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# 2000 JOE E. COVINGTON PRIZEWINNER

## HATE AND THE BAR: IS THE HALE CASE MCCARTHYISM REDUX OR A VICTORY FOR RACIAL EQUALITY?\*

*by W. Bradley Wendel*

*Editor's note: This article consists of excerpts from the essay that won the 2000 Joe E. Covington Prize for Scholarship in Bar Admissions Topics. That essay was adapted from a longer work by the same author, "Free Speech for Lawyers," 28 HASTINGS CONST. L.Q. no. 2 (2001), and the excerpts from the shorter work are reprinted with permission of the Hastings Constitutional Law Quarterly.*

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*A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar.*

—Justice Hugo Black<sup>1</sup>

### I. INTRODUCTION.

The application of the constitutional free expression guarantee to the activities of the organized bar is one of the most important unexplored areas of legal ethics. In this essay I will consider in particular the question of whether an applicant may be denied admission to the bar for involvement with hateful or discriminatory activities. This question 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 alone, and the plenary authority of bar associations to make predictive judgments about the character and fitness of applicants and their ability to function as lawyers. It is also the most recent iteration of the running

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clash between two constitutional values—freedom of speech, as enshrined in the First Amendment, and racial equality, embodied in the Fourteenth.<sup>2</sup> Courts that have considered the constitutional issues posed by restrictions on expressive activities of lawyers are badly split. This uncertainty is due in part to the welter 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, 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 anti-establishment speech by lawyers?

In this essay I will discuss the constitutional issues presented in bar admissions cases by focusing on the controversy surrounding the application of Matthew Hale, an avowed white supremacist, to the Illinois bar. The Illinois bar committee denied Hale's application on the ground that he was unlikely to comply with a state disciplinary rule prohibiting racial discrimination. As this case shows, the application of hate speech regulations to the organized bar is complicated by the disciplinary structure under which lawyers operate, and by the ethical traditions of the practice of law. These normative frameworks may, in some cases, impose conflicting duties on lawyers. On the one hand, lawyers are expected to act as loyal advocates, advisors, and confidants to

their clients. (Charles Fried memorably referred to the lawyer as the client's "special-purpose friend."<sup>3</sup>) This obligation requires a kind of devotion to client causes that may be incompatible with ordinary antidiscrimination norms, creating an opposition between ethical and legal norms. For instance, in a recent state civil rights agency action, a woman divorce lawyer was fined for her stated intent to accept only women as clients, and ordered to work on behalf of men as well as women.<sup>4</sup> In that case, the lawyer's personal moral agency and her ideological commitment to serving women were at opposition with the principle of formal gender equality (although her decision arguably advanced substantive gender equality by providing women with effective counsel). On the other hand, lawyers are held to be "officers of the court," charged with responsibility for conforming the conduct of individuals to the law.<sup>5</sup> This obligation obviously stands in tension with the lawyer's duty to advocate her client's cause zealously; the conflict here is well known in legal ethics and has been the occasion of a great deal of thoughtful scholarship.<sup>6</sup>

It is a commonplace in political thought that "negative" liberty—that is, the absence of government restraints on individual autonomy—is incompatible with a state regime that seeks to advance a particular vision of human flourishing.<sup>7</sup> In the bar admissions and hate-speech cases, courts must grapple with a question of priority, namely, whether to elevate the constitutional value of racial equality over the expressive and associational liberties of lawyers and bar applicants. My claim is that the bar's attempt to deny admission to lawyers who espouse hateful positions is admirable, and is certainly consonant with "positive" liberty, in other words with a substantive conception of a good society. At the same time, however, the Supreme Court

has continually interpreted the First Amendment as emphasizing negative liberty in cases where expressive interests conflict with the state's attempt to vindicate substantive values such as racial and gender equality. In the absence of the special obligations imposed on lawyers as officers of the court, the constitutional questions presented by a state-imposed admissions regulation that discriminated on the basis of an applicant's viewpoint would be relatively straightforward. Even where the ethical duties associated with the lawyer's role are taken into account, however, the constitutional balance still tips in favor of the individual expressive liberties.

The reason, in short, for favoring First Amendment rights is that lawyers must be free to represent unpopular clients, dissenters, and those who oppose powerful state and private institutions. One natural rejoinder to this position is that "the book is closed" on ideas like Matthew Hale's white supremacist beliefs. 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 should give one pause. History has shown that restrictions that are enforced against the "bad guys" (let us say, the enemies of liberal political causes) 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,<sup>8</sup> and the disciplinary action against the Massachusetts judge who attended a gay rights rally.<sup>9</sup> 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, the racist beliefs of Matthew Hale are paradoxically a reason to *favor* his admission to the bar. Although in the particular case we certainly have cause to regret

the conferring of a law license on the applicant, the general principle that the state may not discriminate on the basis of the viewpoint of a bar applicant is of surpassing importance.

