

# Lawyers for White People?

by Jessie Allen\*

*Wait a minute. Are you telling me that after I graduate I  
could go downtown and hang out a sign that says  
“Lawyers for White People”?*

- Student in my Professional Responsibility class

## INTRODUCTION

In 2016, the American Bar Association adopted a new Model Rule of Professional Conduct that for the first time forbids lawyers from discriminating on the basis of race or sex, among other protected characteristics.<sup>1</sup> It is rather shocking that it took so long for the most influential source of legal ethics standards in the United States to identify discrimination as an ethical violation. After all it has been over 50 years since the Civil Rights Act of 1964 prohibited restaurants and hotels from excluding customers because of race.<sup>2</sup> But the delay in promulgation is not the most surprising thing about the new rule. That honor goes to the rule’s penultimate sentence, which apparently *exempts* lawyers’ client selection.<sup>3</sup> What gives? Why would the ABA’s first black-letter legal ethics rule against discrimination exclude prospective clients from its coverage?

The answer has implications that run well beyond rules of professional

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\* Associate Professor, University of Pittsburgh School of Law. Thanks to Richard Abel, Alberto Bernabe, William S. Carter, Deborah Brake, Stephen Gillers, Jules Lobel, Lynn Mather, Peter Oh, David Udell, Lu-in Wang, and Ellen Yaroshevsky for helpful comments. The Article also benefited from early workshopping at the Legal Ethics Scholars’ Roundtable at the Benjamin N. Cardozo School of Law and from research provided by Alexandra Good, David Patterson, Cameron Roeback, Marcie Solomon (whose work was supported by a Derrick Bell Research Fellowship), and Carolyn Thompson.

1. “It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.” MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

2. See 42 U.S.C. § 2000a.

3. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

responsibility. Paradoxically, under prevailing civil rights doctrine, an ethics rule prohibiting discrimination in client selection might be used to disable some of the very practitioners most committed to addressing persistent inequalities in our legal system. This counterintuitive effect results from the way the ascendant “anti-classification” approach has deformed civil rights doctrine in the United States.<sup>4</sup> Anti-classification forbids consideration of protected characteristics like race, gender or sexual orientation,<sup>5</sup> even when that consideration aims to redress rather than perpetuate stigma and inequality. In the vocabulary of today’s progressive civil rights movement, anti-classification blocks “anti-racist” policies and practices.<sup>6</sup>

For instance, in the prevailing anti-classification regime, a rule against discrimination in client selection might prohibit lawyers from prioritizing African American clients in excessive force claims or from representing only women in employment discrimination claims.<sup>7</sup> Indeed, the only reported court decision applying state civil rights law to a lawyer’s client selection is a 2003 Massachusetts ruling against a feminist family lawyer who refused to represent a man in a divorce case.<sup>8</sup> Judith Nathanson “had earned a law degree with the purpose of helping to advance the status of women in the legal system.”<sup>9</sup> She was held liable for violating state public accommodations law.<sup>10</sup>

Of course, the ABA rule does not expressly authorize discriminatory

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4. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion) (citations omitted) (“[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion) (citations omitted) (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (holding that an alleged benign purpose does not exempt racial classification from presumption of illegitimacy).

5. This Article uses the term “sex discrimination” to encompass discrimination on the basis of either gender or sexual orientation. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (holding “sex discrimination” within Title VII encompasses discrimination on the basis of sexual orientation and gender identity).

6. As Robert J. Patterson puts it: “Anti-racism is an active and conscious effort to work against multidimensional aspects of racism.” Hillary Hoffower, *What It Really Means to Be an Anti-Racist, and Why it’s Not the Same as Being an Ally*, BUS. INSIDER (June 8, 2020, 10:16 AM), <https://www.businessinsider.com/what-is-anti-racism-how-to-be-anti-racist-2020-6> [<https://perma.cc/7EAM-WY2R>]; see also IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 13 (2019).

7. See 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, 227 (2017).

8. *Nathanson v. Mass. Comm’n Against Discrimination*, No. 199901657, 2003 WL 22480688, at \*1. Despite this ruling, at least one firm, Cordell & Cordell, continues to advertise as divorce attorneys for men in Massachusetts. See CORDELL & CORDELL, *infra* note 85.

9. *Nathanson*, 2003 WL 22480688, at \*1 n.1.

10. *Id.* at \*7.

client selection. By its own terms, it simply “does not limit the ability of a lawyer to accept, decline or withdraw from a representation” in accordance with the pre-existing rules that say nothing about discrimination.<sup>11</sup> Even if the existing rules could be read to implicitly forbid discrimination,<sup>12</sup> though, the choice to exclude prospective clients from the new anti-discrimination rule seems odd. The records of the ABA rule adoption process are largely silent on the reasoning behind the exemption for client selection.<sup>13</sup> So we do not know whether the ABA delegates had Nathanson’s case in mind as a cautionary tale. We don’t know if the drafters sought to avoid directly forbidding discriminatory client selection, fearing it might do more harm than good under the anti-classification analysis it would likely receive. But in the legal world we currently inhabit that would have been a perfectly rational choice.

Yet, shying away from condemning discrimination against prospective clients hardly seems ethical. While this approach may protect politically motivated client-selection practices, it does so by weakening civil rights protection for individuals seeking legal representation.<sup>14</sup> Moreover, as an expression of the core norms of legal practice, the exemption sends a terrible message that lawyers enjoy an elite prerogative to refuse service based purely on personal bias. Perhaps most important, as a practical matter it disincentivizes law firms from examining their client selection procedures with an eye toward identifying and remedying practices that produce discriminatory results. After all, if the ABA will not say clearly that discriminatory client selection is unethical, why should a firm work to avoid it?

The arguments of this Article therefore have a double purpose. The first aim is to frame an alternative regulatory approach that would declare firmly that rejecting clients based on stigma and stereotypes is deeply unethical. The goal is to forbid discriminatory exclusion and encourage law firms to monitor their client selection policies for bias, without destroying lawyers’ ability to prioritize representing groups who have been subordinated in our legal system. But the Article also aims to use the problem of crafting and defending such a rule to illuminate the deeply

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11. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016); *see also id.* r. 1.16.

12. *See infra* Part I.

13. *See* Memorandum from the ABA Standing Comm. on Ethics and Pro. Resp., Memorandum on Draft Proposal to Amend Model Rule 8.4 (Dec. 22, 2015) [hereinafter 2015 ABA Memo], [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/rule\\_8\\_4\\_1\\_language\\_choice\\_memo\\_12\\_22\\_2015.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_1_language_choice_memo_12_22_2015.authcheckdam.pdf) [<https://perma.cc/YG4F-YHGK>]; MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 2016).

14. Moreover, as *Nathanson* shows, those lawyers may remain subject to liability when states are ready to enforce generally applicable public accommodations laws against them. *See Nathanson*, 2003 WL 22480688, at \*3–4.

distorting influence of anti-classification doctrine in civil rights law more broadly.

After considering the institutional and legal context in which the ABA exemption was adopted, I propose an alternative rule—one that expressly forbids discrimination against prospective clients and adopts an overtly “anti-subordination” approach. In contrast to anti-classification’s focus on uniform treatment of individuals, anti-subordination focuses on recognizing and remedying systemic inequality.<sup>15</sup> Nathanson’s practice of exclusively representing women in divorce actions embodied an anti-subordination approach, because she aimed to select clients in a way that would dismantle gender hierarchy.<sup>16</sup> She considered sex when choosing whom to represent, in order to actively resist what she believed, with considerable objective reason, was the legal system’s tendency to subordinate women.<sup>17</sup> In legal scholarship, anti-subordination is sometimes presented as a relic of an earlier political era, or the province of academics.<sup>18</sup> The implication seems to be that anti-classification is a more realistic and straightforward way to embody ideals of equality, and that anti-subordination has failed because it is a creation of a bunch of liberal egg heads out of step with real world relationships. But this is completely backwards.

More and more these days, anti-subordination coincides with popular

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15. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 (2003) (“Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification . . .”). Owen Fiss is often credited with first fully articulating the tension between two different views in civil rights law, calling them the “antidiscrimination” and “group-disadvantaging” principles. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 108 (1976); see also Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 206–07 (2010) (noting that anti-subordination advocates understand the Equal Protection Clause “to bar those government actions that have the intent or the effect of perpetuating traditional patterns of hierarchy,” while anti-classification theorists “take the view that the Constitution prohibits government from ‘[r]educ[ing] an individual to an assigned racial identity for differential treatment.’” (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring in part))).

16. See Nathanson, 2003 WL 22480688, at \*1 n.1.

17. *Id.*

18. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 40–41 (2006); Sergio J. Campos, *Subordination and the Fortuity of Our Circumstances*, 41 U. MICH. J.L. REFORM 585, 587 (2008). But see Francisco Valdes, *LatCrit 2013 Conference Symposium Afterword: Theorizing and Building Critical Coalitions: Outsider Society and Academic Praxis in Local/Global Justice Struggles*, 12 SEATTLE J. FOR SOC. JUST. 983, 985 (2014) (describing a community of “academics and activists committed equally to critical approaches toward anti-subordination theory and action”); cf. Sheila I. Vélez Martínez, *Towards an Outcrit Pedagogy of Anti-Subordination in the Classroom*, 90 CHL.-KENT L. REV. 585, 587–88 (2015) (proposing that anti-subordination theorists should practice what they preach and “teach in a way that challenges the power differential between professors and students and fosters a horizontal teaching and learning community.”).

political morality. It is not only political leftists and Black Lives Matter activists who recognize the systemic persistence of racial hierarchy. We are living in a time when a centrist Democrat running for, and winning, the Presidency declares, “the fact of the matter is, there is institutional racism in America.”<sup>19</sup> Opinion polls in summer 2020 show that a large majority of Americans (76%) now say that racial discrimination is a big problem in the United States, and 57% believe that Black Americans are more likely than Whites to be the targets of police violence.<sup>20</sup> These are stark increases from just a few years ago when only about half of Americans viewed discrimination as a major problem and around a third saw Blacks as more likely to experience excessive force.<sup>21</sup> That is not to say that White Americans favor explicit racial preferences to address this unequal situation. Indeed, it seems that while a majority of Whites approve of “affirmative action” in the abstract, that does not translate into support for direct government action to redress racial inequality.<sup>22</sup> But certainly the awakening to systemic racism does not align with a “color blind” approach to anti-discrimination law. And recently some state lawmakers are pushing back against the view that it is unconstitutional to channel benefits to groups disadvantaged by longstanding discrimination. In response to the Covid-19 pandemic’s disproportionate harm to Black Americans, due to economic and health disparities that stem from racial discrimination, the Oregon legislature earmarked more than half of the state’s federal Covid-19 aid for Black residents. Predictably, a lawsuit was filed charging that distributing aid on racial lines violates equal protection.<sup>23</sup>

In the context of a country increasingly aware of systemic racism, exempting client selection from the ABA’s new explicit ban on

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19. CNBC Television, *Joe Biden: There Is Institutional Racism in America*, YOUTUBE (Oct. 22, 2020), [https://www.youtube.com/watch?v=KBz\\_licONG4](https://www.youtube.com/watch?v=KBz_licONG4) [<https://perma.cc/5ZZS-DXHF>].

20. *Protestors’ Anger Justified Even If Actions May Not Be*, MONMOUTH U. POLLING INST. (June 2, 2020), [https://www.monmouth.edu/polling-institute/reports/monmouthpoll\\_us\\_060220/](https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_060220/) [<https://perma.cc/6ESW-R8UA>].

21. *Id.*; see also Justin Worland, *America’s Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), <https://time.com/5851855/systemic-racism-america/> [<https://perma.cc/7WM8-TB7C>] (observing that thousands of White Americans have joined summer 2020 protests against police killings of African Americans).

22. “Americans are divided about government action to improve the social and economic condition of Blacks. A slight plurality of respondents says some help is needed (43 percent), but the majority (57 percent) are either undecided or opposed to systemic help.” *Poll: Americans’ Views of Systemic Racism Divided by Race*, UMASS LOWELL (Sept. 22, 2020), <https://www.uml.edu/News/press-releases/2020/SocialIssuesPoll092220.aspx> [<https://perma.cc/XMB6-CHDE>].

23. See *Cocina Cultura LLC v. Oregon*, No. 3:20-cv-02022-IM, 2020 WL 7181584, at \*4–5 (D. Or. Dec. 7, 2020) (denying motion for preliminary injunction because, although “the race-based criterion may indeed prove unconstitutional,” plaintiff failed to prove irreparable harm).

discrimination looks more problematic than ever. But in the counter-intuitive doctrinal regime that has taken over U.S. civil rights law, expressly forbidding discriminatory client selection risks creating a rule that would punish the very lawyers most dedicated to dismantling anti-democratic hierarchies. There is an old saying that “bad facts make bad law,”<sup>24</sup> but this looks like a case of bad legal doctrine making it impossible to make any law at all. With this in mind, I set out to do three things: understand the practical and doctrinal context that led to this peculiar regulatory result, frame an anti-discrimination rule that would explicitly protect lawyers’ principled consideration of clients’ race and sex while prohibiting stigmatic bias, and see what defending such a rule would reveal about the way anti-classification doctrine affects regulatory choices.

Part I of this Article traces the anti-discrimination rule’s evolution through the ABA process and explains how disavowing coverage of client selection may work to protect two groups of lawyers whose political interests ordinarily diverge. Part II steps back to ask whether we need an ethics rule forbidding discriminatory client selection. Despite a great flowering recently of studies documenting race and sex disparities in law firms’ employment practices, there have been few investigations of the part race and sex play in law firms’ interactions with prospective clients, who they choose to represent, and the terms on which they offer their services. This part also addresses the objection that, because lawyers serve clients through expressive advocacy, prohibiting discriminatory client selection would violate lawyers’ First Amendment rights of expressive association. Part III proposes a legal ethics rule that forbids rejecting clients based on race or sex stereotypes and stigma, but protects lawyers’ race- and sex-conscious client selection as part of an intentional practice aimed at redressing inequality. Then I defend the proposed rule against constitutional challenges.

As a matter of equal protection, an anti-subordination rule can be defended even in today’s anti-classification culture.<sup>25</sup> The benefits of a diverse legal system are not confined to disadvantaged groups. In our common law system, legal rules are shaped by the claims and interests brought to courts and so by the circumstances and identities of the litigants. Just as the absence of Black voices distorts education for all, the legal system’s failure to recognize race and sex hierarchies and represent the interests of subordinated groups distorts the law itself.<sup>26</sup> Even if it survives

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24. See, e.g., *Haig v. Agee*, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting).

25. See *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

26. See *id.* at 330–33.

equal protection review, however, the proposed rule faces a more threatening viewpoint discrimination claim.<sup>27</sup>

Considering an anti-subordination approach to client selection leads to two principal conclusions, one practical and the other involving constitutional interpretation. As a practical matter, it highlights how little we know about how prospective clients' race and sex affect their ability to obtain legal counsel.<sup>28</sup> There are reasons to suspect that access to legal representation is systematically unequal.<sup>29</sup> But without knowing more about whether and how inequalities arise, it is hard to fashion a rule of professional responsibility to address them. So, this Article's most concrete recommendation is for empirical work to fill these knowledge gaps.

On the constitutional front, defending my proposed ethics rule exposes the way anti-classification doctrine affects our understanding of rights provisions outside the Fourteenth Amendment. Most critiques of anti-classification focus on equal protection doctrine.<sup>30</sup> But it turns out that the strongest objections to the proposed anti-subordination rule are based on a claim of viewpoint discrimination under the First Amendment.<sup>31</sup> Through the cracked anti-classification lens, a rule that forbids race discrimination but allows private attorneys to pursue anti-racist client selection looks like a violation of government's duty to avoid taking ideological sides.<sup>32</sup> Ironically, although that rule allows consideration of race or sex only in narrow, arguably benign, circumstances, it would face daunting constitutional challenges, while a rule exempting all client-selection discrimination would sail through judicial review.

Arguably, it was not the job of the ABA drafters to insist that a much-needed anti-discrimination rule confront anti-classification's distortion of civil rights doctrine. Indeed, adopting a rule like the one I propose might

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27. Note that Josh Blackman criticizes as viewpoint discrimination Comment 4 to ABA Model Rule 8.4(g), which states that "[l]awyers may engage in conduct undertaken to promote diversity and inclusion" in employment policies without violating the rule. Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 259–60 (2017) (quoting MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS'N 2016)).

28. See Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339, 350 (2008).

29. See *id.*; Deborah L. Rhode, *Law Is The Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That.*, WASH. POST (May 27, 2015, 7:25 AM), <https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/> [<https://perma.cc/BND6-LUTK>].

30. For two exceptions that focus on the First Amendment, see generally Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117 (2018) and Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 62 ARIZ. L. REV. (forthcoming), [https://papers.ssm.com/sol3/papers.cfm?abstract\\_id=3630648](https://papers.ssm.com/sol3/papers.cfm?abstract_id=3630648) [<https://perma.cc/JD5A-W66D>].

31. Cf. Blackman, *supra* note 27.

32. See *id.*

have done more to elevate than expose the anti-classification approach, given that the anti-subordination exemption might not survive a viewpoint discrimination challenge. But if legal scholars have a role to play in legal reform, it would seem to entail bringing to light the way narrow regulatory problems are sometimes driven by broad structural distortions in our legal system. Hence this article.

#### I. THE ABA ADOPTS AN ANTI-DISCRIMINATION RULE PROTECTING EVERYONE EXCEPT PROSPECTIVE CLIENTS

*[W]hat is more important to the integrity of the law than ensuring that those who seek out legal representation are not subject to discrimination . . . ?*<sup>33</sup>

When the ABA adopted Model Rule 8.4(g) in August 2016, it was the first black-letter prohibition on discrimination in the ABA Model Rules of Professional Conduct since their origination in 1983.<sup>34</sup> The rule's coverage is sweeping. It forbids any act "the lawyer knows or reasonably should know is harassment or discrimination . . . in conduct related to the practice of law."<sup>35</sup> Yet it expressly declines to alter the status quo in one fundamental part of legal practice, explaining that "[t]his paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16."<sup>36</sup>

Rule 1.16, "Declining or Terminating Representation," certainly does not expressly authorize a lawyer to reject clients for racist or sexist reasons.<sup>37</sup> But neither does it explicitly prohibit it. After addressing situations that mandate refusing or abandoning a representation, Rule 1.16 lists circumstances in which lawyers are permitted to withdraw from a representation once they have taken on a client.<sup>38</sup> Those circumstances are broadly permissive, but not totally unlimited.<sup>39</sup>

Arguably, Rule 1.16 can be read to implicitly forbid a discriminatory withdrawal from an ongoing representation. Although the rule authorizes withdrawal if "the client insists upon taking action that the lawyer considers repugnant," withdrawing because a client's *action* is repugnant seems fundamentally different than withdrawing because a lawyer finds a

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33. 2015 ABA Memo, *supra* note 13, at 2.

