

# ABA MODEL RULE 8.4(g), DISCRIMINATORY SPEECH, AND THE FIRST AMENDMENT

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## I. INTRODUCTION

More than two decades ago, various courts and bar associations adopted civility codes to address lawyers' objectionable speech and conduct.<sup>1</sup> While civility codes articulated useful professional aspirations, some critics warned that incivility might be used as a disciplinary standard to restrict lawyers' constitutionally protected speech.<sup>2</sup> The

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1. See, e.g., *Lawyers' Duties*, A.B.A. (June 2, 2020), [https://www.americanbar.org/groups/litigation/policy/conduct\\_guidelines/lawyers\\_duties](https://www.americanbar.org/groups/litigation/policy/conduct_guidelines/lawyers_duties) ("We will abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnesses."); STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT,

[https://www.ca7.uscourts.gov/forms/Seventh\\_Circuit\\_Standards\\_for\\_Professional\\_Conduct.pdf](https://www.ca7.uscourts.gov/forms/Seventh_Circuit_Standards_for_Professional_Conduct.pdf).

Incivility has typically been regarded as a problem of overzealous advocacy, but for a different view, see Melissa Mortazavi, *Incivility as Identity*, 2020 MICH. STATE L. REV. 939, 980 ("The legal profession's struggle with civility is best understood as an attempt to appear trustworthy and anti-elitist or increasingly as part of a broader social unmooring of traditional masculinity and a defensive response to that challenge.").

2. See, e.g., Amy R. Mashburn, *Making Civility Democratic*, 47 HOUS. L. REV. 1147, 1226 (2011) ("In a society where honesty and a willingness to speak one's mind are encouraged, incivility may be the unavoidable result of speech and liberty rights Americans have given themselves. A democratic civil society is one that tolerates incivility that offends, but does not imperil or obstruct the fair administration of justice."). The civility codes were criticized on other grounds as well. See, e.g., Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 STETSON L. REV. 253, 258, 263 (1998) (disputing claims that civility codes would be used to diminish legitimate advocacy or be used as the basis of civil liability actions); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 664 (1994) (contending "that civility codes are a patrician reaction to the shortcomings of the attorney disciplinary and regulatory systems and a paradoxical application of the ethics of liberalism," and that civility codes "reflect unconscious desires to impose a reactionary and authoritarian conformity upon a rapidly diversifying profession and to resist redistributions of power to those who have been historically excluded from the practice of law and denied access to legal services").

saving grace at the time was that the codes were not meant to be enforceable.<sup>3</sup>

Fast forward, and the American Bar Association (“ABA” or the “Bar”) is now asking state judiciaries to adopt and enforce restrictions on objectionable speech as a part of an anti-discrimination and anti-harassment rule, Rule 8.4(g) of the Model Rules of Professional Conduct.<sup>4</sup> The rule targets unlawful behavior including racial discrimination and sexual harassment, as well as some bad conduct that may otherwise be lawful and that might be hard to reach under existing rules, but that plainly should be sanctioned.<sup>5</sup> The purpose of the rule is to adopt a viewpoint within the profession, and so it sweeps in lawyers’ speech that expresses biased and emotionally harmful beliefs.<sup>6</sup> The rule applies not only to lawyers’ interactions with courts, clients, and other third parties in the course of legal representation but also to all other “law-related practice,” including law firm events and educational forums.<sup>7</sup>

Our focus is on the constitutionality of Rule 8.4(g)’s restriction on objectionable speech as distinct from conduct. The rule targets certain speech and conduct that are based on “race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.”<sup>8</sup> In particular, according to the accompanying comment, Rule 8.4(g) reaches speech that is “derogatory or demeaning” or that “manifests bias or prejudice towards others” and is “harmful” (including, presumably, emotionally harmful).<sup>9</sup> Although

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3. Some of the civility codes were eventually made enforceable, however. See Brenda Smith, Comment, *Civility Codes: The Newest Weapons in the “Civil” War Over Proper Attorney Conduct Regulations Miss Their Mark*, 24 U. DAYTON L. REV. 151, 167 (1998) (giving examples).

4. Rule 8.4(g) provides:

It is professional misconduct for a lawyer to . . . engage in conduct 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 in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

5. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020).

6. See *id.*

7. The comment to the rule explains that:

Conduct 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 OF PRO. CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS’N 2020).

8. *Id.* r. 8.4(g).

9. The comment states: “[D]iscrimination 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,

the rule refers to “verbal conduct,” its reach is not limited to the sorts of speech that one might characterize as “verbal acts,” such as threats, persistent pressure, or sexual advances,<sup>10</sup> or to speech that is merely incidental to bad physical conduct.<sup>11</sup> Nor is the rule limited to extremely destructive speech—for example, “fighting words” that are likely to provoke violence,<sup>12</sup> or overtly biased speech that creates a hostile work environment<sup>13</sup> or that harms particular individuals in other ways beyond angering them or hurting their feelings. Under the comment’s broad construction, the rule applies equally to insults that merely sting.<sup>14</sup> Critics say that the rule’s breadth presents a problem because the First Amendment protects freedom of speech.<sup>15</sup>

The rule’s proponents do not dispute that the rule extends in part to lawyers’ constitutionally protected speech.<sup>16</sup> The question is in how

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requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.” *Id.* r. 8.4 cmt. 3.

10. For instance, if a law firm partner were to say to an associate, “sleep with me or we’ll fire you,” that would not be protected speech because, as a threat of action, it would be regarded as conduct. The Court has made a distinction between an employer’s protected speech in the workplace and threats or promises, which can be regulated. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 579 (1969).

11. Courts have expressed some skepticism about the distinction between “speech” and “verbal conduct,” observing that “the enterprise of labeling certain verbal or written communications ‘speech’ and others ‘conduct’ is unprincipled and susceptible to manipulation.” *King v. Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2015). Nonetheless, the American Bar Association (“ABA” or the “Bar”) ethics committee’s opinion interpreting Rule 8.4(g) initially suggests that the rule extends only to conduct and to speech that has attributes of conduct. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 7 (2020) (“Harassment is a term of common meaning and usage under the Model Rules. It refers to conduct that is aggressively invasive, pressuring, or intimidating.”). As the opinion continues, however, any distinction breaks down, and it becomes clear, as the comment to rule 8.4(g) reflects, that the rule is meant to apply simply to lawyers’ speech that is racist, sexist, etc. *See, e.g., id.* at 11 (“[A] lawyer would clearly violate Rule 8.4(g) by directing a hostile racial, ethnic, or gender-based epithet toward another individual, in circumstances related to the practice of law.”); *id.* (describing, with approval, an Indiana decision sanctioning “a lawyer who made racially disparaging accusations in a court filing”).

12. For discussions of how the “fighting words” doctrine has been narrowed since the Supreme Court first articulated it, see, e.g., *United States v. Bartow*, 997 F.3d 203, 209-11 (4th Cir. 2021) (words must be likely to provoke violence); *Boyle v. Evanchick*, No. 19-3270, 2020 U.S. Dist. LEXIS 49958, at \*14-20 (E.D. Pa. Mar. 19, 2020) (holding the same).

13. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986) (upholding Title VII claim where sexual harassment creates a hostile work environment).

14. *See* Josh Blackman, Reply, *A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and “Conduct Related to the Practice of Law,”* 30 GEO. J. LEGAL ETHICS 241, 244-46 (2017).

15. *See, e.g.,* Bradley S. Abramson, *ABA Model Rule 8.4(g): Constitutional and Other Concerns for Matrimonial Lawyers*, 31 J. AM. ACAD. MATRIM. LAW. 283, 295-98 (2019); Blackman, *supra* note 14, at 248-50; George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J. L. ETHICS & PUB. POL’Y 135, 161-66 (2018); Jack Park, *ABA Model Rule 8.4(g): An Exercise in Coercing Virtue?*, 22 CHAP. L. REV. 267, 273-78 (2019).

16. *See, e.g.,* Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 48 (2018) (“[T]he 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

large a part. Some argue that examples of constitutionally protected speech that might be covered by the rule are far-fetched or fanciful, and that disciplinary authorities can be trusted not to apply the rule to such speech.<sup>17</sup> Whether the rule covers a broad range of objectionable speech, and therefore encroaches significantly on lawyers' First Amendment rights, or bumps up against the First Amendment to a lesser degree, depends both on how one reads the rule and comment,<sup>18</sup> and on how one reads and applies the First Amendment case law. The rule's proponents were initially dismissive of the constitutional concerns,<sup>19</sup> but constitutional scholars' objections were reinforced in late 2020 when a federal district court concluded that Pennsylvania's version of the rule discriminated based on viewpoint in violation of the First Amendment.<sup>20</sup>

The First Amendment generally does not allow the government to punish people for speech, like that covered by Rule 8.4(g), which is objectionable and emotionally hurtful ("derogatory and demeaning") and expounds discreditable (biased or prejudiced) ideas, like that covered by Rule 8.4(g).<sup>21</sup> As we discuss, any such restriction must satisfy strict

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victimization of individuals, the comment's expansiveness may well raise First Amendment overbreadth concerns.").

17. See, e.g., 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, 235 (2017) ("Experience teaches us that the kind of biased or harassing speech that will attract the attention of disciplinary counsel will not enjoy First Amendment protection."). The late Ronald D. Rotunda offered many examples of speech that would appear to be forbidden by Rule 8.4(g) but that, in his view, are constitutionally protected. Memorandum from Heritage Found. 4-5 (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>. Although it is true that disciplinary authorities have discretion not to bring charges when they conclude that speech covered by the rule is constitutionally protected, some might lack faith that they will consistently do so. See, e.g., Park, *supra* note 15, at 279 ("Vesting discretion in the hands of bar regulators and trusting to their judgment is no solution."); cf. *Matal v. Tam*, 137 S. Ct. 1744, 1769 (2017) (Kennedy, J., concurring) ("A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence.").

18. The rule undoubtedly presents interpretive questions. 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 PRO. 201, 257 (2017) ("The new model rule is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms.").

19. The ABA report to the House of Delegates in support of Rule 8.4(g) contained no analysis of constitutional overbreadth—that is, whether the rule reached substantial constitutionally-protected speech, and included only a footnote dismissing the possibility that the rule was unconstitutionally vague. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 9, 11 n.53 (2020).

20. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 30-32 (E.D. Pa. 2020). The court later reached the same conclusion after the Pennsylvania Supreme Court revised the rule to attempt to satisfy constitutional concerns. *Greenberg v. Goodrich*, No. 20-03822, 2022 WL 874953, at \*16-37 (E.D. Pa. Mar. 24, 2022).

21. See, e.g., *Matal*, 137 S. Ct. at 1751 (holding that federal law could not deny trademarks for terms that may disparage people); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); see *infra* note 69 and accompanying text.

scrutiny.<sup>22</sup> Even in public universities, speech codes that forbid objectionable, biased, painful speech, like that covered by Rule 8.4(g), go too far.<sup>23</sup> The ordinary answer to the problem of demeaning and derogatory speech in public places is not a legal restriction but more speech, including public opprobrium. Rule 8.4(g) raises the question of whether lawyers and their work are different: Is there a compelling enough reason to single out this sort of racist, sexist, or otherwise biased speech when it is employed by lawyers and is “related to the practice of law”?<sup>24</sup>

To ground our constitutional analysis of Rule 8.4(g), we start with an example that is neither far-fetched nor fanciful. It is taken from *United States v. Wunsch*,<sup>25</sup> a disciplinary prosecution of a California criminal defense lawyer for sending a letter to opposing counsel derogating and demeaning her based on her sex.<sup>26</sup> The lawyer, Frank Swan, spent several years defending a couple and their daughter in connection with a federal tax investigation.<sup>27</sup> In early 1993, after securing the daughter’s indictment, the federal prosecutor persuaded the district court to disqualify Swan and his co-counsel based on their alleged conflict of interest.<sup>28</sup> This was undoubtedly a blow to Swan no less than to his clients. He expressed his frustration in a letter to the prosecutor, Elana Artson, attaching a photocopy of part of a *California Lawyer* article on negative gender stereotyping of female lawyers.<sup>29</sup> The letter stated, “Your disqualification of . . . me was neither just nor fair to the defendants. Surely, it serves your interests because now it will be

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22. See *infra* Part II.

