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# LAWYER SPEECH, INVESTIGATIVE DECEPTION, AND THE FIRST AMENDMENT

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*It seems unassailable that attorneys must refrain from deception or dishonesty of any kind as a condition of professional licensure. But this principle, one of the foundational norms of the legal profession, may well infringe upon First Amendment rights, at least in certain applications. In this Article, we confront the tension between an attorney’s expressive and associational rights and her professional duty of absolute honesty. We explain that the latter must yield to the former in the unique circumstances presented by undercover investigations, where attorneys work side-by-side with journalists, civil rights testers, political activists, and others who seek to expose information of profound public concern. Deception about the investigator’s identity or purpose is often necessary to obtain access to information that has been deliberately concealed from the public. That attorneys should be permitted to provide counsel, notwithstanding the deceptive element of the investigation, may seem like a surprising conclusion for a profession that pervasively regulates attorney speech and has long assumed that any kind of deception must be categorically off limits for lawyers. Nonetheless, a close examination of rapidly evolving First Amendment principles reveals that lawyers have a right to provide counsel, advice, and supervision to individuals and entities engaged in investigations – even the deceptive kind.*

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## I. INTRODUCTION

As 2019 drew to a close, the *New Yorker* declared it “The Year of the Whistleblower,” musing that it was “hard to think of another recent period when the act of whistle-blowing has had such a consequential impact on our politics and culture.”<sup>1</sup> From the scientist who exposed the Massachusetts Institute of Technology’s relationship with Jeffrey Epstein to the United States intelligence official whose complaint regarding Ukraine triggered impeachment proceedings against President Trump, the *New Yorker* celebrated these stories as “an exhilarating reminder of the power of a single voice.”<sup>2</sup> But whistleblowers, leakers, and undercover investigators do not receive such a warm embrace from every

1. David Remnick, *Sunday Reading: The Year of the Whistleblower*, *NEW YORKER* (Dec. 22, 2019), <https://www.newyorker.com/books/double-take/sunday-reading-the-year-of-the-whistle-blower> [https://perma.cc/MUC3-SJ5F].

2. *Id.*

quarter.<sup>3</sup> Whether working from within an organization or gaining access to it specifically for investigative purposes, those who reveal secrets of public significance pose a threat to powerful interests.<sup>4</sup> They face a treacherous minefield of civil and criminal liability, depending on the nature of the information they seek to reveal and the methods they use to access the information.<sup>5</sup> Whistleblowers who leak classified information have been prosecuted and convicted under the Espionage Act, receiving lengthy sentences.<sup>6</sup> Animal rights activists seeking to expose horrific abuse in the agricultural industry are threatened with prosecution under “Ag-Gag” laws, which criminalize undercover reporting in the agricultural industry.<sup>7</sup> Nor is criminal prosecution the only threat: in some states, whistleblowers and investigators also face potentially catastrophic monetary damages.<sup>8</sup> This landscape, however, is constantly in flux.<sup>9</sup> Legislatures sympathetic to the industries that fear whistleblowing and undercover investigations have overstepped First Amendment boundaries in their zeal to criminalize expressive activity. At least four such statutes have been struck down as unconstitutional burdens on free speech, and many other challenges are pending.<sup>10</sup>

Amidst all this complexity, one thing is clear: whistleblowers and investigators need the assistance of counsel to navigate this intricate and high-stakes terrain. But the surprising truth is that the Rules of Professional Responsibility impede an attorney’s ability to provide precisely the type of guidance most valuable to a would-be investigator. While it is beyond serious dispute that someone charged with a criminal offense for completed conduct is entitled to legal representation,<sup>11</sup> it is much less clear that an attorney can guide someone through an

3. See Michael German, *The Law Is Designed to Punish Whistleblowers Like Me*, WASH. POST (Oct. 11, 2019, 5:00 AM), [https://www.washingtonpost.com/outlook/the-law-is-designed-to-punish-whistleblowers-like-me/2019/10/10/9cefe4da-cb71-11e9-9c6d-436a0df4f31d\\_story.html](https://www.washingtonpost.com/outlook/the-law-is-designed-to-punish-whistleblowers-like-me/2019/10/10/9cefe4da-cb71-11e9-9c6d-436a0df4f31d_story.html) [<https://perma.cc/HA9U-JK67>].

4. See Charlie Savage & Emmarie Huetteman, *Manning Sentenced to 35 Years for a Pivotal Leak of U.S. Files*, N.Y. TIMES (Aug. 21, 2013), <https://www.nytimes.com/2013/08/22/us/manning-sentenced-for-leaking-government-secrets.html> [<https://perma.cc/XLW4-K6CM>].

5. See, e.g., *id.*

6. See, e.g., *id.*; Charlie Savage & Alan Binder, *Reality Winner, N.S.A. Contractor, Accused in Leak, Pleads Guilty*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/26/us/reality-winner-nsa-leak-guilty-plea.html> [<https://perma.cc/2ZNQ-RLYZ>].

7. Leighton Akio Woodhouse, *Charged With the Crime of Filming a Slaughterhouse*, NATION (July 31, 2013), <https://www.thenation.com/article/archive/charged-crime-filming-slaughterhouse/> [<https://perma.cc/NZL8-YSU2>].

8. See N.C. GEN. STAT. § 99A (2017) (providing statutory basis for employers to receive extraordinary monetary damages from whistleblower employees); ARK. CODE ANN. § 16–118–113 (2017).

9. See Woodhouse, *supra* note 7.

10. See, e.g., *Animal Legal Def. Fund v. Kelly*, 434 F. Supp. 3d 974, 1002 (D. Kan. 2020), *amended by* No. 18–2657–KHV, 2020 U.S. Dist. LEXIS 58909 (D. Kan. Apr. 3, 2020), *appeal docketed*, No. 20–3082 (May 1, 2020); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018); *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 827 (S.D. Iowa 2019), *appeal docketed*, No. 19–1364 (8th Cir. Feb. 22, 2019); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017). The authors disclose that Professor Chen has served as plaintiffs’ counsel in these cases. See also *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547, 566 (M.D.N.C. 2020) (enjoining North Carolina’s Property Protection Act, which would impose severe civil liability on whistleblowers and undercover investigators, as an unconstitutional burden on protected speech), *appeal docketed*, No. 20-1807 (4th Cir. July 24, 2020).

11. See *Right to an Attorney*, JUSTIA, <https://www.justia.com/criminal/procedure/miranda-rights/right-to-attorney/> (last updated Apr. 2018) [<https://perma.cc/M9W7-MM9N>].

ongoing undercover investigation without imperiling her own license. Many such investigations rely on some element of deception to gain access to information that is deliberately concealed from public scrutiny.<sup>12</sup> A journalist or an activist might, for example, apply for a job at a facility they are intending to investigate, omitting their organizational affiliation or misrepresenting aspects of their background that would reveal their professional or ideological commitments.<sup>13</sup> The deceptive nature of the investigation puts the attorney on a collision course with one of the foundational norms of the legal profession: attorneys may not engage in dishonesty or deception of any kind, for any reason.<sup>14</sup>

As expressed in Rule 8.4(c) of the Model Rules of Professional Conduct, a lawyer commits professional misconduct if she engages “in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>15</sup> While the rule addresses a wide range of fraudulent conduct that should unquestionably be prohibited to protect clients, courts, and the public at large, it is written in a sufficiently capacious manner to sweep in the actions of lawyers who are supervising investigators using deception as part of lawful, undercover activity. These lawyers might be prosecutors overseeing law enforcement “sting” operations,<sup>16</sup> civil rights advocates working with “testers” to uncover conduct that violates anti-discrimination laws,<sup>17</sup> or animal rights attorneys and labor lawyers guiding undercover whistleblowers trying to expose unethical, inhumane practices in the animal agricultural industry.<sup>18</sup> Additional examples include lawyers who counsel journalists, documentary filmmakers, and the media organizations that employ them and publish their work; intellectual property lawyers seeking to uncover violations of trademark or copyright law; and attorneys working for regulatory agencies that investigate and punish violations of consumer protection law and other unfair trade

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12. Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND L. REV. 1435, 1438 (2015) [hereinafter Chen & Marceau, *High Value Lies*].

13. As one of us has previously explained, “[i]nvestigative deceptions are intentional, affirmative misrepresentations or omissions about one’s political or journalistic affiliations, educational backgrounds, or research, reportorial, or political motives to facilitate gaining access to truthful information on matters of substantial public concern.” *Id.*

14. MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS’N 2018).

15. *Id.* Most jurisdictions follow this rule or some variant. See CPR POL’Y IMPLEMENTATION COMM., AM. BAR ASS’N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 8.4: MISCONDUCT (Nov. 9, 2020), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.pdf) [https://perma.cc/LC7R-PXR9] (excluding Colorado’s adoption of an investigation exception in September 2017) [hereinafter VARIATIONS OF ABA MODEL RULES].

16. Jesse Paul, *Colorado AG Halts All In-House Undercover Investigations amid Ethics Questions About “CHEEZO” Unit*, DENVER POST (May 12, 2017, 6:30 AM), <https://www.denverpost.com/2017/05/12/jeffco-cheezo-unit-ethics-concerns/> [https://perma.cc/M8DG-FRTR] (explaining that concern about professional discipline prompted the Colorado Attorney General to shut down the Child Sex Offender Internet Investigations Unit).

17. Chen & Marceau, *High Value Lies*, *supra* note 12, at 1463–64 (describing how the Fair Housing Act is enforced through paired testing, in which “investigators will send a white tester and an African American tester to the same person to inquire about buying or renting a home. If that person informs the white tester that housing is available, but tells the African American tester that it is not, an FHA violation has occurred.”).

18. See *id.* at 1467 (describing an investigation conducted by the Humane Society of the United States that revealed slaughterhouse workers “kicking cows, ramming them with the blades of a forklift, jabbing them in the eyes, applying painful electrical shocks, and even torturing them with a hose and water in attempts to force sick or injured animals to walk to slaughter.” (internal quotations omitted)).

practices.<sup>19</sup> The categorical anti-deception rule casts a shadow across a surprising number of different sectors of the legal profession, serving clients with a wide spectrum of political, ideological, journalistic, financial, and expressive goals.

Recognizing the adverse policy implications of punishing lawyers engaged in this type of activity, some jurisdictions have amended their ethics rules to carve out an exemption for attorneys who are working on such investigations.<sup>20</sup> In other jurisdictions, courts and regulatory bodies have declined to sanction lawyers engaged in such activity under Rule 8.4.<sup>21</sup> In the majority of states, however, professional conduct rules continue to place lawyers who work with undercover investigators at great risk of professional discipline, deterring them from doing so<sup>22</sup> or requiring significant restructuring of their practices.<sup>23</sup> This restraint on lawyer speech thereby translates readily into an effect on the *clients* who conduct such investigations or benefit from them, because it impedes their ability to seek legal counseling. It requires clients to pursue undercover investigations without the robust involvement of counsel, or to forego such investigations altogether.

Rule 8.4, then, effectively prevents clients from obtaining attorney assistance with lawful covert activity—activity that, as we are beginning to understand more fully, is itself protected by the First Amendment.<sup>24</sup> Building on the emerging recognition that certain types of false statements are entitled to constitutional protection, this Article explores whether the First Amendment also protects lawyers who are directly or indirectly engaged in undercover investigations that employ the use of deception. It is the first scholarly work to apply the Court's newly protective treatment of false statements to the regulation of attorney speech.

Not long ago, the prospect of constitutional protection for false statements of fact would have seemed almost frivolous.<sup>25</sup> The Supreme Court's decision in *United States v. Alvarez*,<sup>26</sup> however, substantially narrowed the scope of lies that are presumptively punishable without violating the First Amendment.<sup>27</sup> In that decision, a plurality of the Court, joined by a concurrence, held that the government may only prohibit lies that are likely to cause legally cognizable harm to others or yield material and undeserved benefits to the speaker.<sup>28</sup> Since that decision, several lower courts have invalidated criminal laws prohibiting deceptive

19. See, e.g., Nitasha Tiku, *Whistleblowers Say Facebook Has Not Warned Investors About Illegal Activity*, in *New SEC Complaint*, WASH. POST (May 27, 2020, 1:29 PM), <https://www.washingtonpost.com/technology/2020/05/27/facebook-sec-whistleblower/> [https://perma.cc/VA4D-347M].

20. See, e.g., COLO. RULES OF PRO. CONDUCT r. 8.4(c) (COLO. BAR ASS'N 2020); OR. RULES OF PRO. CONDUCT r. 8.4(b) (OR. BAR ASS'N 2020).

21. See, e.g., *United States v. Parker*, 165 F. Supp. 2d 431, 454 (W.D.N.Y. 2001); *Apple Corps. Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456, 476 (D.N.J. 1998); D.C. Bd. on Pro. Resp., Formal Op. 323 (2004); N.Y. State Bar Assoc. Comm. on Pro. Ethics, Formal Op. 515 (1979).

22. For evidence of such deterrent effect, see Paul, *supra* note 16; see also *infra* notes 114–21 and accompanying text.

23. For examples of such restructuring, see *infra* notes 115–121 and accompanying text.

24. See *infra* notes 75–76 and accompanying text.

25. *United States v. Alvarez*, 567 U.S. 709, 719 (2012).

26. *Id.* at 713.

27. *Id.* at 715.

28. *Id.* at 724.

conduct used to gain access to agricultural operations to conduct undercover investigations.<sup>29</sup> These decisions protect the speech rights of investigators, but have yet to address whether their attorneys remain vulnerable to professional discipline.

In general, the same free speech principles adopted in these cases provide an explanation for why lawyers' conduct in supervising such investigations might also be constitutionally protected. But among the complicating factors for a First Amendment analysis of Rule 8.4 is the fact that the Supreme Court sometimes treats regulation of professional speech differently than other types of speech-restricting laws—especially when it comes to lawyers.<sup>30</sup> The Court has allowed bar regulators to restrict lawyer speech “in a manner that would not be permissible regulation of the citizenry in the general marketplace.”<sup>31</sup> The types of harms associated with lawyer misrepresentations might be viewed as distinct from those associated with the conduct of investigators—when lawyers are engaged in deception, it is thought to reflect adversely on the profession as a whole, undermining public confidence in the legal system itself.<sup>32</sup> Acknowledging the force of these distinctions, we nonetheless argue that First Amendment interests are sufficiently compelling to require carefully tailored regulation of lawyers who supervise legitimate undercover investigations.

In Part II, we lay out the ethical landscape that confronts attorneys who are advising undercover investigations, explaining in detail how the rules of professional responsibility expose attorneys to discipline for their involvement. Having established that there is sufficient exposure for attorneys to produce a chilling effect on the guidance they might offer to clients, we then turn to the constitutional implications. In Part III we canvas the free speech and association precedents most relevant here, drawing together principles from professional speech and association cases with the post-*Alvarez* treatment of falsehoods. In Part IV we propose a framework for examining the constitutionality of rules prohibiting attorney involvement in investigative deceptions. First, we argue for the application of an intermediate scrutiny standard to the enforcement of the anti-deception rules in these circumstances. Second, taking stock of the purposes underlying attorney regulation in general and Rule 8.4(c) in particular, we argue that such interests cannot support the imposition of a categorical anti-deception rule whose operative effect is to prohibit attorney involvement in undercover investigations. Whether we think of the right as grounded in the client, the attorney, or the relationship between the two, it is weighty enough to require a closer calibration between the scope of the deception prohibition and the harms it is trying to prevent.

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29. See Woodhouse, *supra* note 7; see also 281 Care Committee v. Arneson, 638 F.3d 621, 636 (8th Cir. 2011) (holding that strict scrutiny is the proper standard of review for government conduct prohibiting lies).

30. Cf. Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, 66 FLA. L. REV. 961, 967–68 (2014).

31. *Id.* at 989.

32. *Id.*

## II. UNDERSTANDING THE ETHICAL LANDSCAPE

At first blush, the analytical problem seems to be a relatively simple one: Rule 8.4(c) sets out a categorical prohibition on lawyer “conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>33</sup> Without any further requirements that the conduct in question cause harm, be unlawful, or otherwise material to the lawyer’s fitness to practice law, the plain text of the rule conveys that falsity alone is enough to warrant bar discipline for any lawyers involved.<sup>34</sup> As it should be, many would say: it hardly seems objectionable to require lawyers to be truthful at all times as a condition of professional licensure.<sup>35</sup> As expressed repeatedly by one court, “[n]o single transgression reflects more negatively on the legal profession than a lie.”<sup>36</sup> To the extent that undercover investigations are usually predicated on some degree of misrepresentation about the identity, affiliation, or motive of the investigator,<sup>37</sup> it would seem fairly straightforward that a cautious lawyer must refuse to be “involved” in such investigations in any capacity. This caution is driven not only by the idea that “involvement” is more capacious than simply direct participation, but also by the additional instruction in Rule 8.4(a) that lawyers may not violate the ethical rules “through the acts of another.”<sup>38</sup>

At the same time, reading the rule in this way is profoundly costly, foreclosing attorney involvement in undercover investigations across a wide range of matters, from narcotics and weapons trafficking, to housing and employment discrimination, to consumer protection and intellectual property. Confronted with these dramatic costs, lawyers and scholars have resisted the implications of the rule’s most natural reading, urging an inferred exception for deceptions undertaken in the context of legitimate investigative activities.<sup>39</sup> Putting aside that this is a decidedly nontextualist approach to a rule that does, after all, govern the conduct of lawyers, it turns out that the confidence some reposed in this “gloss

33. MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS’N 2018) For a chart showing state implementation of Rule 8.4(c), along with variations, see VARIATIONS OF ABA MODEL RULES, *supra* note 15.

34. See MODEL RULES OF PRO. CONDUCT r. 8.4(c).

35. See David J. Dance, *Pretexting: A Necessary Means to A Necessary End?*, 56 DRAKE L. REV. 791, 792 (2008) (arguing that a “lawyer’s use of deception degrades the public’s perception of lawyers.”).

36. *In re Nardi’s Case*, 705 A.2d 1199, 1200 (N.H. 1998). For exploration of the moral opprobrium attached to lies more generally, see Chen & Marceau, *High Value Lies*, *supra* note 12, at 1478–79, 1500–01.

37. For a more extensive depiction of the ways investigators use deception to obtain access to facilities and information, see Chen & Marceau, *High Value Lies*, *supra* note 12, at 1454–70.

