

CONFRONTING RACISTS AT THE BAR: MATTHEW HALE, MORAL CHARACTER, AND REGULATING THE MARKETPLACE OF IDEAS

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I. INTRODUCTION

In 1998, Matthew Hale graduated from Southern Illinois Law School and passed the Illinois bar examination in July of that year.¹ Nevertheless, the Inquiry Panel for the Supreme Court of Illinois's Committee on Character and Fitness, in a 2-1 decision, denied Hale admission to the practice of law.² Because of his racist beliefs, the Panel found that Hale did not possess the "requisite character and fitness" necessary for admission.³

At the time of his application to the Illinois bar, Hale was not only a recent law school graduate, but also the Pontifex Maximus (Supreme Leader) of an organization called the World Church of the Creator. Hale's church was founded in 1973 by Ben Klassen, a Canadian-born former member of the Florida legislature. The organization admires Adolf Hitler and Germany's movement of National Socialism; however, it believes that Hitler's ideas regarding racial superiority should have been applied to include all whites, as opposed to only Germans.⁴ Hale and his church oppose violence and the forcible overthrow of the American government. Nevertheless, the Inquiry Panel of the Committee on Character and Fitness noted, "Mr. Hale stated in his interview with us that if his organization would gain power by peaceable means it would call for the deportation of the Jews, blacks and others whom his church refers to as 'mud races.'"⁵

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1. See Mark Schauerte, *Illinois Seeks to Deny a Law License to Vocal Racist*, ST. LOUIS POST-DISPATCH, Feb. 22, 1999, at A1.
2. *In re Hale*, COMM. OF CHARACTER & FITNESS (Ill. App. Ct. 1998), reprinted in GEOFFREY C. HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 875 (3d ed. 1999).
3. *Id.* at 875-76, 883-84.
4. *Id.* at 876.
5. *Id.*

Hale has tried repeatedly to gain status among right-wing extremists. In 1992, Hale anointed himself National Leader of the National Socialist White Americans Party.⁶ While a freshman at Bradley University, Hale founded the American White Supremacist Party (AWSP).⁷ After Hale dissolved the AWSP, he unsuccessfully attempted to join the National Association for the Advancement of White People (NAAWP).⁸ After being thwarted from attaining NAAWP membership, Hale became involved with the World Church of the Creator.⁹

Hale's denial of bar admission may be justified as a means of protecting the Illinois judicial system at a structural level. The majority of Americans would find Hale's beliefs abhorrent, and one would be hard-pressed to find a mainstream organization that would publicly welcome his views. There is real danger that Hale's beliefs could hinder the fair and equitable administration of justice within Illinois's courts and beyond. Firstly, if admitted to the Illinois bar, Hale would be able to use his legal training to advocate for limitations on the legal rights of racial and ethnic minorities. Secondly, Hale's racism forces one to question whether any openly racist lawyer can effectively operate in a judicial system that is composed of a racially diverse group of actors—judges, clients, witnesses, jury members, opposing counsel—all of whom must be treated with a minimal level of respect and dignity for the judicial system to run smoothly and efficiently. Finally, the presence of an openly racist lawyer has the potential of tainting the entire bar by giving average citizens the impression that racism is at least tacitly accepted, if not openly welcomed, within a state's legal community.

Nevertheless, Hale's case is troublesome in many respects. After dedicating substantial amounts of time and money in furtherance of their legal education, recent law school graduates applying to their respective state bar associations may be disturbed by the possibility that their career aspirations could be thwarted by mainstream opposition to personally held political or religious beliefs. One therefore wonders whether Illinois's Committee on Character and Fitness set a dangerous precedent within the realms of First Amendment jurisprudence and legal professionalism by denying Hale admission to the bar.

This Article will explore the ramifications of the Hale decision on the free speech rights of bar applicants, as well as the social costs and benefits of limiting such freedoms. This Article ultimately asserts that although states have a right to regulate bar admission, privately held racism should not serve as the sole grounds for denial of bar admission, despite the abhorrence of such views. Part II of this Article provides a brief historical overview of the use of moral character and fitness requirements for state bar admission, as well as the justifications provided for the utilization of such requirements. Part III summarizes the legal arguments underlying the Inquiry Panel's decision and provides an overview of the subsequent

6. See Anti-Defamation League, *Recurring Hate: Matt Hale and the World Church of the Creator*, available at http://www.adl.org/special_reports/wcotc/wcotc-new-lease.asp (last visited Feb. 26, 2005).

7. *Id.*

8. *Id.*

9. *Id.*

procedural developments stemming from its decision. Part IV addresses the First Amendment issues raised by Hale's case and discusses the constitutionality of alternative state responses to racist bar applicants. Part V suggests a new framework for thinking about the problems raised by these applicants. Part VI addresses the possibility of rehabilitation for bar applicants found lacking in good moral character. Lastly, Part VII concludes with an update of Hale's case, in light of recent developments.

II. MORAL CHARACTER AS CREDENTIAL

The Anglo-American roots of the moral character requirement date back to thirteenth-century England.¹⁰ According to Professor Deborah Rhode, “[w]ithin the American bar, moral character requirements have been a fixed star in an otherwise unsettled regulatory universe. Educational standards came and went, but, at least after the colonial period, virtue remained a constant prerequisite, in form if not in fact.”¹¹ Along with lawyers, increasing numbers of professional occupations became subject to character screening during the late nineteenth and early twentieth centuries, including “barbers, beauticians, embalmers, engineers, veterinarians, optometrists, geologists, shorthand reporters, commercial photographers, boxers, piano tuners,” as well as trainers of guide dogs for the blind and vendors of erotica.¹²

Two rationales underlie the moral character requirement. First the requirement is justified by the need to protect the public. Attorneys are critical to the maintenance of freedom and openness in society. Their training and skill make them primary players in the adjudication and settlement of horizontal legal rights and obligations between individuals and entities (e.g., contractual rights and duties), and vertical legal rights and obligations between the government and private individuals and entities (e.g., federal regulations and municipal ordinances). In his concurring opinion in *Schwartz v. Board of Bar Examiners*, Justice Frankfurter observed, “all the interests of man that are comprised under the constitutional guarantees given to ‘life, liberty and property’ are in the professional keeping of lawyers.”¹³ Given the enormity of this responsibility, moral character requirements are an important means of providing protection to the general population from unethical or immoral lawyers before problems arise.

A second justification for moral character requirements is its use as a means for the bar to protect itself and the entire judicial system from degradation of its image through regulation. The presence of unethical lawyers has the potential to taint the entire legal profession—at least within the minds of members of the public. “By excluding applicants early, a state bar can maintain control and hopefully avoid the problems that unfit attorneys may cause.”¹⁴

10. See Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 493 (1985).

11. *Id.* at 496.

12. *Id.* at 498–99.

13. *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

14. Marcus Ratcliff, Note, *The Good Character Requirement: A Proposal For A Uniform National Standard*, 36 TULSA L.J. 487, 492 (2000).

Despite these justifications for the use of the moral character requirement, it has also been used discriminatorily during various periods as a means of excluding certain groups from the practice of law. Rhode notes that “[m]uch of the initial impetus for more stringent character scrutiny arose in response to an influx of Eastern European immigrants, which threatened the profession’s public standing.”¹⁵ Moral character requirements were successfully used to exclude women, and to a lesser extent, Jews and African Americans.¹⁶

During the mid-twentieth century, the United States Supreme Court provided significant guidance to states regarding the acceptable criteria for demonstrations of good moral character. In *Konigsberg v. State Bar of California*,¹⁷ the Supreme Court expanded its characterization of good moral character. Although the Court restricted states from using past membership in the Communist Party as an indicator of the lack of good moral character, the Court validated the use of exacting moral standards in principle.¹⁸ Nevertheless, several additional cases have placed limitations on moral character requirements. In *Schwartz* (decided on the same day as *Konigsberg*), the Supreme Court rejected the New Mexico Board of Bar Examiners’ finding that Rudolph Schwartz lacked requisite moral character for bar admission.¹⁹ The Court held that the denial of Schwartz’s request to take the bar examination could not be based on his former membership in the Communist Party, use of aliases during a three-year period, and record of multiple arrests.²⁰ In overturning the Board’s decision on due process grounds, the Court held that although a state may require that certain standards be met for bar admission (such as good moral character), there must be some rational relationship between the standards and the applicant’s ability or fitness to practice law.²¹ Accordingly, the requirements cannot be applied in a discriminatory manner:

Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that [the applicant] fails to meet these standards, or when their action is invidiously discriminatory.²²

Secondly, the Court held that a prior arrest has little probative value in demonstrating that a person has engaged in misconduct.²³ “When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated.”²⁴

15. Rhode, *supra* note 10, at 499.

16. *See id.* at 500–02.