23. See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301, 305, 320 (3d Cir. 2008) (finding the university’s sexual harassment policy constitutionally overbroad insofar as it forbade “expressive . . . conduct of a . . . gender-motivated nature, when . . . such conduct has the purpose or effect of creating an . . . offensive environment”); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182-85 (6th Cir. 1995) (invalidating on overbreadth grounds a university’s “discriminatory harassment” policy that defined punishable harassment as including “offensive” or “demeaning” speech, which the court found to encompass constitutionally protected speech). The university’s “discriminatory harassment” policy was found to be unconstitutionally overbroad where it forbade [A]ny intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual’s racial or ethnic affiliation.

*Dambrot*, 55 F.3d at 1182; see Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. LEGAL EDUC. 739, 755-57 (2017).

24. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

25. 84 F.3d 1110 (9th Cir. 1996). *Wunsch* has previously been used to illustrate the rule’s broad application. See, e.g., *Dent*, *supra* note 15, at 168-69.

26. *Wunsch*, 84 F.3d at 1113.

27. *Id.* at 1112.

28. *Id.* at 1112-13.

29. *Id.* at 1113 n.1.

easy for you.”<sup>30</sup> The attachment stated in capital letters, “M[ale lawyers play by the rules, discover truth and restore order]. F[emale lawyers are outside the law, cloud truth and destroy order.]”<sup>31</sup> Rather than tossing the correspondence in the file or the trash, Artson shared it with her office, resulting in a motion for sanctions, which the district court granted.<sup>32</sup>

On appeal, the Ninth Circuit reversed.<sup>33</sup> It disagreed that the correspondence violated a rule forbidding “conduct which degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice.”<sup>34</sup> The letter and attachment said nothing about the court and had no effect on the administration of justice.<sup>35</sup> The court acknowledged that “[i]n a general sense, all manifestations of gender bias related in any way to the adjudicative process affect the administration of justice,” but noted that “the courts cannot punish every expression of gender bias . . . without running afoul of the First Amendment.”<sup>36</sup> Further, the appellate court found that Swan could not be sanctioned under a different rule requiring lawyers “to abstain from all offensive personality,” because the rule was void for vagueness.<sup>37</sup> Because the rule did “not sufficiently identify the conduct that is prohibited,” the court concluded that lawyers might worry that it covered conduct in which they regularly engage as a matter of zealous advocacy, and the rule might be enforced discriminatorily.<sup>38</sup> One member of the panel disagreed, observing “that lawyers may be subjected to restrictions on speech that an ordinary citizen cannot,” and that “[t]he dangers of vagueness—lack of fair notice and adequate warning—are lessened with respect to the regulation of the legal profession because a lawyer will understand the context of the statutory language within the code of behavior that all lawyers are charged with knowing.”<sup>39</sup>

There is little doubt that many members of our profession—including the federal prosecutors and the district court in Swan’s case—would applaud punishing a lawyer for such correspondence. And Rule 8.4(g), which would provide a basis for Swan’s punishment, is clearer about what it covers than a rule prohibiting “offensive personality.”<sup>40</sup> But the First Amendment generally forbids states from punishing people for sending sexist, derogatory letters, like this one. Our question is

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30. *Id.* at 1113.

31. *Id.*

32. *Id.*

33. *Id.* at 1112.

34. *Id.* at 1116.

35. *Id.* at 1116-17.

36. *Id.* at 1117 n.10.

37. *Id.* at 1114 n.6, 1120.

38. *Id.* at 1119.

39. *Id.* at 1120-21 (Farris, J., concurring & dissenting).

40. *See id.* at 1119.

whether state courts can enforce a rule making an exception for lawyers, or whether the First Amendment protects lawyers' speech equally. Lawyers are not subject to restrictions on speech simply because they are lawyers.<sup>41</sup> A restriction on lawyers' speech in a given case would have to closely serve a compelling government interest.<sup>42</sup>

We think that many realistic applications of Rule 8.4(g) would fail this test. Presumably to address this concern, the ABA Committee on Ethics and Professional Responsibility issued an opinion in 2020 narrowly interpreting Rule 8.4(g).<sup>43</sup> The opinion said that Rule 8.4(g) does not extend to lawyers who comment on issues of public concern,<sup>44</sup> and that the rule typically, though not invariably, applies when lawyers' remarks are directed at a particular person or persons.<sup>45</sup> But even assuming state disciplinary authorities adopted this interpretation, a lawyer would remain subject to sanctions for a single degrading or demeaning comment as in Swan's letter to the federal prosecutor. This would be true even if the comment were made outside the context of a representation—for example, at a law firm lunch outside the prosecutor's earshot and without her ever learning of it.<sup>46</sup>

We do not address whether, as a consequence, Model Rule 8.4(g) is unconstitutionally overbroad.<sup>47</sup> We argue that, regardless of whether the rule targets a substantial amount of protected expression or a tolerable amount for constitutional purposes, state courts should not adopt it. Courts should not adopt and enforce professional conduct rules that, besides targeting bad conduct that may and should be proscribed, deliberately and unnecessarily target constitutionally protected speech, however objectionable. We begin in Part II with a constitutional overview.<sup>48</sup> We show in Part III that plausible applications of the rule to lawyers' derogatory, demeaning, or biased speech in the practice of law

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41. See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018) (“[T]his Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’”).

42. See, e.g., *Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2371, 2374-75 (holding restriction on professional speech subject to strict scrutiny).

43. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 6, 11-12 (2020).

44. *Id.* at 6.

45. *Id.* at 12-13. As a counterexample, the opinion describes remarks that a hypothetical senior associate makes to newly hired associates denigrating Muslim lawyers and clients, including “never trust a Muslim lawyer.” *Id.* at 13. The opinion states that the remarks are covered by the rule, explaining “the fact that the comments may not have been directed at a specific individual would not insulate the lawyer from discipline.” *Id.* Although the opinion characterizes the remarks as “harmful,” it does not specify who or what the remarks harm and how. *Id.*

46. See Memorandum from Heritage Found., *supra* note 17, at 4.

47. On the overbreadth doctrine, see, e.g., *United States v. Stevens*, 559 U.S. 460, 473-76 (2010).

48. See *infra* Part II.A.

cannot withstand strict scrutiny.<sup>49</sup> In particular, we dispute that the rule closely serves the interest it says it serves, which is to preserve “confidence in the legal profession and the legal system.”<sup>50</sup> Finally, in Part IV, we argue why this makes the current version of the rule undesirable, even assuming it is not unconstitutional on its face.<sup>51</sup>

## II. THE FIRST AMENDMENT AND RULE 8.4(g)

This Part briefly discusses how the First Amendment applies to restrictions, like that of Rule 8.4(g), targeting discriminatory or harassing speech. It shows that because Rule 8.4(g) is aimed at the content of speech and discriminates based on viewpoint, the First Amendment would prevent a legislature from enacting a similar law if it were applied to nonlawyers because it could not satisfy the strict scrutiny standard. Rule 8.4(g) is presumptively invalid and subject to this rigorous standard both because, as Subpart A shows, it constitutes impermissible viewpoint discrimination,<sup>52</sup> and as Subpart B shows, it constitutes a content-based restriction.<sup>53</sup> Finally, Subpart C discusses strict scrutiny in general<sup>54</sup> before we turn in Part III to whether or not Rule 8.4(g) would meet this demanding test as applied to various speech covered by the rule.<sup>55</sup>

### A. Impermissible Viewpoint Discrimination

In *Matal v. Tam*,<sup>56</sup> the Supreme Court invalidated a clause in the federal trademark law that denied approval to any mark that disparaged members of a racial or ethnic group.<sup>57</sup> The Court held that the clause was an unconstitutional speech restriction, explaining, “[T]hat is viewpoint discrimination: Giving offense is a viewpoint.”<sup>58</sup> The opinion concluded that the restriction was not adequately justified by the need to protect members of minority groups “from being ‘bombarded with demeaning messages in commercial advertising.’”<sup>59</sup> Justice Alito explained that this is just another way of saying that the government has an interest in preventing offensive speech:

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49. See *infra* Part III.D–E.

50. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 2020).

51. See *infra* Part IV.

52. See *infra* Part II.A.

53. See *infra* Part II.B.

54. See *infra* Part II.C.

55. See *infra* Part III.

56. 137 S. Ct. 1744 (2017).

57. *Id.* at 1757, 1765.

58. *Id.* at 1763.

59. *Id.* at 1764–65.



[T]hat idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.”<sup>60</sup>

In *R.A.V. v. City of St. Paul*,<sup>61</sup> the Supreme Court similarly struck down a city ordinance criminalizing the use of an object or symbol if the speaker knows, or reasonably should know, that it would arouse anger or alarm based on a protected class.<sup>62</sup> It did so even though the state court had limited the reach of the law to “fighting words.”<sup>63</sup> The Court reasoned that even though the ban applied only to “fighting words”—a category usually exempt from First Amendment protection—the government is not free to discriminate against certain viewpoints.<sup>64</sup> In other words, the state cannot pick and choose which fighting words it wants to ban based on the content of the words, even if it finds these particular messages to be the most offensive.<sup>65</sup> Applying these principles to the ordinance, the Court held that it was facially invalid even though it applied to “fighting words” because it targeted only those words directed at “race, color, creed, religion or gender.”<sup>66</sup> Abusive displays of any other sort were allowed under the ordinance, no matter how harmful or severe.<sup>67</sup>

Like the Minnesota ordinance in *R.A.V.*, Rule 8.4(g) singles out hateful messages based on race or other specified categories.<sup>68</sup> And, like both that ordinance and the law in *Matal*, the professional conduct rule addresses biased, prejudiced, demeaning, or derogatory statements only if they are aimed at one of the protected classes.<sup>69</sup> Abusive words of any other kind are allowed. Furthermore, a comment to the rule explains that it addresses only those biased words that demean a protected class, not those that are aimed at promoting diversity.<sup>70</sup> Thus, presumably, under the rule, speakers in a Continuing Legal Education (“CLE”) program

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60. *Id.* at 1764 (citing *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

61. 505 U.S. 377 (1992).

62. *Id.* at 380, 391.

63. *Id.* at 380.

64. *Id.* at 384.

65. *Id.*

66. *Id.* at 391.