38. “It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” MODEL RULES OF PRO. CONDUCT r. 8.4(a). Lawyer involvement in undercover investigations might violate other provisions as well, as we will explain throughout the section, but no other provision is as capacious as Rule 8.4(c).

39. In some of the earlier discussions of Rule 8.4(c)’s application to undercover investigations, experts opined that, notwithstanding the rule’s plain text, “[t]he prevailing understanding in the legal profession is that a public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.” *Apple Corps. Ltd. v. Int’l Collectors Soc’y*, 15 F. Supp. 2d 456, 475 (D.N.J. 1998) (citing declaration of legal ethics scholar Bruce Green); see also *Petition for Original Writ Under C.A.R. 21* at 43 n.8, *Coffman v. Off. of Att’y Regul. Couns. & Coyle* (2017) [hereinafter *Coffman Petition*], asserting that the language of the rule does not apply to prosecutors overseeing undercover investigations. Some courts have accepted such arguments. *Apple Corps.*, 15 F. Supp. 2d at 476.

on the rule” was somewhat misplaced: lawyers *have* been disciplined under Rule 8.4(c) for investigatory deceptions,<sup>40</sup> notwithstanding what, for many, is a strong intuition that the rule shouldn’t be interpreted to cover such situations.<sup>41</sup> And the uncertainty itself is likely sufficient to chill the conduct of lawyers who might otherwise be willing to participate.<sup>42</sup>

A number of jurisdictions have taken steps to resolve these competing impulses, accommodating lawyer involvement in undercover investigations within specified parameters.<sup>43</sup> Some have revised the rule to explicitly allow lawyers to be involved in undercover investigations.<sup>44</sup> Colorado, for example, provides that “lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities.”<sup>45</sup> Some states exempt only prosecutors<sup>46</sup> or government attorneys,<sup>47</sup> or lawyers involved in a narrow band of investigations intended to uncover violations of “criminal law or civil or constitutional rights.”<sup>48</sup> Others have simply added a materiality element to Rule 8.4(c), limiting the pro-

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40. See generally *In re* Conduct of Gatti, 8 P.3d 966 (Or. 2000); *In re* Pautler, 47 P.3d 1175 (Colo. 2002); Matter of Discipline of Luther, 374 N.W.2d 720, 720 (Minn. 1985).

41. See, e.g., David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791, 816 (1995). Isbell and Salvi construed Rule 8.4(c) so that it “applies only to conduct of so grave a character as to call into question the lawyer’s fitness to practice law.” *Id.* They do so by borrowing from Rule 8.4(d)’s prohibition on criminal conduct that “reflects adversely on a lawyer’s fitness to practice law,” and then conclude that “[i]nvestigators and testers, however, do not engage in misrepresentations of the grave character implied by the other words in the phrase but, on the contrary, do no more than conceal their identity or purpose to the extent necessary to gather evidence.” *Id.* at 817. See also Christopher J. Shine, *Deception and Lawyers: Away from A Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722, 749–50 (1989).

42. See, e.g., Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, SEATTLE UNIV. L. REV. 123, 174–75 (2008).

43. One list, compiled by then-Colorado Attorney General Cynthia Coffman, reflects nineteen states that have taken some steps to authorize lawyer involvement with investigations via rule revision, comment, or ethics opinion. To this list we would now add Colorado, which subsequently adopted an investigation exception. Coffman Petition, *supra* note 39, at 43 n.8.

44. COLO. RULES OF PRO. CONDUCT r. 8.4(c) (COLO. BAR ASS’N 2020); FLA. RULES REGULATING THE FLA. BAR r. 4–8.4(c) (FLA. BAR ASS’N 2020); IOWA RULES OF PRO. CONDUCT r. 32:8.4 cmt. 6 (IOWA BAR ASS’N 2020); OR. RULES OF PRO. CONDUCT r. 8.4(b) (OR. BAR ASS’N 2020); WIS. RULES OF PRO. CONDUCT r. 20:4.1(b) (WIS. BAR ASS’N 2021).

45. COLO. RULES OF PRO. CONDUCT r. 8.4(c).

46. ALA. RULES OF PRO. CONDUCT r. 3.8(2) (ALA. BAR ASS’N 2020). *But see* Ala. State Bar Off. of Gen. Couns. Ethics Op., R0-2007-05 (2007) (interpreting the investigation exception to include attorneys seeking to discover violation of intellectual property rights); WYO. RULES OF PRO. CONDUCT r. 3.8 cmt. 2 (WYO. BAR ASS’N 2020).

47. Utah State Bar Ethics Advisory Op. Comm., Op. No. 02–05 (2002); S.C. RULES OF PRO. CONDUCT r. 4.1 cmt. 2 (S.C. BAR ASS’N 2020); TENN. RULES OF PRO. CONDUCT r. 8.4 cmt. 5 (TENN. BAR ASS’N 2018); MO. RULES OF PRO. CONDUCT r. 4–8.4(c) (MO. BAR ASS’N 2017).

48. ALASKA RULES OF PRO. CONDUCT r. 8.4 cmt. 4 (ALASKA BAR ASS’N 2020). Note that this approach would not appear to protect attorneys seeking to uncover violations of consumer protection or animal welfare laws. See also N.C. State Bar, *Use of Tester in an Investigation that Serves a Public Interest*, 2014 N.C. Formal Ethics Op. 9 (July 17, 2015).

hibition to those deceptions reflecting “adversely on the lawyer’s fitness to practice law,” apparently relying on the supposition that there would be no such adverse reflection for lawyer involvement in undercover investigations.<sup>49</sup>

The significant majority of states, however, still follow the Model Rules in categorically prohibiting deception without exemption for investigative purposes.<sup>50</sup> To understand a lawyer’s liability in these jurisdictions requires a careful disaggregation of the various postures in which lawyers might be “involved” in investigatory deceptions. As the scope of the lawyer’s involvement changes, so too does the ethical analysis—but as we will see, even in the more attenuated posture, lawyers in certain practice settings have considerable exposure. In this Part, we provide a framework for understanding an attorney’s liability for deceptive behavior connected with an investigation.<sup>51</sup>

#### A. *Attorney herself engages in investigative deceptions*

The easiest scenario to evaluate is where the lawyer misrepresents her *own* identity and purpose, typically to obtain information that would not have been freely divulged to the lawyer had her identity been known. Several of the high-profile cases in which lawyers have been disciplined under Rule 8.4(c) present this type of situation.<sup>52</sup> In one, an Oregon lawyer named Daniel Gatti suspected

49. VA. RULES OF PRO. CONDUCT r. 8.4(c) (VA. BAR ASS’N 2018); MICH. RULES OF PRO. CONDUCT r. 8.4(b) (MICH. BAR ASS’N 2020); N.D. RULES OF PRO. CONDUCT r. 8.4(c) (N.D. BAR ASS’N 2006).

50. Although our focus for the remainder of this Section will be the supermajority of states that follow the Model Rules, it bears noting here that of the twenty states that have sought to exempt investigation advising from the anti-deception rule, six exempt only government attorneys. For a discussion of prosecutorial deceit, see Rebecca B. Cross, *Ethical Deception by Prosecutors*, 31 *FORDHAM URB. L.J.* 215 (2003); Thomas H. Moore, *Can Prosecutors Lie?*, 17 *GEO. J. LEGAL ETHICS* 961 (2004). For a discussion of deception on the part of attorneys working for national intelligence agencies, see Eric Morrow, *When Is a Lie Not a Lie? When It Is Told by the State: Lawlessness in the Name of the Law*, 19 *GEO. J. LEGAL ETHICS* 871, 872 (2006). Three other jurisdictions employ the highly subjective materiality approach, conferring a troubling degree of discretion on disciplinary authorities as to when a lawyer’s involvement in an investigation might raise questions about her professional fitness. For a discussion of the risks of discriminatory enforcement under existing Rule 8.4(c), and the prospect of using Rule 8.4(c) as a “means of stifling dissent,” see Sean Keveney, *The Dishonesty Rule: A Proposal for Reform*, 81 *TEX. L. REV.* 381, 394 (2002).

51. We limit our analysis to those situations in which the *only* foundation for discipline against the lawyer is the deceptive nature of the investigation, which will generally violate Rule 8.4(c), and may violate Rule 1.2(d) in a small handful of jurisdictions with exceptionally broad (and probably unconstitutional) definitions of crime or fraud. In the scenarios with which we are concerned, the lawyer is in full compliance with other provisions of the Rules that attach to more carefully delineated circumstances, such as Rule 4.2’s prohibition on lawyer communications with persons represented by counsel. These other provisions advance specific goals, such as preserving the integrity of the attorney-client relationship, that are conceptually distinct from the interests in prohibiting deception. Thus, although it is possible to imagine circumstances in which an investigation runs afoul of Rule 4.2 because the attempt to obtain information constitutes prohibited communication “about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter,” we don’t address such circumstances here. MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS’N 1983); see also *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119, 121 (S.D.N.Y. 1999) (interpreting that rule to be inapplicable to undercover trademark infringement investigation). Lawyers can, for the most part, tailor their investigatory work to steer clear of these circumstances, and we do not argue that the First Amendment requires a different result.

52. See, e.g., *In re Conduct of Gatti*, 8 P.3d 966 (Or. 2000); see also *In re Chambers*, 642 P.2d 286, 293 (Or. 1982) (lawyer violated anti-deception provision by presenting himself as an independent insurance agent.);

that his client's insurance company had improperly denied benefits to which the client was entitled.<sup>53</sup> In an attempt to smoke out evidence of an intentional, coordinated scheme to reject valid claims, Gatti posed as a chiropractor and a doctor in conversations with the insurance company and their medical review personnel.<sup>54</sup> When Gatti initiated civil litigation on the client's behalf to recover damages arising from the benefits denial scheme, the vice president of the medical review team filed a disciplinary complaint against him for the lawyer's deceptive phone conversations.<sup>55</sup> Using language identical to MR 8.4(c), Oregon's then-operative ethical rule prohibited "dishonesty, fraud, deceit, or misrepresentation."<sup>56</sup>

Gatti defended against the charge by asking the court to recognize an exception to the anti-deception rule for misrepresentations made "only to identity and purpose" and "solely for purposes of discovering information," arguing that such an exception was necessary to allow lawyers to successfully "root out evil."<sup>57</sup> The Oregon Supreme Court acknowledged that "there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of law, are useful means for uncovering unlawful and unfair practices, and that lawyers in both the public and private sectors have relied on such tactics."<sup>58</sup> Nonetheless, the court felt bound to proceed in "[f]aithful adherence" to the language of the ethical rule, which contained no investigatory exception, and to impose sanctions upon Gatti for his violation of the rule.<sup>59</sup>

Another case in this category is *In re Pautler*, imposing discipline on a Colorado prosecutor who, under exigent circumstances, impersonated a public defender to induce a murder suspect to turn himself in.<sup>60</sup> The Colorado Supreme Court affirmed the conclusion that Pautler had engaged in conduct "involving dishonesty, fraud, deceit, or misrepresentation,"<sup>61</sup> insisting that "purposeful deception by an attorney licensed in our state is intolerable, even when it is undertaken as part of attempting to secure the surrender of a murder suspect."<sup>62</sup> The court emphasized the importance of lawyer truthfulness to the integrity of the profession.<sup>63</sup>

These cases illustrate what is fairly straightforward to understand from the plain text of the rule: a lawyer who directly participates in deceptive investigation

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Matter of Discipline of Luther, 374 N.W.2d 720, 720 (Minn. 1985) (lawyer knowingly made false statements to assist clients in collecting from clients' judgment debtors).

53. *Gatti*, 8 P.3d at 970.

54. *Id.*

55. *Id.* at 970–71.

56. OR. CODE OF PRO. CONDUCT r. 1–102(A)(3) (OR. BAR ASS'N 2020).

57. *Gatti*, 8 P.3d at 971.

58. *Id.* at 976.

59. *Id.*

60. *In re Pautler*, 47 P.3d 1175, 1176 (Colo. 2002); *see also* *People v. Reichman*, 819 P.2d 1035, 1035 (Colo. 1991).

61. *Pautler*, 47 P.3d at 1179. Pautler was also found to have violated Rule 4.3. *Id.* at 1182.

62. *Id.* at 1176.

63. *Id.* at 1179.

by misrepresenting her own identity is engaged in conduct “involving dishonesty, fraud, deceit, or misrepresentation.”<sup>64</sup> In jurisdictions that do not exempt investigations from the 8.4(c) prohibition, the salutary motives underlying the deception do not protect the lawyer from disciplinary sanction.<sup>65</sup> In the next Section, we consider whether the analysis changes if the lawyer uses an employee or other agent to conduct the investigation.

*B. Attorney uses an agent to deceive and investigate or is systematically using the fruits of investigative deceptions*

What if Gatti had asked his paralegal to call the insurance company? Or hired a private investigator to do the same? In either case, whether as an employee or an independent contractor, the investigator actually uttering the falsehood would be an agent of the attorney, acting at the attorney’s behest and instruction.<sup>66</sup> It might be tempting to conclude that this layer of removal makes the difference, since non-lawyers are not subject to the reach of professional conduct rules.<sup>67</sup> Along these lines, some legal ethics scholars have opined that Rule 8.4(c) should be read to allow a lawyer’s “use of an undercover investigator to detect ongoing violations of the law,”<sup>68</sup> and some courts have accepted this gloss on the rule.<sup>69</sup> But as tempting (and as widespread) as this instinct might be,<sup>70</sup> it sits so uncomfortably with the text of the rule that it is perhaps unsurprising that other scholars and other courts have rejected it.<sup>71</sup> The rules provide multiple reasons to be skeptical that an attorney can avoid ethical sanction by using an investigator to obtain information through the misrepresentation of identity or purpose.<sup>72</sup>

First, working within the confines of 8.4(c) itself, the lawyer’s instruction and request to the agent to lie in a specified way still seems to fall within the terrain of “conduct involving dishonesty.”<sup>73</sup> While the lawyer in this scenario does not herself make a dishonest statement or misrepresent his own identity to the insurance company, that slight attenuation is insufficient to insulate the lawyer from the language of the rule. Rule 8.4(c) requires only that the lawyer engage in “conduct involving dishonesty” to be subject to discipline.<sup>74</sup> The lawyer’s coaching of the investigator to lie—to obtain specified information defined and sought by the lawyer—would most likely satisfy this abstract and capacious language.

64. See also *Matter of Discipline of Luther*, 374 N.W.2d 720, 720 (Minn. 1985).

65. One commentator has suggested that Pautler, facing exigent circumstances in which the strategy that seemed most likely to save lives was one that violated Rule 8.4(c), was engaged in something akin to civil disobedience. See Steven Lubet, *A Prosecutor’s Complex Dual Role*, NAT’L L.J., June 25, 2001, at A20.

66. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

67. See also *id.*

68. *Apple Corps. Ltd. v. Int’l Collectors Soc’y*, 15 F. Supp. 2d 456, 475 (D.N.J. 1998) (citing declaration of legal ethics scholar Bruce Green); Isbell & Salvi, *supra* note 41, at 806.

69. *Apple Corps.*, 15 F. Supp. 2d at 475.

70. See also *Coffman Petition*, *supra* note 39.

71. See, e.g., Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577, 578 (2005).

72. *Id.* at 580.

73. See *id.* at 586.

74. *Id.* at 596.

Second, as noted above, Rule 8.4(a) forbids the lawyer from violating the ethical rules “through the acts of another.”<sup>75</sup> If it would violate the ethical rules for the attorney to induce disclosures from the insurance company by posing as a doctor, then Rule 8.4(a) instructs that the lawyer may not escape the restraint by engaging someone else to do the same.<sup>76</sup> Illuminating the force of this principle, one court imposed discipline on a prosecutor who, trying to preserve an undercover officer’s fake identity, was responsible for the filing of a fictitious complaint against the officer.<sup>77</sup> The court did not even bother to determine whether it was the prosecutor himself or an agent who actually filed the false complaint, casually identifying both possibilities in language clearly conveying that the difference was immaterial.<sup>78</sup>

Third, lawyers have affirmative supervisory duties under the Rules of Professional Conduct.<sup>79</sup> Rule 5.3 instructs that “a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”<sup>80</sup> The rule then specifies that the lawyer will be responsible for the nonlawyer’s conduct if the lawyer “orders, or with the knowledge of the specific conduct, ratifies the conduct involved,” or if the lawyer has either “general managerial authority” in the organization, or “direct supervisory authority” over the nonlawyer, and knows of the conduct but fails to take reasonable remedial action.<sup>81</sup>

For all of these reasons, an attorney cannot escape liability simply by sending someone else to conduct the undercover investigation; the attorney’s somewhat attenuated involvement in the deceptive scheme is nonetheless sufficient to trigger the operation of disciplinary rules even where someone else utters the falsehood.<sup>82</sup> A high-profile case in Colorado reflects exactly this combination of principles. A criminal defense attorney whose client had been caught in a sting operation filed an ethics complaint against the district attorney who supervised the covert investigation.<sup>83</sup> The complaint alleged that the district attorney’s role

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75. *Id.* at 582.

76. Steven C. Bennett, *Ethical Limitations on Informal Discovery of Social Media Information*, 36 AM. J. TRIAL ADVOC. 473, 483 (2013) (observing that “lawyers cannot do through third parties (such as investigators or paralegals) what they cannot themselves do under the rules.”).

77. *People v. Reichman*, 819 P.2d 1035, 1035 (Colo. 1991).

78. *Id.* at 1036 (“The respondent, either personally or through his agents, filed a false criminal complaint . . .”).

79. MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS’N 1983).

80. *Id.*

81. *Id.*

82. Additional cases confirming this premise include *In re Ostitis*, P.3d 500, 504 (Or. 2002) (imposing discipline against lawyer for misrepresentations made by private investigator acting under lawyer’s direction and control; observing that lawyers may not circumvent the disciplinary rules “by acting through persons who are not subject to the rules”); *Midwest Motor Sports v. Arctic Sales, Inc.*, 347 F.3d 693, 698 (8th Cir. 2003) (noting Rules 5.3 and 8.4(a) and rejecting attorneys’ “attempt to shield themselves from responsibility by ‘passing the buck’” to investigator).

