

Free Speech for Lawyers

BY W. BRADLEY WENDEL*

I. Introduction

One of the most important unanswered questions in legal ethics is how the constitutional guarantee of freedom of expression ought to apply to the speech of attorneys acting in their official capacity. The Supreme Court has addressed numerous First Amendment issues involving lawyers,¹ of course, but in all of them has declined to consider directly the central conceptual issue of whether lawyers possess diminished free expression rights, as compared with ordinary, non-lawyer citizens. Despite its assiduous attempt to avoid this question, the Court's hand may soon be forced. Free speech issues are proliferating in the state and lower federal courts, and the results betoken doctrinal incoherence. The leader of a white supremacist "church" in

* Assistant Professor, Washington and Lee University School of Law. LL.M. 1998 Columbia Law School, J.D. 1994 Duke Law School, B.A. 1991 Rice University. The assistance of the Frances Lewis Law Center, Washington and Lee University is gratefully acknowledged. Thanks to Jack Chin, Teresa Collett, Ron Krotoszynski, Betsy Malloy, Judith Maute, Pam Metzger, Irma Russell, and Barry Sullivan for their comments. A version of this paper was presented at the annual meeting of the Southeastern Conference of the AALS. I am grateful to the organizers and participants in the young scholars workshop for their assistance and helpful discussion. Finally, I would like to thank my research assistants Cameron Garrison and John Kalinger for their valuable contributions.

1. The Court has considered First Amendment issues relating to attorney advertising and solicitation, see *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); pretrial publicity, see *Gentile v. Nevada State Bar*, 501 U.S. 1030 (1991); admission to the bar, see *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971); *In re Stolar*, 401 U.S. 23 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *In re Anastaplo*, 366 U.S. 82 (1961); *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957); *In re Summers*, 325 U.S. 561 (1945); and contempt of court and other sources of discipline for making critical comments about lawyers and judges, see *In re Snyder*, 472 U.S. 634 (1985); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *In re Sawyer*, 360 U.S. 622 (1959).

Illinois was denied admission to the bar because of the incompatibility of his beliefs with the principle of racial equality to which lawyers as professionals ought to be dedicated. This decision reveals the tension between the First Amendment principle, established after the agonizing struggles of the McCarthy era, that no one may be denied membership in the bar because of his or her beliefs, and the plenary authority of bar associations to make predictive judgments about the ability of applicants to function as lawyers.

The Court ducked the constitutional issue presented in the Hale case, but did grant certiorari in a case involving restrictions on the types of cases that could be handled by legal aid lawyers who received federal funding.² This case, which is in one sense another iteration of the debate over whether the government may restrict speech by selectively funding it, implicates the fundamental question of the ethical duties of lawyers: is challenging the status quo a core aspect of their role, so that the analysis of whether the government may fund legal service corporations with strings attached differs from the question of government funding for family-planning clinics³ or artistic expression?⁴

Finally, bar associations have asserted the power to restrict racist, sexist, and “uncivil” speech by lawyers, to make the profession more welcoming to people of color and women, and to reduce the cost and delays associated with obnoxious pretrial behavior. These civility and antidiscrimination codes, however, may run afoul of constitutional limitations on vague, overbroad, and content-based restrictions of expression. Although similar content-based restrictions on speech have been rejected by courts considering university hate-speech codes, remedies for hostile work-environment sexual harassment under Title VII of the 1964 Civil Rights Act have uniformly been upheld against constitutional challenges. Are antidiscrimination and civility codes for lawyers more like the hate speech regulations or the right of action for sexual harassment?

Courts that have considered these issues are badly split on whether these regulations violate the First Amendment. This uncertainty is due in part to the multiplicity of constitutional rules implicated by any restrictions on speech, but also by the categorization problems presented by lawyers’ speech. Are lawyers like soapbox orators in Hyde Park, or are they more like government employees,

2. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2000).

3. See *Rust v. Sullivan*, 500 U.S. 173 (1991).

4. See *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

whose expressive rights may be limited? Is lawyer speech “political,” and therefore entitled to the highest degree of First Amendment protection, or in a category of lower constitutional value, like commercial speech? Do lawyers surrender a portion of their expressive freedom when they become members of the bar, “officers of the court,” as judges are fond of labeling them? How should courts reconcile the solicitude of the First Amendment for unorthodox points of view and spirited dissent with the regulatory interests of the bar, which may not necessarily be furthered by antiestablishment speech by lawyers? These are typical of the questions which confront anyone trying to reason through the collision of ethical, constitutional, and regulatory norms governing lawyer speech.

The arguments of this Article are synthetic in structure. I do not aim just to criticize reported cases, but rather to show how the regulation of lawyers’ speech fits within the various doctrinal complexities that characterize First Amendment law and within the ethical norms that govern the practice of law. This synthesis has three features: First, although the focus is on the application of free speech principles to the legal profession, the issues considered here are also implicated in other contemporary constitutional debates, such as the regulation of hate speech on college campuses⁵ and elsewhere,⁶ and the application of the First Amendment to “hostile environment” sexual harassment claims under Title VII.⁷ First Amendment law has tended to

5. See, e.g., Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 174-77 (1992); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825 (1991); J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991).

6. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* (1997); Martha Minnow, *Regulating Hatred: Whose Speech, Whose Crimes, Whose Power? — An Essay for Kenneth Karst*, 47 UCLA L. REV. 1253 (2000); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991).

7. See, e.g., Deborah Epstein, *Can a “Dumb Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L. J. 399 (1996); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995); Linda S. Greene, *Sexual Harassment Law and the First Amendment*, 71 CHI.-KENT L. REV. 729 (1995); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1994 SUP. CT. REV. 1; Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment — Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991).

fragment into discrete, context-specific bodies of law,⁸ with the result predictably being doctrinal confusion. I am aware of the dangers inherent in searching for a grand unified theory that can be made intelligible in application only by Procrustean contortions, and I do not wish to diminish the importance of the social context⁹ in which speech acts occur. In fact, many of the arguments in this Article criticize courts for not giving sufficient weight to the ethical and disciplinary context that informs lawyering activities. At the same time, however, First Amendment law has been impoverished by its division into an ever-increasing number of contextual pigeonholes, which exist in hermetic isolation from one another. This discussion, therefore, draws together the constitutional reasoning from expressive-rights cases involving lawyers and those arising in analogous contexts.

Second, this Article integrates constitutional principles that bear on lawyer-speech cases, but which have their origins outside the First Amendment. For instance, regulation by courts of “offensive personality” or “conduct prejudicial to the administration of justice” implicates due process, vagueness, and overbreadth concerns. A court that considers only the First Amendment in analyzing a case arising under one of these standards risks overlooking significant constitutional issues. Similarly, the Supreme Court’s periodic flirtation with the right/privilege distinction in procedural due process cases is another constitutional theme that recurs in lawyer-speech cases.

Finally, I consider not only the constitutional dimension of lawyer-speech regulation, but also the ethical and disciplinary context that informs the practice of law. Being a lawyer means participating in a social practice which has its own unique traditions, history, and conceptual difficulties. For example, one frequently encounters the claim that the lawyer’s role is to serve as a zealous advocate within

8. A glaring example of the process of categorization run amok (and also of infelicitous language by a law clerk) is *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In that case, the Court said: “Each method of communicating ideas is ‘a law unto itself’ and that law must reflect the ‘differing natures, values, abuses, and dangers’ of each method. We deal here with the law of billboards.” *Id.* at 501 (footnote omitted). There is no such thing as the “law of billboards,” which is somehow distinct from the law of print advertisements, handbills, or websites. Naturally each medium will display unique characteristics, but what makes legal rules *law* is that they may to some extent be generalized beyond the particulars of a given dispute. If it is not possible to harmonize the law of billboards with the law of television broadcasts in a principled way, the Court has not performed its function adequately. *Cf.* *Texas v. Johnson*, 491 U.S. 397, 436 (1989) (Stevens, J., dissenting) (unpersuasively arguing that First Amendment principles applicable to wearing black armbands in protest do not carry over to flag-burning).

9. *See generally* STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH* (1994); Robert Post, *Recuperating First Amendment Doctrine*, 47 *STAN. L. REV.* 1249 (1995).

the bounds of the law; this motto points to the lawyer's function as both a representative of clients and an "officer of the court," charged with responsibility for conforming the conduct of individuals to the law. This tension has obvious implications for the analysis of the free expression rights of lawyers. Speaking out on behalf of a disfavored position or an unpopular client may put the lawyer at odds with powerful government actors. On the other hand, restraining one's speech in order to stay well within the boundaries of permitted expression may have the effect of muzzling one's client's voice — an illegitimate act of private domination. This clash of principles plays out in cases like the recent dispute over whether a divorce lawyer could accept only women as clients.¹⁰ In that case, the lawyer's personal moral agency and her ideological commitment to serving women conflicted with the norm of formal gender equality (although her decision arguably advanced substantive gender equality by providing women with effective counsel). Although this case is more a matter of First Amendment associative, rather than expressive rights, it shows nicely how the ethical obligations of lawyers may create treacherous cross-currents in constitutional doctrine.

A theory of free speech for lawyers must achieve a satisfying fit in two directions: with broader constitutional and ethical principles, and with the results of particular cases.¹¹ In many First Amendment cases involving the expressive activities of lawyers, the result seems obvious, but is difficult to justify in terms of constitutional doctrine. For example, it seems intuitively correct to extend First Amendment protection to the speech of an experienced defense lawyer who argues, at a meeting arranged by a labor union, that the government's prosecution of suspected Communists in organized labor is overzealous and threatening to civil liberties.¹² But does this decision entail a requirement that an avowed white supremacist must be admitted to the bar, despite the compelling constitutional value of racial equality?¹³ Or, does it protect the speech of the newly elected judge of a

10. See Steve Berenson, *Politics and Plurality in a Lawyer's Choice of Clients: The Case of Stropnick v. Nathanson*, 35 SAN DIEGO L. REV. 1 (1998); Bruce K. Miller, *Lawyers' Identities, Client Selection and the Antidiscrimination Principle: Thoughts on the Sanctioning of Judith Nathanson*, 20 W. NEW ENG. L. REV. 93, 94-95 (1998).

11. See generally JOHN RAWLS, *A THEORY OF JUSTICE* 48-50 (1971); Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256 (1979).

12. See *Sawyer*, 360 U.S. at 628-29.

13. See Ann Woolner, *Barring Bigots: Should the Privilege to Practice Law Depend on One's Politics?*, LEGAL TIMES, July 26, 1999, at 15 (reviewing story of Matthew Hale, discussed in detail *infra* notes 25-76 and accompanying text). See also OWEN M. FISS, THE

state court of last resort, who addresses an anti-abortion rally and thanks advocates for their support in his recent election campaign?¹⁴ In other cases, established constitutional law challenges some visions of ethical lawyering. The popular understanding of the First Amendment celebrates outcasts, iconoclasts, and dissenters — which is why the scrofulous Larry Flynt is occasionally mistaken for a moral hero — and well known judicial decisions protect all manner of offensive communications, from hate speech to flag burning. This extraordinary constitutional solicitude for speech seems to doom the efforts of bar associations and courts to enforce civility codes in an attempt to control perceived obnoxious behavior by lawyers. Certainly one strand of our professional tradition idealizes colorful lawyers, such as William Kunstler and Johnnie Cochran, who flout conventions of decorous speech or respect for courts. But another, equally powerful part of the ethical heritage of lawyers emphasizes their subordination to public interests such as the expeditious and fair resolution of disputes. This Article seeks to accommodate these crosscutting tensions within a constitutional and ethical framework.

In this Article I do not propose some variation on the ubiquitous balancing tests that have multiplied in constitutional law, in which the interests of the client, the lawyer, the court system, affected third parties, and society are generally weighed against one another on some miraculous multidimensional scale.¹⁵ A significant camp of First Amendment scholars contends that flexibility and “thinking small” is the hallmark of free speech doctrine, and courts should not be preoccupied with the search for rules that apply without sensitivity to contextual variations.¹⁶ There is a great deal of truth in this position, but the response to the diversity of circumstances of individual cases is to work harder to discern the principles and policies which undergird First Amendment adjudication in analogous cases, not to abdicate this function by purporting to balance numerous incommensurable

IRONY OF FREE SPEECH 12-13 (1996) (observing that hate speech poses a confrontation between two constitutional norms — freedom of expression and equality — and there is no way for the legal system to choose easily between these two transcendent commitments).

14. See *In re Sanders*, 955 P.2d 369, 370-71 (Wash. 1998) (reversing reprimand against state Supreme Court Justice who spoke to an anti-abortion rally).

15. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Cf. Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994).

16. See, e.g., STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 4, 14-17 (1990); Post, *supra* note 6; Fallon, *supra* note 7.

factors. How, for example, is a court to balance “the government’s interest in a fair and impartial judiciary, a judge’s interest in the right to express his or her views, and the need for the free expression of those views in a system wherein the members of the judiciary are elected to office” in an intellectually honest way? Better simply to decide that the speech of judges is subject to regulation in a given context, reasoning by analogy from similar cases involving attorneys, government employees, or some other relevantly similar category of speakers. Naturally, the determination that two categories are relevantly similar is itself a contestable one, but it will usefully expose the normative issues that undergird the legal doctrines. The constraint of making principled distinctions, or plausible analogies, ensures that judicial decisions are justified on the basis of generally applicable political and moral principles.¹⁷ It also gives decision makers access to the intellectual resources of past decisions, so that each judge is not engaged in a process of reinventing the wheel (or, worse, failing to invent the wheel, which happens in a great many constitutional cases).¹⁸ The ambition of this Article, therefore, is to produce an account of First Amendment theory that is both coherent and sensitive to the variety of contexts in which lawyers’ expressive interests are implicated.

Part II provides a critical overview of some of the contexts in which lawyers’ First Amendment interests are implicated. It draws analogies between contemporary disputes like the Matthew Hale application and historically significant events such as the McCarthy crusade to weed subversive lawyers out of the bar. Parts III and IV then provide two independent, but complementary approaches for analyzing lawyers’ free speech rights: Part III adopts a doctrinal perspective, connecting the multifarious strands of constitutional law with the factual settings in which they arise in lawyer-speech cases. The aim of this discussion is to provide a sound doctrinal framework for decisions in these cases, as a corrective to the frequently conclusory reasoning employed by courts. Part IV takes the standpoint of free speech theory, and asks whether the underlying reasons for affording a high degree of protection to expression apply to cases in which the speakers

17. See generally ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1988); EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

18. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 195 (1996).

are lawyers. Familiar constitutional tropes like the marketplace of ideas and the dissenting pamphleteer make their appearance in this section. Part V considers the intersection with the ethical norms which regulate the practice of law. (By “ethical” here I mean both the disciplinary rules enacted by state bar associations and the generally applicable moral principles that bind lawyers by virtue of being persons.) The conception of professional ethics proposed is pluralistic, meaning that no single value can adequately account for the social function of lawyers in our political culture. Thus, any complete theory of free speech for lawyers must adapt to this pluralism. Finally, Part VI proposes a number of principles that may be inferred from the preceding discussion of First Amendment doctrine and theory and an appropriate vision of legal ethics.

To anticipate the arguments of the following sections, I will claim that decisions by courts considering free speech arguments by lawyers are surprisingly out of touch with the mainstream of constitutional law. While generally applicable First Amendment law is astonishingly protective of expression, even when it imposes high social costs,¹⁹ the decisions of courts in lawyer-speech cases cluster around the opposite extreme. They generally acquiesce in the government’s asserted reasons for protecting speech, even where these reasons have been unavailing in other contexts. Protecting the public image of the bar, for example, has been deemed a legitimate state interest, justifying regulations on expression, even in light of the Supreme Court’s commercial speech doctrine, which does not permit restrictions on speech to be justified by similar concerns.²⁰ Furthermore, the vision of robust, open, vigorous public debate announced by the Supreme Court in *New York Times v. Sullivan*²¹ has not been carried through by lower courts into a protective rule for criticism of participants in the judicial system. Judges, perhaps realizing that what’s sauce for the goose is sauce for the gander, also uphold decency and dignitary restrictions on speech critical of the judiciary, despite a consistent line of cases protecting undignified and indecent speech, subject only to narrow exceptions for obscenity, and making clear that the offense of

19. One of the few decisions in recent memory recognizing the high social cost of some speech as a reason for restricting it is *Hill v. Colorado*, 530 U.S. 703 (2000), upholding the validity of a floating no-speech zone around women seeking treatment at abortion clinics.

20. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

21. 376 U.S. 254 (1964).

a listener is alone no basis for restricting expression.²² Courts also relax their customary scrutiny of vague and overbroad statutes, permitting enforcement of prohibitions on “offensive personality” and “conduct unbecoming a member of the bar,” again notwithstanding the Court’s concern that vague regulations may be selectively enforced against the powerless or unpopular.²³ Finally, courts tend to permit viewpoint-based discrimination, permitting selective enforcement of general standards (such as the moral character requirement for admission to the bar) against unpopular or obnoxious lawyers.

Throughout this article I will consider some sources of this doctrinal confusion. One possibility is that courts have over-generalized from cases involving in-court expression. Naturally a court has the power to discipline speech by lawyers that disrupts a court proceeding or in some other manner interferes with a fair trial; in criminal cases this power is of a constitutional dimension, owing to the Sixth Amendment’s fair trial guarantee. Outside of the context of formal proceedings, however, these government interests are absent, yet courts often assume, without analysis, that the speech of lawyers is similarly circumscribed. In addition, courts seem to forget some basic policies supporting expressive rights, such as the distrust of government power or state-prescribed orthodoxies of belief that underlies the “marketplace of ideas” rationale for protecting speech. Courts in this area are surprisingly deferential to state decisions about the social acceptability of the ideas and values of lawyers, in a way that would not withstand scrutiny outside of this context. For example, they are frequently willing to accept the prevention of offense or the preservation of the dignity of courts as a sufficient reason for restricting speech.

A more charitable reason for the most significant source of the observed disarray in state and lower federal court decisions is the overlay of a pluralistic foundation for legal ethics onto the famously indeterminate body of First Amendment law. It is almost a cliché to observe the baroque complexity of free speech doctrine, but what is less well appreciated is the extent to which no single model of lawyering theory can account for the function of lawyers in our society. Courts sometimes assume that the traditional status of lawyers as “officers of the court” entails a limited set of First Amendment freedoms. The officer of the court obligation, however, must be consid-

22. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Cohen v. California*, 403 U.S. 15 (1971).

23. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41 (1999).

ered in light of the lawyer's other traditional role, which is to challenge exercises of state power. Taking the officer of the court duty too seriously means undermining the lawyer's role as a bulwark between individual liberty and abuse of government power. Each of these competing visions of legal practice — the quasi-governmental obligation to help ensure the efficient functioning of the judicial system and the private role as representative and advocate of clients — can be connected with aspects of First Amendment doctrine to create a theory of free speech for lawyers. The result of this multi-tiered pluralism is a geometric increase in the number of plausible resolutions to expressive-rights disputes, and hence the welter of conflicting lower-court decisions.

II. Formal Taxonomy of Lawyer-Speech Cases

A. "Are You Now, or Have You Ever Been, a White Supremacist?": The Hale Case and Pre-Admission Moral Character Review

The case of Matthew Hale has crystallized the debate over the free speech rights of attorneys in a way that has not occurred since the McCarthy era's loyalty oath cases. Hale is the leader (the self-styled "Pontifex Maximus") of a white supremacist organization called the World Church of the Creator, undistinguished among fringe hate groups for its beliefs,²⁴ but notable for its enthusiastic embrace of technology. His organization has been particularly aggressive in using the World Wide Web to spread its message. Hale maintains a web site for his organization, which contains numerous exhortations to "racial loyalty" and "racial holy war;" rantings about blacks, Jews, and other ethnic minorities (called the "mud races" by Hale); a bizarre theology based on the "Sixteen Commandments" and vehement denunciations of Christianity; long-discredited bogus biological theories about racial differences; and a boilerplate disclaimer that the group does not condone violence.²⁵ The disclaimer rings hollow in the face of the group's refusal to disavow violence in the pursuit of its ambitions: "It is the program of the Church of the Creator to keep expanding the White Race and keep crowding the mud races without *necessarily* engaging in any open warfare or without

24. See generally MICHAEL BARKUN, RELIGION AND THE RACIST RIGHT: THE ORIGINS OF THE CHRISTIAN IDENTITY MOVEMENT (1997).

25. See World Church of the Creator, (visited 11/23/99) <<http://www.rahowa.com>>. "Rahowa" is Hale's acronym for "racial holy war."

necessarily killing anybody.”²⁶ And few believed that Hale was not pleased when one of his followers, Benjamin Nathaniel Smith, went on a multi-state killing spree targeted at Jews and people of color.²⁷ Due to the visibility of the World Church of the Creator, Hale’s application to become a licensed attorney in Illinois was a high-profile event, and the decision of the local bar committee, declining to certify his fitness for admission, generated immediate controversy.²⁸

Despite the horror of the Smith killings, the Hale proceeding is a tempest in a teapot compared with the great upheaval surrounding Senator Joseph McCarthy’s investigations into alleged Communist infiltration of American political institutions in the 1950s.²⁹ The McCarthy era produced an extraordinary outpouring of sharply divided Supreme Court opinions, all considering the extent of constitutional

26. See FAQ About Creativity, Question #21, (visited 11/23/99) <<http://www.rahowa.com/faq1>> (emphasis added). See also Question # 24, *id.* (“Q: But wouldn’t [the agenda of the group] mean the decline and perhaps the extermination of the colored races? A. Perhaps it would”); Question #29, *id.* (“Hitler’s program was similar to what we are proposing”). Unlike the *Nuremberg Files* website, which publishes photographs and addresses of physicians who perform abortions, Hale’s site does not contain any information that would facilitate the commission of a crime of racial violence. Thus, it does not fall within the category of “harm advocacy” speech, which two commentators have recently proposed should be subject to plenary government regulatory authority. See S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159 (2000).

27. See Bill Dedman, *Midwest Gunman Had Engaged in Racist Acts at 2 Universities*, N.Y. TIMES, July 6, 1999, available in 1999 WL 30542190. See also Southern Poverty Law Center, *The Great Creator*, INTELLIGENCE REPORT (Summer 1999), at 23, 25-26 (detailing connections between Hale and Smith).

28. The full name of the body which initially denied Hale’s application is the Committee on Character and Fitness for the Third Appellate District of the Supreme Court of Illinois (Inquiry Panel). (Illinois does not have a unified bar.) The Inquiry Panel’s decision is reprinted in GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* 875 (3d ed. 1999). For convenience I will refer to the version of the Inquiry Panel’s opinion included in the Hazard casebook, using that book’s pagination [hereinafter “Hale Inq. Panel Opinion”]. The Inquiry Panel’s decision was affirmed on a narrower ground by a Hearing Panel of the Character and Fitness Committee. That decision is reprinted in the Teacher’s Manual to the Hazard casebook, but is not otherwise readily available to the public. I will use the pagination from the Teacher’s Manual for that decision [hereinafter “Hale Hrg. Panel Opinion.”] The Hearing Panel ruling is final, in light of the decision of the Supreme Court of Illinois to deny Hale’s petition for review and the denial of certiorari by the U.S. Supreme Court. See Illinois Supreme Court minute order, M.R. 16075 (Nov. 12, 1999) (on file with author); *Hale v. Illinois Bar*, 120 S. Ct. 2716 (2000).

29. See generally STANLEY I. KUTLER, *THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR* (1982); MICHAL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* (1977); Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1 (1991).

protection afforded to those who were suspected of harboring Communist sympathies.³⁰ A significant number of these cases involved lawyers who were denied admission to state bar associations, sometimes merely for refusing to answer questions about membership in subversive organizations.³¹ The holdings of those cases, none of which has ever been expressly overruled by the Court, may be surprising to a lawyer who is acquainted only with contemporary free speech jurisprudence, which is highly protective of potentially harmful speech. Although applicants to the bar may not be required to disclose mere membership in "subversive" organizations,³² they nevertheless may be forced to reveal whether they belong to an organization advocating overthrow of the government by force and whether they share that group's specific intent.³³ The Court cited a long line of decisions establishing the permissibility of conditioning government employment on a satisfactory record of the applicant's freedom from subversive activity.³⁴ Indeed, the bar-admission cases and other anti-Communist loyalty-oath cases³⁵ were decided after the Supreme Court's landmark *Brandenburg* decision, which generally imposes a requirement that the harm threatened by speech be imminent in time. Thus, the *Hale* case poses an unresolved constitutional question of the highest importance — namely, whether a state benefit may be withheld on a showing that the applicant poses a particularly acute threat to the democratic form of government.

The character and fitness committee's Inquiry Panel that considered *Hale's* application was aware of the loyalty-oath cases proscribing inquiry into beliefs as such, but it nevertheless concluded that the state's interest in ensuring that lawyers are dedicated to certain "fundamental truths" outweighs *Hale's* First Amendment rights.³⁶ These

30. See, e.g., *Adler v. Board of Educ.*, 342 U.S. 485 (1952); *Beilan v. Board of Educ.*, 357 U.S. 399 (1958); *Speiser v. Randall*, 357 U.S. 513 (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *United States v. Robel*, 389 U.S. 258 (1967).

31. See, e.g., *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971); *In re Stolar*, 401 U.S. 23 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *In re Anastaplo*, 366 U.S. 82 (1961); *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

32. See *Baird*, 401 U.S. at 8.

33. See *Wadmond*, 401 U.S. at 166-67. See generally Thomas Church, Jr., *Conspiracy Doctrine and Speech Offenses: A Reexamination of Yates v. United States from the Perspective of United States v. Spock*, 60 CORNELL L. REV. 569 (1975).

34. See, e.g., *Scales v. United States*, 367 U.S. 203 (1961).

35. See, e.g., *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974).

36. See *Hale Inq. Panel Opinion*, *supra* note 28, at 881.

fundamental truths include racial equality and the responsibility of the courts to enforce this value. The Inquiry Panel cited the Supreme Court's holding in *Baird* that "a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."³⁷ Its attempts to distinguish between inquiry into belief as such, and belief as it reveals an intent to commit unlawful acts, reveals both constitutional questions left open by the McCarthy-era jurisprudence of the Court and the issues posed by the collision between antidiscrimination norms and free expression principles.

First, the Inquiry Panel in the Hale case emphasized the difference between inquiring into beliefs and merely taking notice of beliefs that an applicant has publicized: "Matthew Hale has no interest in keeping his beliefs a secret."³⁸ It is true that the precise issue in *Baird* was whether the state of Arizona could deny admission to an applicant who had refused to answer questions about membership in the Communist Party or any organization that "advocates overthrow of the United States Government by force or violence."³⁹ It seems peculiar to read *Baird* so narrowly as standing for a proposition that the state may not inquire into membership in organizations advocating the violent overthrow of the United State government, but may permissibly deny membership in the bar to an applicant who has *admitted* membership in such a group, perhaps through inadvertence, naivete, or misplaced trust in the tolerance of the government. But the Court is responsible for encouraging this strained interpretation because it never squarely confronted the issue suggested by *Baird* — whether Arizona could have denied admission to Sara Baird if she had filled out her application truthfully. In a contemporaneous decision, the Court insisted that a state retains the power to inquire into whether a bar applicant had the specific intent to further the aims of an organization dedicated to the violent overthrow of the United States government.⁴⁰ The only prohibited inquiry is into beliefs as

37. *Id.* at 880, citing *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971).

38. *Id.* at 880, taking judicial notice of Hale's website.

39. 401 U.S. at 5 (internal quotation marks omitted).

40. *See* *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. at 164-66. (The Court had previously held, in *Scales v. United States*, 367 U.S. at 203, that prosecution for membership in the Communist Party was not unconstitutional, provided that the state prove "active" membership and specific intent to take illegal action.) The state may require the applicant to answer these questions, on pain of denial of admission for refusing to answer. *Konigsberg*, 366 U.S. at 56; *In re Anastaplo*, 366 U.S. at 96-97. One member of the Court has expressed the view that these holdings are of dubious

such, which do not manifest themselves as a specific intent to commit illegal acts.⁴¹ Still, this distinction does not complete the Illinois Inquiry Panel's analysis. Hale never admitted forming a specific intent to commit acts of racial violence; in fact, he specifically disavowed this intent.⁴² One might disbelieve Hale on this point, but the Inquiry Panel's decision does not contain a factual finding, supported by evidence on the record, that Hale had a specific intent to accomplish a criminal act. All that is apparent from the record is Hale's belief in white supremacy — odious to be sure, but constitutionally protected.

The Inquiry Panel, perhaps anticipating this argument, then waded into the quagmire of constitutional issues surrounding the application of free expression principles to regulation of hate speech. It concluded that the fundamental value of racial equality is so basic to our legal system that it ought to be preferred to the values of the First Amendment.⁴³ To call this a novel argument would be a gross understatement. The Supreme Court, and federal appellate courts, have consistently held that speech may not be restricted solely because of its content, even where the regulations are motivated by the desire to vindicate substantive norms of racial equality. For example, in *R.A.V. v. City of St. Paul*, the Court invalidated a city ordinance criminalizing actions that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender"⁴⁴ The Court reasoned that the ordinance discriminated on the basis of the content of the expression; a sign arguing for racial tolerance

precedential value in light of intervening developments in the law and the end of the Cold War. See Ruth Bader Ginsburg, *Supreme Court Discourse on the Good Behavior of Lawyers: Leeway Within Limits*, 44 *DRAKE L. REV.* 183, 189 (1995). Justice Ginsburg cites *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which held that advocacy of illegal action is not, by itself, a justified basis for restricting speech unless there is a clear and present danger of imminent lawless activity. It is certainly difficult to reconcile *Wadmond* with *Brandenburg*, but the latter case was decided before *Wadmond*, so it does not seem to cast doubt on the precedential value of the 1971 bar-admission cases. Rather, the argument would have to be that *Wadmond* was wrongly decided in light of *Brandenburg*. See generally Special Project, *Admission to the Bar: A Constitutional Analysis*, 34 *VAND. L. REV.* 655 (1981); Rohr, *supra* note 29, at 115. Interestingly, as of 1994 the character and fitness section of the application to the New York bar still contained a question about membership in subversive organizations, in the form approved by the court in *Wadmond*. See Colin A. Fieman, *A Relic of McCarthyism: Question 21 of the Application for Admission to the New York Bar*, 42 *BUFF. L. REV.* 47 (1994).

41. See *Baird*, 401 U.S. at 9-10 (Stewart, J., concurring).

42. See Hale Inq. Panel Opinion, *supra* note 28, at 876.

43. *Id.* at 882.

44. 505 U.S. 377, 380 (1992) (quoting St. Paul Bias Motivating Crime Ordinance, St. Paul, Minn, Legis Code §292.02 (1990)).

would not be subject to the ordinance, but a message conveying hatred or racial superiority is illegal.⁴⁵ Significantly, the state interest asserted by the city — “help[ing] ensure the basic human rights of members of groups that have historically been subject to discrimination”⁴⁶ — is the same interest that the Illinois Inquiry Panel claimed justified Hale’s exclusion from the bar. The ordinance was not necessary to advance this interest, however. In an allusion to the “marketplace of ideas” vision of the First Amendment, the Court said that if the St. Paul City Council wished to respond to hate speech, its only option was to speak out against hate, not to ban expressions of it.⁴⁷

The Inquiry Panel’s only response to this argument was a citation to *Wisconsin v. Mitchell*,⁴⁸ the Supreme Court decision unanimously upholding the constitutionality of a state penalty enhancement provision for crimes committed as a result of racial bias. *Mitchell* essentially recapitulates the distinction drawn in *Wadmond* and *Baird* between beliefs as such and criminal acts motivated by beliefs. A sentencing judge may not take into account a defendant’s beliefs, as might be evidenced by membership in a white supremacist prison gang, having nothing to do with the actus reus of the crime for which the defendant was convicted.⁴⁹ If racist beliefs motivated the defendant’s actions, however, the sentencing judge may take them into account.⁵⁰ Similarly, under *Baird* a state may not inquire into a bar applicant’s membership in subversive organizations, but it is permitted by *Wadmond* to take into account evidence that the applicant had formed the specific intent to overthrow the United States government by force.⁵¹ The Court distinguished between conduct, which could be made the subject of criminal penalties, and expression, which under *R.A.V.* could not.⁵² As I will argue, the speech/conduct distinction is

45. *See id.*

46. *Id.* at 395.

47. *See id.* at 396. For a well known appellate decision reaching a similar conclusion, see *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978). In that case, the court held that the city of Skokie, Illinois, could not deny a parade permit to a group of Nazis who wished to demonstrate in a city whose population included many Holocaust survivors. *See id.* at 1199, 1210. *See also* ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979). *See also* American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

48. 508 U.S. 476 (1993).

49. *See Dawson v. Delaware*, 503 U.S. 159, 167 (1992).

50. *See Mitchell*, 508 U.S. at 486; *Barclay v. Florida*, 463 U.S. 939, 949 (1983).

51. *See supra* note 32 and accompanying text.

52. *See Mitchell*, 508 U.S. at 487.

difficult to draw with any precision; the immediate problem for the Illinois Inquiry Panel, however, was the lack of any factual record that Hale had engaged in criminal conduct, as opposed to the advocacy of criminality. For the same reason that the Inquiry Panel's application of *Baird* was incorrect — namely, Hale had only advocated race war, not formed the specific intent to commit racially motivated crimes — the Inquiry Panel seriously misread *Mitchell* when it argued that antidiscrimination values may be preferred to the First Amendment in bar admission cases like Hale's.

Of course, the Minnesota teenager charged with the cross-burning in *R.A.V.* was not a lawyer; perhaps Hale ought to be required to accept diminished free speech rights in exchange for the valuable privilege of practicing law in Illinois. Indeed, the Inquiry Panel makes exactly this argument: "The balance of values that we strike leaves Matthew Hale free . . . to incite as much racial hatred as he desires But in our view he cannot do this as an officer of the court."⁵³ Many students of constitutional law will immediately be reminded of Holmes' well known aphorism, from an opinion written as a Justice on the Massachusetts Supreme Judicial Court, that a person "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."⁵⁴ The so-called right/privilege distinction has been repudiated on several occasions by the Supreme Court, only to reappear in a different guise a few years later. It is particularly prevalent in lawyer-discipline cases in which lawyers claim First Amendment protection. The misuse of right/privilege reasoning forms the subject of Part III, Section C. of this article.⁵⁵

On Hale's appeal from the Inquiry Panel's decision, a separate five-member panel of the character and fitness committee (which I will refer to as the Hearing Panel) affirmed the denial of Hale's application to the bar, on the narrow ground that Hale had not proven that he is willing to abide by the state's disciplinary rules for lawyers.⁵⁶ Specifically, the record, including Hale's extravagantly racist web site and a letter he had written using a racial epithet, indicated that he would be unable to put aside his white supremacist beliefs and abide by Illinois Rule of Professional Conduct 8.4(a)5, which provides that "[a] lawyer shall not . . . engage in adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others, based on race, sex,

53. Hale Inq. Panel Opinion, *supra* note 28, at 882.

54. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

55. See *infra* notes 311-349 and accompanying text.

56. See Hale Hrg. Panel Opinion, *supra* note 28.

religion, or national origin.”⁵⁷ Significantly, however, the Hearing Panel did not allege that any of Hale’s actions were illegal, or that they revealed a specific intent to commit an illegal act. Were it not for the Illinois disciplinary rule prohibiting racial discrimination, the Hearing Panel’s argument would be foreclosed by the Supreme Court’s decision in *Baird*.

Is the evidence that Hale would be unable to comply with Rule 8.4(a)5 a constitutionally permissible basis to deny Hale admission to the bar? The answer turns on whether the rule itself is constitutionally sound and the related question of whether this evidence is rationally related to Hale’s fitness to practice law. There is nothing unconstitutional (as opposed to wrongheaded⁵⁸) with a court body or state bar committee making predictive judgments about an applicant’s fitness to practice law, provided that the committee does not rely on evidence of beliefs as such, as opposed to conduct which reveals character incompatible with the role of lawyer. Applicants are frequently denied permission to sit for the bar exam on the basis of evidence showing alcohol dependency, serious financial difficulties, a criminal record, academic dishonesty, or even impulse-control problems, on the grounds that they are more likely to be involved in some kind of breach of professional standards if admitted.⁵⁹ Moreover, even if Illi-

57. *Id.* at 292. Several other states, including California, Florida, Michigan, Minnesota, and New Jersey, have made or proposed similar modifications to the ABA Model Rules. See PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 250-54 (John S. Dzienkowski, ed., 1999-2000 unabridged edition); Brenda Jones Quick, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession’s Response to Discrimination on the Rise*, 7 NOTRE DAME J. L. ETHICS & PUB. POL’Y 5, 6-7 (1993). The Illinois rule at issue in the Hale case is not limited on its face to discrimination in one’s capacity as a lawyer, unlike other rules which are more narrowly tailored. Compare MODEL RULES OF PROFESSIONAL CONDUCT, Rule 8.4, Comment [2] (“A lawyer who *in the course of representing a client*, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, . . .”) (emphasis added). Thus, several of Hale’s actions, including writing letters expressing racial hatred, may be violations of the Illinois rule, despite being entirely unconnected with lawyering activities. The scope of this rule may make it vulnerable to a constitutional challenge on the basis of overbreadth.

58. See generally Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985).

59. See, e.g., *In re Gossage*, 99 Cal. Rptr. 2d 130 (2000) (convicted murderer with a subsequent pattern of traffic and parking convictions); *Radtke v. Board of Bar Examiners*, 601 N.W. 2d 500 (Wis. 1999); see also, *In re Converse*, 602 N.W.2d 500 (Neb. 1999) (pattern of harassing school officials); *In re Kapel*, 651 N.E.2d 955 (Ohio 1995) (repeated traffic violations and psychiatric treatment for impulse control problems); *In re Mustafa*, 631 A.2d 45 (D.C. App. 1993) (mishandling moot court funds); *In re Simmons*, 584 N.E.2d 1159 (Ohio 1992) (misappropriation of funds from student organization); *In re Charles M.*, 545 A.2d 7 (Md. 1988) (fraud, bad faith bankruptcy claim, and lying in a deposition as a lay witness); *In re Lubonovic*, 282 S.E.2d 298 (Ga. 1981) (commingling funds, failing to

nois lawyers are never disbarred for violating Rule 8.4(a)5, the character and fitness committee could still use Hale's prospective violation of the rule as a basis for excluding him from the bar. Numerous decisions have affirmed orders denying applications for admission where the applicant's conduct would not have warranted disbarment if committed by a licensed lawyer.⁶⁰

These decisions strike me as seriously flawed as a matter of regulatory policy for reasons admirably canvassed by Deborah Rhode in her 1984 article, *Moral Character as a Professional Credential*.⁶¹ They are not, however, incorrectly decided as a matter of constitutional law. Although the state could not criminalize the status of being an alcoholic,⁶² it may rely on evidence of this status to make a forward-looking judgment about the likelihood that an applicant to the bar will be unable to function as a lawyer, provided that there is a rational connection between the evidence presented and the applicant's fitness to practice law.⁶³ Similarly, the state could not attach criminal sanctions to speech that represents "mere abstract teaching" of the necessity of resorting to violence,⁶⁴ but the unconstitutionality of such a statute does not, by itself, establish that evidence of advocating racist violence is off limits as a basis for exclusion from the bar. This reasoning depends, however, on the constitutionality of the anti-discrimination rule, which is doubtful.

Making a number of crucial assumptions, the character and fit-

audit, and using company funds for extravagant purchases). Compare the Court's reasoning in one of the loyalty-oath cases that questions aimed at membership in subversive organizations are intended to "deny positions [of public trust] to persons supposed to be dangerous." *Konigsberg*, 366 U.S. at 54 (quoting *Speiser v. Randall*, 357 U.S. 513, 527).

60. See, e.g., *Unglaub v. Board of Law Examiners*, 979 S.W.2d 942 (Tex. App. 1998) (applicant with history of alcohol abuse, but four years sober in AA; also had fallen behind on student loan payments); *In re C.R.W.*, 481 S.E.2d 511 (Ga. 1997) (applicant defaulted on student loans and had filed two previous petitions for bankruptcy); *Frasher v. Board of Law Examiners*, 408 S.E.2d 675 (W. Va. 1991) (applicant had three DUI convictions and 24 speeding tickets); *Martin-Trigona v. Underwood*, 529 F.2d 33 (7th Cir. 1975) (denial for psychiatric evaluation of "moderately-severe character defect"); see also Rhode, *supra* note 58, at 546-50 (reviewing empirical evidence of bar admission and attorney-discipline cases).

61. See Rhode, *supra* note 58.

62. See *Robinson v. California*, 370 U.S. 660 (1962) (criminal punishment for narcotics addiction violates Eighth Amendment guarantee against cruel and unusual punishment).

