of human endeavor . . . not 'within the realm of the police power,'"[20] the court held that the State cannot "materially burden" such values.[21] The court noted that constitutional questions are often resolved by asking "whether the impingement created by the statute is outweighed by the public health, welfare, and safety served."[22] Remarkably, however, the court purported to

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13. *See Miller*, 413 U.S. 15; Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). For further discussion of the Supreme Court's definitional balancing in these cases, as well as that of the Canadian Supreme Court in a similar context, see Daniel O. Conkle, *Harm, Morality, and Feminist Religion: Canada's New—But Not So New—Approach to Obscenity*, 10 CONST. COMM. 105 (1993).

14. *Price*, 622 N.E.2d at 966. The court explicitly stated that the law was content-neutral only in discussing the First Amendment, rather than section 9. *See id.* at 965-66. Its reasoning under section 9, however, was entirely consistent with this conclusion. *See id.* at 960 n.6.

15. In contrast to the Indiana Supreme Court, the court of appeals had treated the prohibition as content-based, at least in part, and accordingly had limited the statute's content-based applications to unprotected categories of speech. *See* Price v. State, 600 N.E.2d 103, 106-12 (Ind. Ct. App. 1992).

16. *See Ward*, 491 U.S. at 796 (upholding New York City's content-neutral regulation of sound amplification in Central Park, noting that "the government may act to protect even such traditional public forums as city streets and parks from excessive noise").

17. *Price*, 622 N.E.2d at 960.

18. *Id.* at 960-61.

19. *Id.* at 961-63.

20. *Id.* at 960 (quoting Milharcic v. Metropolitan Bd. of Zoning Appeals, 489 N.E.2d 634, 637 (Ind. Ct. App. 1986)).

21. *Id.*

22. *Id.* at 960 n.7 (citations omitted).

eschew such balancing here: "'Material burden' analysis involves no such weighing nor is it influenced by the social utility of the state action at issue. Instead, we look only at the magnitude of the impairment."[23]

The court's "material burden" analysis is linked to the overall structure of the Indiana Constitution, which derives from a theory of natural rights and which is "calculated to correlate the enjoyment of individual rights and the exercise of state power such that the latter facilitates the former."[24] Accordingly, political speech ought not be punished unless it "injures the retained rights of individuals or undermines the State's efforts to facilitate their enjoyment."[25] Relying on a public/private distinction drawn from this interpretation of the Indiana Constitution, the court held that the State's content-neutral prohibition on "unreasonable noise," as applied to political speech, would impose a material burden if the statute were permitted to reach a "public nuisance," that is, conduct that merely "disturbs the 'public order and decorum.'"[26] By contrast, no material burden would exist if the statute's application to political speech were limited to "private nuisances," nuisances that cause harm to determinable private persons of a gravity analogous to that required under the law of torts.[27] Applying these principles to the case at hand, the court found that, given the time of day and the loudness of the speech, the defendant had probably created a public nuisance,[28] but had not created a private nuisance, because the neighbors had suffered no more than "a fleeting annoyance" that would not be actionable in tort.[29] As a result, section 9 precluded conviction.[30]

In four significant respects, *Price* departs from First Amendment analysis, raising questions that the Indiana Supreme Court will be forced to confront as it continues to expound the meaning of section 9. First, in describing the speech that constitutes a "core value" under the Indiana Constitution, thereby triggering the "material burden" analysis, the court states that it is protecting

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23. *Id.* at 961 n.7.

24. *Id.* at 958-59.

25. *Id.* at 959. Only in such circumstances, according to the court, does political speech constitute an "abuse" that is subject to punishment under the "responsibility" clause of section 9. *Id.*; *see also id.* at 958-60 (discussing the meaning of "abuse" as used in the "responsibility" clause). For the full text of this clause, see *supra* note 2.

26. *Price*, 622 N.E.2d at 963-64 (quoting 66 C.J.S. *Nuisance* § 160 (1950)).

27. *Id.*

28. *Id.* at 964.

29. *Id.* The court also questioned the causal link between the defendant's speech and the neighbors' harm, noting that many officers and civilians had been involved in the commotion surrounding the defendant's arrest, and that, therefore, the speech and conduct of these individuals may have also contributed to the neighbors' injury. *Id.*

30. *Id.* at 964-65. To be precise, the court interpreted the statute to avoid constitutional infirmity under section 9, limiting the statute's reach to private nuisances and, accordingly, holding that the defendant's speech did not violate the statute. *Id.* at 963-65.