83. Peter A. Weir, Off. of Dist. Att’y, *Proposed Rule Change to the Colorado Rules of Professional Conduct, Rule 8.4(c)*, in COMBINED COMMENTS TO THE COLORADO SUPREME COURT 108 (2017), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/Pro-](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Pro-)

in the investigation violated Rules 5.3 and 8.4(c).<sup>84</sup> State disciplinary authorities agreed that the allegations in the complaint were sufficient to open an investigation into the district attorney.<sup>85</sup> The investigation of the district attorney found no improprieties other than the fact that the attorney was employing and supervising undercover investigators engaged in deceptive conduct.<sup>86</sup> Nonetheless, on that basis, the district attorney and the disciplinary board agreed to a resolution in which the ethics complaint would be dismissed, provided that (1) the investigative team would no longer continue to operate out of the district attorney's office and (2) the district attorney would work to "bring to the attention" of the state supreme court the need for clarification of these issues.<sup>87</sup> Colorado eventually did so, recognizing that it serves no public benefit whatsoever to foster an environment in which attorneys protect themselves from liability by superficially cordoning themselves off from investigations in which they have a vital interest.<sup>88</sup> As expressed by one state attorney general, "law enforcement agents engaged in undercover investigations need the expert advice of government lawyers to ensure that their actions comply with the letter and spirit of the law."<sup>89</sup> This need for lawyer supervision extends beyond government attorneys working with law enforcement agents, as lawyers from multiple sectors of the profession have explained.<sup>90</sup> Having lawyers absent themselves from investigations that are instrumental to their subsequent professional activity is a "counterproductive charade" that simply doesn't advance the interests underlying the Rules of Professional Conduct.<sup>91</sup>

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posed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf [https://perma.cc/PXK4-NPVU]. The district attorney specified that "[a]ttorneys did not actively participate in the actual undercover investigations." *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *See also* United States v. Adamidov, No. CV 01-72-BR, 2002 WL 31971836, \*2 (D. Ore. Sept. 4, 2002) (observing that prosecutors in Oregon refrained from supervising investigations involving confidential informants or undercover agents who misrepresented their identities).

88. *See* Joseph G. Michaels, "Lawful Investigative Activities" and Rule 8.4(c), 48 COLO. L. 36 (2019).

89. Comments submitted by Attorney General Cynthia Coffman, urging the Colorado Supreme Court to revise Rule 8.4(c) to exempt lawful investigations from the deception prohibition.

90. Intellectual property attorneys from a number of prominent law firms have explained that when attorneys are allowed to participate in undercover investigations, they can "assist in ensuring that those investigations are lawful." Mary V. Sooter, Intell. Prop. Section: Colo. Bar Ass'n, *Support of Proposed Amendment to R.P.C. 8.4(c) on Behalf of the Intellectual Property Section of the Colorado Bar Association*, in COMBINED COMMENTS TO THE COLORADO SUPREME COURT 143 (2017), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf) [https://perma.cc/PXK4-NPVU].

91. Alexander R. Rothrock, Burns, Figa & Will, P.C., *Proposed Amendment to Colo. RPC 8.4(c)*, in COMBINED COMMENTS TO THE COLORADO SUPREME COURT 76 (2017), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf) [https://perma.cc/PXK4-NPVU].

C. *The attorney's client is engaged in investigative deceptions, with attorney's advice and perhaps supervision*

The more challenging scenario is where the deceptive investigation is conducted not by the attorney's *agent* but by the attorney's *client*.<sup>92</sup> Here, it is the client who wants to pursue an undercover investigation, for reasons grounded in the client's own professional, political, or ideological goals. The client might be a journalist or an activist seeking to expose wrongdoing and shape public debate and committed to doing so within the confines of the law. The client-investigator comes to the attorney for guidance and advice about the legal principles that govern the particular investigation the client is contemplating. How does the relevant jurisdiction define trespass? Invasion of privacy? What kinds of civil liability might the investigator have for the reputational harm that will ensue if the investigator discovers and then publicizes what she is expecting to find?<sup>93</sup> When it comes to the substantive area with which the client-investigator is concerned – housing or employment discrimination, animal abuse, consumer protection – what would the investigator have to document, and how, in order to have a cause of action under the relevant legal regime?

Although some clients seeking advice in this posture might well expect to uncover violations of law that would eventually serve as the basis for litigation against the investigated entity,<sup>94</sup> others might not. The client might be expecting to uncover conduct that is troubling, harmful, or immoral but not currently illegal,<sup>95</sup> precisely with the goal of educating the public that the existing legal regime is inadequate.<sup>96</sup> In the case of a scholar or a journalist, the client might have absolutely no intention of initiating litigation, regardless of what she discovers, but instead desires to publish the information produced.<sup>97</sup> Across all of these

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92. We mean to include in this discussion lawyers who work for nonprofit organizations, which in such cases may not only be the lawyers' employers, but also their clients. This situation also presents potential issues about role confusion for the attorney. See generally Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 23 (2003).

93. The analysis of exposure to criminal or civil liability in these circumstances frequently turns on the question of whether the law being enforced against the investigator specifically targets expressive conduct or is simply a law of general applicability. See, e.g., *Food Lion, Inc. v. Capital Cities/ABC*, 194 F.3d 505, 520–22 (4th Cir. 1999) (upholding nominal damages award against undercover journalists for breach of the duty of loyalty to their employer, which was the target of their investigation); *Special Force Ministries v. WCCO Tel.*, 584 N.W.2d 789, 793 (Minn. Ct. App. 1998) (upholding enforcement of generally applicable trespass statute to undercover journalist).

94. This is certainly true for many testers working in the area of housing and employment discrimination. *Chen & Marceau, High Value Lies*, *supra* note 12, at 1464. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 368 (1982) (describing the private use of discrimination testers); *United States v. Garden Home Mgmt. Corp.*, 156 F. Supp. 2d 413, 416 (D.N.J. 2001) (describing the Department of Justice's use of testers).

95. Animal rights organizations, for example, conduct undercover investigations not merely to discover violations of existing animal cruelty laws, but to expose the extraordinary cruelty of *legal* methods of slaughter, hoping to convince the public that it is morally unsupportable to exempt farmed animals from the protection of most animal cruelty laws.

96. See *Chen & Marceau, High Value Lies*, *supra* note 12, at 1458–59 (describing undercover journalist's exposure of troublesome conduct that did not violate laws applicable to foreign lobbying).

97. See, e.g., TIMOTHY PACHIRAT, *EVERY TWELVE SECONDS: INDUSTRIALIZED SLAUGHTER AND THE POLITICS OF SIGHT* 108 (2011); *Food Lion*, 194 F.3d at 510–11 (describing publication of undercover investigation of food handling at branches of grocery store chain).

variants, however, the investigation is not simply a tool to succeed against an adversary in litigation, but is a means to other, larger ends – objectives that the *client* is defining and pursuing.

For all these reasons, it is eminently sensible to start from the premise that there is a significant difference between an investigation conducted by someone acting as an agent of the attorney, to gain an advantage in pending or anticipated litigation, and an investigation conducted by someone who the attorney has advised as a client. Indeed, even to propose that lawyers might have reason to be concerned about their liability for investigations conducted by a client might seem like a remarkable departure from our ordinary expectations about professional responsibility. One might view it as the classic mode of attorney engagement to advise the client on the client's conduct outside of the law office. The lawyer instructs the client on the legal principles that apply to the client's situation, and whatever the client subsequently decides to do, we do not ordinarily impute this conduct back to the lawyer.<sup>98</sup> Why would it be any different for undercover investigations? As we will see, the rules provide some important support for this intuition, distinguishing between a lawyer's responsibility for agents as opposed to clients, but nonetheless expose attorneys in certain practice settings to profound uncertainty.<sup>99</sup>

Standing alone, the capacious language of Rule 8.4 seems at first to forego any distinction between agents and clients. The plain text leaves open the possibility that a lawyer who assists and guides a client regarding an undercover investigation that relies on deceptions about identity or motive might thereby be engaged in “conduct involving dishonesty, fraud, deceit or misrepresentation,” whether by virtue of her own attenuated involvement or “through the acts of another.”<sup>100</sup> Comment 1 to Rule 8.4, however, provides a critically important backstop, instructing that paragraph (a) “does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.”<sup>101</sup> Rule 8.4(a), as clarified by Comment 1, thus confirms that there is an enormously meaningful distinction between the lawyer's *agents*, whose actions are imputed to the lawyer, and the lawyer's *clients*, whose actions generally are not.<sup>102</sup> This is consistent with other provisions that set out the blueprint for the attorney-client relationship, such as Rule 1.2(d), which provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.<sup>103</sup>

That the attorney may “discuss the legal consequences of any proposed course of conduct” without bearing responsibility for that course of conduct is a

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98. See MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2018).

99. *Id.*

100. *Id.* r. 8.4.

101. *Id.* cmt. 1.

102. *Id.*

103. *Id.* r. 1.2(d).

time-honored principle,<sup>104</sup> and we do not wish to unsettle this understanding of the limited reach of a lawyer's responsibility for client conduct. Nonetheless, this boundary provides only a tenuous protection for attorneys in certain practice settings. It depends on a clear delineation between attorney and client that is easy to discern when we imagine an attorney in private practice but is much blurrier for other types of lawyers.

In precisely the type of advocacy organizations that might be most inclined to use undercover investigations to advance their political and ideological goals, it can be quite difficult to untangle the attorney from the client conclusively enough to rely on the instinct that the attorney is not subject to discipline for the *client's* deceptions.<sup>105</sup> In this setting the client is in fact an organization, one that employs both the attorney and the staff members who will serve as the investigators.<sup>106</sup> The organization's attorneys and its investigators might work shoulder-to-shoulder in a manner that bears no resemblance to the law offices of private practice, from which the client walks away after getting legal advice, off to pursue her course of conduct newly enlightened by the lawyer's guidance. In the context of an advocacy organization, the investigator is not simply an agent of the attorney in the sense we explored in the preceding section—someone hired by the attorney to obtain information the attorney needs for pending or anticipated litigation—but neither is the attorney disjoined from the client in such a way as to sever the attorney's involvement in the ensuing scheme once the advising phase is over.<sup>107</sup> On the contrary, the investigator might be consulting with the attorney in an ongoing and iterative manner, one that keeps the lawyer deeply intertwined with the investigation itself. We can imagine a similar entanglement for in-house attorneys working for media organizations like the New York Times or Vox Media.

In the world of Rule 8.4, where neither the lawyer nor her agents are permitted to engage in deception,<sup>108</sup> a lawyer's recurring involvement in her organization's undercover investigation could put pressure on the comment's safe harbor for lawyers who advise "a client concerning action the client is legally entitled to take."<sup>109</sup> The comment, after all, is addressed only to paragraph (a), which prohibits a lawyer from violating the Rules "through the acts of another."<sup>110</sup> It seems to have no effect on 8.4(c), thus leaving intact a lawyer's exposure for her own engagement in "conduct involving dishonesty, fraud, deceit,

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104. See Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1550–52 (1995).

105. See Spaulding, *supra* note 92, at 23–25.

106. We sidebar the potentially significant conflicts of interest that might arise between an organization and its individual employee-investigators, and the further complications that arise when the organization facilitates an attorney-client relationship between the organization's own staff attorneys and individuals who might serve as plaintiffs in a particular litigation matter. See *id.* at 23. We also note that some organizations employ independent contractors, rather than staff members, to carry out undercover investigations.

107. See *id.*

108. MODEL RULES OF PRO. CONDUCT r. 8.4(c).

109. See *id.* cmt. 1.

110. *Id.* r. 8.4(a).

or misrepresentation.”<sup>111</sup> As explored above, the language of paragraph (c) seems to contemplate a wider swath of conduct than simply direct participation, and could ensnare a lawyer working closely with her organization’s investigators in a deceptive undertaking.

To be clear, we think the better way to read the rules is one that allows an attorney to provide vigorous and sustained counseling to a client-initiated investigation regardless of whether the attorney is employed by the client alongside the investigator, or retained by the client in the more traditional posture of private practice. If the Humane Society is entitled to conduct an undercover investigation, and could retain outside counsel to advise it on such matters by virtue of Rules 1.2(d) and 8.4 comment [1],<sup>112</sup> it makes little sense to leave its in-house attorneys subject to discipline on the theory that they are too entangled with the client to benefit from the safe harbor. We would be hard-pressed, however, to assure an attorney working for an advocacy organization that she could count on this reading to insulate her from discipline stemming from an investigation she has closely advised.

Attorneys whose clients conduct undercover investigations in certain jurisdictions must navigate around another potential pitfall, one for which the rules provide at best only partial protection. Rule 1.2(d), as set forth above, prohibits a lawyer from providing counsel or assistance with conduct that is “criminal or fraudulent.”<sup>113</sup> This is a fundamental cornerstone of professional responsibility for lawyers,<sup>114</sup> and it is awkward, if not nearly impossible, to imagine how anyone might possibly object to this mandate, other than to query whether it constrains lawyers as much as it promises.<sup>115</sup> The problem is that what constitutes crime or fraud is defined by the law of the relevant jurisdiction,<sup>116</sup> and some states have shown a troubling inclination to expand their definitions of crime or fraud to capture undercover investigations. Reacting to the success that investigations have had in mobilizing public opinion against some powerful industries, a number of state legislatures have attempted to criminalize undercover investigations,<sup>117</sup> in spite of repeated rulings by federal courts that such laws violate the First Amendment.<sup>118</sup> Other states allow investigators to be subjected to civil

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111. *Id.* r. 8.4(c).

112. *Id.* cmt. 1; *id.* r. 1.2(d).

113. *Id.* r. 1.2(d).

114. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 471 (1990) (explaining how central it is to the traditional model of legal ethics to instruct lawyers to “zealously represent their clients’ interests ‘within the bounds of the law.’”).

115. *See id.*; *see also* Rebecca Aviel, *The Boundary Claim’s Caveat: Lawyers and Confidentiality Exceptionalism*, 86 TUL. L. REV. 1055, 1056 (2012).

116. *See* MODEL RULES OF PRO. CONDUCT r. 1.0(d).

117. *See* Chen & Marceau, *High Value Lies*, *supra* note 12, at 1457 (describing how Ag-Gag laws that criminalize whistleblowing in the agricultural industry were the product of intense lobbying by dairy farmers in the aftermath of an undercover investigation revealing horrific abuse of dairy cows); *see also* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1198 (D. Utah 2017) (describing how Ag-Gag legislation was enacted as a response to extremely effective undercover investigations that lead to consumer boycotts, ballot initiatives banning certain farming practices, and the largest meat recall in US history).

118. Animal Legal Def. Fund v. Kelly, 434 F. Supp. 3d 974, 1002 (D. Kan. 2020), *amended by*, No. CV 18-2657-KHV, 2020 WL 1659855 (D. Kan. Apr. 3, 2020), *appeal docketed*, No. 20-3082 (May 1, 2020); *see*,

fraud liability, treating the investigator's misrepresentation as if it were the proximate cause of the reputational harm that ensues when the fruits of the investigation are revealed.<sup>119</sup> Investigations, then, could potentially fall within the confines of client conduct the lawyer is not permitted to assist because the investigation is deemed criminal or fraudulent under applicable state law.<sup>120</sup> Furthermore, even lawyers practicing in jurisdictions that exempt them from discipline when they participate in deception-based investigations may be vulnerable to sanction in these situations because the exemptions under Rule 8.4(c) frequently are limited to work in "lawful investigative activities."<sup>121</sup>

For reasons that have been detailed elsewhere,<sup>122</sup> criminalizing undercover investigations or making them cost-prohibitive via civil fraud liability is incompatible with the demands of the First Amendment. Clients affected by such laws may wish to challenge their constitutional validity, and have an increasingly strong basis for doing so—as long as they can resolve the Hobson's choice they face between subjecting themselves to liability or failing to establish that their challenge is justiciable.<sup>123</sup> Sensibly, Rule 1.2(d) somewhat alleviates the corresponding ethical dilemma for lawyers, clarifying that lawyers may "assist a client

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*e.g.*, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018); *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 826–27 (S.D. Iowa 2019), *appeal docketed*, No. 19-1364 (Feb. 22, 2019); *Herbert*, 263 F. Supp. 3d at 1197.

119. *See, e.g.*, *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 794 (Minn. Ct. App. 1998) (allowing civil fraud action to proceed against reporter by treating as an issue of fact whether "claimed damages for emotional distress, humiliation, and aggravated physical and mental ailments were proximately caused" by the deceit). As will be familiar to many readers, common law fraud liability requires (1) a false misrepresentation of a past or present material fact; (2) knowledge by the person making the false assertion that it is false or ignorance of the truth of the assertion; (3) an intention to induce the plaintiff to act or to justify the claimant to act; (4) the plaintiff must have been induced to act or justified in acting in reliance on the representation; and (5) the plaintiff must suffer damage proximately caused by the misrepresentation. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1977). Undercover investigators do sometimes gain access in ways that satisfy the first four elements: knowingly providing false information when filling out a job application, thereby inducing the employer to allow access. Those misrepresentations, however, should not be considered the proximate cause of the lost profits and reputational harms that a facility suffers when its malfeasance is truthfully exposed. As explained pithily in one prominent case, the lost sales stemming from "diminished consumer confidence" in a grocery store following an exposé of its meat counter were caused "by the food handling practices themselves—not the method by which they were recorded or published." *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999). Other states, however, have left open the possibility in a way that might expose investigators to fraud liability. For an extensive discussion arguing that the initial misrepresentation that facilitates an undercover investigation is not the legal cause of any subsequent publication-related reputational damages, see *Chen & Marceau, High Value Lies*, *supra* note 12, at 1501–06.

120. Some states have created statutory causes of action that make whistleblower employees liable to employers for potentially catastrophic monetary damages arising from an investigation. *See* N.C. GEN. STAT. § 99A–2 (2017) (providing statutory basis for employers to receive extraordinary monetary damages from whistleblower employees); ARK. CODE ANN. § 16–118–113 (2017) (similar). As tremendously deterrent as these statutes are, we bracket them here because these civil causes of action are not styled as "fraud" and thus do not implicate Rule 1.2(d)'s prohibition.

121. *See, e.g.*, COLO. RULES OF PRO. CONDUCT r. 8.4(c) (COLO. BAR ASS'N 2020).

122. *See* *Chen & Marceau, High Value Lies*, *supra* note 12, at 1471.

