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# Making Civility Democratic

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# ARTICLE

## MAKING CIVILITY DEMOCRATIC

*Amy R. Mashburn\**

### TABLE OF CONTENTS

I.	INTRODUCTION.....	1148
II.	THE ELUSIVE ASPIRATION .....	1152
III.	LAWYERS BEHAVING BADLY: AN EMPIRICAL STUDY.....	1157
	A. <i>The Goals That Determined the Inclusion of Cases</i> .....	1158
	B. <i>The Database of Cases</i> .....	1158
	C. <i>The Types of Cases Excluded and Reasons for Exclusion</i> .....	1158
	1. <i>Cases Overturned on Appeal</i> .....	1158
	2. <i>Most Cases Involving Bad Faith Litigation or Discovery Abuse</i> .....	1158
	3. <i>Most Cases Involving Sixth Amendment Challenges</i> .....	1159
	D. <i>Disclaimers</i> .....	1159
	E. <i>The Statistical Program and Variables Used for Analysis</i> .....	1160
	F. <i>Results</i> .....	1162
IV.	AN ILLUSTRATIVE CASE .....	1166
	A. <i>Are Lawyers Different and Does That Difference Matter?</i> .....	1171
	B. <i>How Important Is the First Amendment to Regulating Civility Within the Legal Profession?</i> .....	1175

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lawyers most likely to be sanctioned for incivility are those whom the profession affords the least entitlement to deference—lawyers who represent individuals. The study also shows that incivility directed towards those whom the profession affords the greatest entitlement to deference—judges (rather than lawyers, clients, or witnesses)—is the type of rudeness most likely to result in professional sanctions. This Article explores the fundamental challenge bias presents for civility advocates: whether the desirable aspects of the ideal of civility can be advanced without perpetuation of illegitimate, disparate, and subjective standards.

The notion of civility has captured the imagination of philosophers, political theorists, and historians who have created a rich body of scholarship dedicated to defining the essential attributes of a civil society.<sup>4</sup> One recurrent theme of these studies is that the rules of polite social interaction were historically based on a concept of deference that had its origins in aristocratic societies.<sup>5</sup> The obligation of members of the lower classes to defer to those in the upper classes was the organizing principle of European social structure.<sup>6</sup> Elaborate rules of etiquette became intertwined with evolving class distinctions.<sup>7</sup> Because deference-based notions of civility are not easily woven into the social fabric of an egalitarian republic, the intersection between manners and class has posed difficulties for Americans from the beginning. Civil society scholars continue to explore whether “the structures of civility, apparently so deeply bound up with deference and restraint and aristocratic privilege, [can] be put in the service of justice in a society of democratic interests.”<sup>8</sup>

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4. See *infra* Part V.B. See generally P. M. Forni, DR. FORNI'S CIVILITY WEB SITE, <http://krieger.jhu.edu/civility> (last visited Jan. 12, 2011) (noting that Professor Forni, who teaches at Johns Hopkins University, co-founded the Johns Hopkins Civility Project—now The Civility Institute—which he now directs); THE INSTITUTE FOR CIVILITY IN GOVERNMENT, <http://www.instituteforcivility.org> (last visited Jan. 12, 2011) (“[A] grassroots, nonpartisan, nonprofit organization that is building civility in a society that all too often seems tilted toward uncivil speech and actions.”).

5. See EIKO IKEGAMI, BONDS OF CIVILITY 29 (2005) (relating the culture of civility to “prior developments of aristocratic modes of sociability”).

6. See BENET DAVETIAN, CIVILITY: A CULTURAL HISTORY 24 (2009) (describing how in early medieval Christian Europe, paying homage to lords and chieftains formed the foundation of feudal society); TIMOTHY JAY, CURSING IN AMERICA 101–03 (1992).

7. See DAVETIAN, *supra* note 6, at 23–24 (asserting that courtesy in Europe during the Middle Ages “establish[ed] and maintain[ed] rigid differentiations between individuals possessing disparate amounts of military power, social prestige, and wealth”); TIMOTHY JAY, WHY WE CURSE 205–07 (2000) (“Etiquette permits those with power to control the ill-mannered underclass by denying them access to contexts of social power.”).

8. KINGWELL, *supra* note 1, at 240.

The legal profession has struggled for many years with its perception of increasing incivility and widespread disregard for professional norms of behavior among lawyers.<sup>9</sup> The lawyer's representational role complicates efforts to address attorney incivility because when lawyers misbehave, they are often acting not only as individuals, but are also functioning as agents or advocates for others. For this and other reasons, commentators tend to view the practice of law as a unique environment with its own singular history and special adaptive culture.<sup>10</sup>

The profession's response has been to embrace what sets lawyers apart from others. The prevalent ideology for defining and remedying the misbehavior problem from within the profession has been the professionalism paradigm.<sup>11</sup> Professionalism emphasizes conformity to a shared vocational vision and the acculturation lawyers receive while in law school, through the bar admission process, and during subsequent exposure to the norms of practice.<sup>12</sup> This approach is self-consciously isolating.<sup>13</sup> The Bar's professionalism orthodoxy is largely unconcerned with what history, sociology, social psychology, psychiatry, philosophy, linguistics, and political theory have to say about civility.<sup>14</sup> This Article argues that the legal profession cannot make civility a more democratic ideal unless the practicing Bar abandons its ideological isolationism and incorporates relevant

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9. See Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1, 1-2 (2005) ("In response [to changing attitudes regarding the legal community], the past century saw repeated and sustained professionalism movements, aimed at promoting an ideal of professionalism in legal practice.").

10. See OXFORD COMPANION TO AMERICAN LAW 278-88 (Kermit L. Hall ed., 2002) (tracing the development of professional responsibility from its origins in 1817, continuing through the formation of the American Bar Association in 1878, and up to more recent sources of professional obligations and standards).

11. See *infra* pp. 1152-53.

12. See Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217, 221-22, 234 (2002) (describing Dean Anthony Kronman, a noted supporter of professionalism, as advocating that the profession look inward to "ancient assumptions").

13. For example, note Levine's observance that Anthony Kronman's defense of professionalism is that the Bar's traditional ideals are the solution to crisis in the legal profession. *Id.* at 219-20.

14. But see ELIOT FREIDSON, PROFESSIONALISM REBORN: THEORY, PROPHECY AND POLICY 20-23 (1994) (addressing professionalism from a sociological perspective and arguing that sociologists have as great a role in defining professionalism as any other group); DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 249 (2008) (arguing for reconsideration of the adversarial ethic in light of larger societal changes).

insights from other disciplines into its working conception of professionalism.

In Part II, this Article explains why an approach to incivility that relies on ideals expressed as catch phrases, such as “lawyers are officers of the court” and law is a “learned profession, not a trade,” is problematic and creates a space within which deference-based norms may operate. Part III reports the results of an empirical study designed to determine whether judges and disciplinary tribunals are applying deference-based notions of civility and whether case law is giving the concept of civility normative content that is independently viable, capable of articulation, and susceptible to fair administration. The study produced a troubling profile of the type of lawyer most likely to be punished for being impolite or offensive.<sup>15</sup> Well-known attorney Geoffrey Fieger fits this profile, and Part IV uses the Michigan Bar’s efforts to sanction Fieger for criticizing the judiciary as an illustration of the dominant professionalism paradigm at work. The practical effect of cases like Fieger’s has been to vindicate, to some extent, the Bar’s ability to discipline lawyers for using crude speech to criticize judges. The doctrinal result, however, is a more ambiguous stalemate between professionalism’s laudatory goals of protecting the rule of law and the integrity of the judicial system, and a devastating First Amendment critique of suppressing politically-charged speech by a lawyer attempting to advance the cause of a client. Part V suggests that the way around the doctrinal impasse is to develop an understanding of rudeness based on a broader psychological, historical, and political perspective. This approach generates a theory of civility that predicts and explains the results of the empirical study. In Part VI, this Article contends that courts will continue to apply prohibitions against incivility in a biased manner unless they consider the concerns other disciplines have voiced about punishing citizens in a democratic society for being impolite and acknowledge the inherently contingent nature of judgments about impolite, rude, offensive, or disrespectful speech and behavior. Finally, this Article concludes that because of the demonstrated risk of bias, courts should refrain from punishing incivility unless they can identify and articulate a tangible threat to the fair administration of justice in an impending or pending matter.

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15. See *infra* Part III.F (summarizing the results of study and finding that the most likely lawyer to be cited is one who represents an individual and speaks improperly to a judge).

## II. THE ELUSIVE ASPIRATION

Whatever else may be said about professionalism, its usefulness as a basis for commentary cannot be denied. Two strains of observation run through most of the numerous meditations on the meaning of professionalism: concern about increased incivility and a desire to justify the uniqueness of the legal profession because of its commitment to a set of ideals.<sup>16</sup> To the extent that these works make any recommendations at all, they tend to be couched in very general terms. Lawyers should have good character, and the Bar should address attorney misbehavior by communicating and reaffirming the aspirations of the profession and encouraging individual lawyers to conform their conduct to purportedly shared normative ideals.<sup>17</sup> The catechisms of professionalism do, at a minimum, seem to provide an outlet for expressing widespread concern about the state of the profession and reassurance that something is being done to stem the perceived tide of disintegration.

Professionalism, however, has encountered difficulties when it has attempted to move beyond ideology and into the realm of action. The idealistic approach to incivility has been difficult to apply consistently when it is forced outside Bar luncheons and law school graduation speeches, and into courtrooms and disciplinary tribunals. Examination of the cases included in the database described in the next section reveals that the efforts of judges and disciplinary authorities to sanction or otherwise control rude, impolite, offensive, discourteous, and disrespectful behavior have produced a number of complex legal problems.<sup>18</sup>

Professor Fred Zacharias has explained that “overemphasis on a single paradigm . . . tends to produce idealized rules,” and idealized rules are likely to be difficult to enforce.<sup>19</sup> The professionalism paradigm has produced two idealized rules: that the practice of law should be “a profession and not a trade”;<sup>20</sup> and

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16. See, e.g., Warren E. Burger, Remarks, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949, 949, 954 (1995).

17. See Jeffrey M. Vincent, *Aspirational Morality: The Ideals of Professionalism—Part II*, *UTAH B.J.*, Apr. 2002, at 24, 24–26 (detailing the recommendations of the National Action Plan, which required the Bar admission process to reinforce the ideals of conduct expected of attorneys).

18. See *infra* Part IV.B (identifying, for example, the problematic interaction between sanctions for incivility and the First Amendment).

19. Fred C. Zacharias, *The Images of Lawyers*, 20 *GEO. J. LEGAL ETHICS* 73, 74 (2007).

20. Levine, *supra* note 12, at 235 (quoting Anthony T. Kronman, *Legal Professionalism*, 27 *FLA. ST. U. L. REV.* 1, 1 (1999)). But see ROY D. SIMON, CAROL A. NEEDHAM & BURNELE V. POWELL, *LAWYERS AND THE LEGAL PROFESSION: CASES AND*

that lawyers should be “officers of the court.”<sup>21</sup> According to its advocates, professionalism involves adherence to an unwritten code of behavior that goes beyond the baseline requirements of the rules of professional responsibility.<sup>22</sup> Internalizations of the “officer of the court” and “law is a profession” norms are supposed to produce a feeling of separateness from non-lawyers that engenders pride in being a professional and a resulting willingness to refrain from incivility.

If enforced, these norms also allow courts to punish or reprimand lawyers by simply labeling their behavior “unprofessional.”<sup>23</sup> The refusal to unpack the “officer of the court” and “law is not a business” ideals has the effect of allowing the Bar to advocate enforcement of open-ended norms that are not the subject of legislative deliberation or even much informal debate.<sup>24</sup> This is an ideal environment for judges to put into effect, consciously or unconsciously, their expectations about entitlement to deference.

Not surprisingly, using the concept of professionalism as anything more than a label to be attached to conduct redressable through other more concrete legal provisions has, as the following sections demonstrate, proven difficult and controversial. Expositions of professionalism are careful to avoid giving much political, ideological, sociological, moral, or psychological content to the professionalism ideal. Pressing for more detail, or raising concerns about unacknowledged value judgments (about which consensus does not exist), is unwelcomed heresy. One scholar has said that professionalism is analogous to declaration of a religious belief.<sup>25</sup>

Not only is the content of these norms elusive, but their place in the sprawling constellation of rules regulating attorneys

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MATERIALS 413 (4th ed. 2009) (citation omitted) (arguing that the legal profession has always sent profoundly mixed messages about whether law is a business).

21. Marvin E. Aspen, *Let Us Be ‘Officers of the Court,’* A.B.A. J., July 1997, at 94, 94. The “officer of the court” notion had previously been given a developed meaning in disciplinary law as a basis for the requirement of candor towards the tribunal that modifies the obligations of zealous advocacy. MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 2 (2010); CTR. FOR PROF’L RESPONSIBILITY, ABA, A LEGISLATIVE HISTORY 431 (2006) (stating Rule 3.3 was originally adopted in 1983).

22. See, e.g., Vincent, *supra* note 17, at 24 (“Certainly, the concept of professionalism encompasses more than mere adherence to the minimal standards of ethical conduct.”).

23. See, e.g., *People ex rel. Chicago Bar Ass’n v. Berezniak*, 127 N.E. 36, 40 (Ill. 1920) (declaring that a lawyer’s unprofessional advertising, if continued, would lead to disbarment).

24. See Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 289 (2006).

25. See Levine, *supra* note 12, at 220–21 (examining the views of Dean Kronman, a proponent of the “professionalism model”).

is unclear. Numerous so-called “creeds” of professionalism, civility codes, bounds of advocacy “covenants,” and other aspirational prescriptions have proliferated over the last decade and a half.<sup>26</sup> The majority of these are purely permissive rules.<sup>27</sup> A recurrent issue is whether the dictates of professionalism express any norms beyond or different from those already codified in disciplinary rules or grounded in related bodies of case law.<sup>28</sup> Should punishment for incivility or a lack of professionalism be limited to situations involving behavior that falls into unoccupied territory between rules? If so, does this not transform ideals that are merely aspirational from the perspective of the Rules of Professional Conduct into mandatory provisions?

One of the most striking aspects of the civility debate in the legal community is that, although the issue is often framed as a pressing, unmet need for authority to deal with a new problem, in reality the judiciary and the Bar have long possessed extensive powers to punish attorneys for disrespect and other forms of incivility.<sup>29</sup> The common law of professional responsibility is extensive and, together with the disciplinary rules, has given content to, and refined in application, duties of competency, trustworthiness, diligence, zealous advocacy, preservation of confidences, conflicts avoidance, loyalty, respect for client autonomy, candor towards the tribunal, respect for tribunals, respect for opposing parties and their lawyers, prohibitions on unfair litigation tactics, and many other exacting requirements.<sup>30</sup> The Rules of Civil and Criminal Procedure contain numerous

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26. See Ctr. for Prof'l Responsibility, *Professionalism Codes*, A.B.A., <http://www.abanet.org/cpr/professionalism/profcodes.html> (last visited Jan. 28, 2011) (providing a comprehensive list of promulgated civility codes and creeds); THE OXFORD COMPANION TO AMERICAN LAW, *supra* note 10, at 278 (tracing the origins of the recent movement to the 1986 Stanley Commission's recommendation that lawyer professionalism be promoted, leading the ABA and other organizations to approve standards and creeds of professionalism for lawyers).

27. See generally Green & Zacharias, *supra* note 24.

28. See *id.* at 287–91 (discussing the role of judges and lawmakers in “impos[ing] extra-code constraints,” versus lawyer discretion in establishing permissive standards).

29. See ABA CANONS OF PROFESSIONAL ETHICS Canon 22 (1908) (setting forth the duty of the lawyer to maintain a respectful attitude, demonstrate candor and fairness, and refrain from unprofessional and dishonorable conduct). The *Canons of Professional Ethics* have since been replaced with the more forceful *ABA Model Code of Professional Responsibility*. MODEL RULES OF PROF'L CONDUCT ix–x (2010).

30. MODEL RULES OF PROF'L CONDUCT *passim* (2010); see Benjamin P. Cooper, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 BAYLOR L. REV. 174, 186 (2009) (“[The] Model Rules of Professional Conduct derive from the common law of fiduciary relationships . . .”).

provisions for sanctioning lawyers.<sup>31</sup> Tribunals also have local rules of court administration that may impose courtesy requirements.<sup>32</sup>

In addition, courts have broad powers to hold attorneys and litigants in contempt of court, which, in general terms, can be defined as acts calculated to embarrass, hinder, or obstruct a court in the administration of justice, or lessen its authority or its dignity, including primarily disobedience of courts' orders.<sup>33</sup> The U.S. Supreme Court has also expansively defined the inherent power of courts to control the behavior of the lawyers who appear before tribunals, which includes the power to sanction litigation-related conduct that occurs both inside and outside the courtroom.<sup>34</sup> Various statutes exist that are designed to penalize "vexatious" conduct in litigation.<sup>35</sup> The Oath of Admission to the Bar is also occasionally cited as a basis for reprimanding incivility, but its prohibition against "offensive personality" is rarely an independent basis for punishment.<sup>36</sup>

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31. See, e.g., FED. R. CIV. P. 11(c) (describing the grounds and procedures for imposing sanctions for making improper representations to the court); FED. R. CIV. P. 37(b)(2), (d)(3) (describing the types of sanctions that may be imposed for discovery violations).

32. See, e.g., SUPERIOR COURT OF CAL., CNTY. OF SACRAMENTO, LOCAL RULES, at apps. A–B, (amended Jan. 24, 2011), available at <http://www.saccourt.ca.gov/local-rules/docs/local-rules.pdf>.

33. ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT 61:1201–02 (2009) (discussing the breadth of the contempt doctrine and its limitations).

34. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35 (1991) (affirming courts' inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities). For articles discussing the use of inherent authority, see generally Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2147–51 (2003); Judith A. McMorrow, Jackie A. Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1432–33 (2004); Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 19–22 (2005); Jason Mehta, *The Development of Federal Professional Responsibility Rules: The Effect of Institutional Choice on Rule Outcomes*, 6 CARDOZO PUB. L., POL'Y, & ETHICS J. 57, 69–70 (2007); Jessica Shpall, *A Shakeup for the Duty of Confidentiality: The Competing Priorities of a Government Attorney in California*, 41 LOY. L.A. L. REV. 701, 716 (2008).

35. See, e.g., 28 U.S.C. § 1927 (2006) (providing for assessments of attorneys' fees against lawyers found to have unreasonably and vexatiously multiplied proceedings).

36. Janelle A. McEachern, Annotation, *Engaging in Offensive Personality as Ground for Disciplinary Action Against Attorney*, 58 A.L.R. 5TH 429 (1998); see, e.g., Fla. Bar v. Walton, 952 So. 2d 510, 515 (Fla. 2006) (basing affirmation of an attorney's ninety-one-day disciplinary suspension on his motivations, the effect of his actions on his clients and the law profession, violations of the Oath of Admission including abstaining from offensive personality, and prior disciplinary history); Fla. Bar v. Martocci, 791 So. 2d 1074, 1077 (Fla. 2001) (approving a referee's recommended public reprimand and two-year probation based on rule violations that prejudiced the administration of justice and "disrespectful and abusive comments cross[ing] the line from that of zealous advocacy to

Furthermore, numerous provisions of the rules of professional responsibility have relevance or are arguably applicable in these instances.<sup>37</sup> This is ironic given that a common definition of professionalism is that its ideals go beyond the requirements of these rules.<sup>38</sup> The cases belie this.<sup>39</sup> As the empirical study described in the next section shows, courts intent on actually sanctioning lawyers acknowledge the need for rule-based language by searching for and using it whenever possible. They rarely rely upon notions of professionalism to do more than condemn or descriptively label a lawyer's conduct.<sup>40</sup> Of course, some jurisdictions have mandatory provisions prohibiting discourteous behavior or

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unethical misconduct"); *In re Disciplinary Proceedings Against Rudolph*, 744 N.W.2d 466, 467–68 (Wis. 2009) (imposing stipulated, reciprocal discipline, including a thirty-day suspension, from another jurisdiction on the criminal act involved; fraudulent, dishonest, or deceitful conduct; potentially prejudicial conduct towards administration of justice; and conduct involving offensive personality).

37. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2010) (Candor Toward the Tribunal); MODEL RULES OF PROF'L CONDUCT R. 3.4 (2010) (Fairness to Opposing Party and Counsel); MODEL RULES OF PROF'L CONDUCT R. 3.5 (2010) (Impartiality and Decorum of the Tribunal); MODEL RULES OF PROF'L CONDUCT R. 4.4 (2010) (Respect for Rights of Third Persons); MODEL RULES OF PROF'L CONDUCT R. 8.2 (2010) (Judicial and Legal Officials); MODEL RULES OF PROF'L CONDUCT R. 8.3 (2010) (Reporting Professional Misconduct); MODEL RULES OF PROF'L CONDUCT R. 8.4 (2010) (Misconduct); see also Fred C. Zacharias & Bruce Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 90–92 (2009) (describing the sources of disciplinary law available to judges and advocating that the RPC should provide a starting point). For instance, Florida has a rule that states:

A lawyer shall not: . . . (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers, on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic . . . .

RULES REGULATING THE FLA. BAR R. 4-8.4.

38. AM. BAR ASS'N, CTR. FOR PROF'L RESPONSIBILITY, *ABA Professionalism Codes and Creeds*, in ABA COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 491, 494 (2010 ed. 2009) (“[N]ot only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Creed of Professionalism . . . .”); see Keith W. Rizzardi, *Defining Professionalism: I Know It When I See It?*, FLA. B. J., July/Aug. 2005, at 38, 38–39, 41–42, 42 n.12 & n.18 (“Harold G. Clark, Chief Justice of the Supreme Court of Georgia . . . said ‘professionalism differs from ethics in the sense that ethics is a minimum standard . . . while professionalism is a higher standard expected of all lawyers.’” (quoting Interview by John W. Spears with Harold G. Clark, Chief Justice, Georgia Supreme Court (May 24, 1990), available at <http://www.floridabar.org/tfb/TFBProfess.nsf/40090c16eedaf0085256b61000928dc/ac951ac3ada1f20085256b2f006ccda6?OpenDocument>)).

39. See generally Donald J. Winder & Jerald V. Hale, *Enforcing Civility in an Uncivilized World*, UTAH B.J., May/June 2009, at 36 (discussing cases in which courts have found ways to enforce nonbinding notions of civility).

40. *Infra* Part III.F.

speech, but even then reliance upon those provisions alone for authority is rare.<sup>41</sup>

Given the existence of all of those powerful tools to control the behavior of lawyers, together with the Bar's aggressive, well-supported, and popular professionalism agenda, one would predict that the last decade would have experienced a significant decline in the frequency of attorney misconduct involving discourtesy, rudeness, and disrespectfulness. Instead, the situation is perceived by most commentators to have continued to worsen, and lawyers and judges continue to complain of growing incivility.<sup>42</sup> Proof, however, of the basic premise of the professionalism movement has been elusive because commentators have seldom found it necessary or desirable to determine whether the frequency of uncivil acts by lawyers is, in fact, increasing or whether widespread exposure to the ideals of professionalism has had any effect.

### III. LAWYERS BEHAVING BADLY: AN EMPIRICAL STUDY

The Author designed a study as original, empirical research to explore whether the concepts of offensiveness, incivility, or professionalism are, or can be, given any specific normative content in a disciplinary setting that is non-duplicative of other sanctioning authority, independently viable, capable of articulation, and susceptible to fair administration. The program, IBM SPSS Statistics, was used to analyze data collected from reported legal cases for relevant correlations, regressions, and frequencies.<sup>43</sup> The Author chose the variables for analysis, assessed the cases for the presence or absence of those variables, input the data into a database, and used the functions of the SPSS program to analyze the data.<sup>44</sup> The results of this study are reported in the sections that follow.