63. This principle was established by the majority opinion by Justice Black in *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), and emphasized by Justice Frankfurter's concurrence, *id.* at 251.

64. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

ness committee is free to refuse to certify Hale for admission to the Illinois bar.⁶⁵ This conclusion is dependent upon establishing the following propositions: (a) the conduct engaged in by Hale which is purportedly prohibited by Rule 8.4(a)5 occurred in a context that would be germane to Hale's performance of his duties as a lawyer;⁶⁶ (b) the committee did not make illegitimate use of evidence of Hale's beliefs, as opposed to actions which evidence his inability to refrain from racial discrimination; and (c) the factual record supports the inferences drawn by the committee. Many of these assumptions may turn out to be unsupportable. For instance, the evidence of Hale's advocacy of white-supremacist causes may not support the inference that he will be unable to put aside his racist views and comply with Rule 8.4(a)5.⁶⁷ And several of the incidents of racism relied upon by the committee occurred in private settings, which prove nothing about Hale's ability to keep his beliefs in check and conform to professional rules that

65. The decision not to admit Hale may be justified on another ground — namely, Hale's failure to disclose on his bar application several arrests, disciplinary actions, and protective orders entered against him. See Bob Van Voris, *Muddying the Waters: Illinois Racist's Free Speech Case is Complicated by His Arrest Record*, NAT'L L.J., Feb. 21, 2000, at A1. Even though several of these incidents arose out of Hale's advocacy for white supremacy, which may be constitutionally protected as political speech, he was required to disclose them to the Illinois bar-admissions authorities. Failure to disclose anything in a bar application — even a minor traffic offense — is an extremely serious matter, and is frequently asserted as a factor in refusing admission to an applicant on character and fitness grounds. See, e.g., *In re Gossage*, 99 Cal. Rptr. 2d 130 (2000) (failure to disclose traffic and parking tickets as alternate ground for denying admission); Florida Bd. of Bar Examiners v. N.R.W., 674 So. 2d 729 (Fla. 1996); *In re Golia-Paladin*, 472 S.E.2d 878 (N.C. 1996); *In re Majorek*, 508 N.W.2d 275 (Neb. 1993); *In re DeBartolo*, 488 N.E.2d 947 (Ill. 1986). This ground for denial of admission isn't very interesting as a political statement about the moral character of lawyers, but it would have accomplished what the Illinois character and fitness committee intended, which was to keep Hale out of the bar. I am grateful to Bill Hodes for forcefully pointing out this facet of the Hale case in several postings on the LEGALETHICS listserve.

66. If the rule reached conduct not related to the representation of clients, it may be unconstitutionally overbroad. See *infra* notes 373 - 431, and accompanying text.

67. Fictionalized or factual descriptions of criminal activity are protected by the First Amendment, because there is generally some social value — political, educational, artistic, or entertainment — advanced by the work. It is therefore difficult to infer criminal intent from speech about criminal conduct, such as "gangsta" rap lyrics exalting the killing of police officers. See Malloy & Krotoszynski, *supra* note 26, at 1237-38. (Certainly no one believes that humorist Bill Bryson really intends to shoot government bureaucrats, although he plainly stated as much in an essay about his wife's treatment at the hands of immigration officials. See Bill Bryson, *Drowning in Red Tape*, in I'M A STRANGER HERE MYSELF: NOTES ON RETURNING TO AMERICA AFTER TWENTY YEARS AWAY 196 (1999).) Analogously, the factual record, including Hale's website and well-publicized racist beliefs, may be insufficient to support the conclusion that Hale has the intent to violate generally applicable law or state bar disciplinary rules as a lawyer.

prohibit discrimination by lawyers in their professional capacities.⁶⁸

It bears emphasizing, too, that refusing admission to Hale would be a bad decision for reasons relating not to the constitution, but to the ethical duties of lawyers. “Abolitionists, civil rights activists, suffragists, and labor organizers — indeed, the architects of our constitutional framework — all were guilty of ‘disrespect for law’ in precisely the same sense that bar examiners employ it.”⁶⁹ Anti-death penalty activists may be accused of exhibiting disrespect for the law in the same way. (In fact, Justice Scalia has leveled just such a charge, decrying the “guerilla war” tactics of defense lawyers who seek to delay their clients’ executions by all legally available means.⁷⁰) Challenging conventional wisdom about the state of the law is a noble aspect of the lawyer’s role.⁷¹ It does not matter that Hale takes issue with a legal principle that most people consider fundamental. Racial segregation and the juridical inequality of women were deemed orthodox moral principles at one time. Of course, the natural response is, “we’re right and they were wrong,” but it is precisely the function of lawyers occasionally to shake up our most cherished beliefs about right and wrong.

There is no doubt that Hale’s views will not prevail in the marketplace of ideas, and for that we should all be grateful, but it does

68. Courts are frequently willing to discipline lawyers for activities unrelated to the practice of law, generally under state versions of Model Rule 8.4, which prohibits, *inter alia*, committing a criminal act that reflects adversely on the lawyer’s fitness to practice law and engaging in conduct prejudicial to the administration of justice. *See, e.g., In re Ketter*, 992 P.2d 205 (Kan. 1999) (lawyer with pattern of exposing himself to women and masturbating in public); *In re McEnaney*, 718 A.2d 920 (R.I. 1998) (possession of crack cocaine and marijuana); *In re Ring*, 692 N.E.2d 35 (Mass. 1998) (lawyer transferred assets to avoid wife’s claim in divorce case); *In re Shinnick*, 552 N.W.2d 212 (Minn. 1996) (lawyer involved in fraudulent corporate transactions in his personal capacity, not in the course of representing clients); *In re Haecker*, 664 N.E.2d 1176 (Ind. 1996) (lawyer charged with voyeurism for drilling holes in wall to view neighbor’s bathroom and bedroom). Where the conduct at issue would be protected expression if engaged in by a private citizen, however, courts ought to be scrupulous in requiring the government to show a connection with the lawyer’s professional activities. *See infra* notes 384 - 431, and accompanying text, on the overbreadth doctrine, and *infra* notes 279 - 288, and accompanying text, on narrow tailoring.

69. Rhode, *supra* note 58, at 570.

70. *See Simmons v. South Carolina*, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting).

71. Numerous Supreme Court decisions emphasize the role of the First Amendment in protecting dissenters and challengers to state-imposed orthodoxies. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating state law requiring creationism to be taught in secondary schools); *Wooley v. Maynard*, 430 U.S. 705 (1977) (protesting motorists had a right not to display “Live Free or Die” on New Hampshire license plates); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (Jehovah’s Witness children could not be compelled to recite Pledge of Allegiance in school).

not follow that his advocacy of white supremacy ought to lead automatically to his exclusion from the bar. Perhaps it is important, as Lee Bollinger has argued, to discipline ourselves as a society to tolerate odious characters, in order to acquire virtues that are necessary in a democratic polity.⁷² One might also argue, from a legal-process standpoint, that lawyers are not supposed to represent truth and virtue, but *clients*, who may be right or wrong about moral issues.⁷³ Barring a white-supremacist lawyer on the basis of his odious beliefs risks establishing a principle that a lawyer may be denied admission for espousing a viewpoint at odds with the mores of the time. Certainly if the basis for exclusion is Hale's advocacy of a principle that is at odds with then-prevailing law, it is hard to see why this principle cannot be extended to deny admission to lawyers who believe in the unconstitutionality of the death penalty, the immorality of sodomy statutes, or the wrongness of *Roe v. Wade*.⁷⁴

Finally, adopting the classic civil-libertarian defense of freedom of speech, one might argue that Hale's advocacy of white supremacy may have the incidental benefit of strengthening the legal protection of speech for all marginalized members of society.⁷⁵ The ACLU, for example, takes the consequentialist (and controversial) position that the protection of odious speech is justified because it establishes legal principles that can be relied upon by civil rights activists in future cases.⁷⁶ The application of these familiar arguments to the expressive rights of lawyers is the subject of Part IV of this article.

72. See LEE BOLLINGER, *THE TOLERANT SOCIETY* (1986); Lee Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979 (1990).

73. Cf. *United States v. Virginia*, 518 U.S. 515, 566-67 (1996) (Scalia, J., dissenting) (political process should respect moral choices made by citizens).

74. See HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 563 (Jamie Kalven ed. 1988).

75. A black civil-rights lawyer in Texas gave this reason for his decision to represent the Grand Dragon of the Texas Ku Klux Klan in a dispute over whether the Klan would be allowed to participate in a state highway "adoption" program. See David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995). See also ARYEH NEIER, *supra* note 47.

76. See SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 166 (1994); cf. Harry Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 432 (1967) ("Freedom of speech is indivisible; unless we protect it for all, we will have it for none.").

B. “Drunk on the Bench, Ignorant, Dishonest, and a Bully”: Criticism of Participants in Litigation

1. *Lawyers vs. Judges*

A number of freedom-of-speech decisions arise from situations in which lawyers attack judges, often for tactical reasons. Many lawyers seem to have a proclivity for asserting that judges are involved in a conspiracy with their adversary,⁷⁷ or that judges who issue adverse rulings are motivated by some pernicious bias against one side of the dispute.⁷⁸ For instance, a lawyer defending his client, who was alleged to be a “militant radical” black woman, stated in a newspaper interview that he did not believe that the trial judge had “the judicial temperament or the racial sensitivity to sit as an impartial judge” over the criminal trial for the murder of a state trooper.⁷⁹ The lawyer also referred to the proceedings as a “travesty,” a “kangaroo court,” and a “legalized lynching.”⁸⁰ Sometimes these accusations of prejudice take the form of a claim that the judge is on the take.⁸¹ In other cases, the alleged partiality has racial or religious roots.⁸² In one of the more

77. See, e.g., *In re Ronwin*, 680 P.2d 107 (Ariz. 1983); *Cerf v. State*, 458 So.2d 1071 (Fla. 1984); *In re Terry*, 394 N.E.2d 94 (Ind. 1979); *Committee on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Horack*, 292 N.W.2d 129 (Iowa 1980); *In re Graham*, 453 N.W.2d 313 (Minn. 1990); *Bar Ass'n v. Carlin*, 423 N.E.2d 477 (Ohio 1981); *In re Waldo*, 429 N.W.2d 77 (Wis. 1988).

78. See, e.g., *United States v. Cooper*, 872 F.2d 1 (1st Cir. 1989); *Maier v. Orr*, 758 F.2d 1578 (Fed. Cir. 1985); *Alexander v. Sharpe*, 245 A.2d 279 (Me. 1968); *Idaho State Bar v. Topp*, 925 P.2d 1113 (Idaho 1996); *In re Riley*, 691 P.2d 695, 704 (Ariz. 1984) (“[t]he state simply doesn’t get a fair trial in his court”); *Ramirez v. State Bar*, 619 P.2d 399, 401 (Cal. 1980) (accusing judge of maintaining “invidious alliance” with opposing party).

79. *In re Hinds*, 449 A.2d 483, 487 (N.J. 1982).

80. *Id.*

81. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 66 (1964) (district attorney referring to “racketeer influences” on judges); *In re Palmisano*, 70 F.3d 483, 485-86 (7th Cir. 1995) (lawyer characterizing virtually every judge before whom he appeared as a “crook”); *In re Grimes*, 364 F.2d 654 (10th Cir. 1966); *In re Shearin*, 721 A.2d 157 (Del. 1998); *In re Becker*, 620 N.E.2d 691 (Ind. 1993); *In re Kavanagh*, 597 N.Y.S.2d 24 (App. Div. 1993); *In re Westfall*, 808 S.W.2d 829 (Mo. 1991); *In re Belue*, 766 P.2d 206 (Mont. 1988); *Carter v. Muka*, 502 A.2d 327 (R.I. 1985); *In re Lacey*, 283 N.W.2d 250, 251 (S.D. 1979) (“[t]he state courts were . . . sometimes downright crooked”).

82. See, e.g., *In re Green*, 11 P.3d 1078, 1089 (Colo. 2000) (reversing discipline against lawyer who had written several letters to trial judge, calling him a racist and demanding he recuse himself from proceedings); *Standing Comm. v. Yagman*, 55 F.3d 1430, 1434 (9th Cir. 1995) (accusing district judge of anti-Semitism); *In re Kelly*, 808 F.2d 549, 550 (7th Cir. 1986) (attorney suggesting judge would be biased in favor of Marquette University because lawyer falsely believed that the judge had spoken against abortion); *In re Evans*, 801 F.2d 703, 704 (4th Cir. 1986) (accusing magistrate judge of either incompetence or “Jewish bias in favor of the Kaplan firm”); *In re Larvadian*, 664 So.2d 395 (La. 1995) (calling judge

unusual allegations of judicial bias, a lawyer accused the judge of being in love with one of the parties.⁸³ Frequently, eloquence escapes lawyers, and the best they can do is call a judge an “asshole,”⁸⁴ “the biggest fool I’ve ever seen,”⁸⁵ “a disgrace to the bench,”⁸⁶ “puppets and professional stooges,”⁸⁷ and “either incapable of recalling significant facts or an unmitigated liar.”⁸⁸ The prize for insulting creativity probably belongs to the lawyer in *Louisiana Bar Association v. Karst*,⁸⁹ who had accused a judge of corruption. When asked at a deposition whether he had any evidence for this charge, the lawyer replied, “I can’t say that I know for a fact that [opposing counsel] is paying the drug bills of Judge Humphries wife”⁹⁰

Whether these protests are in good taste or not is not the issue. The constitutional question is whether these lawyers’ comments are protected expression under the First Amendment. Consider two appellate decisions written by Judge Easterbrook of the Seventh Circuit and Judge Kozinski of the Ninth Circuit that were issued within six months of each other.⁹¹ Lawyers had been disciplined for making intemperate comments about judges in both cases. Although each lawyer invoked the First Amendment as a defense, the courts’ results and reasoning were diametrically opposed to one another. In *Palmisano*, Judge Easterbrook concluded that the district court did not abuse its discretion by disbaring an obnoxious lawyer who made repeated verbal attacks against state court judges.⁹² Judge Kozinski reached precisely the opposite result in *Yagman*. He reasoned that the district court erred in sanctioning the lawyer because the attorney’s comments did not pose a clear and present danger to the functioning of

a racist); State ex rel. Okla. Bar Ass’n v. Porter, 766 P.2d 958 (Okla. 1988) (same).

83. See *In re Golub*, 597 N.Y.S.2d 370 (App. Div. 1983).

84. See *Lebbos v. State Bar*, 806 P.2d 317, 321 (Cal. 1991).

85. *In re Friedland*, 376 N.E.2d 1126, 1128 (Ind. 1978).

86. *Kunstler v. Gilligan*, 571 N.Y.S.2d 930 (App. Div.), *aff’d mem.*, 587 N.E.2d 286, 579 N.Y.S.2d (N.Y. 1991).

87. State of Nebraska ex rel. Neb. State Bar Ass’n v. Michaelis, 316 N.W.2d 46, 50 (Neb. 1982).

88. *Greene v. Va. State Bar Ass’n*, 411 F. Supp. 512 (E.D. Va. 1976); see also *Bar Ass’n v. Carlin*, 423 N.E.2d 477, 478 n.3 (Ohio 1981) (“Let the record reflect that the Judge is an unmitigated liar, unmitigated, unequivocal liar.”) The lawyer in *Carlin* inexplicably failed to add “pants on fire.”

89. 428 So.2d 406 (La. 1983).

90. *Id.* at 410.

91. See *Palmisano*, 70 F.3d at 483; *Standing Comm. v. Yagman*, 55 F.3d 1430 (9th Cir. 1995).

92. See *Palmisano*, 70 F.3d at 487-88.

the courts.⁹³

What caused two of the most capable judges on the federal bench to reach such different conclusions? One's instinct is that the cases must be factually distinguishable, but in fact, they are remarkably similar. Yagman publicly accused a United States District Judge of anti-Semitism, saying that Judge Keller "has a penchant for sanctioning Jewish lawyers."⁹⁴ He also said that Judge Keller was "drunk on the bench," "ignorant, dishonest, ill-tempered, and a bully."⁹⁵ This barrage was not without design. Yagman admitted that he intended the publicity to cause Judge Keller to recuse himself from future cases involving Yagman, which Yagman believed would benefit his clients. When he and another lawyer discussed the press coverage of his dispute with Judge Keller, "[l]ook, there are certain judges I want to be in front of for my Civil Rights cases who are favorable to my view. And I'd like to recuse out the ones who are extremely unfavorable."⁹⁶ The lawyer who heard Yagman's comment reported him to the bar association.

Palmisano's remarks were similar in context, although they omitted the allegations of religious bias, "I believe [Justices Unverzagt, Inglis, and Dunn] are dishonest";⁹⁷ "Judge Frank Siracusa is a crooked judge, who fills the pockets of his buddies";⁹⁸ "I believe and state that most of the cases in Illinois in my experience are fixed, not with the passing of money, but on personal relations, social status, and judicial preference."⁹⁹ Palmisano's broadside was apparently devoid of any

93. See *Yagman*, 55 F.3d at 1445. For additional discussion of the "clear and present danger" standard, see the analysis of contempt of court sanctions, *infra* notes 219 - 263, and accompanying text.

94. *Yagman*, 55 F.3d at 1434.

95. *Id.* at 1434 & n.4. The full text of this diatribe is remarkable, and warrants quoting at length:

It is an understatement to characterize the Judge as "the worst judge in the central district." It would be fairer to say that he is ignorant, dishonest, ill-tempered, and a bully, and probably is one of the worst judges in the United States. If television cameras ever were permitted in his courtroom, the other federal judges in the Country would be so embarrassed by this buffoon that they would run for cover. One might believe that some of the reason for this sub-standard human is the recent acrimonious divorce through which he recently went: but talking to attorneys who knew him years ago indicates that, if anything, he has mellowed.

Id.

96. *Standing Comm. v. Yagman*, 856 F. Supp. 1384, 1387 (C.D. Cal. 1994) (per curiam opinion of three-judge panel).

97. *Palmisano*, 70 F.3d at 486.

98. *Id.* at 485.

99. *Id.* at 485-86.

tactical significance, i.e., the lawyer was not seeking to recuse these judges in a future lawsuit.

In fact, the results in these two cases diverge because of the theoretical frameworks adopted by the judges as the starting point for their analysis of attorney speech. Judge Easterbrook, who had the benefit of the publication of the Ninth Circuit's opinion in *Yagman*, succinctly identified the point of his disagreement with the earlier case:

Courts therefore may require attorneys to speak with greater care and civility than is the norm in political campaigns. . . . [T]he Constitution does not give attorneys the same freedom as participants in political debate. To the extent *Standing Committee v. Yagman*, 55 F.3d 1430 (9th Cir. 1995), may hold that attorneys are entitled to excoriate judges in the same way, and with the same lack of investigation, as persons may attack political officeholders, it is inconsistent with *Gentile [v. State Bar of Nevada]*, 501 U.S. 1030 (1991)] and our own precedents¹⁰⁰

The reference to the norm of political campaigns is significant because political speech is presumptively entitled to the highest degree of constitutional protection.¹⁰¹ Judge Easterbrook's comments show that he considered Palmisano's comments to be outside of political discourse. Judge Kozinski, by contrast, analyzed Yagman's diatribe as if it had been part of a public political debate, bringing to bear the full panoply of constitutional safeguards that apply to journalists reporting on public figures: "Attorneys who make statements impugning the integrity of a judge are, however, entitled to other First Amendment protections applicable in the defamation context."¹⁰² The different outcomes in these cases can be traced to a disagreement over the nature of the practices engaged in by the two lawyers, Yag-

100. *Palmisano*, 70 F.3d at 487 (added brackets and underlines as found in the original text).

101. See, e.g., *Gentile*, 501 U.S. at 1034 (opinion of Kennedy, J.) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment"); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (speech on matters of public concern occupies the "highest rung of the hierarchy [sic] of First Amendment values, and is entitled to special protection"). Erwin Chemerinsky argues that speech by attorneys regarding pending court cases must fall within this protected core of political speech, subject to the most stringent constitutional protection (he advocates the *Sullivan* malice standard). See Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998).

102. *Yagman*, 55 F.3d at 1438. The sanctions decision was treated as a political-speech case on appeal, with amicus briefs filed by the American Jewish Congress, the National Lawyers Guild, and a number of civil libertarian law professors. See Caprice L. Roberts, Note, *Standing Committee on Discipline v. Yagman: Missing the Point of Ethical Restrictions on Attorney Criticism of the Judiciary*, 54 WASH. & LEE L. REV. 817, 825 n.42 (1997).

man and Palmisano. Judge Kozinski treated Yagman like a soapbox orator in Hyde Park, while Judge Easterbrook recognized that litigation is something different. Judge Easterbrook viewed litigation as an institution that is not necessarily a free-fire zone for all speech.

Neither Judge Easterbrook in *Palmisano* nor Judge Kozinski in *Yagman* paid sufficient attention to a landmark precedent on lawyer speech, the Supreme Court's decision in *In re Sawyer*¹⁰³ (although Judge Kozinski's opinion was of a similar tenor). The lawyer in *Sawyer* served as defense counsel in a Hawaiian trial of several union officers and members who were indicted for violating the Smith Act.¹⁰⁴ She made a speech at a meeting arranged by the union in a village far from Honolulu while the trial was pending. The speech, which was reported in Honolulu newspapers, strongly criticized the government's manner of prosecuting Smith Act cases. The speech survived in the form of reporter's notes who attended the meeting. The notes were reprinted by Justice Brennan as an appendix to his opinion. I excerpt the speech at length here, because the lawyer's exact words are important to the constitutional analysis of the discipline against her:

[S]ome rather shocking and horrible things . . . go on at the trial [M]en in power are trying to put men in jail because of their thoughts and books written before [they] were born. One of the reasons Jack Hall is on trial is because it is said he once got a book, the Communist Manifesto, written in 1898, before Jack Hall was a gleam in his father's eye [The] government has never [charged] conspiracy when it had a case. When it hasn't got enough evidence it lumps a number together and says they agreed to do something. The government does not say advocated overthrow but says they agreed to. Conspiracy means to charge a lot of people for agreeing to do something you have never done It's enough to say a person is a communist to cook his goose So Jack Hall violated the Smith Act because he saw a duffle bag with some books on overthrowing the government in it. It's silly. Why does the government use your money and mine to put people in jail for thoughts? . . . There's no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the government can't make a case There's no fair trial in the case. They just make up

103. 360 U.S. 622 (1959).

104. The Smith Act, 18 U.S.C. § 371, *et seq.*, made unlawful the advocacy or teaching of the duty, necessity, desirability, or propriety of overthrowing the United States government by force. *See Yates v. United States*, 354 U.S. 298, 318-19 (1957); *Dennis v. United States*, 341 U.S. 494, 502 (1951). Smith Act prosecutions were generally aimed at members and organizers of the Communist Party. *See, e.g., Dennis*, 341 U.S. at 497.

the rules as they go along Unless we stop the Smith Act in its tracks here there will be a new crime. People will be charged with knowing what is included in books, ideas.¹⁰⁵

The Hawaii Supreme Court suspended the lawyer for a year for giving this address, determining that the speech impugned the integrity of the trial judge and tended to create disrespect for the courts and judicial officers in general.¹⁰⁶ Notably, the only language in the entire oration that could be interpreted as an attack on the trial judge was the lawyer's contention that there can be "no fair trial" in a Smith Act case and that some unspecified "they" act arbitrarily by "mak[ing] up the rules as they go along." The U.S. Supreme Court decided the case on a narrow nonconstitutional issue — whether the record could support the Hawaii court's finding that the lawyer's speech impugned the trial judge's impartiality and fairness. Although a majority of the justices agreed that it did not, the Court did not agree on how the constitutionality of restrictions on attorney speech should be evaluated. However, the plurality, concurring, and dissenting opinions set forth the constitutional arguments that continue even today to inform free speech jurisprudence in this context.

Justice Brennan, writing for the plurality, declined to reach the question whether the Court's contempt-of-court precedents, which had been briefed extensively, were applicable.¹⁰⁷ However, his opinion did sketch out a constitutional approach to the regulation of speech by attorneys. One of Justice Brennan's principles must form the bedrock of any analysis of lawyer speech — "lawyers are free to criticize the state of the law."¹⁰⁸ Consistent with this axiom, criticism of the law cannot be equated with an attack on the integrity of the judges who enforce legal rules and preside at trials.¹⁰⁹ Thus, a lawyer who vehemently argues that the Smith Act is a perversion which subverts freedom of thought may not be disciplined for impugning the integrity of judges who merely conduct trials under the Smith Act. "To say that 'the law is an ass, an idiot' is not to impugn the character of those who must administer it."¹¹⁰ Furthermore, attribution of honest

105. *Sawyer*, 360 U.S. at 641-45 (some capitalization and punctuation altered for readability).

106. *See id.* at 626.

107. *See id.* at 626-27, citing *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947). These cases are discussed in more detail in Section II. C, *infra*.

108. *Sawyer*, 360 U.S. at 631.

109. *See id.* at 631-32.

110. *Id.* at 634.

error to judges does not impute disgrace — after all, appellate courts and academic commentators accuse judges of error on a daily basis, and “[d]issenting opinions . . . are apt to make petitioner’s speech look like tame stuff indeed.”¹¹¹ The lawyer only criticized the law and the judge’s application of it. Therefore, Justice Brennan argued that the Hawaii Supreme Court erred by disciplining her for her statements, although his opinion left open the possibility that discipline would have been appropriate if the lawyer actually had made an “improper” attack on the trial judge’s administration of justice.¹¹²

Significantly, Justice Brennan’s approach was followed by one of the few recent Supreme Court cases involving lawyers’ speech that was critical of the courts, *In re Snyder*.¹¹³ In that case the Court *unanimously* reversed an order suspending a lawyer from practice after he had written a letter criticizing the scanty payments approved in the Eighth Circuit for lawyers defending indigent clients. Although the Chief Judge of the Eighth Circuit found the letter “totally disrespectful to the federal courts,” the Supreme Court said that lawyers may appropriately express criticism of the courts, and should not be found in contempt for doing so in a forceful manner.¹¹⁴ Thus, Justice Brennan’s comment that a lawyer can say, “the law is an ass, an idiot,” without being taken to have committed contempt of court, is still a valid principle of First Amendment law for lawyers.

Returning to *Sawyer*, Justice Stewart concurred rather reluctantly in the Court’s judgment, on the ground that the lawyer was not charged with attempting to prejudice the administration of justice by

111. *Id.* at 635. The passage of time has shown how apt Justice Brennan’s observation was. Justice Scalia has become well known for the sometimes vitriolic rhetoric of his dissents. For example, he said that certain parts of one of Justice O’Connor’s opinions “cannot be taken seriously” or are “irrational.” See *Webster v. Doe*, 486 U.S. 592, 607 (1988) (Scalia, J., dissenting). See also *Romer v. Evans*, 517, U.S. 620, 638 (1996) (Scalia, J., dissenting), in which he expressed his disgust with Justice Kennedy’s reasoning by harrumphing, “[O]ur constitutional jurisprudence has achieved terminal silliness.” Justice Scalia also broke with the traditional practice of “respectfully” dissenting, in favor of the terse “I [disrespectfully] dissent.” Judge Kozinski who, in the *Yagman* case, was very protective of lawyers’ colorful language, has unleashed some zingers of his own. See, e.g., *United States v. Ramirez*, 91 F.3d 1297, 1306 (9th Cir. 1996) (criticizing majority’s “high-fallutin’ rhetoric” and calling decision “smug” and “bad law on its own terms”); *Gamboia v. Rubin*, 80 F.3d 1338, 1353 (9th Cir. 1996) (“[B]ecause the majority’s rationale for striking down the regulation is so plainly wrong and dangerous, I proceed to address the most obvious flaws in its analysis”). Cf. Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. L. REV. 583 (1994).

112. See *Sawyer*, 360 U.S. at 636.

113. 472 U.S. 638 (1985).

114. *Id.* at 646-47.

interfering with a fair trial.¹¹⁵ However, he made very clear that he did not join in any part of Justice Brennan's opinion which suggests, "a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct"¹¹⁶

Justice Stewart argued that professional norms may require a lawyer to abstain from what would otherwise be constitutionally protected speech, citing as an analogy the proposition that a physician could not claim First Amendment protection for broadcasting confidential patient information.¹¹⁷ The implicit constitutional argument is that the professional is not being compelled by "even-handed discipline" to surrender an expressive right, because the ethical rules of the profession prohibit the expression. As this formulation of the argument shows, the analogy offered by Justice Stewart holds only if it is clear that the lawyer's comments were, in fact, unethical. Establishing this premise is the hardest step in Justice Stewart's argument, for it requires grappling with the nature of the lawyer's role. Is it never proper for a lawyer to excoriate a judge's decision?

Silencing lawyers' criticism of the law and those who administer it interferes with the long-established "rebellious" dimension of the lawyer's social function. Lawyers are supposed to give voice to dissenters, outsiders, and unpopular clients and challenge the exercise of state power. The more difficult analogy for Justice Stewart to consider would not be a physician who discloses confidential information, but one who publicly criticizes the capitation rules imposed by an HMO. In the latter case, the doctor would claim to be vindicating an underlying principle of professional ethics, namely, the duty to advocate for the patient's health.¹¹⁸

Similarly, the lawyer in *Sawyer* is appealing to a traditional function of the legal profession in society to justify her conduct. As I hope to show in this article, particularly in Parts IV and V, the First Amendment and the lawyer's traditional role of defending dissidents, outcasts, and political minorities combine to create a sphere of protected speech, except in narrowly circumscribed areas, such as speech that is directly connected with a pending judicial proceeding. Thus,

115. See *Sawyer*, 360 U.S. at 646-47 (Stewart, J., concurring).

116. *Id.* at 646.

117. See *id.* at 647.

118. For an interesting exploration of this dimension of the doctor's role, see William M. Sage, *Physicians as Advocates*, 35 HOUS. L. REV. 1529 (1999).

Justice Stewart's dictum should not be taken as a justification for restricting the speech of lawyers to a greater extent than would be permissible for ordinary citizens.

Justice Frankfurter, joined by three others, dissented in *Sawyer*.¹¹⁹ First, he challenged Justice Brennan's conclusion that the speech was mere abstract criticism of the law, characterizing it instead as "a plainly conveyed attack on the conduct of a particular trial, presided over by a particular judge, involving particular defendants in whose defense Mrs. Sawyer herself was professionally engaged."¹²⁰ Second, and more importantly, Justice Frankfurter proposed an entirely different constitutional analysis of lawyers' speech. Justice Frankfurter would have found it unprotected for reasons that are difficult to pin down, while Justice Brennan strongly intimated that the speech would be protected even if it were critical of the trial judge.

Initially, it appears that he supports reasonable content-neutral regulations on lawyers' language: "Time, place and circumstances determine the constitutional protection of the utterance."¹²¹ Later on, he seems to suggest a version of the right/privilege distinction:¹²² "An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense."¹²³ However, the qualification "actively engaged in the conduct of a trial," shows that Justice Frankfurter's view is subtler than the ordinary right/privilege doctrine.

The traditional right/privilege doctrine states that one may have a constitutional right to speak, but no right to a government license or benefit. Instead, Justice Frankfurter cautions that:

[T]he *particular* conduct in which this petitioner engaged . . . cannot be disposed of by general observations about freedom of speech What we are concerned with is the *specific* conduct, as revealed by this record, of a *particular* lawyer, and not whether like findings applied to an abstract situation relating to an abstract lawyer would support a suspension."¹²⁴

In other words, Justice Frankfurter suggests that the forum in

119. 360 U.S. at 647 (Frankfurter, J., dissenting).

120. *Id.* at 652.

121. *Id.* at 666.

122. *See supra* notes 311 – 349 and accompanying text.

123. *See Sawyer*, 360 U.S. at 668.

124. *Id.* at 666-68 (emphasis added).

which the lawyer spoke was closely enough related to the business of resolving disputes that it should not be deemed an open forum for expressive activities; the government ought to be permitted to enforce reasonable restrictions on speech in venues that it establishes for a particular purpose, such as trials and court filings.¹²⁵

The problem with Justice Frankfurter's argument, though, is the nature of the forum. The lawyer did not make her allegations in a filed brief or a closing argument. Instead, she attended a public meeting where the conduct of the government in Smith Act trials was discussed. It is simply not true that the lawyer's speech occurred in a non-public forum — it was in the quintessential public forum, far removed from the actual work of courts, and should have been entitled to heightened constitutional protection.

2. *Judicial Independence*

A firestorm of criticism erupted in 1996 when United States District Judge Harold Baer, Jr., granted a motion to suppress a large quantity of drugs that were seized in an investigative stop.¹²⁶ Judge Baer initially reasoned that the suspects' flight from police was natural, considering the history of police abuse directed at people of color.¹²⁷ This ruling provoked outrage. Speaker of the House Newt Gingrich, in a burst of hyperbole remarkable even for him, characterized Judge Baer's decision as "the perfect reason why we are losing our civilization."¹²⁸ Senator Bob Dole, in the midst of a presidential campaign, called for Judge Baer's impeachment.¹²⁹ President Clinton, who had appointed Judge Baer, sensed a political disaster in the offing and pressured Baer to reconsider his decision,¹³⁰ which he did

125. This interpretation is the only way to harmonize Justice Frankfurter's opinion in *Sawyer* with his statement in *Bridges* that "[j]udges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. . . . [J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt." *Bridges v. California*, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting). Presumably Frankfurter would apply this principle to everyone but lawyers who, ironically, are in a better position than other actors to uncover reasons for criticizing judges.

126. See *United States v. Bayless*, 913 F. Supp. 232, *vacated on recons.*, 921 F. Supp. 211 (S.D.N.Y. 1996).

127. See *Bayless*, 913 F. Supp. at 239-40.

128. Louis H. Pollack, *Criticizing Judges*, 70 JUDICATURE 299, 300 (May-June 1996).

129. See *id.*

130. See Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1.

eventually. Perhaps the public outcry was nothing more than predictable election-year bluster and a calculated appeal to the “law and order” vote, but many perceived the attacks on Judge Baer as a threat to judicial independence. The Baer imbroglio was strongly reminiscent of attacks on other judges, which was based on ideological opposition to his decision, such as the movement to impeach Earl Warren,¹³¹ the removal of Rose Bird from the California Supreme Court, and Roosevelt’s court-packing plan during the battle over the New Deal.¹³² As such, it became the occasion for another outpouring of scholarly commentary on judicial independence.¹³³

The value of judicial independence is not easy to define; as Stephen Burbank reminds us, independence is the flip side of judicial accountability, another value of obvious significance in a democracy.¹³⁴ At a minimum, though, independence means that no judge should be removed from office or otherwise punished, through formal or informal means, for the content of her decision.¹³⁵ “Punishment” can mean direct political sanctioning mechanisms such as impeachment, or indi-

131. See BERNARD SCHWARTZ, *SUPERCHIEF: EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY*, 280-81 (1983).

132. See William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s Court-Packing Plan*, 1966 SUP. CT. REV. 347.

133. For some of the most significant contributions to this sizeable body of literature, see Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 YALE L.J. 2155 (1998); Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156 (Jan.-Feb. 1997); Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amidst Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 NYU L. REV. 308 (1997); Monroe H. Freedman, *The Threat of Judicial Independence by Criticism of Judges — A Proposed Solution to a Real Problem*, 25 HOFSTRA L. REV. 729 (1997); Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS L.J. 989 (1996); Stephen P. Croly, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995); Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J. L. & ECON. 875 (1975).

134. See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315 (1999). For this reason, courts should give heightened protection to critical speech that reaches an audience beyond the parties to a case, the lawyers, and the judge. Although the result in *In re Green*, 11 P.3d 1078 (Colo. 2000), is correct, it is worth noting that the court’s reasoning gets this important point backwards. The lawyer in that case, in a series of letters written directly to the judge, called the judge a racist. The court said that the private nature of the speech presented a less serious threat to the administration of justice than public comments in analogous attorney-discipline cases. See *id.* at 1086-87. Ironically, however, the private nature of the comments makes them *less* significant from a First Amendment point of view. To the extent that the constitutional free-speech guarantee is intended to enable robust criticism of public officials, private speech should be entitled to somewhat less protection.

135. See Burbank, *supra* note 134.

rect means of control such as court-packing, contracting the jurisdiction of the court (particularly federal courts, and recently with respect to habeas corpus jurisdiction¹³⁶), and executive defiance of court orders, such as the “massive resistance” to court-ordered school desegregation in the South in the 1950s and 60s.¹³⁷ But what about vehement criticism by politicians and commentators? Is it a threat to judicial independence?

Judicial independence is necessary to safeguard the rule of law so that certain rights possessed by individuals are not subject to abridgement by democratic majorities. For this reason, courts and individual judges must enjoy some freedom from the kind of ordinary democratic-process constraints that affect legislators and executive-branch officials. At the same time, however, the location of the judiciary within a democratic political order counsels against processes of mystification, by which the workings of the court system are obscured from public view and criticism. Courts must be perceived to follow the law — otherwise, lacking an army and the power of taxation, they are ineffectual, the “least dangerous branch” in Alexander Hamilton’s famous phrase.¹³⁸ Ironically, though, the perception that judges are bound by the law is not necessarily furthered by suppressing speech critical of judges. It is too easy for judges and commentators to conclude from the importance of the rule of law that restrictions on the speech of critics is necessary to secure respect for courts.¹³⁹ Courts, too, tend to be maddeningly conclusory in their arguments when it comes to lawyers’ criticism of judges; frequently they simply state that the speech at issue would tend to diminish public confidence in the judiciary if left unchecked.¹⁴⁰

In this regard, it is instructive to compare the reasoning of courts in attorney-criticism cases with that in analogous First Amendment cases, such as those involving university hate speech codes. In the lat-

136. See, e.g., Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1217, 18 U.S.C.A. § 1 (1996); James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998).

137. See Burbank, *supra* note 134, at 324.

138. See Alexander Hamilton, *Federalist No. 78*, in THE FEDERALIST PAPERS 465 (Clinton Rossiter, ed., 1961).

139. See, e.g., Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703 (1997).

140. See, e.g., Iowa State Bar Ass’n v. Horak, 292 N.W.2d 129, 130 (Iowa 1980); Kentucky Bar Ass’n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980); *In re Lacey*, 283 N.W.2d 250, 251-52 (S.D. 1979); *In re Raggio*, 487 P.2d 499, 500 (Nev. 1971).

ter decisions, courts were extremely skeptical of the universities' proffered justifications for regulating speech, such as the interest in maintaining an environment of acceptance and inclusion, in which women, students of color, and students belonging to sexual minority groups could participate without intimidation.¹⁴¹ The courts acknowledged that inclusiveness and diversity were valid educational goals, but concluded that the free speech interests asserted by the challengers were constitutionally more significant. Analogies can be multiplied — the goals of campaign-finance reform,¹⁴² protecting children from Internet pornography,¹⁴³ and even maintaining military security¹⁴⁴ have been forced to yield to the interests of speakers and audiences. In none of these cases was the Court willing to accept that the government's asserted justification passed strict-scrutiny review. (Although not pertaining to a First Amendment case, one might observe that the Court also explicitly rejected the exhaustively compiled Congressional record showing the effect on interstate commerce of violence against women.¹⁴⁵) Yet when speech amounts to judicial *lèse majesté*, courts abandon their customary skepticism toward the government's proffered justification.

