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ARTICLES

WHAT PASSES FOR POLICY AND PROOF IN FIRST AMENDMENT LITIGATION?

*Rodney A. Smolla**

In this Allen Chair Symposium issue of the *University of Richmond Law Review*, three outstanding scholars have written provocative pieces on the First Amendment. Professor John Nowak engages in an exercise of constitutional futurism, "'remembering the future'" to propose a number of relatively radical alterations of First Amendment doctrine to achieve what he argues should be the appropriate balance between freedom of speech and fair trials in "cyber world."[1] Professor Paul Carrington, arguing that a communitarian right of citizens to self-government is the principal that ought to animate our politics and law, has launched a broadside indictment against contemporary First Amendment doctrine, attacking an eclectic range of current doctrines, including obscenity, offensive speech, separation of church and state, symbolic speech, forced speech, freedom of association, commercial advertising, libel, and campaign finance.[2] Professor C. Thomas Dienes, critiquing decisions that have approved of limitations on the speech of lawyers and other participants in trials, offers a spirited argument that such restraints are in tension

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* George E. Allen Professor of Law, University of Richmond School of Law. The School of Law wishes to acknowledge and thank the Allen family for its gracious support of this year's Allen Chair Symposium and for the Allen family's generosity to the School of Law.

1. John E. Nowak, *Jury Trials and First Amendment Values in "Cyber World,"* 34 U. RICH. L. REV. 1213 (2000) (quoting ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS § 4 (1970)).

2. Paul D. Carrington, *Our Imperial First Amendment*, 34 U. RICH. L. REV. 1167 (2000).

with First Amendment doctrines governing prior restraints, newsgathering, and the right to report truthful information.[3]

This collection of scholarly articles in this Allen Chair Symposium issue was inspired by a public program held at the University of Richmond School of Law in April 2000, focusing specifically on ethical and legal policy issues surrounding limitations on the speech of lawyers in connection with pending judicial proceedings. The public symposium session examined disciplinary rules restricting extrajudicial comments on pending judicial proceedings;[4] prior restraints, such as judicial gag orders that limit lawyers and other participants in such proceedings;[5] and the "collateral bar rule," restricting the defense of those held in contempt for violating such speech-restricting injunctions.[6]

It is striking how the issues posed by the live "public" Allen Chair Symposium session triggered such broad philosophical and constitutional excursions by these three scholars, each of whom, in their own unique and inimitable manner, have used the focus of the symposium as a point of departure for major explorations of the underlying purpose and function of the First Amendment. Although each of the articles written by the participating scholars deals, to a greater or lesser degree, with the intersection of the First Amendment and the administration of the legal system, they are each notable for their engagement with and critique of the fundamental philosophical assumptions that underlie the constitutional principles that drive the resolution of conflicts posed when free speech and the administration of the legal system collide.

A problem that permeates First Amendment law, and one that I see as prominent in the efforts of these three scholars, is posed by the title of this introductory essay: "What Passes for Policy and Proof in First Amendment Litigation?" As the three principal articles comprising this symposium demonstrate, laws that curtail freedom of speech are always passed for some politically cogent reason. By "politically cogent" I mean simply that the legislative body, administrative agency, or court (as in the case of

3. C. Thomas Dienes, *Trial Participants in the Newsgathering Process*, 34 U. RICH. L. REV. 1107 (2000).

4. *See In re* Morrissey, 168 F.3d 134 (4th Cir.), *cert. denied*, 527 U.S. 1036 (1999).

5. *See* United States v. Salameh, 992 F.2d 445 (2d Cir. 1993).

6. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967).

disciplinary rules or gag orders) that has promulgated the speech restriction sees itself as pursuing some laudable and worthy public policy objective.[7]

One way to think about First Amendment litigation is to conceive of it as an inquiry into whether the politically cogent rationale for the speech restriction justifies the imposition it exacts on expression. This in turn might be broken down into two different kinds of inquiry. We might ask whether the reason proffered by the legislature is legitimate. This is a critique of the "why" that undergirds the law. What is the end the law seeks to achieve, and is it an end we are willing to credit as permissible? This assessment is primarily an exercise in policy, not proof. We are looking here at ends, not means. Whether the end is permissible is not an empirical question, but a question of policy judgment.

