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## ARTICLES

# ETHICAL RULES PROHIBITING DISCRIMINATION BY LAWYERS: THE LEGAL PROFESSION'S RESPONSE TO DISCRIMINATION ON THE RISE

BRENDA JONES QUICK\*

### I. INTRODUCTION

In 1955, when Rosa Parks refused to give up her seat to a white person on a Montgomery, Alabama bus, it is unlikely that she ever anticipated the fallout that would occur from her arrest.<sup>1</sup> The boycott of the Montgomery public bus system that followed sent shock waves through a nation and sparked the beginning of what became known as the civil rights movement. The movement brought about unprecedented change in the law and much of society's way of viewing its minority members.<sup>2</sup> Some evidence of the movement's success is the Civil Rights Act of 1964,<sup>3</sup> which prohibits, among other things, employment discrimination.<sup>4</sup> The Act was passed during the

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1. On December 1, 1955, Rosa Parks, an African-American woman, was riding a public bus when she was ordered by the bus driver to vacate her seat so that a white man could sit down. The area in which she was sitting was in that part of the bus known as "no-man's-land." When she refused, she was arrested. Her arrest led to the Montgomery bus boycott which resulted in the buses of Montgomery, Alabama becoming integrated. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63, at 128-29 (1988).

2. *Id.*

3. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-e17 (1964).

4. *Id.*

presidency of Lyndon Johnson, a Southern democrat. Subsequently, the Civil Rights Act of 1968 was enacted which prohibits certain types of discrimination in housing,<sup>5</sup> age discrimination<sup>6</sup>, and discrimination against women in the work place.<sup>7</sup>

Through legislation and court decisions, our nation has attempted to end the discriminatory practices that have permeated society. Unfortunately, no matter how successful the civil rights laws have been, they alone have not been sufficient to eliminate the evils of discrimination. In fact, today the discrimination and bigotry the civil rights movement had hoped to eliminate appears to be gaining strength. For example, while David Duke, former Grand Dragon of the Ku Klux Klan, lost his bid for governor of Louisiana, he still received 39% of the vote.<sup>8</sup> Much of Mr. Duke's campaign was based upon his claim that white Christians no longer are getting a fair shake.<sup>9</sup>

In response to the resurgence of blatant and outspoken bigotry, initiatives have been undertaken to once again curtail such conduct. On the national front, Congress recently passed the Civil Rights Act of 1991,<sup>10</sup> the purpose of which is "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace . . . ."<sup>11</sup> Locally, some colleges and universities have taken bold steps to eradicate bigoted behavior on their campuses by adopting rules prohibiting hate-speech.<sup>12</sup> Also, lawyers in California, Michigan and New

5. Title VIII, 42 U.S.C. §§ 3601-31 (1968).

6. Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-07 (1975).

7. Title VII, 42 U.S.C. §§ 2000e-e17 (1964).

8. *Duke Goes Down in Defeat*, TIME, Dec. 16, 1991, at 6.

9. Mr. Duke also ran a short race for President of the United States. He claimed that, "The country is overwhelmingly of European descent. It's overwhelmingly Christian. And if we lose its underpinning, I think we're going to lose the foundations of America." Carl M. Cannon, *Duke Opens Challenge to Bush*, DET. FREE PRESS, Dec. 5, 1991, at 3A. Furthermore, he said the U.S. should get tough on the Japanese, "You no buy our rice, we no buy your cars." *Id.*

10. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

11. *Id.* § 3.

12. According to Professor Richard Delgado, the Universities of California, Connecticut, Michigan, North Carolina at Chapel Hill, Pennsylvania, Wisconsin and Texas, Brown University, Emory University, Pennsylvania State University, Tufts University, Trinity College and Mt. Holyoke have adopted anti-harassment policies. See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 358 n.121 (1991) [hereinafter *Campus Antiracism Rules*].

The University of Michigan and the University of Wisconsin's rules were stricken by the courts as unconstitutional. *UWM Post v. Board of Regents*,

Jersey, after discovering discriminatory practices and conduct among their members, have enacted or have proposed amendments to their Rules of Professional Conduct to prohibit such conduct. California's proposed rule and New Jersey's ethics Rule 8.4 as amended, are limited to restricting a lawyer's professional conduct. Michigan's proposed rule, however, encompasses much more. The Michigan rule places restrictions on a lawyer's conduct both in the lawyer's professional and private life.

California has proposed three rules.<sup>13</sup> The first states in part:

- (A) In the management or operation of a law firm or law practice, a member shall not unlawfully<sup>14</sup> discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex [sexual orientation,] religion, age or disability in:
- (1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person, or
  - (2) accepting or terminating representation of any client.<sup>15</sup>

The second proposed rule prohibits a lawyer from engaging in similar discrimination in the performance of legal serv-

774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

13. California has considered anti-discrimination ethics rules proposals since 1986. The most recent, in 1990, stated as follows:

An attorney shall refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status, against parties, witnesses, counsel, or others. This rule does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic or other similar factors are issues in the proceedings.

This rule was redrafted after serious concerns were expressed about the proposal's ability to withstand a constitutional challenge. Interestingly, the arguments that influenced the committee's decision to redraft the rule are similar to the arguments I make in this article to show that the Michigan rule probably will fail if challenged. See Office of Professional Competence, Planning and Development, State Bar of California, *Report and Recommendation Regarding Proposed New Rules of Professional Conduct on Bias and Employment Discrimination* (Oct. 1991).

14. Section (B) of the rule says that "unlawful" is "determined by reference to applicable California or federal statutes forbidding such discrimination in employment and in the offering of business establishments."

15. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Proposed Rule 2-400 (1991)[hereinafter CALIFORNIA RULES].

ices.<sup>16</sup> The third rule is limited to restrictions on a lawyer's conduct in trial practice.<sup>17</sup>

New Jersey's amended ethics Rule 8.4 (g) is as follows:

It is professional misconduct for a lawyer to: engage in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, marital status, socioeconomic status, or handicaps, where the conduct is intended or likely to cause harm.<sup>18</sup>

Michigan's proposed rule, as previously stated, is broader in scope. It states:

Discriminatory Practices:

- (a) A lawyer shall not engage in invidious discrimination on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin and shall prohibit staff and agents subject to the lawyer's direction and control from doing so.
- (b) A lawyer shall not hold membership in any organization which the lawyer knows invidiously discriminates on the basis of gender, race, religion, disability, age, sexual orientation or ethnic origin.
- (c) A lawyer serving as an adjudicative officer shall prohibit invidious discrimination on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin, against parties, witnesses, counsel, or others on the part of lawyers in proceedings before the adjudicative officer.<sup>19</sup>

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16. *Id.* Proposed Rule 3-220(A) states: "In the performance of legal services, a member shall not threaten, harass, embarrass or impugn any other person on the basis of race, national origin, sex, [sexual orientation,] religion, age or disability." Section (B) of this rule makes an exception for speech and conduct that is protected by the federal and state Constitutions.

17. *Id.* Proposed Rule 5-200(F) prohibits a lawyer from threatening, harassing, embarrassing, or impugning "any party in the matter or any other lawyer, witness, juror or prospective juror, judge, judicial officer, or tribunal employee on the basis of the party's or individual's race, national origin, sex, [sexual orientation,] religion, age or disability." This rule also has an exception for constitutionally protected speech and conduct.

18. NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 8.4(g) (1990)[hereinafter NEW JERSEY RULES].

19. The State Bar of Michigan has recommended that the Michigan Supreme Court adopt MICHIGAN RULES OF PROFESSIONAL CONDUCT Proposed

These proposed and adopted ethics rules have been and continue to be hotly debated by the members of those bars,<sup>20</sup> in part because the rules are not advisory, but obligate and subject lawyers to sanctions if they are violated.<sup>21</sup> Of particular concern is seeing that the rules are drafted in such a way that they are clear, enforceable, and can survive a constitutional challenge.<sup>22</sup>

The purpose of this article is to examine some of the issues that have been raised regarding the newly adopted and proposed anti-discrimination ethics rules. More specifically, it will address the potential conflicts and limitations the rules have with other sections of the ethics codes, the constitutional issues that have been raised, and which of the rules, if any, may survive constitutional scrutiny.

## II. THE ETHICS RULES

### A. *Representing the Unwanted Client*

#### 1. Conflicts and limitations with other sections of the ethics codes.

##### a. *Accepting a prospective client*

Prior to the proposed and adopted anti-discrimination rules, lawyers had an almost unfettered right to represent clients of their choice, or perhaps more importantly, the right not to represent certain persons.<sup>23</sup> Lawyers have been able to refuse to represent clients for whatever reason—"because the client is not of the lawyer's race or socioeconomic status;

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Rule 5.7 (1988) [hereinafter MICHIGAN RULES]. The supreme court has not ruled on the proposal at this time.

20. See Ingrid Farquharson et al., *Can Rules Eliminate "Invidious Discrimination"?*, 69 MICH. B.J. 1280 (1990); John Leo, *Our Misguided Speech Police*, U.S. NEWS & WORLD REP., Apr. 8, 1991, at 25.

21. The Preamble of the Model Rules of Professional Conduct states in part: "Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."

22. See Transcript of the Representative Assembly State Bar of Michigan (Sept. 13, 1990) at 88-152 [hereinafter Transcript]; Memorandum from David Bell, Office of Professional Competence, Planning and Development, to the Board Committee on Admissions and Competence re Gender Bias (Apr. 10, 1991)[hereinafter Memorandum]; Office of Professional Competence, Planning and Development, State Bar of California, *Report and Recommendation Regarding Proposed New Rules of Professional Conduct on Bias and Employment Discrimination* (Oct. 1991)(available from State Bar of California).

23. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.2.2, at 573 (1986).

because the client is weird or not, tall or short, thin or fat, moral or immoral."<sup>24</sup> The only exceptions to this rule have been a lawyer's duty to represent the unpopular client<sup>25</sup> and the duty to accept court appointments.<sup>26</sup> But even with court appointments, a lawyer has been able to seek avoidance of an appointment if certain conditions exist.<sup>27</sup> Included among these conditions is the right to avoid appointment if the lawyer considers the client so repugnant that the attorney-client relationship will be impaired, or the lawyer believes the repugnancy will result in the lawyer not being able to properly represent the client.<sup>28</sup>

In keeping with these good cause exceptions, the courts have found that a lawyer's personal prejudice against a prospective client is a legitimate reason for declining representation.<sup>29</sup> As explained by a California court, "The acceptance of a client by a lawyer involves a complex set of personal and professional judgments. Included in this calculus is the attorney's evaluation of whether he or she harbors any feelings of repugnance for the client."<sup>30</sup> The court recognized that there is more to the attorney-client relationship than the law. It

24. *Id.*

25. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 cmt. (1992)[hereinafter MODEL RULES], which states in part, "An individual lawyer fulfills this [pro bono publico service] responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients."; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-27 (1983)[hereinafter MODEL CODE]; *State v. Maddux*, 571 S.W.2d 819 (Tenn. 1978).

26. MODEL RULES, *supra* note 25, Rule 6.2 states in pertinent part:

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in a violation of the Rules of Professional Conduct or other law;

....

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Michigan and New Jersey have adopted this rule. See also MODEL CODE, *supra* note 25, EC 2-29.

27. MODEL RULES, *supra* note 25, Rule 6.2. For California, see *Cunningham v. Superior Court of Ventura County*, 222 Cal. Rptr. 854 (1986).

28. MODEL RULES, *supra* note 25, Rule 6.2(c).

29. A contempt charge against a lawyer was dismissed after the Supreme Court found that the lawyer's attempts to avoid a court appointment were based on alleged conflicts of interest and his personal prejudice against the defendant. *State v. Maddux*, 571 S.W.2d 819 (Tenn. 1978).

30. *Cunningham v. Superior Court of Ventura County*, 222 Cal. Rptr. 854, 867 (1986).

involves communications between two human beings. Therefore, the court believed that if the lawyer and client are unable to communicate effectively for whatever reason, the relationship should not exist.<sup>31</sup>

The anti-discrimination rules would limit these good cause exceptions.<sup>32</sup> To explain, if the repugnancy is based on something other than the fact that the prospective client belongs to one of the groups identified in the anti-discrimination rules, the lawyer may rely on the good cause exceptions and refuse to represent the client. However, if the client falls into one of those groups and the lawyer does not want to represent the client because of his membership in that group, then the lawyer cannot refuse to accept the prospective client notwithstanding the lawyer's personal feelings. California's Proposed Rule 2-400(A)(2) expressly prohibits refusing to accept a client on the basis of race, national origin, sex, religion, age or disability.<sup>33</sup> And while Michigan and New Jersey's rules do not include similar language, that prohibition is implicit in those rules by virtue of their application. For example, assume that Mary has an aversion to Presbyterians. Fred, a Presbyterian, wants to hire Mary to represent him in a lawsuit against his former employer, the University of Higher Learning. He claims that he was denied tenure because he was a Presbyterian, and not because he did not satisfy the requirements for tenure. If Mary refuses to represent Fred for the sole reason that she does not want to have a Presbyterian as a client, she has violated the Michigan and New Jersey anti-discrimination rules because she has discriminated against him on the basis of his religion, something she is not permitted to do under either rule.<sup>34</sup> Thus in order to avoid unethical conduct, she will be forced to accept Fred as a client notwithstanding her personal feelings.