17. 353 U.S. 252 (1957).

18. *Id.* at 273.

19. 353 U.S. at 241–42.

20. *Id.* at 246.

21. *Id.* at 239.

22. *Id.*

23. *Id.* at 241.

24. 353 U.S. at 241.

During its 1971 term, the Supreme Court placed additional limitations on state bar admission requirements in three cases: *Baird v. State Bar of Arizona*,²⁵ *In re Stolar*,²⁶ and *Law Students Civil Rights Research Counsel v. Wadmond*.²⁷ In *Baird*, the Court held that “a State may not inquire about a man’s views or associations solely for the purpose of withholding a right or benefit because of what he believes.”²⁸ The Court further held that the freedom of association guaranteed by the First Amendment prevents a state from excluding a person from a profession solely because of the applicant’s beliefs.²⁹ With regard to the distinction between rights and benefits within the context of bar admissions, the Court noted “the practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character.”³⁰

The Court’s decision in *In re Stolar* made it impermissible for a state to penalize a bar applicant solely because he or she was or had been a member of an organization that advocated the overthrow, by force, of the United States government, or for espousing illegal aims.³¹ Furthermore, the *In re Stolar* decision made it impermissible for states to demand that bar applicants list all of the organizations to which he or she belongs.³² Lastly, *Wadmond* suggests that once the oath to uphold the Constitution has been taken—a key requirement for bar admission—the burden of proof for contending that the oath was not taken in good faith does not rest with the applicant.³³

III. THE INQUIRY PANEL’S DECISION AND SUBSEQUENT DEVELOPMENTS

Although Hale declared that he could support the Federal Constitution, the binding provisions of the Constitution of Illinois, and the Illinois Rules of Professional Conduct, the three-member Inquiry Panel recommended, 2 to 1, that the Committee on Character and Fitness reject Hale’s application for admission to practice law in Illinois. The majority began its analysis by noting that Illinois Supreme Court Rules 708(b) and 709(b) require a bar applicant to establish his or her general fitness to practice law and good moral character by “clear and convincing evidence.”³⁴ The court found that if the test of good moral character and general fitness were simply a matter of having a person vouch for one’s character or

25. 401 U.S. 1 (1971).

26. 401 U.S. 23 (1971).

27. 401 U.S. 154 (1971).

28. *Baird*, 401 U.S. at 7.

29. *See id.* at 6 (citing *United States v. Robel*, 389 U.S. 258, 266 (1967)).

30. *Id.* at 8.

31. *In re Stolar*, 401 U.S. at 28–29. The committee suggests its “listing” question serves a legitimate interest because it needs to know whether an applicant has belonged to an organization which has “espoused illegal aims” and whether the applicant himself has espoused such aims. But the First Amendment prohibits Ohio from penalizing an applicant by denying him admission to the Bar solely because of his membership in an organization Nor may the State penalize petitioner solely because he personally, as the committee suggests, “espouses illegal aims.”

32. *Id.* at 27–28.

33. *See Wadmond*, 401 U.S. at 162–63 (indicating that placing a burden on applicants would raise serious constitutional problems).

34. *In re Hale*, *supra* note 2, at 877.

demonstrating an absence of past criminal conduct, then Hale had met these requirements by clear and convincing evidence.³⁵ However, the majority explained that “if the lack of good moral character and general fitness to practice law may be judged on the basis of active advocacy to incite hatred of members of various groups by vilifying and portraying them as inferior and robbing them of human dignity,” then Hale did not possess the requisite good moral character and general fitness to practice law.³⁶

Employing this latter test, the majority then examined *In re Stolar* and *Baird* to determine whether the denial of bar admission would be unconstitutional. Both precedents ostensibly forbid a state from excluding someone solely because of personally held beliefs or affiliation with a political organization. Nevertheless, the Panel held *In re Stolar* and *Baird* inapplicable since those cases involved bar applicants who refused to reveal their views. By contrast, Hale openly espoused racist views and was actively involved in inciting racial hatred as a member of the World Church of the Creator.³⁷

The Panel then addressed whether lawyers could have their First Amendment rights limited by analogizing the free-speech limitations on lawyers to speech limitations within the context of government-run workplaces. It observed that the holding of *Elrod v. Burns*³⁸ requires that any major limitation of a public employee’s First Amendment rights by the state must survive “exacting scrutiny”: that the government’s interest “must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.”³⁹ Secondly, the Panel noted that in *Pickering v. Board of Education*⁴⁰ the Supreme Court utilized a balancing test for weighing the relative interests of the government against the free speech rights of a state employee: “The problem in any case is to arrive at a *balance* between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”⁴¹

The Panel concluded that the Supreme Court’s *Elrod* and *Pickering* decisions allowed it to reject Hale’s application for bar admission. The Panel believed that its decision would survive exacting scrutiny and that the

35. *Id.*

36. *Id.* at 877–78.

37. *Id.* at 880.

38. 427 U.S. 347 (1976).

39. *In re Hale*, *supra* note 2, at 880 (citing *Elrod*, 427 U.S. at 362).

40. 391 U.S. 563 (1968). Illinois school teacher Marvin Pickering was dismissed from his position by the Board of Education for sending a letter to a local newspaper addressing a recently proposed tax increase that was critical of the manner in which the Board and the district superintendent of schools had handled previous proposals to raise funds for the schools. *Id.* at 564. Pickering’s dismissal resulted from the Board’s determination, after a full hearing, that the publication of the letter was “detrimental to the efficient operation and administration of the schools of the district” and hence, under the relevant Illinois statute, ILL. REV. STAT., c. 122, § 10-22.4 (1963), that the “interests of the school require[d] [his dismissal].” *Id.* at 564–65. The Court found that Pickering’s freedom of speech rights were violated. *Id.* at 575.

41. *In re Hale*, *supra* note 2, at 881 (citing *Pickering*, 391 U.S. at 568).

state's interests, with regards to the role of the legal profession, are paramount.⁴² In balancing Hale's interest with the state's, under *Pickering* the Panel found that the courts and the bar are committed to certain "fundamental truths":

- All persons are possessed of individual dignity.
- As a result, every person is to be judged on the basis of his or her own individuality and conduct, not by reference to skin color, race, ethnicity, religion or national origin.
- The enforcement and application of these timeless values to specific cases have, by history and constitutional development, been entrusted to our courts and its officers—the lawyers—a trust that lies at the heart of our system of government.
- Therefore, the guardians of that trust—the judges and lawyers, or one or more of them—cannot have as their mission in life the incitement of racial hatred in order to destroy those values.⁴³

It also found that these fundamental truths outweigh a lawyer's First Amendment rights, stating that:

The balance of values that we strike leaves Matthew Hale free, as the First Amendment allows, to incite as much racial hatred as he desires and to attempt to carry out his life's mission of depriving those he dislikes of their legal right. But in our view he cannot do this as an officer of the court.⁴⁴

The dissenting member of the Inquiry Panel, Lawrence Baxter, argued that there was no reason to believe that Hale would be unable practice law in accordance with his oath as an attorney, despite holding racist views: "Until there is such conduct, the holding and even active advocacy of beliefs, no matter how repugnant to current law, cannot be the basis for denial of certification to an applicant who will subscribe to the oath."⁴⁵

In response, the Committee on Character and Fitness created a five-member "Hearing Panel" to give a final determination of whether Hale should be certified for admission to practice law.⁴⁶ On April 10, 1999, the Hearing Panel heard testimony from multiple witnesses stating that Hale possessed the necessary fitness and moral character to practice law and that he respected current laws, including those with which he disagreed.⁴⁷ Nevertheless, the Hearing Panel determined that Hale should not be admitted to the bar, based on the following reasons:

- (1) Hale's belief in private-sector racial discrimination and his intent to privately discriminate were inconsistent with the letter and spirit of the Rules of Professional Conduct;
- (2) Hale's refusal to repudiate a 1995 letter that the Committee believed was insulting

42. *Id.* at 880.

