

# SHOULD KLANSMEN BE LAWYERS? RACISM AS AN ETHICAL BARRIER TO THE LEGAL PROFESSION

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No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to one, and despise the other.<sup>1</sup>

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1. *Matthew 6:24* (King James). I thank Derrick Bell for his essay, which focused my attention on this verse. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

## I. INTRODUCTION

Within the legal community, it is often said that there are certain core values of the legal profession: loyalty, confidentiality and competence.<sup>2</sup> Often overlooked, but recognized by some, is the core value of justice.<sup>3</sup> From our history, which includes the drafting of our Constitution, are derived two core values that serve as the cornerstones of our system of justice, which necessarily includes the legal profession since it has the monopolistic privilege of administering justice.<sup>4</sup> Those core values are fairness and the notion of equal justice for all.<sup>5</sup> Equal justice is a core value of the legal profession<sup>6</sup> because history demonstrates that without a commitment to this value, our legal system will commit atrocities against the powerless and the oppressed. Without a commitment to equal justice, lawyers are empowered to commit the racist mistakes of past administration of justice to our

2. Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 498 n.161 (1998) (citing Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1246 (1991)); see also *Direction of Legal Profession is Debated at Multi-disciplinary Panel Hearings*, in LAWYERS MANUAL ON PROFESSIONAL CONDUCT 45 (ABA/BNA eds., 1999) (wherein Lawrence Fox discusses the core values of the legal profession in the multi-disciplinary practice ("MDP") context).

3. See Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 384 (1994) (arguing that the core value around which the legal profession should be organized is justice); see also Judith L. Maute, *Pro Bono Publico in Oklahoma: Time For Change*, 53 OKLA. L. REV. 527, 549 n.123 (2000) (citing *Conference Report: ABA Mid-Year Meeting*, 69 U.S.L.W. 2042 (U.S. July 18, 2000), in proposing that equal access to justice and pro bono services are core values of the legal profession).

4. It could be argued that a lawyer administers justice any time the lawyer acts in a capacity which constitutes the practice of law because the lawyer's role arguably affects the outcome for the client and therefore affects the "justice" that the client receives. I would probably define the term "administering justice" more narrowly to include functions wherein the lawyer is empowered with the ability to make decisions that could negatively impact those persons seeking justice. Lawyers administer justice in many ways, including but not limited to selecting jurors in *voir dire*, performing the function of civil or criminal prosecutor on behalf of the government, and/or serving as judge, arbitrator or mediator.

5. I use the term "equal justice" not merely as a reference to equal access to our system of justice, but as a reference to the underlying premise that all persons subject to the jurisdiction of our system of justice are entitled to fairness and equal treatment in the administration of the law regardless of, for example, race or socioeconomic background. The preamble to the MODEL RULES OF PROFESSIONAL CONDUCT, as revised by the Ethics 2000 Commission and adopted by the ABA House of Delegates at its February 2002 meeting, supports this contention by providing that "all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel." MODEL RULES OF PROF'L CONDUCT pmbl. (2001).

6. The ABA has intimated that equal justice is a core value of the profession by adopting a resolution in response to the multi-disciplinary practice (MDP) controversy. The resolution acknowledges the obvious core values of client loyalty, independent professional judgment, confidentiality, and competence, while also acknowledging as a core value of the profession "the lawyer's duty . . . [as] an officer of the legal system, and a public citizen having special responsibility for the quality of *justice*." ABA House of Delegates, Revised Resolution 10F (July 2000), available at <http://www.abanet.org/cpr/mdprecom10f.html> (last visited Mar. 15, 2003) (on file with author) (emphasis added).

minority population. A commitment to equal justice is important to the professional role of a lawyer because without it lawyers will be perceived as biased and unfair administrators of justice who will threaten the orderly administration of justice by causing the public to question the integrity of the entire judicial system. Justice is not a commodity for only the majoritarian group;<sup>7</sup> it is for all. Hence in order to be a lawyer, one must be committed to justice for all regardless of race. The thesis of this Article is that in order to possess the requisite moral character to be an officer of the court and an administrator of justice, also known as a lawyer or attorney, an individual must subscribe to the core value of equal justice that serves as a cornerstone of our entire system of justice. Members of any group advocating racial caste systems, including but not limited to white supremacists,<sup>8</sup> do not subscribe to these core values because they do not believe that all people are entitled to fairness and equal justice without regard to their race. White supremacists believe that justice is a commodity that only the whitest of white people should enjoy.<sup>9</sup>

Being a legal realist, I too believe that the world in which we live and practice “law” is a *nomos* contextualized by the narratives that locate law and give it meaning.<sup>10</sup> The genre of narrative that locates

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7. I use this term, as many scholars have, to mean the racial majority, which in this country happens to be “white people.” The definition of “whiteness” has evolved with our culture. For an understanding of who historically has been considered white and who today is considered white, see JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 429-54 (2000).

8. I use the term “white supremacist” to refer to an array of groups and individuals who include, but are not necessarily limited to, Nazis, Skinheads, Klansmen, and the like. The white supremacist is an individual who views non-whites and Jewish people as the enemy and who believes that whites are inherently superior to non-whites. The white supremacist rhetoric and propaganda describe a disdain for non-whites that is nothing short of hatred and suggest an extreme social, economic, and often times violent agenda for the genocide of such groups. For readings on white supremacy, see JOHN GEORGE & LAIRD WILCOX, AMERICAN EXTREMISTS (1996) and JAMES RIDGEWAY, BLOOD IN THE FACE: THE KU KLUX KLAN, ARYAN NATIONS, NAZI SKINHEADS, AND THE RISE OF A NEW WHITE CULTURE (2d ed. 1995).

9. White supremacists believe that, despite the white appearance of one’s skin, a scintilla of non-white blood renders the person in question a “mongrel” and hence inferior to those who are “lily white.” See BEN KLASSEN, 1 NATURE’S ETERNAL RELIGION: THE UNAVENGED OUTRAGE (1992) (see *Chapter 5*, entitled *The Black Plague in Our Midst*), available at <http://www.rahowa.com/ner.htm> (last visited Mar. 26, 2002) (on file with author).

10. Robert M. Cover, *The Supreme Court 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). Robert Cover defines “*nomos*” as a “normative universe” where we continually “create and maintain a world of right and wrong,” partially through rules of law. *Id.* at 4. Law is not created in the abstract and accordingly cannot be constructed or examined in the abstract, but rather must be contextualized by history and/or present culture. See Larry Cata Backer, *Culturally Significant Speech: Law, Courts, Society, and Racial Equity*, 21 U. ARK. LITTLE ROCK L. REV. 845, 869 n.95 (1999) (citing Larry Cata Backer, *Chroniclers in the Field of Cultural Production: Courts, Law and the Interpretive Process*, 20 B.C. THIRD WORLD L.J. 291 (2000), which discusses how court-made law is produced by culture); see also Mari J. Matsuda, *Looking to the Bottom: Critical Legal*

our civil rights and equal protection jurisprudence in this country is history, and our history regrettably incorporates the narrative of racism. Although racism is an ancient concept that long pre-dates the birth of our United States Constitution,<sup>11</sup> American racism is a unique narrative. Our long history of racism needs not to be recapitulated here in order to be accepted and understood as an integral part of our contemporary view of law and culture. Suffice it to say that our nation embraced the notion of racial inferiority for generations, and upon attempting to correct its evil mistake, organizations such as the infamous Ku Klux Klan (hereinafter “KKK”) were formed in an effort to maintain the status quo of white privilege and to resist the ever-evolving political, social and jurisprudential trend toward racial equality.<sup>12</sup>

In addition to the KKK, various other groups have perpetuated

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*Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-25 (1987), reprinted in KIMBERLÉ CRENSHAW ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 63 (1995) (arguing that law ought to be based on the actual history, culture, and experience of people of color).

11. See DINESH D’SOUZA, THE END OF RACISM 62-63 (1995) (arguing Enlightenment thinkers such as Hume, Voltaire, and Kant expressed racist views).

12. There are conflicting stories about why and when the KKK was founded. See THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 259-60 (1997) (proclaiming that the KKK was founded in 1867 by young men who desired to visit their sweethearts dressed like knights and who merely by happenstance discovered that this garb frightened blacks). Nevertheless, suffice it to say that the KKK emerged as a racist terror organization after the Civil War during the period of Reconstruction (1865-76). See Ku Klux Klan History, at <http://www.kukluxklan.org/history2.html> (last visited Mar. 15, 2003). The Klan describes itself as a Christian organization that strives to maintain the God-given supremacy of the White Race. *Id.* Although its website reveals a rather transparent attempt to sanitize the public image of the organization, the Klan is notorious for its historical and contemporary acts of hatred, violence, terrorism, and intimidation directed toward people of color. For some relatively recent criminal activities of the Klan, see Eric Lichtblau, *Klansman to Apologize for Harassment Law*, L.A. TIMES, May 12, 2000, at A19 (reporting that Roy Frankhouser, Klansman and former grand dragon of the Pennsylvania KKK, engaged in months of harassing and intimidating conduct directed at a woman who was a fair-housing activist and mother of a bi-racial child). See also Pierre Thomas, *Klan Members Face Federal Charges in Church Burning*, WASH. POST, July 9, 1996, at A3 (reporting that two KKK members were charged with the burning of the Mount Zion African Methodist Episcopal Church in Greeleyville, South Carolina). The two men described in the *Washington Post* article later pled guilty to civil rights violations, arson, and other charges in connection with the burning of the AME church in Greeleyville and the Macedonia Baptist Church in Bloomville, South Carolina, and they also admitted to attacking a black man during the same month that they burned the churches. See *Ex-Klansmen Admit Guilt in Church Fires*, L.A. TIMES, Aug. 15, 1996, at A27; see also *Former Klan Member sentenced to 26 years*, HERALD (Rock Hill, S.C.), Sept. 30, 1998, at A10 [hereinafter *Nightclub Shooting*] (reporting that Klansman Joshua Grant England admitted to shooting three African-American teenagers with a semi-automatic rifle outside a nightclub in Pelron, South Carolina, after leaving a rally of the Ku Klux Klan). England and Clayton Spires, his co-conspirator, were members of the same Klan group whose members were prosecuted two years earlier for civil rights and firearms violations arising out of the investigation into church arsons in South Carolina. *Id.*

the cultural myth of white supremacy. Christian Identity,<sup>13</sup> Aryan Nation, and Skinheads are but a few of the better-known organized groups that profess white supremacy and disdain for all non-white and Jewish people.<sup>14</sup> Perhaps less well-known is The World Church of the Creator (“World Church”), which is a largely internet-based organization that promotes white supremacy.<sup>15</sup>

At the time this Article was written, the World Church was headed by Matthew Hale. Hale is a graduate of Southern Illinois University School of Law who passed the bar examination and applied for admission to the Illinois bar.<sup>16</sup> Despite his successful performance in both law school and on the bar exam, Hale was denied admission to the Illinois bar because of a finding by bar authorities

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13. Christian Identity is actually a white supremacist movement uniting several white supremacist groups such as Scriptures for America, The Jubilee, the American Nazi Party and the Confederate Hammerskins. See *Christian Identity Movement*, at [http://www.religioustolerance.org/cr\\_ident.htm](http://www.religioustolerance.org/cr_ident.htm) (last visited Mar. 26, 2003) (on file with author).

14. See VINCENT COPPOLA, *DRAGONS OF GOD: A JOURNEY THROUGH FAR-RIGHT AMERICA* (1996) (describing several white supremacist groups and their racist ideology and activities).

15. Members of the World Church subscribe to 16 “religious” commandments, and among them are the following:

IV. The guiding principle of all of your actions shall be: What is best for the White Race?

.....

VI. Your first loyalty belongs to the White Race.

.....

VII. Show preferential treatment in business dealings to members of your own race. Phase out all dealings with Jews as soon as possible. Do not employ niggers or other coloreds.

THE WORLD CHURCH OF THE CREATOR MEMBERSHIP MANUAL, available at <http://www.creator.org/manual> (last visited Mar. 16, 2003). “[W]hat is good for the White Race is the highest virtue, and what is bad for the White Race is the ultimate sin.” *Id.* Although Hale’s public speeches as head of the organization outwardly condemn violence against non-white people, he does threaten that violence will erupt if his organization and its beliefs are not heeded. For example, after being denied membership to the Illinois bar and prior to his appeal to the Illinois Supreme Court, Hale stated, “If the courthouse is closed to Non Approved Religions, America can only be headed for violence.” See Press Release, *Illinois State Bar Forbids Freedom of Speech and Religion!* (July 5, 1999) (on file with author) (quoting Hale). Indeed, two days after Hale was denied admission to the bar, Benjamin Nathaniel Smith, who had been a member of Hale’s World Church, went on a weekend shooting spree of non-whites in Illinois and Indiana, killing two people before killing himself. See Mark Skertic & Abdon M. Pallasch, *Spree Ends, Alleged Gunman Kills Self Near Salem, Ill.*, CHI. SUN-TIMES, July 5, 1999, at 1. After the killings, Hale said that it was possible that the shootings were the result of the character and fitness committee’s denial of his application for a license to practice law. See *Court rejects Hale’s appeal for law license*, ST. J.-REG. (Springfield, Ill.), June 27, 2000, at 9. In an interview documented on videotape by the Southern Poverty Law Center, Matthew Hale expressed no regret or sympathy for this loss of non-white life. For more information on the World Church’s racist propaganda, see Richard L. Sloane, Note, *Barbarian at the Gates: Revisiting the Case of Matthew F. Hale to Reaffirm that Character and Fitness Evaluations Appropriately Preclude Racists from the Practice of Law*, 15 GEO. J. LEGAL ETHICS 397, 418-20 (2002).

16. Hale passed the Illinois Bar examination in the summer of 1998.

that his racist activities both prior to and during his leadership of the World Church demonstrated a lack of moral character, rendering Hale unfit to practice law.<sup>17</sup> In the judgment of this author, *In Re Hale*<sup>18</sup> was correctly decided, and it stands for the proposition that the bar may legitimately exclude a person from the legal profession if that person participates in racist activities because such activities obstruct the administration of justice and undermine the core values of the legal profession. Nonetheless, the *Hale* decision has been widely criticized as abridging First Amendment rights.<sup>19</sup> It is because

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17. On December 16, 1998, the Illinois Bar Inquiry Panel refused to certify that Hale had the necessary moral character and fitness to practice law. Hale appealed the Inquiry Panel's decision to the Illinois Committee on Character and Fitness ("Committee"), which reviewed Hale's application and, after a hearing, concluded that Hale failed to meet the requirement of "good moral character and general fitness to practice law" as that requirement has been interpreted in Illinois. See GEOFFREY C. HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 875-84 (3d ed. 1999) (reporting the Committee's opinion). Hale appealed the Committee's decision to the Supreme Court of the State of Illinois, which dismissed the appeal. *In re Hale*, 723 N.E.2d 206 (Ill. 1999). He subsequently filed a petition for certiorari to the United States Supreme Court, which was denied without opinion. *Hale v. Comm. on Character & Fitness of the Ill. Bar*, 530 U.S. 1261 (2000). The decision to deny Hale admission to the bar could have been based on the fact that Hale failed to disclose on his application several arrests and disciplinary actions taken 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. Failure to disclose information in a bar application can and has served as the basis for denying admission. See, e.g., *In re Florida Bd. of Bar Exm'rs ex rel. John Doe*, 770 So. 2d 670 (Fla. 2000) (denying admission to Florida bar for an applicant's failure to disclose pending criminal charges); *In re Cunningham*, 502 N.W.2d 53 (Minn. 1993) (denying admission to the Minnesota bar for an applicant's failure to disclose an arrest and paternity proceedings). Moreover, the committee could have cited poor judgment as demonstrated by a letter Hale sent to a woman expressing the opinion that the "nigger race" is "inferior" and inquiring, "Is it going to take your rape at the hands of a nigger beast or your murder before you become aware of the problem?" See Brief of Amicus Curiae Illinois State Bar Association at 8-9, *In re Hale*, 723 N.E.2d 206 (Ill. 1999), cert. denied, 530 U.S. 1261 (2000) (on file with author). Despite the existence of sufficient "benign" reasons to deny Hale admission, the Illinois Inquiry Panel chose to focus on the more disturbing aspect of Hale's application—the fact that he was an admitted white supremacist. For a detailed reporting of the facts and circumstances surrounding Hale's denial of admission to the bar, see Emelie E. East, Note, *The Case of Matthew F. Hale: Implications for First Amendment Rights, Social Mores and the Direction of Bar Examiners in an Era of Intolerance of Hatred*, 13 GEO. J. LEGAL ETHICS 741 (2000). Unlike the cited piece, the instant Article focuses on the ethics of allowing a white supremacist to practice law and offers a legal rationale to support the ethical conclusion.

18. 723 N.E.2d 206 (Ill. 1999), cert. denied, 530 U.S. 1261 (2000).

