

# Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech

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## ABSTRACT

*The ABA’s recent adoption of Model Rule 8.4(g), making it sanctionable for lawyers to engage in discrimination or harassment, has garnered a great deal of attention, much of it focused on whether the rule violates an attorney’s right to free speech. This article attempts to bring clarity to the discussion. It emphasizes the significance of claiming, as some have done, that the rule is facially invalid because it is overbroad, and then engages in the close textual analysis necessary to evaluate claims of overbreadth. This analysis yields important insight about how the rule might be revised to better reflect the crucial distinction between discrimination and harassment on the one hand and the expression of controversial viewpoints on the other. It then explains why the rule’s coverage of all conduct “related to the practice of law” is neither unprecedented nor particularly troubling against the existing backdrop of lawyer regulation and concludes with a few thoughts about the values most central to professional identity.*

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## INTRODUCTION

The extent to which lawyer speech is protected by the First Amendment has troubled courts, scholars, and regulators for decades.<sup>1</sup> Indeed, if we attempt to build a First Amendment data set in which the constant feature across cases is the challenger’s bar membership, there seems to be an erratic quality to the results of these contests, making it difficult if not impossible to develop a coherent paradigm for assessing when the bar can restrict or prohibit lawyer speech.<sup>2</sup> The divergent outcomes make a bit more sense when we consider the numerous roles that lawyers inhabit and the very different contexts in which lawyers speak. Lawyers are employers,<sup>3</sup> activists,<sup>4</sup> advertisers,<sup>5</sup> officers of the

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1. An early expression of the recurring tension between bar authority and lawyer speech rights can be found in *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273 (1957) (reversing the California State Bar’s rejection of an applicant suspected of being a member of the Communist party: “We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar.”).

2. See W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 305–06 (2001) [hereinafter Wendel, *Free Speech*]; Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, 66 FLA. L. REV. 961, 972 (2014) (noting that “the outcomes and animating principles often appear deeply confused”).

3. See, e.g., *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (law firm qualifies as an employer under Title VII of Civil Rights Act of 1964 and is therefore subject to gender discrimination suit brought by female associate); Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 GEO. L. J. 627 (1997).

4. See *In re Primus*, 436 U.S. 412, 414–15 (1978) (ACLU attorney offered to assist women who had been coercively sterilized); *NAACP v. Button*, 371 U.S. 415, 420–22 (1963) (staff attorneys for the National Association for the Advancement of Colored People working on school desegregation efforts and other civil rights matters); *In re Sawyer*, 360 U.S. 622, 628–31 (1959) (lawyer engaged in public criticism of government’s anti-union efforts).

5. See *In re R.M.J.*, 455 U.S. 191, 206–07 (1982) (Missouri rule prohibiting advertising which deviates from a precise listing of areas of practice violates the First Amendment without showing that ads were

court,<sup>6</sup> and professionals who provide services to their clients largely through verbal expression.<sup>7</sup> Lawyer speech is personal, professional, political, and commercial; judged against the “rough hierarchy in the constitutional protection of speech” created by the Court’s First Amendment jurisprudence,<sup>8</sup> we can see that lawyer speech occupies both the highest<sup>9</sup> and the lowest rungs.<sup>10</sup> Much of their speech is treated as conduct subject to regulation rather than protected expression,<sup>11</sup> and the contexts in which they speak and act implicate the strongest

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misleading or that mailings/handbills would be more difficult to supervise); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (truthful, non-misleading lawyer advertising protected by First Amendment). *See also* *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 110–11 (1990) (attorney had First Amendment right to advertise certification as trial specialist by National Board of Trial Advocacy).

6. *See, e.g.,* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991); *In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987); *Hallinan v. Comm. of Bar Exam’rs of State Bar*, 421 P.2d 76 (Cal. 1966); Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 369 (2010).

7. *See* Claudia Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016); Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639, 639 (2011); Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 687–88 (1997) (noting that the professional activities of lawyers “rarely depart from the realm of speech . . . . Our product is argument, persuasion, negotiation, and documentation, so speaking (by which I include writing) is not only central to what the legal system is all about, and not only the product of law as we know it, but basically the only thing that lawyers and the legal system have.”). Schauer then illustrates how a trial is unavoidably a series of content-based restrictions on speech:

[I]t is no exaggeration to describe a trial as a place in which people run the risk of imprisonment for saying things that a government official, a judge, believes to be unrelated to the matter at hand . . . . the very institution we call a trial exists by virtue of an elaborate system of restrictions on the freedom of speech, restrictions whose willful violation carry the ultimate threat of imprisonment for contempt of court.

*Id.* at 689–90.

8. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in judgment) (“Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech.”).

9. *See* *Gentile*, 501 U.S. at 1034 (“[T]his case involves classic political speech . . . . There is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”). *See also* *R. A.V.*, 505 U.S. at 422 (Stevens, J., concurring in judgment) (“Core political speech occupies the highest, most protected position” in the hierarchy of speech).

10. *See infra* Section II(B)(1)(a) (including one case in which an attorney terrorized his ex-girlfriend, an African-American woman with two young sons, by sending her a letter purporting to be from the “White Aryan Resistance” and warning her that she was being watched and followed).

11. Filing motions, for example, or making objections at trial, are speech-constituted but treated as forms of regulable conduct, rather than protected expression. As one commentator has expressed:

Often what clients pay for when they hire an attorney is not speech at all (even though it is accomplished through speech) but a legally binding result. For example, a client may seek: a plea agreement; the creation of a business association; an estate that will be probated according to the wishes of the testator; the discharge of debts; recognition under the Geneva Conventions; the dissolution of a marriage; payment for personal injuries caused by another; or acquisition of a valid title to property.

Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 38 (2011). As another commentator points out, the speech/conduct distinction is a “useful organizing principle” that “drives much of free speech law,” although as an epistemological matter “all expression is both speech and action.” Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 964 (2004). Justice Breyer, in a recent concurrence, has suggested that it is not always fruitful to try to distinguish between “speech” and “conduct,” and that, instead, it is best for the Court “to simply ask whether, or how, a challenged statute, rule, or regulation affects an interest that the First Amendment protects.”

and weakest of state regulatory interests. Although they are sometimes expected (and in fact required) to function as the state's direct adversary,<sup>12</sup> they are, at the same time, licensed and so heavily regulated by the state that it can seem as if the state's endorsement hovers over their practice.<sup>13</sup> Indeed, as perhaps best expressed by the bar's paradigmatic voice, a lawyer is considered "a public citizen having special responsibility for the quality of justice."<sup>14</sup> This language reflects and contributes to a kind of lawyer exceptionalism that, among its many dimensions, has First Amendment implications. One scholar has described this as the idea that "lawyers have such an intimate relationship with the rule of law that they are not purely private speakers. Their speech can be limited along lines analogous with government actors because, in a sense, they embody and defend the law itself."<sup>15</sup>

We ought to expect, then, that evaluating whether restrictions on lawyer expression violate the First Amendment will require painstaking analysis. This is certainly true for the American Bar Association's recent amendment to the *Model Rules of Professional Conduct*, making it professional misconduct for a lawyer to "engage in conduct the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."<sup>16</sup>

The potentially expressive quality of the conduct targeted by the prohibition has brought the First Amendment to center stage in the conversation about

*Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (2017).

12. See, e.g., *Gentile*, 501 U.S. at 1051 (noting that the criminal defense bar "has the professional mission to challenge actions of the State"); *Strickland v. Washington*, 466 U.S. 668 (1984).

13. See, e.g., W. Bradley Wendel, "Certain Fundamental Truths": A Dialectic on Negative and Positive Liberty in Hate-Speech Cases, 65 LAW & CONTEMP. PROBS. 33, 52–53 (Spring 2002) (demonstrating how we might think of state licensing "as 'support' of some kind for expressive activities—here, the activity of taking a position on a legal issue.") [hereinafter Wendel, *Certain Fundamental Truths*].

14. MODEL RULES OF PROF'L CONDUCT pmbl (2016) [hereinafter MODEL RULES].

15. Wendel, *Certain Fundamental Truths*, *supra* note 13, at 52–53.

16. MODEL RULES R. 8.4(g). The comments elaborate in two very important ways. First, comment [3] explains that:

discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

*Id.* Comment [4] provides guidance on the scope of conduct that is considered related to the practice of law:

Conduct related to the practice of law includes representing clients; interacting with witnesses, co-workers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

*Id.*

whether state courts should adopt Rule 8.4(g).<sup>17</sup> Professor Stephen Gillers, writing to encourage state courts to do just that, acknowledged the possibility of such questions but reassured readers that the project ought not to founder upon First Amendment concerns.<sup>18</sup> Professor Josh Blackman wrote a response, asserting that the provision's First Amendment defects were more substantial than Professor Gillers and the rule's drafters had allowed.<sup>19</sup> Speaking ardently about the legal profession's need for an anti-bias rule, Professor Gillers pointed to documented cases of lawyers using racial epithets or sexually derogatory language in the course of their law practice.<sup>20</sup> Urging readers to consider the chilling effect that the rule would potentially have on protected expression, Professor Blackman offered up counter-examples of speech on controversial topics that, in his view, could arguably come within the confines of the rule.<sup>21</sup>

Readers might understandably consider the matter submitted; with such able representatives on either side of the debate, what more could another voice possibly add? The answer lies in the relentless complexity of First Amendment

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17. See, e.g., Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and A Call for Scholarship*, 41 J. LEGAL PROF. 201, 249 (2017) (arguing that the “new model rule requires serious First Amendment analysis”). See Letter Regarding ABA Model Rule 8.4(g) from Alan Wilson, Att’y Gen. of S.C., to Hon. John R. McCravy III, Rep., S.C. House of Reps. (May 1, 2016), <http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf> [<https://perma.cc/55E8-YTJ8>]. See also Op. KP-0123 from Ken Paxton, Att’y Gen. of Tex., to Hon. Charles Perry, Tex. State Sen. (December 20, 2016), <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf> [<https://perma.cc/X63X-U23B>]. This does not quite capture the touch of melodrama with which some commenters have received the amendment—one opponent described it as the adoption of a “speech code,” Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express ‘Bias,’ Including in Law-Related Social Activities*, VOLOKH CONSPIRACY (Aug. 10, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm\\_term=.5cdab79ac1bc](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.5cdab79ac1bc) [<https://perma.cc/NP65-TD9W>], and another titled his op-ed “The ABA Overrides the First Amendment.” Ron Rotunda, Opinion, *The ABA Overrides the First Amendment*, THE WALL STREET JOURNAL (Aug. 16, 2016), <http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418> [<https://perma.cc/PVN7-9EEL>].

18. Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195 (2017). The First Amendment implications of Rule 8.4(g) was not the central focus of Professor Gillers’ article, which was primarily devoted to providing readers with a history of the developments leading up to the rule’s adoption, including previous efforts that were unsuccessful, an overview of analogous state provisions predating the ABA’s revision, and the lessons to be gleaned from the anti-harassment provision in the Code of Judicial Conduct.

19. Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 265 (2017).

20. See Gillers, *supra* note 18, at 238–240. See also Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 788 (1996) (offering examples of racial epithets and sexually derogatory speech).

21. See Blackman, *supra* note 19, at 246–47 (contemplating a speaker who argues that “women should not be eligible for combat duty in the military, and should continue to be excluded from selective services requirements,” or that “the plenary power doctrine permits the government to exclude aliens from certain countries that are deemed dangerous”). See also *infra* Section II(A)(2) (providing additional examples drawn from Blackman’s article of speech on topics pertaining to the rule’s protected categories).

doctrine, especially as applied to lawyers. The conversation would benefit from a considerably more extensive grounding in First Amendment doctrine, which I endeavor here to provide. If we are to assert that Rule 8.4(g) does or does not violate the First Amendment, we are going to need a much closer examination of First Amendment principles than has so far been undertaken.

I begin from the premise that chilling protected speech is a serious charge and we ought not take it lightly. There is no doubt that in rule-drafting and adoption we must maintain fidelity to First Amendment principles, but after examining them in detail it is far from clear that Rule 8.4(g) runs afoul of these principles. For better or for worse, the First Amendment that guides this discussion is the same one that has allowed lawyers to be sanctioned for writing letters to accident victims,<sup>22</sup> criticizing judges,<sup>23</sup> or soliciting campaign contributions for judicial elections.<sup>24</sup> Over their First Amendment objections, lawyers have been held civilly liable for refusing partnership to women,<sup>25</sup> potentially subject to criminal liability for providing advice to clients about pursuing claims in front of international tribunals,<sup>26</sup> and excluded from the practice of law altogether for espousing

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22. See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (note that this was an anticipatory action, seeking declarative and injunctive relief, in advance of the rule's application to a particular lawyer).

23. See *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Ronwin*, 557 N.W.2d 515, 523 (Iowa 1996) ("A court may find disbarment is justified when grossly disrespectful allegations are made, such as suggesting certain judges and justices were conspiring to conceal a crime, and when the allegations are totally unfounded and clearly a violation of the Canons of Professional Ethics."). See also *In re Pyle*, 156 P.3d 1231, 1237 (Kan. 2007) (concluding that attorney's letter to 281 friends, clients, and family members complaining that disciplinary board had been "stacked against" him was conduct prejudicial to the administration of justice even though it was sent nineteen days after conclusion of proceedings).

A number of state courts have expressly ruled that attorneys who criticize judges are evaluated under a different standard than *New York Times v. Sullivan*, 376 U.S. 254 (1964), in which the Supreme Court held that the First Amendment protects against defamation liability unless the statements were made with actual malice. See, e.g., *Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver*, 750 N.W.2d 71, 80 (Iowa 2008) (acknowledging that "sanctioning an attorney for statements he has made implicates the First Amendment," but nonetheless upholding sanction against attorney for making accusation against judge that was demonstrably false; the court expressly considered and rejected the actual malice test articulated in *New York Times v. Sullivan*); *Iowa Supreme Court Attorney Disciplinary Bd. v. Attorney Doe No. 792*, 878 N.W.2d 189, 194 (Iowa 2016) (confirming the Court's adoption of an "objective standard for assessing criticisms of judicial officers made by attorneys."); *In re Disciplinary Action Against Graham*, 453 N.W.2d 313, 322 (Minn. 1990) ("Because of the interest in protecting the public, the administration of justice and the profession, a purely subjective standard is inappropriate. The standard applied must reflect that level of competence, of sense of responsibility to the legal system, of understanding of legal rights and of legal procedures to be used only for legitimate purposes and not to harass or intimidate others, that is essential to the character of an attorney practicing in Minnesota.").

For an in-depth examination of this phenomenon and a persuasive critique, see Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1569 (2009).

24. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

25. See *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

26. See *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). See also Margaret Tarkington, *Freedom of Attorney-Client Association*, 2012 UTAH L. REV. 1071, 1071 (2012) (explaining that "[i]n *Holder v. Humanitarian Law Project* (HLP), the United States Supreme Court held that Congress could constitutionally prohibit attorneys from providing legal assistance and advice regarding lawful nonviolent conduct to groups that the Secretary of State has designated as Foreign Terrorist Organizations (FTOs).").

white supremacy.<sup>27</sup> In every instance the lawyers were unsuccessful in asserting that the First Amendment protected the conduct in question.<sup>28</sup> And that does not begin to address the challenges and implications of assessing the facial validity of the rule in the absence of any application to a particular attorney. To illustrate this important point, we might consider *Gentile v. State Bar of Nevada*, a notable First Amendment victory for a lawyer sanctioned for statements made in a press conference after his client was indicted.<sup>29</sup> The decision was badly fractured as to the appropriate standard of review, but it is useful to hone in on the following metric: while five justices agreed that Dominic Gentile's First Amendment rights were violated when the state bar of Nevada sanctioned him, there was not a single justice who expressed any indication that the rule against pre-trial publicity was facially invalid.<sup>30</sup>

Against this backdrop, Rule 8.4(g)'s opponents will need to be particularly persuasive in explaining why, in contrast to the many free speech rights that attorneys yield to obtain and keep their law licenses,<sup>31</sup> the right to engage in discriminatory and harassing speech is one they should retain.<sup>32</sup> At the same time, the rule's proponents need to engage with the concern that Rule 8.4(g) is different, and more constitutionally suspect, than the myriad other restrictions on attorney speech pervasive throughout the rules of professional responsibility.<sup>33</sup> Critics have charged that Rule 8.4(g) could be applied to prohibit pure political speech on the grounds that it is insulting or offensive, which would make it the

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27. See *Hale v. Comm. on Character & Fitness of the Ill. Bar*, 530 U.S. 1261 (2000). For an in-depth discussion of this high-profile case, see Wendel, *Certain Fundamental Truths*, *supra* note 13, at 46.