34. Prior ethical codes and canons similarly lacked any prohibition on discrimination.

35. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016).

36. *Id.*

37. *See id.* r. 1.16(a)–(b).

38. *See id.*

39. *See id.*

client repugnant on account of race or sex.<sup>40</sup> Besides the specific bases offered, the rule permits leaving a representation if “other good cause for withdrawal exists,” but stigmatic bias against a group can hardly be counted as a “good cause.”<sup>41</sup> Someone might say that 1.16(b)(1)—authorizing withdrawal if it “can be accomplished without material adverse effect on the interests of the client”—allows discriminatory withdrawals.<sup>42</sup> If other lawyers are available, and switching representations will not add costs, racist and sexist withdrawals might be permitted under this no-harm-no-foul section. But perhaps discriminatory rejections are always harmful, and always have a “material adverse effect” on the most fundamental interest of all, one’s personhood.

The harm of discriminatory service denial is not primarily loss of access but denial of dignity. That was the theory anyway, of the Court’s early public accommodations cases. As Justice Goldberg explained, quoting from the Congressional report that accompanied the Civil Rights Act of 1964, “[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.”<sup>43</sup> In this view, refusing legal services to someone out of racist or sexist bias inflicts a dignitary injury that in and of itself amounts to material adversity and so cannot be excused by 1.16(b)(1).

Moreover, in practice, a lack of “material adverse effect” is rarely offered *alone* as a basis for withdrawal. And, despite the rule’s text, there are some situations in which withdrawal is treated as unethical even without quantifiable harm, at least by some legal decisionmakers.<sup>44</sup> For instance, citing a lawyer’s fundamental duty of loyalty to clients, courts sometimes refuse to allow lawyers to withdraw from a client’s case in order to take on a new, more lucrative representation that would otherwise raise a conflict of interest.<sup>45</sup> Most legal decision makers probably would be reluctant to endorse a lawyer’s withdrawal from a case upon

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40. *Id.* r. 1.16(b)(4).

41. *Id.* r. 1.16(b)(7).

42. *Id.* r. 1.16(b)(1).

43. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring).

44. I thank Stephen Gillers for pointing this out to me and for offering the example of the “hot potato” cases.

45. *See, e.g., W. Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074, 1084 (C.D. Cal. 2015) (holding that “[t]he ‘hot potato rule’ bars an attorney and law firm from curing the dual representation of clients by expediently severing the relationship with the preexisting client”); *Markham Concepts, Inc. v. Hasbro, Inc.*, 196 F. Supp. 3d 345, 349 (D.R.I. 2016) (refusing to allow law firm to cure conflict of interest by dropping client, because “[s]uch a rule would render meaningless the duty of loyalty a lawyer owes to his or her clients . . .”).

discovering the client was Black. If dumping a client for profit is questionable, discriminatory withdrawal might well be seen as a more pernicious violation of the basic duty of client loyalty.

That still leaves open the question of discriminatory refusals to take on clients in the first place, about which Rule 1.16 is completely silent. That silence offers no express limit on reasons for rejecting clients. But neither does it explicitly authorize discriminatory rejections. Stephen Gillers therefore argues that even though Rule 8.4(g) defers to 1.16, the new rule forbids declining representation “because of the person’s membership in one of the protected groups.”<sup>46</sup> Others understand Rule 8.4(g) to leave in place a traditional prerogative to turn away prospective clients for any reason at all—including overtly racist or sexist exclusion.<sup>47</sup>

Besides watering down protection for prospective clients, the exemption sends a message that is at best confusing in a text that shapes legal practice throughout the United States. Most American lawyers first absorb the ethical norms of their profession through the ABA Model Rules. All students at ABA accredited law schools, the vast majority of law schools in the United States,<sup>48</sup> are required to take a course on legal ethics or “professional responsibility.”<sup>49</sup> In many, if not most, of these courses, the ABA Model Rules are the central source of authority. Admission to the bar in all but a handful of U.S. jurisdictions requires a passing score on the Multistate Professional Responsibility Exam, which is based on the ABA Model Rules.<sup>50</sup> In addition, every state has a code of

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46. Gillers, *supra* note 7, at 233. Margaret Tarkington points out that Gillers’s reading makes sense of a comment to Rule 8.4(g), which declares that a lawyer does *not* violate the rule “by *limiting the lawyer’s practice* to members of underserved populations in accordance with these Rules and other law.” MARGARET TARKINGTON, VOICE OF JUSTICE: RECLAIMING THE FIRST AMENDMENT RIGHTS OF LAWYERS 269–70 (2018) (quoting MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 5 (AM. BAR ASS’N 2016)). As Tarkington notes, the comment seems unnecessary if the rule exempts client selection. Tarkington, however, declares that “[t]he best reading of Model Rule 8.4(g) is that it does not change the autonomy of private lawyers to decline cases, and should a jurisdiction adopt the rule, the lawyer retains complete autonomy to decline matters.” *Id.* at 269.

47. *See, e.g.*, TARKINGTON, *supra* note 46, at 269.

48. There are currently 199 accredited institutions that make up about 85% of U.S. law schools. *ABA-Approved Law Schools*, AM. BAR ASS’N, [https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/) [<https://perma.cc/D5HL-ZTN5>] (last visited Jan. 23, 2021); *see also Non-ABA-Approved Law Schools*, LSAC, <https://www.lsac.org/choosing-law-school/find-law-school/non-aba-approved-law-schools> [<https://perma.cc/3XCR-2E3Z>] (last visited Jan. 23, 2021).

49. *ABA Standards and Rules of Procedure for Approval of Law Schools 2020–2021*, AM. BAR ASS’N 18, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf) [<https://perma.cc/EQ76-AY83>] (last visited Jan. 23, 2021).

50. “The MPRE is based on the law governing the conduct and discipline of lawyers and judges, including the disciplinary rules of professional conduct currently articulated in the American Bar

legal ethics, under which lawyers can be disciplined for ethical violations, and all state codes track the organization and much of the content of the ABA Model Rules.<sup>51</sup> In many states, additions to the Model Rules are regularly incorporated in the enforceable legal ethics code.<sup>52</sup> To be sure, sometimes ethical norms from other sources appear in state codes, but the ABA model rules are by far the most consistent single source of rule changes in states across the country.<sup>53</sup> So a new model rule forbidding discrimination by lawyers has the potential to influence both enforceable law and widespread professional norms. With all that at stake, it's hard to see why the ABA drafters would choose to water down the new rule's ostensible main purpose: "ensuring that those who seek out legal representation are not subject to discrimination."<sup>54</sup> But the rule's legislative history suggests the exemption for client selection is quite intentional.<sup>55</sup>

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Association (ABA) Model Rules of Professional Conduct . . ." *Preparing for the MPRE*, NAT'L CONF. OF BAR EXAMINERS, <http://www.ncbex.org/exams/mpre/preparing/> [<https://perma.cc/P3WN-V69B>] (last visited Jan. 23, 2021).

51. California, once the lone holdout, recently became the final state to establish an independent legal ethics code. See CAL. RULES OF PRO. CONDUCT (2018); Elisa Cariño, *The Golden Rules: A Primer on California's New Professional Responsibility Rules*, 8 NAT'L L. REV. 339 (Dec. 5, 2018), <https://www.natlawreview.com/article/golden-rules-primer-california-s-new-professional-responsibility-rules> [<https://perma.cc/49SE-6UKF>].

52. See, e.g., *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct*, 46 Pa. Bull. 7519 (Dec. 3, 2016), <http://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol46/46-49/2062.html> [<https://perma.cc/NW32-3U8M>] ("Historically, Pennsylvania has supported adoption of ABA Model Rule amendments to promote consistency in application and interpretation of the rules from jurisdiction to jurisdiction . . ."). Other states may reject or modify ABA amendments.

53. Before the ABA adopted Rule 8.4(g), 24 states had some form of anti-discrimination rule, and 10 of these appear to forbid discriminatory rejection of prospective clients. Most of these rules are limited to "unlawful" discrimination. See, e.g., IOWA RULES OF PRO. CONDUCT r. 32:8.4(g) (2015); MINN. RULES OF PRO. CONDUCT r. 8.4(h) (2015); N.Y. RULES OF PRO. CONDUCT r. 8.4(g) (2017); OHIO RULES OF PRO. CONDUCT r. 8.4(g) (2020). Illinois explicitly requires a court finding of liability for disciplinary action. ILL. RULES OF PRO. CONDUCT r. 8.4(j) (2015). California previously had a rule that explicitly protected client selection, but has since required court adjudication. CAL. RULES OF PRO. CONDUCT r. 2-400 (2015). Nine other states have anti-discrimination rules with general prohibitions that, as a matter of plain meaning, would seem to include client selection. Twenty-six states had no black-letter rule prohibiting discrimination by lawyers. Five states have considered and rejected Rule 8.4(g). *Variations of the ABA Model Rules of Professional Conduct: Rule 8.4: Misconduct*, ABA CTR. FOR PRO. RESP. POL'Y IMPLEMENTATION COMM. (Nov. 9, 2020), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.pdf) [<https://perma.cc/HH4S-MARA>].

54. 2015 ABA Memo, *supra* note 13, at 2.

55. See *id.* at 5.

A. *The ABA Amendment Process and the Resulting New Model Rule 8.4(g)*

The absence of a rule against discrimination in the ABA Model Rules was glaring, and there had long been efforts to address it. In the 1990s, a push for an anti-discrimination rule failed to produce any black-letter prohibition.<sup>56</sup> That was where things stood until 2015, when the new anti-discrimination rule was proposed. Concern and ambivalence about regulating discrimination in client selection surfaced early. In the year between the committee's first draft of the proposed rule and the final rule's adoption in August 2016, the text changed three times, and each revision included language related to client selection.<sup>57</sup>

In July 2015 the ABA Standing Committee proposed that an explicit prohibition on discriminatory conduct be added as a new section (g) of Rule 8.4.<sup>58</sup> The first draft of the new section made it professional misconduct to “knowingly harass or discriminate against persons” on the basis of race, sex, or sexual orientation (among other characteristics) “while engaged [in conduct related to] . . . the practice of law” with no specific reference to client selection, which would seem to be included in “conduct related to . . . the practice of law.”<sup>59</sup> An accompanying proposed comment asserted that the new rule would still allow “lawyers to limit their practices to clients from underserved populations as defined by any of

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56. Instead, in 1998, a comment to Rule 8.4(d), prohibiting conduct “prejudicial to the administration of justice” was adopted. The comment explained that “[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” violates paragraph (d) “when such actions are prejudicial to the administration of justice.” James Podgers, *Proposed Rule that Makes Workplace Bias an Ethics Violation Not Going Far Enough, ABA President Says*, ABA J. (Feb. 8, 2016, 8:31 AM), [http://www.abajournal.com/news/article/proposed\\_rule\\_making\\_workplace\\_bias\\_an\\_ethics\\_violation\\_doesnt\\_go\\_far\\_enough](http://www.abajournal.com/news/article/proposed_rule_making_workplace_bias_an_ethics_violation_doesnt_go_far_enough) [<https://perma.cc/2EQT-G2GJ>].

According to the Model Rules Preamble, however, “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules,” and “Comments are intended as guides to interpretation, but the text of each Rule is authoritative.” MODEL RULES OF PRO. CONDUCT Preamble ¶¶ 14, 21 (AM. BAR ASS’N 2020). Supporters of an ethics rule barring discrimination therefore saw the anti-discrimination comment as a way to avoid addressing the issue “squarely, in the authoritative manner it would be if it were addressed in the text of a Model Rule.” Podgers, *supra* note 56 (quoting 2015 ABA Memo, *supra* note 13, at 3).

57. See 2015 ABA Memo, *supra* note 13, at 6–7; Working Discussion Draft: Amendment to Model Rule 8.4 and Comment [3], AM. BAR ASS’N (July 8, 2015) [hereinafter July 2015 Discussion Draft], [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/draft\\_07082015.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/draft_07082015.authcheckdam.pdf) [<https://perma.cc/AG53-ATBF>]; MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

58. July 2015 Discussion Draft, *supra* note 57.

59. *Id.*

these factors.”<sup>60</sup>

Six months later, the draft released for public comment again made no reference to client selection in the black-letter rule.<sup>61</sup> Again, a comment addressed the issue, but with a shift in emphasis. Instead of approving client selection based on protected characteristics in order to represent “underserved” groups, the comment disavowed the new rule’s application to client selection altogether: “Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation.”<sup>62</sup>

As long as the exemption for client selection appeared only in a comment, while the proposed rule’s text barred discrimination in all “conduct related to the practice of law,” the overall effect remained ambiguous.<sup>63</sup> The ethics committee of the ABA Business Law Section criticized the proposed amendment for “stating a black-letter principle in sweeping terms that the accompanying comment then purports to deny,” remarking tartly that “[p]erpetuating this kind of nonsensical self-contradiction does little to promote respect for lawyers or legal ethics.”<sup>64</sup> In another writer’s view, the new black-letter rule appeared “to abrogate long-standing freedoms to decline or withdraw from representation as currently captured in Rule 1.16,” and the proposed comment would be “insufficient protection for the Rule 1.16 bases for declining or withdrawing from representation.”<sup>65</sup> The ABA Standing Committee on

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60. *Id.* Note that this early version of the ABA Model Rule is closer to the rule that this Article ultimately proposes. Compare *id.*, with *infra* Part III.B.

61. 2015 ABA Memo, *supra* note 13, at 2–3.

62. *Id.* at 3. The full comment did retain an oblique reference to underserved populations, but this time only in terms of ability to pay:

Although lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation.

*Id.* at 2–3.

63. *Id.*

64. Letter from Keith R. Fisher, Chair, ABA Bus. L. Section Pro. Resp. Comm., to Myles V. Lynk, Chair, ABA Standing Comm. on Ethics & Pro. Resp. 4 (Mar. 10, 2016), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_model\\_rule%208\\_4\\_comments/aba\\_business\\_law\\_ethics\\_committee\\_comments.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_business_law_ethics_committee_comments.pdf) [https://perma.cc/X2FT-RFAM].

65. Letter from April King to Myles V. Lynk, Chair, ABA Standing Comm. on Ethics & Pro. Resp. (Feb. 14, 2016), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_model\\_rule%208\\_4\\_comments/king\\_2\\_14\\_2016.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/king_2_14_2016.pdf) [https://perma.cc/C6YA-3AS3].

Professional Discipline worried that the comment did not go far enough, because it failed to “adequately recognize or articulate how the proposed Model Rule interacts with the longstanding principle that a lawyer has the broad discretion to accept or decline a representation.”<sup>66</sup> The Discipline Committee therefore recommended moving the client selection exemption to the black-letter rule, suggesting text from Washington State’s anti-discrimination rule: “This Rule shall not limit the ability of a lawyer to accept, decline or withdraw from the representation of a client in accordance with Rule 1.16.”<sup>67</sup> In its final version, the new ABA rule closely tracks the Washington language.<sup>68</sup> A new comment adopted with the rule further declares that lawyers may choose to limit their practice to “underserved populations in accordance with these Rules and other law.”<sup>69</sup>

In sum, the new rule began as a general black-letter prohibition on discrimination with no exception for client selection and a comment approving preferences for representing “underserved populations.”<sup>70</sup> An intermediate version retained the general black-letter prohibition, but added a comment disavowing the rule’s application to client selection.<sup>71</sup> The rule finally adopted in 2016 incorporates the disavowal in its black-letter text, and restores the comment protecting practices limited to underserved groups.<sup>72</sup> Based on a straightforward reading of the black-letter text, supported by the legislative history, Rule 8.4(g) prohibits discrimination “in conduct related to the practice of law” but expressly declines to prohibit discriminatory client selection.<sup>73</sup>

### *B. Other Professions’ Approach to Discrimination in Client Selection*

The legal ethics rule’s exemption for client selection runs counter to the approach of many other professions, which have not hesitated to explicitly prohibit discrimination against prospective clients or patients. The American Dental Association’s code of professional conduct declares that “dentists shall not refuse to accept patients into their practice or deny

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66. Letter from Arnold R. Rosenfeld, Chair, ABA Standing Comm. on Pro. Discipline, to Myles V. Lynk, Chair, ABA Standing Comm. on Ethics & Pro. Resp. 9 (Mar. 10, 2016), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_model\\_rule%208\\_4\\_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.pdf) [https://perma.cc/VM39-ZNHC].

67. *Id.* (quoting WASH. RULES OF PRO. CONDUCT r. 8.4(g) (2015)).

68. Compare MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016), with WASH. RULES OF PRO. CONDUCT r. 8.4(g) (2015).

69. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS’N 2016).

70. July 2015 Discussion Draft, *supra* note 57.

71. 2015 ABA Memo, *supra* note 13, at 2–3.

72. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS’N 2016).

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

dental service to patients because of the patient's race, creed, color, gender, sexual orientation, gender identity, national origin or disability."<sup>74</sup> An ethics opinion of the American Medical Association explains that physicians must not "discriminate against a prospective patient on the basis of race, gender, sexual orientation or gender identity, or other personal or social characteristics that are not clinically relevant to the individual's care."<sup>75</sup> Architects, engineers, social workers, psychologists and counselors all operate under codes of ethics that either forbid discrimination generally without any exception for client selection or specifically prohibit discrimination in client selection.<sup>76</sup>

Indeed, when, in the spring of 2016, Tennessee passed a law purporting to insulate psychotherapists and counselors from liability for refusing to treat gay clients,<sup>77</sup> the American Counseling Association declared it a direct violation of the counseling profession's code of ethics and pulled the organization's 2017 annual meeting from its scheduled Nashville location.<sup>78</sup> There was national media coverage, with headlines like "Tennessee Lawmakers Just Passed a Bill that Would Allow Therapists to Refuse to Treat Gay Clients" and "Tennessee Governor Signs Discriminatory Law Allowing Therapists to Refuse Treatment to LGBTQ Patients."<sup>79</sup> So, while the ABA was in the process of adopting an ethics rule explicitly *exempting* lawyers' client selection from anti-

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74. PRINCIPLES OF ETHICS & CODE OF PRO. CONDUCT r. 4.A (AM. DENTAL ASS'N 2018).