19. See W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 320 (2001) (discussing the application of free speech principles to the legal profession and arguing that anti-discrimination values should not be preferred to First Amendment values). Wendel acknowledges the odious nature of Hale's belief in white supremacy, but argues that these beliefs are constitutionally protected. *Id.*; see also W. William Hodes, *Accepting and Rejecting Clients—The Moral Autonomy of the Second-to-the-Last Lawyer in Town*, 48 U. KAN. L. REV. 977, 988-89 (2000) (acknowledging that he has criticized the *Hale* decision as implicating the First Amendment); Nadine Strossen, *Incitement to Hatred: Should There Be a Limit?*, 25 S. ILL. U. L.J. 243 (2001) (arguing that the First Amendment precludes bar authorities from discriminating against persons who express racist views).

of this criticism that I feel compelled to write this Article.<sup>20</sup>

This Article explores the issue of whether Klansmen or other white supremacists should be lawyers. It contends that white supremacists should not be lawyers and uses the example of Matthew Hale to illustrate its points. To make its case, this Article looks first in Part II to the definition of moral character in an effort to determine whether white supremacists such as Matthew Hale possess the requisite moral character to be lawyers. Parts II.A and B examine cases in which candidates for admission to the bar have been denied admission on the basis of moral character in an effort to locate the rationale for the moral character requirement. It argues that this rationale is furthered by the exclusion of white supremacists such as Hale from the bar. Part II also looks to relevant case law to determine whether there is precedent for holding an applicant morally unfit to practice law because of conduct that is arguably protected by the First Amendment. In doing so, Part II.C argues for a balanced application of the First Amendment by balancing the state's interest in providing a system of justice free from racism against the individual's free speech interests. It also argues for harmonization of the competing interests of First Amendment liberty with Fourteenth Amendment protections in the bar admission context.

Next, Part II.D looks at the "professional role obligations"<sup>21</sup> of lawyers and asks whether a white supremacist like Hale can meet the obligations of the profession while practicing his racist "religion" or beliefs. It explores several additional questions. May an applicant's personal moral code in any way contradict the profession's code of ethics? May an applicant's political and/or religious beliefs and/or agenda be contrary to existing law? Part III seeks to distinguish the rest of us from the white supremacists in an effort to explain why many candidates, despite their beliefs and biases, meet the moral character requirement while others do not. Part IV proffers a policy rationale for the *Hale* decision and contends that the profession would be harmed by the admission of white supremacists. To make this case, Part V argues that the admission of a person to the bar who does not subscribe to the core value of equality would illegiti-

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20. Since his denial of admission in Illinois, Hale has been on a forum-shopping spree and has sought admission in Montana and Ohio, both of which denied his application. See *Anderson v. Hale*, 2001 U.S. Dist. LEXIS 3774 (N.D. Ill. Mar. 29, 2001) (mentioning Hale's denial of admission in Montana in late March 2001). Although no jurisdiction had admitted Hale at the time this Article was nearing completion, the potential remains for Hale or other white supremacists to be admitted to the bar either because the white supremacist does not have a record containing sufficient grounds for denial that are unrelated to beliefs or because the jurisdiction in question views the First Amendment as an obstacle to precluding admission of an open racist.

21. David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1579-80 (1998).

mize a fundamental principle of our system of justice: the task of administering equal justice to all.

Part VI acknowledges that there are cases in which the application of the proposed rationale of Parts II and III would be more difficult than it was in the *Hale* case. It discusses those difficult cases and seeks to distinguish or harmonize the more difficult cases with the *Hale* decision. Part VI acknowledges that the term “racist” is defined according to degree. Ultimately, Part VI seeks to deconstruct discourses of racism and racist identity in a critical manner to clarify the complex relationship between the two and to identify how racist lawyers or bar applicants should be identified and treated by bar authorities to best further the principles of the profession.

This Article attempts to provide a basis for removing from racism the veil of protection it sometimes has received from the First Amendment in the bar admission context.

## II. DEFINING MORAL CHARACTER AND FITNESS

White supremacists lack the requisite moral character and fitness to be lawyers. All United States jurisdictions require that applicants for admission to the bar possess and demonstrate good moral character.<sup>22</sup> The issue of whether a candidate for admission to the bar is of good moral character is an important one given the degree of discretion that lawyers inevitably exercise in even the most routine of law practices.<sup>23</sup> Good moral character is required of lawyers in order to protect the orderly administration of justice.<sup>24</sup> “Since our ‘fortunes, reputations, domestic peace . . . nay, our liberty and life itself’ rest in the hands of legal advocates, [t]heir character must be not only without a stain, but without suspicion.”<sup>25</sup> The moral character requirement is intended to ensure that the applicant, if admitted to the bar, would not obstruct the administration of justice or otherwise act unscrupulously in his or her capacity as an officer of the court.<sup>26</sup>

Good moral character—what does that mean?<sup>27</sup> The inherent prob-

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22. Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67 (1984) (citing RULES FOR ADMISSION TO THE BAR IN THE UNITED STATES AND TERRITORIES (West 1982)). Good moral character is required by law in other contexts as well. For example, immigration law requires that noncitizens possess good moral character in order to obtain relief from deportability. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY (3d ed. 2002).

23. Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts On Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 122 (1995).

24. *Ex Parte Wall*, 107 U.S. 265, 274 (1883); see also *Hallinan v. Comm. of Bar Exam'rs*, 421 P.2d 76, 87 (Cal. 1966).

25. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 507-08 (1985).

26. *Hallinan*, 421 P.2d at 87.

27. For a brief history of the “good moral character” requirement and an argument in favor of its retention, see Sloane, *supra* note 15, an article that focuses solely on the *Hale*

lem with assessing moral character in any instance is that there is no firm definition of the term. The concept is fluid and quite subjective.<sup>28</sup> Conduct that may demonstrate to one individual that the applicant lacks moral character will have little or no significance in another person's analysis of whether the applicant has the requisite moral character to be a lawyer.<sup>29</sup> Reasonable minds can disagree about what constitutes "moral character."<sup>30</sup> Any person who knowingly and intentionally practices racism lacks moral character because racism<sup>31</sup> is immoral.<sup>32</sup> Assuming reasonable minds can agree on what type of conduct is immoral, the inquiry does not stop there. Adultery is immoral behavior, but if it were used as a litmus test for disqualifying bar applicants and practicing lawyers, there would be a significant decrease in the number of lawyers. Accordingly, not all immoral behavior serves as a disqualifier for purposes of determining bar admission. So what type of immoral conduct is acceptable in lawyers and what type is not?

Courts have offered some guidance in defining and applying the amorphous criterion of moral character.<sup>33</sup> In order for behavior that society characterizes as immoral to become relevant to bar authorities, there must be a nexus between the alleged immoral behavior and the practice of law.<sup>34</sup> In other words, if the immoral behavior will not reflect adversely on the person's fitness to practice law, then it is

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case. This article uses the *Hale* case to construct a framework for discussion of the larger questions underlying the *Hale* case in an effort to aid in the analysis of future cases similar to *Hale*.

28. Rhode, *supra* note 25, at 529.

29. *Id.* at 530-31.

30. *Id.* at 507.

31. Defining racism is beyond the scope of this Article. However, I use the term to encompass racist beliefs (the belief that a person's race makes that person inferior to other people) that necessarily determine one's practices and behavior and thereby render the latter action racist. For a discussion of the definition of racism, see PEREA ET AL., *supra* note 7, at 6-49.

32. See Dr. Martin Luther King Jr., *Letter From Birmingham Jail* (Apr. 16, 1963), available at <http://www.mlkonline.com/jail.html> (last visited Mar. 16, 2003) (arguing that racism in the form of segregation is morally wrong); see also HAZARD ET AL., *supra* note 17, at 878 n.4 (citing *In re A.L.*, 702 N.E.2d 1021, 1024-25 (Ill. App. Ct. 1998), in which "the Appellate Court cited bigotry as evidence of depravity which has been defined as the opposite of good moral character," and *In re Abdullah*, 423 N.E.2d 915, 917 (Ill. 1981), which held that "depravity is 'an inherent deficiency of moral sense and rectitude'"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987) (discussing how society has come to accept the idea that racism is immoral).

33. It is also important to note that the applicant bears the burden of proving that she is of good moral character, so if the applicant fails to meet this burden of proof, denial of admission to the bar is appropriate. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 40-41 (1961).

34. *In re Eimers*, 358 So. 2d 7, 10 (Fla. 1978) (holding that while homosexuality "affronts public conventions," there is no substantial nexus between homosexual acts and the ability of the applicant to live up to the professional responsibility and conduct required of a lawyer).

not the type of immoral conduct that disqualifies a candidate from bar admission.<sup>35</sup> For example, adultery, although still considered immoral behavior in our society, does not reflect adversely on a candidate's fitness to practice law—one can be an adulterer and a competent and effective lawyer at the same time. Unlike adultery, the practice of racism is a type of immoral behavior that is integrally connected to the practice of law. A lawyer who commits adultery in no way harms his clients, the profession, or his ability to provide competent and loyal representation.<sup>36</sup> On the other hand, a lawyer who practices racism is likely to harm non-white clients either by refusing them representation or providing them with less than loyal and competent representation through reduced zeal caused by his personal conflict of interest arising from racism. A lawyer who practices racism is also likely to have a detrimental impact on the public image of the profession. Members of the public, particularly minority members, will likely view our system of justice as less fair if it is administered by racially biased lawyers and judges.<sup>37</sup>

In *Konigsberg v. State Bar of California*,<sup>38</sup> the United States Supreme Court defined the parameters of the moral character inquiry as seeking to determine whether “a reasonable [person] could fairly find that there were substantial doubts about [an applicant's] ‘honesty, fairness and respect for the rights of others and for the laws of the state and nation.’”<sup>39</sup> Admittedly, the moral character requirement is a subjective standard for determining fitness to practice law. Most bar admission cases that seek to determine moral character fall within one or more of the following categories: political/religious belief and conduct; “misconduct in the bar admission process; past illegal conduct; financial malfeasance; and emotional or mental instability.”<sup>40</sup> Both past illegal conduct and misconduct in the bar admission process are non-controversial factors that routinely have been used as a basis for determining that a candidate does not possess the requisite moral character for admission to the bar. Factors that indicate that a candidate is dishonest are generally agreed upon as legitimate grounds for denial of membership to the bar. The more controversial factors that bar authorities have used to reach the conclusion that an applicant does not possess the requisite moral character include

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35. *In re Haukebo*, 352 N.W.2d 752, 754-55 (Minn. 1984).

36. This statement assumes, of course, that the lawyer's accomplice/partner in the adulterous act is not his/her client.

37. Indeed, a recent American Bar Association report on perceptions of the United States justice system reveals that non-whites perceive our system of justice as failing to treat whites and non-whites equally. See *American Bar Association Report On Perceptions Of The U.S. Justice System*, 62 ALB. L. REV. 1307, 1317 (1999).

38. 353 U.S. 252 (1957).

39. *Id.* at 264.

40. See McChrystal, *supra* note 22, at 73.

membership in controversial organizations<sup>41</sup> and repetitive use of speech and/or the media to personally attack others.<sup>42</sup> These factors are controversial because they involve the bar candidate's exercise of First Amendment rights such as the right of association or the right to practice one's religion without governmental intrusion. Thus, these factors have provoked disagreement about whether conduct that is arguably protected by the First Amendment, such as advocating and practicing private racism and discrimination, can be considered by bar authorities in their assessment of an applicant's moral character. This question must be answered in the affirmative if the profession is to preserve its integrity and its core values, and thereby not to undermine the fair administration of justice.<sup>43</sup>

#### A. *The First Amendment as a Shield, Not a Sword*

Those who argue that First Amendment rights trump all others, frequently referred to as "free speech absolutists,"<sup>44</sup> argue that the First Amendment guarantees to white supremacists such as Hale the right to say whatever they choose and to associate with whomever they choose without governmental consequence or punishment. Those who adopt this myopic absolutist view are willing to suffer any social evil in order to prevent any restriction of speech. Such a view stretches the First Amendment beyond its reasonable limits by allowing the First Amendment to subvert other important constitutional guarantees.<sup>45</sup> Even acknowledging the individualistic rights-based stance of American jurisprudence, our Supreme Court has recognized that the interest in free expression must yield at times to other more important considerations. The First Amendment should be interpreted as a shield that protects us all,<sup>46</sup> not a sword that is used to protect some while disemboweling others. Restrictions on the

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41. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961) (upholding the denial of admission of an applicant who argued that the California Bar Commission violated the applicant's First Amendment rights by forcing him to reveal whether he was affiliated with the Communist Party).

42. *In re Converse*, 602 N.W.2d 500 (Neb. 1999) (denying admission to a bar candidate due to several instances of using letters, the newspaper, and artwork on t-shirts to personally attack his opponents in disputes).

43. At least one court has agreed with this proposition in holding that a bar Commission may consider conduct arguably protected by the First Amendment when investigating whether an applicant possesses the requisite moral character and fitness to practice law. *Id.*

44. MARI J. MATSUDA ET AL., WORDS THAT WOUND 11 (1993).

45. For an enlightening and prolific argument that the First Amendment is not absolute and should not be used as a sword to permit harm to defenseless people, see *id.* See also RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? (1997).

46. I recognize that the First Amendment has been a tool used by minorities for the advancement of their interests. Protesters during the Civil Rights movement were to some extent protected by the First Amendment. See DERRICK BELL, RACE, RACISM AND AMERICAN LAW 653-734 (Chapter 11, entitled *Parameters of Racial Protest*) (4th ed. 2000).

content of speech are imposed when the social value of the speech is significantly outweighed by the harm it imposes.<sup>47</sup> Such restrictions include, but are not limited to, those on child pornography,<sup>48</sup> obscenity,<sup>49</sup> defamation,<sup>50</sup> fighting words,<sup>51</sup> sexually harassing speech,<sup>52</sup> and false or misleading advertising.<sup>53</sup>

In the case of allowing white supremacists into the bar, the value of racist speech<sup>54</sup> is outweighed by the need to protect minority citizens from the high risk of harm, just as the right of free association was outweighed by the interest in racially integrated public schools. The First Amendment must be balanced against other competing interests guaranteed by the Constitution. If First Amendment principles were absolute and could not be balanced against the often competing interest of promoting equal protection under the law, we could not have made strides in achieving integrated public schools in this country.<sup>55</sup> The arguments that free speech absolutists make in oppo-

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

48. *Osborne v. Ohio*, 495 U.S. 103 (1990) (upholding an anti-child pornography statute that was challenged on First Amendment grounds); see also Victor C. Romero, *Restricting Hate Speech Against "Private Figures": Lessons in Power-Based Censorship from Defamation Law*, 33 COLUM. HUM. RTS. L. REV. 1, 13 (2001).

49. See *Roth v. United States*, 354 U.S. 476 (1957) (holding that obscenity is not protected by the First Amendment); see also *Miller v. California*, 413 U.S. 15 (1973) (affirming the *Roth* decision that obscenity is not protected by the First Amendment).

50. See *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (explicating when defamatory speech is not protected by the First Amendment); see also *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

51. *Chaplinsky*, 315 U.S. at 571-72 (upholding a conviction on the ground that fighting words are not protected under the First Amendment). *But see* Romero, *supra* note 48, at 13 (noting that at least one scholar has argued that *Chaplinsky* should be overruled by citing Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129 (1993)).

52. Title VII regulations forbid sexually harassing speech, even when unaccompanied by conduct, to the extent that such speech creates a hostile work environment for the employee. 29 C.F.R. § 1604.11(a) (2001). Racist speech in the workplace is also banned to the extent that such speech causes a hostile work environment. See *Daniels v. Essex Group Inc.*, 937 F.2d 1264 (7th Cir. 1991) (finding that an employee has a cause of action under Title VII when persistent racist speech creates a hostile work environment for the employee); see also *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (listing the elements of a claim for a racially hostile work environment).

53. See *Friedman v. Rogers*, 440 U.S. 1 (1979) (upholding a provision of the Texas Optometry Act that prohibited the practice of optometry under a trade name and holding that the provision did not violate the First Amendment because it furthered the state's interest in protecting the public from deceptive and misleading use of optometric trade names).

