

EXPRESSING CONSCIENCE WITH CANDOR: SAINT THOMAS MORE AND FIRST FREEDOMS IN THE LEGAL PROFESSION

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This Article explores recent challenges to lawyers' "first freedoms" under the First Amendment to the United States Constitution, especially freedom of speech, with particular attention to the ABA's 2016 adoption of Rule 8.4(g) of the Model Rules of Professional Conduct. It begins with a brief reflection on sixteenth-century England's Thomas More, patron saint of lawyers, and the meaning that his life and example may offer for lawyers today. Next, it analyzes a profoundly flawed 1996 Tennessee ethics opinion advising a lawyer who was court appointed to represent minors seeking abortions, and its troubling implications for lawyers with traditional religious and moral views relating to their practice of law. It then examines multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, socially conservative lawyers' justified distrust of new speech restrictions, and the impact of the United States Supreme Court's 2018 decision in *National Institute of Family & Life Advocates v. Becerra* on "professional speech" under the First Amendment. It concludes with a call for the American legal profession to embrace a vision of diversity that includes, rather than excludes, socially conservative lawyers who dissent from its currently dominant moral views, including on matters of sexual ethics.

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INTRODUCTION

I do none harm, I say none harm, I think none harm.

—Thomas More, in *A Man for All Seasons*¹

It isn't difficult to keep alive, friends—just don't *make* trouble—or if you must make trouble, make the sort of trouble that's expected.

—The Common Man, in *A Man for All Seasons*²

1. ROBERT BOLT, *A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS* 160 (First Vintage International ed., Vintage Books 1990) (1960) (from the playwright's account of Thomas More's words spoken before receiving his sentence of death for "High Treason").

2. *Id.* at 162–63 (from his concluding narrative comments after More's execution).

In June 1996, the Board of Professional Responsibility of the Supreme Court of Tennessee issued an ethics opinion (the “1996 Tennessee Ethics Opinion”)³ that marked a new and troubling turning point in the already ongoing cultural movement in the legal profession to marginalize and deter its traditionalist moral dissenters. It involved a “devout Catholic” lawyer who had been court appointed to represent a client who was requesting a judicial bypass to Tennessee’s statutory parental-consent requirement for minors seeking abortions.⁴ In sum, the Board advised the lawyer: (1) it would be ethically improper to seek relief from the appointed representation on religious and moral grounds; and (2) it would be ethically suspect to offer counseling to the client with insights borne of the lawyer’s religious and moral convictions concerning abortion, including the possible benefits of notifying her parents instead of pursuing the judicial bypass.⁵

Twenty years later, in August 2016, the House of Delegates of the American Bar Association (“ABA”) adopted Rule 8.4(g) of the Model Rules of Professional Conduct (the “Model Rules”). Its provisions, which elicited strong external opposition and rapidly evolved only weeks before the vote occurred, included broad language prohibiting “discrimination” and “harassment” by lawyers in conduct “related to the practice of law.”⁶ The Comment to Model Rule 8.4(g) defines “discrimination” as including “verbal . . . conduct” (that is, speech) that “manifests bias or prejudice towards others” and “harassment” as including “derogatory or demeaning verbal . . . conduct” (that is, speech).⁷ Many lawyers and legal academics, both before and after its adoption, recognized Model Rule 8.4(g)’s deliberately broad prohibitions on lawyers’ “manifest[ing] bias or prejudice towards others” and “verbal . . . conduct” not invol-

3. Bd. of Prof’l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 96-F-140 (Appointed Counsel for Minor in Abortion Case) (1996) [hereinafter 1996 Tennessee Ethics Opinion], 1996 WL 34565491, https://www.tbpr.org/ethic_opinions/96-f-140 [<https://perma.cc/3NCX-KX5Q>].

4. *Id.* at *1, *3.

5. *Id.* at *2–4.

6. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2018).

7. *Id.* r. 8.4 cmt. 3.

ing the representation of clients as effectively creating an ideological speech code for the American legal profession.⁸

This Article explores the need to sustain strong protections for lawyers in maintaining their personal integrity relating to the practice of law,⁹ and examines how recent developments in the legal profession are imperiling lawyers' "first freedoms" under the First Amendment to the United States Constitution.¹⁰ It advocates for a robust understanding of lawyers' freedom to speak (or not speak) consistently with their religious and moral convictions. Part I sets the stage by considering the example of Saint Thomas More (1478–1535), who served as Lord Chancellor of England during the tumultuous reign of King Henry VIII¹¹ and was canonized as a saint in the Catholic Church in 1935, four hundred years after his martyrdom.¹² Part II considers the 1996 Tennessee Ethics Opinion in detail, including academic scholarship that has criticized its narrow vision of the

8. See, e.g., RONALD D. ROTUNDA, *THE ABA DECISION TO CONTROL WHAT LAWYERS SAY: SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT* (Heritage Found., Legal Memorandum No. 191, 2016) [hereinafter ROTUNDA, *SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT*], <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf> [<https://perma.cc/8PBW-VEPP>]; RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 8.4-2(j) (2018–2019 ed.); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 *GEO. J. LEGAL ETHICS* 241 (2017) [hereinafter Blackman, *A Pause for State Courts*]; George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 135 (2018); Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 *J. LEGAL PROF.* 201 (2017).

9. See generally Michael S. McGinniss, *The Character of Codes: Preserving Spaces for Personal Integrity in Lawyer Regulation*, 29 *GEO. J. LEGAL ETHICS* 559 (2016).

10. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Although "first freedoms" traditionally refers to religious liberties under the Free Exercise Clause, the contemporary legal debates addressed in this Article illustrate how the core freedoms of religious exercise and speech are closely intertwined. For the purposes of this Article, they share "United Status" as our "first freedoms."

11. See generally PETER ACKROYD, *THE LIFE OF THOMAS MORE* (1998) (offering a comprehensive narrative of More's life from birth to death).

12. Veryl Victoria Miles, *A Legal Career for All Seasons: Remembering St. Thomas More's Vocation*, 20 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 419, 420 n.3 (2006) (citing Robert F. Drinan, *Renaissance Lawyer, Renaissance Man*, 99 *HARV. L. REV.* 499 (1985)).

lawyer's role as one separated from moral considerations, and its implicit expectations that lawyers must consistently subordinate and set aside their religious faith in deference to the positive law of lawyering. Part III examines Model Rule 8.4(g) and its reception in state courts, the practicing bar, and legal academia. It also considers how Model Rule 8.4(g) constitutes an armed-and-ready weapon for marginalizing and deterring expression by lawyers whose traditional religious and moral convictions on matters of sexual ethics dissent from those endorsed by the organized bar and currently dominant in the American legal profession. It also explains why the rule's history and its advocates' expressed objectives for a "cultural shift" in the legal profession make its adoption a significant risk to lawyers with such traditional views. Finally, it briefly considers the 2018 United States Supreme Court decision in *National Institute of Family & Life Advocates v. Becerra*,¹³ how the Court's decision reinforces Model Rule 8.4(g)'s First Amendment infirmities, and why states should reject such a rule.

I. SAINT THOMAS MORE: SILENCE FOR CONSCIENCE'S SAKE

Saint Thomas More is venerated in the Catholic Church for his martyrdom, which followed his steadfast refusal to take the Oaths of Succession and Supremacy as required by successive acts of the English Parliament during the sixteenth-century reign of King Henry VIII.¹⁴ After years resisting the King's coercion under color of law, including long imprisonment in the Tower of London, More was convicted of treason based on perjured testimony.¹⁵ He was first sentenced to death by eviscera-

13. 138 S. Ct. 2361 (2018).

14. ACKROYD, *supra* note 11, at 385–87. The Oath of Supremacy was intended by King Henry VIII to "negate Papal supremacy" over the Church of England. William G. Bassler, *More on More*, 41 CATH. LAW. 297, 297 & n.3 (2002) (citing ANTHONY KENNY, THOMAS MORE 91 (1983)). As Veryl Victoria Miles and others have noted, "More could have taken the oath with some legal qualification or reservation, as many Catholics of the time did in fact do. But he did not." Miles, *supra* note 12, at 423 (citing, e.g., G. Roger Hudleston, *Thomas More*, in 14 THE CATHOLIC ENCYCLOPEDIA 689, 689–93 (Charles G. Herbermann et al. eds., 1912), <http://www.newadvent.org/cathen/14689c.htm> [<https://perma.cc/Q3B3-SNLV>]).

15. ACKROYD, *supra* note 11, at 395–400.

tion and hanging, a horrific process of prolonged torture, but the King commuted the sentence to death by beheading.¹⁶ The King's executioner brought his axe down upon More's neck and killed him on a summer day in 1535.¹⁷

Why did More persist in refusing to take the Oaths? The answer begins with the words More is said to have spoken to the crowd before his beheading: "I die His Majesty's good servant, but God's first."¹⁸ The journey that led him there commenced with More's appointment as Lord Chancellor in 1529.¹⁹ Shortly thereafter, the King asked him to confer with certain scholars and theologians who were already pursuing the "great matter" of the King's desired annulment of his marriage to Catherine of Aragon.²⁰ In 1530, the King sent a petition to Pope Clement urging the grant of an annulment, with More conspicuously missing from its signatories.²¹ Historian Peter Ackroyd notes that "[a]lthough [More] may have refused to sign, it is more likely that his opinions were so well known that he was not asked to put his name to the letter; but already it is possible to sense the isolation and exclusion into which he would eventually be drawn."²² Receiving no relief, the King issued "a proclamation against the entry of any papal bulls detrimental to [his] concerns."²³ From this foray ensued a series of challenges by the King to the Pope's authority, which soon spurred More's resignation as Lord Chancellor;²⁴ then, More's silence in re-

16. *Id.* at 403.

17. *Id.* at 406.

18. *See id.* at 405 (noting that, according to More's son-in-law William Roper, he asked the crowd "'to bear witness with him that he should now there suffer death in and for the faith of the Holy Catholic Church' . . . ; but a contemporary account suggests that 'Only he asked the bystanders to pray for him in this world, and he would pray for them elsewhere. He then begged them earnestly to pray for the King, that it might please God to give him good counsel, protesting that he died the King's good servant but God's first.'"); *see also* A MAN FOR ALL SEASONS (Columbia Pictures 1966).

19. ACKROYD, *supra* note 11, at 313.

20. *Id.* at 313–14.

21. *Id.* at 314.

22. *Id.*

23. *Id.* at 314–15.

24. *Id.* at 315, 327–29. "More's resignation was not precisely over the marriage of Henry VIII to Catherine of Aragon. . . . For whatever reason—canonical or political—the annulment of Henry's marriage seemed impossible to More, but that was not what led to his principled resignation." Edward McGlynn Gaffney,

sponse to the Acts of Succession and Supremacy and their mandatory oaths;²⁵ and, finally, his martyrdom.²⁶

Robert John Araujo has described More as “a scrupulous lawyer, husband, father, statesman, legislator, judge, and saint.”²⁷ He had mastered and revered the positive law and respected the authority of the English government, but he would neither utter a falsehood for its sake nor compromise his faith convictions to comply with its orders:

If Parliament had said that the King was God, [More] would have done nothing to interfere; however, when Parliament said the King rather than the Pope was head of the Church and commanded More to publicly declare his agreement by taking an oath that would conflict with his convictions about the respective authorities of the Church and the King, More could not do this because of conscience. For More was also subject to God’s law, which said such a declaration would

Jr., *The Principled Resignation of Thomas More*, 31 LOY. L.A. L. REV. 63, 72 (1997). Rather, “[t]he problem of conscience was on a different level, the claim of the Crown to absolute authority over the church [that is, the Oath of Supremacy]. That was for More a principle worth resigning over and even worth dying for.” *Id.* at 72–73.

25. The Act of Succession (1534) “pronounced the marriage between Henry and Catherine of Aragon to be ‘void and annulled’ and then, in a curious but consistent extension of policy, dealt with the matter of all such ‘prohibited’ marriages.” ACKROYD, *supra* note 11, at 356. “It was claimed that no power on earth could sanction them, and in one sentence the Act thereby destroyed the jurisdiction and authority of the Pope.” *Id.* At its conclusion “came the stipulation that eventually took More to his death on the scaffold: all the king’s subjects ‘shall make a corporal oath’ to maintain ‘the whole effects and contents of this present Act.’” *Id.* Although Parliament later adopted a second Act of Succession with a new oath “remedying the defect which More had found in the first and too broadly inclusive oath,” it also introduced the Act of Supremacy, “proclaiming Henry to be ‘the only supreme head in earth of the Church of England, called *Anglicana Ecclesia*.’” *Id.* at 378–79. “But there followed other proposals which touched upon More directly, as surely as if the king had run upon him in a tilting yard,” including the Treason Act, which “made it a capital offence to ‘maliciously wish, will, or desire, by words or writing’ to deprive the royal family of their ‘dignity, title, or name of their royal estates’, or to declare the king ‘heretic, schismatic, tyrant, infidel.’ To call Henry a schismatic, therefore, would be to incur the penalty of a lingering death.” *Id.* at 379.

26. ACKROYD, *supra* note 11, at 360–64, 373–75, 387, 400.

27. Robert John Araujo, *Conscience, Totalitarianism, and the Positivist Mind*, 77 MISS. L.J. 571, 575 (2007).

violate the higher law that is beyond the competence of the state.²⁸

For the ancient Greek philosopher Socrates, seeking the “whole truth” and pursuing the good were what made life worth living.²⁹ More’s conscience was likewise grounded in his uncompromising devotion to sacred and eternal Truth.³⁰

Saint Thomas More’s story became more popularly known when Robert Bolt’s *A Man for All Seasons* premiered in London in 1960 and then in New York in 1961.³¹ Bolt’s vivid portrait of More as a paragon of virtue who refused to surrender his convictions—even unto death—resonated with theatergoers and readers from many walks of life, but particularly with lawyers. One of them was Antonin Scalia. At the time, Scalia had just graduated *magna cum laude* from Harvard Law School and married Radcliffe graduate Maureen McCarthy. He also had been awarded a fellowship that enabled them to travel to Europe over the next year.³² During their visit to London, they

28. *Id.* at 572–73.

29. See PLATO, SOCRATES’ DEFENSE (APOLOGY) 17b–c, 38a–39a (c. 399–390 B.C.), reprinted in THE COLLECTED DIALOGUES OF PLATO 3, 4, 23–24 (1963) (Edith Hamilton & Huntington Cairns eds., Hugh Tredennick trans., 1961); see also Araujo, *supra* note 27, at 572 (“Socrates, Thomas More, Rosa Parks, each was brought before the law because of their disagreement with some rule, and each stood their ground, often in a quiet, even private way, with the force of reason and conscience reinforcing their position. . . . It was accomplished . . . through the synthesis of mind and soul working in harmony.”).

30. Steven Smith explains this point well:

. . . [F]or More, conscience was inseparably connected to truth—even, to use a modern designation, to Truth. As a matter of *meaning*, to say that something was a reason of conscience was to say that it arose from a belief about some matter of vital truth. And as a *normative* matter, the preeminent value of conscience was connected to the sacred value of truth. For better (as I suspect) or worse, that insistence on the connection between conscience and Truth would seem to distance More’s conception of conscience from some of the notions that go under that name today.

Steven D. Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS L.J. 580, 603 (2003).

31. See BOLT, *supra* note 1, at xxi. The film version, *A MAN FOR ALL SEASONS* (Columbia Pictures 1966), received eight Academy Award nominations and won in six categories, including Best Picture. *The 37th Annual Academy Awards, ACADEMY OF MOTION PICTURE ARTS AND SCIENCES*, <https://www.oscars.org/oscars/ceremonies/1967> [<https://perma.cc/AP6M-VESK>].

32. Antonin Scalia, *The Christian as Cretin*, in SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 107, 107 (Christopher J. Scalia & Edward Whelan eds., 2017).

saw Bolt's new play with its compelling depiction of More "combining a life of faith with a firm commitment to the rule of law."³³ According to Mrs. Scalia, More's example "made a strong impression on them and 'grew in significance to us over the years.'"³⁴ During his several decades as an Associate Justice of the United States Supreme Court, Justice Scalia spoke often to lawyers, judges, and law students in local chapters of the St. Thomas More Society.³⁵ In a 2010 speech, Justice Scalia concluded his remarks by encouraging legal professionals with traditional Christian beliefs—who may be scorned by their contemporaries as foolish or weak minded—to look to the courageous faith of Saint Thomas More as a source of inspiration:

It is the hope of most speakers to impart wisdom. It has been my hope to impart, to those already wise in Christ, the courage to have their wisdom regarded as stupidity. Are we thought to be fools? No doubt. But, as St. Paul wrote to the Corinthians, "We are fools for Christ's sake." And are we thought to be "easily led" and childish? Well, Christ did constantly describe us as, of all things, his sheep, and said we would not get to heaven unless we became like little children. For the courage to suffer the contempt of the sophisticated world for these seeming failings of ours, we lawyers and intellectuals—who do not like to be regarded as unsophisticated—can have no greater model than the patron of this society, the great, intellectual, urbane, foolish, childish man that he was. St. Thomas More, pray for us.³⁶

Blake Morant has also examined More's dilemma of conscience through the lens of conflict between a lawyer's personal moral convictions and professional expectations.³⁷ This conflict requires a lawyer to choose whether, "like Thomas More, she might adhere strictly to her beliefs and suffer the consequences from her failure to accommodate the sovereign's goals; alterna-

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 115–16; see also Michael S. McGinniss, *A Tribute to Justice Antonin Scalia*, 92 N.D. L. REV. 1, 10–11 (2016) (discussing the importance to Justice Scalia of his devout Catholic faith).

37. Blake D. Morant, *Lessons from Thomas More's Dilemma of Conscience: Reconciling the Clash Between a Lawyer's Beliefs and Professional Expectations*, 78 ST. JOHN'S L. REV. 965 (2004).

tively, she might take a more pragmatic stance that accommodates professional expectations without the complete abandonment of personal beliefs.³⁸ Although More disagreed with his client, the King, about the Acts of Succession and Supremacy, “he attempted to appease the King, and himself, through [his] code of silence.”³⁹ Morant observes that this course of “action, though mild and designed to reduce the dissonance associated with frustrating the expectations of the King to whom he owed a duty, must have caused More some measure of dissonance. He undoubtedly suffered discomfort from his silence on such a blatant violation of his core beliefs.”⁴⁰ Only when he had been convicted of treason and “the policy of silence [had] failed,” did More “finally express[] publicly the illegality of the King’s proclamations and ultimately act[] in accordance with his personally held beliefs.”⁴¹

Thus, Saint Thomas More expressed his conscience about the Acts and the King’s marriage with candor only when his silence under the law failed to preserve his life.⁴² Although More’s adherence to religious conscience when confronted by government mandates was exemplary in its courage and personal integrity, his self-imposed silence in response to legal coercion should never become the normative practice for American lawyers with traditional religious and moral views. But socially conservative lawyers are coming under increasing pressure to compartmentalize their lives and separate their religious and moral convictions from their law practices, espe-

38. *Id.* at 969.

39. *Id.* at 1002.

40. *Id.* at 1002–03.

41. *Id.* at 1003.

42. In Bolt’s play, More’s speech after his conviction is powerfully rendered: The indictment is grounded in an Act of Parliament which is directly repugnant to the Law of God. The King in Parliament cannot bestow the Supremacy of the Church because it is a Spiritual Supremacy! And more to this the immunity of the Church is promised both in Magna Carta and the King’s own Coronation Oath!

. . . I am the King’s true subject, and pray for him and all the realm. . . . I do none harm, I say none harm, I think none harm. And if this be not enough to keep a man alive, in good faith I long not to live. . . . Nevertheless, it is not for the Supremacy that you have sought my blood—but because I would not bend to the marriage!

BOLT, *supra* note 1, at 159–60.

cially when those convictions dissent from the dominant views within the organized bar.

II. THE 1996 TENNESSEE ETHICS OPINION: COMPELLED ADVOCACY AND ADVICE AGAINST PRO-LIFE ADVICE

In the 1996 Tennessee Ethics Opinion, the Board of Professional Responsibility of the Supreme Court of Tennessee (the “Board”) addressed an inquiry by a Catholic lawyer who regularly practiced in juvenile court.⁴³ The lawyer was appointed to represent minors requesting a judicial bypass from Tennessee’s statutory parental-consent requirement for minors seeking an abortion.⁴⁴ At the time, Tennessee’s rules of professional conduct for lawyers (the “Tennessee Code”) were still based on the 1969 ABA Model Code of Professional Responsibility (the “Model Code”), rather than the Model Rules.⁴⁵ The Board opined that: (1) it would be ethically improper to seek relief from the appointed representation on religious and moral grounds; and (2) it would be ethically suspect to offer counseling to the minor client with insights borne of the lawyer’s religious and moral convictions concerning abortion, including the possible benefits of consulting with her parents instead of pursuing the judicial bypass.⁴⁶ The Board’s conclusions were profoundly flawed both as a matter of law and in their failure to justly treat deeply convicting matters of moral responsibility for Catholic lawyers.

A. *Compelled Advocacy: “But Let Us at Least Refuse to Say What We Do Not Think”*⁴⁷

The lawyer informed the Board that “he is a devout Catholic and cannot, under any circumstances, advocate a point of view

43. 1996 Tennessee Ethics Opinion, *supra* note 3, at *1, *3.

44. *Id.* at *1.

45. *Id.* at *2. See generally MODEL CODE OF PROF’L RESPONSIBILITY (AM. BAR ASS’N 1969).