75. CODE OF MEDICAL ETHICS Op. 1.1.2 (AM. MED. ASS'N 2016).

76. See CODE OF ETHICS & PRO. CONDUCT r. 1.401 (AM. INST. OF ARCHITECTS 2020); CODE OF ETHICS FOR ENG'RS r. III.1.f (NAT'L SOC'Y OF PRO. ENG'RS 2019); CODE OF ETHICS r. 4.02 (NAT'L ASS'N OF SOC. WORKERS 2017); ETHICAL PRINCIPLES OF PSYCHS. & CODE OF CONDUCT r. 3.01 (AM. PSYCH. ASS'N 2017); AM. COUNSELING ASS'N CODE OF ETHICS r. C.5 (AM. COUNSELING ASS'N 2014).

77. TENN. CODE ANN. § 63-22-302 (2016). The law was one of many such measures taken across the country in response to the U.S. Supreme Court's blessing of same sex marriage, and everyone understood that its primary purpose was to allow conservative Christians to refuse gay clients without fear of liability under civil rights law. The ACLU called the law an "attack on the LGBT community" and a "free pass to discriminate." Kevin Lessmiller, *Tennessee Governor Signs Religious Counseling Bill*, COURTHOUSE NEWS SERV. (Apr. 28, 2016), <https://www.courthousenews.com/tennessee-governor-signs-religious-counseling-bill/> [<https://perma.cc/76HH-93RR>].

78. *The American Counseling Association Will Not Hold Its Annual Conference & Expo in Tennessee*, AM. COUNSELING ASS'N (May 10, 2016), <https://www.counseling.org/news/updates/2016/05/10/the-american-counseling-association-will-not-hold-its-annual-conference-expo-in-tennessee> [<https://perma.cc/SE5W-7HGJ>].

79. Eric Levitz, *Tennessee Lawmakers Just Passed a Bill That Would Allow Therapists to Refuse to Treat Gay Clients*, N.Y. MAG. (Apr. 6, 2016), <https://nymag.com/intelligencer/2016/04/tennessee-bill-would-let-therapists-reject-gays.html> [<https://perma.cc/9N9Y-2XT4>]; Elliot Hannon, *Tennessee Governor Signs Discriminatory Law Allowing Therapists to Refuse Treatment to LGBTQ Patients*, SLATE (Apr. 27, 2016, 11:18 PM), <https://slate.com/news-and-politics/2016/04/tennessee-governor-signs-law-allowing-therapists-to-refuse-treatment-to-lgbtq-patients.html> [<https://perma.cc/G72F-HHFH>].

discrimination coverage, the American Counseling Association was reaffirming its rule forbidding client selection discrimination.<sup>80</sup> One might wonder how it could be headline news for Tennessee to allow therapists to reject gay patients, but perfectly acceptable for lawyers to reject clients on the basis of race and sex.<sup>81</sup>

Part of the answer must be that legal practice retains an aura of exclusivity that other professions renounced long ago. One doubts that in the late twentieth century doctors would have proclaimed a prerogative to reject patients on account of race. But according to Charles Wolfram's *Modern Legal Ethics*, "a lawyer may refuse to represent a client for any reason at all," including "because the client is not of the lawyer's race."<sup>82</sup> That classic text was published in 1986, more than thirty years after *Brown v. Board of Education* and more than twenty years after the Civil Rights Act of 1964 made it illegal for hotels and lunch counters to turn away patrons on account of race. Even among critics, lawyers' privilege to discriminate is often described as the "traditional" view of legal practice.<sup>83</sup> What's more, although most lawyers today would probably hesitate to broadcast race-based client choices, there seems to be no such compunction regarding sex. In many states, law firms openly advertise as "divorce attorneys for women"<sup>84</sup> and "divorce attorneys for men" and even explicitly "divorce for men only."<sup>85</sup> It is not surprising that Tennessee's governor defended the state's new law allowing therapists to reject gay

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80. See AM. COUNSELING ASS'N CODE OF ETHICS r. C.5 (AM. COUNSELING ASS'N 2014).

81. See Gillers, *supra* note 7, at 201 ("[W]hy has the ABA, an organization of lawyers who are trained in drafting, had so much trouble writing a rule forbidding bias, harassment, and discrimination in law practice?").

82. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 10.2, at 573 (Hornbook Series Student ed. 1986). Wolfram served until 2000 as the Chief Reporter for the Restatement of Law for Lawyers. See *Charles W. Wolfram Professional Biography*, CORNELL L. SCH., <https://www.lawschool.cornell.edu/faculty/bio.cfm?id=183> [<https://perma.cc/FY7J-4X9N>] (last visited Jan. 23, 2021).

83. See, e.g., Robert T. Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule*, 64 ALB. L. REV. 153, 155 (2000) (discussing "the traditional view that lawyers need absolute discretion in client selection" and so are "'above the law' when it comes to discrimination in the selection of clients").

84. See, e.g., *What Makes DAWN Different?*, DIVORCE ATTY'S FOR WOMEN, <https://womensrights.com/law-firm/what-makes-dawn-different/> [<https://perma.cc/99CP-PBNT>] (last visited Jan. 23, 2021) (a Michigan firm advertising online as "divorce attorneys for women"); HOFHEIMER FAM. L. FIRM, <https://hoflaw.com/> [<https://perma.cc/9EBN-4FTR>] (last visited Jan. 23, 2021) (a Virginia firm "representing women exclusively in divorce, custody and support").

85. See, e.g., THE FIRM FOR MEN, <https://www.thefirmformen.com/> [<https://perma.cc/PRR9-J9P5>] (last visited Jan. 23, 2021) (advertising as "the ONLY Family Law Firm in Virginia Representing Men Only!"); CORDELL & CORDELL, <https://cordellcordell.com/> [<https://perma.cc/6P4A-5QAX>] (last visited Jan. 23, 2021) (a firm with offices in multiple states that identifies online as a "firm focused on men's divorce and all other family law practice areas," and "a partner men can count on"); DIVORCE FOR MEN ONLY, <https://divorceformen.com/> [<https://perma.cc/XN3L-FCUK>] (last visited Jan. 23, 2021) (California firm).

clients by observing that “[l]awyers don’t serve everyone.”<sup>86</sup>

### C. *Interest Convergence*

Both the Tennessee law and the new ABA rule were proposed and adopted around the time the U.S. Supreme Court declared that same-sex couples have a constitutional right to marry.<sup>87</sup> After that decision, conservative organizations pushed back with impact litigation. Across the country, lawsuits were filed on behalf of bakers, florists, and event spaces, contending that state laws requiring them to serve same-sex weddings violated their rights of free association, free expression, and religious freedom.<sup>88</sup>

Some attorneys expressed similar concerns about the draft of the ABA’s proposed anti-discrimination rule, before the text excluding client selection was added. One attorney contended that “gay individuals have deliberately sought out Christian bakers, wedding planners, photographers, etc., to force them to go against their consciences and religious beliefs to provide services,” and worried that others would “deliberately target lawyers who are devout Christians, or other more conservative or religious traditionalists in an effort to silence them for their moral stand and to force them from the practice of law.”<sup>89</sup> Another wrote that imposing any constraint on lawyers’ ability to choose clients would be like “attempting to drag the ‘you must bake the cake!’ rule into the profession of practicing law.”<sup>90</sup> The Christian Legal Society questioned the “wisdom of imposing a ‘cultural shift’ on 1.3 million opinionated, individualistic, free-thinking lawyers” and argued that the new rule “poses a real threat that lawyers will be disciplined for . . . their free exercise of religion, expressive association, and assembly.”<sup>91</sup> The letter

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86. Steve Inskeep, *For Tennessee Governor Weighing Religious Objection Bill, It’s All About Values*, NPR (Apr. 21, 2016, 6:02 AM), <https://www.npr.org/2016/04/21/475026247/for-tenn-gov-weighing-therapist-religious-objection-bill-its-all-about-values> [<https://perma.cc/2VWF-74E7>].

87. See *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

88. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1723 (2018) (considering a bakery’s challenge to Colorado public accommodations law on religious grounds).

89. Letter from Michael P. Avramovich, Avramovich & Associates, PC, to ABA Standing Comm. on Ethics & Pro. Resp. (Mar. 11, 2016), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_model\\_rule%208\\_4\\_comments/avramovich\\_3\\_11\\_16.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/avramovich_3_11_16.pdf) [<https://perma.cc/J4K2-VQ9V>].

90. Letter from Daniel E. Garner to ABA Standing Comm. on Ethics & Pro. Resp. (Mar. 11, 2016), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_model\\_rule%208\\_4\\_comments/garner\\_3\\_11\\_16.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/garner_3_11_16.pdf) [<https://perma.cc/QJZ8-Y9AX>].

91. Letter from David Nammo, CEO & Executive Director, Christian Legal Soc’y, to ABA Ethics Comm. 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://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/nammo_3_10_16.authcheckdam.pdf) [<https://perma.cc/Y8L6-L8KK>].

recommended adding a comment explaining that “declining representation based on religious, moral, or ethical considerations is not proscribed by this rule.”<sup>92</sup>

Reading these submissions from the anti-discrimination rule’s notice and comment period, one might conclude that the exemption for client selection was driven only by pressure from a conservative wing. But, as I have suggested, there is another constituency of lawyers whose practices were at stake. Liberal cause lawyers did not argue against the new rule, at least not in any published comments, but in our anti-classification world, they might well have been concerned about a rule expressly barring discriminatory client selection.

Some non-profit legal organizations make a deliberate choice to direct their services to members of historically subordinated groups in an effort to fight against what they see as persistent legal and social inequalities. So, for example, groups like the NAACP Legal Defense Fund (NAACP-LDF), Mexican-American Legal Defense and Educational Fund (MALDEF), National Organization for Women Legal Defense and Education Fund (NOWLDEF) and GLTBQ Legal Advocates & Defenders (GLAD) all focus their services on causes that are in part identified with particular groups defined by race, gender, ethnicity and sexual orientation.<sup>93</sup> To be sure, none of these organizations have a categorical policy of exclusively representing only members of any one group defined by protected characteristics. But they may consider an individual’s identification with one or more such group when they select clients. Likewise, some attorneys in private practice consider prospective clients’ race or sex in an effort to direct their services toward groups they perceive as having been denied equal legal rights. Indeed, that was Massachusetts attorney Judith Nathanson’s reason for representing only women in divorce cases.<sup>94</sup>

A legal ethics rule understood and enforced as a rule against

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92. *Id.* at 14.

93. *Our Impact*, NAACP LEGAL DEF. FUND, <https://www.naacpldf.org/naacp-mission/> [<https://perma.cc/LH7H-PC5G>] (last visited Jan. 23, 2021); *Public Policy*, MEXICAN AM. LEGAL DEF. & EDUC. FUND, <https://www.maldef.org/public-policy/> [<https://perma.cc/NM7K-RKL8>] (last visited Jan. 23, 2021); *Legal Impact*, WOMEN’S LEGAL DEF. & EDUC. FUND, <https://www.legalmomentum.org/our-legal-impact> [<https://perma.cc/PN3A-53WV>] (last visited Jan. 23, 2021); *Our Impact*, GLBTQ LEGAL ADVOC. & DEFS., <https://www.glad.org/our-impact/> [<https://perma.cc/XX4X-ZXX7>] (last visited Jan. 23, 2021).

94. *Nathanson v. Mass. Comm’n Against Discrimination*, No. 199901657, 2003 WL 22480688, at \*1 n.1 (Mass. Super. Ct. Sept. 16, 2003). Likewise, the firms that target their services today to men in custody cases often express—and advertise—a belief that men are at a disadvantage in some family law matters. *See, e.g.*, THE FIRM FOR MEN, *supra* note 85 (stating that men are “traditionally disadvantaged in the court system”); CORDELL & CORDELL, *supra* note 85 (advertising its “dedication to leveling the playing field for men in family law cases”).

considering race, gender or sexual orientation in client selection turns all these lawyers' efforts at social justice into ethics violations. And that is unfortunately how an anti-discrimination rule is likely to be understood and enforced in our current legal culture. Exempting client selection from the anti-discrimination rule thus protects two groups whose political interests often diverge: conservative lawyers who wish to avoid representing LGBTQ clients they regard as immoral, and progressive lawyers who want to focus their efforts on clients from groups they view as unfairly denied legal rights. Indeed, Rule 8.4(g) could be seen as a kind of negative example of Derrick Bell's "interest convergence" theory.<sup>95</sup> Bell posits that legal doctrines that promote equality for subordinated groups will be developed only in ways that converge with the interests of dominant groups.<sup>96</sup> Progressive lawyers would ordinarily champion anti-discrimination measures. But in this case, they would have a reason to join with conservatives in opposing those regulations that would limit their ability to make race- and sex-conscious client choices.

## II. IS A LEGAL ETHICS RULE BARRING CLIENT SELECTION DISCRIMINATION DESIRABLE?

If an ethics rule expressly barring client-selection discrimination could harm some worthy legal practices, perhaps the ABA is right to do without it. After all, client-selection discrimination has not received much attention. Despite a wealth of studies on Americans' "access to justice," there is very little empirical data on how race, gender, or sexual orientation affects access to legal representation.<sup>97</sup> A 2008 article concluded that "[n]o major qualitative study has focused expressly on race and disputing, justiciable problems, or contact with civil courts or staff."<sup>98</sup> To my knowledge, no wide-ranging subsequent studies have been done since. Moreover, some ethicists take the position that regulating lawyers' client selection would be a violation of lawyers' and clients' rights of free association under the First Amendment.<sup>99</sup>

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95. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("[R]acial equality will be accommodated only when it converges with the interests of whites.").

96. *See id.*

97. Note that most studies have differentiated based on socioeconomic status, not race. *See, e.g., The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans*, LEGAL SERVS. CORP. 28–36 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/93QX-S2ZK>]; Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49, 49–51 (2019).

98. Sandefur, *Access to Civil Justice*, *supra* note 28, at 350.

99. *See, e.g., TARKINGTON, supra* note 46, at 270–75.

A. *Is Client Selection Discrimination a Problem?*

It seems clear from the comments filed with the ABA, and from the firms advertising online as “Family Law Attorneys for Men” and “1-866-DADS-LAW,” that some lawyers claim the right to exclude clients on the basis of sex.<sup>100</sup> But they may be outliers. Moreover, whatever one thinks of the principles on which these lawyers wish to base their client selection, at least there are principles at stake. One might still imagine that lawyers’ client selection is relatively free of stigmatic bias based on race and sex. But there are reasons to doubt this rosy picture.

There is a great deal of evidence that lawyers’ negative race and sex stereotypes affect their behavior in other contexts. People of color, women and LGBTQ individuals are underrepresented on the bench, in legal practice, and in legal academia.<sup>101</sup> As Deborah Rhode points out, law is even less diverse than other professions.<sup>102</sup> While 72% of physicians and surgeons are White, that number is 88% for lawyers.<sup>103</sup> Thirty-eight percent of lawyers are women.<sup>104</sup> And the problems do not end with simple under-representation. African American and women lawyers are less likely than White men with comparable credentials to reach the most highly paid, high status, high visibility positions in the legal profession.<sup>105</sup> “In major law firms, only 3 percent of associates . . . are African Americans.”<sup>106</sup> “[B]lacks, Latinos, Asian Americans and Native Americans” together “make up fewer than 7 percent of law firm partners.”<sup>107</sup> Women in law firms are “less likely to make partner even controlling for other factors, including law school grades and time spent out of the workforce or on part-time schedules.”<sup>108</sup> Women of color are

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100. See, e.g., CORDELL & CORDELL, *supra* note 85.

101. See, e.g., ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics, AM. BAR ASS’N (2019), [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/national-lawyer-population-demographics-2009-2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf) [<https://perma.cc/HJL3-R7GS>]; Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts?*, AM. CONST. SOC’Y 7–12 (2016), <https://www.gavelgap.org/pdf/gavel-gap-report.pdf> [<https://perma.cc/K967-D6AL>]; Meera E. Deo, *The Ugly Truth about Legal Academia*, 80 BROOK. L. REV. 943, 947, 961 (2015).

102. Rhode, *supra* note 29.

103. *Id.*

104. Jennifer Cheeseman Day, *Number of Women Lawyers at Record High But Men Still Highest Earners*, U.S. CENSUS BUREAU (May 8, 2018), <https://www.census.gov/library/stories/2018/05/women-lawyers.html> [<https://perma.cc/PRF6-F4P8>].

105. See Jeffrey A. Lowe, *2018 Partner Compensation Survey*, MAJOR, LINDSEY & AFRICA LLC 11 (2018) (finding that male partners at top law firms make an average of 53% more than similarly situated female partners).

106. Rhode, *supra* note 29.

107. *Id.*

108. *Id.*

the most underrepresented at the top of the profession, making up just 2.55% of law firm partners in 2015.<sup>109</sup>

These disproportions are accompanied by qualitative evidence of both structural and personal bias. A 2018 survey of nearly 3,000 in-house and law firm attorneys documents widespread experiences of bias.<sup>110</sup> Women lawyers and lawyers of color report discrimination in hiring, performance evaluations, assignments, pay, and promotion.<sup>111</sup>

The same law firms and individual lawyers accused of race and sex discrimination in their treatment of colleagues interact with prospective clients. So assuming that the legal profession is devoid of discriminatory conduct toward prospective clients entails a belief that lawyers somehow turn on and off their discriminatory attitudes depending on the context, burdening their professional colleagues and employees but not the individuals who come seeking professional services. That scenario is unlikely enough to trouble assumptions that lawyers' client selection practices are free of bias.