28. See *Hunter v. Va. State Bar ex rel. Third Dist. Comm.*, 744 S.E.2d 611 (Va. 2013) (criminal defense lawyer blogging accurately about successful cases deemed to be engaged in misleading advertising and sanctioned; Hunter was represented by no less an authority on the First Amendment than Professor Rodney Smolla and was still unable to successfully interpose First Amendment objections to the disciplinary sanction); *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633, 638 (S.C. 2011) (upholding sanction against lawyer for violating the civility oath, stating that “[t]he interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally in the manner in which Respondent attacked Attorney Doe.”); *State v. Russell*, 610 P.2d 1122, 1127 (Kan. 1980).

29. *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

30. *Id.* at 1034, 1036.

31. Including the rights that lay persons enjoy to be uncivil, see *In re Anonymous Member of S.C. Bar*, 709 S.E.2d, and have “an offensive personality.” See also *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Ronwin*, 557 N.W.2d 515, 517 (Iowa 1996) (noting that attorneys have an obligation “to abstain from all offensive personalities”).

32. I understand that one of Professor Blackman's most important efforts in this regard is to characterize most preceding attorney speech cases as arising from the delivery of legal services or otherwise “within the state bar's competencies,” rather than encroaching into the more private sphere of an attorney's social and political activities. See Blackman, *supra* note 19, at 255–57. For reasons we will explore in Part II, this distinction does not do the work that it needs to in order to render Rule 8.4(g) unprecedented or unconstitutional.

33. See Lindsey Keiser, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629, 638 (2015). See generally MODEL RULES R. 8.4(g).

sort of regulatory effort the Court has repeatedly rejected.<sup>34</sup>

This Article contributes to the discussion by laying the appropriate doctrinal foundation for evaluating claims that Rule 8.4(g) is overbroad and therefore facially invalid. Part I establishes that overbreadth analysis requires a comparative assessment of the rule's permissible and impermissible applications, and that the range of permissible applications is likely to reflect the laxity with which the Court has examined restraints on attorney speech. Part II then closely examines both the provision of the rule that delineates the prohibited *conduct* and the portion of the rule that articulates the regulated *context*. Part II(A) focuses first on prohibited conduct: discrimination or harassment on the basis of protected status. I explain that this language, both of its own force and by reference to federal and state anti-discrimination law with lengthy interpretive histories, covers a great deal of conduct that is not protected by the First Amendment. Having posited that this is considerably more central to a sound overbreadth analysis than critics have acknowledged, I then consider whether the language in the rule's comments expands the coverage to a point of overbreadth. This analysis yields an important insight into how the rule might be revised to better reflect the crucial distinction between discrimination and harassment, on the one hand, and the expression of controversial viewpoints on the other. Part II(B) then turns to the regulated context, explaining why the rule's coverage of conduct "related to the practice of law" is far from unprecedented in the world of professional responsibility. The Conclusion offers a few thoughts on the contested and contingent nature of the values deemed to be most central to a lawyer's professional identity.

## I. FACIAL CHALLENGES TO ATTORNEY SPEECH REGULATION

I begin with a rudimentary point from which considerable complexity follows: when we talk about First Amendment concerns while debating a proposed rule change rather than evaluating the rule's application to a particular lawyer's conduct, we are evaluating the proposed rule *on its face*. To claim that there is a First Amendment problem at this stage is in fact to assert that the rule, if adopted by a state supreme court, would be facially invalid and therefore unenforceable against any lawyer—even for conduct not protected by the First Amendment. As both Professors Gillers and Blackman appreciate, the appropriate instruments with which to gauge this claim are the principles of overbreadth and vagueness,<sup>35</sup>

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34. See, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (describing "bedrock First Amendment principle: speech may not be banned on the ground that it expresses ideas that offend"). See also *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (First Amendment protects graphic, offensive, homophobic and anti-Catholic picketing outside funeral for fallen soldier); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988) (First Amendment protects parody suggesting that Falwell had a "drunken incestuous rendezvous with his mother in an outhouse").

35. Specifically, overbreadth and vagueness claims brought in what we might call an "anticipatory" posture rather than in response to a state court enforcing a statute against an actual person. See Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 877 (1991).



but together their articles just begin to scratch the surface of these complex and often confounding doctrines.

Blackman faults Gillers for too readily assuming that such challenges will fail, but then moves orthogonally to what he calls “the far more important question” of whether state courts should regulate “speech outside the delivery of legal services.”<sup>36</sup> Blackman proceeds to set forth his objections to what he sees as an “unprecedented” intrusion into “the private spheres of attorneys’ speech and conduct.”<sup>37</sup> Although Blackman references concepts of narrow tailoring and compelling state interest, his discussion of what he acknowledges to be a “profound policy question”<sup>38</sup> functions much more effectively as an exploration of whether Rule 8.4(g) is offensive to free speech values than an assessment of how an overbreadth or vagueness challenge against Rule 8.4(g) would be likely to fare under the Court’s current First Amendment doctrine.<sup>39</sup> I do not mean this to suggest that the former is unimportant. On the contrary, the question of which values the bar should be manifesting in its rules of professional responsibility is vital. It just is not the same as asking whether, as a matter of constitutional law and federal courts doctrine, the rule would be struck down as facially invalid,<sup>40</sup> and there is enough chatter about the rule’s asserted First Amendment defects to make the latter question essential to address.<sup>41</sup> It is also important to be candid about the degree of choice left open to the profession about what values to prioritize, rather than treating the free speech value as a compulsory obligation imposed by the First Amendment.<sup>42</sup>

The difference between free speech values and First Amendment doctrine is particularly pronounced when it comes to lawyers because of the considerable leeway the Court has offered to states in the regulation of attorney speech. As Professor Smolla has observed, “[e]xisting First Amendment doctrine easily permits limitation of the speech of judges and attorneys when the government professes, to support such regulation, convincing functional rationales manifestly

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36. Blackman, *supra* note 19, at 255.

37. *Id.* at 250, 255.

38. *Id.* at 255.

39. This quality may derive from Blackman’s view that 8.4(g) is so novel that there is little functional precedent for it. *See id.* at 257 (“Because no jurisdiction has ever attempted to enforce a speech code over social activities merely ‘connected with the practice of law,’ there are no precedents to turn to in order to assess such a regime’s constitutionality.”).

40. Fred Schauer has made precisely this point before, observing that when we are evaluating restrictions on speech, we must consider whether “it is important or desirable to view the full range of plausible policy arguments in terms of the much narrower range of arguments that are cognizable by the First Amendment and its constitutive rules and doctrines.” *See Schauer, supra* note 7, at 695.

41. *See Wendel, Free Speech, supra* note 2, at 306–07.

42. For discussion of the peril of treating constitutional argumentation as a trump, see, e.g., Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 *CORNELL L. REV.* 701, 707 (2016) (“[T]he Constitution too often functions as a kind of trump. Political actors feel that evoking higher law will overwhelm all manner of careful policy arguments by their opponents.”).

directed to its internal management of the legal system.”<sup>43</sup> Professor Smolla also notes that more difficult questions arise 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.”<sup>44</sup> Whether the prohibition of discrimination and harassment in the legal profession is better thought of as “internal management of the legal system” or an “ethereal value” such as “maintaining professionalism” is of course something that reasonable lawyers could dispute. But what is key at this stage is to understand the general background principle that Smolla identifies: that regulation of the legal profession 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.”<sup>45</sup> Any discussion of the First Amendment as a bar to the adoption of Rule 8.4(g) must seriously grapple with this feature of the First Amendment landscape.

The series of decisions in which the Supreme Court has interpreted the First Amendment to permit the restriction of attorney speech might certainly be criticized for failure to recognize and protect free speech values, but they are the very cases that one would have to draw from to make assertions about what the First Amendment does and does not do when it comes to lawyers.<sup>46</sup> Asserting that an attorney speech regulation is facially invalid, moreover, presents yet additional obstacles, as I explain in detail in this section.

#### A. DIFFERENTIATING BETWEEN TYPES OF FACIAL CHALLENGES

To assert that a law should be deemed unconstitutional in advance of its actual application to a particular attorney is to assert that the law is facially invalid.<sup>47</sup> From here, we must then observe that a restriction on speech might be facially invalid under the First Amendment in one of various ways. The rule might clearly and narrowly target constitutionally protected expression—consider, for example, a city ordinance prohibiting the display of signs in support of political candidates.<sup>48</sup> The state would not need to enforce the law against a particular person for us to see the infirmity: a content-based restriction on speech that does not

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43. Smolla, *supra* note 2, at 968.

44. *Id.*

45. *Id.* at 989.

46. See *supra* pp. 4–6 and accompanying notes.

47. As the Court recently put it, “[t]o succeed in a typical facial attack, Stevens would have to establish ‘that no set of circumstances exists under which [§ 48] would be valid,’ *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statute lacks any ‘plainly legitimate sweep,’ *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997).” *United States v. Stevens*, 559 U.S. 460, 472 (2010).

48. Cf. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (discussing a municipal code regulating, inter alia, “political” and “ideological” signage).

satisfy strict scrutiny.<sup>49</sup>

The constitutional defects of Rule 8.4(g), if any, are of a different nature. Whatever protected expression the rule might arguably sweep into its domain, the rule indisputably includes conduct that is *not* protected by the First Amendment. Although we do not yet have the necessary tools to demarcate the exact boundaries, we can suggest an example for the immediate purpose. An attorney whose unwanted sexual advances towards a junior associate subjected him to discipline under the proposed rule would be categorically unable to invoke the protections of the First Amendment. Any physical touching would, of course, be conduct completely beyond the concern of the First Amendment. Even where the harassment is achieved through speech, such as a statement warning the associate that she would not be promoted unless she were to comply with his sexual demands, the fact that there is a speech component to his behavior does not mean that it is *protected* speech, and in fact, this sort of *quid pro quo* harassment is not.<sup>50</sup>

I understand that this application, because it so clearly reflects conduct that is already unlawful under Title VII, does not engage with the primary concern of some of the rule's critics.<sup>51</sup> But that is precisely what illustrates the fact that the proposed rule, in prohibiting discrimination and harassment, targets a great deal of conduct for which there is no serious argument for First Amendment protection. Rule 8.4(g) thus forbids conduct the state is clearly entitled to prohibit, but that is not enough to save the rule from a facial challenge. The rule might nonetheless be facially invalid if it is overbroad, reaching too far beyond this subset of plainly legitimate applications. The next section takes a closer look at what is required to demonstrate First Amendment overbreadth.

## B. UNDERSTANDING OVERBREADTH

First Amendment overbreadth doctrine derives from the accommodation of two competing principles, each with a rich pedigree in constitutional law and structure.<sup>52</sup> The first, sounding in terms of justiciability and the appropriate role of federal courts in a tripartite federalist system, is that a party will be heard to challenge a statute only if its application to her own conduct would violate the

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49. *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (“[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”). It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972).

50. *See, e.g., Cynthia L. Estlund, Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 703 (1997) (“[Q]uid pro quo harassment, in which sexual compliance is made a condition of continued employment or of advancement, raises no free speech issues.”).

51. *See Blackman, supra* note 19, at 246 (expressing particular concern about applications of Rule 8.4(g) that extend “beyond the work environment”).

52. *See Fallon, supra* note 35, at 858 (describing the overbreadth question as: “When should someone whose conduct is not constitutionally protected escape a legal sanction on the ground that the statute under which she is threatened would be constitutionally invalid as applied to someone else?”).

Constitution.<sup>53</sup> In a world where this was the only operative principle, any party seeking to challenge a speech restriction on First Amendment grounds would be tasked with either showing that the law was invalid in all applications, or demonstrating how the rule's application to her conduct would violate the First Amendment.<sup>54</sup> Statutes that covered both protected and unprotected expression would necessarily require as-applied adjudication, with the impermissible applications getting struck down and the permissible applications allowed to proceed.<sup>55</sup>

The competing concern, however, is that the unpredictability and inevitable imperfections of this process would deter many from engaging in protected expression because of concerns that their speech would be unprotected.<sup>56</sup> The Court has thus said, essentially, that speech restrictions with a sufficiently deterrent effect are facially invalid—they cannot be enforced at all, even against unprotected expression, because of the unacceptable cost of chilling protected speech.<sup>57</sup> It is this feature—the wholesale invalidation of a law with admittedly permissible applications—that has inspired the description of overbreadth rulings as “strong medicine”<sup>58</sup> that is “not to be casually employed.”<sup>59</sup> While this characterization has been critiqued as inaccurate,<sup>60</sup> what is indisputable is that it is fairly rare medicine: it is unusual for the Court to strike down a statute on overbreadth grounds.<sup>61</sup> What is also essential to remember is that the Court's refusal to strike down a statute as facially invalid for overbreadth leaves completely unhindered a challenger's ability to demonstrate that the statute's application to her conduct

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53. *Id.* at 859.

54. See Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid*

*Rule Requirement*, 48 AM. U. L. REV. 359, 360 (1998) (“Litigants in the federal courts can attack the constitutionality of legislative enactments in two ways: they can bring a facial challenge to the law, alleging that it is unconstitutional in all of its applications, or they can bring an as-applied challenge, alleging that the law is unconstitutional as applied to the particular facts that their case presents.”).

55. I note briefly that scholars have advanced visionary alternative conceptions of what it means to characterize a statute as overbroad and whether it makes any sense at all to distinguish facial challenges from those that are as-applied. See, e.g., Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010). In time, these ideas may reshape our conception of these (perhaps erroneously) time-honored overbreadth principles. In this article, however, I use and deploy those principles in the same way as the participants in the debate I am joining—meaning that I run the risk of recapitulating the errors that Professor Rosenkranz addresses.

56. See Fallon, *supra* note 35, at 867–68.

57. See *id.*; see also Eberle, *supra* note 11, at 961 (explaining that overbreadth doctrine “suspends normal constitutional standing requirements on the assumption that any member of society has an interest in the free exchange of ideas that might otherwise be chilled by application of a statute that reaches legal expression while also proscribing illegal expression”).

58. See *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

59. *United States v. Williams*, 553 U.S. 285, 293 (2008) (citing *L. A. Police Dept. v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982))).

60. “All that the Supreme Court says when it holds a state statute overbroad, and all that it could say, is that the statute as authoritatively construed by the state courts prior to the Supreme Court's judgment is too sweeping to be enforced through the imposition of civil or criminal penalties.” Fallon, *supra* note 35, at 854.

61. *Virginia v. Hicks*, 539 U.S. 113, 124 (2003) (“Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).”).

would violate the First Amendment. In fact, the Court has said expressly that for a statute whose overbreadth failed to meet the substantiality threshold, “whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanction, assertedly, may not be applied.”<sup>62</sup> So Professor Gillers’ observation that “any lawyer charged with violating Rule 8.4(g) remains free to argue that as applied to his or her conduct the rule is unconstitutional,”<sup>63</sup> while it might read as insufficiently attentive to First Amendment concerns,<sup>64</sup> stands on a substantial doctrinal footing.