123. We bracket the question of how lawyers seeking First Amendment protection from discipline under the rules might assert their claims, which, unlike other possible constitutional challenges to disciplinary rules, would face obstacles because the rules are not likely to be seen as facially invalid. *E.g.*, *Herbert*, 263 F. Supp. 3d at 1199 (observing that the standing inquiry "becomes somewhat complicated when the alleged injury, as here, is a chilling effect on speech based on a threat of future prosecution."); *see also* Lauren Stuy, Note, *Standing as*

to make a good faith effort to determine the validity, scope, meaning or application of the law.”<sup>124</sup> Appearing directly after the prohibition on lawyer assistance with crime or fraud, this language suggests a potential qualification on that constraint, but its scope is elusive.

To the extent that an investigation criminalized under state law is undertaken with the specific intent of initiating a legal challenge—perhaps because it is the most reliable way to establish the requisite standing and ripeness for constitutional litigation—the “good faith effort” language may provide an important pathway for the lawyer’s involvement. But what exactly does the language allow lawyers to do? On the one hand, lawyers can obviously assist clients with litigation challenging an unconstitutional law in an anticipatory posture, seeking injunctive or declaratory relief instead of violating the law and defending against its enforcement.<sup>125</sup> But that can’t be the sole meaning of the provision, because surely that simple proposition requires no clarification in the ethical rules; why would anyone bother to specify such an obvious premise, which would be all but a *non sequitur* appearing right after the language prohibiting lawyers from assisting with client crime or fraud? On the other hand, there is an important difference between openly challenging an unconstitutional law and simply evading or defying it, and the language of 1.2(d) clearly does not authorize attorneys to assist with the latter.<sup>126</sup> Lawyers have to bail out as soon as the client’s course of conduct ceases to constitute “a good faith effort to determine the validity” of the law.<sup>127</sup> That is not, however, always so straightforward to discern.

Consider a situation in which the client is planning to embark on an investigation that is criminally prohibited, where the client’s primary goal is not to challenge the validity of the prohibition but to obtain the information believed to be hidden from view. The client wants to conduct the investigation for its own sake, not as a vehicle for determining the validity of the law, and in fact only intends to challenge the constitutionality of the criminal prohibition if actually prosecuted. Is that a “good faith effort to determine the validity of the law” such that the lawyer can be involved without running afoul of 1.2(d)? Probably not, even though from an external perspective such a scenario would be difficult to distinguish from the one contemplated above, in which the investigation is launched with the intent of triggering an open determination of constitutionality. In any event, where one falls on this question is actually beside the point. All one needs to acknowledge is that, notwithstanding the benefit of 1.2(d)’s safe harbor, a prudent lawyer has good reason to hesitate before assisting a client with investigations that are criminal or fraudulent under state law, even if such laws are indisputably unconstitutional.

What, in sum, do the Rules of Professional Responsibility allow when it comes to lawyer involvement in undercover investigations? They simply do not

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*a Barrier for Constitutional Challenges to Civil Ag-Gag Statutes*, 69 CASE W. RESV. L. REV. 209, 214 (2018) (explaining the difficulty that plaintiffs face in establishing standing for preemptive challenges to Ag-Gag laws).

124. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS’N 2020).

125. *Id.*

126. *Id.*

127. *Id.*

allow attorneys or their agents to engage in the kind of deception on which most investigations are predicated.<sup>128</sup> At most, they allow attorneys to advise clients about the *client's* proposed investigations, but only where the attorney has an identity that is sufficiently distinct from that of the client – something that is often missing in the context of advocacy groups, media corporations, and other organizational clients.<sup>129</sup>

Practicing lawyers confirm what this textual analysis reveals: the categorical anti-deception provision has a chilling effect on the ability of lawyers to participate in investigations intended to uncover unlawful conduct.<sup>130</sup> When the Colorado Supreme Court was considering adopting an investigation exception to Rule 8.4(c), the Civil Rights Education and Enforcement Center made the point very clearly: “Given the existing ambiguity concerning an attorney’s role in testing, we have been unwilling to participate in such tests, and have turned down potentially meritorious cases as a result.”<sup>131</sup> Colorado’s Department of Regulatory Agencies similarly interpreted Rule 8.4(c) to foreclose attorneys from providing “needed guidance when a law enforcement official or regulatory investigator conducts an undercover investigation.”<sup>132</sup> And regional counsel for the United States Department of Housing and Urban Development likewise concluded that “[a]bsent a change to Rule 8.4(c), HUD attorneys must remove themselves from such investigations.”<sup>133</sup> Nor is this simply an irrational excess of caution, as Colorado’s experience demonstrates—no less an authority than the Attorney Regulation Counsel indicated a clear intention to pursue disciplinary proceedings against attorneys participating in undercover investigations.<sup>134</sup>

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128. *See id.*; *see also id.* r. 8.4(c).

129. As discussed above, if the relevant jurisdiction has criminalized such investigations or subjected participants to civil fraud liability, lawyers face additional uncertainty as they assess whether a client’s proposed course of conduct will qualify as the kind of “good faith effort to determine the validity, scope, meaning or application of the law” with which the lawyer may assist. *Id.* r 1.2(d).

130. Amy Robertson, Civ. Rts. Educ. & Enf’t Cir., *Proposed Change to Rule 8.4(c) of the Colorado Rules of Professional*, in COMBINED COMMENTS TO THE COLORADO SUPREME COURT 52 (2017), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf) [<https://perma.cc/PXK4-NPVU>].

131. *Id.* at 57. The authors disclose that Professor Chen is a member of the CREEC Board of Directors.

132. Marguerite Salazar, Colo. Dep’t of Regul. Agencies, *Proposed Amendment to Colo. RPC 8.4(c)*, in COMBINED COMMENTS TO THE COLORADO SUPREME COURT 77 (2017), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf) [<https://perma.cc/PXK4-NPVU>].

133. Matt Mussetter, Off. Dep’t of Hous. & Urb. Dev., *Proposed Amendment to Colo. RPC 8.4(c)*, in COMBINED COMMENTS TO THE COLORADO SUPREME COURT 106–07 (2017), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf) [<https://perma.cc/PXK4-NPVU>].

134. James C. Coyle, Colo. Sup. Ct. Att’y Regul. Couns., *Proposed Rule Change to Colo. RPC 8.4(c), for Conduct Involving Covert Activities*, in COMBINED COMMENTS TO THE COLORADO SUPREME COURT 37–38 (2017), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf) [<https://perma.cc/PXK4-NPVU>].

Similar concerns about Rule 8.4(c)'s restrictions affected other attorneys we interviewed for this Article.<sup>135</sup> Three attorneys, two of whom worked for nonprofit advocacy groups and one who worked at a private law firm, indicated that concerns about professional discipline restricted the type of advice they felt they could give to investigators working for their clients.<sup>136</sup> It is also apparent that fear of Rule 8.4(c) sanctions affected the organization of some of these lawyers' practices.<sup>137</sup> Two of the attorneys stated that they restructured their organizations specifically so they would be "walled off" from any persons who engaged in deception-based investigations.<sup>138</sup>

Colorado and a handful of other jurisdictions have chosen to revise Rule 8.4 to resolve the tension between the absolute anti-deception provision and the manifest public utility of allowing robust attorney advice for investigations.<sup>139</sup> But most jurisdictions continue to adhere to the Model Rules formulation of Rule 8.4(c),<sup>140</sup> leaving unmitigated the chilling effect described above. Moreover, cases such as Gatti's suggest that in the absence of clear guidance, targets of investigations could weaponize Rule 8.4(c) to retaliate against lawyers engaged in investigative deceptions.<sup>141</sup> In the next Part, we consider whether the categorical prohibition of deception raises First Amendment implications.

### III. THE TERRAIN OF FIRST AMENDMENT LAW AND THE LEGAL PROFESSION

In this Part, we explore some of the theoretical claims for why attorney speech may or may not be covered by the First Amendment. If lawyers' expression does not even count as "speech" within the meaning of the Free Speech Clause then, a fortiori, it is not entitled to any constitutional protection.<sup>142</sup> Not surprisingly, we reject that argument and assert that lawyers, like other actors in our political and legal system, may defend their expression under the First Amendment in appropriate circumstances. But even if lawyers' speech falls within the First Amendment's scope, we must also establish why false statements of fact by or under the supervision of attorneys would not constitute an exception to the general rule of coverage. Here, we build the theory, drawing on previous work, that when lawyers are engaged, either directly or in cooperation with their

135. As part of the research for this paper, the authors conducted confidential interviews with six attorneys who engage in practices that might involve counseling undercover investigators to determine whether the Model Rules influence the way they practice or structure their law offices (interview summaries on file with authors). This research is not intended to provide empirical support, but only some anecdotal understanding of how Rule 8.4(c) affects practitioners. Two attorneys (A and B) were supervisory attorneys at nonprofit advocacy organizations, two (C and D) worked at private law firms, and two (E and F) worked in the general counsel's office for major metropolitan newspapers.

136. Interview with Attorneys A and B (supervisory attorneys at nonprofit organizations); Attorneys C and D (private law firms); and Attorneys E and F (newspaper general counsel's office).

137. *Id.*

138. Interview with attorneys A and B.

139. Compare MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2020), with COLO. RULES OF PRO. CONDUCT r. 8.4 (COLO. BAR ASS'N 2020) (Misconduct).

140. MODEL RULES OF PRO. CONDUCT r. 8.4; VARIATIONS OF ABA MODEL RULES, *supra* note 15.

141. See MODEL RULES OF PRO. CONDUCT r. 8.4; see also discussion *supra* Section I.A.

142. U.S. CONST. amend. I; see *R.A.V. v. St. Paul*, 505 U.S. 377, 383–84 (1992).

agents or clients, in lies that are used to further undercover investigations of unlawful or other objectionable (or newsworthy) conduct and produce information that is of public concern, they may at least make a plausible free speech claim.<sup>143</sup> Later, in Part IV, we assess whether lawyers' speech and association relating to investigative deceptions is also *protected* by the First Amendment.<sup>144</sup>

### A. First Amendment Coverage

It is axiomatic under First Amendment doctrine that state action discriminating on the basis of speaker viewpoint or the content of speech is presumptively unconstitutional.<sup>145</sup> Such restrictions are ordinarily subject to strict scrutiny, requiring the state to demonstrate that its regulation is narrowly tailored to serve a compelling government interest that cannot be achieved by less restrictive means.<sup>146</sup> An important exception applies, however, to speech that either does not count as speech for First Amendment purposes or which has been categorically defined as having no value, both of which may be regulated precisely because of their content.<sup>147</sup>

#### 1. General Coverage Claims

Notwithstanding the Constitution's protection of "freedom of speech," a vast amount of human communication that might count as speech to a layperson falls outside the scope of First Amendment coverage.<sup>148</sup> Some types of expression, such as true threats,<sup>149</sup> are typically labeled "no value" or "low value" speech because they contribute little or nothing to public discourse, while also

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143. See Chen & Marceau, *High Value Lies*, *supra* note 12, at 1438; see also Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655, 658 (2018) [hereinafter, Chen & Marceau, *Taxonomy*].

144. Speech can be covered by the First Amendment, yet not protected. See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). For example, under the First Amendment sub-doctrine of commercial speech, expression such as advertising that proposes a commercial transaction is subject to First Amendment scrutiny but may not always be protected. Rather than invalidating such content-based regulations, the Court applies an intermediate scrutiny analysis so that some, but not all, commercial speech is protected. *Id.* at 564. For extensive discussions of the coverage/protection distinction under the law of free speech, see MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* (2017); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

145. Maura Douglas, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PA. J. CONST. L. 727, 732 (2018).

146. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994).

147. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

148. As Professor Schauer has observed, "[i]t would be somewhat more accurate to describe the First Amendment itself as an exception to the general principle that the policy about communication, including the policy about controlling communication, may be made in a non-constitutionalized way without the intervention of courts or constitutional argumentation." Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 697 (1997) [hereinafter Schauer, *Speech of Law*].

149. *Watts v. United States*, 394 U.S. 705, 708 (1969). Other examples of expression that fall within this exemption from First Amendment scrutiny include obscenity, *Miller v. California*, 413 U.S. 15, 23 (1973), fraud, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003), and so-called "fighting words," *Chaplinsky*, 315 U.S. at 571–72.

presumptively causing social harm.<sup>150</sup> In these areas, government regulation, and even prohibition, is categorically permissible.<sup>151</sup>

In an entirely distinct realm, government regulation of many other types of speech does not implicate the values that animate the Free Speech Clause and is therefore not thought to trigger close judicial scrutiny.<sup>152</sup> In these areas, state regulation of speech based on its content, and government compelled speech, normally anathema to the First Amendment, are both routine and uncontroversial.<sup>153</sup> Examples of this type of expression, which is speech in its everyday meaning, but not “speech” for constitutional purposes, include regulation of information included in securities offerings, requirements about the content of labels on prescription drugs, and prohibitions on false or misleading advertising.<sup>154</sup>

Although these two categories of expression that do not count as speech for First Amendment purposes are, qualitatively speaking, vastly different, they share an important commonality—their regulation does not appear to undermine any of the First Amendment values most frequently thought to be advanced by protecting speech from state regulation.<sup>155</sup> Coverage inquiries typically start with an assessment of whether the class of communication in question furthers any of the three central aspirational goals of free speech: advancing the search for “truth,”<sup>156</sup> promoting democratic self-governance,<sup>157</sup> and protecting the self-realization or personal autonomy of the speaker.<sup>158</sup> Furthermore, approaching speech protection from the perspective of negative theory, we are not ordinarily suspicious that government regulation of expression in these categories is likely driven by an impermissible, censorial motive.<sup>159</sup>

Thus, the first step in advancing the claim that lawyers’ work in deceptive undercover investigations is constitutionally protected is determining whether *any* lawyer speech is even covered by the Free Speech Clause. Several legal scholars have offered competing theoretical accounts addressing the latter question and provide a useful template for our discussion.<sup>160</sup>

150. *Chaplinsky*, 315 U.S. at 571–72.

151. *Id.*

152. See, e.g., Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 641–42 (2006) (observing the many ways in which securities regulations affect speech yet are assumed to fall outside of the First Amendment’s scope).

153. See *id.*; sources cited *supra* note 149.

154. Schauer, *Speech of Law*, *supra* note 148, at 691 (describing the federal regime governing securities offerings as a “prototypical prior restraint system”).

155. See *id.*

156. JOHN STUART MILL, ON LIBERTY 82–83 (2d ed. 1859); JOHN MILTON, AREOPAGITICA 4 (1644).

157. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88–89 (1948).

158. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204, 206 (1972).

159. Negative theorists are skeptical of the value of consequentialist approaches to speech theory and instead direct our attention to the reasons we might distrust the government’s decision to regulate a particular form of expression. See, e.g., LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005); Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U.L. REV. 647, 647 (2013).

160. See, e.g., Smolla, *supra* note 30, at 972; Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 30 (2011); Kathleen M. Sullivan, *The Intersection of Free Speech*

Some accounts suggest that professional regulation of lawyers should simply fall outside the concerns of the First Amendment.<sup>161</sup> One theory suggests that because the legal profession's core function is written and oral communication, much of which is heavily regulated, it makes no sense for lawyers to assert free speech claims.<sup>162</sup> Another argument stems from the fact that practicing law is a privilege, not a right, and that attorneys must forego even constitutional rights as the price of admission to the profession.<sup>163</sup> But the law has evolved in ways that make those claims essentially nonstarters, given that the Supreme Court has repeatedly applied free speech doctrine to protect attorneys from the imposition of disciplinary or other legal penalties.<sup>164</sup>

At the other end of the spectrum, scholars have contended that lawyers should, like other citizens, be free to engage in expression, at least outside of the formal context of highly-proceduralized judicial forums such as trials, enjoying the full protection of the First Amendment.<sup>165</sup> This view would demand that the law treat content-based restrictions on attorney speech as highly suspect and subject to the most searching judicial scrutiny, which requires constitutional invalidation in the absence of compelling state interests.<sup>166</sup> The Court has sometimes, though rarely, employed this approach to evaluating restrictions on attorney speech, such as in the case of a state law prohibiting attorneys and judges running for elected judicial positions from stating their views on specified political issues.<sup>167</sup>

A less absolutist position calls for the application of a free speech sub-doctrine, such as the law of commercial speech, to regulations of lawyers' expression.<sup>168</sup> But these categories don't always map well onto the variety of expression lawyers use.<sup>169</sup> For example, although some regulations of attorney speech, such as restrictions on lawyer advertising, might comfortably fit under the umbrella of commercial speech because they involve the proposal of a commercial transaction,<sup>170</sup> many other restrictions do not. The Court has typically evaluated restrictions on lawyer advertising by applying the intermediate scrutiny from its

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*and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 569 (1998); Schauer, *Speech of Law*, *supra* note 148, at 688.

161. See Schauer, *Speech of Law*, *supra* note 148, at 700; Tarkington, *supra* note 160, at 62.

162. Schauer, *Speech of Law*, *supra* note 148, at 688 ("As lawyers, speech is our stock in trade. Speech is all we have."). In addition, attorneys frequently speak not for themselves, but for their clients.

163. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1081 (1991) (Rehnquist, C.J., dissenting). A variation on this claim suggests that as "officers of the court," attorneys might be construed as quasi-state actors, in which case their speech might fall into the class of government speech, which is not subject to ordinary First Amendment constraints. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

164. See Tarkington, *supra* note 160, at 47.

165. *Id.* at 48, 62.

166. *Id.* at 52; VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, *THE FIRST AMENDMENT: CATEGORIES OF SPEECH I* (2019).

167. *Republican Party of Minnesota v. White*, 536 U.S. 765, 776 (2002); see also *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015) (holding under strict scrutiny, compelling state interest in "preserving public confidence in the integrity of the judiciary" justified restriction on speech of candidates for judicial office).

168. Tarkington, *supra* note 160, at 52.

169. See *id.* at 53.

170. *Bates v. State Bar of Arizona*, 433 U.S. 350, 385 (1977).

commercial speech doctrine,<sup>171</sup> but that test is never even invoked in other attorney speech cases.