43. *Id.* at 881.

44. *Id.* at 882.

45. *Id.* at 884.

46. *Hale v. Committee on Character and Fitness for Ill.*, No. 01 C 5065, 2002 WL 398524, at *2 (N.D. Ill. Mar. 13, 2002).

47. *Id.*

and inappropriate showed a “monumental lack of sound judgment” that would put Hale “on a collision course with the Rules of Professional Conduct [sic]; and (3) the Committee’s conclusion that Hale “was not open with the panel during the hearing.”⁴⁸

Hale petitioned the Illinois Supreme Court for review of its denial of his bar application, reasoning that the grounds invoked by the Hearing Panel had not been previously raised as part of the Inquiry Panel’s earlier proceeding, and that the Committee’s denial of his application was unconstitutional.⁴⁹ Nevertheless, the Illinois Supreme Court denied his petition on November 12, 1999,⁵⁰ and the United States Supreme Court subsequently denied Hale’s petition for a writ of certiorari.⁵¹ Hale then filed suit in federal court under 42 U.S.C. § 1983 against the Illinois Committee on Character and Fitness and the Illinois Supreme Court, *inter alia*, alleging due process, equal protection, and First Amendment violations.⁵² Invoking the Rooker-Feldman and preclusion doctrines, the Court summarily dismissed these claims without reaching the merits.⁵³

IV. FIRST AMENDMENT CONSIDERATIONS

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.⁵⁴

In the wake of the Panel’s decision, several individuals and organizations have argued in favor of Hale’s bar admission, asserting that the Panel’s decision was an impermissible limitation on his First Amendment rights. Hale gained a vocal supporter in George Anastaplo, a law professor at Loyola University of Chicago who was himself famously denied admission to the Illinois bar for his refusal to answer questions about whether he was involved with the Communist Party. In a precursor case similar to Hale’s, the Supreme Court upheld Anastaplo’s rejection.⁵⁵

Jay Miller, director of the Illinois chapter of the American Civil Liberties Union also advocated for Hale: “He hasn’t committed any felony. He’s talked and written. . . . You can’t deprive someone the right to prac-

48. *Id.*

49. *See id.* at *3–*4.

50. *In re Hale*, M.R.16075, 1999 Ill. LEXIS 1639 (Ill. Nov. 12, 1999).

51. *Hale v. Comm. on Character and Fitness of the Ill. Bar*, 530 U.S. 1261 (2000).

52. *See Hale*, 2002 WL 398524, at *1.

53. *See id.* at *3–*5. The Rooker-Feldman doctrine is a rule of civil procedure articulated by the U.S. Supreme Court in two cases, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which prevents lower federal courts from sitting in direct review of state court decisions.

54. U.S. CONST. amend. I.

55. *See In re Anastaplo*, 366 U.S. 82 (1961); *see also* Schauerte, *supra* note 1 (“This kind of [racist] talk, however irresponsible and unseemly, is not the kind the courts these days would deem as worthy to disqualify one from practicing law,” asserted Anastaplo, who was never granted a license.)

tice law because of their political views."⁵⁶ The Anti-Defamation League (ADL), a prominent civil rights organization founded by leaders of the Jewish fraternal organization B'nai B'rith, protested Hale's denial. Richard Hirschhaut, ADL's Chicago regional director, spoke out in defense of Hale: "We are repulsed by Matt Hale, but we respect the principle of free speech and believe he is entitled to the opportunity to spew his venom without restriction."⁵⁷ Although Hale and Harvard law professor Alan Dershowitz were ultimately unable to come to an agreement, Dershowitz had considered representing Hale: "My fear was that if he was kept out of the bar, members of the Jewish Defense League, or radical black activists, or radical feminists could be kept out of the bar too on the basis of ideology."⁵⁸

As *Pickering* illustrates, an individual or organization's First Amendment rights and interests must be counterbalanced by a state's compelling interests, perceived radicalism notwithstanding. Outside the context of the legal profession, various restrictions on the content of speech are imposed when the value of the speech is outweighed by the harm that it causes. Some examples of such restrictions are laws regulating false or misleading advertising,⁵⁹ fighting words,⁶⁰ defamation,⁶¹ obscenity,⁶² and child pornography.⁶³

Within the legal profession, rules of professional responsibility already place numerous limitations on the First Amendment rights of lawyers. For instance, Rule 3.5(a) of the *ABA Model Rules of Professional Conduct* (2004) prevents lawyers from communicating with judges, jurors, or prospective jurors in a manner that would hinder a court's impartiality.⁶⁴ Similarly, Rule 3.6(a), forbids lawyers from making statements to the press that would likely prejudice trials in which they are involved.⁶⁵ Other

56. *Id.*

57. Adrienne Drell, *Jewish Group Protests Denial of Law License for Anti-Semite*, CHICAGO SUN-TIMES, Feb. 10, 1999, at 14.

58. Elli Wohlgeleinter, *Spreading Hate on the Net*, JERUSALEM POST, July 9, 1999, at 6B.

59. See *Friedman v. Rogers*, 440 U.S. 1, 18–19 (1979) (upholding a provision of the Texas Optometry Act that forbid the practice of optometry under a trade name and holding that the provision did not violate the First Amendment since it promoted the state's legitimate interest in protecting the public from misleading and deceptive use of optometric trade names).

60. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). Regarding fighting words, the Court declared, "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*

61. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 291–92 (1964) (explaining when First Amendment protection is superior to restrictions on defamatory speech).

62. See *Miller v. California*, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

63. See *Osborne v. Ohio*, 495 U.S. 103, 125–26 (1990) (upholding an anti-child pornography statute against a First Amendment challenge).

64. See ABA MODEL RULES OF PROF'L CONDUCT R. 3.5(a) (2004) ("A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law . . .").

65. See *id.* R. 3.6(a) ("A lawyer who is participating or has participated in a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a sub-

rules place restrictions on a lawyer's ability to communicate with opposing parties in a case,⁶⁶ prohibit disclosure of client information without consent,⁶⁷ and limit the manner in which lawyers can advertise and solicit potential clients.⁶⁸

Although the above regulations involve incidental limitations on the freedom of speech rights of lawyers, they safeguard the compelling state interest of the fair and equitable administration of justice. Accordingly, by preventing openly racist individuals like Hale from practicing law, the bar is further promoting this interest by preventing bigotry from hindering the impartiality of courts, much in the same way Rule 3.5(a) restricts lawyers from making statements that could influence a court's impartiality.⁶⁹

However, the *ABA Model Rules of Professional Conduct* regulating the speech of lawyers, as cited above, all relate to speech made ancillary to the performance of legal business. Hale's racist statements are distinguishable as speech made as an ordinary citizen. While acknowledging his beliefs of racial separatism, Hale promised that as a lawyer, he would follow current laws mandating equality: "Yes, I will follow the law as long as it's the law."⁷⁰ By using Hale's racism to deny his admission to the bar, the Inquiry Panel essentially punished Hale for the abhorrence of his personal beliefs, despite the lack of any clear nexus between such beliefs and the usual proof of criminality or general misconduct necessary for a finding of the kind of poor moral character that would hinder good lawyering. The Inquiry Panel based its denial recommendation solely on the mere suspicion that Hale will manifest his racism in his behavior as a lawyer. The Panel made assumptions about Hale's future behavior—assumptions that are difficult to overcome, given the demonstrably subjective nature of moral character examinations.

Furthermore, although the denial of racists' bar applications would serve a similar purpose as existing rules of professional conduct, the denial of law licenses in such instances can be distinguished from the existing rules since denial of admission is a form of viewpoint discrimination: it is highly unlikely that Hale would be denied bar admission if he belonged to a religion that espoused love, not hate, for African Americans and Jews. Under current constitutional jurisprudence, the government may engage in viewpoint discrimination when necessary; however, for it to do

stantial likelihood of materially prejudicing an adjudicative proceeding in the matter.").

66. See *id.* R. 4.2.

67. See *id.* R. 1.6(a).

68. See *id.* R. 7.1, 7.3(a), 7.4(d).

69. See Carla D. Pratt, *Should Klansmen Be Lawyers?: Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857, 872 (2003) ("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.").