Although the departure from ordinary standing principles that we see in First Amendment doctrine has been explained by reference to the concern that protected speech will be chilled by overbroad laws, the Court does not endeavor to measure deterrent effect in any kind of empirical or behavioral sense.<sup>65</sup> Instead, as Professor Fallon has explained,

[w]hen speech or expressive activity forms a significant part of a law’s target, the law is subject to facial challenge and invalidation if: (i) it is ‘substantially overbroad’—that is, if its illegitimate applications are too numerous ‘judged in relation to the statute’s plainly legitimate sweep,’ and (ii) no constitutionally adequate narrowing construction suggests itself.<sup>66</sup>

As this restatement suggests, the Court has required more than a minimal spillover before striking down a law as overbroad.

Overbreadth assessment, then, involves gauging the proportion of legitimate applications compared to illegitimate ones. That this is difficult to measure credibly has been ably noted; it is at best a sort of stylized comparison.<sup>67</sup> But the analysis must reflect some sort of honest effort to judge the degree to which a statute’s reach impermissibly covers protected activity *in comparison* to unprotected activity that the state is free to regulate.<sup>68</sup> The declarations of overbreadth that have

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62. *Broadrick*, 413 U.S. at 615–16. This is the doctrinal footing for Professor Gillers’ observation that any lawyer remains free to challenge the rule’s application to her conduct on First Amendment grounds.

63. Gillers, *supra* note 18, at 230–31.

64. Blackman, *supra* note 19, at 255 (arguing that Gillers considered the First Amendment merely as “an afterthought”).

65. See Brandice Canes-Wrone & Michael C. Dorf, *Measuring the Chilling Effect*, 90 N.Y.U. L. REV. 1095, 1097 (2015) (“The Supreme Court has not made any attempt to detect or measure the chilling effects that ostensibly support its free speech doctrines.”).

66. Fallon, *supra* note 35, at 863.

67. *Id.*

68. This phenomenon was manifest in *United States v. Stevens*, in which the Supreme Court struck down as overbroad a federal statute prohibiting depictions of animal cruelty. Stevens argued that the statute applied “to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute.” *United States v. Stevens*, 559 U.S. 460, 473 (2010). Accepting for purposes of overbreadth analysis the government’s contention that certain extreme depictions could be constitutionally prohibited, the Court noted that the government had failed to “seriously contest that the presumptively impermissible applications of § 48 (properly construed) far outnumber any permissible ones.” *Id.* at 481 (emphasis added). The Court emphasized that however “growing” and “lucrative” might be the markets for the unprotected depictions, they were “dwarfed by the market for other depictions, such as hunting magazines and videos,” that were

proliferated in response to Rule 8.4(g) lack this comparative assessment. They do not acknowledge the extent to which prohibitions on discrimination or harassment in other legal regimes have survived First Amendment scrutiny, even where the proscribed conduct is primarily verbal expression.<sup>69</sup> Vigorous criticism notwithstanding, this chronology establishes a robust collection of permissible applications that are an essential component of any serious overbreadth analysis.

Furthermore, we must also remember that it is lawyers that we are talking about, and their speech is subjected to considerable regulation, making off-limits to lawyers what would undoubtedly be protected expression for others. To attempt an overbreadth analysis without taking stock of this phenomenon is to excise the anti-bias provision from the context of lawyer regulation, distorting any assessment of the rule's permissible applications. Recall Professor Fallon's observation that "speech may be privileged under current doctrine either because it belongs to a constitutionally protected category, or because it merits protection as the result of a balancing test."<sup>70</sup> This same idea can be expressed in the negative: expressive activity may be unprotected because it is categorized as fighting words, obscenity, or not even speech at all;<sup>71</sup> or it might be unprotected because the government has met its burden to show the requisite level of state interest.<sup>72</sup> This is salient for lawyers on both counts—because so much of our speech is considered conduct subject to regulation<sup>73</sup> and because of the Court's readiness to find a compelling (or otherwise sufficient) state interest in the regulation of lawyer speech.<sup>74</sup>

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protected under the First Amendment. *Id.* at 481–82. The Court concluded that the law was thus "substantially overbroad, and therefore invalid under the First Amendment." *Id.* As Justice Alito observes in his dissent, the majority's analysis is predicated on the tacit assumption that the statute would be valid as applied to certain portrayals of animal cruelty. *Id.* at 485–86.

69. See Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 1 (1994) (noting that the "hostile environment" cause of action under Title VII "frequently imposes liability based on speech and expressive conduct").

70. Fallon, *supra* note 35, at 864.

71. See, e.g., *Stevens*, 559 U.S. at 468–69 (describing the existence of "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," including obscenity, defamation, incitement, fraud, and speech integral to criminal conduct).

72. See Fallon, *supra* note 35, at 867.

73. See Schauer, *supra* note 7, at 688 (explaining that "law is a speech-constituted activity," and that speech in the practice of law is so pervasively regulated that we scarcely recognize its omnipresence); Wendel, *Free Speech*, *supra* note 2, at 365 ("The two-track analytical framework which varies the level of scrutiny applied to government regulations according to whether the subject of the regulation is characterized as speech or conduct, shows that a wide variety of court-imposed restrictions on attorneys' conduct may be justified, notwithstanding the First Amendment interests asserted by lawyers.").

74. See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015) (compelling state interest in "preserving public confidence in the integrity of the judiciary," justifying under strict scrutiny restriction on speech of candidates for judicial office); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (compelling state interest in preventing terrorism, justifying criminal prohibition on providing legal advice to certain types of clients); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624–25 (1995) ("substantial" state interest in "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact,"

Bringing these insights back to the possible applications of Rule 8.4(g), we can see immediately that we might have an unprotected expression because the lawyer is engaged in discriminatory conduct, not speech—for example, refusing to assign certain types of cases to female associates, or putting all the lawyers of color at one table at a bar event. Or we might have a constitutionally permissible application because the state has a compelling interest at stake, such as protecting the integrity of court proceedings, that would justify the prohibition of all kinds of speech related to a pending proceeding—the denigration of a juror, for example, on racial or gender grounds.<sup>75</sup>

To say that Rule 8.4(g) is overbroad, then, is to assert that the legitimate applications are too few in comparison to the impermissible ones to allow for case by case adjudication. This, in turn, is a proposition that requires a close reading of the rule and a painstaking assessment of what the rule can convincingly be said to cover. As the Court has instructed, “the first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.”<sup>76</sup> Part II engages in the close textual analysis that is necessary to assess whether Rule 8.4(g) is overbroad.

## II. CONSTRUING THE TEXT OF RULE 8.4(G)

Rule 8.4(g) proscribes conduct “related to the practice of law” that the lawyer “knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status.”<sup>77</sup> These clauses together seek to provide two distinct instructions: what the lawyer is forbidden from doing (discriminate or harass on the basis of protected status),<sup>78</sup> and which aspects of

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thereby justifying anti-solicitation rule under intermediate scrutiny).

75. I note here that such conduct might also be sanctionable under other provisions of the *Model Rules*, such as Rule 8.4(d)’s prohibition on conduct prejudicial to the administration of justice.

76. *United States v. Williams*, 553 U.S. 285, 293 (2008).

77. MODEL RULES R. 8.4(g). In addition to these operative provisions, the rule also contains a notable caveat, specifying that “[t]his paragraph does not preclude legitimate advice or advocacy consistent with these Rules.” *Id.* While “legitimate advocacy” is a contestable concept, and debates over its proper contours have filled volumes, this inclusion is nonetheless an important one in limiting the rule’s reach. It hedges against the possibility that the rule might be enforced against a lawyer who, let’s imagine, aggressively cross-examines an elderly witness, undermining her credibility through a series of leading questions that focus on her failing vision, hearing loss, or clouded memory. However distasteful this might be to many, it is surely within the realm of “legitimate advocacy” contemplated by the ABA Rules and the caveat thus forestalls what might otherwise be the attorney’s arguable liability for engaging in harassment on the basis of age.

78. The rule’s opponents have not taken aim at the list of protected categories, at least not explicitly. They have not openly asserted, for example, that race is an acceptable category for inclusion in an anti-discrimination regime but that gender identity is not, and their counter-proposals have not tinkered with the list of protected categories.

her professional life are subject to the prohibition (pretty much everything).<sup>79</sup> These two different provisions raise distinctive concerns and need to be examined independently. This Section first considers the portion of the rule setting forth the prohibited conduct and then turns to the provision defining the regulated context.

#### A. PROHIBITED CONDUCT: DISCRIMINATION OR HARASSMENT

The portion of the rule describing the proscribed conduct has an extensive list of protected categories, but its operative delineation of the forbidden behavior relies on the load-bearing terms “harassment or discrimination.” This is significant to the overbreadth assessment in two different ways. First, anything we might conjure up as a potential application of the rule—permissible or impermissible—must at least arguably constitute discrimination or harassment to come within the confines of the prohibited conduct. Mindful of the limitations of using dictionaries in statutory interpretation,<sup>80</sup> we can nonetheless draw some understanding from the Oxford English Dictionary’s definition of discrimination as “the unjust or prejudicial treatment of different categories of people, especially on the grounds of race, age, or sex.”<sup>81</sup> Harassment, in turn, is defined as “aggressive pressure or intimidation.”<sup>82</sup> That potential applications of the rule would have to fit within these concepts might seem like an exceedingly basic observation, but some of the rule’s critics have imagined scenarios in which a lawyer’s *mere membership* in a group that takes a controversial stance on a subject concerning one of the protected categories would subject the lawyer to discipline. Both the Attorneys General of South Carolina and Texas, for example, have expressed concern that lawyers could be subject to discipline for belonging to a religiously-affiliated organization that opposes the recognition of same-sex marriage, or simply discussing controversial subjects that touch upon the protected categories: “candid dialogues about illegal immigration, same-sex marriage, or

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79. The phrase “related to the practice of law” is self-evidently capacious and the comment confirms the impression, explaining that

[c]onduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.

MODEL RULES R. 8.4(g) cmt 4.

80. See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFF. L. REV. 227, 228 (1999); see also Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 277 (1998) (“The Supreme Court’s use of dictionaries appears to be increasing and becoming more prominent.”); Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437 (1994) (arguing that “the Supreme Court should exercise greater care in its use of dictionaries”).

81. *The Oxford Dictionaries, Discrimination*, <https://en.oxforddictionaries.com/definition/discrimination> [<https://perma.cc/C7LQ-VWJ2>].

82. *The Oxford Dictionaries, Harassment*, <https://en.oxforddictionaries.com/definition/harassment> [<https://perma.cc/7GC8-UTMH>].



restrictions on bathroom usage will likely involve discussions about national origin, sexual orientation, and gender identity. Model Rule 8.4(g) would subject many participants in such dialogue to discipline . . . .”<sup>83</sup>

Subjecting a lawyer to discipline for “candid dialogue” or membership in a religiously affiliated professional association would be alarming indeed, but these assertions do not reflect much effort to explain how such conduct could be considered to fall within even the most capacious definitions of “discrimination” or “harassment.”<sup>84</sup> As we endeavor to assess whether the rule’s impermissible applications are excessive in relation to the permissible ones, these imagined scenarios do not merit inclusion in our line-up of potential applications because they do not present a “realistic danger” of the infringement of First Amendment rights.<sup>85</sup>

Second, and probably more important, by using these terms to delineate the prohibited conduct, Rule 8.4(g) makes an overt connection to state and federal anti-discrimination laws that have, for decades now, been deemed compatible with the demands of the First Amendment.<sup>86</sup> Although some commentators have been quite insistent that these conclusions are wrong,<sup>87</sup> the utility of this background is actually enhanced by the robust debate about First Amendment principles that Title VII and other anti-discrimination regimes engendered.<sup>88</sup>

Title VII is thus enormously useful on several levels; first, it provides a well-established reference point for interpreting the terms “discrimination” and “harassment” in ways that avoid First Amendment defects; and second, on a more abstract level, it provides an example of the practical accommodation of the potentially competing goals of expression and equality in the realm of

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83. S.C. Office of Att’y Gen., Opinion Letter on ABA Model Rule 8.4(g) (May 1, 2017) (quoting Tex. Office of Att’y Gen., Opinion Letter (Dec. 20, 2016)).

84. See also ISBA Legal Ethics Comm., Formal Op. 1 (2015) (“An attorney’s active participation in an organization that has gender, religious or racial requirements for membership is not an inherent violation of Rule 8.4(g) of the Indiana Rules of Professional Conduct.”).

85. *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (“[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.”).

86. Fallon, *supra* note 69, at 9 (“[I]t is virtually inconceivable that the Supreme Court might hold that the First Amendment forbids the imposition of Title VII liability for a broad category of sexually harassing speech.”). Advocates for an earlier anti-bias rule proposed using the terms “discrimination” and “harassment” “precisely because the courts are familiar with the terms from, and because we wanted to encourage analogies to, Title VII and its regulations, particularly those concerning sexual harassment and hostile environment.” Taslitz & Styles-Anderson, *supra* note 20, at 826 (also discussing how the earlier proposed rule would fit comfortably within the guideposts laid out in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) and *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)).

87. See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

88. See Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, 19 U. PA. J. CONST. L. ONLINE 1, 9 (2017) (explaining how the free speech critiques of Rule 8.4(g) “reflect and invoke arguments made in earlier debates surrounding First Amendment objections to Title VII workplace harassment law”).

employment, a context that transfers well to professional regulation. While a full overview of the debate and its resolution is well beyond the scope of this piece, a brief summary and a few observations will help clarify how this background is illuminating for Rule 8.4(g). We will see that concerns about the expressive rights of employees, business owners, and other regulated parties were colorable, worthy of scrutiny and deliberation, but resolved conclusively in favor of the constitutionality of these laws. Acknowledging that the prohibition of discrimination and harassment in the workplace decisively survived First Amendment challenge is an essential part of construing the text of Rule 8.4(g). However, with that foundation in place, I then identify how the comments to Rule 8.4(g) expand on the prohibited conduct in a way that diverges from the Title VII model. Combined with the rule's failure to specify that what is being prohibited is the targeted victimization of individuals, the comment's expansiveness may well raise First Amendment overbreadth concerns. Fortunately, as I explain, there is an easy fix.

### 1. THE LESSONS OF TITLE VII

Enacted in 1964 as part of the Civil Rights Act, Title VII makes it unlawful for any employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>89</sup> As is now well-established, unlawful discrimination may be shown where severe or pervasive harassment on the basis of protected status creates a “hostile work environment.”<sup>90</sup> The idea, as has been articulated in case law and amply theorized in the scholarly literature, is that an individual who is subjected to “intimidation, ridicule, and insult” at work suffers the sort of discriminatory treatment in the “conditions” of employment that strikes at Title VII’s core concerns.<sup>91</sup> The cases establishing the principle illustrate its heft, revealing workplaces where individuals were subjected to such profound humiliation and terror on the basis of gender or race that even to attempt a summary of

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89. 42 U.S.C. § 2000e-2.