46. 1996 Tennessee Ethics Opinion, *supra* note 3, at *2–4.

47. ALEXANDER SOLZHENITSYN, *Live Not By Lies* (1974), in THE SOLZHENITSYN READER: NEW AND ESSENTIAL WRITINGS, 1947–2005, at 556, 558 (Edward E. Ericson, Jr. & Daniel J. Mahoney eds., 2006) (“We are not called upon to step out onto the square and shout out the truth, to say out loud what we think—this is scary, we are not ready. But let us at least refuse to say what we *do not* think!”).

ultimately resulting in what he considers to be the loss of human life."⁴⁸ The Board acknowledged that the lawyer's "religious beliefs are so compelling that [he] fear[ed] his own personal interests will subject him to conflicting interests and impair his independent professional judgment in violation of [Tennessee Code] DR 5-101(A)."⁴⁹ Because of this potential conflict, the lawyer was concerned these representations could expose him to malpractice liability and believed declining the appointments would avoid that risk.⁵⁰ Finally, the Board recognized the lawyer's "deep[-]seated, sincere belief that appointments in such cases constitute state action violative of his free exercise of religion rights guaranteed by the First Amendment to the United States Constitution."⁵¹

Although the Board did not categorically state that seeking to avoid such court appointments would subject the lawyer to discipline, it strongly suggested it would be unethical under the Tennessee Code.⁵² First, the Board purported to resolve the malpractice liability concern by citing the Code's Disciplinary Rule ("DR") 6-102(A), stating "a lawyer should not attempt to exonerate himself from or limit his liability to his client for personal malpractice."⁵³ This reliance was entirely misplaced. Like

48. 1996 Tennessee Ethics Opinion, *supra* note 3, at *3. Although the Board described the consequence of abortion in terms of the lawyer's subjective belief, it bears mention that every abortion, objectively and scientifically speaking, involves "the loss of human life." See, e.g., KEITH L. MOORE ET AL., *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 11 (10th ed. 2016) ("Human development begins at fertilization . . . when a sperm fuses with an oocyte to form a single cell, the zygote. This highly specialized, *totipotent cell* . . . marks the beginning of each of us as a unique individual.").

49. 1996 Tennessee Ethics Opinion, *supra* note 3, at *3. This Tennessee Code provision was identical to its counterpart in the Model Code. See MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(A) (AM. BAR ASS'N 1980) ("Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."); cf. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2018) ("A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.").

50. 1996 Tennessee Ethics Opinion, *supra* note 3, at *2.

51. *Id.* at *3.

52. See *id.*

53. *Id.* (citing TENN. CODE OF PROF'L RESPONSIBILITY DR 6-102(A) (1995)).

its counterpart in Model Rule 1.8(h), Tennessee Code DR 6-102(A) merely restricted a lawyer in seeking from a client contractual waivers of malpractice liability.⁵⁴ It did *not* support any notion that a lawyer acted unethically by limiting law practice or selection of client matters to avoid foreseeable problems that could result in future malpractice liability. Nevertheless, the Board concluded the lawyer's concerns did "not appear to be a sufficient ground for declining such appointments."⁵⁵

The Board's analysis focused primarily on the weight (if any) that should be given to the lawyer's religious and moral convictions. At the time, Tennessee had not adopted Model Rule 6.2, which provides:

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law . . . or (c) the client *or the cause* is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.⁵⁶

The Board thus turned to a non-binding Ethical Consideration ("EC"), Tennessee Code EC 2-29, which the Board said "exhorts appointed counsel to refrain from withdrawal where a person is unable to retain counsel, except for compelling reasons."⁵⁷ As far as the Board was concerned, the lawyer's religious and moral convictions opposing abortion, though "clearly fervently held," were not reasons sufficiently "compelling" to avoid the imposition of state-compelled legal advocacy.⁵⁸ As support, it pointed to EC 2-29's examples of non-compelling reasons for relief from appointment, which included "the repugnance of the subject matter of the proceeding."⁵⁹

54. See MODEL RULES OF PROF'L CONDUCT r. 1.8(h)(1) (AM. BAR ASS'N 2018) ("A lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement."); cf. MODEL CODE OF PROF'L RESPONSIBILITY EC 6-6 (AM. BAR ASS'N 1969).

55. 1996 Tennessee Ethics Opinion, *supra* note 3, at *3.

56. MODEL RULES OF PROF'L CONDUCT r. 6.2(a), (c) (AM. BAR ASS'N 2018) (emphasis added).

57. 1996 Tennessee Ethics Opinion, *supra* note 3, at *3.

58. *Id.*

59. *Id.* (quoting TENN. CODE OF PROF'L RESPONSIBILITY EC 2-29 (1995)).

Even under the Code, the Board's approach is unconvincing for at least two reasons. First, a lawyer finding a proceeding's "subject matter" to be "repugnant" (e.g., representing a defendant charged with a particularly heinous violent crime) is distinguishable from a lawyer finding the client's *objectives* for the representation (i.e., obtaining an abortion) to be "repugnant." Second, EC 2-30 states clearly: "a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client."⁶⁰ The Board ignored these considerations. Instead, the Board closed its analysis by citing two Tennessee Supreme Court cases allegedly casting "serious doubt" on whether the lawyer could be relieved of these appointments.⁶¹ Both involved lawyers appointed to represent criminal defendants; and though the Board stated that the court indicated "it would have scant sympathy for an attorney who sought to avoid representation merely because the defendant's cause was unpopular, or because the crime of which he was accused was distasteful,"⁶² neither of these grounds matched those asserted by the inquiring Catholic lawyer. Rather, his objections were squarely founded on his faith-based moral convictions against complicity in abortion, not on community unpopularity or distaste for a client's past actions.

Finally, the Board incorrectly relied on what it called an "instructive" 1984 Tennessee ethics opinion involving the "ethical obligations of counsel in first[-]degree murder cases."⁶³ The 1984 opinion concerned a criminal defendant who insisted that counsel not seek to mitigate or argue against the death penalty.⁶⁴ From this opinion, the 1996 Board extracted two ethical principles: (1) "[c]ounsel's moral beliefs and usually acceptable

60. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-30 (AM. BAR ASS'N 1969).

61. 1996 Tennessee Ethics Opinion, *supra* note 3, at *3 (citing *State v. Jones*, 726 S.W.2d 515, 518-19 (Tenn. 1987) and *State v. Maddux*, 571 S.W.2d 819 (Tenn. 1978)).

62. *Id.* (citing *Maddux*, 571 S.W.2d at 831).

63. *Id.* at *4 (citing Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 84-F-73).

64. Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 84-F-73 (1984) [hereinafter 1984 Tennessee Ethics Opinion], https://www.tbpr.org/ethic_opinions/84-f-73 [<https://perma.cc/R5N3-JW2E>] (Murder defendant insists no argument against the death penalty).

ethical standards and duties must yield to the moral beliefs and legal rights of the defendant"; and (2) "[c]ounsel is ethically obligated to follow the law and to do nothing in opposition to the client's moral and legal choices."⁶⁵ But what actually makes the 1984 opinion "instructive" is the language sandwiched between these statements and conspicuously omitted by the 1996 Board: "Counsel is not ethically required to accept the moral and legal choices of the client and has no ethical obligation, in this instance, to advocate those choices on behalf of the client."⁶⁶ So, the 1984 lawyer was properly advised to "move the court to withdraw from representation during the portion of the trial where the conflict is manifested."⁶⁷ Although the 1996 Board quoted from this sentence,⁶⁸ it clearly regarded the first two quotations as the most significant for the lawyer's circumstances. In her exhaustive critique of the Board's "corrupt, and corrupting, understanding of the lawyer's professional obligations," Teresa Stanton Collett expresses the crux of the problem:

The distorted quotation in Opinion 96-F-140 suggests a vision of lawyering far removed from the vision contained in Opinion 84-F-73. In contrast to the earlier opinion's vision of lawyers and clients as persons of equal moral dignity, Opinion 96-F-140 suggests that lawyers are only the means to achieving clients' objectives. According to this vision, lawyers have no independent standing as moral actors. Instead they are merely the mouthpiece through which the clients' claims are presented to the court. This conversion of human beings into the moral equivalent of talking Westlaw machines is itself immoral.⁶⁹

Even more pointedly, Collett observes: "[T]he problem is [ultimately] not with the Tennessee Board's selective quotation of authority. The problem is with the Board's linguistic sleight of hand that converted an inquiry based on assertions of justice

65. 1996 Tennessee Ethics Opinion, *supra* note 3, at *4 (quoting 1984 Tennessee Ethics Opinion).

66. 1984 Tennessee Ethics Opinion, *supra* note 64, at *3; see also Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 644 (1997).

67. 1984 Tennessee Ethics Opinion, *supra* note 64, at *3.

68. 1996 Tennessee Ethics Opinion, *supra* note 3, at *4.

69. Collett, *supra* note 66, at 644-45 (footnotes omitted).

and objective truth to one of personal exemption or subjective beliefs.”⁷⁰

Turning briefly to the lawyer’s Free Exercise Clause concerns about compelled advocacy for his client’s objective to obtain an abortion, the Board opined, without explanation, that two federal cases “under analogous facts” were “pessimistic” as to whether a lawyer’s rights were “unconstitutionally burdened.”⁷¹ But neither case cited by the Board actually provides any meaningful support for this dismissive conclusion.⁷² After examining (1) the federal case law more relevant to lawyers⁷³ and professional obligations and (2) the teachings of the Catholic Church regarding cooperation with procurement of abortion,⁷⁴ Collett rightly concludes that “[t]he refusal of the Board

70. *Id.* at 642–43; *see also* *Ind. Planned Parenthood Affiliates Ass’n v. Pearson*, 716 F.2d 1127, 1137 (7th Cir. 1983) (stating that “we would certainly expect an attorney who held such beliefs [that abortion is immoral] not to accept a court appointment”).

71. 1996 Tennessee Ethics Opinion, *supra* note 3, at *4 (citing *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *United States v. Greene*, 892 F.2d 453, 456 (6th Cir. 1989)).

72. As Collett explains, in *Mozert* “[t]here was no evidence that the conduct required of the students [that is, studying a reading series chosen by school authorities] was forbidden by their religion. The [Sixth Circuit] clearly repudiate[d] compelled speech violating the speaker’s religious beliefs.” Collett, *supra* note 66, at 658 (quoting and citing *Mozert*, 827 F.2d at 1070); *cf.* *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (concluding that a compelled Pledge of Allegiance by school children in violation of religious beliefs violated the Free Exercise Clause). “Similarly,” Collett notes, *United States v. Greene* involved a federal court’s rejection of a Free Exercise defense to a criminal charge for use and sale of a controlled substance. Collett, *supra* note 66, at 658 (citing *Greene*, 892 F.2d at 453). Because “[r]efusal to accept court-appointed representation is not criminal conduct, nor is the pro-life position of the lawyer a unique interpretation of Catholic teaching,” she concludes that “the Board’s attempted analogy fails.” *Id.* at 659.

73. Collett, *supra* note 66, at 659–60 (citing and discussing *In re Summers*, 325 U.S. 561, 572 (1945) and *Nicholson v. Bd. of Comm.*, 338 F. Supp. 48 (M.D. Ala. 1972)).

74. *Id.* at 660–65; *see also id.* at 664 (“Representing a girl who seeks judicial authority to obtain an abortion would be collaborating with the application of the positive law permitting procured abortion.”). Collett notes “[t]his is true, notwithstanding the legal profession’s statement [in Model Rule 1.2(b)] that a ‘lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.’” *Id.* at 664–65 (quoting MODEL RULES OF PROF’L CONDUCT R. 1.2(b) (AM. BAR ASS’N 1995)). She asserts:

to recognize the deeply held religious beliefs of the inquiring lawyer and accept those beliefs as a 'compelling reason' to decline the appointment unconstitutionally burdens the lawyer's ability to act in accordance with his religious beliefs."⁷⁵ Overall, the Board's opinion reflects a strikingly narrow vision of the lawyer's professional role and a disturbing level of disregard for the indispensable role that religious faith plays in the lives of many lawyers.⁷⁶

By accepting the court appointment in judicial bypass proceedings, the lawyer would be agreeing to publicly defend the act of abortion and to make that act possible through obtaining a court order authorizing the procedure. Every conscientious Catholic lawyer must refuse such appointment to be faithful to God and Church teaching.

Id. at 665; see also Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 *FORDHAM L. REV.* 1339, 1359 (1998) [hereinafter Collett, *Client Selection*] ("Representation that requires the lawyer to advocate the performance of evil acts, or the total disregard of religious obligations, or the irrelevance of religious beliefs, results in evil acts by the lawyer, and thus such representation cannot be accepted by the Catholic lawyer."); Larry Cunningham, *Can a Catholic Lawyer Represent a Minor Seeking a Judicial Bypass for an Abortion? A Moral and Canon Law Analysis*, 44 *J. CATH. LEG. STUD.* 379 (2005).

75. Collett, *supra* note 66, at 665. Expressing strong objections to the Board's effective treatment of "Pro-life Lawyers as Second-Class Citizens," *id.* at 651, Collett emphasizes that in a religiously pluralistic society with diverse views on the morality of abortion, "it is important to recognize that personal opposition to conduct that courts will not permit to be outlawed is meaningless unless individuals remain free to act upon their beliefs in conducting their affairs." *Id.* at 653. The Board "ignored this distinction" and effectively opined that "by becoming a licensed attorney the lawyer accepted the positive law as the sole measure of what conduct she would use her professional expertise to further." *Id.*

76. After critiquing the "bleaching out" concept of the lawyer's role reflected in the 1996 Tennessee Ethics Opinion, Russell Pearce and Amelia Uelmen encourage a more tolerant posture toward traditionally religious lawyers, one far more consistent with the ideal of a truly diverse and inclusive legal profession:

The problem with the argument that personal attributes such as religion are irrelevant to the practice of law is that it runs counter to experience. Lawyers are neither fungible nor neutral. They differ in their abilities, as well as in the ways that their identities and experiences influence their conduct. The religious lawyering movement insists that we should not ignore this reality. While it acknowledges that as a community lawyers must seek to improve our system so that all people receive impartial treatment, it nonetheless insists that this must occur within a framework that respects that lawyers are not "neutral" interchangeable parts. It emphasizes that it is important for lawyers to honestly acknowledge their differences and to strive together to manage those differences in service of the shared goal of rule of law.

Although the lawyer did not specifically inquire about the Free Speech Clause of the First Amendment, the 1996 Tennessee Ethics Opinion conflicts with this constitutional restraint as well. As Collett explains, “There is substantial precedent affirming that attorneys enjoy some level of constitutional protection of their right to free speech,” and this right “encompasses both the right to speak and the right to remain silent.”⁷⁷ When the Board insisted the Catholic lawyer had a professional duty to accept a court appointment compelling his legal advocacy leading to an abortion, it utterly failed to respect the lawyer’s First Amendment right to remain silent.⁷⁸

At the heart of the injustice caused by the state-compelled legal advocacy favored by the Board is the principle expressed so memorably in 1943 by Justice Robert Jackson in *West Virginia State Board of Education v. Barnette*: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁷⁹ Unlike judicial proceedings involving defenses of a client’s alleged past actions, the judicial bypass procedure for minors seeking an abortion requires the lawyer to engage in advocacy to promote a client’s ability to perform a future action.⁸⁰ As Collett puts it, “The inquiring lawyer has a right not to be forced to defend a *future act* as ‘legal’ when he believes the act is intrinsically evil.”⁸¹ And, in effect, the Board “has either adopted ‘abortion

Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CASE W. RES. L. REV. 127, 144–45 (2004) (footnotes omitted); see also Robert K. Vischer, *Faith, Pluralism, and the Practice of Law*, 43 CATH. LAW. 17 (2004).

77. Collett, *supra* note 66, at 666. In *Nat’l Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), the Court has moved its precedent from providing “some level of constitutional protection,” Collett, *supra* note 66, at 666, to providing strong First Amendment protection for lawyers’ freedom of speech. See *infra* Part III.D.

78. See Collett, *supra* note 66, at 666.

79. 319 U.S. 624, 642 (1943).

80. Collett, *supra* note 66, at 666.

81. *Id.* at 667 (emphasis added). Moreover, she points out “[i]t is constitutionally irrelevant that the lawyer’s advocacy may not be mistaken for the personal views of the lawyer.” *Id.* (citing MODEL RULES OF PROF’L CONDUCT r. 1.2(b) (AM. BAR ASS’N 1995)); see also Howard Lesnick, *The Religious Lawyer in a Pluralist So-*

rights' or 'the lawyer as mouthpiece' as the orthodox position to which all lawyers must subscribe. The 'confession of faith' required by the opinion cannot withstand scrutiny under the Free Speech Clause of the First Amendment."⁸²

B. *Advice Against Pro-Life Advice: Your Client Has a Right to Your Silence*

The 1996 Tennessee Ethics Opinion offered other advice incompatible with robust freedom of speech and conscience for lawyers with traditional religious and moral convictions. The lawyer asked whether, if he was not relieved of the compulsory judicial bypass representations of minors seeking abortions, he could at least advise the client "about alternatives and/or advise her to speak with her parents or legal guardian about the potential abortion."⁸³ The Board began with Tennessee Code DR 7-101(A)(3), stating a lawyer has a positive duty to "'explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.'"⁸⁴ It then suggested duties of zeal and loyalty constrain the already-conscripted lawyer to withhold any advice that might lead the minor to reconsider the planned abortion:

Whether informing the minor about alternatives to abortion and suggesting that she discuss the potential procedure with her parents or legal guardian is ethically appropriate may depend on a case-by-case analysis. If the minor is truly mature and well-informed enough to go forward and make the

ciety, 66 *FORDHAM L. REV.* 1469, 1491 (1998) (analyzing the 1996 Tennessee Ethics Opinion in light of Model Rule 1.2(b), and commenting "[s]ome find in this principle a sufficient basis to permit attorneys to deny responsibility, while others do not, but what is the justification for a rule imposing the principle on one for whom it rings hollow?").

82. Collett, *supra* note 66, at 668; see also Jennifer Tetenbaum Miller, Note, *Free Exercise v. Legal Ethics: Can a Religious Lawyer Discriminate in Choosing Clients?*, 13 *GEO. J. LEGAL ETHICS* 161, 166–67 (1999) ("The emerging trend in legal ethics unrealistically expects a person to divorce her personal religious or moral beliefs from her professional responsibilities. . . . The Tennessee Board clearly suggests that legal ethics outweigh personal considerations such as religion and a relationship with God.").

83. 1996 Tennessee Ethics Opinion, *supra* note 3, at *2.

84. *Id.* at *2 (quoting TENN. CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(3) (1995)); cf. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2018) (identical language).

decision on her own, then counsel's hesitation and advice for the client to consult with others could possibly implicate a lack of zealous representation under DR 7-101(A)(4)(a) and (c) (a lawyer shall not intentionally fail to seek the client's lawful objectives, or prejudice or damage his client during the course of the professional relationship). Counsel also has a duty of undivided loyalty to his client, and should not allow any other persons or entities to regulate, direct, compromise, control or interfere with his professional judgment. To the extent that counsel strongly recommends that his client discuss the potential abortion with her parents or with other individuals or entities which are known to oppose such a choice, compliance with Canon 5 is called into question.⁸⁵

The Board's assessment is disturbing. First, it treats lawyers as "mouthpieces" who cannot legitimately bring moral considerations to bear on their advice to clients without unjustly intruding on client autonomy.⁸⁶ But silencing the lawyer is consistent with client "autonomy" only if autonomy merely means, as Collett states, "the client's right to do anything not forbidden by the law."⁸⁷ By hypothesizing a client who is already "well-informed" (of what relevant considerations?) and is "truly mature" (in what relevant respects?), the Board fundamentally begs the question about communication. The lawyer's duty of "undivided loyalty" entails a sincere and devoted commitment to the client's well-being in both the short and long terms.⁸⁸ The Board seemingly presupposes that if a "mature" minor client comes to the lawyer seeking a judicial bypass, abortion is necessarily in the client's best interests. On the contrary, without parental involvement, the lawyer's role in counseling the minor client assumes even greater importance. In such cases, a lawyer loyal to the client's well-being should engage in a searching and attentive dialogue, one that would properly include exploring the client's reasons for seeking the judicial bypass and her openness to considering alternative

85. 1996 Tennessee Ethics Opinion, *supra* note 3, at *2 (internal citations omitted).

86. See Collett, *supra* note 66, at 644-48.

87. *Id.* at 645.

88. See Michael S. McGinniss, *Virtue and Advice: Socratic Perspectives on Lawyer Independence and Moral Counseling of Clients*, 1 TEX. A&M L. REV. 1, 38-45 (2013).

courses of action.⁸⁹ Even looked at in its most favorable light, the Board's advice against pro-life advice manifests what Howard Lesnick has called "a wooden and impoverished view of the lawyer's counseling function," and reflects "an inhospitality to the 'personal' norms of individual lawyers" that, in the context of a religiously pluralistic legal profession, is fairly described as "statist."⁹⁰

At the time, Tennessee had yet to adopt Model Rule 2.1, which addresses the lawyer's role as an "Advisor" and provides, "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice."⁹¹ The Board did, however, invoke Canon 5 of the Code,⁹² which states, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."⁹³ Confronted with a self-described "devout Catholic" lawyer, it is telling that the Board did not base its non-independence theory on the lawyer's "personal interest" in opposing abortion. Rather, the Board insisted that the lawyer must "not allow *any other persons or entities*" —

89. In his article criticizing the 1996 Tennessee Ethics Opinion for devaluing religious pluralism in the legal profession, Lesnick states that because the client's objective should not be assumed to be as fixed or certain as initially expressed, the lawyer may ethically invite the client to reflect and engage in dialogue relating to the wisdom or moral rightness of proceeding with the stated objective. Lesnick, *supra* note 81, at 1493–95; see also Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 48 (1997) (describing Lesnick's point as being "that considerable room remains for client counseling that gives expression to the lawyer's moral and religious beliefs in a manner that invites genuine mutual exploration"). Lesnick notes the lawyer should exercise restraint and sensitivity in this dialogue, leaving open the possibility of accepting the client's objectives and respecting the client's wish to conclude the conversation. Lesnick, *supra* note 81, at 1495.