It is certainly true that the public is woefully uninformed about the process of judging, and is frequently swayed by single-issue campaigns against particular judges.¹⁴⁶ But at the risk of repeating a First Amendment cliché, the remedy for this ignorance is more speech, not suppression of wrongheaded criticism of judges.¹⁴⁷ It would be won-

141. See *UWM Post, Inc. v. Board of Regents of Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Dambrot v. Central Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993); *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

142. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

143. See *Reno v. ACLU*, 521 U.S. 844 (1997).

144. See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

145. See *United States v. Morrison*, 529 U.S. 598 (2000).

146. See *Burbank*, *supra* note 134, at 317.

147. "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions [J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt." *Bridges v. California*, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting). Judges complain, however, that they are forced to endure this criticism in silence. Judicial speech is fairly tightly circumscribed by state codes of judicial conduct, many based on the ABA's *Model Code of Judicial Conduct*. Provisions of the ABA Code prohibit judges from making statements that undermine public confidence in the integrity and impartiality of the judiciary, see § 2(A), acting in an impatient or discourteous manner toward lawyers and litigants, see § 3(B)(4), manifesting bias or prejudice, through words or conduct, see § 3(B)(5), or commenting publicly on a pending proceeding, see § 3(B)(9). The public-comment proscription has therefore recently

derful if all criticism of courts was “responsible,” in the sense of being backed up by a careful study of the relevant decision and the legal background.¹⁴⁸ A robust requirement of responsible criticism, however, would conflict with First Amendment doctrine in other contexts, such as the highly speech-protective *Sullivan* malice standard, which requires a public-figure defamation plaintiff to show either knowledge of falsity or reckless disregard for possible falsity of the statements at issue.¹⁴⁹ Granted, criticism of judges’ decisions is not the same as defamation, so *Sullivan* does not technically apply, but the underlying principle is the same — judges, as political officials, must be prepared to tolerate a great deal of sharply worded criticism. Courts should not be permitted to hold up maintaining public confidence in the judiciary as a sufficient reason for restricting critical commentary, even caustic or unfair attacks, without first establishing two premises: first, that this criticism does, in fact, decrease public confidence in the judiciary, and second, that the government’s interest in maintaining public confidence is not outweighed by the First Amendment values that inform similar cases, such as public-figure defamation actions. Both of these premises, I think, are highly doubtful.¹⁵⁰

come in for criticism for ignoring the value of counterspeech in the marketplace of ideas. See Stephen J. Fortunato, Jr., *On a Judge’s Duty to Speak Extrajudicially: Rethinking the Strategy of Silence*, 12 GEO. J. LEGAL ETHICS 679 (1999). See also Joseph W. Bellacosa, *Judging Cases Versus Courting Public Opinion*, 65 FORDHAM L. REV. 2381 (1997); Erwin Chemerinsky, *Is it the Siren’s Call? Judges and Free Speech While Cases are Pending*, 28 LOY. L.A. L. REV. 831 (1995); Abbie G. Baynes, *Judicial Speech: A First Amendment Analysis*, 6 GEO. J. LEGAL ETHICS 81 (1992). Consideration of the other speech-limiting provisions of the Code of Judicial Conduct must await analysis of constitutional doctrine in Section III. As discussed further in that section, I have serious doubts as to the constitutionality of many of these restrictions, if challenged for vagueness, overbreadth, or as impermissible content-based regulations of speech.

148. See Kaye, *supra* note 139, at 724.

149. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). “Actual malice,” as used in the law of defamation, is a “term of art denoting deliberate or reckless falsification.” *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 499 (1991).

150. Cf. Chemerinsky, *supra* note 101, at 881-87 (noting that on the analogous issue of pretrial publicity, empirical studies have shown no effect on jury deliberation from the extrajudicial statements of lawyers, and arguing that the *Sullivan* malice standard ought to be employed to protect First Amendment interests of lawyers); William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325 (1996) (reviewing empirical studies of the public perception of lawyers, and finding little impact from advertising); Rita J. Simon, *Does the Court’s Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of New Coverage?*, 29 STAN. L. REV. 515 (1977).

3. *Judges vs. Lawyers*

Numerous judges have been disciplined for using racial or sexual slurs to describe lawyers or litigants.¹⁵¹ A state trial court judge commented to a prosecutor that no one would care about the case, because the victim was “just some old n—— bitch.”¹⁵² Another judge was finally disciplined after establishing a long history of using a limitless variety of racial epithets to describe attorneys in his courtroom.¹⁵³ The judge in one divorce case demonstrated his bias against women by commenting on the physical appearance of the woman in a divorce case, calling her a “girl,” and concluding that the woman must have proposed marriage to the man because why “buy the cow when you get the milk free?”¹⁵⁴ After the conclusion of trial in a domestic-abuse case, the judge told the victim that once he had “laid [his own wife] on the floor and did not have any more problems from her.”¹⁵⁵ A state court judge in Illinois reportedly told a woman lawyer: “I don’t think ladies should be lawyers. I believe you belong at home raising a family.”¹⁵⁶ Yet another judge told a sophomoric sexual joke to two women attorneys.¹⁵⁷

Courts tend to deal harshly with judges who consistently subject attorneys to harassment and abuse. Judges can be removed from office or suspended for lengthy periods of time for failing to keep their tempers in check.¹⁵⁸ In these cases, First Amendment arguments do not cut much ice. One judge’s constitutional arguments were brushed aside after he was disciplined for writing an opinion in the form of

151. In addition to cases specifically mentioned in the text, see, e.g., *In re Barr*, 13 S.W.3d 525 (Tex. Rev. Trib. 1998); *In re Goodfarb*, 880 P.2d 620, 621 (Ariz. 1994); *In re Esworthy*, 568 N.E.2d 1195 (N.Y. 1991); *Gonzalez v. Commission on Judicial Performance*, 657 P.2d 372, 381-82 (Cal. 1983); *In re Pearson*, 386 S.E.2d 249 (S.C. 1989). For representative scholarly overviews, see Marina Angel, *Sexual Harassment by Judges*, 45 U. MIAMI L. REV. 817 (1991); Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181 (1985).

152. See Gail Diane Cox, *How Could They Do It?*, NAT’L L.J., May 1, 2000, at A1.

153. See *In re Stevens*, 645 P.2d 99 (Cal. 1982).

154. *In re Marriage of Iverson*, 15 Cal. Rptr. 2d 70, 72 (1992).

155. *In re Greene*, 403 S.E.2d 257, 258 (N.C. 1991).

156. Quoted in J. Cunyon Gordon, *A Response from the Visitor from Another Planet*, 91 MICH. L. REV. 1953, 1956 (1993).

157. See *Ryan v. Commission on Judicial Performance*, 754 P.2d 724 (Cal. 1988). See also *Barr*, 13 S.W.3d at 537 (another crude sexual joke).

158. See, e.g., *In re Del Rio*, 256 N.W.2d 727 (Mich. 1977) (judge suspended for five years for subjecting attorneys to harassment and abuse); *In re Jordan*, 622 P.2d 297 (Or. 1981) (judge removed from office for calling defendant “chicken shit” and other violations of Code of Judicial Conduct); *In re Ross*, 428 A.2d 858 (Me. 1981) (judge suspended for 90 days for using abusive and vulgar language).

humorous verse.¹⁵⁹ The court, apparently forgetting the lesson of *Marbury v. Madison*, said that the judge's free speech rights were limited by the Code of Judicial Conduct. Although it is true that disciplinary rules may impose *justifiable* restraints on the freedom of speech, it is by no means an automatic inference that any communication prohibited by the Code of Judicial Conduct passes constitutional muster. As Justice Kennedy emphasized, "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment [W]e will [not] defer to professional bodies when those restrictions impinge upon First Amendment freedoms."¹⁶⁰ Unfortunately, even where there may be a valid constitutional argument supporting the imposition of sanctions, judicial reasoning in disciplinary cases involving expression frequently tends to be highly conclusory, with courts asserting that the restraints on expression placed on lawyers and judges by bar association rules is dispositive of the First Amendment issues.

The difficulty of the constitutional analysis, which is so often elided by courts, is apparent in cases where a judge's speech may be probative of racial or gender bias, but does not disrupt a pending proceeding. Consider the case of the chief judge of an intermediate appellate court in Florida, who was interviewed by a local newspaper.¹⁶¹ The interview reveals deep-seated racial prejudices and stereotypes, revealing the judge as almost a caricature of the ignorant, right-wing bigot:

I would not date a black girl. I would not take one home, my mother would kill me I would not want my children to marry a black or an Asian or a Chinese or a Puerto Rican. I would not want them to. And they know that. . . . I think that there is a difference between a lot of them that they can't overcome. And it's not all of it their fault. It's the fault of their mothers and their daddies and their ancestors. And our fault. We have been too good to them. We, the United States Congress. Because they make more money by staying home on welfare than they do working. . . . [W]hy is it that 20 percent of the population is black and 45 percent of the prisoners are black. That's because, goddamnit, they're the ones committing the crimes.¹⁶²

159. See *In re Rome*, 542 P.2d 676 (Kan. 1975). Contrast the result in *Fisher v. Lowe*, 333 N.W.2d 67 (Mich. App. 1983) (opinion in verse).

160. *Gentile*, 501 U.S. at 1054.

161. See *In re Removal of a Chief Judge*, 592 So. 2d 671 (Fla. 1992). The interview is reproduced as an appendix to the Florida Supreme Court's opinion.

162. *Id.* at 673.

The Florida Supreme Court stripped the judge of his administrative post as chief, but permitted him to remain on the bench, with a public reprimand being the only other sanction imposed on him.¹⁶³

The judge's comments were not in violation of the relevant provision of the Code of Judicial Conduct, which reaches expression or conduct only insofar as it is connected with the tasks of judging:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status¹⁶⁴

But in essence the judge's words differ little from Matthew Hale's. Hale is more overtly hateful, and does not distance himself from Klansmen and Nazis, as this judge surely would if pressed, but the substance of the messages is the same. To complicate matters further, the Supreme Court has said that hate crime statutes must be treated as content-based restrictions on speech,¹⁶⁵ thus, if the rule of judicial conduct quoted were drafted in such a way to reach the judge's out-of-court comments, it arguably must be analyzed under the same rubric as the statute in *R.A.V.* Applying ordinary First Amendment principles, judicial speech in non-public forums (such as courtrooms) may be subject to reasonable regulations, provided that adequate alternative channels of communication remain open.¹⁶⁶ However, any restriction or state penalty that reaches the judge's interview with the newspaper would amount to a regulation of speech in a classic public forum. In a public forum, government penalties may not be imposed on the basis of the content of the message communicated, unless there is a compelling state interest supporting the regulation.¹⁶⁷ There is obviously a significant government interest in guaranteeing an impartial judiciary, but is it sufficient to warrant enforcing an anti-bias rule against judges in their private capacities?

With respect to judges, the answer to this question is almost certainly yes, because the state, as an employer, has substantial power to restrict its employees' speech where it would be disruptive of a core government function.¹⁶⁸ A government agency may fire an employee

163. See *In re Santora*, 602 So. 2d 1269 (Fla. 1992).

164. ABA, MODEL CODE OF JUDICIAL CONDUCT § 3(B)(5) (1990).

165. See *R.A.V.*, 505 U.S. 377.

166. See RODNEY A. SMOLLA, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH* § 8:8 (1996).

167. See *id.* § 8:5.

168. See *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Educ. of Town-*

for a variety of reasons — being rude to customers, criticizing supervisors, or using vulgar language.¹⁶⁹ Although these grounds for disciplining employees pertain to speech in the workplace, the Court has suggested that government employees may claim the protection of the First Amendment only where their speech pertains to a matter of public concern and where the state's ability to perform its services is not compromised.¹⁷⁰ In the case of the racist judge, the speech did touch on matters of public concern — welfare policy, crime, and so on — but it also interfered with the state's interest in assuring the public of a fair, unbiased judiciary.

I am somewhat hesitant to endorse this position as a rule of constitutional law because of the real potential for ideological bias, or viewpoint discrimination. While it is hard to mourn the removal of a virulently racist judge from the bench, consider as a counterexample *In re Bonin*,¹⁷¹ in which a trial court judge in Massachusetts was disciplined for merely *attending* a speech by Gore Vidal. The event was held to benefit a fund for criminal defendants who had been accused of engaging in homosexual activity in the Boston area. Vidal's speech denounced the "witch hunt" by prosecutors and police against gays, and questioned whether the defendants would receive a fair trial. (Justice Bonin, the subject of the disciplinary action, was not scheduled to preside over the trials, nor to exercise any administrative responsibility over them.¹⁷²) Vidal and Justice Bonin met, shook hands, and were photographed together, and the photo was printed the next day in a local newspaper with the caption, "Bonin at benefit for sex defendants." The Supreme Judicial Court of Massachusetts affirmed the public censure against the judge, reasoning that his impartiality could be questioned as a result of his attendance at the Vidal lecture. It brushed aside the First Amendment arguments raised in an amicus brief by the ACLU, stating implausibly that there were no "serious" constitutional questions raised by the requirement that judges exercise "mild self-restraint" on their associational and expressive liberties.¹⁷³

ship High School District 205, 391 U.S. 563 (1968).

169. See *Waters v. Churchill*, 511 U.S. 661 (1994); *Pereira v. Comm'r of Soc. Servs.*, 733 N.E.2d 112 (Mass. 2000) (upholding dismissal of social worker for making racist joke at testimonial dinner).

170. See *Waters*, 511 U.S. at 668.

171. 378 N.E.2d 669 (Mass. 1978).

172. See *id.* at 679.

173. *Id.* at 684 n.8.

Because judges are public employees, their speech is afforded a lower degree of constitutional protection as compared with the speech of private citizens. Although cases like *Bonin* seem wrongly decided, it may be impossible to preserve a full measure of First Amendment freedoms for judges without compromising the ideal of judicial impartiality. Disciplining Justice Bonin may simply be the price we pay for keeping racists like the Florida judge discussed above off the bench. It is important not to conflate this principle into a diminution of the speech rights of private lawyers, however. The state interest in maintaining respect for the judiciary means that it may take action against judges who manifest racial bias, either in their in-court or extrajudicial comments. But this interest does not justify punishing non-government lawyers (or prohibiting individuals from becoming lawyers) for revealing themselves to be racists. It is also important to remember that the fact of comprehensive state regulation of judicial speech is not, in itself, dispositive of the permissibility of discipline for judges who show bias. Courts wrongly short-circuit the First Amendment analysis where expression by lawyers and judges is at issue, reasoning that the extensive regulatory authority asserted by state bar associations is *ipso facto* justified. It is essential for courts to pay attention to the constitutional analysis, however, because there are significant differences between the speech rights of state-employee judges and private lawyers, even though both judges and lawyers are subject to court and bar association regulations.

4. *Lawyers vs. Lawyers*

Although the criminal trial of O.J. Simpson may have drawn increased popular attention to the problem of *ad hominem* (and *ad feminam*) verbal assaults,¹⁷⁴ and possibly represented the recent nadir of lawyers' public dignity, name-calling in litigation certainly predates the *Simpson* case. Disciplinary cases reveal a remarkable number and variety of attorneys with what might sympathetically be termed anger-management problems.¹⁷⁵ Some lawyers' harangues are suffi-

174. For a rather depressing overview of the sniping by the Simpson lawyers, see Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1676 n.179 (1996).

175. See, e.g., *United States v. Cutler*, 58 F.3d 825, 831 (2d Cir. 1995) (accusing prosecutors of "dealing in vendettas" and going on a "witch hunt," and calling government lawyers a "sick and demented lot"); *Polk v. State Bar of Texas*, 374 F. Supp. 784, 786 (N.D. Tex. 1974) (publicly stating that his DWI trial was "one more awkward attempt by a dishonest and unethical district attorney . . . to assure me an unfair trial"); *Attorney Grievance Comm'n v. Alison*, 565 A.2d 660, 662 (Md. 1989) (calling opposing counsel an "ass-

ciently over the top to merit block quotations in judicial opinions, such as a lawyer's tirade in a deposition where he repeatedly called opposing counsel a "son-of-a-bitch" and threatened to punch him in the nose.¹⁷⁶ This sort of petty obnoxiousness has become one of the principal concerns of one branch of the "professionalism" movement. Most legal ethics casebooks now contain colorful stories about verbal abuse in depositions, and both scholarly and practitioner-oriented journals are filled with articles decrying incivility among lawyers.¹⁷⁷ Courts have also become increasingly impatient with gratuitous nastiness by lawyers, and can be fairly creative in fashioning remedies for incivility, such as one federal court which reduced a statutory fee award by more than \$350,000 to penalize persistent obnoxiousness by the plaintiffs' lawyers.¹⁷⁸

More serious incidents of incivility involve racist or sexist comments by lawyers, which are intended to intimidate opposing counsel. Reported cases reveal an almost limitless variety of insults, including a lawyer's characterization of his opponent's conduct at a deposition as "little sheeny Hebrew tricks";¹⁷⁹ a bankruptcy lawyer's reference to a woman counsel for the United States trustee as "office help";¹⁸⁰ repeated references to an attorney as "little lady," "little mouse," "young girl," and "little girl";¹⁸¹ and a prosecutor's comment that he did not believe "either one of those chili-eating bastards" who were defendants in a death penalty case.¹⁸² One male lawyer was required

hole," saying "fuck you" to attorney during court proceeding); *In re Vincenti*, 554 A.2d 470, 472 (N.J. 1989) (calling his opponent incompetent and a "piece of shit"); *In re Eisenberg*, 423 N.W.2d 867, 870 (Wis. 1988) ("There is no excuse for that sleazy scum bag tactic . . . Does that stink. Talk about a smelly odor . . . Mr. [Prosecutor], you don't even know what you are talking about or what you are doing in this courtroom.").

176. *Carroll v. Jaques Admiralty Law Firm*, 110 F.3d 290, 292 (5th Cir. 1997).

177. See, e.g., Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996); Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513 (1994). Rob Atkinson has been a strong critic of the conformist impulse behind some of these civility codes. See Rob Atkinson, *Br'er Rabbit Professionalism: A Homily on Moral Heroes and Lawyerly Mores*, 27 FLA. ST. U. L. REV. 137 (2000); Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995).

178. See *Lee v. American Eagle Airlines, Inc.*, 93 F. Supp. 2d 1322, 1336 (S.D. Fla. 2000).

179. *In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987).

180. *In re Plaza Hotel Corp.*, 111 B.R. 882, 891-92 (Bankr. E.D. Cal. 1990).

181. *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 184 (Sup. Ct. 1992). For another New York lawyer's sexist comments in a deposition, see *In re Schiff*, 599 N.Y.S.2d 242 (App. Div. 1993).

182. *People v. Sharpe*, 781 P.2d 659, 660 (Colo. 1989). The trial in this case was highly

to pay his opponent's attorney's fees for a deposition at which he called his female adversary "babe"; the court found that "babe," in context, was "a crass attempt to gain an unfair advantage through the use of demeaning language."¹⁸³ Another lawyer was so annoyed at his disqualification on the basis of a conflict of interest that he mailed a flyer to the prosecutor, who was a woman. The flyer read: "MALE LAWYERS PLAY BY THE RULES, DISCOVER TRUTH AND RESTORE ORDER. FEMALE LAWYERS ARE OUTSIDE THE LAW, CLOUD TRUTH AND DESTROY ORDER."¹⁸⁴ Finally, a lawyer was suspended for two years after repeatedly making sexual advances toward his women employees.¹⁸⁵ Dozens of other incidents fill the pages of bar association study commission reports, which detail pervasive gender and racial bias among lawyers and court personnel.¹⁸⁶

Analysis of the constitutional issues presented by these cases largely depends on the context of the utterance. More theoretically, the outcome turns on the legal paradigm to which courts assimilate the utterance. Obnoxious comments in a deposition may be thought of as discovery abuse, no different in principle from refusing to turn over documents in response to a request for production. Alternatively, they may be viewed as an instance of expression — a statement of political dissent that may not be suppressed any more than a comment made on a call-in radio show may be. In essence, this is the question raised by the regulation of "hostile environment" sexual harassment under Title VII.¹⁸⁷ The aim of sexual harassment law is to eradicate discrimination in the workplace, which may take the form

publicized and the comments resulted in widespread perception that the prosecutor was biased against Latinos and was motivated by that prejudice to seek the death penalty.

183. *Mullaney v. Aude*, 730 A.2d 759, 769 (Md. App. 1998).

184. *United States v. Wunsch*, 84 F.3d 1110, 1113 (9th Cir. 1996). The flyer was a copy of a headline from an article in *California Lawyer* magazine, which reported on negative gender-based stereotyping of female lawyers. *See id.* at 1113 n.1.

185. *See Cincinnati Bar Ass'n v. Young*, 731 N.E.2d 631 (2000).

186. *See, e.g., Andrew E. Taslitz & Sharon Styles-Anderson, Still Officers of the Court: Why the First Amendment is no Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 788-90 (1996) (summarizing Florida's Supreme Court Gender Bias Study Commission Report); Ninth Circuit Gender Bias Task Force, *The Effects of Gender in the Federal Courts*, 67 S. CAL. L. REV. 745 (1993). Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report, 15 WM. MITCHELL L. REV. 825 (1989); Report of Maryland Special Joint Committee on Gender Bias in the Courts, 20 U. BAL. L. REV. 1 (1990); Suellyn Scanecchia, *Gender and Race Bias Against Lawyers: A Classroom Response*, 23 U. MICH. J.L. REF. 319 (1990); Report of the New York Task Force on Women in the Courts, 15 FORD. URBAN L.J. 11 (1986).

187. *See Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986).

of tangible actions, such as refusing to hire women or demanding sexual favors in exchange for promotions, but which also may occur through a pattern of communications that changes the atmosphere of the workplace to the point where it becomes intolerable to a reasonable woman.¹⁸⁸ The critical analytical step here is to equate speech with discriminatory *action*. Amazingly, this bit of category-manipulation seems to have worked. Despite a consistent string of decisions invalidating hate-speech statutes,¹⁸⁹ reiterating the constitutional principle of content-neutrality,¹⁹⁰ and underscoring the principle that speech may not be regulated on the basis of its offensiveness,¹⁹¹ and despite strenuous academic criticism,¹⁹² sexual harassment law has secured its location outside the domain of the First Amendment. Courts generally accept the plaintiffs' argument that expression is not the subject of regulation, even though the prohibited discrimination occurs through the medium of speech. Rather, it is only the effect of placing women in a subordinate role in the workplace that is reached by Title VII. Given the setting of the speech, especially where the listener is in some sense a captive audience,¹⁹³ the antidiscrimination norm embodied in the federal statute takes precedence over the free speech principles that would ordinarily apply in cases like *Hustler* and

188. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993).

189. See *R.A.V.*, 505 U.S. 377.

190. See, e.g., *Boos v. Barry*, 485 U.S. 312 (1988); *American Booksellers Ass'n v. Hudnut III*, 771 F.2d 323 (7th Cir. 1985).

191. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997); *Texas v. Johnson*, 491 U.S. 397 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

192. See, e.g., Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997); Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701 (1995); Volokh, *supra* note 7; Browne, *supra* note 7.

193. The Supreme Court has occasionally permitted content-based restrictions on speech where the audience would otherwise find it difficult to avoid offensive communications. See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988) (ban on residential picketing); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (FCC's "seven dirty words" regulation of speech on radio broadcasts); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (ban on adult movies at a drive-in theater whose screen was visible outside the premises); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (restriction on political advertising on city buses); *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) (upholding power of postal service to restrict offensive mailings at the request of customers); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (ban on sound trucks). The Court's most recent attorney-speech case, dealing with solicitation of accident victims, was also motivated in part by captive-audience concerns. See *Went For It*, 515 U.S. 618 (1995). Justice O'Connor's opinion alludes to the interest in protecting the peace and tranquility of the recipient of attorneys' solicitations, an interest that would be presumptively insufficient to justify restrictions on speech in anything other than a captive-audience case.

R.A.V. Those cases differ from hostile work environment harassment cases only in their context — the victims of harassment are not required to face their antagonists every day, and are not faced with the Hobson's choice of leaving their jobs or enduring abuse.¹⁹⁴ In fact, it is probably fair to read the sexual-harassment cases for the principle that it is the workplace setting that transmutes the hostile utterances from protected speech to unprotected conduct. University hate speech codes, by contrast, do not make this context-based distinction. Most of these regulations apply to speech uttered at any time, in any place, by members of the university community. Thus, they fail to account for the fact that in many settings, the audience is not "captive," and may not be subjected to a pattern of discriminatory treatment.

Harassing speech by lawyers, too, may be broadly regulated in limited contexts. The captive audience concern certainly permits extensive regulation of speech in trials and depositions where the audience is present under compulsion. A witness does not have the option of leaving a formal judicial proceeding, and an attorney who terminates a deposition runs the risk of being sanctioned for dilatory tactics.¹⁹⁵ The distinction between concise, non-argumentative objections and prohibited interference with a deposition is undoubtedly content-based, but the First Amendment permits this kind of regulation in a non-public forum, provided that the regulation is reasonable.¹⁹⁶ In addition, by analogy with the Title VII cases, courts reason that prohibitions on introducing irrelevant or unfairly prejudicial evidence, engaging in dilatory tactics, or making frivolous arguments are regulations of conduct, not expression. Cases in which attorneys berate their adversary in an attempt to intimidate also do not raise First Amendment issues, to the extent that the utterances can be characterized as assaults or threats.¹⁹⁷ Traditionally, speech by attorneys in judicial forums is subject to rules of evidence and procedure, which unproblematically draw content-based distinctions. Lengthy "speaking objections" in depositions are rightly characterized as discovery abuse, not protected speech, and may subject the speaker to penalties.¹⁹⁸

The hard cases are those in which the communications at issue occur outside formal proceedings, but which nevertheless create the

194. See Epstein, *supra* note 7, at 421-29.

195. See FED. R. CIV. P. 30(d)(2).

196. See *infra* notes 464 - 482 and accompanying text.

197. See *infra* notes 219 - 252 and accompanying text.

198. See FED. R. CIV. P. 30(d)(1).

evils of racial and gender bias in the legal system. (Examples include the letter to opposing counsel in *Wunsch*, muttered courthouse comments as in *Sharpe*, and statements to the media.) Here, the clash of constitutional and regulatory norms is most apparent. State bar associations and courts possess extensive power to control lawyers subject to their jurisdiction — lawyers must keep personal and client funds separate, respond promptly to client communications, refrain from talking to represented opponents, and so on. Does this power extend to regulating the speech of lawyers, insofar as it is germane to their professional activities? The answer turns on how the extrajudicial speech of lawyers ought to be understood.

In an important article on workplace harassment, Cynthia Estlund argues that the workplace is a natural forum for the exchange of ideas among citizens, yet is outside the public domain in significant ways.¹⁹⁹ It is what political theorists might call an intermediate association²⁰⁰ — one which serves the valuable end of permitting individuals to participate in public discourse outside the orbit of the state — but because of the pervasiveness of work in our society, the norm of sexual and racial equality applies with particular force in that setting. This dual nature of the workplace makes it difficult to strike a balance between equality norms and free speech considerations. Inequality in the workplace is likely to have a significant deleterious effect on social justice generally. However, the flip side of the captive audience doctrine is the “captive speaker” concern; the only place that many people can express themselves is in the workplace, and if they are prohibited from expressing particular viewpoints, those messages will be suppressed entirely.²⁰¹

Analogously, the legal system provides a venue for individuals to address their grievances to a wider audience, and attorneys are required to facilitate this access; at the same time, the system can function effectively only if barriers to participation, such as sex- and race-based discrimination, are eradicated. This is another example of Robert Post’s “paradox of public discourse” — free and open debate requires the absence of coercion and other barriers to participation, yet the very nature of unrestricted debate may have the effect of si-

199. See Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997).

200. See Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1714-15 (1988).

201. See KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 83-87 (1995) [Hereinafter GREENAWALT, *FIGHTING WORDS*].

lencing would-be participants.²⁰² Post's solution is to define clearly the boundaries around "public" discourse, leaving that sphere relatively unregulated, while permitting more restrictions on speech in non-public settings. Outside the domains of public discourse, equality norms have priority; within the public setting, free speech norms take precedence, even if the effect may be to silence marginalized speakers.

Estlund challenges the narrowness of Post's definition, and proposes recognizing "satellite" domains of expressive freedom, which are those settings in which speech may "contribute to public discourse and to self-governance . . . largely through the prism of its mediating role between individual and society."²⁰³ In order to accommodate the equality interests that seem to be sacrificed through the enhanced speech rights of participants, she argues that the *manner* of expression, though not its content, should be regulated. "Personal insults, divisive gossip, racial slurs, sexual taunts, propositions, [and] innuendo" are the kind of words that undermine the respect, tolerance, and trust among co-workers that are necessary preconditions for rational discourse.²⁰⁴ Thus, speech forfeits protection if, in its manner of expression, it would be grossly offensive to the listener and the listener has no chance to avoid the speech.²⁰⁵

Applied to the professional setting, Estlund's proposal would permit enforcement of various civility and professionalism regulations promulgated by state and local bar associations and courts. For instance, federal district courts have, by local rules, proscribed conduct that is "incivil,"²⁰⁶ or "provoking or insulting."²⁰⁷ Restrictions such as these are not as troubling as content-based regulations, Estlund argues, because government actors are not to be given discretion to make value-laden decisions, such as whether an utterance is a matter of public concern.²⁰⁸ But the "grossly offensive" criterion is surely evaluative in its essence. Certainly sexual advances at co-workers make no contribution to public discourse, but the case is not so clear

202. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 134-48 (1995). See also FISS, *supra* note 13, at 16-18.

203. Estlund, *supra* note 199, at 720-21.

204. *Id.* at 733.

205. See *id.* at 750.

206. U.S. DIST. CT. M.D. FLA. R. 2.05(g).

207. U.S. DIST. CT. D. ALASKA R. 39.5(d); cf. U.S. DIST. CT. N.D. OKLA. R. 83.2(14) (lawyers admonished to "[a]void disparaging personal remarks or acrimony toward opposing counsel"); U.S. DIST. CT. W.D. TEX. R. AT-5(b)(17) (same).

208. See Estlund, *supra* note 199, at 753.

with other kinds of offensive speech. (This is probably why Estlund relies on the captive-audience principle in conjunction with the offensiveness standard.) I can readily imagine a judge concluding that Stephen Yagman's tirade was grossly offensive,²⁰⁹ and I suspect that judicial evaluation would diverge on the civility of the comments of another lawyer who called a judge a racist and referred to the trial as a "kangaroo court" and a "legalized lynching."²¹⁰ Offensiveness seems to be an innocuous criterion when applied to racial epithets, but the potential for manipulation of this category is evident from innumerable cases where thin-skinned judges have reacted against speech they regarded as incivil. The following discussion of contempt of court reveals some of the plasticity of the concept of civility in litigation.

C. "When There Is No More Respect We Might As Well Give Up the United States": Contempt of Court and the Legacy of the Chicago Seven

The power to punish contempt of court is inherent within the institution of the judicial system, and is remarkably unconstrained by statutory guidelines. The federal contempt statute, for example, does not define key terms such as "misbehavior" and "obstruct[ion of] the administration of justice."²¹¹ Virtually every observer to address contempt of court has remarked upon the murkiness of the substantive and procedural law governing the imposition of contempt sanctions.²¹² It is nevertheless possible to provide a brief overview of the law of contempt and show how constitutional norms set limits on the ability of courts to sanction attorneys for engaging in expressive activities.

Contempt was closely related to defamation throughout its historical development in England, and this relationship was preserved across the Atlantic.²¹³ Just as the law of defamation was brought by

209. For a discussion of the *Yagman* case, see *supra* notes 94-96 and accompanying text.

210. *In re Hinds*, 449 A.2d 483, 487 (N.J. 1982).

211. 18 U.S.C. § 401. Judicial glosses on this language are frequently vague and subjective. See, e.g., *United States v. Seale*, 461 F.2d 345, 366 (7th Cir. 1972) (defining misbehavior as "conduct inappropriate to the particular role of the actor, be he judge, juror, party, witness, counsel or spectator").

212. See Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1026-29 (1995) (summarizing critical scholarship).

213. See Melvin B. Lewis, *Judicial Forging of a Political Weapon: The Impact of the Cold War on the Law of Contempt*, 27 J. MARSHALL L. REV. 3 (1993).

the Supreme Court within the ambit of the First Amendment to reflect the public interest in open, spirited public debate,²¹⁴ contempt law has been constitutionalized to some extent, to accommodate a similar public interest. (Unlike the law of defamation, however, Congress has acted to curb the power of courts to issue contempt citations, in one case impeaching a federal judge who had imposed a contempt sentence on a lawyer who had criticized him.²¹⁵) This process began before World War II, with the appeal from contempt citations against labor leader Harry Bridges and the *Los Angeles Times*, involving public statements made about labor-relations disputes in the state courts.²¹⁶ In one contempt proceeding, local newspapers published a telegram by Bridges, asserting that enforcement of a state court decree would cause work stoppages along the entire waterfront. While the dissenting justices read the comments as a threat by Bridges to call a massive strike, and therefore as an attempt to intimidate the courts into reversing the decision,²¹⁷ Justice Black for the majority invoked the classic First Amendment vision of the free exchange of ideas, comment, and criticism. He observed that the very facts that made Bridges' comments dangerous — the importance of the issue in public debate and the impact a strike might have on the local economy — are precisely the reasons for affording his speech a high degree of protection. "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression."²¹⁸

Paradoxically, then, the inherent power of the courts to safeguard the integrity of their processes is limited in the cases which most threaten them.²¹⁹ Courts are permitted to punish speakers pursuant to their contempt power only where the speech poses a clear and present danger of substantially interfering with the pending pro-

214. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

215. See Lewis, *supra* note 213, at 5. The judge was acquitted in the Senate, but the case led Congress to pass a statute specifying acts for which federal courts could find lawyers, or others, in contempt. The statute is still in effect at 18 U.S.C. § 401. RONALD L. GOLDFARB, *THE CONTEMPT POWER* 21 (1963).

216. See *Bridges v. California*, 314 U.S. 252 (1941).

217. See *id.* at 301-04 (Frankfurter, J., dissenting).

218. *Id.* at 269.

219. See also *Wood v. Georgia*, 370 U.S. 375, 388 (1962) ("The type of 'danger' evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification.").

ceeding.²²⁰ Under this standard, the Court reversed the separate contempt convictions against the *Los Angeles Times*, on the grounds that the newspaper editorials and cartoons critical of judicial decisions did not pose a sufficient threat to the administration of justice.²²¹ Subsequent Supreme Court decisions expanded *Bridges*, making clear that all trials, not just high-profile cases, have an element of public interest, and judges must accept criticism of their disposition of cases, even in sharp or intemperate language.²²² The Court has even refused to permit a finding of contempt to be predicated on a distortion of the factual record.²²³ These cases therefore establish a broad sphere of protected expression around criticism of the judiciary and underscore the principle that the harm permitting interference with expression must go beyond insults to dignity or the potential diminution of public respect for courts.

After the constitutionalization of contempt in *Bridges*, *Pennekamp*, and *Craig*, a lawyer may still be punished for contempt for engaging in conduct that violates standards of courtroom decorum, and which rises to the level of actual interference with the administration of justice.²²⁴ The Court has cautioned that lawyers may be found in contempt only where the effect of their conduct goes beyond mere offense to the judge's sensibilities, and extends to actual obstruction of the proceedings.²²⁵ The difficult boundary to draw is between contemptuous obstruction of justice and the kind of zealous advocacy that is expected of certain kinds of participants in the trial process, such as criminal defense lawyers, who are constitutionally entitled to

220. See *Bridges*, 314 U.S. at 261-63.

221. See *id.* at 273-75.

222. See *Craig v. Harney*, 331 U.S. 367 (1947).

223. See *Pennekamp v. Florida*, 328 U.S. 331 (1946).

224. See *Sacher v. United States*, 343 U.S. 1 (1952); *In re McConnell*, 370 U.S. 230 (1962).

225. See *Offutt v. United States*, 348 U.S. 11 (1954); *Brown v. United States*, 356 U.S. 148, 153 (1958); *In re Michael*, 326 U.S. 224, 227-28 (1945). A similar limitation is contained in the disciplinary rules of many state bar associations, which prohibit lawyers from engaging in "conduct intended to disrupt a tribunal." MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.5(c). For a state court case drawing this distinction correctly, see *Williams v. Williams*, 721 A.2d 1072, 1073 (Pa. 1998). In that case, after an unfavorable ruling, the lawyer said under his breath, "[h]e's such a fucking asshole," referring to the trial judge. *Id.* The opposing lawyer repeated the remark louder to get it on the record. See *id.* The Pennsylvania Supreme Court said the remark was ill-mannered but caused no significant disruption in proceeding; thus, criminal contempt was not warranted. See *id.* at 1074-75.

gum up the works.²²⁶ “Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client’s behalf.”²²⁷ To turn the point around, even a seemingly respectful act can interfere with another party’s goals at trial. A well-timed objection to the admission of evidence can obstruct justice, if “justice” is understood only as the conviction of guilty defendants. No one would suggest that objecting to evidence is contempt, but that is only because we have become comfortable with the role of exclusionary rules in the law of evidence. These rules are justified by other policies, such as ensuring even-handed treatment by the government.

Other kinds of lawyering activities at trial are more controversial. In the Chicago Seven trial, for example, the defense lawyers’ strategy was to portray the entire government effort to prosecute the Vietnam war and quell domestic opposition as an abuse of authority.²²⁸ Their actions were directed at making the judge look ridiculous, as he gradually lost control over the proceedings. Were these actions justified as part of an effort to vindicate principles of substantive justice? Some legal ethicists would respond in the affirmative, appealing to the tradition in our legal culture of appealing to the social values that underwrite and legitimate positive legal norms.²²⁹ Contempt decisions, however, tend to emphasize procedural norms such as efficiency and manageability. The rule that disagreement with a judge’s order is no justification for disruptive courtroom conduct²³⁰ is intended to channel lawyers’ adversarial zeal. Lawyers should refrain from informal avenues of protest such as speaking out at trial, and opt for formal processes such as filing appeals and collateral challenges. “It is essential to the proper administration of criminal justice that

226. See, e.g., *In re Dellinger*, 461 F.2d 389, 397-98 (7th Cir. 1972).

227. *Id.* at 400. See also Louis S. Raveson, *Advocacy and Contempt – Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743 (1990). I agree with Rob Atkinson’s characterization of the obsession with civility as “Mickey Mouse professionalism,” which obscures the moral tradition of rebellious lawyering. Atkinson, *supra* note 177, at 146-49.

228. See Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83).

229. For the most prominent, and best argued example of this position, see WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998).

230. See, e.g., *Illinois v. Allen*, 397 U.S. 337, 346-47 (1970); *United States v. Sacher*, 182 F.2d 416, 430 (2d Cir. 1950) (Augustus Hand, J.), *aff’d*, 343 U.S. 1 (1952) (involving contempt proceedings against the lawyers who had participated in the Smith Act trial which underlay *United States v. Dennis*, 341 U.S. 494 (1951)); *Office of Disciplinary Counsel v. Breiner*, 969 P.2d 1285 (Haw. 1999).

dignity, order, and decorum be the hallmarks of all court proceedings in our country.”²³¹ Or, as the foreman of the Chicago Seven jury said, “[w]hen there is no more respect we might as well give up the United States.”²³²

Although this proposition sounds innocuous enough, it is difficult to square with First Amendment law in other contexts and with the ethical traditions of lawyering. Courts generally rule out ensuring “dignity” and “decorum” as reasons for regulating speech in other contexts. Even attorneys may speak indecorously in advertisements, for example,²³³ and journalists may use “strong language, intemperate language, [and] . . . unfair criticism” in response to judicial decisions.²³⁴ But other constitutional norms complicate the regulation of lawyer speech at trial. For instance, the Sixth Amendment fair trial guarantee limits expression by lawyers, judges, parties, and even spectators that might unfairly prejudice a criminal defendant.²³⁵ The application of this principle to restrict even core political speech is evident from a Ninth Circuit case in which the court reversed a rape conviction because of the presence of a large number of spectators wearing “Women Against Rape” buttons at the trial.²³⁶ The importance of the Sixth Amendment is apparent in light of Supreme Court decisions protecting significantly more inflammatory slogans worn in courthouses, such as the “Fuck the Draft” jacket in *Cohen v. California*.²³⁷ The difference between *Cohen* and the rape case lies in the impact the buttons had on the jury’s deliberations; by suggesting that the spectators had already satisfied themselves of the defendant’s guilt, the buttons undermined the presumption of innocence.²³⁸ Although

231. *Allen*, 397 U.S. at 343.

232. J. ANTHONY LUKAS, *THE BARNYARD EPITHET AND OTHER OBSCENITIES: NOTES ON THE CHICAGO CONSPIRACY TRIAL* 26 (1970).

233. *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re Felmeister & Isaacs*, 518 A.2d 188 (N.J. 1986).

234. *Craig*, 331 U.S. at 376.

235. *See, e.g.*, *Haeberle v. Texas Int’l Airlines*, 739 F.2d 1019 (5th Cir. 1984).

236. *See Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990). Two state court cases reached divergent results in drunk-driving cases where the spectators wore Mothers Against Drunk Drivers (“MADD”) buttons. *See State v. McNaught*, 713 P.2d 457 (Kan. 1986) (buttons not prejudicial); *State v. Franklin*, 327 S.E.2d 449 (W. Va. 1985) (ordering new trial because of prejudice caused by buttons).

237. 403 U.S. 15 (1971).

238. *See Norris*, 918 F.2d at 830. Whether the “Women Against Rape” or MADD buttons may be worn in courtrooms may depend on the permissibility of lawyers advocating jury nullification. Lawyers have been prosecuted for obstruction of justice, notwithstanding the First Amendment, for directly appealing to jurors to reach decisions unsupported

the state's dignitary interests were not sufficient to justify punishing Cohen for wearing his jacket, the combination of dignitary and Sixth Amendment interests warranted a rule prohibiting political commentary by trial spectators. It is noteworthy that the addition of fair trial interests justifies even content-based restrictions, which are ordinarily disfavored and subject to heightened scrutiny. (There is no suggestion in the opinion that the Court would have reversed the conviction if spectators had been wearing "Save the Whales" buttons.)