54. Admittedly, I do not see any value in racist speech, but I use this framework for those who do.

55. Indeed, *Brown v. Board of Education*, 347 U.S. 483 (1954), demonstrates that any First Amendment right of white parents to choose to have their white children associate exclusively with other white children must necessarily yield at the point that exercise of this First Amendment right tramples the Fourteenth Amendment rights of children of color. I do not contend that the mandates of *Brown* have ever been fully achieved in this country, but to the extent that there are no longer positive rules of law that preclude children of color from attending predominately "white" public schools, I will acknowledge that public schools are integrated at least in theory. For a recent study indicating that segrega-

sition to the *Hale* decision are reminiscent of arguments made by opponents of public school integration in the 1950s. During the 1950s, those who practiced racial bigotry used First Amendment absolutism to argue in favor of continued segregation by claiming that they and their children had the First Amendment right to associate or not associate with persons of their choosing.<sup>56</sup> Accordingly, they argued that forced integration administered through court orders, busing programs, and police escorts violated their First Amendment rights to free association.<sup>57</sup> Proponents of free speech absolutism argue that there should be no government regulation of speech, and to the extent that regulation is imposed, it should be content-neutral, meaning that the government should not regulate the content of speech or impose regulations based on the content of the speech.<sup>58</sup> This view ignores the harm that a white supremacist is likely to inflict upon the legal profession and the administration of justice, not to mention our non-white citizens who are subject to our justice system.<sup>59</sup> Like the majoritarian group, racial minorities have a right to a fair justice system that does not make judgments based on race.<sup>60</sup>

First Amendment absolutists give inadequate consideration to the nature and degree of harm that is and could be inflicted by the ad-

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tion of white and non-white students is on the rise, see Sean F. Reardon et al., *The Changing Structure of School Segregation: Measurement and Evidence of Multiracial Metropolitan-Area School Segregation, 1989-1995*, 37 DEMOGRAPHY 351 (2000). See also Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996) (holding that resegregation of Hartford school district violated the state's equal protection clause); Press Release, The Civil Rights Project, *Race in American Public Schools: Rapidly Resegregating School Districts* (Aug. 8, 2002) (reporting that segregation in public schools has intensified in the last decade), available at [http://www.civilrightsproject.harvard.edu/news/pressreleases.php/record\\_id=9](http://www.civilrightsproject.harvard.edu/news/pressreleases.php/record_id=9) (last visited Mar. 13, 2003) (on file with author).

56. Segregationists found support in the writings of constitutional scholar Herbert Wechsler. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (arguing that integration forces an association upon those who find it unpleasant or repugnant). For an extant articulation of the argument that people should have an absolute right to not associate, see Robert W. McGee, *The Right to Not Associate: The Case for an Absolute Freedom of Negative Association*, 23 UWLA L. REV. 123 (1992). Of course, outside the realm of racial discrimination, the United States Supreme Court has recognized that the First Amendment right to free association may trump a state's desire to eliminate sexual orientation discrimination. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

57. Wechsler, *supra* note 56, at 34.

58. Lyle Denniston, *Absolutism: Unadorned, and Without Apology*, 81 GEO. L.J. 351 (1992).

59. For a discussion of the "costs" of absolute tolerance of speech and how society's tolerance of extremist speech may become an excuse for excessive intolerance in other areas, see LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 58-75 (1986).

60. Even our highest court has acknowledged that the "particular character of the Klan's activities, involving acts of unlawful intimidation and violence" warrants the allowance of some intrusion into the First Amendment veil if the government can establish a compelling justification for so doing. *NAACP v. Alabama*, 357 U.S. 449, 465 (1958).

mission of racists to the bar.<sup>61</sup> As Derrick Bell and Charles Lawrence have pointed out, it is not uncommon for the white majority to sacrifice the constitutional rights of non-whites in order to preserve the interests of the majority.<sup>62</sup> In this case, the most obvious beneficiaries of a judicial system free of white supremacist administrators are people of color and perhaps Jews. However, excluding white supremacists from the legal profession will benefit all of us, not just people of color. The benefit to whites in yielding First Amendment liberty in this context will be a system of justice that is less contaminated with racism. Why should whites desire a justice system less contaminated by racism? What benefits to whites would be derived by such a system? The system would be more efficient and effective because race would become less of a factor in administering justice. For example, if Mark Furman had not been a racist police officer, O.J. Simpson would probably be in prison now. By allowing a racist to enforce our laws, society paid a price—we allowed racism to create reasonable doubt in the minds of the jurors. A racist police officer has a motive to frame a black<sup>63</sup> man, whereas a fair-minded police officer has no more motive to frame a black man than any other person. Thus, a system of justice not administered by racists makes it less likely that actions of administrators will be questioned as being racially motivated<sup>64</sup> and more likely that the actions of our lawyers will

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61. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 478 (arguing that some civil libertarians minimize the harm to victims of racist speech by characterizing racial harassment as isolated incidents in an otherwise racism-free community).

62. See *id.* at 475 (citing BELL, *supra* note 46, at 30).

63. In this Article, I sometimes use the terms “black” and “African-American” interchangeably to refer to people of African descent. I elect to use the term “black” rather than African-American in most instances because “black” is broader in the sense that it encompasses people of African heritage who may not be American, but who nonetheless experience racism in America.

64. Examples of challenges to decisions rendered by our system of justice on the basis of perceived racism abound. See RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* 61-63 (2002) (discussing cases in which decisions of judges have been overturned due to the judges’ use of the “N” word and citing *United States v. Brown*, 539 F.2d 467, 468 (5th Cir. 1976)). Kennedy also discusses the removal of an elected district attorney for his use of the “N” word. *Id.* at 65-72. Kennedy opines that the district attorney’s removal was justified because statements he made

rendered him unfit to fulfill his public responsibility. Such a responsibility entails a commitment to the idea that all people, regardless of race, should be treated equally and with respect before the bar of justice. By calling [the defendant] Ray Jacobs a nigger, Jerry Spivey [the district attorney] cast a pall over public confidence in his commitment to accord all people due respect regardless of race.

*Id.* at 70-71 (citing *In re Spivey*, 480 S.E.2d 693 (N.C. 1997)). For a current example of how racism in the judicial process creates inefficiency and causes doubt about the validity of judicial action, see Sara Rimer, *In Dallas, Dismissal of Black Jurors Leads to Appeal by Death Row Inmate*, N.Y. TIMES, Feb. 13, 2002, at A24.

be perceived as rational, fair-minded decisions. And from that we all benefit.

*B. Lawyers' First Amendment Freedoms Are Already Restricted  
When Necessary to Promote the Interests of Justice*

The denial of bar admission to Matthew Hale is neither the first nor the only instance in which bar authorities have imposed restrictions on the First Amendment freedoms of lawyers. Lawyers already surrender some First Amendment rights in exchange for the privilege of administering justice. There are several ethical rules that impose limitations on the First Amendment freedoms of lawyers. The rules pertaining to advertising and client solicitation restrict lawyers' First Amendment freedoms.<sup>65</sup> These rules restrict commercial speech, which is subject to the less stringent tests of time, place, and manner.

There are other instances where non-commercial speech of lawyers is restricted in an effort to safeguard the administration of justice.<sup>66</sup> Rule 3.5 of the *Model Rules of Professional Conduct*, as drafted by the American Bar Association and adopted by many jurisdictions, provides that a "lawyer shall not: seek to influence a judge, juror, prospective juror or other official by means prohibited by law; communicate ex parte with such a person except as permitted by law; or engage in conduct intended to disrupt a tribunal."<sup>67</sup> The rule expressly restricts a lawyer's First Amendment right to free speech by restricting communications that lawyers may have with jurors and judges. The rule also prohibits speech that is intended to disrupt the decorum of the courtroom.<sup>68</sup> The rule has a dual purpose, which is to prevent prejudice to the adjudicative process and to protect and promote the impartiality—as well as the appearance of impartiality—and fairness of the judicial system. Despite constitutional challenges to the rule, it has been upheld as not violative of a lawyer's right to free speech.<sup>69</sup>

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65. See MODEL RULES OF PROF'L CONDUCT Rs. 7.1, 7.3 (2001).

66. See *id.* R. 4.2 (prohibiting a lawyer from communicating with a person whom the lawyer knows is represented by another lawyer); see also *id.* R. 3.6 (prohibiting a lawyer from making an "extrajudicial statement" if the lawyer should know that the statement would have a "substantial likelihood of materially prejudicing an adjudicative proceeding"); *id.* R. 3.8(g) (supplementing Rule 3.6 by precluding a prosecutor from making an extrajudicial statement that would have a "substantial likelihood of heightening public condemnation of the accused").

67. *Id.* R. 3.5.

68. See *State v. Swisher*, 676 S.W.2d 576 (Tenn. Crim. App. 1984) (providing an example of how a lawyer may be sanctioned by the court for speaking in court when said speech disrupts the decorum of the court).

69. *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425 (Tex. 1998).

Likewise, political speech of lawyers is restricted by ethical rules in the context of judicial election campaigns. Lawyers who are candidates for judicial office are precluded from expressing a political position.<sup>70</sup> The obvious purpose of this rule is to promote the public's confidence in the rule of law and our judicial system. By prohibiting political statements of judicial candidates, the state ensures that the public views judicial candidates as fair and impartial decision-makers rather than as political decision-makers. Public confidence is essential to our system of justice because our legal system depends upon support from the public to maintain its authority.<sup>71</sup> The exclusion of white supremacists from the bar serves a purpose similar to the purpose of Model Rule 3.5 and the rule governing political speech of judicial candidates. That purpose is to prevent racial prejudice from affecting the judicial process, thereby promoting the public's confidence in the rule of law derived from the judicial process. A system of justice that allows a devout racist to administer justice to a citizenry that includes people who are the object of the racist's hatred and discriminatory practices promotes the appearance of unfairness in our justice system and will cause a loss of public confidence in the system.

The decision in *Hale* is supported also by the decision in *Bob Jones University v. United States*,<sup>72</sup> which held that the government has a "fundamental, overriding interest in eradicating racial discrimination in education" that "substantially outweighs whatever burden [that the] denial of tax benefits" placed on the University's exercise of its religious beliefs.<sup>73</sup> Likewise, a state has an overriding interest in eradicating racial discrimination in the administration of justice that substantially outweighs whatever burden the denial of a law license may place on a white supremacist's freedom of expression or exercise of religion. The *Hale* decision is not censorship. Like the restriction on speech in *Bob Jones*, excluding *Hale* from the bar is merely an incidental restriction on speech. In other words, the state's objective in excluding a racist from the bar is to eradicate racial discrimination in the administration of justice, not to censor speech. In-

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70. See, e.g., CODE JUD. CONDUCT Canon 7, 42 PA. CONS. STAT. ANN. §§ A(1)(b), B(1)(c) (West 2002).

71. Such sentiments are suggested by the preamble and Rule 6.1 of the *Model Rules of Professional Conduct*, as revised by the Ethics 2000 Commission and adopted by the ABA House of Delegates at its February 2002 Meeting. MODEL RULES OF PROF'L CONDUCT pmbl., R. 6.1 (amended 2000).

72. 461 U.S. 574 (1983) (upholding an IRS ruling denying section 501(c)(3) tax exempt status to the private Bob Jones University on the ground that the university practiced racial discrimination that was contrary to the public policy promoted by the tax exemption for charitable organizations). The university prohibited interracial dating and interracial marriage and denied admission or expelled any student who was engaged in such an interracial relationship. *Id.* at 580-81.

73. *Id.* at 604.

cidental limitation on First Amendment freedom is permissible and justified when the government regulation furthers a substantial governmental interest and that governmental interest is unrelated to the suppression of free expression.<sup>74</sup>

Not only is the restriction on speech in the *Hale* case incidental, it is insignificant when compared to the interest that the state is seeking to promote—eradicating racism in the administration of justice. The incidental restriction on racist speech in this context is a permissible restriction on speech because it leaves open alternative avenues for the white supremacist to communicate his message of racial superiority and hatred<sup>75</sup> toward minorities. Matthew Hale is free to continue to practice his “religion,” hold his beliefs, and say whatever he pleases. Moreover, the state’s interest in eradicating racism in the administration of justice is compelling and outweighs the individual racist’s interest in practicing law. Free speech absolutists, who argue in favor of admitting racists to the bar, either do not consider important values expressed elsewhere in the Constitution or elevate First Amendment rights over other constitutional rights.<sup>76</sup> First Amendment rights should not undermine the administration of justice nor trample Fourteenth Amendment rights. In First Amendment jurisprudence, like much American jurisprudence, courts make value judgments and determine the confines of the law based on those preconceived values. Unfortunately, protecting the rights of the colored minority at the expense of the privileged majority has never been a popular cause. Nonetheless, if we value equality and truly want to strive to be a color-blind nation with color-blind justice, we must elevate the right of the minority to be free from racial oppression over the right of the majority to inflict and/or ignore such racial oppression under the auspices of expression. The refusal of our courts to restrict hate speech is an example of how our system of justice makes such value judgments.<sup>77</sup> Hate speech, like pornography, has no societal worth, yet it is valued and protected over the rights of those who

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74. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

75. Matthew Hale, through his use of the WHITE MAN’S BIBLE, admits that the Credo of the World Church is to hate “Jews, blacks and other colored people,” but argues that loving the “White Race” makes hate for the enemies of the white race inevitable. According to the WHITE MAN’S BIBLE, those who profess love for their enemies are liars and hypocrites. See BEN KLASSEN, WHITE MAN’S BIBLE: CREATIVE CREDO NO. 71, available at <http://www.creator.org/holybooks/wmb/credo71.html> (last visited March 26, 2002) (on file with author). I define the term “hatred” as the absence of love. For those who need a definition of love, see 1 *Corinthians* 13:4 (New International).

76. See Lawrence, *supra* note 61, at 436-37 (noting that traditional civil libertarians do not take into account important values expressed elsewhere in the Constitution).

77. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down a bias-motivated crime ordinance as unconstitutional). Banning white supremacists from the bar is easier to defend than banning hate speech due to the unique nature of the legal profession and the limited and incidental nature of the restriction on speech.

are its target to be free from such harm.<sup>78</sup>

To allow a white supremacist to become a lawyer would be to privilege the interests of racists over the interests of Jews and people of color. The white supremacist masquerading under the guise of the strict libertarian asks our system of justice to privilege his interest in promoting racism above the interests of people of color and the interests of our justice system, and he cites the First Amendment as the authority for granting such privilege. Meanwhile, Jews and people of color demand from our government a system of justice that is not infested with racist administrators who may intentionally and covertly sabotage their rights. The resolution of the First Amendment conflict, therefore, necessarily lies in determining *ab initio* whose interest is most valued by the state, or, assuming the interests are equally valued, whether such competing interests can be reconciled.

Communitarianism is perhaps the most rational mechanism for reconciling the competing interests of civil liberties and civil rights.<sup>79</sup> Communitarians believe that, in a rights-based society, rights have limits as well as concomitant responsibilities.<sup>80</sup> Underlying the theory of communitarianism is the idea that, as members of a community, we are morally obligated to undertake certain responsibilities, and that these responsibilities may exist without an imminent payback in the form of rights.<sup>81</sup> In other words, communitarianists recognize that individual rights cannot be absolute, but must be tempered by that which is in the best interest of the community,<sup>82</sup> which in this case is the legal profession and all those who are governed by our system of justice. The court in *Hale* applied a communitarian-type rationale by choosing first to recognize, and then second to value, the civil rights of those who come in contact with the legal profession, as well as by choosing to value the sanctity of the legal profession and its goal of administering justice.

### *C. Balancing First Amendment Rights With Other Constitutional Interests*

The First Amendment co-exists with other rights in our Constitution—specifically, the Fourteenth Amendment, which obviously was

78. See MATSUDA ET AL., *supra* note 44, at 79.

79. Linda E. Fisher, *A Communitarian Compromise On Speech Codes: Restraining the Hostile Environment Concept*, 44 CATH. U. L. REV. 97, 122-25 (1994) (discussing the merit of campus speech codes and arguing that in the academic community, justice is attained when the institution balances the rights and needs of all of the members who comprise the academic community).

80. Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 650 (1995).

81. *Id.* at 653.

82. *Id.* at 654.

added to our Constitution after the First Amendment. Prior to the adoption of the Fourteenth Amendment, the United States Constitution was interpreted to permit essentially all types of racist conduct by the states. States were free to adopt laws that furthered the interests of whites while sacrificing the rights and interests of non-whites. The Fourteenth Amendment necessarily restricted the states' rights to elevate the First Amendment rights of whites over the equality rights of non-whites. A basic maxim of statutory construction provides that to the extent that a prior provision of a positive rule of law conflicts with a subsequent provision, the prior provision must yield to the subsequent provision.<sup>83</sup> This canon reasonably presumes that the drafters of the rule of law were aware of the prior provision and therefore must have intended the subsequent provision to limit the prior one to the extent that the two provisions cannot be reconciled.<sup>84</sup> This elementary canon of statutory construction is no less applicable to our Constitution than it is to statutes enacted by Congress.<sup>85</sup> States should not permit First Amendment principles to impede the state's effort to eradicate racial discrimination in the administration of justice.<sup>86</sup> Moreover, the First Amendment should not be used as a sword to cut away Fourteenth Amendment rights held by the group of people for whom the Fourteenth Amendment was deemed necessary. If a state permits self-proclaimed racists to administer justice within that state, the state is elevating the interests of free speech over the state's interest in providing a system of justice free from racism. The state may also be denying equal protection of the law to the group of people who would be the obvious targets of lawyers' racism.<sup>87</sup>

Synthesized to their core, the cases applying the moral character requirement can be understood to hold that a candidate for admission to the bar is required to prove by clear and convincing evidence that he is honest, fair, and respectful of both the laws of this nation and the rights of others. Surely reasonable minds would agree that an applicant who advocates white supremacy through such notions as racial disenfranchisement, racial segregation, the denial of employment based on race, and even the deportation of all non-white United States citizens does not demonstrate respect for the rights of

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83. 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51.02 (6th ed. 2000).