90. Lesnick, *supra* note 81, at 1471. As Lesnick puts it, the Board "sees the pluralist quality of our society as calling on the lawyer to accommodate his or her religion to the official norms of the legal profession, rather than the reverse." *Id.* This approach is consistent with what Sanford Levinson describes as the "bleaching out" of lawyers' consciences in the standard conception of the lawyer's role. See Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578–79 (1993) (describing the goal of the "standard version of the professional project" as "the creation, by virtue of professional education, of almost purely fungible members of the respective professional community"); see also McGinniss, *supra* note 9, at 559, 566–67 n.48.

91. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

92. 1996 Tennessee Ethics Opinion, *supra* note 3, at *2 (citing "Canon 5");

93. MODEL CODE OF PROF'L RESPONSIBILITY Canon 5 (AM. BAR ASS'N 1980).

including, presumably, the Catholic Church—“to regulate, direct, compromise, control or interfere with his professional judgment.”⁹⁴ Thus, when the Board warned the lawyer that “strong” recommendation to the client to consult with a person known to oppose abortion would be ethically suspect under Canon 5, it demeaned the lawyer’s Catholic faith as a *disloyal* motive, and then treated that alleged disloyalty as a legitimate ground for silencing the lawyer from fully exploring with the client her options in a life-changing legal and moral situation.

Today’s Model Rule 2.1 makes the proper course of action for a lawyer in similar circumstances all the clearer, expressly creating an affirmative duty of candor in advising a client and a discretionary authority to “refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”⁹⁵ In discouraging the lawyer from offering moral counseling, the Board diminished the candor of the lawyer’s prospective advice. Candor requires a lawyer to engage in genuine, frank discussion of the fundamental substantive matters involved with the client’s objectives and the means to accomplish them.⁹⁶ Especially in the context of legal matters involving matters of high moral significance—which include a client’s decision about whether and how to engage in a legal and medical process that leads to the death of an unborn child—a lawyer’s candid advice should not be limited merely to technical matters of court procedure.⁹⁷

In other scholarship, I have proposed the moral ideal of the “trustworthy neighbor” as a model for lawyers serving in the advising role.⁹⁸ This concept of the lawyer’s responsibility in

94. 1996 Tennessee Ethics Opinion, *supra* note 3, at *2 (emphasis added).

95. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2018).

96. *See* McGinniss, *supra* note 88, at 14–16 (discussing what makes advice “candid” for purposes of Model Rule 2.1).

97. *Cf.* MODEL RULES OF PROF’L CONDUCT r. 2.1 cmt. 2 (AM. BAR ASS’N 2018) (stating that an advising lawyer’s “[p]urely technical legal advice . . . can sometimes be inadequate”).

98. *See* McGinniss, *supra* note 88, at 6, 38–45; *see also id.* at 44 (“Whether following a Socratic or a Christian path, lawyers should aspire to an ethic of care that deeply values moral goodness, both within themselves and, as their words and conduct may have an influence upon them, within their ‘neighbor’ clients.”) (footnote omitted); Michael S. McGinniss, *Advice in the Lawyer-Client Re-*

the advising relationship is one in which “[t]he lawyer loves and respects the client as a neighbor in need who should be served in a manner worthy of trust, and who possesses an essential dignity and personality deserving of the lawyer’s devotion of time, energy, and counsel.”⁹⁹ Whether court-appointed or otherwise, a lawyer whose conscience is engaged and who recognizes the moral stakes involved in a client’s decision should have the freedom to invite conversation and share, in a thoughtful dialogue, the benefits of the lawyer’s insights and experience.¹⁰⁰ As for the 1996 Tennessee Ethics Opinion, the lawyer simply asked if he could properly advise the client about “alternatives” to abortion or about the potential value in discussing the decision with her parents.¹⁰¹ Yet the Board deemed even these modestly stated suggested topics—not even broaching the lawyer’s own views on the morality of abortion—to be ethically dubious.¹⁰² And, as Robert Vischer has ob-

lationship, in THE OXFORD HANDBOOK OF ADVICE 277, 296 (Erina L. MacGeorge & Lyn M. Van Swol eds., 2018) (encouraging advising lawyers to “strive to establish relationships with their clients founded on subject-to-subject trust and care for client well-being”).

99. McGinniss, *supra* note 88, at 45.

100. Lawyer-client counseling on moral considerations may originate from either party to the dialogue:

In a lawyer’s advising relationship with a client, it may be the lawyer’s conscience that must first be awakened, so as to recognize and grasp the moral issue to discuss with the client. Or the recognition of the moral issue may begin with the stirring of the client’s conscience, awakened to the point that the client seeks the lawyer’s counsel as to how the moral issue should be addressed. However the moral conversation is initiated, for its outcome to be fruitful the advising lawyer should understand the need to help the client “recollect” the values and convictions that form the client’s identity independent of the legal situation. This recollection may result in an adherence to those values and convictions, or in changes to the client’s moral perspective through the process of dialogue with the lawyer and, perhaps, also with other persons the client trusts. Whatever the outcome may be, the client will have been afforded the best opportunity to make a conscious choice about how to apply moral values to the law.

Id. at 50 (footnotes omitted).

101. See 1996 Tennessee Ethics Opinion, *supra* 3, at *1.

102. Addressing his view of the lawyer’s responsibility if the broader dialogue on the morality of abortion were to be engaged, Lesnick explains that “[t]he challenge to the attorney is to integrate strong conviction with a lively awareness that in a pluralist society even the strongest conviction is personal, and that the manner of counseling must reflect the realities of a client’s vulnera-

served, urging lawyers to censor their candid expression of moral convictions (whether religiously based or otherwise) risks not only creating an unsettling “sense of personal incoherence” in the lawyer, but also inhibiting truly informed decision-making by the client.¹⁰³

C. *The Continued Importance of the 1996 Tennessee Ethics Opinion*

Many years later, the 1996 Tennessee Ethics Opinion continues to receive significant attention in legal ethics circles.¹⁰⁴ In addition to vividly revealing how a narrow vision of the lawyer’s role can be used to justify imposing on dissenting lawyers a narrow range of permitted speech and action, it provides a striking example of how malleable the language of professional conduct rules can be in the hands of state bar authorities. This apprehension is especially heightened when those rules implicate moral issues in which the opinions of many lawyers today—and, in some cases, the official positions of national or state bar associations—differ from lawyers with traditional religious and moral convictions.¹⁰⁵ In such cases, the lawyer may be chilled from candid expression on matters of conscience, out of real fear that such speech may be the subject of disciplinary proceedings impacting the lawyer’s license to practice law.

bilities.” Lesnick, *supra* note 81, at 1496–97. “The task,” he observes, “is to seek to engage *the client’s* moral agency” *Id.* at 1497.

103. ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 274 (2010); *see also id.* (“Especially in cases in which the law is indeterminate, an attorney’s conscience will often shape the advice she gives, and clients will be better off if the attorney’s moral perspective is articulated openly and deliberately instead of being left to operate beneath the surface of the attorney-client dialogue.”).

104. *Id.* at 273. Observing that “[r]esistance to [the] amoral lawyering paradigm is evidenced in part by the tension between the compulsions of conscience and the compulsions of the profession,” Vischer illustrates his point by noting that “[t]he tension is unmistakable when a state ethics board, in requiring a devout Christian lawyer to represent a minor seeking an abortion without parental consent, reasons that religious beliefs are not a legitimate basis for declining a court appointment.” *Id.* (citing 1996 Tennessee Ethics Opinion, *supra* note 3); *see also* RUSSELL G. PEARCE ET AL., PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 86, 174 (3d ed. 2017) (quoting two excerpts from the 1996 Tennessee Ethics Opinion to illustrate points relating to court appointments and advising on non-legal considerations, respectively).

105. *See infra* Part III.C.1 (discussing the ABA’s support for expansive abortion rights, and progressive lawyers’ longstanding advocacy for broad restrictions on speech opposing abortion).

Stated simply: the 1996 Tennessee Ethics Opinion illustrates why “trust us” is a wholly inadequate response to the oft-stated concerns that 2016’s Model Rule 8.4(g) is a weapon which adopting states could wield with animosity against ideologically disfavored lawyers, especially those with traditional views on matters of sexual ethics.¹⁰⁶

III. MODEL RULE 8.4(G) AND THE MOVEMENT TO MARGINALIZE SOCIALLY CONSERVATIVE LAWYERS AND DETER THEIR SPEECH

Model 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.¹⁰⁷

The new Comments [3], [4], and [5] to Model Rule 8.4 provide, in their most pertinent parts:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession

106. “Sexual ethics” is a subtopic of bioethics addressing a broad range of issues relating to human sexuality, and which “considers standards for intervention in physical processes, rights of individuals to self-determination, ideals for human flourishing, and the importance of social context for the interpretation and regulation of sexual behavior.” *Sexual Ethics*, ENCYCLOPEDIA OF BIOETHICS (2004), <https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/sexual-ethics> [<https://perma.cc/6PAY-4AR5>]. Sexual ethics includes issues of procreative morality, including abortion and contraception. *See id.* Sexual ethics is a topic of fundamental importance in many religious faith traditions. For example, the core Catholic doctrines on sexual ethics are expressed in detail in the Catechism, and are based on Scripture, sacred tradition, and Thomistic natural-law moral philosophy. *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2332, 2335, 2337, 2362 (Geoffrey Chapman trans., Cassell 1994). From a Catholic perspective, sexual ethics also includes doctrine relating to the sacramental nature of marriage and the unitive and procreative purposes of conjugal sexual union in marriage. *See, e.g., id.* ¶¶ 1614, 1652, 2249, 2335, 2363.

107. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2018).

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

[4] 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. 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.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice. . . . A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).¹⁰⁸

A. *Model Rule 8.4(g): Its Background and Its Deficiencies*

In August 2016, the ABA House of Delegates approved Model Rule 8.4(g).¹⁰⁹ Its proponents hailed the absence of floor opposition prior to its passage by voice vote as indicative of broad acceptance.¹¹⁰ But in reality, its adoption was strongly opposed by numerous lawyers and legal organizations in writ-

108. *Id.* r. 8.4 cmts. 3–5.

109. Halaby & Long, *supra* note 8, at 204–05.

110. See, e.g., Andrew Burger, *Attorney: Scathing criticism of new ABA harassment and discrimination rule ill-founded*, LEGAL NEWSLINE (Sept. 9, 2016), <https://legalnewsline.com/stories/511004265-attorney-scathing-criticism-of-new-aba-harassment-and-discrimination-rule-ill-founded> [<https://perma.cc/26W3-G78F>].

ten comments on its December 22, 2015 draft version;¹¹¹ in written submissions when the draft was changed in substantive ways during the final days before passage,¹¹² and in short pieces published by prominent legal academics such as Eugene Volokh,¹¹³ Josh Blackman,¹¹⁴ and the late Ronald Rotunda,¹¹⁵ both before and immediately after the vote.

Prior to the ABA's adoption of Model Rule 8.4(g), the black-letter text of the Model Rules did not prohibit lawyers from engaging in "harassment" or "discrimination." Instead, Model Rule 8.4(d)—which prohibits lawyers from engaging in "conduct that is prejudicial to the administration of justice"—was accompanied by a former version of Comment [3], stating that the rule might be violated by "[a] lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status" *if* those words or conduct were "prejudicial to the administration of justice."¹¹⁶ Thus, its disciplinary enforcement was

111. Halaby & Long, *supra* note 8, at 218–23.

112. *Id.* at 227–32.

113. See Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, WASH. POST: VOLOKH CONSPIRACY (Aug. 10, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/> [https://perma.cc/9E4P-5CRB]. David French, a lawyer long active in First Amendment litigation and a well-known essayist on law and politics, also penned a short piece describing and critiquing Model Rule 8.4(g) as a "speech code" for lawyers. David French, *A Speech Code for Lawyers*, NAT'L REV. (Aug. 11, 2016, 7:46 PM), <https://www.nationalreview.com/2016/08/free-speech-lawyers-american-bar-association-model-rules-professional-conduct/> [https://perma.cc/Y3WL-T6AP].

114. See Josh Blackman, *Model Rule 8.4(g) and the First Amendment: Trust the Disciplinary Committees*, JOSH BLACKMAN'S BLOG (Nov. 21, 2016), <http://joshblackman.com/blog/2016/11/21/model-rule-8-4g-and-the-first-amendment-trust-the-disciplinary-committees/> [https://perma.cc/ZE57-8PQS].

115. See Ron Rotunda, *Opinion, The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech*, WALL ST. J. (Aug. 16, 2016), <http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418> [https://perma.cc/JF6W-BNKG]. Rotunda, a renowned scholar of legal ethics and constitutional law for many decades, passed in March 2018. See *In Memoriam: Ronald Rotunda*, FEDERALIST SOC'Y (Mar. 16, 2018), <https://fedsoc.org/commentary/blog-posts/in-memoriam-ronald-rotunda> [https://perma.cc/PB9F-EMH7].

116. MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2015).

limited to conduct in the course of client representation and required a showing that the lawyer's behavior had an actual or potential adverse impact on the fair administration of justice in a specific legal matter.¹¹⁷

In the more than two years since Model Rule 8.4(g) was adopted, it has been subject to strong and sustained critiques from academics, practitioners, and public interest organizations in the legal profession.¹¹⁸ Seven aspects of the new rule are particularly noteworthy for the risks they pose to lawyers' freedom of speech and highlight why so many commentators have recognized Model Rule 8.4(g) in its current form as an unacceptable "speech code."¹¹⁹

1. What Is "Conduct Related to the Practice of Law"?

Rather than being limited to a lawyer's conduct while engaged in client representation or otherwise practicing law, Model Rule 8.4(g) applies far more broadly to a lawyer's "conduct related to the practice of law."¹²⁰ Although Comment [4] offers a non-exclusive list of what this may "include[],"¹²¹ legal commentators have pointed out that many unlisted activities lawyers perform "relate" to law practice and implicate core

117. See Lindsey Keiser, Note, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629, 632 (2015) ("Determining when a lawyer's conduct is prejudicial to the administration of justice is essential to determining when a lawyer's speech can be restricted.").

118. See, e.g., ROTUNDA, SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT, *supra* note 8; ROTUNDA & DZIENKOWSKI, *supra* note 8; Blackman, *A Pause for State Courts*, *supra* note 8; Dent, *supra* note 8; Halaby & Long, *supra* note 8; Caleb C. Wolanek, Note, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(g) of the Model Rules of Professional Responsibility*, 40 HARV. J.L. & PUB. POL'Y 773 (2017); cf. Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31 (2018) (providing a generally favorable view of Model Rule 8.4(g) and its constitutionality, but acknowledging facial First Amendment overbreadth problems with the rule and comment that justify making revisions). *But cf.* Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195 (2017); Robert N. Weiner, "Nothing to See Here": *Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 HARV. J.L. & PUB. POL'Y 125 (2018).

119. Wolanek, *supra* note 118, at 775.

120. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (emphasis added).

121. *Id.* r. 8.4 cmt. 4.

written and oral speech activities traditionally protected by the First Amendment (e.g., continuing legal education or legal symposium events, social events involving legal groups such as the Federalist Society or the NAACP, volunteer service on a religious organization's board of trustees, law review articles, and law school classroom discussions).¹²²

2. What Are "Discrimination" and "Harassment"?

This Article emphatically takes as a given (and, in fact, vigorously supports) the principle that lawyers ought not to engage in any unlawful acts of discrimination or harassment, either in their law practices, law-related activities, or any other aspect of their daily lives. This basic premise, however, leaves two fundamental questions unresolved: (1) what conduct should the civil law deem to be "unlawful" acts of discrimination and harassment, particularly in light of critically important First Amendment freedoms of speech, religious exercise, and association?¹²³ and (2) how broad a meaning ought a rule of professional conduct such as Model Rule 8.4(g) give to the terms "discrimination" and "harassment," particularly in a diverse legal profession concerned with maintaining inclusiveness for dissenting moral viewpoints? The first question raises

122. See Blackman, *A Pause for State Courts*, *supra* note 8, at 246–48; Dent, *supra* note 8, at 142–43.

123. For example, anticipating the United States Supreme Court's 2018 decision in *Masterpiece Cakeshop* (discussed *infra* Part III.C.2), Ryan Anderson has pointed out critically important distinctions between same-sex and interracial marriage for purposes of enforcing anti-discrimination laws:

Exemptions from laws banning discrimination on the basis of race run the risk of undermining the valid purposes of those laws—such as eliminating the public effects of racist bigotry—by perpetuating the myth that blacks are inferior to whites. . . . [But] [a] ruling in favor of Jack Phillips [the baker in *Masterpiece Cakeshop*] sends no message about the supposed inferiority of people who identify as gay—indeed, it sends no message about them or their sexual orientations at all. It would simply say that citizens who support the historic understanding of marriage are not bigots, and that the state may not drive them out of business or civic life. Such a ruling doesn't threaten the social status of people who identify as gay or their community's profound and still-growing political influence.

Ryan T. Anderson, *Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J. L. & PUB. POL'Y 123, 125 (2018). See generally Ryan T. Anderson & Sherif Girgis, *Against the New Puritanism*, in DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 108 (2017).

significant issues of public policy that are beyond the intended scope of this Article, but the second one bears further attention and analysis.

New Comment [3] to Model Rule 8.4 defines “discrimination” as including “harmful verbal . . . conduct” (that is, speech) that “manifests bias or prejudice towards others” relating to one or more of the characteristics identified in the black-letter text.¹²⁴ The rule does not define what it means for a lawyer’s speech to be “harmful” to the reader(s) or listener(s).¹²⁵ Nor does the rule require that the words be directed “towards” the reader(s) or listener(s), but rather they could violate the rule merely by being written or spoken about “others” who are not present at the time the words are received.¹²⁶ “Harassment,” as defined in the Comment, “includes . . . derogatory or demeaning verbal . . . conduct” (that is, speech) relating to one or more of the same characteristics that can give rise to a violation for “discrimination.”¹²⁷ Comment [3] states the “substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).”¹²⁸ Accepting such guidance is thus purely optional, and the Comment language conspicuously fails to require a showing of severity or pervasiveness—generally necessary for civil harassment claims in employment law—for a lawyer to be found guilty of Model Rule 8.4(g) “harassment.”¹²⁹ Thus, a single comment relating to a person or a group (not even necessarily the reader or listener) that the lawyer knows or reasonably should know will be considered “demeaning” or “derogatory” by someone concerning

124. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 2018).

125. The concept of “harm” alleged to have been caused by speech the reader or listener finds disagreeable or offensive has expanded in recent years, especially with respect to historically marginalized groups and in particular on college campuses. See generally Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. LEGAL EDUC. 739, 741–44 (2017); see also Dent, *supra* note 8, at 154–56 (“Does the Rule Require Proof of Harm?”); *infra* Part III.C.3.

126. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 2018).

127. *Id.*

128. *Id.* (emphasis added).

129. See Blackman, *A Pause for State Courts*, *supra* note 8, at 245 (citing *Fara-gher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998)); see also ROTUNDA, SUPPORTING “DIVERSITY” BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 4 (citing *Davis Next Friend LaShonda D. v. Monroe City Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

a protected characteristic appears to be sufficient to violate the rule.¹³⁰

3. *Mens Rea Requirement: “Knows,” “Reasonably Should Know,” or None at All?*

Under Model Rule 8.4(g), disciplinary authorities need not prove that the lawyer knows the speech in question constitutes “discrimination” or “harassment.”¹³¹ Rather, it is sufficient if, in the eyes of the state bar authorities reviewing the facts, the lawyer *reasonably should have known* the speech falls within the broad standards described in Comment [3] (i.e., for “discrimination,” if the words and ideas they express are deemed “harmful” or “manifest bias or prejudice”; and for “harassment,” if a reader or listener would deem expressed words and ideas to be “demeaning” or “derogatory”). An earlier draft of Model Rule 8.4(g)—strongly urged on the ABA Standing Committee on Ethics and Professional Responsibility by “Goal III Commission” entities within the ABA—included no mens rea requirement of any kind.¹³² Only in the final weeks before

130. “Black’s Law Dictionary defines ‘demeaning’ as ‘[e]xhibiting less respect for a person or a group of people than they deserve, or causing them to feel embarrassed, ashamed, or scorned.’” Blackman, *A Pause for State Courts*, *supra* note 8, at 245 (quoting *Demeaning*, BLACK’S LAW DICTIONARY (10th ed. 2014)). “Random House defines ‘derogatory’ as ‘tending to lessen the merit or reputation of a person or thing; disparaging; depreciatory.’” *Id.* (quoting RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 537 (2d ed. 1998)). The *Oxford Living Dictionary* defines “derogatory” as “[s]howing a disrespectful or critical attitude” *Id.* (quoting *Derogatory*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/derogatory/> [<https://perma.cc/U28W-PXB8>] (last visited Apr. 20, 2017)).