The Supreme Court tried to reconcile the fair-trial interests protected by the Sixth Amendment and the free speech interests of lawyers, secured by the First, in *Gentile v. State Bar of Nevada*.²³⁹ The lawyer, whose client had been indicted the previous day, held a press conference at which he attempted to establish his client's innocence. Significantly, this was a "highly publicized" case,²⁴⁰ meaning that the press had already been given information by the prosecution. The defense lawyer (but not the prosecutor) was disciplined under a state bar association rule, based upon ABA Model Rule 3.6, prohibiting extrajudicial statements by attorneys that are substantially likely to create material prejudice to a party in a judicial proceeding. The resulting opinion, responding to the First Amendment challenge to this rule, is a badly fragmented mess — one of those decisions that requires a scorecard to keep straight the alignment of the Justices. The opinion for the Court encompassed two separate holdings: first, that the Nevada rule was void for vagueness, for failing to give adequate notice of when a press conference would subject a lawyer to discipline;²⁴¹ second, that the rule was not an unconstitutional prior restraint.²⁴² The most interesting aspect of the opinion was the debate

by the judge's instructions and evidence received in a case. *See, e.g.,* *Turney v. State*, 936 P.2d 533 (Alaska 1997). In the *Turney* case, the lawyer had urged jurors to call 1-800-TEL-JURY to listen to a recording instructing them on the "right" of jury nullification. *See id.* at 536. One scholar of nullification essentially argues that nullification advocacy in the courtroom may be regulated, just as the state may punish attempts to bribe or threaten jurors. *See* Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 495-99 (1998).

239. 501 U.S. 1030 (1991).

240. *Id.* at 1063.

241. *See id.* at 1048-51 (majority made up of Kennedy, J., and four other Justices).

242. *See id.* at 1063-76 (majority made up of Rehnquist, J., and four other Justices). Prior restraint doctrine requires the state to show a "clear and present danger" of actual prejudice or an imminent harm in order to justify an injunction against the publication of newsworthy information. *See, e.g.,* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971). "Prior restraints are presumptively unconstitutional" and, in fact, are almost always held to violate the First Amendment. SMOLLA, *supra* note 166 § 15:7.

among the Justices over why the bar association rule was not subject to the near-absolute constitutional ban on prior restraints. The lawyer had argued that the case ought to be controlled not only by the prior-restraints doctrine, but also by the Court's contempt precedents, which held that a court may not punish, by contempt penalties, newspapers that published editorials, cartoons, and other materials critical of the judge's conduct of a particular case, unless the publications posed a clear and present danger of harm.²⁴³ Justice Rehnquist, in response, noted that none of the speakers in the contempt cases had been lawyers.²⁴⁴ This is true, and it is also a commonplace that lawyers' speech in the courtroom itself may be regulated under the less demanding "reasonable basis" standard,²⁴⁵ but neither of these premises are dispositive of whether a criminal defense lawyer's extrajudicial speech ought to be subject to restriction on a broader basis than a newspaper reporter's speech.

It is important to focus carefully on what Chief Justice Rehnquist's opinion says about the constitutional protection for lawyers' speech, because *Gentile* is frequently misinterpreted by lower courts. The opinion is a pastiche of dicta from other cases, which themselves are susceptible to misinterpretation. For example, Chief Justice Rehnquist reads *Sawyer* as establishing the proposition that "lawyers in pending cases [a]re subject to ethical restrictions on speech to which an ordinary citizen would not be."²⁴⁶ But as we have seen, the Court decided *Sawyer* on non-constitutional grounds. Justice Stewart's concurring opinion in *Sawyer* does suggest that he would permit the state to impose discipline for "unethical" behavior, even if it involved speech that would otherwise be protected. But this statement begs the question of what speech would be unethical, a question which must be answered by delving into both First Amendment principles and the function of the legal profession in society. Justice Kennedy's opinion in *Gentile* emphasizes this distinction; he characterizes the lawyer's press conference as "classic political speech" on a matter of public importance.²⁴⁷ Political speech is entitled to the highest degree of First Amendment protection; moreover, speaking out in defense of individuals who are resisting government power is a traditional function of lawyers. Ethical principles and con-

243. See *Bridges*, 314 U.S. 252; *Pennekamp*, 328 U.S. 331; *Craig*, 331 U.S. 367.

244. See *Gentile*, 501 U.S. at 1070.

245. *Id.* at 1071.

246. *Id.* (citing *In re Sawyer*, 360 U.S. 622 (1959)).

247. *Gentile*, 501 U.S. at 1034.

stitutional norms coincide. To avoid this conclusion, Chief Justice Rehnquist relied heavily on the dissent in *Sawyer*, which said that lawyers are “an intimate and trusted and essential part of the machinery of justice, an ‘officer of the court’ in the most compelling sense.”²⁴⁸ This vision of the lawyer’s role emphasizes the alignment of the lawyer with the government’s interests, even if the “machinery of justice” grinds on to the detriment of the client. In some cases lawyers must accept additional responsibility for social justice,²⁴⁹ but the one situation in which that is never true is criminal defense. The responsibilities of the criminal defense lawyer have always been understood as being in opposition to the state. For instance, although lawyers are prohibited from advancing frivolous defenses, a criminal defense attorney is nevertheless entitled to “put the state to its proof,” requiring that the government establish every element of its case, even if the defense lawyer knows that there is no good faith basis in law and fact for doing so.²⁵⁰ Thus, it is wrong to characterize the “officer of the court” dimension of the criminal defense lawyer’s duty as placing the lawyer’s speech on some sort of a lower plane of constitutional significance from pure political speech. Because criminal defense lawyers are expected to be independent of the government, and to serve as a bulwark against state overreaching in the domain of individual liberty, the press conference by the lawyer in *Gentile* was indeed a classic example of political speech.

So Justice Kennedy is right and Chief Justice Rehnquist is wrong — but the latter Justice’s opinion in *Gentile* is still the authoritative pronouncement from the Supreme Court on this issue. What, then, is the rule in that case? It is emphatically not that lawyers have diminished expressive rights, as compared with ordinary citizens, in most speech situations. The scope of *Gentile* extends only to statements made about a pending case in which the lawyer is participating.²⁵¹ Lawyers are still free to denounce the government’s prosecution of certain categories of cases, to rail against bias in the court system, even to advocate white supremacist causes on the Internet. Thus, Judge Easterbrook read too much into *Gentile* when he said that “the

248. *Gentile*, 501 U.S. at 1072 (quoting *Sawyer*, 360 U.S. at 668 (Frankfurter, J., dissenting)).

249. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8 and cmt. 1 (detailing special obligations of prosecutors who are “minister[s] of justice” and not simply advocates).

250. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.1.

251. See *Gentile*, 501 U.S. at 1072 n.5, 1074.

Constitution does not give attorneys the same freedom as participants in political debate.”²⁵² The attorney in that case did make numerous baseless allegations of corruption against judges, but the constitutional status of his speech is identical with that of private citizens. Under *Gentile*, being a lawyer does not change Palmisano’s speech rights, except with respect to pending cases. It does not work a general diminution of the constitutional protection afforded to political speech, of which accusations of judicial corruption is surely an exemplar. Although courts sometimes miss this point, *Gentile* does not revive the long-discredited right/privilege distinction, in which a lawyer may be said to have accepted reduced protection for speech in exchange for the privilege of a license to practice law. It merely makes the less controversial constitutional point that in some kinds of state-established forums, speakers’ rights may be limited by reasonable government interests. The only novel aspect of *Gentile* is the extension of the “forum” beyond the courtroom and court filings, to extrajudicial comments on pending cases. This modest extension is justified by the Sixth Amendment fair trial guarantee. In cases where the lawyer’s speech is not germane to a pending proceeding, however, the Sixth Amendment is not implicated and the extension of the non-public forum is not warranted.

III. Lawyers and First Amendment Doctrine

The byzantine complexity of contemporary First Amendment law is no accident. It is the natural by-product of a recurring need to reconcile the basic political values of freedom and order. The pull exerted by these two values has never been adequately restrained by some “meta” theory of constitutional interpretation, no matter how sophisticated.²⁵³ For this reason, some have proposed abandoning the search for constitutional theory at a high level of abstraction, and resolving cases “one case at a time,” through a process of reasoning by analogy in which moral principles serve as only one position in a dialectic with the particularities of decided cases.²⁵⁴ I do not wish to be distracted by this debate, but I do think it is important to approach questions of First Amendment law from both sides, as it were: first,

252. *Palmisano*, 70 F.3d at 487 (discussed *supra* notes 91-105 and accompanying text).

253. See WILLIAM W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 13-19 (1984).

254. See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1996).

from the direction of the particular; second, from the direction of the general. This section is concerned with the general, with the agglomeration of precedents generated by generations of litigation. The objective of this discussion is to bring together the body of lawyer-speech cases with First Amendment decisions from other contexts, to illuminate some of the continuities that do exist in constitutional law. Following, Part IV will change course and examine lawyer-speech cases from the theoretical direction, inquiring whether and to what extent the policies which underlie the First Amendment apply to the expression of lawyers.

A. Speech or Conduct?

Threats of physical violence, although obviously involving speech in the literal sense, do not raise First Amendment issues. The Court has never wavered from its position that criminal *conduct* such as conspiracy, solicitation, and intimidation may be proscribed without offending the First Amendment.²⁵⁵ Even Justice Black, who is associated with the absolutist view that no restrictions on speech are permissible,²⁵⁶ was perfectly willing to grant states considerable latitude to regulate expressive conduct.²⁵⁷ The speech/conduct distinction undergirds the heightened constitutional protection for expressive activities, because the government is naturally in the business of regulating conduct — violence, threats, discrimination — without regard to the beliefs that motivated the actions.²⁵⁸ A politically motivated

255. See, e.g., *R.A.V.*, 505 U.S. at 380 n.1 (conceding that burning cross in back yard of African-American family can be prosecuted as a terroristic threat or damage to property); *Johnson*, 491 U.S. at 406-07 (suggesting that flag burning could be prosecuted under a statute prohibiting outdoor fires); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (First Amendment does not preclude regulation of commercial conduct); *Brandenburg v. Ohio*, 395 U.S. 444, 456-57 (1969) (Douglas, J., concurring) (“The line between what is permissible and not subject to control and what may be made subject to regulation is the line between ideas and overt acts.”). For examples of cases in which attorneys threatened physical harm to another (generally an opposing lawyer) and raised First Amendment arguments, see *Florida Bar v. Sayler*, 721 So.2d 1152 (Fla. 1998) (sending adversary a newspaper article about workers’ compensation lawyers who had been murdered); *In re Beaver*, 510 N.W.2d 129 (Wis. 1994) (threatening to kill adversary); *In re Belue*, 766 P.2d 206 (Mont. 1988) (threatening to beat up public defender and shoot sheriff’s deputy). In all of these cases, the courts summarily rejected the free speech claims.

256. See, e.g., *Konigsberg*, 366 U.S. at 60-61 (Black, J., dissenting); *Barenblatt v. United States*, 360 U.S. 109, 141-43 (1959) (Black, J., dissenting).

257. See *Cohen v. California*, 403 U.S. 15, 27 (1971) (Black, J., dissenting) (Cohen’s “absurd and immature antic” was mainly conduct, not speech); *Adderley v. Florida*, 385 U.S. 39 (1966) (affirming trespass convictions of civil rights demonstrators).

258. See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 3.6, at 319 (1986); Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some*

killing, such as the shooting of physicians who perform abortions, may still be prosecuted as murder, despite the intention of the killer to express a message. Making a threat against the life of the President is a federal offense,²⁵⁹ even though the speaker may be motivated by disagreement with the President's economic policies. Absent the very narrow boundaries of the necessity doctrine, would-be Robin Hoods cannot escape punishment by appealing to considerations of distributive justice. The distinction between speech and conduct is an artificial one in many cases, and courts can manipulate outcomes by moving the line between speech and conduct to protect activity that has previously been determined to be worthy of protection.²⁶⁰ As John Ely has famously observed, all communicative behavior is 100% speech and 100% conduct.²⁶¹ Line-drawing problems are not difficult in cases where the activity at issue is a specific threat of physical violence. Impassioned advocacy that might be construed as a call to arms presents a problem for free speech theory that has long troubled the Court,²⁶² but the modern "clear and present danger" test nevertheless allows prosecution of a speaker whose words are "directed to inciting or producing imminent lawless action and [are] likely to incite or produce such action."²⁶³

Notes Inspired by the Problems of Hate Crime and Animal Sacrifice, 1993 SUP. CT. REV. 1.

259. See 18 U.S.C. § 871.

260. See, e.g., *Texas v. Ku Klux Klan*, 853 F. Supp. 958 (E.D. Tex. 1994), *aff'd*, 58 F.3d 1075 (5th Cir. 1995) (approving of state highway department's denial of Klan's application to "adopt" a section of highway abutting a public housing project, where the adoption would allow the Klan to continue threatening the project's residents in violation of a court order); see also Stanley Fish, *Fraught With Death: Skepticism, Progressivism, and the First Amendment*, 64 U. COLO. L. REV. 1061, 1066-67 (1993).

261. See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495-96 (1975). For examples of cases in which the Court protected expressive conduct as speech, see *Texas v. Johnson*, 491 U.S. 397 (1989) (burning the American flag); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (camping in public park to dramatize problem of homelessness); *Spence v. Washington*, 418 U.S. 405 (1974) (attaching peace sign to flag); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (wearing black armbands to protest Vietnam war).

262. See, e.g., *Whitney v. California*, 274 U.S. 357 (1927) (affirming conviction for "criminal syndacalism" based on defendant's attendance at Communist Party convention); *Gitlow v. New York*, 268 U.S. 652 (1925) (upholding criminal anarchy convictions based on circulation of a pamphlet urging strikes).

263. *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam). This robust version of the "clear and present danger" test should be contrasted with the original statement of the test in *Schenck*, which upheld a conviction for what today would probably be considered protected advocacy. Cf. *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) (reversing conviction for threatening to take the life of the President, and construing defendant's statement as mere "political hyperbole").

Kent Greenawalt has written about a category of communications he refers to (following J.L. Austin and John Searle) as "situation-altering utterances."²⁶⁴ Situation-altering utterances alter the legal status of existing relationships, for example, by creating a binding contract between an offeror ("I'll sell you my car for \$10,000") and an offeree ("You've got yourself a deal").²⁶⁵ Similarly, in the case of *quid pro quo* sexual harassment, a supervisor's explicit or implicit threat that, "I'll fire you if you don't sleep with me" puts the employee to the Hobson's choice of having unwanted sex or losing her job.²⁶⁶ Under ordinary First Amendment doctrine, situation-altering utterances may be regulated as conduct because they are properly thought of as behavior itself.²⁶⁷ Attorneys have unusually broad power to change the rights and obligations of others by their utterances. They are vested by the state with the power to commence lawsuits, compel the attendance of witnesses at trials and depositions, obtain documents from parties who may not wish to have them inspected, encumber property with liens, bind their clients to various legal relationships, and so on. Under the distinction proposed by Greenawalt, these speech-acts do not raise First Amendment issues. Consider, for example, court rules proscribing frivolous or vexatious legal documents, which have never been invalidated on free speech grounds. These communications are more like conduct than speech, and for this reason are subject to broad regulation by courts. Accordingly, many courts have brushed aside freedom of expression arguments by characterizing contested incidents as conduct, not speech.²⁶⁸

Similarly, a great deal of recent scholarship has proposed that racial and sexual epithets may be, in some cases, essentially identical to unprotected conduct, such as the tort of intentional infliction of emotional distress.²⁶⁹ Slurs uttered against another on the basis of race or

264. See KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 57-60 (1989) [hereinafter "GREENAWALT, SPEECH"].

265. Cf. FED. R. EVID. 801(c) advisory committee's note ("verbal acts" bear on the legal rights of the parties and, accordingly, are not offered in evidence to prove the truth of the matter asserted).

266. See GREENAWALT, *FIGHTING WORDS*, *supra* note 201, at 78-79 (1995). Of course, not all sexual harassment cases are of the *quid pro quo* variety. Some cases are examples of pure hatred based on sex, with no attempt by the speaker to extort sexual favors from the plaintiff.

267. See GREENAWALT, *SPEECH*, *supra* note 264, at 58.

268. See, e.g., *Eisenberg v. Boardman*, 302 F. Supp. 1360 (W.D. Wis. 1969).

269. See, e.g., CATHERINE A. MACKINNON, *ONLY WORDS* 29-41 (1993); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 180 (1982).

sex cause tremendous pain and humiliation, when compared with other, more generic insults.²⁷⁰ Thus, some have argued that bar associations ought to promulgate enforceable rules forbidding lawyers to engage in “verbal or physical discriminatory conduct, on account of race, ethnicity, or gender.”²⁷¹ The words “verbal . . . conduct” are carefully chosen to avoid the First Amendment protection that would accompany pure non-conduct, or speech. (Indeed, many courts have upheld state hate crimes statutes against constitutional challenge, on the ground that they penalize conduct motivated by biased belief, not beliefs or speech as such.²⁷²)

The debate over remedies for hate speech is perhaps sharpest in the area of workplace sexual harassment, where creating a “hostile work environment” is actionable under federal law.²⁷³ One group of scholars argues, in one form or another, that it is the act of discrimination which is prohibited, not speech.²⁷⁴ Thus, the First Amendment is a non-issue. Opponents contend that if the statute punishes speech taking a particular viewpoint (e.g. “women don’t belong in the workplace”), then it is unconstitutional.²⁷⁵ Here, the characterization issue — speech or conduct — drives the constitutional analysis. As noted previously, courts have largely accepted the characterization of sexual

270. See generally Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2337-38 (1989).

271. Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment is no Bar to Challenging Racism, Sexism, and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 785 (1996).

272. See, e.g., *In re Joshua H.*, 17 Cal. Rptr. 2d 291 (Ct. App. 1993); *People v. Richards*, 509 N.W.2d 528 (Mich. App. 1993).

273. See *Harris v. Forklift Sys.*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The Supreme Court upheld Title VII of the 1964 Civil Rights Act against First Amendment challenges in *Hishon v. King & Spaulding*, 467 U.S. 69 (1984).

274. See, e.g., Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-based Discriminatory (Mis)Treatment*, 85 GEO. L.J. 649 (1997); Deborah Epstein, *Can a “Dumb Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L. REV. 399 (1995); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 41 (1995); Linda S. Greene, *Sexual Harassment Law and the First Amendment*, 71 CHI.-KENT L. REV. 729 (1995).

275. See, e.g., Nadine Stroessen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 710 (1995); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992); Nadine Stroessen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment — Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991).

harassment as conduct, not speech.

The line between speech and conduct collapses entirely in cases where the government seeks to regulate expressive conduct, such as flag- or draft card-burning,²⁷⁶ camping in public parks as a protest against homelessness,²⁷⁷ and labor picketing.²⁷⁸ Where government regulations touch on expressive conduct, the constitutional analysis depends on whether the regulation is directed at the communicative nature of the act.²⁷⁹ If so, the restriction must be justified by a compelling government interest and must be narrowly tailored to achieve that interest. In the Texas flag-burning case, for example, the challenged state statute prohibited the “desecration” of a flag.²⁸⁰ The Court had little difficulty concluding that this statute was aimed at the expressive elements of hybrid speech/conduct.²⁸¹ (The Court was more sharply divided over the sufficiency of the asserted government interest in preserving the sanctity of the flag.) A closer case might have been presented by the federal Flag Protection Act of 1989, which was drafted to avoid the holding in *Johnson* by purporting to regulate the conduct of anyone who “knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag” without regard to the expressive intent of the actor.²⁸² The Court, however, essentially concluded that the statute’s asserted justification was a pretext for regulating the expressive aspect of communicative action, and invalidated the statute.²⁸³ If, on the other hand, the government regulation is justified by an interest un-

276. See *United States v. O'Brien*, 391 U.S. 367 (1968) (draft cards); *Eichman v. United States*, 496 U.S. 310 (1990) (American flag); *Texas v. Johnson*, 491 U.S. 397 (1989) (American flag).

277. See *Clark*, 468 U.S. 288.

278. See, e.g., *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

279. See generally LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (2d ed. 1988). Tribe’s metaphor of “track one” and “track two” regulation has become widely accepted in First Amendment scholarship. See, e.g., Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921 (1993).

280. *Johnson*, 491 U.S. at 400 n.1.

281. See *id.* at 407-08, 412.

282. *Eichman*, 496 U.S. at 314.

283. See *id.* at 317. Rodney Smolla points out that the statute prohibiting mutilation of draft cards at issue in the *O'Brien* case was also passed for reasons related to the suppression of free expression, and the asserted government interests, such as reminding holders of their ongoing obligation to notify the draft board of changes of address, were pretextual. See RODNEY A. SMOLLA, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH* §9:5 (1996).

related to the suppression of expression, the regulation is subjected to relaxed scrutiny — it must be no broader in scope than necessary to accomplish an important state interest.²⁸⁴ Begging on the subway, for example, may be regulated to achieve the city government's interest in protecting passengers from intimidation and harassment by aggressive panhandlers.²⁸⁵ Similarly, a city may prohibit the posting of leaflets on city property in order to prevent the proliferation of litter and visual blight.²⁸⁶ Of course, both sides of any debate can play the categorization game, as revealed by Justice Rehnquist's characterization of aggressive anti-abortion protests as "speech," even though the record showed that the protesters had shoved, jostled, grabbed, pushed, elbowed, and spit on women entering the clinic.²⁸⁷ "Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment,"²⁸⁸ wrote the Chief Justice, as though the protesters merely had been passing out handbills, not attempting to obstruct women's access to the clinic physically. Indeed, these cases reveal that the Court has considerable latitude to label disfavored expressive activities as "conduct," thereby avoiding the protection of the First Amendment altogether.

The two-track analytical framework which varies the level of scrutiny applied to government regulations according to whether the subject of the regulation is characterized as speech or conduct, shows that a wide variety of court-imposed restrictions on attorneys' conduct may be justified, notwithstanding the First Amendment interests asserted by lawyers. The critical inquiry is whether the regulation is directed at the expressive dimension of the conduct. If not, then the expressive conduct may be regulated, provided that an important government interest is advanced, and the restriction does not infringe on expression more than necessary. Requiring allegations of judicial corruption or unethical conduct by opposing counsel to be raised in separate proceedings or motion papers is a permissible restriction on speech, because it leaves open alternative channels for communicating the message. Attorneys who berate their opposing counsel in depositions, causing delay and increased expense, may be sanctioned for discovery abuse (a category which belongs more to the paradigm

284. See, e.g., *O'Brien*, 391 U.S. at 377.

285. See *Young v. New York City Transit Auth.*, 903 F.2d 146, 157-58 (2d Cir. 1990).

286. See *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

287. See *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 363 (1997).

288. *Id.* at 377.

of conduct than speech), because the regulation is not aimed at suppressing expression.²⁸⁹ Arguably, though, a courtroom setting justifies even more explicitly content-based restrictions on the expressive dimensions of hybrid speech/conduct. Suppose an attorney wishes to wear a tie with a Kente cloth pattern, symbolizing pride in his African heritage.²⁹⁰ The lawyer is representing a criminal defendant in a city with a sizeable African-American population; thus, there is a good chance that the jury pool will be racially diverse. Could the lawyer be ordered by the court not to wear the tie? Disciplinary rules prevent lawyers from personally vouching for the credibility of a witness or stating a personal opinion about the justness of the proceeding.²⁹¹ As far as I can tell, no lawyer has even asserted, much less prevailed on, a First Amendment-based argument that the anti-vouching rule is unconstitutional; it is unproblematically regarded as a justifiable incident of the trial court's inherent power to regulate the proceedings before it, despite infringing on lawyers' speech.²⁹² Thus, if the characterization of the tie as "vouching" is correct, the lawyer can be ordered not to wear it, although I am skeptical that a Kente cloth tie is any more prejudicial than, say, a yarmulke or some other symbol of religious observance or racial pride.

Finally, the speech/conduct distinction provides the key to understanding some of the First Amendment issues surrounding bar-admissions cases, which are otherwise rather puzzling. Contemporaneously with the Matthew Hale controversy, the Nebraska Supreme Court approved the decision of that state's bar association to deny admission to an applicant who had caused endless headaches to fac-

289. See FED. R. CIV. P. 37. The formulation "not aimed at the expressive dimension of the utterance" is better than the familiar term "content-neutral," because rules against discovery abuse are certainly content-based. That is, questions which seek to elicit information that may lead to the discovery of admissible evidence are permissible in depositions, see FED. R. CIV. P. 26(b)(1). However, "speaking objections," or those which do more than concisely state the basis for the objection, are not allowed. See FED. R. CIV. P. 30(d)(1). The distinction here turns on the content of the communication, although the regulation is not aimed at the expressive dimension, or the meaning, of the utterance, but at its effect on the orderly disposition of the litigation.

290. This example is taken from the case of John Harvey, an African-American lawyer in the District of Columbia. See Paul Butler, *Racially Based Jury Nullification*, 105 YALE L.J. 677, 685 (1995); Patricia Gaines-Carter, *D.C. Lawyer Told to Remove African Kente Cloth for Jury Trial*, WASH. POST, May 23, 1992, at F1. For a similar case involving a lawyer, who was an ordained Catholic priest, and was prohibited from wearing a clerical collar while trying a jury case, see *LaRocca v. Lane*, 338 N.E.2d 606 (N.Y. 1975).

291. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4(e).

292. Cf. *Saltany v. Reagan*, 886 F.2d 438, 440 (D.C. Cir. 1989) (no First Amendment defense to Rule 11, even for lawsuits filed as political protests).

ulty and administrators at his law school, by writing letters to local newspapers, threatening to sue over the school's request that he remove a nude photograph from his library carrel, publicly accusing the dean of incompetence and corruption, and printing and selling "Deanie on a Weenie" T-shirts, depicting the dean "astride what appears to be a large hot dog."²⁹³ There is no doubt that this student was a pain in the neck, but the harm created by his speech pales in comparison with the hatred and terror created by Hale's white-supremacist Web site and organization. Nevertheless, although the Hale case has attracted the attention of high-profile constitutional lawyers, who claim that it is a classic First Amendment case,²⁹⁴ the denial of Paul Converse's application to the Nebraska bar was unanimously affirmed by the court. What explains the difference in these cases? The answer turns on the ability of the Nebraska Supreme Court to characterize all of Converse's activities as *conduct*, which could be used as evidence of his unfitness to practice law.²⁹⁵ At this point, however, the court's constitutional analysis became muddled. Instead of arguing that the bar's character-and-fitness inquiry was aimed at the non-expressive elements of hybrid speech/conduct, it assumed *arguendo* that Converse's expressive conduct was protected by the First Amendment. It then interpreted the McCarthy-era loyalty oath cases as permitting a bar association to inquire into protected expression which bears on an applicant's moral character. But the distinction articulated in *Baird* and *Wadmond* was not between expression and character, but between beliefs as such, and membership in an organization combined with the specific intent to further an unlawful end.²⁹⁶ There is no suggestion in the court's opinion that Paul Converse acted unlawfully; if anything, his conduct was hyper-legalistic — threatening lawsuits over trifles, accusing others of serious illegality, and translating interpersonal disputes into juridical terms.

293. See *In re Converse*, 602 N.W.2d 500, 505 (Neb. 1999).

294. See Van Voris, *supra* note 65 (quoting Alan Dershowitz, who had offered to represent Hale); George Anastaplo, *Lawyers, First Principles, and Contemporary Challenges: Explorations*, 19 N. ILL. L. REV. 353, 356-57 (1999) (reporting that a Jewish civil rights lawyer — a "true believer" in the First Amendment — had also offered to represent Hale). Anastaplo himself had been refused admission to the Illinois bar for refusing to disclose whether he was a member of the Communist party. He also asserted a right of revolution, citing the Declaration of Independence. See *id.* at 359-62.

295. See *Converse*, 602 N.W.2d at 505.

296. See *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971).

The kernel of a constitutionally sound basis for denying Converse's application is located in Converse's record of lawsuits and outbursts, for they show that he has a tendency to overreact to perceived offenses and employ legal and extralegal processes to harass and intimidate others. By writing letters to the newspaper (carbon-copied to federal judges Alex Kozinski and Richard Posner), rallying other students to trash a professor who had treated Converse harshly in class, and printing the infamous "Deanie on a Weenie" hot dog shirt, Converse showed that he was not inclined to resolve disputes in an orderly manner.²⁹⁷ Of course, the same could be said about Matthew Hale — he is apt to seek social change through extralegal methods such as exhorting followers to "racial holy war." The only distinction, therefore, between the two cases is that Hale's expression has so far taken the form of pure speech, while Converse's crossed the line into conduct. In both cases the bar was making a predictive judgment about the compatibility of the character of the applicants with the character required of lawyers. What apparently makes the Hale decision a significant constitutional case, worthy of the intervention of Alan Dershowitz, is that his hatefulness is manifested in speech alone, while Converse's case languishes in obscurity because he had actually *acted* on his character. This seems to be a flimsy reed on which to hang the constitutional protection afforded to beliefs, but bar-admissions cases have consistently permitted state bar associations to inquire into a broad range of conduct that is held to be probative of one's future fitness for practicing law. This inquiry is extremely narrowly circumscribed by the First Amendment under *Baird* and *Wadmond*, probably less so than many lawyers appreciate. It is interesting to speculate about what would happen if the Hale case, or one like it, makes it to the U.S. Supreme Court. Would the Court take that opportunity to bring bar-admissions cases more in line with contemporary First Amendment law, which is broadly protective of hateful speech, and even the advocacy of illegal action, provided that the danger is not imminent, clear, and present? Or would the Court continue effectively to carve out an exception for expressive activities by lawyers, who are subject to heightened state regulation? I believe that the more satisfying resolution of these tensions would be to treat the Hale case more like *R.A.V.* and *Brandenburg*, prohibiting state bar associations from denying membership to odious characters who have not crossed the line into unlawful conduct. But this resolution

297. See Converse, 602 N.W.2d at 509-10.

would fly in the face of the extremely deferential approach of state courts, who tend to approve of state bar decisions in cases like *Converse*, for reasons related to the public esteem and image of the legal profession.

B. Fighting Words

Perhaps the speech of Paul Converse and Matthew Hale is of such marginal constitutional status that it merits less protection than higher-valued speech. The preceding discussion of threats of violence, with the related suggestion that certain situation-altering speech is beyond the purview of the First Amendment, brings to mind the Supreme Court's multiple holdings that some kinds of expression are of such slight social value that the First Amendment does not prohibit their regulation.²⁹⁸ These two concepts are somewhat different, because some speech may not be situation-altering, but may nevertheless be virtually valueless. The classic example of an unprotected category of speech is "fighting words," which are those words which, "by their very utterance inflict injury or tend to incite an immediate breach of the peace."²⁹⁹ The *Chaplinsky* fighting words standard has been criticized as anachronistic and gender-based, because it assumes that listeners are equivalent to drunk, rowdy men, who are prone to starting a barroom brawl if insulted.³⁰⁰ It is a bizarre constitutional doctrine that depends more on the size, health, and temperament of the listener than on the content of the communication or

298. See, e.g., *Miller v. California*, 413 U.S. 15, 22 (1973) (obscenity); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (offensive language in radio broadcasts); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity).

299. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

300. See, e.g., Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 80 (1994); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 42 (1992); Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531 (1980). The "fighting words" metaphor may be overinclusive as well, because just about any statement could start a barroom brawl under the right circumstances. Even an innocuous — and, presumably, constitutionally protected — statement about a baseball team might lead to a fracas if the audience were drunk enough and the speaker cast aspersions on the hometown team. This is unlikely most of the time, of course, but it shows the oddity of making constitutional free speech guarantees depend on the likelihood of fisticuffs. The fighting words doctrine strikes me as a strange vestige of the culture of honor, which flourished in the American South prior to the Civil War, and which to some extent lives on in the form of a heightened sensitivity to insult and tendency to resort to extrajudicial retaliation for the redress of grievances. See generally RICHARD E. NISBETT & DOV COHEN, *CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH* (1996); KENNETH S. GREENBERG, *HONOR & SLAVERY* (1996); BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS & BEHAVIOR IN THE OLD SOUTH* (1982).

the speaker's intent. Professor Greenawalt observes that a torrent of insults directed by a white speaker toward a black listener would be subject to regulation under *Chaplinsky* where the listener is a twenty-year-old male, but not a child of nine or a person with a disability.³⁰¹ In addition, *Chaplinsky's* interment, or at least drastic limitation, has been suggested by a host of subsequent Supreme Court decisions.³⁰²

Just when one thinks *Chaplinsky* is a dead letter, however, the Court cites it with approval, as all but one of the justices did in their separate opinions in *R.A.V.*³⁰³ The lower federal courts that considered university hate speech restrictions in the early 1990s were forced to wrestle anew with the fighting words doctrine, because the universities generally defended their speech codes on the basis of congruence with the category of fighting words.³⁰⁴ Courts considering the free speech arguments advanced by obnoxious lawyers are also fond of *Chaplinsky*. For example, in one disciplinary proceeding, the lawyer was suspended from the practice of law for ninety days for, among other offenses, shouting at workers from the Connecticut Department of Children and Youth Services, calling them "nazis" and screaming,

301. See GREENAWALT, FIGHTING WORDS, *supra* note 264, at 52.

302. See *Lewis v. New Orleans*, 415 U.S. 130, 132 n.1 (1974) ("you goddamn mother-fucking police"); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) ("We'll take the fucking street later"); *Gooding v. Wilson*, 405 U.S. 518, 520 n.1 (1972) ("You son of a bitch I'll choke you to death"); *Cohen v. California*, 403 U.S. 15 (1971) (protester wearing "fuck the draft" jacket in courthouse); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). In all but *Cohen* and *Brandenburg*, the words were uttered to a police officer, but the speakers' convictions were nevertheless struck down. In *Gooding* and *Lewis*, the statutes under which the conviction was obtained were deemed overbroad, because they proscribed speech beyond that which would tend to incite an immediate breach of the peace. Similarly, in *Texas v. Johnson*, the Court observed that burning the flag, a "generalized expression of dissatisfaction with the policies of the Federal Government," is unlikely to be perceived as a direct personal insult that would naturally provoke an observer to violence. 491 U.S. 397, 409 (1989). One student commentator has accordingly urged that the fighting words doctrine be interpreted in parallel with *Brandenburg*, to permit suppression of speech only where there is a clear and present danger of imminent lawless action. See Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527 (1993).

303. See *R.A.V.*, 505 U.S. at 377; see also *Johnson*, 491 U.S. at 409, 430-31 (Justice Brennan and Justice Rehnquist disagreeing over applicability of *Chaplinsky* to flag burning).

304. See, e.g., *UWM Post, Inc. v. Board of Regents of Univ. of Wis.*, 774 F. Supp. 1163, 1169-73 (E.D. Wis. 1991) (holding that the University of Wisconsin hate speech rules went beyond the scope of *Chaplinsky*); *Dambrot v. Central Mich. Univ.*, 839 F. Supp. 477, 482-83 (E.D. Mich. 1993) (observing that rules did not proscribe fighting words that were not directed at the listener on account of race, sex, or other protected class); see also DELGADO & STEFANCIC, *supra* note 6, at 96 (reporting that University of Texas and University of California at Berkeley prohibited speech that was essentially equivalent to fighting words).

“there go the child molesters.”³⁰⁵ The court invoked *Chaplinsky*, and held that the attorney’s speech was not constitutionally protected because it constituted words that “tend to incite a breach of the peace.”³⁰⁶ In other words, the court seemed to make the remarkable assumption that the state workers would have beaten up the lawyer if they had not been capable of exercising extraordinary self-restraint. But the decision does fall within the narrowed construction of *Chaplinsky* given by the Court — the words were uttered directly at the person of the addressee,³⁰⁷ and possibly were words which by their very nature would tend to provoke violent retaliation.³⁰⁸

Another attorney-speech case, *In re Spivey*,³⁰⁹ also fits within the narrow bounds of *Chaplinsky*. In that case, a district attorney repeatedly and loudly addressed another patron at a bar as a “n——,” and was removed from office by the Superior Court, pursuant to a state statute. The court took judicial notice of the effect the attorney’s words would have on an African-American listener, and observed that the attorney was probably trying to provoke a confrontation at the bar — a paradigmatic instance of fighting words under *Chaplinsky*. Interestingly, the trial court went beyond this application of *Chaplinsky*, and concluded that the attorney’s removal was justified because he had engaged in conduct prejudicial to the administration of justice.³¹⁰ Not only the bar confrontation, but also the testimony of numerous witnesses at the removal hearing, established that the attorney had a long history of mistreating black citizens of his district. The finding that his conduct was prejudicial to justice was one that the trial court was obligated to make under the removal statute, but it is worth speculating on the result if the bar assault had not occurred. Could the testimony of the African-American witnesses, showing that the district attorney was a racist, establish a constitutionally sound basis for removal? And, if so, why could the Illinois committee not deny admission to Matthew Hale on the same ground? The answer, in light of the university hate speech cases, is probably that racially disparaging language that was not essentially an invitation to fight could not form the basis for state sanctions against a lawyer, provided

305. See *Statewide Grievance Comm’n v. Presnick*, 559 A.2d 220, 225 (Conn. App. Ct. 1989).

306. *Id.*

307. See *Cohen*, 403 U.S. at 20.

308. See *Gooding*, 405 U.S. at 525-27.

309. 345 N.E.2d 693 (N.C. 1997).

310. *Id.* at 699.

that the language was not part and parcel of the act of racial discrimination in the lawyer's professional capacity. The decision of the Illinois character and fitness committee is supportable only on the ground that the record supports a predictive judgment that Hale will be unable to comply with a valid disciplinary rule preventing discrimination against clients and other lawyers and litigants. *Chaplin-sky* does not equate to an exception to the general requirement that speech restrictions be content-neutral; it merely provides some regulatory authority where violent response may be expected.

C. The Right/Privilege Distinction

A recurring theme in constitutional law, going back at least as far as Justice Holmes's tenure on the Supreme Judicial Court of Massachusetts, is that in some cases the government may hand out benefits with strings attached. Justice Holmes wrote a decision upholding the dismissal of a policeman for violating a regulation against participating in political activity, famously stating in the process that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."³¹¹ This vision of constitutional rights is essentially contractarian — in the absence of coercion, the individual is free, in the course of her relationship with the state, to surrender a privilege that the state otherwise would have safeguarded, in exchange for some valuable government benefit. The employee's government job, along with the full panoply of expressive rights enjoyed by other citizens, therefore, is merely a privilege, an interest "created by the grace of the state and dependent for [its] existence on the state's sufferance."³¹² If the state wishes to demand the surrender of a constitutional right in exchange for the government job, it is free to do so.

On several occasions, the Court has announced the end of the right/privilege distinction.³¹³ The modern doctrine, which the Court

311. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892). Interestingly, the same principle was applied by the Tennessee Supreme Court in Scopes's appeal from his conviction at the famous "monkey trial." The court said that Scopes "had no right or privilege to serve the State except upon such terms as the State prescribed," including requiring teachers to refrain from teaching evolution. *See Scopes v. State*, 289 S.W. 363, 364-65 (Tenn. 1927).

312. Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 71 (1982).

313. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 229-30 (1977). *See also* William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 83 HARV. L. REV. 1429 (1968)(providing a well known academic commentary on this development).

generally claims to follow, is that of “unconstitutional conditions.”³¹⁴ According to this principle, the government may not grant a benefit to a person on the condition that the recipient refrain from engaging in some constitutionally protected activity, even if the recipient is not entitled to the benefit in the first place.³¹⁵ For instance, a government agency may not deny a job to someone or dismiss an employee for belonging to “subversive” organizations,³¹⁶ for refusing to take a loyalty oath,³¹⁷ for refusing to declare belief in God,³¹⁸ or for criticizing the employer.³¹⁹ A federal appellate court has held that a state may not deny a hateful organization permission to “adopt” a stretch of highway, reasoning that the state could not condition the privilege of picking up litter alongside the road on the renunciation of white supremacist beliefs.³²⁰ The Court has extended the protection of the unconstitutional conditions doctrine to government contractors, whose contracts may not be terminated for speaking out against the government or for refusing to support an elected official’s campaign.³²¹

The unconstitutional conditions analysis does not apply to many lawyer free expression cases, because the constitutional right that the lawyer claims is infringed is not a right which would exist outside the context in which it was asserted.³²² Suppose a lawyer is disciplined for making racist remarks in a closing argument at trial. It is to no avail to claim that the disciplinary agency is requiring the lawyer to surrender a constitutional right in exchange for the privilege of trying cases before the courts of the state, because the lawyer had no preexisting right to address a jury in a courtroom.³²³ If, on the other hand, the

314. See Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). For an early statement of this doctrine, see *Frost & Frost Trucking Co. v. Railroad Comm’n*, 271 U.S. 583 (1926).

315. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

316. See *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

317. See *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

318. See *Torcaso v. Watkins*, 367 U.S. 488, 405 (1961).

319. See *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977).

320. See *Cuffley v. Mickes*, 208 F.3d 702, 709 (8th Cir. 2000). This reasoning is faulty, because the court misconstrued the nature of the Klan’s rights. It is true that Klansmen had a preexisting right to pick up litter near the highway, wearing their robes if they’d like, but they had no prior right to have the state put up signs acknowledging this effort.

321. See *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Board of County Comm’rs v. Umbehr*, 518 U.S. 668, (1996).

322. See WILLIAM W. VAN ALSTYNE, *FIRST AMENDMENT* 330-31 (1991).

323. Cf. *Leis v. Flynt*, 439 U.S. 438 (1979) (appearing *pro hac vice* is a privilege, not a right). This case is not an impermissible example of right/privilege reasoning, because the

lawyer had been disciplined for making racist remarks in a letter to the editor, unconnected with any pending litigation, the unconstitutional conditions analysis would be applicable. In that case, the lawyer would be engaging in an activity in which she was fully entitled to participate as an ordinary, non-lawyer citizen.

Despite the Supreme Court's avowal of the end of the right/privilege doctrine, this reasoning lives on in two contexts which have immediate application to the regulation of lawyers. The first is the Court's procedural due process line of cases: a government entity must provide due process only when the claimant is deprived of an interest that may be characterized as "life, liberty, or property."³²⁴ In other situations, the recipient of a government benefit may be deemed to have waived due process rights as part of the bargaining process by which the benefit was obtained. So long as "courts retain their normal power to police bargains and carefully scrutinize the contractual process, the lack of meaningful procedural recourse for an individual can surely be the legitimate object of an enforceable bargain."³²⁵ In the words of Justice Rehnquist, the recipient of a government license, job, or benefit must "take the bitter with the sweet."³²⁶

The second, closely related, recurrence of the right/privilege distinction, one which bears by analogy on the First Amendment rights of lawyers, is the Court's public employment cases. The typical fact pattern involves a government employee who says something critical of her employer or makes comments inconsistent with the employer's mission, and is subsequently fired. For example, an employee of the county sheriff's office heard that someone had attempted to assassinate President Reagan, and remarked, "[i]f they go for him again, I hope they get him."³²⁷ The Court reasoned that the sheriff's interest in the effective functioning of his office did not outweigh the employee's right to speak out on matters of public concern.³²⁸ In *Waters*

lawyer has no preexisting constitutional right to represent clients in states in which she is not licensed. Thus, the government is not requiring her to surrender a right in order to obtain a state license. If appearing *pro hac vice* were conditioned upon the lawyer's agreement not to criticize the courts of the new state, however, the exchange would be a violation of the unconstitutional conditions doctrine.

324. See RONALD D. ROTUNDA AND JOHN E. NOVAK, TREATISE ON CONSTITUTIONAL LAW § 17.2, at 584 (2d ed. 1992).

325. Smolla, *supra* note 312, at 111.

326. *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974).

327. *Rankin v. McPherson*, 483 U.S. 378, 380 (1987).

328. The Court announced this two-prong test for the free speech rights of public employees in *Connick v. Myers*, 461 U.S. 138 (1983). See also *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

v. Churchill,³²⁹ by contrast, the Court held that a public hospital employee could be fired for criticizing her department, because the state's interest in the efficient operation of the hospital outweighed the employee's free expression rights. These two cases exhibit some of the vexing analytical problems raised by First Amendment issues — the prevalence of balancing rhetoric in the Court's decisions, the need to pass on the importance of asserted government or individual interests, and the manipulation of categories such as "matters of public concern." Nevertheless, there are some appealing analogies between the public employee cases and lawyer-speech issues.³³⁰ For one thing, the public employee analysis recognizes the "officer of the court" dimension of the lawyer's role. Lawyers do have a significant private or fiduciary function — they represent the interests of clients *against* the state and other private parties. At the same time, however, lawyers must conform their client's conduct to the boundaries of the law, and may not counsel or assist their clients in violating the law. This aspect of the lawyer's role is a quasi-public obligation; lawyers are not literally public employees, but their acts do take on a public quality by virtue of the power of lawyers to invoke the official apparatus of the state. (Significantly, the Supreme Court has recognized that lawyers are officers of *the court*, not of the government, a distinction which recalls both the importance of judicial independence and of the independence of lawyers from the state.³³¹ The Court has also cautioned that the public-employer analogy is not to be taken literally, and that lawyers are not government officeholders — a class whose membership may permissibly be limited to United States citizens.³³²) In addition, the public employee cases capture an important feature of First Amendment policy in the requirement that speech be on matters of public concern in order to be protected. There is little reason to require the efficient functioning of government to be impeded by lawyers' speech that does not in some way contribute to public welfare or to the protection of a legal or moral entitlement of

329. 511 U.S. 661 (1994).

330. In the Matthew Hale bar-admission case, the committee cited some of the Court's public-employee decisions as though they were directly on point, not simply helpful by analogy. See Hale Inq. Panel Opinion, *supra* note 28, at 880-81, *citing* Pickering v. Board of Educ., 391 U.S. 563 (1968). The committee seemed blissfully unaware of the limitations of this analogy, principally that lawyers also have a significant (and perhaps overriding, in many cases) private duty to represent clients, even those whose interests are not aligned with those of the government.

331. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378 (1866).

332. See *In re Griffiths*, 413 U.S. 717 (1973).

the speaker — by advancing the search for truth, facilitating democratic self-government, or enabling disempowered minorities or dissidents to assert claims for relief. Speech that merely harasses the listener, drives up the cost of resolving disputes, or enables the lawyer to vent his spleen ought to be entitled to less protection than speech that is critical of government actions.

The Court claims to have repudiated the right/privilege distinction in the context of admission to the bar, in *Baird v. State Bar of Arizona*.³³³ In that case, a lawyer was denied admission to the state bar because she refused to answer questions about whether she had ever belonged to the Communist Party or any other organization which advocates violent overthrow of the United States government. Justice Black, writing for the majority, said that “[t]he practice of law is not a matter of grace, but of right for one who is qualified by his learning and moral character.”³³⁴ Thus, the applicant could not be forced to give up her right not to speak about her previous associations as a condition of becoming an attorney. In a later case, *Keller v. State Bar of California*, the Court reiterated that lawyers cannot be forced to surrender their right to associate or to refrain from speaking in exchange for a license to practice law.³³⁵ *Keller* involved a scheme under which a portion of state bar association licensing fees were allocated to the bar association’s lobbying activities. (This issue recurred many years later in the guise of the funding of student political advocacy organizations through student activity fees at public universities.³³⁶) The Court reasoned, citing several cases involving labor unions, that employees (or lawyers) cannot be required to surrender, as a condition of employment or licensing, their First Amendment right not to be compelled to support ideological causes with which they disagree.³³⁷

Despite the Court’s claim to have eschewed the right/privilege

333. 401 U.S. 1 (1971). For a representative statement to the same effect from a state court, see *Cunningham v. Superior Court*, 170 Cal. App. 3d 349 (citing to *Baird v. State Bar*, 401 U.S. 1 (1971)) (“The right to practice law . . . must not be predicated upon the relinquishment of constitutional rights.”).

334. *Baird*, 401 U.S. at 8. Compare Justice Blackmun’s dissent, where he argued that membership in the bar is a privilege, not a right, and that the state could constitutionally inquire into the applicant’s fitness as a condition on granting that privilege. See 401 U.S. at 19-20.

335. 496 U.S. 1 (1990).

336. See *Board of Regents of the Univ. of Wis. System v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

337. See *Baird*, 496 U.S. at 10.

distinction in bar admissions and licensing fee cases, this analysis can still be found in numerous cases involving discipline for lawyers engaging in expressive activities, the most prominent example being Justice Rehnquist's opinion in *Gentile v. State Bar of Nevada*.³³⁸ "Membership in the bar is a privilege burdened with conditions," he wrote, quoting Judge Cardozo.³³⁹ According to Justice Rehnquist, lawyers in pending cases are subject to restrictions on speech to which an ordinary citizen would not be.³⁴⁰ He emphasized that even rights as fundamental as those guaranteed by the First Amendment may be subordinated to other interests that arise in litigation.³⁴¹ The reason for this subordination is the special status of a lawyer — she is an officer of the court, "an intimate and trusted and essential part of the machinery of justice."³⁴² Justice Kennedy, by contrast, was concerned that application of the right/privilege distinction to speech by lawyers would have the consequence of reducing a lawyer to the status of a cog in the machinery of justice. "There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."³⁴³ A cog, after all, is in no position to criticize the operation of the machine. Thus, Justice Kennedy sought to vest the lawyer's speech with the constitutional safeguards available to core political speech, arguing that the public's right to be informed on how criminal trials are conducted justified heightened protection for the lawyer's comments to the press.³⁴⁴ The attorney's capacity to make this information public suggested to Justice Kennedy that the

338. See *Gentile*, 501 U.S. 1030 (1991).

339. *Id.* at 1066 (citing *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917) (Cardozo, J.)); see also *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 489 (N.Y. 1928) (Cardozo, J.). Despite the prestige of the author of these opinions, they are of doubtful precedential value, since they long predate the Supreme Court's general rejection of the right/privilege distinction.

340. See *id.* at 1071.

341. See *id.* at 1073 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (claiming that courts may issue protective orders limiting the dissemination of information obtained in discovery)). This citation is also inapposite, because the confidential information divulged by the parties in *Rhinehart* was obtained by the lawyer only pursuant to the court's power to order discovery; it is not information to which the lawyer (and therefore the newspaper) would otherwise have been entitled.

342. *Id.* at 1072 (quoting *In re Sawyer*, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting)).

343. *Gentile*, 501 U.S. at 1034 (Kennedy, J.).

344. See *id.* at 1035 (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980)). The lawyer in *Gentile*, after all, was only countering the state's publicity efforts, which included a leak to the press suggesting that two other potential suspects had passed lie-detector tests. See *id.* at 1040-42.

“officer of the court” appellation actually entailed less regulation of lawyers’ speech, not more, as Justice Rehnquist argued.³⁴⁵ It may be more accurate, however, to say that Justice Kennedy elevated the private, or fiduciary dimension of the lawyer’s role to a position of primacy over the public or officer of the court duty.

As I have argued, Justice Kennedy’s reasoning is sounder, in light of both constitutional doctrine and the ethical traditions of the legal profession.³⁴⁶ Because Justice Rehnquist’s opinion commanded the majority on the constitutional issues, however, it is important to be very clear on what, exactly, it holds. Courts³⁴⁷ and commentators³⁴⁸

345. *Id.* at 1056.

346. *See supra* notes 160 - 173 and accompanying text.

347. *See, e.g.*, Howell v. State Bar of Texas, 843 F.2d 205, 207 (5th Cir. 1988); *In re Frerichs*, 238 N.W.2d 764, 768-69 (Iowa 1976) (“A lawyer, acting in a professional capacity, may have some fewer rights of free speech than would a private citizen”); Attorney Grievance Comm’n v. Alison, 565 A.2d 660, 665-66 (Md. Ct. App. 1989) (lawyers voluntarily accept restrictions on conduct more demanding than those applicable to other members of society); *In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987) (“Outside the courtroom the lawyer may, as any other citizen, freely engage in the marketplace of ideas But here respondent was in the courtroom, and officer of the court engaged in court business, and for his speech to be governed by appropriate rules of evidence, decorum, and professional conduct does not offend the first amendment.”); State ex rel. Nebraska Bar Ass’n v. Michaelis, 316 N.W.2d 46, 53 (Neb. 1982) (“A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics; and if he wishes to remain a member of the bar he will conduct himself in accordance therewith.”); *In re Converse*, 602 N.W.2d 500 (Neb. 1999); *In re Raggio*, 487 P.2d 499, 500-01 (Nev. 1971) (“We are never surprised when persons, not intimately involved with the administration of justice, speak out in anger or frustration about our work A member of the bar, however, stands in a different position by reason of his oath of office and the standards of conduct which he is sworn to uphold.”); Justice of the Appellate Division v. Erdmann, 301 N.E.2d 426, 428 (N.Y. 1973) (Burke J., dissenting) (“The article, as well as the remarks, violate restrictions placed on attorneys which they impliedly assume when they accept admission to the Bar.”) *but see* Polk v. State Bar of Texas, 374 F. Supp. 784, 787 (N.D. Tex. 1974) (“It cannot be seriously asserted that a private citizen surrenders his right to freedom of expression when he becomes a licensed attorney in this state”); *In re Johnson*, 729 P.2d 1175, 1178 (Kan. 1986) (“One who has received a license and is accorded the privilege to practice law is still guaranteed the right of freedom of speech.”); State ex rel. Okla. Bar Ass’n v. Porter, 766 P.2d 958, 961 (Okla. 1988); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §11.3.2, at 602 (1986).

348. This student note on an attorney free speech case is typical: “[E]very attorney should be aware that the right to free speech is a qualified right. Attorneys representing clients in a judicial context are subject to ethical restrictions on speech greater than those that bind ordinary citizens.” Brian E. Mitchell, Note, *An Attorney’s Constitutional Right to Have an Offensive Personality?* United States v. Wunsch and Section 6068(f) of the California Business and Professions Code, 31 U.S.F. L. REV. 703, 720 (1997). *See also* Leora Harpaz, *Compelled Lawyer Representation and the Free Speech Rights of Attorneys*, 20 W. NEW ENG. L. REV. 49, 56 (1998) (“the speech of lawyers can be subject to some

are prone to misread *Gentile* as endorsing a broad right/privilege distinction. Careless quotation from Justice Rehnquist's opinion in *Gentile* can suggest that lawyers waive expressive rights upon admission to the bar, but of course this is a position that has no support in precedent and is wildly out of step with First Amendment doctrine in other contexts. *Gentile*, properly understood, permits courts to regulate lawyers' speech related to pending cases in which they are involved, at a threshold lower than "clear and present danger." Significantly, it still requires the state to show a substantial likelihood of material prejudice to a judicial proceeding.³⁴⁹ Only a very small set of lawyers' utterances may be regulated under this standard, and a great many cases which cite *Gentile* do not involve speech that threatens concrete harm to a specific court proceeding.

D. The Government Speech Analogy

There is some truth in the right/privilege distinction as applied to lawyers, but only in a limited context. When lawyers speak on behalf of clients, either in courtroom proceedings or otherwise as agents for their clients, they are speaking pursuant to an entitlement granted by the state, to which the state may attach certain conditions necessary for the realization of important government interests. No one has seriously suggested that rules of evidence (such as standards of relevance³⁵⁰), civil procedure (for example, the rule prohibiting frivolous legal arguments³⁵¹), or professional conduct (such as the anti-vouching rule³⁵²) raise First Amendment problems. In these cases, however, the lawyer is not giving up constitutional rights that she otherwise would have possessed as a private citizen, in exchange for a government benefit or license. Without a license to practice law, the lawyer could not have spoken on behalf of a client in a courtroom at all. Thus, it may be helpful to think of lawyers' speech that is directly related to representing clients as a kind of government-funded expression, to which content-based restrictions may be attached.

The government is free to attach certain kinds of conditions to the speech it funds. It may allocate funding using criteria that would

forms of regulation that would not be constitutional if applied to the expression of other speakers"); Roberts, *supra* note 102, at 820-25.

349. This standard is incorporated into Rule 3.6(a) of the ABA Model Rules of Professional Conduct.

350. FED. R. EVID. 401.

351. FED. R. CIV. P. 11.

352. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4(e).

be impermissible if used as a basis for direct regulation of speech.³⁵³ For example, when setting up public schools, the state may limit expression — in the form of books to be bought for the school library, the scope of curricula, and the in-class speech of teachers — according to criteria of educational suitability.³⁵⁴ “It may be true that a life promoting astrology, cat-beating, sadomasochism, racism or witchcraft is the good life, but a grammar school pursuing any of the above in a substantial way would not be accredited.”³⁵⁵ Universities may make funding available to student organizations whose activities are related to the educational purposes of the university.³⁵⁶ Grants may be parceled out to artists on the basis of artistic excellence (the NEA does not have to fund kitsch),³⁵⁷ or to teachers on the basis of pedagogical effectiveness.³⁵⁸ The government may fund anti-smoking, pro-seat belt, or join-the-military campaigns, which obviously discriminate on the basis of viewpoint in the distribution of subsidies.³⁵⁹ Congress may establish the National Endowment for Democracy, which is permitted to deny funding for speakers who wish to tout the benefits of a Latin American-style military *junta* as an acceptable alternative form of government.³⁶⁰ Speech *restrictions*, too, can be permissible if applied to government speakers. The Hatch Act, which limits the ability of federal employees to engage in electoral politics, has been held constitutional.³⁶¹ By analogy then, the state ought to be free to set up a court system in which frivolous arguments are prohibited, only relevant evidence is introduced, and courtroom speech may be limited by criteria of germaneness to the business of the court.

None of the permissible criteria for funding speech has any bearing on what the speaker does outside the narrow context in which

353. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998).

354. *See, e.g., Hazlewood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Board of Educ. v. Pico*, 457 U.S. 853 (1982).

355. SHIFFRIN, *supra* note 300, at 89.

356. *See Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995).

357. *See Finley*, 524 U.S. 569.

358. *Id.* at 589 (reviewing government awards, such as fellowships and grants, available to teachers and students on the basis of excellence in some activity).

359. *See Rust v. Sullivan*, 500 U.S. 173 (1991) (restricting government funding of family planning clinics to those which did not mention abortion). One of the insights of Mark Yudof's book on government speech is just how pervasive this state-sponsored expression is. *See* MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

360. *See Rust*, 500 U.S. at 194.

361. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

government funding is available. Although the NEA may fund art that is “excellent” and not “indecent,” it may not restrict its funding to artists who agree not to criticize the government in some other forum — such as through the medium of their privately-funded art. Schoolteachers may participate in public debate, and may weigh in with opinions that may not be expressed in the classroom³⁶² — say, a judgment that “creation science” ought to be taught on a par with evolution. They just may not talk about creationism to their students, on class time. The government is entitled, under the First Amendment, to disassociate itself from speech that reflects badly on its policies, such as providing sound education in science to high school students or promoting artistic excellence, but it may not extend this selective funding authority to regulate the speech of private actors who do not speak on behalf of the government.³⁶³

Although most lawyers are not literally state employees, frequently they speak pursuant to government-established procedures, or using state property, such as courthouses. Thus, the Court’s forum-analysis cases also provide a principled distinction between speech settings in which lawyers are subject to stringent regulation and those in which lawyers’ expressive rights are more akin to those of non-lawyer citizens. The essential distinction is between government property that may be used “for purposes of assembly, communicating thoughts between citizens, and discussing public questions”³⁶⁴ and that which is closed to expressive activities by the general public.³⁶⁵ The first category of “public forums” is typified by sidewalks and parks, and within these venues, content-based regulations on speech are strictly disfavored.³⁶⁶ In non-public forums, by contrast, the government may impose reasonable restrictions on speech, provided that it is not viewpoint-discriminatory.³⁶⁷ The permissibility of reasonable regulation of speech in a non-public forum captures the core of truth in the right/privilege distinction — if an individual would

362. Cf. *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down “equal time” statute which required teaching creationism along with evolution); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating ban on teaching evolution in public schools).

363. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 *FORD. L. REV.* 569, 587 (1998).

364. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

365. See generally SMOLLA, *supra* note 166 §§ 8:1 - 8.9.

366. See, e.g., *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37 (1983). For further discussion of content-based and content-neutral regulations, see *infra* notes 432 - 482 and accompanying text.

367. See *Perry*, 460 U.S. at 47.

not have the right to enter onto government property and use it for expressive purposes, then the government may condition entry into this forum on the speaker's agreement to comply with reasonable ground rules set by the government. Although cases are legion in which courts have been called upon to determine whether particular settings — such as airports,³⁶⁸ high school student newspapers,³⁶⁹ internal mail systems,³⁷⁰ and sidewalks in front of government buildings³⁷¹ — are public or a non-public forums, it is clear that many of the contexts in which lawyers speak are not open to the public for expressive purposes. The reason why lawyers may not make frivolous arguments in court filings is emphatically *not* because they possess diminished expressive rights as “officers of the court”; rather, it is because the pleading system set up by the rules of civil procedure is a non-public forum, subject to reasonable, viewpoint-neutral regulations. Kathleen Sullivan is therefore absolutely correct to point out that the state should not be permitted to define its functional interests too broadly.³⁷² The domain of non-public forums, in which lawyers' speech is subject to extensive regulation, should be understood as limited to communications which are essential to the accomplishment of core court business, such as resolving disputes. Speech outside these venues, such as courthouse-steps press conferences, critical letters to newspapers or even judges, and spats between adversaries, may not be restricted except in the relatively rare instances in which it poses a clear and present danger to the administration of justice.

E. Vagueness and Overbreadth

A regulation that “either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”³⁷³ The Court has ruled on several occasions that terms such as “loafing,” “rogues and vagabonds,” “obscene or opprobrious language,” and “credible and reliable identification” are too imprecise to give fair warning to those who risk punishment under a criminal statute.³⁷⁴ The vagueness doc-

368. See *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).

369. See *Hazlewood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

370. See *Perry*, 460 U.S. 37.

371. See *United States v. Kokinda*, 497 U.S. 720 (1990).

372. See Sullivan, *supra* note 363, at 588.

373. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

374. See *Papachristou*, 405 U.S. at 156-57; *Kolender v. Lawson*, 461 U.S. 352 (1983);

trine requires the government to provide clear guidelines for law enforcement, so that the threat of sanctions does not have a chilling effect on lawful activity.³⁷⁵ Because the Constitution is designed to maximize individual liberty within the rule of law, restrictions on one's lawful activities ought to be clearly demarcated, so a law-abiding citizen can conform her conduct to legal requirements without excessively limiting her freedom.³⁷⁶ Impermissibly vague laws also permit government agents to target enforcement efforts selectively, usually against unpopular individuals or groups.³⁷⁷

The vagueness doctrine is a corollary of the requirement, embodied in the Fifth and Fourteenth Amendments, that the government provide due process before depriving a citizen of a protected interest.³⁷⁸ However, courts have long maintained that the First Amendment is an independent basis upon which to find regulations void for vagueness.³⁷⁹ This is so because of the heightened public interest in the free flow of information,³⁸⁰ particularly in academic settings or other institutional contexts where the exchange of ideas is of paramount importance,³⁸¹ the concern that fuzzy boundaries around

Lewis v. City of New Orleans, 415 U.S. 130 (1974); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). The statute at issue in *Papachristou* is a marvel of unconstitutionally vague, but wonderfully evocative, Damon Runyon-esque language:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants

Papachristou, 405 U.S. at 156-57

375. See *Colautti v. Franklin*, 439 U.S. 379 (1979); *NAACP v. Button*, 371 U.S. 415, 432-33 (1963).

376. See *Kolender*, 461 U.S. at 357.

377. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Kolender*, 461 U.S. at 358, 360; *Papachristou*, 405 U.S. at 168-70.

378. See 4 ROTUNDA AND NOWAK, *supra* note 324 § 20.9, at 36.

379. See, e.g., *Kolender*, 461 U.S. at 358; *Grayned*, 408 U.S. at 109; *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997); *Parker v. Levy*, 417 U.S. 733, 756 (1974); *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1266 (3d Cir. 1992).

380. See, e.g., *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1981) (more stringent vagueness test applies where law interferes with right of free speech); *Smith v. California*, 361 U.S. 147, 151 (1959).

381. See *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

unprotected speech would chill protected communication,³⁸² and because of the possibility that vague restrictions on speech might be employed arbitrarily to penalize speakers of unpopular messages.³⁸³

Under the closely related overbreadth doctrine, a court may invalidate a regulation that is designed to punish activities that are not safeguarded by the constitution, but which includes within its scope activities which are constitutionally protected.³⁸⁴ An overbroad statute amounts to "burn[ing] the house to roast the pig."³⁸⁵ Courts often speak of the chilling effect of overly broad statutes on free expression.³⁸⁶ Thus, statutes regulating speech potentially covered by the First Amendment must be narrowly drawn to address specific harms.³⁸⁷ "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."³⁸⁸ For example, a statute which prohibits assaulting, opposing, abusing, or molesting a police officer *in any manner* is unconstitutionally overbroad because it forbids criticizing the police in impassioned speeches, letters to the editor, rap songs (like "Cop Killer"), or even private conversation.³⁸⁹ In a university hate-speech case involving the termination of a basketball coach for using a racial epithet, the court worried that a student's term paper "or even a cafeteria bull session" might have the effect of creating a "negative con-

382. See *ACLU*, 521 U.S. at 872.

383. See, e.g., *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 666 n.10 (1985) (Brennan, J., concurring in part and dissenting in part); *Shuttlesworth*, 382 U.S. at 90. Cf. *Hoffman Estates*, 455 U.S. at 503-04 (deferring consideration of retailer's contention that city ordinance against selling cigarette papers, roach clips, and other drug paraphernalia would be selectively enforced against individuals with alternative lifestyles). Where this concern is not present, such as where the government is selectively funding speech, the vagueness doctrine is not strictly enforced. See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 588-89 (1998).

384. See 4 ROTUNDA AND NOWAK, *supra* note 324 § 20.8, at 26; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).

385. *Sable Communications. of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989)(quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

386. See, e.g., *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (invalidating a ludicrously overbroad ban on all "First Amendment activities" in Los Angeles International Airport); *Stromberg v. California*, 283 U.S. 359 (1931) (striking down statute making it illegal to display a red flag as a "sign, symbol or emblem of opposition to organized government").

387. See *ACLU*, 521 U.S. at 874-76; *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

388. *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)).

389. See *Houston v. Hill*, 482 U.S. 451 (1985).

notation about an individual's racial or ethnic affiliation"; because the university's "discriminatory harassment policy" covered speech that did not amount to legally proscribed racial discrimination, harassment, defamation, or intentional infliction of emotional distress, the court held it facially overbroad.³⁹⁰ The Communications Decency Act, designed to protect children from obscene material on the Internet, was held invalid in part because it effectively criminalized a substantial amount of expression that adults had a right to receive.³⁹¹ But courts tend to relax their vigilance against overbreadth when the speech of lawyers is concerned. For example, in one judicial-speech case in which a judge was charged with making sexist comments to attorneys, the court paid lip service to the limitless variety of judging styles that exist in Texas, noting that "[t]here must always be room for the colorful judge as well as the more conventional judge."³⁹² The court, however, dealt perfunctorily with the judge's argument that terms like "promotes public confidence in the integrity and impartiality of the judiciary" prohibited the kind of colorful judging styles the court professed to protect.³⁹³ Although the record reveals that the judge was an insensitive, boorish individual — a good ol' boy, in the local vernacular — it is hard to see how his conduct could have undermined public confidence in the Texas judiciary (which isn't all that high to begin with).³⁹⁴ Moreover, the rule would presumably also have restricted the speech of eccentric but competent judges — just the kind of jurists the court claimed to want in Texas.

A facially vague or overbroad statute may be narrowed through judicial construction, administrative guidelines, or social context. For

390. *Dambrot v. Central Michigan Univ.*, 839 F. Supp. 477, 481-82 (E.D. Mich. 1993). In a somewhat paradoxical decision, the court also granted the university's cross-motion for summary judgment on the coach's wrongful-termination claim. It held that because the coach's speech was not on a matter of public concern, the university did not violate his First Amendment rights by terminating him. *See id.* at 490. The university's inability to promulgate an enforceable code of conduct prohibiting the coach's use of a racial epithet, alongside its power to fire the coach for precisely that reason, is an ironic consequence of the byzantine complexity of First Amendment doctrine.

391. *See ACLU*, 521 U.S. at 874.

392. *In re Barr*, 13 S.W.3d 525, 539 (Tex. Review Tribunal 1999).

393. *See id.* at 564-65 (opinion on rehearing). *See also In re Hill*, 8 S.W.3d 578, 583 (Mo. 2000) (making extremely conclusory argument that judge's letter to a local newspaper, as part of a political dispute, did not promote public confidence in the judiciary).

394. For a fairly typical view of the Texas judiciary, see Randall T. Shepard, *Judicial Professionalism and the Relations Between Judges and Lawyers*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 223, 239 n.114 (2000) (relating joke in which a judge decides that the ethical course of action is to take campaign contributions from both sides and decide the case on the merits).

example, in *Hoffman Estates*, the Court was unimpressed with the defendant's argument that statutory language requiring a retail outlet to obtain a license to sell drug paraphernalia was vague.³⁹⁵ The village's licensing guidelines employed terms like "roach clips" and "pipes," which the Court concluded were adequately clear in the context of illegal drug use.³⁹⁶ Of course, clarity through common usage by itself may not save a statute from unconstitutional vagueness, because of the problem of discriminatory enforcement. Everyone knows who "persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold" are — even Justice Douglas, the author of the majority opinion in *Papachristou* knew these persons were the "so-called undesirables" who are continually subjected to police harassment.³⁹⁷ The basis for the constitutional infirmity of the statute is the possibility that these disfavored citizens "are permitted to stand on a public sidewalk. . . only at the whim of any police officer."³⁹⁸ In other words, the words in a statute might not be literally vague, when read in light of common usage, but they may be unconstitutionally vague insofar as they permit discriminatory enforcement of penal laws.

The twin issues of vagueness and overbreadth are inextricably bound up with the attempt by courts to promulgate rules regulating speech and expressive conduct by lawyers. Some federal district court local rules prohibit speech which is "prejudicial to the administration of justice;"³⁹⁹ that "degrades or impugns the integrity of the court;"⁴⁰⁰ or that is "unbecoming [of] an officer of the Court."⁴⁰¹ Many states have adopted a version of ABA Model Rule 4.4, which prohibits statements to third parties that have no purpose other than embarrassing, delaying, or burdening the listener; some courts have held

395. See *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497-500 (1981).

396. See *id.* at 500-02.

397. *Papachristou*, 405 U.S. at 171, 158.

398. *Id.* at 170 (citing *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965) (internal alterations omitted)).

399. U.S. DIST. CT. D. HAW. R. 110-3; cf. U.S. DIST. CT. D.S.C. R. 2.09(1)(4) (prohibiting "[c]onduct tending to pollute or obstruct the administration of justice").

400. U.S. DIST. CT. E.D. CAL. R. 180(e); U.S. DIST. CT. C.D. CAL. R. 2.5.2 U.S. DIST. CT. D. IDAHO R. 83.6(a).

401. U.S. DIST. CT. E.D. KY. AND W.D. KY. R. 3(b); see also U.S. DIST. CT. D.R.I. R. 4(e)(3); U.S. DIST. CT. E.D. TEX. R. 3(d)(1)(A); U.S. DIST. CT. N.D. TEX. R. 13.2(b)(i).

that these rules are unconstitutionally vague.⁴⁰² On a different subject, federal district courts have prohibited speech which “can reasonably be interpreted as manifesting prejudice or bias” based on race, sex, or other suspect classifications.⁴⁰³ One state statute prohibits the exhibition of “offensive personality” by lawyers.⁴⁰⁴ A handful of states have adopted anti-discrimination amendments to their rules of professional discipline, such as the Michigan rule prohibiting “invidious discrimination.”⁴⁰⁵ All of these rules are potentially vulnerable to a challenge for vagueness or overbreadth, but interestingly, many courts have found expressions like “offensive personality” to be pellucid to lawyers, most of whom are presumably well acquainted with many personalities of varying degrees of offensiveness.

Consider, as an example, the case of *In re Beaver*, in which an attorney was disciplined for violating his oath to “abstain from all offensive personality.”⁴⁰⁶ Mr. Beaver argued that this provision of the oath was unconstitutionally overbroad and vague, but the court concluded that, in context, the term was restricted to “conduct that reflects adversely on a person’s fitness as a lawyer.”⁴⁰⁷ I cannot fathom why *this* verbal formulation is not just as vague as “offensive personality,”⁴⁰⁸ but the court’s discussion does suggest an important principle: attorneys are expected to conduct themselves according to professional standards, and these standards are not always susceptible to being reduced to precise statutory language.⁴⁰⁹ Indeed, the Supreme Court has said that the phrase “conduct unbecoming a member of the bar” must be read in the context of the “lore of the profession.”⁴¹⁰ Although at one point in the opinion the Court seemed to equate professional lore with the positive disciplinary codes promulgated by

402. See, e.g., *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 440-43 (Tex. 1998) (holding that Texas Disciplinary Rule 3.06(d), a version of Model Rule 4.4, is unconstitutionally vague).

403. See U.S. DIST. CT. D. ARIZ. R. 1.20; see also U.S. DIST. CT. N.D. CAL. R. Cv. 11-3(b) (lacking mention of suspect classifications); U.S. DIST. CT. W.D. WASH. R. GR 9; U.S. DIST. CT. N.D. AND S.D. W. VA. Gen P 3.02.

404. See CAL. BUS. & PROF. CODE § 6068 (f) (West 2000).

405. See Quick, *supra* note 57, at 37.

406. 510 N.W.2d 129, 132 (Wis. 1994).

407. *Id.* at 133.

408. Cf. *Nunez v. City of San Diego*, 114 F.3d 435, 941 (9th Cir. 1997) (finding city ordinance against loitering remains vague if the imprecise terms are equated with another vague term, in this case, “hanging out”).

409. See *Beaver*, 510 N.W.2d at 133-34.

410. *In re Snyder*, 472 U.S. 634, 644-45 (1985).

state bar associations,⁴¹¹ the Court also appears to concede that the competing demands of zealously advocating one's client's cause and advancing the cause of justice must be resolved "in light of the traditional duties imposed on an attorney,"⁴¹² which are not neatly captured in the disciplinary codes. In other cases, the Court has not attempted to anchor the narrowing construction of disciplinary standards to the state bar codes and rules.

Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for conduct which all responsible attorneys would recognize as improper for a member of the profession.⁴¹³

In other words, by belonging to a community and sharing in the practices of similarly situated professionals, lawyers become acquainted with professional norms that are not reducible to neat disciplinary codes.

Lower federal and state courts have offered similar arguments for why the standard of "good moral character" required for applicants to the bar is not unconstitutionally vague.⁴¹⁴ The only due process-related limitation on the use of this criterion by states is that the evidence upon which denial of admission is based must bear a "rational connection with the applicant's fitness or capacity to practice law."⁴¹⁵ At the very least, this principle has prevented states from relying on such private matters as cohabitation and consensual homosexual intimacy as grounds for denial of admission.⁴¹⁶ But in relation to other disciplinary rules, such as the prohibition in Model Rule 8.4(d) on engaging in conduct prejudicial to the administration of justice, judges have been quite willing to reject challenges to the vagueness of these aspirational standards. Like the Supreme Court in *Snyder*, these courts claim that "the traditions of the legal profession"⁴¹⁷

411. *See id.* at 645 (finding guidance provided by "lore of the profession, as embodied in codes of professional conduct") (emphasis added; internal quotation marks omitted).

412. *Id.* at 644-45.

413. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 666 (1985) (Brennan, J., dissenting) (internal citations and quotation marks omitted).

414. *See* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 15.3, at 859 (1986).

415. *Schwartz v. Board of Bar Exam'rs*, 353 U.S. 232, 239 (1957).

416. *See In re N.R.S.*, 403 So. 2d 1315 (Fla. 1981); *Cord v. Gibb*, 254 S.E.2d 71 (Va. 1979).

417. *Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325, 328 (W. Va. 1988).

flesh out the rules and provide adequate notice of prohibited conduct to reasonable lawyers.⁴¹⁸

Not all courts to consider the issue have assumed that the exercise of professional judgment and the lore and traditions of the profession are sufficient to warn lawyers of when their conduct may be sanctioned as a violation of the duty of civility. For example, the Ninth Circuit held that a provision of the California Business and Professions Code proscribing offensive personalities was void for vagueness. In *Wunsch*, a male defense lawyer, annoyed with his adversary, a woman, sent her a letter with the photocopied statement "MALE LAWYERS PLAY BY THE RULES, DISCOVER TRUTH, AND RESTORE ORDER. FEMALE LAWYERS ARE OUTSIDE THE LAW, CLOUD TRUTH, AND DESTROY ORDER."⁴¹⁹ The trial court had sanctioned the lawyer under the California statute, incorporated by reference into the local rules of the federal district courts. It had reasoned that state judicial decisions had sufficiently narrowed the range of proscribed conduct, affording lawyers notice of what behavior would fall within the statutory definition of "offensive personality." The court of appeals, however, held that the cases did not provide a sufficiently clear boundary between obnoxious, but permissible, lawyering activities and those which could be the subject of sanctions.⁴²⁰ A dissenting judge would have applied the "professional lore" analysis, reasoning that the ethical traditions of the legal profession are known to all lawyers, and provide a clear

418. For courts that have accepted the argument that professional norms or traditions are sufficiently clear to provide guidance for lawyers, see, e.g., *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988); *In re Phelps*, 637 F.2d 171, 175 (3d Cir. 1981); *In re Bithoney*, 486 F.2d 319, 324-25 (1st Cir. 1973); *In re Keiler*, 380 A.2d 119, 126 (D.C. 1977); *Commission on Prof. Ethics v. Hurd*, 360 N.W.2d 96, 105 (Iowa 1984); *In re Frerichs*, 238 N.W.2d 764, 768 (Iowa 1976); *State v. Nelson*, 504 P.2d 211 (Kan. 1972); *Attorney Grievance Comm'n v. Alison*, 565 A.2d 660, 667 (Md. 1989); *In re Stanbury*, 561 N.W.2d 507 (Minn. 1997); *In re Hinds*, 449 A.2d 483, 497-98 (N.J. 1982). The Eleventh Circuit appears to take the position that the "lore of the profession" must be set forth in disciplinary codes in order to serve as grounds for sanctions. See *In re Finkelstein*, 901 F.2d 1560, 1565 (11th Cir. 1990) (citing *In re Snyder*, 472 U.S. 634 (1985)). That court faulted the district judge for suspending a lawyer from practice based on violations of a "transcendental code of conduct . . . [which] existed only in the subjective opinion of the court." *Id.* However, the court was focused on whether the lawyer had notice of the code of conduct which he allegedly violated, leaving open the possibility that an uncodified but suitably clear professional norm could form the basis for discipline, even in the Eleventh Circuit, if the lawyer knew or should have known of its existence. Uncodified norms are not necessarily subjective.

419. See *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996).

420. See *id.* at 1119.

enough boundary between acceptable and impermissible behavior.⁴²¹

The problem with the approach suggested by courts' reliance on the lore of the legal profession is that norms of a professional community provide sufficient guidance only if a sufficient number of professionals assent to the norms or at least agree on what they provide.⁴²² In large-scale, pluralistic communities, however, there is unlikely to be substantial agreement on the boundaries of acceptable behavior. For example, economic theorist Robert Ellickson has described informal norm-enforcement mechanisms among cattle ranchers in a rural California county, which provide an interesting contrast to state-sponsored law as a means of social control.⁴²³ Although Ellickson argues that the ranchers' society tends to propagate efficient norms, he recognizes the limitation of that kind of model of social control to small, closely-knit groups.⁴²⁴ Perhaps the small, homogeneous group of English barristers could be regulated by informal means, and governed by the lore of the profession and the unwritten code of English gentlemen.⁴²⁵ In a more diverse professional association, such as the bar of any medium-sized or larger city, unwritten codes of behavior are much more difficult to enforce. Individuals are frequently not repeat players with respect to each other, so they have less incentive to take into account the perceptions of others.⁴²⁶

Another problem with professional lore and community standards is suggested by the Court's decision in *Papachristou*: it is not enough to avoid unconstitutional vagueness for a statute to provide an adequate description of the class of persons to whom it applies, if the possibility exists of discriminatory enforcement in the hands of enforcement personnel. Every practitioner knows what a "Rambo litigator" or an "attack dog" lawyer is, and can cite examples at will, but this does not guarantee the constitutional fitness of a court rule prohibiting "attack dog" tactics. These rules may be enforced only

421. See *id.* at 1121 (Farris, J., concurring in part and dissenting in part).

422. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 358-59 (1997).

