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## Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession

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## REGULATING THE SPEECH OF JUDGES AND LAWYERS: THE FIRST AMENDMENT AND THE SOUL OF THE PROFESSION

*Rodney A. Smolla\**

### Abstract

The legal profession has historically asserted moral and legal authority to substantially control the speech of judges and lawyers. This impulse to control the speech of judges and lawyers is driven by many of the profession's most strongly held interests and values. These include such interests as ensuring the fair administration of justice, the promotion of respect for the rule of law, the preservation of public confidence in the legal system, the preservation of the appearance of judicial impartiality, the maintenance of professionalism, and the safeguarding of the dignity of the profession. Some of these interests are palpable and may directly buttress the functionality of the legal system. These functional interests include regulations that directly affect the operation of the legal system, such as regulations that are calculated to deter actual interference with the administration of justice, to preserve the lawyer's obligations to maintain client confidences, or to prevent misleading lawyer advertising or marketing. Other interests often advanced to defend restrictions on the speech of judges and lawyers, however, are grounded in the highest ideals and values of the profession, rather than the actual functionality of the legal system. These include values such as promoting respect for the rule of law, maintaining public confidence in the legal system, maintaining professionalism (a concept different from adherence to hard-law legal ethical rules), and safeguarding the dignity of the profession. This Essay argues that the two types of rationales, functional and idealistic, are on different footings under First Amendment theory and doctrine. Regulation of the speech of judges and lawyers is appropriately treated as a "carve out" from the high levels of protection afforded speech in the general marketplace. Even so, this Essay maintains, once regulation moves from the actual protection of functional interests to the aspirational values of the profession, the First Amendment comes to bear with greater force, and many regulations restricting the speech of judges and lawyers on more ethereal grounds ought to be deemed inconsistent with the First

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Amendment. These values, of enormous importance to most judges, lawyers, and legal educators, are best advanced through education and peer pressure, and not outright regulation.

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INTRODUCTION

Woody Allen tells a story of being disciplined for cheating on a metaphysics exam: He looked into the soul of the student sitting next to him.<sup>1</sup> This Essay looks into the soul of the legal profession and explores how some of the profession’s most deeply cherished values, such as fairly administering justice, promoting respect for the rule of law, preserving public confidence in the legal system, preserving the appearance of judicial impartiality, maintaining professionalism, and safeguarding the dignity of the profession, may serve to justify restricting the free speech rights of judges and lawyers.

The speech of judges and lawyers operating within the legal profession

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1. ANNIE HALL (MGM 1977).

is circumscribed to protect palpable functional interests, such as avoiding actual interference with the administration of justice, preserving the lawyer's obligations to maintain client confidences, or preventing misleading lawyer advertising or marketing. Where speech is limited for these reasons, the case for reduced First Amendment protection for judges and lawyers is theoretically coherent and practically straightforward. Restricting the speech of judges and lawyers in such circumstances fits comfortably within established First Amendment theory and doctrine.

When the basis for restricting speech drifts from such palpably functional rationales and ranges into the more idealistic and mythological values of the profession, the First Amendment justifications for such regulation become much less coherent and far more complicated. Values such as promoting respect for the rule of law, maintaining public confidence in the legal system, maintaining professionalism (a concept different than adherence to hard-law legal ethical rules), and safeguarding the dignity of the profession are aspirational. They are values embraced with great pride by most judges, lawyers, legal educators, and law students. But to what extent do First Amendment theory and doctrine permit these values to serve as justifications for reducing the free speech protections that judges and lawyers would otherwise enjoy as private citizens? Exploring that question is the principal focus of this Essay.

## I. DISTINGUISHING THE GOVERNMENT AS SOVEREIGN FROM THE GOVERNMENT AS MANAGER

In considering the extent to which construction of the First Amendment ought to permit the government to restrict the speech of judges, it is critical, at the outset, to determine what capacity the government is acting in. Is the government acting in its capacity as a sovereign, invoking its police power to control expression in the general marketplace of ideas? Or is it instead acting as “manager” of an enterprise constituting one of the special settings that are appropriately treated as “carve outs” from the marketplace? This determination is critical because the First Amendment applies with substantially diminished force in these carve outs.

### A. *The High Protection for Speech in the Marketplace*

Modern First Amendment law provides robust protection for freedom of speech in the general marketplace. Content-based regulation of speech in the general marketplace is subject to the rigorous demands of the “strict scrutiny” test. The test requires that the law be “justified by a compelling government interest and . . . narrowly drawn to serve that interest.”<sup>2</sup> “Viewpoint discrimination,” in which the government targets not simply a subject, but particular viewpoints advanced by speakers on that subject, is

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2. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

an especially egregious form of content discrimination.<sup>3</sup> Viewpoint discrimination is virtually always deemed invalid.<sup>4</sup> A network of more specific First Amendment doctrines in turn augments these general prohibitions on content and viewpoint discrimination in the general marketplace. This network creates additional layers of protection for freedom of speech in specific pockets of First Amendment law, in which special tests styled for specific problems have evolved. This accounts, for instance, for the high levels of constitutional protection surrounding defamation of public officials and public figures,<sup>5</sup> and the tests for incitement,<sup>6</sup> threats,<sup>7</sup> and obscenity.<sup>8</sup> Under this regime of extraordinarily high protection for freedom of speech in the general marketplace, myriad forms of grossly graphic and highly offensive speech are deemed protected by the First Amendment. These forms of speech include flag burning, cross burning, graphic depictions of violence against animals, hateful picketing of military funerals, and false claims of military honors.<sup>9</sup>

The restrictions commonly placed on the expressive rights of judges and lawyers would thus almost certainly be struck down under the First Amendment if the general marketplace rules were applied.<sup>10</sup> The restrictions on expression by judges and lawyers are invariably based on content and viewpoint, and in addition often implicate other more specific First Amendment doctrines protecting free speech. The question thus

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3. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination.” (citation omitted)).

4. *Id.* at 828 (“Discrimination against speech because of its message is presumed to be unconstitutional.”).

5. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334–35 (1974) (recognizing that the actual malice standard extended to defamation of public figures); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that public officials may only recover for defamation if they prove “actual malice” through clear and convincing evidence, requiring knowledge of falsity or reckless disregard for truth or falsity).

6. *See Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam) (distinguishing incitement from mere advocacy, and creating a test that is essentially a restatement of the older “clear and present danger” test requiring that the speech be directed to the incitement of imminent lawless action and likely to produce that action before it may be rendered criminal).

7. *See Watts v. United States*, 394 U.S. 705, 707–08 (1969) (per curiam) (distinguishing between the rhetorical use of threatening language against the President incident to advocacy and a true threat not protected by the First Amendment).

8. *See Miller v. California*, 413 U.S. 15, 24, 27 (1973) (holding that “patently offensive ‘hard core’” pornography is not protected by the First Amendment but establishing a demanding three-part test for obscenity that was highly protective of sexually explicit speech).

9. *See, e.g., United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (protecting false claims of military honors); *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (protecting hateful protests directed at the funeral of a serviceman who died in Iraq); *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (protecting violent and graphic depictions of animal cruelty); *Virginia v. Black*, 538 U.S. 343, 347–48 (2003) (protecting cross-burning when it does not constitute a true threat); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (protecting flag-burning as a symbol of protest).

10. *See infra* text accompanying notes 43–71.

becomes whether the regulation of the speech of judges and lawyers, incident to the government's managerial regulation of the "legal profession," may appropriately be deemed a "carve out" in which diminished First Amendment protections should apply.<sup>11</sup>

### B. *The Reduced Protection in the Carve Outs*

First Amendment doctrine imposes less severe restraints on governmental speech regulation when the government is acting as a direct participant in an enterprise in which the regulation of speech is incident to the government's superintendence of that enterprise, rather than regulating speech as a pandemic sovereign exercising its police power in the general marketplace.<sup>12</sup> These are best understood as carve outs from the general marketplace, with the government managing the setting that comprises the carve out. Classic examples of such carve outs where the government regulates speech include the following: in its role as manager of public employees,<sup>13</sup> when it operates as educator,<sup>14</sup> when it operates prisons,<sup>15</sup> when it operates as military commander,<sup>16</sup> when it regulates broadcasting

11. See *infra* text accompanying notes 43–71.

12. See, e.g., *In re Kendall*, 712 F.3d 814, 825 (3d Cir. 2013) ("Sometimes, however, the government acts in a capacity that goes beyond merely being sovereign, and it gains additional authority to regulate speech in those capacities.").

13. See *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) ("We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties."); *Connick v. Myers*, 461 U.S. 138, 154 (1983) ("The limited First Amendment interest involved here does not require that [the district attorney for Orleans Parish] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1968) (determining that the First Amendment does not protect statements directed toward a public official by a government employee "when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity").