Secondly, we might ask whether the law actually achieves the goal it is designed to achieve, or, slicing matters even more thinly, we might ask how well the law achieves its goal. This is an inquiry into the "whether" that lies beneath the law. The issue is not the legitimacy of the ends, but whether the means chosen effectuate those ends. This is not a matter of policy judgment, but a matter of proof.

Treating First Amendment litigation as a two-prong inquiry into ends and means is nothing new. Much of modern constitutional law doctrine distills into such ends and means investigations.[8] This is the backbone methodology of equal protection analysis.[9] It often is also employed to resolve First Amendment problems.[10] The outcome of First Amendment disputes, in turn, often centers on how demanding we choose to be in our ends and

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7. Those who promulgate regulations placing restrictions on expression rarely, if ever, see themselves as censors. Rather, they see themselves as enacting rules that vindicate worthy social goals. *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 39-42 (1992).

8. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (employing an ends/means test in substantive due process analysis); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (employing an ends/means test in dormant Commerce Clause analysis); Ry. Express Agency v. New York, 336 U.S. 106 (1949) (employing an ends/means test in "rational basis" equal protection analysis).

9. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

10. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992) (applying strict scrutiny test and upholding restrictions on political activity within 100 feet of polling places); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (applying strict scrutiny test to content-based regulation of "dial-a-porn").

means evaluations. We typically calibrate this in terms of various "levels of judicial review." At the most permissive end of the spectrum, we usually are willing to give the government virtual carte blanche to pursue any end. Correspondingly, there will be no meaningful cross-examination of the government's proof. As long as the government can at least articulate an arguable connection between its objectives and the means chosen to vindicate them, the law will not be struck down. "Rational basis" review in equal protection analysis is the epitome of this approach.[11] At the opposite end of the spectrum, employing tests such as "strict scrutiny," courts will severely critique both ends and means. Many ends will simply be declared entirely out-of-bounds.[12] Even when the ends are deemed permissible, we will be extremely rigorous in putting the government to its proof, requiring a relatively tight connection between the government's objective and the mechanism employed to try to achieve it.[13]

In these familiar terms, Professor Carrington's proposals amount to a calculated default to the political process on the issue of ends. In placing the communitarian value of self-governance as the highest end of law and policy, Professor Carrington would essentially take courts entirely out of the business of presuming to critique the ends chosen by the body politic.[14] For example, if the city of Atlanta wants to ban the showing of the film *Carnal Knowledge* because of moral judgments about the content of the film, the end pursued—public morality—is beyond second-guessing by the judiciary. It is not for the courts to reason why.[15] Similarly, eliminating the influence of money in politics, curbing the excesses of modern advertising, protecting public reputations, and a myriad of other coherent policy goals all are automatically

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11. *See, e.g.*, *Murgia*, 427 U.S. 307 (1976); *Rodriguez*, 411 U.S. 1 (1973); *Ry. Express Agency*, 336 U.S. 106 (1949).

12. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (employing a virtual per se prohibition against viewpoint discrimination in First Amendment cases); City of Phila. v. New Jersey, 437 U.S. 617 (1978) (erecting a virtual per se prohibition in dormant Commerce Clause analysis forbidding state restrictions on interstate commerce motivated by local protectionism).

13. *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997) (striking down federal restrictions on sexually explicitly material on the Internet, citing alternative approaches to protecting children); *Sable*, 438 U.S. 726 (1989) (applying strict scrutiny test to content-based regulation of "dial-a-porn").

14. *See* Carrington, *supra* note 2, at 1168-70.

15. *Id.* at 1180 (citing Jenkins v. Georgia, 418 U.S. 153 (1974) (striking down obscenity prosecution of the film *Carnal Knowledge*)).

in bounds, because it is not for the judiciary, but rather the political process, to define what is out-of-bounds.[16] So too, Professor Carrington's approach will concede all but the most patently perverse law as within the means of the government, without any exacting insistence on a close causal connection between means and ends. The court may look faintly into whether the law effectuates its nominal purpose at all, but it may not ask strenuously how well the law effectuates that purpose.