The dissenting justices harshly criticized the majority's section 9 analysis: "In an apparent desire to give vitality to Art. 1, § 9, of the Indiana Constitution independent of its federal counterpart, the majority has chosen an ill-suited case and formulated a strained rationale." *Id.* at 967 (Dickson, J., joined by Givan, J., dissenting).

"political" speech in this fashion, but not other speech.[31] Although political speech often garners enhanced protection under the First Amendment as well, *Price* elevates the political/nonpolitical distinction to an analytical point of departure, a point of departure that presumably will guide the resolution of every free speech challenge. Moreover, determining whether speech is "political" may well be tantamount to determining whether the challenge will succeed, because when core constitutional values are not implicated, free speech analysis reverts to a highly deferential, rational-basis review.[32]

Under the reasoning of *Price*, the definition of political speech is crucial. Is speech political only when it explicitly addresses governmental action or governmental policymaking, as in *Price* itself,[33] or does the concept extend to more general social commentary, or perhaps even to scientific or educational speech on issues of public significance?[34] The court in *Price* suggested that "popular comment on public concerns" would constitute political speech,[35] but this is hardly a clear-cut test.[36] In future cases, the court will be asked to clarify its understanding of political speech, and the court's direction in these cases will help determine the breadth and importance of the *Price* decision.

The Indiana Supreme Court's second departure from First Amendment analysis is its claim that section 9's "material burden" analysis focuses exclusively on the free speech interest and the extent of its impairment, ignoring governmental interests and thereby avoiding the balancing of competing values. This would be a radical doctrinal innovation, for it would mean that even the most powerful governmental interest could not justify a material burden on political speech. In fact, however, despite the court's disclaimer, its analysis in *Price* does include an appraisal of particular

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31. *Id.* at 961-63 (majority opinion). Indeed, the court limited its ruling to "pure" political speech, noting that the case did not involve "disruptive conduct." *Id.* at 963 & n.14.

The dissenters complained that the majority had elevated political speech to a "preferred position" under the Indiana Constitution, even as it disclaimed a "preferred position" analysis. *Id.* at 969 (Dickson, J., joined by Givan, J., dissenting). *See id.* at 958 (majority opinion) (rejecting overbreadth analysis for free speech challenges under section 9, in part on the ground that speech does not occupy a "preferred position" under the Indiana Constitution, as compared to other protected rights).

32. *Id.* at 959-60.

33. In the view of the *Price* dissenters, even this kind of speech should not necessarily qualify as political speech. *See id.* at 969 (Dickson, J., joined by Givan, J., dissenting) (questioning the majority's conclusion "that the defendant's vulgar complaints constituted political speech").

34. *Cf.* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26-28 (1971) (arguing that First Amendment protection should be confined to "explicitly and predominantly political speech," defined as "speech concerned with governmental behavior, policy or personnel," and should not include "scientific, educational, commercial or literary expressions as such").

35. *Price*, 622 N.E.2d at 961.

36. In certain contexts, the United States Supreme Court has used similar language, distinguishing between speech on "'matters of public concern'" and speech "on matters of purely private concern." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) (plurality opinion) (citations omitted). But this distinction is often elusive. In *Dun & Bradstreet*, for example, a five-justice majority concluded that a credit report concerning the alleged bankruptcy of a construction contractor involved no matter of public concern, leading the four dissenters to decry the Court's "impoverished" understanding of the "public concern" concept. *See id.* at 761-62 (plurality opinion); *id.* at 764 (Burger, C.J., concurring in the judgment); *id.* at 774 (White, J., concurring in the judgment); *id.* at 786 (Brennan, J., dissenting).

governmental interests and a determination of which such interests are sufficient to justify restrictions on political speech. Otherwise, one could not explain the court's distinction between private and public nuisances. To justify this distinction, the court must have concluded that the governmental interest in protecting against private nuisances is sufficient to support a content-neutral regulation of political speech, but that the governmental interest in protecting against public nuisances is not.