70. Christi Parsons, *Decision Triggering Free-Speech Debate: White Separatist Denied Law License*, CHI. TRIB., Feb. 9, 1999, Metro Chicago at 1.

so, the government must show both that the discrimination (1) furthers a compelling state interest, and (2) is narrowly tailored to achieve that end.⁷¹

In meeting this second requirement of narrow tailoring, the state's response to a racist bar applicant depends upon which goal is paramount to bar administrators: protecting the public or regulating the image of the bar. If the state prioritizes protecting the public, it may decide *ex ante* to reject a racist's application before he or she may cause harm to clients. Alternatively, if the bar's image takes priority, the state may decide to allow entry and provide for *ex post* disbarment as a means of policing prejudicial behavior by attorneys.

A. *Ex Post Disbarment for Prejudicial Behavior*

If one believes that the primary goal of moral character requirements is protecting the public, then it may be unnecessary to deny Hale bar admission. First, the constant threat of disbarment or court sanctions would compel Hale to treat opposing minority clients and lawyers with respect. The only way for Hale to effectively advocate for his cherished causes in court is by maintaining his membership in the state bar, and it is highly unlikely that Hale would jeopardize that membership by breaking existing rules of legal professionalism. Secondly, it is also unlikely that Hale would ever represent a member of one of the racial or ethnic groups that he despises. Hence, there is little concern that Hale would use his power as a lawyer to hurt non-white clients. Hale's religion has an analogue to the Biblical Ten Commandments, the Sixteen Commandments of Creativity, several of which proscribe the dealings of whites with non-whites.⁷² The Sixth Commandment of Hale's religion states, "Your first loyalty belongs to the White Race."⁷³ Furthermore, the Seventh Commandment states, "Show preferential treatment in business dealings with members of your own race. Phase out all dealings with Jews as soon as possible. Do not employ niggers or other coloreds. Have social contacts only with members of your own racial family."⁷⁴ Even more disturbing, the Eighth Commandment states, "Destroy and banish all Jewish thought and influence from our society. Work hard to bring about a White world as soon as possible."⁷⁵ In light of these mandates, it is hard to imagine that Hale would be willing to advocate for Jewish clients or clients of color. Thus, the potential for harm to such groups is minimized.

Furthermore, by making *ex ante* rejections of overtly racist bar applicants, state bar committees, ironically, may harm the public by making it more difficult for potential clients to identify bigots in the legal profession, since racist bar applicants would have great incentive to hide their

71. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

72. BEN KLASSEN, *NATURE'S ETERNAL RELIGION* Bk. 2 Ch. 4 (Creativity World Wide, 1992) (1973), available at <http://www.wcotr.com/holybooks/ner-2-04.html> (last visited Dec. 3, 2005).

73. *Id.*

74. *Id.*

75. *Id.*

true political leanings. Hale even articulated this risk: "They apparently would like me to be a silent racist . . ." ⁷⁶

Such silent racism is particularly invidious since it would be so difficult for clients to detect and hard for bar authorities to police. A racist lawyer who does not want to represent a black or Jewish client, for instance, could easily provide pretextual reasons for not taking the client's case, such as a belief that the case lacked merit, a lack of the necessary skill and resources, or a heavy caseload.⁷⁷ To be sure, such silent racism is not a problem if we are concerned solely about the prospect of a racist lawyer representing a minority client; however, such silent racism harms the legal profession at a structural level by tainting all lawyers with the air of prejudice exhaled by only a small unidentifiable number of racist members of the bar. Consequently, minority clients may begin to suspect the entire bar of harboring racist beliefs. By not encouraging racist lawyers to be silent about their beliefs, bar authorities may in fact assist the general public by making it easier to identify which lawyers may be less than effective due to a client's race.

Nevertheless, there remains the concern that a racist lawyer, after being admitted to the bar, may make statements or engage in conduct detrimental to the administration of justice. To the extent necessary to protect the integrity of judicial proceedings, courts are free to enact rules mandating that lawyers treat fellow lawyers, judges, court staff, and represented parties with respect, regardless of race or ethnicity. The threat of suspension or disbarment for the violation of such regulations thus may prevent harm before it happens. Furthermore, this solution results in less encroachment upon the First Amendment rights of lawyers than the alternative of the ex ante rejection of racist bar applicants.

B. *The Ex Ante Response*

If the primary goal is protecting the image of the legal profession, and more generally, the public's confidence in the entire judicial system, then denying bar admission to openly racist applicants is arguably the only possible solution. If segments of the general public—especially minority groups—perceive the justice system as tolerant of bigotry, then they will become less willing to try to vindicate their legal rights in court, out of suspicion that they will not be able to get a fair trial. This negative effect is particularly damaging with respect to antidiscrimination laws, since the unwillingness of minority plaintiffs to litigate could result in a frustration of state and federal legislatures' goal of combating racism in various areas of American life, such as education, housing, employment, and public accommodations.

It is important to note, however, that the concern of public distrust of the bar and the judicial system is not necessarily borne from experience.

76. Schauerte, *supra* note 1.

77. See Pratt, *supra* note 69, at 887; see also Martha Minow, *Foreword: Of Legal Ethics, Taxes, and Doing The Right Thing*, 20 W. NEW ENG. L. REV. 5, 6-7 (1998) (arguing that a rule prohibiting lawyers from discriminating in the selection of clients will force them to lie and/or give pretextual reasons for denying the potential client representation).

The most familiar, but the least persuasive, reason offered by courts for restricting the speech of lawyers is that attacks on judges, courts, or other lawyers inevitably breeds [sic] public distrust for the judicial system. Courts and commentators tend to be extremely conclusory when making this argument, using it as a talisman that automatically warrants restriction of speech. . . . [C]ourts present the argument as though the soundness of the premises and the inevitability of the conclusion are so obvious that only a fool could disagree. Consider this statement from a justice of the New York Court of Appeals: “[Erdmann’s] widely publicized statement, couched in such scandalous terms, is bound to have the effect of bringing discredit upon the administration of justice amongst the citizenry, an act which ought not be permitted.” The dissenting justice in *Erdmann* does not explain why the public would pay attention to the lawyer’s statement, rather than simply conclude that the lawyer was a jerk who was unworthy of belief.⁷⁸

In this case, it is not clear that the presence of openly racist lawyers would hurt public perception of the legal profession. Instead of ascribing such bigotry to all lawyers, the public may see racists like Hale for who they are: unpleasant people who are trapped within their own anachronistic racist beliefs. Furthermore, the public opinion regarding the judicial system may be improved in the long run by allowing racists to publicly espouse their views, since fellow lawyers disgusted by bigotry are prompted to publicly respond. Given the small number of supporters for Hale’s political ideology, the bar is likely served by allowing the public to witness the sheer volume of fellow lawyers openly dismayed by Hale’s beliefs.

C. Does Either Alternative Redeem the Court’s Decision?

From the perspective of an individual lawyer’s free-speech rights, it might not matter which alternative is chosen—ex post disbarment or ex ante bar application rejection—since either may produce the same results. As stated above, one of the advantages of the ex post alternative is that it does not discourage racists from being open about their beliefs, as long as this openness does not hinder the administration of justice. Thus, potential clients are made aware of such racism and can accordingly make decisions regarding their representation. However, just as potential clients are made aware of a lawyer’s racism, bar authorities are also made aware of these beliefs as well and thus will scrutinize the professional behavior of such lawyers more heavily. Consequently, this heightened scrutiny may result in a chilling effect on the candor of racist lawyers, resulting in a silencing just as if the ex ante response was put into effect.

This result also hints at the paradoxical relationship between the twin goals underlying character and fitness requirements. On the one hand, the full disclosure of racism helps clients make informed choices; on the other hand, such open racism can hurt the image of the bar and the justice sys-

78. W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 424–25 (2001) (quoting *In re Erdmann*, 301 N.E.2d 426, 430 (N.Y. 1973) (Gabielli, J., dissenting)).

tem generally. Courts are thus forced to make normative choices as to which goal is of highest priority. However, given the less intrusive nature of ex post bar dismissals and suspensions for rule violations, this is ostensibly the preferable option. Moreover, in light of the difficulty of detecting covert racism among both bar applicants and admitted lawyers, courts and bar authorities should direct greater resources toward finding the appropriate means of dealing with discriminatory behavior within the legal profession once it is manifest, thereby directing the bar to look toward ex post solutions.