14. See *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (permitting school officials to confiscate a student banner promoting illegal drug use); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 275–76 (1988) (finding no First Amendment violation when a school principal deleted two pages from a school-sponsored newspaper because the principal reasonably believed the material "was [not] suitable for publication"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."). *But see Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that the First Amendment does not permit school officials to deny students the right to display their opposition to hostilities in Vietnam by wearing black bands of cloth on their sleeves).

15. See *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (recognizing "the 'inordinately difficult undertaking' that is modern prison administration" in considering First Amendment protections in the prison context (citation omitted)).

16. See *Parker v. Levy*, 417 U.S. 733, 758–59 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.").

to retain effective “ownership” of the scarce electromagnetic broadcast spectrum,<sup>17</sup> and when the government manages its own nonforum and limited-forum property, facilities, and programs under the rubric of public forum law.<sup>18</sup>

The First Amendment doctrines governing these carve outs are often multilayered. One of the principal tasks is to determine whether the regulation at issue is genuinely regulation “inside the carve out” or rather an inappropriate effort to extend regulation into the general marketplace. A threshold question in government employee speech cases, for example, is whether the employee–claimant to First Amendment protection was speaking in his or her capacity as an employee.<sup>19</sup> If so, the employee–claimant falls within the carve out and may not launch a First Amendment claim.<sup>20</sup> If not, that is, if the employee was speaking as a citizen on a matter of public concern, the employee–claimant will at least qualify for a First Amendment claim, which is then subject to a special balancing test to weigh the interests of the employee–citizen against the interests of the government as employer.<sup>21</sup> Even within a carve out, the level of First Amendment protection enjoyed by individuals within the “special setting” may vary. In public school student speech cases, for example, the students receive reduced, albeit still high protection, when they engage in passive personal expression on school grounds in circumstances not connected to any curricular or programmatic activity sponsored by the school. This was the case for the famous black armband protest in *Tinker v. Des Moines Independent Community School District*.<sup>22</sup> In contrast, when the expression of the student arises from school-sponsored activities implicating the pedagogical mission of the school, students may receive lower levels of First Amendment protection.<sup>23</sup>

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17. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386–90 (1969); *id.* at 388 (“Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”).

18. See *United States v. Kokinda*, 497 U.S. 720, 725–26 (1990) (“The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is unreasonable, or . . . arbitrary, capricious, or invidious.” (internal quotation marks omitted)); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (“In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”).

19. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

20. *Id.*

21. *Id.*

22. 393 U.S. 503, 509 (1969) (applying a standard that permitted school officials to restrict speech in such circumstances only on a showing of substantial and material disruption).

23. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988) (employing a standard lower than the *Tinker* test in a case involving censorship of material in a school-sponsored student newspaper, permitting schools to regulate such expression merely on a showing that the regulation is reasonably related to legitimate pedagogical concerns).

## II. THE “LEGAL PROFESSION” AS A SPECIAL SETTING CARVED OUT OF THE GENERAL MARKETPLACE

The legal profession is appropriately treated as a carve out from the First Amendment principles that apply in the general marketplace. In articulating the contours of this carve out, it is important to distinguish between the “insiders” and the “outsiders” to the system. It is also important to distinguish between the rationales for regulating the speech of insiders that bear directly on the functionality of the legal system, and rationales grounded in idealism that express the aspirational values of the profession, but do not directly affect functionality.

### A. *Distinguishing Outsiders from Insiders*

Expression connected to the system of justice is quintessential “political speech.” When the speaker is an *outsider* to the profession, such as a citizen or journalist, the speaker receives the highest levels of First Amendment protection. Even when the government seeks to restrain the speech of journalists or citizens for reasons as compelling as preservation of a fair criminal trial<sup>24</sup> or avoidance of interference with the fair administration of justice, First Amendment doctrine imposes highly demanding standards. Such regulation is rarely upheld.<sup>25</sup>

Existing First Amendment doctrines, in contrast, have long recognized that government may exert greater restraints on *insiders*.<sup>26</sup> First Amendment principles should be construed as treating the “Legal Profession” as a special setting carved out from the general marketplace. In this setting the expression of the two key classes of “insider” participants in the profession—judges and lawyers—may be subject to greater regulation than would otherwise be permitted in the general marketplace.

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24. *See, e.g.*, *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 562, 569–70 (1976) (establishing a demanding First Amendment test creating a near-absolute prohibition on “gag orders” restraining journalists from reporting on events germane to criminal prosecutions arising from gruesome murders in Nebraska).

25. *See In re Kendall*, 712 F.3d 814, 825 (3d Cir. 2013).

In the realm of speech about ongoing judicial proceedings, the government’s authority as sovereign provides only limited power to criminally punish speech by those outside the judicial system. As the Supreme Court made clear in a trio of cases involving members of the press held in criminal contempt for their news stories, speech about ongoing judicial proceedings is criminally punishable only if it poses a clear and present danger of obstructing or prejudicing the ongoing proceedings.

*Id.* (citing *Craig v. Harney*, 331 U.S. 367, 372 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 348 (1946); *Bridges v. California*, 314 U.S. 252, 260–63 (1941); and *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1442 (9th Cir. 1995)).

26. *See infra* text accompanying notes 43–71.

### B. *Defining the Contours of the “Legal Profession” Carve Out*

The “legal profession” is a construct distinct from the “legal system.” To the extent that the government’s management of the legal system entails the management of the government employees who work within it, a carve out already exists under the rubric of the special principles governing the diminished free speech rights of government employees.<sup>27</sup> As to members of the legal system who work for the government, in short, no additional analysis is required. Sometimes these government employees are, of course, lawyers—as in the case of lawyers who become judges or prosecutors, or who work for a state Attorney General’s Office, the Department of Justice, or a myriad of other local, state, or federal agencies. Indeed, the two most important Supreme Court decisions defining the contours of the First Amendment standards applicable to government employees were both cases involving prosecuting attorneys.<sup>28</sup>

The government also, however, may treat the legal profession as a carve out, one that not only overlaps the legal system populated by government lawyers but also extends well beyond it. In its capacity as manager of the legal profession, government may extend its reach to nongovernmental employees—the vast array of licensed practicing attorneys who do not work for the government.

### C. *Functional Justifications for Reduced Free Speech Protection for Judges and Lawyers*

Existing First Amendment doctrine easily permits limitation of the speech of judges and attorneys when the government proffers, to support such regulation, convincing functional rationales manifestly directed to its internal management of the legal system. When government seeks to regulate the speech of attorneys *inside* a courtroom, as when a judge holds a lawyer in contempt for obstructive or contumacious speech, the Constitution plainly will not provide the same shelter that would exist for the speech of the attorney in the general marketplace. In *Sacher v. United States*, the Supreme Court sustained the power of courts to use their contempt authority to sanction a lawyer for his expression within a courtroom.<sup>29</sup> The Court invoked solid functional rationales for its ruling, noting that “[t]he nature of the [lawyer’s] deportment was not such as merely to offend personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial.”<sup>30</sup>

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27. See *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006); *Connick v. Myers*, 461 U.S. 138, 154 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1968).

28. *Garcetti*, 547 U.S. at 413; *Connick*, 461 U.S. at 140.

29. 343 U.S. 1, 11 (1952).

30. *Id.* at 5.

When an attorney speaks *outside* the courtroom, however, the First Amendment questions begin to become more complex. Should such speech be deemed speech in the general marketplace and deserving of the same high levels of protection that would attach to the speech of those outside the legal system? Or is such speech appropriately deemed speech by an internal participant, justifiably restricted for functional reasons?

The response of the legal profession itself is quite clear. The rule commonly imposed in most states, and set forth in the American Bar Association's Model Rules of Professional Conduct is the same. It limits the extrajudicial speech of a lawyer participating in an ongoing proceeding when the lawyer knows or reasonably should know that the speech will "have a substantial likelihood of materially prejudicing an adjudicative proceeding."<sup>31</sup> This standard provides less First Amendment protection for the participant-lawyer than it provides for citizens commenting on the proceedings. In *Gentile v. State Bar of Nevada*, the Supreme Court upheld this standard.<sup>32</sup> Chief Justice William Rehnquist, writing for the Court on this issue, distinguished between parties to litigation and strangers to it. He wrote that the "substantial likelihood of material prejudice" standard struck a "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the [government] interest in fair trials."<sup>33</sup> Chief Justice Rehnquist emphasized functional justifications for the rule, as well as the rule's viewpoint neutrality, and its limited temporal impact, noting that the restriction only lasted while the proceeding was ongoing.<sup>34</sup>

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31. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2013) ("A lawyer who is participating or has participated in the investigation or litigation of 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 substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.").