Even if there is always *some* lawyer willing to take a case, if prospective clients face discrimination, that surely will discourage their pursuit of legal counsel. In any case, it is too soon to conclude that no problems of access exist. A few studies of particular types of legal cases suggest underrepresentation along race and gender lines, at least in some areas. One by Amy Myrick et al. reports racial imbalance in legal representation of plaintiffs in employment discrimination cases.<sup>112</sup> Using a sample of over 2,000 cases from federal courts, the study's authors found that African Americans are more than twice as likely as Whites to lack lawyers for the employment discrimination claims they take to court.<sup>113</sup> The authors conclude that "race operates in complex ways, both for

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109. Liane Jackson, *Minority Women Are Disappearing from BigLaw—and Here's Why*, ABA J. (Mar. 1, 2016, 12:15 AM), [http://www.abajournal.com/magazine/article/minority\\_women\\_are\\_disappearing\\_from\\_biglaw\\_and\\_heres\\_why](http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why) [https://perma.cc/Q3AT-JFAT].

110. Joan C. Williams, Marina Multhaup, Su Li & Rachel Korn, *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession*, ABA COMM'N ON WOMEN IN THE PRO. & MINORITY CORP. COUNS. ASS'N 7–10 (2018), <https://www.mcca.com/wp-content/uploads/2018/09/You-Cant-Change-What-You-Cant-See-Executive-Summary.pdf> [https://perma.cc/58PL-G93J].

111. *Id.*

112. Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 707–08 (2012); see also Mary Nell Trautner, *Tort Reform and Access to Justice: How Legal Environments Shape Lawyers' Case Selection*, 34 QUALITATIVE SOCIO. 523, 529 (2011) (discussing how plaintiffs' race can affect their "likeability" to juries and thus whether an attorney takes the case); Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1278 (2016) (noting that a history of biased treatment in the judicial system made people of color less likely to seek legal representation due to a distrust of institutions).

113. Myrick et al., *supra* note 112, at 709, 718.

minority plaintiffs seeking lawyers, and for the lawyers who decide whether to accept them as clients” and that “minority plaintiffs face many of the same barriers to obtaining legal resources as minority groups do in other social domains.”<sup>114</sup>

The Myrick et al. study details lawyering approaches that make the client selection process susceptible to bias.<sup>115</sup> Lawyers interviewed “claimed to have an ability to assess the merits of a case almost instantly,” an approach that, as the authors note, is known to increase the potential for unconsciously biased selection.<sup>116</sup> “After the initial phone call, most plaintiffs’ attorneys said a large part of their decision whether to accept a client was based on her mannerisms or demeanor at the initial meeting.”<sup>117</sup> Or on something even more ineffable: One attorney explained that part of what he was looking for was “chemistry” between him and the client, asking “[i]s this somebody that you feel like you can work with? Are you able to communicate effectively with that person?”<sup>118</sup> Another attorney said “if I personally don’t get a sense of the honesty of the person or if I don’t feel like what I’m hearing is what’s really there, I generally don’t get involved.”<sup>119</sup> And one lawyer declared that she uses the “smell test”—to decide whether the potential client has a “‘morally right’ conviction” that she has suffered discrimination or is just “trying to work the system.”<sup>120</sup> Myrick et al. point out the potential for discriminatory racial effects “if lawyers tend to unfavorably assess the demeanor of minority plaintiffs, viewing them either as ‘difficult’ to work with, not credible, or unlikely to present well to a judge or jury.”<sup>121</sup> They conclude that “lawyer screening practices may be vulnerable to racial bias.”<sup>122</sup>

Civil rights claims filed against lawyers offer further evidence that some prospective clients encounter discriminatory receptions. In a few cases, clients have sued lawyers under 42 U.S.C. § 1981, alleging racially

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114. *Id.* at 708.

115. *Id.* at 742–50. There is a large and growing body of scholarship indicating that many, perhaps most, people with no conscious racial animus carry unconscious racial biases. And there is another large and growing body of work contending that this type of bias is particularly likely to operate in situations where a person is engaging in quick, intuitive judgments. See Cheryl Staats, *State of the Science: Implicit Bias Review 2014*, KIRWAN INST. 24 (2014), <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf> [https://perma.cc/ZZ8E-ZEL7] (last visited Feb. 7, 2021).

116. Myrick et al., *supra* note 112, at 743–44.

117. *Id.* at 744.

118. *Id.* at 745.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 756.

discriminatory treatment.<sup>123</sup> For instance, in *Davis v. Fenton*, an African American client alleged that a law firm had targeted advertising to recruit African Americans facing mortgage foreclosure and then offered her a retainer agreement “that was different in its performance, making, and conditions from contracts offered to white individuals.”<sup>124</sup>

The claims in *Davis* point out that race and sex stereotypes need not lead attorneys to total exclusion, but might affect client choice, and result in different standards for acceptance of clients’ cases or offering different terms for lawyers’ services based on race or sex.<sup>125</sup> A study of 163 divorce attorneys found that they often used fees to discourage clients they saw as problematic.<sup>126</sup> Two thirds of the attorneys interviewed expressed no preference for men or women clients.<sup>127</sup> Most of the remaining third strongly preferred women.<sup>128</sup> Some offered feminist explanations, but others viewed women clients as easier to control.<sup>129</sup>

A 2012 mail survey of bankruptcy attorneys suggests that race stereotypes might influence attorneys’ judgments of what legal claims they would be willing to pursue on behalf of prospective clients.<sup>130</sup> The study by Braucher et al. surveyed consumer bankruptcy attorneys and found significant differences in the type of bankruptcy filings the attorneys recommended depending on the prospective clients’ race.<sup>131</sup> When the hypothetical couple seeking representation were identified as Reggie and Latisha and said to attend an African Methodist Episcopal Church, the attorneys were much more likely to recommend that they file under Chapter 13, a more arduous and often unsuccessful form of bankruptcy relief, than when they were told the hypothetical clients were named Todd and Allison and attended a United Methodist Church.<sup>132</sup> Moreover, the surveyed attorneys viewed “Reggie and Latisha” as having “good values”

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123. These cases were dismissed for various reasons, without discussion of § 1981’s applicability to the lawyer-client relationship.

124. *Davis v. Fenton*, 26 F. Supp. 3d 727, 735 (N.D. Ill. 2014); *see also* *Rhodes v. Fleming*, No. 1:13-cv-0165-SEB-MJD, 2014 WL 852747 (S.D. Ind. Mar. 4, 2014), in which a man who pled guilty and was convicted of criminal sexual misconduct sued his defense attorney alleging racially discriminatory treatment. *Id.* at \*1–2. The district judge dismissed the § 1981 claim because there was no evidence that the lawyer acted with racial animus in representing the complaining client. *Id.* at \*2.

125. *See Davis*, 26 F. Supp. 3d at 735.

126. LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK* 102–03, 196 (2001).

127. *Id.* at 212–13 n.8.

128. *Id.*

129. *Id.* at 213.

130. Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 394–95 (2012).

131. *Id.* at 419–20.

132. *Id.* at 406–07, 419–20.

and being more competent when they expressed a preference for Chapter 13, while attributing competence and good values to “Todd and Allison” when they preferred to file under the faster, simpler Chapter 7 process.<sup>133</sup> Braucher et al. comment that “it seems that the African-American . . . couple expresses good values by indicating they want to pay back their old debts by filing in Chapter 13; the white couple expresses good values by putting their desire for a fresh start above repayment . . . .”<sup>134</sup>

Further large-scale research studies should be undertaken to discover racial differences in representation and whether law firm practices skew access to justice by race or other protected factors. But if it isn’t an ethical violation to reject prospective clients on account of race or sex, why expend resources trying to discover and eliminate such biased behavior? The ABA rule’s exemption signals implicit acceptance of status quo structural and implicit bias in law firms’ client selection practices, or at least a belief that ethics rules cannot, or should not, address them.

#### B. *Public Accommodations Laws*

Some existing generally applicable laws against discrimination may already prohibit lawyers’ discriminatory rejections of prospective clients. The best-known anti-discrimination law regulating private businesses’ provision of services is Title II of the federal Civil Rights Act of 1964,<sup>135</sup> but the statute limits its coverage to “establishments which serve[] the public,” including “any inn, hotel, motel, or other establishment which provides lodging to transient guests,”<sup>136</sup> and courts have tended to read that list as exclusive.<sup>137</sup> So the Act has generally been held to exclude retail stores, let alone professional services.<sup>138</sup> Section 1981 of the Civil Rights

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133. *Id.* at 415–16.

134. *Id.* at 416.

135. 42 U.S.C. § 2000a.

136. *Id.* § 2000a(b).

137. *See, e.g.,* *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 433–34 (4th Cir. 2006) (holding that a hair salon, because not listed under Title II as a place of public accommodation, was not subject to the Act’s prohibition against discrimination).

138. By contrast, the most recently enacted federal public accommodations law, the Americans with Disabilities Act of 1990 (ADA), explicitly includes lawyers’ offices in its list of places of public accommodation. *See* 42 U.S.C. § 12181(7)(F). But the ADA forbids only discrimination “on the basis of disability.” *Id.* § 12182(a). The ADA’s definition of lawyers’ offices as places of public accommodation figured prominently in the Massachusetts court’s decision to hold the feminist lawyer liable under state public accommodations law. *See* *Nathanson v. Mass. Comm’n Against Discrimination*, No. 199901657, 2003 WL 22480688, at \*4 (Mass. Super. Ct. Sept. 16, 2003). On the other hand, there is a plausible argument that the ADA’s coverage of lawyers’ offices is meant only to ensure access to the physical space, making it possible for prospective clients who are disabled to meet with attorneys, but not regulating the attorneys’ ability to select or reject clients based on their

Act of 1866,<sup>139</sup> however, occasionally grounds claims that professionals denied or provided inferior services for racist reasons.<sup>140</sup> Arguably, § 1981 forbids race discrimination by lawyers in client selection, although no court has ever so held.<sup>141</sup> In addition, most states have “public accommodations” laws that have been more broadly construed.<sup>142</sup> Under these statutes, businesses and organizations are forbidden to discriminate in their provision of services.<sup>143</sup> All state public accommodations laws prohibit discrimination on the basis of race and sex, and 24 expressly

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disabled status. The ADA’s definition of discrimination seems to support this view:

[D]iscrimination includes . . . a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations . . . .

42 U.S.C. § 12182(b)(2)(A)(ii).

139. Section 1981 provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

42 U.S.C. § 1981(a).

140. See, e.g., *Aghazadeh v. Me. Med. Ctr.*, No. 98-421-P-C, 1999 WL 33117182, at \*1, \*12 (D. Me. June 8, 1999) (denying motion to dismiss on claim that patients “suffered delays in and denials of medical care because the [hospital] did not provide services in their primary languages,” in violation of § 1981); *Wheeler v. United States*, No. 1:12-cv-00540-LJO-JLT, 2012 WL 1594148, at \*3, (E.D. Cal. May 4, 2012) (dismissing patient’s § 1981 claim that he had to wait to receive medical care at clinic because he is White under *res judicata* due to earlier decision finding lack of evidence of intentional discrimination).

141. The only direct analysis of § 1981’s applicability to the lawyer-client relationship appears to be in a case involving a client’s termination of a lawyer’s contract. *Mass v. McClenahan*, 893 F. Supp. 225, 229 (S.D.N.Y. 1995). In that case, a lawyer sued his corporate client under § 1981, claiming that the client terminated his contract because of concerns about being represented by a “New York Jew.” *Id.* The judge held that § 1981 “undoubtedly reaches the attorney-client relationship.” *Id.* Rejecting the client’s First Amendment arguments, the judge reasoned that while some lawyer-client relationships might be constitutionally protected as expressive associations, an ordinary commercial representation did not involve a collaboration “to advance shared political or social goals,” nor was it “the kind of close personal bond with which the First Amendment is concerned.” *Id.* at 230 n.4, 231.

142. Only five states do not—Alabama, Georgia, Mississippi, North Carolina, and Texas. See *State Public Accommodation Laws*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 8, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [<https://perma.cc/BFK2-A3UW>] (last visited Feb. 7, 2021).

143. See, e.g., N.J. STAT. ANN. § 10:5-12(f) (West, Westlaw through 2020 L.2020, c. 136 & J.R. No. 2).

prohibit discrimination on the basis of sexual orientation.<sup>144</sup> While hotels, restaurants, and theaters are paradigmatic places of public accommodations, some states and municipalities have expanded the category to include businesses, organizations, and institutions providing professional services.<sup>145</sup> The 2003 Massachusetts ruling against the feminist attorney appears to be the only application of state public accommodations law to a lawyer's rejection of a client.<sup>146</sup> A small body of cases suggests that state courts and legislators may be increasingly inclined to view professionals as subject to these laws.<sup>147</sup> Some courts, however, would likely not view lawyers as providers of the sort of "public accommodations" that are the subject of those rules.<sup>148</sup>

Even assuming that § 1981 and some state public accommodations laws apply to lawyers' client selection, that does not obviate the need for an ethics rule forbidding discrimination. Civil liability is not a substitute for professional ethics regulation, which aims at different goals, provides

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144. *State Public Accommodation Laws*, *supra* note 142. All also prohibit discrimination on the basis of ancestry and religion. *Id.* Arguably, statutes that prohibit sex discrimination necessarily prohibit discrimination on the basis of sexual orientation and gender identity. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) (holding that the federal statute banning employment discrimination because of sex covers sexual orientation and gender identity discrimination). Thus, even jurisdictions whose public accommodations laws do not ban sexual orientation and gender identity discrimination per se may wind up interpreting their statutes to cover such claims. But that presents yet another issue that has been rarely litigated and would need to be established as a matter of statutory interpretation in every state.

145. *See, e.g.*, CAL. CIV. CODE § 51(b) (West, Westlaw through Ch. 372 of 2020 Reg. Sess.) (stating that the state's anti-discrimination prohibition applies to "all business establishments of every kind whatsoever").

146. *Nathanson v. Mass. Comm'n Against Discrimination*, No. 199901657, 2003 WL 22480688, at \*3 (Mass. Super. Ct. Sept. 16, 2003).

147. New York courts have held that dentists' offices are places of public accommodation. *Cahill v. Rosa*, 674 N.E.2d 274, 277 (N.Y. 1996). The Michigan Court of Appeals found that a doctor's refusal to provide fertility services to a single woman violated that state's public accommodations law. *Moon v. Mich. Reprod. & IVF Ctr., P.C.*, 810 N.W.2d 919, 925 (Mich. Ct. App. 2011). Rejecting a lower court's "conclusion that a professional, such as a doctor, may reject a patient or client for any reason, including discriminatory animus toward a protected characteristic," the court found that the state civil rights act "serves to prohibit doctors and medical facilities from refusing to form a doctor-patient relationship based solely on the patient's protected status." *Id.* at 923-24, 925. The court reiterated that under the Michigan law doctors are not free to follow their "personal prejudices or biases and deny treatment to a patient merely because the patient is African-American, Jewish, or Italian." *Id.* at 925; *see also Fiske v. Rooney*, 663 N.E.2d 1014, 1018 (Ohio Ct. App. 1995) (holding that a hospital was a place of public accommodation covered by the state's anti-discrimination statute and that an ER doctor's denial of treatment based on a person's HIV status could constitute unlawful discrimination).

148. Illinois courts refused to extend coverage of the state's human rights act to doctors and dentists. *See Baksh v. Hum. Rts. Comm'n*, 711 N.E.2d 416, 424 (Ill. App. Ct. 1999) (dentists); *Duffy v. Ill. Dep't of Hum. Rts.*, 820 N.E.2d 1186, 1189 (Ill. App. Ct. 2004) (doctors). But the Illinois state legislature responded by expressly broadening the state's anti-discrimination statute to cover professionals, including lawyers. 775 ILL. COMP. STAT. ANN. 5/5-101(A)(6) (West, Westlaw through P.A. 101-651).

different remedies, and works through different processes. The fact that lawyers are subject to civil liability for fraud has not obviated ethics rules that forbid assisting clients' fraudulent schemes.<sup>149</sup> Civil rights laws compensate victims while prospective client protection is a primary purpose of a professional ethics code, as is maintaining the integrity—and the reputation—of the profession, and, indirectly, of the whole legal system.<sup>150</sup> There are significant enforcement differences as well. Even if rejected clients knew or suspected that a lawyer refused to represent them for discriminatory reasons, damages in such claims would be hard to imagine, let alone calculate and prove. State bar disciplinary committees, however, operate as independent investigators of professional misconduct without the need for proving damages. And state courts can impose professional sanctions that are different from civil remedies, ranging from published criticisms to fines to suspension or disbarment.<sup>151</sup>

*C. Would an Ethics Rule Against Client-Selection Discrimination Violate Lawyers' First Amendment Rights of Expressive Association?*

Someone might say that even if discrimination against people seeking legal representation is wrong, lawyers' client selection should still be unregulated. Unlike doctors or dentists, lawyers' work is a matter of expressive advocacy, so one might argue that the choice of whom to represent should be protected by the First Amendment. The Massachusetts court that found Judith Nathanson liable under a public accommodation law rejected that argument.<sup>152</sup> But it is worth considering this basic First Amendment claim at some length. The U.S. Supreme Court's 2018 ruling in *Masterpiece Cakeshop* suggests the claim should not be lightly dismissed.<sup>153</sup> Nevertheless, I predict that it would ultimately fail.

Despite recognizing the special nature of lawyer-client relationships, in the 1980s, the Court upheld state regulation of lawyers' communications with prospective clients against a First Amendment

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149. See MODEL RULES OF PRO. CONDUCT r. 1.2(d), 8.4(c) (AM. BAR ASS'N 2020).

150. See MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 2020).

151. See MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 10(A) (AM. BAR ASS'N 2020).

152. *Nathanson v. Mass. Comm'n Against Discrimination*, No. 199901657, 2003 WL 22480688, at \*4–7 (Mass. Super. Ct. Sept. 16, 2003).

153. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1728 (2018) (observing that a public accommodations law forcing a baker to make a cake for a same-sex wedding might implicate “a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message.”).

challenge.<sup>154</sup> With the narrow exception of politically motivated non-profit litigation, a state is free to punish solicitation.<sup>155</sup> In the employment context, the Court has held that law firms are subject to anti-discrimination regulation, presumably without exception for non-profit organizations.<sup>156</sup> The Court recognized that “the activities of lawyers may make a ‘distinctive contribution . . . to the ideas and beliefs of our society.’”<sup>157</sup> Nevertheless, law firms could not use the First Amendment as a shield to protect discriminatory practices.<sup>158</sup>

In one sense, upholding regulation of a law firm’s partnership decisions defeats a stronger expressive association challenge than any posed by client selection. Most clients come and go. Their pictures are not displayed on the firm’s website. In some ways, however, representing a client is both a more personal and a more public association. After all, partners do not necessarily learn the confidential details of their colleagues’ lives and then stand up in open court to advocate for them. It is the expressive nature of this public advocacy, and of legal representation generally, that arguably makes lawyer-client relationships special in a First Amendment context. The question is whether that expressive nature precludes anti-discrimination regulation.