The Hale case implicates two central features of modern First Amendment law, which I will discuss in detail: the principle of viewpoint-neutrality and the unconstitutional conditions doctrine. Under the former, state regulations on expression must be justified without reference to the speaker's viewpoint; thus, state actors such as court committees and integrated bar associations may not exclude someone like Matthew Hale while at the same time admitting a lawyer who admits to an intention to work only on behalf of progressive causes. If a lawyer is permitted to work for the NAACP Legal Defense Fund, representing only African-American clients, the perhaps regrettable constitutional tradeoff is that Matthew Hale is equally entitled to represent only white clients in the cause of white supremacy, to the extent his cause can be furthered lawfully. The unconstitutional conditions doctrine states that a state actor may not confer government benefits, such as a license to practice law, with strings attached. In other words, the state may not condition a privilege or license on the applicant's agreement to refrain from engaging in some constitutionally protected activity, such as speaking out in the pursuit of an unpopular cause. The Supreme Court has, on occasion, attempted to undermine the unconstitutional conditions doctrine when the expressive liberties of lawyers are at stake, most recently in the case of *Gentile v. State Bar of Nevada*.<sup>10</sup> The *Gentile* opinion is frequently misapplied by courts, and has created a great deal of confusion in the analysis of the Hale case.

## II. THE HALE CASE.

The case of Matthew Hale has crystalized the debate over the First Amendment rights of attorneys in bar

admissions proceedings, in a way that has not occurred since the McCarthy era's loyalty-oath and character and fitness cases.<sup>11</sup> Hale is the leader (the self-styled "Pontifex Maximus") of a white supremacist organization called the World Church of the Creator, undistinguished among lunatic fringe hate groups for its beliefs,<sup>12</sup> 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.<sup>13</sup> 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 *necessarily* killing anybody."<sup>14</sup> And few believed that Hale was not pleased when one of his followers, Benjamin Nathaniel Smith, went on a three-state killing spree targeted at Jews and people of color.<sup>15</sup> 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 character and fitness committee of the Illinois Supreme Court, declining to certify his fitness for admission, generated immediate controversy.<sup>16</sup> Although the U.S. Supreme Court denied certiorari on his petition,<sup>17</sup> Hale has since applied for and been denied admission to the Montana Bar,<sup>18</sup> ensuring that these issues will remain in the spotlight for the foreseeable future.

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.<sup>19</sup> The McCarthy era produced an extraordinary outpouring of sharply divided Supreme Court opinions, all considering the extent of constitutional protection afforded to those who were suspected of harboring Communist sympathies.<sup>20</sup> 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.<sup>21</sup> The holdings of those cases, none of which has been overruled expressly 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,<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> Indeed, the bar admission cases and other anti-Communist loyalty-oath cases<sup>25</sup> 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 Illinois Supreme Court committee's inquiry panel considering 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" outweighed Hale's First Amendment rights.<sup>26</sup> These 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."<sup>27</sup> The panel's attempts to distinguish inquiry into belief as such and belief as it reveals an intent to commit unlawful acts reveal both constitutional questions left open by the McCarthy-era jurisprudence of the Court and the issues posed by the collision between anti-discrimination 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."<sup>28</sup> 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."<sup>29</sup> It seems peculiar to read *Baird* so narrowly—for the proposition that the state may not inquire into membership in organizations advocating violent overthrow of the United States 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 Supreme Court is respon-

sible 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.<sup>30</sup> The only prohibited inquiry is into beliefs as such, which do not manifest themselves as a specific intent to commit illegal acts.<sup>31</sup> 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.<sup>32</sup> 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 has 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.<sup>33</sup> 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.”<sup>34</sup> The Court reasoned that the ordinance discriminated on the basis of the content of the expression; a sign arguing for racial tolerance would not be subject to the ordinance, but a message conveying hatred or racial superiority would be illegal.<sup>35</sup> 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”<sup>36</sup>—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 in *R.A.V.* 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.<sup>37</sup>

The inquiry panel’s only response to this argument was a citation to *Wisconsin v. Mitchell*,<sup>38</sup> 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.<sup>39</sup> If racist beliefs motivated the defendant’s actions, however, the sentencing judge may take those beliefs into account.<sup>40</sup> 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.<sup>41</sup> The Court distinguished between conduct, which could be made the subject of criminal penalties, and expression, which under *R.A.V.* could not.<sup>42</sup> The problem with this position of the inquiry panel, however, was the lack of any factual record that Hale had engaged in criminal conduct. 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 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.”<sup>43</sup> Many students of constitutional law will immediately be put in mind of Holmes’s notorious statement, 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.”<sup>44</sup> 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.