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41. Both Florida and Michigan have such provisions, but few cases interpret those rules as freestanding authority. See MICH. SUPREME COURT, ORDER NO. 10-11 (Oct. 26, 2010) (effective Jan. 1, 2011), available at <http://courts.michigan.gov/supremecourt/Resources/Administrative/2009-06-102610.pdf> (amending the MRPC to read: "A lawyer shall not . . . (d) engage in undignified or discourteous conduct toward the tribunal"); RULES REGULATING THE FLA. BAR R. 4-8.4 (1993), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/982D8C3C832DF2BA85256CBE007C330C/\\$FILE/Master%202010%20RRTFB%20Columns%2012-10-10.pdf](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/982D8C3C832DF2BA85256CBE007C330C/$FILE/Master%202010%20RRTFB%20Columns%2012-10-10.pdf) ("A Lawyer shall not: (d) engage in conduct . . . that is prejudicial to the administration of justice, including to . . . disparage, humiliate, or discriminate . . .").

42. See Sandra Day O'Connor, *Professionalism*, WYO. LAW., Apr. 27, 2004, at 12, 13 (commenting on the conduct of attorneys and the frustration of lawyers toward the "growing incivility").

43. The SPSS program is widely-used in academic research. IBM SPSS, <http://www.SPSS.com> (last visited Jan. 28, 2011).

44. The database and the results of the statistical analysis are on file with the author.

A. *The Goals That Determined the Inclusion of Cases*

The primary objective of this study was to explore how courts are actually using the concepts of civility, offensiveness, and professionalism. In particular, it sought to identify whether these concepts had any normative content independent of the prohibitions found in other sources of law governing lawyers. The study selected for inclusion only those cases where courts and disciplinary tribunals were engaged in condemning or sanctioning the speech or conduct of lawyers that did not fit entirely within the purview of another category of sanction. The study was also designed to determine what specific types of speech or conduct were predictive of condemnation or sanction by courts.

B. *The Database of Cases*

For a ten-year period from 1998 to 2008, various Westlaw case databases were searched for all available cases where courts used the words “offensive,” “uncivil,” “unprofessional,” “professionalism,” and derivations of these words to describe the behavior of lawyers. This produced a database of 474 cases, which were then screened along the lines set forth below for their appropriateness for inclusion in the database. Each of the cases selected for inclusion was then analyzed for the existence, or not, of the variables described below. The results were entered into a database. In each of these cases, the judge or disciplinary tribunal, having already labeled the lawyer’s behavior as lacking in civility or professionalism, had to make a second decision: whether to impose a sanction beyond that of having the label “uncivil” or “unprofessional” affixed to the lawyer’s name in a reported opinion. The database, therefore, includes a complete universe of decisions to sanction and those not to sanction, and avoids the empirical problem of selection for a dependent variable.

C. *The Types of Cases Excluded and Reasons for Exclusion*

The study excluded the following types of cases:

1. *Cases Overturned on Appeal.* The study excluded overturned cases where reversals had the effect of negating lower courts’ decisions *in toto*. It also excluded those cases where an appellate ruling, in any form, reversed or cast any doubt on a lower court’s decision to sanction an attorney.

2. *Most Cases Involving Bad Faith Litigation or Discovery Abuse.* The study excluded most of the cases where courts were relying exclusively on bad faith litigation statutory provisions,

such as 28 U.S.C. § 1927,<sup>45</sup> or the power of courts to sanction attorneys and parties for misconduct in the discovery process. These cases often included passing references to “incivility” or a “lack of professionalism,” but were rarely attempting to sanction lawyers for conduct so-labeled as separate or independent offenses. The database, however, did not exclude those cases where it is apparent that courts were assessing separate or enhanced sanctions against lawyers because their speech or behavior was uncivil or unprofessional.

3. *Most Cases Involving Sixth Amendment Challenges.* Most cases involving Sixth Amendment ineffective assistance of counsel challenges do not involve an attempt by a court to sanction a lawyer for the separate offense of behaving in an unprofessional manner. The issue, instead, is whether a conviction should be overturned because of an attorney’s deviation from professional standards of conduct, which may also involve incivility. The high stakes of these cases and the collateral nature of the inquiry into professionalism issues warranted their exclusion.

#### *D. Disclaimers*

Some disclaimers should be considered in evaluating the results of the study. The ten-year period is an arbitrary timeframe. It was selected because it allowed sufficient time for the Bar’s formal professionalism agenda to have been publicized and pursued for at least ten years before the first cases. In addition, even though care was taken to avoid omissions, the weaknesses inherent in case law database searches could have resulted in missed relevant cases. Although the study may not include every single case it might have, it identified most of the relevant cases and produced a sample large enough to allow legitimate observations and conclusions. Furthermore, because many of the orders and judgments of the federal district courts, both trial judges and magistrates, are available in searchable databases (which is not true of state court cases), the federal courts’ contribution and influence to the study is likely overstated. Moreover, it is possible that the federal trial courts use their power to sanction attorneys in ways that are not typical of state trial courts. Because Article III judges are not elected, have life tenure, and have immunity from salary reduction, they may be more willing to condemn the behavior of lawyers. Many state trial level judges are subject to election or re-election and

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45. 28 U.S.C. § 1927 (2006).

may feel more beholden to attorneys, and thus less likely to use their discretionary powers to sanction them. Finally, empiricism of this type is inherently imperfect and to some extent subjective even when the database is carefully constructed. Being mindful of these limitations helps to insure that the reach of the analysis does not exceed the grasp provided by the statistics.

*E. The Statistical Program and Variables Used for Analysis*

The search criteria as modified produced 201 cases. For each of the 201 cases, the following data were collected and put into an SPSS spreadsheet database. The program's correlation, cross-tabulation, and regression functions were then used to analyze the variables.

1. Type of tribunal: state court, disciplinary tribunal, or federal court.
2. Level of tribunal assessing the lawyer's conduct: appellate or nonappellate.
3. Gender of lawyer: male, female, or unknown.
4. Type of client: individual, corporate, government (non-prosecutor), criminal defendant, or government (prosecutor).
5. Location of misconduct: in the presence of an adjudicator, in the work product of a lawyer (other than an appellate brief), in an appellate brief, in a communication (letter, telephone call, e-mail, etc.), in a legal workplace (law office, court clerk's office, etc.), or in a non-law related location.
6. Victims or persons towards whom misbehavior was directed: judge, opposing counsel, opposing party, witnesses, other legal actors (court personnel, etc.), lawyer's own client, or nonclient/nonlegal person.
7. Practice-related misconduct: yes or no.
8. Litigation-related misconduct: yes or no.
9. Nature of misconduct:
  - a. Speech
    - i. rude or uncivil
    - ii. vulgar or profane
    - iii. threatening or aggressive
    - iv. defiant
    - v. sexual
    - vi. accusatory (incompetency, error, stupidity)
    - vii. accusatory (bias, prejudice)

2011]

*MAKING CIVILITY DEMOCRATIC*

1161

- viii. accusatory (racism)
- ix. accusatory (sexism)
- b. Conduct
  - i. gestures (eye-rolling, smirking, laughing)
  - ii. physical (violence, aggression)
  - iii. physical (sexual misconduct)
  - iv. nonconformance to or disobedience of court's order
  - v. filing baseless bar grievances against opposing counsel or judge
  - vi. filing baseless lawsuits against opposing counsel or judge, including placing liens on property
- 10. Authorities cited by court:
  - a. contempt
  - b. inherent authority
  - c. statute, local rule of court, or context-specific (e.g., family law) rule
  - d. First Amendment of the U.S. Constitution
  - e. Rules of Professional Conduct (RPC)
    - i. RPC Preamble/Scope
    - ii. RPC 3.1 (meritorious claims)
    - iii. RPC 3.3 (candor toward the tribunal)
    - iv. RPC 3.4 (fairness to opposing party and counsel)
    - v. RPC 3.5(d) (impartiality and decorum of the tribunal/conduct intended to disrupt a tribunal)
    - vi. RPC 8.2(a) (statements about judges)
    - vii. RPC 8.4(d) (conduct prejudicial to the administration of justice)
    - viii. RPC 8.4 (any other section)
    - ix. Other RPC (trial publicity, prosecutor's duties, rights of third persons)
  - f. Oath of Admission to the Bar (refrain from "offensive personality")
  - g. Professionalism or courtesy statute or rule<sup>46</sup>

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46. Arizona, California, Florida, Georgia, Texas, and Utah have promulgated courtesy or civility rules. Winder & Hale, *supra* note 39, at 36, 38 n.1; *see, e.g.*, TEXAS LAWYERS' PROFESSIONAL ETHICS 10-2 to 10-3, 10-5 (4th ed. 2007) (finding within the Texas Lawyer's Creed, a Mandate for Professionalism, several references to a requirement of civility and courtesy).

11. Sanction: referral to disciplinary authority, written or verbal condemnation in opinion, ethics or professionalism training, disciplinary reprimand, suspension, disbarment, or other sanction, including monetary penalties.

#### F. Results

The cases were evenly distributed across the United States with a slightly lower percentage coming from the western region of the country. They were almost evenly distributed between state and federal cases (38.8% state cases and 37.3% federal cases), with disciplinary cases comprising 26.9%.<sup>47</sup> Overall, the frequency of the civility cases increased over the ten-year period. Predictably, the overwhelming majority of the cases were not only practice-related, but litigation-related as well. A more surprising result was that 15.9% of the incivility occurred in appellate briefs.<sup>48</sup> While 80% of the misbehaving lawyers were men and 19% were women,<sup>49</sup> none of the variables, other than those involving sexually inappropriate language and sexual misconduct, were correlated with gender.

The majority of the lawyers in these cases (57.7%) represented clients who were individuals. Corporate clients were the next largest represented group at 18.4%. Other groups of represented clients included criminal defendants at 10.9%, governments (state and federal prosecutors in criminal proceedings) at 8.0%, and other government entities at 7.0%.<sup>50</sup> Lawyers directed their incivilities primarily at opposing counsel (58.7%) and judges (52.2%).<sup>51</sup> Other intended victims were opposing parties (27.4%), witnesses (11.9%), other legal actors (such as judicial assistants, clerks of the court) (7.0%), their own clients (3.5%), and others (2.5%).<sup>52</sup>

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47. A small number of the cases were classified as both state and federal, or both disciplinary and federal, primarily because of attempts by lawyers to remove some of the cases to federal court.

48. For a discussion of inappropriate language in appellate briefs, see Stuart C. Markman, *Responding to Appellate Lawyers Who Cross the Line*, 32 STETSON L. REV. 425, 429–30 (2003) (discussing inappropriate language and accusations in appellate briefs); Steven Wisotsky, *Invective on Appeal: Impugning the Integrity of Judges*, FLA. B.J., May 2005, at 41, 41–42 (analyzing the problem of inappropriate language in appellate briefs and MRPC 8.2(a)).

49. In 1% of the cases, the gender of the lawyer was not apparent from available resources.

50. The total of these percentages exceeds one hundred because a few cases involved multiple clients who fell into different categories.

51. The total of the percentages exceeds one hundred because many of the lawyers directed their discourteous speech or behavior towards more than one type of victim.

52. This included individuals who were not related to the legal proceedings and were not the lawyers' clients.

The main focus of the study was the nature of the speech and behavior that courts characterized as uncivil, discourteous, unprofessional, or offensive. The incidents were divided into the general categories of speech and behavior. The speech category was further broken down by type, which produced the following results: The majority of the impolite speech was rude<sup>53</sup> (67.7%) and defiant (59.7%). The next largest category of speech (22.9%) that prompted condemnation was speech that accused judges or other members of the legal system of general bias against the lawyer or his/her client. Speech that accused judges of incompetence was present in 15.9% of the cases, followed by vulgar speech at 13.9%. Another 10.0% of the incidents involved threatening speech, while 7.5% consisted of accusations that a judge was racist. Some of the cases (4.5%) sanctioned lawyers for using sexually inappropriate language, such as making sexual comments to or about opposing counsel or court personnel. Finally, 2.0% of the cases involved accusations that judges were sexist.

In the behavior category, defiant behavior represented the majority of uncivil acts at 57.2%. The filing of actions with no evidentiary support or repetitive motions occurred in 13.4% of the cases. Inappropriate gestures (8.0%), sexual misconduct (3.5%), and violent or aggressive acts (2.5%) comprised the remainder of uncivil behavior.

In addressing incivility, judges and disciplinary tribunals make reference to, and rely upon, a variety of legal provisions as sources of their authority to impose sanctions or penalties for incivility, discourteousness, and disrespect. These provisions are of three types. First, a court other than a disciplinary tribunal may use statutory provisions and rules of procedure that clearly authorize the court to sanction lawyers. The study showed that 29.9% of the cases made reference to rules of procedure (such as Federal Rule of Civil Procedure 11), 17.9% grounded their power in the court's inherent authority to control the conduct of attorneys appearing before them,<sup>54</sup> 13.9% involved exercises of the power to hold lawyers in contempt, and only 5% of the cases relied upon statutory provisions (such as 28 U.S.C. § 1927).

The second category of authority is sanctioning power based on the use of the RPC, but here a distinction should be made

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53. Speech involving interruptions, yelling, name-calling, and general disrespectfulness was classified as "rude." "Vulgar" speech involved profanity, cursing, racial slurs, and other insults of this type.

54. For an example of this, see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35 (1991) (upholding a district court's use of inherent power to impose sanctions for a party's bad faith conduct).

between the use of these rules by disciplinary tribunals, which is explicitly authorized, and their use in civil or criminal cases. Courts seldom recognized the issue of whether using the disciplinary rules for this purpose was appropriate. The study found that many courts used them to give content and guidance to their use of inherent authority in particular. The RPC most commonly referenced in the inherent authority cases was RPC 8.4(d), which prohibits conduct prejudicial to the administration of justice, at 20.4% of the cases. Other provisions of RPC 8.4, including the general prohibition against misconduct and conduct that reflects on a lawyer's honesty, trustworthiness, and fitness, were used in 16.4% of the cases. RPC 8.2(a), which prohibits a lawyer from making false statements concerning the qualifications or integrity of a judge, was employed in 11.4% of the cases. The remainder of the RPC cited included RPC 3.3, candor towards the tribunal, at 9.0%; RPC 3.5(d), prohibition against engaging in conduct intended to disrupt a tribunal, at 8.5%; RPC 3.4, knowing disobedience to an obligation under the rules of a tribunal, at 7.0%; and RPC 3.1, a requirement that claims have a non-frivolous basis in law and fact, at 2.0%.

The third category of provisions includes those whose status as independent bases of authority to sanction is unclear. For example, 6.5% of the cases cite to the Preamble to the RPC, which is not drafted as a basis for discipline.<sup>55</sup> Other courts (8.0%) relied upon, or made reference to, provisions in the attorneys' Oath of Admission to the Bar.<sup>56</sup> Finally, although 73.1% of the cases cited the concept of "professionalism," the study did not reveal any courts that relied upon this concept exclusively or primarily for any sanction other than a written or verbal condemnation in an opinion or during a proceeding.

The study revealed the following frequencies for each of the types of sanctions: written or verbal condemnations occurred in 77.6% of the cases, monetary and other penalties in 34.3%,

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55. The language most often referenced is the instruction that lawyers have "respect for the legal system and for those who serve it, including judges" and that lawyers should "uphold legal process." MODEL RULES OF PROF'L CONDUCT Preamble ¶ 5 (2010).

56. *E.g.*, *Arizona Replaces Decree That Lawyers 'Abstain From All Offensive Personality'*, 23 LAW. MANUAL ON PROF'L CONDUCT 505 (2007); McEachern, *supra* note 36; see also Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 43-44 (2009) (noting that the oath was once the principal source of attorney regulation but is often overlooked today); Brian E. Mitchell, Note, *An Attorney's Constitutional Right to Have an Offensive Personality?* *United States v. Wunsch and Section 6068(f) of the California Business and Professions Code*, 31 U.S.F. L. REV. 703, 704-10 (1997) (addressing the background of *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996), by detailing various California court decisions applying provisions from the statutory codification of an attorney's general oath).

suspensions in 15.9%, reprimands in 10.4%, disbarment in 3.5%, and orders to attend ethics CLE or diversion programs in 2.0%. In a combined total of 62.2% of the cases, the courts imposed a sanction beyond, or in addition to, a verbal or written condemnation. Courts referred lawyers to the Bar for discipline in 8.5% of the cases in which they found incivility or a lack of professionalism in addition to breaches of the RPC.

The data can be analyzed from a number of different perspectives, only some of which were germane to the bias and deference issues that are the focus of this Article. Significant correlations were observed in the areas of the type of authority upon which the courts relied, the nature of the misconduct correlated with sanctions, the types of clients represented by sanctioned lawyers, and the role of the First Amendment.

The only two sources of authority that were correlated with discipline (other than a verbal or written condemnation) were to a court's invocation of RPC 8.2(a), which forbids a lawyer from making false statements concerning the qualifications or integrity of a judge, and RPC 8.4(d), which prohibits conduct prejudicial to the administration of justice.<sup>57</sup> A court's reliance upon, or reference to, other sources of judicial power to sanction, including, astonishingly, the power of contempt, was not predictive of serious punishment. The use of inherent authority, which gradually increased as a percentage of the total cases over the ten-year period, was highly correlated to federal courts and was infrequently used by state courts.

Another clear and significant finding concerned defiant speech, which was defined as speech that constitutes, in and of itself, or states a refusal to comply with a court's orders, rules, or directives. This was the single type of conduct that was generally correlated with discipline beyond a verbal or written condemnation. More specifically, defiant speech directed towards judges was highly correlated with sanctions, even though, paradoxically, the use of the contempt power was not. The significance of this finding is apparent only when one considers that all of the other types of speech and behavior, directed at all of the other victims, were not predictive of a sanction.

A particularly noteworthy finding was that representing an individual client was highly correlated with serious discipline. Conversely, representing a corporation or being a prosecutor was highly negatively correlated with being sanctioned. This troubling result was not explained by other variables. Along

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57. MODEL RULES OF PROF'L CONDUCT R. 8.2(a), 8.4(d) (2010).

these same lines, even though the lawyer's First Amendment rights were raised or considered in only 6.5% of these cases, invocation of the First Amendment was highly correlated to representation of an individual.

Putting all of these observations together results in a typical profile of a lawyer who is in the greatest danger of being sanctioned for incivility beyond a verbal or written condemnation: he/she represents an individual, speaks defiantly to a judge, and has been accused of making a false statement about the qualifications or integrity of a judge or engaging in conduct that is prejudicial to the administration of justice. A closer examination of one of these cases, typical in some respects but extraordinary in others, is illuminating.

#### IV. AN ILLUSTRATIVE CASE

Geoffrey Fieger is a nationally known, high-profile Michigan plaintiffs' personal injury lawyer.<sup>58</sup> He has also been the central figure in a series of protracted legal battles with Michigan attorney disciplinary authorities and the courts regarding their efforts to sanction him for statements critical of the judiciary he made while representing clients. One of these legal entanglements began with Fieger's involvement in a personal injury case, *Badalamenti v. William Beaumont Hospital*.<sup>59</sup>

In 1997, Fieger represented Salvatore Badalamenti, the plaintiff in a medical malpractice case.<sup>60</sup> A Michigan jury ultimately returned a \$15 million verdict in Badalamenti's favor. The defendants appealed, arguing that the verdict was based on insufficient evidence and that Fieger's misconduct during the trial denied them their constitutional right to a fair trial.<sup>61</sup> The Court of Appeals of Michigan unanimously ruled in favor of the defendants.<sup>62</sup> Judges Jane Markey, Richard Bandstra, and

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58. Petition for Writ of Certiorari at 3, *Fieger v. Mich. Sup. Ct.*, 130 S. Ct. 1048 (2010) (No. 09-142). He is also known for representing Dr. Jack Kevorkian and being the Democratic Party nominee for Governor of Michigan in 1998. *Geoffrey Nels Fieger*, FIEGER LAW, <http://www.fiegerlaw.com/GeoffreyFieger.php> (last visited Jan. 29, 2011).

59. Petition for Writ of Certiorari, *supra* note 58, at 3–4; *Badalamenti v. William Beaumont Hosp.*, 602 N.W.2d 854, 856, 860–61 (Mich. Ct. App. 1999). Subsequent to the disciplinary cases discussed herein, Fieger continued what one court called his “feud” with the Michigan Supreme Court by litigating the appropriateness of the justices' refusals to recuse themselves in cases where Fieger represented plaintiffs. *See Fieger v. Corrigan*, 602 F.3d 775, 776 (6th Cir. 2010); *Fieger v. Gromek*, 373 F. App'x 567, 568–69 (6th Cir. 2010).

60. *Badalamenti*, 602 N.W.2d. at 856.

61. *Id.* at 856–57, 860.

62. *Id.* at 860, 862.

Michael Talbot held that the trial court should have granted the defendants a judgment notwithstanding the verdict because of the insufficiency of the plaintiff's evidence.<sup>63</sup> The panel also held that Fieger's repeated "egregious" and "pervasive" misconduct "completely tainted the proceedings," and by itself would have warranted a new trial.<sup>64</sup> According to the court, Fieger, without a basis in fact, accused defendants and their witnesses of engaging in collusion, committing perjury, and destroying, altering, or suppressing evidence. He also suggested that one of the defendants neglected the plaintiff's medical care in order to have a sexual assignation with a nurse.<sup>65</sup>

On August 23, 1999, Fieger commented on the *Badalamenti* decision and the appellate panel on his southeast Michigan radio program as follows:

Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too. . . . [Badalamenti] lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses.<sup>66</sup>

On the same radio program two days later, Fieger referred to the judges as "three jackass Court of Appeals judges."<sup>67</sup> In response to another person's use of the word "innuendo" on the show, Fieger said, "I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist."<sup>68</sup> He continued, "They say under their name, 'Court of Appeals Judge,' so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think—what was Hitler's—Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals."<sup>69</sup>

Subsequently, through its Grievance Administrator, the Michigan Attorney Grievance Commission (AGC) filed a formal complaint with the Michigan Attorney Discipline Board (ADB), which alleged that Fieger's comments on August 23 and 25, 1999, were in violation of the Michigan Rules of Professional Conduct (MRPC).<sup>70</sup> Among the disciplinary rules the AGC alleged Fieger

63. *Id.* at 856–57, 859–60.

64. *Id.* at 860.

65. *Id.*

66. Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129 (Mich. 2006).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 130.

violated were MRPC 3.5(c), MRPC 6.5(a), and MRPC 8.4(a) and (c). MRPC 3.5(c) provides, in relevant part, that a lawyer shall not “engage in *undignified or discourteous conduct toward the tribunal*.”<sup>71</sup> MRPC 6.5(a) mandates that “[a] lawyer shall treat with *courtesy and respect all persons involved in the legal process*.”<sup>72</sup> MRPC 8.4(a) defines professional misconduct as including instances when a lawyer “violate[s] or attempt[s] to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”<sup>73</sup> MRPC 8.4(c) defines professional misconduct to include a lawyer “engag[ing] in conduct that is prejudicial to the administration of justice.”<sup>74</sup>

While the complaint was pending, the parties stipulated that Fieger would not contest that his remarks violated MRPC 3.5(c) and 6.5(a), and the AGC would in turn dismiss the charges alleging violations of MRPC 8.4(a) and (c).<sup>75</sup> In addition, the parties also stipulated that Fieger would receive a reprimand as a sanction, although their agreement was conditioned on the discipline being stayed while Fieger argued on appeal that MRPC 3.5(c) and MRPC 6.5(a) were inapplicable to his conduct and unconstitutional if so applied.<sup>76</sup> Fieger contended that the rules were inapplicable because his remarks were made after the case was completed and occurred outside a courtroom. Further, he maintained that the two disciplinary rules “were unconstitutional because they infringed his First Amendment rights.”<sup>77</sup> The collective effect of the ADB’s November 8, 2004 ruling was in Fieger’s favor.<sup>78</sup> The majority concluded that the plain language of the two rules did not apply to Fieger’s statements because they were not made either before a tribunal or in the context of a pending case.<sup>79</sup> The ADB also stated that

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71. MICH. RULES OF PROF’L CONDUCT R. 3.5(c) (2009) (emphasis added), available at <http://www.michbar.org/generalinfo/pdfs/mrpc.pdf>.