84. *Id.*

85. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) (restating the holding of *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), that the Eleventh Amendment to the Constitution is necessarily limited by the enforcement provisions of the Fourteenth Amendment).

86. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

87. This argument is premised upon a group justice view of the Fourteenth Amendment that our current Supreme Court likely would refuse to adopt.

non-white people, nor a willingness to treat such people fairly. Accordingly, the unwillingness to deal fairly with non-whites and the lack of respect for the rights of such persons that render white supremacists such as Matthew Hale deficient in the area of moral character as that term has been applied to lawyers means he is thereby unfit to be a lawyer. At the heart of the moral character inquiry is the desire by bar authorities to ascertain whether the candidate is someone who can be trusted with the power of lawyers<sup>88</sup> and who will treat people fairly so that “justice” is done. Bar authorities simply cannot trust that a racist lawyer will fairly administer justice to our citizens of color.

Supporters of white supremacist lawyers will undoubtedly point out that a lawyer need not subscribe to or believe in all the laws of our country. A Catholic applicant is not excluded from bar membership because she opposes abortion or the death penalty, both of which are legal in our country. Indeed, a lawyer need not support abortion rights laws or the imposition of the death penalty in order to be admitted to the bar. However, neither abortion nor the death penalty are core values of the legal profession. Unlike abortion or the death penalty, equal justice is a core value of the legal profession. Acceptance of and adherence to this core value are appropriate criteria for entry into the legal profession. All persons who desire to become an officer of the court must subscribe to the core values of the profession. An applicant who is not committed to equal justice for all is necessarily lacking the requisite moral character to become a lawyer because that applicant cannot demonstrate that he is fair and respectful of the rights of other people regardless of their race. If the applicant cannot demonstrate a commitment to equal justice for all, that applicant is not qualified to be an administrator of justice in a system of justice that is founded upon and committed to such a core value. A lawyer who is anti-abortion or anti-death penalty is qualified to administer justice because her political position or belief does not demonstrate a lack of commitment to the core values of the profession, which are competence, loyalty, confidentiality, and equal justice for all. A lawyer must respect the rights of our citizenry. Our Fourteenth Amendment grants all of our citizens the right to equal protection under the law. This right has been interpreted to mean that a person is entitled to fair and non-discriminatory administra-

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88. Lawyers have more power than laypeople. Lawyers have the power to initiate civil lawsuits or criminal charges and to compel the appearance of witnesses and the production of documents. Lawyers even have the power to gain access to certain venues not open to the public.

tion of the law.<sup>89</sup> A white supremacist does not respect the rights of other people unless those people are purely white. This lack of respect for the basic human rights of all people, a concept so fundamental to most organized governments of the world,<sup>90</sup> makes the white supremacist lack the moral character required for all lawyers.

#### D. *Serving Two Masters*

The wisdom of *Matthew 6:24* is infinite. “No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to one, and despise the other.”<sup>91</sup> Hale’s religious and/or personal beliefs require him to use his profession and its instrumentalities, principally the courts, to engage in discriminatory treatment of non-whites, yet the profession that he sought to enter is charged with administering equal justice and prohibits discriminatory treatment based on race. In essence, Hale seeks to serve two masters—his racist “religion” and the legal profession.

Lawyers are not merely hired guns who advocate their client’s position. Lawyers are also officers of the court and thereby public servants. Even a lawyer who has a “private practice” is a public servant—the public has entrusted him with the power of being a lawyer. It is the public that has awarded him the title “officer of the court” and the monopolistic privilege of administering justice. As such, a lawyer has certain responsibilities to the public. Many of those responsibilities are codified in the rules of professional conduct adopted by the jurisdiction in which the lawyer practices. The rules of professional conduct arguably establish the ethical floor beneath which no lawyer should fall. The rules outline the duties of a lawyer, which range from loyalty to the client to the duty of candor to the tribunal. The rules of professional responsibility proscribe certain conduct as unprofessional and therefore subject to discipline. A lawyer cannot pick and choose which of the rules he or she will follow. Accepting the rules and agreeing to adhere to them is an all-or-nothing proposition. To the extent that the lawyer’s personal morality conflicts with rules

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89. See *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a state that allows a lawyer to prevent a black person, on account of his or her race, from serving as a juror in the administration of justice violates the Equal Protection Clause).

90. See Stephanie Farris, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT’L L. 1, 5 (1996) (noting that the international community has declared that there are certain fundamental “Truths,” one of which is that all people are created equal and deserve equality and non-discrimination). Professor Farris cites various international human rights instruments that convey this declaration, including but not limited to Article 19 of *The Universal Declaration of Human Rights*, G.A. Res. 217 A(III), at 71, U.N. Doc. A/810 (1948), and the *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976. See Farris, *supra*, at 5 n.21.

91. *Matthew 6:24* (King James).

of professional conduct, the latter wins.<sup>92</sup>

If admitted to the bar, Matthew Hale, like all lawyers, would have certain “binding professional role obligations”<sup>93</sup> that would directly conflict with his personal and/or religious obligations as leader of the World Church. Lawyers should strive to promote equality in the legal system.<sup>94</sup> This aspirational goal of lawyers would be ignored, if not expressly violated, by the white supremacist lawyer. More importantly, the white supremacist lawyer is likely to violate the non-aspirational rules of law governing lawyers. If an applicant’s religious canons mandate that the individual engage in conduct that violates the law of lawyering, that individual is presented with a dilemma and must choose which master he or she will serve, for it will not be possible for such an individual to comply with his or her religious canons and be a lawyer if those religious canons command conduct that will violate a rule of professional responsibility.

Thus, if an applicant’s religious beliefs mandate conduct that is contrary to the ethical obligations of an attorney, it is both fair and necessary to exclude such a person from the profession for the purpose of preserving the integrity of the legal system as a whole. Matthew Hale was faced with this very dilemma—he wanted to serve two masters: the World Church and the legal profession. Hale’s sworn pledge to the profession to uphold the laws of this country, including the rules of professional conduct, would have been in direct opposition to the canons of his church because many jurisdictions now prohibit lawyers from participating in discriminatory conduct in the management or operation of a law practice.<sup>95</sup> Hale practiced a re-

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92. Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 618-19 (1986) (arguing that individual personal moral autonomy is limited once that person becomes a lawyer).

93. See Wilkins, *supra* note 21, at 1580.

94. Phoebe A. Haddon, *Education for a Public Calling in the 21st Century*, 69 WASH. L. REV. 573 (1994) (asserting that lawyers have a professional obligation to promote equality in the legal system); see also MODEL RULES OF PROF’L CONDUCT pmbl. (as revised by the Ethics 2000 Commission and adopted by the ABA House of Delegates at its February 2002 meeting). The preamble provides that “all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure [adequate] legal counsel.” See also *id.* R. 6.1.

95. CAL. R. PROF’L CONDUCT R. 2-400 (prohibiting discriminatory conduct in a law practice and providing in part that a member of the bar in the management or operation of a law practice “shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in: hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or accepting or terminating representation of any client”); see also CAL. BUS. & PROF. CODE § 125.6 (West 2003) (permitting the state to discipline any licensed attorney who refuses to perform legal services because of the potential client’s “race, color, sex, religion, ancestry, disability, marital status, or national origin”). Other jurisdictions have also adopted anti-discrimination rules. See, e.g., FLA. R. PROF’L CONDUCT R. 4-8.4(d); IDAHO R. PROF’L CONDUCT R. 4.4(a); ILL. SUP. CT. R. 8.4(a)(5); MICH. R. PROF’L CONDUCT R.

ligion that mandates discriminatory conduct against non-whites. Hale's "religion" forbids him from hiring non-whites and mandates that his actions promote white supremacy, not racial equality.<sup>96</sup> If the bar ignored his commitment and intended adherence to the racist precepts of the World Church, it would render the oath that we take as lawyers meaningless.<sup>97</sup> Lawyers affirm to uphold the Constitution and promise to not maliciously hinder the cause of any person. If facts in the record demonstrate that an applicant lacks sincerity in professing a willingness to abide by the attorney oath, such facts may serve as the basis for denial of admission to the profession.<sup>98</sup> If the candidate for admission is a devout racist who has pledged to do everything in his power to promote the white race and to subjugate all others, bar authorities are justified in doubting that applicant's declarations of willingness to abide by the attorney's oath.

Ignoring the fact that a bar applicant engages in racist practices is tantamount to ignoring the fact that an elementary school teacher applicant admittedly enjoys virtual child pornography.<sup>99</sup> Does the fact that the teacher has no criminal record for engaging in real child

6.5; MINN. STAT. R. PROF'L CONDUCT R. 8.4; N.J. R. PROF'L CONDUCT 8.4(g); N.M. R. PROF'L CONDUCT R. 16-300; N.Y. CODE PROF'L RESPONSIBILITY DISCIPLINARY R. 1-102(A)(6); OHIO REV. CODE ANN., CODE PROF'L RESPONSIBILITY R. 1-102; R.I. SUP. CT. R. PROF'L CONDUCT R. 8.4(d); TEX. GOV'T CODE ANN. R. 5.08; WASH. R. PROF'L CONDUCT R. 8.4(g).

96. The World Church canons preclude a member/believer from hiring African-Americans. BEN KLASSEN, 2 NATURE'S ETERNAL RELIGION: THE SALVATION (1992) (see *Chapter 4, The 16 Commandments*) [hereinafter THE SALVATION]. In its writings, the World Church utilizes the pejorative term "niggers," which, given its historical usage and meaning as well as the context in which it is used, has been interpreted by this author to be an intended reference to African-Americans.

97. Lawyers in many jurisdictions take an oath similar to the following:

I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity, as well as to the court as to the client, that I will use no falsehood, nor delay the cause of any person for lucre or malice.

42 PA. CONS. STAT. § 2522 (2000). Any person refusing to take the oath or affirmation shall forfeit his office. *Id.*

98. See *In re Roots*, 762 A.2d 1161 (R.I. 2000) (denying an applicant admission to the Rhode Island bar based in part on the fact that the applicant's racist writings demonstrated insincerity in professing a willingness to take and abide by the attorney's oath).

99. Absolutists argue that virtual child pornography, which is computer-generated images of children engaging in sexual acts, is protected by the First Amendment and is not subject to regulation because the pornography does not use real children and therefore does not afford the state the same harms analysis as pornography that utilizes real children. Child advocates counter this argument by arguing that children are harmed by even virtual pornography because permitting such material promotes a culture that often leads to pedophilic conduct by those who indulge in child pornography. The U.S. Supreme Court recently sided with the more absolutist view by holding that Congress cannot ban virtual child pornography. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (an opinion from which Justices O'Connor, Rehnquist, and Scalia dissented). For an enlightening discussion of how pornography is the practice of sex discrimination that should not be protected by the First Amendment, see Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

pornography or pedophilic conduct mean that we can entrust our children to this person? Do we cite to the First Amendment to protect the right of the teacher to work in our schools? Not if we value our children enough to protect them from the risk of harm of a potential pedophile. If there are facts in the record that demonstrate that an applicant lacks sincerity in professing a willingness to abide by the attorney oath, such facts may serve as the basis for denial of admission.<sup>100</sup> Because Hale's religious beliefs mandate racist discriminatory practices that would violate the rules of professional responsibility, his beliefs cannot be reconciled with the rules of our profession or the oath required by attorneys. Accordingly, this impossibility of reconciling the mandates of the two sets of canons supports the decision to deny Hale and other white supremacists admittance to the bar.

Even jurisdictions that do not have a rule expressly precluding discriminatory conduct by a lawyer may still impose discipline for such conduct under subsection (d) of the general misconduct rule of the *Model Rules of Professional Conduct*<sup>101</sup> or subsection (5) of Disciplinary Rule 1-102(A) of the *Model Code of Professional Responsibility*.<sup>102</sup> Those subsections prohibit a lawyer from engaging in conduct that is prejudicial to the administration of justice. Discriminatory conduct by a lawyer is prejudicial to the administration of justice because it causes the public to lose confidence in the system and it renders the system unfair.<sup>103</sup> Hence, such conduct would violate the rules of professional responsibility even in the absence of an explicit anti-discrimination rule.<sup>104</sup>

Devilish advocacy could perhaps force one to argue that a bar applicant such as Hale could legitimately hold these beliefs and still respect the rights of non-whites while practicing law. Hale supporters may ask, Why do we assume that Hale will violate the rules of professional conduct in his role as a professional? Can't Hale set aside his personal hatred and the World Church mission for purposes of

100. *In re Roots*, 762 A.2d 1161.

101. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2001).

102. MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(5) (1981).

103. *In re Goodfarb*, 880 P.2d 620, 621-22 (Ariz. 1994) (finding the judge's use of racial epithets to be prejudicial to the administration of justice because it caused many citizens to lose faith in the judge's judgment).

104. See *In re Williams*, 414 N.W.2d 394, 398-99 (Minn. 1987), *appeal dismissed sub nom. Williams v. Lawyers Prof'l Responsibility Bd.*, 485 U.S. 950 (1988) (publicly reprimanding a lawyer for his use of a racial slur against a Jewish adversary at a deposition and holding that such conduct violated rule 8.4(d) of the *Minnesota Rules of Professional Conduct*); see also *In re Stevens*, 645 P.2d 99 (Cal. 1982) (censuring a judge for repeated use of racial epithets that the court found to be prejudicial to the administration of justice); *People v. Sharpe*, 781 P.2d 659, 660 (Colo. 1989) (holding that a prosecutor who used racially hostile language to refer to a Hispanic defendant violated DR1-102(A)(6) of the *Colorado Rules of Professional Conduct*); *Florida Bar v. Uhrig*, 666 So. 2d 887 (Fla. 1996) (holding that an attorney violated rule 4-8.4(d) of the *Rules Regulating the Florida Bar* by mailing a racially insulting letter to an opposing party who was a minority).

practicing law and administering justice?<sup>105</sup> This argument makes several assumptions that may lack veracity. Perhaps the most interesting assumption lurking behind this question is the assumption that Hale could and would set aside his racist beliefs and practices while practicing law. By making this assumption, those who support allowing white supremacists to be lawyers demonstrate that they would rather risk the civil rights of all non-white people before possibly restricting the liberties of a few white people. They also assume that the applicant who has adopted racist religious beliefs has done so only for purposes of his private life and has decided that his religious beliefs do not apply to his professional life, or that the applicant can serve both masters—the profession and the religion. Those who are serious about their religious beliefs try to apply the commandments of their faith to all aspects of their lives.<sup>106</sup> Religious beliefs may be at the core of who the person is, and for white supremacists, racism is at the core of their being. Thus, we cannot assume that a white supremacist applicant will ignore the mandates of his racist religious canons while practicing law.<sup>107</sup>

Assuming a white supremacist did promise to set aside his racist agenda while practicing law—and we could somehow be assured that this promise was not illusory and would be kept—there would still be problems with admitting such a person to the bar. As lawyers, we are charged with protecting the public and the image of the profession. If a white supremacist is admitted to the bar and thereby given the title of “officer of the court,” the image of the profession would be tarnished. No longer would officers of the court be perceived by the public as fair-minded, respectable ministers of justice. Public confidence in the profession would be diminished.<sup>108</sup>

Even if a candidate promised to disavow racist canons while practicing law, such a promise might be no more than chimerical, and the risk of harm is not worth taking. Bar authorities are justified when excluding an applicant who poses a significant risk of engaging in hidden racial discrimination in the practice of law. Bar authorities, like the rest of us, know that a racist agenda can be carried out in a

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105. In the *Hale* decision from the Illinois Supreme Court, Justice Heiple seemed to be concerned with this possibility in his dissent. See *In re Hale*, 723 N.E.2d 206, 206-07 (Ill. 1999).

106. Indeed the World Church commandments mandate that Hale apply his racist beliefs to all aspects of his life, including his professional life. See *THE SALVATION*, *supra* note 96.

107. Indeed, Hale appeared unwilling to disavow the World Church canons even within the confines of law practice. Ironically, if Hale were willing to violate the canons of the World Church while practicing law, such a willingness to violate his own religious canons when doing so would promote his self-interest in obtaining a law license would raise serious concerns about his willingness to violate ethical canons of the legal profession when doing so would promote his racist agenda.