Furthermore, where legal professionalism intersects with the First Amendment, the Supreme Court's current jurisprudence weighs in favor of admitting Hale. If the Inquiry Panel's only guiding precedent were *Konigsberg*, then under the test of reasonableness used in that case Hale's denial would be upheld.⁷⁹ On the basis of Hale's racist beliefs and active advocacy of racial hatred, any reasonable person would have adequate grounds to doubt his ability to faithfully execute his responsibilities as an officer of the court. However, the Supreme Court's subsequent tightening of moral character tests, manifested in *Baird* and *In re Stolar*, was perhaps an acknowledgment of the empirical evidence that moral character tests could be used in a politically discriminatory manner. "By the end of the 60's, the inadequacies of such narrow notions of good moral character factored into the Court's thinking. The 60's bore witness to the reality that honest people could, in good conscience, possess vastly different ideas about right and wrong."⁸⁰ Consequently, some limitations needed to be placed on state bar administrators to ensure that the bar accommodates a multiplicity of beliefs.

D. Beyond the Ex Ante/Ex Post Dialectic: The Battle of "Fundamental Truths"

Despite the legitimacy of the state's interest in ensuring that the legal profession remains free of bigotry, it is nonetheless difficult to reconcile the Inquiry Panel's decision with existing First Amendment precedent. The Committee on Character and Fitness found an ingenious, though flawed, means of sidestepping the problems raised by the freedom of speech protections afforded to bar applicants by *Baird* and *In re Stolar*. By characterizing the laudable values emphasized in the Inquiry Panel's decision—values such as the recognition of individual dignity without reference to race or ethnicity—as "fundamental truths," these values are elevated above the realm of quotidian political or religious discourse where different people may have different ideas of the worth of such values. Thus, Hale's inability to recognize these fundamental truths transforms his personally held political stance into a reason for questioning his moral character and fitness for being a lawyer, much in the same way that a bar committee could question the moral character and fitness of a bar applicant who re-

79. See *Konigsberg*, 353 U.S. at 262 ("We now pass to the issue which we believe is presented in this case: Does the evidence in the record support any reasonable doubts about Konigsberg's good character or his loyalty to the Governments of State and Nation?").

80. Mathew Stevenson, Comment, *Hate vs. Hypocrisy: Matt Hale and the New Politics of Bar Admissions*, 63 MONT. L. REV. 419, 436 (2002).

fuses to pay parking tickets or needlessly defaults on student loan obligations.

However, the Committee's rhetorical strategy is not particularly satisfying when one considers the fact that there is no tangible consensus on the value of equality and dignity. The Inquiry Panel could not cite to any existing case law to support its proclamation of fundamental truths, but instead relied upon persuasive (but not controlling) statements from the United Nation's Charter and the United Nation's Universal Declaration of Human Rights.⁸¹ Reflecting our societal inability to openly and unitedly stand behind fundamental truths of equality and dignity beyond perhaps the specific values articulated in the U.S. Constitution, Professor Anastaplo notes that this problem is particularly evident within the training grounds for bar applicants: "Law school faculties, for example, are not confident enough about the enduring basis for reasoned judgments about good and bad to develop persuasive responses to ill-founded moral judgments and to discipline effectively those who hold them."⁸²

Furthermore, it is unclear what threshold must be met before a value becomes a fundamental truth. The Inquiry Panel cites the Declaration of Independence and the Illinois Constitution to support the propositions that people have individual dignity and possess "certain inalienable rights."⁸³ The Fourteenth Amendment likewise provides some indication of how much American society values the notion of equality under the law. Nevertheless, the mere presence of such normative values within central American legal documents does not appear, in this context, dispositive as to fundamentality. Posit, for an instance, that Constitutional text alone were sufficient to establish fundamentality, without regard or reference to significant complementary and countervailing texts such as federal and state common and statutory law, to say nothing of social, historical, or political convention. Under such a test, a lawyer who disagreed with the Twenty-first Amendment (establishing prohibition) for instance, or the Twenty-sixth Amendment (setting the voting age at eighteen), could also be denied bar admission for a refusal to recognize the values embodied in those amendments as fundamental truths. Most troubling, an adherence to the Inquiry Panel's affinity for fundamental truth discourse invariably results in a conflict between two social values—equality and freedom of speech—each of which can reasonably claim "fundamental truth" status.

Moreover, the Inquiry Panel's decision is inconsistent with the Supreme Court's decision *Bond v. Floyd*.⁸⁴ In *Bond*, African American civil rights worker Julian Bond was prevented from taking his seat in the Georgia House of Representatives by the other members on the grounds that they found his pacifism and civil rights politics to be "totally and completely repugnant to and inconsistent with the mandatory oath prescribed by the Constitution of Georgia."⁸⁵ The Supreme Court held that this disqualifica-

81. *In re Hale*, *supra* note 2, at 881 n.8.

82. George Anastaplo, Editorial, *Confronting Racist Opinions*, ST. LOUIS POST-DISPATCH, July 22, 1999, at B7.

83. *In re Hale*, *supra* note 2, at 881 nn.8–9.

84. 385 U.S. 116 (1966).

85. *Id.* at 123.

tion, based on beliefs and statements, violated the freedom of expression guaranteed to Bond by the First Amendment.⁸⁶ Despite the different functional purposes of lawyers and representatives, both are integral to the determination of the legal rights of citizens. In introducing and passing bills in legislatures, representatives regulate the relationships between individuals and the state; lawyers interpret such laws and test them in court when they are perceived as unjust. Given the Supreme Court's reluctance to allow a state actor to prevent Julian Bond from taking his seat on the grounds of Bond's beliefs and public activism, it is hard to imagine that the Court could predicate the decision to deny bar admission solely on account of an applicant's privately held racist beliefs.

To that end, the Inquiry Panel could have found that Hale lacked moral character or fitness, or avoided confronting First Amendment issues by initially focusing on Hale's conduct. Although none of the prior charges against Hale rose to the level of felonies, the sheer number of instances where Hale displayed questionable behavior or poor judgment should allow bar administrators to shift the focus away from Hale's political views. For example, in January 1992, Hale's aggressive resistance to a mall security officer led to his arrest for assault and battery.⁸⁷ Hale failed to report on his bar application a fine for the illegal distribution of hand bills.⁸⁸ Hale also had a citation for littering, and had an order of protection against him by an ex-girlfriend for what she characterized as verbally abusive behavior.⁸⁹

Nevertheless, the Committee's decision was predicated primarily on Hale's racism. At its most basic level, Hale's denial of bar admission can be viewed as akin to an unconstitutional condition. Under the unconstitutional conditions doctrine, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."⁹⁰ Constitutional law scholar Kathleen Sullivan explains:

86. *See id.* at 136–37.

87. 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, 746 (2000).

88. *Id.* at 745.

89. *Id.* at 747. In another incident of reprehensible behavior, Hale lied to police regarding his white supremacist activities. In May 1991, Hale and his brother were carrying signs and chanting white supremacist slogans near the University of Peoria, where they were later threatened in their car by a group of black men. Hale's brother threatened the men with a handgun and then fled the scene, leaving Hale behind. When Hale was apprehended, he refused to cooperate and lied to the police. *Id.* at 745–46.

90. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In *Perry*, the respondent was employed in the state college system of Texas for ten years, the last four as a junior college professor "under a series of one-year written contracts." *Id.* at 594. The Board of Regents declined to renew the respondent's employment for the next year without giving him an explanation or prior hearing. *Id.* at 595. The respondent brought an action in federal court, alleging that the decision was based on his public criticism of the college administration, and thus infringed his freedom of speech rights. *Id.* He also alleged that the Regents's failure to grant him a hearing violated his procedural due process right. *Id.* The U.S. Supreme Court held that the respondent was entitled to pursue a lawsuit against the college for termination of his employment despite the lack of a contractual or tenure right to reemployment. *Id.* at 602–03.

The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.⁹¹

To be sure, as discussed earlier, members of the legal profession face many limits on their freedom of speech rights. However, in those instances, there is a much clearer connection between the limitations (e.g., regulation of legal advertising) and the state's compelling interest of protecting the legal system, and such limitations are far less intrusive upon First Amendment rights.⁹² Here, Hale cannot obtain the benefit of bar admission from the state unless he repudiates his racist views and disengages from the World Church of the Creator. Remarkably, in conditioning Hale's bar admission on the restriction of his speech and associational rights, Illinois's Committee on Character and Fitness did not rely on any empirical showing that Hale's views harmed the legal profession.