423. See ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

424. See *id.* at 177-82.

425. See SAMUEL HABER, *THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS 1750-1900* 76 (1991).

426. See ELICKSON, *supra* note 423, at 178-80; Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 543-46 (1994) (noting that small, localized communities are necessary for the development of "reputational markets").

against disfavored lawyers — those representing unpopular clients or causes, for example.⁴²⁷ As the Court recognized in *Papachristou*, vesting too much discretion in the hands of enforcement authorities creates pressure to toe the official line: “Those generally implicated by the imprecise terms of the ordinance — poor people, nonconformists, dissenters, idlers — may be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and courts.”⁴²⁸ Too much enforcement discretion in the hands of courts and disciplinary agencies is intolerable, given the lawyer’s traditional role as a champion for dissenters and nonconformists. And lest one believe that the discriminatory enforcement is a constitutional bogey that never actually appears, consider some cases in which African-American lawyers have been disciplined for accusing government actors of racism. In one case, a lawyer was sanctioned for making “overly emphatic denunciations of Judge Tucker’s courtroom procedures.”⁴²⁹ The federal district court abstained from the Virginia disciplinary proceedings on *Younger* grounds, but the opinion leaves a definite impression of racially discriminatory enforcement.⁴³⁰ Similarly, although a court ultimately refused to impose discipline, the Oklahoma bar association attempted to punish a black lawyer who had called a trial judge a racist.⁴³¹

F. Content and Viewpoint Neutrality

The analysis of restrictions on speech proceeds on different courses or tracks, to use Laurence Tribe’s metaphor,⁴³² depending on whether the regulation is motivated by the substance of the expression.⁴³³ Some government regulations are justified without reference

427. Cf. DONALD D. LANDON, COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE 123-31 (1990) (reporting interviews with small-town lawyers who were discouraged by their community from taking on certain types of cases, like civil rights suits).

428. *Papachristou*, 405 U.S. at 170.

429. *Greene v. Virginia State Bar Ass’n*, 411 F. Supp. 512, 515 (E.D. Va. 1976).

430. *See id.* at 517 (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

431. *See State ex rel. Okla. Bar Ass’n v. Porter*, 766 P.2d 958 (Okla. 1988).

432. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7 (2d ed. 1988).

433. For some of the academic commentary on the distinction between content-based and content-neutral regulation of speech, see Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Geoffrey Stone, *Comment: Anti-Pornography Legislation as Viewpoint Discrimination*, 9 HARV. J. L. & PUB. POL’Y 461 (1986); Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589; Su-

to the content of the communication; these do not trigger presumptive First Amendment scrutiny, provided that they are narrowly tailored to achieve a significant government interest and leave open ample alternative channels of communication.⁴³⁴ These regulations do not implicate value judgments about the substantive message contained in the communication; therefore, they do not raise concerns about government interfering in the marketplace of ideas. The same relaxed scrutiny is applied to expressive conduct that is not particularized, which may be subject to regulations unrelated to the suppression of free expression.⁴³⁵ Conditions on speech that meet these criteria are frequently referred to as “time, place, and manner” restrictions, but I will use the term “modal” restrictions, for brevity. The classic example of a permissible modal restriction is a municipal ordinance that prohibits sound trucks from operating in residential neighborhoods after 10:00 p.m. This ordinance is justified by the gov-

san Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991).

434. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). According to the Court in *Ward*, this test is functionally equivalent to the *O'Brien* test, which is intended to evaluate restrictions on symbolic expression. See *infra*, note 441; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

435. See *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968). The definition between conduct that “possesses sufficient communicative elements to bring the First Amendment into play” and conduct whose message is more peripheral is another one of those exceedingly blurry lines of which courts are so fond in First Amendment cases. See, e.g., *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990). In *Young*, the court argued that begging in the subway is not like burning a flag by a political protester (See *Johnson*, 491 U.S. 397), wearing black armbands to protest the Vietnam war (See *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969)), or sitting in at a segregated lunch counter (See *Brown v. Louisiana*, 383 U.S. 131 (1966)). The court admitted that begging does communicate messages such as “government aid for the homeless is inadequate,” but claimed that it was nevertheless not expressive, because most subway panhandlers just want money. *Young*, 903 F.2d 146. Of course, in one sense black students who sat in at lunch counters just wanted lunch, albeit on equal terms with white patrons. The power of the sit-in protests was incidental to the inability of the protesters to engage in the conduct of obtaining a meal. The court’s analysis in *Young* also depended on its armchair empiricism about the actual intention of subway panhandlers. See 903 F.2d at 153-54. It does not seem improbable that panhandlers choose certain subway lines — say, the 4/5/6 East Side trains heading downtown during morning rush hour — to dramatize their plight to wealthy commuters heading to their jobs at law firms and investment banks. Perhaps, like John Dillinger, panhandlers ride those trains only because “it’s where the money is.” In any event, a constitutional line of demarcation that depends on the subjective intention of the speaker seems destined for inconsistent application and manipulation by courts. Cf. Larry Alexander, *Free Speech and Speaker’s Intent*, 12 CONST. COMMENTARY 21 (1995); Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1.

ernment interest in preserving the tranquility of residential neighborhoods, and therefore would apply whether the sound trucks were broadcasting an oration by Castro or the *B-Minor Mass*.⁴³⁶ There is little likelihood that government disagreement with a particular message motivated the passage of the ordinance, because the ordinance is aimed at the “non-meaning effect” of the sound trucks — the noise pollution that is independent of the meaning of the broadcasts.⁴³⁷

Modal restrictions *coordinate* expressive interests with other competing, valid claims, rather than subordinating speech interests to the other values.⁴³⁸ (Compare the Court’s obscenity cases, which state that the government interest in order and morality outweigh the speaker’s and the audience’s right to sexually explicit entertainment.⁴³⁹) For this reason, scholars from all political perspectives tend to praise the Court’s endorsement of modal restrictions instead of outright bans on certain kinds of speech.⁴⁴⁰ Modal regulations are, by their very nature, directed toward the non-communicative aspect of expression, such as the forum in which it is delivered. Provided that alternative channels of communication are left open, the speaker’s message is not suppressed. At the same time, the modal regulations ensure that other rights-holders are not forgotten in the rush to protect the speaker’s expressive interests — residents living near Central Park are not subjected to intolerably loud rock concerts, for example,⁴⁴¹ patients seeking access to abortion clinics are not prohibited from obtaining treatment by aggressive protesters,⁴⁴² and visitors at the Minnesota State Fair are free to move around without being followed by Hare Krishnas.⁴⁴³

436. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 113 (1980).

437. See Melville Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 *UCLA L. REV.* 29 (1973). Of course, the sound truck ordinance and its supposedly content-neutral justification may be a pretext to regulate the content of speech if, for example, the only speakers using sound trucks in a given town are members of the opposition political party, or some other disfavored group such as union organizers or civil rights advocates. As I argue below, the distinction between content-neutral and content-based restrictions on speech is extraordinarily slippery.

438. Post, *supra* note 202, at 1261.

439. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

440. See, e.g., Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 *HARV. L. REV.* 1175, 1208-09 (1996) (on the left); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 *U. CHI. L. REV.* 225, 237 (1992) (on the right).

441. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding requirement that bands use city sound engineer at concert).

442. See *Hill v. Colorado*, 530 U.S. 703 (2000).

443. See *Heffron v. International Soc’y for Krishna Consciousness*, 452 U.S. 640 (1981)

The reduced burden on the state to justify modal restrictions on speech has obvious application to cases involving in-court expression by lawyers, or statements made by lawyers in filed court papers or pretrial depositions. In just about any conceivable case, the government can show a significant interest and alternative channels of communication that are not foreclosed by the restriction. For example, many courts, considering allegations of corruption by judges, have responded that lawyers are free to make these accusations in the appropriate time, place, and manner — such as to a state commission on judicial conduct.⁴⁴⁴ The government's interest is in maintaining orderly recusal or disqualification procedures, and the alternative channels of communication are established by these mechanisms, which permit complaints to be filed by aggrieved attorneys. In general, these decisions are unobjectionable, but it is important not to overstate the reach of permissible modal restrictions. A requirement that criticism of judges be “respectful” or not “prejudicial to the administration of justice” may very well be enforced in a discriminatory manner, even though it appears to be a modal regulation. The Chicago Seven trial was replete with incidents in which the judge's attempt to maintain “decorum” was transparently aimed at delegitimizing the political messages communicated by the defendants and their lawyers. (This stigmatizing of dissenting voices extended beyond the courtroom: amidst the passions of the trial, a skit performed at the Chicago Bar Association's annual Christmas show, criticizing Judge Hoffman's conduct of the trial, was attacked in the Chicago

(upholding requirement that groups distributing literature must do so from booth).

444. See, e.g., *United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995) (noting that “[a]ttorneys should be free to challenge, in appropriate legal proceedings, a court's perceived partiality”); *In re Riley*, 691 P.2d 695, 704-05 (Ariz. 1984) (“Any grievance a lawyer may have concerning ethical misconduct by a sitting judge should be submitted to the Commission on Judicial Qualifications. ‘Going public’ by a member of the Bar is not the appropriate method to redress misconduct by a judge”); *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165, 169 (Ky. 1980) (“the proper forum in which to have made his claim was the Judicial Retirement and Removal Commission”); *Louisiana Bar Ass'n v. Karst*, 428 So.2d 406 (La. 1983); *Attorney Grievance Comm'n v. Alison*, 565 A.2d 660 (Md. Ct. App. 1989); *In re Westfall*, 808 S.W.2d 829, 839 (Mo. 1991) (“Avenues of complaint were available . . . through the filing of a complaint with the Commission on Retirement, Removal, and Discipline”); *State ex rel. Nebraska State Bar Ass'n v. Michaelis*, 316 N.W.2d 46, 51 (Neb. 1982) (finding that “Michaelis never brought the alleged acts of impropriety to the attention of the proper authorities”); *In re Lacey*, 283 N.W.2d 250, 252 (S.D. 1979) (noting that “[the lawyer] must have been well aware at the time he made the statement that he could have voiced his complaints to the South Dakota Judicial Qualifications Commission”).

Tribune as “a clear violation of the canons of professional ethics.”⁴⁴⁵) The question of how to reconcile dignitary and efficiency interests and other procedural norms with the political function of trials was nicely posed by an exchange at the trial between Judge Hoffman and David Dellinger:

THE COURT: There comes a time when courtroom decorum must be observed.

MR. DELLINGER: Decorum is more important than justice, I suppose.⁴⁴⁶

Dellinger’s comment shows that a criterion like “decorum” is not necessarily content-neutral because Judge Hoffman had arguably used the interest in order and dignity to bias the trial against the defendants. By repeatedly punishing the defendants and their lawyers for conduct which passed without comment when engaged in by the government, Judge Hoffman effectively removed the defendants’ viewpoint from discourse in the trial; thus, what appeared on its face to be a content-neutral regulation was in fact enforced in a discriminatory manner.

For this reason, courts should take seriously the possibility that a rule requiring dignified speech is not a modal regulation at all, but impermissible viewpoint-discrimination.⁴⁴⁷ For example, local court rules that prohibit speech that is “incivil”⁴⁴⁸ or “provoking or insulting”⁴⁴⁹ may be used as a basis for sanctioning a lawyer who annoyed the judge through persistent advocacy of an unpopular position. One wonders whether the attorney in *In re Maloney*⁴⁵⁰ was referred to the bar association for discipline because her words were genuinely likely to interfere with the administration of justice, or because she had been a persistent and vigorous advocate for a Democratic judicial candidate against one of the Republican judges who considered the case. Considering that the lawyer’s comments were contained entirely within a filed court document — a motion for reconsideration

445. LUKAS, *supra* note 232, at 93.

446. *Id.* at 32.

447. *Cf.* *Hill v. Colorado*, 530 U.S. 703 (2000) (Scalia, J., dissenting); *Schacht v. United States*, 398 U.S. 58 (1970) (reversing conviction of protester who had worn an Army uniform in a street skit, under statute prohibiting wearing military uniform in a portrayal that tends to discredit the armed forces).

448. *See* U.S. DIST. CT. M.D. FLA. R. 2.05(g).

449. *See* U.S. DIST. CT. D. ALASKA R. 39.5(d); *cf.* U.S. DIST. CT. N.D. OKLA. R. 83.2(14) (admonishing lawyers to “[a]void disparaging personal remarks or acrimony toward opposing counsel”); *see also* U.S. DIST. CT. W.D. TEX. R. AT-5(b)(17).

450. 949 S.W.2d 385 (Tex. Ct. App. 1997).

of the decision on the merits of a case — it is difficult to credit the court's professed concern about the public's confidence in the judicial process.⁴⁵¹ Instead, the decision smacks of retaliation by thin-skinned judges. The history of persecution of lawyers representing unpopular causes, under supposedly neutral contempt-of-court standards, is also sobering.⁴⁵² For this reason, the Supreme Court's decision in *In re Snyder*⁴⁵³ should be borne in mind. The Court in that case said that criticism of courts, although it may have been a bit rude or discourteous, is not a constitutionally sufficient basis for disciplining a lawyer.⁴⁵⁴

As some lawyer-speech cases show, gratuitously abusive language should carefully be distinguished from expression of political dissent, which is entitled to stringent First Amendment protection. "Fuck the draft"⁴⁵⁵ considered in isolation linguistically resembles "fuck you,"⁴⁵⁶ but the two utterances are entirely different when placed in context. For one thing, the slogan emblazoned on a jacket is not directed at any individual.⁴⁵⁷ More importantly, Cohen's jacket carries a powerful message of criticism and dissent, and as Justice Harlan observed, conveys otherwise inexpressible emotions that would not be expressed by less vulgar words.⁴⁵⁸ As Rodney Smolla notes, the impact of protests against the Vietnam-era draft would be dramatically blunted if the government were able to demand that pro-

451. *See id.* at 388.

452. *See, e.g., In re Sawyer*, 360 U.S. 622 (1959) (reversing discipline against lawyer who had criticized government's handling of Smith Act prosecutions); *Sacher v. United States*, 343 U.S. 1 (1952) (affirming contempt convictions for defense attorneys who had represented accused members of the Communist Party in Smith Act cases); *Hallinan v. United States*, 182 F.2d 880 (9th Cir. 1950) (affirming contempt conviction for lawyer who defended Harry Bridges, the labor activist); *In re Schlesinger*, 172 A.2d 835 (Pa. 1961) (disbarment proceedings against same lawyer); *Schlesinger v. Musmanno*, 81 A.2d 316 (Pa. 1951) (writ of prohibition against trial judge who had found lawyer in contempt for refusing to disclose whether or not he was a Communist); FRED RODELL, *NINE MEN* (1955) (recounting the Smith Act trial in *Dennis*, and contempt proceedings against defense lawyers); Daniel H. Pollitt, *Counsel for the Unpopular Cause: The "Hazard of Being Undone"*, 43 N.C. L. REV. 9, 10-13 (1964) (reviewing record of contempt proceedings brought against civil rights lawyers challenging racial segregation).

453. 472 U.S. 634 (1985).

454. Some critics of campus hate-speech codes have expressed the concern that the codes themselves will be enforced against out-of-power groups, who may find it necessary to be provocative or even insulting to gain attention. *See Minow, supra* note 6, at 1264 n.39 (reporting comments of Regina Austin).

455. *Cohen v. California*, 403 U.S. 15 (1971).

456. *Attorney Grievance Comm'n v. Alison*, 565 A.2d 660, 663 (Md. 1989).

457. *See Cohen*, 403 U.S. at 20.

458. *Id.* at 26.

testers confine themselves to genteel words like “oppose the draft.”⁴⁵⁹ Opening up public discourse to vulgar, passionate expressions of dissent may also have encouraged participation by a segment of society that otherwise may have been silenced.⁴⁶⁰ On the other hand, the words as directed to opposing counsel, litigants, or court personnel may be little more than a verbal blow, intended primarily to hurt or humiliate, and not to deliver a powerful message of protest. The attorney in *Alison* was not engaged in anything so noble as protesting an unjust war. Rather, he was involved in a messy divorce, representing himself in the divorce action and ancillary proceedings (“a lawyer who represents himself has a fool for a client”), and he had an unchecked temper.⁴⁶¹ His language was merely abusive, not an attempt to persuade anyone of anything.⁴⁶² I hesitate to endorse a supposedly content-neutral modal restriction on attorneys’ speech that would require it to be “respectful” because I worry that courts would use that rule to punish protesters like Cohen. Those who use abusive language toward powerful officials are often the most alienated from public life and “polite” forms of governance; punishing their speech merely on the grounds of intemperance risks further marginalizing and radicalizing these speakers. I would rather see lawyers curse, not shoot, at each other. At the same time, the attorney’s speech in *Alison* is valueless, constitutionally speaking. The only reason to prohibit courts from enforcing modal regulations against someone like attorney Alison is the difficulty inherent in drawing lines between political dissent and being a jerk. But this may be a conclusive rea-

459. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 27 (1992). The impact of certain carefully chosen words is illustrated by *San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters*, 125 F.3d 530, 1236 (9th Cir. 1997). In that case, the court said that although “rat” has historically been understood to mean “workers employed by non-union contractors” in the context of labor disputes, a union may be enjoined from displaying a sign in front of a hospital that says “THIS MEDICAL FACILITY IS FULL OF RATS.” *Id.* Judge Kozinski dissented, arguing that the district court’s injunction sapped the union’s protest of its vigor. *See id.* at 1239-40. The dissent had the better argument here, since the meaning of the message cannot be divorced from the emotion-laden language in which it was expressed. *Cf.* *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974) (finding that the word “scab” is protected expression in a labor dispute).

460. *See* Richard J. Arneson, *Liberal Democratic Community*, in *NOMOS XXXV: DEMOCRATIC COMMUNITY* 191, 217 (John W. Chapman & Ian Shapiro, eds., 1993).

461. *See* *Attorney Grievance Comm’n v. Alison*, 565 A.2d 660, 661-64 (Md. Ct. App. 1989).

462. *Cf.* *R.A.V.*, 505 U.S. at 401 (White, J., concurring) (“Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury.”).

son, given the number of reported decisions in which courts overreact to what they perceive to be disrespect by attorneys, and given the Supreme Court's tendency to define the category of content-neutral regulations expansively.⁴⁶³

Standing on completely different constitutional footing from modal regulations are restrictions on speech that are content-based.⁴⁶⁴ These are subject to "the most exacting scrutiny,"⁴⁶⁵ except for the limited categories of speech restrictions that have traditionally been subject to more extensive regulation, such as obscenity⁴⁶⁶ and defamation.⁴⁶⁷ In cases of content-based restrictions on speech, it is likely that the government is acting based on animus against the message, though we might share the government's ends.⁴⁶⁸ "[C]ontent-based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages."⁴⁶⁹

Consider, for example, a decision by a state highway department that the Klan may not "adopt" a section of highway — agreeing to clean up litter alongside the road in exchange for the display of a sign commemorating the group. If the adopt-a-highway program is open to all comers, as these programs usually are, the state could not permissibly deny permission to the Klan to adopt a stretch of road solely

463. SHIFFRIN, *supra* note 16, at 36-39.

464. *See, e.g., R.A.V.*, 505 U.S. 377 (1991); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972). The same is true of expressive conduct that is intended to communicate a particularized message, as opposed to conduct which is incidentally communicative. *See Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning is the communication of a particular message); *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (particularized communication occurred by taping a peace symbol to an American flag); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 391-92 (4th Cir. 1993) (even idiotic fraternity "ugly woman" contest is "inherently expressive entertainment"); *but see Young v. New York City Transit Auth.*, 903 F.2d 146, 153 (2d Cir. 1990) (begging in the subway is not the communication of a particularized message, even though it does effectively demonstrate the plight of the homeless).

465. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994).

466. *See, e.g., Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

467. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985).

468. It is important not to collapse two analytically distinct questions: (1) whether a regulation is content-based and (2) whether it is motivated by government disagreement with the content of the message. Steven Shiffrin, criticizing the Court's decision in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), notes that a zoning measure prohibiting adult movie theaters from locating within 1000 feet of a school is certainly based on the content of the films, even though the ordinance may not be an attempt to suppress unpopular views. *See SHIFFRIN, supra* note 16, at 38.

469. *Hill v. Colorado*, 530 U.S. 703, 735 (2000) (Souter, J., concurring).

because of the viewpoint of the message communicated by the organization.⁴⁷⁰ In the Eighth Circuit's *Cuffley* case, there was ample evidence that the state denied the Klan's application because it disagreed with the Klan's message of white supremacy.⁴⁷¹ Although the state's position is laudable, it is a violation of the constitutional norm of viewpoint-neutrality; thus, the state's action violated the First Amendment.

As another example of the application of the content-neutrality principle, consider the decision invalidating New York's "Son of Sam" law, which would have required proceeds from the sale of books about a crime written by the perpetrator to be paid to crime victims.⁴⁷² The Court concluded that the statute was an impermissible content-based regulation of speech, and subjected it to heightened scrutiny, inquiring whether it was necessary to serve a compelling state interest and narrowly tailored to achieve that end.⁴⁷³ (Notice the increased threshold for the state's interest — from "significant" to "compelling" — as compared with the test for permissible modal restrictions.) The Court found the state's interest in compensating crime victims and ensuring that criminals do not profit from their crimes compelling, but concluded that the statute was not narrowly tailored to advance the government interest.⁴⁷⁴

470. Two federal appellate courts reached opposite results on these facts. *See Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000) (holding that the Klan could not be prohibited from adopting highway); *Texas v. Knights of Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (upholding denial of highway adoption). The Fifth Circuit's decision was influenced by the proximity of a federal housing project which was under a desegregation order, and whose black residents had been the target of frequent intimidating assaults by the Klan. *See Cuffley*, 208 F.3d at 705 n.2 (distinguishing the Fifth Circuit case on this basis). The state in *Cuffley* also did not help its case by granting permission to adopt stretches of highway to other organizations, such as the Knights of Columbus, which restricted membership to certain classes — Catholic men in the case of the K.O.C. *See* 208 F.3d at 711. The state's decision was thus an example of *viewpoint* discrimination, which is subject to even more stringent constitutional scrutiny than content discrimination. (The difference between content- and viewpoint-based discrimination can be brought out by imagining what the state would have done with an application by the NAACP to adopt a stretch of highway. In that case, the permit almost certainly would have been granted, showing that race — a content-based category — is a permissible object of concern for organizations who wish to adopt signs. Only a positive *viewpoint* on racial issues would be permitted, however.) I am grateful to Ron Krotoszynski for pressing me to clarify the difference (which is often muddled by courts) between content-based and viewpoint-based discrimination.

471. *See Cuffley*, 208 F.3d at 708.

472. *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105 (1991).

473. *See id.* at 116-18.

474. *See id.* at 118-21.

A great number of restrictions (often denominated "ethical" rules, although they have little to do with ethics) on lawyers' speech are content-based. The provision of the ABA Model Rules prohibiting extrajudicial comments on pending cases permits lawyers to discuss with the press details such as "the claim, offense or defense involved" and the identity of the persons involved.⁴⁷⁵ Lawyers may not, however, make statements that a reasonable person would believe would have a substantial likelihood of causing material prejudice in the proceeding.⁴⁷⁶ Whether or not this rule strikes the correct balance, it is undoubtedly content-based, just as the statute in the Son of Sam case applied to books written about crimes differently than to books about gardening or sports. The ban on pretrial comments to the press has survived constitutional scrutiny,⁴⁷⁷ and other restrictions on attorneys' speech designed to secure an impartial tribunal may similarly pass muster, but it would be disingenuous for a court to deny that the regulation is content-based and attempt to employ a less exacting standard of review than the "strict" scrutiny mandated by First Amendment doctrine.

In some cases, the project of selecting a "track" for speech restrictions is itself a substantive value judgment about the quality of the underlying expression. (The Court ducked this issue in the Son of Sam case, preferring to resolve the case on the question of narrow tailoring.⁴⁷⁸) Consider a statute which prohibits the wearing of a mask in public.⁴⁷⁹ Is this like the sound-truck ordinance, justified without regard to the content of the communication? The history of the Georgia legislation at issue in *State v. Miller* reveals that it was adopted in response to harassment, intimidation, and violence perpetrated by the Klan against African Americans in the 1950s.⁴⁸⁰ The Georgia Supreme Court, however, held that the statute was not unconstitutional, arguing that the anti-mask statute was content-neutral (thus, on track two) because it was aimed at the non-speech elements of hooded terrorism. The anti-mask statute is arguably in the nature

475. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.6(b).

476. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.6(a).

477. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1031 (1991) (holding that extrajudicial speech by lawyers may be regulated on a showing of a "substantial likelihood of material prejudice").

478. See *Simon & Schuster*, 502 U.S. at 122.

479. See, e.g., *American Knights of the Ku Klux Klan v. City of Goshen, Indiana*, 50 F. Supp. 2d 825 (N.D. Ind. 1999); *State v. Miller*, 398 S.E.2d 547 (1990).

480. See *State v. Miller*, 398 S.E.2d 547 (Ga. 1990); see also SMOLLA, *supra* note 166 § 11:25, at 11-41.

of a modal regulation — Klansmen are free to appear in public in their robes and hats, preaching racial hatred; they just cannot wear masks to conceal their identity.⁴⁸¹ Perhaps the statute could have survived strict scrutiny as a content-based regulation, given the importance of the government interest in protecting black citizens from violence. If putting on masks was a prelude to “imminent lawless action,” the expression could be regulated under the *Brandenburg* standard.⁴⁸² The ordinance would have to be narrowly drawn to pass *Brandenburg* scrutiny, however; a Klansman who is merely standing around in a public square in the daytime wearing a mask is probably not on the verge of committing violent acts. It appears that the court selected the track of the non-meaning effects of speech for the regulation because it had already decided that the speech of hooded Klansmen was of low social value. We may agree with that value judgment, but nevertheless be suspicious of a constitutional doctrine that is so readily manipulated.

G. Offensiveness

It is absolutely clear that the offensiveness of an utterance, by itself, is not a valid basis for suppressing it, as long as the audience is composed of adults who have consented to hear the speech.⁴⁸³ “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁴⁸⁴

481. See *Miller*, 398 S.E.2d at 551. This aspect of the *Miller* case is difficult to square with Supreme Court decisions that recognize a hybrid privacy and First Amendment interest in speaking anonymously. See, e.g., *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (discussing Colorado ordinance requiring initiative-petition circulators to wear identification badges unconstitutional); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (finding ban on anonymous campaign literature unconstitutional). Anonymous publication of pamphlets and handbills has been crucial to the ability of persecuted groups to get out their message. See *Talley v. California*, 362 U.S. 60, 64 (1960).

482. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

483. See, e.g., *United States v. Eichman*, 496 U.S. 310, 319 (1990); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Spence v. Washington*, 418 U.S. 405 (1974); *Papish v. University of Missouri*, 410 U.S. 667 (1973); *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576, 592 (1969).

484. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985). One prominent First Amendment scholar argues that refraining from banning offensive speech is an affirmative good for a pluralistic society, because it teaches the virtue of tolerance. See LEE BOLLINGER, *THE TOLERANT SOCIETY* (1986); Lee Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979 (1990).

This principle is subject to some limitations established by the Supreme Court. For example, speech to a captive audience may be regulated⁴⁸⁵ and the fact that an audience is composed in part of children may warrant restrictions on speech that would otherwise be unacceptable.⁴⁸⁶ Nevertheless, in most attorney-speech cases; pure emotive harms do not justify regulations on speech. For example, a court would not be constitutionally justified in punishing a lawyer for her words merely because a judge was offended. Indeed, the Court has specifically observed that protection of a judge's personal sense of dignity is not a valid justification for holding an attorney in contempt of court.⁴⁸⁷ It further warned against conflating offense to a judge's sensibilities with interference with judicial proceedings.⁴⁸⁸ In one of its classic contempt precedents, the Court echoed Harry Truman's advice that if you can't stand the heat, get out of the kitchen: "[J]udges are supposed to be men of fortitude, able to survive in a hardy climate."⁴⁸⁹

As discussed above, however, it is a mistake to equate all emotional harms with mere "offense", which cannot be a valid ground for regulating speech. Just as obstruction of a trial is a valid ground for contempt punishment, even though offense to the judge's sensibilities

485. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (invalidating city ordinance that deterred drive-in movie theaters from showing films containing nudity); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (holding that city may prohibit political advertising on buses, because viewers of bus signs have no choice but to observe advertising); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736 (1970) (noting that recipient of sexually explicit materials can instruct Postmaster to stop sending them).

486. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

487. See *Offutt v. United States*, 348 U.S. 11, 13-14 (1954).

488. See *Brown v. United States*, 356 U.S. 148, 153 (1958); see also Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 208 (1971).

489. *Craig v. Harney*, 331 U.S. 367, 576 (1947). Compare *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974), in which the Court said that non-union letter carriers would have to put up with being called scabs. Labor disputes are ugly, said the Court, and are "frequently characterized by bitter and extreme charges, counter-charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." *Id.* at 272 (quoting *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 58 (1966)). But that's what happens when we as a society subscribe to ideals of "uninhibited, robust, and wide-open debate." *Austin*, 418 U.S. at 273. Progressive federal judges in the American South during the civil rights movement were constantly subjected to death threats and other harassment — certainly a lot of heat to tolerate to remain in the kitchen. These judges, however, persevered in the face of these attempts at intimidation. See JACK W. PELTASON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* (1961). Judges who are quick to discipline lawyers for insulting their integrity should keep in mind the example of the civil rights judges, who endured far more serious assaults without complaining.

is not, some substantive injuries may justify restrictions on expressive behavior. It is an important argument of some critical race scholars that the harm from racist speech is not “mere” offense, but is akin to the kind of severe emotional distress that forms the basis for tort recovery in other contexts.⁴⁹⁰ Non-speech behavior, such as racial segregation, produces a harm that the legal system properly takes into account; in both speech and non-speech cases, the injury is the cruel message of being treated as inferior by the dominant culture.⁴⁹¹ This is an injury different in kind from an affront to taste, preferences, or sensibilities, which are not harms that justify restrictions on speech.⁴⁹² The harm resulting from sexual harassment, similarly, is not simply offense, but is unlawful discrimination on the basis of sex.⁴⁹³ There is no reason why speech that creates a hostile work environment ought not to be regarded as sex discrimination, if adverse employment actions based on sex are otherwise proscribed.⁴⁹⁴

The Court considered the line between mere offense and substantial harm in *Florida Bar v. Went For It, Inc.*,⁴⁹⁵ which was somewhat anomalous in light of the Court’s recent laissez-faire attitude toward attorney advertising. In approving a state-imposed ban on direct-mail solicitation of accident victims within thirty days of the accident, the Court accepted the state’s argument in justification of the restriction, that it was not concerned with the offense experienced by the recipients of solicitations, but “with the demonstrable detrimental effects that such ‘offense’ has on the profession.”⁴⁹⁶ The Court’s qui-

490. See, e.g., Delgado, *supra* note 5; Lawrence, *supra* note 270; Matsuda, *supra* note 270. On the contours of tort remedies for infliction of emotional distress, see generally DAN B. DOBBS, *THE LAW OF TORTS* §§ 303-06 (2000).

491. This is, of course, the lesson of *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

492. See Lawrence, *supra* note 270, at 461. As Lawrence notes, discussing *Pacifica* and *Cohen v. California*, words like “shit” and “fuck” do not carry connotations of the inferiority or untouchability of an individual or group; indeed, it is the point of Carlin’s Seven Dirty Words monologue that our attitudes toward these words are silly.

493. See, e.g., Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-based Discriminatory (Mis)Treatment*, 85 GEO. L.J. 649 (1997).

494. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (rejecting First Amendment free association argument which would have the effect of permitting sex discrimination). As David Strauss argues, hostile or harassing speech addressed to one person, who has been singled out for mistreatment on the basis of race or sex, does not attempt to persuade; thus, the government can properly regulate it. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 343 (1991). Speech addressed to a broader audience, however, may be considered an attempt at persuasion and should not be subject to government regulation. See *id.*

495. 515 U.S. 618 (1995).

496. *Id.* at 631.

escence in this case is surprising, given its general skepticism toward state-asserted reasons for restricting speech. A bit more suspicion would have been useful in *Went For It*. The detrimental effect the state was targeting was the effect of offense, not some harm that can be separated from the visceral revulsion that is experienced by the recipients of letters from lawyers. As the Court argued, distinguishing this case from others where the recipient of mailings ought simply to avert her eyes, “[t]he purpose of the 30-day targeted direct-mail ban is to forestall the *outrage and irritation* with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered.”⁴⁹⁷

Dissenting, Justice Kennedy suggested that unwanted advertising by lawyers should be dealt with in the same manner as undesired messages from other speakers — the recipient should toss the letter in the garbage,⁴⁹⁸ just as an offended user of the Los Angeles courthouse should look away when Paul Cohen with his “Fuck the Draft” jacket comes strolling down the corridor. Under existing First Amendment precedents, including cases on advertising by lawyers,⁴⁹⁹ Justice Kennedy’s proposal was by far the better one. The majority’s approval of the direct mailing bans never surmounted the constitutional limitation on regulating speech solely on the basis of the offense taken by audiences.⁵⁰⁰

IV. Functional Analysis of First Amendment Cases

One of the initial rhetorical steps in First Amendment analysis is to identify the reason or reasons why there should be a presumption in favor of allowing speech to be free from state regulation.⁵⁰¹ In other words, what is the “free speech principle”? Why should government be required to supply a stronger reason for limiting speech

497. *Id.* (emphasis added).

498. *See id.* at 639 (Kennedy, J., dissenting) (citing *Bolger v. Youngs Drug Prods. Corp.* 463 U.S. 60, 72 (1983) (proposing that unwanted mailings should take the “short, though regular, journey from mail box to trash can”)).

499. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985) (stating that “the mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it.”).

500. As Kathleen Sullivan rightly points out, the Court has never articulated a satisfactory reason for subjecting restrictions on lawyers’ speech to lesser scrutiny than the regulation of expression by other regulated professionals, such as accountants and pharmacists. *See Kathleen M. Sullivan, The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 *FORD. L. REV.* 569, 580 (1998).

501. *See, e.g., Rodney A. Smolla, Free Speech in an Open Society* 5 (1992).

than for regulating other forms of conduct?⁵⁰² It is not because speech is less harmful than other kinds of regulated conduct; the profound pain and fear generated in concentration camp survivors by a parade of Nazis is surely a more serious matter than many crimes which are routinely punished.⁵⁰³ Matthew Hale's white supremacist Web site is far more damaging than the indecent exposures and indecorous criticisms of law school administrators that frequently justify exclusion of an applicant from the bar, yet Hale's denial of an Illinois law license attracted the attention of civil libertarians nationwide, while these other cases scarcely merit a footnote in legal ethics treatises. The heightened protection for speech is such a commonplace in our legal culture that we no longer consider it remarkable that a person may be prosecuted for stealing from the rich to give to the poor, but may not be punished for advocating the replacement of capitalism with communism, despite the grave risk of property damage and threat to human life posed by a revolution.

The search for a free speech principle is not a mere academic exercise because the First Amendment is not self-applying. On the initial categorization question — whether nude dancing, flag burning, political campaign contributions, computer software, or some other form of human activity falls within the protection of the Constitution — the text of that document is notoriously unhelpful. The First Amendment itself states only that “Congress shall make no law . . . abridging the freedom of speech.”⁵⁰⁴ For this reason, free speech scholars generally attempt to understand the First Amendment functionally. Their argument is that in deciding whether some communicative activity warrants constitutional protection, courts should look to the underlying interests, goals, or utilitarian calculations that should be advanced by the constitutional value of “the freedom of speech.”⁵⁰⁵ There is no reason to assume that each suggested justification for protecting speech must be exclusive of all the others.⁵⁰⁶ Proponents of some models of speech regulation often argue for privileging one rationale absolutely over its competitors, thereby skewing

502. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 8 (1982).

503. See BOLLINGER, *THE TOLERANT SOCIETY*, *supra* note 72, at 14-15.

504. U.S. CONST. amend. I.

505. See, e.g., James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 *STAN. L. REV.* 493, 505-06 (1999); Post, *supra* note 9, at 1255.

506. See GREENAWALT, *SPEECH*, *supra* note 264, at 13-14; SMOLLA, *supra* note 501, at 5.

the analysis of the desirability of proposed rules. The following social functions of expressive liberties are complimentary rather than exclusionary — different cases may implicate diverse rationales, and some cases may touch on more than one constitutional value simultaneously. I will now briefly review those proffered rationales and examine their applicability to attorney-speech cases.

A. Discovery of Truth

The marketplace of ideas is perhaps the best-known metaphor in First Amendment discourse. The image is taken from a stirring dissent written by Justice Holmes, protesting the convictions under the Espionage Act of five Russian-born pamphleteers who had circulated leaflets critical of U.S. opposition to the Russian Revolution:

But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁵⁰⁷

Holmes's dissent is animated by the recognition that government may have reasons other than respect for truth for encouraging or suppressing the expression of ideas. Moreover, as Mill pointed out, there is no reason to think that government decision makers are better able to discern the truth than private citizens.⁵⁰⁸ Thus, the government should not be allowed to influence the free trade in ideas, or to "drown out" the voices of other speakers.⁵⁰⁹ The proper remedy for the ill effects of speech the government wishes to prevent is not suppression of speech, but counter-speech — battling "evil counsels" with good ones.⁵¹⁰

507. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (arguing that "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their choice and have their way.").

508. See JOHN STUART MILL, *ON LIBERTY* 20-21 (Stefan Collini, ed., 1989) (1859).

509. See YUDOF, *supra* note 359; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4-5; Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 595-601 (1980). Judge Easterbrook's opinion in *Hudnut* was based on his understanding of the Indianapolis anti-pornography ordinance as government opposition to a particular opinion about women. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

510. *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring). Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (stating that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges

The marketplace image is a powerful one, and courts often use this rhetoric to justify invalidating restrictions on speech, even where the expressive activities are far removed from reasoned discussion of issues. For example, in a case arising out of protests at abortion clinics, the Supreme Court struck down a “floating” buffer zone around patients entering a clinic, reasoning that the floating buffers burdened more speech than was necessary to ensure access to the clinic.⁵¹¹ The district court’s injunction had allowed two “counselors” to approach women and carry on a non-threatening conversation,⁵¹² but Justice Rehnquist said that the protesters must also be permitted to harangue women who did not consent to the “conversation.”⁵¹³ He quoted a well known passage from Justice O’Connor’s opinion in *Boos v. Barry*, to the effect that citizens must tolerate insulting, even outrageous speech in public debate.⁵¹⁴ What this quotation shows is that, for Justice Rehnquist, the paradigm of public debate is applicable to violent protesters who scream obscenities in patients’ faces as the women try to obtain medical treatment, even though it is almost farcical to call some of the actions of the protesters a “debate,” rather than a blockade. However, once the Court deployed the metaphor of a public debate, the conclusion followed naturally that restrictions on that debate must be carefully tailored.

The marketplace of ideas image, despite its undeniable polemical appeal, suffers from several well known weaknesses as a general justification for the protection of speech. For one thing, the market in ideas, like any other market, is not perfectly free.⁵¹⁵ Concentration of wealth can influence not only elections, as discussed in *Buckley*, but other kinds of behavior — that, of course, is the reason corporations

and juries but on the competition of other ideas.”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 833-34 (2d ed. 1988) (“Whenever the harm feared could be averted by a further exchange of ideas, government suppression is conclusively deemed unnecessary”).

511. *See* *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 377-79 (1997).

512. *See id.* at 366 n. 3.

513. *See id.* at 383-84.

514. *See id.* at 383 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

515. *See generally* *Buckley v. Valeo*, 424 U.S. 1 (1976) (limiting the influence of wealth on the electoral process violates First Amendment); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290 (1981) (invalidating contribution limit to committees formed to support or oppose ballot measures); *cf. Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down right-of-reply statute that would have lessened the relative power of newspapers by giving political candidates an opportunity to rebut attacks on the candidate’s personal character).

spend billions of dollars on advertising.⁵¹⁶ Although the Court in *Buckley* rejected the argument that the First Amendment requires leveling the marketplace of ideas, the government may nonetheless be tempted to intervene in the market to correct inefficiencies, just as it might in the event of a failure in a more traditional economic market.⁵¹⁷ Government intervention then creates incentives for private speakers to conform to favored views, either to avoid the government's threatened penalty or to obtain the offered prize.⁵¹⁸ Or the government may itself become a speaker, in which case a taboo viewpoint may be suppressed or a favored viewpoint expressed with the backing of the extraordinarily powerful, wealthy government.⁵¹⁹ Finally, hate speech, which many urge should be protected on the marketplace rationale, may actually undermine the functioning of the market by silencing or chilling the speech of its victims.⁵²⁰ As Martha Minow asks rhetorically, "Why participate if only to be demeaned?"⁵²¹ The hate speech example shows that in some cases, the marketplace metaphor contains internal contradictions.