Modern First Amendment analysis, in marked contrast to Professor Carrington's approach, has many pockets of legal doctrine in which both the *why* and the *whether* are vigorously cross-examined. The heavy presumption against viewpoint-based discrimination, for example, rules out-of-bounds an entire large class of cogent political reasons for the enactment of speech restrictions.[17] Indeed, the modern anti-viewpoint discrimination rule strikes at the heart of Professor Carrington's communitarian pursuits. The majority's determination that a particular form of expression is morally repugnant, or inherently inimical to peace and order, is simply not *credited* as a permissible purpose at all.[18] Restrictions on speech in pursuit of the common good, at least when manifested through prohibitions that discriminate against viewpoints overwhelmingly judged by the community as contrary to the common good, are deemed virtually per se unconstitutional.

To say that there are many pockets of First Amendment law that run directly contrary to Professor Carrington's communitarian agenda, however, is not to say that the First Amendment's bias for libertarian over communitarian values is universal. Obscenity law is an example. Professor Carrington, and many other critics of obscenity law, may deem it ridiculously overprotective of sexually explicit speech.[19] Conceptually, however, obscenity law is an example of the communitarian impulse prevailing over the lib-

16. *See, e.g.*, Carrington, *supra* note 2, at 1188, 1193, 1197.

17. *See R.A.V.*, 505 U.S. 377 (1992) (striking down prosecution for cross burning, employing a virtual per se prohibition against viewpoint discrimination in First Amendment cases).

18. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (reversing conviction for the wearing of a jacket containing the message "Fuck the Draft," holding that a state could not attempt to sanitize public discourse by treating certain vulgar words as unfit for public display).

19. *See* Carrington, *supra* note 2, at 1177–79.

ertarian, at least as to the kind of "hard core" pornography that meets the legal definition of obscenity.[20] Obscenity remains a pocket of First Amendment law in which protection of the quality of the community's moral fabric is deemed a legitimate animating end.[21]

In some First Amendment contexts, the determination as to whether the government is permitted to pursue ends grounded in some moral judgment may turn on subtleties. When the government is perceived as engaged in its own speech, for example, the Supreme Court has suggested that the rule against viewpoint discrimination does not apply and that only the political process itself serves as a check on such discrimination, essentially rendering the no-viewpoint-discrimination principle nonjusticiable in this setting.[22] In *Board of Regents of the University of Wisconsin System v. Southworth*,[23] for example, the Supreme Court stated that a decision requiring viewpoint neutrality in the administration of grants to student organizations for expressive activity should "not be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to" the same First Amendment analysis.[24] "Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse

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20. *See* Miller v. California, 413 U.S. 15 (1973).

21. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), in which the Court stated:

> In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests "other than those of the advocates are involved." . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.

Id. at 57-58 (citing Breard v. Alexandria, 341 U.S. 622, 642 (1951)).

22. See *Board of Regents of the University of Wisconsin System v. Southworth*, 120 S. Ct. 1346 (2000), in which the court stated:

> The University having disclaimed that the speech is its own, we do not reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself. If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker.

Id. at 1354.

23. 120 S. Ct. 1346 (2000).

24. *Id.* at 1357.

faculties," the Court stated, "the analysis likely would be altogether different."[25] Echoing the political accountability norms that Professor Carrington espouses, the Court in *Southworth* intimated that, in this special context of government speech, the political process, not constitutional doctrine, is the only meaningful check and balance. The solution is to vote the rascals out.[26] Yet when the government allocates its funding not to engage in its own speech, but to subsidize the speech of private speakers, a powerful First Amendment prohibition against viewpoint discrimination kicks in and will be judicially enforced.[27]

On the proof side of the equation, a significant part of First Amendment doctrine is wrapped up in determining what shall pass as persuasive justification for a law, a question that often turns on the degree of deference courts will grant to legislative judgments. When high levels of First Amendment protection are deemed appropriate, such as the tests classically applied when speech is penalized because it is deemed an incitement to violence,[28] the legislature is not permitted to declare in advance that certain utterances are inherently harmful.[29] Thus a government

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25. *Id.* (citing Rust v. Sullivan, 500 U.S. 173 (1991); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983)).

26. *Id.* ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.").

27. *See id.* at 1356-57 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995)).

28. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

29. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). The Court stated:

> A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Id. at 844; Herndon v. Lowry, 301 U.S. 242, 258 (1937) (holding that a state may not restrict words that have a mere bad tendency to be dangerous and that attempts to penalize "even . . . utterances of a defined character" must satisfy the standard applied independently by courts); Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring), *overruled by Brandenburg*, 395 U.S. 444 (1969). The Court stated:

> [A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether

prosecution for some specific act of incitement normally must be grounded in a demonstration that the offending speech was closely linked to violence in proximity and time.[30]

In contrast, when the level of First Amendment protection is reduced to "intermediate" scrutiny levels, as it is for such matters as the regulation of commercial speech[31] or the regulation of the "secondary effects" associated with sexually explicit "adult" uses such as strip clubs,[32] current doctrine is at times substantially more lax in its proof requirements. This is presently an area of significant contention in commercial speech law, for example, where those who seek to expand protection of commercial speech argue for proof requirements that approach strict scrutiny in their level of rigor,[33] and those who believe commercial speech is

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> there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.

Id. at 378-79; *see also* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding a hate speech statute confining proscriptions to use of certain symbols unconstitutional even if the conduct proscribed would otherwise be unprotected under the standards of *Brandenburg*); Bose Corp. v. Consumer's Union of United States, Inc., 466 U.S. 485, 499 (1984) (stating that the "appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'") (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284, 286 (1984)).

30. *See Brandenburg*, 395 U.S. at 447.

31. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the Supreme Court articulated the standard that, with some refinements, now governs regulation of commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

32. *See* City of Erie v. Pap's A.M., 120 S. Ct. 1382 (2000).

33. *See generally* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990) (arguing for vigorous protection of commercial speech); Jeffrey Shaman, *Revitalizing the Clear-and-Present-Danger Test: Toward a Principled Interpretation of the First Amendment*, 22 VILL. L. REV. 60 (1977) (arguing in favor of treating all speech as protected under rigorous heightened review standards, without regard to categories such as "commercial speech" or "libel"); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEXAS L. REV. 777 (1993) (arguing for vigorous protection of commercial speech).

It may thus be asserted that commercial speech, *as speech*, should presumptively enter the debate with full First Amendment protection. *See* Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437, 448-53 (1980) (arguing that commercial speech deserves greater protection than it currently receives to

less deserving of protection are more inclined to argue for a level of deference to legislative judgment closer to rational basis review, if indeed commercial speech should receive any protection at all.[34]

Similarly, when dealing with the regulation of sex through zoning laws that attempt to disperse adult uses within a city, or ban nude erotic dancing, the Supreme Court now is willing to accept claims by the government that such regulation is needed to combat the "secondary effects" associated with such establishments,[35] such as prostitution or the spread of sexually communicable diseases, even when the particular municipality asserting this need has no empirical evidence that such secondary effects exist within that municipality.[36] The Court thus permits the legislature essentially to assume such effects without proof.[37] This has the effect of largely allowing what might otherwise be an impermissible, or at least a highly suspect motive—moral revulsion for the eroticism of nude dancing or pornographic movies—to drive such policies in disguise. The Court, in effect, permits cities in such circumstances to look the other way on what is probably an illicit motive, at least if one believes that moral judgments and

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ensure that data necessary for economic and political decisionmaking is available); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 431 (1971) (arguing that certain commercial speech, such as informational and artistic advertising, should receive protection); Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 556 (1997) (arguing for the soundness of the Supreme Court's protection of commercial speech, but also for a stronger theoretical justification for this protection); Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 236 (1998) (arguing that the exclusion of corporate expression from the scope of the free speech clause would eliminate a substantial amount of information about issues of fundamental importance to the country); Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080, 1083-84 (agreeing with the result of a recent Supreme Court case that seemed to reject a notion of affording a different protection for commercial speech and arguing that the distinction between commercial and noncommercial speech is untenable and unwise).

34. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 195-210 (1989); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) (stating that "a complete denial of first amendment protection for commercial speech is not only consistent with, but required by, first amendment theory").

35. *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976).

36. *See Pap's A.M.*, 120 S. Ct. at 1395.