It is most likely that Hale's beliefs will not survive in America. Despite its difficult history of race-relations, at its core, the United States is a nation that values equality and dignity. As the country evolves politically, Matthew Hale may find that he has fewer and fewer followers. Nevertheless, the First Amendment does not allow state bar authorities to speed up the death of racism through the kind of politicization of the bar admission process exhibited by Illinois's Committee on Character and Fitness in Hale's case.

V. AN ALTERNATIVE VIEW: REGULATING THE MARKETPLACE OF IDEAS

The "marketplace of ideas," famously expressed by Justice Holmes, has been used as a rationale for freedom of expression. It stems from an analogy of ideas to goods in an economic marketplace. Under this theory, the truth emerges from the competition of ideas in an open market:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.⁹³

Through the process of acceptance and rejection, ideas are tested, which thus gives the ideas that successfully emerge from this process a type of

91. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989).

92. See *supra* notes 64 to 68 and accompanying text.

93. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

legitimacy among the “consumers”—the public—that would not exist without such negotiation.⁹⁴

Applied to Matthew Hale’s case, the market theory also seems to weigh in favor of Hale’s admission. By admitting Hale and others with racist views, bar administrators would avoid facing a racist bar applicant’s First Amendment challenges by allowing the market to flush racists out. To that end, such a liberalized admissions process would also avoid the question of how much society values “fundamental truths” like dignity and antidiscrimination doctrines: the general public would make such valuations through their decision to hire—or not to hire—racists like Hale. Faith in the power of the market leads W. Bradley Wendel to observe, “[t]here is no doubt that Hale’s views will not prevail in the marketplace of ideas, and for that we should all be grateful, but it does not follow that his advocacy of white supremacy ought to lead automatically to his exclusion from the bar.”⁹⁵

Furthermore, market theory also tests the “fundamental truths” espoused by the Inquiry Panel in its decision. By not allowing the market to weigh the relative values of Hale’s racism against the values of equality and dignity, Avi Brisman notes, “the Committee missed a golden opportunity to prove the strength of the ‘fundamental truths’ and the collective goal and integrity of the law profession in upholding these truths.”⁹⁶

Although market theory seems to weigh in favor of the admission of Matthew Hale to the bar, his case immediately begs the question of whether there are ever instances when the denial of bar admission to racist applicants is justifiable under the theory. One need only to look at real markets for answers. If the analogy of the marketplace of ideas to the economic marketplace of goods is pushed further, it becomes clear that marketplaces of ideas are just as susceptible to market failure as marketplaces in goods. Economic theory has identified and described several problems that can emerge in markets for goods, three of which are entirely applicable within the context of the marketplace of ideas: externalities, information asymmetry, and unequal bargaining power.

A. Externalities

In a perfect market, individuals or firms bear the cost for the benefits that they enjoy. For instance, a farmer has to pay for the land, seeds, fertilizer, and pesticides necessary to grow his or her crops. However, there are circumstances in which a third party is forced to incur the cost of such benefits. The burdens of these negative externalities stem from a failure of the market to distribute costs and benefits efficiently. This failure of parties to fully internalize costs underlies the nuisance doctrine in torts;

94. Cf. Jack Snyder & Karen Ballentine, *Nationalism and the Marketplace of Ideas*, 21 INT’L SECURITY 5, 10 (1996) (defining myths within the context of nationalist discourse as “assertions that would lose credibility if their claim to a basis in fact or logic were exposed to rigorous, disinterested public evaluation”).

95. Wendel, *supra* note 78, at 324–25.

96. Avi Brisman, Note, *Rethinking the Case of Matthew F. Hale: Fear and Loathing on the Part of the Illinois Bar Committee on Character and Fitness*, 35 CONN. L. REV. 1399, 1423 (2003).

likewise, much of current litigation within the realm of environmental law is directed at addressing the externalities of pollution.⁹⁷

Viewed in this light, one can see how racist lawyers can produce negative externalities, both within and outside of the legal profession. The candor of the overtly racist lawyer allows him or her to attract followers for his or her beliefs, and serves as a beacon to the select potential clients enamored with racist ideology. The overtly racist lawyer's willingness to express his or her views, in the face of government scrutiny, also has the benefit of attracting supporters like Professors Anastaplo and Dershowitz—people who are not willing to sanction the content of the overt racist's views, but rather his or her right to express them. However, this benefit to the racist comes with a concomitant cost to the legal profession and the general public. The legal profession has to expend resources in policing itself to make sure that the private racism of lawyers is not influencing the judicial system. Most problematically, the general public has to bear the cost of a marketplace that (arguably) becomes just a bit more intolerant of the ideas of equality and diversity, measure by measure, with every inflammatory statement an overtly racist lawyer makes. This increased intolerance is of particular harm to racial and ethnic minorities maneuvering within the marketplace.⁹⁸ In an optimal situation, the overtly racist lawyer would have to bear the full costs of his or her behavior—whether in the form of being confronted with intense social stigma or, relatedly, being forced to expend a great deal in advertising costs to find the few (if any) clients who would want a racist lawyer. However, where there is a high risk that the public and the judicial system will have to bear the cost of bigotry (e.g., in an environment of racial segregation where a larger number of clients would want a racist lawyer), courts may need to step in and regulate the marketplace of ideas through the preventative measure of ex ante bar rejections.

B. Information Asymmetry

Information asymmetry occurs when one party in a transaction has more or better information than the other party in a transaction. Where this occurs, the party with more information has an opportunity to defraud the other party. In a market with information asymmetry, buyers must

97. Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE J. ON REG. 67, 76 (1996) (“Indeed, much of what we call environmental law deals specifically with externalities that do not have a well-established price in the marketplace.”).

98. Charles R. Lawrence III asserts that “it is not just the prevalence and strength of the idea of racism that make the unregulated marketplace of ideas an untenable paradigm for those individuals who seek full and equal personhood for all. The real problem is that the idea of the racial inferiority of nonwhites infects, skews, and disables the operation of a market” Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in MARI J. MATSUDA ET AL., WORDS THAT WOUND 53, 77 (1993).

factor in lack of knowledge when deciding how much to pay for any good, thereby dampening the average value of commodities in that market.⁹⁹

Within the marketplace of ideas, information asymmetry may take the form of the inability of a racist lawyer to value equality or dignity ideals to the same degree as the average non-racist actor in the marketplace. A lawyer who has not had to encounter people of another race, or whose racist beliefs have never been tested, might not know or understand the value of equality in American society to the same degree as the non-racist pool of prospective clients, and thus might not recognize the social value of providing legal assistance to someone of a different race or ethnicity. Consequently, a racist lawyer may attempt to avoid representing a person of a different race even in situations where such representation would be socially beneficial (e.g., challenging an unconstitutional regulation), since the racist lawyer will inaccurately find little or no value in doing so. In this scenario, if the percentage of lawyers harboring racist beliefs is high enough in a given area such that certain members of the population have trouble finding lawyers to represent them, bar authorities may need to regulate the marketplace of ideas by forcing racist lawyers to challenge their own views. Such regulation could come in familiar forms: mandating diversity training for lawyers, ex ante bar application rejections, or suspensions.

C. Unequal Bargaining Power

Unequal bargaining power is the most plausible scenario. Unequal bargaining power may occur where there is a large pool of potential clients in a given area, but only one lawyer, or very few lawyers, in the area. In economics, this situation is termed a monopoly or an oligopoly, respectively. In the marketplace of ideas, a racist lawyer with monopoly or oligopoly power will not have his ideas challenged as rigorously by clients as he or she optimally would when there is competition among lawyers, since he or she provides a service which clients need.¹⁰⁰

Although the First Amendment affords access to the marketplace of ideas and blocks courts from completely censoring lawyers, bar authorities have several options to respond to monopoly and oligopoly power. By using ex ante rejections to prevent racist lawyers from practicing law, bar associations leave racist applicants free to espouse their views (thus they can still participate in the marketplace of ideas) but they cannot use their desired legal training and skills against clients who espouse the ideals of equality, dignity, and diversity. To be sure, such a solution might have been untenable in a previous era when racism was an accepted and common social norm; bar associations with large numbers of racist lawyers probably would not bar admission on the grounds of an applicant's racism. In such

99. See generally George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488-90 (1970) (illustrating this dynamic with the classic example of the used automobile market).