67. *Id.*

68. *See id.* at 392; MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

69. *See R.A.V.*, 505 U.S. at 393-94; *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017); MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

70. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS’N 2020) (“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.”).

would not violate Rule 8.4(g) if they argued that White people are inherently racist and exploit their privilege to hurt people of color.<sup>71</sup>

Rule 8.4(g), like the ordinance at issue in *R.A.V.*, discriminates based on viewpoint and, unlike the ordinance, does not limit its reach to fighting words.<sup>72</sup> It discriminates by allowing lawyers to express tolerance or approval but not prejudice or bias based on one of the protected classes.<sup>73</sup> And, it allows lawyers to express other forms of hateful, demeaning opinions, but not those based on one of the protected classes.<sup>74</sup> As the Court said of the law in *Matal*, “The law . . . reflects the Government’s disapproval of a subset of messages . . . , the essence of viewpoint discrimination.”<sup>75</sup>

### B. Content-Based Regulation

Viewpoint discrimination is “an egregious form of content discrimination,”<sup>76</sup> but even if there is no viewpoint discrimination, a law is presumed invalid if it targets the content of speech.<sup>77</sup> A law targets the content of speech if it is directed at the idea or content of the message expressed.<sup>78</sup> This is true even if the message is outrageous and offensive.<sup>79</sup> The First Amendment protects this sort of speech not because it has inherent value, but because determining what sort of language is offensive is a far too subjective enterprise to trust to

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71. See generally ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* (2018) (ebook) (arguing that white people are thin-skinned and unable to talk about race or confront their privilege, leading to a perpetuation of racist structures).

72. See *R.A.V.*, 505 U.S. at 391-92; MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

73. See *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring).

74. See *R.A.V.*, 505 U.S. at 383-84.

75. *Matal*, 137 S. Ct. at 1750.

76. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that even public property, which the government can reserve for certain uses, does not allow viewpoint discrimination).

77. The flip side of this is that the government can engage in a time, place, or manner restriction so long as the restriction is content-neutral. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 20 (1986) (“For a time, place, or manner regulation to be valid, it must be neutral as to the content of the speech.”). But even if the legal profession would otherwise qualify, Rule 8.4(g) is not content-neutral.

78. See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64 (2011). The Court has upheld laws that incidentally target a message if the law is aimed at the conduct and only incidentally bans speech. So, for instance, the Court upheld a general law prohibiting destroying draft cards even when that law was used to target individuals engaged in the symbolic act of burning his card to protest the war. *United States v. O’Brien*, 391 U.S. 367, 369-70, 376-77 (1968). But Rule 8.4(g) is not a general law aimed at conduct that incidentally affects a particular message. Its entire purpose is to target that message.

79. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 446-49 (1969) (per curiam) (extending protection to hateful antisemitic and racist speech at a Ku Klux Klan rally because it was not found to incite violence).

government officials.<sup>80</sup> As the Court in *R.A.V.* concluded, “The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.”<sup>81</sup> Rule 8.4(g), like the Minnesota ordinance at issue in *R.A.V.*, is directed at the content of lawyers’ speech.<sup>82</sup> It too invites courts to make a subjective determination of what constitutes “harmful,” “derogatory,” or “demeaning” words.<sup>83</sup>

Of course, the government is allowed to regulate some forms of discrimination and harassment, and many federal and state anti-discrimination and harassment policies have withstood challenges.<sup>84</sup> The Supreme Court has interpreted Title VII of the Civil Rights Act of 1964, for instance, to protect against a “hostile work environment.”<sup>85</sup> The Court defines this as harassment so severe or pervasive as to “alter the conditions of [the victim’s] employment and create an abusive working environment.”<sup>86</sup> According to Justice Scalia, the key distinction between lawful workplace harassment policies and the ordinance at issue in *R.A.V.* is that the workplace harassment laws address conduct and ban words only incidentally, while the ordinance is aimed at pure speech.<sup>87</sup> He explained, “[W]ords can in some circumstances violate laws directed not against speech but against conduct,”<sup>88</sup> and “[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea.”<sup>89</sup> As a result, “sexually derogatory ‘fighting words,’ *among other words*, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices.”<sup>90</sup>

The distinction between speech and conduct is an important one because if the banned words are part of an ongoing course of conduct,

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80. See *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (“‘Outrageousness’ in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.”).

81. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

82. See *id.* at 380; MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

83. See MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 2020).

84. *E.g.*, *O’Rourke v. City of Providence*, 235 F.3d 713, 735-36 (1st Cir. 2001) (finding that the First Amendment does not protect the displaying of nude pictures and the watching of sexually explicit movies in the workplace); *Baty v. Willamette Indus.*, 172 F.3d 1232, 1246-47 (10th Cir. 1999) (rejecting the defendant’s claim that the speech was protected by the First Amendment); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (holding that the defendant’s sexually harassing speech was not protected under the First Amendment).

85. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-67 (1986).

86. *Id.* at 67.

87. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992).

88. *Id.*

89. *Id.* at 390. Some scholars have criticized Justice Scalia’s distinction in *R.A.V.* See, *e.g.*, Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1994 SUP. CT. REV. 1, 12-16, 20.

90. *R.A.V.*, 505 U.S. at 389 (emphasis added).

they are no longer protected speech.<sup>91</sup> While there is substantial disagreement on how to distinguish speech from conduct,<sup>92</sup> the Supreme Court has made it clear that when the harm that the words cause is personal offense or emotional pain, the speech cannot be classified as conduct.<sup>93</sup> In other words, when the speech at issue causes emotional harm because of its offensive content, it is protected speech, not conduct.<sup>94</sup> Speech is not an element in the tort of intentional infliction of emotional distress for this reason,<sup>95</sup> and as the Court held in *Hustler Magazine, Inc. v. Falwell*,<sup>96</sup> when emotional distress is caused solely by the content of speech, it cannot be the basis of recovery.<sup>97</sup> Insofar as Rule 8.4(g) targets words that manifest “bias or prejudice towards others” as well as “derogatory or demeaning verbal or physical conduct,”<sup>98</sup> it punishes speech that causes only emotional pain, which enjoys full protection under the First Amendment.

The Court in *R.A.V.* also explained this distinction. The First Amendment does not prohibit regulations that punish words only as an incident to regulating certain conduct.<sup>99</sup> Policies, like the hate speech ordinance, aimed at insults, not at conduct, even when they concern race, ethnicity, gender, or another protected class, are subject to the most rigorous analysis under the First Amendment because they target the

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91. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”); see also *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62-65 (2006) (upholding a law that denied federal funding to universities that banned military recruiters from coming to campus because the law targeted conduct not words).

92. See Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1278-86 (2005).

93. *R.A.V.*, 505 U.S. at 414 (White, J., concurring) (“Our fighting words cases have made clear, however, that such generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.”).

94. See *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (holding that an offensive ad parody about a public figure was protected speech even though it caused emotional distress); *Cohen v. California*, 403 U.S. 15, 16-17, 26 (1971) (finding a generally applicable breach of the peace law unconstitutional when it was applied to a person wearing a “Fuck the Draft” message on a jacket).

95. *Intentional Infliction of Emotional Distress*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/intentional\\_infliction\\_of\\_emotional\\_distress](https://www.law.cornell.edu/wex/intentional_infliction_of_emotional_distress) (last visited Apr. 23, 2022).

96. 485 U.S. 46 (1988).

97. *Id.* at 55-56.

98. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 2020).

99. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992). The Court reiterated this point that the government cannot regulate pure hate speech in *Virginia v. Black*. In an opinion written by Justice O’Connor, the Court invalidated a provision of a statute that made it prima facie evidence of intimidation for an individual to burn a cross. The Court explained that the provision was unconstitutional because it failed to take into account that cross-burning can be an expression of ideology, a symbol of group solidarity, or a part of art designed to repudiate racism. In any event, cross-burning at a rally would certainly be protected speech. 538 U.S. 343, 365-67 (2003).

content of the speech and the viewpoint of the speaker.<sup>100</sup> Rule 8.4(g)'s definition of discrimination and harassment includes speech directed at a protected class that causes only emotional harm.<sup>101</sup> Thus, Rule 8.4(g), in part, regulates the content of speech, not conduct. The provisions of Rule 8.4(g) addressing harassing, demeaning, and emotionally harmful speech would be subject to strict scrutiny even if they did not discriminate based on viewpoint, which they do.

Courts have struck down multiple university sexual harassment and anti-discrimination policies under the First Amendment,<sup>102</sup> particularly when the policies target offensive words that cause only emotional harm without necessarily impeding the targeted student's ability to learn.<sup>103</sup> For instance, several courts have found university policies overbroad because they bar students from, among other things, saying offensive things that do not actually interfere with another student's learning environment.<sup>104</sup>

Another set of cases on university harassment policies makes it clear that the proscribed speech must be directed at a particular person or persons because the First Amendment clearly protects offensive messages disseminated to the general public as opposed to words that actually cause harm to one or more people.<sup>105</sup> Federal anti-harassment laws require that the banned speech substantially interfere with the learning or work environment of particular persons.<sup>106</sup> Rule 8.4(g) has no such limitation. A discriminatory or harassing speech at a firm event would be covered even if it were not directed at one or more individuals.<sup>107</sup> Without this limitation, it is even clearer that Rule 8.4(g)

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100. See *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206-07 (3d Cir. 2001).

101. See MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2020).

102. See, e.g., *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182-83 (6th Cir. 1995) (striking down a university policy as overbroad because it was viewpoint discriminatory); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1015-17 (N.D. Cal. 2007) (finding a likelihood of success on claim that the university civility code was overbroad); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004) (finding a school policy banning insults, epithets, ridicule, and personal attacks overbroad).

103. See, e.g., *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 237-38, 252 (3d Cir. 2010) (invalidating university policy that bans speech causing "mental harm" or "emotional distress"); *Saxe*, 240 F.3d at 204-05, 210 (striking down a college harassment policy in part because it did not require that the offensive speech substantially interfere with a person's learning environment); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993) (invalidating a policy that banned racially offensive speech).

104. See e.g., *Saxe*, 240 F.3d at 210-11; *DeJohn v. Temple Univ.*, 537 F.3d 301, 317, 319-20 (3d Cir. 2008).

105. See *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2010). For an argument that this line ought to have constitutional significance, see Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1846-71 (1992).

106. See Volokh, *supra* note 105, at 1816 n.111.

107. The ABA has clarified that Rule 8.4(g) does not extend to lawyers' speeches on matters of public concern and will typically apply to words directed at a specific person or persons. ABA

proscribes pure speech because it is not tied to conduct that might intrude on the rights of any particular listener.<sup>108</sup>

Although the comments to Rule 8.4(g) refer to “verbal conduct,” the rule targets speech no less than conduct.<sup>109</sup> The Supreme Court has stated that the key in determining whether a law targets speech or conduct is to assess whether there is any possibility that the government is stifling a particular message.<sup>110</sup> If so, it is engaged in impermissible content regulation and viewpoint discrimination.<sup>111</sup> Here, the entire purpose of the rule is to single out a particular viewpoint. The ABA is targeting offensive speech based on a protected class, so the rule is clearly directed at the content of the message.<sup>112</sup> One might argue that the rule seeks to ban the conduct of discrimination and harassment by banning the words used to carry it out. But a rule prohibiting words that “manifest bias or prejudice” covers more speech than is necessary to prevent the acts of discrimination and harassment, which require some interference with an individual’s ability to carry on her work or some other concrete harm.<sup>113</sup>

Relatedly, the government can regulate words when the law is really addressing a secondary effect of the speech, rather than the message itself.<sup>114</sup> But this doctrine does not apply when the secondary effects are merely emotional reactions to the words. With the ordinance in *R.A.V.* or Rule 8.4(g), the secondary effects of some of the proscribed speech are personal offenses.<sup>115</sup> As the Court has explained, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because

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Comm. on Ethics & Pro. Resp., Formal Op. 493, at 13-14 (2020). This language is not, however, binding. Nor is it dictated by the plain language of the rule and its comments. In addition, the use of the word “typically” implies that a regulator would have the discretion to apply it in such circumstances. *See id.* at 14.