Since the civil rights revolution in the mid-twentieth century, the Court’s basic approach to First Amendment challenges to anti-discrimination laws has been to distinguish protected expression from unprotected exclusion. So, for example, when White parents challenged a ban on segregated private schools, the Court agreed that states could not prevent private schools from teaching that segregation was good.<sup>159</sup> Even so, “the [p]ractice of excluding racial minorities from such institutions” was not protected.<sup>160</sup> Advocating racial segregation and White supremacy

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154. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 458–59 (1978) (holding that a state ban on solicitation was constitutional as applied to a lawyer who reached out to an accident victim inquiring if she wanted legal representation). In a companion case decided the same day, however, the Court found that in the context of non-profit public interest litigation, lawyers’ client solicitation is part of “collective activity undertaken to obtain meaningful access to the courts” and “a fundamental right within the protection of the First Amendment.” *In re Primus*, 436 U.S. 412, 426 (1978) (quoting *United Transp. Union v. Mich. Bar*, 401 U.S. 576, 585 (1971)). The distinction built on a previous case, *NAACP v. Button*, decided during the heart of the Civil Rights movement, in which the Court explained that prohibiting public interest lawyers’ efforts to reach out to prospective clients amounted to curtailing “a form of political expression.” *NAACP v. Button*, 371 U.S. 415, 429 (1963).

155. *Ohralik*, 436 U.S. at 449, 458.

156. *Hishon v. King & Spaulding*, 467 U.S. 69, 77–79 (1984) (holding law firms are not immune from Title VII by the nature of the organization and complying with Title VII does not infringe on a firm’s constitutional rights under the First Amendment).

157. *Id.* at 78 (quoting *Button*, 371 U.S. at 431).

158. *Id.*

159. *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

160. *Id.*

was not the same thing as practicing it.<sup>161</sup> First Amendment arguments could not be used to repackage forbidden discrimination as protected expression.<sup>162</sup> The Court cited the private school desegregation case when it held that law firms were subject to anti-discrimination employment regulation.<sup>163</sup> The law firm's free association defense was unavailing because, "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."<sup>164</sup>

Looking at the early public accommodations cases in historical context shows that those decisions compelled businesses to curtail conduct that expressed political, moral, and sometimes religious beliefs.<sup>165</sup> Consider the Pickrick Restaurant, owned by Lester Maddox, who believed integration was "ungodly, un-Christian, and un-American."<sup>166</sup> For Maddox, the mandate to serve African Americans compelled expressive conduct directly contrary to his personal and political views.<sup>167</sup> As Linda McClain notes, along with the food, "Maddox also offered up 'homespun political commentary' through the voice of 'Pickrick,' in 'Pickrick Says' advertisements in the Atlanta Journal Constitution."<sup>168</sup> The restaurant's gift shop sold pick handles (or, ax handles), then a notorious symbol of segregationist ideology because of their use as weapons by White supremacist mobs.<sup>169</sup> Maddox sometimes autographed these "Pickrick drumsticks."<sup>170</sup> Without a doubt, serving an exclusively White clientele was an expressive performance of Maddox's White supremacist politics. Nevertheless, a federal court ordered Maddox to desegregate and threatened him with a contempt conviction if he continued to exclude

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161. *See id.*

162. *See id.* at 175–76.

163. *Hishon*, 467 U.S. at 78 (citing *Runyon*, 427 U.S. at 176) ("There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union.").

164. *Id.* (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

165. *See, e.g.*, *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (calling restaurant owner's free exercise defense to forced integration "patently frivolous").

166. Richard Severo, *Lester Maddox, Whites-Only Restaurateur and Georgia Governor, Dies at 87*, N.Y. TIMES (June 25, 2003), <https://www.nytimes.com/2003/06/25/us/lester-maddox-whites-only-restaurateur-and-georgia-governor-dies-at-87.html> [<https://perma.cc/6GTD-RAHT>].

167. *See* Linda C. McClain, *Involuntary Servitude, Public Accommodations Laws, and the Legacy of Heart of Atlanta Motel, Inc. v. United States*, 71 MD. L. REV. 83, 89 (2011).

168. *Id.* (quoting Justin Nystrom, *Lester Maddox (1915–2003)*, NEW GA. ENCYC. (Apr. 20, 2004), <https://www.georgiaencyclopedia.org/articles/government-politics/lester-maddox-1915-2003> [<https://perma.cc/63Q5-FQVX>]).

169. Severo, *supra* note 166; *see also* Dierdre Conner, *Ax Handle Saturday, 1960: A Day of Defiance in Black and White*, FLA. TIMES-UNION (Aug. 22, 2010, 12:21 AM), <https://www.jacksonville.com/article/20100822/NEWS/801246165> [<https://perma.cc/Y2PT-ZMXQ>].

170. Severo, *supra* note 166.

African American customers.<sup>171</sup>

Indeed, the Court's public accommodations opinions stress the expressive effects of practicing and prohibiting racial exclusion.<sup>172</sup> Beyond making services available to African Americans, the Civil Rights Act's "fundamental object . . . was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"<sup>173</sup> As Justice Goldberg put it, the injury public accommodation laws redress "is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public" because of his membership in a stigmatized group.<sup>174</sup> Thus desegregation was always understood to forbid an expressive performance of racial hierarchy. Making businesses serve customers without regard to race was understood to force service providers to perform their customers' dignity and equal membership in the "public."<sup>175</sup> Likewise, a 1980s decision forcing the national Jaycees Club to admit women on equal terms with men acknowledged that it restricted the Club's right to expressive conduct.<sup>176</sup> Nevertheless, because discrimination causes "unique evils," the Court held that a state has the power to prevent discriminatory exclusion just as government can prohibit "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact."<sup>177</sup>

Because these early decisions so clearly implicate forced expressive messages and associations, it should be hard, going forward, to claim an exemption from anti-discrimination regulation, even for associations that obviously have expressive value. But the Court has subsequently recognized such exceptions. In 1995, the Court held that requiring a St. Patrick's Day parade to include marchers who aimed to "express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals" violated the parade organizers' First Amendment rights.<sup>178</sup> A parade is an

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171. See McClain, *supra* note 167, at 90–91. Maddox's case was paired with that of a segregationist motel owner, who likewise was ordered to integrate and appealed the ruling to the Supreme Court and lost. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 242 (1964).

172. See *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

173. *Heart of Atlanta*, 379 U.S. at 250 (quoting S. REP. NO. 88-872, at 2370 (1964)).

174. *Id.* at 292 (Goldberg, J., concurring).

175. See *id.*

176. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984).

177. *Id.* at 628.

178. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559, 561 (1995). The Massachusetts public accommodations law the parade organizers violated is the same law under which the feminist attorney Judith Nathanson was held liable for rejecting a male client. See MASS. GEN. LAWS ANN. ch. 272, § 98 (West, Westlaw through Ch. 226 of the 2020 2d Ann. Sess.); *Nathanson v. Mass. Comm'n Against Discrimination*, No. 199901657, 2003 WL 22480688, at \*1 (Mass. Super. Ct. Sept. 16, 2003).

unusually, perhaps uniquely, difficult context in which to separate expression and exclusion.<sup>179</sup> So the state's forced accommodation of the gay pride marchers was an extraordinarily direct and specific intervention in expressive activity, and the decision condemning the regulation initially could be thought limited to its facts. Then, five years later, the Court ruled that a state could not constitutionally require the Boy Scouts to accept a gay assistant scoutmaster.<sup>180</sup> There, the Court effectively held that simple discriminatory exclusion could be a form of expressive association protected by the First Amendment.<sup>181</sup>

Fast forward to 2015, when the ABA began considering its anti-discrimination rule. At the time, conservative groups were pushing back against the series of U.S. Supreme Court opinions leading to *Obergefell*'s recognition that year of same-sex partners' constitutional right to marry.<sup>182</sup> Some groups filed constitutional claims on behalf of caterers, florists, photographers, and bakers who refused to serve same-sex weddings and were found to have violated state public accommodations laws.<sup>183</sup> When one case, *Masterpiece Cakeshop*, reached the U.S. Supreme Court in 2018, it was decided on narrow fact-specific grounds, leaving the central First Amendment issues unresolved.<sup>184</sup> The Court's opinion is nevertheless revealing.<sup>185</sup> Pointing to a canonical civil rights era public accommodations case, the Court reaffirmed the basic commitment to distinguishing discriminatory exclusion from discriminatory

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179. See *Hurley*, 515 U.S. at 568–70.

180. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000).

181. *Id.* at 648. The Court differentiates this case from *Roberts* unpersuasively and does not mention *Runyon*, the decision holding that private schools may not exclude African American students. *Id.* at 657–59. Notably, Justice Stevens cites *Runyon* in dissent. *Id.* at 678 n.10 (Stevens, J., dissenting). In light of those omissions, it is hard not to view *Boy Scouts* as at least partly a product of the legally validated stigmatization of LGBTQ Americans. At the time, states were free to criminalize same sex intimacy with the Supreme Court's approval. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003). The "principle" driving the results in *Hurley* and *Boy Scouts* may not have been expressive association beats anti-discrimination, but rather gay people always lose.

182. See Robert E. Rains, *Icing on the Wedding Cake: Same-Sex Marriage and Religious Objections—Is There an Accommodation That Will Make Everyone Equally Happy (or Unhappy)?*, 42 VT. L. REV. 191, 215 (2017).

183. *Id.* at 215–19 (discussing *Knapp v. City of Coeur d'Alene*, 172 F. Supp. 3d 1118 (D. Idaho 2016); *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016); *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017)).

184. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018) (noting that similar challenges "must await further elaboration in the courts").

185. The Court declined the Justice Department's invitation to apply a heightened level of scrutiny to a civil rights dispute involving LGBTQ Americans. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4004530, at \*14–21.

expression.<sup>186</sup> As a “general rule,” businesses and “other actors in the economy and in society” may not “deny protected persons equal access to goods and services under a neutral and generally applicable” anti-discrimination law.<sup>187</sup>

It may seem unlikely that situations involving wedding cakes and flower arrangements could have much to do with lawyers’ clients. But as the conservative Christian lawyers foresaw when they wrote to oppose the ABA’s anti-discrimination rule, the connection is not as farfetched as it may appear.<sup>188</sup> Lawyers would likely contend that a refusal to represent clients of a particular race or sex should be understood as refusing to express a particular message, rather than excluding members of a protected group. Likewise, the baker in *Masterpiece Cakeshop* argued that ordering him to provide a cake for a same-sex wedding forced him to “use his artistic skills to make an expressive statement . . . in his own voice.”<sup>189</sup> The Court signaled some support for this argument, observing that “[i]f a baker refused to design a special cake with words or images celebrating the marriage . . . that might be different from a refusal to sell any cake at all.”<sup>190</sup> A lawyer has a persuasive argument that, in taking on any new client’s case, she is engaging to craft a custom-made expressive message to advance that particular client’s cause. Even if a new client’s case is similar to previous cases, it will at least entail reshaping arguments to fit the new facts.<sup>191</sup>

As the state argued in *Masterpiece Cakeshop*, however, even if a service is genuinely expressive, regulation only offends First Amendment principles if it affects the service provider’s “own message.”<sup>192</sup> That depends largely on whether observers are reasonably likely to believe the message or association reflects the views of the person being compelled to

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186. *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (citing *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968) (per curiam)). In *Newman*, the Court characterized as “patently frivolous” a segregated restaurant owner’s free exercise defense for defying public accommodations law. 390 U.S. at 402 n.5; see also Brief of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127302, at \*3–5 (arguing that *Newman* controls).

187. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

188. See Letter from David Nammo, *supra* note 91, at 5–13 (articulating similar First Amendment arguments against the proposed anti-discrimination rule).

189. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

190. *Id.* at 1723.

191. See *Nathanson v. Mass. Comm’n Against Discrimination*, No. 199901657, 2003 WL 22480688, at \*2 n.6 (Mass. Super. Ct. Sept. 16, 2003). Note that if the Court were to view the rule’s effect as compelled speech, it would almost certainly fail a First Amendment challenge. See *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371–76 (2018).

192. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4004530, at \*14–21, 30.

associate.<sup>193</sup> In *Hurley*, the Court explained that everything in a parade is generally understood to be part of the parade organizers' communication on their own behalf.<sup>194</sup> So, forcing the parade to accept gay-pride marchers changed the expressive message attributed to the parade organizers.<sup>195</sup> In contrast, for a law school allowing military recruiters, or a shopping center allowing political protesters, "there was little likelihood that the views of those engaging in the expressive activities would be identified" with the proprietors.<sup>196</sup> Like a parade, legal advocacy is inherently expressive in the sense that its *raison d'être* is communicating messages. Still, regulating lawyers' choice of clients may not trigger the same constitutional concerns as requiring parade organizers to include marchers if lawyers' choices to advocate for certain clients are not widely understood as expressing the lawyers' own world view.<sup>197</sup>

An aspect of the attribution question is whether the person compelled to associate remains free to express disagreement with any message of approval or affiliation that the enforced association might send.<sup>198</sup> Citing the U.S. Supreme Court's observation that a shopping center could put up signs disclaiming its endorsement of the messages handed out by leafletters on the premises, the lower court's decision in *Masterpiece Cakeshop* pointed out that "the bakery remains free to disassociate itself from its customers' viewpoints."<sup>199</sup> While the public accommodations statute would prohibit the bakery from putting up a sign refusing to provide cakes for same-sex marriages, it would "not prevent Masterpiece

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193. See *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 63–64 (2006).

194. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569–70, 574 (1995).

195. *Id.* at 574–75. Likewise forcing a newspaper to give equal time to opposing views unconstitutionally compelled speech because it altered "the message the paper wished to express" both by forced inclusion and by taking space away from other articles the paper wanted to print. *Rumsfeld*, 547 U.S. at 65 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

196. *Rumsfeld*, 547 U.S. at 65 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980)).

197. See *id.*; Brief of American Unity Fund and Profs. Dale Carpenter & Eugene Volokh as Amici Curiae in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4918194, at \*22–23 (arguing that the Masterpiece baker's refusal to bake a cake for a homosexual wedding is not protected by the First Amendment). Other obviously expressive professional conduct would be constitutionally protected, even if it is professional expression clearly made on behalf of others: "An actor who holds himself out as willing to work in commercials . . . cannot be penalized for refusing to act in an advertisement for a Southern Baptist Church—even if he is willing to act in advertisements for other religions, and even if state law treats such selective refusals as forbidden religious discrimination." *Id.*

198. In a case upholding a federal requirement that law schools allow military recruitment on campus, the Court observed that "students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so." *Rumsfeld*, 547 U.S. at 65.

199. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015), *rev'd sub nom. Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

from posting a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by” the Colorado civil rights statute.<sup>200</sup>

In one sense this is a circular argument.<sup>201</sup> The fact that someone who loses her First Amendment claim that she has a right to refuse an association can say that she was legally compelled to associate is not an argument that some pre-existing legal authority permits or requires the government compulsion. Put another way, the First Amendment does not say Congress can make any law it chooses compelling speech, so long as the speakers are free to announce that the government is making them do it. As Justice Thomas observed, “[t]his reasoning . . . would justify virtually any law that compels individuals to speak.”<sup>202</sup>

Nevertheless, legal decisionmakers do consider the pragmatic effects of a given outcome. In weighing the social impact of a ruling that compels association, it seems relevant if speakers can effectively distance themselves from any message the association expresses.<sup>203</sup> Here, lawyers are something of a special case. While a lawyer’s personal opposition to her clients’ views may be well recognized, professionally lawyers are expected to be consistently loyal to their clients’ interests.<sup>204</sup> A lawyer can’t walk out onto the courthouse steps and say, “actually, I don’t believe a thing I said in court today; personally, I think he’s guilty.”

But ultimately that may not matter. Lawyers are traditionally, almost definitionally, understood to be delivering messages they do not themselves believe. A lawyer literally advocates “in his own voice,” and his arguments are “of his own creation.”<sup>205</sup> But it’s well known that lawyers advocate for clients’ interests and goals, with which they personally disagree, and, for that matter, on behalf of clients they do not personally like or respect. As the Massachusetts court explained in rejecting Judith Nathanson’s First Amendment claim, an attorney “operates more as a conduit for the speech and expression of the client, rather than as a speaker for herself.”<sup>206</sup> Authentic self-expression is

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200. *Id.*

201. Moreover, the Supreme Court does not apply this rationale consistently. The Boston parade organizers and the Boy Scouts could have proclaimed that including gay marchers and gay scoutmasters was not a freely chosen expression of their own beliefs but rather a reluctantly fulfilled duty imposed by legal *fiat*. But the Court made no such point in these cases.

202. *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring in part).

203. *Rumsfeld*, 547 U.S. at 64–65.

204. MODEL RULES OF PRO. CONDUCT Preamble ¶ 2 (AM. BAR ASS’N 2020).

205. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

206. *Nathanson v. Mass. Comm’n Against Discrimination*, No. 199901657, 2003 WL 22480688, at \*6 (Mass. Super. Ct. Sept. 16, 2003) (distinguishing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995)).

exactly what is missing from a lawyer's advocacy. Arguably, that absence of self-expression is part of what *makes it* legal advocacy.<sup>207</sup> When lawyers speak as lawyers, their audience views that expression through a lens of double consciousness, taking in their speech and associations as if they were sincere, while at the same time recognizing that they are “hired guns,”<sup>208</sup> who can never be assumed to be voicing their own authentic opinions. Indeed, compared with the political messages sent by segregated restaurants in the South in the 1960s, most lawyers' client lists seem quite unexpressive of the lawyer's own views.