100. Cf. Bert W. Rein & John E. Barry, *A Free Market Solution To Contingent Fees*, FLORIDA BUSINESS INSIGHT, May/June 1999 (noting the emerging oligopoly power of trial lawyers, fostered by the contingent fee system), available at <http://flabusinessinsight.com/1999Issues/May&June99/maylegal.htm>.

instances, one solution to the problem of unequal bargaining power might be the encouragement of more minority individuals to enter the legal profession, thereby providing a core group of lawyers who could potentially serve the communities harmed by racist lawyers and their prejudicial beliefs.

D. Role of Government

Like economic markets, the marketplace of ideas may at times require regulation by government agents to ensure that transactions are efficient. To be clear, the decision by authorities to regulate involves some basic normative judgments regarding the necessity of government power to protect certain segments of the population as they operate within the marketplace of ideas, whether they are Jews or African Americans pushing for equality or racists pushing for inequality. Indeed, many free speech proponents may be disconcerted by the idea of allowing the government to influence dialogue between individual citizens.

From this perspective, the First Amendment (in the marketplace of ideas) becomes an analogue of the liberty to contract found within the Fourteenth Amendment's Due Process Clause. However, with regards to economic markets, the Supreme Court has moved away from the logic underlying *Lochner v. New York*¹⁰¹ of limiting the government's power to regulate. Likewise, some regulation may be necessary within the marketplace of ideas, and wariness toward limiting a state's power to regulate without first weighing the cost to market participants is warranted. Although lawyers are in demand in this country, and a racist lawyer would likely be able to find clients, American society probably would not allow an overtly racist lawyer like Hale to find mainstream success. However, just as the Great Depression induced the government to more actively engage in economic markets, modified American attitudes could prompt bar authorities to reject any laissez-faire approach in favor of more regulation.

VI. THE POSSIBILITY OF REHABILITATION

Assuming *arguendo* that the rejection of racist bar applicants passes constitutional muster, Matthew Hale's case also prompts one to ask the question of whether a reformed racist has a chance of demonstrating good moral character, such that he or she may eventually gain admission to the bar. Although there is no single guiding principle, several common themes emerge from the state cases dealing with the rehabilitation of bar candidates. Below are three relevant examples.

A. In re Prager¹⁰²

In re Prager addresses the standard of rehabilitation appropriate for a convicted felon to establish the requisite "good moral character" for ad-

101. 198 U.S. 45 (1905) (holding that a labor law regulating length of work days in bakeries violates the right to contract, which the majority considered implicit in the Due Process Clause of the Fourteenth Amendment).

102. 661 N.E.2d 84 (Mass. 1996).

mission to the Massachusetts bar. Harvey Prager was a *summa cum laude* graduate of Bowdoin College and a member of Phi Beta Kappa. From 1971 to 1972, Prager attended Harvard University as a graduate student, during which time he began smoking marijuana regularly.¹⁰³ This lifestyle, according to Prager, led him into the illegal sale and distribution of marijuana.¹⁰⁴ Prager organized and led a large-scale international drug smuggling operation for close to six years.¹⁰⁵ In 1983, Prager was indicted by a federal grand jury in Maine; he subsequently fled the United States, living as a fugitive until the United Kingdom extradited him in 1987. In 1988, Prager pled guilty to smuggling narcotics into the United States.¹⁰⁶

Prager received a suspended sentence with probation for five years. Prager helped negotiate the terms of his sentence, which contained special conditions of probation, including the condition that Prager "volunteer a minimum of forty-five hours each week toward assisting those with acquired immune deficiency syndrome (AIDS), and to create and maintain a free-standing hospice unit for persons in the terminal stages of AIDS."¹⁰⁷

Prager received permission from a federal court to apply to law school and was admitted to the University of Maine School of Law in 1991.¹⁰⁸ During law school, Prager was named to the dean's list, was selected as a staff member on the Law Review, and worked for the Cumberland Legal Aid Clinic.¹⁰⁹ Prager graduated *summa cum laude* from law school in 1994 and subsequently clerked for Justice Howard H. Dana, Jr., of the Maine Supreme Court.¹¹⁰

In 1993, Prager's probationary period ended, and he applied for admission to the Massachusetts Bar in June of 1994.¹¹¹ He passed the written examination, and the state character and fitness board, in recommending his admission, observed that "Prager has so rehabilitated himself since the time of his criminal activities thirteen years ago that he is of present good moral character."¹¹² Nevertheless, the Supreme Judicial Court of Massachusetts denied Prager's application, stating that he could reapply for bar admission in five years.¹¹³ In their analysis, the court recognized that "the primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice."¹¹⁴ The court analyzed distinctions between applicants to the bar and attorneys seeking reinstatement after disbarment. Regarding reinstatement following disbarment, the court considered five critical factors in evaluating whether it is proper for a court to hold a person out as being trustworthy:

103. *Id.* at 86.

104. *Id.*

105. *Id.* at 87.

106. *Id.*

107. 661 N.E.2d at 87.

108. *Id.* at 88.

109. *Id.*

110. *Id.*

111. *Id.*

112. 661 N.E.2d at 89.

113. *Id.* at 94.

114. *Id.* at 89 (quoting ABA CODE OF RECOMMENDED STANDARDS FOR BAR EXAM'RS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (1995-96)).

(1) the nature of the original offense for which the petitioner was disbarred; (2) the petitioner's character, maturity, and experience at the time of his disbarment; (3) the petitioner's occupations and conduct in the time since his disbarment; (4) the time elapsed since the disbarment; and (5) the petitioner's present competence in legal skills.¹¹⁵

To evaluate the character and fitness of an applicant to the bar, the court applied analogous standards, yet also noted that bar admission is not necessarily prevented by a prior conviction: "no offense is so grave as to preclude a showing of present moral fitness."¹¹⁶ Rather, at the time of bar application, the court seeks evidence of good moral character by examining whether the candidate has been sufficiently rehabilitated by "[leading] a sufficiently exemplary life to inspire public confidence once again, in spite of his previous actions."¹¹⁷

In reaching its conclusion regarding Prager, the court was "not surprised that Prager would carry out his functions [by working with AIDS patients] in a diligent manner, [and] with the utmost respect and care for his patients. This is precisely what was required of him by his sentence."¹¹⁸ The court expressed concern that not enough time had passed for Prager to demonstrate evidence of good moral character: "seven years of a creditable work history, successful completion of law school, and compliance with the terms of a five-year probationary period, are insufficient to show good moral character when balanced against approximately sixteen years of marihuana use, international smuggling, and living as a fugitive."¹¹⁹ Therefore, the court required Prager do more than merely fulfill the requirements of his sentence to satisfy the requirement of positive action it would deem sufficient to demonstrate rehabilitation.¹²⁰

B. *In re Mustafa*¹²¹

While a student at the law school of the University of California at Los Angeles, John Mustafa used his access to the checking account of the school's moot court program to write checks for his personal use.¹²² After a fellow student discovered and reported his misconduct to the dean, Mustafa confessed his actions to a law school professor and the District of Columbia's Committee on Admissions.¹²³ He also informed the law firm that ultimately hired him. After performing an investigation, the university placed a letter of censure in Mustafa's confidential student discipline file.

115. *In re Prager*, 661 N.E.2d at 89–90.

116. *Id.* at 89.

117. *Id.* at 93 (quoting *In re Hiss*, 333 N.E.2d 429, 433 (Mass. 1975)).

118. *Id.* at 93.

119. *Id.* at 94.

120. 661 N.E.2d at 94.

121. 631 A.2d 45 (D.C. 1993).

122. *Id.* at 46.