516. See Stephen L. Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581 (1984) (reviewing YUDOF, *supra* note 359) (observing that commentators who worry about government speech do not pay sufficient attention to the marketplace-distorting effects of wealth in private hands). Cf. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-64 (1976) (commercial speaker's interest in promoting its product is entitled to constitutional protection).

517. See, e.g., *Regan v. Taxation With Representation*, 461 U.S. 540, 546-48 (1983) (upholding regulations that grant tax deductions for veterans' groups, but not other groups, engaged in lobbying). The favorable tax treatment for veterans' groups may not be a response to a perceived market failure, but it is certainly a government decision to favor one speaker in the marketplace of ideas. As the Court noted in *Regan*, the government has a longstanding policy of compensating veterans for their past sacrifices by providing them with numerous advantages. See 461 U.S. at 551.

518. See *Finley v. National Endowment for the Arts*, 100 F.3d 671, 690 (9th Cir. 1996) (Kleinfeld, J., dissenting) (government funding for the arts tends to produce conformity).

519. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding regulations that barred recipients of federal family-planning funds from providing information on abortion). After *Rust*, the greater the number of family-planning facilities that received federal funding, the more severe the impact of the government's ban on abortion-related speech would be on a great deal of abortion-related information in the marketplace. Thus, the great danger of *Rust* is that the government will seek to suppress discussion of abortion by offering generous federal funding for family planning facilities, but restricting the speech of recipients in return. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1496-97 (1989) (pre-*Rust*, arguing that government may not constitutionally "buy out" ideas it considers dangerous); Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 217-27 (1983).

520. See, e.g., FISS, *supra* note 13, at 16-21; Gilbert Paul Carrasco, *Hate Speech and the First Amendment: On a Collision Course?*, 37 VILL. L. REV. 723 (1992).

521. Minow, *supra* note 6, at 1261.

A second problem with the marketplace thesis is that it may be false as an empirical matter. Plenty of silly beliefs have gained widespread currency.⁵²² Furthermore, speech is not without consequences — false beliefs may lead to injury or social injustice. Consider, for example, the vehement hatred that exists toward minority racial or ethnic groups. Scholars of outsider jurisprudence have exhaustively catalogued the recurrence of racist speech, which indicates underlying attitudes of prejudice which have not been swept away by countervailing ideas of tolerance in the marketplace.⁵²³ Perhaps these ideas don't deserve to compete for acceptance in the marketplace; perhaps "the book is closed on some issues,"⁵²⁴ like genocide, slavery, and white supremacy. There is no point in letting neo-Nazis speak or march through the streets of Skokie because their beliefs have already been proven false and horrifically dangerous. The problem, of course, is that beyond a small core of beliefs universally recognized as abhorrent, there is a broad penumbra of controversial positions that some regard as having no debatable merit, but which others perceive as being open issues.⁵²⁵ The marketplace rationale ceases to protect speech if disputants can characterize the opposing position as being completely out of bounds in a civilized community. Better to let through the occasional truly aberrant idea for swift and decisive rejection in the marketplace. Otherwise the marketplace metaphor would tend to vest too much authority in tradition and the status quo, instead of cultivating the sense that conventional wisdom is always open to challenge.⁵²⁶

Furthermore, as Rodney Smolla has argued, the presence of false ideas does not diminish the utility of the free trade in ideas — the

522. See, e.g., SCHAUER, *supra* note 502, at 15-33.

523. See, e.g., Matsuda, *supra* note 270, at 2327-30; Lawrence, *supra* note 270, at 431-34; PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 80-96, 110-15 (1991). Although not a jurisprudential work, Ellis Cose's book, *THE RAGE OF A PRIVILEGED CLASS* (1993), is an excellent account of the effect of continuing subtle racism on black professionals.

524. Harry H. Wellington, *On Freedom of Expression* 88 *YALE L.J.* 1105, 11332 (1979).

525. Consider the controversy over a moot court problem at NYU, which would have required some students to argue that the child's best interests were not served by being placed with a lesbian parent. Some student members of the moot court board argued that the problem was inappropriate because "the issue of whether awarding custody to a homosexual parent is presumptively contrary to a child's best interests was not an open question in a law school community." See DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 460-66 (2d ed. 1998) (reprinting newspaper article and responses by several NYU faculty members).

526. See SHIFFRIN, *supra* note 16, at 95.

marketplace concept does not depend on the ultimate triumph of truth.⁵²⁷ It is the integrity of the process, particularly the freedom from government interference in the market and the disposition not to conform, that is central to the justification of the theory.⁵²⁸ Indeed, the notion that the effectiveness of the marketplace can be demonstrated by truthful outcomes is circular — the marketplace metaphor depends on an attitude of epistemological skepticism.⁵²⁹ After all, if truth were known *a priori*, there would be no need for a marketplace; true beliefs could simply be promoted and false ones suppressed by an all-knowing authority, without bothering with the intermediate step of offering them on the market for acceptance or rejection.

Thirdly, the marketplace rationale leaves unprotected many words and expressive acts that are unrelated to the discovery of truth, even though those messages ought to be heard. In the New York subway-begging case, for example, the court casually dismissed the act of panhandling as unworthy of constitutional protection because it is not “a means indispensable to the discovery and spread of political truth.”⁵³⁰ Putting aside the objection that the court may have been wrong about the truth-enhancing effect of panhandling — how many Yuppies are aware of the problem of homelessness only when it confronts them literally in the face in the form of a beggar on the sidewalk or the subway? — the court ignored the other interests served by communicating the plight of the homeless. Suppose everyone in New York City was perfectly informed about the scope of the homelessness problem, so that panhandling could not communicate any factual information relevant to the discovery of truth. Even so, the act of begging conveys an *emotive* element missing from sociological studies and all but the best journalism. “This problem is really *awful*, for *me*, this person standing in front of you,” is a different message

527. See SMOLLA, *supra* note 459, at 8.

528. See Wellington, *supra* note 524, at 1133. For Wellington the harm from suppressing neo-Nazi speech is that a practice of government censorship of ideas will have been established — some state body will have responsibility for determining the narrow category of ideas on which the book has been closed.

529. See SMOLLA, *supra* note 459, at 8, (citing Benjamin S. Du Val, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 190-91 (1972)). David Strauss disagrees with Smolla on this matter. Strauss argues that the marketplace argument, by analogy with economic markets, can succeed only if it is possible to specify what counts as a well-functioning market, but we do not know what constitutes perfect competition in the realm of ideas. See Strauss, *supra* note 494, at 349.

530. *Young v. New York City Transit Auth.*, 903 F.2d 146, 154 (2d Cir. 1990) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

from the one communicated by dry statistics to New York *Times* readers in their doorman-guarded apartments. Panhandling is an act of political dissent whose value is independent of the state of community knowledge about the social problem at issue.

The final objection to the marketplace argument is that it is incoherent. The free speech principle stipulates that some reason must be offered to prefer unrestricted speech over regulation. The key premise of the marketplace justification is that we don't know truth with confidence. Today's "fighting faiths" might turn out to be just as false as the belief that the earth is flat. Proponents of the marketplace argument confidently assert their belief that all truth is potentially revisable, but they fail to apply this belief to their own argument. Perhaps the argument for free speech stands on no firmer foundation than the argument for a flat earth. Of course, we have good reasons to believe that the earth is round, and that free speech is a good thing, but one cannot be a global skeptic about every argument except the argument currently being defended.⁵³¹

The marketplace metaphor has limited application to the free speech arguments as they are sometimes asserted by lawyers. It is difficult to see how calling one's adversary a "sheeny little Hebrew"⁵³² or "office help"⁵³³ bears any conceivable relationship with the attempt to discover truth. Steven Shiffrin is probably correct to argue that the search for truth is incompatible with perfect civility.⁵³⁴ Or, as Rob Atkinson observes, sometimes the requirement of civility becomes part of the means of oppression.⁵³⁵ Some unpleasant speech by lawyers is a vital contribution to the search for truth; Yagman's diatribe about biased judges did at least raise the issue of whether certain district court judges in Los Angeles might be predisposed against civil rights cases, even if most of his utterance was off the mark.⁵³⁶ On an

531. To be fair to the argument I am criticizing, one cannot be a global skeptic about *anything* — that is the point of Neurath's boat metaphor. See W.V.O. QUINE, WORD AND OBJECT 3-4 (1960) (describing Otto Neurath's argument that our epistemological situation is like being a sailor at sea, forced to stand on some firm planks of the boat while making repairs to other parts).

532. *In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987).

533. *In re Plaza Hotel Corp.*, 111 B.R. 882, 891-92 (Bankr. E.D. Cal. 1990).

534. See SHIFFRIN, *supra* note 16, at 94.

535. See Atkinson, *supra* note 177, at 148.

536. See *supra* notes 91 - 102 and accompanying text. See also *In re Green*, 11 P.3d 1078 (Colo. 2000). Unless the lawyer in *Green* was extraordinarily sensitive, he must have had some basis for his charge that the judge was a racist — he repeated it in three separate letters seeking recusal. In light of the persistence of racism on the bench, one should be hesitant to condemn the letters in *Green* as constitutionally valueless.

analogy with civil disobedience, disrespectful speech may be justified insofar as it appeals to a conception of value that has been suppressed by the dominant political order. But many cases involving abuse and insults are difficult to fit even within Shiffrin's capaciously protective model of dissenting speech. The only way to stretch the marketplace metaphor to encompass these cases is to conceive of the value protected by the First Amendment as a kind of aggressive skepticism about conventional wisdom — a disposition to rock the boat, slay the sacred cows, upset the apple cart, or what have you. Perhaps cantankerousness is a constitutional virtue, as has sometimes been suggested.⁵³⁷ Even so, racist and sexist insults, threats of violence, and attempts at intimidation of opposing counsel fall outside the scope of even this hypothetical constitutionally significant incivility. Disrespectful speech that appeals to some underlying political principle is easily accommodated within the marketplace of ideas metaphor. (Paradigmatic examples are Cohen's "Fuck the Draft" jacket and the outbursts by the Chicago Seven defendants.) Speech that is utterly divorced from any plausible alternative conception of political morality is, however, entitled to a significantly lessened degree of protection, at least under the marketplace rationale.

For this reason, a refinement of the marketplace image — the "persuasion principle" — better illustrates when speech by lawyers ought to be entitled to constitutional protection. There is one absolutely excluded reason for government regulation of speech: expression may never be limited because it is too effective. "[T]yrants suppress speech because they fear it will be persuasive."⁵³⁸ The persuasion principle assumes that speech is ultimately aimed at representing some vision of the right or the good. Undoubtedly this is true of many lawyers' utterances, such as the criticism of the government's handling of Smith Act cases in *In re Sawyer*.⁵³⁹ Punishing the lawyer in *Sawyer* for her speech is absolutely ruled out by the Constitution, if it appears that the restriction was aimed at preventing the lawyer's comments from persuading others that the government was acting unjustly. Again, however, the persuasion principle has difficulty accommodating emotive speech such as insults, epithets, and other kinds of communications that are not attempts at persuasion. Perhaps this is the correct balance to strike; perhaps utterances like "I

537. See *infra* Section IV.C.

538. Strauss, *supra* note 494, at 337.

539. 360 U.S. 622 (1959).

don't believe those chili-eating bastards"⁵⁴⁰ ought to be unprotected. The danger in this position, however, is that a relatively small fraction of speech by lawyers is aimed at persuading the listener of *truth*. Lawyers are constantly derided as sophists — skilled rhetoricians who aim to make the false seem true and the true false.⁵⁴¹ This criticism is sometimes warranted, but in many cases lawyers are appealing to some important political value other than truth to justify a position on behalf of their clients. To take an easy example, lawyers who seek to suppress evidence that is probative of factual truth but which was obtained in an unconstitutional search rely on norms of fair law enforcement practices and procedural due process principles to justify their actions. Extending that example, the lawyers who sought to suppress evidence in the case before U.S. District Judge Harold Baer, which erupted in calls for Judge Baer's impeachment,⁵⁴² were attempting to extend these process norms to take into account a robust conception of racial equality, in which the suspects' flight from police officers could be given a non-incriminating explanation. The factual truth of the matter — whether the defendants possessed large quantities of heroin — would have been obscured by the lawyers' tactics, but that does not mean the lawyers should be criticized in moral terms as sophists. They were attempting to persuade their listener not of factual truth about guilt or innocence, but about some plausible alternative conception of justice in which broad social inequalities, such as discriminatory policing practices, would be relevant to assessing the propriety of warrantless searches. Similarly, Johnnie Cochran's much-criticized "send-a-message" closing argument in the O.J. Simpson criminal trial was an attempt to make understandable the defense's theory that Simpson was framed by putting in issue the history of racism on the LAPD. The argument was an attempt at persuasion, in David Strauss's terms, even though it was not directed at resolving the case on the narrow factual merits.

B. Democratic Self-Government — The Meiklejohn Thesis

Without a broad sphere of expressive freedom, individuals would not be able to participate in rational, democratic self-government.⁵⁴³

540. *People v. Sharpe*, 781 P.2d 659, 660 (Colo. 1989).

541. See, e.g., JANET MALCOM, *THE CRIME OF SHEILA MCGOUGH* (1999); James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849 (1983).

542. See *supra* notes 126 - 133 and accompanying text.

543. This justification for protecting speech is associated most strongly with Alexander

Popular sovereignty requires free exchange of opinions without distortion by government censorship. Individuals, not the state, ought to be free to choose what opinions are expressed in public debate. This debate may be “uninhibited, robust, and wide-open,” as the Supreme Court said in *Sullivan*, and it may include “vehement, caustic, and sometimes unpleasantly sharp attacks on public officials.”⁵⁴⁴ The Supreme Court has been especially protective of speech on “matters of public concern,” which suggests that the self-governance rationale plays a large role in the Court’s First Amendment jurisprudence.⁵⁴⁵

Under the strict Meiklejohn view, however, the scope of protected speech may be narrow. Expression is protected only where it “bears, directly or indirectly, upon issues with which voters have to deal — only therefore, to the consideration of matters of public interest.”⁵⁴⁶ On the other hand, this definition may not be narrow at all; rather, it may be potentially limitless. What subject does not bear, at least indirectly, upon matters which can be affected by decisions made by voters?⁵⁴⁷ Since funding for the arts, education, and civil rights are all issues of public importance, the Meiklejohn thesis, un-

Meiklejohn; see ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), although numerous other prominent constitutional scholars have appealed to it as well. See, e.g., ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 62 (1975); KALVEN, *supra* note 74; SMOLLA, *supra* note 459, at 12; Akhil Reed Amar, *Comment: The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 141 (1992); Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986). Theoretically, the self-government principle is related to the discourse ethics of Habermas. See JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy, trans., 1987). On several occasions the Supreme Court and individual justices have alluded to self-government as the basis for safeguarding freedom of expression. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (First Amendment has structural role in guaranteeing republican form of government); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (“there is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of government affairs”); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“speech concerning public affairs is more than self-expression; it is the essence of self-government.”); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth”).

544. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

545. See, e.g., *Board of County Comm’rs v. Umbehr*, 518 U.S. 668, (1996); *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); cf. *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (“political belief and association constitute the core of those activities protected by the First Amendment”).

546. MEIKLEJOHN, *supra* note 543, at 94.

547. See, e.g., Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 681 (1990) (“all speech is potentially relevant to democratic self-governance”).

derstood broadly, implies protection for the right of gays and lesbians to march in traditional Irish parades,⁵⁴⁸ “obscene” books,⁵⁴⁹ and so on. Harry Wellington states this criticism eloquently: “One learns much about political behavior from Anthony Trollope and about social behavior from Jane Austen. Does this knowledge help the voter discharge his obligation? The obscene teaches about the human condition. Is that not important to the voter as a voter?”⁵⁵⁰

One response is to admit, as Meiklejohn subsequently did, that speech pertaining to art, literature, philosophy, science, and education is indeed “public” speech worthy of protection.⁵⁵¹ This redescriptive strategy, however, tends to divorce the definition of political speech from its underlying justification, which is furthering deliberation that is pertinent to actions ultimately taken in the name of government.⁵⁵² It is also difficult to know when speech actually facilitates democratic self-government and when it is “pathological”⁵⁵³ or merely irrelevant to concerns of government.⁵⁵⁴ What is one to make, for example, of tobacco and liquor advertising?⁵⁵⁵ The other alternative is to seek to narrow the definition of political speech so that it excludes more troublesome categories of expression.

Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary, or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional ob-

548. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

549. See, e.g., *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Mass.*, 383 U.S. 413 (1966).

550. Wellington, *supra* note 524 at 1116.

551. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255-57.

552. See Zechariah Chaffee, Book Review, 62 HARV. L. REV. 891, 899-900 (1949).

553. See David A.J. Richards, *Tolerance and Free Speech*, 17 PHIL. & PUB. AFF. 323, 326 (1988). Compare the quite different use of the term pathology to describe “certain dynamics that increase the likelihood that people who hold unorthodox views will be punished for what they say or believe,” in Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 450 (1985).

554. It is difficult to defend advocacy of overthrow of a democratic government as being justifiable on the basis of facilitating self-government, but that is precisely the effect of numerous Supreme Court decisions permitting citizens to join political parties which have as their ultimate object the overthrow of the United States Government. See, e.g., *Herrndon v. Lowry*, 301 U.S. 242 (1937); *DeJonge v. Oregon*, 299 U.S. 353 (1937).

555. See Fallon, *supra* note 7, at 29-30.

struction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law.⁵⁵⁶

Judge Bork's approach eliminates many of the pesky line-drawing problems inherent in the Meiklejohn thesis, and also resolves the anomaly of protecting advocacy of overthrow of the government as a means to enhancing democratic self-government. Furthermore, Bork's argument shows another weakness of the self-government rationale for protecting free speech: if only "political" speech is worthy of constitutional safeguards, a court intent on suppressing speech may do so by paying lip service to the importance of political speech, and then defining narrowly the scope of political speech to exclude the challenged expression. Indeed, many of the Supreme Court's pronouncements on the centrality of political discourse are uttered as a prelude to a conclusion that the speech under consideration is *not* core political speech and is, therefore, subject to regulation.⁵⁵⁷ The Court in other cases has been unwilling to confine protection to political speech, however, suggesting that it is aware of the malleability of the political speech concept and is reluctant to allow too much weight to be placed on the determination that speech is or is not related to political matters.⁵⁵⁸

Courts also may err by too easily assuming that speech is "political" and, therefore, protected more zealously than non-political

556. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20 (1971).

557. For example, the Court in an early obscenity case conceded that "[T]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). It then proceeded to hold that obscenity is not within this constitutionally protected area. *Id.* at 492. Similarly, in *FCC v. Pacifica Found.*, 438 U.S. 744 (1978), the Court permitted federal regulation of a broadcast of George Carlin's Seven Dirty Words monologue, but only after a tip of the hat to core political speech: "If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content . . . First Amendment protection might be required." *Id.* at 746.

558. *See, e.g.*, *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("[G]uarantees for speech and press are not the preserve of political expression or comment upon public affairs."); *NAACP v. Alabama*, 357 U.S. 449, 460 (1957) ("[I]t is immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religious, or cultural matters."); *cf.* *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 288-89 & n.2 (1974) (Douglas, J., concurring) (explicitly rejecting Bork's view that only explicitly political speech is protected by First Amendment).

communication. The debate over hate speech is complicated by the argument over whether it belongs to the protected core of political speech or is beyond the purview of the First Amendment.⁵⁵⁹ Consider, as another example, the debate whether sexual harassment is merely the communication of ideas inconsistent with gender equality or a discriminatory condition of employment.⁵⁶⁰ The civil libertarian position in the debate over sexual harassment depends, in large part, on the premise that sexual harassment is protected (political) expression — speech with a viewpoint that most find abhorrent, but an idea that nevertheless must be allowed to seek acceptance in the marketplace.⁵⁶¹ The same characterization led the Supreme Court to protect the activities of abortion protesters, even though their conduct restricted access to medical facilities and caused severe distress to women entering the clinics.⁵⁶² The effort to label speech as “political” is an effective tactic for the civil libertarian because it blunts the impact of cases that limit access to the marketplace to that speech which is “political.” As a general rule, then, if one is determined to protect as much speech as possible, the best approach is to seek to portray a wide variety of expression as political.

Whether the political domain is defined broadly or narrowly, there is a substantial universe of expression by lawyers which is indisputably political. Even Bork would concede that the lawyer who speaks to a public gathering, criticizing the government’s misuse of a statute proscribing advocacy of violent overthrow of the United States government, is addressing matters of public concern.⁵⁶³ In this case, the premises of the lawyer’s argument deserve to be heard because they are relevant to whether the state is abusing its power in applying a statute. The lawyer’s speech is not advocacy of overthrow of the government, which Bork would find unprotected; it is, instead, a critique of existing political structures which may contribute to the

559. See, e.g., *R.A.V.*, 505 U.S. 377. Justice Scalia’s opinion underscored the principle that political discourse enjoys the greatest social value. See *id.* Justice Stevens’ concurring opinion agreed that “[c]ore political speech occupies the highest, most protected position.” *Id.* at 422. (Stevens, J., concurring). These pronouncements simply beg the question, though, whether burning a cross in a black family’s yard is political speech. For a discussion of how the Court fragmented over how to frame the issues in *R.A.V.*, see Amar, *supra* note 543, at 147-51.

560. See *supra* note 151, and accompanying text.

561. Strossen, *supra* note 192, at 709.

562. See *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997).

563. This example is taken from *In re Sawyer*, 360 U.S. 622 (1959). For discussion in more detail, see *supra* notes 103 - 105 and accompanying text.

revision of unjust doctrines. As Harry Kalven has argued, the very fact that the speech resonated with others in the community shows that the lawyer's arguments touched on values that were widely enough shared to be relevant to democratic deliberation.

If a man is seriously enough at odds with the society to advocate violent overthrow, his speech has utility not because advocating violence is useful but because the premises underlying his call to action should be heard. He says something more than "Revolt! Revolt!" He advances premises in support of that conclusion. And those premises are worth protecting, for they are likely to incorporate serious and radical criticism of the society and the government.⁵⁶⁴

One might add that speech that is ineffective — a call to arms that is likely to be ignored — is not dangerous, because it does not resonate with its audience. This is one of the paradoxes of the First Amendment. Speech deserves protection insofar as it taps into currents of political morality that are widely enough shared to be relevant to self-government, but if these radical or critical beliefs are accepted by enough of the populace, there is a real danger that action might follow advocacy.

C. Dissent

Some commentators, most prominently Steven Shiffrin, have extended the argument for protecting critical speech, suggesting that the central purpose of the First Amendment is to preserve the unorthodox views of the outcasts and rebels in a majoritarian society.⁵⁶⁵

If the first amendment is to have an organizing symbol, let it be an Emersonian symbol, let it be the image of the dissenter. A major purpose of the first amendment . . . is to protect the ro-

564. KALVEN, *supra* note 74, at 120.

565. See, e.g., Shiffrin, *supra* note 300, at 84; STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999) [hereinafter SHIFFRIN, *DISSENT*]; SHIFFRIN, *supra* note 16. Shiffrin's approach has been criticized by Ron Krotoszynski, who notes that Shiffrin's definition of "dissent" is a bit slippery; causes close to the political left tend to be labeled as dissent by Shiffrin, while other kinds of unpopular speech, like tobacco advertising, come in as candidates for extensive government regulation. See Ronald J. Krotoszynski, Jr., *Dissent, Free Speech, and Continuing Search for the "Central Meaning" of the First Amendment*, 98 MICH. L. REV. 701 (2000). Shiffrin also struggles mightily to avoid protecting racist speech. See SHIFFRIN, *supra* note 16, at 77-78. Ultimately this line-drawing is unpersuasive, because Shiffrin has to back away from his pure dissent model, and argue that racist speech is not constitutionally protected because it silences its victims. See *id.* at 62-65. While this may be true, it does not make the speech any less an example of rebelliousness, nonconformity, and romanticism; it shows only that other constitutional goals, like ensuring participation in public deliberation by marginalized speakers, must also be taken into account in constructing a theory of free speech.

mantics — those who would break out of classical forms: the dissenters, the unorthodox, the outcasts. The first amendment's purpose and function in the American polity is not merely to protect negative liberty, but also affirmatively to sponsor the individualism, the rebelliousness, the antiauthoritarianism, the spirit of nonconformity within us all.⁵⁶⁶

And indeed, countless First Amendment cases arise out of protests by those dissatisfied with the present state of the government or other powerful groups. The appeal in the flag-burning case, *Texas v. Johnson*,⁵⁶⁷ followed the conviction of Johnson for his “expression of dissatisfaction with the policies of this country”⁵⁶⁸ The defendant in *Watts v. United States*⁵⁶⁹ was spared a conviction for threatening the life of the President only because the Court recognized his words as an expression of political opposition to the government and the war in Vietnam.⁵⁷⁰ *Schacht v. United States*⁵⁷¹ arose out of a skit critical of the American involvement in Vietnam, in which one of the actors wore a military uniform. The Court in *Terminiello v. City of Chicago* said: “[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”⁵⁷² Justice Marshall recognized the importance of protecting dissent when he argued that the most harmful effect of allowing prison officials to read inmates' mail would be the chilling effect on criticism of the prison authorities.⁵⁷³ Finally, one of the indisputably canonical cases in First Amendment jurisprudence, *West Virginia Board of Education v. Barnette*,⁵⁷⁴ recognized that compelling schoolchildren to salute the flag against their religious scruples threatened a vital principle of our democracy.

566. SHIFFRIN, *supra* note 16, at 5. Any lingering hope that “affirmative sponsorship” of individualism and nonconformity might extend to actual funding of expressive activities was squelched by the Supreme Court's decision that the government may impose decency restrictions on grants to artists. See *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

567. 491 U.S. 397 (1989).

568. *Id.* at 411.

569. 394 U.S. 705 (1969) (per curiam).

570. Watts had announced he would not report for a physical examination in connection with his conscription, and then said: “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.” See *id.* at 706.

571. 398 U.S. 58 (1970).

572. 337 U.S. 1, 4 (1949).

573. *Procunier v. Martinez*, 416 U.S. 396, 427 (Marshall, J., concurring).

574. 319 U.S. 624 (1943).

The Shiffrin position may also be restated as a recognition that a broad, unregulated sphere for free expression helps prevent the abuse of power by the government.⁵⁷⁵ The paradigmatic example of the checking function of free speech is the role of journalists in exposing the Watergate cover-up,⁵⁷⁶ and the publication of the Pentagon Papers can be viewed as another triumph for the right of an independent press corps to reveal government secrets.⁵⁷⁷ Voters can act to correct abuses of state power only if they are fully informed about the inner workings of the government, without any censorship, prior restraints, or other interference. Moreover, even where private citizens' expression causes harm, any response the government makes to this speech is likely to make the situation worse, because of the government's systematic bias toward the position held by public officials.⁵⁷⁸ Certainly the government is likely to be biased against speech in favor of disfavored beliefs or unlawful conduct, such as the trial antics of the Chicago Seven defendants.⁵⁷⁹

The protection of dissent entails a great deal of latitude for lawyers' speech when they represent unpopular or marginalized clients, such as political dissidents or indigents. This First Amendment principle is aptly illustrated by *NAACP v. Button*,⁵⁸⁰ in which the Supreme Court struck down a state statute that would have prohibited the solicitation of legal representation by an organization, such as the NAACP, that did not have any pecuniary stake in litigation. Justice Brennan, writing for the Court, observed that southern blacks, unable to achieve equality through the electoral process, were justified in turning to the courts for redress of their grievances.⁵⁸¹ He then imputed the clients' First Amendment right of association to the lawyers, since legal representation was necessary to secure relief from the courts.⁵⁸² Because of the clients' strong expressive interest, the State of Virginia was required to show a compelling interest in regulating the lawyers' conduct, contrary to the ordinary presumption that states

575. The classic articulation of this thesis is Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

576. See, e.g., BOB WOODWARD AND CARL BERNSTEIN, *ALL THE PRESIDENT'S MEN* (1974).

577. See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

578. See, e.g., BOLLINGER, *THE TOLERANT SOCIETY*, *supra* note 72, at 76-103; Blasi, *supra* note 575, at 538-44.

579. See Strauss, *supra* note 494, at 350.

580. 371 U.S. 415 (1963).

581. See *id.* at 429-30.

582. See *id.* at 434.

have plenary power of regulation over the legal profession.⁵⁸³ Even Justice Harlan, writing in dissent, agreed that litigation can have a transformational value: "Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights. This is particularly so in the sensitive area of racial relationships."⁵⁸⁴ He disagreed with the majority only in his characterization of the NAACP's solicitation of clients, and the resulting litigation, as more conduct than pure speech.⁵⁸⁵ *Button* shows that powerless litigants may be vulnerable to what seem like viewpoint-neutral regulations, such as bans on in-person solicitation of clients by organizations. The effect of that rule was to preserve the existing power imbalance by making access to legal representation difficult for challengers to segregation. Understanding the function of free speech rights as protecting, or even encouraging, dissent ought to have the effect of making courts skeptical about supposedly evenhanded restrictions on lawyers' speech.

It is probably necessary to caution here that broad constitutional solicitude for dissenting speech does not entail absolute protection for any disruptive conduct that has an expressive element. I tend to view contempt sanctions against political defendants warily, and believe that the protection for dissenting speech ought to command restraint in the face of the outbursts of someone like Bobby Seale, who was protesting the denial of his choice of counsel.⁵⁸⁶ I do not mean to suggest, however, that courts are powerless to secure order. The latitude for permissible dissent varies according to the context of the utterance.⁵⁸⁷ In-court speech, which occurs in a non-public forum, is subject to reasonable, viewpoint-neutral regulations, while speech outside of a judicial proceeding (including court filings and depositions) may be regulated only on a much more stringent showing, corresponding to the clear and present danger standard from the Court's contempt decisions. Finally, even where forbearance is not mandated by the First Amendment, it may be the better part of prudence. Politically charged trials are inevitably attended by protests against the government's exercise of power, and overly enthusiastic attempts to secure order will be portrayed as repressive by the dissenters. Judge

583. *See id.* at 438-39.

584. *Id.* at 453 (Harlan, J., dissenting).

585. *See id.* at 455; *cf.* the discussion of the elusive speech/conduct distinction, *supra* note 257 - 297, and accompanying text.

586. *See United States v. Seale*, 461 F.2d 345 (7th Cir. 1972).

587. *See SHIFFRIN*, *supra* note 16, at 103.

Hoffman's overreaction to the antics of the Chicago Seven defendants played directly into the hands of the protesters, who sought to discredit the government's claim of moral authority, both in its conduct of the Vietnam war and its response to domestic unrest.

D. Self-Fulfillment

Speech may be protected not only instrumentally, as a means to another end such as determining truth or maintaining democratic self-government, but also because expressive freedom is valuable as an end in itself.⁵⁸⁸ Speech *as speech* is so inextricably bound up with individual autonomy and dignity that its suppression, especially by the government, represents a rejection of the humanity of the speaker.⁵⁸⁹ The Supreme Court has hinted at this rationale,⁵⁹⁰ but has never accepted it as the primary basis for the guarantee of free expression. Indeed, the Court has rejected First Amendment challenges to regulation of conduct that is arguably highly self-expressive, but does not serve other ends thought by the Court to be more central to the constitutional guarantee of free speech.⁵⁹¹ Given the Court's flirtation

588. See Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443 (1998); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); David A. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974). Scanlon emphasizes the inherent value of individual autonomy, not self-expression, in Thomas M. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213-24 (1972). Protecting free expression helps prevent manipulation of an individual by government actors. Scanlon has modified his views to meet some objections to his so-called "Millian principle," in particular to recognize that private, as well as state actors can violate autonomy by manipulating individuals. See Thomas M. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979).

589. See GREENAWALT, CRIME, *supra* note 264, at 33.

590. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) ("The First Amendment serves not only the needs of the polity but also those of the human spirit — a spirit that demands self-expression."); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . valued liberty both as an end and as a means."). Cf. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-04 (1984) (dicta) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty — and thus a good unto itself — but also is essential to the common quest for truth and the vitality of society as a whole."). An unintentionally ironic appeal to this rationale can be found in *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980), in which the Court invalidated an order of the Commission, which prohibited inclusion of inserts in utility bills discussing issues of public policy. The Court referred to "the individual's interest in self-expression" while defending the right of a gigantic corporation to extol the value and safety of nuclear power plants. See 477 U.S. at 534 n.2.

591. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (nude dancing is only "within the outer perimeters of the First Amendment," although all of the justices

with the self-fulfillment rationale, and the criticism that has been leveled against it,⁵⁹² it is probably safe to regard this value as not central to First Amendment jurisprudence.

More importantly for the purposes of my argument, the self-expression rationale has little relevance to attorney-speech cases, for the simple reason that self-fulfillment has little application to the job of attorney. Lawyers are fiduciaries of their clients — a fact which has engendered considerable angst from legal ethicists, but a fundamental aspect of the job of attorney nonetheless. It is not the *lawyer's* self that is expressed through the attorney-client relationship, but the client's.⁵⁹³ The disciplinary rules promulgated by the organized bar repeatedly emphasize the lawyer's independence from her client's substantive moral position and her concomitant obligation to represent the lawful objectives of her client with competence and alacrity.⁵⁹⁴ I do not mean to deny the lawyer's moral agency; lawyers are still responsible to some extent for the clients they choose,⁵⁹⁵ and certainly responsible for immoral actions they take in the course of their representation of clients. But moral agency is not the same thing as an unfettered sphere of self-expressive freedom.

E. Spurious State Interests for Restricting Lawyers' Speech

Another way to analyze restrictions on speech is to invert the arguments presented above — that is, instead of explaining why speech should be protected, showing the damage that would result if the

agreed it was self-expressive); *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978) (George Carlin Seven Dirty Words sketch “surely lie[s] at the periphery of First Amendment concern.”).

592. *See, e.g.*, ROBERT P. GEORGE, *MAKING MEN MORAL* 194-99 (1993). George argues that speech is instrumentally, not intrinsically valuable. “Speech that fails to advance any human good is valueless, for the value of speech is instrumental, not intrinsic. . . . Speech is valuable when it makes possible valuable co-operation; and co-operation is valuable when it is for the sake of worthy ends.” *Id.* at 195. Without this restriction, speech may be protected where it inhibits the realization of worthwhile ends, or makes possible the realization of immoral ends. *See also* FISS, *supra* note 13, at 5 (the self-expression rationale for protecting speech fails to explain why the speaker's interest in self-expression should trump listeners' interests in being protected from the speech).

593. *Cf. Post*, *supra* note 9, at 1273 (“No sane legal system would view the practice of medicine as an occasion for physician self-realization.”).

594. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.2(a) (client has authority over objectives of representation); 1.2(b) (lawyer's representation does not constitute endorsement of client's ends); 1.1 (lawyer's obligation is to provide competent representation).

595. *See, e.g.*, Monroe H. Freedman, *Ethical Ends and Ethical Means*, 41 J. LEG. EDUC. 55 (1991); Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978).

speech were permitted in the case under review. This strategy is common in attorney-speech cases, with courts offering a myriad of reasons why speech should be sanctioned. Not all of the suggested justifications stand up under scrutiny, however.

1. *Public Image of the Bar*

The most familiar, but the least persuasive, reason offered by courts for restricting the speech of lawyers is that attacks on judges, courts, or other lawyers inevitably breeds public distrust for the judicial system.⁵⁹⁶ Courts and commentators tend to be extremely conclusory when making this argument, using it as a talisman that automatically warrants restriction of speech. Sometimes the circularity of the argument is obvious, as in this example: “[T]o permit unfettered criticism regardless of the motive . . . would foster unwarranted criticism of the courts.”⁵⁹⁷ In other cases, courts present the argument as though the soundness of the premises and the inevitability of the conclusion are so obvious that only a fool could disagree. Consider this statement from a justice of the New York Court of Appeals: “[Erdmann’s] widely publicized statement, couched in such scandalous terms, is bound to have the effect of bringing discredit upon the administration of justice amongst the citizenry, an act which ought not

596. See, e.g., Lloyd L. Weinreb, *Speaking Out Outside the Courtroom*, 47 EMORY L.J. 889, 893 (1998); Carl Selinger, *The Public’s Interest in Preserving the Dignity and Unity of the Legal Profession*, 32 WAKE FOREST L. REV. 861 (1997); *Went For It*, 515 U.S. at 626-27; *United States v. Brown*, 72 F.3d 25 (5th Cir. 1995); *In re Converse*, 602 N.W.2d 500, 508 (Neb. 1999) (turbulence, intemperance, and irresponsibility on the part of lawyers “seriously lower[s] the public respect for the bar”); *Ramirez v. State Bar*, 619 P.2d 399, 406 (Cal. 1980) (“Appropriate discipline must be imposed, if for no other reason than the protection of the public and preservation of respect for the courts”); *In re Shimek*, 284 So. 2d 686, 688 (Fla. 1973) (“Once the integrity of a judge is in doubt, the efficacy of his decisions [is] more likely to be questioned”); *In re Terry*, 394 N.E.2d 94, 96 (Ind. 1979) (“Unwarranted public suggestion by an attorney that a judicial officer is motivated by criminal purposes and considerations does nothing but weaken and erode the public’s confidence in an impartial adjudicatory process.”); *Commission on Professional Ethics and Conduct v. Horak*, 292 N.W.2d 129, 130 (Iowa 1980); *In re Johnson*, 729 P.2d 1175, 1178 (Kan. 1986); *Kentucky Bar Ass’n v. Heleringer*, 602 S.W.2d 165, 168 (Ky. 1980) (“Insolent, impudent, and derogatory conduct can only serve to bring the judicial system into discredit in the public mind.”); *Attorney Grievance Comm’n v. Alison*, 565 A.2d 660, 666 (Md. 1989); *In re Westfall*, 808 S.W.2d 829, 835 (Mo. 1991); *Bar Ass’n of Greater Cleveland v. Carlin*, 423 N.E.2d 477, 479 (Ohio 1981) (“This court will not tolerate an attorney’s engaging in such persistent, derogatory attacks on a judicial officer and, thus, on the decorum of the judicial process itself.”).

597. *Commission on Professional Ethics and Conduct v. Horak*, 292 N.W.2d 129, 130 (Iowa 1980).

be permitted.”⁵⁹⁸ The dissenting justice in *Erdmann* does not explain why the public would pay attention to the lawyer’s statement, rather than simply conclude that the lawyer was a jerk who was unworthy of belief.⁵⁹⁹ Other courts could undoubtedly offer a more persuasive constitutional justification for restricting speech, but tend to fall back reflexively on the interest in elevating the public image of the legal profession.⁶⁰⁰ Surely the worst example of this reasoning is to be found in an opinion of the Florida Supreme Court:

Admitting, therefore, the human weaknesses of judges as individuals but affirming our belief in the essentiality of the chastity of the goddess of justice we are impelled to the inescapable notion that any conduct of a lawyer which brings into scorn and disrepute the administration of justice demands condemnation and the application of appropriate penalties.⁶⁰¹

The court seems to have confused the common-law doctrine of libel per se, in which imputation of unchastity to a woman was actionable without proof of actual damages,⁶⁰² with a valid justification for muzzling criticism of the judiciary.

Other courts have correctly realized the inadequacy of “affirming the chastity of the goddess of justice” as a basis for restricting speech. For instance, the Fifth Circuit pointed out the vacuity of the arguments made by the disciplinary agency: “Neither in its brief nor at oral argument was the Commission able to explain precisely how Scott’s public criticisms would impede the goals of promoting an efficient and impartial judiciary”⁶⁰³ In a California case, the lawyer had been disciplined for alleging in a brief that state appellate judges had acted “unlawfully” and “illegally” by reversing a judgment in favor of the lawyer’s client.⁶⁰⁴ Although the court upheld the discipline, the dissenting justices questioned the majority’s uncritical assumption that the lawyer’s comments would bring the judiciary into disrepute. The press is constantly harping on judges, often in very strong lan-

598. *In re Erdmann*, 301 N.E.2d 426, 430 (N.Y. 1973) (Gabielli, J., dissenting).

599. Justice Kennedy has argued that societal disapproval is the only sanction for obnoxious lawyers that does not violate the First Amendment. See *Went For It*, 515 U.S. at 643 (Kennedy, J., dissenting) (“this problem is largely self-policing: Potential clients will not hire lawyers who offend them.”); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1058 (1991) (Kennedy, J.).

600. See, e.g., *Carroll v. Jaques Admiralty Law Firm*, 110 F.3d 290, 294 (5th Cir. 1997).

601. *Florida Bar v. Calhoon*, 102 So. 2d 604, 608 (Fla. 1958).

602. See W. PAGE KEETON, ET AL., *PROSSER AND KEETON ON TORTS* § 112, at 792-93 (5th ed. 1984).

603. *Scott v. Flowers*, 910 F.2d 201, 213 (5th Cir. 1990).