90. “[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex [or other protected status such as race] has created a hostile or abusive work environment. . . . [T]o be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66–67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

91. As articulated by one scholar, “it seems beyond dispute that the law of racial and sexual harassment properly reflects a concern with the phenomena of group domination in the workplace that causes nondominant groups or individuals to experience different terms and conditions of employment.” Linda S. Greene, *Sexual Harassment Law and the First Amendment*, 71 CHI.-KENT L. REV. 729, 733 (1995); see *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971) (“One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.”).

the pattern of torment is to soft-pedal it.<sup>92</sup>

The First Amendment problem arises from the fact that much of what an employee might do to harass a co-worker could be thought to have an expressive quality, raising concerns that the employer's state-imposed obligation to stamp out such expression violates freedom of speech.<sup>93</sup> Commenters have been insistent upon this idea,<sup>94</sup> and advocates urged the Supreme Court to address it when it took up *Harris v. Forklift Systems*,<sup>95</sup> a case in which the plaintiff's sexual harassment claims were predicated in large part on verbal conduct.<sup>96</sup> Instead, the Court implicitly rejected the First Amendment objections by unanimously ruling that Harris could proceed with her claims without having to show psychological injury.<sup>97</sup> *Harris*, without so much as mentioning the First Amendment, has thus been understood as a major inflection point in the regulation of harassing speech in the workplace. As Professor Fallon explains,

Harris implicitly recognizes a category of constitutionally regulable speech defined by (i) an understanding of the content of sexually harassing expression as

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92. A scholarly exchange about one such case is illustrative. The plaintiff was the first female police officer hired by the City of Seminole and the only woman on the force for the duration of her employment. Professor Eugene Volokh, criticizing the court's handling of her Title VII sexual harassment claims, observed that the statement "women do not belong on the police force" is core political speech protected by the First Amendment. See Volokh, *supra* note 87, at 1795–96, 1854–55. But as another scholar, Suzanne Sangree, took pains to illustrate, plucking out that comment for First Amendment analysis without canvassing the full facts of the case is to misapprehend entirely the scope and nature of the discriminatory treatment to which the plaintiff had been subjected. See Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 543–44 (1995). Sangree included in her work a more extensive depiction, all the more shocking for being but a partial compilation:

Her immediate supervisor displayed on his police car and on his locker the statement that women should not be police officers. He repeatedly told her the same, adding that he hated her, and he would harass her until she either quit or was fired. While the egregious findings of harassment are too extensive to detail here, they included the following: plaintiff was poked in the face by a co-worker who shouted obscenities at her and pulled the phone out of the wall when she attempted to call for help; the same coworker pushed the plaintiff across the room and knocked her into a filing cabinet, bruising her; an unidentified person repeatedly locked plaintiff's keys in her squad car; plaintiff's supervisor put a coiled snake in plaintiff's car; an unidentified person posted on work bulletin boards pornographic pictures of women with plaintiff's name written on the genitals, and of a man having intercourse with a goat with plaintiff's name written on the goat; plaintiff's supervisor identified plaintiff as "bitch," "RAT," and "the wicked witch" on official work schedules when all other officers were called by their names; plaintiff's supervisor repeatedly brought false disciplinary charges against plaintiff; plaintiff's supervisor caused plaintiff's son to be falsely arrested; plaintiff's supervisor posted plaintiff's name on the punching bags in the station gym along with the words, "Mona hit me, hate me" and "Mona love me;" and plaintiff's supervisor arranged plaintiff's work schedule so that plaintiff was always the junior officer.

*Id.*

93. See, e.g., Sangree, *supra* note 92, at 508–09.

94. See *id.* at 463–70 (compiling sources and summarizing the debate).

95. 510 U.S. 17 (1993).

96. See Fallon, *supra* note 69, at 9–10 (noting that the First Amendment issues had been briefed by both sides as well as by several amici).

97. See *id.* at 1.

characteristically possessing little First Amendment value, (ii) a view of the workplace as a context apt for regulation, and (iii) a conception of reasonableness (or a set of objective standards) designed to mediate between interests in freedom from harassment on the one hand and legitimate speech interests on the other.<sup>98</sup>

If the application of anti-discrimination law to primarily verbal conduct does not unduly trouble the Court when it comes to employees of a forklift company, it is unlikely to disturb the Court much more when it comes to lawyers. The premises described above apply with as much—perhaps even more—force to discrimination or harassment perpetrated by lawyers, given our “special responsibility for the quality of justice”<sup>99</sup> and the recurring view from the Court that the First Amendment allows lawyers to be subjected to a wide range of speech restrictions. The second premise—that the workplace is a context apt for regulation—translates particularly well, although we must once again table the pressing question of what should the lawyer’s “workplace” be thought to encompass. As other scholars have noted, the regulation of discriminatory and harassing speech in the workplace is predicated in part on the “captive audience” quality of the employment setting.<sup>100</sup> This captive audience quality will be readily discernible in many of the settings in which lawyers engage in conduct “related to the practice of law,” but for others may be less immediately apparent.<sup>101</sup>

If we are to arrive at reliable conclusions about the First Amendment implications of Rule 8.4(g), it is essential to be candid about the extent to which the Title VII chronology lays a strong foundation for the prohibition on discrimination or harassment. Statutes using the same terms have been upheld in the face of First Amendment challenge—even as applied to verbal conduct—and help illustrate the wide range of permissible applications that is essential to understand for a careful overbreadth analysis.

## 2. ASSESSING THE EFFECT OF COMMENTS

Were the rule’s operative effects limited to the text of the rule, the interpretive task would thus be much easier and the First Amendment concerns much less troubling. The complication arises from the fact that the comments accompanying Rule 8.4(g) elaborate and expand upon the prohibited conduct in a way that decouples the operative text from Title VII and analogous anti-discrimination regimes. Comment [3], of particular concern, specifies that “discrimination includes harmful verbal or physical conduct that manifests bias or prejudice

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98. *Id.* at 41.

99. MODEL RULES pmb1.

100. *See* Wendel, *Free Speech*, *supra* note 2, at 444 (positing that the captive audience quality of the workplace transforms protected expression into unprotected conduct). *See also* Greene, *supra* note 91, at 735 (“[E]mployees find themselves . . . captive in an environment on which they depend for their livelihood.”).

101. We turn to these issues in Part II(B), where we address the rule’s coverage of all conduct “related to the practice of law,” a terrain that is much broader in scope than the workplace as regulated under Title VII.

towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct.”<sup>102</sup> As Professor Blackman observes, the rule in combination with the comment imposes no severity or pervasiveness requirement, in contrast to Title VII (as interpreted by the Court), and would allow for a single harassing comment to form the basis of disciplinary liability.<sup>103</sup> Honing in on the comment’s notation that harassment includes verbal conduct that is “derogatory or demeaning,” Blackman then provides a vivid illustration of the range and breadth of statements that might be considered “derogatory or demeaning,” and therefore within the ambit of 8.4(g).<sup>104</sup> A partial sampling offers a representative glimpse, albeit without the impact of the full list:

- *Ethnicity*—A speaker states that *Korematsu v. United States* was correctly decided, and that during times of war, the President should be able to exclude individuals based on their ethnicity.
- *Disability*—A speaker explains that people with mental handicaps should be eligible for the death penalty.
- *Age*—A speaker argues that minors convicted of murder can constitutionally be sentenced to life without parole.
- *Sexual Orientation*—A speaker contends that *Obergefell v. Hodges* was incorrectly decided, and that the Fourteenth Amendment does not prohibit classifications on the basis of sexual orientation.
- *Gender Identity*—A speaker states that Title IX cannot be read to prohibit discrimination on the basis of gender identity, and that students should be assigned to bathrooms based on their biological sex.<sup>105</sup>

The examples serve Blackman’s purpose so effectively because, while they may be offensive or controversial, they are so obviously protected by the First Amendment that no one could seriously argue otherwise. This is classic political speech, occupying the “highest, most protected position” in the “rough hierarchy” created by the Court’s First Amendment doctrine.<sup>106</sup> Prohibiting this kind of speech

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102. MODEL RULES R. 8.4(g) cmt. 3. Comment [3] also provides the somewhat tenuously phrased suggestion that “[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application.” *Id.*

103. Blackman, *supra* note 19, at 245–46 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998) (describing how Court has examined “all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance”)).

104. See also Caleb C. Wolanek, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(g) of the Model Rules of Professional Responsibility*, 40 HARV. J.L. & PUB. POL’Y 773, 780 (2017) (offering an example of a lawyer criticizing *Obergefell*, expressing her “belief that marriage should be between one man and one woman,” and therefore being deemed to have manifested “bias or prejudice” against the LGBTQ community).

105. Blackman, *supra* note 19, at 246.

106. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (“Core political speech occupies the highest, most protected position” in the hierarchy of speech); see also *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991) (“[T]his case involves classic political speech . . . There is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”).

because it is insulting or disparaging runs headlong into the “bedrock principle” that “speech may not be banned on the ground that it expresses ideas that offend.”<sup>107</sup>

Nor could we say that the result would be different because the speakers are lawyers. Every example Blackman offers can be described as a lawyer’s reasoned criticism of the state of the law, something we could readily identify as the core of protected expression, even for lawyers, and especially for lawyers. The freedom to speak in this way is not merely something lawyers retain in spite of their otherwise circumscribed rights, but something that is particularly important to preserve for lawyers given their particular role in advancing law reform and resisting the state’s aggrandizement of its own power through law.<sup>108</sup>

The difficulty is not in the application of First Amendment principles to these statements, but rather whether the rule can fairly be interpreted to cover the statements. The supposition is that because the statements concern the rule’s protected categories and could very well be offensive to members of those groups, they might constitute “harassment” or “discrimination” as prohibited by the rule. To bridge the gap between his list of examples—speech that may be controversial but is surely protected—and the rule’s proscription of harassment or discrimination, Blackman endeavors to explain how a person could feel disparaged or demeaned by each of the statements, thereby hooking the statement into the prohibited “discrimination or harassment” by virtue of the comment.<sup>109</sup> He anticipates the charge that the possibility is remote and in rejoinder points to the “tempestuous reaction to Justice Scalia’s discussion of mismatch theory during oral arguments in *Fisher v. University of Texas, Austin*.”<sup>110</sup>

The use of this episode as a cautionary tale directed against Rule 8.4(g) is, to be frank, a bit perplexing. A sitting Justice makes a controversial statement about affirmative action during a high-profile oral argument,<sup>111</sup> provoking reactions from many who see it not only as offensive but also ill-informed.<sup>112</sup> Responses are swift,

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107. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017); see also *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (quoting *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65 (1983)) (“[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”) (internal quotation marks omitted).

108. “We start with the proposition that lawyers are free to criticize the state of the law.” *In re Sawyer*, 360 U.S. 622, 631 (1959). Professor Wendel sees this idea as one that “must form the bedrock of any analysis of lawyer speech.” Wendel, *Free Speech*, *supra* note 2, at 331.

109. Blackman, *supra* note 19, at 246–47.

110. *Id.* at 247.

111. At issue in *Fisher* was whether the affirmative action program operated by the University of Texas, Austin satisfied strict scrutiny. Counsel for the University of Texas was asserting that without race-sensitive admissions, diversity would plummet. Justice Scalia, in response, queried whether African-American students might be better off at a “less-advanced” or “slower-track school where they do well” and do not feel that they are being pushed ahead in classes that are too fast for them. See CBS Evening News, *Justice Scalia Under Fire for Affirmative Action Comments*, YOUTUBE (Dec. 10, 2015), <https://www.youtube.com/watch?v=SjaY-hZsgBQ>.

112. See Tanya Washington, *Were Justice Scalia’s Remarks in Fisher v. Texas Racist?*, AM. CONST. SOC’Y FOR L. & POL’Y (Dec. 18, 2015), <https://www.acslaw.org/acsblog/were-justice-scalia%E2%80%99s-remarks-in-fisher-v-texas-racist> [<https://perma.cc/4G6S-BJHR>] (observing that while the Justice’s comments were indeed offensive, they also obscured the actual goal of race-conscious admissions policies); see also Yanan

heated, and vociferous.<sup>113</sup> The Justice’s defenders object to the objection,<sup>114</sup> attacking the critics for the intensity and negativity of their reaction, even questioning their veracity.<sup>115</sup> And so on and so forth, unfolding in a nearly perfect exemplar of what it is to live in a society characterized by freedom of speech. It exemplified the most time-honored of First Amendment justifications: the idea that we ought to foster a marketplace of ideas, in which the best antidote to offensive, hurtful, and wrongheaded speech is more speech.<sup>116</sup> The “tempestuous” reaction,<sup>117</sup> which it surely was, involving the exchange of epithets such as “racist” and “liar,” confirmed what hardly lacks for exposition: speech on sensitive matters elicits strong and emotionally charged reactions. This is particularly likely when issues concern race, gender, and other identity categories. But what it most decidedly did *not* illustrate was that anyone looking back at what Justice Scalia said through the lens of Rule 8.4(g) would conclude that he was engaged in “discrimination” or “harassment,” even as broadly defined by the comment.<sup>118</sup> For this episode to offer any insight as we engage in the close statutory construction entailed in an overbreadth analysis, we would have to be able to commit to the logical conclusion: that Justice Scalia’s query whether African-American students might do better at a “less-advanced” or “slower-track school where they do well” constitutes

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Wang, *Where Justice Scalia Got the Idea that African Americans Might Be Better Off at ‘Slower-Track’ Universities*, WASH. POST (Dec. 10, 2015), [https://www.washingtonpost.com/news/morning-mix/wp/2015/12/10/where-justice-scalias-got-the-idea-that-african-americans-might-be-better-off-at-slower-track-universities/?utm\\_term=.d3db3d73c126](https://www.washingtonpost.com/news/morning-mix/wp/2015/12/10/where-justice-scalias-got-the-idea-that-african-americans-might-be-better-off-at-slower-track-universities/?utm_term=.d3db3d73c126) [<https://perma.cc/WBP3-FCNK>] (summarizing research refuting the mismatch theory upon which Scalia’s comments appeared to be based).

113. See Tal Kopan, *Harry Reid, John Lewis Assail ‘Racist’ Scalia Comments*, CNN (Dec. 10, 2015, 3:11 PM), <http://www.cnn.com/2015/12/10/politics/harry-reid-antonin-scalia-racist-comments/index.html> [<https://perma.cc/BK3R-84FD>].

114. See, e.g., Paul Mirengoff, “Mismatch”—*A Taboo Subject for the MSM*, POWER LINE (Dec. 11, 2015), <http://www.powerlineblog.com/archives/2015/12/mismatch-a-taboo-subject-for-the-msm.php> [<https://perma.cc/45RZ-SDRT>]; Ben Shapiro, *The Left Is Claiming Justice Scalia’s a Racist. That’s Because They’re Contemptible Liars.*, DAILY WIRE (Dec. 10, 2015), <http://www.dailywire.com/news/1751/left-claiming-justice-scalias-racist-thats-because-ben-shapiro> [<https://perma.cc/UZ6X-KYZZ>] (calling Justice Scalia’s critics “contemptible liars” and “lying liars who lie”).

115. See Michael McGough, *No, Scalia’s Comment About ‘Less-Advanced’ Schools Wasn’t Racist*, L.A. TIMES (Dec. 9, 2015, 2:51 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-scalia-affirmativeaction-supremecourt-20151209-story.html> [<https://perma.cc/M92R-HDWT>].

116. “Among the most enduring themes in the history, literature, and legal doctrine concerning freedom of speech is the view that speaking and writing deserve special legal, constitutional, and political protection because the unfettered exchange of ideas advances truth and knowledge.” Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1161 (2015). See also *id.* at 1161–62 n.3, 1164 n.12 (collecting sources that examine and critique the marketplace of ideas and the associated premise that the cure for bad speech is counter-speech).

117. Blackman, *supra* note 19, at 247.

118. This is the implicit suggestion woven through Blackman’s mention of the episode: it was used to bolster his supposition that someone might feel sufficiently “demeaned” by any one of his listed examples (excerpted above) to trigger the application of Rule 8.4(g), via the comment’s inclusion of “demeaning verbal conduct.” To dispel the anticipated charge that this prospect is “implausible,” he refers readers to the “tempestuous reaction” sparked by Justice Scalia’s comments. See *id.* at 246–47.

*discrimination or harassment* as prohibited by the rule because some listeners felt demeaned by the comments.

While I do find this far-fetched,<sup>119</sup> I also think we nonetheless ought to tread cautiously here, if for no other reason than to model for the larger community the appropriate standard of care in drafting and analysis. What Blackman can be understood to be arguing is that the comment effectively transforms the rule from a proscription of discrimination or harassment—concepts that either in ordinary usage or as terms of art entail conduct that states can proscribe without running afoul of the First Amendment—into a content-based ban on offensive or controversial speech.