*b. Withdrawing as counsel*

In addition to the traditionally recognized right of a lawyer to refuse to accept a prospective client, a lawyer also has the right to withdraw from a case if she discovers at some future date that her client is so repugnant to her that she cannot in good conscience continue with the representation.<sup>35</sup> In fact,

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31. WOLFRAM, *supra* note 23, § 4.3, at 158-59.

32. CALIFORNIA RULES, *supra* note 15, Proposed Rule 2-400(A)(2); MICHIGAN RULES, *supra* note 19, Proposed Rule 5.7; NEW JERSEY RULES, *supra* note 18, Rule 8.4(g).

33. See *supra* notes 13-17 and accompanying text.

34. See *supra* notes 18-19 and accompanying text.

35. See CALIFORNIA RULES, *supra* note 15, Rule 3-700(c)(6); MICHIGAN



the ethics codes require a lawyer to withdraw if the lawyer is unable to represent the client as mandated under the rules.<sup>36</sup> The proposed and adopted anti-discrimination rules suggest a significant change from this right to withdraw as counsel.<sup>37</sup> By strict interpretation of the rules, a lawyer could not withdraw from a case if the basis for that withdrawal was the fact that the client falls within one of those classes of persons as defined under the rules.

It is important to note, however, that by complying with the anti-discrimination rules a lawyer could find herself in violation of other ethics rules. Once a lawyer has accepted a client, she has a continuing duty to zealously and competently represent him,<sup>38</sup> and if she cannot do this, she is required to withdraw as counsel.<sup>39</sup> But if the lawyer attempts to withdraw because she cannot represent the client as required under the code, and the reason for her failure to provide the appropriate representation is that she finds the client repugnant because the client is a member of one of the classes identified in the anti-discrimination rules, she violates the anti-discrimination

RULES, *supra* note 19, Rule 1.16(b)(6); NEW JERSEY RULES, *supra* note 18, Rule 1.16(b)(6).

36. For Michigan and New Jersey, Rule 1.16(a)(1) requires a lawyer to withdraw from representation if such representation would result in the lawyer violating her code of ethics. For California, see Rule 3-700(B)(2). It may be argued that if the lawyer finds the client so repugnant that the lawyer cannot continue zealous representation, she is obligated to withdraw. See CALIFORNIA RULES, *supra* note 15, Proposed Rule 3-110; MICHIGAN RULES, *supra* note 19, Rule 1.3; NEW JERSEY RULES, *supra* note 18, Rule 1.3.

37. The scope of the proposed and adopted rules is limited in that those rules only apply to situations that involve certain types of discriminatory conduct and speech against persons who fall within certain identifiable groups such as race, gender, religion, disability, age, and sexual orientation. California also includes national origin and socio-economic factors. New Jersey includes marital status. All other cases would remain the same as before under the rules.

38. New Jersey and Michigan's Rule 1.1 requires in part: "[a] lawyer shall provide competent representation to a client." Rule 1.3 requires "[a] lawyer [to] act with reasonable diligence and promptness in representing a client." Furthermore, the Comment to Michigan's Rule 1.3 states in part: "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." California's Rule 3-110 requires a lawyer to perform all services competently. The rules go on to define "competently" as applying the law and the lawyer's skills diligently. A lawyer's "ability" is defined as, among other things, having the emotional ability to perform the necessary legal services.

39. CALIFORNIA RULES, *supra* note 15, Rule 700(B)(2); MICHIGAN RULES, *supra* note 19, Rule 1.16(a)(1); NEW JERSEY RULES, *supra* note 18, Rule 1.16(a)(1).

rules. Clearly, this places the lawyer in an awkward position. She is "damned if she does, and damned if she doesn't."

## 2. Personal prejudices and professional obligations.

The anti-discrimination rules can be effective only if lawyers are able to conform their behavior accordingly. Thus, the question that needs to be asked with regard to the anti-discrimination rules is whether it is realistic to expect a lawyer to ignore and put aside her personal prejudices and biases if she wants to remain a lawyer in good standing.

This question has been the subject of prior debate. One approach has been adopted by those who claim the lawyer's first obligation is to serve the public and see that society's trust in the legal system remains intact. They believe that these duties can be accomplished only if the lawyer puts aside her personal prejudices and biases.<sup>40</sup> Certainly, the Michigan Ethics Committee has adopted this position. It reported that the purpose of that jurisdiction's proposed anti-discrimination rule was to protect the public's confidence in the legal system.<sup>41</sup> As stated in their report, "[a]ny manifestation of invidious discrimination by lawyers or judges damages public confidence in the fairness and impartiality of the administration of justice."<sup>42</sup>

Furthermore, the supporters of this position argue that all persons who are entitled to the protection of the law must have access to the courts, particularly since the legal system is so complex that most persons are dependent upon lawyers to walk them through it.<sup>43</sup> They believe that the greatest injustice a person could suffer would be the denial of access to the legal system that was designed to protect him because a lawyer's personal prejudices resulted in the lawyer's refusal to accept him as a client.<sup>44</sup> Thus, it is the lawyer's responsibility to overcome

40. *Michigan Bar Approves Antibias Rules for Codes of Conduct*, B. LEADER, Nov.-Dec. 1990, at 4 [hereinafter *Michigan Bar Approves Antibias Rules*]; Stephen L. Pepper, *Autonomy, Community and Lawyers' Ethics*, 19 CAP. U. L. REV. 939 (1990); Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER* 150, 164-69 (David Luban ed., 1983).

41. *Michigan Bar Approves Antibias Rules*, *supra* note 40, at 4.

42. *Id.*

43. Pepper, *supra* note 40, at 940.

44. See generally Schwartz, *supra* note 40, at 164-69. This argument would apply only in the most extreme circumstances. For example, if an African-American lived in a small community that had only three lawyers, all of whom despised and refused to represent blacks, the African-American might have difficulty taking his case to court if he could not find a lawyer from another town to represent him. His only choice might be to file his complaint *pro se*, which might be no choice at all, if the litigation is complex. However, it

her prejudices and provide the legal assistance necessary to help the client. If she cannot do this, she must bear the weight of possible sanctions for violating her code of ethics.<sup>45</sup>

On the other hand, many ethics scholars suggest that a lawyer should not be forced to accept a client she cannot adequately represent.<sup>46</sup> Furthermore, she has a duty to withdraw from a case if proper representation cannot be maintained.<sup>47</sup> As explained by Professor Geoffery Hazard, "Indeed, a lawyer must reject a case if she knows or reasonably believes that because of moral qualms she will not be able to provide full zealous representation."<sup>48</sup> This is so even if it means the potential client may have to find access to the courts with the aid of another lawyer. These scholars recognize that persons with meritorious claims are entitled to access to the courts; however, they believe that the means of providing that access should not be enforced through the ethics codes. Universal access to the courts is hardly the purpose for which the ethics codes were adopted.<sup>49</sup>

The second approach, while on the surface appearing harsh, is much more realistic than the first. It recognizes human nature for what it is and accepts the inevitable. If a lawyer is forced to represent a client that she does not want "[the] quality of the . . . service can be expected to decrease in almost direct proportion to the loss of choice of the professional in rendering the service."<sup>50</sup> A client has the right to expect loyalty<sup>51</sup>, competence<sup>52</sup>, and zealous representation<sup>53</sup> from his lawyer. However, where the representation is forced, these minimum standards may be lacking. Furthermore, if the lawyer

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would be extremely rare for any person with a meritorious claim, regardless of his race, sexual preference, or other characteristic, to be unable to find a lawyer to represent him.

45. In addition to disciplinary charges, the lawyer also may face the possibility of a legal malpractice suit filed by the disgruntled client.

46. GEOFFERY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.2:302, at n. 1 (2d ed. 1990).

47. *MODEL CODE*, *supra* note 25, Rule 1.16(a)(1).

48. HAZARD & HODES, *supra* note 46, § 1.2:302, at 35 & n.1.

49. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 239 (1988).

50. *Cunningham v. Superior Court of Ventura County*, 222 Cal. Rptr. 854, 866 (1986).

51. *MODEL RULES*, *supra* note 25, Rule 1.7 cmt. states: "Loyalty is an essential element in the lawyer's relationship to a client."

52. *Id.* Rule 1.1.

53. *Id.* Rule 1.3 cmt. states in part: "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

fails in any of these, it is the client who suffers and will pay the price of the poor representation.

The fact that the lawyer may be disciplined under the ethics code will bring little solace to an injured client. The client may have to resort to a legal malpractice suit to recover some of his losses and such a case is not easy to win. Moreover, the client would be forced to litigate his case twice. First, he tries the case with lawyer number one, the lawyer who does not want to represent him, and again in the legal malpractice suit where he has to convince the trier of fact that he would have won the first time around had it not been for his representation by lawyer number one. Furthermore, a malpractice suit will cost him additional attorneys' fees and expenses. This does not take into account the loss of respect for the legal system the client likely will suffer. It would seem that if lawyer number one had been able to refuse to accept the client when the services originally were sought, the client possibly would have been spared all this unpleasantness and additional expense. Certainly, the public will gain nothing if representation is forced and the representation results in only more problems for an already troubled client.

Furthermore, if one accepts the proposition that some, if not most, lawyers are unable to separate their personal values and prejudices from their professional responsibilities, a lawyer who wishes to avoid sanctions for violating the code of ethics still may do so by hiding her real reasons for refusing to represent the client. The lawyer knows that if she fails to represent the client within the parameters of the code, she may be subjected to sanctions. Therefore, she may choose to take what she sees as the only way out by articulating an acceptable conflict that would allow her to escape from representing the unwanted client. If no acceptable conflict can be found, she simply may resort to fabricating a reason that appears legitimate on the surface. In other words, she will lie. This does not mean she is not in violation of the ethics code,<sup>54</sup> but it probably will protect her from sanctions. Moreover, it is unlikely that her deceit will be discovered unless she has a pattern of rejecting clients who fall within the protection of the rule. Thus, it is obvious that enforcement of the rule, at least in this situation, could be extremely difficult, if not impossible.

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54. By lying about her reasons for refusing the client, she violates not only the anti-discrimination rule, but also MODEL RULES, *supra* note 25, Rule 8.4(c) which states that "It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

### B. Control Over the Lawyer's Employees

The proposed California anti-discrimination rules and the adopted New Jersey anti-discrimination rule make no reference to a lawyer's duty regarding her employees' conduct; however, other existing ethics rules make lawyers in those jurisdictions as well as in Michigan responsible for the conduct of employees under their supervision. Rule 5.3 of the Michigan and New Jersey Rules of Professional Conduct states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

The comment following California's Rule 3-110 indicates that lawyers in that jurisdiction have a similar duty.<sup>55</sup> Thus, lawyers must make all reasonable efforts to see that their non-lawyer employees refrain from engaging in inappropriate conduct in the performance of their duties.

However, it appears that the State Bar of Michigan did not believe that Rule 5.3 was adequate to guarantee that lawyers will do what is necessary to see that their staff and agents refrain from engaging in discriminatory conduct. As a result, expressly written into Michigan's proposed anti-discrimination rule is a requirement that a lawyer must "prohibit staff and agents subject to the lawyer's direction and control from [engaging in invidious discrimination]. . . ." <sup>56</sup> This language appears to impose upon a lawyer a much greater duty than that imposed upon her under Rule 5.3.

First, the proposed Michigan rule makes no reference to a standard of reasonableness as does Rule 5.3. Instead, the rule requires that a lawyer follow a strict standard of accountability to prohibit invidious discrimination by her employees and agents. The strict standard of accountability will force a lawyer to take whatever steps are necessary to ensure that the prohibited conduct does not occur. This would mean that a lawyer will have to take extraordinary measures, if necessary, to curb

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55. See CALIFORNIA RULES, *supra* note 15, Rule 3-110 cmt.

56. MICHIGAN RULES, *supra* note 19, Proposed Rule 5.7(a) states in pertinent part that "A lawyer shall not engage in invidious discrimination . . . and shall prohibit staff and agents subject to the lawyer's direction and control from doing so." The New Jersey and California rules do not include this requirement.

the discrimination even if it means going beyond what ordinarily is considered reasonable.

Second, the proposed Michigan rule appears to impose accountability upon a lawyer for the conduct of some employees and agents for which she would not be held responsible under Rule 5.3. The proposed Michigan rule refers to all "staff and agents subject to the lawyer's direction and control." Rule 5.3 limits the lawyer's obligation to overseeing the conduct only of those employees for whom a lawyer has "direct supervisory authority." Clearly, it is possible to have general direction and control over an employee or agent without having direct supervisory authority over him. For example, an associate with a law firm may direct and control a paralegal's work with regard to a particular client; however, the associate probably will have no authority to discipline or terminate the paralegal if the paralegal engages in prohibited discriminatory conduct. Nevertheless, under Michigan's proposed rule, the associate would be responsible for seeing that the paralegal does not engage in such conduct.

Third, Rule 5.3 recognizes that nonlawyers may "need time to adjust to their quasi-professional roles, for they may not have been subject to such norms before, or have been aware that they exist."<sup>57</sup> The Michigan anti-discrimination rule makes no allowances for an adjustment period. The lawyer's staff and agents are required to conform their conduct immediately.

It appears that the drafters of the proposed Michigan rule found the conduct in question so offensive that they decided to impose a much higher standard on lawyers than has bound them in the past, at least with regard to certain types of discriminatory conduct by their staff and agents. This may be the reason that the drafters added a section to the new rule rather than rely on the existing code for governance. However, by imposing this higher standard, several questions are raised. What happens if the staff person or agent engages in prohibited discriminatory conduct notwithstanding prior warnings to the contrary? What if the lawyer did not inform the nonlawyer about the anti-discrimination rule because she believed her employee or agent incapable of committing such an act? Will the lawyer be subject to sanctions because the misconduct has occurred? What type of action must the lawyer take against the offender? Must the staff person or agent be terminated, or will a reprimand be sufficient? What if the lawyer has no supervi-

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57. HAZARD & HODES, *supra* note 46, § 5.3:102.

sory authority over the employee and cannot discipline the employee?