108. *See Rodriguez*, 605 F.3d at 710. For an argument that workplace harassment laws would be constitutional if they required all covered speech to be directed at particular individuals, see Volokh, *supra* note 105, at 1796.

109. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 2020).

110. *See Boos v. Barry*, 485 U.S. 312, 326-27, 329 (1988).

111. *See id.* at 319, 321.

112. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

113. *See id.* r. 8.4 cmt. 3.

114. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-52 (1986) (holding that a zoning law directed at adult theaters was really aimed at preventing secondary effects on the community, not at the content of the films).

115. *See Boos*, 485 U.S. at 321. The emotive impact of speech on its audience is not the kind of secondary effect that alters the First Amendment analysis. The Court in *Boos* invalidated an ordinance barring hostile images outside of embassies. *Id.* When the law was challenged as impermissible content regulation, the government defended it on the ground that it was aimed at the “secondary effect” of the dignitaries’ offense. *Id.* The Court rejected this rationale, reasoning, “Listeners’ reactions to speech are not the type of ‘secondary effects’ we referred to in *Renton*. . . . The emotive impact of speech on its audience is not a ‘secondary effect.’” *Id.*

society finds the idea itself offensive or disagreeable.”<sup>116</sup> Thus, it seems uncontroversial to conclude that Rule 8.4(g) covers much speech that would be protected if it were aimed at the general public, not just lawyers.

### C. *Strict Scrutiny*

As viewpoint discrimination or a content-based regulation, Rule 8.4(g) would be subject to strict scrutiny if it were directed at the general public.<sup>117</sup> This Subpart addresses the next question: whether it could withstand such analysis. The most exacting level of review, strict scrutiny, requires that the regulation be narrowly tailored to serve a compelling government interest.<sup>118</sup>

In analogous cases, the Court has found that restrictions on speech similar to Rule 8.4(g) fail to survive this test. For instance, once the Court in *R.A.V.* determined that the ordinance discriminated based on viewpoint, it applied strict scrutiny.<sup>119</sup> Justice Scalia noted that protecting the “basic human rights of members of groups that have historically been subjected to discrimination” is a compelling interest.<sup>120</sup> But this interest did not justify selectively silencing speech based on content,<sup>121</sup> because there is not a close enough fit between the ordinance and the government’s interest: “The dispositive question . . . is whether content discrimination is reasonably necessary to achieve St. Paul’s compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect.”<sup>122</sup>

In *Matal*, the Court did not think a legitimate government interest justified the anti-discrimination provision of the trademark law.<sup>123</sup> The interest, in Justice Alito’s assessment, was really in protecting certain groups from offensive language, and this sort of interest can never be sufficient because it strikes at the very purpose of the First Amendment.<sup>124</sup> The Court in *Matal* concluded that the trademark law involved would not even pass the less rigorous intermediate scrutiny test

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116. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

117. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (holding that any law that targets the content of speech is subject to strict scrutiny).

118. *Boos*, 485 U.S. at 321.

119. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 395-96 (1992).

120. *Id.* at 395.

121. *Id.* at 391-92.

122. *Id.* at 395-96.

123. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017). The Court does acknowledge another potential government interest in protecting the orderly flow of commerce, but that interest is clearly not relevant to Rule 8.4(g). *Id.*

124. *Id.* at 1765.

involved when commercial speech is at issue.<sup>125</sup> But whether you adopt the Court's view in *R.A.V.* or *Matal*, it seems unlikely that a law aimed at biased or harassing speech on the basis of a person's membership in protected groups that offends, but does not cause any other harm, could withstand strict scrutiny.

Rule 8.4(g) would similarly fail strict scrutiny if it were applied to nonlawyers either because it is not narrowly tailored to a compelling government interest or because the government interest itself is faulty from a First Amendment perspective. Applying the reasoning in *R.A.V.*, a general rule barring offensive speech by lawyers would achieve the same goal of protecting the human rights of those affected.<sup>126</sup> The interest being served, like the one in *Matal*, is really protecting minority groups from offensive speech, which would swallow up the bedrock First Amendment principle that even offensive speech is protected.<sup>127</sup>

In Part III below, we discuss whether the strict scrutiny analysis will come out differently because the speakers are lawyers.<sup>128</sup>

### III. ARE LAWYERS DIFFERENT?

Discussions of Rule 8.4(g) generally give short shrift to whether the rule satisfies strict scrutiny. Some assume that the rule is drawn narrowly enough, or will be applied narrowly enough, to avoid having to meet this test.<sup>129</sup> Others assume that the rule is adequately justified by courts' authority to regulate the Bar,<sup>130</sup> or that it is justified at least insofar as it applies to lawyers' work in the course of representing clients, although not necessarily to lawyers' other professional activities.<sup>131</sup> Conversely, some critics assume that a strict scrutiny standard cannot possibly be met, so there is no need to analyze how well the rule serves legitimate regulatory aims.<sup>132</sup>

Identifying compelling interests served by the rule and analyzing whether these interests are closely served turns out to be easier said than done because the rule applies to a broad range of lawyers' speech across

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125. *Id.* at 1754.

126. *See R.A.V.*, 505 U.S. at 394.

127. *See Matal*, 137 S. Ct. at 1764.

128. *See infra* Part III.A–E.

129. *See, e.g.*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 10 (2020) (“[T]he fact that it is possible to construe a rule’s language to reach conduct protected by the First Amendment is not fatal to its application to unprotected conduct.”).

130. *See, e.g.*, Aviel, *supra* note 16, at 40 (“[R]egulation of the legal profession is ‘legitimately regarded as a ‘carve-out’ from the general marketplace.’”).

131. *See, e.g.*, Blackman, *supra* note 14, at 256.

132. *See, e.g.*, Aviel, *supra* note 16, at 54 (“[I]t 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.”).



a broad range of professional conduct, including both litigation and transactional representations, as well as interactions with colleagues in one's law office, or in professional organizations outside of legal representation. Even while representing clients, lawyers might transgress in many ways. Different justifications might be offered depending on the context. As discussed below, most justifications relate to only a fraction of the speech covered by the rule, and broader justifications are not closely served by the rule's speech restriction.<sup>133</sup>

#### A. *Protecting the Lawyer-Client Relationship*

It seems easy to justify forbidding lawyers from gratuitously derogating or demeaning clients to their faces. The lawyer-client relationship is supposed to be one of trust and confidence.<sup>134</sup> Whether biased or not, lawyers' derogatory and demeaning attacks on clients undermine that fiduciary relationship.<sup>135</sup> But this justification covers only a narrow range of statements within the rule's reach. The interest in protecting the fiduciary relationship does not cover derogatory and demeaning statements targeting opposing parties, opposing counsel, colleagues, or anyone else aside from clients.

This is not to say that even a rule drawn narrowly to protect only clients may permissibly discriminate based on viewpoint. Lawyers' derogatory and demeaning comments may be just as painful to the client, and just as damaging to the client's trust, when based on irrelevant personal attributes outside the rule, such as the client's appearance or lack of education. Even the compelling interest in promoting clients' trust might not justify punishing gratuitous slights and slurs based on race, sex, religion, or another attribute covered by the rule, while exempting equally hurtful statements with other bases. Even if lawyers' gratuitously derogatory and demeaning speech could otherwise be restricted, it may not be possible to justify singling out certain biased remarks for harsher treatment.<sup>136</sup> But insofar as one is concerned with protecting the fiduciary relationship, it should be possible to craft a rule

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133. See *infra* Part III.A–E.

134. MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 20 (AM. BAR ASS'N 2020).

135. See Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J.L. & POL'Y (forthcoming 2022) (manuscript at 4, 15-16) (on file with authors). Arguably, derogating clients publicly or to some third parties would be a breach of the lawyer's fiduciary duty of loyalty and would, therefore, also be punishable, assuming the rule applies to some derogatory statements outside the target's presence. However, the fiduciary rationale might not apply to a lawyer's derogatory statements about a client made privately to colleagues or co-counsel.

136. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 393-94 (1992) (striking down a law that differentiated among "fighting words" and punished only those that were aimed at a protected class).

that does not discriminate based on the message contained in the lawyer's speech.

### B. *Protecting the Administration of Justice*

Likewise, the First Amendment probably would not protect gratuitously derogatory and demeaning comments that lawyers direct at the judge, court personnel, witnesses, and various others in adjudicative proceedings. By exempting "legitimate advice or advocacy,"<sup>137</sup> Rule 8.4(g) attempts to draw the line between advocates' speech that might be constitutionally protected because it advances the client's lawful interests by a procedurally permissible means, and advocates' derogatory, demeaning, and biased speech that harms the administration of justice rather than advancing it.<sup>138</sup>

Courts have broad authority to regulate speech in advocacy, and especially in court, to promote the administration of justice.<sup>139</sup> In the context of advocacy, restrictions on gratuitously derogatory and demeaning speech would probably serve compelling purposes like other restrictions on speech that are taken for granted.<sup>140</sup> For example, Rule 3.5(d), the professional conduct rule forbidding "conduct intended to disrupt a tribunal," proscribes some abusive speech as well as physical conduct.<sup>141</sup> The rule's restriction on speech is justified by the interest in preserving the decorum of the tribunal.<sup>142</sup> Restricting comments in court gratuitously derogating or demeaning the judge would serve essentially the same end. Likewise, Rule 4.4(a) forbids a lawyer from "us[ing] means that have no substantial purpose other than to embarrass" a party, witness, or another third person during a representation.<sup>143</sup> This restriction reaches speech gratuitously embarrassing the third person but can be justified because protecting participants from gratuitous

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137. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

138. *See id.*

139. *See, e.g., In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987) (citations omitted) ("Outside the courtroom the lawyer may, as any other citizen, freely engage in the marketplace of ideas and say all sorts of things, including things that are disagreeable and obnoxious . . . . But here respondent was in the courtroom, an officer of the court engaged in court business, and for his speech to be governed by appropriate rules of evidence, decorum, and professional conduct does not offend the first amendment.").

140. Thus, courts could adopt and enforce a rule forbidding derogatory and demeaning statements that are prejudicial to the administration of justice. We do not mean to suggest, however, that courts could adopt a rule forbidding derogatory and demeaning statements based on race, sex, religion, etc., that are prejudicial to the administration of justice but excluding other derogatory and demeaning statements that are prejudicial to the administration of justice. As previously noted, it is doubtful that any compelling justification is closely served by the distinction, which constitutes viewpoint discrimination. *See id.*

141. MODEL RULES OF PRO. CONDUCT r. 3.5(d) (AM. BAR ASS'N 2020).

142. *See id.*

143. *Id.* r. 4.4(a).

embarrassment encourages their willingness and ability to participate effectively in the legal process.<sup>144</sup> Barring gratuitously demeaning or derogatory comments to other participants in the legal process may promote a similar end. Parties and witnesses, who are often compelled to participate in litigation, should not be distracted or discouraged by derogatory, demeaning, or personally hurtful comments that are unrelated to legitimate advocacy. Insofar as Rule 8.4(g) applies to this sort of speech, one can regard it as a special application of Rule 8.4(d), which forbids “conduct that is prejudicial to the administration of justice,”<sup>145</sup> and which has been applied to speech in litigation,<sup>146</sup> including speech that Rule 8.4(g) covers.<sup>147</sup>

It is doubtful, however, that justifications relating to the administration of justice extend to another set of derogatory and demeaning remarks covered by Rule 8.4(g)—namely, a lawyer’s uncivil, biased comments to a lawyer’s opposing counsel or professional colleague. Courts cannot regulate lawyers’ interactions with each other as if lawyers are court employees. Much like private employers, courts and other public employers have broad authority to regulate the speech of employees while they are on the job.<sup>148</sup> Public employers may adopt workplace speech codes or otherwise regulate lawyers’ speech to promote the work environment or to promote the public agency’s mission.<sup>149</sup> But lawyers (other than actual court employees) are

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144. *See id.*

145. *Id.* r. 8.4(d) (“It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”). The interest in protecting the administration of justice would not justify sanctioning isolated incivility, however. *See, e.g., In re Snyder*, 472 U.S. 634, 647 (1985) (noting that “[t]he necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. However, even assuming that the letter exhibited an unlawyerlike rudeness, a single incident of rudeness or lack of professional courtesy—in this context—does not support” the imposition of discipline).