131. See MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2018); *id.* r. 1.0(f) (defining “knows” as “denot[ing] actual knowledge of the fact in question,” which “may be inferred from the circumstances”); *cf.* MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 2015) (requiring for a possible violation of Model Rule 8.4(d) that the lawyer “*knowingly* manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status”) (emphasis added).

132. This emphatic advocacy for rejecting a mens rea requirement continued from multiple speakers at the February 2016 hearing before the ABA Standing Committee on Ethics and Professional Responsibility. See Halaby & Long, *supra* note 8, at 216–18 (reciting testimony, including ABA Section of Civil Rights and Social Justice member Robert Weiner’s statement that “[m]any people who are racists or misogynists or anti-gay don’t realize they are. . . .”); see also *id.* at 211–12, 218, 226 (discussing Goal III: Eliminate Bias and Enhance Diversity, and the

its adoption in August 2016, and at the urging of other groups within the ABA, was the “knows or reasonably should know” language added.¹³³ Legal scholarship has already criticized even this relaxed mens rea standard and proposed additional Comment amendments that would more explicitly draw lawyers’ speech reflecting unconscious, or “implicit,” bias within the reach of the rule.¹³⁴ And as George Dent notes, “Political correctness condemns microaggressions, which may be committed ‘unconsciously,’ but perhaps a lawyer ‘reasonably should know’ what behavior constitutes a microaggression. . . . [T]he politically correct definition of bias is continuously and rapidly expanding, so lawyers may have to update themselves constantly about what is the new taboo.”¹³⁵

role that members of the Goal III Commission entities played in promoting Model Rule 8.4(g) and, in particular, urging “that any knowledge qualifier be deleted” and for “the ambit of covered lawyer conduct to be broad”).

133. Halaby & Long, *supra* note 8, at 227–31.

134. See Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 367, 402–05 (2017) (stating that she “would have supported the elimination of the word ‘knowingly’ from” Model Rule 8.4(g), and asserting that lawyers should be required by professional conduct standards “to refrain from manifestations of bias, whether those manifestations come from their conscious or unconscious bias”). Chopp, however, insists that her proposed supplement to Comment [3] to address “unconscious biases” has educational rather than disciplinary objectives, and responds to potential concerns about “grievance procedures for unknowingly manifesting bias” with assurances that “it is the text of the rule that is authoritative, not the commentary to the rule.” *Id.* at 404–05 (citing MODEL RULES OF PROF’L CONDUCT Preamble and Scope [21] (AM. BAR. ASS’N 2016)). But these assurances ring hollow, as pairing explicit Comment language on “unconscious biases” with black-letter text supporting disciplinary action against lawyers for what they “reasonably should know” would very likely impact the interpretation and application of the rule. *Cf.* Halaby & Long, *supra* note 8, at 245 (“Even crediting the existence of implicit bias as well as corresponding concerns over its impact on the administration of justice, one recoils at the dystopian prospect of punishing a lawyer over unconscious behavior.”).

135. Dent, *supra* note 8, at 144 (footnote omitted) (citing Hannah Yi, *What Exactly Is a Microaggression? Let These Examples from Hollywood Movies Explain*, QUARTZ (Sept. 22, 2016), <https://qz.com/787504/what-exactly-is-a-microaggression-let-these-examples-from-hollywood-movies-explain/> [<https://perma.cc/XPA8-TTXX>]); *cf.* Latonia Haney Keith, *Cultural Competency in a Post-Model Rule 8.4(g) World*, 2 DUKE J. GENDER L. & POL’Y 1, 41 (2017) (advocating that Model Rule 8.4(g) should be enforced by invoking “the ‘reasonably culturally competent lawyer,’ a mindful, self-aware lawyer of ‘reasonable prudence and [cultural] competence,’” rather than “through the lens of the ‘reasonable lawyer,’ which is unfortunately a homogenous being capable of infusing bias in such decisions”).

4. *Is Model Rule 8.4(g) a Content-Based Speech Prohibition That, on the Face of its Comment, Discriminates Based on Viewpoint?*

Model Rule 8.4(g) is a content-based speech prohibition and is not viewpoint neutral. In fact, on its face (via its explanatory Comment), it discriminates against disfavored viewpoints relating to the characteristics it identifies for protection. For example, Comment [4] states “[l]awyers 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.”¹³⁶ As Josh Blackman notes, this “well-intentioned” language expressly “sanctions one perspective on a divisive issue—affirmative action—while punishing those who take the opposite perspective.”¹³⁷ It also strengthens concerns that “discrimination” and “harassment” relating to the characteristics identified in the text of Model Rule 8.4(g) will be interpreted and enforced in an ideologically one-sided, “politically correct” manner (i.e., only to protect subgroups the state bar authorities deem worthy of protection for historical, political, or cultural reasons, rather than evenhandedly to all persons regarding that characteristic).¹³⁸ “Diversity” and “inclusion” are “left undefined” by the rule,¹³⁹ and considering the progressive advocacy by the Goal III Commission entities during its drafting history,¹⁴⁰ there is no basis to infer any intent or desire to safeguard inclusion in the profession of lawyers with traditional religious and moral convictions.¹⁴¹

136. MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS'N 2018).

137. Blackman, *A Pause for State Courts*, *supra* note 8, at 259.

138. See ROTUNDA, SUPPORTING “DIVERSITY” BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 7 (stating that “[t]he ABA rule is not about forbidding discrimination based on sex or marital status; it is about punishing those who say or do things that do not support the ABA’s particular view of sex discrimination or marriage.”).

139. See Halaby & Long, *supra* note 8, at 240.

140. See *supra* note 132 and accompanying text (discussing Goal III Commission entities and their influence on the drafting of Model Rule 8.4(g)).

141. Cf. Aviel, *supra* note 118, at 58 n.139 (suggesting that because the text of the Comment *could* be construed as including ideological diversity, there is no viewpoint discrimination in the rule).

5. *Does Model Rule 8.4(g) Actually Protect Lawyers' Freedom of Client Selection, Including Declinations Based on Their Moral Objections to Client Objectives?*

Despite its ostensible nod of non-limitation, Model Rule 8.4(g) offers lawyers no actual protection against charges of “discrimination” based on their *discretionary* decision to decline representation of clients, including ones whose objectives are fundamentally disagreeable to the lawyer. Although the new rule states it “does not limit the ability of a lawyer to accept, decline or withdraw from a representation *in accordance with Rule 1.16*,”¹⁴² Model Rule 1.16 itself provides no standard for when lawyers are *permitted* to decline client representation; rather, it addresses only when lawyers *must* decline representation, or when they may or must *withdraw* from representation.¹⁴³ So Model Rule 8.4(g)'s approval for lawyers to “decline” representation “in accordance with Rule 1.16” seems, on the face of the two rules, to allow only what was already required. And, as Ronald Rotunda observed, even if this new black-letter language does protect or acknowledge *some* right of lawyers to decline representation, Comment [5] “appears to interpret this right . . . narrowly,”¹⁴⁴ stating a lawyer commits no violation “by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved

142. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (emphasis added).

143. *Id.* r. 1.16(a), (b) (mandating when “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client,” and stating when “a lawyer may withdraw from representing a client”); see also ROTUNDA & DZIENKOWSKI, *supra* note 8; Dorothy Williams, Note, *Attorney Association: Balancing Autonomy and Anti-Discrimination*, 40 J. LEGAL PROF. 271 (2016); Bradley Abramson, *Gagging Attorneys: A Critical Look at the ABA “Anti-Discrimination” Rule*, JURIST (July 31, 2017, 2:17 PM), <https://www.jurist.org/commentary/2017/07/bradley-abramson-aba-rule> [<https://perma.cc/6EK4-U877>]. Lawyers’ essentially unrestricted freedom in initial client selection (outside the context of court appointments or violations of other law) has not been grounded in the black-letter text of the professional conduct rules; rather, it comes from the longstanding traditions, customs, and accepted ethical practices of the legal profession. See Collett, *Client Selection*, *supra* note 74, at 652 n.67; Dent, *supra* note 8, at 163 n.202; Williams, *supra*, at 271 (citing CHARLES WOLFRAM, MODERN LEGAL ETHICS § 10.2.2 (1986)).

144. ROTUNDA, SUPPORTING “DIVERSITY” BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 5.

populations in accordance with these Rules and other law.”¹⁴⁵ Thus, if state bar authorities consider a lawyer’s declining representation—including a lawyer’s moral objections to the client’s objectives—as “manifest[ing] bias or prejudice,” they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g).¹⁴⁶

The risk that Model Rule 8.4(g) will interfere with lawyers’ conscience-based decisions to decline representation is heightened by the adjacent statement in Comment [5] that “[a] lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities.”¹⁴⁷ Although this language reiterates a concept of moral non-accountability already expressed in Model Rule 1.2(b),¹⁴⁸ its conspicuous placement in this Comment could be construed as meaning to deprive a lawyer charged with discrimination of any defense based on avoiding complicity with client objectives that conflict with the lawyer’s religious or moral convictions.¹⁴⁹

145. MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS’N 2018).

146. There is already reason for concern that states adopting Model Rule 8.4(g) will apply it broadly and strictly (albeit unpredictably) to regulate client selection decisions by lawyers. As Bradley Abramson explains, “In the Reporter’s Notes appended to Vermont’s new rule, the Vermont Supreme Court expressly states that ‘Rule 1.16 must also be understood in light of Rule 8.4(g)’ and that an attorney’s client selection or withdrawal decisions ‘cannot be based on discriminatory or harassing intent without violating the rule.’” Abramson, *supra* note 143. “The lesson,” he concludes, “is that—contrary to the representations of the rule’s proponents—a regime governed by the new Model Rule will, in fact, require attorneys to represent clients they do not want to represent, and will subject them to possible discrimination claims from anyone whose representation the attorney declines.” *Id.*; see also Gillers, *supra* note 118, at 231–32 (conceding that the United States Conference of Catholic Bishops’ concerns about religious lawyers’ loss of freedom in client selection under Model Rule 8.4(g) are well founded, though not a basis for objecting to the rule, and asserting “the prospect of a successful First Amendment defense under the Free Exercise Clause for violating [the rule] may be remote”).

147. MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS’N 2018).

148. *Id.* r. 1.2(b); see McGinniss, *supra* note 88, at 7–8 (discussing Model Rule 1.2(b) and its “principle of non-accountability”).

149. See Bradley S. Abramson, *6 Reasons States Should Shun ABA Attorney Misconduct Rule*, LAW 360 (Sept. 6, 2016, 10:17 PM), <https://www.law360.com/texas/articles/836505/6-reasons-states-should-shun-aba-attorney-misconduct-rule> [<https://perma.cc/TH3R-WCMM>] (“[O]ne would have to be obtuse not to grasp the fact that—by preemptively depriving attorneys of the claim that representing a client will make them complicit in a client’s behavior—the ABA’s very purpose in adopting this rule is to foreclose attor-

In this respect, the Board's dismissive treatment of the Catholic lawyer's moral objections to abortion in the 1996 Tennessee Ethics Opinion is particularly instructive of how state bar authorities might utilize this Comment language in support of discrimination charges.¹⁵⁰

6. *What Does Model Rule 8.4(g) Mean by "Legitimate Advice or Advocacy," and Whose Standard of "Legitimacy" Will Be Applied?*

Model Rule 8.4(g) states that it "does not preclude legitimate advice or advocacy consistent with these Rules."¹⁵¹ What makes advice or advocacy "legitimate" (or not) is neither defined nor elucidated in the Comment, although some guidance about relevance and materiality to the facts or law in representation had been offered in earlier Comment drafts.¹⁵² As Andrew Halaby and Brianna Long explain, the word "cries for definition," particularly where "the subject matter is socially, culturally, and politically sensitive."¹⁵³ Looking to the "consistent with these

neys from being able to assert religious or moral considerations in making client selection decisions, thereby forcing attorneys to either act against their conscience or face professional discipline. No state should adopt a rule that would do that.").

150. *See supra* Part II.

151. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018). Former Comment [3] to Model Rule 8.4 stated "[l]egitimate advocacy respecting [race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status] does not violate paragraph (d)." MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2015). It also specified "[a] trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule." *Id.* This caveat about racially-discriminatory preemptory challenges remained in new Comment [5]. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018); *see* ROTUNDA, SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 6 (observing that the rule "does not tell us what is 'legitimate' advice or advocacy," but "a racially motivated preemptory challenge apparently may be legitimate").

152. In the April 2016 draft, Comment [3] stated "[p]aragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation." Halaby & Long, *supra* note 8, at 215–16. After further revision to this Comment in July 2016, it was finally dropped in August 2016 when the ABA Standing Committee on Ethics and Professional Responsibility added the "legitimate advice and advocacy" language to the black-letter text. *Id.* at 227–32.

153. Halaby & Long, *supra* note 8, at 237–38; *see also* Michael William Fires, Note, *Regulating Conduct: A Model Rule against Discrimination and the Importance of Legitimate Advocacy*, 30 GEO. J. LEGAL ETHICS 735, 741 (2017) ("[S]ince the in-

Rules” limitation, they point to Model Rule 2.1 and its requirements that advice be “candid” and its allowing for “advice” that refers “not only to the law but to other considerations,” such as moral ones.¹⁵⁴ Presumably, the “legitimate advice” language in Model Rule 8.4(g) protects the full-spectrum of “candid advice” required and permitted under Model Rule 2.1.¹⁵⁵ But the lack of definition or explanation in the rule itself, and the circularity of “consistent with these Rules” (including other parts of Model Rule 8.4(g)), makes this harbor far from safe.¹⁵⁶ This is especially so for lawyers with traditional religious or moral convictions, often disparaged as so-called bigotry in contemporary political and popular culture and which may be deemed illegitimate by state bar authorities.¹⁵⁷ Moreover, considering that Model Rule 8.4(g) covers not only speech made in the course of representing clients or practicing law, but also speech “related to the practice of law,” it is not clear whether a lawyer’s “advocacy” on matters of law and public policy in an individual or organizational capacity will be

clusion of the term ‘legitimate advocacy’ in the original Comment 3 to Rule 8.4, scholars have not only disagreed on an appropriate definition of ‘legitimate advocacy’ but have also struggled to create a simple way to distinguish ‘legitimate advocacy’ from illegitimate advocacy.”)

154. Halaby & Long, *supra* note 8, at 242–43 (quoting MODEL RULES OF PROF’L CONDUCT r. 2.1).

155. *But cf.* Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, U. PA. J. CONST. L. ONLINE, Apr. 2017, at 1, 12–17 (sketching restrictive boundaries for what constitutes “professional advice” under Model Rule 8.4(g)). The only “advice” that Haupt deems “professional” is advice “based on the accepted methodology of the knowledge community, that is . . . legal doctrine,” rather than on “exogenous justifications” such as “religious, political, or philosophical” beliefs of the professional, recourse to which is contrary to clients’ expectations and also places lawyers “outside of the knowledge community.” *Id.* at 12–13. In critiquing Haupt’s narrow vision of “legitimate advice,” Dent observes that she provides “no evidence that this is true of all clients,” and adds “many prominent lawyers have viewed their role as not just technicians of positive law, but as wise counselors advising their clients on ethics and prudence as well as the law.” Dent, *supra* note 8, at 175–76, 176 n.295. In any event, Haupt’s claim certainly “underscores the uncertain meaning of ‘legitimate advice or advocacy’ in Model Rule 8.4(g).” *Id.* at 176.

156. *See* ROTUNDA, SUPPORTING “DIVERSITY” BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 6–7.

157. *See id.* at 7 (“The ABA rule is . . . about punishing those who say or do things that do not support the ABA’s particular view.”).

safeguarded from disciplinary challenge if it is deemed morally offensive and therefore “harmful.”¹⁵⁸

158. See Blackman, *A Pause for State Courts*, *supra* note 8, at 246–47, 258; see also Dent, *supra* note 8, at 154 (“Even if some harm is required, the comments do not indicate what *kind* of harm qualifies.”). The only state thus far to have adopted Model Rule 8.4(g), Vermont, included Reporter’s Notes suggesting its intent to construe narrowly the term “legitimate . . . advocacy”:

Rule 8.4(g) permits “legitimate advice or advocacy” consistent with the rules. Essentially, as new Comment [5] suggests, this language calls on the lawyer not to forget that even the client whose views or conduct would violate legal prohibitions against discrimination or harassment applicable to him or her may deserve representation under Rules 6.1 and 6.2. As Rule 1.2 makes clear, representation does not constitute endorsement of a client’s views and may include efforts to assist the client to avoid unlawful activity. *The effect of Rule 8.4(g) is to prohibit the lawyer from expressing views as his own that would violate that rule.*

Order Promulgating Amendments to the Vermont Rules of Professional Conduct, slip op. at 3 (Vt. July 14, 2017), <https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPr8.4%28g%29.pdf> [<https://perma.cc/L9SD-CM7N>] (emphasis added). Not only does this Reporter’s Note indicate Vermont deems expression of “views” as violating its Rule 8.4(g), it also appears to remove any legitimacy-based safe harbor for lawyers who express (i.e., advocate for) their “own” views on moral questions relating to the law.

7. *Why Was the Exclusion for “Conduct . . . Protected by the First Amendment” Removed from the New Comment, and What Does this Deliberate Silence Betoken¹⁵⁹ for its Intended Application to (and Chilling Effects on) Lawyers’ Speech?*

Although Model Rule 8.4(g) creates an unprecedentedly broad range of speech subjecting lawyers to disciplinary action, the final version of its Comment dropped earlier draft language assuring writers and speakers on matters relating to the law that the rule “does not apply to conduct . . . protected by the First Amendment.”¹⁶⁰ The December 2015 report accompanying that earlier draft language “ma[d]e clear that a lawyer does retain a ‘private sphere’ where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment.”¹⁶¹ As Josh Blackman notes, the history behind its omission from the final version of the Comment suggests a “deliberate effort” to de-emphasize lawyers’

159. In honor of this Article’s protagonist, Saint Thomas More, “betoken” alludes to prosecutor Thomas Cromwell’s argument that More was guilty of treason notwithstanding his silence:

CROMWELL: Now, Sir Thomas, you stand upon your silence.

MORE: I do.

CROMWELL: But, Gentleman of the Jury, there are many kinds of silence. Consider first the silence of a man when he is dead. Let us say we go into the room where he is lying; and let us say it is in the dead of night—there’s nothing like darkness for sharpening the ear; and we listen. What do we hear? Silence. What does it betoken, this silence? Nothing. This is silence, pure and simple. But consider another case. Suppose I were to draw a dagger from my sleeve and make to kill the prisoner with it, and suppose their lordships there, instead of crying out for me to stop or crying out for help to stop me, maintained their silence. That *would* betoken! It would betoken a willingness that I should do it, and under the law they would be guilty with me. So silence can, according to circumstances, speak.

BOLT, *supra* note 1, at 151.

160. Halaby & Long, *supra* note 8, at 215.

161. STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY, AM. BAR ASS’N, DRAFT PROPOSAL TO AMEND MODEL RULE 8.4, at 5 (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.pdf [https://perma.cc/US3Z-F9BJ]. The committee considered this language to be “a useful clarification” that “would appropriately address” some of the “possible First Amendment challenges” that could arise when “state courts adopted similar black letter provisions.” *Id.*

First Amendment rights.¹⁶² In any case, neither Model Rule 8.4(g), the new Comment language, nor the final ratified report contains even a passing mention of the First Amendment and the need to guard against overreaching disciplinary enforcement.¹⁶³ This development also reinforced the strong distrust its opponents already felt about the ultimate objectives for such a purposefully expansive rule and deepened their concerns about its potential abuse in targeting lawyers expressing disfavored traditional religious and moral viewpoints.¹⁶⁴

B. States' Reception (and Widespread Rejection) of Model Rule 8.4(g)

In the more than two years since the ABA House of Delegates approved Model Rule 8.4(g) and the new Comment language, only one state, Vermont, has adopted it substantially as written.¹⁶⁵ A continually growing number of other state courts

162. See Blackman, *A Pause for State Courts*, *supra* note 8, at 248–50. He describes testimony at the committee's February 2016 hearing urging the removal of the "First Amendment" language "because it 'take[s] away' from the purpose of the rule." *Id.* at 249 (alteration in original) (quoting Am. Bar Ass'n House of Delegates, Tr. of Proceedings at 43 (Feb. 7, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf [<https://perma.cc/WNZ3-BA4Y>]).

163. See Blackman, *A Pause for State Courts*, *supra* note 8, at 250.

164. See, e.g., Dent, *supra* note 8, at 178 ("Perhaps proponents of Rule 8.4(g) do not intend to comply with First Amendment precedent; perhaps they intend to initiate a 'cultural shift' in the meaning of the First Amendment and of the role of free speech in our society.").