To date, there are no apparent answers to these questions. Consequently, it puts lawyers in the precarious position of having a responsibility under the rule, but with no direction as to how that responsibility should be fulfilled.

### III. THE CONSTITUTIONAL ISSUES

#### A. *Introduction*

It is my contention that the proposed Michigan rule and the adopted New Jersey rule raise constitutional questions that place their survival in jeopardy. More specifically, the rules attempt to prohibit certain types of speech and conduct, much of which is protected under the First Amendment of the Constitution.

First, this section will summarize the perspectives and legal arguments of those who support broad restrictions against certain types of discriminatory speech and conduct.<sup>58</sup> Following that discussion, will be my critical examination of those arguments. I will attempt to show why I believe the arguments of the proponents have little legal bases. Lastly, I have included a discussion of constitutional issues that were not raised by the proponents, but I believe are critical in determining whether the rules are constitutional.

#### B. *In Support of Regulation*

While most of the literature written in support of regulating discriminatory conduct has been confined to the regulation of racist and anti-semitic speech,<sup>59</sup> some of the proponents of such regulation have expressed their support of public restric-

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58. See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech On Campus*, 1990 DUKE L.J. 431, 444. Professor Lawrence states that "[r]acism is both 100% speech and 100% conduct." *Id.*

59. See, e.g., *Campus Antiracism Rules*, *supra* note 12; Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L.L. REV. 133 (1982) [hereinafter *Words that Wound*]; Lawrence, *supra* note 58; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2331 (1989). But see CATHARINE MACKINNON, *FEMINISM UNMODIFIED, DISCOURSES ON LIFE AND THE LAW* (1987). Many of Professor MacKinnon's arguments in favor of prohibiting pornography are the same or similar to the arguments proposed by Professors Matsuda, Delgado and Lawrence regarding racist speech. Professor MacKinnon discusses "how [pornography] is a harm of gender inequality, and how that far outweighs any social interest in its protection by recognized First Amendment standards." *Id.* at 177.

tions against other forms of hate speech such as pornography,<sup>60</sup> anti-lesbian speech and anti-gay speech.<sup>61</sup> I believe it is fair to assume that some of the arguments promulgated to support their position vis-a-vis racist and anti-semitic speech also would apply in support of the other forms of hate speech. Since the proposed and adopted anti-discrimination ethics rules are efforts to regulate conduct similar to the conduct the proponents of regulation wish to curtail, it is appropriate to examine their legal arguments in support of such regulation.

The proponents of regulation uniformly focus on the victim rather than the speaker. They examine in great detail the impact discriminatory conduct has on those minorities who suffer from it.<sup>62</sup> For example, Professor Mari Matsuda goes beyond the immediate personal indignation and insult that racist conduct can cause and delves, quite effectively, into the long term ramifications of being a victim.<sup>63</sup> "Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."<sup>64</sup> Professor Charles Lawrence adds reputational injury and deep emotional scarring to the list.<sup>65</sup> Professor Richard Delgado examines the lasting impact that continuing racism has on the psychological, sociological and political effects of those who suffer from harmful discrimination.<sup>66</sup> According to Professor Delgado, racial insult is a mechanism whereby attitudes of discrimination are nurtured which create and maintain "distinctions of merit, dignity, status, and personhood."<sup>67</sup>

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60. See, e.g., MACKINNON, *supra* note 59.

61. See, e.g., Matsuda, *supra* note 59, at 2331-32.

62. MACKINNON, *supra* note 59, at 177-79; *Campus Anti-Racism Rules*, *supra* note 12, at 345-48; *Words that Wound*, *supra* note 59, at 135-49; Lawrence, *supra* note 58, at 458-66; Matsuda, *supra* note 59, at 2326-31.

63. Matsuda, *supra* note 59, at 2378. Professor Matsuda explores several case studies involving racist speech and the effects of such speech on its victims. She concludes by stating that "[w]hen hate propaganda spreads attitudes of racism and desensitizes potential abusers to the wrongness of violence, other more obvious goals of safety and order are sacrificed." *Id.*

64. *Id.* at 2336.

65. Lawrence, *supra* note 59, at 462.

66. *Id.* at 136

67. *Words that Wound*, *supra* note 59, at 136. The examination of the harmful impact racial insults have on minorities continues today. A recent article discusses the impact upon black students who perform well in school. According to the article, many of those students receive pressure from their black peers not to act so "white." Being white is associated with doing well in school. *Some Black Students Bear a Burden of Being Smart*, DET. FREE PRESS, Sept.



However, the proponents do not focus on the victim simply because they believe the victim suffers long-term harm. This alone would raise a moral issue, but would offer little legal basis upon which to support a regulation. The foundation upon which they build their legal arguments is their contention that the victim has an equal protection right under the Fourteenth Amendment to be free from harmful discriminatory acts committed against them.<sup>68</sup>

While the proponents acknowledge that state action must exist before protection under the Fourteenth Amendment can be asserted, they claim that state action is present when one of two things occur: (1) the state offers its protection to persons who engage in certain types of discriminatory conduct or (2) the state fails to restrict certain types of discriminatory conduct.<sup>69</sup>

The first argument relies on the premise that when the state provides protection for those persons who engage in discriminatory conduct, it acts in conjunction with or "in a joint venture" with the speaker.<sup>70</sup> Thus, it not only is the speaker who is engaging in the discriminatory conduct, but also the state by virtue of its protection.

Second, state action is triggered when the government idly stands by and allows such discriminatory conduct to occur. Professor Matsuda argues that, "State silence . . . is public action where the strength of the new racist groups derives from their offering legitimization and justification for otherwise socially unacceptable emotions of hate, fear, and aggression."<sup>71</sup>

Perhaps even more forcefully stated is the proposition by Professor Frank Michelman,<sup>72</sup> that by refusing to regulate conduct that results in a "subversion of liberty and equal protection" of certain persons, the state is choosing "to incur those subversions and thereby to cause them by even the strictest

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24, 1991, at 1A. This may be a continuation of the attitudes that are reinforced about how minorities perceive themselves, given the attitudes society imparts upon them.

68. See Lawrence, *supra* note 58, at 444-49.

69. The conduct to which they allude is discriminatory conduct that is harmful. More specifically, racist speech, ant-semitic speech, and pornography.

70. Lawrence, *supra* note 58, at 445-46; Matsuda, *supra* note 59, at 2378.

71. Matsuda, *supra* note 59, at 2378.

72. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989). Professor Michelman argues in favor of pornography regulation.

notions of legal causation.”<sup>73</sup> At the very least, the government’s failure to regulate discriminatory conduct infringes on the rights of minorities to liberty and equal protection.<sup>74</sup> In effect, these assertions convert nonaction into action. By the state refusing to act, it causes and supports the conduct that most of society finds so reprehensible.

While the proponents uniformly agree that the victim has a constitutional right to be protected against hate conduct, they are at odds as to whether the offender’s conduct falls within the parameters of the First Amendment.<sup>75</sup> Some contend that the speaker’s conduct may fall within the parameters of the First Amendment, but claim the state has a compelling interest to restrict it anyway.<sup>76</sup> The basis for the restriction is that the harm to the victim that results from the discriminatory conduct far exceeds the harm suffered by the offender whose words are stifled. Thus, the rights of the victim should succeed over the rights of the offender.<sup>77</sup>

Other proponents claim that the offender’s speech should be outside the parameters of the First Amendment. These proponents argue that the Court has recognized that certain con-

73. *Id.* at 307-08.

74. *Id.* at 308.

75. However, the proponents do not always make the distinction between speech that never falls within the protection of the First Amendment such as obscenity (*Roth v. United States*, 352 U.S. 964 (1956)) and speech that is unprotected because it falls outside the purpose of the amendment. The latter would include the prevention of a person from “falsely shouting fire in a theatre and causing a panic.” *Schenck v. United States*, 249 U.S. 47, 52 (1919). Certainly, a person may yell fire in an empty theatre. The purpose of the First Amendment is to allow the expression of ideas. Yelling fire in a crowded theatre does not advance that purpose. It only creates a clear, present and imminent danger, something the state has the right to prevent.

76. *See* Lawrence, *supra* note 58 at 457-58; *see also* MACKINNON, *supra* note 59.

Judicial resolution of this conflict [equality guaranteed to all women and the freedom of pornographers to make and sell, and their customers to have access to certain pornographic materials], if the judges do for women what they have done for others, is likely to entail a balancing of the rights of women arguing that our lives and opportunities, including our freedom of speech and action, are constrained by—and in many cases flatly precluded by, in, and through—pornography, against those who argue that the pornography is harmless, or harmful only in part but not in the whole of definition; or that it is more important to preserve the pornography than it is to prevent or remedy whatever harm it does.

*Id.* at 177-78.

77. *See generally* Lawrence, *supra* note 58; *Words that Wound*, *supra* note 59.

duct does not fall within the protection of the First Amendment,<sup>78</sup> and hate speech should be denied protection as well.<sup>79</sup> They base much of their position on the premise that hate speech is so reprehensible and devoid of social worth that nothing is lost by its prohibition.<sup>80</sup>

The case law upon which some of the proponents rely to support such regulation is found in *Chaplinsky v. New Hampshire*.<sup>81</sup> The Supreme Court held that the defendant's speech was not protected under the First Amendment because the

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78. Professor Matsuda notes that certain types of expressions are limited by law such as "false statements about products, suggestions that prices be fixed, opinions about the value of stock, and pro-employer propaganda during union elections." Matsuda, *supra* note 59, at 2354. Professor Delgado refers to the government's carving out several exceptions to the First Amendment. He cited criminal conspiracy, defamation, libel, plagiarism, fighting words, patently offensive speech on the airwaves, speech intended to defraud, criminal threats, disclosing official secrets, and perjury, to name a few. *Campus Antiracism Rules*, *supra* note 12, at 377. Professor Lawrence argues that *Brown v. Board of Education*, 347 U.S. 483 (1954), was a case about regulating racist speech. Lawrence, *supra* note 58, at 438-40.

See also *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1941); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Stromberg v. California* 283 U.S. 359 (1931); *Schenck v. United States*, 249 U.S. 47 (1919).

79. Matsuda, *supra* note 59, at 2356-61. Professor Matsuda limits her arguments to racist speech. She proposes that racist speech, because of its inherent evil, should be treated as a *sui generis* category and outside the protection of the First Amendment. However, she does not advocate the stifling of all racist speech. She states that "arguing that particular groups are genetically superior in a context free of hatefulness and without the endorsement of persecution is permissible. Satire and stereotyping that avoids persecutorial language remains protected. Hateful verbal attacks upon dominant-group members by victims is permissible." *Id.* at 2358. I have difficulty with the forms of speech Professor Matsuda would permit. First, I believe it is extremely difficult to argue that one group is genetically superior to another or that stereotyping can occur without it having a persecutory effect. Second, if the verbal attacks against dominant-group members to which she alludes are racist, I believe it weakens her position. That would mean that she is opposed to racist speech against society's minorities, but condones it against others. If racist speech is "so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation . . ." *id.* at 2357, it would seem that she would seek restrictions of such speech against all persons. The victim is no less harmed because he is white.

80. See generally Lawrence, *supra* note 58.

81. 315 U.S. 568 (1941). Professor Matsuda does not take this position. She argues that extending the "fighting words" doctrine of *Chaplinsky* to include racist speech only would weaken the fabric of the First Amendment. Instead, she claims that racist speech should be a *sui generis* category that is outside the protection of the First Amendment. Matsuda, *supra* note 59, at 2357-61.

utterances in question were not intended to expose ideas,<sup>82</sup> but were “insulting or ‘fighting’ words—those by their very utterance intended to inflict injury or tend to incite an immediate breach of the peace.”<sup>83</sup> In *Chaplinsky*, the defendant publicly called a city marshall a “racketeer” and “a damned Fascist.” The insults resulted in his arrest and conviction for violating a state statute which prohibited a person from addressing another in a manner that was intended to “deride, offend or annoy him.”<sup>84</sup>

The importance of this case is the language in the opinion that allows restrictions of utterances if they “inflict injury.” The rule focuses on the reaction the speech causes. Again, the central figure is the victim, not the speaker. The Court implies that since the loss to the speaker is minimal and the recipient of the speech suffers great harm, the emphasis should be on the recipient. *Chaplinsky* suggests that while the First Amendment protects ideas, it does not necessarily protect all ways of packaging them.<sup>85</sup>

In addition to *Chaplinsky*, the supporters of regulation turn to *Beauharnais v. Illinois*,<sup>86</sup> a case in which the court held that the accused could be found guilty under a criminal libel law for handing out pamphlets that portrays a class of people, rather than simply an individual, in a libelous manner. Prior to *Beauharnais* the crime of libel was imposed only when it was committed against individuals. However, the Court held that speech directed at groups could be punishable, too, if that speech resulted in harm to the group.<sup>87</sup> The proponents of regulation claim that even though subsequent cases have weakened the force of *Beauharnais*,<sup>88</sup> it still is good law and supports regula-

82. “Resort to epithets or personal abuse is not in any proper sense communication by the Constitution.” *Chaplinsky*, 315 U.S. at 572 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)).