146. *See, e.g., Fla. Bar v. Martocci*, 791 So. 2d 1074, 1075 (Fla. 2001) (applying Rule 8.4(d) to a lawyer who disparaged the opposing party and counsel); *In re McClellan*, 754 N.E.2d 500, 501-02 (Ind. 2001) (applying Rule 8.4(d) to a lawyer whose rehearing petition demeaned the legal profession); *Miss. Bar v. Lumumba*, 912 So. 2d 871, 881 (Miss. 2005) (applying Rule 8.4(d) to a lawyer’s statements to a judge and to a newspaper reporter); *Bd. of Pro. Resp. v. Slavin*, 145 S.W.3d 538, 543, 550 (Tenn. 2004) (applying Rule 8.4(d) to disparaging statements in court filings).

147. *See, e.g., In re Williams*, 414 N.W.2d 394, 397-98 (Minn. 1987) (disciplining lawyer for antisemitic comment to opposing counsel in a deposition).

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

149. *See id.* at 426 (“We reject . . . the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.”); *Connick v. Myers*, 461 U.S. 138, 147 (1983) (holding that the First Amendment does not protect the speech of “a public employee [who] speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest”); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (stating that the State’s interests in regulating public employees’ speech “differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general”); *see, e.g., Lumpkin v. Brown*, 109 F.3d 1498, 1500 (9th Cir. 1997) (finding that the First Amendment did not forbid the city’s Human Rights Commission member from terminating a minister’s service where

independent of the courts,<sup>150</sup> and the courts' rulemaking authority is subject to the same First Amendment limits as that of state legislatures and other state regulatory entities when regulating private citizens.<sup>151</sup> This makes it harder for courts to justify restrictions on lawyers' biased speech that does not tangibly threaten either the lawyer-client fiduciary relationship or the administration of justice. Lawyers' interchanges may have no relationship to the administration of justice when they occur outside the context of litigation; moreover, in many cases, litigators' off-the-record discussions have no impact on the administration of justice, even in the course of litigation.

### C. *Protecting Targets of Demeaning, Derogatory, and Hurtful Speech*

In extreme cases, the restriction on lawyers' biased speech will be justified by the interest in protecting the targeted individual from harm that is more significant than momentary upset or anger. Lawyers' demeaning or derogatory speech may be so extreme or pervasive that it interferes with the targeted individual's ability to function in the legal workplace. At that point, the First Amendment allows the speech to be restricted because the government's interest in protecting the target and promoting a functioning legal environment is sufficiently compelling and well-served by restricting the objectionable speech. Not to mention that the line between speech and conduct is not so clear in this context. As previously discussed, public institutions, such as public universities, may adopt and enforce rules forbidding speech that is so extreme.<sup>152</sup> Courts should have comparable power to restrict speech that creates hostile work environments for lawyers and their employees. In determining in a particular situation whether one's speech causes cognizable harm, not just annoyance or anger, a court can take account of the content, including whether it is racist, sexist, or otherwise framed in a way that is particularly likely to create a hostile environment for its target.

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his "statements explicitly condemning homosexuality as a sin and implicitly endorsing violence against homosexuals are not simply hostile to the Commission's charge, they are at war with it").

150. See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542-43 (2001) ("The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept."); Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 621-22 (2013) (maintaining that lawyers' independence from the judiciary includes freedom to criticize judges).

151. See Aviel, *supra* note 16, at 47-48 (comparing Rule 8.4(g) with state and federal anti-discrimination laws that have been held compatible with the First Amendment).

152. See *supra* Part I.

But Rule 8.4(g) is not directed exclusively, or primarily, at lawyers' objectionable speech that impairs the target's ability to function.<sup>153</sup> In fact, the speech need not even address a particular individual or individuals, let alone harm them.<sup>154</sup> If the lawyer's speech is demeaning, derogatory, or hurtful and it is based on a protected class (by which we mean a class protected by the rule), the rule applies regardless of whether the lawyer's speech has any impact.<sup>155</sup> The result is that the rule reaches speech that is objectionable but that causes no harm to the lawyer-client relationship or the administration of justice, and that causes no cognizable harm to any individual. This will be true even when a lawyer demeans or derogates another lawyer directly.

By way of example, consider the *Wunsch* case, with which we began.<sup>156</sup> A criminal defense lawyer, Swan, sent a letter that derogated and demeaned the federal prosecutor, Artson, based on her gender.<sup>157</sup> Given the history of gender discrimination and subordination in the legal profession and in society generally,<sup>158</sup> Swan's letter may have pained Artson, notwithstanding that in this instance she was the more powerful lawyer both in the criminal case where they crossed swords (in which she secured Swan's disqualification) and in general (in that she wielded the prosecution's superior might).<sup>159</sup> Nothing suggested that the letter could impede Artson's ability to conduct her work and, as the appellate court explained, the letter had no tangible impact on the administration

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153. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

154. Josh Blackman has made a compelling argument that the First Amendment will often preclude Rule 8.4(g)'s application to lawyers' speech in educational programs and similar settings "related to the practice of law" but outside the actual delivery of legal services. Blackman, *supra* note 14, at 255-57 ("As drafted, the rule could discipline a wide range of speech on matters of public concern at events with only the most dubious connection with the practice of law. Though these laws may survive a facial challenge, they are quite vulnerable to individual challenges."). We think that his argument is too modest, in that even in the practice of law, the justifications for applying Rule 8.4(g) will often be insufficient to satisfy strict scrutiny.

155. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

156. *See supra* Part I.

157. *United States v. Wunsch*, 84 F.3d 1110, 1113 (9th Cir. 1996).

158. The legal profession's history of sexism, to the present day, has been documented extensively. *See, e.g.*, Katrina Lee, *Discrimination as Anti-ethical: Achieving Systemic Change in Large Law Firms*, 98 DENV. L. REV. 581, 597-98 (2021) (describing systemic gender discrimination and bias in law firms); Kimberly Jade Norwood, *Gender Bias as the Norm in the Legal Profession: It's Still a [White] Man's Game*, WASH. U. J.L. & POL'Y, 2020, at 25, 31-34 (describing gender bias in law practice). For discussions of the utility of Rule 8.4(g) in addressing gender bias in the legal profession, see Ashley Badesch, *Lady Justice: The Ethical Considerations and Impacts of Gender-Bias and Sexual Harassment in the Legal Profession on Equal Access to Justice for Women*, 31 GEO. J. LEGAL ETHICS 497, 507-09 (2018); Ashley Hart, *Sexism "Related to the Practice of Law": The ABA Model Rule 8.4(g) Controversy*, 51 IND. L. REV. 525, 537-38 (2018); Wendy N. Hess, *Addressing Sexual Harassment in the Legal Profession: The Opportunity to Use Model Rule 8.4(g) to Protect Women From Harassment*, 96 U. DET. MERCY L. REV. 579, 590, 592, 596-98 (2019).

159. *Wunsch*, 84 F.3d at 1112-13.

of justice.<sup>160</sup> At worst, the letter might have angered or disturbed Artson. This would be true even if Swan had sent the letter during ongoing proceedings in the criminal case—for example, right after Artson filed her disqualification motion.

Professional colleagues can have similar interactions where objectionable speech violating Rule 8.4(g) has merely an emotional sting. Suppose that a senior male prosecutor criticized Artson for complaining to her supervisor or for initiating disciplinary proceedings, telling her, “That was a ‘little girl’ move. Running to daddy makes you look weak. Next time, just beat the pants off him again,” to which Artson replied, “What do you know, you old coot! You have no idea what it’s like to be a young woman in this profession. You’re ancient and hopelessly out of touch!” Rule 8.4(g) would subject both lawyers to discipline for denigrating each other—the senior prosecutor because he targeted Artson’s gender, and Artson because she targeted her colleague’s age.<sup>161</sup>

As this imagined exchange illustrates, the rule covers more than the term “harassment” would ordinarily suggest.<sup>162</sup> It covers far more than harassment under civil rights law—for example, more than “unwelcome sexual advances [and] requests for sexual favors”<sup>163</sup>—and more than harassment under other professional conduct rules.<sup>164</sup> It covers speech that may be commonplace in law practice and elsewhere—namely, the subclass of derogatory, demeaning, or emotionally hurtful speech that is based on race, sex, religion, age, or another protected class. In this example, the lawyers were expressing viewpoints—as disparaging and demeaning speech often does—and the invocation of gender- and age-related stereotypes was tied to the views the lawyers expressed. They could have made their points without invoking objectionable, emotionally hurtful stereotypes. But the First Amendment would not allow the state to ban this type of expression generally, because the restriction would not closely serve a compelling state interest.

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160. *Id.* at 1116-17.

161. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020). We assume that these transgressions, like most, probably would not be reported to disciplinary authorities, and would probably not elicit disciplinary authorities’ interest if they were. But this is not necessarily a saving grace. *See* Park, *supra* note 15, at 279; Greenberg v. Haggerty, 491 F. Supp. 3d 12, 24-25 (E.D. Pa. 2020) (“Defendants effectively ask Plaintiff to trust them not to regulate and discipline his offensive speech even though they have given themselves the authority to do so. So, despite asking Plaintiff to trust them, there remains the constant threat that the rule will be engaged as the plain language of it says it will be engaged.”).

162. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 2020).

163. *Id.*

164. *See* ABA Comm. On Ethics & Pro. Resp., Formal Op. 493, at 7 (2020) (“Harassment is a term of common meaning and usage under the Model Rules. It refers to conduct that is aggressively invasive, pressuring, or intimidating.”).

*D. Promoting Public Confidence in the Legal Profession and the Legal System*

The comment to Rule 8.4(g) implies that even if others must be allowed to speak more freely, professional conduct rules may restrict lawyers' biased speech related to the practice of law because such speech "undermine[s] confidence in the legal profession and the legal system."<sup>165</sup> More than two decades ago, a state court advanced a similar rationale when it sanctioned a litigator under Rule 8.4(d) for moving to foreclose a lawyer of color from serving as a criminal defendant's co-counsel.<sup>166</sup> The court reasoned:

When any individual engages in race-based misconduct it undermines the ideals of a society founded on the belief that all people are created equal . . . . Left unchecked, such racially-biased actions as we have here not only undermine confidence in our system of justice, but also erode the very foundation upon which justice is based.<sup>167</sup>

The strict scrutiny test necessitates interrogating this claim insofar as it is used to justify content- or viewpoint-based restrictions on speech.