165. Order Promulgating Amendments to the Vermont Rules of Professional Conduct, slip op. at 3 (Vt. July 14, 2017), [https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4\(g\).pdf](https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf) [<https://perma.cc/Z8AU-8KHU>]. The Vermont Supreme Court, in fact, made the rule's restrictions on lawyers even greater, adding language to Comment [4] to emphasize its clear intent to prohibit lawyers from making an otherwise *discretionary withdrawal* from representation: "The optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." *Id.* It further explained that, under the mandatory withdrawal provision of Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)." *Id.*; see also Andrew Strickler, *Vermont's Anti-Bias Rule Vote an Outlier in Heated Debate*, LAW 360 (Aug. 14, 2017), <https://www.law360.com/articles/953530/vermont-s-anti-bias-rule-vote-an-outlier-in-heated-debate> [<https://perma.cc/LRK9-93WD>].

and bar association committees have considered whether to adopt Model Rule 8.4(g) and have declined to do so.¹⁶⁶ The circumstances involved and the reasons for these declinations have been varied, but common themes have also emerged.¹⁶⁷

Before August 2016, twenty-three states and the District of Columbia had already adopted black-letter rules of professional conduct addressing issues relating to bias in the legal profession.¹⁶⁸ For example, in December 2016, the Illinois State Bar Association recommended that its Supreme Court retain existing rules prohibiting lawyers from engaging in “discrimination” violating established civil law standards and only after a civil claim has been successfully adjudicated against the lawyer.¹⁶⁹ Model Rule 8.4(g) has been considered either by petition or bar association rules committee review in many other states, including Nevada (where those proceedings concluded with-

166. See Am. Bar Ass’n Ctr. for Prof. Responsibility, *Pol’y Implementation Comm., Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct*, AM. BAR ASS’N (Sept. 19, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.authcheckdam.pdf [https://perma.cc/T3KD-4DFB].

167. See David L. Hudson Jr., *States split on new ABA Model Rule limiting harassing or discriminatory conduct*, A.B.A. J. (Oct. 2017), http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct/ [https://perma.cc/MU8J-PNTC].

168. *Comparison of State Black-Letter Rules to Model Rule 8.4(g)*, CHRISTIAN LEGAL SOC’Y, <https://www.christianlegalsociety.org/pdfs/1004.pdf> [https://perma.cc/J6PG-6LSC] (last visited Dec. 3, 2018); see also MODEL RULES OF PROF’L CONDUCT r. 8.4 app. B (AM. BAR ASS’N, Discussion Draft July 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf [https://perma.cc/VA89-4UPQ] (cataloging anti-bias provisions in state rules of professional conduct).

169. See ILL. RULES OF PROF’L CONDUCT r. 8.4(d), (j) (2018), http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#8.4 [https://perma.cc/2K7K-F68B]; Mark S. Mathewson, *ISBA Assembly OKs futures report, approves UBE and collaborative law proposals*, ILL. ST. BAR ASS’N: ILL. LAW. NOW (Dec. 15, 2016), <https://www.isba.org/iln/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals> [https://perma.cc/59W3-2YG7]. The Court requested and received comments from the public, and as of July 2018 the issue remained pending. See *ABA Model Rule 8.4(g) Efforts in Illinois*, CHRISTIAN LEGAL SOC’Y, <https://www.christianlegalsociety.org/aba-model-rule-illinois> [https://perma.cc/YKV8-VK2R] (last visited Dec. 3, 2018).

out changes to existing rules)¹⁷⁰ and Maine (which rejected Model Rule 8.4(g) in favor of a far narrower rule).¹⁷¹

The most dramatic intragovernmental conflict thus far occurred in Montana. When, despite vocal and vigorous opposition, the Montana Supreme Court initiated and continued a notice and comment process on Model Rule 8.4(g), the Montana Legislature passed a joint resolution in April 2017 resolving that the proposed rule, if adopted, would violate the Constitutions of the United States (First Amendment) and Montana (separation of powers and exceeding judicial authority “to regulate the speech and conduct of attorneys”).¹⁷² Moreover, the attorneys general of Texas (December 2016), South Carolina (May 2017), Louisiana (September 2017), and Tennessee (March 2018) each issued a detailed legal opinion concluding that Model Rule 8.4(g) would violate the First Amendment if adopted by their courts.¹⁷³ In Texas, that was the end of the sto-

170. Order in the Matter of Amendments to Rule of Prof'l Conduct 8.4, ADKT-0526 (Nev. Sept. 25, 2017), <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf> [<https://perma.cc/6UPK-B9GU>].

171. Order Issuing Proposed Amendment to the Me. Rules of Prof'l Conduct (Me. Nov. 30, 2017), http://courts.maine.gov/rules_adminorders/rules/proposed/mr_prof_conduct_proposed_amend_2017-11-30.pdf [<https://perma.cc/BV88-484B>] (adding new Maine Rule 8.4(g) prohibiting a lawyer from “engag[ing] in unlawful harassment or unlawful discrimination”; also explaining that “Maine has considered, but not adopted, the ABA Model Rule 8.4(g)” and that “Maine’s version makes a statement to all attorneys that the profession does not tolerate unlawful harassment or unlawful discrimination”). See generally *A Misguided Proposed Ethics Rule Change: ABA Model Rule 8.4(g) and the States*, CHRISTIAN LEGAL SOC’Y: CTR. FOR L. & RELIGIOUS FREEDOM, <https://www.clsreligiousfreedom.org/resources/aba-model-rule-84g-and-states> [<https://perma.cc/XXS8-AFU5>] (last visited July 30, 2018). For an excellent summary of arguments made in opposition to Model Rule 8.4(g) in response to state supreme courts’ requests for comments, see Christian Legal Soc’y, Comment Letter Opposing Adoption of Model Rule 8.4(g) (May 3, 2018), <https://www.clsnet.org/document.doc?id=1126> [<https://perma.cc/8NZH-NG9U>].

172. S.J. Res. 15, 65th Leg. (Mont. 2017), <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf> [<https://perma.cc/9DRA-JSRG>].

173. ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution, La. Att’y Gen. Op. 17-0114 (Sept. 8, 2017), <https://www.ag.state.la.us/Opinions> [<https://perma.cc/9TWR-8GY9>] (select “Search Released Opinions”; then enter “17-0114”); S.C. Att’y Gen. Op. Letter to Hon. John R. McCravy III, S.C. House of Representatives (May 1, 2017), <http://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS10143->

ry, and the state retained its existing anti-bias rule.¹⁷⁴ Subsequently, the Supreme Courts of South Carolina (June 2017)¹⁷⁵ and Tennessee (April 2018)¹⁷⁶ issued orders rejecting Model Rule 8.4(g).¹⁷⁷

In some jurisdictions, Model Rule 8.4(g) has been rejected for reasons that combined preference for an existing state rule and great concerns about First Amendment problems and potential chilling effects on lawyers' speech. For example, in September 2017, North Dakota's Joint Committee on Attorney Standards

FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf [https://perma.cc/ED72-3UGM]; American Bar Association's New Model Rule of Professional Conduct 8.4(g), Tenn. Att'y Gen. Op. 18-11 (Mar. 16, 2018), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf> [https://perma.cc/DZY2-YG23]; Whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney's statutory or constitutional rights (RQ-0128-KP), Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf> [https://perma.cc/M248-HKGG].

174. See TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT r. 5.08 (2018), <https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm> [https://perma.cc/U429-8VG9].

175. Order Declining to Incorporate Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct, No. 2017-000498 (S.C. June 20, 2017), <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> [https://perma.cc/5WVW-65PS].

176. Order Denying Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g), No. ADM2017-02244 (Apr. 23, 2018), https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf [https://perma.cc/6HBN-7TAA]; see also Mindy Rattan, *Tennessee Again Rejects Anti-Discrimination Ethics Rule*, BLOOMBERG LAW (Apr. 27, 2018), <https://www.bna.com/tennessee-again-rejects-n57982091727/> [https://perma.cc/EG95-X7PA].

177. The Supreme Courts of Arizona (August 2018) and Idaho (September 2018) also have issued orders rejecting Model Rule 8.4(g). See Kim Colby, *Two More State Supreme Courts Reject ABA Model Rule 8.4(g)*, FEDERALIST SOC'Y (Sept. 17, 2018), <https://fedsoc.org/commentary/blog-posts/two-more-state-supreme-courts-reject-aba-model-rule-8-4-g> [https://perma.cc/63Y9-ANK6]. Following its attorney general's opinion, Louisiana's State Bar Association Committee on the Rules of Professional Conduct voted not to proceed with either Model Rule 8.4(g) or an alternative rule draft proposed by its subcommittee. See *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, LA. ST. BAR ASS'N (Oct. 30, 2017), <https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892> [https://perma.cc/74SP-Z3TH].

recommended against the adoption of Model Rule 8.4(g)¹⁷⁸ in preference for its Supreme Court's existing black-letter rule prohibiting "conduct that is prejudicial to the administration of justice."¹⁷⁹ In North Dakota's rule, such conduct includes to "knowingly manifest through words or conduct in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel, or others, except when those words or conduct are legitimate advocacy because [one of those characteristics] is an issue in the proceeding."¹⁸⁰ In addition, North Dakota's Committee members stated serious concerns that Model Rule 8.4(g) is "overbroad, vague, and imposes viewpoint discrimination" and "may have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views," and expressed "uncertainty with how the phrase 'conduct relat[ed] to the practice of law' would be interpreted."¹⁸¹

C. *Justified Distrust of Speech Restrictions: "Cultural Shift" in the Legal Profession against Socially Conservative Viewpoints*

In his leading 2017 article on Model Rule 8.4(g) and the First Amendment, Josh Blackman recounts a story that illustrates the clash of perspectives on whether the risks that the new rule poses to lawyers' freedom of speech are real and worthy of concern:

During the 2016 Federalist Society National Lawyers Convention, Professors Eugene Volokh and Deborah Rhode debated how the new rule [8.4(g)] interacted with the First

178. Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. on Att'y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (Dec. 14, 2017) [hereinafter N.D. Att'y Standards Letter], <https://perma.cc/3FCP-B55J>.

179. N.D. RULE OF PROF'L CONDUCT r. 8.4(f) (2018), <http://www.ndcourts.gov/rules/conduct/frameset.htm> [<https://perma.cc/6LDY-ZU5B>].

180. *Id.*

181. N.D. Att'y Standards Letter, *supra* note 178; see also Meeting Minutes, Joint Comm. on Att'y Standards (Sept. 15, 2017), http://www.ndcourts.gov/court/committees/Jt_ASC/MinutesSept2017.pdf [<https://perma.cc/HYA5-A5EC>]; Meeting Minutes, Joint Comm. on Att'y Standards (Mar. 24, 2017), http://www.ndcourts.gov/court/committees/Jt_ASC/MinutesMarch2017.pdf [<https://perma.cc/55DG-APSZ>].

Amendment. . . . Professor Volokh worried that complaints could be filed against a speaker at a CLE event who critiques the Supreme Court's decision in *Obergefell v. es.*^[182] . . . Volokh stressed that what the drafters of the rule "are getting is exactly what they are intending. They are intending to suppress particular views in these kinds of debates."

Professor Rhode was not particularly concerned with the potential for abuse. From her experiences, disciplinary committees "don't have enough resources to go after people who steal from their clients' trust fund accounts." She found "wildly out of touch with reality" the "notion that they are going to start policing social conferences and go after people who make claims about their own views about" religion or sexual orientation. . . . She concluded her remarks, "*We're a profession that knows better than that.*" Rhode paused. "*I would hope.*"

Moments later, [moderator] Judge [Jennifer] Walker Elrod asked whether Professor Rhode's position "would depend on a trust . . . that the organizations would not be going after people that they don't like, such as . . . conservatives." She asked, "We would have to just trust them?" The Federalist Society luncheon, packed with right-of-center lawyers, laughed aloud. Professor Rhode interjected that Rule 8.4(g) did not depend on trusting the disciplinary crowds alone. "And the Courts!" she added. "My [G]od, I never thought I'd be saying this at a Federalist Society conference, the Rule of Law people, it's still out there!" Professor Rhode concluded, "*I don't think we'd see a lot of toleration for those aberrant complaints.*" In other words, *trust the bar such that the rules would not be abused.*¹⁸³

Blackman elaborates on the Volokh/Rhode debate and reaches a well-justified conclusion:

During her remarks at the Federalist Society conference, Professor Rhode admitted that she viewed Rule 8.4(g) as "a largely symbolic gesture," and that "the reason why proponents wanted it in the Code was as a matter of educating the next generation of lawyers as well as a few practitioners in

182. 135 S. Ct. 2584 (2015).

183. Blackman, *A Pause for State Courts*, *supra* note 8, at 261 (final two ellipses in original) (emphases added) (footnotes omitted).

this one about *other* values besides First Amendment expression.” Her answer is quite revealing. Even before Rule 8.4(g) was adopted, attorneys who engaged in sexual harassment and other forms of discrimination were already subject to liability under federal, state, and local employment law, which extend beyond the actual workplace. . . .

What Rule 8.4(g) does accomplish is “educating the next generation of lawyers” about what sorts of speech are permitted, and what sorts of speech are not. . . . At bottom, this rule, and its expansion of censorship to social activities with only the most tenuous connection with the delivery of legal services, is not about education. It is about reeducation.¹⁸⁴

Other legal ethics scholars, such as Stephen Gillers, have echoed Rhode’s sanguinity in response to arguments against Model Rule 8.4(g) for contravening First Amendment freedoms and values.¹⁸⁵ One 2018 article by lawyer Robert Weiner has gone so far as to assert in its title, and insist in its analysis, that there is “*Nothing to See Here*” for those who value the letter and spirit of the First Amendment.¹⁸⁶ In a 2018 article providing a comprehensive First Amendment Free Speech Clause study of Model Rule 8.4(g), however, Rebecca Aviel identifies an overbreadth problem stemming from its expansive Comment language on “harassment.”¹⁸⁷ She advises reinstating an earlier

184. *Id.* at 264–65.

185. Similar to Rhode, Gillers insists that “[e]xperience teaches us that the kind of biased or harassing speech that will attract the attention of disciplinary counsel will not enjoy First Amendment protection.” Gillers, *supra* note 118, at 235. Yet in this same article, he uses broad language to describe his view of the scope of sanctionable violations under Model Rule 8.4(g) that would purportedly withstand First Amendment scrutiny by the courts. *See id.* at 237 (“No lawyer has a First Amendment right to *demean* another lawyer (or anyone involved in the legal process).”) (emphasis added). Although he does not “foreclose the possibility of improvement” in its drafting, *id.* at 238, Gillers concludes that the rule is not overbroad or vague despite its use of general, sweeping terms such as “demeaning” and “derogatory” to describe what kind of “harassment” will be prosecutable. That Gillers provides just one extreme example—i.e., “if one were to seek to discipline a lawyer who said ‘ladies first’ when opening a door for a woman”—as his step too far for prosecution under the First Amendment provides little reassurance about his view of the rule’s proper scope and potential enforcement. *Id.* at 237; *see also* Dent, *supra* note 8, at 20 (“Gillers lists some examples that he says would not violate the rule, but these are so innocuous as to give little reassurance about the scope of the rule.”).

186. *See* Weiner, *supra* note 118, at 125.

187. *See* Aviel, *supra* note 118, at 38.

draft's black-letter rule requirement that neither "discrimination" nor "harassment" is a violation unless it is "against a person."¹⁸⁸ But in other respects, Aviel concludes that the rule is facially constitutional and insisted that lawyers, rather than objecting to its adoption as an infringement of their freedoms, should simply defend themselves against abuses of the rule by asserting constitutional violations on an as-applied basis.¹⁸⁹ Her arguments on First Amendment Free Speech Clause issues involving Model Rule 8.4(g) are distinctive insofar as she "engages in the close textual analysis that is necessary to assess whether Rule 8.4(g) is overbroad."¹⁹⁰ But ultimately her assurances that the rule is only a modest revision away from constitutional security, and her insistence that its reach into the "illusive private sphere" is "neither unprecedented nor particularly troubling against the existing backdrop of lawyer regulation," offer little comfort for socially conservative lawyers.¹⁹¹

In any case, the powerful distrust exhibited by many lawyers and scholars about the scope of the agenda for—and what could go wrong with—Model Rule 8.4(g) has remained deep

188. *See id.* at 58.

189. *See id.* at 74; *cf.* Dent, *supra* note 8, at 178 ("This is not how the First Amendment works. Those subject to speech restrictions are entitled to know *in advance* what the boundaries are; they cannot be forced into case-by-case Russian roulette in which a wrong guess about the scope of a rule can destroy one's career.").

190. Aviel, *supra* note 118, at 45. Although Gillers exhibits little concern with accommodating the consciences of lawyers with traditional religious and moral views relating to the law, Aviel at least recognizes the genuine risks that the overbreadth problems with Model Rule 8.4(g) could pose. *Compare* Gillers, *supra* note 118, at 232 *with* Aviel, *supra* note 118, at 56.

191. *See* Aviel, *supra* note 118, at 63, 74. Recent developments in American legal advocacy and the culture of the legal profession also reflect it would be unwise for socially conservative lawyers to support Model Rule 8.4(g) on the optimistic assumption that all state bar authorities, state courts, and federal courts will always rigorously adhere to the most speech-protective precedents of the United States Supreme Court, and, moreover, that those precedents will never be weakened by any subsequent Court decision on the First Amendment (including by tomorrow's Justices, who may well be drawn from the ranks of today's anti-free-speech legal activists). *See infra* Part III.C.3 (Rising Opposition to Free Speech on College Campuses and in Law Schools); *see also* Dent, *supra* note 8, at 179 ("The speech code imposed by 8.4(g) may not be the end goal but merely one more step in the campaign to end free speech and to substitute a standard of partisan political correctness for what any American is allowed to say.").

and persistent. Why have organizations such as the United States Conference of Catholic Bishops¹⁹² and the Christian Legal Society¹⁹³ written in opposition to the breadth of the new rule, not to mention a cascade of individual lawyers submitting comments first to the ABA's Standing Committee on Ethics and Professional Responsibility,¹⁹⁴ and then to state supreme courts around the country?¹⁹⁵ To understand why, it is necessary to consider how the rule's development, adoption, and attempted implementation in the states has occurred alongside the legal profession's efforts in other areas to marginalize social conservatives, including lawyers holding and expressing traditional religious and moral views on matters of sexual ethics.

In the December 2015 report accompanying the only draft version of Model Rule 8.4(g) for which opportunities for public comment and a hearing were offered, the ABA Standing Committee on Ethics and Professional Responsibility quoted with approval an earlier supportive comment—on an analogous proposal for the ABA Young Lawyers Division Assembly—that it had received from the Oregon New Lawyers division: “There is a need for a *cultural shift* in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, to be captured in the

192. See United States Conference of Catholic Bishops, Comment Letter on Proposed Amendment to Model Rule 8.4 (Mar. 10, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/amos_3_11_16.authcheckdam.pdf [<https://perma.cc/KKS4-KJQZ>].

193. See, e.g., Christian Legal Soc’y, Comment Letter on Proposed Rule 8.4(g) and Comment 3 (Mar. 10, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/nammo_3_10_16.authcheckdam.pdf [<https://perma.cc/Y8Q2-KSF9>].

194. See *Model Rule 8.4 Comments*, AM. BAR ASS’N (July 12, 2016), https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments/ [<https://perma.cc/6HSZ-59GU>].

195. See, e.g., Rattan, *supra* note 176 (noting that the proposed Rule 8.4(e) in Tennessee “generated voluminous comments from law professors, practitioners, and religious groups” before its rejection by the Tennessee Supreme Court).

rules of professional conduct.”¹⁹⁶ The concept of promoting and increasing civility and respectfulness in lawyers’ interactions with others is not only entirely uncontroversial, but also entirely deserving of enthusiastic support and promotion, especially with respect to persons who have historically been marginalized in the legal profession. For example, for lawyers who are faithful Catholics, the intrinsic value and dignity of all human beings—born and unborn—is a foundational principle of the moral law,¹⁹⁷ and this understanding should impact each communication they have with others in their personal and professional lives. But asserting “cultural shift” within the legal profession as a broader goal for Model Rule 8.4(g) has raised social conservatives’ suspicions that, if adopted by the states, it could be employed to discipline lawyers for (1) expressing viewpoints on law and morality that are disfavored by state bar authorities and courts, or (2) declining client representations for religious and moral reasons that may be deemed to reflect adversely on their “fitness” for the practice of law.¹⁹⁸

196. STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY, *supra* note 161, at 2 (emphasis added) (quoting a proposal from the Oregon New Lawyers Division).

197. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 106, ¶ 1700 (“The dignity of the human person is rooted in his creation in the image and likeness of God.”); *id.* ¶ 1978 (“The natural law is a participation in God’s wisdom and goodness by man formed in the image of his Creator. It expresses the dignity of the human person and forms the basis of his fundamental rights and duties.”); *see also id.* ¶ 2270 (“Human life must be respected and protected absolutely from the moment of conception.”).

198. *Cf.* MODEL RULES OF PROF’L CONDUCT r. 8.4(b), (c) (AM. BAR ASS’N 2018) (providing that it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on lawyer’s honesty, trustworthiness or fitness as a lawyer” or to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”). Aviel defends the scope of Model Rule 8.4(g) by pointing to these two rules, both of which apply to lawyers’ behavior outside of law practice. Aviel, *supra* note 118, at 64–67. For Model Rule 8.4(b), however, there is a check on the discretion of state bar authorities’ “fitness” analysis because the underlying conduct must constitute an actual crime (i.e., be unlawful), a requirement that does not exist under Model Rule 8.4(g). As for Model Rule 8.4(c), Aviel is right that the rule “simply assumes” lawyers’ deceptions—in practicing law or otherwise—raise professional “fitness” concerns. *Id.* at 64. However, because honesty/dishonesty is an ideologically-neutral character trait (unlike the socially and politically charged issues Model Rule 8.4(g) implicates), Model Rule 8.4(c) presents far less risk of selective prosecution based on viewpoint.