On Hale’s appeal from the inquiry panel’s decision, a separate five-member panel of the Illinois Supreme Court’s 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 was willing to abide by the state's disciplinary rules for lawyers.<sup>45</sup> 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:

A lawyer shall not . . . engage in adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others, based on race, sex, religion, or national origin.<sup>46</sup>

Significantly, however, the hearing panel did not allege that any of Hale's actions were illegal, nor 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. There is nothing unconstitutional (as opposed to wrongheaded) with a bar association 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.<sup>47</sup> Moreover, even if Illinois 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.<sup>48</sup> These decisions strike me as seriously flawed as a matter of regulatory policy.<sup>49</sup> They are not, however, incorrectly decided as a matter of constitutional law. Although the state could not criminalize the status of being an alcoholic,<sup>50</sup> 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. Similarly, the state could not attach criminal sanctions to speech that represents "mere abstract teaching" of the necessity of resorting to violence,<sup>51</sup> 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.

To illustrate the extensive regulatory authority ordinarily enjoyed by the organized bar, consider a case that was decided contemporaneously with the Matthew Hale controversy by the Supreme Court of Nebraska. In that case, *In re Converse*,<sup>52</sup> the Nebraska court approved the decision of that state's bar association to deny admission to an applicant who had caused endless headaches to faculty 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.”<sup>53</sup> 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,<sup>54</sup> the denial of Paul Converse’s application to the Nebraska bar was unanimously affirmed by the court, and attracted hardly a whimper of protest from the civil libertarians flocking to Hale’s defense.

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.<sup>55</sup> At this point, however, the court’s constitutional analysis became muddled. 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.<sup>56</sup> There is no suggestion in the *Converse* 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.

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 two prominent federal judges), 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.<sup>57</sup> 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 had 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, made 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? In my judgment, 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 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.

The bottom line on the constitutionality of the Hale decision is that the character and fitness committee of the court could refuse to certify Hale for admission only under very stringent conditions.<sup>58</sup> In practice, however, these prerequisites are difficult, if not impossible, to establish. The constitutional latitude to deny admission to Hale 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; (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 not to be supportable. 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.<sup>59</sup> And several of the incidents of racism relied upon by the committee occurred in private settings, proving nothing about Hale's ability to keep his

beliefs in check and conform to professional rules prohibiting discrimination by lawyers in their professional capacities.<sup>60</sup>

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."<sup>61</sup> 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 tactics" of defense lawyers who seek to delay their clients' executions by all legally available means.<sup>62</sup> Challenging conventional wisdom about the state of the law is a noble aspect of the lawyer's role. 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 traditional function of lawyers to occasionally 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 not follow that his advocacy of white supremacy is socially valueless. Perhaps it is important, as Lee Bollinger has argued, that we discipline ourselves as a society to tolerate odious characters, in order to acquire virtues that are necessary in a democratic polity.<sup>63</sup> 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.<sup>64</sup> Barring a white-supremacist lawyer on the basis of the hatefulness of his 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*.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

...

### III. CONCLUSION.

The epigraph from Justice Black which opened this essay captures the delicate balancing task which presents itself to bar examiners upon evidence that an applicant is likely to engage in racial discrimination or other hateful acts. I do not believe, however, that the solution to this problem is to create some kind of balancing test, in which the interests of the lawyer, the court system, potentially affected third parties, and society generally are weighed against one another on some miraculous multidimensional scale.<sup>68</sup> 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.<sup>69</sup> 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 factors. How, for example, is a court to balance the government's interest in a fair and impartial system of justice and a lawyer's interest in the right to express his or her views in an intellectually honest way? Better simply to decide that the speech of lawyers is subject to regulation in a given context, reasoning by analogy from similar cases involving some 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 and actions by state agencies are justified on the basis of generally applicable political and moral principles.<sup>70</sup>

When one examines the underlying constitutional principles, one cannot help but be struck by the extent to which decisions by courts considering First Amendment arguments by lawyers are 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,<sup>71</sup> 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.<sup>72</sup> Furthermore, the vision of robust, open, vigorous public debate announced by the Supreme Court in *New York Times v. Sullivan*<sup>73</sup> 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 a listener is alone no basis for restricting expression.<sup>74</sup> Finally, courts 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.<sup>75</sup>