While we assert that First Amendment rights ought to apply to regulation of lawyers engaged in deception-based undercover investigations, we reject the notion that full-throated strict scrutiny should apply in all cases, or that any of the preexisting sub-doctrines are a good fit for this context. We acknowledge the negative externalities of even more sub-doctrines, but lawyer speech seems to cry out for a more nuanced analysis. Having to discern when an attorney's communication counts as speech under the First Amendment is not unique to this area of free speech law. In the realm of public employee speech, for example, the Court carefully distinguishes between circumstances where a public employee is speaking as a private citizen, in which case her speech is subject to protection,<sup>172</sup> and situations where an employee is speaking on behalf of her employer, in which case she may not enjoy the same protection.<sup>173</sup>

If attorney speech is covered by the First Amendment, at least in some circumstances, we must offer a solid theoretical account of why and in what contexts that should be so. We turn to that discussion in the next Subsection.

## 2. *The Political Nature of Lawyers' Investigative Speech and Association*

First Amendment doctrine regarding lawyer speech is frustratingly opaque—there is neither a strong theoretical framework nor a categorical doctrinal claim about the First Amendment's coverage of lawyer speech.<sup>174</sup> Rather, context very much matters.<sup>175</sup> The context-sensitive nature of the inquiry may explain why the Court has never clearly articulated a distinct “professional speech” doctrine, as its most recent pronouncement on the subject has expressly restated.<sup>176</sup> A more functional approach, therefore, seems to be both descriptively accurate and normatively desirable.

As previously discussed, many routine restrictions on attorney communication are reflexively not thought to even trigger any First Amendment concerns.<sup>177</sup> Because that speech is tethered to the performance of professional obligations in representing individual clients or takes place in forums that have

171. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995); *Zauderer v. Off. Disciplinary Couns. Sup. Ct. Ohio*, 471 U.S. 626, 647 (1985); *Bates*, 433 U.S. at 350.

172. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563, 573–74 (1968); *Connick v. Myers*, 461 U.S. 138, 154 (1983).

173. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). *But see* Tarkington, *supra* note 160, at 52–53 (stating that analysis of attorney speech rights generally takes an all or nothing approach and that “[t]his may be contrasted with the special analysis created by the Supreme Court for restrictions on public employee speech.”).

174. *See* Tarkington, *supra* note 160, at 53.

175. *See id.* at 54.

176. *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) (“[T]his Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’”). For an in-depth exploration of professional speech, see Claudia E. Haupt, *Professional Speech*, 125 *YALE L.J.* 1238 (2016).

177. *See* Tarkington, *supra* note 160, at 53; *see also* Haupt, *supra* note 176, at 1277.

highly ritualized structures for communication, the law frequently does not understand attorneys' expressions to count as speech.<sup>178</sup> Accordingly, lawyer speech, or at least much of it, is routinely subject to substantial professional regulation that raises no suspicion of government censorship.<sup>179</sup> But in other contexts, attorneys may be engaged in a role that transcends individual client representation. That role may further broader societal goals and involve communication and interaction with clients and others that we commonly associate with political or social movements. In those contexts, the Court has been more reluctant to defer to the state's regulation of attorney expression.<sup>180</sup>

Searching for common threads among these cases, we can see that the Court is more protective of lawyer speech when it has a discernable connection to facilitating democracy.<sup>181</sup> For example, in *Republican Party of Minnesota v. White*, the Court struck down a state judicial code of conduct provision forbidding candidates for judicial office from announcing their "views on disputed legal or political issues."<sup>182</sup> Although the provision restricted judges' and lawyers' speech, the Court did not deem the regulation beyond the First Amendment's scope.<sup>183</sup> As the Court noted, expression about candidates' qualifications is at the core of constitutionally protected speech.<sup>184</sup>

In other cases concerning attorney speech that arises in a professional capacity but also implicates the values that most clearly animate the First Amendment, the Court has likewise recognized the applicability of free speech principles.<sup>185</sup> Thus, for example, an attorney may discuss a pending case in the media to expose perceived biased treatment of her client or the unfairness of the criminal justice system to people of color. Here, the courts have not categorically rejected lawyers' speech claims, but have closely weighed the value of the speech against the government's asserted interests in regulation.<sup>186</sup> In *Gentile v. State Bar of Nevada*,<sup>187</sup> disciplinary proceedings were brought against a criminal defense lawyer who suggested at a press conference that his client was a "scapegoat" and was the subject of mistreatment by "crooked cops."<sup>188</sup> The state bar claimed that such speech violated the rule of professional responsibility prohibiting conduct that had a "substantial likelihood of materially prejudicing an adjudicatory proceeding."<sup>189</sup> The Court rejected the lawyer's facial challenge to the rule, concluding that "[b]ecause lawyers have special access to information through discovery and client communications, their extrajudicial statements pose

178. See Tarkington, *supra* note 160, at 54; Haupt, *supra* note 176, at 1280.

179. See Tarkington, *supra* note 160, at 54–55; Haupt, *supra* note 176, at 1284.

180. See Tarkington, *supra* note 160, at 56 n.122; Haupt, *supra* note 176, at 1283.

181. See Tarkington, *supra* note 160, at 56 n.124; Haupt, *supra* note 176, at 1284.

182. *Republican Party of Minnesota v. White*, 536 U.S. 765, 765 (2002).

183. *Id.*

184. *Id.* at 781.

185. See generally *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1030 (1991) (providing example of the Court applying free speech principles to speech delivered in a professional capacity).

186. See generally *id.* at 1038.

187. *Id.* at 1030.

188. *Id.* at 1059.

189. *Id.* at 1033.

a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative."<sup>190</sup> The Court acknowledged, however, that First Amendment rights are implicated when an attorney's public speech is subject to discipline.<sup>191</sup> As a plurality of the Court observed, "this case involves punishment of pure speech in the political forum . . . [the attorney's] words were directed at public officials and their conduct in office."<sup>192</sup>

In a similar vein, the Supreme Court has expressly acknowledged that social change litigation is a form of attorney expression that advances political goals, implicating core First Amendment values.<sup>193</sup> In the realm of cause lawyering, nonprofit organizations and their attorneys frequently seek out plaintiffs to be the face of lawsuits that challenge systemic harms.<sup>194</sup> Such conduct may run afoul of the profession's prohibitions on the direct solicitation of clients, which are motivated by concerns about lawyers overcoming the autonomy of their potential clients by pressuring them to sign retainers. Recognizing the political nature of the speech that is swept up by the anti-solicitation rules, the Supreme Court has subjected such regulations to First Amendment scrutiny.<sup>195</sup>

In *NAACP v. Button*,<sup>196</sup> the Supreme Court invalidated the application of a Virginia statute prohibiting "the improper solicitation of any legal or professional business" to NAACP Legal Defense Fund lawyers.<sup>197</sup> The lawyers had discussed their desegregation litigation in front of audiences at which blank retainer forms were provided to interested participants, thereby violating Virginia's anti-solicitation rule.<sup>198</sup> The Court noted that in this setting, litigation was not just a "technique for resolving private differences," but also "a form of political expression."<sup>199</sup> Similarly, in *In re Primus*,<sup>200</sup> the Court overrode state disciplinary sanctions against an attorney, working with the ACLU, who contacted women who had been sterilized or threatened with sterilization as a condition of receiving Medicaid assistance.<sup>201</sup> Direct attorney solicitation in the context of cause litigation, the Court explained, is both a form of political expression and freedom of association.<sup>202</sup>

190. *Id.* at 1074.

191. A different majority of the Court splintered from the main decision and held that a separate section of the professional conduct rules providing a safe harbor for some attorney speech was unconstitutionally vague. *Id.* at 1082 (O'Connor, J., concurring).

192. *Id.* at 1034.

193. *Id.* at 1034–35.

194. See ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 358–59 (2013).

195. The Model Rules now reflect this difference as well, imposing stricter rules on the solicitation of clients "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." See MODEL RULES OF PROFESSIONAL CONDUCT r. 7.3 (AM. BAR ASS'N 2020).

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

197. *Id.* at 418–19.

198. *Id.* at 424–26.

199. *Id.* at 429.

200. 436 U.S. 412, 412 (1978).

201. *Id.* at 415–16.

202. *Id.* at 428.

As these cases illustrate, there is a strong doctrinal foundation for the protection of attorney speech that implicates core First Amendment values. Building on these cases and emphasizing the unique and essential nature of an attorney's role in the proper functioning of the justice system, Professor Tarkington offers a theoretical approach for determining when regulation of lawyers' speech should be subject to First Amendment scrutiny. As she writes:

Just as citizen free speech is essential to the proper functioning of democracy, the access-to-justice theory posits that certain species of attorney speech are essential to the proper functioning of our justice system. Thus, the core protection for attorney speech must consist of attorney speech that is key to the proper and constitutional functioning of the United States justice system.<sup>203</sup>

Although we agree with Tarkington's general approach, in our view, the First Amendment should apply even more broadly: lawyers frequently play a role in promoting democratic self-governance and advancing the search for truth even when they are not directly facilitating access to justice, which Tarkington defines as "any work of a lawyer (whether paid or not, whether transactional or litigation, whether civil, criminal, or administrative) that invokes or avoids the power of government in securing individual or collective life, liberty, and property."<sup>204</sup> As we argue below, attorneys can play critical roles in our constitutional democracy not only by facilitating access to justice, but by helping to advance social movements through the exposure of information about matters that are unquestionably of public concern.<sup>205</sup>

The Court's analysis in the public interest solicitation cases contributes another important perspective to our framework. Thus far, we have focused on the notion of attorneys' speech (either directly, or perhaps vicariously through their agents or investigators). But how would the First Amendment apply to lawyers' work with clients who are themselves carrying out the underlying investigation? The Court's decisions in *Button* and *Primus* clarify that the solicitation of clients to participate in public interest litigation constituted both freedom of speech and freedom of *association*.<sup>206</sup> Any serious challenge to the application of the ethical rules to attorneys working closely with clients engaged in investigative deceptions would include the claim that, like the solicitation activity found to be protected in those cases, working in close collaboration with clients toward the goal of revealing publicly significant information, whether for litigation purposes or not, is a comparable act of political association.<sup>207</sup>

Finally, we acknowledge that the Supreme Court's path to recognizing the distinctiveness of lawyers' roles when they are engaged in explicitly political

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203. Tarkington, *supra* note 160, at 61.

204. *Id.* at 43.

205. *See infra* Section II.B.

206. *See In re Primus*, 436 U.S. at 428; *NAACP v. Button*, 371 U.S. 415, 428 (1963).

207. *See Button*, 371 U.S. at 431 ("The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time . . . makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.").

work has not been entirely linear. In *Holder v. Humanitarian Law Project*,<sup>208</sup> the Court rejected the First Amendment claims of nonprofit organizations that filed a pre-enforcement challenge to a federal law criminalizing the act of providing “material support” to a “foreign terrorist organization [FTO].”<sup>209</sup> The definition of material support included providing “expert advice or assistance.”<sup>210</sup> The plaintiffs argued that the law prohibited them from engaging in lawful, peaceful advocacy for organizations that had been so designated, including providing legal training and engaging in political advocacy.<sup>211</sup> The *Holder* majority agreed that the law implicated the plaintiffs’ speech rights, including those of the lawyer plaintiffs, but nonetheless rejected their free speech challenge.<sup>212</sup>

One argument distinguishing *Holder* from the lawyer speech cases is that the Court did not seem to view the federal prohibitions as directly affecting attorneys’ expression in carrying out their professional obligations.<sup>213</sup> While the plaintiffs provided legal advice and training, they were not legally representing the alleged FTOs.<sup>214</sup> Rather, their activities were geared toward providing support for the FTOs to engage in their own advocacy in international legal forums.<sup>215</sup>

Another possible distinction that removes *Holder* from the broader category of lawyer speech cases is the relevant national security interests at stake. It is not at all implausible that the Court might have examined the plaintiffs’ First Amendment claims with greater skepticism precisely because there were issues of institutional competence in second-guessing the judgments of Congress and the President. The Court said as much in its opinion, noting that “[t]his litigation implicates sensitive and weighty interests of national security and foreign affairs.”<sup>216</sup> Such national security exceptionalism is hardly rare in free speech cases.<sup>217</sup>

### B. Lawyers and High Value Lies

Even assuming that the First Amendment covers some lawyer speech if it bears a close relationship to political or social advocacy, a second barrier to coverage must be overcome. For decades, the Supreme Court refused to treat falsehoods as speech for constitutional purposes.<sup>218</sup> False statements of fact were

208. 561 U.S. 1, 8 (2010).

209. 18 U.S.C. § 2339B(a)(1).

210. *Id.* § 2339B(g)(4).

211. *Holder*, 561 U.S. at 10–11.

212. *Id.* at 27 (“§ 2339B regulates speech on the basis of its content.”).

213. *Id.* at 24, 59–60.

214. *Id.* at 26.

215. *Id.* at 36–37 (describing plaintiffs’ goals to provide training to an alleged FTO “on how to use humanitarian and international law to peacefully resolve disputes” and teach their members “how to petition various representative bodies such as the United Nations for relief”).

216. *Id.* at 33–34.

217. See Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 *FORDHAM L. REV.* 379, 386 (2017); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 *HARV. C.R.–C.L. L. REV.* 1, 7 (2003).

218. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 223, 340 (1974).

thought to have no speech value because they are more likely to undermine the search for truth and other values at the core of the First Amendment.<sup>219</sup> The Court repeatedly pronounced categorical statements to this effect, such as its claim that “there is no constitutional value in false statements of fact.”<sup>220</sup> This understanding of lies as having no value appeared to be axiomatic as well as intuitively appealing.

To the extent that the Court’s First Amendment decisions ever entertained constitutional protection for false factual statements, they made it clear that such a rule was necessary not to protect falsehoods themselves, but to ensure that truthful speech was not swept up in or chilled by the state’s restrictions.<sup>221</sup> Thus, for example, in *New York Times v. Sullivan*, its seminal case limiting common law defamation claims by public officials against private civil rights groups and the media, the Court held that the Free Speech Clause requires plaintiffs to demonstrate that a defamatory statement was made with actual malice or reckless disregard for the truth.<sup>222</sup> The Court’s reasoning was that without some protection from defamation liability, speakers would be chilled from criticizing public officials.<sup>223</sup> Thus, not long ago, the prospect of constitutional protection for false statements of fact in the absence of such a prophylactic effect would have seemed unsupportable.

The Supreme Court’s decision in *United States v. Alvarez*,<sup>224</sup> however, dramatically changed the free speech landscape by substantially narrowing the scope of lies that are presumptively punishable without violating the First Amendment.<sup>225</sup> At issue in *Alvarez* was the constitutionality of the Stolen Valor Act, which made it a federal crime to falsely claim to have received certain honors from the United States military.<sup>226</sup> The defendant had been convicted under the Act after falsely claiming to have been awarded the Congressional Medal of Honor.<sup>227</sup> A plurality of the Court, joined by a concurrence, held that the government may only prohibit lies that are likely to cause legally cognizable harm to others or yield material, undeserved benefits to the speaker.<sup>228</sup> Rather than accepting the blanket notion that lies and misrepresentations categorically have no value under our free speech regime, the *Alvarez* plurality and concurrence both focused on the more central inquiry about what government interests might

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219. *Id.*

220. *Id.*

221. *Id.* at 340–41.

222. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

223. *Id.* at 279.

224. *United States v. Alvarez*, 567 U.S. 709 (2012).

225. *Id.* at 729–30.

226. 18 U.S.C. § 704, *invalidated by Alvarez*, 567 U.S. 709.

227. *Alvarez*, 567 U.S. at 714.

228. *Id.* at 719, 734 (Breyer, J., concurring). For a discussion of how the Court’s harm/benefit analysis might be applied to a wide range of regulations of false statements, see Chen & Marceau, *Taxonomy*, *supra* note 143. There is some question about whether the material gain analysis is actually an independent aspect of the *Alvarez* test, since frequently false speech that causes cognizable harms simultaneously results in benefits to the speaker, as in the case of fraud. *Id.* at 670.

exist to regulate such falsehoods.<sup>229</sup> Notwithstanding admonitions from prior Supreme Court decisions declaring that lies have no value, the *Alvarez* opinions make it clear that such statements may not be banned without sufficient justification.<sup>230</sup>

Still, there is more to be said than that lies do not always cause cognizable harms or provide undeserved benefits to the liar. The claim that lawyers' investigative deceptions and supervision of those engaged in the same should be covered by the First Amendment rests on the premise that this sort of speech is not only harmless, but paradoxically that it also has significant speech *value*.<sup>231</sup> As we have previously discussed, one method of evaluating whether a category of speech ought to fall within the First Amendment's scope is determining whether that type of expression advances the goals of promoting democratic self-governance, facilitating the search for "truth," and furthering individual self-realization.<sup>232</sup> When lawyers are counseling, advising, and perhaps even supervising undercover investigators who seek to reveal information of great public concern, they are engaged not only in professional conduct, but also in political speech and association.<sup>233</sup> The nonprofit housing lawyer who oversees "testers" is part of a social movement to eradicate unlawful discrimination in property sales and rentals.<sup>234</sup> Similarly, disability rights attorneys who send in investigators to assess compliance with antidiscrimination laws may be part of a larger public interest advocacy coalition.<sup>235</sup> The general counsel for large media outfits who review plans for undercover investigations by television news shows or the print media, while not engaged in political advocacy, are nonetheless part of an institutional effort to expose newsworthy information that might not otherwise see the light of day.<sup>236</sup> Even government lawyers who oversee stings and other undercover investigations to root out fraud or other unlawful activity can be said to be promoting the proper functioning of government, and thereby enhancing democracy.<sup>237</sup>

Since the Court's decision in *Alvarez*, several lower courts have invalidated various "Ag-Gag" laws, which criminalize deceptive conduct used to gain access to agricultural operations for investigative purposes.<sup>238</sup> These courts have embraced the notion that false statements of fact, when used to further investigations

229. See, e.g., Chen & Marceau, *Taxonomy*, *supra* note 143, at 688.

230. *Alvarez*, 567 U.S. at 719, 734 (Breyer, J., concurring).

231. See Chen & Marceau, *High Value Lies*, *supra* note 12, at 1455.

232. See *supra* notes 156–58 and accompanying text.

233. This understanding would place such professional conduct in the category of "high value lies" – false factual statements that nonetheless have intrinsic or instrumental value that advances the goals underlying freedom of speech. The theory of high value lies is fully developed in Chen & Marceau, *High Value Lies*, *supra* note 12.