One problem with the ABA's theory is that in most cases, as in our examples based on *Wunsch*, the speech violating Rule 8.4(g) occurs privately—in a lawyer's private correspondence or private conversation.<sup>168</sup> The rule can apply not only when a lawyer derogates or demeans someone in a biased fashion to their face but also when the target is not present and never knows of the biased, demeaning remarks—and, indeed, even when the remarks do not refer to any particular individual.<sup>169</sup> Unless someone present publicizes the lawyer's remarks, the public is unlikely ever to know of them, much less be affected by them.

But even if the lawyer's biased speech is public, it is questionable that punishing it, ostensibly to promote public confidence in lawyers or the legal system, closely serves a compelling interest. As we argue regarding whether courts can punish lawyers who tell political lies in the public square, "the restriction must rest on more than mere conjecture; there must be persuasive evidence that the speech in question significantly erodes public trust."<sup>170</sup> We are unaware of any evidence that, when the public learns of lawyers who make hurtful, biased

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165. *Id.*; MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2020).

166. *In re Charges of Unprofessional Conduct Contained in Panel File 98-26*, 597 N.W.2d 563, 566-68 (Minn. 1999).

167. *Id.* at 567-68.

168. *See supra* notes 154-59 and accompanying text.

169. *See supra* notes 107-08 and accompanying text.

170. Green & Roiphe, *supra* note 135 (manuscript at 20, 50).

statements relating to law practice, the public's confidence in lawyers or the legal system tends to erode.

This sort of justification for limits on lawyers' speech is rarely invoked successfully and when it is, it is used to justify interactions with the public, like advertising,<sup>171</sup> solicitation,<sup>172</sup> and campaign donation requests.<sup>173</sup> The first two of these cases involve limits on commercial speech, which, unlike Rule 8.4(g)'s speech restriction, are subject only to intermediate scrutiny.<sup>174</sup> Even under this less exacting standard, the Court has been reluctant to uphold restrictions on speech based on this justification and requires that the government proceed not on speculation or intuition, but on a showing of actual harm to the profession that will in fact be alleviated by the regulation.<sup>175</sup> In *Williams-Yulee v. Florida Bar*,<sup>176</sup> the Court upheld a restriction on judicial campaign solicitations on the theory that it furthered the government's interest in preserving the reputation of the judiciary.<sup>177</sup> Justice Scalia argued in his dissent, however, that this application of strict scrutiny was inconsistent with case law:

The judges of this Court . . . evidently consider the preservation of public respect for the courts a policy objective of the highest order. So it is—but so too are preventing animal torture, protecting the innocence of children, and honoring valiant soldiers. The Court did not relax the Constitution's guarantee of freedom of speech when legislatures pursued those goals.<sup>178</sup>

In other words, even though the government's interest in the integrity of the profession is a noble one, the speech restriction must nonetheless be narrowly tailored to achieve it, an extremely difficult hurdle to clear.

Another problem in surviving strict scrutiny in this context is that much of the speech covered by Rule 8.4(g), and particularly the speech with which we are concerned, has nothing to do with "the legal system"

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171. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 367-72 (1977) (rejecting the government's argument that restrictions on advertising would directly advance the government's interest in preserving the reputation of the profession).

172. See *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 624-26 (1995) (relying on both the reputation of the legal profession and the government's interest in preserving the privacy of accident victims to justify the limits on mailed solicitations).

173. See *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 455 (2015) (upholding a limitation on judicial solicitation of campaign contributions under intermediate scrutiny because the rule directly advanced the interest in the reputation of the judiciary).

174. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) (requiring that the restriction advance the government's interest in a direct and material way); *supra* Part II.C.

175. *Went for It Inc.*, 515 U.S. at 625-26 (relying on a 106-page study showing that the public views direct mail solicitation as a poor reflection of the Bar).

176. 575 U.S. at 433.

177. *Id.* at 445.

178. *Id.* at 473 (Scalia, J., dissenting).



and little to do with “the legal profession.”<sup>179</sup> Will a lawyer’s biased comment or tasteless joke at a law firm event unrelated to law practice really erode the public reputation of the legal profession?

As discussed above, we are principally concerned with how Rule 8.4(g) applies in contexts where the speech at issue cannot fairly be said to be “prejudicial to the administration of justice.”<sup>180</sup> Concern for the public perception of the legal system cannot justify restrictions on speech that have no implication for whether the legal system functions fairly or whether it achieves fair outcomes. This rationale is irrelevant to speech in professional, educational, and social events—speech that seems to be covered by Rule 8.4(g) since it is “related to the practice of law.”<sup>181</sup> It is also irrelevant to speech in transactional representations and other representations unrelated to the legal system. And even in advocacy, the interest in promoting public confidence in the legal system is not closely served by a restriction on off-the-record speech between lawyers—whether between opposing counsel or between co-counsel. When lawyers’ biased speech has no impact on the course of justice, the speech is unlikely to erode public confidence in the legal system.

Lawyers’ biased speech also may have little or no implication for how the public perceives “the legal profession,” beyond perhaps confirming that in a profession of over a million lawyers, some lawyers are both uncivil and biased. There is no compelling reason to restrict lawyers’ speech to fool the public into believing this is not so: the public is entitled to know the truth. Besides that, the rule does little to keep the truth from slipping out. It leaves lawyers free in law practice to make demeaning, disparaging, and hurtful comments that are unbiased or to make biased statements that are not disparaging, demeaning, or hurtful. Further, lawyers may engage in uncivil, biased speech unrelated to law practice or harassing or discriminatory speech that promotes diversity and inclusion in the profession. Therefore, the rule does little to prevent uncivil, biased lawyers from revealing their true selves.

#### *E. Identifying Lawyers with Bad Character or Bad Views*

If speech covered by the rule undermines public confidence in the legal profession or the legal system, the reason cannot be because the speech itself causes some sort of harm beyond hurt feelings, because in many situations it will not. And the reason cannot be simply that the lawyers are revealed to hold the biased views that they expressed, since

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179. See MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020); Blackman, *supra* note 14, at 256-57.

180. See *supra* Part III.B.

181. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

the lawyers are allowed to express those views so long as they are not engaged in law-related practice.

One might posit that the rule's premise is that lawyers who express inappropriate bias related to law practice presumptively have a biased character that will spill out into other aspects of their legal work, just as other rules presuppose that a lawyer's dishonest act may reflect a general lack of integrity or a lawyer's criminal act may reflect general lawlessness.<sup>182</sup> But if this were a rule designed to weed out lawyers with a bad character for law practice, the rule would apply to all expressions of objectionable bias, not only to those that are linked to discrimination or harassment (as broadly defined in the comment);<sup>183</sup> it would sweep in biased statements regardless of whether they related to law practice. Given the rule's limitations, it is hard to defend it as a rule targeting bad character.

Beyond that, the profession has never adopted the view that an unbiased character is a prerequisite for law practice. Although, in an extreme case, the Illinois admissions authorities denied admission to Matthew Hale, an avowed white supremacist, largely because of his overtly racist views,<sup>184</sup> his conduct provided further grounds for the decision,<sup>185</sup> and some questioned whether avowed racism would have sufficed.<sup>186</sup> With the possible exception of Hale, we know of no examples of racists, sexists, religious bigots, homophobes, etc., being excluded from the profession because of their biased views. The courts, through the admissions and disciplinary processes, may exclude people who are dishonest or lawless,<sup>187</sup> but we doubt they may exclude those

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182. See *id.* r. 8.4(c)–(d).

183. *Id.* r. 8.4 cmt. 3.

184. For discussions of the various decisions regarding Hale's application to the Illinois Bar, see Jason O. Billy, *Confronting Racists at the Bar: Matthew Hale, Moral Character, and Regulating the Marketplace of Ideas*, 22 HARV. BLACKLETTER L.J. 25, 29–32 (2006); Richard L. Sloane, Note, *Barbarian at the Gates: Revisiting the Case of Matthew F. Hale to Reaffirm That Character and Fitness Evaluations Appropriately Preclude Racists From the Practice of Law*, 15 GEO. J. LEGAL ETHICS 397, 416–29 (2002).

185. See Sloane, *supra* note 184, at 431 (maintaining that denying Hale admission to the Bar was warranted by “the totality of the circumstances—Hale’s beliefs, his record of violence, various lies, and concealment of material information”).

186. See Billy, *supra* note 184, at 41 (“[T]he First Amendment does not allow state bar authorities to speed up the death of racism through the kind of politicization of the bar admission process exhibited by Illinois’s Committee on Character and Fitness in Hale’s case.”); Steven Lubet, *Can a Racist Be a Lawyer?*, CHI. TRIB. (Aug. 3, 1999, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-1999-08-03-9908030019-story.html> (“Racist ideas are ideas nonetheless, and once we begin penalizing people for their opinions it is impossible to predict where the process will stop.”). But see Carla D. Pratt, *Should Klansmen Be Lawyers?: Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857, 909 (2003) (“So if color-blindness is the goal for our legal system and not just a catchy phrase to be used to promote the interests of whites, then persons who seek to use color as the basis to deny our citizens of color full participation in and protection under our legal system should be excluded from the bar.”).

187. See, e.g., *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 262–64 (1957).

who are biased. While the legal profession and law practice have been prone to racism,<sup>188</sup> sexism,<sup>189</sup> religious bigotry,<sup>190</sup> anti-gay bias,<sup>191</sup> ageism,<sup>192</sup> and other biases, and courts are right to take countermeasures, they cannot punish lawyers who reject their views of equality. For example, Swan could not be excluded from law practice for believing that “[female lawyers are outside the law, cloud truth and destroy order,]” for publicly espousing this belief (however absurd), or for possessing a biased character given this avowed belief.<sup>193</sup>

Even if courts were to attempt to rid the profession of those who would bring disfavored biases to their work, it is doubtful that a lawyer’s violation of Rule 8.4(g) demonstrates that one possesses a biased character that will be expressed in one’s law practice more generally. The traditional idea that lawyers have a discernible character—for example, for honesty or lawfulness—that predicts how they will conduct their legal practices rests on shaky grounds from a social science perspective.<sup>194</sup> The idea that non-bias, in particular, is such a defining, immutable trait of character, not just a set of beliefs, is novel. And if there is such a thing as a biased character that predicts how one practices

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188. See, e.g., John G. Browning, *Righting Past Wrongs: Posthumous Bar Admissions and the Quest for Racial Justice*, BERKELEY J. AFR.-AM. L. & POL’Y, 2021, at 1 *passim* (describing posthumous admission of Bar applicants who were denied admission on racial grounds); Raymond H. Brescia, *Lessons From the Present: Three Crises and Their Potential Impact on the Legal Profession*, 49 HOFSTRA L. REV. 607, 651-62 (2021) (describing the legal profession’s response to its current lack of diversity); Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 817 (2019) (“[T]he history of overt, systematic discrimination, racism, and misogyny throughout the American legal profession remains undisputed, and its impact continues to resound in the lives of lawyers today.”); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?*, 84 CAL. L. REV. 493, 509-10 (1996) (identifying racism as among the barriers limiting the number of Black lawyers in corporate law firms).