72. MICH. RULES OF PROF’L CONDUCT R. 6.5(a) (2009) (emphasis added), available at <http://www.michbar.org/generalinfo/pdfs/mrpc.pdf>.

73. MICH. RULES OF PROF’L CONDUCT R. 8.4(a) (2009), available at <http://www.michbar.org/generalinfo/pdfs/mrpc.pdf>.

74. MICH. RULES OF PROF’L CONDUCT R. 8.4(c) (2009), available at <http://www.michbar.org/generalinfo/pdfs/mrpc.pdf>.

75. *Fieger*, 719 N.W.2d at 130.

76. *Id.*

77. *Id.*; see U.S. CONST. amend. I (stating that the government “shall make no law . . . abridging the freedom of speech”).

78. *Fieger*, 719 N.W.2d at 130; *Fieger*, Case No. 01-055-GA, at 29 (Mich. Att’y Discipline Bd. Nov. 8, 2004), available at <http://www.adbmich.org/coveo/opinions/2004-11-08-01o-55.pdf>.

79. *Fieger*, 719 N.W.2d at 130; *Fieger*, Case No. 01-055-GA, at 27–29.

even if the courtesy provisions did apply, Fieger's speech was protected by the First Amendment.<sup>80</sup>

The AGC appealed the decision to the Michigan Supreme Court after Fieger unsuccessfully attempted to remove the case to federal court.<sup>81</sup> On July 31, 2006, the Michigan Supreme Court issued an opinion holding that Fieger's comments concerning the judges were made while the case was pending, were directed toward the tribunal, and violated the disciplinary rules prohibiting undignified or discourteous conduct toward a tribunal and requiring attorneys to treat with courtesy and respect all persons involved in the legal process.<sup>82</sup> The court also held that the ADB lacked authority to declare the MRPC unconstitutional.<sup>83</sup>

Fieger was reprimanded and subsequently turned to the federal district court for relief.<sup>84</sup> Utilizing the Federal Declaratory Judgment Act,<sup>85</sup> he sought a declaration that Michigan's rules were unconstitutional and that he was in danger of repeated prosecution.<sup>86</sup> Even though a federal court will typically abstain from hearing a case that challenges attorney discipline imposed by a state court, Fieger was initially successful in obtaining federal relief because he did not challenge the Michigan Supreme Court's sanction against him.<sup>87</sup> The federal district court found no procedural bars to exercising jurisdiction and granted summary judgment in Fieger's favor. The district court held that Michigan's civility rules were unconstitutional on their face because they were both overly broad and vague, and thus, violated the First and Fourteenth Amendments.<sup>88</sup>

Michigan appealed the district court's issuance of an order enjoining enforcement of its disciplinary rules to the Sixth Circuit Court of Appeals.<sup>89</sup> The Sixth Circuit Court of Appeals vacated the declaratory judgment as an abuse of discretion.<sup>90</sup> It rejected Fieger's argument that the chilling effect of the courtesy and civility provisions gave rise to an injury in fact sufficient for

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80. *Fieger*, Case No. 01-055-GA, at 15.

81. *Fieger*, 719 N.W.2d at 131 n.7.

82. *Id.* at 136-38.

83. *Id.* at 138.

84. *Fieger v. Mich. Supreme Court*, No. 06-11684, 2007 WL 2571975, at \*1 (E.D. Mich. Sept. 4, 2007).

85. Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (2006).

86. *Fieger*, 2007 WL 2571975, at \*1, \*20-21.

87. *Id.* at \*1-2.

88. *Id.* at \*1.

89. *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 960 (6th Cir. 2009).

90. *Id.* at 974.

standing and found that Fieger's prior discipline did not constitute a significant possibility of future harm.<sup>91</sup> The Sixth Circuit held that Fieger failed to articulate with requisite specificity the intended speech or conduct that would likely subject him to disciplinary action in the future because he made only vague suggestions of a general desire to criticize the Michigan judiciary.<sup>92</sup> In contrast, Judge Merritt, in dissent, argued that Fieger had met the requirements for standing under the Declaratory Judgment Act.<sup>93</sup>

Although their procedural posture is somewhat unusual, the various opinions in Fieger's disciplinary cases are an excellent illustration of a serious effort to give content to the notion of civility and the difficulties courts encounter. What emerges from the majority and dissenting approaches in these opinions is a point/counter-point clash between two conflicting, and perhaps equally dogmatic, paradigms. In general, Bar orthodoxy would label Fieger's incivility an absence of professionalism or characterize Fieger as engaging in "offensive personality" and applaud the courts' efforts to curtail such conduct.<sup>94</sup> To the dissenters, all those opposed to sanctioning his conduct, Fieger's disrespectful and rude speech cannot constitutionally be sanctioned because of his First Amendment rights.<sup>95</sup> The judges throughout the various *Fieger* cases disagreed on four related issues, described below in Sections A–D, that reveal the Bar's dominant professionalism approach to incivility and its legal critique. The sections that follow describe these disagreements at length, using the various courts' words, not to determine which position is the stronger one under First Amendment jurisprudence, but rather because the civility debate is in large part a dispute about language. By listening to the words chosen by each side one may discern precisely how this issue is framed by the Bar and courts, and, perhaps more importantly, what is left out.<sup>96</sup>

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91. *Id.* at 965.

92. *Id.* at 964.

93. *Id.* at 978 (Merritt, J., dissenting).

94. MICH. STATE BAR R. 15, §3(1) (2008) (noting each applicant to the bar must swear to refrain from offensive personality).

95. *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 153–54 (Mich. 2006) (Cavanagh, J., dissenting); *id.* at 196–200 (Kelly, J., dissenting).

96. For articles addressing the application of the First Amendment to attorney discipline for criticizing the judiciary, see generally Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161 (2008); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L. J. 1567 (2009); Angela Butcher & Scott Macbeth, Comment, *Lawyers' Comments About Judges: A Balancing of Interests to Ensure a Sound Judiciary*, 17 GEO. J. LEGAL

A. *Are Lawyers Different and Does That Difference Matter?*

The fundamental issue dividing the majority and the dissent in the *Fieger* Michigan Supreme Court case is a disagreement about the extent to which the professional roles of lawyers justify broad prohibitions against incivility and discourtesy that have the effect of restricting the rights of attorneys to speak freely. The majority asserted that an attorney discipline matter is constitutionally different and “more restrictive rules are permissible in such a circumstance.”<sup>97</sup> From the perspective of the First Amendment, the practice of law is not the same as the general context of the right of citizens to speak freely.<sup>98</sup> The majority emphasized the “exclusive role” of lawyers and noted that society has “reposed special stewardship duties on lawyers on the basis of the venerable notion that lawyers are more than merely advocates who happen to carry out their duties in a courtroom environment, they are also officers of the court.”<sup>99</sup>

The majority identified the unique function of lawyers as the reason why, in a manner “unprecedented in other professions,” lawyers are licensed in terms of character and fitness, and not just competence.<sup>100</sup> Michigan, the court noted, like many other jurisdictions, requires lawyers to take an oath of admission that:

[P]rovides that the lawyer will, upon being accorded the privileges provided by membership in the bar, (1) maintain the respect due to courts of justice and judicial officers, (2) abstain from all offensive personality, and (3) conduct himself or herself personally and professionally in conformity with the high standards of conduct imposed on members of the bar as conditions for the privilege to practice law in Michigan.<sup>101</sup>

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ETHICS 659 (2004); David R. Cooper, Note, *Speaking Out: Lawyers and Their Right to Free Speech*, 18 REV. LITIG. 671 (1999).

97. *Fieger*, 719 N.W.2d at 140.

98. *See id.* at 140 n.27 (rebutting the dissents’ First Amendment arguments by explaining that the U.S. Supreme Court has held attorneys to a different professional standard).

99. *Id.* at 133.

100. *Id.* at 133–34.

101. *Id.* at 134 (footnote omitted) (citing MICH. STATE BAR R. 15, § 3(1) (2008)). The Oath of Admission to the Bar taken by lawyers in forty-seven states in some form including this language for 125 years provides:

The general principles which should ever control the lawyer in practice of the legal profession are clearly set forth in the following Oath of Admission to the Bar, . . . which [the lawyer is] sworn on admission to obey and for the wilful violation of which disbarment is provided: I do solemnly swear: . . . I will maintain the respect due to the Courts of Justice and judicial officers; . . . I

Civility rules, according to the majority, should be read in light of the complex code of behavior to which attorneys are subject.<sup>102</sup> This code is part of the cultural history of the legal profession and manifests appropriate “respect for the wisdom of those who have preceded us in the judiciary in this country.”<sup>103</sup> Tellingly, the majority quoted from a century-old opinion by the Ohio Supreme Court regarding attorney misbehavior:

When a man enters upon a campaign of vilification he takes his fate into his own hands and must expect to be held to answer for the abuse of the privilege extended to him by the [C]onstitution. An attorney of more than twenty years’ standing at the bar must be presumed to know the difference between respectful, fair and candid criticism, and scandalous abuse of the courts which gave him the high privilege, not as a matter of right, to be a priest at the altar of justice.<sup>104</sup>

For the majority, civility rules do not simply protect the sensitivities of judges, but rather, are “designed to maintain public respect for a rule of law that is dependent on such public respect.”<sup>105</sup> The preservation of the American legal system requires that citizens have confidence in the process of adjudication as:

[O]ne in which the fairness and integrity of the process is not routinely called into question, one in which the ability of judges to mete out evenhanded decisions is not undermined by the fear of vulgar characterizations of their actions, one in which the public is not misled by name-calling and vulgarities from lawyers who are held to have special knowledge of the courts, [and] one in which discourse is grounded in the traditional tools of the law—language, precedents, logic, and rational analysis and debate.<sup>106</sup>

Rudeness, discourtesy, and incivility are, thus, according to the majority, inherently misleading and dangerous. The majority

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will . . . never seek to mislead the Judge or jury by any artifice or false statement of fact or law; . . . I will abstain from all *offensive personality*, and advance no fact prejudicial to the honor or reputation of a party or witness, unless [I am] required by the justice of the cause with which I am charged[.]

AM. BAR ASS’N, REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 567, 584–85 (1908).

102. See *Fieger*, 719 N.W.2d at 131–32 (explaining that an attorney’s responsibilities in the profession are taken into account when drawing a line “between robust comment that is protected by the First Amendment and comment that undermines the integrity of the legal system”).

103. *Id.* at 132.

104. *Id.* at 144 (quoting *In re Thatcher*, 89 N.E. 39, 88 (Ohio 1909)).

105. *Id.* at 133.

106. *Id.* at 132.

condemned the dissent's repudiation of the courtesy and civility rules and charged that they:

[W]ould usher an entirely new legal culture into this state, a Hobbesian legal culture, the repulsiveness of which is only dimly limned by the offensive conduct that we see in this case. It is a legal culture in which, in a state such as Michigan with judicial elections, there would be a permanent political campaign for the bench, pitting lawyers against the judges of whom they disapprove. It is a legal culture in which rational and logical discourse would come increasingly to be replaced by epithets and coarse behavior, in which a profession that is already marked by declining standards of behavior would be subject to further erosion, and in which public regard for the system of law would inevitably be diminished over time.

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Given the position advanced by the dissenting justices in this case...one wonders whether the dissenting justices would simply surrender the legal process to the least-restrained and worst-behaved members of the bar. With increasingly little need to adhere to the rules necessary to ensure public confidence in the integrity of the legal process, the dissenters would create a world in which legal questions come increasingly to be decided, not by a fair and rational search for truth, but by bullying and uncivil behavior, personal abuse, one-upmanship, and public exhibitionism on the part of those who are custodians of this system, the bar. Justice under the law cannot flourish within such a system.<sup>107</sup>

The majority characterized Fieger's argument that Michigan's rules mandating courteous and respectful speech violated the First Amendment to be tantamount to an assertion that "there can be no courtesy or civility rules at all of this sort and that judges and other lawyers assailed verbally, as public figures, have [only] the same remedies any other public figures have in libel and slander law."<sup>108</sup>

The dissent acknowledged that lawyers do play a special role in society, but condemned the majority for "impermissibly exalt[ing] the protection of judges' feelings over the sanctity of the First Amendment's guarantee of freedom of speech."<sup>109</sup> The dissent

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107. *Id.* at 144 & n.34.

108. *Id.* at 132.

109. *Id.* at 153-54 (Cavanagh, J., dissenting); *see id.* at 164 ("A bar composed of lawyers of good character is a worthy objective . . ." (quoting *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273 (1957))).

found the “majority’s treatise” on the Michigan Supreme Court’s “duty to oversee the legal profession and foster rules geared toward maintaining respect for the judiciary” an unpersuasive justification for its expansive interpretation of the permissible reach of Michigan’s disciplinary rules.<sup>110</sup> The U.S. Supreme Court, according to the dissent, has previously explained:

We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar.<sup>111</sup>

The dissent rejected the “officer of the court” notion as dispositive of the instant case in the absence of an explanation of how Fieger’s public statements were “irreconcilable with that role.”<sup>112</sup> Similarly, Judge Cavanagh did not understand vulgar or disrespectful speech to be inherently misleading.<sup>113</sup>

The dissent condemned the majority’s “glimpse into the likely future” as “nothing more than a scare tactic designed to conceal the fact that the ADB’s decision merely maintained the status quo and did not, in fact, ‘usher’ some ‘Hobbesian legal culture’ into our jurisprudence.”<sup>114</sup> Judge Cavanagh opined that the majority melodramatically misrepresented Fieger as arguing that “there can be no courtesy or civility rules at all of this sort,” and wrongly faulted the dissent for its putative “repudiation of ‘courtesy’ and ‘civility’ rules.”<sup>115</sup> The dissent contended that, “[a]lthough the majority purport[ed] to recognize that ‘lawyers have an unquestioned right to criticize the acts of courts and judges,’ and that ‘there is no prohibition on a lawyer’s [sic] engaging in such criticism even during the pendency of a case,’” the majority nonetheless held that “limitations [exist] . . . on the form and manner of such criticism.”<sup>116</sup> According to Judge Cavanagh, this revealed the majority’s core conception of

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110. *Id.* at 164.

111. *Id.* (quoting *Konigsberg*, 353 U.S. at 273).

112. *Id.* at 176.

113. *See id.* at 173 (stating that the majority is making a “frightening judgment that speech itself is inherently misleading”).

114. *Id.* at 176 (quoting the majority opinion).

115. *Id.* at 156 (quoting the majority opinion).

116. *Id.* at 174 (third alteration in original) (quoting the majority opinion).

professionalism “for what it truly is: an attorney cannot use choice language to criticize a judge, ever.”<sup>117</sup>

*B. How Important Is the First Amendment to Regulating Civility Within the Legal Profession?*

The hyperbolic characterizations of their opponent’s arguments as being, on the one hand, “no valid civility rules can exist” and, alternatively, “no impolite criticisms of judges are allowed ever,” are a manifestation of another basic area of disagreement between the majority and dissent: to what extent should First Amendment jurisprudence frame the debate about civility within the legal profession?<sup>118</sup> The majority made crystal clear its refusal to allow First Amendment considerations to dominate its analysis. The Michigan Supreme Court perceives the paramount concern to be preserving respect for the judiciary and thereby ensuring the proper functioning of the system.<sup>119</sup> The majority declared that:

To disregard such interests in the pursuit of a conception of the First Amendment that has never been a part of our actual Constitution would in a real and practical sense adversely affect our rule of law, a no less indispensable foundation of our constitutional system than the First Amendment.<sup>120</sup>

The dissent found it “astounding[ ]” that the majority would view the First Amendment as not “part of our actual

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117. *Id.*

118. For a case addressing the intersection of the power of the courts to sanction lawyers or repress speech and lawyers’ First Amendment rights, see *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991), finding that an attorney’s speech during judicial proceedings may be subject to greater limitations than the speech of other citizens or the press, but that such limitations should be no broader than necessary to protect the integrity of the judicial system and the defendant’s right to a fair trial. Several cases have applied *Gentile*. See, e.g., *In re Zeno*, 504 F.3d 64, 66 (1st Cir. 2007); *Mezibov v. Allen*, 411 F.3d 712, 717 (6th Cir. 2005); *United States v. Scarfo*, 263 F.3d 80, 91 (3d Cir. 2001); *United States v. Wunsch*, 84 F.3d 1110, 1117 (9th Cir. 1996); *Hirschfeld v. Arpaio*, No. 98-15398, 1999 WL 311378, at \*1 (9th Cir. May 7, 1999); *In re Morrissey*, 168 F.3d 134, 139 (4th Cir. 1999); U.S. Dist. Court for the E. Dist. of Wash. v. *Sandlin*, 12 F.3d 861, 865–66 (9th Cir. 1993); *United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993); *In re Madison*, 282 S.W.3d 350, 354 (Mo. 2009); *In re Cobb*, 838 N.E.2d 1197, 1211 (Mass. 2005); *Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Visser*, 629 N.W.2d 376, 380–81 (Iowa 2001); *In re Inquiry of Broadbelt*, 683 A.2d 543, 551–52 (N.J. 1996); *Idaho State Bar v. Topp*, 925 P.2d 1113, 1116 (Idaho 1996); *Twohig v. Blackmer*, 918 P.2d 332, 336–37 (N.M. 1996); *In re Coe*, 903 S.W.2d 916, 917 (Mo. 1995); *Colo. Supreme Court Grievance Comm. v. Dist. Court of Denver, Co.*, 850 P.2d 150, 151 n.2 (Colo. 1993).

119. See *Fieger*, 719 N.W.2d at 132–33 (discussing the “substantial interests” the civility rules are designed to further).

120. *Id.* at 132.

Constitution” and be unable to conceive of the provision as protecting offensive attorney speech.<sup>121</sup> According to this dissent, “[s]uch protection has been lost” because of the majority’s decision.<sup>122</sup> For the dissent, the majority’s “feverish invocation” of the state’s authority to enact rules of professional conduct and protect the integrity of the judiciary “overshadows the pivotal question,” which is whether Michigan’s imposition of discipline infringed on the guarantees of the First Amendment.<sup>123</sup> The federal district court agreed with the Michigan Supreme Court’s dissent that the First Amendment analysis was the primary consideration because:

[T]he vague and overbroad courtesy provisions[] that enforce silence in the name of preserving the dignity of the bench, do[] not override an attorney’s right to speak her mind against public institutions, especially an elected judiciary, regardless of whether that speech is in good taste.<sup>124</sup>

### C. *Is Incivility in the Legal Profession a Political Issue?*

The fact that Fieger’s incivility was directed towards judges implicates a third issue dividing the Michigan Supreme Court majority and dissent.<sup>125</sup> The majority and dissenting opinions evidenced differing degrees of sensitivity to the political dimensions of mandating that attorneys use polite and respectful speech when addressing or discussing members of a branch of a democratic government.<sup>126</sup> This political dimension becomes apparent in two related, but distinct, aspects of the Michigan Supreme Court’s analysis. The first is the question of whether Fieger’s speech should be considered political speech for constitutional purposes.<sup>127</sup> The second is whether the state’s

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121. *Id.* at 176 (Cavanagh, J., dissenting).

122. *Id.* at 153.

123. *Id.* at 173.

124. *Fieger v. Mich. Supreme Court*, No. 06-11684, 2007 WL 2571975, at \*2 (E.D. Mich. Sept. 4, 2007).

125. *See* Tresa Baldas, *Lawyers Critical of Judges Fight For Rights*, NAT’L L. J., Feb. 9, 2009, at 4 (discussing the appropriateness of Fieger’s and other attorneys’ critical comments about the judiciary).

126. *Compare Fieger*, 719 N.W.2d at 140 (“Not only was Mr. Fieger’s speech not campaign speech, it was not political speech of any kind.”), *with id.* at 167 (Cavanagh, J., dissenting) (“This case . . . involves ‘classic political speech.’”). For an example of how political agendas can affect legal ethics, see generally James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725, 728–30 (2005) (describing various instances of the use of attorney discipline for political reasons).

127. *See Fieger*, 719 N.W.2d at 139–40 (addressing Fieger’s argument that his comments were protected political speech); *see also* Tresa Baldas, *Insulting Judges*

actions in sanctioning Fieger for criticizing the judiciary have political implications.<sup>128</sup>

As to the first issue, the majority rejected Fieger's argument that his remarks were political speech and, thus, fit within the most protected sphere of the First Amendment.<sup>129</sup> Fieger argued that his criticisms of the judges warranted the same preferential treatment afforded campaign speech.<sup>130</sup> In holding otherwise, the majority reasoned that the State's interest in protecting the judiciary allowed Michigan to prohibit an attorney's speech critical of a public official unless the public official was facing reelection at the time the speech was made or the speech uttered was not discourteous or disrespectful.<sup>131</sup>

Similarly, the court also refused to give Fieger's rude comments the broad protection extended to speech about public figures in *New York Times Co. v. Sullivan*.<sup>132</sup> In *Sullivan*, the Supreme Court held that a public figure could not recover damages for defamation in the absence of clear and convincing evidence that the offending statements were made with knowledge of their falsity or with reckless disregard therefor.<sup>133</sup> The Michigan court did not find *Sullivan* instructive in any sense because it deemed the disciplinary and defamation contexts distinguishable.<sup>134</sup> The majority did not perceive any similarities between sanctioning an attorney for rudely criticizing judges and assessing damages in defamation against a defendant who made false statements about a public figure.<sup>135</sup>

While the dissent did not disagree that Fieger's comments were crude, Judge Cavanagh found them unmistakably political and, like the statements in *Gentile v. State Bar of Nevada*, "classic political speech."<sup>136</sup> The Supreme Court has previously

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*Escalates into Speech Case*, NAT'L L.J., Mar. 13, 2006, at 4 (Fieger's lawyer is quoted as saying "Judges are government officials, and once we allow people to be harmed for criticizing government officials, we've lost . . . enormous . . . freedoms.").

128. See *Fieger*, 719 N.W.2d at 132–35 (discussing the state's justification for limiting attorney criticism of judges).

129. *Id.* at 139–40.

130. *Id.* at 139.

131. See *id.* at 139–41, 143–44.

132. *Id.* at 140 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 283 (1964)).

133. *Sullivan*, 376 U.S. at 279–80, 285–86; see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 366 (1974) (stating that the standard set forth in *Sullivan* requires "clear and convincing proof").

134. See *Fieger*, 719 N.W.2d at 140–41 (making the distinction between defamatory words in a media publication and abrasive language targeted at public official).

135. See *id.* at 141 (differentiating between "a matter of professional discipline" and the "civil action" involved in *Sullivan*).

136. *Id.* at 167 (Cavanagh, J., dissenting) (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991)).

made clear that “speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”<sup>137</sup> Therefore, to the dissent, the commentary about the *Badalamenti* panel:

[O]ccupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection. . . . [W]hen a government ventures into the perilous realm of restricting political speech, it must produce evidence of a state interest so significant that it fully justifies the otherwise forbidden endeavor of silencing those who desire to publicly find fault with the way in which the government conducts its affairs.<sup>138</sup>

Judge Cavanagh believed the majority “totally misunderstand[ed] the nature of political speech[,] . . . disregard[ed] the entire body of law pertaining to it[,] . . . completely gut[ted] the First Amendment[,] and render[ed] an alarming—and, no doubt, singular—holding.”<sup>139</sup>

To illustrate, the dissent pointed to the majority’s requirement that public officials must be facing reelection for statements about them to qualify as political speech and its general prohibition against lawyers making rude, vulgar, or disrespectful comments about judges outside the courtroom.<sup>140</sup> The dissent argued that “[n]either precept can be found in our First Amendment jurisprudence”<sup>141</sup> and did not accept that “political hyperbole and satire should be limited to a campaign setting.”<sup>142</sup> The offending statements in *Fieger* were criticisms of the character and competency of three members of the judiciary. To the Michigan Supreme Court dissent, *Fieger*’s sole transgression was to complain publicly about a decision that *Fieger* believed “unjustly divested his seriously injured client of a jury verdict.”<sup>143</sup>

Discerning the second political dimension of the *Fieger* cases necessitates shifting the focus away from the political nature or

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137. *Gentile*, 501 U.S. at 1034.