Speech regulation is content-based if the law applies to particular speech because of the topic discussed or the idea or message expressed.<sup>120</sup> Such restrictions are, of course, subject to strict scrutiny. Government regulation—especially of lawyers—can sometimes satisfy this famously demanding standard.<sup>121</sup> Recent and notable examples include a provision of the Florida Code of Judicial Conduct that prohibits candidates for judicial office from soliciting campaign contributions,<sup>122</sup> and a federal statute prohibiting the provision of “material support,” including legal advice from attorneys about international law, to designated terrorist organizations.<sup>123</sup> Nonetheless, as set forth above, it is simply not possible to imagine that even where lawyers are concerned, the Court would find a sufficiently strong government interest in prohibiting the wide swath of arguably derogatory or demeaning statements illustrated by Professor Blackman’s examples. If the comments can drive the interpretation of the rule in the way that Blackman imagines, the rule would indeed be overbroad, sweeping in a great deal of protected expression alongside the discriminatory and harassing conduct we know the state can prohibit. We can then readily anticipate the resulting chilling effect: while it is certainly true that an attorney facing discipline for protected expression could assert an affirmative defense based on the First Amendment, attorneys may well choose to censor their speech instead. Just the initiation of disciplinary proceedings can disrupt professional reputation in ways that most lawyers would prefer to avoid, and the burden of defending against such charges, even where one prevails, is not a trivial one.<sup>124</sup>

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119. Or, to put the point in more doctrinally grounded terms, I am not sure there is in fact a “realistic danger” that the rule would be interpreted in this way. *Cf. Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (requiring a “realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds”).

120. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564–65 (2011).

121. *See, e.g., Burson v. Freeman*, 504 U.S. 191 (1992) (statute prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of entrance to polling place was narrowly tailored to serve compelling state interest in preventing voter intimidation and election fraud). *See Adam Winkler, Free Speech Federalism*, 108 MICH. L. REV. 153, 164 (2009) (showing that many speech restrictions do survive strict scrutiny).

122. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1663 (2015).

123. *See also Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

124. I thank Alan Chen for emphasizing the significance of this professional calculus.



The question, then, is how best to understand the role of the comments and their relationship to the text of the rule. While it is reasonable to consult with instructions provided in the introductory sections of the Model Rules, here we find two relevant but ultimately unhelpful items. Paragraph fourteen provides that “[c]omments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”<sup>125</sup> Paragraph twenty-one elaborates: “The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule . . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”<sup>126</sup> There is just enough here to caution us against disregarding the language of comment [3] in our overbreadth assessment. While it may not “add obligations,” it is intended to guide interpretation, and comment [3] reads plausibly as a *definition* of the operative terms “discrimination” and “harassment.” If so, the rule then needs to be read as a prohibition on “verbal conduct” that is “derogatory or demeaning,” covering a range of expressive conduct that is much broader than the discrimination or harassment prohibited under Title VII and analogous regimes.

As suggested above, it is particularly troubling to envision the prospect that a lawyer’s criticism of the state of the law might be sanctionable, and while common sense would suggest that bar regulators would never use their limited resources to pursue these types of cases,<sup>127</sup> the Court in other contexts has been unwilling to accept prosecutorial discretion as a means to salvage an overbroad statute.<sup>128</sup> To put it differently, invoking the government’s intent to use restraint in enforcing the law does not assuage the “realistic danger” of compromising First Amendment protections where it otherwise exists. Fortunately, there is a much better fix, as I explain in the next section.

### 3. RESTORING THE RULE’S MISSING VICTIM

To this point in our overbreadth analysis, we have seen that the operative terms “discrimination” and “harassment” have a wide range of permissible applications, such as the types of conduct prohibited by Title VII and analogous regimes, raising no serious First Amendment concerns. But we have also confronted the possibility that these terms, as glossed by the comments accompanying Rule 8.4(g), might also apply

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125. See also Gillers, *supra* note 18 at 205 (“Comments occupy an ambiguous space in the Model Rules.”).

126. MODEL RULES scope. These provisions also appear in state rules of professional responsibility and have been invoked to aid in the interpretation of a rule’s scope during disciplinary proceedings. See, e.g., *In re Matter of Gilbert*, 346 P.3d 1018, 1026 (Colo. 2015) (emphasizing that “[c]omments to the Rules of Professional Conduct do not add obligations to the Rules but merely provide guidance for practicing in compliance with the Rules[, but] [u]ltimately, the text of the Rule is authoritative”) (citing COLO. RULES OF PROF’L CONDUCT scope ¶¶ 14, 21). *But see* *People v. Lincoln*, 161 P.3d 1274, 1280 (Colo. 2007) (relying heavily on comment to interpret rule).

127. Some of 8.4(g)’s advocates have urged this point as well, as Blackman observes. Blackman, *supra* note 19, at 261–62.

128. See *United States v. Stevens*, 559 U.S. 460, 480 (2010) (rejecting government’s argument that prosecutorial discretion could save the statute: “[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”).

to controversial, possibly offensive, but nonetheless serious pronouncements of opinion on legal doctrines—paradigmatic protected expression that surely lies at the heart of any meaningful First Amendment regime. Professor Blackman’s critique is disarming because he has managed to envision multiple scenarios in which a speaker’s articulated position on legal issues might feel “derogatory” to members of the protected class whose interests have been advanced by those developments. And while it might seem a bit far-fetched to imagine that a listener would feel sufficiently demeaned by a speaker’s vigorous critique of *Obergefell* or race-based affirmative action to assert that she has suffered discrimination or harassment in contravention of Rule 8.4(g), we ought not to simply reject it out of hand.

What I want to suggest here is that part of what makes the rule susceptible to such interpretations is that it lacks any reference to the individual (or individuals) victimized by the discriminatory or harassing conduct. Upon examination, this turns out to be a significant omission, one that helps explain the perplexing disconnect between what the rule’s supporters see as the long-overdue embrace of equality and dignity principles versus the threat to freedom of expression that others so readily observe.

The omission is perhaps best understood by looking to counter-examples. As Professor Gillers notes in his article, many states adopted anti-bias provisions well before the ABA’s recent amendment, some with variations that illustrate precisely the point I argue here. Colorado’s Rule 8.4(g), for example, adopted in 1996, prohibits a lawyer from engaging in conduct that manifests bias “against a person.”<sup>129</sup> While the language of the Colorado rule is not perfect,<sup>130</sup> this inclusion does a lot to communicate the sense that what is prohibited is the *targeted victimization of a particular person* on the basis of protected status, not the expression of controversial or even offensive viewpoints about general matters that concern race, gender, and other protected categories. Title VII’s context and its plain language also presuppose an individual suffering a particularized harm: the statute makes it unlawful for an employer to “discriminate *against any individual* with respect to his compensation, terms, conditions, or privileges of employment.”<sup>131</sup> Similar language is found in

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129. COLO. RULES OF PROF’L CONDUCT R. 8.4(g).

130. The full text is a bit clumsy, prohibiting conduct “that exhibits or is intended to appeal to or engender bias against a person on account of that person’s race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status.” *Id.* More importantly, for the reasons explored in the previous section, the terms “discrimination” and “harassment” offer a more finely-honed set of tools.

131. 42 U.S.C. § 2000e-2(a) (2012) (emphasis added).

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

*Id.*

state anti-discrimination laws as well.<sup>132</sup> Once awakened to what seems like a trivial detail, we can see that the inclusion of language specifying the object of the discrimination is pervasive, and the scholarly literature helps explain and reinforce the phenomenon. Fallon has noted that individually targeted speech is more likely to be “invasive, threatening, or coercive.”<sup>133</sup> The scholarly literature portraying the physical and psychological effects felt by people who are victims of hate speech further support this distinction.<sup>134</sup> None of this should be all that surprising: anti-discrimination law has as its goal the protection of individuals from disparate treatment and assaultive harassment, not the sanitizing of public discourse to render it free of inflammatory or offensive speech.<sup>135</sup> The bar’s efforts to eliminate harassment and discrimination in the legal profession can and should reflect this crucial distinction as well.

Interestingly, one of the earlier drafts of Rule 8.4(g) considered by the ABA included such language: the second version circulated for comments would have made it professional misconduct to “harass or knowingly discriminate *against*

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132. See, e.g., COLO. REV. STAT. ANN. § 24-34-402(1)(a) (West 2017) (making it unlawful “[f]or an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment *against any person* otherwise qualified because of disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry”) (emphasis added); IDAHO CODE ANN. § 67-5909 (West 2017) (making it “a prohibited act to discriminate *against a person* because of, or on a basis of, race, color, religion, sex or national origin”) (emphasis added); IOWA CODE ANN. § 216.6A (West 2017) (“It shall be an unfair or discriminatory practice for any employer or agent of any employer to discriminate *against any employee* because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such employee”) (emphasis added). For additional examples, see Thomson Reuters, *Unlawful Discrimination*, 0060 SURVEYS 25 (2016) (showing relevant language in all fifty states).

133. Fallon, *supra* note 69, at 42.

134. See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2336–37 (1989) (“Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide . . . . Victims are restricted in their personal freedom. In order to avoid receiving hate messages, victims have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor.”) (internal citations omitted).

135. See Greene, *supra* note 91, at 737 (“Sexual harassment law does not provide a blanket prohibition of speech—whether it be sexual in nature or otherwise—because of the content of the speech. Rather, the central inquiry is whether terms and conditions of employment are different for those subject to harassment. Only when speech or conduct creates a pervasive hostile environment, or requires submission to harassment as a quid pro quo condition of employment, promotion, retention, or other beneficial employer actions, does expressive freedom yield to the policy of equal employment.”) (internal citations omitted). As Greene further explains,

The primary focus of harassment doctrine is the result of the harassment, not the particular content of the speech or the viewpoints expressed. Several important cases illustrate this point. To reiterate, in *Harris*, the Court focused on the “alter[ation of] the conditions of . . . employment” and the “creat[ion of] an abusive working environment.” In *Meritor*, the Court noted that Title VII was broad, prohibiting “the entire spectrum of disparate treatment,” including conduct having the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating hostile or offensive work environment. The mere offensiveness of the conduct is not dispositive; the requisite harm to the individual and workplace must occur.

*Id.* at 732. (internal citations omitted).

*persons* on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.”<sup>136</sup> By the time the third version was circulated, the “against persons” language had been omitted, although it did not seem to be the basis for any of the criticism leveled at the second version.<sup>137</sup> Neither of the two articles offering a detailed chronology of the rule’s adoption explains or even notes this particular change, although they both delve deeply into other drafting changes that took place as the rule went from one version to the next.<sup>138</sup> Most likely the clause seemed superfluous to the drafters and has appeared similarly immaterial to commentators. Perhaps it would be less important if the rule’s operative prohibition were limited to “discrimination” or “harassment.” These hard-working words by their own terms strongly suggest the presence of an individual being subjected to invidious, unequal treatment, making the addition of an expressly specified target less necessary. But in combination with the comment’s expansive description of prohibited conduct, including “harmful verbal conduct that is derogatory or demeaning,” the absence of any specified target in the rule is troubling. It is these features in combination that engenders the risk, however remote, of the sort of applications that Professor Blackman envisions, where members of a protected class feel demeaned by reasoned engagement with legal doctrines. The prospect that a lawyer might be sanctioned for praising *Korematsu* or advancing an interpretation of Title IX that did not include protection for transgender individuals is much less plausible, however, where the rule specified that lawyers were prohibited from engaging in discrimination or harassment against *persons*. With such an inclusion, there is an additional interpretive hurdle to translate controversial speech on matters of race or gender into the sort of discrimination or harassment “against a person” that would be adequate to trigger the rule.<sup>139</sup>

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136. Halaby & Long, *supra* note 17, at 214. See also Gillers, *supra* note 18, at 220 (referring to this as the December 2015 draft).

137. Halaby & Long, *supra* note 17, at 224.

138. Similarly, Gillers undertakes a careful study of the twenty-five states that currently have anti-bias rules to compare variations in the state of mind requirement and whether the prohibited conduct must relate to the representation of a client or to a proceeding before a tribunal. Gillers, *supra* note 18, at 208–09.

139. Refining the rule in this way would also cure whatever defects of viewpoint discrimination are presented by the current text. I am not entirely convinced that Rule 8.4(g) in its current form will, as Professor Blackman fears, “disproportionately affect speech on the right side of the ideological spectrum.” Blackman, *supra* note 19, at 260. The protected categories include religion and socioeconomic status, and would, for example, protect someone who was targeted for adhering to conservative Christian beliefs. The assumption that anti-discrimination principles will protect liberal constituencies at the expense of conservative ones is in tension with the widespread perception of American Christians—particularly Republicans and Trump supporters—that they are routinely subjected to discrimination. See Emma Green, *Most American Christians Believe They’re Victims of Discrimination*, ATLANTIC (June 30, 2016), <https://www.theatlantic.com/politics/archive/2016/06/the-christians-who-believe-theyre-being-persecuted-in-america/488468/> [https://perma.cc/F82E-N39S] (reporting polling results that reveal that three-quarters of Republicans and Trump supporters believe that “discrimination against Christians is as big of a problem as discrimination against other groups, including blacks and minorities”).

Even his most prominent example of viewpoint discrimination, the allowance in comment [4] for “conduct undertaken to promote diversity,” is less straightforward than it appears. Blackman, *supra* note 19, at

I understand Professor Blackman's argument: Japanese-Americans or members of the transgender community might feel so denigrated by these assertions that they would perceive themselves to be *individually* harmed or demeaned within the meaning of the comment. I can anticipate that he might doubt that the inclusion of language specifying a target as an element of the offense would sufficiently mitigate the risk. I do not mean to suggest that adding such a clause makes it foolproof—nothing is foolproof that depends on the limits of human language. But this is, after all, drafting and construction with which we are engaged, and one of the norms we deploy in this endeavor is the idea that terms are not to be treated as superfluous. If we add the clause “against any person” or some variant, we will be signaling (and benefitting from) the expectation that it must mean something.

Such a requirement would likely have foreclosed the imposition of discipline in a troubling case from Indiana in which an attorney was sanctioned for using the n-word to communicate something inchoate about the way he felt *he* had been treated.<sup>140</sup> Indiana's version of Rule 8.4, adopted before the ABA added (g), makes it sanctionable for an attorney to “engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors.”<sup>141</sup> An Indiana attorney disciplined under this

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264. The comment is not limited to any particular type of diversity and it is worth noting that conservatives are borrowing from the language and spirit of affirmative action to support programs that promote *ideological* diversity. See, e.g., Abby Jackson, *Liberal Colleges are Recruiting Conservative Professors to 'Stir Up Some Trouble'*, BUS. INSIDER (Aug. 10, 2017), <http://www.businessinsider.com/affirmative-action-conservative-professors-liberal-colleges-2017-8> [https://perma.cc/BLG9-NXDP] (describing “a kind of affirmative action for conservative professors that's starting to spread across the country”); J. Cal Davenport, *Is "Affirmative Action for Conservatives" Good for Colleges*, REDSTATE (Aug. 12, 2017), <http://www.redstate.com/cal-davenport/2017/08/12/is-affirmative-action-for-conservatives-good-for-colleges/> [https://perma.cc/4S3G-JKH8] (noting limited nature of such programs but nonetheless expressing optimism about “positive effects”); Rachel Lu, *Liberals Can Help Make Academia Ideologically Diverse*, NAT'L REV. (Dec. 13, 2016), <http://www.nationalreview.com/article/442986/conservative-academics-numbers-are-few-colleges-and-universities> [https://perma.cc/73YZ-QRKP] (describing “how difficult it is to make one's way in the academy as an orthodox Christian or political conservative”).

In any event, Rule 8.4(g) can and should be refined to make clear that it permits speech on any subject, from any perspective, that does not subject *an individual* to unequal treatment or intimidation. Returning to the affirmative action debate that Blackman uses as an exemplar, neither of the positions for or against the use of racial preferences can credibly constitute discrimination or harassment *against a person*, for all the reasons we have been exploring. Blackman, *supra* note 19, at 259–60.