83. 315 U.S. at 571.

84. *Id.* at 569.

85. *Id.* at 573-74. The fighting words doctrine was discussed in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2358 (1992), wherein the Court noted that it was not the content of the speech that was being regulated, but the speaker’s intolerable mode of expression. See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-8, at 839 (2d ed. 1988).

86. 343 U.S. 250 (1952).

87. *Id.* at 258.

88. See *Words that Wound*, *supra* note 59, at 175 n.250; see also, *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Court held that a libelous statement must be directed at a public official rather than a unit of government. Even though *New York Times* dealt with public officials, the principle may be the same. Personal harm rather than group harm must be proven before a cause of action exists.

tion aimed at protected classes of persons as well as individuals.

Finally, the proponents of regulation argue that the government has an obligation to emulate the international community which has become actively involved in restricting discriminatory conduct.<sup>89</sup> The United Nations General Assembly has adopted Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>90</sup> which prohibits all propaganda by persons, organizations, public authorities or public institutions that promotes the superiority of a particular race or ethnic group. Furthermore, Article 4 makes such conduct a crime punishable by law.<sup>91</sup> The United Kingdom has adopted the Race Relations Act,<sup>92</sup> Canada has criminal statutes governing hate propaganda,<sup>93</sup> and Australia and New Zealand have laws that restrict racist speech.<sup>94</sup> The proponents note that the United States is the only major com-

89. See *Campus Antiracism Rules*, *supra* note 12, at 362-71; Matsuda, *supra* note 59, at 2341-48.

90. Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Convention on Racial Discrimination]. Article 4 states:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organization or activities as an offence punishable by law; [and]

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

91. *Id.*

92. Race Relations Act, 1965, ch. 73, § 6(1)(Eng.). Professor Matsuda discusses in some detail this act as well as the laws adopted by other countries which prohibit racist conduct. Matsuda, *supra* note 59, at 2346 n.139 and accompanying text.

93. R.S.C., ch. C-46, §§ 318, 319 (1985)(Can.).

94. Matsuda, *supra* note 59, at 2347 n.143.

mon law country that has not adopted restrictions against racist speech.<sup>95</sup>

According to the proponents of regulation, these regulatory schemes have taken into consideration the speaker's right to freedom of expression and association but, on balance, the victim's right to be free from all forms of discrimination exceeds the rights of the speaker.<sup>96</sup> The proponents further claim that the United States Congress has the constitutional power to pass similar legislation. This is so even if the discriminatory conduct falls within the parameters of the First Amendment since the government's interest in protecting the victim's right to be free from discrimination outweighs the speaker's First Amendment rights.<sup>97</sup>

These arguments are similar to those promulgated by the supporters of the anti-discrimination ethics rules.<sup>98</sup> The ethics rules supporters focus primarily on the harm to the victim and the victim's constitutional right to be free from invidious discrimination.<sup>99</sup> Moreover, they believe that such rules not only would have an impact on the legal profession, but also play a role in transforming society "into one that treats people fairly without regard to race or gender."<sup>100</sup>

95. *Id.* at 2347-48. It is important to note that while the Convention on Racial Discrimination was signed by the United States government on September 28, 1966, it was signed with reservation, and never has been ratified. See *Campus Antiracism Rules*, *supra* note 12, at 363 n.154.

96. Thomas D. Jones, *Article of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment*, 23 *How. L.J.* 429, 432-33 (1980).

97. *Id.* at 443-44. Professor Jones' article is a little confusing on this subject. At the beginning of his article, he states that "racially defamatory speech, the logical precursor of racial hatred and discrimination, should not be classified as constitutionally protected speech. The value of such speech is so slight that it does not merit the protection of the First Amendment." *Id.* at 433. This certainly indicates that Professor Jones believes that racially defamatory speech should be outside the First Amendment. However, later in the article, he discusses the balancing test and states that "[w]here speech falls within the ambit of First Amendment protection, the government must show a 'compelling state interest' to justify the intrusion upon and impairment of First Amendment freedoms." *Id.* at 455. This leaves the reader to wonder if Professor Jones believes the speech may fall within the First Amendment, but the state has a compelling interest in regulating it. Perhaps he simply is arguing in the alternative, but his position is somewhat unclear.

98. Farquharson et al., *supra* note 20, at 1280, 1284-85; Memorandum, *supra* note 22. This memorandum summarized comments received regarding the California proposed rule.

99. Farquharson et al., *supra* note 20, at 1285.

100. *Id.* at 1284. Ms. Roberts notes that lawyers and judges have a

One notable difference between the proponents of the anti-discrimination rules and some of those individuals who support restrictions against racist and anti-semitic speech, is that the proponents of the rules have been hesitant to claim that the speaker's conduct falls outside the parameters of the First Amendment. Instead, the supporters of the anti-discrimination rules argue that even though the rules may infringe on the speaker's constitutional rights, the rules should prevail because "[o]n balance . . . the [state's] compelling interest in eliminating invidious discrimination justifies the means."<sup>101</sup>

### C. *Analysis of the Proponents' Arguments in Favor of Regulation*

To briefly reiterate, the proponents' focus is on the victims and the harm they suffer as a result of being exposed to discriminatory conduct. Unquestionably, the evidence supports the proponents' findings regarding the personal and group harm that results from certain types of discrimination.<sup>102</sup> The conduct in question is reprehensible, inexcusable and undoubtedly imposes severe and lasting harm on its victims. And while I wholeheartedly agree that the victims have a moral right to be free from discrimination, I disagree with the proponents' position that the victims have a Fourteenth Amendment right to be free from such conduct.<sup>103</sup>

Since 1883 when the *Civil Rights Cases*<sup>104</sup> were decided, the Supreme Court has interpreted the Fourteenth Amendment as prohibiting the government from engaging in discriminatory conduct that denies persons equal protection and due process under the law; however, there is nothing in the Fourteenth Amendment that extends this limitation to private persons.<sup>105</sup>

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tremendous impact on society. "With 27,000 lawyers in the state of Michigan, it is not difficult to imagine the effect that the threat of withdrawal of certain memberships could have on the policies of organizations." *Id.*

101. *Id.*

102. For example, Professor Matsuda notes that victims of discrimination "have experienced psychological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide." Matsuda, *supra* note 59, at 2336. Professor Delgado explains that discrimination results in a justification for denied opportunities and equal treatment. *Words that Wound*, *supra* note 59, at 135.

103. See Lawrence, *supra* note 58; Matsuda, *supra* note 59; Michelman, *supra* note 72.

104. 109 U.S. 3 (1883).

105. *Id.* at 17; see also *Moose Lodge 107 v. Irvis*, 407 U.S. 163 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

Thus, the Fourteenth Amendment comes into play only when there is action on the part of the state.

The type of conduct to which the proponents allude, and the conduct that is prohibited by the proposed and adopted anti-discrimination rules, is not the conduct of the state, but rather the acts of private persons committed against other private persons. Therefore, the only way the proponents could succeed in their claims that the victim has a Fourteenth Amendment right to be free from discrimination is to show that the state's conduct or its acquiescence in the conduct of the private actors, has resulted in state action.

The proponents argue that when the state protects the speaker, it becomes a joint venturer with the speaker; thus, state action is present.<sup>106</sup> The difficulty with this position, however, is the premise from which the proponents begin. Their assertion is based on the assumption that the police are "protecting" the speaker rather than simply upholding the law that requires the police to see that peace is maintained. This is mis-casting the situation. First, the police have no authority to take any position if there is no threat of violence against the speaker. They remain neutral, neither supporting the speaker nor opposing him. They only become involved if there is a threat of a breach of the peace. While this incidentally may result in the protection of the physical well-being of the speaker, the purpose of the interference is to enforce a law that prohibits persons from engaging in disorderly conduct. Enforcing the law to keep the peace does not elevate the speaker to the status of state actor. In fact, if the speaker becomes disorderly, the police are obligated to arrest him in the same way that they are obligated to arrest a disorderly person who opposes the speaker.

The courts have held that in order for the state to enter into a joint venture with a private person, thus creating state action, the state must take affirmative steps to create the joint venture and there must be some degree of control by both parties.<sup>107</sup> In defining what constitutes control sufficient to create state action, the third circuit, in certain shoplifting cases, held that state action may exist where there is a prearranged plan between the store and the police whereby the police agree to arrest, without independently finding probable cause, anyone

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106. Lawrence, *supra* note 58; Matsuda, *supra* note 59; Michelman, *supra* note 72.

107. See generally MICHAEL AVERY & DAVID RUDOVSKY, POLICE MISCONDUCT LAW AND LITIGATION § 3.2(b) (2d ed. 1991).



the store employees accuse of shoplifting.<sup>108</sup> In *Coleman v. Turpen*,<sup>109</sup> the court found a joint venture where a tow company towed cars at the direction of the police. In *Lugar v. Edmondson Oil Co.*,<sup>110</sup> the Court found that where a private person employed a writ of prejudgment attachment to seize another's private property, the actor could be held liable under 42 U.S.C. § 1983. The conduct in question was found to be state action. In all these situations there was cooperation and control by both the state and the private actor.

Contrary to the preceding cases, in *King v. Massarweh*,<sup>111</sup> the court found no state action where a landlord, who elicited the help of the police, had no control over the police officers' decision to search or to make an arrest. In *Wagenmann v. Adams*,<sup>112</sup> the court held there is no joint venture simply because a private person requests and receives the protection of the police.

The proponents would have us believe that by preventing a breach of the peace, the state is engaging in a joint venture with those discriminators who are incidentally protected. However, as explained in the *King* and *Wagenmann* cases, protecting the physical well-being of persons who engage in harmful discriminatory conduct does not create a joint venture.

The second position argued by some of the proponents is that the government's failure to restrict certain types of discriminatory conduct results in an "act by omission" which denies the victim his constitutional right to be free from such discrimination. This act by omission creates the state action that is needed to invoke the Fourteenth Amendment.<sup>113</sup>

The proponents' argument is not sound. The Court never has found state action where the government stands idly by while a private person engages in a lawful activity.<sup>114</sup> In fact, government officials have no authority to intervene even if they would like to because no law is being broken. If they did intervene, their intervention probably would be unlawful and could subject the government to liability.

However, even if the courts should find that certain discriminatory conduct is not lawful, it still is unlikely that the gov-

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108. *Cruz v. Donnelly*, 727 F.2d 79 (3d Cir. 1984).

109. 697 F.2d 1341 (10th Cir. 1982).

110. 457 U.S. 922 (1982).

111. 782 F.2d 825 (9th Cir. 1986).

112. 829 F.2d 196 (1st Cir. 1987).

113. *See supra* pp. 20-21.

114. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 12.5, at 450 (3d ed. 1978).

ernment's failure to prevent such conduct would rise to the level of state action. For example, in *DeShaney v. Winnebago County Department of Social Services*,<sup>115</sup> the Supreme Court held that the state's failure to prevent a private person from engaging in illegal conduct did not create state action for purposes of Fourteenth Amendment protection. The case involved a child who was subjected to several beatings by his father after the county department of social services failed to remove the child from the father's custody. The child and his mother sued the state under 42 U.S.C. § 1983, claiming a violation of the child's Fourteenth Amendment rights. In an opinion delivered by Justice Rehnquist, the Court held that mere acquiescence does not convert the acts of an individual into the acts of the state.<sup>116</sup> The Court explained that the Fourteenth Amendment's purpose "was to protect the people from the State, not to ensure that the State protected them from each other."<sup>117</sup> Furthermore, while the Fourteenth Amendment limits the state's right to act, it does not impose upon the state a duty to act.<sup>118</sup> Justice Rehnquist also noted that while the state may have known of the danger the child faced, it did not do anything to create those dangers nor did it do anything to make him more vulnerable to them.<sup>119</sup> Thus, there was no state action.

The rule of law in *DeShaney* clearly indicates that the state's inaction does not result in state action even if the private person's acts are unlawful. And without state action, the victims have no claim for protection under the Fourteenth Amendment.

A more radical approach to claiming that victims are entitled to Fourteenth Amendment protection has been espoused by Professor Lawrence who claims that evidence of state action should not be necessary in order for the victims to find Fourteenth Amendment protection. He claims that, "[t]he best way to constitutionally protect [competing interests between the speaker and the victim] is to balance them directly."<sup>120</sup> The competing interests to which Professor Lawrence alludes are

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115. 489 U.S. 189 (1989).

116. *Id.* at 195-97.

117. *Id.* at 196; see also *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Harris v. McRae*, 448 U.S. 297 (1980); *Lindsey v. Normet*, 405 U.S. 56 (1972).

118. *DeShaney*, 489 U.S. at 195.

119. *Id.* at 201.

120. Lawrence, *supra* note 58, at 446-47. In support of this position, Professor Lawrence claims that the Court in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), implicitly held that private discrimination was

the speaker's right to engage in racist speech and the victim's right to liberty and equal protection.<sup>121</sup> According to Professor Lawrence, a requirement of state action circumvents "our value judgment as to how these competing interests should be balanced."<sup>122</sup>

As to Professor Lawrence's suggestion that the state action requirement be ignored, this is highly unlikely to occur given the Court's interpretation of the Fourteenth Amendment and the Court's history regarding the state action requirement.<sup>123</sup> The Supreme Court has discussed the state action requirement as it pertains to the Fourteenth Amendment since 1876,<sup>124</sup> and while the Court has discussed over the years what specific acts constitute state action,<sup>125</sup> it never has considered the elimination of the state action requirement. However, even without state action, the government still may restrict certain types of discriminatory conduct if it is determined that the conduct is outside the protection of the Constitution. The next question, then, is whether or not a lawyer or other person has a First Amendment right to engage in harmful discriminatory practices against certain protected classes of persons.