138. *Fieger*, 719 N.W.2d at 167–68 (Cavanagh, J., dissenting) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)) (internal quotation marks omitted) (citing *Bridges v. California*, 314 U.S. 252, 270–71 (1941)).

139. *Id.* at 167.

140. *See id.* (asserting the seeming narrowness of the majority’s holding as applied to public officials up for reelection and citing speech that is not “palatable to the majority’s sense of civility”).

141. *Id.*

142. *Id.* at 197 (Kelly, J., dissenting). The dissent notes that the majority emphasized *Fieger*’s references to the judges as “Hitler,” “Goebbels,” and “Eva Braun,” but observed that referring to political figures as Nazis is a common form of political satire. *Id.* at 197 n.14.

143. *Id.* at 167 (Cavanagh, J., dissenting).

content of Fieger's words and turning instead to consideration of the justification advanced by the state for repressing and sanctioning speech about government officials by certain citizens based on its character and content. Courts have affirmed such restrictions in two important and related categories: to preserve a party's right to a fair trial; and to preserve the integrity of the legal process and the public's respect for the institution.<sup>144</sup> The majority conceded that there must be some justification beyond "merely protecting judges from the robust criticism that is sometimes a part of the give-and-take of the democratic process" or "merely insulat[ing] judges from the inconvenience of being held accountable from their public actions."<sup>145</sup> The court contended that by establishing rules prohibiting and sanctioning uncivil, disrespectful, and discourteous attorney conduct and speech, Michigan is protecting the ability of the judiciary to function properly and to play its role in preserving the rule of law.<sup>146</sup> The purpose of civility codes, according to the majority, is not solely to safeguard "the sensitivities of judges."<sup>147</sup> The majority reasoned that a lawyer's duty to maintain a respectful attitude toward the courts is necessary to preserve the public's confidence in the integrity of the legal system, which might otherwise be unjustifiably undermined.<sup>148</sup> The rules, according to the majority, are, therefore, "not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance."<sup>149</sup>

The dissent's response to that argument was that concern about behavior and speech that may engender public disrespect for the judiciary *as a whole* is not, in and of itself, an adequate justification for restricting attorneys' First Amendment rights.<sup>150</sup> Unless the incivility occurs in the courtroom, and hence, in connection with a *particular* proceeding, First Amendment jurisprudence requires courts to weigh the state's interest in its professional regulation against a lawyer's First Amendment interest in the kind of speech at

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144. Fieger v. Mich. Supreme Court, No. 06-11684, 2007 WL 2571975, at \*3-4 (E.D. Mich. Sept. 4, 2007).

145. *Fieger*, 719 N.W.2d at 132.

146. *Id.* at 132-33.

147. *Id.* at 133.

148. *Id.* at 132-33.

149. *Id.* at 133 (quoting *Ginger v. Culehan*, 116 N.W.2d 216, 218 (1962)) (internal quotation marks omitted).

150. *See id.* at 168 (Cavanagh, J., dissenting) (stating that "protecting the judiciary . . . has consistently been rejected" as an interest substantial enough to curtail First Amendment freedoms).

issue.<sup>151</sup> The dissent's baseline principle was that "attorneys can publicly criticize the judiciary and cannot be punished for such speech, no matter how crass, when the criticisms do not affect the decorum of the tribunal or substantially prejudice the administration of justice."<sup>152</sup>

The dissent and the federal district court agreed that a lawyer, like any other citizen, has an "absolute . . . right to speak and write as he wishes[,] . . . to say anything . . . he believes to be true,"<sup>153</sup> and to "castigate courts and their administration of justice"<sup>154</sup> anywhere "other than the courtroom."<sup>155</sup> Thus, the dissent concluded that Fieger's remarks could not be punished because the majority failed to identify an "unassailable connection" between Fieger's vulgar and insulting speech, and prejudice to the administration of justice.<sup>156</sup>

The majority also identified a related interest of the states: their desire to have a court system "in which the public is not misled by name-calling and vulgarities from lawyers who are held to have special knowledge of the courts."<sup>157</sup> Judge Cavanagh called this statement "presumptuous and insulting to the intellect of our citizenry," and inferred that the majority believes that citizens are "unable to think for themselves [or] . . . engage in critical thinking when faced with divergent viewpoints, [and] need the state to protect them from what the *majority* perceives may mislead them."<sup>158</sup> The majority assumed that judges might be reluctant to "mete out evenhanded decisions . . . [if they] fear[ed] . . . vulgar characterizations of their actions," and cast this concern as a legitimate state interest that overrides First Amendment rights.<sup>159</sup> The dissent regarded this assertion as "a sad and, presumably, misguided commentary on the ability of our judges to elevate their duties

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151. See *id.* at 198 (Kelly, J., dissenting) (distinguishing Fieger's case from other First Amendment civility cases because the statements in question were made after his case was decided).

152. *Id.* at 177 (Cavanagh, J., dissenting).

153. *Id.* at 176–77 (quoting *In re Ronwin*, 667 P.2d 1281, 1288 (Ariz. 1983)) (internal quotation marks omitted).

154. *Id.* at 176 (quoting *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 430 (Tex. 1998)); see *Fieger v. Mich. Supreme Court*, No. 06-11684, 2007 WL 2571975, at \*1–2 (E.D. Mich. Sept. 4, 2007) (agreeing that an attorney has a right to criticize public institutions outside the courtroom).

155. *Fieger*, 719 N.W.2d at 176 (Cavanagh, J., dissenting) (quoting *In re Ronwin*, 667 P.2d at 1288) (internal quotation marks omitted).

156. *Id.* at 177.

157. *Id.* at 132 (majority opinion).

158. *Id.* at 173 (Cavanagh, J., dissenting).

159. *Id.* at 132 (majority opinion).

over their feelings and to maintain neutrality in the face of inevitable criticism.”<sup>160</sup>

The dissent advanced a contrary characterization of judges as having “thick skins” and needing no protection from criticism, other than “malicious defamation.”<sup>161</sup> As the federal district court pointed out, “the law gives judges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions.”<sup>162</sup> Justice Cavanagh further argues this position:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

. . .

Danger of unbridled exercise of judicial power because of immunity from speech which is coercing is a figment of groundless fears. In addition to the internal censor of conscience, professional standards, the judgment of fellow judges and the bar, the popular judgment exercised in elections, the power of appellate courts, including this Court, there is the corrective power of the press and of public comment free to assert itself fully *immediately* upon completion of judicial conduct.<sup>163</sup>

Fieger’s response to the appellate opinion was unsurprising given his “well-known ‘long-continued militancy’ in the field of litigation for injured plaintiffs.”<sup>164</sup> The public, according to the dissent, would most likely evaluate his vulgar criticisms of the judges in the *Badalamenti* case with no prejudice to the fair administration of justice or the reputations of the judges involved.<sup>165</sup> Restrictions on public comment are invalid unless the “serious substantive evil” of unfair administration of justice is a

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160. *Id.* at 173 (Cavanagh, J., dissenting).

161. *Id.* (quoting *In re Westfall*, 808 S.W.2d 829, 845 (Mo. 1991) (Blackmar, C.J., dissenting)).

162. *Fieger v. Mich. Supreme Court*, No. 06-11684, 2007 WL 2571975, at \*3 (E.D. Mich. Sept. 4, 2007) (quoting *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978)).

163. *Fieger*, 719 N.W.2d at 168–69 (Cavanagh, J., dissenting).

164. *Id.* at 172 (quoting *Bridges v. California*, 314 U.S. 252, 273 (1941)).

165. *See id.* at 171 (discussing the public’s right to be informed of the judiciary).

likely consequence.<sup>166</sup> Protecting the judiciary from derision has been held not to meet this standard, and the dissent did not believe the constitutional standard was met by Michigan in *Fieger*.<sup>167</sup> As the ADB has explained (and the dissent agreed):

Few if any members of the Michigan judiciary will be cowed by such outbursts. . . . [O]ur system of justice is not put at risk if these statements are not censored. The public and the profession can express their revulsion at such crudity, while at the same time feeling pride in belonging to a society that allows its expression. If we write rules governing speech to quell such antics, then we will have truly lost our bearings. The judiciary is not so fragile. It is the First Amendment that needs protection.<sup>168</sup>

The dissent's criticism of the majority's approach to attorney incivility was not, however, based solely on the absence of a required showing that Fieger's speech would likely have a substantial impact on the administration of justice in a particular case.<sup>169</sup> Another weakness the dissent identified was the majority's apparent failure to apprehend any potential benefits from public criticism of the judiciary by lawyers.<sup>170</sup> Lawyers, by virtue of their education and experience, are uniquely qualified to evaluate and critique the performance of judges. Some courts have predicted that preventing lawyers from performing this function by repressing critical speech, however uncivil it may be, may have "unintended, deleterious effect[s] upon the public's perception" of the legal system.<sup>171</sup> In addition, courts have also acknowledged that an attorney's public comments about a pending case can be part of a lawyer's competent and zealous representation of a client

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166. See *id.* at 168 (quoting *Bridges*, 314 U.S. at 270) (commenting on how rules that "shackl[e] the right to freely express opinion" can be justified). In promoting the first interest, attorney speech is subject to more limitations based on a less stringent standard, "substantial likelihood of material[ ] prejudic[e]." *Fieger*, 2007 WL 2571975, at \*3-4. If the restrictions are to preserve judicial integrity, however, attorney speech should be subject to restriction based on a higher standard.

167. See *Fieger*, 719 N.W.2d at 168-69 (Cavanagh, J., dissenting) (arguing that protecting the judiciary from criticism is not a valid reason for restricting free speech).

168. *Fieger*, No. 94-186-GA, at 32 (Mich. Att'y Discipline Bd. Sept. 2, 1997), available at <http://www.adbmich.org/coveo/opinions/1997-09-02-94-186a.pdf>.

169. See *Fieger*, 719 N.W.2d at 171 (Cavanagh, J., dissenting) (admonishing the majority's finding that Fieger's comments were made during a pending case and therefore negatively impacted the administration of justice).

170. See *id.* at 171-72 (detailing the importance of public interest and comment in judicial actions).

171. See, e.g., *Fieger*, 2007 WL 2571975, at \*1; *Bridges*, 314 U.S. at 270-71 ("[A]n enforced silence . . . solely in the name of preserving the dignity of the bench[ ] would probably engender resentment, suspicion, and contempt much more than it would enhance respect.").

by, for example, “swaying the court of public opinion by countering adverse publicity; . . . gathering crucial evidence; . . . encouraging settlement; . . . and engaging the public in discourse surrounding the issues of import in the particular case.”<sup>172</sup>

The judges who overturned the jury verdict in *Badalamenti* were an integral part of a branch of government which plays a critical role in a democracy and upon which is conferred “unique powers, significant influence, and considerable insulation” from scrutiny and accountability.<sup>173</sup> The dissent warned that it is not uncommon for courts to act arbitrarily, and if lawyers are unable to inform the public of these transgressions, the public’s ability to temper the judiciary will be compromised.<sup>174</sup> Turning to Justice Frankfurter:

There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.<sup>175</sup>

The dissent posited that “speech concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>176</sup> That perspective, coupled with the realization that discipline by the Bar results from “an unusual concentration of power in one branch of government: [because] the Michigan Supreme Court in effect makes, enforces, and interprets the laws relating to the criticism of its members” for some commentators militates against expansive interpretations of civility codes and counsels skepticism in evaluating claims of harm to the judiciary.<sup>177</sup>

#### *D. Can Civility Be Narrowly Defined?*

The fourth and final dispute between the majority and dissent in the *Fieger* Michigan Supreme Court case was whether provisions prohibiting “incivility,” “discourtesy,” and “disrespect,”

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172. *Fieger*, 2007 WL 2571975, at \*3 (citing Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998)).

173. *See Fieger*, 719 N.W.2d at 171 (Cavanagh, J., dissenting) (explaining that because the judiciary is conferred these crucial responsibilities, the public should not be “denied its right to temper this institution”).

174. *See id.* at 169–72 (explaining that the corrective power of the public and the press serves as a fundamental balance to unbridled judicial power).

175. *Id.* at 171–72 (quoting *Bridges*, 314 U.S. at 289 (Frankfurter, J., dissenting)).

176. *Id.* at 167–68 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

177. *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 977 n.4 (6th Cir. 2009) (Merritt, J., dissenting).

in these general terms, are, or can be, defined in a manner that gives lawyers adequate notice of prohibited behavior.<sup>178</sup> The majority, of course, deemed the courtesy provisions in MRPC 3.5(c) and MRPC 6.5(a) as narrow and carefully tailored regulations that are “necessary adjuncts to a responsible legal system and are compatible with the First Amendment.”<sup>179</sup> The dissent accused the majority of deciding a question not before it in order to create a sweeping and troubling expansion of the MRPC and an unconstitutional blanket prohibition on “discourteous” and “undignified” speech that allows repression and punishment of truthful and innocuous statements.<sup>180</sup>

The majority rejected Fieger’s argument that Michigan’s civility rules are unconstitutionally vague because they do not give lawyers sufficient notice of what speech is prohibited.<sup>181</sup> Its defense of the rules is based on two assertions: the rules do not prohibit criticism of judges; and words such as “discourtesy” and “disrespect” do not require more specific definition in the context of attorney regulation.<sup>182</sup> The dissent disputes both of these claims.<sup>183</sup>

As to the first defense, the majority states that the rules are “a call to discretion and civility, not to silence or censorship, and they do not even purport to prohibit criticism.”<sup>184</sup> The court interprets MRPC 3.5(c) as precluding criticism only if a lawyer uses “undignified or discourteous conduct toward the tribunal.”<sup>185</sup> All other forms of critical remarks are allowed, and therefore, give lawyers an alternative avenue of expression as the First Amendment requires.<sup>186</sup> In support, the majority points to the comment to MRPC 3.5 and states “[a]s should be clear, these rules are designed to prohibit only ‘undignified,’ ‘discourteous,’

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178. Compare *Fieger*, 719 N.W.2d at 139 (asserting that the language of the Michigan Rules of Professional Conduct adequately put Fieger on notice that his egregious conduct and speech was prohibited), *with id.* at 195 (Kelly, J., dissenting) (disagreeing that the Rules provided adequate notice to Fieger and instead concluding that they are constitutionally vague).

179. *Id.* at 132 (majority opinion). In *F.C.C. v. Fox Television Stations, Inc.*, the U.S. Supreme Court declined to address the First Amendment issues raised by a statutory provision that prohibits “any . . . indecent . . . language.” *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1803, 1819 (2009) (quoting 18 U.S.C. § 1464 (2006)).

180. *Fieger*, 719 N.W.2d at 153–54, 176–77 (Cavanagh, J., dissenting).

181. *Id.* at 139 (majority opinion).

182. *Id.* at 135, 139.

183. *Id.* at 156–57 (Cavanagh, J., dissenting); *id.* at 193–95 (Kelly, J., dissenting).

184. *Id.* at 135 (majority opinion).

185. *Id.* at 134 (quoting MICH. RULES OF PROF’L CONDUCT R. 3.5(c) (2009), available at <http://www.michbar.org/generalinfo/pdfs/mrpc.pdf>).

186. See *id.* (citing MICH. RULES OF PROF’L CONDUCT R. 3.5(c) cmt. (2009), available at <http://www.michbar.org/generalinfo/pdfs/mrpc.pdf>).

and ‘disrespectful’ conduct or remarks.”<sup>187</sup> The *Fieger* court’s confidence that the courtesy rules, despite their lack of explicit definitions, pose no threat to criticism of the judiciary seems to be based primarily on the efficacy of the statement to that effect in the rule. The Sixth Circuit majority implicitly accepted this rationale by emphasizing that Fieger’s punishment was based upon his utterance of “*vulgar, personally abusive* comments about participants in a *pending* case,” not because he criticized or disagreed with the judges.<sup>188</sup>

The dissent countered that because lawyers have a due process right to receive notice of prohibited conduct; the absence of notice can render even a rule of professional responsibility unconstitutionally vague.<sup>189</sup> Such notice, according to Judge Cavanagh, is absent in *Fieger* because of the reality that many trials and other proceedings are subject to public discussion and analysis after their conclusion, and nothing in Michigan’s rules suggests that persons involved in the legal process may not be criticized for their roles, especially after their involvement in the proceedings has ceased.<sup>190</sup>

The dissent charged that the majority opinion substituted conclusions and assurances for analysis, falsely maintained that the civility rules are narrowly drawn, and then gave the rules an even narrower construction.<sup>191</sup> The majority was convinced that the Michigan civility rules do not chill the speech of attorneys who wish to criticize judges and will not be used by disciplinary authorities to punish such speech because the rules say they should not be used in such a manner.<sup>192</sup> The dissents in both the Michigan Supreme Court and the Sixth Circuit cases countered by arguing that declarations that the rules are narrowly tailored does not make them so.<sup>193</sup> Moreover, Michigan

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187. *Id.* at 135.

188. *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 964 (6th Cir. 2009).

189. *Fieger*, 719 N.W.2d at 194–95 (Kelly, J., dissenting).

190. *See id.* at 164 (Cavanagh, J., dissenting) (advocating the ADB lead opinion in showing that the majority’s interpretation would encompass critical comments made throughout an individual’s role in the justice system).

191. *See id.* at 156, 169 (criticizing the majority for “haphazardly” drawing conclusions and expanding the MPRC “without any regard for the plain language, history, or context of the rules”).

192. *See id.* at 135, 143–44 (majority opinion) (“The limited restriction placed by the rules on Mr. Fieger’s speech is narrowly drawn and is no greater than is necessary to maintain . . . the integrity of [the] legal system.”).

193. *See id.* at 169 (Cavanagh, J., dissenting) (stating that the majority’s claim that the rules are “narrowly drawn” is without support); *Fieger*, 553 F.3d at 975 (Merritt, J., dissenting) (stating that although the majority emphasized the narrow construction given to the MPRC, such an interpretation was not credible).

did not carry its burden, according to the dissents in these courts, of showing that its rules authorized no unnecessary interference with the First Amendment rights of lawyers.<sup>194</sup> Instead, the majority “interpret[ed] these rules with a brush so broad as to now encompass *any offensive language used to criticize a judge.*”<sup>195</sup>

The Michigan Supreme Court majority did not define the descriptive and operative words “undignified,” “discourteous,” and “disrespectful” in more detail because of Fieger’s stipulation to accept discipline to facilitate an appellate challenge and the court’s conclusion that his remarks indisputably violated the rule.<sup>196</sup> The court’s argument seems to be that the rule is constitutionally sound on its face because in this case:

[T]here is no question that even the most casual reading of these rules would put a person clearly on notice that the kind of language used by Mr. Fieger would violate MRPC 3.5(c) and MRPC 6.5(a). To invite the sodomization of a judge, with a client’s finger, a plunger, or his own fist, and to invite a judge to kiss one’s ass are statements that do not come close to the margins of the “civility” or “courtesy” rules.<sup>197</sup>

In addition, the majority alluded to the construction of Michigan’s civility provision that is “narrowly drawn and is no greater than is necessary to maintain this state’s . . . interests in the integrity of its legal system.”<sup>198</sup> The court further presupposed that Michigan lawyers will be able to perceive the boundary

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194. See *Fieger*, 719 N.W.2d at 168–69 (Cavanagh, J., dissenting) (asserting that the government has an obligation to prove that rules limiting free speech do not cause “unnecessary interference” with the First Amendment); see also *Fieger*, 553 F.3d at 976–77 (Merritt, J., dissenting) (criticizing the vagueness of the Michigan Supreme Court’s construction of the rules, in addition to the expansive application of the rules without any precedent).

195. *Fieger*, 719 N.W.2d at 156 (Cavanagh, J., dissenting).

196. *Id.* at 131, 139 (majority opinion).

197. *Id.* The Sixth Circuit accepted the Michigan Supreme Court majority’s reasoning in its analysis of the standing issue:

In light of the narrowing construction placed on the rules by the Michigan Supreme Court in *Fieger*, the court’s acknowledgment that lawyers have a right to criticize judges generally, and Fieger’s extreme remarks about participants in a pending case, for which he stipulated that reprimand was warranted, it is incumbent upon plaintiffs to articulate something more than a generalized, subjective “chilling” of speech to establish the required injury-in-fact. . . . Thus, the purported “chilling effect” of the rules on plaintiffs and on Michigan attorneys, in light of the narrow construction placed on those rules and Fieger’s extreme behavior, is objectively unsubstantiated and, accordingly, fails to give rise to an injury-in-fact.

*Fieger*, 553 F.3d at 965.

198. *Fieger*, 719 N.W.2d at 143.

between “courteous” and “discourteous” criticism by virtue of their Bar membership.<sup>199</sup>

The dissent conceded that speech restrictions based on language that “teeter[s] on the edge of vagueness” have been saved when the troublesome words or phrases have been subject to sufficient interpretation to provide the constitutionally required notice that is not inherent in the language itself.<sup>200</sup> The majority, however, did not point to any narrowing constructions by courts. Instead, as Judge Merritt posits in his Sixth Circuit dissent, the majority simply asserted that the rules are meant to apply only to “vulgar, crude, or personally abusive remarks.”<sup>201</sup> This approach missed the point of a vagueness challenge, according to the Sixth Circuit dissent.<sup>202</sup> The flaw in the Michigan Supreme Court majority’s analysis was its failure to identify, with greater specificity, speech to which the rules do not apply.<sup>203</sup>

The federal district court derided the Michigan Supreme Court majority’s directive that lawyers are free to criticize judges, but only in a courteous and respectful manner, as an invitation to arbitrary and selective enforcement.<sup>204</sup> In making the point that a person of ordinary intelligence would not necessarily know what these rules mean, the court recounted the following exchange:

[A] Michigan State Senator, who happens to be an attorney, made certain comments about a federal judge stating that he was “out of control,” [and] “not quite lucid” . . . . During oral argument [in *Fieger*], the assistant Attorney General for the State of Michigan was asked . . . whether she believed that these comments violated the courtesy

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199. See *id.* at 144 (quoting *In re Thatcher*, 89 N.E. 39, 88 (Ohio 1909)) (“An attorney of more than twenty years’ standing at the bar must be presumed to know the difference between respectful . . . criticism, and scandalous abuse.”). The court recognized that this code is complex, but apparently did not perceive any potential conflict between its directive that lawyers behave courteously and some of the other provisions of the codes of professional responsibility such as the requirement that lawyers be competent and zealous advocates for their clients. See *id.* at 143 (noting that the MRPC only prevent lawyers from “casting such disagreement and criticism in terms that could only bring disrepute on the legal system,” not general disagreement).

200. *Id.* at 160 n.7 (Cavanagh, J., dissenting).

201. See *Fieger*, 553 F.3d at 975 (Merritt, J., dissenting) (quoting the majority opinion) (admonishing the majority for claiming to emphasize a “narrow construction” of the MRPC, which the dissent found “impossible”); *id.* at 965 (majority opinion) (observing that plaintiffs did not suggest any other attorneys intended to make “vulgar, crude, or personally abusive remarks”).

202. *Id.* at 975–76 (Merritt, J., dissenting).

203. *Id.* at 976.

204. *Fieger v. Mich. Supreme Court*, No. 06-11684, 2007 WL 2571975, at \*11–12 (E.D. Mich. Sept. 4, 2007).

provisions. Her initial response was, “I don’t know . . . I need a more specific context to address that . . . .”<sup>205</sup>

Critics of the courtesy rules also posed this question: Is a lawyer, for example, allowed to say that a judge “behaved dictatorially[,] . . . is a jackass[,] . . . a stubborn idiot, a right-wing radical, a doctrinaire ideologue[,] . . . driven by party politics, . . . or an incompetent jurist whose presence on the bench is a disgrace?”<sup>206</sup> The federal district court further illustrated the vagueness and shapelessness of the majority’s approach by asking how each of the following statements would be treated under Michigan’s rules:

- Today’s ruling by the Court was a travesty of justice . . . .
- . . . I believe that the Supreme Court is in the back pocket of special interest groups.
- Like the Oracle [of Delphi], you too must have been inhaling the intoxicating vapors when writing this decision.
- [This opinion] makes [one] wonder if the members of the court actually went to law school.
- Three monkeys with typewriters could have written a more coherent opinion . . . .
- Something should be done to those Judges.<sup>207</sup>

In addition to the assertion that the Michigan rules were narrowly constructed for the reasons previously stated, the majority also pointed to two other ways in which the scope of the rules was limited in *Fieger*: they were applied to a pending case and to remarks directed towards a tribunal. *Fieger*’s radio comments were made immediately after the appellate court published its opinion, but prior to the expiration of the time during which the parties could have moved the court for reconsideration or rehearing. Based on this fact, the majority concluded that the *Badalamenti* case was still pending and *Fieger*’s comments were, thus, made during the course of ongoing litigation. In order to reach this conclusion, the majority, ironically, had to define “during” and “pending case” in very broad terms to include cases “begun, but not yet completed,” and “awaiting an occurrence or conclusion of [the]

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205. *Id.* at \*11.