140. *In re McCarthy*, 938 N.E.2d 698 (Ind. 2010). The case is so perplexing that commentators have not even been able to agree on how the attorney's conduct should be described. Opponents of anti-bias rules, using this case as a cautionary tale, describe it as one where the attorney was sanctioned for applying a racially derogatory term to *himself*. See Gillers, *supra* note 18, at 222. Gillers takes issue with this characterization, noting that we do not know the attorney's race and asserting that McCarthy was using the word “to invoke the subordinate status of a racial group.” *Id.* Gillers continues by musing that “for all he knew, [the attorney] was communicating with a person who was herself a member of that group.” *Id.* But the fact that we do not know the racial identity of either McCarthy or the recipient of his email, or whether McCarthy himself knew the racial identity of the secretary he was emailing, makes it harder, not easier, to assess whether McCarthy was “manifesting racial bias” as prohibited by the rule. See *id.*

141. IND. RULES OF PROF'L CONDUCT R. 8.4 (IND. STATE BAR ASS'N 2016).

rule represented a title company in a real estate dispute that had grown bitterly contentious. Upon receiving what he perceived to be a disrespectful email ordering him to set up a meeting, he responded with the following email:

I know you must do your bosses [sic] bidding at his direction, but I am here to tell you that I am neither you [sic] or his nigger. You do not tell me what to do. You ask. If you ever act like that again, it will be the last time I give any thought to your existence and your boss will have to talk to me. Do we understand each other?

For this inflammatory, unprofessional, and preternaturally angry email, deemed by the disciplinary authorities to have “manifested racial bias,” the attorney was suspended from the practice of law for thirty days.<sup>142</sup>

*In re McCarthy* is one of those cases that Rule 8.4(g)’s opponents love to hate, frequently holding it up as an example of anti-bias enforcement gone amok.<sup>143</sup> Although I think they have not sufficiently engaged with the historical and cultural context of the n-word in dismissing the case as ridiculous,<sup>144</sup> the case reveals the unexpected ways in which anti-bias rules can be enforced, and I take the point that a case like this ought to give us pause. I think that is because *McCarthy* runs contrary to our underlying intuition that the purpose of anti-discrimination and harassment law is to protect individuals from victimization at the hands of others. *McCarthy* is troubling because it is difficult to discern who, if anyone, was targeted or victimized by the attorney’s racially charged statement. The outcome in *McCarthy* would be virtually impossible under a rule that forbade “discrimination or harassment against a person,” at least without considerably more facts.

This refinement expresses the distinction we have been exploring between targeting an individual for vilification on the basis of protected status and expressing controversial viewpoints that are more likely to be perceived as offensive and hurtful by members of a protected class. Anti-discrimination regimes prohibit the former; the First Amendment protects the latter. Drawing this line as carefully as possible is what will make the difference between a rule that is overbroad and one that is not.<sup>145</sup>

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142. *McCarthy*, *supra* note 140, at 698.

143. See Gillers, *supra* note 18, at 220 (noting that the case was cited by fifty-two ABA members in a comment opposing one of the drafts); see also Keiser, *supra* note 33, at 836–37.

144. For the definitive history of “the nuclear bomb of racial epithets,” see RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD (2002).

145. Restoring to the rule an element of individualized targeting also addresses the concern that some critics have expressed that the rule is unconstitutionally vague. See, e.g., Nat’l Lawyers Ass’n, Comm’n for the Protection of Constitutional Rights, *Statement on ABA Model Rule 8.4(g)* (2017) (asserting that the Model Rule simply leaves it “to the attorney’s imagination what sorts of speech and behavior may be prohibited and what may be allowed”). The touchstone of any such inquiry is whether the law “provide[s] a person of ordinary intelligence fair notice of what is prohibited.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010). For the reasons explored above, honing the rule to prohibit discrimination and harassment against a person sharpens the line between the conduct prohibited by the rule and the expression of controversial or even offensive opinions on matters touching upon race, gender, and other protected categories. In the absence of concern that the

What the rule need not do—and indeed should not do—to avoid constitutional infirmities is specify that its reach is limited to conduct that is *already* unlawful under existing anti-discrimination law.<sup>146</sup> Readers may at first perceive this to be in tension with the foregoing, where we focused intensively on the constitutionally permissible prohibition of discrimination and harassment operative in the Title VII context. But the point there was to illustrate that these terms can be used to regulate such conduct without violating the First Amendment, *not* to argue that Title VII and analogous state regimes are sufficient for the regulation of attorneys or that they exhaust the range of regulation that may be imposed without violating the First Amendment. Laws governing employment and public accommodations simply will not cover many of the scenarios in which lawyers have been known to engage in discrimination or harassment that the bar might wish to regulate: including the treatment of clients, opposing counsel, witnesses and other third parties, jurors, court staff, and others that do not fit into the employment paradigm. The bar will have to decide for itself which of these scenarios ought to be covered by the rule and whether the scope will extend beyond the delivery of legal services. It is to this question, the one that Professor Blackman identifies as a “far more important” one, that we now turn.

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latter will come within the confines of the rule, lawyers of “ordinary intelligence” have sufficient notice of what is prohibited, especially given the rule’s knowledge requirement. *Id.* at 21 (holding that “the knowledge requirement of the statute further reduces any potential for vagueness, as we have held with respect to other statutes containing a similar requirement”). Modified in this way, the rule does at least as much to convey what the “ordinary lawyer” must do to avoid discipline as the existing provision of Rule 8.4(c) that defines misconduct by reference to what reflects “adversely on a lawyer’s fitness to practice.” *See* Gillers, *supra* note 18, at 216 n.80 (citing *In re Holley*, 729 N.Y.S.2d 128, 132 (N.Y. App. Div. 2001)). Whether Rule 8.4(c) is itself overbroad or excessively vague I leave for another day, taking it here as a fixed point for purposes of comparing the reach of 8.4(g).

146. *Cf.* Attorney General of Tex., Opinion Letter on Whether Adoption of Model Rule 8.4(g) Would Violate an Attorney’s Statutory or Constitutional Rights, Op. No. KP-0123, 2016 WL 743186 (Dec. 20, 2016) (objecting to the fact that the rule prohibits discrimination “without clarifying whether it is limited to unlawful discrimination or extends to otherwise lawful conduct”). The author participated in the deliberations over whether to amend Colorado’s existing anti-bias rule to conform with Rule 8.4(g) and one participant proposed an alternative that would not only have limited the rule’s coverage to conduct already unlawful under other statutes, but would also have imposed an exhaustion requirement of the sort unprecedented in professional regulation, providing in the comment that

no charge of professional misconduct may be brought pursuant to paragraph 8.4(g) unless and until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in unlawful harassing or unlawful discrimination, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

Draft on file with the author. Considerably less troubling is Professor Blackman’s revision, which would specify that the law of antidiscrimination and anti-harassment statutes “will” rather than “may” guide application. Blackman, *supra* note 19, at 263–64. Even with this fine-tuning, the instruction remains aspirational by virtue of the flexibility inherent in the meaning of the word “guide,” and because of the questions we will explore in the next section about scope.

## B. THE BAR'S REGULATORY REACH AND THE PROBLEM OF CONTEXT

Assuming that the bar may prohibit discrimination and harassment so long as it does so with precision, leaving intact a lawyer's freedom to make controversial and offensive statements that do not subject individuals to unequal treatment and intimidation, we must then assess whether it can impose the prohibition on all attorney conduct "related to the practice of law."<sup>147</sup> The language is capacious, and the comment provides further illustration, explaining that the covered conduct includes "representing clients, interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law."<sup>148</sup> The rule's critics have expressed concern about what they see as a dramatic expansion of the scope of the bar's regulatory authority.<sup>149</sup> Professor Blackman argues vigorously that this is an unprecedented "incursion into the private spheres of an attorney's professional life" for which the bar's regulatory interest is inadequate.<sup>150</sup>

The question of scope is a distinctive one, and it needs to be given its own place in the deliberations over whether to adopt the new rule. But the suggestion that it is somehow novel for the bar's regulatory authority to reach deep into virtually every aspect of a lawyer's life is entirely misplaced, as is the idea that we can cordon off certain professional activities as purely "social" or "private" and therefore beyond the legitimate reach of bar authority. Lastly, I think there are reasons to challenge the assumption that there is some sort of linear progression in the bar's authority to regulate attorney expression that decreases as the conduct becomes more attenuated from the delivery of legal services.<sup>151</sup>

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147. MODEL RULES R. 8.4(g).

148. MODEL RULES R. 8.4(g) cmt. 4.

149. See Halaby & Long, *supra* note 17, at 252–53 (2017) (arguing that by "extending its prohibitions not just to words 'prejudicial to the administration of justice,' or even words spoken or written in courtroom or ancillary environs, but all the way to any and all conduct 'related to the practice of law,' the new rule left the safe harbor that, at least arguably, marks positively the First Amendment jurisprudence governing limitations on lawyer speech"). See also George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, NOTRE DAME J.L. ETHICS & PUB. POL'Y (forthcoming 2018) (decrying what he views as the "unprecedented scope" of Rule 8.4(g)), available at [https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=3012&context=faculty\\_publications](https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=3012&context=faculty_publications) [<https://perma.cc/P6CX-Z2B3>].

150. See Blackman, *supra* note 19, at 257 ("Because no jurisdiction has ever attempted to enforce a speech code over social activities merely 'connected with the practice of law,' there are no precedents to turn to in order to assess such a regime's constitutionality.").

151. See *id.* at 256 ("[W]hen the nexus between the legal practice and the speech at issue becomes more attenuated, the disciplinary committee's authority to regulate an attorney's expressions becomes weaker.").



## 1. THE ILLUSIVE PRIVATE SPHERE

To advance the claim that the scope of Rule 8.4(g) is unprecedented, reaching well beyond the accepted parameters of bar regulation, Blackman divides existing misconduct rules into three “heads of conduct: (1) conduct during the practice of law or representing a client; (2) conduct that reflects on a lawyer’s fitness to practice law; and (3) conduct prejudicing the administration of justice.”<sup>152</sup> At first blush this is an appealing way to make sense of the bar’s assertion of authority over lawyer conduct, and it is consistent with the idea that “context matters” in assessing the strength of the state’s regulatory interest.<sup>153</sup> To take an easy example, consider the truly *sui generis* nature of a courtroom during trial.<sup>154</sup> As others have observed, the unique qualities of that particular context make it difficult to imagine someone putting forth a serious argument that the First Amendment is violated by the rules of evidence or any of the myriad rules of professional responsibility that limit what lawyers can say in court.<sup>155</sup> From there it is a small step to understand the bar’s authority to control attorney speech in adjacent situations that affect the “administration of justice.”<sup>156</sup> It is similarly easy to understand the justifications for the bar’s regulation of the practice of law and the representation of clients.<sup>157</sup> Two of Blackman’s categories, then, do a lot to draw the contrast that he is urging between the types of conduct and contexts heretofore regulated by the bar and the assertedly new reach of Rule 8.4(g). But the project runs aground upon any attempt to cabin as distinctive the second category, conduct that reflects adversely on a lawyer’s “fitness to practice law.” Upon examination, this carve-out simply cannot perform the work that it must do to establish by contrast that 8.4(g) is unprecedented.<sup>158</sup>

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152. *Id.* at 251.

153. *Id.* at 257. Indeed, part of what makes it virtually impossible to imagine a member of the bar being disciplined for something akin to Justice Scalia’s clumsy paraphrase of mismatch theory was, of course, that the setting was an oral argument about the constitutionality of affirmative action—making it even more specious to argue that the words were verbal conduct constituting harassment or discrimination.

154. Schauer develops this point in his work on lawyer speech restrictions. *See* Schauer, *supra* note 7, at 689–90.

155. *Id.*

156. *See, e.g.*, MODEL RULES R. 3.6(a) (“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.”); MODEL RULES R. 8.4(d) (prohibiting lawyers from engaging in “conduct that is prejudicial to the administration of justice,” presumably including conduct in the form of verbal expression).

157. Chief among the bar’s stated objectives in maintaining a system of attorney discipline is the protection of the public, and, as Professor Smolla has observed, the bar has had little trouble advancing sufficient justification for speech restrictions when doing so is a function of its “management of the legal system.” Smolla, *supra* note 2, at 968.

158. Blackman acknowledges some difficulty here, citing a source for the proposition that even before Rule 8.4(g) the profession struggled with a “recurring inquiry into which lawyer conduct has a sufficient nexus with fitness to practice law that it ought to be a basis for lawyer discipline, even when it is marginal to the direct representation of clients.” Blackman, *supra* note 19, at 257 (citing Donald R. Lundbert, *Of*

The idea rests upon Blackman's rather optimistic supposition that "disciplinary committees do not have boundless discretion over all aspects of an attorney's life."<sup>159</sup> However, as we shall see, the imposition of bar discipline on conduct thought to reflect "adversely on a lawyer's fitness to practice law" has been trans-contextual in a way that collapses any meaningful notion of an attorney's private sphere. If, as I will demonstrate, the bar has long been asserting the prerogative to monitor and sanction private aspects of an attorney's life on the rationale that this conduct is relevant to fitness, then Rule 8.4(g)'s scope is really nothing new. In fact, it requires a "connection" to the practice of law that is actually lacking in existing provisions.

#### a. Fitness to Practice

The landscape we will be surveying is a result of two different provisions in Rule 8.4 that significantly pre-date the addition of provision (g). Rule 8.4(b) makes it sanctionable for a lawyer to commit a criminal act that reflects adversely on the lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects,"<sup>160</sup> while 8.4(c) prohibits conduct "involving dishonesty, fraud, deceit, or misrepresentation."<sup>161</sup> As should be immediately apparent, these provisions impose absolutely no requirement that the conduct at issue have occurred while the lawyer is representing clients, delivering legal services, or otherwise engaging in the practice of law. Rule 8.4(b) instead sets forth a considerably vaguer requirement that the conduct "reflect adversely" on a lawyer's professional fitness, while 8.4(c) simply assumes that this is the case for all conduct involving deception. Noting as much, Professor Blackman proffers the standard justification that honesty and trustworthiness are categorically and self-evidently essential to a lawyer's fitness to practice law.<sup>162</sup> The argument, then, is that the existing rules protect the "private sphere" of an attorney's life because they only allow discipline for conduct that bears on professional fitness.

Even the briefest and most haphazard look at professional disciplinary cases will reveal what a contestable and indeterminate concept this turns out to be. Take, for example, the recurring problem of lawyers driving under the

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Telephonic Homophobia and Pigeon-Hunting Misogyny: Some Thoughts on Lawyer Speech, *RES GESTAE*, June 2010, at 22, 23. [http://lawyerfinder.indybar.org/\\_files/11th%20Hour/D.LundbergReRule8.4pdf](http://lawyerfinder.indybar.org/_files/11th%20Hour/D.LundbergReRule8.4pdf) [<https://perma.cc/VT9M-NQVN>]. But this dramatically understates the persistent indeterminacy of this concept.

159. *Id.* at 259.

160. MODEL RULES R. 8.4(b).

161. MODEL RULES R. 8.4(c). Some state ethical codes have in fact prohibited *any* conduct that adversely reflects on the lawyer's fitness to practice law, without the requirement that the conduct be criminal. *See, e.g., State ex rel. Counsel for Discipline of Neb. Supreme Court v. Janousek*, 674 N.W.2d 464, 470 (Neb. 2004) (making it professional misconduct to, in addition to specified prohibitions, "engage in any other conduct that adversely reflects on his fitness to practice law"); *see also State v. Russell*, 610 P.2d 1122, 1125 (Kan. 1980).

162. "These two provisions articulate a standard that a lawyer's actions, even when unconnected with the practice of law, must at all times promote honesty and trustworthiness, so there is no doubt about his or her fitness to practice law." Blackman, *supra* note 19, at 251.

influence—sometimes to tragic result. If an otherwise fit lawyer kills someone in a drunk driving accident, does the episode “reflect adversely” on his fitness to practice law? It should not surprise us a bit that some jurisdictions have said yes<sup>163</sup> and others have said no,<sup>164</sup> all of them working with the same operative language. Killing someone in a drunk driving accident definitely reflects adversely on something, but whether that is a lawyer’s fitness to practice law is not an easy call.