32. 501 U.S. 1030, 1063 (1991). *Gentile* is somewhat complex in its technical holding because the formal opinion of the Court was divided between the opinions of two Justices. Chief Justice Rehnquist delivered the opinion of the Court in a section joined by Justices White, O'Connor, Scalia, and Souter, upholding the general "substantial likelihood of material prejudice" standard. *Id.* ("We conclude that the 'substantial likelihood of material prejudice' standard applied by Nevada and most other States satisfies the First Amendment."). The Court nonetheless struck down Nevada's unusual interpretation and application of the rule, holding it was unconstitutionally vague, in an opinion written by Justice Kennedy, and joined by Justices Marshall, Blackmun, Stevens, and O'Connor. *Id.* at 1048–49. Justice O'Connor thus provided the key swing vote, joining the group that sustained the standard in general, but also joining the group that struck down Nevada's unique version of the standard.

33. *Id.* at 1075 (internal quotation marks omitted).

34. *Id.* at 1076 (Rehnquist, C.J., dissenting).

The regulation of attorneys' speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial.

The *Gentile* decision has impressive and articulate critics, including Dean Erwin Chemerinsky, who lauds the great informational value to the public of commentary by attorneys on pending cases.<sup>35</sup> Dean Chemerinsky makes the irrefutable point that such speech is plainly “political speech” of the sort normally receiving the highest levels of First Amendment protection.<sup>36</sup> Dean Chemerinsky argues that the *Gentile* court should have invoked the strict scrutiny test and struck down the Nevada rule.<sup>37</sup> This position is surely correct *if* we assume that the general marketplace principles properly apply to an attorney’s extrajudicial speech. This Essay argues, though, that *Gentile* is persuasive in treating a *participating* attorney’s speech about a *pending* case as a carve out from the general marketplace; at least to the extent that the attorney’s speech demonstrably creates a substantial likelihood of material prejudice. An attorney is not required to entirely check his or her First Amendment rights when entering the courthouse door. By the same token, however, an attorney does not entirely leave his or her professional responsibility to the tribunal behind when exiting the courthouse door.

So too, restrictions on the expression of judges, beginning with restrictions in the courtroom itself, ought not be deemed to face any potent First Amendment objections when the regulations are grounded in such functional rationales as the fair administration of justice. A solid example is Rule 2.3(B) of the American Bar Association Model Code of Judicial Conduct:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.<sup>38</sup>

As the commentary to the Rule makes clear, this ethical restriction proscribes a wide range of expression, such as “slurs” and “epithets,”<sup>39</sup> that

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*Id.*

35. Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 862–67 (1998).

36. *Id.* at 863.

37. *See id.* at 872–74.

38. MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2011).

39. *Id.* cmt. 2. The official commentary states:

Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant

would plainly be protected by the expansive First Amendment protections that exist in the general marketplace.<sup>40</sup> Judges, of course, are government employees, and fall under the government employee rule established in *Garcetti v. Ceballos*. Under the rule, judges are not entitled to predicate a First Amendment claim upon restrictions of speech if those restrictions constitute “managerial discipline based on an employee’s expressions made pursuant to official responsibilities.”<sup>41</sup> Because of the nexus to the government employee cases, regulation of statements made by judges acting within the scope of their courtroom judicial duties usually presents no serious First Amendment problems and is well justified by the government’s powerful interests in managing the fair administration of justice. When judges speak outside the contours of their job descriptions, however, *Garcetti*’s terms do not apply, and government must resort to nonfunctional justifications to buttress its effort at speech regulation.<sup>42</sup>

#### D. *Nonfunctional Justifications for Speech Restrictions*

The difficult First Amendment problems are triggered when government regulations are grounded not in palpably functional rationales, but in more ethereal values such as promoting respect for the rule of law, maintaining professionalism and public confidence in the legal system, and safeguarding the dignity of the profession. As might be expected, in such cases the precedents are less consistent and the principles less clear. To explore these rationales, this Essay looks at how the legal profession struggles to apply First Amendment principles from both “negative” and “positive” poles. The “negative pole” involves criticism of the system of justice by lawyers and judges. Examples include when a lawyer writes or says negative things about a sitting judge, or one sitting judge writes or says negative things about another or about existing rules of law. The “positive pole” involves self-promotion, as when a judicial candidate runs for judicial office and attempts to garner votes for herself, or a lawyer promotes himself in the marketplace for legal services to advance his reputation and attract clients. In all of these cases the underlying speech, judged by its content, would be presumptively protected under the First Amendment if general marketplace rules applied. In the context of

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references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

*Id.*

40. See discussion *supra* Section I.B.

41. 547 U.S. 410, 424 (2006).

42. *Id.* at 424 (“Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.”).

government regulation of the legal profession, however, the outcomes and animating principles often appear deeply confused.

### 1. Critique of the Legal System by Lawyers and Judges

As previously noted, critique of the legal system by outsiders to the system enjoys the highest levels of First Amendment protection.<sup>43</sup> When insiders engage in such critique, however, “it ain’t necessarily so.”<sup>44</sup> A lawyer who criticizes a judge in the general marketplace, as opposed to “going through the system” by invoking a state’s judicial disciplinary apparatus, often does so at the lawyer’s own peril. A statement by the Seventh Circuit captures this ethos:

Some judges are dishonest; their identification and removal is a matter of high priority in order to promote a justified public confidence in the judicial system. Indiscriminate accusations of dishonesty, by contrast, do not help cleanse the judicial system of miscreants yet do impair its functioning—for judges do not take to the talk shows to defend themselves, and few litigants can separate accurate from spurious claims of judicial misconduct.<sup>45</sup>

Examples might be drawn from virtually any jurisdiction. A Florida decision, *In re Shimek*,<sup>46</sup> is nicely illustrative. A Florida attorney, Paul Shimek, was defeated in a motion for summary judgment in a matter pending before a Florida state trial judge, William Frye III, in the Circuit Court of Escambia County, Florida.<sup>47</sup> Shimek then filed a civil rights suit in federal court in Florida. In a filing opposing a motion to dismiss, he made the following statement:

Succinctly put, the state trial judge avoided the performance of his sworn duty. To repeat a time worn phrase—you cannot get justice in a state court where the judge is a product of the prosecutorial system which aided dramatically in elevating him to the bench. A product of that system who works close with Sheriffs and who must depend on political support and re-election to the bench is not going to do justice. We are forced into this court because of the federal court’s general attitude that state courts are available and should first be sampled. We shouldn’t be rejected here because we tried to follow the federal court’s general guidelines. Justice delayed is justice denied. How much longer must Plaintiff wait?<sup>48</sup>

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43. See *supra* text accompanying notes 24–25.

44. GEORGE GERSHWIN, *It Ain’t Necessarily So*, in *PORGY AND BESS* (1934).

45. *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995).

46. 284 So. 2d 686 (Fla. 1973) (per curiam).

47. *Id.* at 686.

48. *Id.* (internal quotation marks omitted).

The filing of this statement in federal court led to disciplinary sanctions against Shimek that the Florida Supreme Court affirmed.<sup>49</sup>

*In re Shimek* was decided in the context of legal ethics and professional responsibility. Before examining the holding and rationale of the Florida Supreme Court in *In re Shimek*, let us consider how this attack by a Florida lawyer on a Florida judge would have played out in the general marketplace of common law legal rights and remedies. There, the analysis would be tempered by the constraints of the First Amendment.

If Judge Frye were to sue Shimek for defamation, Judge Frye would face formidable common law and constitutional law obstacles. Common law privileges would operate to shelter Shimek from liability for statements made in judicial pleadings.<sup>50</sup> Common law and First Amendment doctrines would protect Shimek from liability arising from the expression of opinion, rhetorical hyperbole, or mere epithet. They would distinguish between libel against the judge and libel against the judicial system and would impose on Judge Frye the burden of proving that the allegations were false. They would also insulate Shimek absent proof of “actual malice.”<sup>51</sup>

On the threshold question of whether the statement is legally actionable at all, the case would turn on whether the statement that the judge “avoided the performance of his sworn duty,”<sup>52</sup> in the context of the entire allegedly offending passage, could reasonably be construed as stating or implying false statements of fact about the judge. Could these statements be objectively verified as true or false, or were they instead subjective critiques of the judge—that is, amorphous ideological assertions of a judicial temperament and bias favoring prosecutors and police because of the judge’s background as a former prosecutor and his ongoing need for political support to get reelected?<sup>53</sup> There is perhaps a modicum of doubt as to how a court applying current First Amendment doctrines would resolve these issues. The question, to be decided in the first instance by the court as a matter of law, would be whether the passage could be reasonably understood as either making or implying a false statement of fact. Judge Frye’s best argument would be that the passage quoted above implies a false and defamatory statement of fact: that Judge Frye, a former prosecutor, was corrupt and did not decide cases on the merits but instead bowed to the inappropriate influence of the Sheriff’s office, on whom he

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49. *Id.* at 686–87, 690.