234. See *id.* at 1464.

235. See *id.* at 1465–66.

236. See *supra* note 135.

237. Paul, *supra* note 16.

238. See *Animal Legal Def. Fund v. Kelly*, 434 F. Supp. 3d 974, 1002 (D. Kan. 2020), *amended by* No. CV 18-2657-KHV, 2020 WL 1659855 (D. Kan. Apr. 3, 2020), *appeal docketed*, No. 20-3082 (10th Cir. May 2020); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018); *Animal Legal Def. Fund v. Reynolds*,

directed at matters of public concern, are both covered and protected by the First Amendment.<sup>239</sup> There is a direct link between the initial deception about the investigator's identity or purpose and the ultimate goal of informing the public about the abusive and oppressive conditions under which our food is produced. This connection is constitutionally significant: the investigator's false statement turns out to be nothing less than a mechanism for facilitating democratic self-governance, one of the chief ideals animating the First Amendment.<sup>240</sup> As previously explained:

[I]nvestigative deceptions are directly connected to the advancement of self-governance . . . . Deception and lies can effectively uncover criminal conduct, enhance transparency in government, expose race discrimination, and reveal animal abuse, among many other types of illegal conduct. These are all matters of public concern, and enhancing citizen scrutiny of them advances public discourse and democracy in meaningful ways.<sup>241</sup>

But how do lawyers fit into this emerging recognition that lies can actually promote First Amendment values? Returning to lawyer speech cases such as *NAACP v. Button* and *In re Primus*, we see that the Court distinguished between ordinary commercial solicitation and political litigation because it was looking for a way to provide enhanced protection to the type of professional association that most directly advances the First Amendment value of facilitating democracy.<sup>242</sup> In that same spirit, we might understand lawyers involved in deceptive investigations to be engaged in a larger enterprise that advances explicit political goals. On this understanding, the Free Speech Clause might reasonably forbid the enforcement of professional conduct rules prohibiting deception and "conduct involving dishonesty, fraud, deceit or misrepresentation" against such lawyers.

As we consider the potential conflict between this rule and First Amendment principles, it bears emphasis that the type of deception we analyze here not only reveals information of public concern, but may in fact expose illegal conduct that is intentionally being concealed to evade justice. These investigative deceptions therefore have a unique relationship to the rule of law: they are specifically designed to uncover truthful information directly leading to the enforcement of a range of criminal and civil legal regulations.<sup>243</sup> Lawyers engaged in undercover investigations may reveal widespread corruption in government, as the federal government did in the so-called Abscam investigation.<sup>244</sup> Housing testers and their lawyers may expose landlords and real estate agents who are

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353 F. Supp. 3d 812, 826–27 (8th Cir. 2019), *appeal docketed*, No. 19-1364 (8th Cir. 2019); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1197, 1213 (D. Utah 2017).

239. *But cf. Wasden*, 878 F.3d at 1202–03 (upholding restrictions on some lies used to gain employment at agricultural facilities).

240. *See* Chen & Marceau, *High Value Lies*, *supra* note 12, at 1482–86.

241. *Id.* at 1474.

242. *NAACP v. Button*, 371 U.S. 415, 428–29 (1963); *In re Primus*, 436 U.S. 412, 428 (1978).

243. *See* Chen & Marceau, *High Value Lies*, *supra* note 12, at 1461.

244. Katie Lannigan, *FBI Undercover 'Stings': Catching Politicians Red-Handed*, ALJAZEERA AM. (Oct. 30, 2013, 9:00 PM), <http://america.aljazeera.com/articles/2013/10/30/fbi-undercover-stingscatchingpoliticiansredhanded.html> [https://perma.cc/96TR-M27H].

themselves using lies about housing availability to discriminate against protected classes.<sup>245</sup> Even those attorneys whose clients have commercial motives at stake—consider the New York Times, for example, or other for-profit media entities—may be engaged in covert investigations intended to expose illegal activity and reveal information of paramount public concern.<sup>246</sup>

The value promoted by such deceptions goes well beyond what Professor Tarkington would call access to justice, although justice is surely involved.<sup>247</sup> Rather, the exposure of such illegalities is fundamental to the rule of law, and it becomes plain that lawyer involvement serves two equally compelling goals: advising the investigators as to the legal framework that governs the conduct of their targets, so that investigators know what to look for, and steering the investigators away from methods that would violate their own legal duties, ensuring that the investigators respect the legitimate privacy rights of their targets.<sup>248</sup> Undercover investigations are thus particularly likely to promote democratic self-governance when investigators have robust and ready access to legal advice.<sup>249</sup>

The transparency values served by undercover investigations are not solely limited to enforcement of existing laws, but provide the grist for reflection and deliberation about how the law should be reformed and improved.<sup>250</sup> In this way, investigative deceptions overseen by attorneys may facilitate the search for truths in a very broad sense, allowing for the development of moral and social values.<sup>251</sup> “[T]he search for truth in the sense of social enlightenment is also advanced by the information produced by investigative deceptions.”<sup>252</sup> The Ag-Gag cases, discussed above, are a compelling example of this claim. When animal rights advocates use deception to gain access to industrial agricultural facilities to expose abuse of animals produced for human consumption, they not only reveal illegal conduct, they gather information that, when disseminated to the public, generates moral debate about the commercial production of animals for food.<sup>253</sup>

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Having now explored the question of coverage, we turn to the analysis of protection. The fact that lawyer involvement in investigative deception counts as speech does not automatically lead to the conclusion that it is constitutionally protected. Sufficiently countervailing government interests might nonetheless provide reasons to regulate or restrict the speech.

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245. Chen & Marceau, *High Value Lies*, *supra* note 12, at 1464–66.

246. *See* Isbell & Salvi, *supra* note 41, at 806.

247. *See* Tarkington, *supra* note 160, at 35.

248. *See* Richmond, *supra* note 71, at 598.

249. *See* Chen & Marceau, *High Value Lies*, *supra* note 12, at 1474.

250. *See id.* at 1468.

251. *See id.* at 1475–76.

252. *Id.* at 1476.

253. *Id.* at 1475–76.

#### IV. IMPLEMENTING A LAWYER FREE SPEECH CLAIM FOR INVESTIGATIVE DECEPTIONS

##### A. *Identifying the Standard of Review*

Assuming that professional responsibility rules prohibiting deception by lawyers who participate in undercover investigations implicate the Free Speech Clause, the next part of the analysis requires us to determine what level of judicial scrutiny should be applied to such laws. As we explored in the previous section, there is no straight analytical path to the appropriate standard of review because it is not at all clear which category of First Amendment rules applies. Or, perhaps more confusingly, it might be that multiple categories of free speech rules apply. First, there is the emerging First Amendment doctrine of lies and free speech. Second, there is the set of doctrines that apply to lawyer speech. Below we discuss each in turn, and then suggest that the confluence of these two regimes calls for some form of intermediate scrutiny.

##### 1. *Post-Alvarez Review Standards*

As noted above, laws that burden speech on the basis of content are presumptively subject to strict scrutiny.<sup>254</sup> To the extent that the Model Rules distinguish between truthful and false speech by lawyers, they are facially content discriminatory.<sup>255</sup> Determining which standard of scrutiny applies, however, turns out to be more complicated than just applying the general rule.

Constitutional protection for lies is a relatively new phenomenon.<sup>256</sup> The plurality and concurring decisions in *Alvarez* establish a presumption that lies are covered by the First Amendment's Free Speech Clause unless they cause a cognizable harm or produce an unjustified material gain for the speaker.<sup>257</sup> Those opinions, however, disagreed about the appropriate level of scrutiny to be applied to laws that prohibit lies.<sup>258</sup> The plurality concluded that the Stolen Valor Act was a restriction on pure speech.<sup>259</sup> Applying the traditional model, it noted that "[i]n assessing content-based restrictions on protected speech, the Court has not adopted a free-wheeling approach, . . . but rather has applied the "most exacting scrutiny."<sup>260</sup> Though articulated slightly differently across cases, the highest level of scrutiny in speech cases generally requires that content-based laws be

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254. *Turner Broad Sys. v. FCC*, 512 U.S. 622, 641–42 (1994).

255. *See, e.g., Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 919 (S.D. Iowa 2018); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1210 (D. Utah 2017).

256. *See Chen & Marceau, High Value Lies, supra* note 12, at 1451.

257. *United States v. Alvarez*, 567 U.S. 709, 719, 723 (2012).

258. *See id.* at 715, 730–31 (Breyer, J., concurring).

259. *Id.* at 730.

260. *Id.* at 724 (citations omitted).

struck down unless the government can show that the restriction is narrowly tailored to serve a compelling government interest and that there are no less restrictive alternatives to advancing that interest.<sup>261</sup>

Justice Breyer's concurring opinion, while agreeing that many government restrictions on lies trigger First Amendment concerns, suggested that an intermediate standard of review would be more appropriate.<sup>262</sup> Rejecting what he called the plurality's "strict categorical analysis," he instead endorsed an approach that examines the degree of First Amendment harm, the legitimacy of the government's interests, and whether those interests could be accomplished in less restrictive ways.<sup>263</sup> Justice Breyer has long advocated that balancing tests such as this should replace categorical formulations not only under First Amendment law, but also in other constitutional doctrines.<sup>264</sup> But critics of this approach maintain that it provides too much discretion in individual cases for judges to import their own values into their decision-making, risking the dilution of constitutional protection for individual rights.<sup>265</sup>

In any event, the absence of a clear majority rule on the applicable standard of scrutiny for government regulation of lies leaves the doctrinal landscape somewhat murky.<sup>266</sup> Many lower courts applying *Alvarez* (but by no means all) have applied strict scrutiny to laws prohibiting false factual statements.<sup>267</sup> As one of us has previously written, the law might consider a range of approaches to the scrutiny issue depending on the nature of the relevant category of lies.<sup>268</sup> Because of the dangers of overzealous and politically-biased government regulators, one might surmise that a higher level of scrutiny would be appropriate where the lies are told in a pure political context.<sup>269</sup> Similarly, out of concern for limiting the

261. See *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000); see also *Alvarez*, 567 U.S. at 725 (noting that the government's means must be "actually necessary" to serve its putative interests).

262. *Alvarez*, 567 U.S. at 730 (Breyer, J., concurring). For a fully developed model explaining which levels of scrutiny should apply to the regulation of different categories of lies, see Chen & Marceau, *Taxonomy*, *supra* note 143.

263. *Alvarez*, 567 U.S. at 730 (Breyer, J., concurring). As Justice Breyer noted, the Court has been inconsistent in what it calls this type of analysis. *Id.* ("Sometimes the Court has referred to this approach as 'intermediate scrutiny,' sometimes as 'proportionality' review, sometimes as an examination of 'fit,' and sometimes it has avoided the application of any label at all.")

264. See generally Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U.L. REV. 375, 411–12 (2009); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 121 n.393 (1997).

265. See Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 283–84 (1995).

266. We do not address the rather opaque rule from *Marks v. United States*, 430 U.S. 188, 193 (1977) for discerning which opinion represents the Court's holding with respect to the standard of review because it does not appear to be particularly helpful for resolving this type of split decision. See Chen & Marceau, *High Value Lies*, *supra* note 12, at 1481 ("The difference between intermediate and strict scrutiny is arguably one of kind, not of breadth, and so it is simply not the case that one opinion is necessarily narrower than the other.")

267. See, e.g., *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 472 (6th Cir. 2016); 281 Care Comm. v. Arneson, 766 F.3d 774, 784 (8th Cir. 2014).

268. Chen & Marceau, *Taxonomy*, *supra* note 143, at 659.

269. See *id.* at 697–700.

production of truthful speech, courts might be more skeptical of the state's attempt to control investigative or "high value" lies.<sup>270</sup> At the same time, it might be overkill to apply the more rigid level of scrutiny to every area in which the government attempts to restrict mistruths. Indeed, the government is unlikely to concern itself with regulating what might be called "socially routine lies," and even when it does so, it is doubtful that its goals would be to suppress controversial political expression.<sup>271</sup>

Even following this taxonomy, however, there are no easy answers to which level of scrutiny ought to apply to the anti-deception provisions of the Model Rules. On the one hand, lawyers who supervise activists and undercover journalists may be using or facilitating high value lies that lead to broad dissemination of information that is of major concern to the public,<sup>272</sup> which would suggest that strict scrutiny should apply. On the other hand, not all investigative deceptions are motivated by pure political motives or to enhance public discourse.<sup>273</sup> For example, a lawyer who uses or endorses deception to discover violations of her client's trademarks is not, or not necessarily, doing so to promote the public interest.<sup>274</sup> Rather, the latter lawyer is likely to be engaged in the practice of law for private gain, both her own and her client's.<sup>275</sup> Even if we took a very broad conception of the public interest that categorized all enforcement of the rule of law as a general public good, the primary motive in such cases is a private one. The law could direct that judges apply strict scrutiny to anti-deception disciplinary rules enforced against the civically-minded lawyer-investigator and *ad hoc* balancing when the same rules are applied to privately-driven lawyers, but that would seem to be both cumbersome and arguably unfair.

Perhaps some more light will be shed when we consider the different levels of scrutiny applicable to a range of disciplinary regulations in the lawyer speech cases.

## 2. *Review Standards in Lawyer Speech Cases*

The disjointed and context-specific way in which the Supreme Court has analyzed speech protection for attorney expression substantially impairs the clarity of free speech law in this context.

### a. Lawyers and Political Speech

As we have seen, the more closely analogous a lawyer's speech is to the political expression of other citizens, the more likely the Court will treat the expression as speech.<sup>276</sup> In such cases, the Court will also apply the most rigorous

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270. *See id.* at 694–97.

271. *Id.* at 700–02.

272. *Id.* at 658.

273. *See* Chen & Marceau, *High Value Lies*, *supra* note 12, at 1477.

274. *See* Chen & Marceau, *Taxonomy*, *supra* note 143, at 669.

275. *Id.* at 657.

276. *Id.* at 669.

standard of review to the state's regulation of such speech.<sup>277</sup> For example, in cases involving lawyers and judges engaged in expression directly related to the electoral process, the Court has treated attorneys' speech like political speech and imposed the traditional strict scrutiny analysis it would apply to other content-based restrictions.<sup>278</sup> Similarly, in the public interest litigation solicitation cases, *NAACP v. Button* and *In re: Primus*, the Court quite clearly applies a strict scrutiny standard to professional conduct rules prohibiting solicitation of clients.<sup>279</sup> Whether we view those cases as protecting purely expressive rights or political association, the Court is comfortable viewing government regulation with a high degree of skepticism. Indeed, even in *Holder*, which reviewed the constitutionality of a federal law prohibiting the provision of material support to foreign terrorist organizations, the Court rejected the government's claim that only intermediate scrutiny should apply and, at least on the surface, applied something akin to strict scrutiny.<sup>280</sup>

#### b. Lawyers and Speech About Their Cases

The *Gentile* case stands in its own corner of this area of First Amendment doctrine.<sup>281</sup> Recall that Gentile was disciplined by the Nevada Supreme Court for statements he made at a press conference after his client was indicted on criminal charges involving the theft of large amounts of cocaine and almost \$300,000 in travelers' checks from a safe deposit vault that was used by a local police unit to store evidence.<sup>282</sup> Several other customers reported valuables and money missing from their safe deposit vaults in the same location.<sup>283</sup> Although two police officers had access to the safe deposit vault, the press coverage, which was based largely on information provided by the police department, suggested that the primary suspect was the owner of the company that rented out the vaults, who was Gentile's client.<sup>284</sup> Believing that this publicity prejudiced the case against his client and might poison the potential jury pool, Gentile held a press

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277. See *id.* at 693–94.

278. See *Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (2002); *Williams-Yulee v. Florida Bar*, 575 U.S. 443, 444 (2015).

279. *In re Primus*, 436 U.S. 412, 432 (1978) (requiring application of “exacting scrutiny” that compels State to justify restrictions with a compelling interest and that its means be “closely drawn to avoid unnecessary abridgment of associational freedoms”); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (requiring state to justify restriction with a compelling state interest without mentioning narrow tailoring requirement).

280. 561 U.S. 1, 28–29 (2010). Although the *Holder* Court never invoked the magic words “strict scrutiny,” it strongly intimated that it was applying a rigorous review standard. Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 587 (2014). Several commentators have criticized the majority opinion in *Holder*, however, for not applying strict scrutiny with the same rigor that appears in other speech cases. See *id.* at 588–89; Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 25 (2012); Heidi Kitrosser, *Free Speech and National Security Bootstraps*, 86 FORDHAM L. REV. 509, 526 (2017); Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455, 516 (2011).

281. See generally *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

282. *Id.* at 1033, 1039.

283. *Id.* at 1041.

284. *Id.* at 1039–41.

conference to help facilitate a more balanced public perception of the case.<sup>285</sup> There, he stated that the evidence would show that his client was innocent, that there was another likely suspect, a police detective who had access to the vault, and that some of the other victims of theft were not credible witnesses because they were “known drug dealers and convicted money launderers.”<sup>286</sup>

Gentile was disciplined for violating a state professional conduct rule that prohibited attorneys from making “an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”<sup>287</sup> The Supreme Court took his case to determine whether the state bar’s enforcement of the rule against Gentile violated his First Amendment free speech rights.<sup>288</sup>

The reason this case is not particularly instructive here is that the Court issued divided opinions offering different grounds and distinct reasoning.<sup>289</sup> In one opinion for the Court, written by Justice Kennedy, a majority held that, as interpreted by the Nevada Supreme Court, the applicable rule was unconstitutionally vague.<sup>290</sup> But in another opinion, written for the Court by Chief Justice Rehnquist, a different majority held that, to the extent that the conduct rule limited professional discipline to lawyers who knew or should have known that there was a “substantial likelihood that his statements would materially prejudice the trial of his client,” the state’s disciplinary actions did not violate Gentile’s speech rights.<sup>291</sup>

Comparing the two separate majority opinions in *Gentile* hardly advances our project of evaluating the proper standard of review in lawyers’ investigative deception cases. First, there is the substantial difference between a vagueness analysis and a more straightforward content discrimination analysis.<sup>292</sup> Second, the Rehnquist opinion somewhat confusingly frames its analysis in terms resembling an incitement case, rejecting Gentile’s proposal to apply an actual prejudice or even a “clear and present danger” or “imminent threat” test.<sup>293</sup> In the end, the dueling opinions illustrate little more than the persistent difficulty in identifying the appropriate standard of review in lawyer speech cases.<sup>294</sup>

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285. *Id.* at 1041–42.