108. See Part IV regarding harm to the profession and accompanying footnotes.

covert manner in which pretextual rationales for racist conduct present themselves not as pretextual at all, but rather as plausible and rational reasons for conduct ultimately deemed race-neutral. Because racism can be perpetrated without detection, it poses an especially insidious threat to the cause of equal justice. Thus, the challenge for bar authorities is to determine who cannot reasonably be trusted to follow the dictates of equal justice if admitted to the bar. To determine whether a candidate for admission to the bar is likely to violate an ethical canon if admitted to the bar, bar authorities should look to the applicant's past conduct. If the applicant's conduct demonstrates firmly held beliefs that are incompatible with practicing law, exclusion from the bar is justified. In Hale's case, the finding was easily made. Faced with the evidence of Hale's active and overt racism, a conscientious bar examiner could not fail to conclude that Hale's odious personal convictions were at war with the interests and obligations of the legal profession. Thus, the inquiry is not simply one of kind, but of degree.

Hale's supporters overlook the gate-keeping function of the bar authorities. The primary responsibility of bar authorities is not to punish lawyers who engage in wrongdoing, but rather to safeguard the administration of justice and to protect the public from the misconduct of lawyers.<sup>109</sup> The process of screening for moral fitness is a prophylactic measure to prevent injury to the public and the legal profession. "To achieve '[t]he greatest protection for the public, the courts, and potential clients,' bar spokesmen have advocated 'eliminating the diseased dogs before they inflict their first bite.'"<sup>110</sup> Whether a white supremacist or an applicant who has embezzled funds from a former employer, the bar authorities cannot determine with certainty that the applicant will in fact violate a canon of professional ethics if admitted to the bar. Nonetheless, bar authorities use such information as an indicator of the applicant's potential for harming the public and/or the profession in an effort to prevent future harm to our system of justice, which includes clients, the courts, and the image of the profession. The legal profession as a self-governing body has therefore determined that pre-admission conduct can be used to indicate whether an applicant would violate disciplinary rules at some point in the future if admitted to practice.<sup>111</sup> If bar authorities abandoned these prophylactic measures, the profession could admit all applicants and theoretically disbar them later when and if they violate an ethical canon.

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109. See *Statewide Grievance Comm. v. Fountain*, 743 A.2d 647, 650 (Conn. App. Ct. 2000) (citing *In re Durant*, 67 A. 497 (Conn. 1907)).

110. Rhode, *supra* note 25, at 509.

111. See generally *McChrystal*, *supra* note 22.

This approach is problematic for several reasons. First, once admitted, a lawyer lacking in moral character may commit many violations of the ethical rules before someone finally reports him to the disciplinary authorities. "The vast majority of attorney misconduct remains undetected, unreported, or unprosecuted, and bar disciplinary authorities have proved highly reluctant to withdraw individuals' means of livelihood. Given the difficulties of ex post policing, entry restrictions appear to be a logical means of maximizing public protection."<sup>112</sup> Due to the stealthy nature of racism, a bar candidate who practices racism and is admitted to the profession is less likely to have such misconduct detected than a lawyer who steals client funds. Applicants are frequently denied admission to the bar if their past conduct indicates that they cannot be entrusted with client funds.<sup>113</sup> Theft of client funds is a tangible, traceable, identifiable form of misconduct that is more easily identified and more easily proven than misconduct that is committed in the form of racism. Conduct that may appear racist to one person may appear benign to another. Moreover, even if conduct appears racist at first blush, it can often be explained away by some non-racist, well-reasoned rationale for the conduct. Hence, it is because misconduct in the form of racism or racial discrimination is too hard to detect and even harder to prove that the prophylactic measure of denying admission is required.

Because much misconduct goes unreported or undetected, many members of the public may be harmed before bar authorities are informed of the lawyer's misconduct. By screening candidates for admission, we seek to avoid harm to the public and to preserve public confidence in the profession. Accordingly, bar authorities should screen out hardened racists to ensure confidence in the legal profession in the minds of people who question whether the legal profession is committed to treating whites and non-whites equally. Taking this paternalistic approach of trying to weed out the bad eggs helps assure the public that our system of justice is fair and not corrupt, thereby improving the image of the profession and the public's faith in our system of justice.

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112. See Rhode, *supra* note 25, at 509.

113. See, e.g., *In re Mustafa*, 631 A.2d 45 (D.C. 1993) (denying admission to a candidate for the bar of the District of Columbia because the candidate, while a student in law school, embezzled funds from his law school's moot court program).

### III. LAWYERS SHOULD NOT EXEMPT THEMSELVES FROM ANTI-DISCRIMINATION LAWS

Hale informed the Illinois Committee attempting to assess his character that he would probably never represent a black client.<sup>114</sup> One should not be surprised that a white supremacist who feels no remorse or sense of loss for the death of several non-white people at the hands of one of his followers would not want to represent a black client.<sup>115</sup> One may be surprised to learn that historically lawyers have had the autonomy to choose which clients to represent, and that this autonomy permitted the lawyer to deny representation on the basis of the client's race.<sup>116</sup> Those who argue against a prohibition on such race discrimination by lawyers argue that an anti-discrimination rule against lawyers would be illusory because it would force lawyers to lie about the reason for declining the representation. Indeed, Harvard Law Professor Martha Minow acknowledges that in the face of an anti-discrimination rule, lawyers are likely to offer pretextual reasons to cover up their practice of racial discrimination.<sup>117</sup> One could argue that there is no problem with Matthew Hale refusing to represent black clients because there are other lawyers who will provide representation to such clients, and therefore the clients are not harmed by the denial of representation unless Matthew Hale is the last lawyer in town.<sup>118</sup> Moreover, it could also be argued that blacks

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114. See Transcript of Hearing on Application of Matthew Frederick Hale for Admission to the Illinois Bar (Apr. 10, 1999) at 205, *In re Hale*, 723 N.E.2d 206 (Ill. 1999), *cert. denied*, 530 U.S. 1261 (2000) (on file with author).

115. See *Hate.com: Extremists on the Internet* (HBO television broadcast, Oct. 23, 2000) (on file with author) (featuring Hale's statement that he feels no remorse when black people are murdered).

116. See Jennifer Tetenbaum Miller, *Free Exercise v. Legal Ethics: Can a Religious Lawyer Discriminate in Choosing Clients?* 13 GEO. J. LEGAL ETHICS 161, 165-66 (1999) (noting that traditionally lawyers have held an unencumbered right to decline representation, citing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.2.2, at 573 (1986)). See also CANONS OF PROF'L ETHICS Canon 31 (1908), providing that:

[n]o lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants.

117. Martha Minow, *A Duty to Represent? Critical Reflection on Stropnick v. Nathanson Foreword: Of Legal Ethics, Taxes, and Doing the Right Thing*, 20 W. NEW ENG. L. REV. 5, 6 (1998). Professor Minow argues that a rule prohibiting a lawyer from discriminating in the selection of clients will force lawyers to lie and proffer pretextual reasons for denying the potential client representation. *Id.* While Professor Minow's assumption is probably correct to some degree, the tendency of lawyers to lie in this situation should not serve as a roadblock to protecting the rights of the clientele of the legal profession. If Professor Minow's reasoning were adopted, we would need to abolish almost all anti-discrimination laws, including the rule proffered in *Batson*, which is frequently circumvented through pretextual rationales which Professor Minow accurately labels as lies.

118. See Hodes, *supra* note 19, at 990 (outlining the "last lawyer in town" argument and arguing that lawyers have moral autonomy to choose which clients to represent).

should be grateful that a white supremacist lawyer would refuse to represent them given the harm that could be imposed upon the black client by the racist lawyer.<sup>119</sup>

While it is true that lawyers have historically enjoyed the privilege of determining which clients to represent, the public policy promoted by such lawyer autonomy is the promotion of zealous advocacy, arguably because a lawyer will not be as zealous in the representation of a client if the lawyer either disbelieves in or disapproves of the client or the client's cause. Lawyer autonomy in client selection still exists, but it is not absolute. Limiting lawyer autonomy in client selection is not a new or novel concept. Lawyer autonomy in client selection is restricted already by the conflict rules which prohibit a lawyer from representing a client when such representation would create a conflict of interest between the potential client and an existing client or the lawyer's own personal interests.<sup>120</sup> Hence, the privilege of lawyer autonomy in client selection must be reconciled with both society's and the profession's commitment to equal justice for all, which translates into a commitment to eradicate racial discrimination in the administration of justice, which necessarily includes the selection of clients. Lawyers should consider only legitimate factors in declining representation such as the merits of the case, the client's ability to pay the fee charged, and even whether the client's cause is morally repugnant to the lawyer. By way of example, it is perfectly reasonable for a lawyer to decline representation because the lawyer believes that she will be unable to prove the potential client's case. A lawyer who does not believe that the client's case has merit would arguably not be a zealous advocate for the client. Likewise, lawyers are not expected to provide representation without adequate compensation unless the lawyer is acting to meet her *pro bono publico* obligations.<sup>121</sup> Accordingly, it is reasonable to decline the representation of a client who is unable to pay for the services of the lawyer. Again, the argument is that a lawyer who is forced to represent a client without compensation might be less zealous in the representation.<sup>122</sup>

Finally, the ethics rules permit discrimination in client selection where the lawyer finds the client's cause morally repugnant. Again, the rationale behind this rule is that the lawyer arguably would not be able to represent such a client with zeal. Arguably a lawyer who

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119. Gabriel J. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. NEW ENG. L. REV. 9 (1998).

120. See MODEL RULES OF PROF'L CONDUCT Rs. 1.7, 1.8, 1.9 (2001).

121. See *id.* R. 6.1.

122. Kendra Emi Nitta, *An Ethical Evaluation of Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 909, 932 (1996) (outlining the arguments against mandatory pro bono, including the argument that it would impede zealous representation by the lawyer).

harbors racial hatred for a client would also be less likely to provide competent zealous representation for such client. Nonetheless, client disdain based solely on the immutable characteristic of the race of the client should not be a permissible basis for the denial of representation. Rather than argue that racist lawyers will not provide zealous advocacy, the legal profession should demand that lawyers be capable of providing zealous representation to all without regard to race. Those who cannot do so should not be in the profession. Thus, if we preclude the admission of racists to the bar in the first instance, the profession can uphold its commitment to equal justice for all and ensure zealous representation. In other words, if the profession only admits persons who are committed to the notion of equal justice for all, then the profession need not be troubled by a rule prohibiting discriminatory conduct in the client selection process or in any other aspect of the administration of justice. Hence, the exclusion of white supremacists is necessary to protect the integrity of the profession and to ensure compliance with ethical rules prohibiting discrimination by lawyers in the practice of law.<sup>123</sup> Most importantly, though, the exclusion of white supremacists should be mandated in order to ensure the fair and orderly administration of justice.

#### IV. ADMISSION OF WHITE SUPREMACISTS WOULD BE PREJUDICIAL TO THE PUBLIC, THE LEGAL PROFESSION AND OUR SYSTEM OF JUSTICE

##### A. *Racism Obstructs the Administration of Justice*

Politically or religiously inspired conduct that is prejudicial to the administration of justice can serve as the basis for denying admission

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123. Some may find this argument reminiscent of the arguments made in favor of excluding women from the bar in the case of *Bradwell v. Illinois*, in which the state argued that women lacked the requisite moral character to be lawyers because: (1) they were frail; (2) the legislature did not contemplate their admission; and (3) their clients would not be able to sue them to enforce their contracts because the law at that time would not enforce a contract against a married woman. 83 U.S. 130, 139 (1872) (citing the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), which found that the Fourteenth Amendment applied only to State discrimination against “negroes”). The Court held that excluding women from the bar did not violate the privileges and immunities clause because the power to control:

the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

*Id.* at 139 (citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36). Obviously, *Bradwell* is no longer the law since the Fourteenth Amendment was subsequently interpreted to extend protection to women. The distinction between white supremacists and female candidates for bar admission should be obvious as well. Unlike women, white supremacists are not a protected class under the Fourteenth Amendment. *See, e.g.*, 42 U.S.C. § 2000e-2 (2000) (prohibiting several types of discrimination on the basis of “race, color, religion, sex, or national origin”). Perhaps more importantly, white supremacists pose a more significant risk to the public and the administration of justice than the alleged risk posed by women as articulated in *Bradwell*.

to the bar.<sup>124</sup> Denying admission to an individual whose stated “religious” mission requires the individual in part to transgress the limitations of the law by refusing to represent or hire blacks,<sup>125</sup> for example, is not only reasonable, it is necessary to preserve the integrity of our entire system of justice. “Maintaining public respect for the laws and the courts is essential to the effective administration of justice.”<sup>126</sup> Our profession plays a crucial role in our legal and political order.<sup>127</sup> Thus, any conduct by a lawyer that decreases public confidence in our legal system should be condemned.<sup>128</sup>

How could a lawyer who regards blacks as inherently inferior and undeserving of equal treatment under the law adequately represent a black person? Such preconceived notions about the worth of the client would “likely impair [the lawyer’s] ability to represent the client” and would seriously damage and erode the lawyer-client relationship.<sup>129</sup> This argument assumes, of course, that a white supremacist lawyer would even accept a black client.<sup>130</sup> The *Model Rules* specifically allow a lawyer to refuse to accept a court appointment in circumstances where “the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”<sup>131</sup> Moreover, a lawyer has the right to control his or her own labor, meaning that a lawyer does not have to accept as a client, every person who seeks his services.<sup>132</sup> Thus, a racist lawyer, which I will define in this instance as one whose beliefs mandate discriminatory behavior against non-whites, necessarily will be more likely to discriminate against a black in determining whether to accept that individual’s case. Since he has the intellectual acumen to become a lawyer, he probably will be astute enough to offer a pretextual reason for declining to accept a black client. For example, Hale could deny a black person representation with the explanation that he thinks the case lacked merit or that his current caseload or other commitments would not permit the representation. These rationales are race-neutral on their face and reasonable. In fact, Hale’s real reason for denying the representation may be the race of the potential client. Rather than allow this type of

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124. See McChrystal, *supra* note 22, at 74.

125. See THE SALVATION, *supra* note 96.

126. Elizabeth I. Kiovsky, Comment, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 OHIO ST. L.J. 201, 201 (1986) (citing MODEL CODE OF PROF'L RESPONSIBILITY EC 1-1, 1-5 (1980)).

127. See Wilkins, *supra* note 21, at 1512.

128. See Kiovsky, *supra* note 126, at 201.

129. MODEL RULES OF PROF'L CONDUCT R. 6.2(c) (2001).

130. Matthew Hale admitted that he would probably never represent a black client.

131. MODEL RULES OF PROF'L CONDUCT R. 6.2(c) (2001).

132. THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY PROBLEMS AND MATERIALS 300 (7th ed. 2000); Monroe Freedman, *Must You Be the Devil's Advocate?*, LEGAL TIMES, Aug. 23, 1993, at 19.

subtle and often unprovable discriminatory behavior, bar examiners are correct to not empower white supremacists with a license to practice law.

While some jurisdictions still do not have ethical rules precluding lawyers from refusing to represent an individual based on the race of the would-be client, this author submits that it is morally and ethically improper for a lawyer to refuse to accept a matter if that refusal is based even partially upon the race of the potential client. Indeed, even in the absence of an ethical rule precluding discrimination in the acceptance of clients, such conduct may be illegal under federal, state, and/or local public accommodation laws,<sup>133</sup> as well as 42 U.S.C. Section 1981,<sup>134</sup> which guarantees to blacks the same right to make and enforce contracts as to whites.<sup>135</sup> Thus a lawyer who refuses to enter into a lawyer-client relationship, which is a contractual relationship, solely on the basis of the potential client's race would be violating Section 1981.<sup>136</sup> This "status-based discrimination"<sup>137</sup> undermines the legitimate social purposes underlying the rules regarding client selection. The law governing lawyers has historically permitted a lawyer to choose which clients and causes the lawyer will represent. The reason that the law has granted a lawyer this type of autonomy is so that the lawyer's independent professional judgment will not be compromised by the lawyer's personal beliefs and/or morals that may conflict with the client or the client's legal position.<sup>138</sup> The classic example of such a conflict is the lawyer who is asked to represent a person charged with a sex offense against a child. Many

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133. See Wilkins, *supra* note 21, at 1575-76 (citing *Stropnick v. Nathanson*, 19 Mass. Discrimination L. Rep. 39 (Mass. Comm'n Against Discrimination Feb. 25, 1997), *aff'd*, 1999 WL 33453078 (Mass. Comm'n Against Discrimination July 26, 1999) (finding that a lawyer's office is a public accommodation under the terms of the relevant Massachusetts anti-discrimination statute). For a discussion of whether lawyers should be allowed to decline representation based on the race of the potential client, see Issue One of Volume 20 of the *Western New England Law Review* (1998), which has several essays discussing lawyer autonomy in client selection.

134. 42 U.S.C.A. § 1981(a), (c) (2000) provides in relevant part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other . . . . The rights protected by this section are protected against impairment by *nongovernmental discrimination* and impairment under color of State law.

(emphasis added).

135. *Id.*

136. See *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that Section 1981 of the United States Code prohibits private schools from excluding qualified children solely because they are black).

137. See Wilkins, *supra* note 21.

138. See Hodes, *supra* note 19, at 990.

lawyers would refuse this representation because their own beliefs and morals are so offended by the alleged offense that they would be unable to zealously represent such a client.