206. *Fieger*, 553 F.3d at 976 (Merritt, J., dissenting); see Baldas, *supra* note 127, at 4 (quoting *Fieger*’s lawyer as saying, “[W]hat did he do that was so terrible? He made some uncharitable comments about a couple of judges in the course of a radio program”).

207. *Fieger*, 2007 WL 2571975, at \*11-12.

action” and time periods “before the conclusion of,” and “prior to the completion of,” cases and periods of “continuance or indeterminacy.”<sup>208</sup>

To the dissent, it was significant for purposes of assessing the overbreadth and vagueness challenges to the courtesy rules that the majority’s opinion never actually limited, in general, the reach of the speech restrictions to pending cases, but instead merely relied upon a finding that Fieger’s comments were made while that case was pending in its defense to charges that the rules were being applied unconstitutionally.<sup>209</sup> In other words, the court, according to the dissent, did not state unequivocally that the rules do not reach nonpending cases. Moreover, according to the dissent, the majority’s construction of the “pending case” requirement was “reached haphazardly and without any regard for the plain language, history, or context of the rules.”<sup>210</sup> Convinced that the rules were not intended to reach the type of speech involved in *Fieger*, the dissent believed the court expanded the reach of the courtesy rules in order to sanction Fieger.<sup>211</sup> Judge Cavanagh would take counsel from Justice Frankfurter’s dissent in *Bridges*, a case in which the Court considered whether speech that occurred between trial and sentencing prejudiced the fair administration of justice.<sup>212</sup> Justice Frankfurter distinguished cases awaiting decisions from those which are not:

The question concerning the narrow power we recognize always is—was there a real and substantial threat to the impartial decision by a court of a case actively pending before it? The threat must be close and direct; it must be directed towards a particular litigation. The litigation must be immediately pending. When a case is pending is not a technical, lawyer’s problem, but is to be determined *by the substantial realities of the specific situation*.<sup>213</sup>

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208. *Grievance Adm’r v. Fieger*, 719 N.W.2d 123, 136 (Mich. 2006).

209. *See id.* at 166 (Cavanagh, J., dissenting) (arguing that the majority’s broad interpretation of the term “pending” will lead to incongruous results in non-Court of Appeals cases); *see also Fieger*, 553 F.3d at 977 n.2. (Merritt, J., dissenting) (contending that an expansive reading of the majority’s opinion may restrict a lawyer’s freedom of speech in nonpending cases as well).

210. *Fieger*, 719 N.W.2d at 156 (Cavanagh, J., dissenting).

211. *See id.* at 156, 161, 166 (arguing the majority “abruptly change[d] the rule” and pointing repeatedly to the lack of support for their view).

212. *Id.* at 169.

213. *Bridges v. California*, 314 U.S. 252, 303–04 (1941) (Frankfurter, J., dissenting) (emphasis added). Judge Cavanagh disputed whether speech restrictions should be allowed even if the case is still pending, as he explains:

[E]ven if one were to accept the majority’s precarious conclusion that the *Badalamenti* case was pending, its end result that the comments were not

To the contrary, the majority's interpretation of the rule will equate a recent appellate decision and an ongoing trial for purposes of the applicability of the courtesy rules, so long as the time for filing a motion for leave to appeal further has not expired. The dissent pointed out that in order to reach the "pending case" issue in the first place, the majority had to give a similarly expansive interpretation to another provision in the rules.<sup>214</sup> The Michigan Supreme Court held that the phrase "all persons involved in the legal process" in MRPC 6.5(a) included judges in order to find that they are persons who must be treated with courtesy and respect under the rule.<sup>215</sup> The dissent argued that this particular disciplinary rule had never previously been applied to an attorney's public comments about a judge after an appellate ruling.<sup>216</sup>

In addition to its finding that the *Badalamenti* case was still pending when Fieger made his critical remarks, the majority also held they were directed "toward a tribunal," which was an explicit predicate to the imposition of sanctions under the rule.<sup>217</sup> The court characterized Fieger's statements, even though made outside a courtroom for a radio audience, as attacking the judges in their professional capacity and "in a forum designed to reach both the public and the [ ] judges" who might have been members of the audience.<sup>218</sup> The court held that "[Fieger's] comments were in the direction of and with respect to these judges," and therefore, "were necessarily comments made toward the

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protected is irreconcilable with the basic truth that even restrictions on speech regarding *pending* cases merit the most careful scrutiny. . . . Protections for speech about pending cases are no less vital because pending cases are likely to fall not only at a crucial time but upon the most important topics of discussion, and [n]o suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Indeed, public interest in a pending matter and the importance of disseminating information in a timely manner are at a pinnacle while the matter is ongoing. Moreover, negating constitutional restraints on limiting speech about pending matters would disregard, at the expense of free speech, that cases, especially in today's overburdened legal system, frequently remain unresolved for extended periods.

*Fieger*, 719 N.W.2d at 171 (Cavanagh, J., dissenting) (quoting *Bridges*, 314 U.S. at 268–69) (internal quotation marks omitted).

214. *Id.* at 162–64 (explaining that the majority's reading of MPRC 3.5(a) was a similarly expansive interpretation as that given to MPRC 6.5(a)).

215. *See id.* at 138 (majority opinion) (asserting that MRPC 6.5(a) applies to judges involved in an current legal proceeding).

216. *See id.* at 174 (Cavanagh, J., dissenting) (noting that the majority's reliance on an ethical rule supposedly prohibiting nondefamatory, rude remarks was untried constitutionally).

217. *Id.*

218. *Id.*

tribunal.”<sup>219</sup> The court rejected the argument that an attorney’s speech cannot be suppressed or punished in the absence of a finding that the speech could “actually disrupt the proceeding.”<sup>220</sup> Further, the court found that such a requirement was contrary to the explicit language of the rule and that the ADB did not have the power to declare a court-enacted professional rule of conduct unconstitutional.<sup>221</sup> The court equated the necessity of an actual threat of disruption of a case with adding a requirement that the discourteous conduct occur in the courtroom and reasoned that limiting the applicability of the courtesy rule in this manner would render the rule “largely superfluous, and of little practical utility.”<sup>222</sup> The court based this conclusion on the assumption that the statutory power to hold lawyers in contempt for violating court orders gives judges all of the power necessary to reach any misconduct that could disrupt a tribunal.<sup>223</sup>

The dissent’s interpretation of the “towards the tribunal” language is contrary to the majority’s construction in almost every respect. The dissent argued that the plain language of the phrase, when viewed in a context that includes consideration of its historical evolution, makes clear that the “toward the tribunal” limitation should be read to narrow the scope of the rule to reach only conduct that occurs proximate in time and space to the tribunal or its immediate environs, such as judicial chambers or in pleadings.<sup>224</sup> This construction is bolstered by the comment to MRPC 3.5, which indicates that the rule was drafted with the intent to promote the specific interest of protecting litigants’ rights to fair trials.<sup>225</sup> In the ordinary course of events,

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219. *Id.* (internal quotation marks omitted).

220. *Id.*

221. *Id.* at 137–38 (majority opinion).

222. *Id.* at 137.

223. *Id.*; see *Pounders v. Watson*, 521 U.S. 982, 989–91 (1997) (holding that a lawyer who engages in contumacious conduct, disruptive of judicial proceedings and damaging to the court’s authority may be punished summarily without normal due process, even if misconduct was not pervasive or disrespectful). *But see In re Jefferson*, 657 S.E.2d 830, 833 (Ga. 2008) (holding that a court must show that an attorney’s statements and conduct actually interfered with, or posed an imminent threat of interfering with, the administration of justice and that the attorney knew or should have known that the statements or conduct were out of bounds before a court may sanction an attorney summarily for contempt); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 105 cmt. e & reporter’s note to cmt. e (2000) (expressing the view that a lawyer should not be punished summarily for contempt unless the conduct constitutes an obstruction of justice).

224. *Fieger*, 719 N.W.2d at 157 (Cavanagh, J., dissenting).

225. MICH. RULES OF PROF’L CONDUCT R. 3.5 cmt. (2009), available at <http://www.michbar.org/generalinfo/pdfs/mrpc.pdf>; see *Fieger*, 719 N.W.2d at 158–59 (Cavanagh, J., dissenting) (arguing that the MRPC comment supports the inference that the rule is limited to remarks made toward the tribunal).

conduct or speech outside a courtroom, like Fieger's, does not disrupt, or pose a serious threat of disrupting, a court proceeding.<sup>226</sup> According to the dissent, "[t]he majority's removal of the proximate element of this rule" gives courts the unconstitutional power to protect the sensitivities of judges by restricting a lawyer's ability to speak even when the speech occurs in a setting removed in time and space from a judicial proceeding.<sup>227</sup> The district court worried that the Michigan Supreme Court's holding would extend the suppression of speech "all the way to extrajudicial statements made on the proverbial street corner, at the meeting-hall, on the radio, in the newspaper and even [in] one's household."<sup>228</sup> The dissent viewed such a broad interpretation of the civility rule as preventing lawyers from criticizing the conduct of judges even when the lawyers' participation in the proceedings makes them particularly qualified to comment.<sup>229</sup> Finally, the dissent argued that because the majority's construction of the "towards the tribunal" language goes so far afield from protecting the citizenry's right to fair trials and impartial adjudications, and compelling evidence exists that the expansive interpretation is contrary to the rule's plain language and its drafters' intent, lawyers have not received notice sufficient to allow them to avoid the rule's proscriptions.<sup>230</sup> At a minimum, if the interpretation was at all doubtful, the dissent contends the more prudent path would have been to resolve the issue in favor of Fieger's First Amendment right to criticize the judiciary in a nondefamatory manner.<sup>231</sup>

The split between the majority and dissent in the Michigan Supreme Court case mirrors a division in the holdings of courts that have considered whether the First Amendment protects attorneys from sanctions in situations similar to Fieger's.<sup>232</sup> Not

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226. *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 977 n.3 (6th Cir. 2009) (Merritt, J., dissenting) ("As commentators have noted, '[i]f a lawyer takes action outside a courtroom setting, it is virtually impossible that it could "disrupt" a tribunal.'" (quoting GEOFFREY C. HAZARD, JR., ET AL., *THE LAW OF LAWYERING* § 31.6, at 31-12 (3d ed. 2004))).

227. *Fieger*, 719 N.W.2d at 157 (Cavanagh, J., dissenting).

228. *Fieger v. Mich. Supreme Court*, 2007 WL 2571975, at \*5 (E.D. Mich. Sept. 4, 2007).

229. *See Fieger*, 719 N.W.2d at 157 (Cavanagh, J., dissenting) (noting that the majority's interpretation of the civility rules is aimed at protecting the feelings of judges at the expense of a lawyer's constitutional rights).

230. *Id.* at 159-60.

231. *See id.* at 160 (stating that "any gray area" should be resolved in favor of protecting Fieger's First Amendment rights).

232. Many courts have found First Amendment protections. *See, e.g.*, *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995); *In re Green*, 11 P.3d 1078, 1086 (Colo. 2000); *Ramsey v. Bd. of Prof'l Responsibility*, 771 S.W.2d 116, 121

only have their respective legal arguments put them at odds in the courtroom, but the opinions in the Fieger cases also reflect contrary views of professionalism and civility in the legal profession.<sup>233</sup>

The majority's opinion in the Michigan Supreme Court case adheres to the classic notion. When lawyers become officers of the court they are versed in an unwritten code of behavior that obligates them to respect the judiciary and preserve the public's confidence in the integrity of the legal system.<sup>234</sup> They do not need specific guidance about inappropriate behavior or language because they know where the boundaries are. A lawyer's vulgar, insulting, discourteous, disrespectful language and acts towards the judiciary have no political content or value and pose an inherent threat to the rule of law.<sup>235</sup> Such speech and behavior may be repressed and sanctioned without offense to the First Amendment because lawyers play a unique role in the legal system, may constitutionally be subjected to more expansive speech restrictions than non-lawyers, and always have an alternative avenue of expression available, i.e., courteous and respectful criticism.<sup>236</sup>

From the other point of view, lawyers have the same rights to speak freely as other citizens and proper application of First Amendment case law should create a presumption against enforcement of courtesy codes.<sup>237</sup> Their ethical duties of competency and zealous representation may compel lawyers to engage in behavior or to speak in a manner others find disrespectful or uncivil.<sup>238</sup> Moreover, lawyers are uniquely qualified to comment on the performance of judges, and therefore, the state should not repress or punish their speech in particular.<sup>239</sup> Criticizing the judiciary is an inherently political activity.<sup>240</sup> Drafting rules that mandate courtesy and respect towards judges outside the courtroom in the name of professionalism is an unjustified intrusion into lawyers' First

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(Tenn. 1989); State *ex rel.* Okla. Bar Ass'n v. Porter, 766 P.2d 958, 966 (Okla. 1988). Other courts, however, have found that the First Amendment does not prevent sanctions. See, e.g., *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995); Miss. Bar v. Lumumba, 912 So.2d 871, 883 (Miss. 2005); *In re Westfall*, 808 S.W.2d 829, 838 (Mo. 1990) (en banc).

233. See Baldas, *supra* note 125, at 4 (addressing the legal profession's debate about constitutional battles involving harsh criticism of judges).

234. See Fieger, 719 N.W.2d at 133–34.

235. See *id.* at 132, 141–42.

236. See *id.* at 134–35, 143.

237. See generally Chemerinsky, *supra* note 172 (contending that courtesy rules are content-based restrictions and must pass the strict scrutiny standard).

238. See *id.* at 867–71 (commenting on the important social value of attorney speech).

239. Butcher & Macbeth, *supra* note 96, at 673.

240. See Chemerinsky, *supra* note 172, at 863.

Amendment rights, not only because of the insufficiency of the notice provided by these vaguely-worded provisions, but also because the requisite threat to the fair administration of justice is absent.<sup>241</sup> In any event, courtesy rules cannot be enforced fairly because they rely upon a nonexistent and unattainable consensus about appropriate speech and behavior.<sup>242</sup>

The civility debate in case law appears to be at a stalemate of sorts between viewpoints that have proven difficult to reconcile, notwithstanding the plasticity of First Amendment precedent. For every point, there is a counterpoint.<sup>243</sup> The classic professionalism paradigm, to its critics, manifests as little more than a jurisprudence of labels supported by tautological reasoning.<sup>244</sup> Conversely, to professionalism advocates, misbehaving lawyers are attempting to use the First Amendment as a legal trump card in a cynical effort to avoid accountability, rather than vindicating their clients' rights or improving the legal system.<sup>245</sup> Some commentators on attorney speech issues attempt to bridge the wide gap between approaches like those of the majority and dissent in *Fieger*, by advocating tests that identify and balance the various interests at stake.<sup>246</sup> In a

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241. See *id.* at 881, 884–85.

242. See, e.g., *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 975–76 (6th Cir. 2009) (Merritt, J., dissenting) (questioning what speech establishes a definite violation of the MRPC, as the majority failed to “suggest[] where the line between permissible and impermissible form might lie”).

243. For example, one argument for protecting judges is that their code of ethics prohibits them from publicly defending themselves against criticism. See *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 129 n.2 (Mich. 2006) (pointing out that a canon of the Code of Judicial Conduct prohibits judges from commenting on impending or pending cases). A responsive argument for not sanctioning lawyers for criticizing the judiciary is that lawyers cannot easily obtain appellate review of sanctions for incivility, which are often publicized in reported cases. See *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 202, 208, 210 (1999) (holding that an order imposing sanctions on an attorney is not immediately appealable); Carla R. Pasquale, Note, *Scolded: Can an Attorney Appeal a District Court's Order Finding Professional Misconduct?*, 77 *FORDHAM L. REV.* 219, 242–44 (2008) (arguing that allowing appeals only for explicit and formal sanctions damages an attorney's reputation because sanctions are often published).

244. See *Fieger*, 553 F.3d at 976 (Merritt, J., dissenting) (asserting that words like “undignified” and “discourteous” have no clear meaning).

245. See *Fieger*, 719 N.W.2d at 140–43 (addressing how the protections afforded by the First Amendment should not permit attorneys to abuse their privileges through personal attacks on judges, but rather should allow the attorneys to advocate for their clients and uphold the law).

246. See generally Chemerinsky, *supra* note 172, at 885–87 (concluding that a lawyer should enjoy unrestricted freedom of speech unless he knows a statement is false and makes it with reckless disregard for the truth); Butcher & Macbeth, *supra* note 96, at 667–80 (advocating the use of a subjective standard that balances the goal of protecting a lawyer's ability to participate in public discourse with the need to defend the judiciary against false statements); David R. Cooper, Note, *Speaking Out: Lawyers and Their Right to Free Speech*, 18 *REV. LITIG.* 671, 683–701 (1999)

factually distinguishable case, the U.S. Supreme Court took such an approach to attorney speech.<sup>247</sup> As we shall see, however, for the reasons explained by the following sections, any conceptualization of attorney civility issues that relies exclusively on the language of law and the tools of legal analysis will be ideologically deficient, inherently unworkable, and incurably susceptible to prejudiced and arbitrary enforcement.

## V. THE UNCIVIL SOCIETY

The exploration of incivility outside the legal profession ranges wide and deep. The meaning of civility has been the subject of extensive study and vigorous debate by historians, anthropologists, sociologists, philosophers, linguists, psychiatrists, and psychologists, among others.<sup>248</sup> Legal scholarship frames civility as a principle tied to professional identity, i.e., the legal profession's commitment to professionalism is its defining characteristic, and therefore, a commitment to professionalism's ideals, one of which is civility, is the defining characteristic of a good citizen of the Bar.<sup>249</sup> Insights from other, nonlegal studies suggest that the Bar should focus less on defending its incivility problem as a unique component of the legal profession and give greater consideration to the way these issues are framed in the society-wide debate about bad behavior.<sup>250</sup> The sections that follow identify common themes that emerge from a broad range of civility scholarship and discuss their potential applicability to the legal profession. The discussion is organized around the three spheres within which notions of civility operate: personal, interpersonal, and societal.

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(describing factors that should be weighed in determining if an attorney's speech should be sanctioned).

247. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034, 1036 (1991) (setting out the requirement that courts balance "the need for free and unfettered expression" with "the imminence and magnitude of the danger" posed by the speech at issue).

248. *Infra* p. 1203.

249. Levine, *supra* note 12, at 224–25 (describing Anthony Kronman's view that professionalism is at the core of the profession).

250. See generally Daniel Markovits, *Legal Ethics from the Lawyer's Point of View*, 15 YALE J.L. & HUMAN. 209 (2003) (discussing the philosophical underpinnings of morality). *But see* Ted Schneyer, *The Promise and Problematics of Legal Ethics from the Lawyer's Point of View*, 16 YALE J. L. & HUMAN. 45, 45 (2004) (critiquing the work of Daniel Markovits, which "couples a philosophic argument about legal ethics with a theory about long-term cultural trends and their effect on the profession . . . [and] purports to explain a 'commonly-observed crisis' in today's legal profession that may be linked to 'other crises of moral justification . . . in the modern world'" (quoting Markovits, *supra*, at 211)).

*A. Personal*

From a nonlegal perspective, a significant omission from the Bar's incivility narrative is the role of emotions. Many, perhaps most, acts of rudeness, disrespect, discourtesy, and the like, are borne of an uncontrolled emotional reaction.<sup>251</sup> Some recent research concludes that civility should be conceptualized as primarily about the means by which societies govern emotion.<sup>252</sup> The range of emotions implicated when a lawyer is vulgar, rude, discourteous, disrespectful, or the like include, among others, excitement, agitation, anger, sadness, fear, frustration, aggression, resentment, envy, disappointment, shame, and humiliation.<sup>253</sup> A psychological perspective might conceptualize sanctions for breaching courtesy rules as punishment for a lawyer's failure to control the inappropriate manifestations of his/her emotions.<sup>254</sup> A shift in the direction of taking the emotional component of civility seriously would require the Bar and judiciary to look to experts in the mental health fields for guidance on when it is reasonable to expect lawyers to govern their emotions and when a failure to control emotions should be punishable.<sup>255</sup>

Considering Fieger's outburst from a psychological point of view, it seems likely that his remarks were, at least in part, manifestations of the emotions of anger, frustration, disappointment, contempt, and aggression. These are feelings many plaintiffs' lawyers would experience in the aftermath of an appellate reversal of a large verdict, coupled with a public condemnation of the lawyer's trial tactics. Because these

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251. See NICO H. FRIJDA, *THE EMOTIONS* 295–96 (1986) (linking violent displays of anger to feeling a loss of control).

252. See DAVETIAN, *supra* note 6, at 17–18, 362–63, 369–70 (analyzing the relationship between culture and emotion and the effect this interaction has on civility). See generally *THE SOCIAL CONTEXT OF NONVERBAL BEHAVIOR* (Pierre Philippot, Robert S. Feldman & Erik J. Coats eds., 1999) (tracking theories that analyze the reciprocal relationship between nonverbal behavior and social variables); Dan Vergano, *Study: Emotion Rules the Brain's Decisions*, USA TODAY, Aug. 6, 2006, [http://www.usatoday.com/tech/science/discoveries/2006-08-06-brain-study\\_x.htm](http://www.usatoday.com/tech/science/discoveries/2006-08-06-brain-study_x.htm) (reporting the results of a study between healthy cognition and emotion and noting that “[t]he evidence has been piling up throughout history, and now neuroscientists have proved it's true: The brain's wiring emphatically relies on emotion over intellect in decision-making”).

253. See FRIJDA, *supra* note 251, at 295–96 (discussing the types of expressive behavior associated with major emotions).

254. See *id.* at 408–09 (relating emotional behavior to adverse consequences such as nonreward and punishment).

255. See generally Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 17–19 (1997) (discussing the applicability of therapeutic jurisprudence and preventive law perspectives to lawyering, which includes consideration of the mental health and psychological functioning of lawyers and clients).

feelings are nearly universal, the civility problem, from this point of view, is, in essence, about how to deal with the failures of some lawyers to control public manifestations of emotions that the Bar and judiciary deem professionally inappropriate or unacceptable.

A fully-informed approach to incivility must take into consideration both the misbehaving lawyer's state of mind and the circumstances surrounding the misconduct, including the existence of provocation. In Fieger's case, all conceded that his words were vulgar and offensive.<sup>256</sup> In most cases, however, such concessions are unlikely and the proper characterization of the lawyer's act or speech will not be clear-cut.<sup>257</sup> In that event, according to this approach, the court should consider the lawyer's psychological state as a relevant factor in determining whether the lawyer's acts or words are disrespectful or offensive.

To illustrate, consider whether a judge should sanction a lawyer for being discourteous or disrespectful in the following circumstances. Assume the lawyer addressed a middle-aged, African-American clerk of the court as "Sparky."<sup>258</sup> Would we condemn the act as disrespectful or offensive if we assumed that the lawyer had a good faith, but erroneous, belief that the clerk's name was in fact Sparky?<sup>259</sup> What if we assumed, in the alternative, that the lawyer and the clerk were involved in a dispute and the lawyer addressed the clerk as Sparky only after the clerk had called him a "shyster?" Is the lawyer's tone of voice or physical posture relevant? Should the analysis change if the lawyer addressed the clerk as "Chief" instead of Sparky? What if the lawyer used the word "Sparky" to refer to the clerk in a dismissive tone of voice while muttering under his breath, believing no one would hear him? What if the lawyer knew the clerk was not named Sparky, and understood that the clerk would take offense at being addressed in this manner, but suffered from Tourette's syndrome, a mental condition that causes its sufferers to uncontrollably utter socially unacceptable

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256. See, e.g., *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 141 (Mich. 2006); *id.* at 157, 168 (Cavanagh, J., dissenting); *id.* at 197 (Kelly, J., dissenting).