To be sure, this analysis does not involve an ad hoc balancing of particular interests on a case-by-case basis. At least implicitly, however, it does involve a kind of generalized balancing, akin to definitional balancing under the First Amendment. Here, as there, the end result is a general rule of law to guide the resolution of not only the case at hand, but also future cases. Thus, in *Price*, the court implicitly considered the value of political speech under the Indiana Constitution as compared to the competing governmental interest in protecting tranquility and repose. Emerging from this balance was a general rule of law, the private nuisance requirement.

Although not clearly articulated, the balancing process under section 9 appears to be quite protective of political speech. The court's private nuisance standard is extremely demanding, as shown by its application to the conviction under review. Thus, the particular balance struck in *Price* evinces a speech-protective stance. More generally, the court's analysis indicates that unlike definitional balancing under the First Amendment, generalized balancing under section 9 extends even to content-neutral laws, such as the noise provision in *Price*. As a result, the protection of political speech will not be left to the uncertainties of case-by-case judicial balancing, even when the government's purposes are not censorial.

Future cases will require further balancing in accordance with the generalized balancing process suggested by *Price*. For example, to what extent would section 9 protect political speech from a content-neutral ban on the posting of signs on public property?[37] In this situation, the government's interests might include aesthetics and traffic safety, and the court would be forced to evaluate those interests as compared to the value of political speech. Balancing, at least of the generalized variety, is inevitable and entirely appropriate. Further, as *Price* reveals, it can be quite speech-protective. The Indiana Supreme Court should retract its supposed renunciation of balancing,[38] and it should proceed forthrightly to evaluate the competing interests that it confronts in future cases.

Price's third significant departure from First Amendment analysis is its distinction between public and private interests, as reflected in its public nuisance/private nuisance dichotomy. Drawing on the natural rights underpinnings of the Indiana Constitution, the court implied that the State's power to restrict political speech might be limited to the protection of competing

37. *Cf.* City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (rejecting First Amendment challenge to such a ban).

38. *Price*, 622 N.E.2d at 960-61 n.7.

private interests. This part of the court's analysis is closely related to its generalized balancing process. Indeed, it may help explain—although it cannot justify—the court's confusing disclaimer of a balancing methodology: if only private interests can be considered, then perhaps it is literally true that the court will ignore the "*social* utility" of laws restricting political speech, as well as "the *public* health, welfare, and safety served."[39]

Even on this assumption, however, balancing is at work in *Price*, a balancing of the speaker's rights against competing *private* interests. As the facts of *Price* reveal, a public nuisance may well involve an injury to private interests. After all, the neighbors were disturbed in the middle of the night.[40] A private nuisance simply involves a more pronounced and particular private injury, one sufficient to justify an action in tort. In effect, *Price* holds that the State can protect private interests through the regulation of political speech only when those private interests are substantially and specifically impaired, a holding that clearly reflects the weighing of competing private interests.[41]

More generally, the court's public/private distinction has potentially far-reaching implications. Although the public nuisance/private nuisance distinction reflects a sensible balance in the particular context of *Price*, the court's reliance on natural rights theory and its stated refusal to consider competing public interests might suggest a far broader public/private dichotomy. Under this reading of *Price*, the government could never impose a burden on political speech when only public interests were at stake. Such an approach to section 9, however, could not survive as a general analytical tool. For example, the State surely can protect the operations of government through the imposition of time, place, and manner restrictions on speech occurring on public property, even if these restrictions burden political speech. (To take an extreme case, imagine a political protestor refusing to leave the governor's office.) Depending on the circumstances, of course, the court might conclude that a particular restriction on political speech did not constitute a "material" burden, but this determination would surely be influenced by the nature and strength of the competing public concerns.

To the extent that it does have doctrinal importance, the court's public/private distinction, not unlike its political/nonpolitical dichotomy, raises significant definitional issues. What sorts of governmental actions protect public interests, and what sorts protect private interests? Indeed, is there not a public interest in the protection of private rights, and, at least arguably, a private interest in ensuring efficient and effective governmental operations? When the government acts to protect "public health, welfare, and safety,"[42]

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39. *Id.* (emphasis added); *see supra* notes 22-23 and accompanying text.

40. *Price*, 622 N.E.2d at 956-57, 964-65.