Of all the amendments that make up the Bill of Rights, the First Amendment has been the most jealously guarded by the

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not protected under the First Amendment because of the absence of state action. *Id.* at 448.

However, it is important to note that state action was not an issue in *Heart of Atlanta Motel* because the case was decided under the Commerce Clause of the United States Constitution. *Heart of Atlanta Motel* involved a motel owner who, prior to the passage of Title II of the Civil Rights Act of 1964, had refused to rent rooms to blacks, and stated an intent to continue to do so after the Act was adopted. As a result of his refusal, an action was filed. The Court decided the case after finding that Congress had not exceeded its authority under the Commerce Clause. There was no discussion about the Fourteenth Amendment or state action. Thus, it is difficult to understand how Professor Lawrence could have reached this conclusion.

Further, Professor Lawrence claims that in *Griffin v. Prince Edward County School Board*, 377 U.S. 218 (1964), the Court held that attempts to avoid the Fourteenth Amendment by privatizing discrimination failed. The Court ordered the reopening of public schools after they were closed in an attempt to avoid desegregation of the public school system. Lawrence, *supra* note 58, at 448. Again, Professor Lawrence seems to be misguided. The Court did not fault the private schools for discriminating, but insisted that the government act in accordance with the desegregation laws. The Court never attempted to force the private schools out of business.

121. Lawrence, *supra* note 58, at 446.

122. *Id.* at 447.

123. See generally *The Civil Rights Cases*, 109 U.S. 3 (1883).

124. *United States v. Cruikshank*, 92 U.S. 542 (1876).

125. See generally *TRIBE*, *supra* note 85, § 18.

Supreme Court.<sup>126</sup> While there is a recognition that protected speech can result in harm to certain individuals, there is an even greater fear that if restrictions are placed on discriminatory speech, other types of speech soon will be subjected to restrictions. As explained by Justice Brennan, “[t]he censor’s business is to censor.”<sup>127</sup> Once the censor has pen in hand, it sometimes is hard to get the censor to lay it down. It is like opening Pandora’s box.

The proponents of regulation acknowledge the slippery slope argument, but give it short shrift.<sup>128</sup> Professor Matsuda argues, “We have already taken those first steps down the icy mountain, we have already abandoned the flat plane of absolutism.”<sup>129</sup> She argues that since exceptions to free speech already have been recognized, an additional, narrowly defined exception that protects persons from harm does not detract from the purpose of the First Amendment.<sup>130</sup> However, the problem with this position is that while each proponent supports the regulation of a very specific type of speech, they are not the same type of speech. For instance, Professors Matsuda, Delgado and Lawrence argue that racist speech should be outside the protection of the First Amendment.<sup>131</sup> Professors Mackinnon and Michelman urge restrictions on pornography.<sup>132</sup> Professor Matsuda also claims that anti-gay and anti-lesbian hate speech “require public restriction.”<sup>133</sup>

This leaves two choices. First, all the types of speech the proponents wish to prohibit could be found unlawful. But, it is not difficult to realize that the First Amendment will be greatly diluted if this should occur. The second choice is to pick and choose between the types of speech the proponents hope to regulate. The problem with this, of course, is which speech deserves to be protected and which does not? Is prohibiting

126. See, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

127. *Freedman v. Maryland*, 380 U.S. 51, 57 (1965).

128. Professor Matsuda states, “I acknowledge that this is the central civil liberties concern, and argue that it is as well met by narrowly defining racist speech as it is by other First Amendment exceptions.” Matsuda, *supra* note 59, at 2351-52 n.164.

129. *Id.*

130. *Id.*

131. See, e.g., Matsuda, *supra* note 59, at 2357-58.

132. MACKINNON, *supra* note 59, at 177; Michelmann, *supra* note 72.

133. Matsuda, *supra* note 59, at 2331-32.

racist speech more important than restricting pornography? Is it more important to restrict pornography than to prohibit discriminatory conduct against gays and lesbians? Should we restrict racist speech and anti-homosexual speech, but allow pornography? What happens when others interested in protecting their groups urge for one more narrowly defined exception? Where does it stop?

The slippery slope argument simply cannot be ignored. Furthermore, it does not have to rely on the "absolutism" of free speech to be credible. Unquestionably, not all speech is protected under the First Amendment. However, types of speech that are excepted from the Constitution's protection have been few and far between. Furthermore, over time, the Court has been inclined to narrow the exceptions rather than broaden them.<sup>134</sup> For example, in *Beauharnais v. Illinois*,<sup>135</sup> the Court's ruling was based on the premise that all forms of libel were outside the protection of the Constitution.<sup>136</sup> However, twelve years later when the Court decided *New York Times v. Sullivan*,<sup>137</sup> the majority held that certain libelous statements made against public officials deserve First Amendment protection.

Even the rule of law in *Chaplinsky v. New Hampshire*<sup>138</sup> has been narrowly defined. The Court in *Chaplinsky* held that the defendant's words were "insulting or 'fighting' words — those by their 'very utterance inflict injury' or tend to incite an immediate breach of the peace."<sup>139</sup> This language allows some very broad interpretations. However, the Court in *Cohen v. California*,<sup>140</sup> narrowed *Chaplinsky* by indicating that before the state can punish a speaker under a breach of the peace statute, it must show that the utterance that inflicted the injury was directed at a particular person rather than at the public at large, and the speaker must have intended that the message provoke a hostile reaction.<sup>141</sup>

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134. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).

135. 343 U.S. 250 (1952).

136. *Id.* at 266.

137. 376 U.S. 254 (1964).

138. 315 U.S. 568 (1942).

139. *Id.* at 572.

140. 403 U.S. 15 (1971).

141. The Court noted that the facts of this case were different from those in *Chaplinsky*. In the latter, the words were directed at the hearer and they were intended to provoke a reaction in that particular hearer. *Id.* at 20.

More recently, the Court in *Texas v. Johnson*,<sup>142</sup> recognized the right of individuals to create conditions of unrest:

Our precedents do not countenance such a presumption. On the contrary, they recognize that a principle function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.<sup>143</sup>

The Court struck down a Texas statute that made it a crime to desecrate the American flag.<sup>144</sup> The state of Texas argued that the purpose of the statute was to prevent a breach of the peace and that the state had the right to prohibit conduct of that nature.<sup>145</sup> The Court, however, disagreed, explaining that the question to ask was not whether the conduct incited a riot, but whether it was intended to incite a riot.<sup>146</sup> The Court found that there was no attempt to provoke fisticuffs or directly insult an individual as was the case in *Chaplinsky*.<sup>147</sup> Again, the Court affirmed its narrow interpretation of the "fighting words" doctrine.

While the Court may limit speech when its purpose is to incite a riot, it has been very reluctant to approve any attempt to restrict speech based on its content. For example, in *R. A. V. v. St. Paul, Minnesota*,<sup>148</sup> the Court struck down an ordinance that prohibited the displaying of a symbol that the displayer knows or should know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."<sup>149</sup> The Court noted that the ordinance was intended to prohibit fighting words, but found that it did not prohibit fighting words aimed at all persons, but only certain favored groups. This, in the majority's mind, was an attempt to restrict certain disfavored subjects as well as a particular mode of the speech. Thus, it was unconstitutional under the First Amendment.

In *Cohen v. California*,<sup>150</sup> the Court held that the state cannot remove words from the public vocabulary just because they

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142. 491 U.S. 397 (1989).

143. *Id.* at 408-09 (citations omitted).

144. *Id.* at 399.

145. *Id.* at 407-08.

146. *Id.* at 409.

147. *Id.*

148. 112 S. Ct. 2538 (1992).

149. *Id.* at 2541.

150. 403 U.S. 15.

are offensive.<sup>151</sup> As Justice Harlan explained, "one man's vulgarity is another's lyric."<sup>152</sup> In *Police Department of Chicago v. Mosley*,<sup>153</sup> the Court found a city ordinance to be unconstitutional because it was content-based.<sup>154</sup> The ordinance prohibited all picketing within 150 feet of a primary or secondary school while it was in session and for one-half hour before and after, except for peaceful picketing that involved a labor dispute.<sup>155</sup> The Court held that this went to the heart of the content of the speech and violated the First Amendment.<sup>156</sup>

The Court in *West Virginia State Board of Education v. Barnette*<sup>157</sup> explained, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>158</sup>

Based on the course the Supreme Court historically has followed regarding the regulation of speech and conduct, there is no legal foundation upon which to build a claim that the proposed and adopted anti-discrimination ethics rules do not infringe on the First Amendment. The rules prohibit a lawyer from engaging in discrimination against persons on the basis of certain criteria.<sup>159</sup> Certainly, it is not the "packaging" the rules attempt to regulate, but the content of the lawyer's speech. Since the First Amendment gives a person the right to express ideas, even unpopular or reprehensible ideas, without some showing that the lawyer's attempts to discriminate against a person who falls within one of the protected classes are aimed at a particular person and are intended to cause a breach of the peace, the speech ordinarily cannot be prohibited.<sup>160</sup>

However, the proponents argue that even if the conduct ordinarily falls within the protection of the First Amendment, the state has a sufficiently compelling interest to restrict it,<sup>161</sup> and can do so because the "impairment of First Amendment

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151. *Id.* at 26.

152. *Id.* at 25.

153. 408 U.S. 92 (1972).

154. *Id.* at 102.

155. *Id.* at 92-93.

156. *Id.* at 99.

157. 319 U.S. 624 (1943).

158. *Id.* at 642.

159. See MICHIGAN RULES, *supra* note 19, Proposed Rule 5.7.

160. *But see*, Part IV, "Discrimination by Lawyers Within Their Professional Lives," *infra*, for exceptions to this rule.

161. Jones, *supra* note 96, at 458.

freedoms" is narrow.<sup>162</sup> First, while the state clearly has a compelling interest in protecting its citizens from being victims of discrimination, the Supreme Court has held that a rule that infringes on the constitutional rights of the individual is valid only where it is *necessary* to serve the state's asserted compelling interest.<sup>163</sup> If there is any other alternative, then that alternative must prevail rather than the rule that infringes on a person's fundamental constitutional rights. The Court struck down the ordinance in *R.A.V.* after finding that, as adopted, it was unnecessary. The Court explained that an ordinance that prohibited the use of fighting words against all persons could have the same effect. The latter, of course, would not be limited to "favored topics."<sup>164</sup> In a similar vein, the proposed and adopted ethics rules are selective in their application, and could achieve the same result if they simply prohibited lawyers from engaging in certain types of discriminatory conduct against all persons. Instead, like the St. Paul ordinance, they are directed at certain favored groups.

Second, in what sense is the impairment of the individual's constitutional rights narrow? If it is the regulation of the conduct itself, i.e., invidiously discriminatory conduct or conduct that results in prejudice or bias, that is at issue, and the regulations that prohibit such conduct would apply equally to all lawyers, then it might be said that the limitation is narrow because it prohibits only certain types of discriminatory conduct aimed at certain persons. However, if it is narrow because the proponents believe it should apply only to discriminatory conduct as it applies to race or gender, then a problem arises. The proposed ethics rules not only prohibit discriminatory conduct on the basis of race and gender, but also discriminatory conduct against persons on the basis of religion, national origin, disability, age, sexual orientation, or socio-economic factors.<sup>165</sup> If regulations are valid that prohibit discrimination on the basis of race or gender notwithstanding the infringements on the First Amendment because it is "limited," then should not the same limitations on one's First Amendment rights also be permitted to prohibit discriminatory conduct against the other identifiable groups? It is difficult to believe that the other groups' interests in equality are less than those who suffer from racial or gender discrimination. Furthermore, what about

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162. *Id.*

163. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2549-50 (1992) (citing *Burson v. Freeman*, 112 S. Ct. 1846 (1992)).

164. 112 S. Ct. at 2550.

165. *See supra* notes 13-19 and accompanying text.



those groups of persons who suffer from some form of discrimination that are not included among the groups currently selected for special treatment, but later convince society of their need for protection?<sup>166</sup> Must further "limitations" be placed on one's First Amendment rights to accommodate their right to be free from discrimination? At what point will the limitations stop?

The last argument proposed by the proponents of regulation is that the government should adopt rules that prohibit certain types of discrimination in a manner similar to those rules already adopted by the international community. The difficulty with this position is that it would require the government to adopt laws that most likely would conflict with the First Amendment of the Constitution. While Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination was not ratified and, thus never has been tested as to its validity under the Constitution, it seems unlikely given the direction the Court has taken thus far that it would find the provisions of the treaty constitutional. Apparently, the government had similar concerns, which is evident from the fact that when the treaty was signed, it was signed with the following reservation:

The Constitution of the United States contains provisions for the protection of individual rights such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.<sup>167</sup>

The fact that these anti-discrimination laws have received recognition in the international arena does not remove them from the realm of the United States Constitution. Even if all the countries of the world should adopt laws similar to Article 4,<sup>168</sup> the United States most likely could not follow suit without first adopting a constitutional amendment that

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166. Immediately coming to mind is the tragically fast growing group of persons who suffer from the AIDS virus.