189. See *supra* note 158.

190. See, e.g., Sarah Malik & Mustafa T. Kasubhai, *Is There a Place for Us? On Being a Muslim-American in Oregon’s Legal Community*, OR. ST. BAR BULL., Feb.–Mar. 2021, at 18, 24 (“[I]t’s important to acknowledge that for most of my adult life—including in law school, private practice and as a judge—I have had a recurrent experience whenever a tragic act of terrorist violence occurs anywhere in the world . . . I brace for the backlash of hate crimes directed at anyone who might look like a Muslim, including family members, friends and me.”).

191. See, e.g., Los Angeles County Bar Association’s Ad Hoc Committee on Sexual Orientation Bias, *The Los Angeles County Bar Association Report on Sexual Orientation Bias*, 4 S. CAL. REV. L. & WOMEN’S STUD. 305, 310-36 (1995) (documenting sexual orientation discrimination in the legal profession).

192. See, e.g., Ashleigh Parker Dunston, *A Call to Action: Fighting Racial Inequality Behind the Bench*, 43 CAMPBELL L. REV. 109, 109 (2021) (“I’m a thirty-three-year-old, black woman and have been practicing law for only the last eight years and serving on the bench for the past three years; however, even during that small amount of time, I have experienced my fair share of racism, sexism, and ageism. I’ve been asked if I’m the secretary, ignored during calendar calls, told that I was ‘unqualified, inexperienced, and too young’ to be a judge, and had a defendant ask for a ‘white male judge next time’—just to name a few of my experiences.”).

193. See *United States v. Wunsch*, 84 F.3d 1110, 1113, 1116-17 (9th Cir. 1996).

194. See Green & Roiphe, *supra* note 135 (manuscript at 39).

law, there is no reason to think that a single violation of Rule 8.4(g) reveals it.

In sum, when it comes to a significant amount of speech covered by Rule 8.4(g) as the ABA interprets it, we doubt that Rule 8.4(g) closely serves a compelling interest in promoting public confidence in the legal profession or the legal system. If Rule 8.4(g) advances these interests by targeting certain biased speech that derogates, demeans, or causes emotional harm, it is not because the particular speech itself undermines public confidence in the legal profession or the legal system. It is because the professional conduct rule itself makes a statement.

Specifically, the rule expresses the commitment of the organized Bar and, where the rule is adopted, of state courts to the values or principles animating the rule—namely, that people are entitled to equal dignity regardless of their race, sex, religion, etc., and should not be subject to gratuitously hurtful comments targeted at these attributes.<sup>195</sup> We do not doubt that courts can and should express this commitment and that the organized Bar should encourage courts to do so. But courts must express this commitment other than by restricting speech that expresses an opposing viewpoint.<sup>196</sup> The state (including through judicial rulemaking) cannot permissibly punish lawyers' speech to affirm the judiciary's commitment to a different viewpoint, however convinced we are that the judiciary's view of equality is essential to the fair and just operation of the courts.

While some speech covered by the rule can be restricted, not all can be. As construed by the accompanying comment and by the ABA Ethics Opinion, the rule covers much speech that is constitutionally protected

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195. Cf. Gillers, *supra* note 17, at 222-24. In this respect, the rule might be characterized as “largely symbolic.” See Meredith R. Miller, *Going Beyond Rule 8.4(G): A Shift to Active and Conscious Efforts to Dismantle Bias*, 10 J. RACE, GENDER, & ETHNICITY 23, 33 (2021). Of course, the symbolic meaning addresses only derogatory speech that demeans certain groups. If the speech promotes diversity and inclusion, it is acceptable to the Bar. MODEL RULE OF PRO. CONDUCT r. 8.4(g), cmt 4 (AM. BAR. ASS'N 2020).

196. See, e.g., *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]here are some purported interests—such as a desire to suppress support for . . . an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule.”). While equality is a noble goal—one that is embodied in the 14th Amendment of the Constitution—it is, in this context, in tension with the Constitution's commitment to self-determination, which is, in turn, embodied in the First Amendment's right to free speech. It is not clear why the Bar's reputation depends on the former but not the latter or why the Bar should resolve that tension in any way differently from how the law resolves it for the general public. For a discussion of the tension between equality and self-determination and its implications for hate speech, see Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 290-93 (1991).

because no compelling interest is closely served by forbidding it.<sup>197</sup> The *Wunsch* case, and our further scenarios based on it, illustrate this.

#### IV. WHY PROFESSIONAL RESPONSIBILITY RULES SHOULD NOT PUSH THE EDGES OF FIRST AMENDMENT LAW

Even if Model Rule 8.4(g) can withstand a facial challenge, state courts should not adopt it because they should not flirt with the First Amendment's limits. To be sure, purging the profession of biased, hateful speech is a noble cause. But like other such worthy causes, it should, as a general matter, be pursued by means other than banning speech. Rule 8.4(g) will chill valuable speech, and its broad language leaves a dangerous amount of discretion to regulators to pick and choose which violations to pursue.

Many of the cases dealing with university and college harassment policies emphasize that college is a place where open dialogue is fundamental, and the same might be said of law offices and bar associations. As one court explained, "Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular."<sup>198</sup> Certainly, when a lawyer is acting in court or in his role as a fiduciary, this would not be an accurate description of the profession.<sup>199</sup> Limits on speech are necessary to ensure the proper administration of justice. But lawyers play a number of roles in society. They are also professors, government officials, pundits, advocates of law reform, and public intellectuals. Sometimes those roles overlap with legal work as lawyers represent important, and at times contrarian, views in court.<sup>200</sup> In these roles, lawyers too are tasked with engaging in public debate. One might even argue that given their education and training, lawyers are particularly well-suited to this job. The Bar should encourage rather than chill them in this endeavor.

A diverse bar is also desirable because even in their representative capacity, lawyers give voice to a wide array of different clients, some with unpopular views. As a general matter, this is important to ensure

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197. See MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2020); ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 7 (2020).

198. *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010).

199. See ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM* 43-45 (2012) (ebook) (arguing that professions and other experts need to limit speech in certain contexts to promote the development of expert knowledge).

200. See *id.* at 43 (arguing that professionals and experts play many roles and that their speech must be protected insofar as they are contributing to a discourse in the public square). The Supreme Court has made clear that some speech in court is protected speech for this reason. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 538-39, 544, 549 (2001) (striking down funding restrictions that limited the arguments that Legal Aid lawyers could make on behalf of clients).

that the diverse perspectives in society can find representation.<sup>201</sup> In the past, the Bar has used rules that limit speech to deter or divest itself of lawyers with unpopular views. It has done so in part to exclude or deter those who would be most likely to represent unpopular clients. In the McCarthy Era, for instance, the Bar used its character and fitness review process,<sup>202</sup> rules against offensive speech in the courtroom,<sup>203</sup> and rules about prejudicing ongoing proceedings<sup>204</sup> to chill lawyers who represented controversial clients and positions.<sup>205</sup> The Bar embraced its fight against communism with the same fervor it currently invokes to battle discriminatory speech and conduct.<sup>206</sup> This was a dark moment in the Bar's past. It is not that we value lawyers who spew hateful speech, quite the contrary, but if the Bar takes an expansive view of its power to police lawyers' speech, it will inevitably use this to stifle the voices of unpopular but worthy lawyers and clients in the future. It may well chill those with reasonable views as it seeks out the truly hateful lawyers. This is especially so as some critics define racism so broadly to include any support for policies that impact races differently.<sup>207</sup>

In drafting Rule 8.4(g), the ABA seemed to acknowledge this concern by carving out an exception when the lawyer is engaged in "legitimate advice or advocacy."<sup>208</sup> But if there are some messages that would be appropriate to utter on behalf of a client, say, "homosexuality

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201. Of course, representing a client does not necessarily mean that a lawyer shares or approves of that client's views, beliefs, or objectives. MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 2020). But lawyers can also choose their clients, and many choose not to represent clients with whom they disagree, especially high-profile clients. See Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 111-12 (1995) (arguing that lawyers can choose their clients and therefore owe an obligation to explain why they choose to represent controversial clients). In a dissent in a libel case, Chief Justice Warren Burger explained that this fundamental role of lawyers in representing unpopular causes ought to inform First Amendment analysis when lawyers are involved. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 355 (1974) (Burger, C.J., dissenting).

202. See, e.g., *Law Students Civ. Rts. Rsch. Council, Inc. v. Wadmond*, 401 U.S. 154, 159 (1971); *In re Stolar*, 401 U.S. 23, 29 (1971); *Baird v. State Bar of Ariz.*, 401 U.S. 1, 7 (1971); *In re Anastaplo*, 366 U.S. 82, 83 n.1, 88 (1961); *Schwartz v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 239 (1957); *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 259-61 (1957).

203. See *In re Disbarment of Isserman*, 345 U.S. 286, 289 (1953). This decision was set aside. *In re Disbarment of Isserman*, 348 U.S. 1, 1 (1954) (per curiam).

204. *In re Sawyer*, 360 U.S. 622, 623-26 (1959) (reviewing a case in which the lawyer had been sanctioned for a speech she made six weeks after a trial had begun criticizing the government prosecution in a Smith Act case).

205. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 231-263 (1976) (ebook).

206. See Arthur G. Powell, *The Point Where Toleration Ends*, 34 A.B.A. J. 696, 696 (1948) (insisting on a crusading effort to purge the ranks of the Bar of communism).

207. IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 13-24 (2019). This is not merely speculative. A judge speaking at a university event noted that certain racial groups commit crimes at a rate disproportionate to their population. A disciplinary complaint was filed against her that resulted in a nearly two-year investigation. *Greenberg v. Goodrich*, No. 20-03822, 2022 WL 874953, at \*2 (E.D. Pa. Mar. 24, 2022).

208. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

is a sin and, therefore, my religious client should not have to bake a cake for a gay marriage,” why should those same messages be banned if spoken by the lawyer on her own behalf at a law-related function? Why are a smaller subset of views acceptable within the legal profession than without?

Throughout the first half of the twentieth century, the Bar also exploited what it considered its special ability to repress speech to enforce rules against solicitation and advertising.<sup>209</sup> These rules, too, were used to exclude newcomers to the profession, immigrant lawyers, and others who represented plaintiffs and had to use advertising to obtain clients.<sup>210</sup> The Supreme Court ultimately invalidated many of these restrictions on lawyer advertising on First Amendment grounds.<sup>211</sup> But, as historian Jerold Auerbach has argued, this was only after the Bar had managed to shape the course of substantive law by excluding lawyers who would represent the needs of the poor.<sup>212</sup>

African American lawyers, too, have been the target of the Bar’s aggressive enforcement of speech-related offenses. The Oklahoma Bar Association, for instance, sought sanctions against a lawyer for calling a trial judge a racist, and a lawyer in Arkansas was disbarred for, among other things, accusing a white lawyer of racism.<sup>213</sup> Cases like this do not prove a pattern but they do show that rules targeting speech are used differently by different authorities. The best way to protect less powerful lawyers is to avoid aggressive use of speech restrictions, not to broaden discretion in the area. Rule 8.4(g) does the latter.

The legal profession is also one that thrives on the clash of ideas, the confrontation with contrary arguments, and robust debate. Of course, this should be carried on in a civil manner, and biased and derogatory words are not only unnecessary but unwelcome in professional discourse. But there are ways of promoting civility in the profession other than pushing the limits of the First Amendment, which will invariably chill useful debate. Enforcing norms of the profession by imposing reputational consequences does a great deal to develop a code of conduct. If lawyers cannot model the willingness to fight unpopular, even hateful views, by arguing against them rather than punishing them,

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209. See AUERBACH, *supra* note 205, at 42-44.