As a result of this disjunct, the First Amendment cases involving expressive activities by lawyers may be construed to support the organized bar's effort to prevent hateful and obnoxious applicants from gaining admission to the bar, but I believe that would be a mistake. Bar admissions cases such as *Converse*, which approved the Nebraska Bar's denial of the application of the student who printed the "Deanie on a Weenie" shirts, are inconsistent with a significant body of Supreme Court law. Landmark free speech decisions such as *Hustler Magazine v. Falwell*,<sup>76</sup> *Cohen v. California*,<sup>77</sup> *R.A.V. v. City of St. Paul*,<sup>78</sup> and *Texas v. Johnson*<sup>79</sup> stand for the principle that obnoxious speech that causes substantial emotional distress to listeners is nevertheless protected. The fact that the speaker in question is an applicant to join the

bar does not permit the state to enforce viewpoint-based regulations on speech, or to take actions that have the effect of creating viewpoint discrimination. Indeed, the applicant's status as a would-be lawyer should afford him with heightened expressive liberties. Although a significant ethical dimension of the lawyer's role is to serve as an officer of the court, it is important to remember that lawyers are sometimes the voices of the powerless, and that these voices may not always be pleasant to hear. We may be confident that hateful lawyers, who seek cover under the mantle of dissent and civil disobedience, are ultimately in the wrong. Even if we are correct, however, it is well to be skeptical about reposing the capacity to make these judgments with state actors.

I do not mean to suggest that state bar associations and courts are powerless to enforce any restrictions on lawyers' speech. In contexts in which a lawyer would not have had the right to speak as a non-lawyer, such as a courtroom, her expressive rights may be restricted to further goals related to the judicial system. Thus, lawyers' speech in trials, depositions, formal and informal pretrial proceedings (such as letters to other lawyers), and court filings may be subject to reasonable regulations. This is the rule that emerges from *Gentile*. It bears emphasizing, however, that this principle is not a consequence of the lawyer's surrendering speech rights that she would have enjoyed as a private citizen, in exchange for a state-granted license to practice law. 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. Decent people hope that Matthew Hale's ambitions will be thwarted, but the Constitution prohibits state bar associations from

preventing him from becoming a lawyer on the basis of his odious beliefs.

## ENDNOTES

1. *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957).
2. *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH 12-13 (1996).
3. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).
4. *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 (1998); Robert T. Begg, *Revoking the Lawyers' License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275 (1993).
5. *See, e.g.*, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1056 (1991) (Kennedy, J.); *id.* at 1075 (Rehnquist, J.); *In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987); *Hallinan v. Committee of Bar Examiners*, 421 P.2d 76, 87 (Cal. 1966).
6. *See, e.g.*, ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES (1999); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE (1998); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).
7. *See* Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969).
8. *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).
9. *See In re Bonin*, 378 N.E.2d 669 (Mass. 1978).
10. 501 U.S. 1030 (1991).
11. *See* Ann Woolner, *Barring Bigots: Should the Privilege to Practice Law Depend on One's Politics?*, LEGAL TIMES (Jul. 26, 1999), at 15. For an excellent overview of the cases in which bar associations attempted to weed out suspected Communists, see HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 548-87 (Jamie Kalven ed. 1988).
12. *See generally* MICHAEL BARKUN, RELIGION AND THE RACIST RIGHT: THE ORIGINS OF THE CHRISTIAN IDENTITY MOVEMENT (1994).
13. *See* World Church of the Creator, <[www.rahowa.com](http://www.rahowa.com)> (visited 11/23/99). "Rahowa" is Hale's acronym for "racial holy war."
14. *See* FAQ About Creativity, Question #21, <[www.rahowa.com/faq1](http://www.rahowa.com/faq1)> (visited 11/23/99) (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 notorious *Nuremberg Files* Web site, 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 extensive 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).
15. *See* Bill Dedman, *Midwest Gunman Who Shot 11 Had Engaged in Acts of Racism at 2 Universities*, N.Y. TIMES (Jul. 6, 1999). *See also* Southern Poverty Law Center, *The Great Creator*, INTELLIGENCE REPORT (Summer 1999), at 23, 25-26 (detailing connections between Hale and Smith).
16. 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). 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. 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).
17. *See Hale v. Illinois Bar*, 120 S. Ct. 2716 (2000).
18. *See* Nation, *St. Louis Post-Dispatch*, March 2, 2001, at A6.
19. *See generally* DAVID M. OSHINSKY, A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY (1983); 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).
20. *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).
21. *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); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957).
22. *See Baird*, 401 U.S. 1.
23. *See Wadmond*, 401 U.S. 154. *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).