167. Matsuda, *supra* note 59, at 2345 (quoting Convention on Racial Discrimination, *supra* note 90, art. 20 at 236).

168. Other countries have adopted laws prohibiting racial discrimination. For a more complete examination of those laws see Matsuda, *supra* note 59, at 2346-47, wherein she describes the Race Relations Act adopted by the United Kingdom, Sections 318 and 319 of the Canadian Code, and Australia and New Zealand's anti-racist speech laws; see also *Campus Antiracism Rules*, *supra* note 59, at 364-71.

removes certain types of speech from the protection of the First Amendment. If Congress should ratify Article 4 of the International Convention, and it is found to be a violation of the First Amendment, the treaty would be void as to its application in the United States because “[a] rule of international law or a provision of an international agreement of the United States will not be given effect as law in the United States if it is inconsistent with the United States Constitution.”<sup>169</sup> As explained by Justice Black in *Reid v. Covert*,<sup>170</sup> “no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. . . . This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.”<sup>171</sup>

Certainly, if Congress cannot adopt a provision of an international treaty because the treaty’s prohibitions against discriminatory conduct would be in violation of the First Amendment, the state supreme courts cannot adopt ethics rules that infringe upon the First Amendment rights of the lawyers they are intended to regulate.

#### D. *Additional Constitutional Issues*

##### 1. Vagueness

The Supreme Court has held that the language of a statute or rule must be sufficiently definite as to provide warning of the proscribed conduct to persons of ordinary intelligence.<sup>172</sup> Furthermore, it must be stated with sufficient clarity to insure fair and indiscriminate enforcement.<sup>173</sup> A failure to do so will result in the statute or rule being stricken as a violation of the Due Process Clause of the Fourteenth Amendment.<sup>174</sup>

Michigan’s proposed rule prohibits a lawyer from engaging in “invidious discrimination” against certain identifiable groups of people.<sup>175</sup> The difficulty with the language of this rule is one of vagueness. What constitutes “invidious discrimination” is extremely difficult to ascertain. The rule does not

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169. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1986).

170. 354 U.S. 1 (1957).

171. *Id.* at 16-17 (citations omitted).

172. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Smith v. Goguen*, 415 U.S. 566 (1974); *Zwickler v. Koota*, 389 U.S. 241 (1967); *NAACP v. Button*, 371 U.S. 415 (1963); *Jordan v. DeGeorge*, 341 U.S. 223, 231-32 (1951).

173. *Id.*

174. *Id.*

175. MICHIGAN RULES, *supra* note 19, Proposed Rule 5.7(a).

attempt to define the terms utilized, and looking to outside sources offers little or no assistance.

The Supreme Court has applied the label "invidious" to unlawful discrimination,<sup>176</sup> but never has attempted to prospectively define the term. Therefore, the only types of discrimination that a lawyer comfortably could label as "invidious discrimination" are those types of discrimination that the Court already has identified as such. Without a complete definition, there is nothing that aids the lawyer in determining whether other types of discriminatory conduct are "invidious."

Furthermore, relying on the use of the word in the ordinary sense is not particularly helpful because, in the ordinary sense, "invidious discrimination" is defined as, "giving offense by discriminating unfairly."<sup>177</sup> It is unlikely that the drafters of the proposed rule intended all types of discrimination that result in unfairness to be prohibited under the rule. That would encompass much more than anyone imagined.

The members of the House of Representatives of the State Bar of Michigan, during their debate on the proposed anti-discrimination rule, discussed the meaning of "invidious discrimination." Attempts to define the term resulted in words being used such as "evil,"<sup>178</sup> "wrongful,"<sup>179</sup> "harmful,"<sup>180</sup> "painful,"<sup>181</sup> and "shameful."<sup>182</sup> Michigan's Judge Baxter suggested that "invidious" should be defined much in the same way as Justice Stewart attempted to identify obscenity — "I know it when I see it."<sup>183</sup> However, her colleague, Judge Kent disagreed, stating:

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176. The Court used the term "invidious discrimination" to describe prohibited conduct as early as 1884. *Hagar v. Reclamation District No. 108*, 111 U.S. 701 (1884).

177. WEBSTER'S NEW WORLD DICTIONARY 741 (2d ed. 1976).

178. Transcript, *supra* note 22, at 128.

179. *Id.* at 129.

180. *Id.*

181. *Id.*

182. *Id.*

183. Transcript, *supra* note 22, at 125-26. Judge Baxter was referring to the comments of Justice Potter Stewart found in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). A manager of a motion picture theatre had been convicted of violating an Ohio obscenity statute. The Court reversed the conviction, finding that the film the manager possessed and exhibited was not obscene. In his concurring opinion, Justice Stewart stated, "I shall not today attempt further to define the kinds of material I understand to be embraced within [the definition of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Id.* at 197.

It's been suggested that although we cannot define invidious discrimination we know it when we see it. I would remind this body that when Justice Potter Stewart wrote those words with respect to pornography some three decades ago he was speaking on behalf of a minority of the court [sic], because indeed the nine assembled justices could not agree among themselves whether what they viewed was pornographic or not.

In the same manner, I suggest to you after listening to the debate of this body we cannot in many examples agree what constitutes invidious discrimination and what does not. It's been suggested that invidious means evil and wrongful. In another context I find myself in respectful disagreement with the fundamentalist preacher down the street as to what is evil and what is wrongful.<sup>184</sup>

It quickly becomes apparent that not only can practicing lawyers not agree on what conduct is "invidious," but even members of the judiciary are unable to agree on how the term should be interpreted.<sup>185</sup> Thus, the only thing certain is that the term "invidious discrimination" cannot be defined with any degree of certainty.

In addition to the problems with defining the term "invidious," it may be difficult to determine whether certain conduct is even discriminatory. For example, Professor Peter Linzer criticizes the regulation of hate speech on the grounds that figuring out whether certain speech is racist may be more difficult than expected.<sup>186</sup> He discusses the fluidity of language, and how terms once believed to be good become bad, and how the use of certain terms by different groups of people have different meanings.<sup>187</sup>

In this century alone, we have seen the preferred term go from 'black' to 'colored' to 'negro' to 'Negro' to 'Afro-American' to 'black' to 'Black' back to 'black' and now to 'African-American' and 'person of color.' We remember, also, that Richard Pryor put out several rec-

184. Transcript, *supra* note 22, at 134-35.

185. One delegate noted that, to his shock, in a room of about 300 lawyers, most did not "know what the word invidious means when it's attached to the word discrimination." Transcript, *supra* note 22, at 128. What might be more correct is that he was dismayed because most of those present did not seem to accept or understand his definition of the term.

186. Peter Linzer, *White Liberal Looks at Racist Speech*, 65 ST. JOHN'S L. REV. 186 (1991).

187. *Id.* at 211-19.

ord albums with the word 'nigger' in the title. While he has publicly abandoned the word, the term is often used by blacks about other blacks, and I have heard whites say that they use the term to refer not to all blacks but to lower-income blacks, much as whites and blacks refer to 'rednecks.' Thus, can we put a complete ban even on the use of the term 'nigger'?<sup>188</sup>

This particular issue surfaced at the University of Wisconsin when two white students, in separate incidents, called a black student "nigger." While the first student intended to racially slur his victim, the second student, who was raised in an integrated neighborhood in Chicago where both blacks and whites referred to blacks that were not liked or respected as "nigger," did not.<sup>189</sup>

It seems inevitable that the Michigan proposed rule will be found unconstitutional because it does not sufficiently define the conduct it intends to prohibit. There are too many possible interpretations that could be applied, both by the lawyers that would be governed by the rules, and by the ethics committees and courts that would be responsible for enforcing them.

To a lesser degree, the New Jersey rule may present some difficulty as well. The rule prohibits lawyers from engaging in discriminatory conduct that is "intended or likely to cause harm."<sup>190</sup> While the term, "harm," can be understood, the question is, what type of harm is necessary to result in a violation of the rule? Does the victim have to suffer a great harm? What if the harm is simply that the victim becomes angry? The Supreme Court in *Texas v. Johnson*<sup>191</sup> has said that a person has a constitutional right to engage in conduct that causes anger so long as the conduct is not personally directed.

Not only does the lack of clarity raise the problem that a lawyer unknowingly may engage in conduct that is in violation of the rule, but because of the vagaries of the language, a lawyer may avoid engaging in certain types of permissible conduct because she is unsure about whether it violates the rule. This creates a chilling effect on her right to do certain activities that otherwise are protected. As stated by the Court in *NAACP v. Button*,<sup>192</sup> the threat of enforcement can have as great an effect

188. *Id.* at 215-16.

189. *UWM Post v. Board of Regents of Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991).

190. NEW JERSEY RULES, *supra* note 18, Rule 8.4(g).

191. 491 U.S. 397 (1989).

192. 371 U.S. 415 (1963).

on a person as the actual enforcement.<sup>193</sup> Clearly, a rule never should be so vague or uncertain as to cause a person to refrain from participating in activities that are within the bounds of the law.

## 2. Overbreadth

In addition to being void-for-vagueness, the scope of the Michigan and New Jersey anti-discrimination ethics rules extends beyond what is constitutionally permissible. As stated by the Court in *NAACP v. Button*,<sup>194</sup> since constitutionally protected freedoms “are delicate and vulnerable . . . in our society,”<sup>195</sup> the government can regulate “only with narrow specificity”<sup>196</sup> when a person’s First Amendment rights are involved.<sup>197</sup>

The purpose of the anti-discrimination rules is to “assure equal treatment for men and women free from discrimination on the basis of race, religion, disability, age, sexual orientation, gender or ethnic origin”<sup>198</sup> and to promote the administration of justice and public confidence in the legal system.<sup>199</sup> And while the states may regulate to further those purposes, they may not do so to the extent that they unlawfully infringe on an individual’s constitutional rights. With regard to the First Amendment, the Supreme Court has held that if a regulation “is susceptible of application to protected speech, the section is constitutionally overbroad and therefore is facially invalid.”<sup>200</sup>

The difficulty with the Michigan and New Jersey rules is that they proscribe both constitutionally protected speech and unprotected speech. Specifically, the rules go well beyond the prohibition of fighting words or those types of libel that are outside the protection of the First Amendment,<sup>201</sup> and attempt to restrict the expression of ideas. According to the anti-discrimination ethics rules, a lawyer may not speak out against or take a political stand against persons on the basis of certain cri-

193. *Id.* at 433.

194. 371 U.S. 415 (1963).

195. *Id.* at 433.

196. *Id.*; see also *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Zwickler v. Koota*, 389 U.S. 241 (1967); *Speiser v. Randall*, 357 U.S. 513 (1958).

197. 371 U.S. at 433.

198. Transcript, *supra* note 22, at 88-89.

199. *Michigan Bar Approves Antibias Rules*, *supra* note 40, at 4.

200. *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974).

201. See *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1941).

teria such as race, gender or sexual orientation.<sup>202</sup> For example, if a lawyer, in her professional capacity, should vocalize a view in opposition to legalizing sexual activity between consenting adults of the same sex because she believes a homosexual can change his sexual preference, this could be interpreted as violating the anti-discrimination rules. It is another way of saying that there is something wrong with homosexuality, and it should be eradicated. This is a discriminatory comment, aimed at a group of persons identified within the anti-discrimination rules, and is likely to cause harm. It also is the expression of an idea and is protected by the First Amendment.<sup>203</sup> As explained by the court in *In re Williams*,<sup>204</sup> "[T]he lawyer may, as any other citizen, freely engage in the marketplace of ideas and say all sorts of things, including things that are disagreeable and obnoxious."<sup>205</sup>

According to Professor Tribe, "[a] plausible challenge to a law as *void for overbreadth* can be made only when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach."<sup>206</sup> Unquestionably, the speech protected by the First Amendment is a significant part of the anti-discrimination rule's target. Furthermore, there is no way to separate from the rules, as they are written, that conduct and speech which is protected from conduct that is unprotected.

### 3. Freedom of Association

The proposed Michigan anti-discrimination ethics rule states, "A lawyer shall not hold membership in any organization which the lawyer knows invidiously discriminates on the basis of gender, race, religion, disability, age, sexual orientation or ethnic origin."<sup>207</sup> Once again, the purpose of the prohibition against joining organizations that engage in discriminatory conduct is to protect certain persons from the

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202. See generally *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

203. *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

204. 414 N.W.2d 394 (Minn. 1987), *appeal dismissed*, 485 U.S. 950 (1988).

205. *Id.* at 397.

206. TRIBE, *supra* note 85, § 12-27, at 1022.

207. MICHIGAN RULES, *supra* note 19, Proposed Rule 5.7(b).

harm that results from such discrimination<sup>208</sup> and to preserve the public's confidence in the legal system.<sup>209</sup> Furthermore, if adopted, the rule also could have an effect on the organizations themselves even though the rules are not intended to regulate beyond the legal profession. If lawyers are unable to join an organization because of the organization's discriminatory practices, the organization may consider changing its discriminatory practices rather than lose some of their more prestigious members. Organizations have reacted to this pressure in the past, and have made significant changes in their policies.

For example, prior to 1986, the Detroit Athletic Club had a "no women members" policy. In 1986, a vote was taken to change that policy, but the organization's all male members voted the proposal down.<sup>210</sup> As a result of the "No" vote, Michigan Consolidated Gas Co. and the Detroit Edison Co. announced they no longer would pay their executives' club dues.<sup>211</sup> The companies explained that they anticipated more females in executive positions and would not offer a perk to their male executives that could not be offered to their female executives.<sup>212</sup> The directors of the Detroit Athletic Club responded to the announcements by voting unanimously to make women eligible for membership.<sup>213</sup>

Similarly, in 1990, Shoal Creek, a private golf club that was asked to host the PGA tournament, did not allow African-Americans to become members. However, after much negative publicity, as well as a threat of protest by local civil rights groups, a few days before the start of the tournament Shoal Creek accepted as a member its first person of color.<sup>214</sup> Furthermore, not only did the publicity change the membership policies at Shoal Creek, but also at other private clubs such as Augusta National, the home of the Masters tournament.<sup>215</sup>

208. See *supra* notes 62-67 and accompanying text.

209. Transcript, *supra* note 22, at 90.

210. *Michigan News Briefs*, UNITED PRESS INT'L, Sept. 16, 1986 [hereinafter *Michigan News Briefs*].