Or, to take another regrettably recurring problem for lawyer disciplinary authorities, consider the lawyers who have been disciplined for the way they treated their intimate partners. Mr. Keaton, for example, was disbarred for “an extreme and pervasive pattern of conduct involving harassment and dishonesty” arising out of his sexual relationship with his daughter’s college roommate, “JD.”<sup>165</sup> After she broke up with him, he commenced a campaign of “threatening, abusive, and highly manipulative” oral and written communications, augmented by a number of in-person confrontations at her home and school.<sup>166</sup> The dozens of voicemail messages<sup>167</sup> and thousands of email messages<sup>168</sup> were notable not only for their hostility and persistence but also for his repeated and explicit threats to make her life a “living hell” by publicizing her alleged mental illness and disseminating sexually explicit photos of her.<sup>169</sup> The following, in which he threatens to email the entire incoming class of Indiana University, where JD was a student, is an illustrative example:

Return my call. If I don’t hear from you by midnight, you will regret you ever f\* \* \*ing met me. Every day of your life will be a f\* \* \*ing living hell. I will ruin your life. . . . I will f\* \* \*ing wreak nothing but hatred on you every day of your life for the rest of your life if my phone does not ring by midnight . . . You will be embarrassed every f\* \* \*ing time you turn around . . . I have every f\* \* \*ing email of every person who was accepted at IU in the incoming class,

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163. See *In re Hoare*, 155 F.3d 937 (8th Cir. 1998); Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 79 (Iowa 2008); State *ex rel.* Okla. Bar Ass’n v. Wyatt, 32 P.3d 858 (Okla. 2001).

164. See *In re* Disciplinary Proceedings Against Johns, 847 N.W.2d 179, 188 (Wis. 2014).

165. *In re Keaton*, 29 N.E.3d 103, 104 (Ind. 2015).

166. *Id.* at 104, 109.

167. The victim preserved ninety voicemail messages. *Id.* at 104. Although the court cautioned that it was difficult to appreciate how hostile and threatening the voicemails really were without listening to them, it nonetheless offered the text of one as an “illustrative example”:

Call me the f\* \* \* back! I don’t know who the f\* \* \* you think you are. But I’ll tell you what, you better f\* \* \*ing call me f\* \* \*ing back now! You f\* \* \* with me one more time and this time you’ll really f\* \* \*ing pay for it! And you need to think about it! Now you f\* \* \*ing quit f\* \* \*ing with me! I f\* \* \*ing deal with your f\* \* \*ing illness so f\* \* \*ing long, don’t f\* \* \* with me another f\* \* \*ing day! Not another f\* \* \*ing day! You return my call right now!

*Id.* at 104 n.1.

168. *Id.* at 104.

169. *Id.* at 105.

it's posted on the f\* \* \*ing site. I have tracked down their f\* \* \*ing emails. I will destroy your m\* \* \* \* \* \*ing life, you f\* \* \*er.<sup>170</sup>

Keaton eventually followed through on some of his threats, disseminating at least 150 sexually explicit photos of JD via email, various adult-oriented websites, and his own blog, on which he identified her by name and posted “disparaging diatribes” alongside the images.<sup>171</sup> The court had little trouble concluding that his course of conduct amounted to criminal stalking, harassment, and intimidation, reflecting adversely on his professional fitness.<sup>172</sup>

Similarly distressing circumstances are found in other cases from various jurisdictions.<sup>173</sup> *Janousek* is notable for the depravity of the attorney’s efforts to terrorize his ex-girlfriend, an African-American woman with two young sons.<sup>174</sup> Among his other stratagems, he sent her the following letter, purportedly from the “White Aryan Resistance”:

Dear Mrs. Negro. . . .

In case you're too dumb to notice by now, you ARE being watched. We see it as our duty to keep watch on undesirables in our neighborhoods. You must know why you would be an undesirable. We keep an eye on where you live, where you work and the college you go to a couple of nights a week. We are hoping that you will just pack up and move back to wherever you came from. Go back and get some of that big jungle cock you colored women crave so much and leave our White men alone. You might be trying to live White, but you never will be. Our neighborhood will be much better after you move out. We have not seen those two young thugs of yours around for awhile. Good.

Remember-you are being watched. Every car in back of you could be one of us. Every phone call could be one of us. By the way-your bed looked better with the curved wood headboard. Wear less when you're typing in the basement. Why aren't you sleeping much in your bedroom-that big black ass of yours really is something in the moonlight. It should make some jungle bunny real happy. We'll see you around. Did you know the lock on your patio screen door needs fixin'?'<sup>175</sup>

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170. *Id.* (stars appear in the original).

171. *Id.* The court noted that his blog was free of any identifying information about him.

172. *See id.* at 109.

173. *See, e.g.,* *People v. Saxon*, No. 16PDJ018, 2016 WL 8540133 (Colo. O.P.D.J. Nov. 7, 2016) (describing in graphic detail an attorney’s “course of conduct designed to control and humiliate” his ex-girlfriend, including distribution of letters and sexually explicit photos to her friends and family); *Columbus Bar Ass’n v. Linnen*, 857 N.E.2d 539, 541 (Ohio 2006) (attorney indefinitely suspended for exposing himself to women and photographing their reactions).

174. *See State ex rel. Counsel for Discipline of Neb. Supreme Court v. Janousek*, 674 N.W.2d 464 (Neb. 2004).

175. *Id.* at 468. The court noted that

[a]ttached to the letter was a photocopied pornographic picture, depicting a man ejaculating in the mouth of a black woman. Underneath the picture was the handwritten caption, ‘Bet this makes you

Rejecting the referee's recommendation that Janousek receive a two-year suspension, the Nebraska Supreme Court concluded that Janousek should be disbarred, explaining:

It is beyond dispute that hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability and adversely reflects on one's fitness to practice law . . . An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal.<sup>176</sup>

It is worth noting that Nebraska's version of Rule 8.4 makes it sanctionable for a lawyer to engage in *any* conduct that adversely reflects on his or her fitness to practice law, without the requirement found in the ABA version that the conduct be criminal.<sup>177</sup> But that just makes the larger point all the easier to make, which is that the bar has for some time been regulating the most private spheres of an attorney's life on the theory that behavior there can be germane, which is in fact to put it somewhat mildly. The Supreme Court of Nebraska was fervent in its view that Janousek's conduct was an appropriate basis for attorney discipline, explaining that his "behavior is not only disgraceful, but shows disrespect for the law, the legal profession, the legal process, the authority of the courts, and basic principles of justice, fairness, and human dignity."<sup>178</sup>

In sum, the bar readily considers conduct completely unconnected to the practice of law when such conduct is either deceptive or otherwise reflective on fitness, with some jurisdictions requiring and others omitting the element that the conduct in question be criminal. The key point is that the bar has already adopted—and routinely enforces—provisions that regulate attorneys only by delineating what conduct is prohibited, without setting any parameters on context. In prohibiting discrimination or harassment where "related" or "connected" to the practice of law, Rule 8.4(g) articulates contextual parameters that are broad but hardly unprecedented.

Without any real line between public and private where Professor Blackman supposes it to be, the question is whether there are affirmative reasons to limit the anti-discrimination duty in a way that runs contrary to the pervasive understanding illustrated above: that the bar has control over most aspects of a lawyer's life. As I explain in the next subsections, I think the answer is no.

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hungry!' The complainant testified that although the woman in the picture was not the complainant, the woman resembled the complainant.

*Id.* at 469.

176. *Id.* at 472.

177. *See id.* at 470.

178. *Id.* at 473.

b. The Business of Law

Even if it were possible against this backdrop to somehow conceive of lawyers as having “private spheres” in their professional lives, it would be inapt to characterize bar association events, continuing legal education, and other such functions as belonging to the private sphere. Blackman repeatedly refers to these as “social events,” “social activities,” and “events with only the most dubious connection with the practice of law.”<sup>179</sup> The rhetorical intent is clear, which is to make it seem ridiculous that the bar would purport to regulate attorneys when they gather together to socialize.

To make the obvious point first, the bar requires continuing legal education for licensure, making attendance at such events mandatory for practicing lawyers. Blackman acknowledges this, but he uses the point to argue that lawyers in such settings should not be fearful that they will be disciplined for expressing their views.<sup>180</sup> Emphasizing the compulsory nature of these events, however, also sheds light on why it is appropriate for the bar to require that lawyers refrain from discrimination and harassment while attending them.

Even more importantly, to dismiss bar association events and continuing legal education seminars as merely social gatherings, to attempt to excise such functions from some sort of true core of an attorney’s practice, is to utterly disregard the business of law and the way such business is generated, bringing to mind a romanticism about law practice that the Supreme Court scoffed at some forty years ago.<sup>181</sup> When I was an associate at a large law firm, the heading under which we were instructed to record the time spent attending such events was “business development,” and the firm paid for the ticket. The intensity with which lawyers at all stages of their careers are being urged to participate in these events has only increased—it has become a staple of advice about business development for attorneys. Here is an example from an ABA publication entitled *A Business Development Checklist for Young Lawyers*:

Is an attorney in your office presenting a seminar? Go! Is the firm hosting a client event at the local pub? Go! Is the office you’re in sponsoring a chamber of commerce event? Go! . . . Billable hours will keep you busy, but if you don’t expand your network now, you’ll have no clients to bill in the future. Join a committee at the local bar association or become a member of a nonprofit organization in your area. Grab business cards at networking events and follow up with a lunch meeting. Develop relationships with attendees of seminars you present—they’re already interested in what you have to say, so follow up and

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179. Blackman, *supra* note 19, at 244, 246, 256–57.

180. *See id.* at 246, 263.

181. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 368 (1977) (expressing skepticism that lawyers “conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar”).

strengthen those relationships. Through these activities, you will increase the number of contacts in your network for years to come.<sup>182</sup>

Or consider an article titled *Business Development: 5 Things That I Have Seen Work*, in which “current in-house lawyer and former Biglaw partner Mark Herrmann reflects back on 30 years of practicing law and identifies what he saw actually generate new business.”<sup>183</sup> His advice:

Get famous; make contact; repeat . . . You get famous by getting your name out into the world in whatever way comes most naturally to you. Are you great at cocktail parties? Go to cocktail parties, and pass out your card. Are you great at organizing small groups and getting things done? Join a bar association committee or a non-profit board, volunteer to lead some projects, and get results. Are you great at speaking? Learn a subject, and deliver CLE courses in the field. Are you the quiet, studious type? Publish several articles (with interesting theses) in a particular field of law, so that folks in that field start to recognize your name. Create a blog in a narrow field, and publish relentlessly (and substantively) until the world recognizes you as an authority in your niche. As you get famous, meet people. Work with the members of your bar committee; attend non-profit board meetings; write with co-authors; speak on panels; never dine alone.<sup>184</sup>

Other examples are plentiful and share the “it’s very easy, you just do everything” quality that is pervasive in this genre.<sup>185</sup> It is hard to escape the feeling that the casual, almost breezy tone of these guides to professional success masks the enormity of the financial pressure that lawyers increasingly face in generating and keeping client business. But whatever else they might reveal, they make plain

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182. Kelly G. O’Malley, *A Business Development Checklist for Young Lawyers*, LAW PRACTICE TODAY (Aug. 2013), [https://www.americanbar.org/content/newsletter/publications/law\\_practice\\_today\\_home/lpt-archives/august13/a-business-development-checklist-for-young-lawyers.html](https://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/august13/a-business-development-checklist-for-young-lawyers.html) [<https://perma.cc/CCF6-XVV5>].

183. Mark Herrmann, *Business Development: Five Things That I have Seen Work*, ABOVE THE LAW (Dec. 8, 2014), <http://abovethelaw.com/2014/12/business-development-5-things-that-i-have-seen-work/> [<https://perma.cc/Q6BW-TQAN>].

184. *Id.*

185. *See, e.g.*, Heidi K. Brown, *Business Development*, FUNDAMENTALS OF FEDERAL LITIGATION app. B § B-20 (“In building your business development skills, you can: (1) join a variety of bar associations—local, regional, or national (to meet other lawyers); (2) join industry associations (to meet non-lawyers); (3) identify key market players in your area of practice by reading industry newsletters and journals; (4) attend conferences and seminars; (5) follow up with new contacts by sending them law firm newsletters and law firm credentials packages; (6) write articles for your law firm newsletters; (7) write articles for bar journals or industry journals; (8) give speeches; and (9) serve on panels at industry seminars.”); Jim Cranston, *A Focused Strategy for Associate Business Development*, OF COUNSEL, October 2006, at 13–14 (“Join a professional association or other organization through which you can learn about emerging issues and identify up-and-coming contacts.”); David H. Freeman, *Current Best Practices in Business Development*, OF COUNSEL, February 2011, at 8 (“Techniques for rapidly growing networks include starting groups that can serve targeted prospects, organizing a local chapter of a national organization, or joining the membership committee of an existing trade organization. Our experts share some of their favorite techniques for ‘becoming memorable,’ such as offering onsite presentations, making introductions to others, sending articles, inviting contacts to seminars, or asking top prospects to co-present at a speaking engagement.”).

that these events do not resemble anything like a “private sphere.” What they constitute is a market for legal services, and lawyers are being told in no uncertain terms that if they do not show up they will not have clients to bill and there will not be law to practice.<sup>186</sup> These exhortations make explicit what scholars of the legal profession have long observed, which is that the acquisition of the right kind of social capital, including the cultivation of relationships at bar association events and the like, is an absolutely essential component of success as a lawyer.<sup>187</sup> Given the well-documented obstacles that women and attorneys of color face in the accumulation of social capital within firms and beyond,<sup>188</sup> it is particularly troubling to cordon off these events as merely “social activities” beyond the legitimate reach of the bar’s anti-discrimination provisions.

## 2. EXPRESSIVE RIGHTS AS PART OF A LAWYER’S PRACTICE

To this point, we have seen how profoundly inapt it is to conceive of lawyers as having a “private sphere” in their capacity as lawyers that is somehow uniquely threatened by Rule 8.4(g). The bar’s existing authority to regulate conduct that reflects “adversely” on a lawyer’s fitness, and the widespread understanding that law-related social events serve as the trading floor for an indispensable form of professional capital, make that position untenable. It is nonetheless worth noting that the objection to the rule’s coverage of all conduct “related to the practice of law” rests not only on the supposition that such a private sphere exists, but also that it is a more protected terrain for attorney expression. This latter premise presents its own difficulties, as we will briefly explore in this section.

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186. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984) (recognizing that discrimination in private associations has business effects due to the commercial programs and benefits offered to members, along with leadership skills, business contacts and employment promotions).

187. This voluminous literature includes Ronit Dinovitzer, *Social Capital and Constraints on Legal Careers*, 40 L. & SOC’Y REV. 445 (2006), Lucille A. Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 U. MEM. L. REV. 239 (2012), and Eli Wald, *Biglaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509 (2015).

188. See, e.g., Wald, *supra* note 187, at 2543 (positing that “[t]he underrepresentation of women and minority lawyers in positions of power and influence at BigLaw is in part explained by their relatively low (or even negative) endowments of capital compared with their Caucasian male counterparts, by the tendency of BigLaw to misrecognize capital with merit, and by its adoption of purportedly universal policies and procedures of retention and promotion that implicitly build on lawyers’ capital endowments and therefore disproportionately disfavor women and minority attorneys”); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 499–500 (1996) (positing that “black lawyers in firms (as well as those contemplating joining firms) are more likely to choose human capital strategies that, paradoxically, decrease their overall chances of success in these environments”); Kevin Woodson, *Human Capital Discrimination, Law Firm Inequality, and the Limits of Title VII*, 38 CARDOZO L. REV. 183, 184 (2016) (noting and citing a “rich body of literature” examining the “difficulties of minority law associates in predominantly white firms”); Caroline Turner, *Women Lawyers and Business Development: The “Sex Thing,” Golf and Other Challenges*, LAW PRACTICE TODAY (Aug. 15, 2016), <http://www.lawpracticetoday.org/article/women-business-development-sex-thing-golf-challenges/> [<https://perma.cc/Z8Q8-8GFM>] (describing concerns expressed by female attorneys about the risk of misperceived sexual innuendo when reaching out to potential clients).