257. See *infra* Part V.B (explaining the inherent subjectivity of civility standards, making consensus and consistent application of any such standard almost unachievable).

258. See *Attorney Grievance Comm'n of Md. v. Link*, 844 A.2d 1197, 1200 (Md. 2004) (describing an incident in which an attorney called an African American customer service agent "Sparky").

259. In the case upon which the hypothetical is loosely based, the lawyer did not believe that the clerk's name was "Sparky," and he also accused the clerk of being "lazy" and "incompetent." *Id.* at 1200-01.

words and phrases?<sup>260</sup> What if the lawyer suffered instead from bipolar mania but refused to take medication that would control his behavioral symptoms? What if the lawyer in any of the foregoing examples manifested genuine remorse and apologized immediately?

Psychologists and other medical scientists assess rude and disruptive acts and behaviors in light of emerging knowledge about impulsivity, anger, and power-seeking and autonomy-preserving behaviors.<sup>261</sup> Looking at attorney misconduct from such a perspective suggests consideration of, at a minimum, a rude lawyer's intent to harm, her emotional motivations, the existence of provocation, and the harm inflicted on others. The modern psychological sensibility is to think of controlling one's emotions and behavior as facets of mental health.<sup>262</sup> Outside of admissions decisions and assessments of the appropriate sanction in disciplinary actions, the Bar has been slow in this context to embrace available insights from psychology, psychiatry, and other mental health fields, preferring instead to see civility issues as primarily questions of character or adherence to the legal profession's "officer of the court" unwritten code.<sup>263</sup>

Taking into account psychological factors affecting behavior is, however, fraught with difficulties and ambiguities.<sup>264</sup> While the problems mentally ill attorneys pose for the legal profession

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260. Cf. Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 279 & n.486 (2005) (noting a similar scenario where a grocery store bagger with autism, which hindered social interaction and made him speak loudly, could not be discharged when he otherwise properly performed the essential functions of the job).

261. Cf. James J. Gross & Ricardo F. Muñoz, *Emotion Regulation and Mental Health*, 2 CLINICAL PSYCHOL.: SCI. & PRAC. 151 (1995) (weighing the issue of whether or not aggressive emotional outburst are or are not controllable).

262. *Id.* at 154–55.

263. See Jane H. Herrick, *Misconduct, Mental State and Mitigation: The Developing Role of Mental State, Condition, or Impairment in Kentucky Lawyer Discipline*, 6 APPALACHIAN J.L. 31, 45–46 (2006) (observing that an attorney's mental state cannot be a full bar against liability in disciplinary proceeding); John V. Jacobi, *Professionalism and Protection: Disabled Lawyers and Ethical Practice*, 69 U. PITT. L. REV. 567, 587–88 (2008) (using the methods the medical profession employs as a starting point for how the legal profession should deal with impaired attorneys); Michael L. Perlin, "Baby, Look Inside Your Mirror": *The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589, 594–95 (2008) (arguing that the legal profession ignores mental illness in its ranks); Page Thead Pulliam, Comment, *Lawyer Depression: Taking a Closer Look at First-Time Ethics Offenders*, 32 J. LEGAL PROF. 289, 291 (2008) (calling into question the ABA's failure to fully appreciate the effects of mental illness on attorneys).

264. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-431, at 3 (2003) (acknowledging that lawyers are not health care professionals and cannot be expected to discern mental illness as would a professional).

share some similarities with those created by substance abuse, they are, from a practical standpoint, far more complex.<sup>265</sup> For example, consider bipolar disorder, one of a number of mental illnesses where impulsivity and acting out are symptoms.<sup>266</sup> An attorney suffering from untreated mania might repeatedly engage in conduct most would deem offensive, impolite, disruptive, and disrespectful.<sup>267</sup> In many jurisdictions, if a lawyer evidenced a recurrent problem with alcohol or drug abuse that resulted in inappropriate speech or behavior, the Bar, judges, or perhaps his/her peers could intervene, often in advance of disciplinary action. Although some jurisdictions include mental illness as a basis for referring a lawyer to a diversion-type program for assistance from the Bar, most do not.<sup>268</sup> If one agrees

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265. See Kristy N. Bernard & Matthew L. Gibson, Comment, *Professional Misconduct by Mentally Impaired Attorneys: Is There a Better Way to Treat an Old Problem?*, 17 GEO. J. LEGAL ETHICS 619, 630 (2004) (noting the unfairness in arbitrarily sanctioning attorneys with undiagnosed but easily treatable conditions); Len Klingen, Comment, *The Mentally Ill Attorney*, 27 NOVA L. REV. 157, 160 (2002) (noting that drug addictions are often included when discussing mental illness of attorneys, both because they are thought of as mental disorders and because they can be symptoms of or correspond with mental illness). See generally Anita Bernstein, *Lawyers with Disabilities: L'Handicapé C'est Nous*, 69 U. PITT. L. REV. 389 (2008) (noting that while lawyers are afforded ADA protections, they are often prejudiced by other lawyers making claims in the interest of client safety); Donald B. Hilliker, *The Impaired Lawyer: Implications Under the Rules of Professional Conduct*, 2004 PROF. LAW. 49 (outlining the ethical implications and duties of impaired lawyers and those aware of their impairment).

266. See Timmons, *supra* note 260, at 208 (describing grandiosity and “loud, rapid, and difficult to interrupt” speech as symptoms of bipolar disorder); Stacey A. Tovino, *Neuroscience and Health Law: An Integrative Approach?*, 42 AKRON L. REV. 469, 513–14 (2009) (referencing National Institute of Mental Health defining bipolar mania as a mental disorder that causes shifts in a person’s mood, energy, ability to function, and irritability).

267. Cf. Frederick Cassidy et al., *A Factor Analysis of the Signs and Symptoms of Mania*, 55 ARCHIVES GEN. PSYCHIATRY 27, 27 (1998) (noting the four defining aspects of mania are “euphoric mood, psychomotor pressure, grandiosity, and irritable aggression”).

268. See, e.g., CAL. BUS. & PROF. CODE §§ 6230–6238 (West 2003 & Supp. 2010) (establishing the Attorney Diversion and Assistance Program to help rehabilitate impaired attorneys suffering from addiction or mental illness); RULES REGULATING THE FLA. BAR R. 2-9.11 (2010) (creating a fund and offering assistance for attorneys suffering from chemical dependency or psychological impairments); OKLA. STAT. ANN. tit. 5, App. 1-A, Rule 5.1(c) (West 2003 & Supp. 2011) (allowing attorneys to enter diversion programs, including psychological counseling, in lieu of formal proceedings for less serious offenses); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.03 (allowing lawyers to report another lawyer to a peer assistance program when mental illness is the cause of misconduct); RULES GOVERNING THE UTAH STATE BAR R.14-533 (2010) (offering a diversion program for lawyers consisting of penalties ranging from paying restitution to undergoing psychological and behavioral counseling); WASH. RULES FOR ENFORCEMENT OF LAWYER CONDUCT, ELC 6.1, 6.2, 8.2 (effective Oct. 1, 2002), available at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.rulesPDF&groupName=ga&setName=ELC&pdf=1](http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&groupName=ga&setName=ELC&pdf=1) (stating that diversion programs for attorney misconduct can include “psychological and behavior counseling,” but failing to list mental illness as a basis for utilizing the diversion program); UTAH SUPREME COURT STANDING ORDER NO. 7 (effective Apr. 1, 2008) (creating a professionalism counseling referral program). There are many alcohol and drug

that those who cannot control their rude behavior should be treated differently from those who can, what should a judge in a jurisdiction with a courtesy code, but no mental health referral system, do when confronted with unprofessional behavior that might be attributable to mental illness?<sup>269</sup>

While the behavior of mentally ill attorneys may be more likely to disrupt the fair administration of justice—because of the absence of inhibitions and the ineffectiveness of ordinary disincentives—their behavior is also more likely to be involuntary or uncontrollable from a psychological point of view.<sup>270</sup> Consequently, situations involving lawyers who commit repeated acts of incivility because of some degree of mental illness not only pose a real dilemma for the bench and bar, but also put advocates of courtesy codes in a bind. Medical professionals frequently disagree about whether an individual is suffering from mental illness, and, in any event, elsewhere in the law and society, there is no consensus about the extent to which a mentally ill person should be held accountable for his/her actions.<sup>271</sup> Is it reasonable to expect judges, who often must make quick decisions during hearings or trials, to distinguish between run-of-the-mill rudeness and manifestations

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diversion programs for attorneys. *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-431 (2003) (indicating that information on diversion programs is available through the ABA Commission on Lawyer Assistance Programs website); Diana M. Ellis, *A Decade of Diversion: Empirical Evidence That Alternative Discipline Is Working for Arizona Lawyers*, 52 EMORY L.J. 1221 (2003) (providing a statistical study of the success of Arizona's diversion program). An additional issue is whether a lawyer's reporting requirement should be affected by knowledge that the offending lawyer's misconduct was caused by mental illness. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3 (2010); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-431 (2003) (discussing a lawyer's duty to report rule violations by another lawyer who may suffer from disability or impairment); Douglas R. Richmond, *Law Firm Partners as Their Brothers' Keepers*, 96 KY. L.J. 231, 234 (2008) (noting instances where law firm partners choose not to turn in attorneys they know are impaired); Robert Dowers, Comment, *Duties Invoked Under the Model Rules of Professional Conduct by a Mentally Impaired Lawyer*, 19 GEO. J. LEGAL ETHICS 681, 684 (2006) (commenting on the difficulty lawyers have in knowing whether they are impaired such that they are materially unable to represent their clients diligently).

269. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-431, at 3 (2003) (opining that despite their lack of expertise, lawyers may not be willfully blind to obvious symptoms of impairment such as memory lapse or inexplicable behavior).

270. *See* Gross & Muñoz, *supra* note 261, at 152–55 (explaining that emotions, an important aspect of mental health, are characteristically “powerful and uncontrollable”).

271. *See* Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1513–16 (1992) (struggling to find a balance between the accountability and blamelessness of a mentally ill individual); Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534, 598–99 (1995) (“The law has rejected an ‘irresistible impulse’ test for legal insanity because of concern with the difficulty of differentiating between irresistible and merely unresisted impulses.”).

of mental illness and act upon those distinctions in enforcing courtesy codes?<sup>272</sup>

Given the foregoing difficulties, the failure of the professionalism paradigm to adopt a more psychologically savvy strategy for addressing attorney rudeness may seem understandable. In reality, however, those complexities auger against having courtesy rules at all, rather than in the direction of selectively disregarding psychological insights and pretending that all acts of incivility have their origins in character defects or willful failures to live up to the “officer of the court” ideal. At a minimum, if jurisdictions persist in adopting and enforcing courtesy codes, consideration of the emotional and psychological dimensions of impulsive uncivil acts probably can assist a judge or the Bar in deciding how to react, even if only by suggesting how to make rational distinctions in situations like those posed in the Sparky hypotheticals. Even in a case such as Fieger’s, where mental illness is not an issue, an expanded awareness of the relevance of the state of mind behind incivility might have counseled the Michigan Bar to refrain from imposing discipline because his outburst was an understandable angry response and was likely perceived as such by the majority of those who heard his comments.

### B. *Interpersonal*

A consideration of the intrapersonal aspects of attorney misbehavior leads one to an examination of the sphere within which civility norms predominantly operate—interpersonal relationships. One of the most notable things about the professionalism approach to civility is that it presupposes that disputes about rude behavior are straightforward matters about which consensus exists.<sup>273</sup> The drafters of courtesy rules use words such as “discourteous,” “disrespectful,” and “undignified”

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272. For a discussion on making quick judgments in general, see MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* *passim* (2005), demonstrating that “thin slicing” and other forms of quick judgments about people and situations are often incorrect. Other concerns about judges include their use of power through accusations of mental illness. See George J. Alexander, *International Human Rights Protection Against Psychiatric Political Abuses*, 37 SANTA CLARA L. REV. 387, 392 (1997) (noting that “it is important to recognize . . . the unique role of psychiatry in discrediting opinion and dehumanizing those with whom one disagrees” and warning that this concern should not be “limited to totalitarian regimes[,]. . . [but may in fact] be more dangerous in countries in which individual rights are generally protected”).

273. See Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 687–88 (1994) (noting the “exclusionary” nature upon which civility codes are based, and the resulting lack of “legitimate consensus”).

without further definition, confident in their convictions that the command of the rules is clear; lawyers and judges discern their meaning in a uniform way; and judges will enforce these prohibitions fairly even if there is a lot of play in the language.<sup>274</sup> From a nonlegal perspective, every one of those assumptions is unfounded and probably wrong.<sup>275</sup>

Nothing about civility is simple or self-evidently true. It is a sprawling, multi-faceted concept that has been the subject of diverse commentary and analysis that runs the gamut from primers on etiquette by Emily Post<sup>276</sup> to theories about the nature of a just society by John Rawls.<sup>277</sup> A common thread that runs throughout civility studies by linguists, social psychologists, anthropologists, sociologists, historians, political theorists, and philosophers is that the notion of what constitutes civil behavior is contingent and relative.<sup>278</sup> Not only do definitions of civility vary dramatically across history and cultures, but they are also contingent within societies and depend on politics, age, religion, and class,<sup>279</sup> a concept some refer to as the “relativity of politeness.”<sup>280</sup>

Our consensus on what constitutes proper behavior, according to historians, evolves as society changes.<sup>281</sup> Commentators have described an increasingly high tolerance for informality and vulgarity in contemporary American society.<sup>282</sup> To many, it seems that traditional restrictions and sanctions for rude behavior have all but disappeared.<sup>283</sup> Vulgar language and curse words have become pervasive in popular culture, and this

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274. See *id.* at 687 (examining how civility codes micromanage lawyers with broad rules that do not allow for flexibility).

275. See *id.* (asserting that ambiguous words mean different things to different people, such that they can be interpreted multiple ways).

276. See generally PEGGY POST, EMILY POST'S ETIQUETTE (17th ed. 2004) (pronouncing proper behavior in a wide variety of circumstances).

277. See JOHN RAWLS, JUSTICE AS FAIRNESS 117–18 (Erin Kelly ed., 2001) (“The idea of public reason brings out . . . the great values achieved by a society that realizes in its public life . . . a spirit of compromise and the will to honor the duty of public civility.”).

278. See, e.g., CALDWELL, *supra* note 2, at 6–8 (“Civility in one context may be barbarism in another; what’s superficially polite can be covertly rude, and vice versa.”).

279. DAVETIAN, *supra* note 6, at 5–6.

280. See RICHARD J. WATTS, POLITENESS *passim* (2003) (exploring the historical and linguistic characteristics of politeness); Anthony Synnott, *Endorsement* to BENET DAVETIAN, CIVILITY: A CULTURAL HISTORY, at back flap (2009) (endorsing Davetian’s book by explaining that it covers topics ranging from toilet hygiene to the relativity of politeness).

281. ANNA BRYSON, FROM COURTESY TO CIVILITY *passim* (1998).

282. See JAY, *supra* note 7, at 223, 225–26 (arguing that the increase of cursing in films is indicative of society’s growing tolerance for vulgarity).

283. CALDWELL, *supra* note 2, at 46–52 (“A nation of transient strangers [such as the United States] is a nation without a real system of social bonds, and any civility thus shallowly planted is bound to be fragile.”).

acceptance is reflected in films, where their use has increased steadily.<sup>284</sup>

The gap between the legal profession's official aversion to vulgarity and informality and the contrary attitude of society in general is widening.<sup>285</sup> The classic professionalism paradigm seems to be clinging to the sensibilities of an earlier era, even when other facets of the practice of law may be adjusting. For example, litigants, witnesses, and observers wear much more casual clothing to court than would have been common thirty years ago, but reports of judges making an issue of the informality are rare.<sup>286</sup> The majority in Fieger's case was shocked that he compared the judges to Nazis, apparently unaware that it is not at all unusual for this epithet to be used to condemn the perceived heavy-handed use of power.<sup>287</sup> The dissent in Fieger's case chastised the majority for being out of touch with the public, who would likely have viewed his vulgar remarks, including declaring "war" on the judges and suggesting that they be sodomized, as satire, hyperbole, and "colorfully expressed" commentary.<sup>288</sup>

Every lawyer is trained to argue that generalized statutory language is susceptible to differing interpretations.<sup>289</sup> Yet, in drafting courtesy and civility rules, the Bar has taken the position that the law that governs lawyers is fundamentally different from most other law.<sup>290</sup> Nonspecific terms like "courtesy," according to the Bar, provide sufficient notice because

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284. See JAY, *supra* note 6, at 225 (finding a "significant increase" in the use of curse words in film from before 1960 until the 1980s). The law, however, still views a number of the words that are commonly used as legitimately subject to repression in some circumstances. See *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806–07 (2009) (detailing the evolving enforcement of statutory restrictions placed on indecent broadcasts).

285. In *F.C.C. v. Fox Television Stations, Inc.*, Justice Stevens observed that:

It is ironic, to say the least, that while the FCC patrols the airwaves for words that have a tenuous relationship with sex or excrement, commercials broadcast during prime-time hours frequently ask viewers whether they too are battling erectile dysfunction or are having trouble going to the bathroom.

*Fox Television*, 129 S. Ct. at 1827 & n.4, 1828 (Stevens, J., dissenting) (disagreeing with the majority's holding that the FCC did not act arbitrarily or capriciously in changing its policy from a per se nonactionable rule for nonrepetitive use of expletives to a context-based approach).

286. See KATHY LASTER, *LAW AS CULTURE* 310 (2d ed. 2001) (discussing the ritualistic aspect of clothing in the courtroom).

287. *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 142 (Mich. 2006).

288. *Id.* at 176 n.15 (Cavanagh, J., dissenting); *id.* at 197 (Kelly, J., dissenting).

289. See LINDA D. JELLUM & DAVID CHARLES HRICK, *MODERN STATUTORY INTERPRETATION* xxvii (2d ed. 2009) (noting the importance of statutory interpretation as statutes gradually replace common law).

290. See DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* 231–33 (2008) (describing how legal ethics has become increasingly regulated over time).

these provisions reference normative content that is already known to lawyers.<sup>291</sup> Civility studies make clear that the opposite is true: unwritten norms are, in reality, unfixed and perceived differently by lawyers in a demographically diverse profession and a pluralistic society.<sup>292</sup> Outside of homogenous groups, no consensus exists about appropriate language except at a level of generality that is not helpful (e.g., avoid using vulgar or indecent language in court) or at the outermost boundaries of behavior where other law is implicated (e.g., do not threaten opposing counsel with physical violence).<sup>293</sup>

Legislative efforts to overcome this lack of notice by providing more specific definitions in rules seem doomed to fail. Words such as “incivility,”<sup>294</sup> “decorum,”<sup>295</sup> “courtesy,”<sup>296</sup> and “offensive,”<sup>297</sup> are invariably defined by using other equally vague words. Given the creativity, persistence, and argumentativeness of lawyers, drafting courtesy codes that prohibit enumerated acts and forbid specified words would be, not just an exercise in futility, but an absurdity.<sup>298</sup> Case law is similarly unlikely to provide any particularized guidance. Would a case holding that a lawyer violated a courtesy rule by calling an opponent’s witness a “nut case” outside a courtroom<sup>299</sup> notify a lawyer who is about to yell at opposing counsel in a

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291. Mashburn, *supra* note 273, at 687.

292. *Id.*

293. For example, even the expression of anger, which is a neurological response, “is learned in a familial and cultural context.” JAY, *supra* note 7, at 59.

294. “Ill-bred, uncivil, or uncourteous behaviour towards others; want of civility or politeness; discourtesy, rudeness.” 7 OXFORD ENGLISH DICTIONARY 797 (2d ed. 1989).

295. “That which is proper, suitable, seemly, befitting, becoming; fitness, propriety, congruity.” 4 *id.* at 348.

296. “Courteous behaviour; courtly elegance and politeness of manners; graceful politeness or considerateness in intercourse with others.” 3 *id.* at 1061.

297. “Offense” can be defined as “[t]he action of attacking or assailing; attack, assault” and as “[a] breach of law, duty, propriety, or etiquette; a transgression, sin, wrong, misdemeanour, or misdeed; a fault.” 5 *id.* at 724. “Offend” can be defined as “[t]o sin against; to wrong (a person); to violate or transgress (a law, etc.)” or “[t]o hurt or wound the feelings or susceptibilities of; to be displeasing or disagreeable to; to vex, annoy, displease, anger.” *Id.* at 725. “Offensive” is defined as “[p]ertaining or tending to offence or attack; attacking; aggressive; adapted or used for purposes of attack; characterized by attacking” or “causing offence.” *Id.* at 725–26.

298. For example, could a court enforce a rule that said a lawyer could not smirk in court? “Smirk” is defined: “To smile in an affected, self-satisfied, or silly manner; to simper.” 9 *id.* at 792. See *Guy Chem. Co. v. Romaco AG*, No. 3:06-96, 2007 WL 1276909, at \*3 (W.D. Pa. May 1, 2007) (involving a lawyer who called opposing counsel “a ferret hit with an electric cattle prod” and “Eddie Haskell”).

299. See *Attorney Grievance Comm’n of Md. v. Link*, 844 A.2d 1197, 1203 & n.8 (Md. 2004); see also *Lieberman v. Fieger*, 338 F.3d 1076, 1079 (9th Cir. 2003) (explaining how a psychiatrist sued Fieger for defamation after he called the psychiatrist, who had testified as an expert witness, “nuts” and “Looney Tunes”).

courthouse corridor, “Read the case, Moron[!]”<sup>300</sup> that he would be in danger of sanctions?

Attempting to determine forbidden words and deeds out of context is fruitless for a more fundamental reason. Experts tell us that languages are organic and growing; new words and expressions constantly come into existence, while others wither and die.<sup>301</sup> Popular usage transforms formerly forbidden words into acceptable ones.<sup>302</sup> For example, the curse words “jackass,”<sup>303</sup> “hell,” and “damn” are probably now so commonly used that they are no longer considered by most to be vulgar.<sup>304</sup> Yet, it remains unclear whether a Michigan judge could sanction a lawyer who complained that the court’s ruling against her client was a “miscarriage of justice and a damn shame.”

Both offensiveness and politeness must be assessed contextually. Words and phrases may be offensive in one context but not in another.<sup>305</sup> Linguists explain that being offended by a word is not caused by a quality of the word per se, but rather is a personal reaction to stimuli, which include the offending event and the offender.<sup>306</sup> The words a person finds offensive tell us something about personality, rather than semantics.<sup>307</sup> Politeness is similarly relative and relational.<sup>308</sup> Linguistic politeness is defined as establishing an interactional relationship in which both the content of the speech and the linguistic expression make the speech appropriate.<sup>309</sup> According to one linguist, “what may be frowned upon as inconsiderate or even rude in one culture may have relation-consolidating effects

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300. See *State v. Torres*, 632 N.W.2d 609, 618 (Minn. 2001).

301. See TIMOTHY B. JAY, *THE PSYCHOLOGY OF LANGUAGE* 451 (2003) (“Human language evolves through individuals who live in cultures.”); Mark Pagel, Quentin D. Atkinson & Andrew Meade, *Frequency of Word-Use Predicts Rates of Lexical Evolution Throughout Indo-European History*, 449 *NATURE* 717, 717 (2007) (using a comparative database to propose that the most frequently used words tend to remain unaltered while rarer words change or disappear).

302. JAY, *supra* note 7, at 197.

303. Cf. *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 976 (6th Cir. 2009) (Merritt, J., dissenting) (observing that usage of the term “jackass” is likely impermissible “despite the fact that the word is a non-vulgar name for a donkey”).