211. *Two Utilities Snub Males-Only Clubs*, CHI. TRIB., Sept. 16, 1986, at C3.

212. *Id.*

213. *Michigan News Briefs*, *supra* note 210.

214. Furthermore, the PGA, the U.S. Golf Association, the PGA Tour and the Ladies Professional Golf Association decided that they would not hold their tournaments at clubs that discriminated on the basis of gender or race. Joan Mazzolini, *Shoal Creek's Impact: Genuine Minority Progress or Merely Tokenism?*, CHI. TRIB., Aug. 11, 1991, at C12.

215. *Id.* Augusta National admitted an African-American to membership during the height of the controversy.



Thus, it becomes apparent that prohibiting lawyers from joining clubs that engage in certain types of discrimination could have a "trickle down" effect and help eliminate discriminatory practices outside the legal community.

However, even if prohibiting lawyers from joining certain organizations could bring about such positive results, the proposed ethics anti-discrimination rule still must regulate within the parameters of the Constitution. If the proposed rule unlawfully infringes upon the constitutional rights of the members of the legal profession it must fail. The rulemakers claim they have the right to restrict the conduct of lawyers because "[t]here is no constitutional right to discriminate in the political setting."<sup>216</sup> This statement, of course, is not correct. Persons do not shed their constitutional rights when they become lawyers.<sup>217</sup> This includes their First Amendment right to freely associate with others.<sup>218</sup> And while freedom of association is not expressly guaranteed in the Constitution, the Court has recognized an individual's right to freely associate as a means of preserving those fundamental rights guaranteed in the First Amendment.<sup>219</sup>

The Court has recognized the right to: (1) freedom of expressive association which allows an individual to exercise her right of speech, assembly, petition for redress of grievances and freedom of religion<sup>220</sup> and, (2) intimate association which allows a person to maintain certain intimate relationships.<sup>221</sup>

216. *Id.*

217. *See generally* *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Baird v. Arizona*, 410 U.S. 1 (1971).

218. *Healy v. James*, 408 U.S. 169 (1972).

219. The Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) states:

Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

*Id.* at 617-18.

220. *Id.*

221. *Id.* at 618.

However, while the Court recognizes that the right to freely associate is necessary to protect an individual's right of free speech,<sup>222</sup> it also has held that freedom of association is not absolute. The government may infringe on an individual's right to freely associate<sup>223</sup> if: 1) a compelling state interest is served, 2) the regulation is the least restrictive alternative; and 3) the regulation is unrelated to the suppression of ideas.<sup>224</sup>

Certainly, the protection of its citizens from unfair and harmful discrimination is a legitimate governmental interest.<sup>225</sup> But, on balance, is it more compelling than the protection of an individual's right of association? The American Civil Liberties Union argued in their brief *amicus curiae* in *Roberts v. United States Jaycees*<sup>226</sup> that a state's interest in preventing discrimination should prevail over an individual's right of association.<sup>227</sup> And while this may be correct when dealing with organizations that have characteristics similar to the Jaycees, the Court does not agree that it is correct when dealing with all organizations. As explained by Justice Brennan, the state does not have the right to interfere with the policies of smaller, more selective and congenial organizations because of the relationship its members share with one another.<sup>228</sup> That relationship is protected under the First Amendment and is paramount to the interests of the state.<sup>229</sup> This is the case even if the smaller organizations engage in the same types of discrimination that is not permitted by organizations with characteristics similar to the Jaycees. The Court's opinion in *Roberts* implies that if the Jaycees had been a smaller, more selective and congenial organization, the state could not have interfered with its discriminatory policies.<sup>230</sup> Thus, the members' right to associate

222. *Id.* at 622.

223. *Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51 (1961).

224. *Roberts*, 468 U.S. at 623 (citations omitted).

225. William P. Marshall, *Discrimination and the Right of Association*, 81 *Nw. U. L. Rev.* 68, 92 (1986).

226. 468 U.S. 609 (1984).

227. Laurence H. Tribe, writing for the American Civil Liberties Union, argued in closing that, "[T]he state's central purpose here — the elimination of sex discrimination in those businesses and facilities that open themselves to the state's public — can be achieved *only* by forbidding the systematic subordination of women within such organizations; and incidental infringement of associational rights is simply a necessary price, if in this case also a trivial one." Brief of Amicus Curiae by the American Civil Liberties Union for Appellant at 30, *Roberts v. United States Jaycees*, 468 U.S. 609 (No. 83-724).

228. *Roberts*, 468 U.S. at 622-23.

229. *Id.* at 622.

230. *Id.* at 629-31.

only with persons of their choice would have succeeded over the state's interest in eliminating the discrimination.

While the Michigan rule does not impose restrictions on organizations, it does prohibit lawyers from joining organizations that engage in certain types of discrimination, including organizations that the government would not be allowed to regulate. If the government cannot interfere with an organization's policies, certainly it should not be able to deny certain persons the right to belong to the organization simply because the government finds its policies unacceptable. This would allow the state to do through the back door what it could not do through the front door. It would allow the government to impose restrictions based on the message the organization promotes — something it has no authority to do. It would be tantamount to the government saying, "The state may not be allowed to place restrictions on the organization, but its membership will be limited so long as it promotes ideas the state finds unacceptable."

However, even if it is assumed for the sake of argument that the state's interests are sufficiently compelling to allow the infringement on the lawyers' freedom of association, the proposed ethics rule still must be the least restrictive alternative. As explained by Justice Stewart in *Shelton v. Tucker*:<sup>231</sup>

[E]ven though the purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.<sup>232</sup>

If the anti-discrimination ethics rule is adopted, what actually would occur is that the rules would deny membership to both lawyers who would promote the discrimination *as well as* lawyers who would have no intention of personally engaging in or promoting the organization's discriminatory policies. Even if it is assumed that restricting membership of the former should be allowed since that would help accomplish the purpose for which the rules are intended, the denial of membership to the latter group results in a flagrant violation of their constitutional rights. The Court has labeled this type of regulation, a "guilt by association" regulation and has refused to

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231. 364 U.S. 479 (1960).

232. *Id.* at 488.

uphold similar rules in the past that were based upon this principle.<sup>233</sup>

The Court has held that a government regulation that infringes on an individual's right of association is valid only if the state makes a distinction between those individuals who are active members of the organization and those who are passive members.<sup>234</sup> Justice Stewart explained in his concurring opinion in *Baird v. State Bar of Arizona*<sup>235</sup> that passive membership in an organization is quite different from active membership,<sup>236</sup> thus implying that only active members are a threat to a legitimate interest of the state. In *Baird*, the Arizona bar attempted to deny an applicant the right of membership to the bar because she refused to answer a question on her application about whether or not she held membership in an organization that advocated "the overthrow of the United States Government by force or violence."<sup>237</sup> The bar believed that such membership could adversely reflect on her character to practice law.<sup>238</sup> While the Court agreed that the state had a legitimate interest in determining whether applicants for membership to the bar were of good character, it held that mere membership in an organization that advocated the violent overthrow of the government was not sufficient, by itself, to prove a lack of character. Justice Black, writing for the plurality, opined that mere membership was not evidence of an individual's personal intent to participate in the overthrow of the government, and thus, was not a sufficient reason for denying a person admission to the bar.<sup>239</sup>

In a similar vein, the Court also has explored the issue of whether a state has the right to penalize a person who is a passive member of an organization that has unlawful objectives where such membership does nothing to threaten a governmental interest. For example, in *Elfbrandt v. Russell*,<sup>240</sup> the Court found unconstitutional an Arizona statute that required state employees to take a loyalty oath.<sup>241</sup> In addition to the

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233. *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966); see also, *NAACP v. Alabama*, 377 U.S. 288 (1963); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960).

234. *Baird v. Arizona*, 401 U.S. 1, 9 (1971); *United States v. Robel*, 389 U.S. 258, 264 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966).

235. 401 U.S. 1 (1971).

236. *Id.* at 9.

237. *Id.* at 5.

238. *Id.* at 7.

239. *Id.* at 6-7.

240. 384 U.S. 11 (1966).

241. The oath read as follows: "I, (type or print name) do solemnly

requirement that employees take the oath, the statute imposed criminal penalties and the threat of discharge if an employee became a member or remained a member of the Communist Party after taking the oath. The Court struck down the statute after finding that the government did not sufficiently distinguish between those members who actively supported the unlawful purposes of the Communist party from those who supported only the party's legal political ideologies.<sup>242</sup> The Court held that persons who do not actively participate in the unlawful activities of the party pose no threat to national security.<sup>243</sup> The Court found that the statute was not the least restrictive alternative because it penalized those persons who were passive members of the Communist party as well as those who actually threatened the overthrow of the United States government.

In *United States v. Robel*,<sup>244</sup> the Court overturned the conviction of a defendant who was found guilty of violating the Subversive Activities Control Act. The defendant violated the Act by being employed in a defense facility while a member of the Communist party. The Court noted that the purpose of the Act was to "reduce the threat of sabotage and espionage in the Nation's defense plants;"<sup>245</sup> however, as in *Elfbrandt*, it again found the means chosen to accomplish that purpose was not the least restrictive alternative.<sup>246</sup> The statute imposed sanctions against persons who posed no threat to the government's national security as well as against those who did.<sup>247</sup> The Court found the statute to be overreaching and, thus, unconstitutional.

The Court repeatedly has made distinctions between active members and passive members of organizations in determining whether a regulation may lawfully infringe on an individual's right to freely associate.<sup>248</sup> While the Court has recognized that the states may have a legitimate reason to regulate against

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swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God (or so I do affirm)." *Id.* at 12.

242. These persons are known as "passive members." *Id.* at 17.

243. *Id.*

244. 389 U.S. 258 (1967).

245. *Id.* at 264.

246. *Id.*

247. *Id.* at 265.

248. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *United States v.*

the active participant, it has found no justification for infringing upon the Constitutional rights of the passive member. Furthermore, the Court has held that the government cannot exclude a person from a profession or punish an individual solely because the individual belongs to a particular organization.<sup>249</sup> The Michigan rule, like the statutes that were challenged in the aforementioned cases, does not distinguish between those individuals who are active members of an organization from those who are passive members. If the organization is engaged in certain types of discriminatory conduct all lawyers, regardless of their purpose for joining, are prohibited from membership. This seems to fly in the face of everything the Court has decided thus far.

Like the person who joins the Communist party only because she supports the legal political philosophies of the party,<sup>250</sup> a lawyer certainly could join a private club that does not allow women members only because he likes to play golf on that club's golf course.<sup>251</sup> Assuming he does nothing to promote the discrimination the proposed rules are intended to eliminate, restricting his membership does not foster the state's interest. However, under the proposed rules, he would be prohibited from joining.

If the Court continues on the same course as it previously has followed, it is unlikely that the lawyer who is a passive member of a golf club would be found any more of a threat to the state's interest in eliminating discrimination than the Court found the passive member of the Communist party to be a threat to national security. The least restrictive alternative would be to distinguish those lawyers who actively promote the unacceptable discriminatory practices of the organization from those lawyers who are members simply for the purpose of "playing golf," and place prohibitions against only the former.<sup>252</sup>

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Robel, 389 U.S. 258 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Aptheker v. Secretary of State*, 84 U.S. 332 (1963).

249. *United States v. Robel*, 389 U.S. 258 (1968).

250. Not to advocate the violent overthrow of the government.

251. This is the explanation given by former Vice President Dan Quayle when he refused to withdraw as an honorary member of Burning Tree Country Club, a club in the Washington, D.C. area that not only refuses to accept women as members, but will not allow women to play golf as a member's guest. Richard Cohen, *The Courage of Dan Quayle's Convictions Saying No to Cypress Point, Yes to Burning Tree*, WASH. POST, Jan. 3, 1991, at A21.

252. One such rule might read as follows: "No lawyer shall engage in such conduct that promotes the discriminatory practices of an organization if

However, perhaps it is worthwhile to note that the Court's opinions that made the distinctions between active membership and passive membership were decided under a liberal Court whose policies generally were much different from that of the justices that sit on the Supreme Court today. In fact, only one justice who participated in the *Robel* and *Elfbrandt* decisions currently is sitting on the bench, and that is Justice White, who dissented in both cases. Justice White disagreed with the majority, implying that if the state's interest is sufficiently compelling, there should be no distinction between active and passive participation.<sup>253</sup> Given the fact that the conservative arm of the Court agreed with Justice White at the time,<sup>254</sup> this could be an indication of how the justices might rule today. It is very likely that the justices that currently sit on the Supreme Court would agree with Justice White and refuse to make the active-passive distinction.

However, even if the Court should decline to uphold precedent on this issue, the result should remain the same because of the first prong of the test, which requires the state to have an interest sufficiently compelling to allow it to infringe on an individual's constitutional rights. Again, while the state may have a legitimate interest in preventing discrimination and protecting the reputation of the legal profession, a lawyer's membership in an organization that does not unlawfully discriminate probably will be considered too attenuated to threaten that state interest. It is important to remember that, while a member of the organization, the lawyer is wearing the hat of a private person, not the hat of an officer of the court.