Lawyers as administrators of justice stand as an instrumentality of government. The judicial process itself is viewed as government. Lawyers have a government-granted monopoly on the administration of justice in this country which gives them power to affect the lives of others. Racially discriminatory or racially charged behavior by lawyers obstructs the fair administration of justice.<sup>139</sup> Granting a license to practice law to an individual who practices racial hatred and discrimination effectively gives that person more ammunition to add to his arsenal to support his personal race war because a lawyer has more powers and privileges than he had as a lay person.<sup>140</sup> Thus, whether a law office constitutes a public accommodation or not, the profession's commitment to "equal access under law" and "justice for all" is undermined if an individual lawyer is permitted to refuse to represent individuals on the basis of race or other "considerations that have nothing to do with either their moral worth as human beings or the legitimate interests of attorneys," such as the merits of the case.<sup>141</sup>

There is precedent for excluding white supremacists from a profession or occupation. The military has found that active participation in hate groups such as the KKK is incompatible with military service, which requires trust, cohesiveness, and discipline among service members.<sup>142</sup> While the military is easily distinguished from the legal profession due to its status as a separate community,<sup>143</sup> the

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139. See Brenda Jones Quick, *Regulating a Lawyer's Discriminatory Conduct: Constitutional Limitations*, 21 OHIO N.U. L. REV. 897, 911 (1995) (citing *In re Vincenti*, 554 A.2d 470 (N.J. 1989), in which the court held that a lawyer who uttered racial slurs against opposing counsel had undermined the administration of justice). Quick also cites *Gonzalez v. Commission on Judicial Performance*, 657 P.2d 372 (Cal. 1983), which held a judge guilty of misconduct because he had made racially discriminatory remarks to a juror and a defendant. Quick, *supra*, at 911.

140. See L. Ray Patterson, *The Fundamentals of Professionalism*, 45 S.C. L. REV. 707, 716, 719-20 (1994) (noting the power that lawyers have to control the affairs of others and arguing that this power is derived both from the client and the state).

141. See Wilkins, *supra* note 21, at 1581.

142. *Military Forbids Active Role of Soldiers in Hate Groups*, N.Y. TIMES, Sept. 12, 1986, at A25. The military also has limited other activities protected by the First Amendment in an effort to ensure that the military is ready, willing and able to perform its vital role in protecting national security. For example, the military found desecration of the United States flag by a military service member to constitute the military offense of dereliction of duty despite the First Amendment because the military has a compelling government interest in ensuring a respect for duty and discipline among its members. See *United States v. Wilson*, 33 M.J. 797 (A.C.M.R. 1991).

143. See Douglas Daniels, *Freedom of Hate and Service in the United States Coast Guard: Rights vs. Duty*, 9 U.S. A.F. ACAD. J. LEG. STUD. 147 (1998/1999) (describing the distinction between civil and military law based on the view of the military as a separate community).

legal profession, not unlike the military, has a compelling interest in ensuring that its lawyers adhere to the values of the community, one of which is equal justice. Public employers other than the military have attempted with mixed success to deny employment based on membership in a hate group.<sup>144</sup> Thus, police forces that have sought to exclude members of hate groups from their ranks have only been successful when the hate groups in question had been involved in the commission of violent crimes.<sup>145</sup>

### B. *The Parade of Horribles*

A license to practice law is broad and unrestricted. Once admitted to the bar, an individual can pursue many areas of practice, including public service. Indeed, if admitted to the bar, Hale or any other white supremacist could seek a position as a criminal prosecutor. Criminal prosecutors have broad discretion, ranging from the powers to determine who to prosecute and what charges to bring against the accused to the powers to offer a plea bargain or downgrade charges. Already there are questions of whether white prosecutors who claim to be objective are subconsciously abusing this discretionary power in implementing the criminal justice process.<sup>146</sup>

Because prosecutors have such broad discretion and power over the lives of people who become a part of our criminal justice system, a white supremacist cast in such a role would have the power to implement his racist agenda by race-based exercises of discretion in the charging function, plea bargaining process, and in sentencing recommendation. For example, a white supremacist prosecutor could choose to prosecute all blacks charged with a crime to the fullest de-

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144. *Id.* Daniels acknowledges that police and firefighters restrict active membership in hate groups such as the KKK in an effort to avoid biased treatment of those who depend on the crucial services provided by these professions. *Id.* at 157 (citing *McMullen v. Carson*, 568 F. Supp. 937 (M.D. Fla. 1983), in which dismissal of police officer based on officer's active membership in the KKK was upheld). Daniels defines biased treatment by police officers as including unlawful apprehension and/or assault on the basis of race and points to the Rodney King tragedy as evidence of the harm that racist police officers are able to inflict. *Id.* Daniels also points to an incident wherein a firefighter was charged with intentionally allowing two black children to die in a fire to demonstrate the nature and severity of harm that racists in the ranks of the fire department may cause. *Id.* at 157.

145. See *Young v. City of Louisville*, 1993 U.S. App. LEXIS 22647 (Aug. 31, 1993) (citing *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985)).

146. The disproportionate number of black men who are prosecuted, convicted, and sent to jail in this country, along with racist guidelines and practices uncovered in some prosecutors' offices and contextualized by our racist history, have caused many lawyers and scholars to opine that our criminal justice system is racially biased. See Anthony Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999); Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); Sheri Johnson, *Unconscious Racism and Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Richard McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998).

gree possible under the law despite the circumstances of the case and could look for mitigating factors to support a decision to charge white defendants with lesser charges or not at all. The white supremacist prosecutor could also refuse to plea bargain with black defendants. On the surface, this refusal could be supported under the law through an easily proffered non-race-related rationale, but underneath that determination lies the racist belief that blacks are evil and undeserving of leniency, a second chance, or even a fair process. Such abuse would be difficult if not impossible to prove because the law gives the prosecutor this untamed discretion. Not only is the prosecutor's subjective motive virtually impossible to prove, the standard of proof that a minority seeking to challenge an official's implementation of discretion must meet is "exceptionally clear proof."<sup>147</sup> In this circumstance, the black criminal defendant would have no power or legal basis upon which to reject the system's use of the white supremacist as a minister of justice.

It is reasonably foreseeable that Hale or any other white supremacist would be more inclined than the average lawyer to deny black jurors the privilege of serving on a jury, especially in cases involving black criminal defendants charged with victimizing whites. After all, the precepts of Hale's religion mandate that he perform in a manner consistent with what he perceives as best for the white race. Admittedly, there exists positive law that prohibits a lawyer's use of peremptory challenges to exclude jurors based on race.<sup>148</sup> Nonetheless, because discrimination is an intent offense that occurs within the confines of the perpetrator's mind, it is relatively easy to camouflage the offense as permissible action. Lawyers can frequently offer a pretextual reason for excluding a juror that, on its face, is a rational, race-neutral basis for excluding the juror.<sup>149</sup>

Once admitted to the bar, Hale might even be elevated to the

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147. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (rejecting the Baldus study's evidence of the disparate impact that the death penalty has upon blacks).

148. *Batson v. Kentucky*, 476 U.S. 79 (1986).

149. See Tracy M.Y. Choy, *Branding Neutral Explanations Pretextual Under Batson v. Kentucky: An Examination of the Role of the Trial Judge in Jury Selection*, 48 HASTINGS L.J. 577 (1997) (discussing the problem of identifying pretextual reasons for discrimination in jury selection). Examples of explanations that have been accepted by the courts as non-pretextual reasons for striking minority jurors include too much eye contact, too little eye contact, living in public housing, poor attitude, and poor posture and demeanor. See, e.g., *United States v. Tindle*, 860 F.2d 125, 129 (4th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989); *United States v. Mathews*, 803 F.2d 325, 331-32 (7th Cir. 1986), *rev'd on other grounds*, 485 U.S. 58 (1988); *United States v. Forbes*, 816 F.2d 1006, 1010-11 (5th Cir. 1987); *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987); *United States v. Cartledge*, 808 F.2d 1064, 1070 (5th Cir. 1987); see also *Purkett v. Elem*, 514 U.S. 765 (1995); BELL, *supra* note 46, at 552 n.20; Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 97-98 (1990).

bench.<sup>150</sup> If Hale were a judge, affiliation with the World Church would certainly be problematic because of the restraints on affiliation placed on judges by the *Model Code of Judicial Conduct*, which has been adopted in many jurisdictions. The *Code of Judicial Conduct* expressly provides that a “judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.”<sup>151</sup> Arguably this rule restricts a judge’s freedom of expression and/or association under the First Amendment in the same manner as Hale’s denial of admission to the bar. The lawyer or judge must choose her master; she cannot serve both. The commentary to this canon explains the rationale behind the rule. Judges in our system of justice are supposed to be impartial arbiters,<sup>152</sup> and one of the reasons that we give deference to the decisions of judges is because we perceive them as being fair and impartial.<sup>153</sup>

If a judge is also a Klansman or affiliated with any white supremacist group, our perception of that judge’s impartiality is impaired because we quite logically think that he is unable to be impartial when presiding over matters presented by non-white lawyers in-

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150. The argument that Hale’s racist views would act as a barrier to an appointment or election to the bench is not persuasive in light of the political success of lawyers for whom a history of racist politics has not been a hindrance to judicial appointment. The case of Charles Pickering is instructive. Judge Pickering, who was recently nominated for appointment to the Court of Appeals for the Fifth Circuit from his current district court judgeship, wrote a law review article advocating an amendment to Mississippi’s anti-miscegenation law to strengthen the law. See Charles W. Pickering, *Criminal Law, Miscegenation, Incest*, 30 MISS. L.J. 326 (1959). Many opposed Judge Pickering’s appointment due to his allegedly racist past. See *Our Opinions: Extremist judge is unfit to sit on appeals court*, ATLANTA J.-CONST., Feb. 7, 2002, at A17 (noting that Pickering has offered no apologies for a law review article he wrote in 1959 suggesting ways to strengthen Mississippi’s anti-miscegenation law and mentioning his support for a segregationist organization in the 1970s). But see David Firestone, *Blacks at Home Support a Judge Liberals Assail*, Feb. 17, 2002, at <http://query.nytimes.com/gst/abstract.html?res=FB0E10FE3A5B0C748000AB0894DA404482> (last visited Mar. 16, 2003) (on file with author) (reporting that some blacks in Laurel, Mississippi, the Judge’s hometown, do not see him as racist). Despite the fact that Judge Pickering’s nomination to the Fifth Circuit was defeated, he still holds a position on the bench, and Pickering has since been re-nominated to the Fifth Circuit by President George Bush. See *Dickering over Pickering*, N.Y. POST, Jan. 19, 2003, at 26. This author makes no judgment about whether Judge Pickering is a racist, but merely acknowledges that serious questions exist regarding his racial views and actions.

151. MODEL CODE OF JUDICIAL CONDUCT Canon 2(C) (2001).

152. See *id.* Canon 2, cmt; see also Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949 (1996) (outlining the law interpreting Canon 2 and acknowledging that the Canon requires judges to be fair and impartial).

153. See MODEL RULES OF PROF’L CONDUCT pmb1. (2001) (as adopted by the ABA House of Delegates at the February 2002 Meeting and stating in relevant part that “legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority”); see also *id.* R.6; MODEL CODE OF JUDICIAL CONDUCT Canon 1, cmt. (2001) (“Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges.”).

volving non-white litigants or involving issues of race.<sup>154</sup> Since all white supremacist groups require members to be white, such groups without question practice discrimination. One might ask how a judge's passive membership in a white supremacist group affects the judicial system if that judge swears that he is ready, willing, and able to put his personal beliefs aside for the purpose of fulfilling his duties as judge. The judge's passive membership in a white supremacist organization expresses to the public that the judge approves of invidious discrimination against non-white persons. Thus, the judge's affiliation with such an organization manifests bias on behalf of the judge, thereby creating the "appearance of impropriety" and diminishing "public confidence in the integrity and impartiality of the judiciary."<sup>155</sup>

The *Model Judicial Code* also mandates that judges perform their judicial duties without bias or prejudice.<sup>156</sup> The commentary to the canon explains that a "judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute."<sup>157</sup> Hence, a commitment to non-bias on behalf of those administering justice is essential to preserving the integrity of our judicial process.

Although lawyers, as officers of the court, do not have to meet the standard of impartiality that judges do it would seem that they too should not appear unfair or tainted by discriminatory beliefs and/or affiliations. Lawyers tainted by such discriminatory views would also give the appearance of impropriety in our system of justice. As officers of the court, lawyers have been entrusted with certain unique powers. Even if we assume that a Klansman can set his white supremacy beliefs aside for purposes of practicing law, do we not still have a perception problem from the perspective of the public, which has delegated the duty of administering justice to lawyers? Awarding a license to practice law to a Klansman would diminish the public's

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154. See KENNEDY, *supra* note 64, at 61 (citing *United States v. Brown*, 539 F.2d 467, 468 (5th Cir. 1976), wherein a judge who used a racial epithet was found to have called into question his own ability to be fair and impartial). The question of whether an organization practices invidious discrimination is answered by looking at such factors as "how the organization selects its members," meaning whether the organization arbitrarily excludes people based on race, religion, sex, or national origin. MODEL CODE OF JUDICIAL CONDUCT Canon 2(C), cmt. 1 (1990).

155. *Id.* Canon 2(C), cmt. 2.

156. MODEL CODE OF JUDICIAL CONDUCT, Canon 3(B)(5) (2000), requires judges to perform their duties "without bias or prejudice." In pertinent part, Canon 3(B)(5) states:

A judge shall perform judicial duties without bias or prejudice. 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 . . . and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

*Id.*

157. *Id.*

confidence in the integrity and dignity of our profession, especially the confidence of those whom white supremacists deem inferior.

Some may wonder why Hale is distinguishable from the rest of us who may hold “unpopular” views and bias yet still have the privilege of sitting at the bar. Hale’s views are not merely “unpopular,” many of them have been excluded from the basis of our social and political organization by the Constitution. While I will concede that we all bring our own personal bias and idiosyncracies to the bar, none of us should be committed to promoting racial discrimination or racial violence, both of which are promoted by white supremacists. A white supremacist, unlike the rest of us, has at the core of his very being a burning passion to inflict harm<sup>158</sup> upon non-white people. Unlike the white supremacist, we, as members of the bar, are committed to the core value of equality and justice for all, and we strive to implement those notions in our practice despite the fact that we may from time to time fall short of our efforts. It is our desire and our effort to achieve equality and justice for all that distinguishes the rest of us from the Matthew Hales of society.

*C. Admitting Racists to the Bar Undermines  
Equal Protection For All*

The supreme law of our land, the Constitution of the United States, ensures justice for all and equal protection under the law for all citizens regardless of their race, creed, or national origin.<sup>159</sup> Measures designed to ensure equal protection in the enforcement of the law by the police are necessary in light of the genre of narrative that locates and contextualizes our equal protection jurisprudence.<sup>160</sup> Likewise, measures designed to ensure equal protection in the administration of justice by lawyers is necessary in light of our history. Moreover, such measures are justified by the compelling governmental interests of ensuring safety and equal protection of its citizenry under the law, and are therefore consistent with the guarantees of the First Amendment.<sup>161</sup>

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158. Harm is not limited to physical violence, but also includes the damaging economic effects of discriminatory practices in employment, housing, and other spheres of human activity.

159. U.S. CONST. amend. XIV.

160. See Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role For Civilian Review Board*, 28 COLUM. HUM. RTS. L. REV. 551 (1997) (chronicling the problem of racial profiling by the police and arguing that the Civilian Review Board could be an effective tool for preventing and remedying racial profiling).

161. See Robin D. Barnes, *Blue by Day and White by (K)Night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079 (1996) (arguing that hate group restrictions for police and military members are necessary and legal under the First Amendment).

Granting a law license to a white supremacist would violate the spirit if not the letter of the Fourteenth Amendment, which mandates equal protection under the law. Once admitted to the bar, a lawyer becomes an officer of the court in the state in which he or she is licensed. In some jurisdictions, lawyer oaths acknowledge this status of lawyers by referring to the lawyer as an officer of the state or as holding an office within the state.<sup>162</sup> Moreover, the Proposed *Model Rules of Professional Conduct*, as proposed by the Ethics 2000 Commission established by the American Bar Association, has acknowledged the unique status of lawyers by defining a lawyer as an “officer of the legal system and a public citizen.”<sup>163</sup> It has been held in the context of liquor licensing that the state’s issuance of a license does not constitute “state action” as that term has been defined in Fourteenth Amendment jurisprudence.<sup>164</sup> Nonetheless, the state’s issuance of a license to practice law is distinguishable from the issuance of a liquor license. The licensing of a lawyer has significantly graver consequences than licensing an establishment to serve alcohol. The licensing of a lawyer makes that person an officer of the state and arguably a state actor because that person now has the power to administer justice, which is a function of the state. Conversely, selling liquor is not a function of the state.