Accordingly, in my view, an ethics rule forbidding discrimination in client selection should and would survive a challenge based on lawyers' freedom of association. It is possible that the Court would declare that a lawyer's choice of clients, like a parade's choice of marchers, is itself the sort of sincere personal expression that should be free from rules that ordinarily forbid discrimination. But the better—and more likely—approach would rely on the early public accommodations cases' distinction between exclusion and expression to protect prospective clients from discrimination. Lawyers' traditional role as “neutral partisans” who advocate for clients and positions they may personally deplore supports that basic divide. Accordingly, although the First Amendment protects lawyers' right to advocate for discriminatory people and policies, it also allows states to prevent lawyers from practicing discriminatory exclusion. Under that analysis, states could prohibit discriminatory client selection.

### III. CRAFTING AN ANTI-DISCRIMINATION RULE

Assuming that anti-discrimination regulation of lawyers' client selection is ethically necessary, practically beneficial, and constitutionally acceptable, how should it be shaped?

#### A. *The Anti-Classification Approach to Client Selection Discrimination*

These days, anti-discrimination laws are often interpreted as anti-classification rules. They are understood to forbid decision making based on race or sex, regardless whether those decisions work to perpetuate or to destabilize existing hierarchies. Thus, Stephen Gillers explains that applying ABA Model Rule 8.4(g) to lawyers' client selection would

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207. See Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 *FORDHAM L. REV.* 1339, 1341 (2006) (arguing that the dominant conception of the lawyer is as a “hired gun.”).

208. *Id.*

outlaw Judith Nathanson's refusal to represent men in divorce cases.<sup>209</sup> "She will reject—and therefore discriminate against—prospective male clients because of their sex."<sup>210</sup> For Gillers, to the extent that effect is problematic, it is outweighed by the rule's protection for vulnerable prospective clients and the legitimacy of the legal system.<sup>211</sup> As he puts it, "there is a supervening value in having a system of laws where no person can be denied representation . . . because of the person's membership in one of the protected groups."<sup>212</sup>

Another well-known ethics scholar has directly advocated an anti-classification approach to client selection. David Wilkins has written in depth, and critically, on the problematic mainstream assumption that lawyers' racial or gender identity should be irrelevant to their professional choices.<sup>213</sup> When it comes to a lawyer's choice of legal partners, Wilkins objects to a one-size-fits-all, anti-classification approach.<sup>214</sup> He observes that "minority law firms, like historically black educational institutions, arguably provide a valuable service by creating a supportive environment in which some African-American professionals are more likely to thrive."<sup>215</sup> In contrast, large all-White firms both deny opportunities to underrepresented groups and "reinforce stereotypes of racial inferiority."<sup>216</sup> For Wilkins, those realistic differences mean that race-conscious hiring and partnership decisions in these different contexts are ethically different, and should be treated differently.<sup>217</sup> Nevertheless, he concludes that choosing clients on the basis of race is simply antithetical to the legal "profession's commitment to 'equal justice under law.'"<sup>218</sup>

Wilkins argues that lawyers' professional duty to serve equal justice is undermined if they "systematically refuse to represent individuals on the basis of considerations that have nothing to do with either their moral worth as human beings or the legitimate interest of attorneys."<sup>219</sup> At first, that characterization seems potentially to allow for prioritizing representing members of groups that have been disadvantaged in the legal

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209. Gillers, *supra* note 7, at 228.

210. *Id.*

211. *See id.* at 233.

212. *Id.*

213. See David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached Out Lawyering*, 5 INT'L J. LEGAL PRO. 141, 142–43 (1998).

214. *Id.*

215. *Id.* at 150 (citing JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 130–32 (1994)).

216. *Id.* at 166.

217. *See id.*

218. *Id.*

219. *Id.*

system. Arguably, a choice to represent exclusively members of a historically subordinated group is a vindication of those prospective clients' moral worth, and a legitimate, indeed an admirable, professional goal. But Wilkins apparently rejects this view. His primary example of forbidden client selection discrimination is an African American civil rights attorney who "is committed to using her legal talents to assist the black community and therefore does not represent whites."<sup>220</sup> Ultimately, then, both Gillers and Wilkins advocate an anti-classification approach to ethical client selection. They would forbid race- and sex-conscious client choices across the board, whether those choices spring from personal bias and perpetuate stereotypes of inferiority or are principled attempts to prioritize advocacy for groups an attorney believes have been disadvantaged in the legal system.

I agree with Gillers and Wilkins that prohibiting discrimination in client selection is justified, indeed demanded, by the legal system's existential mandate to aim for equal justice under law. But I do not agree with barring all race- or sex-conscious client selection, regardless of its purpose or effects. In the following sections of this article, I propose a different approach.

*B. Ruling Out Stigma and Stereotype while Permitting Intentional Group Advocacy*

I start from a basic policy goal: to outlaw exclusion that perpetuates demeaning race and sex stereotypes, while allowing lawyers to consider clients' race and sex in order to focus on vindicating the rights of individuals subject to just this kind of stigmatic prejudice. We know the difference between someone who is making categorical group-based judgments in order to focus their work on just goals and someone who is thoughtlessly allowing stereotypical biases to infect their judgment. I want an anti-discrimination rule that recognizes that difference.

I propose the following rule of professional responsibility:

A lawyer shall not accept, decline or terminate representation of a client on the basis of stereotypes, stigma, or bias regarding race or sex, but a lawyer may consider prospective clients' race or sex in order to intentionally direct their practice toward serving underrepresented groups or toward dismantling race and sex hierarchies that frustrate access to equal justice under law.

Under the ascendant anti-classification approach to discrimination,

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220. *Id.* at 141–42.

my proposed rule would likely face additional constitutional challenges besides the basic First Amendment claim just discussed. Doctrinally, these challenges would come packaged as claims that the rule classifies and intentionally disadvantages prospective clients on the basis of race or sex in violation of the Fourteenth Amendment's Equal Protection Clause, and that the exemption for anti-hierarchical race- and sex-consciousness amounts to viewpoint discrimination forbidden by the First Amendment. I will address those claims separately, but it is important to see that both stem from the same basic question: whether the Equal Protection Clause presumptively forbids all policy distinctions based on race or sex or whether it mandates, or at least allows, government policies aimed at dismantling the kind of hierarchical social structures that precipitated its passage.

Mainstream doctrine currently understands the Equal Protection Clause as a guarantee of formally equal treatment by government, even when a policy perpetuates or amplifies the White supremacy the Fourteenth Amendment was enacted to undo. The Supreme Court's equal protection jurisprudence forbids most government policies that classify individuals by race or sex, even when those policies reduce existing inequality.<sup>221</sup> With that in mind, lawyers who wish to serve primarily or exclusively socially dominant groups (and prospective clients from those groups) might argue that my proposed rule treats individuals differently based on race and sex, and privileges the interests of those found to occupy allegedly subordinate places in society.

For instance, the rule would allow Judith Nathanson's practice of representing only women in divorce cases.<sup>222</sup> As the Massachusetts court acknowledged, there was "no evidence of Nathanson's improper animus towards men."<sup>223</sup> Nathanson chose to represent women exclusively not because she hated or disdained men, but because she wanted to use her practice to help women achieve equality.<sup>224</sup> The court recognized that Nathanson "had earned a law degree with the purpose of helping to advance the status of women in the legal system, and her legal work had

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221. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510–11 (1989) (invalidating policy that gave preference to minority contractors).

222. See *Nathanson v. Mass. Comm'n Against Discrimination*, No. 199901657, 2003 WL 22480688, at \*1 n.1 (Mass. Super. Ct. Sept. 16, 2003). Courts also refuse sometimes to apply general business regulations to legal practice when statutes do not explicitly include lawyers, out of deference to legal ethics regulations or under a separation of powers argument. For example, the Illinois Supreme Court refused to apply a consumer fraud statute to lawyers' conduct, explaining that through the state's rules of professional conduct, "this court administers a comprehensive regulatory scheme governing attorney conduct." *Cripe v. Leiter*, 703 N.E.2d 100, 105 (Ill. 1998).

223. *Nathanson*, 2003 WL 22480688, at \*1 n.1.

224. *Id.*

been devoted to that goal.”<sup>225</sup> She chose to focus her limited resources on women in divorce cases, in an “effort to redress social and legal wrongs done to women.”<sup>226</sup> Nathanson supported her argument that women faced ongoing inequality in divorce proceedings with a report on the Massachusetts judicial system showing that women remained disadvantaged in the state’s legal system.<sup>227</sup> Arguably, then, her practice was intentionally directed toward dismantling a sex hierarchy that frustrated equal justice in her state. So Nathanson’s practice would not violate my rule, although her client choices were based on sex.

Similarly, a lawyer who wanted to represent exclusively African American clients in employment discrimination cases might point to the study by Myrick et al., finding that Black employment discrimination plaintiffs are disproportionately *pro se*,<sup>228</sup> and argue that her race-conscious client selection fell within the anti-subordination exemption. In contrast, a lawyer who wanted to represent only White employment discrimination plaintiffs would be ineligible for the exemption unless she could present evidence that Whites are disadvantaged in that legal context. Likewise, if a family lawyer chose to represent only heterosexual couples in adoption cases, it is unlikely that she could show that heterosexuals are underrepresented or subordinated in the Massachusetts court system overall or in adoption proceedings there.

The different results produced by my proposed rule could be challenged on constitutional grounds under an anti-classification theory. The lawyers who choose to represent only heterosexuals and Whites would contend that the rule enacts race and sex classifications and is motivated by intentional race and sex discrimination. They might also argue that the rule amounts to viewpoint discrimination prohibited by the First Amendment, because it promotes an anti-hierarchical reform agenda and punishes lawyers and clients who wish to advocate conservative positions regarding racial and sexual politics.<sup>229</sup>

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225. *Id.*

226. *Id.*

227. *Id.*; see also *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 746–48 (1990).

228. Myrick et al., *supra* note 112, at 757–58.

229. Moreover, the rule likely clashes with numerous state public accommodation statutes that have been enforced as anti-classification rules, as the Massachusetts statute was in *Nathanson*, and with 42 U.S.C. § 1981, as interpreted by the U.S. Supreme Court. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003) (holding that a university’s use of race in admissions violated § 1981 as well as the Equal Protection Clause).

## 1. Equal Protection Arguments

Under the prevailing approach to equal protection, predicating treatment on race or sex for any reason is suspect and “pernicious.”<sup>230</sup> Race and sex classifications are considered equally problematic whether they adversely affect members of historically subordinate or dominant groups. So, “when the government distributes burdens or benefits on the basis of individual racial [or sexual] classifications,” heightened judicial review applies.<sup>231</sup> In the context of race, courts apply “strict scrutiny,” which nearly always proves fatal to a race-conscious policy.<sup>232</sup> In order to survive strict scrutiny, the challenged action must be “‘narrowly tailored’ to achieve a ‘compelling’ government interest.”<sup>233</sup> Government policies that do not explicitly classify by race but which are undertaken with the intent of producing race-based results are likewise valid only if they serve compelling state interests while generating the least possible burden.<sup>234</sup>

Arguably, the proposed ethics rule allows, or even requires, a state to engage in race-conscious decision making when adjudicating claims of discrimination against an attorney who refuses to work with certain clients. The rule forbids discrimination but exempts lawyers’ consideration of race or sex for the purpose of serving underrepresented groups or dismantling hierarchy. So, if an attorney accused of discrimination rejected clients from a historically privileged group (e.g., White men), the attorney would have the opportunity to demonstrate that her decision was part of an

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230. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (quoting *Gratz*, 539 U.S. at 270). Nevertheless, note that some widely accepted policies and laws are based on an anti-subordination approach to discrimination. The most prominent current example of an accepted anti-subordination law is the Americans with Disabilities Act (ADA). The ADA prohibits excluding or disadvantaging individuals who are disabled, but it does not protect people who are treated adversely because they *lack* a disability. 42 U.S.C. § 12201(g) (“Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of disability.”). Likewise, the Age Discrimination in Employment Act (ADEA) protects people over the age of 40 against adverse treatment because of their age but does not protect younger people who are treated adversely because they are young. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 591 (2004) (noting that the ADEA is not “worr[ie]d about protecting the younger against the older”).

231. *Parents Involved*, 551 U.S. at 720. Under the Court’s complex doctrinal framework, different levels of scrutiny apply to race and sex discrimination. The following discussion will therefore focus on race, which elicits the most searching judicial review, “strict scrutiny.” *See id.*

232. Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 3–4 (2000) (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)) (noting that strict scrutiny is “‘strict’ in theory and fatal in fact”).

233. *Parents Involved*, 551 U.S. at 720 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)).

234. *See, e.g., Adarand*, 515 U.S. at 205 (applying strict scrutiny to a federal policy that incentivized hiring subcontractors owned by “socially and economically disadvantaged individuals”).

intentional effort to shape her legal practice to dismantle hierarchy. If the attorney carries this burden, the state would not discipline her. But if the rejected client *is* a member of a historically disadvantaged group in the relevant context, the attorney would be unable to show that she refused to represent this client in order to focus on remedying subordination, and she could be disciplined under the rule. In effect, the argument runs, the rule makes the outcome of state ethics complaints hinge on the race or sex of the rejected clients. It encodes an implicit classification and intentional state preference for groups historically disadvantaged by race or sex, i.e., Blacks, women, and LGBTQ Americans.

To be sure, the rule has some potential defenses even within an anti-classification system. First, even practices that explicitly classify citizens by race are not always treated as the kind of government actions that trigger strict scrutiny.<sup>235</sup> For instance, some race-conscious structures in our electoral system are accepted by the Court without subjecting them to heightened review.<sup>236</sup> As Justice Kennedy noted in his *Parents Involved* concurrence, “[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race.”<sup>237</sup> One could argue that the same reasons that apply in the electoral context make the anti-subordination exemption constitutional in legal client selection. Like race-conscious but facially race-neutral district lines, the anti-subordination exemption allows individual actors in a governmental system to consider race in order to achieve an overall more just and equal institution.

The proposed rule does not expressly single out one or another race or sex for beneficial treatment. In the 1970s, the Supreme Court turned to purposeful intent as the *sine qua non* of discriminatory practices that do not facially classify by race or sex.<sup>238</sup> Under the canonical *Feeney* case, knowing that a policy predictably will harm one race or sex is not sufficient.<sup>239</sup> To violate equal protection, a policy must be enacted “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an

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235. See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 502–15 (2003). As Primus explains, “practices that . . . involve government actors’ identifying people by race are not always subject to strict scrutiny.” *Id.* at 505. For example, when the police used a list of all African-American employees at a university in their questioning after an assault had allegedly been committed by a Black man, strict scrutiny did not apply and it was held not to be a racial classification that violated equal protection. *Brown v. City of Oneonta*, 221 F.3d 329, 333–34, 338 (2d Cir. 2000), *cert. denied*, 543 U.S. 816 (2001).

236. *Bush v. Vera*, 517 U.S. 952, 959 (1996) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) (explaining that plaintiffs must demonstrate that race was “the predominant factor motivating the legislature’s [redistricting] decision” to trigger strict scrutiny).

237. *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part) (quoting *Vera*, 517 U.S. at 958).

238. See *Washington v. Davis*, 426 U.S. 229, 242–46 (1976).

239. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

identifiable group.”<sup>240</sup> Invalidating a facially neutral policy takes “more than intent as volition or intent as awareness of consequences,” it requires what my torts professor used to call “son of a bitch intent.”<sup>241</sup>

The ultimate goal of the proposed ethics rule is not to privilege or disable legal representation of one race or sex, but to dismantle social hierarchies that leverage those characteristics. So a state could argue that any resulting race or gender effects merely reflect the disparate impact of a race- and sex-neutral policy. In *Feeney*, the Court upheld a state’s hiring preference for military veterans that disproportionately benefited men (greatly over-represented among veterans), even though government policymakers obviously knew that women would be disadvantaged.<sup>242</sup> Applying the same standard, the proposed anti-subordination rule arguably survives.

Suppose a group of White men challenge the rule because they were turned away from a law office that represents only people of color. Recall that the race-conscious intent of the private attorneys is not grounds for a constitutional challenge; the rejected clients must prove that the enforceable government rule of legal ethics that exempts their race-conscious practices is itself discriminatory.<sup>243</sup> The rule explicitly *forbids* discrimination against *any* prospective clients “on the basis of stereotypes, stigma, or personal bias” whether the would-be clients are White or Black, men or women, gay or straight. And it allows race- or sex-conscious client selection only *instrumentally* for the purpose of supporting private conduct that aims to break down persistent hierarchies that frustrate equality in the legal system. In line with *Feeney*’s reasoning, if the rule results in some White men being refused representation by certain law firms, that is merely a collateral effect that occurs “in spite of,” not “because of,” the rule’s purpose.<sup>244</sup> Moreover, further proof of the rule’s race-neutral purpose is that in some instances it will benefit members of usually dominant groups. White men will reap the benefits of the law’s exemption, for example, if the law firms that advertise as divorce attorneys for men can argue persuasively that men have been historically disadvantaged in custody cases.

The counterargument is that, unlike the gender disparity in *Feeney*, the categorical effects of the anti-subordination rule are conceptually tied to the rule’s purpose. Although gender inequality in society is doubtless one

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240. *Id.*

241. *Id.* (citing *United Jewish Orgs. v. Carey*, 430 U.S. 144, 179 (1977) (Stewart, J., concurring)).  
h/t Aaron Twerski.

242. *Id.* at 280–81.

243. *See id.* at 279.

244. *See id.*

reason why women are underrepresented among veterans, a veterans' hiring preference would not necessarily hinge on gender to accomplish its goals.<sup>245</sup> So the state could claim that the gender impact was an unfortunate side-effect, like the nausea that comes with a drug used to cure some unrelated illness. In contrast, the proposed client selection exemption allows, or even promotes, race- and sex-conscious client choices in order to dismantle race and sex hierarchies.