304. JAY, *supra* note 7, at 197.

305. JAY, *supra* note 6, at 13.

306. *Id.* at 161.

307. *Id.*

308. See WATTS, *supra* note 280, at 253 (“[T]here are endless daily reminders of the social/cultural relativity of politeness and of norms of acceptable interaction.”); see also GLADWELL, *supra* note 272, 54–55 (finding through experimentation that people are “primed” to be rude or respectful by circumstances).

309. LINGUISTIC POLITENESS ACROSS BOUNDARIES xii (Arin Bayraktaroglu & Maria Sifianou eds., 2001).

in other parts of the world.”<sup>310</sup> For example, some linguists believe Greek is effectively spoken only with the use of facial expressions, gestures, and intonations.<sup>311</sup> They contend that, for these reasons, Greeks may appear rude and abrupt to the English, while the English, who use far fewer gestures, seem to Greeks to be insincere, distant, and hypocritically subservient (because of their profuse use of phrases like “thank you”).<sup>312</sup>

Conceptions of incivility vary not only among cultures, but also within them depending on the relative power of the participants.<sup>313</sup> This variability is particularly important to consider in situations involving attorney behavior, not only because of the obvious power differential among judges, the Bar, and lawyers, but also because of resource disparities among lawyers’ clients. It is probably reasonable to assume that a client with more money has more power than a client with significantly fewer resources. A closer examination of the relationship among language, anger, and power reveals how multifaceted and nuanced even simple civility directives, such as “do not use curse words,” can be.

Impolite utterances come in a variety of forms, including: cursing, profanity, blasphemy, taboos, obscenity, vulgarity, slang, epithets, insults, slurs, and scatology, among others.<sup>314</sup> Even swearing, it seems, is a relational activity.<sup>315</sup> According to Timothy Jay, speakers carry around in their heads an “etiquette” for swearing,<sup>316</sup> and consequently, “cursing is never chaotic, meaningless, or random behavior—[it] is . . . purposeful and rule-governed,”<sup>317</sup> and occasionally, “strategic.”<sup>318</sup> Social psychologists use the term “aversive behavior” to describe “the mean, nasty, annoying things people do to one another.”<sup>319</sup> They

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310. *Id.* at 4.

311. *Id.* at 31.

312. *See id.* at 29–31 (observing the English use a “more level delivery” compared to characteristically extroverted Greek speakers).

313. *See JAY, supra* note 301, at 451 (listing dominance relationships along with personal space and status as concepts that affect social contexts); *cf. CALDWELL, supra* note 2, at 168–69 (recognizing that relations between different races have been “poisoned by the massed forces of an abusive political, social, and economic history, whose shadows never seem to dissipate”).

314. *JAY, supra* note 7, at 9.

315. *See, e.g., JAY, supra* note 6, at 83–84, 96. (“[T]he expression of anger with dirty words may be highly dependent on the context of the episode, the relationship between the speakers, the prosodic features of the speech and other sociolinguistic factors.”).

316. *Id.* at 109.

317. *JAY, supra* note 7, at 22.

318. *Id.* at 57.

319. *See, e.g., ROBIN M. KOWALSKI, COMPLAINING, TEASING, AND OTHER ANNOYING BEHAVIORS*, at flyleaf (2003); Robin M. Kowalski, *Aversive Interpersonal Behaviors: On*

contend that aversive behaviors can perform an interpersonal function, such as when name-calling is used to manipulate another person.<sup>320</sup>

The primary emotional use for cursing is the expression of anger.<sup>321</sup> Anger, according to Jay, is often a response to an obstacle and cursing is, in essence, verbal aggression.<sup>322</sup> Moreover, the expression of spoken anger is coded to the nature of the provocation, with intentional acts provoking more anger.<sup>323</sup> Anger assesses blame and passes a value judgment on the one who provokes it.<sup>324</sup> Although anger-motivated cursing sometimes has as its goal making the target feel offended,<sup>325</sup> it is nonetheless socially valuable. Cursing replaces physical aggression.<sup>326</sup> Furthermore, expressing anger with words may also perform a corrective, equalizing function in hostile interactions where there is a power differential among the participants.<sup>327</sup>

The social context within which impolite interactions occur is suffused with the participants' awareness of nonverbal factors affecting the appropriateness of communication, such as the social status of the parties and their relative power, which suggest what an individual should and should not do.<sup>328</sup> Speakers adapt their verbal and nonverbal communication in a manner that is responsive to their listeners' power and those adaptations reflect perceptions about the parties' standing in relationship to each other.<sup>329</sup> When power and status are unequal, communication becomes asymmetrical.<sup>330</sup> Power differentials allow us to talk up or down to a listener.<sup>331</sup> "People with power have license to tell jokes, make fun of subordinates, and use curse words . . . because they suffer no social consequences for

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*Being Annoying, Thoughtless, and Mean*, in BEHAVING BADLY: AVERSIVE BEHAVIORS IN INTERPERSONAL RELATIONSHIPS 3, 3–4 (Robin M. Kowalski ed., 2001).

320. JAY, *supra* note 301, at 418–19; Kowalski, *supra* note 319, at 45.

321. JAY, *supra* note 7, at 55.

322. JAY, *supra* note 6, at 101–02.

323. *Id.* at 100.

324. *Id.* at 108.

325. JAY, *supra* note 7, at 57.

326. JAY, *supra* note 6, at 97.

327. *See id.* ("The function of expressing anger with words and not physical acts of violence is to perform a corrective operation.")

328. *See* JAY, *supra* note 301, at 451 ("Along with the rules of conversational patterning, every social context activates awareness about personal space, status, and dominance relationships.")

329. Yasemin Bayyurt & Arin Bayraktaroğlu, *The Use of Pronouns and Terms of Address in Turkish Service Encounters*, in LINGUISTIC POLITENESS ACROSS BOUNDARIES, *supra* note 309, *passim*.

330. JAY, *supra* note 7, at 157.

331. *Id.* at 158.

doing it.”<sup>332</sup> Ordinarily, those with less power feel a need to be more polite to those who have more power.<sup>333</sup>

Linguistic politeness, however, can also be used in a passive aggressive manner by persons with lower status to equalize power differentials.<sup>334</sup> They may use a strategy of negative politeness (e.g., being offensive, but apologizing for it) or one of positive politeness (e.g., using effusive compliments that suggest familiarity) to narrow the power gap between them.<sup>335</sup> Alternatively, a member of the lower classes may reduce class and power disparities more directly through verbal aggression.<sup>336</sup> Verbal aggression, through curses and insults, is a means of reducing class and power differences because it expresses disregard for the elevated status of the more powerful party and uses words to diminish his/her status.<sup>337</sup> A “put down” is used literally to lower the social class of another.<sup>338</sup>

While cursing may serve psychologically to diminish the power of one’s opponent, the converse is rarely true—vulgar language does not raise the speaker’s social status outside the realm of the parties’ interaction.<sup>339</sup> This is true because of the construction put upon this type of language and behavior beyond the sphere of interpersonal interactions and in a broader societal context. Inappropriate cursing has historically been “a marker of low social status.”<sup>340</sup> Similarly, the expression of anger in any form has been considered “primitive, uncultured and ill-mannered,” because being able to inhibit and control one’s anger was both a prerequisite for, and a marker of, membership in the upper classes.<sup>341</sup> Sigmund Freud referred to the inappropriate

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332. *Id.* at 157–58.

333. See Seran Dogancay-Aktuna & Sibel Kamisli, *Linguistics of Power and Politeness in Turkish*, in LINGUISTIC POLITENESS ACROSS BOUNDARIES, *supra* note 309, at 75, 84 (reporting the results of a study showing how less powerful people perceive a need for greater politeness around higher status individuals).

334. See JAY, *supra* note 7, at 158–59, 163 (noting Sigmund Freud’s belief that insults allowed lower class members to lessen class disparities).

335. Dogancay-Aktuna & Kamisli, *supra* note 333, at 77–78; see Bayyurt & Bayraktaroglu, *supra* note 329, at 214–15 (illustrating how positive and negative politeness can occur even in those situations that do not call for politeness).

336. See JAY, *supra* note 7, at 9, 57 (suggesting that cursing includes verbal aggression, which can be used strategically to harm or bully others, or obtain some reward, such as the admiration of peers).

337. See JAY, *supra* note 7, at 157–59 (contending that a speaker can curse to change the formality of the conversation and reduce class differences).

338. *Id.* at 159.

339. See *id.* at 158–59 (discussing how offending higher-status individuals can bring social cost, and that inappropriate cursing is an indication of lower social status).

340. *Id.* at 158.

341. JAY, *supra* note 6, at 101–02.

expression of emotions in the public sphere as “unsuitable affect.”<sup>342</sup> So-called *affect control* required the projection of a “false front” and the practice of “moderated hypocrisy.”<sup>343</sup> Among the upper and rising classes, affect control became the prevailing rule governing day-to-day encounters because it was assumed that if one could conceal one’s feelings, one could control them, (i.e., behave in a civilized manner).<sup>344</sup> Civility thus defined required the “bifurcation of private affect from public demeanor,” because too much of any intense emotion was viewed as a threat to the superficial, “fragile solidarity” of civility.<sup>345</sup>

### C. Societal

Taking a closer look at the relationship among cursing, anger, and power leads inevitably to consideration of civility from a more all-encompassing societal perspective. Such an examination is fruitful because manners, according to those who study them, are not “merely empty formalities . . . [but] are inextricably tied to larger political, social, and cultural contexts and . . . their ramifications extend deep into human relations and the individual personality.”<sup>346</sup> Not only do these “rituals of everyday behavior” give structure to our interactions, but they also serve to bind a group of individuals together in a society.<sup>347</sup> On the surface, etiquette is a code of conduct that lends predictability to interactions.<sup>348</sup> On a deeper level, etiquette may also be understood as a system that allows the powerful “to control [an] ill-mannered underclass by denying them access to . . . social power.”<sup>349</sup> Those who study manners, point out that sanctions for being ill-mannered are often subtle and invisible.<sup>350</sup> While this is probably generally true in the legal profession as well, courtesy codes operate differently. They force the Bar and judiciary to make their decisions to punish

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342. See JOHN MURRAY CUDDIHY, *THE ORDEAL OF CIVILITY* 19 (1974) (discussing Freud’s study of the unconscious).

343. John A. Hall, *In Search of Civil Society*, in *CIVIL SOCIETY* 1, 26 (John A. Hall ed., 1995).

344. 2 NORBERT ELIAS, *POWER & CIVILITY* 311–12 (Edmund Jephcott trans., 1982); see JOHN F. KASSON, *RUDENESS & CIVILITY* 148–49 (1990) (asserting the importance traditional etiquette manuals placed on hiding and, through practice, containing one’s emotions).

345. CUDDIHY, *supra* note 342, at 13–14.

346. KASSON, *supra* note 344, at 3.

347. *Id.* at 4; see CALDWELL, *supra* note 2, at 29–30 (arguing that a “mannerly custom’s real function is to bond [a] group together,” however that group is defined).

348. JAY, *supra* note 7, at 206.

349. *Id.*

350. *Id.* at 206–07.

impoliteness explicit and are, therefore, interesting laboratories for studying civility as applied. The discussion that follows identifies themes common to broader historical and political studies of civility.

Whether impolite behavior is becoming more pervasive or not, it is clear that we have been worrying about it for a long time.<sup>351</sup> Echoing popular concerns, the Michigan Supreme Court majority in *Grievance Administrator v. Fieger* expressed apprehension that the legal profession was on a runaway train of incivility.<sup>352</sup> Historians caution that, beginning almost a century ago, jeremiads against rudeness have been a recurrent feature of societal commentary.<sup>353</sup> Other commentators believe that incivility has increased, but argue that this occurs before a society renews its commitment to politeness and mutual respect.<sup>354</sup> A historical theory of incivility posits that the societal consensus may actually “be strongest when it appears broken.”<sup>355</sup> In other words, societal “rebellion against good manners may herald an increased tendency to take *morals* [more] seriously.”<sup>356</sup>

Norbert Elias is the source of the historical analysis that supports this thesis and its important corollary—etiquette becomes more elaborate when a society views it as decaying.<sup>357</sup> Elias explained that, in English history, as societal functions proliferated and became more differentiated under the pressure of competition, individuals were required to interact with and depend upon more and more people.<sup>358</sup> They were compelled at both a conscious and an unconscious level to regulate their conduct.<sup>359</sup> As the state came to monopolize force, individuals were protected by the government from physical harm by others, but were required, in turn, to suppress their own impulses

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351. See, e.g., CALDWELL, *supra* note 2, at 10–12 (listing works on civility dating back to the 1800s, which all note “the perceived coarsening of American manners”); KASSON, *supra* note 344, at 3 (acknowledging “the belief that manners have been in a state of decline for a very long time”).

352. See *Grievance Adm’r v. Fieger*, 719 N.W.2d 123, 132–33 (Mich. 2006) (“[R]ules of the sort at issue here . . . are designed to maintain public respect for a rule of law that is dependent on such public respect.”).

353. CALDWELL, *supra* note 2, *passim*; KASSON, *supra* note 344, *passim*.

354. DAVETIAN, *supra* note 6, at 497, 503, 523 (“Periods of reformation and revolution are . . . corrective measures designed to bring a culture back into a sort of ‘self-alignment.’”).

355. CALDWELL, *supra* note 2, at 241.

356. *Id.* (emphasis added).

357. *Id.*

358. ELIAS, *supra* note 344, at 232.

359. *Id.* at 232–33.

towards physical violence.<sup>360</sup> As the societal web of interactions broadened, the well-being of individuals who could not moderate their spontaneous emotions was more often imperiled.<sup>361</sup> Manners played an important role in that they represented society's judgment about the form moderated impulses were to take.<sup>362</sup>

According to historians, the proliferation of rules of etiquette was part of the emergence of the English middle class.<sup>363</sup> The rising classes identified with the upper classes and sought to adopt their manners (including affect control) and abandon lower class "gestures . . . of subordination."<sup>364</sup> They acknowledged the upper class codes as binding on them, but could not abide by them with the same ease as those born to the upper classes.<sup>365</sup> The upper classes in turn responded with a "feverish multiplication" of class distinctions and more elaborate codes of etiquette.<sup>366</sup> The middle class, according to Elias, was in a predicament.<sup>367</sup> By embracing the upper class's strict codes of manners as a "prestige instrument" they sought to distinguish themselves from the lower classes.<sup>368</sup> Those same codes, however, were also instruments of power and oppression that the upper classes used against them.<sup>369</sup>

Applying this historical perspective to attorney incivility would suggest that perceptions of increased attorney rudeness may simply be wrong—it could be that, despite the fact that the legal profession has perceived itself to be in such a crisis for more than a century, the reality is that the relative frequency of acts of incivility has not increased. Furthermore, according to the historical theory, even if the Bar's assumption that lawyer incivility is at an all time high is factually correct, it may not be an entirely negative situation because widespread rudeness may be the harbinger of a society-wide recommitment to better behavior. On the other hand, the historical theory would also suggest that the Bar may be reacting to its perceptions of the legal profession's collective loss of status and diminishment of its

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360. *Id.* at 235–36.

361. *Id.* at 236.

362. *Id.*

363. *See id.* at 314–17 (analyzing the growth of the middle class and its adoption of rules of conduct, followed by the upper class).

364. *Id.* at 309, 313.

365. *Id.* at 313.

366. CALDWELL, *supra* note 2, at 33–34.

367. ELIAS, *supra* note 344, at 313.

368. *Id.*; *see* KASSON, *supra* note 344, at 43 (discussing the use of proper etiquette to differentiate oneself).

369. ELIAS, *supra* note 344, at 312–13.

societal prestige because of encroachments by ill-mannered members of the profession. Its reaction appears similar to that of the nineteenth-century English upper classes—the enactment of increasingly exacting rules governing conduct and personal expression.<sup>370</sup> Unfortunately, the historical theory would also suggest that “paradoxically, such rules pursue[] a logic that . . . [leads] not toward unity but toward fragmentation.”<sup>371</sup> In law, this fragmentation may mean increased status-based stratification of the Bar.

A core component of the historical theory of civility theme is the relationship between class and deference. To one historian, “[c]lass is to the discussion of civility what the ghost of the murdered king is to *Hamlet*—a ubiquitous exhalation poisoning the atmosphere, elusive, intimidating, but impossible to lay to rest.”<sup>372</sup> Elias subsequently decided that “class” might be too narrow a word and concept, and suggested instead that we should be thinking in terms of those who are “established” in contrast to those who are “outsiders.”<sup>373</sup> This shift in definition was a more accurate description of the dynamic of group domination and group submission to which Elias was referring.<sup>374</sup>

Historians have explained that the manner in which a society categorized appropriate and inappropriate behavior and how the resulting social hierarchies operated, tell us something important about how that culture defined itself.<sup>375</sup> Those categories of behavior required deference within the hierarchies they created.<sup>376</sup> A guiding a priori principle operated behind the rules of etiquette: one deferred to one’s betters and those at the top of the power pyramid deferred to no one.<sup>377</sup> The power of

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370. See KASSON, *supra* note 344, at 147–48 (“The physical control and self-discipline demanded by nineteenth-century etiquette were supported by equally exacting standards of emotional control.”).

371. *Id.* at 257.

372. CALDWELL, *supra* note 2, at 9.

373. See ELIAS, *supra* note 344, at 250–51 (viewing the civilizing process as a vicious cycle in which the “oppressed outsiders” becomes the “established oppressor”).

374. See *id.* at 251 (“The time may well come when the former oppressed groups . . . do not become oppressors in turn; but it is not yet in sight.”); KASSON, *supra* note 344, at 4 (discussing how “manners take the historian squarely into the dialectics of social classification”).

375. KASSON, *supra* note 344, *passim*.

376. See *id.* at 4 (“[O]ne may see how these categories [of manners] are historically constituted, their hierarchies maintained and challenged.”); PHILIP SOPER, *THE ETHICS OF DEFERENCE* 158 (2002) (illustrating the need to adjust to and defer to the views of another out of respect).

377. See, e.g., JAY, *supra* note 7, at 158–59, 163 (noting that someone with power can curse without facing social consequences while someone without power may defer to their superior).

contempt to maintain courtroom decorum, which traces its origins to a time when the King's surrogates presided at trials, is an example of the deference principle in operation.<sup>378</sup> The King's surrogates commanded the same degree of deference for themselves as was owed to the King. To defy a court's power—to fail to give deference due—was the equivalent of being contemptuous of the sovereign's authority.<sup>379</sup>

Note that imbedded within the act of deferring to another is suppression of an impulse to act in a less deferential, more autonomous, self-serving manner.<sup>380</sup> In a pre-Bourgeois, deference-based society, a hegemony of force controlled the autonomy-preserving and power-seeking impulses of individuals.<sup>381</sup> The notion of deferring to one's betters, however, continued to permeate the European rules of social engagement and did not disappear with the rise of the middle classes.<sup>382</sup>

The precepts of European class and deference-based social customs were imported into the United States, but required translation in order to function effectively within a democracy.<sup>383</sup> The issue for Americans was how to build a system of "republican manners."<sup>384</sup> Although European class distinctions would not work in America, historians believe that, ironically, economic "stratification heightened Americans' interest in [a] class-based etiquette" system.<sup>385</sup> Classes emerged based on wealth and members of the resulting upper classes expected deference from members of the lower classes, but this was a distinctly American form of deference.<sup>386</sup> Social mobility, political equality, and the rule of law, even if no more than ideological commitments, required public moderation of demands for class-based deference.<sup>387</sup>

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378. CUDDIHY, *supra* note 342, at 195.

379. *Id.*

380. *See* SOPER, *supra* note 376, at 23 (showing that deferring to others necessitates sublimation of how one acts under usual circumstances).

381. *See* ELIAS, *supra* note 344, at 11–12 (discussing how monarchies maintained power by balancing the interests of the bourgeoisie and nobility to make sure neither gained the upper hand).

382. *See id.* at 307–12 (discussing the rise of the European working class and how its members continued to "control their own affects according to the same pattern").

383. *See* CALDWELL, *supra* note 2, at 34–35, 92 (addressing the breakdown of the "medieval gulf between aristocrat and peasant" in America and the difficulty in creating etiquette standards when everyone is supposedly equal).

384. *Id.* at 34 (internal quotation marks omitted).

385. *Id.* at 34–35.

386. *See id.* at 33–35 (explicating how wealth delineates the class system in America and how members of the lower classes seek to model themselves after the upper class and climb the ranks).

387. *Id.* at 57–61.

From the foregoing, it is apparent that a civility system premised even in part on the notion that one owes deference to another solely because of his/her position in society was historically, and continues to be, a problematic organizing principle for Americans. As one historian discerned, “In hierarchical societies, . . . people learned to control themselves before their superiors or equals, but indulged their tempers with inferiors. In a democracy . . . where all are equal, . . . every man must . . . learn[ ] to control his temper.”<sup>388</sup>

The classic professionalism paradigm seems to be based at least in part on a deference-based conception of civility. This is understandable to some extent because of the necessity to preserve the rule of law by mandating obedience to court orders. The government must maintain its monopoly of force. The farther removed the incivility is from the courtroom and the orders of a court, however, the weaker the justification for demanding deference becomes. Furthermore, the rationale is clearly at its weakest when advanced to prevent extra-judicial insults to the dignity of individual judges. One may view the majority in Fieger’s case as punishing him for his failure to continue to defer to appellate judges, members of the upper class of the legal system, beyond the sphere of the tribunal’s state-sanctioned power. Viewed thusly, the Michigan Bar’s position was that Fieger should have curbed his tongue, moderated the impulse to strike out verbally in anger, and maintained affect control even though his speech was outside the courtroom and any threat posed by his rude remarks to the functioning of the system was attenuated at best.

Historians view the question whether good manners, class-based distinctions, and status-conscious expectations of deference can coexist in a legitimate system of etiquette as one of the issues closest to the heart of the civility debate.<sup>389</sup> This query is premised not only on the relatively noncontroversial assumption that “a rigid class system is immoral,” but also on the more problematic contention that manners embody moral norms.<sup>390</sup> One has only to consider that the cannibalism rituals of the Aztecs were controlled by elaborate rules of etiquette to see why the latter supposition should be subjected to very close scrutiny indeed.<sup>391</sup>

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388. KASSON, *supra* note 344, at 159 (restating the reasoning of scholar Frederick Marryat).

389. See CALDWELL, *supra* note 2, at 31 (recognizing that etiquette necessarily vanishes when all class distinctions are removed).

390. *Id.*

391. *Id.* at 29–30.

Emily Post believed that rules of civility codify “universal and unchanging moral principles.”<sup>392</sup> Today, as in the past, it is not unusual for discussions of manners to become intertwined with ethics.<sup>393</sup> Immanuel Kant, for example, accepted that etiquette was “separate from and inferior to morals,” but nonetheless viewed manners as “a means of developing virtue” and becoming receptive to virtuous principles.<sup>394</sup> The modern view is more likely that “[m]anners *are* related to morals . . . [b]ut the link is far more deceptive, sinuous, and complicated than is usually admitted.”<sup>395</sup> Another way to pose this question is to ask whether civility is a virtue and to consider whether we should distinguish the decline of civility from the decline of virtue.<sup>396</sup>

Before addressing the question whether civility is a virtue, however, one must first surmount a serious obstacle to any attempt to treat civility as a positive norm: perceptions that advocating civility is hypocritical. As previously explained, historians, like John Keane and Norbert Elias, have demonstrated that notions of civility are often “thinly disguised tools for exclusion and hierarchy.”<sup>397</sup> Contemporary commentary would add that calls for greater civility are often unacknowledged appeals to traditional values and have consequently become a centerpiece of conservative social agendas.<sup>398</sup> One commentator suggests that some of the appeals for increased civility are, in fact, advancing an implicit defense of the status quo and worries that such advocacy can become “a fetish of the dominant classes [ ]and . . . a weapon of domination.”<sup>399</sup> Others contend that civility advocates “conflate civility with the more exacting Christian or classical virtues.”<sup>400</sup> For critics, the problem is not just that civility codes are conservative, conformist, oppressive, and stultifying, but that the drafters of these provisions do not see or will not acknowledge any defects or weaknesses in the justifications supporting

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392. *Id.* at 61.