Even if a lawyer is not in all respects a state actor, a lawyer has the power to transform herself into a state actor. For example, a lawyer who chooses to work for the government, such as a prosecutor, is clearly a state actor for purposes of the Fourteenth Amendment. Even a lawyer in private practice may be a state actor when that lawyer exercises state-granted powers.<sup>165</sup> Thus, by issuing a license to practice law, a state is creating a state actor. Accordingly, the act of creating a state actor must itself be state action. Even if a lawyer is not a state actor, the act of licensing a person to practice law may

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162. See, e.g., N.J. STAT. ANN. § 2A:13-1 (West 2001) (requiring attorneys to “solemnly promise and swear” that they will “perform the duties of [their] office faithfully”).

163. Ethics 2000 Report, *Preamble: A Lawyer’s Responsibility* (as adopted by the House of Delegates at the February 2002 Meeting), available at <http://www.abanet.org/cpr> (last visited Apr. 9, 2002) (on file with author) (defining a lawyer as “a member of the legal profession, a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice”).

164. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that the state’s issuance of a liquor license to a private club did not constitute state action under the Fourteenth Amendment); see also *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974) (holding that a utility company’s termination of service to a household did not constitute state action despite the fact that the utility company was engaged in a business affecting public interest, was subject to extensive state regulation, and had a partial monopoly).

165. See *Edmonson v. Leesville Concrete*, 500 U.S. 614, 623-25 (1991) (holding that a private lawyer’s exercise of a peremptory challenge in a civil trial constitutes state action because peremptory challenges derive from state authority and because the private lawyer made extensive use of those government procedures with “overt, significant participation of the government”).

still be state action because the states are delegating governmental power to lawyers—the power to administer justice. States should not be permitted to delegate this power to someone who is a known racist because to do so would serve to encourage racial discrimination in the administration of justice, which states are arguably prohibited from doing under the Fourteenth Amendment.

Even if licensing a lawyer does not constitute state action and therefore does not violate the Fourteenth Amendment, such action by the state does convey a message to the public—particularly the non-white public—that the legal profession tolerates racial bigotry, the Thirteenth and Fourteenth Amendments notwithstanding. Moreover, admission of a white supremacist would serve as the state's concession that racism is either a benign component of our legal system that we all must tolerate, or a benign component of personal character not worthy of concern or challenge. Even worse, admission of an open and notorious white supremacist by the state might even communicate the message that racial inferiority is not a false or evil ideology, but rather one that is open to debate.<sup>166</sup> The admission of openly racist applicants to the bar would contribute to a racist culture that promotes the subordination and marginalization of the minority and heightens the risk that minorities will not receive justice and fairness from our judicial process. If the law permits a white supremacist to become a lawyer, then the law necessarily contributes in a significant way to perpetuating a racist culture.<sup>167</sup> Moreover, admission of a white supremacist to the bar vividly displays that the profession is not committed to ridding itself of the patterns and practices that perpetuate the problem of institutional racism.<sup>168</sup>

Once empowered with a law license, a white supremacist has more power to effectuate his racist agenda than he would have as a layperson. Thus, by granting a license to a white supremacist such as Hale, the state would be indirectly supporting Hale's racist agenda and, through Hale, would be endangering the equal protection rights of all non-whites who are subject to our system of justice—or at least those non-whites who would encounter Hale in his capacity as a lawyer. The failure to protect the minority members of the public from the racist agenda of Hale or any other white supremacist lawyer would elevate the rights and liberty interests of white racists over

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166. Many free speech absolutists argue that one can never be sure that an opinion is a false opinion. See BOLLINGER, *supra* note 59, at 260 n.24.

167. Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 742 (1999) (arguing that hate crimes contribute to a racist culture and create a heightened risk of physical harm to racial minority groups).

168. See Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (analyzing the concept of institutional racism).

the rights and liberty interests of not only non-whites, but also non-racist whites. Absent a law license, one can dismiss Hale as a marginal individual unlikely to effectuate much harm if he operates within the confines of the law, and he will likely be apprehended and punished if he crosses the legal line. But when the state grants a white supremacist such as Hale a license to practice law, the white supremacist agenda is legitimized if not endorsed by the entire system of justice. The state essentially would be saying that lawyers do not have to believe in or uphold a fundamental principle of our system of justice, which is that all persons are entitled to equal justice.

## V. WHY RACISM?

Racism is intimately woven into our traditional social and political ordering. Much governmental and social effort in the twentieth century has been directed toward eliminating racism from institutional organizations of government. Admitting white supremacists to the bar is antithetical to the efforts of the last century.

Some may ask why we should be concerned with racism and how we can bar racism when the courts of the McCarthy era seemed to say that bar authorities cannot exclude candidates for admission based on their beliefs.<sup>169</sup> The loyalty oath cases of the McCarthy era should not be read so broadly. When synthesized, the cases merely hold that the First Amendment prohibits a state from inquiring into the associations of bar applicants without demonstrating that a legitimate state interest is served by the intrusion.<sup>170</sup> In those cases, the applicants refused to reveal their beliefs and bar authorities denied admission based on their refusal to answer questions of associa-

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169. Of course, the political belief that was of concern during the 1950s and 1960s was the belief in communism. See generally *Konigsberg v. State Bar of Calif.*, 366 U.S. 36 (1961). For a thorough history of communism and the First Amendment, see 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).

170. *In re Stolar*, 401 U.S. 23, 28-29 (1971) (holding that “the First Amendment prohibits Ohio from penalizing an applicant by denying him admission to the Bar solely because of his membership in an organization” or because “he personally . . . ‘espouses illegal aims’”). The Court concluded that the question on the application seeking to determine whether the applicant was a member of an organization that advocates overthrow of the United States government by force violated the First Amendment because “no legitimate state interest . . . is served by a question which sweeps so broadly into areas of belief and association.” *Id.* at 30. Likewise, in *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), the Court held that the state failed to show that asking an applicant to identify membership in an organization was necessary to protect a legitimate state interest. Hence, the finding that the applicant was barred from admission was reversed. In *Law Students Research Council v. Wadmond*, 401 U.S. 154 (1971), New York had a rule requiring an applicant to believe in and be loyal to the government of the United States. The Court held that a state could deny admission to the bar if an applicant’s advocacy of government overthrow or membership in an organization advocating forceful overthrow was coupled with the “specific intent” to achieve that illegal goal. *Id.*

tion.<sup>171</sup> During this period in history, states argued that they had legitimate governmental interests in knowing whether an applicant is or was a member of any organization which advocates the overthrow of the United States government by force or whether the applicant personally espoused such illegal aims. The Court rejected this claim and found that whether an applicant is a communist or advocates overthrow of the United States government is irrelevant to his fitness to practice law.<sup>172</sup> The rules of ethics for lawyers do not proscribe communist beliefs or practices. Unlike communism or other political beliefs or ideologies, whether an applicant is a devout racist is relevant to his fitness to practice law for all of the reasons previously discussed in this Article. Unlike the racist, the communist does not seek to subvert the rights of a particular class of citizens identified solely on the irrational basis of an immutable characteristic. Also, unlike communism, racism is, in many contexts, proscribed by the law.<sup>173</sup>

Moreover, unlike anti-communism or other political beliefs, the premise of equality is at the core of the legal profession and the system of justice which the legal profession is entrusted to administer. The legal profession is charged with the duty of administering justice for all people without regard to race or color. Justice for people of color is only achieved in a system that is not entrusted to and administered by racists because racism obstructs the fair administration of justice by bringing the non-relevant factor of race into the process. Hence, a commitment to racial equality should be a prerequisite for admission to the profession. Those who fail to meet the equal justice threshold necessarily lack the qualification to become a lawyer. Finally, unlike communism, racism is a tool that has been used by our government in the administration of justice to systematically deny justice to a group of people, identified only by their race, in an effort to subordinate those people. In light of this history and the pervasiveness of racism in present-day law and society,<sup>174</sup> government should take affirmative steps to eradicate racism from the administration of justice.

As for the First Amendment concern, the First Amendment does not prohibit a state from taking steps to protect its citizens from harm. For those who are wed to First Amendment precedent, the

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171. In the case of Matthew Hale, who is an open racist, there was no need to inquire about his association with a racist group or his willingness to discriminate against people based on their race because he openly advocated such practices and is the public leader of a white supremacist group.

172. See *In re Stolar*, 401 U.S. at 30.

173. See U.S. CONST. amend. XIV; 7 U.S.C. § 1981 (2001).

174. For an intelligent discourse on how race continues to permeate the law and social interactions between people, see K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (1996).

First Amendment does not apply to conduct unless it is expressive conduct such as burning the flag to make a political statement.<sup>175</sup> But expressive conduct can be prohibited when the prohibition is not related to expression.<sup>176</sup> Moreover, expressive conduct can be prohibited even when the state's regulation of such conduct is related to expression, as long as the prohibition is necessary to protect a compelling governmental interest.<sup>177</sup> The exclusion of a white supremacist from the bar is not based solely on his beliefs. In the *Hale* case, there was conduct in the record that supported a finding that Hale did not merely hold racist beliefs, but engaged in racist and discriminatory activities. This author posits that a person who harbors racist beliefs does not do so in the abstract. Racism is a unique narrative that is not easily defined due to its multifaceted conformation. It is not merely a belief held in the abstract; it is, by its very nature, both belief and conduct inseparably merged like a scrambled egg.<sup>178</sup>

Racism informs and influences everyday decision-making and interaction with others. It is not merely thought; it is a practice. It is practiced in ways too numerous to record here.<sup>179</sup> Thus, excluding a racist from the bar is not an exclusion based solely on his or her beliefs, but an exclusion based on the reasonably anticipated *conduct* that the racist will engage in if admitted to the bar. Accordingly, unlike communism, racism is relevant to an applicant's fitness to practice law. Knowing the true nature of racism as both a practice and a belief, it is not acceptable to confine the white supremacist's racism to "his beliefs" and protect him under the First Amendment. It is reasonable for bar authorities to conclude that a white supremacist whose "religion" mandates conduct that violates the anti-discrimination laws of our country, including the law of lawyering, would likely violate those laws while practicing law.

The question arises as to whether the white supremacist's racist conduct is expressive conduct, because if it is, it is entitled to a

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175. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that although the state has a legitimate interest in encouraging appropriate treatment of the flag, it may not promote its view of the flag by prohibiting expressive conduct relating to it by criminally punishing a person who burned the flag as a means of political protest). The Court pointed out, though, that not all action taken with respect to our flag would constitute expressive conduct. *Id.*

176. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (announcing the First Amendment test for non-communicative conduct).

177. See *Spence v. Washington*, 418 U.S. 405, 411 (1974).

178. Lawrence, *supra* note 61, at 443-44 (arguing that the inseparability of the idea and practice of racism was central to the decision in *Brown*, which held that segregation is unconstitutional). Lawrence further argues that we do not see most racist conduct because much of it is considered unrelated to race. *Id.*

179. For a discussion of racism in legal academia, see Pamela J. Smith, *The Tyrannies of Silence of the Untenured Professors of Color*, 33 U.C. DAVIS L. REV. 1105 (2000). See also Peter C. Alexander, *Silent Screams from Within the Academy: Let My People Grow*, 59 OHIO ST. L.J. 1311 (1998).

heightened level of scrutiny under the First Amendment. The racist conduct of a white supremacist is not expressive conduct. The white supremacist who adopts a way of life devoted to violating anti-discrimination laws is not likely doing so to make a political statement, but rather to promote his or her own self-interest in maintaining white supremacy. But even if we accept that the white supremacist is being racist for the purpose of making a political statement, the next issue that must be determined is whether a state regulation banning white supremacists from the bar relates to the suppression of free expression. Banning white supremacists from the legal profession does not relate to the suppression of free expression, but rather it relates to protecting the rights of our citizens, particularly our minority citizens who historically have been denied rights due to their race.

Arguably, a ban on white supremacists is related to the suppression of free expression because to the extent one wants to be a lawyer, one would not be permitted to engage in expressive racist conduct. Nonetheless, even if a ban on white supremacists does suppress free expression, it is not unconstitutional under the First Amendment because the constitutional interest that the state is seeking to promote—equality—outweighs the racists' interest in being able to practice racism without consequence. Unlike communism or other political ideology, racism has a special "juridical category"<sup>180</sup> created for it within the text of our Constitution. Hence, unlike anti-communist ideology, the principle of equality or anti-racist ideology is embedded in the very foundation of our law. "The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas."<sup>181</sup> Nonetheless, the First Amendment does not prohibit the state from taking action that imposes an incidental limitation on speech when such action is aimed at eradicating racial discrimination.<sup>182</sup>

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180. *Texas v. Johnson*, 491 U.S. at 417 (discussing the fact that a Texas law banning flag burning violated the First Amendment when burning the flag was expressive conduct because there is no indication in the Constitution or other law that a separate "juridical category exists for the American flag" so as to permit the state to restrict First Amendment rights with respect to the flag).

181. *Id.* at 418.

182. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

## VI. THE TOUGH CASES

A. *The Reformed Racist*

What do we do with the applicant who is an ex-Klansman? Most of us are continually evolving in our viewpoints and the way in which we conduct ourselves. As such, it is imprudent to apply the “once a racist, always a racist” standard to an applicant for bar admission. Once it is determined that the applicant participated in discriminatory or racist conduct in the past, bar authorities should conduct the same analysis they would for any other past conduct reflecting adversely on a candidate’s moral character and fitness to be a lawyer.

Bar authorities should consider how long ago the racist conduct occurred,<sup>183</sup> and whether the candidate has had a clear record of non-discriminatory conduct for a significant period of time so as to demonstrate reformation or rehabilitation.<sup>184</sup> For example, a bar candidate who was a member of a racist organization less than two years before applying to the bar should not be deemed to have demonstrated reformation because only an insubstantial amount of time has passed since the misconduct.<sup>185</sup> A bar candidate should not be denied admission for conduct that occurred twenty years before applying to the bar when she was an impressionable youth. Similarly, a bar candidate should not be denied admission for past racist conduct when the candidate has conducted herself in a fashion demonstrating fitness to practice law over a long period of time. Finally, bar authorities should also consider whether the candidate has accepted responsibility for the conduct as well as whether the candidate expresses remorse for the conduct.<sup>186</sup> Again, it is important to remember that the applicant bears the burden of proving that she is of good moral character, so if the applicant fails to meet this burden of proof, denial of admission to the bar is appropriate.<sup>187</sup>

B. *The Open Racist vs. The Closet Racist*

White supremacists are extremists marginalized by American society at large. Their viewpoint and political propaganda are “politi-

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183. See *In re Prager*, 661 N.E.2d 84, 89 (Mass. 1996) (acknowledging that a bar candidate who has committed an act reflecting adversely on her fitness to practice law may be sufficiently rehabilitated to be admitted to the bar after the passage of time during which the candidate’s actions demonstrate good moral character).

184. *Id.*

185. *In re Mustafa*, 631 A.2d 45 (D.C. 1993) (denying bar admission to a candidate who had embezzled and repaid funds while in law school since only one year had passed since the misconduct).

186. *In re Zbiegien*, 433 N.W.2d 871 (Minn. 1988).

187. *Konigsberg v. State Bar of Calif.*, 366 U.S. 36, 40-41 (1961).

cally incorrect” and abhorred by most members of the bar.<sup>188</sup> And while there are those who think that white supremacists should not be excluded from the bar based on their status as white supremacists, the decision of the Justices of the Supreme Court of Illinois in *In re Hale* suggests that those justices and many lawyers, especially lawyers of color, tend to agree that the exclusion of white supremacists from the bar is beyond dispute.

The more challenging question arguably is what degree of racism by a member of the bar is permissible. Do persons who are not members of extreme hate groups, but who openly express and exhibit racist viewpoints and practices, meet the requisite moral character standard? Such persons I will call “open racists.” The open racist presents many of the same problems presented by the white supremacist. The open racist is someone that bar authorities can easily identify as presenting a danger to the administration of justice. Like the white supremacist, the open racist would harm the image of the profession, particularly from the viewpoint of non-whites who are subject to our system of justice. Moreover, the open racist would present the same “parade of horrors” that were discussed with respect to the white supremacist. The open racist is likely to engage in discriminatory treatment of minorities while practicing law especially in those areas where discrimination is easily masked with a pretextual rationale for the negative treatment. As such, the open racist should also be excluded from the legal profession under the same rationale as the white supremacist.

The “closet racist,” on the other hand, is a more difficult case. The profile of the closet racist is a familiar one. The closet racist is someone who harbors racist views in his heart or the confines of his mind, and may express those views around other known racists, but is politically and socially astute enough to avoid the expression of racist views in “mixed company” or a public forum. Secretly though, the closet racist seeks to effectuate policy that operates to maintain and/or establish the political and social supremacy of whites and revels in the opportunity to oppress non-whites and/or maintain the status quo of white privilege.<sup>189</sup> The closet racist is not facially identifiable as a villain. The closet racist ostensibly proclaims that racism is wrong and argues that we should take a color-blind approach to jurisprudence. Indeed, she may be an upstanding citizen with no

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188. It is important to acknowledge that even most free speech absolutists express an abhorrence of racism. Nonetheless, they are willing to tolerate it because the alternative sacrifices some First Amendment freedom which they apparently value above the right of the historically oppressed to be free from racism. See Wendel, *supra* note 19.