But this brings up a different defense of the rule's anti-subordination policy. In most jurisdictions, there is no shortage of attorneys available to represent clients of every race and sex so long as they can afford to pay. And no one is entitled to be represented by any particular attorney. Just as a voting district may be redrawn to avoid diluting African American voting strength without diluting White votes, the rule allows lawyers to prioritize representing members of subordinated groups without preventing members of dominant groups from obtaining legal representation. So the rule's support of subordinated groups does not redistribute any substantial entitlements along the lines of race or sex. As William Carter suggests, however, the real target of anti-classification doctrine may be governmental *attention* to race and sex and the communication of that attention.<sup>246</sup> Arguably, race-conscious client selection is constitutional anathema for the same reason that *Parents Involved* struck down school districts' use of race to allocate elementary school placements—its race-conscious *expression*.<sup>247</sup> The proposed rule “tells each [client] he or she is to be defined by race” for the purpose of allowing or forbidding a law firm's decision not to represent them.<sup>248</sup>

The Court repeatedly declares that tangible burdens need not be imposed to make a race-conscious law suspect. So, for instance, strict scrutiny applied to a law school admissions policy that considered “many possible bases for diversity admissions,”<sup>249</sup> because “whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.”<sup>250</sup> Still, as Reva Siegel and Jack Balkin point out, “the law covertly preserves” some

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245. See *id.* at 279–80.

246. See William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 7 (2011).

247. See *id.* at 12–13; see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746–48 (2007) (plurality opinion).

248. *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part); see also Carter, *supra* note 246, at 13 (discussing Justice Kennedy's concurrence and calling it “the apotheosis of race as speech”).

249. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

250. *Id.* at 327 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229–30 (1995)).

exceptions to this supposedly universal anti-classification principle.<sup>251</sup> When and how those exceptions will be recognized can be difficult to predict. Surely, though, as Siegel and Balkin observe, courts' responses have something to do with wider cultural expectations, and the perceived normalcy of different status-based practices.<sup>252</sup>

It may be that anti-subordination client selection fits with implicitly accepted social practices. One can find plenty of ads for “divorce attorneys for women” and “family law attorneys for men,” even in Massachusetts—despite the *Nathanson* decision!<sup>253</sup> And note that the firms representing men expressly frame that choice as an *anti-subordination* mission, talking, for example, about their “dedication to leveling the playing field for men in family law cases.”<sup>254</sup> The founder of one such firm, Cordell & Cordell, explains, “[a]s a society we’ve made progress regarding gender in a number of areas, . . . [b]ut the dark corner of the room . . . is dads’ rights in family courts.”<sup>255</sup>

A general survey of public accommodations caselaw is beyond the scope of this Article, but from a limited review it appears that “reverse discrimination” cases are rare. Moreover, at least in some parts of the country, it is not uncommon to see services advertised as directed primarily, if not exclusively, to groups who have been excluded or treated as outsiders by mainstream providers. Women’s gyms and social spaces that cater to African Americans and Asians are examples.<sup>256</sup> It may be that despite the goose/gander mentality of recent civil rights doctrine, the general public, and some legal decision makers, tend to distinguish between exclusion that perpetuates stigmatic prejudice and efforts to provide safe space and services for individuals previously excluded by those stigmas. In the rare legal challenges to these operations, they are

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251. Balkin & Siegel, *supra* note 15, at 19 (offering adoption decisions and census categories as examples).

252. *See id.* at 25–26.

253. *See, e.g., Family Law Offices: Massachusetts*, CORDELL & CORDELL, <https://cordellcordell.com/offices/massachusetts/> [<https://perma.cc/M8EE-GTCY>] (last visited Jan. 24, 2021) (“Our Massachusetts divorce lawyers focus entirely on men’s divorce, child custody, paternity, and other family law issues.”).

254. CORDELL & CORDELL, *supra* note 85.

255. Angelina Chapin, *Dads’ Rights: The Rise of Firms for Fathers Going Through Divorce*, GUARDIAN, (Oct. 15, 2016, 7:00 AM), [https://www.theguardian.com/lifeandstyle/2016/oct/15/fathers-rights-divorce-lawyers?CMP=share\\_btn\\_link](https://www.theguardian.com/lifeandstyle/2016/oct/15/fathers-rights-divorce-lawyers?CMP=share_btn_link) [<https://perma.cc/3X59-U8RX>].

256. *See, e.g., CURVES*, <https://www.curves.com/> [<https://perma.cc/5YAL-EZXU>] (last visited Jan. 24, 2021) (advertising “Womens’ Health & Fitness Clubs”); Morgan Jerkins, ‘For Us, by Us’: *Inside the New Social Spaces for People of Color*, N.Y. TIMES (Mar. 9, 2019), <https://www.nytimes.com/2019/03/09/nyregion/social-clubs-nyc-people-of-color.html> [<https://perma.cc/T85T-YB34>]; Alice Yin, *A Pioneering Times Square Asian-American Nightclub Closes*, N.Y. TIMES (Mar. 2, 2018), <https://www.nytimes.com/2018/03/02/style/circle-times-square-korean-nightclub-closes.html> [<https://perma.cc/8AX8-7NSR>].

sometimes defended, and sometimes survive, as providing for specialized needs or as otherwise distinguishable.<sup>257</sup> When these practices hit the mainstream press, draw the attention of political opponents, and/or reach the highest levels of judicial review, however, the anti-classification perspective sometimes reasserts itself.<sup>258</sup>

Once again, *Masterpiece Cakeshop* is illuminating. The Colorado Civil Rights Division ruled that the baker who refused to create a cake for a same-sex wedding had violated Colorado's public accommodations statute.<sup>259</sup> In contrast, the Commission found that three other bakers "acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages."<sup>260</sup> The Colorado Court of Appeals distinguished those cases, finding that, rather than discriminating on the basis of sexual orientation or creed, those bakers had declined to make the requested cakes "because of the offensive nature of the requested message."<sup>261</sup> The U.S. Supreme Court's majority opinion, however, treated the Commission's differential holdings as evidence of official hostility toward conservative religious beliefs.<sup>262</sup> In dissent, Justice Ginsburg pointed out that the bakers whose refusals were found to be legitimate had been asked to make cakes with explicit verbal or symbolic messages.<sup>263</sup> These bakers would have refused to bake those cakes no matter who requested them.<sup>264</sup> In contrast, the baker who refused to serve a same-sex wedding declined to provide a basic wedding cake he sold to

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257. See, e.g., *LivingWell (N.) Inc. v. Pa. Hum. Rels. Comm'n*, 606 A.2d 1287, 1294 (Pa. Commw. Ct. 1992) (holding women have a "privacy interest" that permits the exclusion of men from an all-female exercise facility).

258. See, e.g., Ria Tabacco Mar, Galen Sherwin & Erin Harrist, *The Legal Questions Raised by a Women-Only Workspace*, ACLU BLOG (Apr. 3, 2018, 5:45 PM), <https://www.aclu.org/blog/womens-rights/legal-questions-raised-women-only-workspace> [https://perma.cc/978S-9HLN] (discussing challenges to a women-only co-working space under New York's public accommodation law).

259. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1723 (2018).

260. *Id.* at 1728 (citing *Jack v. Azucar Bakery*, Charge No. P20140069X (Colo. C.R. Div. Mar. 25, 2015), [https://mediaassets.thedenverchannel.com/document/2015/04/23/Jack\\_Williams\\_V\\_Azucar\\_Bakery\\_17228465\\_ver1.0.pdf](https://mediaassets.thedenverchannel.com/document/2015/04/23/Jack_Williams_V_Azucar_Bakery_17228465_ver1.0.pdf) [https://perma.cc/32CW-96Z7]; *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070 (Colo. C.R. Div. Mar. 24, 2015), <http://www.adfmedia.org/files/LeBakerySensualDecision.pdf> [https://perma.cc/5YK5-Y6QF]; *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Colo. C.R. Div. Mar. 24, 2015), <http://www.adfmedia.org/files/GateauxDecision.pdf> [https://perma.cc/NH3Q-R878]).

261. *Id.* at 1731 (quoting *Craig v. Masterpiece Cakeshop*, 370 P.3d 272, 282 n.8 (Colo. App. 2015)), *rev'd sub nom.* *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

262. *Id.* at 1730–31. The Court viewed that rationale as inconsistent with the Commission's holding that refusing to make a cake for a same-sex wedding was unprotected discrimination in part because "any message the requested wedding cake would carry would be attributed to the customer, not the baker." *Id.* at 1730. Thus, the Court's majority opinion.

263. *Id.* at 1749 (Ginsburg, J., dissenting) (such as "an image of two groomsmen, holding hands, with a red 'X' over the image," and the words, "[h]omosexuality is a detestable sin").

264. *Id.* at 1750.

other customers, and did so because of the requesting customers' identity.<sup>265</sup> What is glaringly absent from any judicial opinion in this case, however, is the idea that different treatment might be warranted because one baker's refusal of service reproduced the longstanding stigmatization and exclusion of a subordinated group, namely LGBTQ Americans, while the other bakers declined service precisely to avoid perpetuating that same stigmatic prejudice.

In the current doctrinal setting, a state would have a hard time claiming that a general history of social subordination justifies using racial classifications to determine who gets legal representation. The Court has explained that a showing of "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."<sup>266</sup> So, for instance, "a generalized assertion that there has been past discrimination in an entire industry," could not legitimize requiring contractors hired by a city to subcontract 30% of their business to "minority" business enterprises.<sup>267</sup> In order to justify remedial action, states "must identify that discrimination, public or private, with some specificity."<sup>268</sup> Still, in its most recent school desegregation case, the Court stopped short of holding that remedying pervasive structural inequality could not be a compelling state interest, with five justices across various opinions finding that it could.<sup>269</sup>

It is also clear from the caselaw that racially equal results will not suffice as an end goal. A thumb on the scale for one race or sex is only justified as a way to achieve some other policy goal. As the Court explained, when upholding a law school's race-conscious admissions policy, the use of racial or sexual classifications must be "part of a broader assessment of diversity," or instrumental toward some interest other than racial equality, "not simply an effort to achieve racial balance."<sup>270</sup> Just as "attaining a diverse student body is at the heart of the [l]aw [s]chool's proper institutional mission," diversity is crucial in a legal system.<sup>271</sup> Without culturally sensitive representation of all its citizens, a state's legal system can never achieve its promise of "equal justice under law." In validating race-conscious admissions criteria, *Grutter* emphasized that the

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265. *Id.*

266. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion).

267. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498, 477 (1989) (citing *Wygant*, 476 U.S. at 275)).

268. *Id.* at 504.

269. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring in part); *id.* at 843 (Breyer, J., dissenting).

270. *Id.* at 723 (majority opinion) (citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

271. *Grutter*, 539 U.S. at 329.

policy produced substantial educational benefits for all students, “promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races.”<sup>272</sup> Likewise, the benefits of a diverse legal system are not confined to members of disadvantaged groups who would otherwise tend to be excluded.

The anti-subordination rule’s primary purpose is fulfilling the design of a state’s legal system. In our common-law-based system, the facts and interests brought to courts by litigants shape the law that is applicable to subsequent cases. In this way the law evolves to fit the society it regulates. In such a system, a failure of diversity distorts the law itself. A state therefore has a compelling interest in ensuring that the circumstances, claims and interests of all kinds of people are fed into cases being adjudicated. Otherwise courts cannot properly do their job of interpreting legal texts and doctrines in ways that accurately reflect and rationally regulate the dynamic, diverse society to which those laws apply. Arguably, this is not entirely a matter of underrepresentation by the numbers. The anti-subordination rule encourages lawyers to build practices aimed at advocating points of view and promoting interests that tend to be sidelined, suppressed or simply overlooked because they belong to perennially subordinated groups.

Moreover, the legitimacy and public acceptance of a state legal system depend on it being seen to intelligently and sympathetically represent such perspectives. In *Grutter*, the Court explained that “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>273</sup> If a law school has a special need for diversity in order to produce legitimate leadership, a legal system needs attorneys to represent subordinated interests in order to produce legitimate law. If producing legitimate leadership means participation in law school by “[a]ll members of our heterogeneous society,” producing legitimate law requires that attorneys represent perspectives and interests that have traditionally been excluded.<sup>274</sup> Consequently, just as state law schools may put a finger on the admissions scale to achieve diversity, state legal ethics rules may provide a narrow exemption to support private lawyers’ choice to prioritize representation of historically excluded groups.

The Court has emphasized that “[c]ontext matters’ in applying strict

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272. *Id.* at 330 (internal quotation marks omitted).

273. *Id.* at 332.

274. *See id.*

scrutiny.”<sup>275</sup> Thus, a law school’s use of race in its admissions process was upheld in part because “the expansive freedoms of speech and thought associated with the university environment” give universities “a special niche in our constitutional tradition.”<sup>276</sup> Likewise, the special “constitutional niche” of state legal systems, and their need for legitimacy, help to distinguish the Court’s cases invalidating racial preferences. “[A] generalized assertion that there has been past discrimination in an entire industry” might not justify racial set asides for building contractors.<sup>277</sup> But if concerns about the legitimacy of the country’s lawmakers can validate a public law school’s race-conscious admissions process, concerns about the legitimacy of a state’s legal outcomes can support a state’s choice not to shut down private law firms’ efforts to destabilize race and sex hierarchies that obstruct equal justice in the legal system.

Finally, the rule allowing race- or sex-conscious client choices is narrowly tailored to its policy goal. It does not require lawyers to give preference to clients from subordinated groups, or provide state funding for such a practice. Nor would the exemption always legitimize rejecting clients from the same, generally dominant social groups. In a given sociolegal context, representing members of an ordinarily dominant racial or sexual group might be covered by the rule’s exemption. So, for instance, the “Divorce Attorneys for Men” firms might defend their sex-based client selection practice by showing that in the jurisdictions where they work men are at a systemic disadvantage in child custody cases.

One practical issue in administering the rule would be the production of proof that prioritizing clients of a given race or sex is reasonably related to the rule’s anti-hierarchical goal. In order to justify remedial action, states “must identify that discrimination, public or private, with some specificity.”<sup>278</sup> A concrete showing of prior discrimination by the very organization affected by the race conscious policy can justify imposing a racial quota.<sup>279</sup> In contrast, “a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.”<sup>280</sup> The problem will be identifying a target area in which race or

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275. *Parents Involved*, 551 U.S. at 725 (quoting *Grutter*, 539 U.S. at 327).

276. *Grutter*, 539 U.S. at 329 (citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967)).

277. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498, 511 (1989).

278. *Id.* at 504.

279. *See Local 28 of Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 444–45 (1986).

280. *J.A. Croson Co.*, 488 U.S. at 498.

sex hierarchy persists. The level of proof required should be calibrated to the relative strength and invasiveness of the challenged policy, and the rule's exemption is a minimal intervention. Protection for voluntary anti-subordination practices is far from a racial hiring quota or race-conscious allocation of limited spaces in a coveted public school. Indeed, the exemption imposes no positive duty to redress inequality. It merely creates a small area of private liberty to *avoid* a state-imposed anti-discrimination measure.

Moreover, the exemption acts to address a reality of pervasive inequality that is widely recognized. Although charged with assuring equal justice, most, if not all, state legal systems undeniably have a history of anti-democratic group subordination in substantive, procedural and cultural forms. Substantive laws enforced racial segregation, denied property rights to women and people of color, and criminalized same-sex relationships. Procedural rules prevented Black people and women from testifying and serving on juries.<sup>281</sup> Moreover, as numerous studies show, the legal profession and the judicial bench continue to be disproportionately White, male, and heterosexual.<sup>282</sup> A number of state and federal court studies have published evidence of race and gender bias in their jurisdictions.<sup>283</sup> But is a state legal system localized enough? A particular court jurisdiction? Do we need evidence of bias in a particular area of law, for instance, police violence claims, employment discrimination, or child custody proceedings? Certainly, the more tightly the area is defined, and the more concrete the evidence of bias, the more likely the rule's application would survive an equal protection challenge.

Considering what evidence would be needed to support an anti-subordination exemption again points out the dearth of information about how legal representation varies by race and sex. Although much attention has been paid to "access to justice" issues for impoverished and middle-class Americans, and study after study reconfirms the persistence of race and sex biases in other aspects of the legal profession, there have been

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281. See, e.g., *Ballard v. United States*, 329 U.S. 187, 195 (1946); see also James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 910 (2004).

282. See Rhode, *supra* note 29; George & Yoon, *supra* note 101, at 2–3.

283. In support of her view that women were disadvantaged in the jurisdiction where she practiced, Nathanson produced a Massachusetts state court bias study, which found that women had less access to the judicial system than men and were treated worse in that system. See *Nathanson v. Mass. Comm'n Against Discrimination*, No. 19990165716, 2003 WL 22480688, at \*1 n.1 (Mass. Super. Ct. Sept. 16, 2003); see also *Gender Bias Study of the Court System in Massachusetts*, *supra* note 227; Jeh Charles Johnson, *Report from the Special Advisor on Equal Justice in New York State Courts*, N.Y. UNIFIED CT. SYS. 3 (Oct. 1, 2020) (finding "a second-class system of justice for people of color in New York State"), <https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf> [<https://perma.cc/G9XQ-KM9L>].

almost no organized efforts to discover whether race and sex bias affects access to representation. That information is sorely needed.

The narrowness inquiry highlights the paradoxical effects of making states' constitutional responsibility for equal protection a matter of avoiding all classification by protected characteristics. The proposed rule allows race- or sex-conscious client selection by attorneys only to advance a targeted institutional practice aimed at reversing inequality. In contrast, ABA Rule 8.4(g)'s exemption of client selection apparently permits attorneys to consider race and sex in *all* decisions about whom to represent, and to discriminate with impunity against any prospective client on the basis of racist and sexist bias and stereotypes.<sup>284</sup> Yet the ABA rule would not face any significant equal protection challenge.

In the current anti-classification regime, the cardinal sin is not policies that protect inequalities of race and sex, but rather race-conscious or sex-conscious policy intervention for any reason—even to remedy those inequalities. A rule that exempts *all* client-selection discrimination does not require government decisionmakers ever to consider race or sex in adjudicating legal ethics claims.<sup>285</sup> In contrast, the proposed narrower anti-subordination exemption would require consideration of rejected or accepted clients' race or sex, and of status differences by race and sex in the legal system. Thus, an anti-subordination rule arguably requires state actors to “classify” some individuals by race or sex and so becomes vulnerable to constitutional challenges in a legal culture that interprets the guarantee of equal protection as a prohibition on government race and sex consciousness. The bizarre result is that a rule that allows lawyers to engage in race- and sex-conscious decision making only in narrowly defined circumstances, and only to advance equal justice under law, risks being struck down as an equal protection violation, while a rule that allows lawyers to discriminate with impunity against clients on the basis of race and sex is immune from equal protection attack.