123. *Id.*

Mustafa passed the July 1991 bar exam and applied for admission to the Bar of the District of Columbia.¹²⁴ In light of his past misconduct, the District's Committee on Admissions held a hearing to determine whether Mustafa should be admitted to the bar. The Committee found that Mustafa always intended to repay the money he took, and the Committee was impressed by Mustafa's honesty and forthrightness before the Committee and during university investigation.¹²⁵ Several school and work acquaintances also gave testimony of Mustafa's good character. In a unanimous decision, the Committee recommended that Mustafa be admitted to the Bar.¹²⁶

Nevertheless, while noting Mustafa's good law school record and appropriate conduct since the embezzlement, the D.C. Court of Appeals held that the short amount of time that had passed since Mustafa's misconduct prevented him from establishing good moral character:

While we do not hold as a matter of law that an applicant for admission to the Bar, like a disbarred attorney, must necessarily wait a minimum of five years from the date of proven misconduct before applying for admission to the Bar, we conclude that on the record here, particularly the relatively short period of time that has elapsed since the date of his misconduct, Mustafa has failed to establish that he has the good moral character required for admission to the Bar.¹²⁷

However, the court believed it likely that Mustafa would be able to establish the necessary good moral character for admission at some point in the future.¹²⁸

C. In re Application of G.L.S.¹²⁹

G.L.S. was a convicted felon who applied for admission to the Bar of Maryland. He spent six years in prison, read extensively, and took the University of Georgia's extension courses.¹³⁰ After his release in May 1974, G.L.S. attended Morgan State University, where he eventually received his degree in political science and graduated with honors.¹³¹

G.L.S. applied and was admitted to the University of Maryland School of Law. On his application, G.L.S. candidly admitted his incarceration, and gave further explanation of the events in response to a request by the law school for more information.¹³² While in law school, G.L.S. was employed by the Legal Aid Bureau, the Prisoners' Assistance Project, and the Office of the Attorney General.¹³³

124. *Id.*

125. *Id.*

126. 631 A.2d at 47.

127. *Id.*

128. *Id.* at 48.

129. 439 A.2d 1107 (Md. 1982).

130. *Id.* at 1108.

131. *Id.*

132. *Id.* at 1108–09.

133. *Id.* at 1109.

In May 1980, G.L.S. applied for admission to the Bar of Maryland.¹³⁴ On his application, G.L.S. listed the date of his criminal conviction but failed to mention the nature and disposition of the charges—an omission which prompted a member of the Character Committee to recommend rejecting G.L.S.'s application.¹³⁵ The recommendation prompted the Committee to hold a hearing, where they heard testimony regarding G.L.S.'s rehabilitation. After the hearing, the Committee recommended to the court that G.L.S. be admitted to the bar.¹³⁶

The court followed the Committee's recommendation, ordering G.L.S.'s admission upon successful completion of the bar exam. The court agreed that G.L.S. had rehabilitated himself.¹³⁷ Although the Committee was troubled by G.L.S.'s incomplete disclosure of the nature of his conviction, the court found that his disclosure was sufficient to trigger an investigation, and noted that G.L.S. readily provided the information requested during the investigation.¹³⁸

Each of the cited cases are distinguishable from *In re Hale*, since prior criminal acts—not racism—served as the indicia of moral character (or lack thereof). However, these cases also serve as useful tools for predicting the means by which a racist bar applicant like Hale might be granted bar admission in the future. Although there is no single formula for gauging whether a rehabilitated bar applicant has demonstrated evidence of good moral character, some clues emerge from *In re Prager*, *In re Mustafa*, and *In re Application of G.L.S.*

First, in each case the court looked at the amount of time that has elapsed since the applicant's misconduct. As past misconduct becomes more distant in time, courts appear more apt to believe that there has been rehabilitation, especially if the applicant has conducted himself well during that time. Second, courts look for positive evidence of good moral character, beyond mere fulfillment of sentence requirements. Prager's inability to make this showing distinguishes his case from G.L.S.'s. Finally, courts examine the candor and honesty of applicants regarding their past misconduct. This candor was critical to G.L.S.'s admission, and although Mustafa was denied admission, the court was impressed by his forthrightness.

VII. CONCLUSION

Matthew Hale reemerged in the national spotlight in 2005 because of his connection to District Court Judge Joan Humphrey Lefkow. In 2002, Judge Lefkow ordered Hale to pay \$200,000 for violating an Oregon organization's trademark on the name World Church of the Creator.¹³⁹ In April 2004, Hale was convicted of two counts of obstruction and one count of soliciting for attempting to hire his security chief to assassinate Judge

134. 439 A.2d at 1109.

135. *Id.* at 1110.

136. *Id.* at 1115.

137. *See id.* at 1118 ("There can be no question that the applicant has been rehabilitated.").

138. *Id.* at 1117.

139. Jodi Wilgoren, *Man in Plot to Kill Judge Says Slayings are "Heinous,"* N.Y. TIMES, Mar. 4, 2005, at A14.

Lefkow in retaliation for her ruling.¹⁴⁰ On April 6, 2005, Hale was sentenced to forty years in prison; in sentencing Hale, U.S. District Judge James T. Moody noted:

Mr. Hale is a highly educated, intelligent individual who surrounds himself with troubled individuals who feed his enormous ego. He is also very calculating and highly skilled in controlling and manipulating others . . . Mr. Hale's irrational belief that Judge Lefkow's ruling represented the use of force and that he could then declare her a criminal and ask others to murder her is not only frightening and troubling, but it undermines the judiciary's central role in our society and strikes at the very core of our system of government. It is imperative that judges be able to perform their duties without fear of reprisal from people like Mr. Hale attempting to take their lives. I consider Mr. Hale to be extremely dangerous and the offenses for which he stands convicted to be an extreme, egregious attack against the rule of law in the United States. Mr. Hale's conduct impacts the very fabric of our judicial system and the ability of judges to function in a safe environment.¹⁴¹

Hale's actions since his denial of bar admission render the Inquiry Panel's decision moot because his behavior would allow a future bar association to deny him admission on grounds other than his political viewpoints. Indeed, it is unlikely that Hale will ever see the outside of a jail cell, let alone the inside of a law office.

Nonetheless, the *In re Hale* decision has left unanswered many residual free-speech questions. One can easily imagine other scenarios wherein a bar association is confronted with an applicant with a spotless academic record, who is lacking evidence of any criminality, yet who openly espouses racist beliefs. In such cases where character and fitness committees cannot use criminality as an alternate route for denying admission to a racist individual, will courts strike another blow to the First Amendment rights of bar applicants? With every *In re Hale*-like decision, all holders of socially unpopular opinions are at an increased risk of falling victim to the exclusionary tactics used by Illinois's Committee on Character and Fitness.

Furthermore, in balancing lawyers' and bar applicants' First Amendment rights against the need to protect the judicial system, courts and bar associations must remain mindful of the normative context within which they perform this calculus. As minority groups increase in political power, courts may perhaps find that such groups are far better served by a system within which bar associations do not paternalistically protect such groups from the private racism of lawyers: where members of the bar are not punished for their candor with regard to racial politics, minority groups may in fact increase their social, political, and economic savvy by fully and autonomously participating in the legal market without the viewpoint-based gate-keeping of bar authorities.

140. *Id.*

141. Matt O'Connor, *Hale Gets 40 Years for Plot to Kill Judge*, CHI. TRIB., Apr. 7, 2005, News Chicago at 1.

To be sure, one could very easily argue that few, if any, minority groups in the United States currently enjoy the kind of clout necessary to be able to obtain quality legal services in an environment without some degree of regulation from courts and bar associations. Yet regulation need not be an on/off switch whereby states have only the two options of heavy regulation or no regulation at all. Instead, in balancing state needs against lawyers' rights, courts may find solutions in the utilization of a sliding scale of regulation—tailoring the exact nature and degree of regulation to the power dynamics and socioeconomic positions of lawyers relative to the pool of potential clients specific to a state. Nonetheless, such regulation ultimately cannot extend beyond the limits mandated by the Constitution.

As the United States recovers from the insidious grip of segregation and legalized Jim Crow, the goal of ridding the bar of racism is admirable, and perhaps achievable. Nevertheless, in endeavoring to spread ideals of equality and dignity within the legal profession, courts and bar associations must be careful to guard against the lure of easy solutions like short-circuiting the fundamental rights of lawyers. Justice Black noted the delicate balancing act that states must perform:

We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar.¹⁴²

Although these words were written almost fifty years ago, they remain as applicable today as the day they were committed to paper. Courts and state bar authorities will undoubtedly face future questions of moral character and fitness as difficult, if not more so, than the case presented by Matthew Hale. In such instances, the responses of courts and bar authorities will provide indications of this country's true commitment to the competing—yet coexisting—core values of free-speech and equality.

142. *Konigsberg*, 353 U.S. at 274.