393. *See id.* at 11 (noting manners have a propensity of “get[ting] themselves hopelessly entangled with ethics”).

394. *Id.* at 22–23.

395. *Id.* at 241.

396. Leroy S. Rouner, *Introduction* to CIVILITY 1, 6–8 (Leroy S. Rouner ed., 2000).

397. RICHARD BOYD, *UNCIVIL SOCIETY* 25 (2004).

398. *Id.* at 25–26; *see* CUDDIHY *supra* note 342, at 189 (raising the issue of whether decorum and civility are a social prerequisite to political rights).

399. KINGWELL, *supra* note 1, at 231, 234–35 (defining civility as a “strategy of ideological continuance”).

400. BOYD, *supra* note 397, at 29 (describing Stephen Carter’s work as reinforcing the conservative dimensions of civility).

them.<sup>401</sup> These critics argue that civility is a “hypocritical figleaf,”<sup>402</sup> a “sham,” or a “shadow play,” that prevents us from seeing the power struggles that determine the distribution of wealth in a society.<sup>403</sup>

Civility is also viewed as hypocritical in another sense. One may carry out the rituals of etiquette with great civility, but still manage to be insincere, condescending, and insulting.<sup>404</sup> As one commentator notes: “Excessive politeness, as most of us know, can actually be impolite—both intentionally (in irony and sarcasm) and unintentionally (as, e.g., when a person I consider a friend persists in treating me with elaborate courtesy).”<sup>405</sup> When Immanuel Kant argued that manners help to make us virtuous, he was not referring to the “‘cold’ [form of] politeness based on disrespect” which is destructive.<sup>406</sup>

On a more profound level, defining someone who might be engaged in behavior that is very harmful to others or society as “civil” because while doing so they observed the rules of etiquette is itself ethically questionable, particularly if one is inclined to imbue the notion of civility with any moral content. As Hamlet observed, “one may smile, and smile, and be a villain.”<sup>407</sup> One commentator, by way of illustration, points to a New York businessman he calls “[t]he rudest man of the twentieth century” who was a “master of every social grace.”<sup>408</sup> Others worry that “civility . . . [is] an unconscionable willingness to ignore deep-seated moral disagreements in the interest of simply getting along peacefully or maintaining decorum,”<sup>409</sup> and point to the “awful efficiency” of the caste system in India, which adheres remarkably to “the ideal of the civil society.”<sup>410</sup>

Perhaps because of these overwhelming criticisms, the collective theoretical discussion is not much concerned with

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401. ROBERT B. PIPPIN, *THE PERSISTENCE OF SUBJECTIVITY* 228 (2005); cf. Erik K. Johnson, *Standards for Standards' Sake: Questioning the Standards of Professionalism and Civility*, UTAH B.J., May–June 2005, at 10, 12, 14 (criticizing civility standards adopted by the Utah Supreme Court for having “obvious” flaws and being unenforceable and unnecessary).

402. CUDDIHY, *supra* note 342, at 5.

403. Kingwell, *supra* note 1, at 48.

404. BOYD, *supra* note 397, at 25.

405. KINGWELL, *supra* note 1, at 207.

406. *Supra* note 394 and accompanying text; Carrie Doehring, *Civility in the Family*, in *CIVILITY*, *supra* note 396, at 168.

407. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5.

408. CALDWELL, *supra* note 2, at 15.

409. BOYD, *supra* note 397, at 25.

410. Hall, *supra* note 343, at 25.

identifying the specific content of universal morals or values, purportedly embodied by rules of etiquette (however broadly defined), but has turned instead to attempting to define a civil society in terms of the way its citizens deal with one another. The resulting body of political theory—the so-called “civil society” literature—is extensive and substantial and may be collectively described here in only general terms.<sup>411</sup>

The overarching theme of these works seems to be that the fundamental conception of civilization includes the notion of civility, and in order to be deemed civilized, a society must treat its citizens in a certain manner. Civil interaction is often described using the terms of an implicit bargain: citizens agree to be law-abiding, and their societies agree to guarantee the rule of law.<sup>412</sup> John Rawls describes the duty of public civility as a “cooperative virtue[] of political life” and an “ideal of citizenship.”<sup>413</sup> Rawls’ contribution was to insist that the “imperfection in social institutions cannot provide prima facie justification for disobedience,” and to shift the focus to “civility [as] the virtue . . . that allows the state to have authority, while at the same time allowing us to exercise our faculties of critical judgment about state institutions.”<sup>414</sup>

Cultural and political theorists have put forward a variety of definitions of civility, but most echo these notions of reciprocity and mutual respect. Civility thus defined is an attitude of “caring for the welfare of others as well as the welfare of the culture [we] share in common”;<sup>415</sup> respect for the rights, feelings and thoughts of others; and a willingness in some matters to subsume individual self-interest for the benefit of the community.<sup>416</sup> For our purposes here, the defense of civility advanced by Robert Pippin seems particularly insightful and relevant to the legal profession’s struggle with implementing civility directives. Pippin first notes that the ethical status of civility is distinctive in that it “is more than being polite and different from being morally righteous.”<sup>417</sup> Pippin argues next that civility is of vital importance to the collective pursuit of a “free life,” which is the

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411. Christopher G.A. Bryant, *Civic Nation, Civil Society, Civil Religion*, in *CIVIL SOCIETY*, *supra* note 343, at 136, 142.

412. PIPPIN, *supra* note 401, at 223–24.

413. RAWLS, *supra* note 277, at 92, 117.

414. KINGWELL, *supra* note 1, at 26 (discussing his interpretation of Rawls’ theory of civility).

415. DAVETIAN, *supra* note 6, at 9.

416. GEORGE W. JARECKE & NANCY K. PLANT, *SEEKING CIVILITY* 6–7 (2003).

417. PIPPIN, *supra* note 401, at 226.

“highest good” of a civil society.<sup>418</sup> In other words, civility is the “enactment in daily rituals of our equal status [as] free agents.”<sup>419</sup> The final element of Pippin’s definition of civility is that its dictates must be “compatib[le] . . . with[] an extremely competitive, . . . ethnically diverse, rapidly self-transforming, consumer culture.”<sup>420</sup>

In this broader arena, civility is a mediator of the relationship among individuals and groups of individuals, and in society. A consensus about proper behavior is obviously more easily achieved among a homogenous populace.<sup>421</sup> A fundamental issue for political theorists, however, is the difficulty of reaching agreements about proper behavior in a pluralistic society. They question whether the notion of being “fellow Americans’ can overcome the misunderstandings and often suspicions characteristic of a community with so many different national traditions, experiences and religions.”<sup>422</sup> Respect for differences requires that codes of behavior “valu[e] . . . as much difference as is compatible with the bare minimum of consensus necessary for settled existence.”<sup>423</sup>

It would be a mistake, however, to assume that an individual can use the civil society’s laissez faire form of tolerance to justify unbridled self-interest. According to this view, the civil society is threatened by all forms of excessive individualism and fanaticism.<sup>424</sup> This conception of civility demands that individuals respect each other as moral equals.<sup>425</sup> Within this environment of mutual respect, citizens commit to settle disagreements without resorting to force and violence.<sup>426</sup>

Boyd defends civility against charges of conservatism and argues that the concept should be embraced by both the left and the right.<sup>427</sup> Properly conceived, civility does not defend the status quo, nor does it rationalize injustices.<sup>428</sup> It is, however, radically

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418. *Id.* at 224, 232–35.

419. *Id.* at 233.

420. *Id.* at 228.

421. *See id.* at 230 (reasoning that social forms are developed through affirmation of a common enterprise, which is made easier if there is some common basis for citizens to recognize others as fellow participants).

422. *Id.* at 238.

423. Hall, *supra* note 343, at 6.

424. *See* PIPPIN, *supra* note 401, at 11 (arguing that a revolution within a culture is possible if people do not ask and receive from each other reasons for their actions that can be understood by everyone).

425. BOYD, *supra* note 397, at 24.

426. *Id.* at 15–16.

427. *Id.* at 4.

428. *Id.* at 29.

indifferent to the ends individuals choose so long as they pursue them in a manner that respects the rights of others.<sup>429</sup> Civility is, in this sense, a process-oriented norm—it creates an environment where citizens are able to behave justly, but it is not justice itself.<sup>430</sup> Acknowledging moral pluralism means “we are no longer in the business . . . of providing a single . . . answer to the question ‘What is justice?’”<sup>431</sup>

Putting the foregoing together produces a deference-based or historical theory of attorney incivility. It would predict that the legal profession will multiply and make more elaborate its rules regulating polite behavior as it perceives that societal and professional boundaries and distinctions are breaking down. These boundaries are those separating the legal profession from other occupations, but also include distinctions and stratification based on status within the Bar. The theory predicts that the need for more explicit rules will increase if conflicts among members of the profession are layered upon other types of conflicts, such as occur, for example, in societal debates about tort reform.<sup>432</sup>

The deference theory would also predict that the rule breaches most likely to be penalized will be those involving defiance directed towards high status individuals in the system. Attorneys’ failures to control affect, particularly by openly expressing anger, will provoke the most scrutiny and punishment. Penalized lawyers will disproportionately be outsiders or those with less status in the Bar. Even though most outsiders and low status lawyers will accept and internalize the new codes of behavior, the imposition and enforcement of such rules will bring fragmentation, rather than the desired unity, to the legal profession.

## VI. DEMOCRATIC CIVILITY

The profile that emerged from the empirical study of the lawyer most likely to be sanctioned for incivility mirrors the one the historical theory would predict. This troubling result suggests that courts may be enforcing broadly worded courtesy codes and vague professionalism norms using aristocratic notions of deference. The selectivity of the enforcement becomes clear only when one considers what was *not* correlated with a sanction. Even though much rude, vulgar, and disruptive speech was directed at opposing counsel and a significant amount at

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429. *Id.* at 27.

430. KINGWELL, *supra* note 1, at 26.

431. *Id.* at 24, 41–42.

432. Hall, *supra* note 343, at 20.

opposing parties and witnesses, this misconduct was not correlated with punishment.<sup>433</sup>

Within the Bar, status has historically been determined by the wealth of one's clients, with high status lawyers representing entities rather than individuals.<sup>434</sup> A particularly revealing result of the study is that being in one of two categories of lawyers—prosecutors and those representing corporations—was highly negatively correlated with being subjected to discipline.<sup>435</sup> This is true despite the fact that most of the Sixth Amendment cases were excluded from the database because their high stakes (requiring overturning a verdict), it was presumed, would make courts more reluctant to sanction those prosecutors.<sup>436</sup> Recall that the database included only those cases where judges were addressing conduct they had already classified as unprofessional or uncivil.<sup>437</sup> This suggests that judges are not treating comparable uncivil acts equitably and that the inequity is disproportionately associated with the status of the lawyers or their clients.

Advocates of professionalism do not seem to worry much about biased enforcement when they call for greater penalties for incivility. As a consequence, civility in the practice of law is unlikely to become a more democratic ideal as long as the legal profession remains its sole author. A more interdisciplinary approach would suggest the following modifications to the professionalism model.

First and foremost, judges and the Bar should remain cognizant of the breadth of the power they have over attorneys. They have control over virtually every aspect of the disciplinary process. In most jurisdictions, they are the legislators, regulators, adjudicators, and appellate reviewers of attorney misbehavior.<sup>438</sup> Given this, disciplinary authorities should acknowledge that requiring lawyers to use subjectively defined deferential speech in addressing members of one branch of a democratic government and demanding that lawyers representing their clients' interests refrain from criticizing judges to protect the judges' personal reputations and integrity,

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433. *Supra* Part III.F.

434. Mashburn, *supra* note 273, at 668–69, 675–76.

435. *See supra* p. 1162 (finding that corporate lawyers comprised only 18.4% and prosecutors only 8% of the lawyers sanctioned for lack of civility or professionalism).

436. *Supra* Part III.C.3.

437. *Supra* Part III.B.

438. Quintin Johnstone, *Bar Associations: Policies and Performances*, 15 YALE L. & POL'Y REV. 193, 212–13 (1996).

are inherently political acts. “Civility is not to be understood as a set of gag rules, . . . [and we cannot allow] feeling[s] of offense to keep the demands [for justice] off the public agenda.”<sup>439</sup> Lawyers should be mindful that in the hands of government, decorum too easily becomes repression.<sup>440</sup>

Second, civility requires reciprocity. In an ideal version of the civil society, lawyers would generally curb their tongues, control their “fanatical energies,”<sup>441</sup> and comply with the dictates of an often imperfect legal system. One commentator captures this concept of reciprocity as two constraints: “[O]n the one hand, a willingness not to say all the true, or morally excellent, things one could say; and, on the other hand, an interpretive sensitivity to the legitimacy of claims made by others.”<sup>442</sup>

Third, states should avoid adopting civility codes and refrain from enforcing existing professionalism provisions through sanctions. In the words of one commentator: “[B]eware the moralists of manners, the self-appointed defenders of civility . . . [V]alues are always somebody’s values.”<sup>443</sup> As explained above, drafting lists of specific prohibited words and behavior is not practical, and moreover, with greater specificity, consensus is likely to break down. Existing codes use words like “civility,” “disrespect,” and “discourteous,”<sup>444</sup> which experience suggests cannot be given a sufficiently narrow meaning in a pluralistic society. For these reasons and more, cases applying vaguely-worded courtesy rules are unlikely to give lawyers any actual advance warning that their acts or words may subject them to discipline.

An awareness of the psychological motivations for and the complex nature of social interactions are required in order to administer courtesy codes fairly. The intent of the offender matters and perceptions of rudeness and disrespect are very subjective and contingent. However, assessing the mental state of lawyers at the time they misbehave is prohibitively difficult and worrisome. A psychological approach may produce

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439. KINGWELL, *supra* note 1, at 234.

440. See CUDDIHY, *supra* note 342, at 195 (describing the contempt power afforded to judges for purposes of enforcing courtroom decorum in pre-Magna Carta days as the same degree of deference given to the king himself).

441. RICHARD BOYD, *UNCIVIL SOCIETY* 15–16 (2004).

442. KINGWELL, *supra* note 1, at 44.

443. CALDWELL, *supra* note 2, at 241.

444. See, e.g., MICH. RULES OF PROF'L CONDUCT R. 3.5(c), 6.5(a) (2009), available at <http://www.michbar.org/generalinfo/pdfs/mrpc.pdf>; UTAH SUP. CT. RULES OF PROF'L PRACTICE R. 14-301 (2006).

an unpopular, *de facto* presumption against sanctioning attorneys for their rude outbursts, but it also avoids unnecessary intrusions into First Amendment rights and allays concerns about the due process implications of judges sitting in judgment of lawyers who are accused of insulting them.<sup>445</sup>

Restraint should be the default position of the Bar, judges, and the states for another reason. Incivility is, as one commentator notes, “[a] form[ ] of behavior which may fray the fabric of society but . . . [is] not illegal or immoral.”<sup>446</sup> The results of the empirical study showed that very few cases involved physical aggression, violence, or threats of violence.<sup>447</sup> This may be the result of lawyers using angry and vulgar speech to channel impulses towards physical violence and replace them with lesser transgressions—a desirable outcome.<sup>448</sup> A perspective informed by insights from other disciplines counsels against overreaction to the manifestations of emotion, the use of vulgar language, and impolite acts. A sense of being offended or affronted, standing alone, should not be a sufficient predicate for a punitive response.

A regulatory attempt by the Florida Bar is instructive in this regard. In 2006, Florida’s Commission on Professionalism decided that it had to “do something” about attorney incivility and other lapses in professionalism and, therefore, proposed that the Florida Supreme Court adopt a new rule of professional conduct.<sup>449</sup> The rule would have allowed judges to fine lawyers between \$100 and \$500 for instances of incivility. The Florida Bar’s experience with this proposed rule is a perfect illustration of the problems with using the professionalism paradigm as a template for legislating civility. Despite years of near universal support for the Florida Bar’s professionalism agenda—which includes a specific continuing legal education (CLE) requirement in professionalism—Florida lawyers balked. They objected to

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445. This is particularly problematic in light of the nonappealable nature of sanction orders. *See* *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 202, 210 (1999) (holding that an order imposing sanctions on an attorney is not immediately appealable).

446. Rouner, *supra* note 396, at 7. *See* DAVETIAN, *supra* note 6, at 35 (arguing that incivility in the form of anger became a legitimized social convention and replaced overt violence).

447. *Supra* p. 1163 (showing that only 2.5% of all uncivil behavior was characterized as violent or aggressive).

448. Although, this is not as desirable an outcome as reducing impulses towards violence, which would also serve to reduce instances of incivility.

449. Mark D. Killian, *Many Wary of Proposal to Let Judges Fine Attorneys*, FLA. BAR NEWS, Nov. 1, 2006, at 1 (indicating that the “vast majority” of lawyer commentary opposed a proposed rule that would allow judges to fine lawyers between \$100 and \$500 for incivility).

judges being able to condemn their speech or behavior by exercising an informal, discretionary power. Professionalism advocates in Florida were so zealous in their efforts to give judges the unfettered power to punish rude lawyers that they made no provisions in the proposed rule for a right of appeal or entitlement to any process prior to the imposition of monetary sanctions. The rule drafters believed their omissions were justified by observations that a remedy less harsh than a grievance, and unencumbered by the procedures necessary for a contempt citation, was needed.<sup>450</sup> This dangerous attitude reasons backwards from an end it presupposes to justify the means of dispensing with basic due process.

Fourth, as previously demonstrated, judges and the Bar have extensive and varied powers to address the conduct of attorneys.<sup>451</sup> No more or different laws are necessary to manage the judicial system and preserve the rule of law.<sup>452</sup> Gaps in disciplinary powers exist because regulators have been restrained by concerns about reaching too far.<sup>453</sup> The reason why the majority in *Fieger* found itself stretching the meanings of “a pending case” and “towards the tribunal” is because, as the empirical study showed, the rules of professional conduct are rarely employed to punish speech so far removed from the courtroom or active litigation.<sup>454</sup>

Adoption of a civil society perspective, i.e., one that appreciates social diversity and accommodates ideological differences, would push the legal profession in the direction of avoiding the enforcement of any particular vision of what constitutes courteous and respectful conduct.<sup>455</sup> This view favors a functional approach that focuses on identifying the existence of a threat to the fair administration of justice, rather than on classifying an attorney’s conduct as in or out of the bounds of

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450. *Id.*

451. *Supra supra* pp. 1163–64.

452. *See, e.g.,* Michael D. Marcus, *Behavior Modification: Laws Are Already in Place to Restrain Attorneys Who Engage in Uncivil and Offensive Behavior*, L.A. LAW., Sept. 2004, at 30 (arguing that new laws to combat incivility are not necessary).

453. *See* Killian, *supra* note 449, at 1 (relating the opinion of the Florida Prosecuting Attorneys Association that a proposed disciplinary procedure “places too much responsibility in one person’s hands”).

454. *Supra* Part III.F; *see supra* Part IV.D (showing the courts broadly defined “pending case” to include the period after an appellate court has published an opinion and “toward a tribunal” to include statements made out of court to a radio audience).

455. Hall, *supra* note 343, at 25; *see* Bryant, *supra* note 411, at 152–53 (showing that the adoption of a civic society in the Czech Republic led to an embrace of cultural differences, while the refusal to adopt such a perspective in Slovakia could lead to difficulties for the Hungarian minority).

decorum. In the ordinary course of events, sanctions should be limited to courtroom misbehavior where the threat of disruption can be assessed directly and immediately. While this approach might seem to forgive too much attorney misconduct outside the context of impending or pending litigation, it offsets this generosity by demanding reciprocity: judges should take more protective action in the courtroom. The results of the empirical study suggest that judges may not be aggressive enough in their efforts to protect others from the effects of attorney incivility.<sup>456</sup> Consequently, judges should worry less about their own sense of being offended and worry more about behavior directed towards opposing counsel, clients, witnesses, juries, and court personnel that is having, or is likely to have, a disruptive or chilling effect on the proceedings. Judges should be thick-skinned and slow to react to perceived insults to their dignity that occur outside the context of a particular case or physically removed from the courtroom and its environs.

Fifth, an approach grounded in insights from outside law is not unmindful of the need to provide law students, lawyers, and judges with education, assistance, and guidance on matters pertaining to their behavior and interactions with others. However, training in professionalism would look radically different from this prospective. It would not depend so heavily on exhortations to honor the law as a profession, to have good character, to be an officer of the court, and to go beyond the requirements of the rules of professional conduct, although all of those ideals would continue to be expressed and affirmed. In contrast, an interdisciplinary approach would feature the acquisition of certain skills by law students, lawyers, and judges, and the provision of meaningful assistance by law schools, the Bar, and the courts.

Skills training should include exposure to techniques promoting the ability to understand others, to have self-awareness, and to manage emotions, including in particular anger. Law students, lawyers, and judges would be encouraged to gain relevant interpersonal skills, such as how to diffuse emotionally charged situations and deal with agitated people. Law schools and the Bar should consider providing short-term psychological therapy and counseling services that would expose law students and lawyers to techniques of stress reduction, such as

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456. See *supra* p. 1165 (finding that defiant speech made towards a judge correlated highly with sanctions, while no such correlation existed for defiant speech or behavior directed at other persons).

mindfulness meditation.<sup>457</sup> Courts might also consider making venues available that would facilitate informal efforts to work out disagreements and alleviate frustrations among members of the legal community.<sup>458</sup> This version of professionalism would also seek to inspire law students and lawyers, but not by featuring lawyers extolling their own virtuous commitment to the ideals of the profession. Rather, professionalism CLE sessions and workshops with law students would include testimonials by lawyers, from all types of law practices and all cultural and socio-economic backgrounds, who admit to having behavioral problems and discussing how they successfully addressed them.

Sixth, while a civil society perspective recognizes that civility is an indispensable human good, it also acknowledges that it is one “no amount of moral lecturing[,] . . . moral education, . . . [or] legislative constraint . . . can create.”<sup>459</sup> Like other desirable virtues, such as generosity and gratitude, civility in a democracy is not subject to legal coercion.<sup>460</sup> The negative reaction some commentators have to initiatives aimed at making society more polite is similar to the “uneasiness many people feel about so-called political correctness legislation . . . [in] that it makes precisely this mistake [of] . . . tr[ying] to inspire with sanctions and punishment what simply cannot be secured by sanctions and punishment . . . . A society so regulated and so coerced is not civil; it merely looks that way.”<sup>461</sup>

## VII. CONCLUSION

Finally, while it may be true that one of the highest goods of society—a free life—cannot be accomplished without civility, history teaches us to be sanguine about our desire to stem the tide of bad manners, vulgar language, and disrespectfulness. Civility, in and of itself, is an equivocal, rather than an unambiguous, good.<sup>462</sup> The fact that notions of proper behavior never seem to stabilize may mean a broader spectrum of society is participating in shaping them. As one commentator has

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457. See Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1, 60–61 (2002) (suggesting that mindfulness meditation can help lawyers destress and perform better).

458. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-431 (2003) (suggesting that lawyers who suspect another lawyer's misconduct is the product of mental illness speak with the afflicted lawyer to express concern or confirm the problem).

459. PIPPIN, *supra* note 401, at 238.

460. *Id.* at 229–30.

461. *Id.*

462. KASSON, *supra* note 344, at 3.

observed, “[w]hat seems to other[s] . . . to be relativism, narcissism, and . . . hedonism [may be], in fact, a new creativity in shaping an ethic.”<sup>463</sup> In a society where honesty and a willingness to speak one’s mind are encouraged, incivility may be the unavoidable result of speech and liberty rights Americans have given themselves. A democratic civil society is one that tolerates incivility that offends, but does not imperil or obstruct the fair administration of justice.<sup>464</sup>

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463. Rouner, *supra* note 396, at 8.

464. See JARECKE & PLANT, *supra* note 416, at 6 (questioning whether incivility is “an inevitable result of the raucous freedom that . . . Americans have chosen to afford [them]selves, in a culture that values free expression and individual liberty”).