## 2. Viewpoint Discrimination

By no means would I predict that most legal decision makers today would endorse my proposed rule. But it is possible to find a narrow path through which an anti-subordination exemption might survive an equal protection challenge, even in today's doctrinal structure. The very narrowness of the exemption, however, suggests another line of

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284. At least it does so unless the pre-existing rules can be read to implicitly forbid such discrimination. See Gillers, *supra* note 7, at 233.

285. See MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016).

constitutional attack that is still more threatening. Assuming that the First Amendment generally allows anti-discrimination regulation of client selection (as argued in Section II), opponents of the proposed rule might argue that its anti-subordination exemption constitutes viewpoint discrimination.<sup>286</sup> The proposed rule allows race- or sex-conscious client selection by attorneys who wish to turn their legal practices toward certain political goals, namely dismantling existing race and sex hierarchies and promoting equality. But race- and sex-conscious client selection is not permitted for advocacy aimed at preserving hierarchical ideologies and structures, like White supremacy, male dominance, and heteronormativity. Arguably, that distinction unconstitutionally penalizes lawyers who wish to champion hierarchical ideologies.<sup>287</sup> In other words, in an anti-classification regime, anti-subordination is not only a disfavored approach to carrying out the Constitution's equal protection mandate. It is a "viewpoint" that government is forbidden to favor.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>288</sup> A regulation "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law abridging the freedom of speech.'"<sup>289</sup> Through an anti-classification lens, it looks like paradigmatic viewpoint discrimination to exempt considerations of clients' race and sex in advocacy aimed at dismantling hierarchy, while omitting any such exemption supporting the hierarchical status quo.

The anti-subordination exemption has some potential defenses against a viewpoint discrimination claim, even within the dominant anti-classification framework. First, a state might argue that the exemption does not actually burden any person's rights. Individuals seeking legal representation are not entitled to be represented by a particular lawyer or firm. Lawyers are entitled to advocate for discriminatory structures and practices, but they are not constitutionally privileged to practice discrimination. So the exemption does not deny any concrete entitlement. No harm, no foul. Under the Court's First Amendment caselaw, however, that argument is probably a non-starter. No one is entitled to be exempt from paying taxes. Yet the Supreme Court has held that conditioning a property-tax exemption on a loyalty oath amounts to unconstitutional

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286. Indeed, Josh Blackman makes this argument against ABA Rule 8.4(g), Comment 4. Blackman, *supra* note 27, at 259–60.

287. *See id.*

288. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (citations omitted).

289. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring) (quoting U.S. CONST. amend. I).

viewpoint discrimination.<sup>290</sup> By analogy, an exemption from ethics sanctions conditioned on promoting race- or sex-equality coerces acquiescence to a favored viewpoint.

In certain circumstances, however, government legitimately can reward one viewpoint and forbid or penalize another. The “government speech doctrine” allows government policies that force government employees and others who are speaking for the government to promote a particular viewpoint.<sup>291</sup> The Court has held that public funding can depend on carrying out the government’s chosen mission, including expressing a government preferred view (and refraining from promoting views government opposes).<sup>292</sup> Thus, *Rust v. Sullivan* upheld a restriction attached to funding for gynecological care that prohibited doctors from counseling patients about abortion.<sup>293</sup> The Court explained that the government was under no obligation to subsidize communication about a practice it opposed in principle.<sup>294</sup> One might argue that just as a government “may validly choose to favor childbirth over abortion and to implement that choice” by withholding funding from doctors who discuss abortion, a state may support legal practices that work to increase the legal system’s structural equality and deny that support to practices that undermine that goal.<sup>295</sup>

But using legal ethics regulations to support a government-preferred approach to social problems runs counter to the view that lawyers should be independent of government. Indeed, the Court has held that restrictions on lawyers’ advocacy do not fit within the government speech doctrine. In *Legal Services Corp. v. Velazquez*, the Court invalidated a restriction attached to legal services funding that forbade lawyers from challenging the constitutionality of state or federal statutes and thus “discourage[d] challenges to the status quo.”<sup>296</sup> The Court distinguished *Rust* as involving a program in which “the government ‘used private speakers to transmit specific information pertaining to its own program.’”<sup>297</sup> A lawyer,

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290. *Speiser v. Randall*, 357 U.S. 513, 529 (1958).

291. *See, e.g., Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009) (holding that erecting a permanent monument in a public part is “government speech” and thus strict scrutiny does not apply).

292. *Rust v. Sullivan*, 500 U.S. 173, 194–95 (1991).

293. *Id.* at 203.

294. *Id.* at 182.

295. *Id.* (quoting *N.Y. v. Sullivan*, 889 F.2d 401, 410 (2d Cir. 1989), *aff’d sub nom. Rust v. Sullivan*, 500 U.S. 173 (1991)).

296. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 539 (2001) (quoting *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 769–70 (2d Cir. 1999), *aff’d*, 531 U.S. 533 (2001)).

297. *Id.* at 541 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

however—even a legal services funded lawyer—“is not the government’s speaker,” but rather his client’s advocate.<sup>298</sup>

To be sure, the anti-subordination exemption is a much weaker intervention in legal advocacy than the substantive ban invalidated in *Velazquez*. But if opposition to existing race and sex inequalities is just one political “point of view” among many options, an ethics rule exemption that favors it is viewpoint discrimination. Weak or not, the exemption can be cast as an illegitimate “attempt . . . to exclude from litigation those arguments and theories [the state] finds unacceptable but which by their nature are within the province of the courts to consider.”<sup>299</sup> In *Velazquez*, the Court explained that Congress was not required to fund any civil legal actions, but once such funding was provided, it could not be “aimed at the suppression of ideas.”<sup>300</sup> Likewise, the argument runs, states need not prohibit client-selection discrimination at all. But if they do prohibit race- and sex-conscious client selection, exemptions may not aim to foster political ideologies the state favors and suppress their opposition.

Finally, perhaps the basic distinction between discriminatory exclusion and expression adopted in the early public accommodations cases offers some foothold against a viewpoint discrimination claim. One could argue that the proposed rule’s exemption does not violate the First Amendment as viewpoint discrimination because the conduct that remains forbidden under the rule was not constitutionally protected in the first place. But this argument runs up against another First Amendment precedent.

In *R.A.V. v. St. Paul*, the Court struck down an ordinance that criminalized placing a symbolic object on property knowing that it “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”<sup>301</sup> The Court accepted the state court’s ruling that the statute reached only “conduct that itself inflicts injury or tends to incite immediate violence” and so amounted to “fighting words” unprotected by the First Amendment.<sup>302</sup> Nevertheless, the Court struck down the ordinance as impermissible content-based restriction because, rather than prohibiting all symbolic “fighting words,” it proscribed only conduct that conveyed “a message of hostility” based on race, religion and

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298. *Id.* at 542.

299. *Id.* at 546.

300. *Id.* at 549.

301. 505 U.S. 377, 380 (1992).

302. *Id.* at 381 (quoting *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991), *rev’d*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).

gender.<sup>303</sup> Likewise, opponents of the proposed ethics rule would argue that while a state might be free under the First Amendment to generally prohibit lawyers' race- and sex-based client-selection, it cannot selectively bar only race- and sex-based client choices that support hierarchical ideologies and interests.

One could still draw a thin line between the unconstitutional statute in *R.A.V.* and the proposed ethics rule. The Court in *R.A.V.* emphasized that the problem was not that the ordinance outlawed cross burning, but that it outlawed it based on its expressive content.<sup>304</sup> That emphasis was called out when the Court *upheld* a statute that enhanced the penalty for a criminal assault if it were motivated by race bias.<sup>305</sup> In *Mitchell*, the Court explained that "the ordinance struck down in *R.A.V.* was explicitly directed at expression (*i.e.*, 'speech' or 'messages')" whereas the statute at issue in *Mitchell* singled out "bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm."<sup>306</sup> Here, note the echoes of the basic expression/conduct dichotomy underscored in the canonical civil rights cases, along with the view from those cases that bias-driven conduct inflicts a harm akin to violence. One could argue that prohibiting race- and sex-conscious rejections of clients who occupied subordinate positions in the relevant legal context works to prohibit exclusion that inflicts the most serious harm on both vulnerable individuals and on the legitimacy of the legal system.

The problem with that approach (and arguably with the Court's distinction in *Mitchell*) is that the harm caused by the prohibited conduct seems to be a matter of ideas, and the First Amendment protects even allegedly harmful ideas from government suppression. Thus, the Court cautioned in *Button*, the case that protected the NAACP's solicitation of clients for desegregation litigation, that "First Amendment . . . protections would apply as fully to those who would arouse our society against the objectives of" civil rights.<sup>307</sup> "For the Constitution protects expression and association without regard . . . to the truth, popularity, or social utility of the ideas and beliefs which are offered."<sup>308</sup>

You may already see the obvious fix for this problem. To defeat the viewpoint discrimination claim, one could expand the exemption. Retaining the ban on client selection based on "stereotypes, stigma, or bias," one could exempt all principled race- or sex-conscious client

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303. *Id.* at 393.

304. *See id.* at 396.

305. *Wisconsin v. Mitchell*, 508 U.S. 476, 479 (1993).

306. *Id.* at 487–88.

307. *NAACP v. Button*, 371 U.S. 415, 444 (1963).

308. *Id.* at 444–45.

choices that aimed to advance ideological goals, even if those goals are overtly racist and sexist. After all, lawyers are allowed—indeed sometimes required—to advocate for unpopular and immoral policies and people. A criminal defense firm advertising as “Lawyers for Rapists and Murderers” would be both accurate and ethical, if rather disconcerting, so why not Lawyers for White People, so long as the lawyers behind the sign could prove that their practice was dedicated to advancing the ideological goal of White supremacy, as opposed to simply excluding non-White clients? Why not adopt an ethics rule that allows race-conscious client selection in the service of advocacy for any political goal, whether racial equality or racial hierarchy?

Because such a rule would be unethical! It is a travesty of legal ethics to allow lawyers to reject clients on account of race and sex in order to advocate for further entrenching race and sex hierarchy. While lawyers are surely given constitutional protection to advocate for all kinds of vile anti-democratic interests and for clients who want to promote discriminatory structures, they should not be permitted to engage in conduct that perpetuates those structures.<sup>309</sup> That is the line drawn by the canonical civil rights cases that prohibit restaurants and schools from practicing racial exclusion, even while protecting their right to advocate and teach segregation. The turn to anti-classification prevents us from seeing that alignment because it takes what is just one potential method of achieving equality—formally equal, race-blind treatment—and enshrines it as the goal of equal protection.

### 3. Anti-Classification’s Bite

Critiques of anti-classification usually focus on equal protection, but the viewpoint discrimination analysis shows that the anti-classification approach infects First Amendment doctrine, too. By insisting on formally equal treatment of subordinated and dominant groups, anti-classification turns a rule against conduct that perpetuates inequality into suppression of one side of a political controversy. In a world where equal protection’s main goal is avoiding differential government treatment, rather than dismantling status hierarchy, the proposed rule’s anti-subordination exemption is transformed from constitutionally *required* intervention in discrimination to constitutionally *prohibited* restriction of ideas. It is only if one understands equal protection as a mandate that government work to

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309. This seems to have been the view of the Illinois Character and Fitness committee that refused bar admission to the White Supremacist leader, Matthew Hale. See *In re Hale*, 723 N.E.2d 206, 206 (1999).

achieve substantive equality, or at least allow private action toward that goal, that a viewpoint discrimination claim reliably fails. It fails because the Equal Protection Clause makes eradicating status hierarchy a constitutional goal.

Anti-classification doctrine insists that race-conscious government policies must have some “higher” goal beyond “racial balancing.” But, anti-classification also sees equal protection as primarily, if not exclusively, aimed at ensuring racially balanced treatment. The same opinions that denigrate mechanically proportionate racial representation as a measure of equality assume that the guarantee of equal protection requires a mechanical approach to evaluating government policies. And so long as the treatment is formally the same, it doesn’t matter whether the direction of the change is toward or away from equality, reinforcing or dismantling status hierarchy. In contrast, anti-subordination theory sees equal protection’s primary aim as eliminating status hierarchy. From that perspective, as Lauren Lucas puts it, “the primary inquiry is not whether all identity groups are treated the same, but whether the alleged discrimination affects the claimants in a way that exacerbates their subordination.”<sup>310</sup>

Our anti-classification structure has twisted up the goals and mechanisms of equal protection. In the current regime, race- or sex-conscious efforts to break down hierarchy are presumptively illegitimate. Rather than focusing on the problem of hierarchy and the goal of equality, anti-classification makes race- and sex-neutral policies themselves the goal of equal protection. An anti-subordination view of equal protection reverses the ends-means calculus. Government is empowered to use race- and sex-conscious means for the purpose of destabilizing hierarchy.

The meaning and objectives of anti-classification and anti-subordination doctrines are not static. They develop in the context of contingent historical events and have not always been seen as mutually exclusive. As Reva Siegel points out, the current “understanding that anticlassification and antisubordination are competing principles . . . and justify different doctrinal regimes” developed in part through debates about the legitimacy of the Supreme Court’s rejection of separate but equal accommodations in *Brown v. Board of Education*.<sup>311</sup> As I write this in the summer of 2020, the doctrinal demand for a “neutral” anti-classification approach to legal ethics seems particularly absurd. Every day brings more evidence that Black Americans are stigmatized, burdened, excluded,

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310. Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1609 (2015).

311. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1474, 1474–75 (2004).

rejected, impoverished and, yes, even killed, by racist policies and practices. Refusing to acknowledge the stark racial differences in death rates from Covid-19 and lethal police violence, and ignoring the legal system's complicity in perpetuating those differences, is not neutral. It is racist.

Anti-classification should fail as a civil rights doctrine for the same reason that separate but equal failed. Both distort rather than reflect the real-world meaning and effects of selecting one group and rejecting another, and so obscure real moral difference.<sup>312</sup> Yet, though separate but equal is universally condemned as the paradigmatic failure of equal protection, anti-classification thrives in the U.S. Supreme Court's jurisprudence, and spreads from equal protection to other constitutional provisions and regulatory structures. Arguments for anti-classification are every bit as specious as the arguments in the 1950s that school segregation did not violate equal protection because its treatment of White and Black children was the same and that school integration violated White people's freedom of association.

As Charles Black wrote in his defense of *Brown's* holding that segregated schools violated the Constitution's guarantee of equal protection, "[s]egregation is historically and contemporaneously associated in a functioning complex with practices which are indisputably and grossly discriminatory."<sup>313</sup> The same is true today of the housing segregation, economic disparities, and lack of access to health care that subjects African Americans to greater risks in our current pandemic, to say nothing of the obviously racist police violence that streams stunningly across our video screens. In America today, an anti-racist choice to represent Black clients is ethically distinct from a racist rejection of either Black or White clients. Equating the two is utterly unrealistic. And a constitutional interpretation that forbids lawyers from prioritizing advocacy for Black clients is a fantastic denial of history and of our own witnessing of the radical racial inequality that pervades our daily lives. It produces what Charles Black called "the only kind of law that can be warranted outrageous in advance—law based on self-induced blindness, on flagrant contradiction of known fact."<sup>314</sup>

The upshot is that today's dominant anti-classification ideology

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312. As Richard Primus puts it, "[t]he canonical failure of equal protection analysis, after all, was *Plessy v. Ferguson's* refusal to understand that a formally neutral action might carry a clear meaning about racial hierarchy." Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1347 (2010).

313. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425 (1960).

314. *Id.* at 426.

insulates racist and sexist exclusion and distorts civil rights regulation. In the realm of legal ethics, anti-classification produces a rule that protects everyone against discrimination except people seeking legal representation. In an anti-classification regime, protecting professional practices aimed at making the legal system more egalitarian may require declaring, or at least tacitly suggesting, that it is ethical for lawyers to choose clients in ways that perpetuate prejudice and inequality. There are arguments to be made from within the current doctrinal framework for regulation that realistically distinguishes demeaning stigmatic bias from equality-based professionalism—see Sections III.B.1 and 2 of this paper. But robust protection for such regulation would require something more. It would mean re-energizing the anti-subordination objectives once understood to be the driving force of the constitutional guarantee of equal protection.<sup>315</sup>

#### CONCLUSION

Lawyers are not the only professionals who may wish to use their skills to work toward a more egalitarian society. And we are not the only ones whose efforts can be stymied by anti-classification rules. What of an African American doctor practicing in a mixed-race neighborhood who wants to prioritize treating African American patients? There are few opportunities to receive care from Black doctors and some empirical work suggests that for African Americans, seeing a doctor of their own race correlates with improved health outcomes.<sup>316</sup> An anti-classification approach threatens, if not outright prohibits, that doctor's practice.<sup>317</sup>

If lawyers are not prepared to work under an anti-classification regime, it is not enough to simply avoid incorporating it in our self-regulation—a sort of NIMBY approach to legal ethics.<sup>318</sup> As the

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315. See *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) (holding that the Fourteenth Amendment “cannot be understood without keeping in view the history of the times” in which it was adopted, and that its purpose was to secure to African Americans “the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government”).

316. See, e.g., Nicole Torres, *Research: Having a Black Doctor Led Black Men to Receive More-Effective Care*, HARV. BUS. REV. (Aug. 10, 2018), <https://hbr.org/2018/08/research-having-a-black-doctor-led-black-men-to-receive-more-effective-care> [<https://perma.cc/3C57-LRQP>].

317. See Kimani Paul-Emile, *Patients' Racial Preferences and the Medical Culture of Accommodation*, 60 UCLA L. REV. 462, 468 (2012) (arguing that “accommodating patients’ racial preferences actually advances racial equality”).

318. An acronym for the phrase “Not in My Back Yard,” a NIMBY movement opposes some proposed land use in a neighborhood although residents ostensibly favor such uses in the abstract, for instance a psychiatric clinic or residence for recovering drug addicts. See *Nimby*, DICTIONARY.COM, <https://www.dictionary.com/browse/nimby> [<https://perma.cc/CBX4-9K83>].

professionals most responsible for defending civil rights, lawyers should be more creative and less self-protective. We should try to craft a doctrinally viable approach that forbids exclusion based on stigmas and stereotypes and encourages professional practices aimed at dismantling the inequalities that flow from and perpetuate those stigmas and stereotypes. And if that is not possible under today's doctrinal frameworks, we should work to realign anti-discrimination law with the moral imperatives that drove its creation.