The anxiety among socially conservative lawyers has been increasingly acute as growing numbers of lawyers and academics have been promoting a wave of intolerance for viewpoint diversity and religious liberty. In its 2015 decision in *Obergefell v. Hodges*, the United States Supreme Court concluded that the Constitution requires states to issue licenses for same-sex civil marriages and recognize them under the law equally with opposite-sex civil marriages.¹⁹⁹ At the time of the decision, high-profile litigation was already well underway against business owners, such as photographers, bakers, and florists, for declining on religious grounds to provide artistically expressive services for same-sex weddings.²⁰⁰ Then, in May 2016, with the U.S. presidential election approaching and surely anticipating Democrat Hillary Rodham Clinton would prevail over Republican Donald J. Trump, law professor Mark Tushnet advocated that liberals adopt a scorched-earth approach to vanquishing moral traditionalists in the courts:

The culture wars are over; they lost, we won. . . . For liberals, the question now is how to deal with the losers in the culture wars. . . . Trying to be nice to the losers didn't work well after the Civil War, nor after *Brown [v. Board of Education]*²⁰¹. (And taking a hard line seemed to work reasonably well in Germany and Japan after 1945.) . . . When specific battles in the culture wars were being fought, it might have made sense to try to be accommodating after a local victory, because other related fights were going on, and a hard line might have stiffened the opposition in those fights. But the war's over, and we won.²⁰²

199. 135 S. Ct. 2584, 2607 (2015).

200. See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015) (bakers), *cert. denied sub nom. Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *rev'd*, 138 S. Ct. 1719 (2018); *Elane Photography, LLC v. Willock*, No. CV-2008-06632, 2009 WL 8747805 (N.M. Dist. Ct. Dec. 11, 2009) (photographers), *aff'd*, 284 P.3d 428 (N.M. Ct. App. 2012), *aff'd*, 309 P.3d 53 (N.M. 2013); *State v. Arlene's Flowers, Inc.*, 2015 WL 720213 (Wash. Super. Ct. Feb. 18, 2015) (florists), *aff'd*, 389 P.3d 543 (Wash. 2017), *cert. granted & judgment vacated*, 138 S. Ct. 2671 (2018).

201. 347 U.S. 483 (1954).

202. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BLOGSPOT: BALKINIZATION (May 6, 2016), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [<https://perma.cc/4NQW-8HLF>].

After President Trump's election in November 2016, Randy Barnett responded to Tushnet's provocative declaration of legal Armageddon against socially conservative Americans, whom Tushnet called "the losers" after years of ideological "lawfare" and whom he demeaned as deplorable enemies comparable to the Confederacy, the Jim Crow South, Nazi Germany, and the expansionist Japanese Empire in World War II.²⁰³

While Tushnet attributes the origination of the "culture war" metaphor to [Justice Scalia's dissent in *Romer v. ans*²⁰⁴], Scalia was only candidly acknowledging and labeling an already existing "state of war," not declaring a new one. And in stark contrast with Tushnet, Scalia was faulting judges for taking sides in the culture war taking place outside the courts. Contrary to Scalia, then, Tushnet wants the courts to ram his side of the culture war down the throats of any recalcitrant Americans he calls "losers." But the Trump victory represents a repudiation of Tushnet's claim that the culture war has already been won by the Left. The "losers" have struck back.²⁰⁵

Pronouncements such as Tushnet's, when combined with aggressive litigation in civil rights commissions and the courts,²⁰⁶ reinforced fears among socially conservative lawyers

203. *Id.*

204. 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.").

205. Randy Barnett, *Abandoning Defensive Crouch Conservative Constitutionalism*, WASH. POST: VOLOKH CONSPIRACY (Dec. 12, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/12/abandoning-defensive-crouch-conservative-constitutionalism> [https://perma.cc/4JLL-4FE2]; see also *id.* ("To be clear, I strongly support the fundamental liberties and equal rights of all, including LGBT. But I also support the liberty of those with different moral and religious views.").

206. See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016) (religious freedom litigation based on Obama Department of Health and Human Services regulations mandating that religiously affiliated institutions, including the Little Sisters of the Poor and Christian colleges and universities, act to make insurance coverage for contraceptives available to their employees or provide a form stating their objections on religious grounds); see also MARY EBERSTADT, *IT'S DANGEROUS TO BELIEVE: RELIGIOUS FREEDOM AND ITS ENEMIES* 93 (2016) (describing the Obama Administration's aggressive litigation to enforce its contraceptive regulatory mandates against the Little Sisters of the Poor and "make [them] knuckle under to whatever is demanded in the sexual revolution's name").

that dominant forces in the American bar were willing to use their authority through the courts to exact conformity or silence as the price of their continued licensure and inclusion in the legal profession.²⁰⁷ For the sake of progressives' desired "cultural shift," diverse expression and exercise of conscience by socially conservative moral dissenters could be chilled, at best, and retaliated against, at worst. And Model Rule 8.4(g)—with the ardent resolution from Goal III Commission entities that its restrictions must be broad and that a narrowly tailored approach was unacceptable²⁰⁸—became emblematic of that larger cultural effort to marginalize and deter conscientious objectors on matters relating to the law and sexual ethics.

The backdrop of elements that combined to feed and sustain the strong resistance to the adoption of Model Rule 8.4(g) is multifaceted, and includes: (1) the ABA's support for extensive abortion rights under the law, and progressive lawyers' longstanding advocacy for broad restrictions on speech opposing abortion; (2) recent advocacy of speech restriction and compulsion relating to same-sex marriage, including a state judicial conduct commission's hyper-aggressive efforts to remove from the bench a Wyoming municipal judge and part-time magistrate; and (3) rising opposition to free speech on college campuses and, increasingly, even in law schools.

1. *The ABA's Support for Expansive Abortion Rights, and Progressive Lawyers' Longstanding Advocacy for Broad Restrictions on Speech Opposing Abortion*

For decades, the ABA as an organization has been far from neutral on the issue of American law on abortion rights and

207. See, e.g., Ryan T. Anderson, *Harvard Law Professor Says Treat Conservative Christians Like Nazis*, DAILY SIGNAL (May 9, 2016), <https://www.dailysignal.com/2016/05/09/harvard-law-professor-says-treat-conservative-christians-like-nazis> [<https://perma.cc/GWN7-AHSG>]; see also Anderson & Girgis, *supra* note 123, at 205 (observing "[t]he hardening of a consensus against compromise" on issues such as religious accommodations relating to same-sex marriage, and opining that the reason for these aggressive strategies is "less to empower some than to encumber others: to delegitimize those convictions and actions that it is gratuitous to crush").

208. See Halaby & Long, *supra* note 8, at 216–18, 226.

related public policy.²⁰⁹ In fact, it has a long history of advocacy in support of expansive abortion rights under the law. In 1972, one year before the United States Supreme Court decided *Roe v. Wade*,²¹⁰ the ABA supported states' adoption of the Uniform Abortion Act, which would have placed no limitations on abortion during the first twenty weeks of pregnancy.²¹¹ At the mid-year meeting in 1990, the ABA House of Delegates adopted and then, after receiving vociferous objections and mass resignations of members, promptly rescinded a resolution expressing the ABA's opposition to any law that "interferes" with the decision to obtain an abortion for any reason "at any time before the fetus is capable of independent life."²¹² But in 1992, in the aftermath of *Planned Parenthood of Southeastern Pennsylvania v. Casey*²¹³ and leading up to the U.S. presidential election,²¹⁴ the ABA House of Delegates, by a vote of 276–168, adopted a resolution reflecting the organization's position on abortion law that tracked the broad language of a "Freedom of Choice Act" then pending before Congress.²¹⁵ ABA President Talbot

209. See, e.g., David M. Leonard, Note, *The American Bar Association: An Appearance of Propriety*, 16 HARV. J.L. & PUB. POL'Y 537, 548, 551–55 (1993).

210. 410 U.S. 113 (1973).

211. Leonard, *supra* note 209, at 548. For details on the Uniform Abortion Act, see *Roe*, 410 U.S. at 146–47 n.40.

212. Leonard, *supra* note 209, at 551–52.

213. 505 U.S. 833 (1992).

214. See Leonard, *supra* note 209, at 550. At the 1992 ABA Annual Meeting, Hillary Rodham Clinton was invited to be the keynote speaker at a luncheon honoring Anita Hill. *Id.* Published accounts reflect little effort to disguise the political partisanship involved:

Although Vice President Quayle had requested the opportunity to speak, he was denied an invitation. Philadelphia attorney Jerome Shestack, a former aide to Senator Joseph Biden and a member of the powerful ABA Board of Governors, claimed that Vice President Quayle would have been invited if he were "a person of personal stature or legal ability, but there wasn't anything of enlightenment that he could contribute, and the members already know how to spell." This condescending attitude speaks for itself.

Id. (footnote omitted).

215. *Id.* at 552. The text of the resolution stated:

BE IT RESOLVED, That the American Bar Association opposes state or federal legislation which restricts the right of a woman to choose to terminate a pregnancy (i) before fetal viability; or (ii) thereafter, if such termination is necessary to protect the life or health of the woman.

D'Alemberte and other speakers sought to defend the organization's break from its years of neutrality on this contentious issue by favorably comparing the securing of broad legal rights for abortion to the 1950s and 1960s battles for civil rights laws combating racial discrimination.²¹⁶ The deeply offensive implied message—that lawyers who wished to secure protections and justice under the law for unborn humans were the moral equivalent of Jim Crow-era opponents to civil rights for African-Americans—provided no reason for pro-life and other socially conservative lawyers to mitigate their strong apprehensions about the direction that the ABA was taking as the “national representative of the legal profession.”²¹⁷ Attorney General William Barr spoke for many when, soon before the annual meeting where the House of Delegates was to vote on the resolution, he wrote a letter to ABA President D'Alemberte with these words:

It is difficult to understand why the ABA should feel compelled to take a position on this divisive political issue. As a professional association, the ABA is an important voice in the consideration of policies that affect the work of America's lawyers. By adopting the resolution and thereby endorsing one side of this debate, the ABA will endanger the perception that it is an impartial and objective professional association. It seems to me that this perception of impartiality and political neutrality is essential if the ABA is to fulfill the various roles and functions it seeks to perform on behalf of the bar.²¹⁸

BE IT FURTHER RESOLVED, That the American Bar Association supports state and federal legislation which protects the right of a woman to choose to terminate a pregnancy (i) before fetal viability; or (ii) thereafter, if such termination is necessary to protect the life or health of the woman.

Id. (quoting AM. BAR ASS'N, SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 56 (1992)); see also Don J. DeBenedictis, *ABA Supports Abortion Rights*, A.B.A. J., Oct. 1992, at 32, 32; Mark Hansen, *Abortion Rights Before ABA House: Opponents Promise A Fight To Retain Neutrality Position Adopted In 1990*, A.B.A. J., Aug. 1992, at 22, 22.

216. DeBenedictis, *supra* note 215.

217. *ABA Mission and Goals*, AM. BAR ASS'N (June 11, 2018), https://www.americanbar.org/about_the_aba/aba-mission-goals.html [<https://perma.cc/E5LL-VBKY>].

218. Leonard, *supra* note 209, at 555 (quoting Letter from William Barr, U.S. Attorney General, to Talbot D'Alemberte, ABA President (Aug. 7, 1992)).

In the years that followed, although the ABA refrained from direct involvement as *amicus curiae* in the Supreme Court in cases involving abortion or First Amendment cases on speech restrictions relating to pro-life advocacy,²¹⁹ its steadfast opposition to even the most basic humanitarian measures to protect unborn children has never been in doubt. And the 1990-1992 campaign within the ABA to ensconce abortion rights as a featured policy of the organization left scars that were exposed when the movement to adopt Model Rule 8.4(g) was undertaken almost a quarter-century later. In essence, when the ABA advocates for creating a “cultural shift” in the legal profession using rules of professional conduct enforceable by disciplinary action, it approaches that conversation with its credibility among socially conservative lawyers already long and profoundly damaged.²²⁰ This sorely depleted trust is a price the ABA has paid for its ideologically one-sided activism on matters of law and public policy. “Trust us and our fairness and restraint” are words no longer heeded; “conform or else” is the message received.

Moreover, there are no reasonable assurances that pro-life speech and advocacy will remain safe in the long run from bar authorities and courts in states that adopt Model Rule 8.4(g). The rule’s overbroad account of what “discrimination” and “harassment” include—that is, derogatory or biased speech—will open the door selectively to prosecute lawyers who express opposition to abortion or abortion rights in contexts that are “related to the practice of law” yet deemed somehow “illegitimate.” Aside from the often-heard (and entirely wrongful

219. See *Amicus Curiae Briefs*, AM. BAR ASS’N, <https://www.americanbar.org/groups/committees/amicus.html> [<https://perma.cc/4X52-HVHQ>] (last visited Dec. 3, 2018). *But cf.* Ben Sasse, *Group That Rates Trump’s Judicial Nominees Has History of Liberal Advocacy*, DAILY SIGNAL (Nov. 17, 2017), <https://www.dailysignal.com/2017/11/17/sasse-to-aba-the-american-bar-association-is-not-neutral> [<https://perma.cc/K9J9-8M8C>] (providing examples of the ABA’s *amicus curiae* briefs on contentious constitutional questions consistently taking what “can only be described as left-of-center positions”).

220. See, e.g., Amy E. Swearer, *The ABA is Against You and Other Things No One Tells Conservative or Christian Law Students*, FEDERALIST SOC’Y (Feb. 14, 2018), <https://fedsoc.org/commentary/blog-posts/the-aba-is-against-you-and-other-things-no-one-tells-conservative-or-christian-law-students> [<https://perma.cc/6PXH-RVZV>].

and unjust) accusations that pro-life advocates are hostile or, at best, indifferent to the interests and well-being of women, there are hints to be found in the history of abortion litigation as to how such a disciplinary charge might proceed. The United States Supreme Court's 1993 case of *Bray v. Alexandria Women's Health Clinic*²²¹ involved abortion clinics and supporting organizations that sued Operation Rescue and various individuals for physically obstructing women's access to the clinics.²²² Thus, *Bray* was not a speech or pro-life advocacy case. What makes the case relevant to Model Rule 8.4(g) is the argument the plaintiffs urged the Court to accept: that the defendants were liable under the federal Civil Rights Act of 1871 (commonly referred to as the "Ku Klux Klan Act") *because their goal of preventing abortion* constituted an "invidiously discriminatory animus" on the basis of sex.²²³ Writing for the 5–4 majority, Justice Scalia emphatically rejected this contention:

Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself . . . does not remotely qualify for such harsh description, and for such derogatory association with racism. To the contrary, we have said that "a value judgment favoring childbirth over abortion" is proper and reasonable enough to be implemented by the allocation of public funds, and Congress itself has, with our approval, discriminated against abortion in its provision of financial support for medical procedures. This is not the stuff out of which . . . "invidiously discriminatory animus" is created.²²⁴

Nevertheless, it is unsettling that the plaintiffs succeeded in persuading the Eastern District of Virginia, the Fourth Circuit Court of Appeals, and three Supreme Court Justices that the plaintiffs had satisfied the requirement of showing the defendants' conduct reflected "invidiously discriminatory animus" against women *because of their sex*, and the record supporting this finding was based on the defendants' goal of preventing abortion.²²⁵ The closeness of the outcome in *Bray* reflects just

221. 506 U.S. 263 (1993).

222. *Id.* at 266.

223. *Id.* at 267–79.

224. *Id.* at 274 (internal citations omitted).

225. *See id.* at 307, 322–26 (Stevens, J., joined by Blackmun, J., dissenting); *id.* at 345, 347–52 (O'Connor, J., joined by Blackmun, J., dissenting); Nat'l Org. for

how readily state bar authorities could, if so disposed, conclude that lawyers who express disfavored viewpoints opposing abortion or abortion rights in contexts “related to the practice of law” have “manifest[ed] bias or prejudice” on the basis of sex and violated Model Rule 8.4(g).²²⁶ Expressing such viewpoints before a court might reluctantly be deemed “legitimate advocacy” so that pro-life parties may have representation of counsel; but, as the 1996 Tennessee Ethics Opinion foreshadowed, conversations with clients or colleagues might not be protected as “legitimate advocacy or advice.”²²⁷ The prospects for selective prosecution and abuse of the disciplinary process should not be discounted, particularly when “cultural shift” is a stated objective for the rule.²²⁸

The Court’s precedents in the area of free speech challenges to pro-life advocacy in the vicinity of abortion clinics illustrate this concern about disparate treatment. Justice Scalia often pointed to the ways in which the Court’s abortion jurisprudence had distorted its rulings in other related areas, and especially with freedom of speech.²²⁹ In cases such as *McCullen v. Coakley*,²³⁰ *Hill v. Colorado*,²³¹ and *Madsen v. Women’s Health Cen-*

Women v. Operation Rescue, 914 F.2d 582, 585 (4th Cir. 1990); Nat’l Org. for Women v. Operation Rescue, 766 F. Supp. 1483, 1492–93 (E.D. Va. 1989); see also *Bray*, 506 U.S. at 272 n.4 (Justice Scalia, for the majority, responding to Justice Stevens’s and Justice O’Connor’s dissents on this issue). Justice O’Connor’s dissent also considered the defendants’ “use of unlawful means” to achieve their goal of preventing abortion as being relevant to the class-based animus/motivation issue. *Id.* at 351 (O’Connor, J., dissenting).

226. See Dent, *supra* note 8, at 152 (noting that “opposition to abortion is often characterized as discrimination against women and might be claimed to violate” Model Rule 8.4(g)) (citing Twiss Butler, *Abortion Law: “Unique Problem for Women” or Sex Discrimination?*, 4 YALE J.L. & FEMINISM 133, 145 (1991)).

227. See MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2018) (“This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”); see also *supra* Part II (discussing the 1996 Tennessee Ethics Opinion, *supra* note 3).

228. See ROTUNDA & DZIENKOWSKI, *supra* note 8 (observing that “[d]iscretion . . . may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas”).

229. See generally Timothy Zick, *Justice Scalia and Abortion Speech*, 15 FIRST AMEND. L. REV. 288, 291–98 (2017).

230. 134 S. Ct. 2518, 2541 (2014) (Scalia, J., concurring) (“Today’s opinion carries forward this Court’s practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is

ter, Inc.,²³² Justice Scalia detailed how the Court's tendency to be biased against pro-life advocacy and in favor of abortion impacted its review of state or local laws restricting speech. In his *Hill* dissent, he memorably concluded:

What is before us . . . is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice. Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong. Because, like the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent.²³³

Although the Court's most recent First Amendment decisions suggest at least some reason for greater optimism about future abortion-related speech cases,²³⁴ it would be extremely unwise for pro-life lawyers to assume that their ability to express their conscience with candor will remain safe in the

an entirely separate, abridged edition of the First Amendment applicable to speech against abortion.")

231. 530 U.S. 703, 741 (2000) (Scalia, J., dissenting).

232. 512 U.S. 753, 785 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part) ("The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal. But the context here is abortion. . . . Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment.")

233. *Hill*, 530 U.S. at 741–42 (Scalia, J., dissenting) (internal citation omitted). In *McCullen*, the most recent of these cases and the last on which he wrote, Justice Scalia concurred in the Court's judgment that a Massachusetts criminal statute creating a 35-foot "buffer zone" for public spaces around abortion clinics was facially unconstitutional under the Free Speech Clause of the First Amendment, but he vigorously objected to the majority's opinion that the statute was neither content-based nor viewpoint discriminatory against pro-life speech. 134 S. Ct. at 2541–49 (Scalia, J., concurring); see also *id.* at 2549 (Alito, J., concurring) ("As the Court recognizes, if the Massachusetts law discriminates on the basis of viewpoint, it is unconstitutional, and I believe the law clearly discriminates on this ground." (internal citation omitted)).

234. See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), discussed *infra* Part III.D.

American legal profession. The lack of protections for expressing pro-life viewpoints in fellow Western nations such as England²³⁵ and France²³⁶ illustrates the need for constant vigilance in defending First Amendment freedoms and values against persistent and increasingly forceful challenges.²³⁷ Provincial bar authorities in Canada (the Law Society of Ontario) have already leapt beyond Model Rule 8.4(g)-style speech restrictions and into the realm of compelled speech.²³⁸ In December 2016, the governing authorities for the Law Society of Ontario approved a requirement that every bar licensee adopt and abide

235. See, e.g., *High Court Upholds Ban on Praying Outside Abortion Clinic*, CATH. HERALD (July 2, 2018), <http://catholicherald.co.uk/news/2018/07/02/high-court-upholds-ban-on-praying-outside-abortion-clinic> [<https://perma.cc/FZM2-5UFK>]. An effort by New York's former Attorney General Eric Schneiderman to prosecute peaceful sidewalk counselors and prayer vigil participants outside an abortion clinic in New York City was recently dismissed for lack of evidence of "intent to harass, annoy, or alarm" women entering the clinic. Jonathan S. Tobin, *An Inconvenient Amendment*, NAT'L REV. (July 24, 2018, 6:30 AM), <https://www.nationalreview.com/2018/07/new-york-abortion-protest-case-lefts-free-speech-double-standard> [<https://perma.cc/V9F8-3W2F>]. This deficient record existed despite "a year's worth of surveillance" directed by Schneiderman at the clinic, with tactics including "a camera outside the site, sen[d]ing in decoys who could serve as bait for those looking to harass or intimidate women seeking abortions, and hid[ding] microphones on the women's escorts." *Id.* The court's ruling was nevertheless decried by the *New York Times* as another example of conservatives "weaponizing" the First Amendment. See *id.* (citing Jeffery C. Mays, *Anti-Abortion Protestors at Queens Clinic Do Not Harass Patients, Judge Rules*, N.Y. TIMES (July 22, 2018), <https://www.nytimes.com/2018/07/22/nyregion/anti-abortion-protesters-queens-clinic.html> [<https://nyti.ms/2O4B9t4>]).