50. *See, e.g.,* Long v. Marubeni Am. Corp., 406 F. Supp. 2d 285, 294 (S.D.N.Y. 2005) (“Parties to litigation have an ‘absolute privilege . . . for defamatory statements made prior to, in the institution of, or during the course of, a proceeding.’” (alteration in original) (quoting ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 8.2.1.4, at 8–14 (2004))).

51. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

52. *In re Shimek*, 284 So. 2d at 686 (internal quotation marks omitted).

53. *See, e.g.,* Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) (requiring that defamation actions be predicated on false statements of fact).

depended for political support. In opposition, Shimek's best argument would be that the passage, considered in its entirety, is best understood as a generalized attack on Judge Frye for being biased in favor of prosecutors and against defendants, thereby violating his sworn duty of judicial impartiality. While this is undoubtedly an attack on Judge Frye's judicial character, and in that sense certainly *defamatory*, the attack is not grounded in a false *statement of fact*, as required for liability by both the Constitution and the common law.<sup>54</sup> Judges are constantly criticized, by lawyers or by members of the press or public for various forms of bias, as "pro-prosecution," "hanging judges," "soft on criminals," or "pro-plaintiff." These are expressions of opinion, not subject to the sort of objective proof or disproof the First Amendment requires.<sup>55</sup>

Moreover, there are strains in Shimek's statement that appear to attack the broader regime of the Florida judiciary and the legal system itself. The attack seems animated by Shimek's perception that the system is tainted by the common elevation of former prosecutors to the state bench where they remain unfairly loyal to both their prosecutorial roots and their political self-interest.<sup>56</sup> This systemic attack would, under both constitutional and common law traditions, be deemed as a form of "libel on government,"<sup>57</sup> like attacks on the legislature, city hall, or the army and thus, deemed not actionable.<sup>58</sup>

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

55. See generally RODNEY A. SMOLLA, 1 LAW OF DEFAMATION §§ 6:1–6:20 (2013) (discussing the common law opinion and fair comment doctrine in the context of defamation claims). Statements that are "rhetorical hyperbole" or that employ language in a "loose, figurative sense" are not actionable under orthodox First Amendment and common law principles. See, e.g., *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284–85 (1974); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (stating that merely describing a public figure's negotiating position as "blackmail" could not be construed as actually charging the public figure with committing a crime).

56. The court clearly saw this attack on the system as one of the offenses of Shimek's statement. *In re Shimek*, 284 So. 2d at 689 ("The accused attorney's reckless use of words condemns and frowns upon a state judge, and there are many, who at some time in his career has been a prosecutor.").

57. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 291 (1964) ("For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.'" (quoting *City of Chi. v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923))).

58. See, e.g., *City of Phila. v. Wash. Post Co.*, 482 F. Supp. 897, 899 (E.D. Pa. 1979) (holding that the City of Philadelphia could not maintain an action for libel against a newspaper); *City of Albany v. Meyer*, 279 P. 213, 215 (Cal. Ct. App. 1929) (holding that the City of Albany could not maintain an action for libel against citizens); *Capital Dist. Reg'l Off-Track Betting Corp. v. Ne. Harness Horsemen's Ass'n*, 399 N.Y.S.2d 597, 598 (N.Y. Sup. Ct. 1977) (holding that a governmental corporation could not maintain an action for libel against a newspaper); *Grafton v. Am. Broad. Co.*, 435 N.E.2d 1131, 1132, 1138 (Ohio Ct. App. 1980) (holding that the village of Grafton could not maintain an action for defamation against a television broadcaster); *Johnson City v. Cowles Commc'ns, Inc.*, 477 S.W.2d 750, 754 (Tenn. 1972) (holding that Johnson City could not

Even if a court were to hold the statement actionable, additional constitutional and common law lines of defense designed to ensure breathing space for expression would kick in. For example, the burden of proof would be on Judge Frye to prove falsehood. He would bear the burden of proving his rulings are not corruptly biased in favor of prosecutors, but based entirely on the merits, as judged by him impartially. But more formidably, Judge Frye, as a public official, would bear the burden of proving, through clear and convincing evidence, that Shimek published his statements with knowledge of falsity or reckless disregard for truth or falsity.<sup>59</sup> It would not be enough that Shimek's statements about Judge Frye were unreasonable or published negligently. Rather, it would be incumbent on Judge Frye to prove that Shimek harbored subjective doubts about the truth or falsity of what he was saying about Judge Frye, but published his statements anyway. Again, the probable outcome is that Shimek would prevail. It appears likely that he subjectively believed what he asserted about Judge Frye. If so, he did not possess the constitutionally required "actual malice."<sup>60</sup>

In sum, though the outcome, or even the best analysis of the matter, is not entirely free from doubt, what is absolutely clear is that First Amendment principles protecting opinion, especially in the context of criticism of the performance of public officials, would weigh heavily in the analysis. They would tilt the result strongly toward insulating Shimek from liability.

When Shimek was disciplined by the Florida Bar for violating Florida's ethical canons, none of these First Amendment principles came to his rescue.<sup>61</sup> The court interpreted the "thrust" of Shimek's statement exactly as this Essay suggests it should: "The thrust of the statement, when read without explanation, leads to the conclusion that the decision of a state judge with a prosecutorial background is tainted."<sup>62</sup> Rather than view this

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maintain an action for libel against a magazine); *Mayor, Aldermen, & Citizens of Manchester v. Williams*, [1891] 1 Q.B. 94 at 96 (holding that the City of Manchester could not maintain an action for libel against a newspaper); *see also* *Heyward v. Credit Union Times*, 913 F. Supp. 2d 1165, 1188 (D.N.M. 2012) ("Where the group is a government entity, however, there is presumption that the statement refers only to the government, and not to any particular individual or government officer."); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 919 F. Supp. 756, 766 (D.N.J. 1996) (holding that a state agency could not assert a defamation counterclaim because governmental entities cannot maintain defamation actions against private parties for their statements critical of government, public officials, or government services); *Progress Dev. Corp. v. Mitchell*, 219 F. Supp. 156, 163 (N.D. Ill. 1963) (holding that a park district could not assert a libel counterclaim against developers).

59. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986) (explaining that the First Amendment places the burden of proving falsity on plaintiffs in defamation actions arising from issues of public concern).

60. *See In re Shimek*, 284 So. 2d at 686, 688–89; *Sullivan*, 376 U.S. at 279–80.

61. *See In re Shimek*, 284 So. 2d at 689.

62. *Id.*

as constitutionally protected opinion, however, the court saw it as precisely the type of statement lawyers are forbidden from making. And that rationale was dual: to launch such an attack, the court reasoned, both impugns the individual character of individual judges and diminishes the larger public confidence in the legal system as an institution.<sup>63</sup> In the general marketplace, the Constitution protects mere insult and scorn; in the context of lawyers attacking judges, it does not.<sup>64</sup> If made in the general marketplace, attacks on Florida's institutions, even against "the entire judiciary,"<sup>65</sup> are legally protected by the Constitution. But in the context of a lawyer attacking the judiciary, they are not.<sup>66</sup> If made in the general marketplace, attacks on an abstract ideal, such as "the chastity of the goddess of justice"<sup>67</sup> are constitutionally protected, but in the context of a lawyer's attack on that ideal, they are not.<sup>68</sup>

While the court made passing genuflections to the notion that judges are not sacrosanct or immune from criticism for the conduct of their office,<sup>69</sup> these phrases were largely hollow truisms. They carried none of the doctrinal solidity that would have applied in the general marketplace. Invoking phrases that conjured religious devotion to the ideals of impartial justice, the court insisted that "the administration of the judicial process as an institution of government is a sacred proceeding."<sup>70</sup> The *In re Shimek* court maintained it was critical that the "chastity of the goddess of justice" be preserved.<sup>71</sup>

Judges who engage in critique of the system may also become embroiled in disciplinary proceedings or even criminal contempt prosecutions that raise similarly problematic First Amendment concerns. Staying with Florida for the sake of illustrative consistency, consider another case from the Florida Supreme Court. In *In re Kelly*, the court found a trial judge guilty of conduct unbecoming of a judge arising from public statements made to the media criticizing fellow judges on matters relating to the conduct of the court in which the judge had been elected

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63. *Id.* ("Such ill-conceived idea, however false, tends to lessen public confidence in our legal system.").