24. *See, e.g., Scales v. United States*, 367 U.S. 203 (1961); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961).
25. *See, e.g., Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974).
26. *See* Hale Inq. Panel Opinion, *supra* note 16, at 881.
27. *Id.* at 880, citing *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971).
28. *Id.* at 880, taking judicial notice of Hale's Web site.
29. *See* 401 U.S. at 2-3 (internal quotation marks omitted).
30. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 164-66 (1971). (The Court had previously held, in *Scales v. United States*, 367 U.S. 203 (1961), 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 v. State Bar*, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961). One member of the Court has expressed the view that these holdings are of dubious 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 19, 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).
31. *See Baird*, 401 U.S. at 9-10 (Stewart, J., concurring).
32. *See* Hale Inq. Panel Opinion, *supra* note 16, at 876.
33. *Id.* at 882.
34. 505 U.S. 377, 380 (1992).
35. *Id.* at 391-92.
36. *Id.* at 395.
37. *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 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).
38. 508 U.S. 476 (1993).
39. *Dawson v. Delaware*, 503 U.S. 159 (1992).
40. *Mitchell*, 508 U.S. at 486; *Barclay v. Florida*, 463 U.S. 939 (1983).
41. *See supra* note 23, and accompanying text.
42. *Mitchell*, 508 U.S. at 487.
43. *See* Hale Inq. Panel Opinion, *supra* note 16, at 882.
44. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892).
45. *See* Hale Hrg. Panel Opinion, *supra* note 16.
46. *See 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 (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.
47. *See, e.g., In re Gossage*, 2000 WL 1145394 (Cal. 2000) (convicted murderer with a subsequent pattern of traffic and parking convictions); *Radtke v. Board of Bar Examiners*, 15 ABA/BNA Law. Man. Prof. Cond. 551 (Wis. 1999); *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 Application of Charles M.*, 545 A.2d 7 (Md. 1988) (lying in a deposition as a lay witness); *In re Lubonovic*, 282 S.E.2d 298 (Ga. 1981). 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 v. State Bar*, 366 U.S. 36, 54 (1961).
48. *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).
49. See Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985).
  50. See *Robinson v. California*, 370 U.S. 660 (1962) (criminal punishment for narcotics addiction violates Eighth Amendment guarantee against cruel and unusual punishment).
  51. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
  52. 602 N.W.2d 500 (Neb. 1999).
  53. See 600 N.W.2d at 504.
  54. 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 (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.
  55. *Converse*, 602 N.W.2d at 506.
  56. 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).
  57. See *Converse*, 602 N.W.2d at 508-09.
  58. 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, 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 reason for refusing admission to an applicant on character and fitness grounds. See, e.g., *In re Gossage*, 2000 WL 1145394 (Cal. 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. 1995); *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 listserv.
  59. 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 14, at 1237-38. Analogously, the factual record, including Hale’s Web site 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.
  60. 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.
  61. Rhode, *supra* note 49, at 570.
  62. See *Simmons v. South Carolina*, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting).
  63. See LEE BOLLINGER, THE TOLERANT SOCIETY (1986); Lee Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979 (1990).
  64. Cf. *United States v. Virginia*, 518 U.S. 515, 566-67 (1996) (Scalia, J., dissenting) (political process should respect moral choices made by citizens).
  65. See KALVEN, *supra* note 11, at 564.
  66. 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, DEFENDING MY ENEMY (1979).
  67. See SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 160-67 (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.”).

68. *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).
69. *See, e.g.*, STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 4, 14-17 (1990); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark* 1994 SUP. CT. REV. 1.
70. *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).
71. 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*, 120 S. Ct. 2480 (2000), upholding the validity of a floating no-speech zone around women seeking treatment at abortion clinics.
72. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996).
73. 376 U.S. 254 (1964).
74. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Cohen v. California*, 403 U.S. 15 (1971).
75. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41 (1999).
76. 485 U.S. 46 (1988) (denying state tort remedies to a public figure who had been viciously ridiculed in a parodic advertisement).
77. 403 U.S. 15 (1971) (reversing conviction of protester who had worn jacket emblazoned with an obscenity in a courthouse).
78. 505 U.S. 377 (1992) (invalidating city ordinance prohibiting hate speech).
79. 491 U.S. 397 (1989) (reversing conviction of protester for burning American flag).



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