236. See, e.g., Alexandra DeSanctis, *In France, a Defeat for Free Speech and the Right to Life*, NAT'L REV. (Dec. 9, 2016, 9:29 PM), <https://www.nationalreview.com/2016/12/abortion-france-parliament-law-criminalize-pro-life-advocacy-internet/> [<https://perma.cc/DB2Z-QTQ2>].

237. The relentless and increasing efforts to weaken conscience protections in the American medical profession offer troubling indications of the path the American legal profession could take in preventing "discrimination" by lawyers. See, e.g., E. Christian Brugger, *Whose Conscience? What Protections? Conscience Provisions in Healthcare and Elsewhere*, PUB. DISCOURSE (May 30, 2018), <http://www.thepublicdiscourse.com/2018/05/21432/> [<https://perma.cc/FY5P-TLUU>]. See generally ROBERT P. GEORGE, CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM 155-64 (2013).

238. See Arthur J. Cockfield, *Limiting Lawyer Liberty: How the Statement of Principles Coerces Speech* (Queen's Law Research Paper Series, Paper No. 2018-100, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3141561 [<https://perma.cc/KF5W-X34M>].

by a mandatory “Statement of Principles,” asserting agreement with specific ideas relating to “equality, diversity, and inclusion,” and state they are committing themselves to “promote equality, diversity, and inclusion generally, and in their behavior towards colleagues, employees, clients and the public.”²³⁹ Similarly to Model Rule 8.4(g), the opposition to such mandates stems not from a lack of general agreement that equality, diversity, and inclusion are vitally important in the legal profession. They most certainly are. Rather, the opposition stems from fundamental principles of freedom and liberty and a fully justified resistance to compelled conformity. Lawyers must be free to hold and express diverse points of views about the law and morality. Government-imposed restrictions and mandates jeopardize the rights of moral dissenters to themselves be included as equal members of the legal profession without being screened out through admissions processes, identified for exclusion through an annual “test” (such as Ontario’s “Statement of Principles”), or silenced by rules of professional conduct that create opportunities for selective prosecution and imposition of sanctions (Model Rule 8.4(g)).

2. *Recent Advocacy of Speech Restrictions and Compulsions
Relating to Same-Sex Marriage*

In its June 2018 decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,²⁴⁰ the United States Supreme Court held the Colorado Civil Rights Commission violated custom wedding cake baker Jack Phillips’s rights under the First Amendment Free Exercise Clause, because its “consideration of this case was inconsistent with the State’s obligation of religious neutrality.”²⁴¹ The record reflected that “based on his sincere religious beliefs and convictions,”²⁴² Phillips had declined a request to create a custom-designed wedding cake for celebration of a same-sex marriage.²⁴³ The record also showed that

239. *See id.* at 2.

240. 138 S. Ct. 1723 (2018).

241. *Id.* at 1723.

242. *Id.*

243. *See id.* at 1740 (Thomas, J., concurring) (explaining that although “the parties dispute whether Phillips refused to create a custom wedding cake for the individual respondents, or whether he refused to sell them any wedding

the Commission had exhibited “clear and impermissible hostility toward the sincere religious beliefs that motivated his objection,”²⁴⁴ based on (1) several disparaging statements made by commissioners relating to Phillips’s religious faith and (2) “the difference in treatment between Phillips’s case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.”²⁴⁵ Although the Court’s majority opinion did not reach Phillips’s argument that application of Colorado public-accommodations law to compel his artistic expression violated his rights under the Free Speech Clause, Justice Thomas’s concurrence (joined by Justice Gorsuch) made a compelling argument that it did:

This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about

cake (including a premade one),” the Colorado Court of Appeals had already “resolved this factual dispute in Phillips’ favor” by describing “his conduct as a refusal to ‘design and create a cake to celebrate [a] same-sex wedding’” (quoting *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015)).

244. *Id.* at 1729 (majority opinion). For example, the Court pointed to a statement on the record by one of the commissioners explicitly denigrating Phillips’s religious faith:

To describe a man’s faith as “one of the most despicable pieces of rhetoric that people can use” is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips’ invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.

Id.

245. *Id.* at 1730 (observing that “on at least three other occasions” the Colorado Civil Rights Division “had considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text”; and “[e]ach time, the Division found that the baker acted lawfully in refusing service” because “the requested cake included ‘wording and images [the baker] deemed derogatory.’”); see also John C. Eastman, *Why The Masterpiece Ruling Is Truly a Major Win For Religious Liberty*, FEDERALIST (June 7, 2018), <http://thefederalist.com/2018/06/07/masterpiece-ruling-truly-major-win-religious-liberty> [<https://perma.cc/F5B4/WJGN>]; Sherif Girgis, *Filling in the Blank Left in the Masterpiece Ruling: Why Gorsuch and Thomas Are Right*, PUB. DISCOURSE (June 14, 2018), <http://www.thepublicdiscourse.com/2018/06/21831/> [<https://perma.cc/BVA4/2V6Y>].

the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* itself emphasized that the traditional understanding of marriage “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.” If Phillips’ continued adherence to that understanding makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected.²⁴⁶

As *Masterpiece Cakeshop* was proceeding through the court system, another significant case was being prosecuted in Wyoming, this one against a municipal judge and part-time magistrate, Ruth Neely, who in a telephone interview initiated by a local reporter, expressed her religiously based objection to officiating a same-sex marriage if this was requested of her.²⁴⁷ The prosecutor for the Wyoming Commission on Judicial Conduct and Ethics charged her with multiple violations of the Wyoming Code of Judicial Conduct (“Wyoming Code”) and sought her removal from the bench.²⁴⁸ In March 2017, in a 3–2 decision, the Wyoming Supreme Court concluded that Judge Neely had violated Wyoming Code Rules 1.2,²⁴⁹ 2.2,²⁵⁰ and 2.3(B)²⁵¹ simply

246. *Masterpiece Cakeshop*, 138 S. Ct. at 1747 (Thomas, J., concurring) (internal citations omitted). See generally Steven Smith, *Why the Government Shouldn’t Force Bakers—Or Anyone—to Express Support for Same-Sex Marriage*, PUB. DISCOURSE (Oct. 25, 2017), <http://www.thepublicdiscourse.com/2017/10/20215/> [<https://perma.cc/A266/A23P>].

247. *In re Neely*, 390 P.3d 728 (Wyo. 2017), cert. denied, 138 U.S. 639 (2018). The reporter who had contacted Judge Neely and taken her statements “offered to not publish the story if Judge Neely would state a willingness to perform same-sex marriages,” but “Judge Neely declined.” *Id.* at 755 (Kautz, J., dissenting). Judge Neely was well-known in her small community of Pinedale, Wyoming as a devout Christian and member of the Lutheran Church, Missouri Synod, a conservative Protestant denomination. Rod Dreher, *Wyoming Goliath vs. Small-Town Judge*, AM. CONSERVATIVE (May 10, 2016, 4:23 PM), <http://www.theamericanconservative.com/dreher/wyoming-goliath-ruth-neely-judge-lgbt/> [<https://perma.cc/YPL2/8WPK>].

248. *In re Neely*, 390 P.3d at 747–51.

249. Wyoming Code Rule 1.2 tracks the ABA Model Code of Judicial Conduct (“Model Code”), and provides: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” WYO. CODE JUDICIAL CONDUCT r. 1.2 (2018).

250. Wyoming Code Rule 2.2 tracks the Model Code, and provides: “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” WYO. CODE JUDICIAL CONDUCT r. 2.2 (2018).

251. Wyoming Code Rule 2.3 tracks the Model Code, and provides:

by “*announcing* that her religious beliefs prevent her from officiating same-sex marriages.”²⁵² The court imposed a public censure, rejecting the Commission’s extreme recommendation that Judge Neely should be removed from the bench (the judicial equivalent of lawyers’ disbarment).²⁵³ The majority rejected Judge Neely’s arguments that the Commission’s prosecution violated her rights under the Free Speech and Free Exercise Clauses of the First Amendment and their counterparts under the Wyoming Constitution,²⁵⁴ including the state’s strong prohibition against imposing religious tests for public office.²⁵⁵ In a “respectful[], but vigorous[] dissent,” two justices framed the issues quite differently from the majority, maintaining that “[c]ontrary to the position asserted by the majority opinion, this case *is* about religious beliefs and same[-]sex marriage.”²⁵⁶ This case would, in fact, “determine whether there is a religious test for who may serve as a judge in Wyoming” and “whether a judge may be precluded from one of the functions

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

WYO. CODE OF JUDICIAL CONDUCT r. 2.3(B) (2018).

252. *In re Neely*, 390 P.3d at 735, 741 (emphasis added).

253. *See id.* at 752–53.

254. U.S. CONST. amend. I; WYO. CONST. art. I, §§ 18, 20.

255. Wyoming’s ban on religious tests “is significantly broader than the similar provision in the United States Constitution—‘but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.’” *In re Neely*, 390 P.3d at 742 (quoting U.S. CONST. art. VI, cl. 3). The Wyoming Constitution provides, in part:

. . . The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state, and *no person shall be rendered incompetent to hold any office of trust or profit, or to serve as a witness or juror, because of his opinion on any matter of religious belief whatever*; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.

WYO. CONST. art. 1, § 18 (emphasis added). *See generally* Kimberlee Wood Colby, *Resuscitating Intolerance through Religious Tests for Judges*, 7 J. CHRISTIAN LEGAL THOUGHT 27 (2017) (discussing the *Neely* case).

256. *In re Neely*, 390 P.3d at 753 (Kautz, J., dissenting).

of office not for her actions, but for her statements about her religious views.”²⁵⁷ Gerard Bradley captures quite well the heart of the Commission’s attack on Judge Neely’s traditional religious and moral convictions:

The Commission admitted . . . that it would remove Judge Neely because of her “statements” expressing her religious opinion about marriage. This is to say that she would be removed for possessing, or at least for being known to possess, the religious belief of her church that marriage is a relationship which by its natural orientation towards procreation is limited to unions of a man and a woman. In other words, Judge Neely is unfit because she is a Lutheran.²⁵⁸

The dissent made a detailed and highly persuasive case for why Judge Neely had violated none of the charged Wyoming Code Rules, and why the sanctions against her violated the cited provisions of the federal and state constitutions.²⁵⁹ Most relevant to Model Rule 8.4(g), the dissent emphatically refuted the charge that Judge Neely violated Wyoming Code Rule 2.3(B) when she allegedly, “in the performance of judicial duties, by words or conduct manifested bias or prejudice on the basis of . . . sexual orientation.”²⁶⁰ As the dissent correctly explained, “Judge Neely’s religious belief about who may be married has no relationship to her view of the worth of any individual or class of individuals. The overwhelming evidence in the record indicates that Judge Neely does not hold any bias or prejudice

257. *Id.* at 753–54.

258. Gerard V. Bradley, *Today’s Challenges to Religious Liberty in Historical Perspective*, 21 TEX. REV. L. & POL’Y 341, 369 (2017) (footnotes omitted). As Bradley further explains:

Judge Neely did not dispute that the law recognizes same-sex marriage. In fact, the Commission distorted the obvious meaning of these provisions [i.e., Rule 1.2 and 2.2]—which is that a judge must perform with integrity all the duties which she undertakes to perform—to mean instead that no judge may ever seek to recuse herself from performing a duty because of a conflict in conscience (at least where the judge holds a conscientious view of which the Commission disapproves). But no rule of judicial conduct in Wyoming—or anywhere else, for that matter—requires every judge to perform every task that comes across the transom.

Id. at 369 n.146.

259. *In re Neely*, 390 P.3d at 753–69 (Kautz, J., dissenting).

260. WYO. CODE JUDICIAL CONDUCT r. 2.3(B) (2018).

against any person or class of persons.”²⁶¹ Although “[t]he majority opinion hinges on its conclusions that Judge Neely’s statements would cause reasonable persons to question her impartiality, and would conclude she exhibited bias and prejudice toward homosexuals,” the dissent observed that “[t]hose are not conclusions that would be reached by a reasonable person apprised of the appropriate facts.”²⁶²

On the Free Exercise and Free Speech Clause issues, the dissent’s analysis is directly applicable to lawyers who wish to decline client representations based on moral objections to the client’s objectives (prerogatives placed at risk under Model Rule 8.4(g)). Although the State of Wyoming “has a compelling interest in assuring that every person is treated equally and that judges do not display bias or prejudice,” the dissent noted “[t]his interest comes into play when a judge demonstrates actual bias or prejudice.”²⁶³ But the record did not support any such finding about Judge Neely: “To assure that judges do not display bias or partiality, our rules permit a judge to assign a particular case to another judge. That is just what Judge Neely proposed to do.”²⁶⁴

In concluding, the dissent sounded a call for the legal profession and the judiciary to respect diversity and inclusion for members who hold dissenting views on matters of law and morality, particularly on religiously based convictions concerning sexual ethics:

In our pluralistic society, the law should not be used to coerce ideological conformity. Rather, on deeply contested moral issues, the law should “create a society in which both

261. *In re Neely*, 390 P.3d at 762 (Kautz, J., dissenting).

262. *Id.* at 762–63.

263. *Id.* at 767.

264. *Id.* at 767 (internal citations omitted); *see also id.* at 769 (“The strict scrutiny/compelling state interest analysis discussed above for Judge Neely’s right to free exercise of religion applies equally to her right of free speech.”); *id.* at 767 (“Apparently some individuals might find it offensive that Judge Neely said she would decline to personally perform a same-sex marriage and instead would refer them to someone else. There is no compelling state interest in shielding individuals from taking such an offense.”).

sides can live their own values.”^[265] That is precisely how Wyoming has approached the matter since its founding.

The *Obergefell* decision affirms this approach for the issue of same[-]sex marriage. It emphasized that the constitutional problem arose not from the multiplicity of good faith views about marriage, but from the enshrining of a single view into law which excluded those who did not accept it as “outlaw[s]” and “outcast[s].” Unfortunately, the majority opinion does just that for Judge Neely and others who share her views. Caring, competent, respected, and impartial individuals like Judge Neely should not be excluded from full participation in the judiciary. Judge Neely’s friends who actually obtained a same[-]sex marriage recognized this and observed that it is “obscene” to impose discipline in this case.²⁶⁶

In January 2018, the United States Supreme Court denied a petition for writ of certiorari filed by Judge Neely to appeal her public censure by the Wyoming Supreme Court.²⁶⁷ Judge

265. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 877 (2014).

266. *In re Neely*, 390 P.3d at 769 (Kautz, J., dissenting) (internal citations omitted). Grave public concerns about progressives seeking to impose religious tests for public office have also been raised in the context of confirmation hearings before the United States Congress, including most prominently in the September 2017 Senate Judiciary Committee confirmation hearing for Amy Coney Barrett, a devout Catholic, to be appointed as a federal judge on the Seventh Circuit Court of Appeals. See Emma Green, *Should a Judge’s Nomination Be Derailed by Her Faith?*, ATLANTIC (Sept. 8, 2017), <https://www.theatlantic.com/politics/archive/2017/09/catholics-senate-amy-barrett/539124/> [https://perma.cc/PB5M-6XES]; Noah Feldman, *Feinstein’s Anti-Catholic Questions Are an Outrage*, BLOOMBERG (Sept. 11, 2017, 12:22 PM), <https://www.bloomberg.com/view/articles/2017-09-11/feinstein-s-anti-catholic-questions-are-an-outrage> [https://perma.cc/ZJ5P-VK8D]. They also came to the forefront during the June 2017 Senate Budget Committee confirmation hearing for Russell Vought, an evangelical Protestant, to be appointed as Deputy Director of the White House Office of Management and Budget. See Johnny Rex Buckles, *Unashamed of the Gospel of Jesus Christ: On Public Policy and Public Service by Evangelicals*, 41 HARV. J.L. & PUB. POL’Y 813, 815–21 (2018); see also Emma Green, *Bernie Sanders’s Religious Test for Christians in Public Office*, ATLANTIC (June 8, 2017), <https://www.theatlantic.com/politics/archive/2017/06/bernie-sanders-chris-van-hollen-russell-vought/529614/> [https://perma.cc/ZY6Y-LJSE]; John Daniel Davidson, *Bernie Sanders Doesn’t Think Christians Are Fit for Public Office*, FEDERALIST (June 9, 2017), <http://thefederalist.com/2017/06/09/bernie-sanders-doesnt-think-christians-fit-public-office/> [https://perma.cc/8P9X-4U4G].

267. *Neely v. Wyo. Comm’n on Judicial Conduct & Ethics*, 138 S. Ct. 639 (2018).

Neely's counsel had argued the Court should, "at a minimum, hold [the] petition pending resolution of *Masterpiece Cakeshop*, No. 16-111, which raises related First Amendment issues";²⁶⁸ and based on the Court's reasoning in its June 2018 decision in that case,²⁶⁹ Judge Neely's case for vacating her sanction would have been even stronger. For example, the record contained evidence of animus and hostility to Judge Neely's religious faith and convictions similar in nature to the animus and hostility involved in *Masterpiece Cakeshop*.²⁷⁰ Moreover, analogously to Colorado's preferential treatment of custom-design bakers who refused to make cakes with religious messages they found offensive,²⁷¹ the *Neely* record reflected that Wyoming would allow magistrates to decline officiating for marriages for any secular reason or no reason at all, but sanctioned Judge Neely

268. Petition for a Writ of Certiorari at 39, *Neely v. Wyo. Comm'n on Jud. Conduct & Ethics*, 138 U.S. 639 (2018) (No. 17-196), 2017 WL 7689870 [hereinafter *Neely* Petition for Certiorari].

269. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

270. See Amicus Brief of The Becket Fund for Religious Liberty in Support of the Honorable Ruth Neely's Petition Objecting to the Commission's Recommendations at 17, *In re Neely* 390 P.3d 728 (Wyo. 2017) (No. J-16-0001), https://s3.amazonaws.com/becketpdf/Becket-Fund_Judge-Neely-Amicus-Brief_Signed.pdf [<https://perma.cc/S565-W75S>] (noting that "the Commission's prosecutor—who acts on behalf of the Commission— . . . condemned Judge Neely's religious beliefs as 'every bit as repugnant as I found the Mormon Church's position on black people,'" and "recommended sanctioning her \$40,000 because of what he called her 'holy war'"). Moreover, Judge Neely was originally charged with a separate judicial misconduct violation simply because she obtained the pro bono legal assistance of Alliance Defending Freedom, "a faith-based legal organization that shares her beliefs about marriage." See *Neely* Petition for Certiorari, *supra* note 268, at 28. The Commission later "admitted its overreach on this point by 'conced[ing] Judge Neely's motion to dismiss'" this charge. *Id.* at 28 n.11; see also Jonathan G. Lange, *Dissent Will Not Be Tolerated: What the Case of a Wyoming Judge Means for All of Us*, PUB. DISCOURSE (Aug. 30, 2016), <http://www.thepublicdiscourse.com/2016/08/17733/> [<https://perma.cc/862Q-9X4f>] (noting that Judge Neely's church, the Lutheran Church, Missouri Synod, "was called 'repugnant' in open court" and that the prosecutor filed additional charges against Judge Neely "for 'affiliating with a discriminatory organization'" when "Alliance Defending Freedom asked to represent her").

271. See *Masterpiece Cakeshop*, 138 S. Ct. at 1730–32.

merely for announcing her religiously based objections for doing so.²⁷²

The *Neely* case is a troubling landmark for many reasons, as recounted so well by the Wyoming Supreme Court's dissenting justices. But regarding Model Rule 8.4(g), there is a particularly vital moral to the story: socially conservative lawyers should take no comfort from assurances that state bar authorities with limited resources will not prosecute them for "manifest[ing] bias or prejudice" in expressing disfavored traditional viewpoints on matters of sexual ethics, or that either those authorities or the courts will respect their freedoms under the First Amendment or their state constitutions. The Commission deemed Judge Neely, with no disciplinary record and an undisputed sterling reputation in her community, to be "unfit" for the judiciary solely for her out-of-court statements borne of religious conviction. And even after receiving the Court's sharp rebuke of its manifested hostility to Jack Phillips's traditional religious and moral beliefs in *Masterpiece Cakeshop*, the Colorado Civil Rights Commission quickly approved new charges against him: this time, the Commission alleged antidiscrimination law violations because Phillips had declined on religious grounds to make a custom cake designed for the customer's stated purpose of celebrating gender identity transition.²⁷³

272. See *In re Neely*, 390 P.3d at 756–57 (Kautz, J., dissenting); see also Colby, *supra* note 255, at 28.

273. See Verified Complaint Ex. A, *Masterpiece Cakeshop Inc. v. Elenis*, (D. Colo. Aug. 14, 2018) (C.A. No. 2074-WYD) [hereinafter *Masterpiece Cakeshop Phillips Complaint*], <https://www.courthousenews.com/wp-content/uploads/2018/08/Masterpiece-Cakeshop-II-COMPLAINT.pdf> [https://perma.cc/3NMK-6PL7]. The Commission's determination of probable cause for new charges against Phillips came only twenty-four days after the Court's decision in *Masterpiece Cakeshop*. *Id.* Ex. A at 4. In response, Alliance Defending Freedom again came to Phillips's aid, this time by filing a lawsuit in the United States District Court for the District of Colorado asserting violations of his constitutional rights to free exercise of religion, freedom of speech, due process, and equal protection. *Id.* at 39–47; see also David French, *Colorado Defies the Supreme Court, Renews Persecution of a Christian Baker*, NAT'L REV. (Aug. 15, 2018, 3:19 PM), <https://www.nationalreview.com/2018/08/colorado-civil-rights-commission-jack-phillips-case/> [https://perma.cc/9LFX-967L]. In the complaint, Phillips alleges he "declined to create [the requested] cake with [a] blue and pink design because it would have celebrated messages contrary to his religious belief that sex—the status of being male or female—is given by God, is biologically determined, is not determined by perception or feelings, and cannot be chosen or changed." *Masterpiece Cakeshop Phillips Complaint, supra*, at 4. He also

There is no reason to believe these will be isolated cases, or that progressives will refrain from using the disciplinary process to make cautionary examples of selectively chosen lawyers who, like small-town municipal judge and part-time magistrate Ruth Neely and custom-cake baker Jack Phillips, they regard as moral villains deserving of professional destruction.²⁷⁴ “Trust us” or “just litigate as-applied abuses” should no longer be accepted as adequate assurances, if they ever would have been, and creating such a sword of Damocles for the bar to hold over lawyers’ heads like the axe of Saint Thomas More’s executioner becomes even more clearly perilous.²⁷⁵

alleges his belief that “the same Colorado lawyer” who called his shop and requested a cake to “visually depict and celebrate a gender transition” made other custom-cake requests he had received targeting him for his traditional religious beliefs in the year the Court was hearing his case. *Id.* These had included requests for “cakes celebrating Satan, featuring Satanic symbols, depicting sexually explicit materials, and promoting marijuana use.” *Id.*; see also Rod Dreher, *The Persecution of Jack Phillips*, AM. CONSERVATIVE (Aug. 15, 2018, 6:25 PM), <https://www.theamericanconservative.com/dreher/the-persecution-of-jack-phillips/?print=1> [<https://perma.cc/4E9S-YWYP>].