It is simply not so clear that there is any sort of linear progression of increased attorney free speech rights as we move along the spectrum from courtroom conduct, to conduct related to the delivery of legal services, to the networking and business development activities of lawyers. Blackman assumes that the government's interest in regulating attorney speech "becomes far less compelling"<sup>189</sup> the further we get from direct client representation, but consider for a moment the opposite. Perhaps we should be most troubled by restrictions on attorney speech when attorneys are speaking to advance their client's interests.<sup>190</sup> We find support for this idea when we examine those handful of cases in which attorneys have successfully interposed First Amendment claims against state bar regulation.

When the state of Virginia amended its code to criminalize the sort of referrals that the National Association for the Advancement of Colored People (NAACP) staff were providing to individuals seeking legal assistance, the importance of litigation as "a form of political expression" was essential to the Court's ruling.<sup>191</sup> The Court's determination that the First Amendment rights of NAACP attorneys were being infringed by the state's aggressive anti-solicitation rules rested inextricably upon the type of litigation handled by the organization on behalf of its members:

Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts . . . under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances . . . . The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.<sup>192</sup>

*In re Primus*, in which the Supreme Court invalidated a sanction imposed on an American Civil Liberties Union (ACLU) attorney for offering free legal

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189. Blackman, *supra* note 19, at 243.

190. And indeed, Rule 8.4(g) reflects this concern by explicitly excluding from its reach "legitimate advice or advocacy consistent with these Rules," suggesting an intent to preserve unhindered an attorney's ability to speak as an advocate on behalf of clients. MODEL RULES R. 8.4(g).

191. *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 429–30 (1963) (emphasizing that "[T]he First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion . . . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.").

192. *Id.* at 431. For a scholarly account of the civil rights movement's use of First Amendment free expression and association principles to establish the foundation for substantive equality, see Timothy Zick, *The Dynamic Relationship between Freedom of Expression and Equality*, 12 DUKE J. OF CONST. L. & PUB. POL'Y 13, 20 (2016) ("Expressive equality played a critical function in terms of facilitating speech, press, and other expressive rights. As importantly, expressive equality was an early precursor to substantive equality. The right to speak, publish and associate on equal terms with others was, for extended periods of time, the only tangible evidence that African-Americans, gays, and lesbians enjoyed rights of full and equal citizenship.").

representation to women subjected to coercive sterilization, reflects similar themes. The Court noted that “the ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public.”<sup>193</sup> And lest we be tempted to dismiss those cases as limited to the unique qualities of the NAACP and ACLU as political organizations, we should consider *Gentile v. State Bar of Nevada*, in which the Court reversed a sanction imposed on a criminal defense attorney for violating the pre-trial publicity rule.<sup>194</sup> After his client was indicted, the attorney held a press conference at which he asserted that the client was innocent, was being used as a “scapegoat,” and that the people responsible for the stolen drugs and money were “crooked cops.”<sup>195</sup> The state of Nevada, of the view that this was an “extrajudicial statement” presenting “a substantial likelihood of materially prejudicing an adjudicative proceeding,” issued a reprimand.<sup>196</sup> In a fractured opinion reversing, the Court treated this as “punishment of pure speech in the political forum.”<sup>197</sup> The Court noted that the lawyer had sought to “stop a wave of publicity he perceived as prejudicing potential jurors against his client and injuring his client’s reputation in the community” and had acted in part because the investigation had “taken a serious toll” on his client’s health.<sup>198</sup> The lawyer’s role as an advocate for his client was central to the Court’s reasoning:

An attorney’s duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client’s reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.<sup>199</sup>

Across these three cases we can see the Court’s heightened sensitivity to the expressive rights that arise directly out of a lawyer’s practice. Let me pause to offer a few caveats and clarify what a modest claim I am making with the

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193. *In re Primus*, 436 U.S. 412, 431 (1978).

194. *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

195. *Id.*

196. *Id.* at 1048.

197. *Id.* at 1034.

198. *Id.* at 1043.

199. *Id.* Defamation law reflects similar ideas, conferring upon attorneys an absolute privilege from defamation liability, even for defamatory statements made with “knowledge of their falsity and personal ill will,” for statements made in “the course of their participation as counsel in judicial proceedings.” Rodney A. Smolla, *Absolute privilege for participants in judicial proceedings—Who is protected—Attorneys*, 2 LAW OF DEFAMATION § 8:8 (2d ed.). The policy behind the privilege is to give attorneys “utmost freedom in their efforts to obtain justice for their clients.” *Id.*

foregoing discussion. There are plenty of cases where the attorney's assertion that she was acting in pursuit of a client's interests did not save her from discipline, either pursuant to a First Amendment analysis or any other type of defense.<sup>200</sup> Suggesting some sort of relaxed standard for imposing discipline simply because an attorney was acting at a client's behest would indeed be absurd, as it is only a slight exaggeration to say that the entire field of professional responsibility was born out of the post-Watergate anxiety that lawyers were doing quite a bit too much for their clients.<sup>201</sup> But neither can we say with confidence that "as speech bears a weaker and weaker connection to the delivery of legal services, the bar's justification in regulating it becomes less compelling."<sup>202</sup> It is true that context matters a great deal for First Amendment analysis, but not in the categorical or linear way that Blackman suggests. Sometimes the state's interest is weakened by the fact that the attorney expression at issue reflects our deepest aspirations for what lawyers will be willing to do for their clients: preserve their access to the legal system, speak out on their behalf against the abusive deployment of state power, and defend their interests ardently, not only inside the courtroom but also outside of it.

For the present purposes, I do not think we need to settle once and for all whether attorney expression is presumptively more or less protected when directly related to client representation. We should instead attend to the concerns addressed in Section II(A), ensuring that Rule 8.4(g) is drafted to exclude protected expression. Because there is no reason for an attorney to engage in harassment or discrimination whether taking a deposition or attending a CLE, I do not think we need to determine which forum is more likely to present compelling state interests for First Amendment purposes. But because we are evaluating the appropriate contexts for bar regulation, it is worth questioning the assumption that there's an obvious linear dimension to the state interest in restricting attorney speech. Rule 8.4(g) is not more susceptible to being invalidated under the First Amendment because it reaches all conduct "related" or "connected" to the practice of law.

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200. As with the many cases where attorneys are disciplined for criticizing judges they perceive to be treating their clients unfairly. For example, in the case *In re McCool*, an attorney was disbarred for an online and social media campaign intended to influence the judges presiding in her client's child custody case. She claimed her statements were within the scope of the First Amendment and were intended to "encourage the public, to extoll their elected judges to do justice, listen to the evidence, apply the law, and protect children." The Supreme Court of Louisiana disagreed and took "strong exception to respondent's artful attempt to use the First Amendment as a shield against her clearly and convincingly proven ethical misconduct." *In re McCool*, 2015-0284 (La. 6/30/15), 172 So. 3d 1058, 1075, *cert. denied sub nom.* *McCool v. Louisiana Attorney Disciplinary Bd.*, 136 S. Ct. 989 (2016).

201. See, e.g., Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673 (1999). The *ABA Journal* published an article titled, apparently without irony, "1965-1974: Watergate and the rise of legal ethics." The caption for a photo of the Watergate complex reads: "From a 'third-rate burglary,' the ABA Model Rules of Professional Conduct emerged." Mark Hansen, *1965-1974: Watergate and the rise of legal ethics*, ABA JOURNAL (Jan. 1, 2015), [http://www.abajournal.com/magazine/article/1965\\_1974\\_watergate\\_and\\_the\\_rise\\_of\\_legal\\_ethics](http://www.abajournal.com/magazine/article/1965_1974_watergate_and_the_rise_of_legal_ethics) [<https://perma.cc/LMB2-GZVV>].

202. Blackman, *supra* note 19, at 243.

## CONCLUSION

Having carefully scrutinized both the conduct and context portions of Rule 8.4 (g), it is safe to say that the latter raises no new First Amendment problems of its own accord. It is neither unprecedented nor particularly troubling for the bar to regulate conduct “related” or “connected” to the practice of law. The argument rests on a fictitious view of bar authority as currently being limited to the public spheres of an attorney’s life, a notion easily rebutted by surveying the existing professional responsibility landscape.

As to the provision delineating the prohibited conduct, the risks of infringing protected expression can and should be mitigated by a careful revision to better reflect the intended prohibition on discriminatory or harassing conduct that targets an individual for unequal treatment or intimidation. That would address overbreadth and vagueness concerns, allowing for as-applied challenges should an attorney be disciplined under Rule 8.4(g) for engaging in constitutionally protected expression.

With the First Amendment concerns given their due, where we ultimately land is a place that might feel uncomfortable to some because it is so explicitly value-laden: what are the personal qualities that bear on professional fitness, such that the bar can demand that all lawyers manifest them all (or most) of the time? We ought not take for granted that the existing list is inevitable, exhaustive, or somehow beyond refinement. Consider again Rule 8.4(c)’s prohibition on dishonesty, fraud, deceit, or misrepresentation. It is not modified by any requirement that the episode reflect adversely on the lawyer’s fitness, because the bar has already embraced and internalized the normative view that all such conduct, regardless of context or forum, does precisely that. One expression of this idea goes so far as to assert that “no single transgression reflects more negatively on the legal profession than a lie,” and that it is therefore “the responsibility of every attorney *at all times* to be truthful.”<sup>203</sup>

Truthfulness manifests as a higher priority and a more categorical value than even *respect for law*, because only a subset of criminal conduct is sanctionable under Rule 8.4(b), that which “reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.”<sup>204</sup> In contrast, the truthfulness obligation is absolute and unqualified. The choices reflected in Rule 8.4(b) and (c) thus create a strange landscape in which a lawyer might engage in criminal conduct that is thought not to be “relevant to law practice”<sup>205</sup> and thus not sanctionable, while another might engage in

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203. Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577, 578 (2005) (quoting the New Hampshire Supreme Court).

204. MODEL RULES R. 8.4, cmt. 2 (“Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate [a] lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.”).

205. *In re Disciplinary Proceedings Against Johns*, 847 N.W.2d 179, 186 (Wis. 2014).

lawful deception, perhaps even of demonstrable social utility, and yet suffer discipline.<sup>206</sup>

It is awkward to critique the bar's lionization of truthfulness as an absolute imperative, seeing as how truth seems to be an unmitigated good—who wants to be on the side of deception and falsehood? But in fact the bar's commitment to total truthfulness has, at times, been costly, imperiling attorney involvement in undercover investigations and other strategies used, to be blunt about it, to root out evil or even to save lives.<sup>207</sup> There are perfectly good reasons for this state of affairs and plenty of ways it can be justified, but there is nothing inevitable or logically required about it.<sup>208</sup> Indeed, there has been a movement to revise Rule 8.4(c) to reflect an exception for lawful covert activity to uncover violations of law,<sup>209</sup> reweighing the competing interests to strike a different balance.<sup>210</sup> In another ten years or so it might seem obvious that an

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206. See, e.g., *In re Gatti*, 8 P.3d 966 (Or. 2000). An Oregon lawyer named Daniel Gatti suspected that his client was unfairly denied insurance benefits. *Id.* at 971. Trying to smoke out evidence of an intentional, coordinated scheme to reject valid claims, Gatti posed as a chiropractor and a doctor in conversations with the insurance company and their medical review personnel. *Id.* at 970. The client proceeded with civil litigation for damages arising from the benefits denial scheme and the vice president of the medical review team filed a disciplinary complaint against Gatti for the lawyer's deceptive phone conversations. *Id.* at 970–71. Oregon's then-operative ethical rule prohibited "dishonesty, fraud, deceit, or misrepresentation." Or. Code of Prof'l Responsibility Disciplinary Rule (DR) 1–102(A)(3). Defending against the disciplinary charges, Gatti urged the court to interpret the rule as if it had an "investigatory exception," arguing that such an exception was "necessary if lawyers in private practice, like their counterparts in the government, are to be successful in their efforts to 'root out evil.'" *Gatti*, 8 P.3d at 974. The court declined to adopt this reading, suggesting some sympathy for Gatti's predicament yet invoking procedural and separation of powers arguments to explain its unwillingness. *Id.* The court issued a public reprimand and the state of Oregon then did respond by amending the rule to reflect an investigation exception. *Id.* at 971.

207. *In re Pautler*, 47 P.3d 1175 (Colo. 2002) (disciplining prosecutor for posing as public defender in order to encourage murder suspect to turn himself in to authorities).

208. In future work, I plan to explore in more detail the costs and benefits of the strict anti-deception norm.

209. Oregon's Rule 8.4 now explicitly allows lawyers to engage in undercover investigations without risk of sanction for deceptive conduct:

[I]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. 'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.

OR. R. PROF. COND. R. 8.4(b).

210. In May 2017, the Colorado Attorney General's office put its undercover investigation unit on hold and asked the Colorado Supreme Court to clarify whether lawyers can participate without being sanctioned. Jesse Paul, *Colorado AG halts all in-house undercover investigations amid ethics questions about "CHEEZO" unit*, DENVER POST (May 12, 2017), <http://www.denverpost.com/2017/05/12/jeffco-cheezo-unit-ethics-concerns/> [<https://perma.cc/64R2-W9TV>]. The Colorado Supreme Court agreed to consider revising Colorado's Rule of Professional Conduct 8.4(c) to reflect an investigation exception. See Jesse Paul, *Colorado high court to review ethics rule that halted attorney general's in-house undercover investigations, "CHEEZO" unit*, DENVER POST (June 6, 2017), <http://www.denverpost.com/2017/06/06/court-review-ethics-rule-cheezo-unit/> [<https://perma.cc/6HCF-LJCL>]. The Colorado Supreme Court ultimately did exactly that: under the revised version of the rule, lawyers continue to be prohibited from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities." COLO. R. PROF. COND. R. 8.4(c), available at <http://www.cobar.org/For-Members/Opinions-Rules-Statutes/Rules-of-Professional-Conduct/Rule-84-Misconduct> [<https://perma.cc/XN7Y-SY9R>] (emphasis added).

attorney's obligation to be truthful does not foreclose her participation in undercover investigations designed to expose wrongdoing.

Once we understand the entire enterprise to be inescapably value-laden, contingent, and contestable, even as to the most sacred and seemingly uncontroversial values, we have no choice but to ask why the set of non-negotiable elements of professional identity should not include treating people with respect and equal dignity. Without delving too deeply into the realm of moral philosophy, there is no obvious reason that truthfulness is a higher virtue for lawyers than nondiscrimination. It is certainly an older one—the language in Rule 8.4(c) dates back to the 1969 ABA Model Code of Ethics, when female enrollment in law school was seven percent<sup>211</sup> and minority enrollment well below that.<sup>212</sup> But the demographics of the legal profession have, of course, changed since then, as have our expectations for the ways that lawyers ought to behave and the values most central to professional identity. Whether we think of it as a “largely symbolic gesture” or not,<sup>213</sup> Rule 8.4 (g) is a project to reshape the norms of the legal profession so that discrimination and harassment come to be seen as similarly grievous as misrepresentation and dishonesty.<sup>214</sup> It is an ambitious one, to be sure—but with a bit more work we can make sure it is not an unconstitutional one.

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211. AM. BAR ASS'N, *First Year and Total JD Enrollment by Gender, 1947–2011*, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/jd\\_enrollment\\_1yr\\_total\\_gender.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf) [https://perma.cc/Y2FM-E6C5].

212. For a discussion of the legal education's “long and sorry history of exclusion,” see David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1919 (2005). See also David L. Chambers et. al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1856 (2005) (noting that “in 1970, there were about 4000 African American lawyers in the United States”).

213. As Professor Deborah Rhode described in a debate hosted by the Federalist Society. The Federalist Society, *Ninth Annual Rosenkranz Debate: Hostile Environment Law and the First Amendment*, YOUTUBE, <https://www.youtube.com/watch?v=MYsNkMw32Eg>.

214. See Wendel, *supra* note 13, at 64 (imagining a conversation in which honesty is assumed to be a trait fundamental to the practice of law, but treating people respectfully seems otherwise).