210. See *id.* at 43.

211. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

212. See AUERBACH, *supra* note 205, at 42.

213. See *State ex rel. Okla. Bar Ass’n v. Porter*, 766 P.2d 958, 960-61 (Okla. 1988). The *Porter* court refused to impose sanctions, but the case nonetheless shows that different bars can use their discretion to pursue lawyers for their speech to target minorities. W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L. Q. 305, 391 (2001) (citing *Porter*, 766 P.2d at 969). In *Ligon*, the court disbarred a black lawyer for, among other things, insulting a white lawyer and calling him a racist. *Ligon v. McCullough*, 247 S.W.3d 868, 869 (Ark. 2007) (*per curiam*); *Ligon v. McCullough*, 303 S.W.3d 78, 85 (Ark. 2009).

then who can? Restraints on lawyers' speech should be reserved for speech that is not constitutionally protected—for example, biased or discriminatory speech that betrays the lawyer's fiduciary obligations, interferes with the administration of justice, or harms others in a concrete way beyond angering or saddening them.

Like workplace harassment laws,<sup>214</sup> Rule 8.4(g) will chill protected speech. Workplace harassment laws chill speech, in part, by inducing employers who are concerned about civil liability to steer their employees away from the line.<sup>215</sup> Most legal employers are covered by workplace harassment laws, and Rule 8.4(g), by expanding on the scope of anti-harassment law, will cause legal employers to regulate lawyers' speech even more aggressively. Even with the caveats in the ABA opinion,<sup>216</sup> and scholars' reassurances that regulators will not pursue pure political speech,<sup>217</sup> lawyers may hesitate to share opinions or make arguments that could conceivably be viewed as harassment or discrimination under the broadly worded rule. A lawyer's speech at a CLE program arguing that same-sex marriage should not have been afforded constitutional protection or another lawyer's argument about the value of policing low-level crime might never occur for fear of sanction. These opinions may be unpopular, but they should be heard.

Justice Brandeis famously wrote, "If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."<sup>218</sup> This concept is not alien to the legal profession, but rather the nature of our trade. Law school teaches us to combat words with more words. The organized Bar and courts should not test the limits of the First Amendment but should encourage lawyers to use their skills and training to try to guide the public discussion in the right direction.

Consider one last scenario, again building on the *Wunsch* case.<sup>219</sup> Suppose that the lawyer, Swan, tells a group of junior male lawyers at his law firm or in a social gathering, "Never trust a female prosecutor." The ABA Ethics Opinion interpreting Rule 8.4(g) tells us that this sort of remark violates the rule.<sup>220</sup> But we question the rule's premise that this belief, however deplorable, is best suppressed on pain of professional discipline. One can anticipate, among a group of junior lawyers who are

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214. See *supra* notes 84-86 and accompanying text.

215. Volokh, *supra* note 105, at 1811-14.

216. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 9 (2020).

217. See Gillers, *supra* note 17, at 235.

218. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis & Holmes, J. J., concurring). Former head of the ACLU, Nadine Strossen defends this principle when it comes to hate speech. NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 14-15 (Geoffrey R. Stone, ed., 2018) (ebook).

219. *United States v. Wunsch*, 84 F.3d 1110, 1112-13 (9th Cir. 1996).

220. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 5-6, 8 (2020).



trained to question and to demand evidence for dubious assertions, Swan would be pressed to defend his view. In response, Swan might express a general animus toward women or a stereotypical belief that women are untrustworthy because they do not play fair; or he might generalize specifically about female lawyers or female prosecutors based on his particular experience with Elana Artson. It is hard to imagine that Swan's audience would accept his explanation, and regardless of his status, it seems likely they would challenge it, perhaps even persuading him to acknowledge that his view is unfounded.

This is not to say that more speech is always a perfect, or even a very effective, way of countering unpleasant, offensive, or wrong speech, but rather that it is better than the alternative. Nadine Strossen, former head of the ACLU, has argued that laws aimed at hate speech generally do more harm than good.<sup>221</sup> No matter how well-intentioned, these laws are invariably used to suppress the views of those who oppose government policies or support minority beliefs or ideas.<sup>222</sup> They entrench the power of dominant groups and further disempower minorities and other marginalized people. Not only that, but as Strossen demonstrates, censorship is not even an effective way to address intolerance.<sup>223</sup> Historically, laws aimed at curtailing hate speech are not correlated with the reduction of hate. The laws tend to drive such speech underground or force its users to disguise their bigotry in a way that makes it more socially acceptable but no less insidious. In addition, banning speech can actually draw people's attention to the speech, amplifying its message rather than stifling it.<sup>224</sup>

Some have argued, to the contrary, that regulating racist speech will ultimately promote the ends of the First Amendment, particularly the integrity of public discourse. Put another way, the goal of equality embodied in the Fourteenth Amendment demands subordination of free speech rights. As Robert C. Post points out, those opposed to flag burning made a similar argument: free speech ought to be compromised just a little bit by banishing this one clearly distasteful message, for important reasons.<sup>225</sup> This balancing of the very minor nature of the speech infringement with the importance of a particular societal goal is neither sanctioned by current case law nor wise.<sup>226</sup> As Post explains,

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221. STROSSEN, *supra* note 218, at 14-15.

222. *Id.* This is often called the "Streisand Effect," named after an incident in which Barbara Streisand tried to erase images of her home from social media, leading to an even wider dissemination of the images. *Id.* at 146.

223. *Id.* at 157, 160-62, 164.

224. *Id.* at 136.

225. Post, *supra* note 196, at 314-15.

226. *United States v. Stevens*, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").

“[T]here is no shortage of powerful groups contending that uncivil speech within public discourse ought to be ‘minimally’ regulated for highly pressing symbolic reasons.”<sup>227</sup> While most will agree that equal treatment for those who have experienced historic discrimination is a noble goal, it is not, in a principled way, different from patriotism, protecting and honoring the military, or preventing the spread of communism, which have all been invoked in the past to suppress offensive speech.<sup>228</sup> There are ways for us to pursue equality in the public square, as well as in the profession, that do not involve stifling speech. And if suppressing speech is necessary, the strict scrutiny test strikes the right balance. The government can compromise free speech for the sake of equality only when doing so is absolutely necessary to achieve equality or any other noble goal.

Perhaps, the legal profession is different. Perhaps, it ought to be more committed to equality than the outside world. But this does not change the calculus, because the profession must also have an equally enhanced obligation to uphold and embody First Amendment values, like a robust public discourse. If the profession is committed to the Constitution and the rule of law, it is not clear why the potential clash between these two values ought to be resolved differently within the profession than without.

Courts have a history of employing professional conduct rules to restrict lawyers’ speech, testing, and sometimes overstepping the constitutional limits. For example, some courts have aggressively policed lawyers’ false criticisms of judges.<sup>229</sup> Rule 8.2(a), which bars falsehoods about judges’ integrity or qualifications, has mostly been applied to lawyers who lie in court or in pleadings during a proceeding, but the rule also allows courts to punish lawyers for false statements unrelated to an ongoing or pending court case.<sup>230</sup> First Amendment scholars have criticized the rule, contending that lawyers play a vital role not only as officers of the court, but also as a check on judicial power, and that in that latter role they need latitude to criticize courts.<sup>231</sup> We

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227. Post, *supra* note 196, at 316.

228. See, e.g., *Cohen v. California*, 403 U.S. 15, 25-26 (1971) (reversing a conviction for disorderly conduct based on the defendant’s wearing a jacket with the words “Fuck the Draft”); *Tex. v. Johnson*, 491 U.S. 397, 399, 420 (1989) (affirming reversal of a conviction for destroying a venerated object based on the defendant’s burning a flag at a rally to protest former President Reagan’s policies); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (striking down a requirement that recipients of Communist literature notify the Post Office that they wish to receive it).

229. See MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS’N 2020); Green & Roiphe, *supra* note 135 (manuscript at 30).

230. See MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS’N 2020).

231. Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 373 (2010) (arguing that a right to impugn the judiciary even during proceedings is necessary to ensure litigants’ rights to a fair judiciary); Erwin Chemerinsky,

agree with this criticism, but even if the rule were sound, it differs from the anti-harassment rule which is in no way limited to speech that affects the administration of justice or the decorum of the courtroom.

Under the guise of civility or preserving the reputation of the profession, the Bar has used rules to exclude or persecute the most marginalized within the profession.<sup>232</sup> Adopting Rule 8.4(g), which tests or pushes the First Amendment limits, will create a precedent going forward that may later be used in a nefarious way. Better to learn from history and back away from that line.

## V. CONCLUSION

Model Rule 8.4(g) would be unconstitutional viewpoint discrimination and content regulation if it were aimed at the public more broadly.<sup>233</sup> As fiduciaries to courts and clients, lawyers may be subject to greater speech restrictions than others if their words clearly interfere with these roles, or if the restrictions otherwise serve a compelling state interest, but there is no categorical exception to the First Amendment for professional speech.

As our analysis reveals, Rule 8.4(g) covers a significant amount of protected speech because, in many instances in which it applies, it is not narrowly tailored to serve any compelling government interest.<sup>234</sup> We do not focus on whether the rule is unconstitutional on its face, however. We argue that state courts should not adopt rules like this one when they come close to the line drawn by the First Amendment guarantee of freedom of speech.<sup>235</sup> History shows that restrictions on lawyers' speech are employed to chill valuable expression and that regulators use the discretion afforded by such restrictions against the most unpopular and marginalized lawyers and causes.

Others have focused on the rule's most obvious constitutional deficiency: that it allows courts to punish lawyers for advancing controversial and offensive views in a legal educational forum. We have sought to show that the rule also covers a wide range of protected speech in the legal workplace and in legal representations.<sup>236</sup> We give the

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*Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 884-86 (1998) (arguing that the actual malice test ought to apply to lawyers in disciplinary proceedings for impugning the reputation of a judge).

232. See AUERBACH, *supra* note 205, at 3-14 (arguing that the Bar is motivated by an elite desire to secure its own status and serve capitalist interests); James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725, 730-52 (2005) (chronicling the Bar's history of using discipline to punish and exclude lawyers who represent controversial causes).

233. See *supra* Part II.A-B.

234. See *supra* Part III.A-E.

235. See *supra* Part IV.

236. See *supra* Part III.A-E.

example of the criminal defense lawyer in the *Wunsch* case who sent an offensive, sexist letter to a prosecutor.<sup>237</sup> The words did not affect the prosecutor's work, nor did they interfere with the judicial process, but Rule 8.4(g) would clearly apply, nonetheless. While we join the vast majority of lawyers who would condemn this missive, we emphasize that the lawyer expressed a viewpoint, an idea entitled to First Amendment protection. If this lawyer were punished, others might well refrain from criticizing prosecutors in the future, out of a fear that they could say something biased or derogatory. With so many potential violations of the rule, regulators will have to pick and choose. Trusting them to pursue only the truly bad actors would be unwise. History shows, to the contrary, that this sort of discretion is consistently exercised against lawyers who represent unpopular causes, marginalized lawyers, and others who are seeking controversial law reform.

Instead of opting for repression, lawyers trained in argument and persuasion should work to inspire the profession to become a more civil and inclusive group. There is no evidence that restrictions on speech like Model Rule 8.4(g) achieve their ambitions. The rule may deter racist and sexist lawyers from openly speaking their minds, but these lawyers' hateful views may well take a more insidious form. While it is appropriate for disciplinary rules to address harmful *conduct*, the better response to most hateful speech is more speech.

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237. See *supra* notes 25-39 and accompanying text.