64. *Id.* ("The far-reaching significance of the theme is to slur and insult.").

65. *Id.*

66. *Id.* at 690.

67. *Id.* "It is calculated to cast a cloud of suspicion upon the entire judiciary of the State of Florida and is totally unbecoming a member of the Bar." *Id.* at 689.

68. *Id.* at 690.

69. *Id.* ("The conclusion which we here reach takes cognizance of the proposition that a judge as a public official is neither sacrosanct nor immune to public criticism of his conduct in office." (internal quotation marks omitted)).

70. *Id.*

71. *Id.* ("Admitting, therefore, the human weaknesses of judges as individuals but affirming our belief in the essentiality of the chastity of the goddess of justice we are impelled to the inescapable notion that any conduct of a lawyer which brings into scorn and disrepute the administration of justice demands condemnation . . ." (internal quotation marks omitted)).

presiding judge.<sup>72</sup> Judges may engage in critique and advocacy for change of the judicial system and legal principles *within the system*, the court explained.<sup>73</sup> But it is wrong to go public, particularly if the judge's arguments are "intemperate" or "impetuous."<sup>74</sup> The tensions with classic First Amendment doctrines here are plain. Indeed, in *Kelly*, Chief Justice Ervin dissented, arguing that "Judge Kelly had an untrammelled right to publicly explain his side of the disagreement with certain of his judicial colleagues."<sup>75</sup>

Adding to the conceptual difficulty, a recent Third Circuit decision illustrates that at times it may be extremely difficult to determine whether the critical speech of a judge is inside or outside the system. *In re Kendall* arose from an attempt to hold Judge Leon A. Kendall, a Superior Court of the Virgin Islands judge, in contempt for statements he made in a written opinion.<sup>76</sup> The Supreme Court of the United States Virgin Islands issued a writ of mandamus in a high-profile criminal case over which Judge Kendall was presiding, reversing Judge Kendall's rulings and orders.<sup>77</sup> Judge Kendall strongly disagreed with the Supreme Court of the Virgin Islands, and in a very unusual move, published an opinion first chastising the court's mandamus decision and then recusing himself from the case

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72. *In re* 238 So. 2d 565, 566, 574 (Fla. 1970).

73. *Id.* at 569. The court explained:

There are many authorized methods of protest, dissent and criticism within the framework of the judiciary, such as the preparation of dissenting opinions, petitions to the Supreme Court for changes in the rules of procedure, submission of suggested changes to various committees of the Florida Bar, participating in the various legal seminars conducted by the Committee on Legal Education, or taking an active part in the state and local conferences of judges.

*Id.*

74. *Id.* at 569–70. The court stated:

Criticism is not neutral. When a judge sets himself up to criticize other judges, his criticism ultimately must be viewed as having been constructive or destructive in its impact. If he has been temperate and judicious, his criticism is likely to be, in its ultimate result, beneficial to the community which he serves—and it does not matter whether this constructive criticism is publicly or privately voiced. On the other hand, impetuous argument, or criticism taken by methods which prevent honest discussion and a fair rebuttal can be expected only to have a destructive result. No matter how bland or even wholesome the content, if the methods used raise suspicion of motives among the judges, and renders the courts all suspect to the public, the result can only be an increase in disrespect for law and order, an increase in lawlessness, a greater tendency among some of our citizens to let loose their tendencies to disorder.

*Id.*

75. *Id.* at 575 (Ervin, C.J., dissenting).

76. *In re Kendall*, 712 F.3d 814, 816 (3d Cir. 2013).

77. *Id.*

due to alleged prosecutorial misconduct.<sup>78</sup> The Supreme Court of the Virgin Islands reacted with great negativity to this seeming act of obstinate insubordination. It cited Judge Kendall for criminal contempt, treating his opinion as obstruction of the administration of justice.<sup>79</sup> The court took the view that Judge Kendall's obstinate response to its ruling obstructed the administration of justice.<sup>80</sup>

As the Third Circuit framed the issue, the critical question was whether to conceptualize the actions taken by the Supreme Court of the Virgin Islands as discipline of an insider or punishment of an outsider, an issue on which there was no clear guidance from the United States Supreme Court.<sup>81</sup> Suggesting a divide similar to that being explored in this Essay,

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78. *Id.* at 819–20. The court recounted Judge Kendall's opinion:

On July 7, 2009, Kendall filed a thirty-one page opinion “for publication.” As promised, the *Ford* opinion recounted the background of the criminal case, including the events that gave rise to the writ of mandamus, and memorialized his reasons for rejecting the plea agreement to voluntary manslaughter. But the opinion also took two unexpected turns, both of which later became the basis for Kendall's criminal-contempt convictions: First, the opinion offered a point-by-point denunciation criticism of the Virgin Islands Supreme Court's decision to issue the writ of mandamus. The opinion characterized the Virgin Islands Supreme Court's reasoning as erroneous, “improper,” having “no rational basis,” lacking “merit,” and “making no sense.” Indeed, the opinion went so far as to say that the writ of mandamus “was apparently sought and issued to facilitate [Bethel's] blatant misconduct and perpetrate a fraud on the [Superior] Court.” Its issuance, Kendall wrote scathingly, was therefore “contrary to law and all notions of justice.”

*Id.* (alterations in original) (citations omitted).

79. *Id.* at 820 n.1. The court explained:

Contempt can be either direct or indirect. Direct contempt describes “the judge's authority to [summarily] impose punishment, without any form of trial, on one who engages in contumacious behavior in the judge's presence,” such as a party's repeated outbursts during a hearing or a witness's refusal to testify during trial. Indirect contempt targets acts “committed outside the presence of the court for which some fact-finding process is concededly necessary,” such as a person's refusal to obey a court order.

*Id.* (citations omitted).

80. *Id.* at 820–21.

81. *Id.* at 821–22; *see also* Republican Party of Minn. v. White, 536 U.S. 765, 796 (2002) (Kennedy, J., concurring) (“This case does not present the question whether a State may restrict the speech of judges because they are judges—for example, as part of a code of judicial conduct; the law at issue here regulates judges only when and because they are candidates.”); *In re* Judicial Misconduct, 632 F.3d 1289, 1289 (9th Cir. 2011) (deciding that a particular judge's comments were protected by the First Amendment); *In re* Vincent, 172 P.3d 605, 607 (N.M. 2007) (“[W]e recognize that there are nevertheless constitutional limits on the regulation of judicial speech.”); *In re* Sanders, 955 P.2d 369, 375 (Wash. 1998) (“A judge does not surrender First Amendment rights upon becoming a member of the judiciary.”).

the court distinguished between opposing principles. On one side, the lower court embraced the First Amendment principles that constrain the government when it is operating to discipline attorneys or judges for expression that is substantially likely to prejudice an ongoing proceeding. On the other side, Kendall embraced the First Amendment principles that constrain the government when it is acting as a sovereign, invoking its power to enforce criminal laws for expression that poses a clear and present danger to the administration of justice.<sup>82</sup>

Deciding which of the two standards ought to apply was complex because Judge Kendall was, after all, commenting on a *pending* case. At the same time, he was clearly expressing opinions on issues *already decided* in that case *after* he had recused himself from additional participation in it. Thus Judge Kendall's expression had both insider and outsider elements. In the end, as the court saw it, it was more the *remedy*, criminal contempt, than the *speech* that mattered:

[D]oes the government's broader authority to *discipline* attorney speech about ongoing proceedings also permit the government to hold a judge in criminal contempt for his speech about ongoing proceedings? We answer that question with a resounding "No." Criminal contempt is no mere disciplinary tool. It derives, like all crimes, from a government's power as sovereign.<sup>83</sup>

Judges are government employees, and Judge Kendall's expression would appear to be the quintessential example of a judge's on-the-job speech—a judicial opinion, after all! Still, the court refused to apply the government-employee-speech line of cases to Judge Kendall. It reasoned that in using its criminal contempt authority, the government was not exacting discipline against an employee, but punishing a citizen through its criminal processes.<sup>84</sup>

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82. *In re Kendall*, 712 F.3d at 824. The court explained:

Having concluded that a judicial opinion qualifies as "speech," we must determine the scope of its protection. Kendall argues that a judicial opinion is criminally punishable only under the government's limited authority as sovereign to regulate speech that poses a clear and present danger to the administration of justice. By contrast, the Virgin Islands Supreme Court relied on the government's broader authority to discipline attorneys for speech that is substantially likely to prejudice ongoing proceedings and held that this broader authority allows the government to criminally punish judicial speech that poses the same threat. We agree with Kendall.

*Id.* (footnote omitted).

83. *Id.* at 826.