274. Writing in 2013, Robert George predicted the widespread assurances of tolerance and respectful accommodation for “the traditional view of marriage as a conjugal union” would prove themselves tactical rather than principled and enduring. GEORGE, *supra* note 237, at 142–46; see also *id.* at 144 (“[A]dvocates of redefinition [of marriage] are increasingly open in saying that they do not see disputes about sex and marriage as honest disagreements among reasonable people of goodwill. They are, rather, battles between the forces of reason, enlightenment, and equality, on one side, and those of ignorance, bigotry, and discrimination, on the other.”).

275. Further validating the concern about the direction the United States is heading is the Supreme Court of Canada’s 2018 decision that the law societies of Ontario and British Columbia could lawfully deny accreditation to a law school formed at Trinity Western University, solely because its students enter into a required Christian-faith-based community covenant to refrain from engaging in sexual activity outside of heterosexual marriage. See *Trinity W. Univ. v. Law Soc’y of Upper Canada*, 2018 SCC 33 (Can. June 15, 2018), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/17141/1/document.do> [<https://perma.cc/AF56-NJ9V>]. A 7–2 majority of the court held that denying accreditation was a “proportionate” and “reasonable” limitation on religious freedoms that upheld, rather than violated, the values of the Canadian Charter of Rights and Freedoms. *Id.* ¶ 3. In the court’s view, principles of equality and inclusion required denying students the choice to study the law at a religiously-affiliated educational institution committed to traditional moral doctrines and accompanying expectations of student conduct relating to sexual ethics. It is easy to foresee where such an exclusionary attitude toward social conservatives could lead in the United States in the years ahead, especially in light of the ABA’s adoption of Model Rule 8.4(g) as a professional standard in a rule in which “fitness” fea-

3. *Rising Opposition to Free Speech on College Campuses and in Law Schools*

In April 2016, I presented to the students of the University of North Dakota School of Law remarks entitled *A Tribute to Justice Antonin Scalia*.²⁷⁶ Inspired by Justice Scalia's jurisprudence on our First Amendment freedom of speech, and well aware of the ongoing debate over the draft Model Rule 8.4(g), I offered these comments:

Around the country, it has become all too common to encounter not only students, but also faculty and school administrators, promoting policies of increasing campus censorship (whether *de jure* or *de facto*) of ideas or speakers they disfavor. It has also become all too common to hear about intimidating tactics and suppression of the speech of those whose opinions are contrary to the general will of the campus academic subculture and the viewpoints it may prefer. In our national political culture, it has become too common for figures who lead emerging majorities or similarly powerful factions to pronounce that the time for debate is over, and that those who have opposed them must either be silent or suffer retribution for their speech. . . . Whether the prevailing ideas are liberal or conservative, left or right, the urges and actions to silence disagreement about ideas are absolutely wrong, and terribly contrary to our founding constitutional principles and our American traditions.²⁷⁷

Since then, and particularly in the aftermath of the 2016 U.S. presidential election, opposition to free speech on college campuses and even in law schools has continued to escalate. The

tures prominently. See generally Derek Ross, *Trinity Western and the Endangerment of Religious Pluralism in Canada*, PUB. DISCOURSE (July 22, 2018), <http://www.thepublicdiscourse.com/2018/07/22222/> [https://perma.cc/X5NM-XKSH].

276. McGinniss, *supra* note 36, at 1.

277. *Id.* at 15–16 (footnotes omitted); see also Charles Krauthammer, *Opinion, Thought police on patrol*, WASH. POST (Apr. 10, 2014), https://www.washingtonpost.com/opinions/charles-krauthammer-thought-police-on-patrol/2014/04/10/2608a8b2-c0df-11e3-b195-dd0c1174052c_story.html?utm_term=.5d6d20ae9cde [https://perma.cc/KA6A-MYUG] (“What’s at play is sheer ideological prejudice—and the enforcement of the new totalitarian norm that declares, unilaterally, certain issues to be closed. Closed to debate. Open only to intimidated acquiescence.”); EBERSTADT, *supra* note 206, at 44–69 (chapter entitled “Acclaiming ‘Diversity’ vs. Hounding the Heretics”).

challenges have included “no-platform” social justice advocates, who engage in efforts to prevent visiting speakers from being heard through disinvitation campaigns, or by using blockades or extreme noise (or both),²⁷⁸ and violent anti-free-speech groups such as Antifa, who threaten and physically attack others at the events.²⁷⁹ In the 2017–2018 academic year, there were at least two nationally-reported “no-platform” disruptions at American law schools: (1) American Enterprise Institute scholar Christina Hoff Sommers’s guest speaking event at Lewis & Clark²⁸⁰ and (2) South Texas law professor Josh Blackman’s event at CUNY (ironically, on the importance of free speech).²⁸¹ The ideologically based justifications law students offered for “no-platforming” Sommers and Blackman echoed concepts from Model Rule 8.4(g) and its Comment language: they claimed the hosting and very presence at their law schools of speakers whose opinions on law-related questions were seen by some students as offensive and degrading (*cf.* “demeaning” and “derogatory”) would have an adverse (even “violent”) impact on those students (*cf.* “harmful”).²⁸² In a later

278. *See, e.g.,* Jonathan V. Last, *Charles Murray and the Middlebury Mob*, WEEKLY STANDARD (Mar. 9, 2017, 5:46 PM), <https://www.weeklystandard.com/charles-murray-and-the-middlebury-mob/article/2007134> [<https://perma.cc/8TBV-TRB2>].

279. *See, e.g.,* Javier Panzar & Alene Tchekmedyan, *9 arrested as protesters gather at UC Berkeley for talk by conservative speaker Ben Shapiro*, L.A. TIMES (Sept. 15, 2017, 7:35 AM), <http://www.latimes.com/local/california/la-me-berkeley-protest-shapiro-20170914-htmlstory.html#> [<https://perma.cc/YDR5-5P7J>].

280. *See* Nicole Neily, *The Speech Police Go to Law School—And Fail to Learn Anything*, THE HILL (Mar. 8, 2018 10:33 PM EST), <http://thehill.com/opinion/civil-rights/377551-the-speech-police-go-to-law-school-and-fail-to-learn-anything> [<https://perma.cc/LS2T-LNMG>].

281. Josh Blackman, *Students at CUNY Law Protested and Heckled my Lecture about Free Speech on Campus*, NAT’L REV. (Apr. 12, 2018, 12:27 PM), <https://www.nationalreview.com/2018/04/students-at-cuny-law-protested-and-heckled-my-lecture-about-free-speech-on-campus/> [<https://perma.cc/6MWM-YE8X>]; Robby Soave, *CUNY Students Tried to Shout Down Josh Blackman. Here’s Why They Failed.*, REASON (Apr. 12, 2018, 5:01 PM), <https://reason.com/blog/2018/04/12/cuny-josh-blackman-students-speech> [<https://perma.cc/6B6C-3GYV>].

282. *See* Neily, *supra* note 280 (students objecting to Sommers wrote: “Free speech is certainly an important tenet to a free healthy society, but that freedom stops when it has a negative and violent impact on other individuals.”); Soave, *supra* note 281 (“The student activists believed the airing of an opinion with which they disagreed was tantamount to physical violence against marginal-

interview, Blackman remarked that these law students will be among those enforcing Model Rule 8.4(g) in a few years, and “if you give these kids a loaded weapon, they’ll use it to discipline people who speak things they don’t like.”²⁸³ In an era when surveys are reflecting diminishing support for First Amendment freedom of speech among younger generations,²⁸⁴ the risk of future selective prosecutions and abuses of an over-broad black-letter rule of professional conduct such as Model Rule 8.4(g) becomes all the greater.²⁸⁵

D. “Professional Speech” and Model Rule 8.4(g): *National Institute of Family & Life Advocates v. Becerra*

In June 2018, in *National Institute of Family & Life Advocates v. Becerra* (“NIFLA”), the United States Supreme Court held that the petitioners, who had requested a preliminary injunction against enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (“FACT Act”), were likely to succeed on the merits of their claim under the First Amendment’s Free Speech Clause.²⁸⁶ As Justice Thomas’s opinion for the Court’s 5–4 majority summarized the requirements of the FACT Act, “[l]icensed clinics [that

ized communities.”); cf. Dent, *supra* note 8, at 154–56 (discussing the broad potential meaning of “harmful” under Model Rule 8.4(g)).

283. Rattan, *supra* note 176.

284. See David French, *A New Campus Survey Reveals Just How Students Are ‘Unlearning Liberty,’* NAT’L REV. (Mar. 13, 2018, 3:32 PM), <https://www.nationalreview.com/2018/03/a-new-campus-survey-reveals-just-how-students-are-unlearning-liberty/> [<https://perma.cc/NEZ2-BVWP>].

285. Law schools must also do much more to promote respect for First Amendment freedoms and resist the powerful tides of ideological conformity and progressive “political correctness.” Cf. Martin J. Salvucci, *Political Correctness at Stanford Law*, NAT’L REV. (May 25, 2018), <https://www.nationalreview.com/2018/05/stanford-law-school-political-correctness-intolerance-conservative-views/> [<https://perma.cc/WNH6-TV24>]. These efforts should include strongly encouraging and supporting intellectual and viewpoint diversity among faculty and students alike. See Randy Barnett, *Our Letter to the American Association of Law Schools*, WASH. POST: VOLOKH CONSPIRACY (Feb. 25, 2017, 11:32 AM), <https://reason.com/volokh/2017/02/25/our-letter-to-the-association> [<https://perma.cc/7F2D-VYEQ>] (noting a “growing awareness that conservative and libertarian scholars are grossly underrepresented in American colleges and universities and that this imbalance results from political discrimination”). See generally George W. Dent, Jr., *Toward Improved Intellectual Diversity in Law Schools*, 37 HARV. J.L. & PUB. POL’Y 165 (2014).

286. 138 S. Ct. 2361, 2378 (2018).

primarily serve pregnant women] must notify [those] women that California provides free or low-cost services, including abortions, and give them a phone number to call,” and “[u]nlicensed clinics must notify women that California has not licensed the clinics to provide medical services.”²⁸⁷ Although the Court noted “serious concerns that both the licensed and unlicensed notices discriminate based on viewpoint,” it did not need to reach that issue “[b]ecause the notices are unconstitutional either way.”²⁸⁸

In a powerful concurring opinion, Justice Kennedy underscored the “serious constitutional concern” about the “apparent viewpoint discrimination” in the case:

This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State’s own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these. . . .

The California Legislature included in its official history the congratulatory statement that the Act was part of California’s legacy of “forward thinking.” But it is not forward thinking to force individuals to “be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.” It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.²⁸⁹

287. *Id.* at 2368.

288. *Id.* at 2370 n.2.

289. *Id.* at 2379 (Kennedy, J., joined by Roberts, C.J., and Alito and Gorsuch, JJ., concurring) (internal citations omitted).

The aspect of *NIFLA* that connects most specifically to the Model Rule 8.4(g) controversy is how Justice Thomas’s opinion responded to the Ninth Circuit’s asserted justification for lenient First Amendment review of the notice requirements—i.e., that they were merely “professional speech” that “involves personalized services and requires a professional license from the state.”²⁹⁰ Treating “professional speech” as a “separate category of speech that is subject to different rules,” the Court said, “gives the States unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement.”²⁹¹ The Court specifically identified “lawyers” as one of several categories of state-licensed individuals over whom the government may not exercise such “unfettered power” to regulate speech.²⁹² The Court identified two limited exceptions: “some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech’”²⁹³ and “professional conduct, even though that conduct incidentally involves speech.”²⁹⁴ Only the latter of these directly relates to Model Rule 8.4(g). And because the broad range of “verbal . . . conduct” that the rule purports to prohibit is not “conduct” that “incidentally involves speech,” but is instead *speech that incidentally involves professional conduct* (especially when such speech is merely “related to the practice of law”), it provides states with no escape from heightened scrutiny for content-based rules.²⁹⁵ The Court then elaborated on its broader concerns about the government imposing speech requirements or restraints under the guise of professional regulation:

290. *Id.* at 2375 (majority opinion); see also Josh Blackman, *The Constitutionality of Rule 8.4(g) after NIFLA v. Becerra*, JOSH BLACKMAN’S BLOG (July 13, 2018), <http://joshblackman.com/blog/2018/07/13/the-constitutionality-of-rule-8-4g-after-nifla-v-becerra/> [<https://perma.cc/XLX9-7YUX>].

291. *NIFLA*, 138 S. Ct. at 2365, 2375.

292. *Id.* at 2375.

293. *Id.* at 2372 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).

294. *Id.*

295. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2018) (emphasis added); cf. Blackman, *supra* note 290 (discussing his comments submitted to the Pennsylvania Supreme Court on its Disciplinary Board’s proposed variation of Model Rule 8.4(g)).

Outside of these two contexts, the Court's precedents have long protected the First Amendment rights of professionals. The Court has applied strict scrutiny to content-based laws regulating the noncommercial speech of lawyers,^[296] professional fundraisers, and organizations providing specialized advice on international law. . . . [I]n the context of professional speech, . . . content-based regulation poses the . . . "risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." When the government polices the content of professional speech, it can fail to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." Professional speech is also a difficult category to define with precision. If States could choose the protection that speech receives simply by requiring a license, they would have a powerful tool to impose "invidious discrimination of disfavored subjects."²⁹⁷

The Court's emphatic rejection of the notion that "professional speech" is a separate category from private speech and intrinsically more susceptible to increased content-based regulation badly undercuts such defenses offered for Model Rule 8.4(g).²⁹⁸ In combination with its other highly free-speech-protective opinion issued in the same month, *Janus v. American Federation of State, County, & Municipal Employees*,²⁹⁹ the Court's ruling sends a strong signal to state supreme courts that they must fully respect lawyers' First Amendment freedoms. To ensure this occurs and that state bar authorities will exercise similar restraint, particularly concerning lawyers with views unpopular with their dominant peer groups in the legal profession, those courts should continue to reject Model Rule 8.4(g).³⁰⁰

296. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015).

297. 138 S. Ct. at 2366 (internal citations omitted) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994); *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 n. 19 (1993)).

298. See, e.g., Haupt, *supra* note 155, at 12–17 and discussion *supra* note 155.

299. 138 S. Ct. 2248 (2018) (holding that Illinois' union agency-fee scheme violated the Free Speech Clause of the First Amendment of nonmembers by compelling them to subsidize private speech on matters of substantial public concern).

300. The outcomes in *NIFLA* and *Janus* have fueled contentions by progressives that conservatives have "weaponized" the First Amendment. See, e.g., Ad-

IV. CONCLUSION

Model Rule 8.4(g)'s proponents consistently defend it as both a necessary tool and an important symbol in the organized bar's continuing efforts to promote and increase its diversity and inclusion.³⁰¹ These are surely very worthy objectives, but the fairness and justice of their pursuit have suffered from the widespread ideological myopia about what it truly means to have a diverse and inclusive profession. It does not mean silencing or chilling diverse viewpoints on controversial moral issues on the basis that such expression manifests "bias or prejudice," is "demeaning" or "derogatory" because disagreement is deemed offensive, or is considered intrinsically "harmful" or as reflecting adversely on the "fitness" of the speaker. It does mean embracing a vision of diversity that includes, rather than excludes, socially conservative lawyers who dissent from the dominant moral views of the American legal profession, including on matters of sexual ethics.³⁰² The impulses within the legal profession to coerce viewpoint conformity and marginalize and deter dissenters, evidenced in the 1996 Tennessee Ethics Opinion and then further animated and expanded in Model Rule 8.4(g), should be resisted by members of the bench and bar who cherish liberty. The zealous energy of progressive ac-

am Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html?login=email&auth=login-email> [https://nyti.ms/2ID0Wov]; see also Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2219 (2018) (answering the question "No," based on "the American context, with all the historical, sociological, and philosophical baggage that comes with the modern, American free speech right," considering desired "progressive" results). But shielding dissenters from government compulsions relating to speech is, in fact, a fully justified defensive strategy well in keeping with our American traditions, and serves to protect both social conservatives and progressives in times when their views are popularly disfavored. See, e.g., Ryan T. Anderson, *Shields, Not Swords*, NAT'L AFFAIRS, Spring 2018, at 74.

301. See, e.g., Keith, *supra* note 135, at 2, 17–22.

302. See Wolanek, *supra* note 118, at 789 ("If the ABA is committed to institutional diversity, it will not encourage jurisdictions to formally discipline those who disagree with certain moral judgments."); see also *id.* (noting that if Model Rule 8.4(g) "[e]xcludes (in the name of diversity) those with unpopular views, the legal profession ironically experiences a decrease in diversity," which "affects non-lawyers because it makes it difficult for 'biased' citizens to find like-minded attorneys.").

tivism should be redirected away from authoritarian efforts to silence and exclude traditionalist moral dissenters through campus and professional speech codes, and toward civil and tolerant efforts to persuade others of their views on law and social justice.

The long-term preservation of our first freedoms in the American legal profession will require a new and sustained commitment to what John Inazu has called “confident pluralism.”³⁰³ This ideal draws upon strong premises of both *inclusion* (“[a]iming for basic membership in the political community to those within our boundaries”) and *dissent* (asserting “[w]e must be able to reject the norms established by the broader political community within our own lives and voluntary groups”).³⁰⁴ Although “the precise contours of inclusion and dissent are contested,” and these disagreements “strain[] our modest unity,” Inazu insists negotiating this challenging path is a worthy effort in our ideologically-divided culture: “Confident pluralism argues that we can, and we must, learn to live with each other in spite of our deep differences. It requires a tolerance for dissent, a skepticism of government orthodoxy, and a willingness to endure strange and even offensive ways of life.”³⁰⁵ Faced with these conflicts, lawyers should find encouragement from Saint Thomas More, both from his moral courage when faced with compulsions the government brought to bear upon his conscience, and from his lifelong commitment to the law and the recourses to justice it provides. As Thomas Shaffer once wrote:

303. JOHN D. INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* (2016).

304. *Id.* at 26, 30. As Inazu notes, “One reason for the inclusion premise is that confident pluralism depends upon both a willingness *and* an ability to partner toward the possibility of mutual coexistence.” *Id.* at 26. He also observes “[t]his value of dissent entails risk because it strengthens a genuine pluralism against majoritarian demands for consensus.” *Id.* at 30.

305. *Id.* at 125; *see also* STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* 16 (1998) (“It is as though we have forgotten the advice of James Madison in Federalist No. 10, that ‘the first object of government’ is to protect our ability to reach different conclusions, because the alternative is to create a society in which every citizen holds ‘the same opinions, the same passions, and the same interests.’”).

More's hope that he could use the law to save himself, his family, and his country was foreshadowed in his book *Utopia*. There is a debate there between Raphael, who does not believe that a good man can serve princes, and More, who says that good men can serve princes: "You cannot pluck up [wrongheaded opinions] by the root," More says, "Don't give up the ship in a storm because you cannot direct the winds . . . [W]hat you cannot turn to good, you . . . make as little bad as you can."³⁰⁶

Today's lawyers with traditional religious and moral convictions should not "give up the ship" because they "cannot direct the winds" of cultural change or because the dominant forces of the organized bar may seek to marginalize or even exclude them. Like More, they should persevere and remain "the King's good servant, but God's first." Unlike More, they should be free to express their consciences with candor.

306. Thomas L. Shaffer, *More's Skill*, 9 WIDENER J. PUB. L. 295, 301 (2000) (quoting THOMAS MORE, *UTOPIA* 36 (George M. Logan & Robert M. Adams eds., Cambridge Univ. Press 1989) (1516)).