286. *Id.* at 1059.

287. *Id.* at 1033 (quoting NEV. SUP. CT. R. 177 (1991)).

288. *Id.*

289. *Id.* at 1033, 1082 (O’Connor, J., concurring).

290. *Id.* at 1048–51.

291. *Id.* at 1062–63.

292. *Id.* at 1038, 1075.

293. *Id.* at 1069–71.

294. Nowhere in any of the opinions, for example, does any Justice invoke the compelling governmental interest test or the least restrictive means analysis.

### c. Lawyers and Commercial Speech

In still another category of lawyer speech cases, the Court has treated attorneys' expression as commercial speech, defined as expression "related solely to the economic interests of the speaker and its audience."<sup>295</sup> At least when the speech is not misleading, the commercial speech doctrine requires professional regulation standards to satisfy a form of intermediate scrutiny.<sup>296</sup> In its current iteration, the commercial speech test asks whether: (1) "the expression is protected by the First Amendment;" (2) "the asserted governmental interest is substantial;" (3) "the regulation directly advances the governmental interest asserted;" and (4) the regulation "is not more extensive than is necessary to serve that interest."<sup>297</sup>

### d. A Synthesis of Standards of Scrutiny

Like the post-*Alvarez* cases, the Court's lawyer speech cases fall short in determining the appropriate standard of review because the contexts are too disparate to supply a consistent supposition about the relative strengths of the expressive and government interests at stake. Still, they generate some principles from which we might form an argument about the appropriate level of scrutiny. First, the Court is much more likely to apply a more rigorous standard of review when the attorney's speech is more closely analogous to political speech by other citizens than to speech undertaken in the direct service of professional obligations.<sup>298</sup> Higher levels of protection are provided to lawyers who are involved in electoral contests, engaged in litigation to advance political interests, or, depending on the context, criticizing public officials and the larger legal order.<sup>299</sup> But when lawyers' speech involves the business side of law practice, advertising their services and soliciting private clients, the bar has much freer rein to regulate their speech.<sup>300</sup> And, of course, as discussed earlier, when an attorney is speaking in a purely professional mode and in heavily controlled procedural contexts, such as in a courtroom, restraints on her expression might not even trigger any free speech concerns.<sup>301</sup>

One argument for applying strict scrutiny to regulation of lawyers who engage in deception as part of an undercover investigation is that such expression frequently occurs in areas of the law that are politically charged and connected with social movements.<sup>302</sup> We have argued that for these lawyers, there is often

295. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980).

296. *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995); *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626, 638 (1985); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

297. *Cent. Hudson*, 447 U.S. at 566.

298. *See supra* note 279 and accompanying text.

299. *See supra* Subsection III.A.2.a.

300. *Id.*

301. *See supra* Subsection III.A.2.b.

302. *See supra* notes 16–18.

a political or public advocacy element to their conduct, and that there is significant value both in their own speech and in their facilitation of the speech of others working toward these ends.<sup>303</sup> For instance, a lawyer who works for a nonprofit housing organization that employs testers to uncover race discrimination in the housing market most likely considers herself to be part of a larger political project to address racial inequality.<sup>304</sup> Similarly, lawyers who send out testers to identify which employers ask improper mental health questions during job interviews might view themselves as deeply embedded in the disability rights movement.<sup>305</sup> And most attorneys working with animal rights groups to uncover abuse of animals at factory farms surely identify with a broader social reform enterprise.<sup>306</sup>

But this analysis covers only some of the types of investigative deceptions covered by the Model Rules. Prosecutors who oversee law enforcement sting operations may not be viewed as engaged in political expression, even if they consider themselves to be acting in the public interest.<sup>307</sup> And, as we mentioned above, attorneys who facilitate undercover investigations to protect their clients' commercial interests, such as trademark lawyers, are unlikely to be considered as engaging in political, as opposed to private, interests.<sup>308</sup> Even further removed from the political realm are lawyers like Daniel Gatti, who may be using deception to gain information critical to zealously advocating for their clients.<sup>309</sup> Again, each of these lawyers could be said to be engaged in the larger project of enforcing the rule of law, inuring to the benefit of all citizens. But the argument sits somewhat uncomfortably with the distinction the Court has drawn in its cases involving advocacy by nonprofit public interest groups such as the NAACP and ACLU.

Nonetheless, it is essential to recognize that drawing distinctions among lawyers based on their political motivations, ideals, or associations would severely complicate the First Amendment analysis. Doing so would create a regime in which some lawyers who engage in deception to conduct undercover investigations would have a robust First Amendment defense to disciplinary sanctions, but others would have a much weaker speech claim. Not only would this be confusing, and potentially unfair to the lawyers who are not as "political," but it also risks even further balkanizing the already complicated patchwork of First Amendment rules applicable to regulation of lawyers' speech.

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303. See *supra* p. 108.

304. CHEN & CUMMINGS, *supra* note 194, at 87–88.

305. See, e.g., *Employment Advice for People with Psychiatric Disabilities*, DISABILITY RTS. TEX. (Aug. 15, 2018), <https://www.disabilityrightstx.org/en/handout/employment-advice-for-people-with-psychiatric-disabilities/> [https://perma.cc/RD3U-VMH5].

306. Woodhouse, *supra* note 7.

307. CHEN & CUMMINGS, *supra* note 194, at 373.

308. See *supra* p. 105.

309. *In re Conduct of Gatti*, 8 P.3d 966, 969 (Or. 2000)

### 3. *Toward a Unified Intermediate Scrutiny Standard*

Given the range of approaches the Court has taken to these different areas of First Amendment doctrine, we argue here that an intermediate scrutiny standard is appropriate. Applying intermediate scrutiny to Rule 8.4(c) requires the government to justify the categorical ban on any attorney speech with a deceptive element, no matter the context.<sup>310</sup> As we discuss below, the government interests in maintaining an undifferentiated prohibition on all attorney deception turn out to be rather thin, such that lawyers facing sanction for investigative deceptions will be likely to succeed in pressing their free speech claims.<sup>311</sup> The intermediate scrutiny standard is thus sufficiently protective of valuable speech interests while allowing the bar to screen for opportunistic assertions of free speech claims that mask truly problematic lawyer deception.<sup>312</sup>

In endorsing an intermediate standard of scrutiny, we must also articulate and defend precisely what that standard would look like. We do not mean to embrace an open-ended form of ad hoc constitutional balancing of the sort sometimes articulated by Justice Breyer.<sup>313</sup> That type of intermediate scrutiny would give judges unmoored discretion to weigh the value of the lawyer's speech interest against the asserted interests of the professional regulators without any further guidance. Ultimately, of course, all constitutional tests of any level require courts to weigh the constitutional liberty against the asserted government interests that supposedly justify intrusions on that liberty.<sup>314</sup> But balancing tests with no structure or framework seem unhelpful to future courts and allow a great deal of subjectivity in their application.<sup>315</sup>

This brings us to a more general problem about intermediate scrutiny tests that is not indigenous to this project. Even if we wish to guard against a free-wheeling balancing approach, the Court has articulated several distinct intermediate scrutiny tests under different First Amendment sub-doctrines.<sup>316</sup> In one of the most commonly invoked intermediate scrutiny tests, articulated in *Ward v. Rock Against Racism*, the Court examines content neutral government restrictions on expression in a public forum by asking whether the law is "narrowly tailored to serve a significant governmental interest."<sup>317</sup> The law must "leave open ample alternative channels for communication of the information" to be

310. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

311. *See supra* Section III.B.

312. Moreover, the applicable standard of review is probably not relevant to a practical problem that lawyers engaged in undercover investigations are likely to face. Lawyers who are threatened with disciplinary sanctions for engaging in investigative deceptions would be limited to asserting First Amendment claims as an affirmative defense. The level of scrutiny would not alter the procedural barrier imposed by the generally valid application of the rules.

313. *See* Mark Tushnet, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508, 510 (2014).

314. Chen, *supra* note 265, at 298.

315. *Id.*

316. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

317. *Ward*, 491 U.S. at 791.

upheld.<sup>318</sup> The Court has articulated a similar version of intermediate scrutiny for cases involving content neutral regulation of expressive conduct, such as the burning of a draft card.<sup>319</sup> In *United States v. O'Brien*, the Court stated that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>320</sup>

Yet another form of intermediate scrutiny comes from the Court's commercial speech cases, as we described above.<sup>321</sup> Although these tests were originally designed to address very distinct speech concerns and contexts, as Professor Bhagwat has observed, the Court has essentially merged them into one standard, with the *Ward* test evolving into the preferred intermediate scrutiny rule.<sup>322</sup> We therefore advocate its application here.<sup>323</sup>

Although there are certainly criticisms of all these forms of intermediate scrutiny, there is value in the courts' familiarity and experience operationalizing the *Ward* test in so many different contexts. To be sure, there is still plenty of room for judicial discretion and excessive deference to the government's interests under the *Ward* test,<sup>324</sup> but it has the relative advantage of at least requiring the courts to articulate reasons for upholding any government restriction on speech.<sup>325</sup> Where necessary, it also permits courts to account more closely for the nuances of lawyer speech regulation in different contexts.<sup>326</sup> And though it might be considered unusual to advocate for intermediate scrutiny when discussing an overtly content-based regulation such as the anti-deception prohibitions in the Model Rules, that approach is already operative in some other areas of First Amendment doctrine.<sup>327</sup> Commercial speech and professional speech cases, as we have seen, already apply intermediate scrutiny to some content-based regulations.<sup>328</sup>

Furthermore, even if they invoke slightly different wording, the intermediate scrutiny tests share common attributes that are easily understood. First, the fit between the government's means and their objectives must be close, but the government need not show that its chosen measure is necessary as is required

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318. *Id.*

319. *O'Brien*, 391 U.S. at 369 (1968).

320. *Id.* at 377.

321. See *supra* notes 295–297 and accompanying text.

322. Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C.L. REV. 141, 168–69 (1995).

323. *Id.*

324. See *id.*; see also Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1260–64 (1995).

325. Bhagwat, *supra* note 322, at 170.

326. See *supra* Subsection III.A.2.

327. *Id.*

328. *Id.*

under strict scrutiny.<sup>329</sup> Accordingly, the government need not select the least speech-restrictive alternative in advancing its interests.<sup>330</sup> While there are varying degrees with which the Court describes the closeness of the required fit, it still has to be considerably more than “rational” under any of the formulations.<sup>331</sup> Second, the government’s interest in regulating speech must be “significant” or “important” or “substantial,” all of which connote something more than just “legitimate” but less than “compelling.”<sup>332</sup>

To be sure, critics of an intermediate scrutiny approach would not lack arguments. First, of course, one could suggest that the entire enterprise of intermediate scrutiny, or indeed of establishing levels of scrutiny, is fraught with indeterminacy.<sup>333</sup> The inescapable challenge, however, is to identify viable alternatives. An open-ended balancing regime would be even more susceptible to an indeterminacy critique, and turning towards either strict scrutiny or rational basis review risks either over- or under-inclusiveness in this specialized area where there are potentially strong interests on both sides of the ledger.<sup>334</sup> In trying to outrun these persistent problems, we encounter few options other than complete judicial abdication or bright-line rules that will again be heavily over- and under-inclusive, such as Professor Schauer’s assertion that lawyers’ speech should simply be beyond the First Amendment’s concerns.<sup>335</sup> Intermediate scrutiny strikes a tolerable balance between these competing concerns, recognizing the important speech interests at stake while at the same time allowing for a careful examination of the state’s purposes in regulating attorney involvement in deception.<sup>336</sup> We undertake this latter assessment in the next Section.

### B. *Assessing the State’s Interests*

What interests are furthered by Rule 8.4(c)’s categorical prohibition on deception of any sort? To begin, it is useful to observe that Rule 8.4(c) is lacking exactly what seems to be constitutionally required by *Alvarez*: a materiality limitation.<sup>337</sup> Some commentators have urged that the rule should be read as if it

329. “To meet the requirement of narrow tailoring [under intermediate scrutiny], the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government’s interests, not simply that the chosen route is easier.” *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

330. *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989).

331. *Id.* at 797.

332. *Id.* at 798–99.

333. See, e.g., Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397, 397 (1998).

334. *Id.* at 399.

335. Schauer, *Speech of Law*, *supra* note 148, at 688.

336. Paulsen, *supra* note 333, at 399.

337. *Alvarez* uses “materiality” in reference to the undeserved gain secured by the liar that pushes the lie outside the bounds of First Amendment protection. *United States v. Alvarez*, 567 U.S. 709, 723 (2012). Here, we refer to materiality as a limitation on the scope of the Model Rules, one that would subject lawyers to discipline only for lies that are material to concerns about professional conduct. Finally, we note that a third meaning of materiality emerges from *Alvarez*, in determining whether the regulated *lie* is material to the listener, and therefore likely to be relied upon. *Id.* at 734, 738–39 (Breyer, J., concurring).

includes one,<sup>338</sup> but the perils of such an approach are clear,<sup>339</sup> and its absence is especially easy to see when contrasting Rule 8.4(c) to the alternative versions adopted in a few states. Virginia, for example, has added a clause limiting Rule 8.4(c)'s reach to deception “which reflects adversely on the lawyer’s fitness to practice law,”<sup>340</sup> and Michigan has adopted a similar variation.<sup>341</sup> As a general matter, these “adverse reflection” clauses convey that not all dishonesty is tantamount to professional misconduct—there must be something about the deception from which the profession could reasonably draw negative inferences about the lawyer’s commitment to practicing law in an ethical and responsible manner. While an adverse reflection clause does not speak specifically to an attorney’s participation in undercover investigations,<sup>342</sup> it is thought to allow such involvement, because misrepresentations about an investigator’s identity or purpose do not reflect adversely on the fitness of the lawyer who advises the investigation.<sup>343</sup>

The larger point is that Rule 8.4(c)'s absolute prohibition on all deception—regardless of severity or degree of relation to the practice of law—is not the only way to convey a robust commitment to honesty in the legal profession.<sup>344</sup> In assessing the strength of the government interest in enforcing an absolute anti-deception rule, it is illuminating to consider whether states like Virginia and Michigan have lost something meaningful in their regulation of the legal profession by limiting the reach of the anti-deception rule to those instances that reflect adversely on a lawyer’s fitness to practice law. If not, those variations serve as exemplars of more narrowly tailored alternatives.

The absence of a materiality limitation in Rule 8.4(c) also stands in stark contrast to the tailored reach of Rule 8.4(b), which makes it professional misconduct “to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>345</sup> As one of the authors has previously observed, the combination of

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338. For a discussion of the infirmities with this approach, see *supra* Part I.

339. See, e.g., Richmond, *supra* note 71, at 596. Richmond observes that “[i]n most cases, a lawyer’s employment of undercover investigators does not necessarily indicate that the lawyer is untrustworthy or lacks integrity.” *Id.* He goes on to acknowledge that the argument that such conduct should therefore not be considered to violate Rule 8.4(c), “although plausible, is not sure to succeed.” *Id.*

340. VA. RULES OF PRO. CONDUCT r. 8.4(c) (VA. BAR ASS’N 2018).

341. MICH. RULES OF PRO. CONDUCT r. 8.4 (MICH. BAR ASS’N 2020).

342. Unlike the variations adopted in Oregon and Colorado that address investigations specifically. COLO. RULES OF PRO. CONDUCT r. 8.4 (COLO. BAR ASS’N 2020); OR. RULES OF PRO. CONDUCT r. 8.4 (OR. BAR ASS’N 2020).

343. See, e.g., Rachel L. Carnaggio, *Pretext Investigations: An Ethical Dilemma for IP Attorneys*, 43 COLO. LAW. 41, 42 (2014); see also *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119, 123 (S.D.N.Y. 1999) (noting that, as of 1999, “this type of conduct, used frequently by undercover agents in criminal cases and by discrimination testers in civil cases, has not been condemned on ethical grounds by courts, ethics committees, or grievance committees”). To the extent that such lies might reflect adversely on a lawyer’s fitness, we address that interest independently, below. See *infra* Subsection III.B.3.

344. We note that these variations raise problems of their own, conferring a troubling amount of discretion on bar regulators, which could be used in a discriminatory or retaliatory manner. That said, these variations reflect a rational attempt to tailor the reach of the anti-deception constraint—perhaps an approach that is, on balance, better than Rule 8.4(c), even accounting for the trouble with excessive discretion.

345. MODEL RULES OF PRO. CONDUCT r. 8.4(b) (AM. BAR ASS’N 2018).

choices reflected in Rule 8.4(b) and (c) thus create a strange landscape in which a lawyer might engage in criminal conduct that is thought not to be ‘relevant to law practice’ and thus not sanctionable, while another might engage in lawful deception, perhaps even of demonstrable social utility, and yet suffer discipline.<sup>346</sup>

This seems like a peculiar ordering of values—why is the truthfulness obligation more absolute than even the duty to obey the law? And yet, when we widen the lens to compare Rule 8.4(c) to other rules that govern the truthfulness of attorney speech, we see that those provisions, unlike Rule 8.4(c), do include qualifications that tailor the scope of the constraint.<sup>347</sup> Rule 4.1, for example, instructs that “[i]n the course of representing a client a lawyer shall not knowingly make a false statement of *material* fact or law to a third person.” Similarly, Rule 7.1 prohibits lawyers from false or misleading communication about the lawyer or the lawyer’s services, defined as containing “a material misrepresentation” or omission.<sup>348</sup>

As these comparisons to other provisions reveal, the legal profession repeatedly uses materiality and relatedness to professional fitness as limiting principles for the application of ethical duties.<sup>349</sup> In its unqualified character, Rule 8.4(c) is somewhat of an outlier in the Model Rules—and because it implicates speech covered under the First Amendment, we should ask why the limiting techniques pervasive throughout the Rules cannot work to advance the government interest in imposing an attorney truthfulness obligation.

Reading Rule 8.4(c) intertextually with the other rules yields another important insight for our First Amendment analysis: Rule 8.4(c) works alongside the full panoply of other provisions that address the specific harms that a reasonably well-functioning legal profession would seek to prevent. In the scenarios where the lawyer’s contemplated involvement in an undercover investigation is constrained *only* by Rule 8.4(c), it is simply the deceptive nature of the conduct that makes it sanctionable.<sup>350</sup> The more specific prohibitions addressed throughout the remainder of the Rules—interference with the attorney-client relationship, prejudicing the administration of justice, misleading the tribunal—independently continue to govern a lawyer’s conduct in any scenario in which those harms are implicated.<sup>351</sup> It is therefore inapt to defend or justify Rule 8.4(c)’s current iteration by invoking, for example, the importance of ensuring that an

346. Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 74–75 (2018).