41. The court's own language suggests that this kind of balancing was at work in *Price*, albeit under the guise of determining when a "material burden" would be present. Thus, the court noted that criminal liability for a private nuisance "would not materially burden the values protected by § 9 given that particularized harm to more readily identifiable interests would have to be shown before liability could attach." *Id.* at 964.

42. *Id.* at 960 n.7; *see supra* note 22 and accompanying text.

is it not acting, in the end, to protect the private interests of its citizens?[43] Needless to say, the court's public/private distinction will require elaboration and refinement in future decisions.

The court's fourth significant departure from First Amendment doctrine is its failure to address the distinction between content-based and content-neutral laws. The law at issue in *Price* was content-neutral; it did not censor speech on the basis of content. Even so, the court applied its speech-protective, "material burden" analysis, finding that political speech warrants significant protection. One would assume that a content-based restriction on political speech would warrant at least the same protection, if not more, especially in light of the language of section 9,[44] which can be read to express special hostility to content-based lawmaking.[45]

Suppose, for example, that the State had charged the defendant in *Price* not with unreasonable noise, but rather with provocation,[46] asserting that the defendant's profane speech to the officer, because of its content, constituted "fighting words."[47] Under section 9 analysis, the defendant's political speech would be no less burdened than under the noise prohibition; indeed, one could argue that content-based restrictions, given their censorial implications, are inherently more burdensome. At the same time, it would be difficult to find a stronger competing interest to support a provocation conviction than a conviction for unreasonable noise. In any event, given that a police officer was the target of the defendant's wrath, it certainly would be difficult to find a competing interest that the court could plausibly describe as "private" under its public interest/private interest distinction. Interestingly, however, an ambiguous footnote in *Price* could be read to suggest that a prosecution for provocation might have presented a different case.[48]

Based on conventional free speech reasoning, the Indiana Supreme Court should extend its material burden analysis to content-based laws, and, indeed, such laws should perhaps be subjected to especially rigorous examination. But it is not clear whether the court will accept this reasoning. As a result, whether or how the court's analysis will be applied to content-based laws remains to be seen.

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43. In this regard, consider the court's own description of the state's police power: "police power is properly understood as the right of individuals, collectively, to ensure and promote the order, safety, health, morals, and general welfare of the community." *Price*, 622 N.E.2d at 959 (citation omitted).

44. *See supra* note 2.

45. According to the court of appeals in *Price*, the language of section 9 "clearly focuses upon the content of the speech, protecting the right to speak without having particular opinions censored." Price v. State, 600 N.E.2d 103, 113 (Ind. Ct. App. 1992); *see id.* (noting section 9's recognition of a "right to speak . . . freely . . . on *any subject whatever*") (quoting IND. CONST. art. I, § 9; emphasis by court of appeals).

46. "A person who recklessly, knowingly, or intentionally engages in conduct that is likely to provoke a reasonable man to commit battery commits provocation, a Class C infraction." IND. CODE ANN. § 35-42-2-3 (West Supp. 1993).

47. According to the Indiana Supreme Court, the defendant's statements to the officer included the following: "F—— you. I haven't done anything." *Price*, 622 N.E.2d at 957 (alteration in original).

48. *Id.* at 960 n.6.

To recapitulate, *Price* raises difficult questions concerning the distinction between political and other kinds of speech; concerning the nature and propriety of judicial balancing in the free speech context; concerning the dichotomy between private and public interests; and concerning the difference between content-based and content-neutral laws. It is not surprising that *Price* raises as many questions as it answers. Modern First Amendment doctrine is the product of countless Supreme Court decisions, rendered over a span of decades. In *Price*, the Indiana Supreme Court has indicated for the first time that it will be charting a free speech course of its own. The court's decision demonstrates courage, independence, and judicial innovation. The court will need time, however, and additional cases, for its section 9 jurisprudence to evolve.[49] Needless to say, the court's developing doctrine warrants close attention—not only from legal academics, but also from practicing lawyers, whose clients may have important free speech arguments beyond those available under the First Amendment alone.

49. This assumes, of course, that the court remains committed to *Price* itself. *Price* was a three-to-two decision, and Justice Krahulik, who joined the majority opinion, has since been replaced by Justice Sullivan. *See supra* note 3. As this commentary went to press, moreover, the newly constituted court was still considering a petition for rehearing.