84. *Id.* at 826 n.9 ("The Supreme Court has not yet been asked to resolve whether or how *Garcetti's* government-employer rationale extends to disciplinary restrictions on a judge's on-the-job speech. *White*, 536 U.S. at 796 . . . (Kennedy, J., concurring) ("Whether the rationale of [our

The Third Circuit reasoned that the actions of the Supreme Court of the Virgin Islands could not be properly analogized to the power of a military commander to punish an officer's insubordinate speech towards his superiors.<sup>85</sup> A court system is not like the military, the court reasoned, and "[s]uperior courts do not depend on an instinctive obedience to command structure that is critical to executing split-second battlefield orders."<sup>86</sup> Similarly, court systems do not "have a similar need to restrict the role of dissent—unlike the military, the judicial mission depends on courts being deliberative bodies."<sup>87</sup> In contrast to the Florida ruling in *In re Shimek*,<sup>88</sup> the Third Circuit rejected any attempt to analogize Judge Kendall's court opinion to defamation, noting that he was expressing opinion, and engaged in "rhetorical hyperbole" but not actionable false statements of fact.<sup>89</sup> Applying general First Amendment marketplace principles to Judge Kendall's expression, the court held that his opinion could not be construed as posing a clear and present danger to the administration of justice.<sup>90</sup>

## 2. Self-Promotion by Judges and Lawyers

Professionalism abhors self-promotion, but the general marketplace adores it. American judges and lawyers, at once Americans and lawyers, are caught betwixt and between. What are they to do? When judges run for office, may they engage in self-promotion? What if that self-promotion includes articulation of their views or judicial persona—such as portraying themselves as tough on crime? When lawyers advertise, do they get the benefit of the same relatively high levels of protection for commercial

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public-employee-speech cases] could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here.' . . ." (alterations in original).

85. *Id.* at 826–27.

The People analogize the Virgin Islands Supreme Court's authority to punish lower-court judges' speech to the government's broad authority . . . as military commander to punish an officer's insubordinate speech toward his superiors. [This] analog[y] fall[s] flat. . . . And the Virgin Islands Supreme Court's supervisory capacity over lower-court judges is hardly similar to the government's capacity as military commander. The Supreme Court has long differentiated military-speech restrictions from those in the civilian community based on considerations unique to the military.

*Id.*

86. *Id.* at 827.

87. *Id.* (citing *In re Grimley*, 137 U.S. 147, 153 (1890)) ("An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.").

88. *See supra* text accompanying notes 46–71.

89. *In re Kendall*, 712 F.3d at 827 n.10.

90. *Id.* at 829–33.

speech enjoyed by other advertisers in the general marketplace? Or is lawyer advertising better understood as a poor relation that receives a second-class level of commercial speech protection that only applies to plain-vanilla *informational* advertising? Applying existing case law, these questions regarding self-promotion are far from settled.

Hostility toward self-promotion has roots in the history of the profession that are almost primal. Justice Oliver Wendell Holmes, speaking at a Harvard class reunion, reflected on the best service one can do for one's country and one's self. He used language that resonates deeply with the legal profession's proudest conceptions of professionalism: "To see so far as one may, and to feel, the great forces that are behind every detail . . . to hammer out as compact and solid a piece of work as one can, to try to make it first rate, and to leave it unadvertised."<sup>91</sup>

It was Oliver Wendell Holmes, of course, who also indelibly stamped upon the American national psyche the image of the "marketplace of ideas" as the core animating principle of the guarantee of freedom of speech enshrined in the First Amendment.<sup>92</sup> Holmes remains a consummate study in contradiction. It is not only not surprising, but for all of us lesser legal mortals perhaps somewhat comforting, that this towering American legal icon had conflict embedded in his own inner psyche. He was torn between conflicting forces: On the one hand, he had a sense of professionalism that embraced humility; he appealed to our better angels to hammer out the most excellent work we can but to "leave it unadvertised." On the other hand, he retained an abiding faith in the marketplace of ideas, a faith that required tolerance of expression that we loath and believe fraught with death, unless an immediate check is required to save the country.

An American century now past Holmes, the contradiction in his character remains a contradiction in our own. Professional distaste for the self-promoting and self-laudatory endures. But it abides in uneasy coexistence with the triumph of Justice Holmes's passionate embrace of the marketplace of ideas as the defining metaphor for American

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91. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 84 (1993).

92. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes gives his famous proclamation:

But when 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.

*Id.*

conceptions of freedom of speech. Indeed, the American marketplace is all about self-promotion. Politicians self-promote in the political marketplace, denizens of mass culture self-promote in the cultural marketplace, and advertisers self-promote in the marketplace of goods and services.

#### a. Self-Promotion by Judicial Candidates

The leading Supreme Court precedent on the speech of judicial candidates is in *Republican Party of Minnesota v. White*.<sup>93</sup> Minnesota's canons of judicial conduct prohibited judicial office candidates from announcing their views on disputed legal or political issues.<sup>94</sup> This "announce clause" was quite granular, going so far as to prohibit a judicial candidate from discussing *previously decided cases* if the candidate took the view that he or she was not bound by *stare decisis*.<sup>95</sup> In an opinion by Justice Antonin Scalia, the Supreme Court struck down the Minnesota judicial canon, applying classic "marketplace" First Amendment principles and invoking the strict scrutiny standard.<sup>96</sup> Pointedly, the Court rebuffed Minnesota's assertion that the judicial canon was justified by the state's interests in either preserving the *actual* impartiality of the state judiciary or in preserving the *appearance* of impartiality.<sup>97</sup> It was plain, the Court held, that the judicial canon was not narrowly tailored to serve the preservation of impartiality in its core and classic sense—that a judge is not biased for or against either party to a proceeding.<sup>98</sup> In contrast, the Court admitted that the judicial canon did serve Minnesota's interest in "impartiality" in a more jurisprudential sense—a "lack of preconception in favor of or against a particular *legal view*."<sup>99</sup> In a powerful ruling, the Court held that this objective was not constitutionally permissible—and indeed was essentially impossible in the real world.<sup>100</sup>

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93. 536 U.S. 765 (2002).

94. *Id.* at 768.

95. *Id.* at 772.

96. *Id.* at 774–76.

97. *Id.* at 775–76.

98. *Id.* at 776.

99. *Id.* at 777.

100. *Id.* ("A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law."). The Court refused to reach the question of whether achieving impartiality in the sense of "openmindedness" was a compelling state interest because, as a means of pursuing this interest, the announce clause was so "woefully underinclusive" that the Court stated it did not believe it was adopted for that purpose. *Id.* at 777–80. The Court noted that the practice of prohibiting speech by judicial candidates was neither ancient nor universal. *Id.* at 785. No such prohibitions existed throughout the nineteenth and the first quarter of the twentieth centuries, and in modern times they are not universal. *Id.* Acknowledging that there was an obvious tension between Minnesota's constitution, which requires judicial elections, and the announce clause, which placed most subjects

To again draw from Florida jurisprudence, notwithstanding *Republican Party of Minnesota v. White*, the Florida Supreme Court in *In re Kinsey* held that a candidate for a county court judgeship was properly disciplined for statements she made during the course of her campaign; she had portrayed herself as tough on criminals, and generally pro-prosecution and pro-victim on matters relating to criminal justice.<sup>101</sup> The court held that enforcement of the discipline was warranted by Florida's "compelling state interest in preserving the integrity of [their] judiciary and maintaining the public's confidence in an impartial judiciary."<sup>102</sup> This was consistent with the Florida Supreme Court's long-held views about the importance of maintaining public confidence in the judicial system and the rule of law:

There is no doubt that a judge in an appropriate forum may express his protest, dissent, and criticism of the present state of the law as long as he does not appear to substitute his concept of what the law ought to be for what the law actually is, and as long as he expresses himself in a manner that promotes public confidence in his integrity and impartiality as a judge.<sup>103</sup>

#### b. Self-Promotion by Marketing Lawyers

Self-promotion by lawyers engaged in advertising and marketing has caused the American legal profession no end of conflict since lawyer advertising was first declared constitutionally protected, at least to some degree, in *Bates v. State Bar of Arizona*.<sup>104</sup> In *Bates*, the Supreme Court applied the special intermediate scrutiny standard applicable to commercial speech regulation to lawyer advertising.<sup>105</sup> The base line for such

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of interest to the voters off limits, the Court held that the First Amendment does not permit Minnesota to leave the principle of elections in place while preventing candidates from discussing what the elections are about. *Id.* at 787.

101. 842 So. 2d 77, 80–81, 92–93 (Fla. 2003).

102. *Id.* at 87.

103. *In re Gridley*, 417 So. 2d 950, 954 (Fla. 1982).

104. 433 U.S. 350 (1977).