A second point worth mentioning is that the Court usually has allowed a state to infringe on an individual's right of association only when the organization is engaged in unlawful activities.<sup>255</sup> The cases in which membership in the Communist party was brought into question resulted in the Court acknowledging the states' rights to prohibit membership if the individual actively was engaging in furthering the party's unlawful purposes. However, if it could not be proven that the person was actively furthering that unlawful purpose, the Court would

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the organization's discriminatory practices are based on race, religion, age, gender, sexual orientation, national origin, or handicap.'

253. *Elfbrandt v. Russell*, 384 U.S. 11, 22-23 (1966) (White, J., dissenting).

254. *Id.* at 19.

255. Likewise, the court would not find an organization unlawful without proof that the group was engaged in unlawful conduct. *See generally* *Noto v. United States*, 367 U.S. 290 (1961).

not allow the state to infringe on the individual's right to membership.<sup>256</sup> The Michigan rule does not make this distinction. Membership in an organization that discriminates may be prohibited even if the discrimination is not unlawful. Again, this is contrary to the rulings of the Supreme Court.

Lastly, if the purpose of that portion of the rule that infringes on an individual's freedom of association is to suppress the message or the ideas the organization espouses, regardless of how reprehensible the message may be, the rule is unconstitutional.<sup>257</sup> Undoubtedly, the indirect effect of the anti-discrimination rule is to restrict certain messages or ideas that some organizations promote. This is evidenced by the fact that the rule does not prohibit lawyers from joining every organization that discriminates. It only prohibits membership in organizations that engage in certain types of discrimination against certain persons. It is the particular message of these organizations that the rulemakers find offensive and would like to see eliminated. They attempt to accomplish this by telling lawyers they cannot participate in the furtherance of those messages. Certainly, this is unconstitutional.

#### IV. DISCRIMINATION BY LAWYERS WITHIN THEIR PROFESSIONAL LIVES

While the proposed Michigan anti-discrimination rule is intended to regulate the conduct of lawyers in both their private and professional lives, California's and New Jersey's anti-discrimination rules have limited their scope to a lawyer's professional activity.<sup>258</sup> The limitation adopted by the latter two states is in keeping with the longstanding recognized right of the states to restrict the professional conduct of lawyers while in certain environments,<sup>259</sup> including the right to prohibit a lawyer from committing certain discriminatory acts.<sup>260</sup>

To date, however, the courts have not needed an anti-discrimination ethics rule to discipline lawyers or judges who engage in harmful discriminatory acts. The courts simply have relied upon the rule, already in place, which prohibits conduct that is prejudicial to the administration of justice.<sup>261</sup> For exam-

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256. *Elfbrandt*, 384 U.S. 11.

257. *Healy v. James*, 408 U.S. 169 (1972).

258. *See supra* notes 13-18 and accompanying text.

259. WOLFRAM, *supra* note 23, § 2.6.1, at 48.

260. *See Gonzalez v. Commission on Judicial Performance*, 657 P.2d 372 (Cal. 1983); *Attorney Grievance Comm'n of Md. v. Alison*, 565 A.2d 660 (Md. 1989); *In re Vincenti*, 554 A.2d 470 (N.J. 1989).

261. *Ryan v. Commission on Judicial Performance*, 754 P.2d 724 (Cal.



ple, in *In re Vincenti*,<sup>262</sup> an attorney was accused of using racial innuendo against opposing counsel. The court found the conduct intolerable because it undermined the administration of justice.<sup>263</sup> After deciding that some of the attorney's comments carried invidious racial connotations, the court suspended the attorney from the practice of law for a period of three months. The court explained that:

[W]e cannot overemphasize that some of the respondent's offensive verbal attacks carried invidious racial connotations. Such verbal abuse, we reiterate, was directed against another lawyer in the context of the practice of law. We believe that this kind of harassment is particularly intolerable. Any kind of conduct or verbal oppression or intimidation that projects offensive and invidious discriminatory distinctions, be it based on race or color, as in this case, or, in other contexts, on gender, or ethnic or national background or handicap, is especially offensive. In the context of either the practice of law or the administration of justice, prejudice both to the standing of this profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions.<sup>264</sup>

A similar position was taken by the court in *Gonzalez v. Commission on Judicial Performance*.<sup>265</sup> Because of several derogatory comments a judge had made,<sup>266</sup> he was found guilty of misconduct and for bringing the judiciary into disrepute.<sup>267</sup> The court was aware that some of the judge's comments had been made

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1988); *Gonzalez*, 657 P.2d 372; *In re Stevens*, 645 P.2d 99 (Cal. 1982); *Alison*, 565 A.2d 660; *In re Williams*, 414 N.W.2d 394 (Minn. 1987), *appeal dismissed*, 485 U.S. 950 (1988); *Vincenti*, 554 A.2d 470.

262. 554 A.2d 470.

263. *Id.* at 473.

264. *Id.* at 474.

265. 657 P.2d 372 (Cal. 1983).

266. Among other comments, the judge told a defendant of Mexican extraction that his conduct might be tolerated in Mexico, but not the United States. He asked a juror of Japanese descent "What do fishheads and rice cost?" and asked an African-American the price per pound of watermelon. *Id.*

267. *Id.* at 373. The court was not at all concerned with whether the judge had ruled in a nondiscriminatory manner. The court explained that his subjective intent was not at issue, and that as a judge he had an obligation to conduct himself "in a manner that promotes public confidence and esteem . . . ." *Id.* at 382.

in chambers,<sup>268</sup> but held that those comments also resulted in misconduct since the comments could become known to the public and reduce the public's image of the judiciary.<sup>269</sup>

Comments made in chambers also resulted in the public censure of yet another judge.<sup>270</sup> A California superior court judge had referred to African-Americans as "Jig," "dark boy," "colored boy," "nigger," "coon," "Amos and Andy," and "jungle bunny."<sup>271</sup> Furthermore, he commented that an Hispanic attorney was "acting like a Mexican jumping bean," and referred to persons with Hispanic surnames as "cute little tamales," "Taco Bell," "spic," and "bean."<sup>272</sup> The court held that the comments were prejudicial to the administration of justice and brought the judicial office into disrepute.<sup>273</sup>

While most of the case law has centered around racial misconduct, discriminatory conduct based on gender has resulted in the disciplining of judges as well. For example, while in chambers, a judge told an off-color joke to two women lawyers that ended in a suggestion that they engage in a sexual activity with him.<sup>274</sup> The court found the joke tasteless and inappropriate, and prejudicial to the administration of justice.<sup>275</sup>

Interestingly, the question of whether or not such conduct falls within the protection of the First Amendment has been raised in very few cases. However, where the issue has been raised, the courts have dismissed it quite easily. In *Attorney Grievance Commission of Maryland v. Alison*,<sup>276</sup> a Maryland court had no trouble finding an attorney's verbal abuse to be outside the protection of the Constitution.<sup>277</sup> The court explained that regulations against such conduct were not an attempt to regulate the content of one's speech, but were necessary to guarantee the orderly flow of the judicial system. This was, in the opinion of the *Alison* court, no more than an attempt to restrict

268. When told about a deputy district attorney's wife having a miscarriage, he commented, "Oh good. One less minority." *Id.*

269. *Id.*

270. *In re Stevens*, 645 P.2d 99 (Cal. 1982).

271. *Id.* at 99.

272. *Id.* at 100.

273. *Id.* at 99.

274. *Ryan v. Commission on Judicial Performance*, 754 P.2d 724 (Cal. 1988). While in chambers, but during a preliminary hearing, the judge asked two female attorneys if they knew the difference between a Caesar salad and a blow job. When they replied that they did not, he said, "Great, let's have lunch." *Id.* at 739.

275. *Id.*

276. 565 A.2d 660 (Md. 1989).

277. *Id.*

time, place and manner of the speech,<sup>278</sup> which, of course, is permissible.<sup>279</sup>

The preceding cases are illustrative of the fact that the courts do not need an anti-discrimination ethics rule to discipline lawyers who engage in discriminatory conduct while in certain professional environments. The rule that prohibits conduct prejudicial to the administration of justice already is in place and provides the courts with the necessary rule upon which to support a charge of misconduct.

So why adopt the rules? If their only purpose is to give the courts something upon which to base a disciplinary action against a discriminating lawyer, they are redundant and, thus, unnecessary. On the other hand, if the legal profession wants to make a political statement and send a message to the public that it will not tolerate such reprehensible conduct by its members, the rules may have some value. They can be used as a tool to inform the public of the legal profession's position, vis-a-vis harmful discrimination. This, of course, is based on the assumption that they are sufficiently narrow in scope and otherwise properly drafted so that they can survive a constitutional challenge.

## V. CONCLUSION

Professor Matsuda argues that lawmakers have used limited imagination in considering proposals to prohibit hate propaganda, and that such "limitation of imagination is a disability, a blindness, that prevents lawmakers from seeing that racist speech is a serious threat."<sup>280</sup> The question, however, is how creative can one become? While imagination and creativity can be a good thing, the limitations of creative lawmaking must be recognized. Invidious discrimination against any person, whether or not the individual is a member of one of the groups identified in the proposed and adopted ethics rules, is morally wrong. However, the state simply cannot respond to that wrong in a "politically correct" manner because it is the popular thing to do. It is the government's responsibility to respond to any societal need in a manner that is within bounds of the law. This includes attempts to cure this continuing and

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278. *Id.* at 667.

279. See generally NOWAK ET AL., *supra* note 114, § 16.47 (regarding reasonable time, place, and manner restrictions on speech, without regard to content).

280. Matsuda, *supra* note 59, at 2375.

very harmful problem. Certainly, every effort must be made to eliminate discrimination, but it has to be accomplished lawfully.

While the California rules may be legally sound, the proposed Michigan rule and the adopted New Jersey rule appear to have some construction problems. It is lawful for the anti-discrimination rules to prohibit certain conduct in selected professional environments; however, they may not restrict the content of a lawyer's speech. The Michigan and New Jersey rules do not recognize this distinction. For example, a lawyer may be prohibited from speaking out against homosexuals while in the courtroom. However, outside that environment, it would be unconstitutional to prevent the lawyer from speaking out against homosexuality even if the lawyer is acting in her professional capacity.<sup>281</sup> The latter is an attempt to regulate the content of the speech rather than when or where it is spoken. The Michigan rule faces other problems because it attempts to regulate almost every facet of a lawyer's life that might involve the lawyer engaging in certain types of discriminatory conduct,<sup>282</sup> including the lawyer's private life. The courts thus far have not allowed such far reaching restrictions.<sup>283</sup>

What can be done then? First, the proposed rules can be rewritten so that they are limited in scope similar to that of the California rules. Rules that restrict a lawyer's professional activities usually are approved by the courts because the state's interest in preserving the public's confidence in the legal system usually is sufficiently compelling to override any conflicting individual constitutional right.<sup>284</sup>

Second, an advisory ethics rule could be adopted that suggests that lawyers refrain from engaging in all types of discriminatory conduct. While such a rule would not obligate the lawyer, it would send a message to both the lawyer and the public that the legal profession disapproves of such reprehensible conduct.

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281. This assumes that the speech is not in conjunction with an activity that could result in the comments being prejudicial to the administration of justice.

282. See *supra* note 19 and accompanying text.

283. See generally *Polk v. State Bar of Texas*, 374 F.Supp. 784 (N.D. Tex. 1974); *In re Williams*, 414 N.W.2d 394 (Minn. 1987), *appeal dismissed*, 485 U.S. 950 (1988).

284. See generally MODEL CODE, *supra* note 25; MODEL RULES, *supra* note 25; CALIFORNIA RULES, *supra* note 15; see also *Gonzalez v. Commission on Judicial Performance*, 657 P.2d 372 (Cal. 1983); *In re Stevens*, 645 P.2d 99 (Cal. 1982).

Third, the local and state bars can and should continue to make lawyers aware of their conduct and the harm that can result from discriminatory acts. This can be accomplished most effectively through continuing legal education efforts. If a state bar can require a lawyer to take a designated number of continuing legal education hours in ethics and drug abuse,<sup>285</sup> there is no reason why the bars cannot adopt a similar requirement to educate lawyers about the effects of discrimination. Certainly, one of the best ways to eliminate certain undesirable forms of conduct is to educate those who might engage in such conduct.

There are those who are skeptical about the success of education as a means of eliminating discrimination.<sup>286</sup> However, one only need to look to the South where race relations used to be among the worst in the nation to see its positive effects. In a recent article in *U.S. News & World Report*, Andrew Young, the black mayor of Atlanta, was explaining that racial relations in the South had improved significantly because, "[P]eople know each other. . . . We dealt with race overtly."<sup>287</sup> This is not to say that there is no discrimination below the Mason-Dixon line. However, relations have improved because people have learned that the foundation upon which their fears were based are groundless. If education can improve conditions in the South, it should have a similar positive effect on reducing discrimination by members of the legal profession.

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285. Ohio requires all attorneys to take a one-hour per year continuing legal education course in the area of substance abuse as part of its continuing legal education requirement. Michigan, Iowa, Ohio, to name a few, require a designated number of continuing legal education hours in legal ethics.

286. *Campus Antiracism Rules*, *supra* note 12, at 379.

287. Matthew Cooper et al., *Race and the South*, U.S. NEWS & WORLD REP., July 23, 199, at 22.