604. See *Ramirez v. State Bar of California*, 619 P.2d 399 (Cal. 1980).

guage, and no one suggests that this speech is unworthy of protection.⁶⁰⁵ Appellate courts and law professors spend much of their time examining judicial decisions for flawed reasoning, and then exposing these errors to the public, frequently employing provocative language. If preserving respect for courts were a sufficient ground for restricting lawyers' speech, or if speech critical of the judiciary actually had the effect of bringing judges into dishonor, then reviewing courts, legal academics, and the press should also be potentially subject to discipline for creating contempt for judicial decisions.

Furthermore, the argument that the public image of the bar must be protected through restrictions on speech is ethically repellent. It suggests that respect may be won only through mystification — that consumers of legal services would be aghast if they realized that lawyers were paid for their services,⁶⁰⁶ or that the public would cease to defer to the judgments of courts if they realized that judges were fallible human beings instead of hierophants of justice. This reasoning was demolished decades ago by the legal realists, who exposed the rhetoric of "scientific" objectivity in judicial opinions as mere window dressing for decisions reached on other grounds. Certainly in a time of unprecedented media coverage of the legal profession, few non-lawyers believe that lawyers are selfless public servants or that judicial decisions are based in eternal, immutable truths. But even if it were true that a smoke-and-mirrors campaign by the bar could prop up the flagging public image of lawyers, it is hardly clear that preserving respect for the bar and the judiciary counts as a state interest sufficiently important to justify restrictions on speech.⁶⁰⁷

The Supreme Court has never extended this kind of public image protection to politicians and other public figures, who are forced to endure vilification without having resort to common-law tort remedies. Jerry Falwell's public image was probably not enhanced by Larry Flynt's caricature of him in *Hustler* magazine (although the magazine probably does more harm to Flynt's image than to any of his targets), but because he was a public figure the Court refused to

605. See *id.* at 412 (Newman, J., dissenting); see also *Scott*, 910 F.2d at 211 n.20 ("if Scott were a private citizen, the state would have no justification for suppressing his criticisms of the county justice system.").

606. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 368 (1977) ("[W]e find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar.").

607. See *Sullivan*, *supra* note 363, at 584.

permit Falwell to recover for the tort of intentional infliction of emotional distress.⁶⁰⁸ For these reasons, as Justice Kennedy noted in dissent in *Went For It*, promoting the public image of the bar through speech restrictions sounds benign, but it is nevertheless impermissible censorship — the government is suppressing speech that creates a particular opinion in its listeners, in violation of the First Amendment principle of viewpoint-neutrality.⁶⁰⁹ The putative interest in enhancing the public image of the bar hardly qualifies as a legitimate government interest at all, such as would pass deferential “rational basis” review, much less as a significant state interest that would justify content-based restrictions on speech.⁶¹⁰

2. *Protecting Reputation*

As many courts have observed, the interests served by defamation law are different from those advanced by the law of professional discipline.⁶¹¹ In defamation cases, a private plaintiff seeks to recover for injury to her reputation.⁶¹² Disciplinary cases, on the other hand, do not seek to vindicate a private wrong — instead, they are brought by the state, and are directed toward preserving a fair, impartial judicial system.⁶¹³ A lawyer’s conduct may create both civil liability for defamation and liability for discipline, as in *In re Eisenberg*,⁶¹⁴ where the lawyer accused opposing counsel of committing perjury, obtaining his license to practice law by fraud, and distributing cocaine at a party. The opposing lawyer sued for defamation and recovered \$549,000 in compensatory and punitive damages; the state bar association then obtained Eisenberg’s suspension for the same remarks. Or, a judge may be the plaintiff in a libel case if the published statement was susceptible of a defamatory meaning.⁶¹⁵ In many attorney-

608. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

609. See *Went For It*, 515 U.S. at 639-40 (Kennedy, J., dissenting).

610. Cf. *Hornsby & Schimmel*, *supra* note 150 (reviewing evidence indicating that banning advertising by lawyers would have little or no effect on the public’s perception of the legal profession).

611. See, e.g., *In re Terry*, 394 N.E.2d 94, 95 (Ind. 1979); *In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990); *In re Holtzman*, 577 N.E.2d 30, 34 (N.Y. 1991).

612. See generally SMOLLA, *supra* note 459, at 117-19.

613. See *Terry*, 394 N.E.2d at 95.

614. 423 N.W.2d 867 (Wis. 1988).

615. See, e.g., *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299 (N.Y. 1977). In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the lawyer’s comments were the basis of a criminal defamation action, but the judges presumably could have brought a civil action as well.

speech cases, however, there is either no private plaintiff with standing to sue for defamation or no false statement which could harm the reputation of its subject — consider some of the examples cited above, such as referring to a woman lawyer as “little girl,”⁶¹⁶ or calling Latino defendants “chili-eating bastards.”⁶¹⁷

A common analytic confusion therefore arises over whether the constitutional protections available to media defendants in defamation cases brought by public-figure or public-official plaintiffs may be asserted by attorneys in disciplinary proceedings.⁶¹⁸ Many courts have declined to employ the *Sullivan* actual malice standard in discipline cases,⁶¹⁹ although others have adopted the constitutional framework for those proceedings.⁶²⁰ Academic opinion seems to favor the application of the actual malice standard in disciplinary actions.⁶²¹ The issue is complicated by the fact that numerous states have adopted the American Bar Association’s Model Rule 8.2, which provides:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory

616. *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 184 (Sup. Ct. 1992).

617. *People v. Sharpe*, 781 P.2d 659, 660 (Colo. 1989).

618. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990) (statement not actionable unless it contains a provably false statement of fact); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) (emotional distress torts subject to *Sullivan* standard where plaintiff is public figure); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (plaintiff in defamation case bears burden of proving falsity); *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 285-86 (1964) (where plaintiff is a public figure, plaintiff must show that defendant had knowledge of falsity or recklessly disregarded the truth or falsity of the allegedly defamatory statement; plaintiff also must establish case with “convincing clarity”).

619. *See, e.g., In re Terry*, 394 N.E.2d 94, 95 (Ind. 1979); *In re Westfall*, 808 S.W.2d 829, 837 (Mo. 1991) (“because of the interest in protecting the public, the administration of justice, and the profession, a purely subjective standard is inappropriate”); *In re Holtzman*, 577 N.E.2d 30, 34 (N.Y. 1991) (“Neither this Court nor the Supreme Court has ever extended the *Sullivan* standard to lawyer discipline and we decline to do so here.”); *Justices of the Appellate Division v. Erdmann*, 301 N.E.2d 426, 429 (N.Y. 1973) (“The cases of *Garrison v. Louisiana . . .* and *New York Times Co. v. Sullivan . . .* are irrelevant.”); *State Bar v. Semaan*, 508 S.W.2d 429, 432-33 (Tex. Ct. Civ. App. 1974).

620. *See, e.g., In re Evans*, 801 F.2d 703, 706 (4th Cir. 1986); *Ramirez v. State Bar of California*, 619 P.2d 399, 404 (Cal. 1980); *Carter v. Muka*, 502 A.2d 327 (R.I. 1985); *State Bar of Texas v. Semaan*, 508 S.W.2d 429 (Tex. Ct. Civ. App. 1974). *See also In re Green*, 11 P.3d 1087 (Colo. 2000).

621. *See Chemerinsky, supra* note 101, at 884-87; Elizabeth I. Kiovsy, Comment, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 OHIO ST. L.J. 201 (1986); Morris B. Chapman, *Criticism — A Lawyer’s Duty or Downfall?* 1981 S. ILL. U. L.J. 437; Note, *In re Erdmann: What Lawyers Can Say About Judges*, 38 ALB. L. REV. 600 (1974).

officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.⁶²²

Because Rule 8.2 incorporates the *Sullivan* test, courts sometimes assume that disciplinary proceedings brought to enforce some other norm, although not derived from Rule 8.2, should also incorporate the constitutional law of defamation applicable to public officials.

There is some support in scattered cases for the proposition that the *Sullivan* standard and other constitutional safeguards should apply to government-initiated proceedings to punish a lawyer whose speech could be injurious to the reputation of a public official. In *Garrison v. Louisiana*,⁶²³ the Orleans Parish District Attorney criticized the judges of his parish for creating a large backlog of cases through laziness, inefficiency, and a proclivity for taking vacations. He also suggested that the judges were unwilling to approve funding for the enforcement of vice laws, perhaps because of “racketeer influences.”⁶²⁴ Similarly, in the *Yagman* case, the district court found the “impugn the integrity” portion of a local rule, under which the lawyer was disciplined, to be facially overbroad, because it swept within its ambit a great deal of constitutionally protected criticism of judges.⁶²⁵ In order to save the rule from overbreadth, the district court had read the *Sullivan* malice standard into the rule, limiting liability for discipline to attorneys who make false statements made with either knowledge of falsity or reckless disregard for truth or falsity.⁶²⁶ The court of appeals disagreed with this approach, determining that *Sullivan* does not apply lock, stock, and barrel to attorney disciplinary proceedings:

Defamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community. Ethical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice.⁶²⁷

But then Judge Kozinski concluded that *Yagman* is entitled to “other First Amendment protections applicable in the defamation con-

622. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2(a).

623. 379 U.S. 64 (1964).

624. *See id.* at 66.

625. *See Yagman*, 55 F.3d at 1437 (citing *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 577 (1987)).

626. *See id.* (citing *United States Dist. Ct. v. Sandlin*, 12 F.3d 861 (9th Cir. 1993)).

627. *Id.* at 1437.

text.”⁶²⁸ The court held that these constitutional principles, including the rule that truth is an absolute defense⁶²⁹ and the rule that the plaintiff must prove falsity as part of a prima facie case,⁶³⁰ must govern the discipline against Yagman.

Nowhere did the court explain why *Sullivan* is not implicated in disciplinary actions, yet courts must observe other constitutional aspects of defamation law. *Garrison* and *Hepps*, no less than *Sullivan*, are defamation cases. One would think that if *Sullivan* does not apply in this context, because defamation law and the law of attorney discipline protect different interests, then other constitutional libel rules should be similarly inapposite. Nevertheless, Judge Kozinski analyzed the discipline against Yagman under the stringent constitutional standards set forth for libel actions. Since only false statements are actionable under the court’s view, it follows that statements of opinion may be the basis of discipline only if they imply a factual predicate that is proven false.⁶³¹ Thus, Judge Kozinski concluded that Yagman could not be sanctioned for the majority of his diatribe: the allegation of anti-Semitism included an assertion of fact — namely, that Judge Keller had sanctioned several Jewish lawyers — coupled with Yagman’s personal belief that Judge Keller was an anti-Semite. Because the statement did not imply the existence of additional, undisclosed facts, it is protected as an inference drawn from stated facts.⁶³² Yagman’s allegation that Judge Keller was “dishonest” was mere rhetorical hyperbole, conveying Yagman’s contempt for Judge

628. *Id.*

629. *See Garrison v. Louisiana*, 379 U.S. 64 (1964).

630. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986).

631. *See Yagman*, 55 F.3d at 1439, citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) and RESTATEMENT (SECOND) OF TORTS § 556 cmt. b (1977).

632. *See id.* at 1438-40. Judge Kozinski drops a tantalizing suggestion in a footnote in his discussion of the anti-Semitism comment. Even if Yagman’s allegation was not based on stated facts, such as previous sanctions meted out to Jewish lawyers, Judge Kozinski suggested that it may nevertheless be protected as “name calling.” *See id.* at 1440 n.17 (citing several cases in which words like “racist” and “fascist” were held not actionable). These cases do not arise out of comments made by lawyers in connection with pending litigation. *See Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988) (Easterbrook, J.) (considering actionability of accusations of racism in a hotly contested struggle to replace a public school principal); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) (libel action resulting from a book calling William F. Buckley a fascist); *Ward v. Zelikovsky*, 643 A.2d 972 (N.J. 1994) (statement that plaintiff “hates Jews” was made at a condominium association meeting). But this may be a distinction without a difference, if a particular expression by a lawyer is appropriately characterized as political commentary. (Comments by the lawyers in the Supreme Court’s *Snyder* and *Sawyer* cases are functionally equivalent to the remarks at issue in the political-speech cases cited by Judge Kozinski.)

Keller, not a specific accusation of corruption.⁶³³ Alternatively, the “dishonest” comment was equivalent to criticizing Judge Keller as “intellectually dishonest,” which is a commonplace expression of disapproval for judicial decisions.⁶³⁴ The “drunk on the bench” comment *did* imply actual facts that are capable of verification, but the Standing Committee on Discipline had unconstitutionally presumed the falsity of the statement. Under *Hepps*, the Committee was required to prove falsity as part of its prima facie case for discipline.⁶³⁵ As soon as the court of appeals determined to hold the Standing Committee on Discipline to the burden required of a plaintiff in a public-figure libel action, it was a foregone conclusion that Yagman would escape discipline.

The importation of the *Sullivan* standard into disciplinary cases is understandable. The actual malice test is highly protective of speech, and effectively serves important interests, such as freeing attorneys from the hazardous task of attempting to divine the circumstances under which their speech will have a prejudicial impact on a pending proceeding.⁶³⁶ But similar benefits can be realized, without the cost of additional doctrinal complexity, by analyzing lawyer-speech cases under ordinary constitutional rules, such as those employed by the Supreme Court in *Snyder*, *Sawyer*, and *Gentile*. For example, content-based regulations on speech are disfavored, and may be justified only by substantial government interests.⁶³⁷ In a case like *Yagman*, the interests that would support discipline for the lawyer do not justify the infringement on his expressive rights. Yagman’s ranting was inartful and probably ill-advised (he certainly did not make many friends on the federal bench in Los Angeles), but it did contain a core of protected political dissent. On the other side, the state’s interests amounted to little more than shielding the judge from unpleasant attacks and propping up the public image of lawyers. Neither of these interests are of sufficient magnitude to justify a content- or viewpoint-based sanction against Yagman.⁶³⁸ Thus, although the result in that case was correct, the defamation analysis created undue complica-

633. See *Yagman*, 55 F.3d at 1440.

634. See *id.* at 1441 n.19.

635. See *id.* at 1441-42 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986)).

636. See, e.g., *Chemerinsky*, *supra* note 101, at 887.

637. See Section III.F, *supra* notes 432 - 482 and accompanying text.

638. See *SMOLLA*, *supra* note 166, § 15:43 (citing Supreme Court’s contempt-of-court precedents for the proposition that concerns for judicial reputation are not sufficient to justify infringement of First Amendment rights of critics).

tions.

V. The Ethical Environment of Lawyering

An analysis of the free speech rights of lawyers which considered only First Amendment norms would be incomplete, because lawyers are also bound by an extensive system of regulation and by moral restraints which are not backed by state sanctions. Much of this regulation has a constitutional dimension as well; consider, for example, the fair trial and right to counsel guarantees of the Sixth Amendment. The preceding section considered the principles of political morality which undergird the constitutional protection for speech. It is the task of this section to set out a similar analysis into the ethical principles, derived from the social function of lawyers, that ought to inform lawyers' deliberation about their rights and responsibilities as professionals. My claim — which I can defend only briefly here, but which I have considered at length elsewhere⁶³⁹ — is that the role of lawyer is inherently conflicted, because it encompasses duties that are occasionally incompatible. “A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.”⁶⁴⁰ It takes little imagination to conceive of situations in which these obligations would stand in tension. What clients want and what the court system needs are frequently antagonistic. In this Article, however, I will concentrate on the implications of this conflict on the application of First Amendment doctrine to lawyering activities.

A. The Officer of the Court Duty

Judges are inordinately fond of referring to lawyers as “officers of the court,”⁶⁴¹ but it is seldom entirely clear from these decisions what this status entails. In other words, even if it is descriptively true

639. See W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 1 (2000).

640. MODEL RULES OF PROFESSIONAL CONDUCT, Preamble ¶ 1.

641. See, e.g., *Gentile*, 501 U.S. at 1056 (Kennedy, J.); *Id.* at 1075 (Rehnquist, J.); *In re Snyder*, 472 U.S. 634 (1985); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601 n.27 (Brennan, J., concurring); *Cohen v. Hurley*, 366 U.S. 117, 124 (1961); *In re Sawyer*, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting); *Howell v. State Bar of Texas*, 843 F.2d 205, 207 (5th Cir. 1988); *Hirschkop v. Snead*, 594 F.2d 356, 366 (4th Cir. 1979); *In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987) (“here respondent was . . . an officer of the court engaged in court business, and for his speech to be governed by appropriate rules of evidence, decorum, and professional conduct does not offend the first amendment”); *In re Johnson*, 729 P.2d 1175, 1179 (Kan. 1986); *Kaye, supra* note 139, at 715. See also *Hale Inq. Panel Opinion, supra* note 28, at 882.

that lawyers are officers of the court, the normative implication of that label is contestable.⁶⁴² One state court, discussing the moral character requirement for admission to the bar, stated that character and fitness inquiry was intended to ensure that the applicant, if admitted, “will not obstruct the administration of justice or otherwise act unscrupulously in his capacity as an officer of the court.”⁶⁴³ This reasoning suggests that the officer of the court appellation simply underscores the lawyer’s obligation, in common with other citizens, to obey the law and not obstruct justice. Under this formulation of the duty, there is nothing distinctive about being a lawyer, *vis-à-vis* the justice system. (Lawyers are notorious for not recognizing that generally applicable legal norms apply to them with equal force, so perhaps even this minimal interpretation of the officer of the court duty is a useful reminder.⁶⁴⁴)

The lawyer’s duty as officer of the court may, on the other hand, be merely the flip side of the inherent power of courts to regulate the conduct of attorneys who appear before them. This authority is well established, and flows from the very nature of the court — in other words, the inherent power is a necessary condition for the exercise of the other powers possessed by the tribunal. Courts are empowered to compel obedience to their orders,⁶⁴⁵ set aside judgments procured through fraud,⁶⁴⁶ regulate the admission of attorneys to practice before them,⁶⁴⁷ assess attorney fees against parties notwithstanding the “American rule” generally prohibiting fee-shifting,⁶⁴⁸ and sanction behavior that threatens to interfere with the orderly and expeditious resolution of cases, such as discovery abuse.⁶⁴⁹ This conception of the officer of the court duty is somewhat more robust than the duty to comply with generally applicable law, because it recognizes that lawyers acquire certain obligations specific to their profession upon practicing before courts. It is similar to the preceding duty, however, in the sense that it is an obligation imposed by positive law.

642. See Chemerinsky, *supra* note 101, at 872-73.

643. Hallinan v. Committee of Bar Examiners, 421 P.2d 76, 87 (Cal. 1966).

644. See, e.g., United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964) (Friendly, J.); Wemark v. Iowa, 602 N.W.2d 810 (Iowa 1999); Leardi v. Brown, 474 N.E.2d 1094 (Mass. 1985); *In re Giordano*, 229 A.2d 524 (N.J. 1967); Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don’t Get It*, 6 GEO. J. LEGAL ETHICS 701 (1993).

645. See, e.g., Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987).

646. See, e.g., Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944).

647. See, e.g., *Ex parte Burr*, 9 Wheat. 529, 531, 6 L.Ed. 152 (1824).

648. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

649. See, e.g., Chambers v. Nasco, Inc., 501 U.S. 32 (1991).

A different vision of the lawyer as officer of the court duty is suggested by the Supreme Court's principal decision interpreting the Sixth Amendment's guarantee of effective assistance of counsel, *Strickland v. Washington*.⁶⁵⁰ Justice O'Connor, writing for the majority, said that a lawyer's representation is constitutionally deficient if it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result."⁶⁵¹ In other words, the lawyer's role as advocate is derivative of the truth-seeking function of criminal trials. A lawyer fails to act effectively as a lawyer if the lawyer's participation, or lack thereof, contributes to a breakdown of the process — that is, when the lawyer is no longer assisting the court in the task of convicting the guilty and acquitting the innocent. (There is, admittedly, a positive dimension to this role; the obligation of lawyers to act as officers of the court prohibits certain kinds of gamesmanship, such as attempting to secure a default judgment without notifying opposing counsel.⁶⁵²) This limited role for lawyerly independence is reminiscent of Justice Rehnquist's invocation of the right/privilege distinction in *Gentile*, and his argument that First Amendment rights of lawyers must be subordinated to systemic interests in the orderly processing of disputes.⁶⁵³ Judge Easterbrook accepted a similar argument in *Palmisano*, ruling that the heightened protection available to participants in political debates should not be extended to a lawyer who, as an officer of the court, may be expected "to speak with greater care and civility than is the norm in political campaigns."⁶⁵⁴ On other occasions, however, the Supreme Court has recognized that lawyers are officers of *the court*, not of the government, suggesting that Justice Rehnquist overstated the lawyer's obligation to facilitate the efficient functioning of the judicial system.⁶⁵⁵ Provided that the lawyer does not actually subvert the adversarial process, she can be said to be acting as an officer of the court, in this

650. 466 U.S. 668 (1983).

651. *Id.* at 686.

652. *Smith v. Johnston*, 711 N.E.2d 1259, 1263-64 (Ind. 1999).

653. *See supra* notes 248 - 251 and accompanying text. *Cf. Gum v. Dudley*, 505 S.E.2d 391 (W. Va. 1997) (lawyer, as officer of the court, has duty to inform court of settlement agreement, notwithstanding duty of confidentiality owed to client).

654. *Palmisano*, 70 F.3d at 487.

655. *See Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378 (1866); *Spevack v. Klein*, 385 U.S. 511, 520 (1967) (Fortas, J., concurring); *Cammer v. United States*, 350 U.S. 399, 405 (1956). *See also Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) (observing that the officer of the court duty does not override attorney's need for independence and a sphere of privacy protection surrounding "work product").

intermediate sense.

The strongest version of the officer of the court duty is one which essentially requires the lawyer, through her representation of clients, to vindicate the substantively just result in a given dispute or transaction. William Simon, for example, argues that the basic maxim of legal ethics is that lawyers ought to take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.⁶⁵⁶ Of course, it may be the case that another actor — the court, the jury, the legislature, or another lawyer — is in a better position to promote justice. In this case, the lawyer is justified in merely playing her role as an advocate for the client's point of view. But in cases of institutional breakdown, where the procedural protections that ordinarily assure just outcomes have been subverted, the lawyer is herself morally responsible for ensuring a just result. "[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she needs to assume for substantive justice."⁶⁵⁷ This position may also be called a civic republican conception of the lawyer's role, for it calls upon lawyers to discern the public good and bring their clients' ends into conformity with this substantive value, not merely with the norms stated in positive legal rules. As Robert Gordon has argued in a pathbreaking paper, the officer of the court maxim represents an ideal of independence from the parochial interests of clients, but it does not necessarily mean subordinating client interests to those of the state.⁶⁵⁸ The lawyer's independence means she has sufficient distance from both the client and the state to offer detached, impartial advice about the legality, and morality, of the client's ends. The lawyer therefore serves the function of safeguarding and expressing public norms. Independence can be threatened not only by state repression, but also by excessive power concentrated in the hands of clients. Many commentators have maintained that the lawyer's independence, in this sense, is compromised by the increasingly competitive market for legal services, the prevalence of in-house lawyers working for entity clients, and the possible alliance between lawyers and other professionals in multidisciplinary practices.⁶⁵⁹

656. See SIMON, *supra* note 229, at 138.

657. *Id.* at 140.

658. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

659. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993); David Luban, *Asking the Right Questions*, 72 TEMP. L. REV. 839 (1999).

B. Individual Autonomy and the Independence of Lawyers

It is clear from numerous pronouncements of the Supreme Court that lawyers' ethical obligations to their clients cannot entirely be subordinated to their duties as officers of the court. For example, the Court has held that First Amendment association-freedom interests set limits on the control states may exercise over advertising and solicitation by lawyers. In *NAACP v. Button*,⁶⁶⁰ the Court reversed a Virginia Supreme Court decision holding that civil-rights lawyers had violated state rules on unlawful solicitation of clients by meeting with concerned parents to explain the ramifications of the *Brown v. Board of Education* decision and to offer to represent local plaintiffs in school-desegregation litigation. The Court characterized the efforts of the NAACP lawyers as protected expression and association under the First Amendment. Similarly, the Court held that labor unions could maintain lawyer-referral services, or keep lawyers available on a salaried basis, to assist members in pursuing tort claims against employers, notwithstanding state bar association rules against soliciting clients for damage suits.⁶⁶¹ Cases like these suggest an additional dimension, of constitutional significance, to the lawyer's role.

This further constitutionally recognized aspect of the lawyer's role is to safeguard individual liberty against unjustified restrictions on autonomy. In the clearest case --- the defense of a criminal accused --- the lawyer's duties are derived in part from the defendant's procedural due process rights, such as the presumption of innocence, the prosecution's "beyond a reasonable doubt" standard for proving guilt, and the right to refuse to testify. These entitlements create ethical permissions in the defense lawyer, such as the right to "put the prosecution to its proof," by requiring that all elements of the crime be established by the government.⁶⁶² (Compare this right to the obligation of lawyers in civil proceedings to verify that all claims and defenses are adequately supported by law and the factual record.⁶⁶³) The vision of lawyering contemplated by these procedural rights is one of independent representatives of clients, whose professional norms are not subordinated to the efficient functioning of the adversary system of justice. Justice Marshall's dissent in *Strickland ap-*

660. 371 U.S. 415 (1963).

661. See *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964).

662. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.1.

663. See FED. R. CIV. P. 11(b).

pealed to this vision, which was strongly at odds with Justice O'Connor's. "[T]he assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chances that innocent persons will be convicted."⁶⁶⁴ For Justice Marshall, the attorney's role is not derivative of the state's — rather, the lawyer is charged with protecting the intrinsic rights of accused persons, and with ensuring that defendants are treated fairly, regardless of whether that representation results in the acquittal of guilty persons. Justice Marshall's understanding of the lawyer's ethical responsibilities in criminal trials is certainly supported by other liberty-enhancing creations of the Court, such as the Fourth Amendment exclusionary rule⁶⁶⁵ and the related "fruit of the poisonous tree" doctrine.⁶⁶⁶ Marshall's vision of autonomy-enhancing agents for clients was recently echoed in Justice Kennedy's dissent in the Florida direct-mail solicitation case. He recognized that the assistance of an attorney is often necessary for an accident victim to begin rationally assessing her legal and financial position, particularly when the victim lacks the experience and familiarity with the legal system necessary to find legal assistance on her own.⁶⁶⁷ Moreover, the autonomy of accident victims is threatened by a unilateral ban on contact with injured parties — representatives of the tortfeasor or insurer are free to talk with unrepresented victims, in an attempt to negotiate an early settlement.⁶⁶⁸ A decision to give up legal rights, made in the absence of full information, is not an exercise of the client's unconstrained free will. Since lawyers provide information and the ability to resist the badgering of the representatives of defendants and insurance companies, they are necessary to safeguard the autonomy of accident victims.

C. Political Conflict and Lawyers' Ideals

Whether one's vision of lawyering is dominated by the principle of loyalty to clients or by the obligation of serving as an officer of the court, either vision is impossible to realize in a pure form in practice because of the plurality of moral principles that underlie the scheme of legal rules. Consider a recent example — the case of *Stropnick v. Nathanson*, in which a Massachusetts civil rights agency disciplined a

664. *Strickland v. Washington*, 466 U.S. 668, 711 (1983) (Marshall, J., dissenting).

665. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

666. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

667. *See Went For It*, 515 U.S. at 642-43 (Kennedy, J., dissenting).

668. *See id.* at 643-44.

lawyer for limiting her divorce practice only to women.⁶⁶⁹ The lawyer testified she sought to “devote her expertise to eliminating gender bias in the court system,” and that she was able to function effectively as an advocate only on behalf of those clients to whose cause she felt a personal commitment.⁶⁷⁰ Her argument was based on the client’s autonomy — the protection of the rights of women clients in divorce actions — as well as a substantive vision of equality which required the lawyer to represent only out-of-power clients. The agency, on the other hand, based its decision on a formalist anti-discrimination norm, in which the long-term strategy of eliminating sexism was subordinated to the short-term requirement that lawyers refrain from discriminating in client selection. The agency’s statutory interpretation was reasonable: there is no exemption for lawyers from the public accommodation statute, and lawyers are generally free to discriminate on other grounds, such as against representing defendants in personal injury cases or working for management in labor disputes, as long as the discrimination does not impinge upon a statutorily protected class.⁶⁷¹ But its vision of lawyers as officers of the court, who are not permitted to engage in sex-based discrimination, is directly in conflict with the lawyer’s attempt to protect the economic equality (and thus, the autonomy) of her women clients.

Whether or not the agency decision in *Stropnick* was correct, it aptly illustrates the problem of value pluralism in legal ethics. A given legal institution, doctrine, or principle may serve a variety of ends, and in some cases, these ends may stand in conflict. Consider the attorney-client privilege, famously excoriated by Jeremy Bentham as an impediment to the discovery of truth.⁶⁷² Bentham’s critique has force only if one assumes that the only goal of the judicial system is the determination of truth. Contemporary judicial defenders of the attorney-client privilege justify it on other grounds, such as the protection of a sphere of individual privacy, free from government intru-

669. See *Stropnick v. Nathanson*, 19 Mass. Discrimination L. Rep. 39 (1997); see also Martha Minow, *Foreword: Of Legal Ethics, Taxis, and Doing the Right Thing*, 20 W. NEW ENG. L. REV. 5 (1998); Steve Berenson, *Politics and Plurality in a Lawyer’s Choice of Clients: The Case of Stropnick v. Nathanson*, 35 SAN DIEGO L. REV. 1 (1998).

670. See Bruce K. Miller, *Lawyers’ Identities, Client Selection and the Antidiscrimination Principle: Thoughts on the Sanctioning of Judith Nathanson*, 20 W. NEW ENG. L. REV. 93, 94-95 (1998).

671. See *id.* at 96. For another analysis of these issues, see Robert T. Begg, *Revoking the Lawyers’ License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEG. ETHICS 275 (1993).

672. See Jeremy Bentham, *Rationale of Judicial Evidence*, in 7 THE WORKS OF JEREMY BENTHAM 473 (1827).

sion, and as an encouragement for persons and entities to seek legal advice, make candid disclosures to their lawyers, and bring their conduct into compliance with the law.⁶⁷³ These reasons are not dependent upon the ultimate discovery of truth in a judicial proceeding; in fact, they may frustrate that objective.

The attorney-client privilege example shows that lawyers preserve order and also challenge it; they assist their clients in complying with legal norms but also interpose themselves between individuals and the state seeking to enforce its laws; they apply law to their clients but also engage in what might be called nullification, by opposing non-legal values to positive law, in furtherance of substantive justice. The attorney disciplinary codes admit that lawyers serve potentially conflicting functions, but ambitiously (and unrealistically) suggest that conflicts are rare:

While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process. . . . A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. . . . In the nature of law practice, however, conflicting responsibilities are encountered. . . . Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.⁶⁷⁴

As the phrase "sensitive professional and moral judgment" in the Model Rules shows, the plurality of values underlying the lawyer's role makes it exceedingly difficult to construct a simple, formalistic, easily applied theory of legal ethics or, for the purposes of these arguments, a theory of justifiable restraints on the expressive rights of lawyers. For in some cases, the value of preserving order may be paramount, while in others, it may be essential that lawyers be permitted to oppose the exercise of government power. Concepts like discretion and judgment, as used in philosophy, are the very antonym of theoretical neatness.⁶⁷⁵ Instead of resting easy in the assurance that a simple solution is theoretically possible, lawyers are fated to muddle through First Amendment cases, as well as other ethical dilemmas, reasoning by analogy with precedents and making principled distinc-

673. See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *Upjohn Corp. v. United States*, 449 U.S. 383 (1981); *Fisher v. United States*, 425 U.S. 391 (1976).

674. MODEL RULES OF PROFESSIONAL CONDUCT, Preamble ¶¶ 4, 7-8.

675. See, e.g., W.D. ROSS, *THE RIGHT AND THE GOOD* 20-47 (1930) (when prima facie duties conflict, "the decision rests with perception").

tions. This kind of incrementalism in legal reasoning resists systematizing, but there are nevertheless some bedrock principles that emerge from a consideration of constitutional and ethical norms as they apply to lawyers. The final section summarizes these foundational principles.

VI. Toward a Synthesis of Constitutional, Ethical, and Regulatory Norms

This concluding section draws together the strands of First Amendment theory and doctrine that have been developed in this Article, as applied to problems in the regulation of expression by lawyers. I hope to defend a few basic propositions that are clear and capable of application by courts, despite the dizzying complexity of First Amendment law and the inherent conflicts in the ethical tradition of lawyering.

Political speech and dissent. At a minimum, the First Amendment ought to be interpreted to protect lawyers who engage in speech or expressive conduct that is “reasonably designed or intended to contribute to reasoned debate on issues of public concern.”⁶⁷⁶ The natural rejoinder to this principle is that a great deal of speech for which lawyers are sanctioned has nothing whatsoever to do with reasoned debate or issues of public concern. But the constitution does not apply only to sober, carefully reasoned discussion. There may be at least some value in permitting cranky, obstreperous, defiant conduct by lawyers on the ground that it encourages a public culture of skepticism, anti-authoritarianism, pluralism, and openness. It is important to remember that the social function of lawyers is not only to preserve order, but also to permit challenges to the status quo. The difficult question then becomes setting the limits of permissible dissent.

Perhaps the best that can be done here is to recognize that dissenting speech gets a little extra weight in constitutional adjudication,⁶⁷⁷ but that to be worthy of protection, speech must also appeal to some other value of public significance. Clear cases of protected speech include even the most vitriolic criticism of judges and applications for bar admission from candidates who belong to the Communist Party. A harder case is presented by a bar applicant whose value

676. Fallon, *supra* note 7, at 47.

677. See SHIFFRIN, *supra* note 16, at 106 (“Dissenting speech gets a plus, and the failure to get a plus may prove decisive on some issues . . .”).

system is one on which “the book is closed,” so to speak. Matthew Hale’s ideology of racial superiority is not arguable at all by thoughtful people, unlike the justice of the Communist cause. As disgusting as Hale’s beliefs are, however, the prospect of giving bar associations, court committees, or other state actors power to weed out applicants on the basis of the social acceptability of their value commitments is frightening. History has shown that restrictions that are enforced against the bad guys can easily be turned around and used against the good guys — witness the use of anti-pornography statutes in Canada as a basis for demanding that bookstores remove the works of Andrea Dworkin,⁶⁷⁸ and the disciplinary action against the Massachusetts judge who attended a gay rights rally.⁶⁷⁹ A decision permitting Illinois to exclude Hale from the bar seems ripe for abuse the next time a flamboyant lawyer for a marginalized group applies for a law license.

For this reason, racist speech by someone like Matthew Hale paradoxically warrants an extra measure of protection under the First Amendment, but this protection may be limited by other constitutional or regulatory norms, such as the principle of racial equality. Although I doubt that a rule of professional conduct preventing discrimination by lawyers can be drafted to avoid vagueness and overbreadth concerns, if a reviewing court were to hold such a rule constitutional, it may be enforced against Hale, notwithstanding the protection afforded dissenting speech. In other cases, such as *Yagman* and *Palmisano*, there is no principle of similar constitutional significance that would permit the state to restrict the dissenting speech of these lawyers. The extra degree of protection for dissent would carry the day.

Criticism of the law. A necessary corollary to the protection of political speech and dissent is that lawyers must be free to criticize the law. Moreover, judges must be careful not to interpret criticism of the law as an attack on their integrity, fairness, or moral character. The speech made by a defense lawyer criticizing the unfairness of Smith Act trials against alleged members of the Communist Party was a paradigmatic incidence of permissible criticism of the law and the state officials who administer it.⁶⁸⁰ Justice Frankfurter’s position that the defense lawyer, as an officer of the court, was precluded from drawing public attention to abuses of government power by meeting with union members is indefensible. The more recent position of the

678. See Krotoszynski, *supra* note 565.

679. See *supra* note 171 and accompanying text.

680. See *In re Sawyer*, 360 U.S. 622 (1959).

Supreme Court, that an attorney's criticism of the judiciary may on occasion be rude or uncivil without thereby being contumacious, is the better one, particularly in light of the development of defamation rules that are highly protective of vigorous public debate.⁶⁸¹

A much more difficult case is presented by criticism of the law that takes the form of acting out in a trial, or otherwise violating norms of respect and civility, in order to show a proceeding as a farce. Because state-established forums like courtrooms and pleadings are not ordinarily available for private citizens' expressive activities, the speech and conduct of lawyers in these arenas may be subject to reasonable, viewpoint-neutral government regulations. As long as the judge is even-handed with respect to disruptions by the prosecution and defense lawyers, she may act to enforce order in the courtroom. However, as previously noted, high-profile political trials require patience and restraint by the judge, since any muzzling of disruption may be portrayed as repression by the defense.

Respect, civility, and decency. There is nothing constitutionally improper about requiring lawyers to make objections, motions, comments, and criticisms in a respectful, non-abusive manner, on pain of some kind of judicially imposed sanctions. This is the kind of reasonable regulation that may be enforced in a non-public forum such as a courtroom, deposition, or affidavit. Prohibitions on expressions of non-germane racial or gender bias may also be excluded, for although they are content-based restrictions on speech, they are viewpoint neutral.⁶⁸² The crucial distinction is not between biased and non-biased references to race or gender (which would amount to prohibited viewpoint discrimination), but to germane and non-germane speech. In a deposition in a personal injury action, the statement to a woman attorney, "you should be at home making babies,"⁶⁸³ is prohibited because it has nothing to do with the subject matter of the deposition. A long-winded speech praising the accomplishments of women attorneys would also be subject to sanctions, because it disrupted the examination of the witness, although the disruptive effect would probably be less than a sexist diatribe inflicted on a woman lawyer.

As Richard Fallon argues, a sensible accommodation of First

681. See *In re Snyder*, 472 U.S. 634 (1985).

682. See *SMOLLA*, *supra* note 166, § 8:8. Viewpoint discrimination is prohibited, even in a non-public forum. See *id.* § 3:9.

683. *In re Schiff*, 599 N.Y.S.2d 242 (App. Div. 1993) and Hearing Panel Report, reprinted in STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 775 (5th ed. 1998).

Amendment and anti-discrimination principles might require an employee to refrain from using terms like “dumb-ass woman” to make political arguments; it is surely possible to rephrase such a statement in respectful, non-harassing terms if the speaker wishes to communicate an underlying political message.⁶⁸⁴ Thus, in a non-public forum, courts are free to exercise their contempt power to punish lawyers who disrupt the proceedings by gratuitous comments, objections, arguments, and speeches. This is a matter for judgment, and may be misapplied by overzealous courts. Judge Hoffman clearly overreacted in the Chicago Seven trial, by charging the participants with contempt for such innocuous behavior as smirking and laughing, and calling him “Mr. Hoffman” instead of “Your Honor.”⁶⁸⁵ To repeat one of the principles above, judges should not interpret isolated, reasoned criticism as disrespect, even if it is made heatedly or out of frustration by a lawyer. Furthermore, because of the necessity of providing breathing room for valuable speech, courts and regulators must err well on the side of protecting speech, in marginal cases. And certainly the latitude that is given to judges to regulate undignified speech in their presence, where there is a real possibility for disruption of court proceedings (so-called “direct” contempt), is much reduced in cases where the speech is removed from pending proceedings. In those situations, lawyers should have considerably more freedom to employ shocking or offensive language — “fuck the draft” instead of “I’m against the draft,” for example. Although the lawyer’s speech in the Snyder case is not as vehement as Cohen’s jacket, the Supreme Court has nevertheless shown a willingness to countenance a bit of strong language from lawyers as part of their criticism of the judicial system.⁶⁸⁶

Right/privilege distinction. When individuals are admitted to the bar, they do not lose expressive rights that they had possessed as private citizens — they are still entitled to criticize the law, write letters to the editor, engage in vitriolic debate, or even spend their spare time working as white supremacist advocates. In contexts in which they would not have had the right to speak as non-lawyers, however, their expressive rights may be restricted to further goals related to the judicial system, consistent with the Court’s non-public forum doctrine. Thus, lawyers’ speech in trials, depositions, formal and informal pretrial proceedings (such as letters to other lawyers), and court

684. Cf. Fallon, *supra* note 7, at 47-48.

685. See LUKAS, *supra* note 232, at 62, 93.

686. See *In re Snyder*, 472 U.S. 634 (1985).

filings may be subject to reasonable regulations. It bears emphasizing that this principle is not a consequence of the lawyer surrendering speech rights that she would have enjoyed as a private citizen, in exchange for a state-granted license to practice law. Instead, it is an ordinary application of the doctrine that speech in government venues may be subject to reasonable limitations, provided that alternative channels of communication are available.