105. *Id.* at 379–81, 383–84 (striking down a blanket ban on lawyer advertising); *see also* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995) (sustaining a thirty-day restriction on targeted direct-mail solicitation to accident victims); *Peel v. Att’y Registration & Disciplinary Comm’n*, 496 U.S. 91, 108–11 (1990) (striking down a disciplinary action against an attorney for listing truthful nonmisleading information concerning certification on letterhead); *Shapiro v. Ky. Bar Ass’n*, 486 U.S. 466, 479–80 (1988) (striking down a blanket prohibition on targeted direct-mail solicitation); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 649 (1985) (striking down a disciplinary action against an attorney for advertising containing truthful, nondeceptive information and legal advice); *In re R.M.J.*, 455 U.S. 191, 204–07 (1982) (striking down lawyer advertising limitations dealing with listings of areas of practice); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 468 (1978) (sustaining limitations on in-person solicitation); *In re Primus*, 436 U.S. 412, 439 (1978) (striking down limitations on solicitation as applied to public interest groups such as the ACLU).

regulation is the intermediate scrutiny standard often described as the *Central Hudson* test—the decision that is now the governing lodestar for commercial speech regulation.<sup>106</sup> Under *Central Hudson*, the government may regulate commercial speech when four conditions are met: (1) the communication is neither misleading nor related to unlawful activity; (2) the government asserts a substantial interest to be achieved by the regulation; (3) the restriction directly and materially advances the state interest; and (4) the regulation is no more expansive than necessary to advance the substantial governmental interest.<sup>107</sup> While commercial speech, under current doctrine, receives modestly diminished protection in the general marketplace when compared to political, artistic, or other forms of noncommercial speech, the protection is still quite expansive, and when applied by the Supreme Court, especially, is often quite robust.<sup>108</sup> The arc of modern commercial speech jurisprudence is unmistakable: in decision after decision, the Supreme Court has advanced protection for advertising, repeatedly striking down regulations grounded in paternalistic motivations or speculative judgments by government regulators.<sup>109</sup> This is not to say that there have not been “blips” in this progression, cases in which the

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106. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

107. *Id.*

108. See generally Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 *TEX. L. REV.* 777, 793 (1993) (noting that society protects forms of speech that, in the eyes of many, have little or no plausible social value).

109. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011) (striking down a state law restricting the use of prescriber-identifying information in pharmaceutical marketing); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002) (striking down restrictions on pharmaceutical advertising); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554–55, 567, 570 (2001) (striking down some restrictions on tobacco advertising and sustaining others); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 195–96 (1999) (striking down casino gambling advertising limitations); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (striking down liquor advertisement restrictions); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (striking down beer advertising regulations); *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 149 (1994) (striking down restrictions on accountancy advertising); *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (striking down commercial speech limitations on accountants); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430–31 (1993) (striking down restrictions on newsracks for commercial flyers and publications); *Peel*, 496 U.S. at 108–11 (holding that a regulation banning lawyer advertisement of National Board of Trial Advocacy certification violated the Constitution); *Shapiro*, 486 U.S. at 479–80; *Zauderer*, 471 U.S. at 649; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983) (holding that a statute banning unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control violated the Constitution); *In re R.M.J.*, 455 U.S. at 204–07; *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 571–72; *In re Primus*, 436 U.S. at 439; *Bates*, 433 U.S. at 383–84; *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 98 (1977) (holding that a regulation banning placement of “for sale” or “sold” signs on the front lawns of houses in order to prevent the town from losing its integrated racial status violated the Constitution); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (striking down restrictions on pharmaceutical advertising); *Bigelow v. Virginia*, 421 U.S. 809, 828–29 (1975) (striking down restrictions on abortion advertising).

Court has sustained regulation of advertising.<sup>110</sup> But the cases sustaining restrictions on commercial speech pale in number and in force when compared to the overwhelming body of precedent striking restrictions down. It is especially significant that the one commercial speech decision most hostile to the protection of advertising was entirely discredited. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, a case sustaining restrictions on casino advertising in Puerto Rico on a largely paternalistic rationale,<sup>111</sup> was effectively overruled in *44 Liquormart, Inc. v. Rhode Island*.<sup>112</sup>

Advertising in the general marketplace is all about being self-promoting and self-laudatory, often with a healthy dose of hyperbole and puffery.<sup>113</sup> Most states, however, prohibit forms of self-promotion and comparison to one's competitors in the legal profession that would be common fare and outside the pale of regulation in the general marketplace.<sup>114</sup>

A number of prominent commercial speech decisions treat the advertising of lawyers as receiving substantially less protection than advertising by other actors in the marketplace, invoking rationales that would not be permissible in contexts outside the regulation of the legal profession.<sup>115</sup> This distrust of self-promotion is sometimes especially acute

110. *See Went For It, Inc.*, 515 U.S. at 620 (sustaining a thirty-day ban on direct mail solicitation by lawyers to accident victims or families); *United States v. Edge Broad. Co.*, 509 U.S. 418, 435–36 (1993) (sustaining restrictions on the broadcasting of lotteries in states that do not permit lotteries); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473, 485–86 (1989) (sustaining a state university restriction on “Tupperware parties”); *Ohralik*, 436 U.S. at 468 (sustaining bar restrictions on in-person solicitation).

111. 478 U.S. 328 (1986).

112. 517 U.S. at 509 (“*Posadas* clearly erred in concluding that it was ‘up to the legislature’ to choose suppression over a less speech-restrictive policy.”).

113. *See* Roy Simon, *The 1999 Amendments to the Ethical Considerations in New York’s Code of Professional Responsibility*, 29 HOFSTRA L. REV. 265, 266–67 (2000) (“But have you ever seen an advertisement that does not laud the lawyer? Have you ever seen a lawyer advertise by stating that he is not such a good lawyer, but that you should call him because he needs the business?”).

114. Many states have language in their rules governing professional conduct of attorneys, for example, that forbids advertisements that compare an attorney’s services to that of other attorneys. *See* MODEL RULES OF PROF’L CONDUCT R. 7.1 cmt. 3 (2013). The American Bar Association notes that forty-nine states, along with the District of Columbia and the Virgin Islands, have adopted the Model Rules of Professional Conduct. *State Adoption of the ABA Model Rules of Professional Conduct*, AM. BAR ASS’N., [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) (last visited June 28, 2014). The rules in several jurisdictions specifically forbid unsubstantiated self-laudatory statements in advertisement. *See* IND. RULES OF PROF’L CONDUCT R. 7.1 cmt. 2 (2013); S.C. RULES OF PROF’L CONDUCT R. 7.1 cmt. 3 (2005); S.D. RULES OF PROF’L CONDUCT 7.1(c)(3) (2004).

115. *See, e.g., Hirschkop v. Va. State Bar*, 604 F.2d 840, 843 (4th Cir. 1979) (“It is true that in *Bates* the Court sustained the right under the First Amendment for lawyers to engage in the truthful advertising of prices at which routine legal services will be performed. The truthfulness of such advertising is generally susceptible to precise measurement or verification. Self-laudatory statements, however, are not so easily verifiable, particularly by lay persons.” (citation omitted));

when television and radio advertising is employed, on the theory that such electronic advertising is inherently manipulative.

A Virginia case in which I was personally involved as an advocate vividly demonstrates the tension between the First Amendment principles applicable in the general marketplace, and the principles applied to the self-promoting speech of lawyers. The Supreme Court of Virginia in *Hunter v. Virginia State Bar* dealt with a charge of misconduct brought by the Virginia State Bar against Virginia attorney Horace Hunter, predicated on the content of a blog written by Hunter, entitled *This Week in Richmond Criminal Defense*.<sup>116</sup> The blog was accessible to the general public both through a link on a website maintained by Hunter's law firm, Hunter & Lipton, PC, and directly through a routine Internet search, without going through the portal of the law firm website.<sup>117</sup> Hunter's blog contained a variety of content relating to legal affairs and judicial decisions.<sup>118</sup> Some of the blog posts contained Hunter's commentary on national legal events, such as the controversy surrounding former Attorney General Alberto Gonzales and United States Attorneys' Offices.<sup>119</sup> Other posts described legal decisions by state or federal courts in which Hunter was not a participating lawyer.<sup>120</sup> The majority of entries, however, described the facts and outcomes of cases in which Hunter served as defense counsel for a criminal defendant, and which resulted in a favorable outcome for the defendant.<sup>121</sup> The Bar took the position that Hunter's blogs constituted

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Farrin v. Thigpen, 173 F. Supp. 2d 427, 436, 445–47 (M.D.N.C. 2001) (finding that the First Amendment did not protect television commercials allegedly intimating that a law firm was especially aggressive in procuring settlements from insurance companies); Spencer v. Supreme Court, 579 F. Supp. 880, 887 (E.D. Pa. 1984) (rejecting a constitutional challenge to an attorney advertising regulation because claims "using such terms as 'experienced,' 'expert,' 'highly qualified,' or 'competent' are difficult for a layman to confirm, measure, or verify"); *In re Keller*, 792 N.E.2d 865, 870 (Ind. 2003) (applying Indiana law to a similar advertising campaign as *Thigpen*, and reaching the same result); *Comm. on Prof'l Ethics & Conduct v. Humphrey*, 377 N.W.2d 643, 646 (Iowa 1985) ("We continue to believe the 'special problems' recognized by the United States Supreme Court exist in the field of electronic advertising. These problems warrant a special rule to regulate lawyer advertising in the electronic media."); *In re PRB Docket No. 2002.093*, 868 A.2d 709, 712 (Vt. 2005) ("Direct claims of expertise that are not truthful and factually verifiable, however, may be prohibited or restricted as unduly misleading.").