189. For a discussion of white privilege, see Stephanie M. Wildman & Adrienne D. Davis, *Making Systems of Privilege Visible*, in *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 7 (Stephanie M. Wildman ed., 1996).

criminal record and instead a record of public or community service. He may have no conduct that one can easily identify as racist, and he may even have one or more black “friends.” The closet racist arguably presents more danger than the open racist because the closet racist ostensibly demonstrates a commitment to equal justice while secretly looking for pretextual reasons to deny rights, opportunities, and benefits to minorities. As such, this person is likely to be a respected member of the community, whereas the white supremacist generally is not. It is admittedly at this point that the exclusion of racists from the bar becomes a difficult rule to apply.

The closet racist presents evidentiary challenges. How will we determine whether a candidate for bar admission is a closet racist? Bar authorities could ask more probing questions on bar admission applications and in interviews with the candidate’s references.<sup>190</sup> However, the questions could not be so overly broad so as to sweep every person who has any level of bias into the net of bar authorities for a hearing on whether the candidate is racist. Even if bar authorities could ask narrowly tailored questions that stay within the parameters of the First Amendment, it is likely that a politically savvy applicant will answer questions on an application with politically correct responses.<sup>191</sup> If that is the case, we do not want bar authorities conducting investigations into every candidate’s background to determine whether the candidate has ever committed an act that is arguably racist or discriminatory. Such investigations are likely to lead to “witch hunts” in which bar authorities affirmatively seek to determine the presence of a racist taint of each candidate for admission. Even if bar authorities were as lucky as Johnny Cochran in the O.J. trial and located audiotapes<sup>192</sup> or other independent evidence demonstrating the racist nature of the candidate for admission to the bar, the inquiry could not cease there. Bar authorities would also have to determine whether this candidate’s alleged racial bias is so substantial that it would likely preclude the candidate from fairly

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190. Questions related to racist practices could be posed to both candidates and their references. For example, bar authorities could ask, (1) Do you participate in any racially discriminatory activities? Explain; (2) Do you practice racial discrimination or differing treatment of persons outside your racial group in any aspect of your life? Explain. These questions are different from the general communist questions asked by bar authorities in the past because racism is rationally related to the fair administration of justice as well as the core values of the legal profession.

191. Moreover, it is likely that the references provided by the candidate will be biased toward the candidate and would express ignorance of the candidate’s racist views or practices.

192. The reader may recall that when O.J. Simpson was on trial for the murder of his ex-wife, he was represented by attorney Johnnie Cochran, who introduced into evidence audio tapes of police officer Mark Fuhrman using the “N” word to refer to blacks. See JOHNNIE COCHRAN & DAVID FISHER, *A LAWYER’S LIFE* (2002) (discussing the Fuhrman tapes).

and effectively administering justice as a lawyer. After all, arguably we all are racist to some extent because we have been socialized by a racist society.<sup>193</sup> At the very least, we all have our own biases. Thus, the problem is one of degree, and the issue for determination is this: To what extent does one become too tainted by racial bias to be a lawyer?

Given that some scholars have defined us all as racist,<sup>194</sup> the efforts of bar authorities could render us all unfit to practice law if a clear line is not drawn. Bar authorities could adopt a definition of racism that would find that persons supporting affirmative action are racist against white people and therefore not fit to practice law. Likewise, bar authorities could just as easily determine that people who oppose affirmative action are racist because they are attempting to maintain the status quo of white privilege.<sup>195</sup> Clearly, bar authorities should not be targeting proponents or opponents of affirmative action.<sup>196</sup> Hence, the line should be drawn high enough to afford lawyers and bar applicants the room to hold and express political thought while protecting against a substantial risk of harm to the legal profession and the public it serves.

As stated previously, it is likely that the closet racist candidate would answer bar authorities' questions in a politically correct fashion and would assure them that he would not discriminate based on race in the selection of clients or any other aspect of practicing law. Accordingly, a consumer protectionism rationale for excluding the closet racist would not suffice unless bar authorities refused to accept the closet racist's assurances based on a finding that such assurances lack credibility due to some independent evidence of racism that cast doubt on the candidate's commitment to equal justice. The best rationale for excluding the closet racist is the professional protectionism rationale wherein we seek not only to protect the image of lawyers, but also to protect the image of our system of justice so that it

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193. Lawrence, *supra* note 32, at 317-24 (arguing that because Americans share a common historical and cultural heritage in which racism has played an integral role, we are all racist to the extent that this cultural belief system has influenced us). *But see* JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 17, 126-30 (1997) (acknowledging that unconscious racial discrimination, "Negrophobia," influences the judgment of all Americans, while also discussing the different types of racists, including the aversive racist, and arguing that not all persons who are influenced by cultural stereotypes are racist because some people renounce cultural stereotypes and develop their own personal beliefs about race).

194. Lawrence, *supra* note 32, at 317-24; *see also* ARMOUR, *supra* note 193, at 68-80 (discussing unconscious bias).

195. Wildman & Davis, *supra* note 189, at 11-20 (acknowledging that whites live their daily lives as beneficiaries of privilege created by systematic racism).

196. For an enlightening discussion of the arguments in support of and against affirmative action, including a discussion of whether affirmative action is racist discrimination against members of the majoritarian group, see Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503 (1982).

appears fair, not arbitrary, and color-blind, not racist. This rationale alone, however, is not sufficient to warrant exclusion of the closet racist from the bar.

Accordingly, bar authorities should not affirmatively seek to exclude the closet racist from the bar. Bar authorities should restrict their moral character analyses to determining whether there is evidence in the record demonstrating that the candidate for admission is so racist that the candidate is unlikely to adhere to the anti-discrimination laws of our country and/or the rules of professional conduct so as to create a significant risk of harm to the population served by the profession and of harm to the profession itself. Some may argue that a policy that excludes white supremacists and other openly racist candidates while allowing the secretly racist candidates to practice law does not correct the problem of racism in the administration of justice. I agree. The problem of the closet racist will persist, but there are other mechanisms for dealing with the closet racist that do not involve the rule of law. The law is not the only tool for eradicating discrimination.<sup>197</sup> Nonetheless, law should do its part. A rule excluding open racists from the bar ensures that the severely “diseased dogs”<sup>198</sup> will be excluded from the profession and will not be permitted to use the legal system to effectuate their racist agendas. Likewise, the implementation of a policy against racism demonstrates to applicants, lawyers, and the public that the legal profession demands non-discriminatory behavior from lawyers and is committed to providing equal justice.<sup>199</sup>

### C. *The Mythological Black Supremacist*

When I told students and colleagues from the majoritarian group about the thesis of this Article, universally I was asked, “What about the black supremacist? Would your thesis be the same?”<sup>200</sup> Intentionally displaying a state of ignorance, my reply was consistently, “What do you mean by black supremacist? Give me an example.” The two most common examples proffered were Al Sharpton and Louis Farrakhan.<sup>201</sup> As I anticipated, my students and colleagues were comparing oranges with apples. Neither Al Sharpton nor Louis Farrakhan is

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197. Political power (voting), economic power (spending), and education have proven effective tools in combating racism.

198. Rhode, *supra* note 25, at 509.

199. Admittedly, this policy is similar to the “don’t ask, don’t tell” policy adopted by President William Clinton pertaining to gays in the military. See 10 U.S.C. § 654 (2000).

200. Interestingly, rarely was this question presented by students or colleagues of color. Rather than argue the reason for this, I offer it as something worth pondering and leave it to the psychologists to deconstruct.

201. Farrakhan has been labeled a “black separatist” by some. See, e.g., Max Curtis, *Louis Farrakhan: What’s the Big Deal?*, available at [http://ujs-online.co.uk/magazine\\_Freshers01\\_louis\\_Farrakhan.asp](http://ujs-online.co.uk/magazine_Freshers01_louis_Farrakhan.asp) (last visited Mar. 26, 2003) (on file with author).

like Matthew Hale. Neither Al Sharpton nor Louis Farrakhan promotes or advocates subjugation or marginalization of whites. Rather, these figures point to the harm that whites inflict upon the black community and call upon the black community to unite and utilize what power it has to fight oppression.<sup>202</sup> Neither leader reasonably could think that blacks are better than or superior to white people because one half of a millennium of history and its present-day remnants, including politics and social customs, tell them as well as the rest of us otherwise. So even if they do proffer statements proclaiming black supremacy, their statements and actions, like the statements and actions of white supremacists, must not be viewed under an anti-historical lens, but rather a lens that accurately reflects the *nomos* in which such statements were made. Such statements could only have been made after, and therefore presumably in response to, the social, political, and legal institutions which had already firmly established, through hundreds of years of laws and social custom, that blacks are inferior in the eyes of the law and society.

While I am inclined to agree with the argument that the “black supremacist” is a mythological being that has yet to be seen, I am compelled to acknowledge the underlying question which is at the heart of the majoritarian concern. The majoritarian question regarding the black supremacist assumes that blacks can be racist against whites. Indeed, critical race theorists have attacked this presumption and quite persuasively argued that blacks, at least on the group level, do not have the requisite power to “race” whites.<sup>203</sup> While I agree with this theory when applied on the group level, it becomes less persuasive when applied on the individual level. On the individual level, there could be a black applicant to the bar who belongs to an underground organization or movement that seeks to and is preparing to annihilate, deport, and/or enslave white people. There could be a black applicant whose religious tenants mandate that he never hire a white person nor have any business with a white per-

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202. See NBC interview with Minister Farrakhan, available at <http://www.abc2.com/islam/english/toread/farnbc.htm> (last visited Mar. 16, 2003) (wherein Minister Farrakhan stated his position as being based on the notions of “equity and reciprocity”). Referring to black people, Minister Farrakhan stated, “We cannot allow ourselves to be controlled by any outside group. We must take control of our own destiny. That is what I preach, and that is what I believe, and that is what I’m striving for.” *Id.* See also *Transcript from Minister Louis Farrakhan’s Remarks at the Million Man March*, Oct. 17, 1995, available at <http://www.cnn.com/US/9510/megamarch/10-16/transcript/index.html> (last visited Mar. 16, 2003) (saying among other things that “white supremacy has to die in order for humanity to live” and challenging blacks to be productive members of society by saying, “Black man, you don’t have to bash white people, all we gotta do is go back home and turn our communities into productive places.”)

203. JOE R. FEAGIN & HERNAN VERA, *WHITE RACISM: THE BASICS* ix-x (1995).

son.<sup>204</sup> If this is in fact the black applicant's agenda, such an applicant could also harm the legal profession. The extent and gravity of the harm is likely to be less than the harm that a white supremacist could impose because the system of justice will be more circumspect of a black lawyer's actions than a white lawyer's actions because history has demonstrated that blacks lack the credibility of whites in our system of justice,<sup>205</sup> and because our system of justice is predominately white, which makes it a place where the white supremacist can more easily operate "under cover" while the black lawyer stands out like the proverbial "fly in buttermilk."

Nonetheless, the harm that a black supremacist/separatist lawyer could impose on the system is not so *de minimis* as to justify his admission. If the black separatist is more likely than the average lawyer to violate the rights of a white person, as well as the laws of lawyering, he too is a threat to the administration of justice and should be excluded from the bar. It should be noted, however, that the black separatist would have a diminished impact on the profession because the profession is not controlled by his racial group, but rather by the majoritarian group. Thus, it is unlikely that the black separatist will be admitted by the majoritarian-controlled bar, which could likely find some other reason to exclude the candidate other than his racist beliefs. Even if admitted, the black separatist would find few allies in the majoritarian-dominated profession and would likely have a difficult time being appointed to a position such as prosecutor or judge since it is predominately the majoritarian group that controls such appointments. Thus, while the harm that the black separatist could impose is intolerable to this author, it is likely to be significantly less than the potential harm that could be imposed by the white supremacist who, although not accepted by the majoritarian group, is less feared than the black separatist.

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204. Such blacks are frequently referred to as black separatists, not black supremacists, because they preach separatism—blacks living apart from white society in order to escape racism and white supremacy. The separatist movement also preaches black pride, which is an effort to motivate a disenfranchised and oppressed group of people. The black separatist movement seems quite distinguishable from the white supremacist movement because the underlying premise of the respective movements is different as well as the historical context. The white supremacist movement developed in response to efforts to achieve racial equality, and its agenda seeks a return to the days of segregation, or even racial "cleansing" of the non-white races, on the theory that such non-white people are inferior and undeserving of equality with whites. The black separatist movement, on the other hand, is a response to oppression and has as its agenda the separation of the races as a way of self-preservation. This agenda is based upon the historical and arguably present-day reality that people of color, particularly blacks, have been oppressed by whites, and hence the desire to avoid oppression by whites fuels the idea of separatism. In common terms, the theory behind the separatist movement is that if the dog bites, one is best assured of safety by staying away from it rather than trying to domesticate it.

205. For a persuasive article supporting this proposition, see Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996).

#### *D. The Unconscious Racist*

The unconscious racist is someone who does not consider herself a racist. She professes disdain for racism and those who practice it. The unconscious racist has been defined as the person who does not reveal racist tendencies at all, except as “persistent unconscious fantasies.”<sup>206</sup> It has been argued that all of us are unconscious racists to the extent that we have been influenced by a racist cultural belief system.<sup>207</sup> We are unconscious racists because we “do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.”<sup>208</sup> We function on a daily basis by allowing race to influence our decision-making process and our value judgments of others without even realizing that we are doing it.

The unconscious racist should not be the target of bar authorities because the unconscious racist has made a conscious commitment to equal justice. The unconscious racist aspires to be a fair-minded, non-discriminatory actor. In other words, the unconscious racist has made a commitment to and accepts the core value of equal justice even though she may from time to time fall short of her aspirations of equality. Bar authorities cannot seek absence of bias; all they can demand from an applicant is a commitment to equal justice. This commitment should be a criterion for determining whether a candidate for admission to the bar possesses the requisite moral character to be an officer of the court and an administrator of justice.

### VII. CONCLUSION

Racism has taken the form of black slavery in our country, which was remedied by the Thirteenth Amendment to our Constitution. It has also taken the form of denying blacks and other people of color the right to serve on juries and to vote, which was remedied by the Fourteenth and Fifteenth Amendments to our Constitution. Finally, racism has taken the form of denying citizens of color the right to eat in restaurants and to sleep in hotels, which was remedied through Congress’ public accommodation laws. In other words, history teaches us that, if allowed, racism can be integrally connected with the administration of justice.<sup>209</sup> If racism is allowed to remain a component of the administration of justice through racist administrators,

206. JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* 55 (1970).

207. See Lawrence, *supra* note 32, at 317-24.

208. *Id.* at 322.

209. One need only re-read the decisions in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), to be reminded of this. For a more recent but equally tragic example of how racism can infect the administration of justice, see *United States v. Price*, 383 U.S. 787 (1966), in which three racist officials, with the aid of fifteen other whites in the state of Mississippi, murdered three civil rights workers.

it will prejudice our administration of justice, just as it has in the past, albeit much more covertly and virtually imperceptibly in this circumstance. If racist applicants are allowed to become lawyers, there will be no group justice for those who are the target of such lawyers' prejudice.

Much discussion has been had about the color-blind theory of justice and the color-blind nature of our Constitution.<sup>210</sup> Our highest Court has espoused the view that our society should strive to achieve and administer color-blind justice.<sup>211</sup> If color-blind justice is the goal that the legal profession seeks to obtain, the admission of racists to the bar would serve to thwart that effort. Entrusting racists with the power to administer justice to non-whites threatens to carry us further away from the goal of a judicial system that is color-blind. So if color-blindness is the goal for our legal system and not just a catchy phrase to be used to promote the interests of whites, then persons who seek to use color as the basis to deny our citizens of color full participation in and protection under our legal system should be excluded from the bar. If we learn nothing from the mistakes of our past, we are destined to repeat them.

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210. See Wilkins, *supra* note 21, at 1514-15 (discussing "bleached out professionalism" and its link to the color-blind theory of justice and noting that the phrase "color blind" as used to refer to the nature of our Constitution was first made famous by Justice Harlan in his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting), *overruled by Brown v. Board of Education*, 347 U.S. 483 (1954)); APPIAH & GUTMANN, *supra* note 174 (arguing that fairness in a color-conscious society demands color-conscious law and policy because color-conscious policies are instrumental in overcoming historically imposed racial injustice); see also Neil Gotanda, *A Critique of 'Our Constitution is Color-blind'*, 44 STAN. L. REV. 1 (1991) (arguing that the U.S. Supreme Court's use of color-blind constitutionalism fosters white racial domination). Cf. Wechsler, *supra* note 56.

211. For a discussion of the Supreme Court's "color-blind" jurisprudence, see Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39.