37. *See id.* at 1396. ("Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited.").

not secondary effects (which need not be supported any longer with proof) are what really push the regulation.[38]

Regulation of attorneys' speech on pending proceedings, governed by intermediate scrutiny, presents exactly this kind of proof problem. In *Gentile v. State Bar of Nevada*,[39] the Supreme Court rejected the argument that the rigorous proof requirement of the "clear and present danger" test, or some rough equivalent thereof, ought to apply to such extrajudicial lawyer speech.[40] If, instead of clear and present danger, a relatively demanding version of intermediate scrutiny is applied, lawyers will still enjoy a substantial measure of protection.[41] But if the standard is per-

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38. *See id.* at 1409 (Stevens, J., dissenting). Justice Stevens stated:

> To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible. It would be more accurate to acknowledge, as JUSTICE SCALIA does, that there is no reason to believe that such a requirement "will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease."

Id. (Stevens, J., dissenting) (quoting *Pap's A.M.*, 120 S. Ct. at 1402 (Scalia, J., concurring in judgment)); *see also id.* at 1405-06 (Souter, J., concurring and dissenting) (stating that specific evidentiary proof of secondary effects should be required).

39. 501 U.S. 1030 (1991).

40. *See id.* at 1069–74 (plurality opinion).

41. *See id.* at 1077. In *Gentile*, the Supreme Court considered the constitutionality of a disciplinary rule barring lawyers from making extrajudicial statements that would have a "substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* at 1060 (plurality opinion, app. B). Justice Kennedy's plurality opinion, joined by Justices Stevens, Blackmun, and Marshall, would have required a standard higher than a "substantial likelihood of material prejudice." *Id.* at 1051-58 (plurality opinion). While Justice Kennedy's opinion made it clear that a disciplinary rule need not recite the exact incantation "clear and present danger," the plurality would have required that a rule must, either on its face or as authoritatively construed, embody a requirement of "serious and imminent threat" to meet minimum constitutional standards. *See id.* at 1037 (plurality opinion). It was this issue—the question of whether something akin to the highly protective "clear and present danger" test should apply to attorney comments on pending proceedings—that divided the Court. *See id.* at 1051 (plurality opinion). The plurality opinion of Chief Justice Rehnquist, which on this point commanded the approval of five Justices (Justices Scalia, O'Connor, Souter, and White joined the Chief Justice on this issue), held that a standard less than "clear and present danger," or any equivalent test requiring an *imminent* threat, was appropriate when dealing with the speech of attorneys commenting on pending criminal proceedings:

> When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question. . . . The "substantial likelihood" test embodied in Rule 177 is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury ve-

ceived as closer to rational basis review, lawyers may be disciplined or held in contempt when, realistically, it is quite doubtful that their extrajudicial statements pose any palpable likelihood of disruption to the fairness or integrity of the judicial proceedings.[42]

The questions so artfully explored by Professors Nowak, Carrington, and Dienes all implicate these kinds of calibrations, in one context or another. They are all part of the ultimate question that is so prominent in Professor Carrington's provocative piece—whether we should treat the policy judgments and proof debates

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> nire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. . . . Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner. The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.
>
> The restraint on speech is narrowly tailored to achieve those objectives. 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. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.

Id. at 1075-76 (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984); Sheppard v. Maxwell, 384 U.S. 333, 350-51 (1966); Turner v. Louisiana, 379 U.S. 466, 473 (1965)).

Justice O'Connor cast the pivotal swing vote in *Gentile*, joining parts of the opinion of the Chief Justice and parts of the opinion of Justice Kennedy. On the central question of what First Amendment standard should be applied, Justice O'Connor, in a brief concurring opinion, wrote:

> I agree with much of THE CHIEF JUSTICE's opinion. In particular, I agree that a State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press. Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. . . . This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies. I agree with THE CHIEF JUSTICE that the "substantial likelihood of material prejudice" standard articulated in Rule 177 passes constitutional muster.

Id. at 1081-82 (O'Connor, J., concurring) (citing *In re* Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring in result)).

42. This was the position I took in the *Morrissey* litigation in which I represented the petitioner in an unsuccessful petition for certiorari. *See In re* Morrissey, 168 F.3d 134 (4th Cir.), *cert. denied*, 527 U.S. 1036 (1999).

upon which our First Amendment judgments mainly turn as questions that should presumptively be left to the democratic process, or to the courts.