116. *Hunter v. Va. State Bar*, 744 S.E.2d 611, 613 (Va. 2013), *cert. denied*, 133 S. Ct. 2871 (2013). Editor's note: The author of this Essay, Rodney A. Smolla, served as lead counsel, writing the briefs and presenting the oral arguments, for Mr. Hunter in this matter.

117. *Id.*

118. *Id.*

119. Opening Brief of Appellant at 1–2, *Hunter v. Va. State Bar*, 744 S.E.2d 611 (Va. 2013) (No. 121472).

120. *Id.*

121. *Hunter*, 744 S.E.2d at 613. Thirty unique blog posts were at issue. Five of those thirty posts discussed legal and policy issues other than judicial cases. Twenty-five of the posts discussed cases. Hunter represented clients in twenty-two of those cases. One of these posts described a wrongful death case in which Hunter represented one of the parties. The remaining twenty-one

advertising and was misleading.<sup>122</sup> Hunter maintained that his blogs were political speech and were entirely accurate descriptions of what transpired in public judicial proceedings, sprinkled with his own commentary and views. Hunter also admitted that one of his motivations was self-promotion.<sup>123</sup>

The blog, he conceded, was a way of projecting a professional identity as a criminal defense lawyer, noting that “people want to know that you’re more than just trying to sell them services. They want to know who you are and what you stand for.” Yet Hunter insisted in his testimony that he did not regard the blogs as “advertising” or as “soliciting business” in the normal sense of the term. To the contrary, his purpose was also political and ideological. He used the blog to offer broad critiques of the justice system, to comment on the specific facts and outcomes of cases (including many in which he participated as a lawyer and some in which he did not), and to generally advance a point-of-view that was edged toward the values held by many criminal defense lawyers, such as the principle that persons are presumed innocent until proven guilty, and notions that not all criminal defendants are guilty, and not all are convicted—acquittals do happen. In Mr. Hunter’s words:

[I]t’s intended to combat in large part the public perceptions that is clearly on the side that people are guilty until they’re proven innocent. There are shows out there like Nancy Grace and other things that you see and writings all the time, particularly on the Internet; soon as somebody’s arrested, okay, they’re automatically guilty. And one of the things we do is try to combat that public perception. Even when we’re talking about cases that I’ve dealt with personally, generally there’s a comment at the end of the article that says something to the effect of, this case again demonstrates that just because somebody is charged doesn’t mean they’re guilty. Or what this case represents is the fact that this should have never been a crime in the first place. . .

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described criminal cases in which Hunter’s clients were either found not guilty, plea bargained to an agreed upon disposition, or received reduced charges or dismissal. *Id.* at 614.

122. *Id.*

123. Petition for Writ of Certiorari at 8–9, *Hunter v. Va. State Bar*, 133 S. Ct. 2871 (2013) (No. 12-1379).

When asked to elaborate on why he so steadfastly refused to acquiesce in the Bar's insistence that his blogs be labeled advertising, he stated that this would cheapen his message, turning material that he regarded as political and legal commentary into something that was entirely mercenary and profit-driven:

It cheapens the speech when I have to put in front of that, oh, by the way, this is for advertising purposes only. This isn't—you know, and it just takes some of the articles out of context. And I offered a disclaimer that I thought was appropriate based on what it is I was doing.<sup>124</sup>

Hunter lost in the Supreme Court of Virginia, by a 5–2 vote.<sup>125</sup> While the *content* of Hunter's speech may have been entirely political, his motivation was at least partly self-promoting and commercial, and this was enough to convince the Virginia court that his speech was misleading advertising, unless proper disclaimers were affixed to it.<sup>126</sup>

Justice Donald Lemons, joined by Justice Elizabeth McClanahan, dissented.<sup>127</sup> The dissent resisted the majority's willingness to draw a distinction between the blogs that described Hunter's own cases, and those that did not, as though the posts involving Hunter's own prior cases were not also laden with political content.<sup>128</sup> Justice Lemons thus observed:

Hunter's blog contains articles about legal and policy issues in the news, as well as detailed descriptions of criminal trials, the majority of which are cases where Hunter was the defense attorney. The articles also contain Hunter's commentary and critique of the criminal justice system. He uses the case descriptions to illustrate his views.<sup>129</sup>

In reasoning that Hunter's discussion of his own prior cases constituted political speech, the dissenters stated that “[a]s political speech, Hunter uses his blog to give detailed descriptions of how criminal trials in Virginia are conducted. He notes how the acquittal of some of his clients has

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124. *Id.* at 8–10.

125. *Hunter*, 744 S.E.2d at 621.

126. *Id.* at 620–21.

127. *Id.* at 621 (Lemons, J., dissenting).

128. *Id.* at 622.

129. *Id.*

exposed flaws in the criminal justice system.”<sup>130</sup> The United States Supreme Court, however, denied review.<sup>131</sup>

### CONCLUSION

I have worked as an advocate and a scholar on many of the issues explored in this Article. The exploration I have undertaken here is not intended to relitigate lost causes like that of Horace Hunter in a law review essay. Nor is it intended to definitively resolve the tensions regarding the speech of judges and lawyers that so plainly remain at large in the legal profession and in First Amendment doctrine.

I find myself torn, as I am sure many of my colleagues in the profession are torn, between idealism and realism. As a proud lawyer admitted to the Illinois and Virginia bars, and as a legal educator who has been a professor and dean, I hold the noblest values of the profession dear. I cherish the eternal quest for justice, the promotion of respect for the rule of law, the preservation of public confidence in the legal system (including judicial impartiality), the maintenance of professionalism, and the safeguarding of the dignity of the profession. These are values I seek to imbue in law students and promote among my professional colleagues.

For the reasons suggested in this Essay, I believe that these values *do* exert an important gravitational pull on First Amendment doctrine. I believe they are important in shaping the contours of what I believe *is* legitimately regarded as a “carve out” from the general marketplace. This carve out appropriately empowers bar regulators to restrict the speech of judges and lawyers in a manner that would not be permissible regulation of the citizenry in the general marketplace.

First Amendment doctrine, however, like the traditions of self-regulation within the legal profession itself, must often strike a balance among competing values. I remain convinced that in striking that balance, the legal profession has at times partaken of too much American idealism and not enough American legal realism. The Supreme Court’s opinions in landmark cases such as *Republican Party of Minnesota v. White* and

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130. *Id.* The dissenting justices remarked:

The majority does not give sufficient credit to the fact that Hunter uses the outcome of his cases to illustrate his views of the system. Hunter testified that one of the reasons he maintained the blog was to combat “the public perception that is clearly on the side that people are guilty until they’re proven innocent.” For example, when discussing one of the cases where his client was found not guilty, he concludes the post by explaining that this case is an “example of how innocent people are often accused of committing some of the most serious crimes. That is why it is important not to judge the guilt of an individual until all the evidence has been presented both for and against him.”

*Id.*

131. *Hunter v. Va. State Bar*, 133 S. Ct. 2871, 2871 (2013) (denying cert. petition).

*Arizona State Bar v. Bates* were wake-up calls to realism. Professionalism is one thing, paternalism another. The American public is able to handle more critique and self-promotion than we sometimes give it credit for.

The great lawyer and Justice, Oliver Wendell Holmes, well understood these tensions, but in the end, when it came to making hard law, and not just making speeches, he sided with the values of the First Amendment marketplace. A *limited* carve out from that marketplace, restricting the speech of judges and lawyers to advance palpable and functional interests necessary to the integrity of the legal system is justified. We should, though, leave the advancement of our more idealistic values, values that I deeply embrace, to education and peer pressure toward professionalism, and avoid the serious tensions with First Amendment doctrine that occur when we attempt to ossify those values into hard law.