347. See, e.g., MODEL RULES OF PRO. CONDUCT r. 4.1 (“In the course of representing a client a lawyer shall not knowingly . . . make a false statement of *material* fact or law to a third person” (emphasis added)).

348. See also *id.* r. 7.1 (“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a *material* misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not *materially* misleading.” (emphasis added)).

349. *Id.*; *Id.* r. 4.1.

350. *Id.* r. 8.4(c).

351. *Id.* r. 3.3 (Candor Toward the Tribunal); *Id.* r. 3.4 (Fairness to Opposing Party and Counsel).

unrepresented person whose interests conflict with an attorney's client is not misled by the attorney into believing that the attorney is protecting her interests.<sup>352</sup> This concern, while significant, is independently addressed in Rule 4.3.<sup>353</sup> Similarly, any justifications grounded in the importance of protecting the integrity of the trial process will quickly founder because of the multiple other provisions that specifically govern a lawyer's obligations to the tribunal and to opposing parties in the context of pending or anticipated legal proceedings.<sup>354</sup>

The force of these other obligations will significantly limit the range of harms that Rule 8.4(c) itself can be said to prevent. As a particularly useful illustration, consider the Colorado Criminal Defense Bar's submission to the Colorado Supreme Court, opposing an investigation exception to Rule 8.4(c).<sup>355</sup> To explain its position that Rule 8.4(c) should not be revised to allow attorneys to engage in investigation-related deception, the Colorado Criminal Defense Bar asserted:

There are any number of factual scenarios in which the proposed Rule change would allow a lawyer, through his non-lawyer designee, to mislead. For instance, it would be possible for a defense attorney to direct her investigator to lead a prosecution witness to believe she works for the prosecution in order to obtain an interview. Nothing would prevent an attorney from devising a sting operation to be implemented by others in order to catch an adverse witness in a compromising situation. Similarly, it would no longer be unethical for a prosecutor to tell his victim/witness coordinator to pass false information to a victim/witness, which, depending on the circumstances, could be advantageous to the prosecution's case. One can easily imagine a situation in which a prosecution witness is hesitant to testify and the prosecutor directs his staff to convey false, yet damaging, information in an attempt to persuade the witness to testify.<sup>356</sup>

These examples rightly give us pause; they strike us as troubling, even abusive instances of attorney misrepresentation—scenarios that we would not want the legal profession to ratify or the First Amendment to protect. The problem with using them to explore the state interests advanced by Rule 8.4(c) is that each one is independently prohibited by *other* ethical obligations.<sup>357</sup> A defense counsel cannot direct an investigator to lie to a prosecution witness about who the investigator works for because of Rule 4.3, which requires that an attorney “not

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352. Model Rule 4.3 addresses this specific scenario. *Id.* r. 4.3.

353. *See id.* This is why the *Pautler* case is distinctive – the prosecutor's deception was of a specific nature that violated Rule 4.3 in addition to Rule 8.4(c). *In re Pautler*, 47 P.3d 1175, 1184 (Colo. 2002).

354. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.3 (Candor Toward the Tribunal); MODEL RULES OF PRO. CONDUCT r. 3.4 (Fairness to Opposing Party and Counsel).

355. Kathleen McGuire & Philip Cherner, Colo. Crim. Def. Bar, *Proposed Amendment to C.R.P.C. 8.4(c)*, in COMBINED COMMENTS TO THE COLORADO SUPREME COURT 30 (2017), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20of%20Prof%20Conduct.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20of%20Prof%20Conduct.pdf) [<https://perma.cc/PXK4-NPVU>].

356. *Id.*

357. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 4.3 (requiring attorneys to clarify if they have reason to believe that an unrepresented person has misunderstood their role in a matter).

state or imply that the lawyer is disinterested.”<sup>358</sup> Under Rule 4.3, the attorney must also affirmatively correct an unrepresented party’s misunderstanding about the attorney’s “role in the matter.”<sup>359</sup> Setting out to catch an adverse witness in a compromising situation would continue to be governed by Rule 4.4, which states that “in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”<sup>360</sup> The same provision would seem to contravene the idea that a prosecutor would be able to pass along “false, but damaging, information” to a victim/witness with the potential to benefit the state’s case.<sup>361</sup> And all of these examples, which clearly assume a pending legal proceeding, would also be governed Rule 8.4(d), which prohibits any conduct “prejudicial to the administration of justice.”<sup>362</sup>

In assessing the state interests underlying Rule 8.4(c), we should be asking whether there is any convincing justification to prohibit immaterial,<sup>363</sup> lawful deception *that does not implicate any other professional duties*. What is the state’s interest in prohibiting lawful deception of demonstrable social utility? In the Sections that follow, we consider several possibilities, in each instance isolating the territory covered only by Rule 8.4(c) to ensure an accurate assessment of the state interest in enforcing that particular provision against attorneys who might advise investigators.

### 1. *Tangible Second- and Third-Party Harms*

Once we have homed in on the territory that only Rule 8.4(c) governs, we have a much more focused inquiry for assessing whether applying the rule to investigative deceptions works to prevent tangible second- or third-party harms. When a state enforces Rule 8.4(c) against an attorney whose *only* misconduct is her involvement in an investigation that has deceptive qualities, is the state working to prevent any tangible second- or third-party harms? Individuals and organizations targeted by such investigations would surely have a ready answer—but while it is clear that these parties would prefer not to be investigated, it is much less clear that this preference translates into a cognizable harm that can serve as the predicate for a convincing state interest.

358. *See id.* The scenario would also likely constitute a violation of Rule 7.1 to the extent that it could be considered “a false or misleading communication about the lawyer or the lawyer’s services.” *Id.* r. 7.1.

359. *Id.* r. 4.3. As discussed previously, the investigator’s conduct would be imputed to the attorney under both Rules 5.3 and 8.4(a). *See supra* Section I.B.

360. MODEL RULES OF PRO. CONDUCT r. 4.4.

361. This example is somewhat opaque. If there was the potential for the false information to enter into the witness’s testimony, then additional provisions would apply, including Rule 3.4(b), which states that a lawyer shall not “assist a witness to testify falsely.” *Id.* r. 3.4(b). And of course, Rule 3.3(a)(3) forbids a lawyer from offering evidence “that the lawyer knows to be false.” *Id.* r. 3.3(a)(3).

362. *Id.* r. 8.4(d).

363. Here used as shorthand for the concept that the deception is not of the sort that would reflect adversely on a lawyer’s fitness to practice law.

When we are talking about lawful investigations,<sup>364</sup> whether it be law enforcement officials seeking to uncover criminal activity or housing testers seeking to discover racial discrimination in rental properties, the subject of the investigation has no entitlement to be free of the investigation.<sup>365</sup> Quite the contrary—courts have “repeatedly approved and sanctioned the role of ‘testers’ in racial discrimination cases,”<sup>366</sup> and there is no serious dispute that law enforcement is permitted to use a wide range of deceptive tactics to ensnare those engaged in criminal activity.<sup>367</sup>

We could conceive of Rule 8.4(c) as conferring some sort of indirect entitlement to not have *attorneys* involved in those investigations.<sup>368</sup> But it is difficult to imagine how that provides any benefit at all to the parties being investigated, much less the public at large. As the submissions to the Colorado Supreme Court reveal, many investigations into illegal conduct proceed notwithstanding the rule—the attorneys simply absent themselves from the investigations, at the cost of ensuring that the investigations are undertaken lawfully and in a way that respects the rights of the subjects.<sup>369</sup> Colorado’s experience gives us a concrete

364. Additional complexity is presented by state laws that attempt to criminalize or impose civil liability for investigative work, which would seem to take any covered investigations out of the realm of “lawful.” Such state laws have been repeatedly struck down and continue to be challenged in federal court as violative of the First Amendment. *See, e.g.*, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018); *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 826 (S.D. Iowa 2019); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017). *See also* *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547, 558 (M.D.N.C. 2020) (declaring portions of North Carolina’s civil anti-whistleblower law to be unconstitutional), *appeal docketed*, No. 20-1807 (4th Cir. July 24, 2020). Although attorneys are not permitted to assist clients in conduct that is criminal or fraudulent, Rule 1.2(d) allows attorneys to assist with a good faith effort to determine the validity of a law, providing an avenue to resolve the 1.2(d) concerns about the ostensibly criminal nature of the investigation. MODEL RULES OF PRO. CONDUCT r. 1.2(d). Rule 8.4(c), which does not turn on the lawfulness of the conduct, applies regardless of whether there is state law purporting to criminalize the investigation. *Id.* r. 8.4(c). The variations adopted in Colorado and Oregon, on the other hand, exempt from the anti-deception rule only “lawful investigative activities,” raising questions about whether an attorney could assist with an investigation that had been purportedly criminalized, but by a law that is constitutionally invalid. COLO. RULES OF PRO. CONDUCT r. 8.4(c) (COLO. BAR ASS’N 2020); OR. CODE OF PRO. CONDUCT r. 1-102(D) (OR. BAR ASS’N 2020). We would define “lawful investigative activities” as those that have either not been prohibited or those that the state is not permitted to prohibit by virtue of the First Amendment.

365. *Gidatex S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119, 123 (S.D.N.Y. 1999).

366. *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983).

367. *See, e.g.*, *Lewis v. United States*, 385 U.S. 206, 210 (1966) (refusing to “hold the deceptions of the agent in this case constitutionally prohibited” for fear of creating “a rule that the use of undercover agents in any manner is virtually unconstitutional per se. Such a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest.”). For a discussion of the use of deception by government officials, see Helen Norton, *The Government’s Lies and the Constitution*, 91 IND. L.J. 73, 94 (2015) (addressing the difference between government lies that are coercive and “those that are instead ‘merely’ deceptive”).

368. We mean this only in the most abstract sense, in the spirit of thinking generously about the interests furthered by precluding lawyer participation in deceptive investigations. The ethical rules do not in fact confer any entitlements on third parties, as the Preamble specifies:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached . . . . The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

MODEL RULES OF PRO. CONDUCT (AM. BAR ASS’N 2018), Scope ¶ 20.

369. Rothrock, *supra* note 91, at 76.

example upon which to draw: what possible benefit was achieved—either for suspected sex offenders or anyone else—by moving the Internet sex offender investigation unit out of the district attorney’s office and into the sheriff’s office? To conclude that the application of Rule 8.4(c) to attorneys advising investigations protects against a tangible second- or third-party harm, we would have to believe that the target of an investigation experiences more harm when an attorney is counseling the investigators than when she is not.<sup>370</sup> The supposition is transparently illogical. An investigation that proceeds without the benefit of a lawyer’s advice is more likely to lead to harm, either to the investigators or to the targets, than ones that proceed with attorney involvement.<sup>371</sup>

To be sure, there are investigations that simply don’t take place because of Rule 8.4(c).<sup>372</sup> Colorado’s Civil Rights Education and Enforcement Center, for example, attested that their attorneys had been unwilling to participate in undercover testing because of the rule and “turned down potentially meritorious cases” as a result.<sup>373</sup> But neither can this alternative response to the anti-deception rule be said to serve the goal of protecting against tangible second- or third-party harms in the sense that is necessary for the articulation of a valid state interest. If attorneys cannot advise or otherwise participate in investigations without fear of discipline, and potential investigatory teams will not proceed without counsel, then illegal or immoral conduct will remain secret—and will continue. Any benefit this confers upon those whose wrongdoing therefore never comes to light is obviously not a public benefit; there is no coherent state interest in insulating wrongdoers from investigation.

If Rule 8.4(c) is not preventing specific, tangible second- and third-party harms on the micro level, is it nonetheless serving an important, albeit less direct, function in the regulation of the legal profession? We consider this possibility in the next Subsection.

## 2. *Moral Harm and Reputational Damage to the Legal Profession*

Honesty is obviously a preeminent moral value.<sup>374</sup> Philosophers from Immanuel Kant to Sissela Bok to Seana Shiffrin have contended that lying is harmful, even aside from the tangible, instrumentalist concerns that might or might

370. Cf. Jeff Chostner & Thomas R. Raynes, Colo. Dist. Att’y’s Council, *Regarding Proposed Rule Change to RPC 8.4(c)*, in COMBINED COMMENTS TO THE COLORADO SUPREME COURT 35 (2017), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf) [<https://perma.cc/PXK4-NPVU>].

371. See *id.* at 34.

372. See *id.*

373. See *supra* Section I.C.

374. See, e.g., W. Bradley Wendel, *Truthfulness as an Ethical Form of Life*, 56 DUQ. L. REV. 141, 145 (2018) (“Seeking to learn the truth and communicate it accurately to other people are virtues that are necessary to a common form of life characterized by trust, respect, and the protection of human dignity.”).

not attend a particular falsehood, because lying deprives the listener of her autonomy.<sup>375</sup> As David Strauss has explained, “[l]ying forces the victim to pursue the speaker’s objectives instead of the victim’s own objectives.”<sup>376</sup> Perhaps because honesty is, in most circumstances, a self-evident moral good, when it comes to professional regulation—which does not attempt to make lawyers “professionally answerable” for every moral breach and instead focuses on its connection to fitness for the practice of law<sup>377</sup>—courts and commentators have struggled to articulate precisely the concrete interests that undergird Rule 8.4(c).<sup>378</sup> It is not hard to find statements exhorting the importance of honesty to the legal profession—on the contrary, examples like the following are plentiful: “Attorneys must adhere to high moral and ethical standards. Truthfulness, honesty, and candor are core values of the legal profession.”<sup>379</sup> But even the more detailed efforts to explain the rule’s functional importance to the legal profession remain rather vague. One court, explaining why an attorney’s violation of the rule should result in disbarment rather than suspension,<sup>380</sup> opined that:

In today’s society, more than ever before, the legal profession touches and affects nearly every facet of private and public life. Without debating the merits of this pervasiveness, one indisputable consequence of such an increase has occurred: the need for maintaining and requiring the highest possible levels of honesty and trustworthiness from the legal practitioners in this State. No single transgression reflects more negatively on the legal profession than a lie. As well as being the most fundamental of dishonesties, a lie is the most pernicious; it is easily and readily concealed and, as evidenced by the actions of this respondent, it serves as the seed for a growth of future dishonesty.<sup>381</sup>

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375. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? 40, 48 (Lewis White Beck trans., 1959); SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1999); SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 24 (2014). *But see* Chen & Marceau, *High Value Lies*, *supra* note 12, at 1501 (“We assert that laws targeting investigative deceptions for criminal punishment fall within an area that could well be argued to fall outside of Shiffirin’s general theory because these laws represent a high risk that the government is abusing its regulatory powers to influence expression.”).

376. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991).

377. MODEL RULES OF PRO. CONDUCT r. 8.4, cmt. 2 (AM. BAR ASS’N 2018) (noting that there are “offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.”).

378. *See infra* notes 379–87 and accompanying text.

379. *In re DeRose*, 55 P.3d 126, 131 (Colo. 2002); *see also* *People v. Ritland*, 327 P.3d 914, 929 (Colo. 2014) (“Respondent flouted a cardinal principle: that lawyers must tell the truth in their professional and personal lives.”).

380. *Astles’ Case*, 594 A.2d 167, 170 (N.H. 1991). Note that this was not a case in which the Rule 8.4(c) violation was related to an undercover investigation. The attorney had mishandled client funds, violating Rule 1.15, and then lied about it. *Id.* Nonetheless, the discussion offers some insight into the goals and objectives underlying Rule 8.4(c).

381. *Astles’ Case*, 594 A.2d at 170.

This somewhat opaque explanation begins with an observation about the legal profession's growing reach, and then posits without elaboration that an "in-disputable consequence" of this expansion is an increased need for "the highest possible levels of honesty."<sup>382</sup> The reasoning becomes clearer at the heart of the passage, expressing the concern that the *reputation* of the legal profession as a whole suffers when an attorney tells a lie.<sup>383</sup> This concern is widespread: the pronouncement that "no single transgression reflects more negatively on the legal profession than a lie" has been quoted repeatedly by other courts and commentators.<sup>384</sup> A much wider sampling of cases and commentary similarly emphasizes the importance of protecting the legal profession's public image. One commenter defending the categorical anti-deception rule begins his work by retelling a lawyer joke, clearly meant to indicate that the profession's public image is in need of rehabilitation: "How can you tell when a lawyer is lying? His lips are moving."<sup>385</sup> The author goes on to assert that "[w]hen the profession condones the use of these dishonest tactics by adopting exceptions to rules of professional conduct regarding honesty, the profession as a whole is viewed as dishonest."<sup>386</sup>

The pattern that emerges across multiple examples is an emphasis on public perception of the legal profession rather than a functional analysis of why attorney honesty is essential to the effective management of the legal system.<sup>387</sup> That is not to say that such an endeavor would not be possible—indeed, we attempt it in the next Section—but that a great deal of the discourse surrounding Rule 8.4(c) treats the profession's public image as a sufficient justification for the rule.<sup>388</sup>

Can the state interest in protecting the public image of the legal profession serve as an adequate justification for prohibiting lawyers from involvement in undercover investigations? On one hand, there is something that seems a bit superficial about this outward-facing rationale, suggesting something more akin to a public relations campaign rather than genuine self-regulation grounded on professional expertise.<sup>389</sup> On the other hand, surely it is legitimate, maybe even important, for the legal profession to attend to the public's perception of lawyers,

382. *Id.*

383. *Id.*

384. *See, e.g.,* Law. Disciplinary Bd. v. Campbell, 807 S.E.2d 817, 820–21 (W. Va. 2017) (noting how a lawyer misrepresented to her supervisor the nature of her relationship with a client); Grew's Case, 934 A.2d 537, 542 (N.H. 2007) (describing how a lawyer committed insurance fraud). There are at least fourteen other cases and twelve secondary sources which quote this pronouncement.

385. Dance, *supra* note 35, at 791.

386. *Id.*

387. *See also In re DeRose*, 55 P.3d 126, 131 (Colo. 2002) ("Lawyers serve our system of justice as officers of the court, and if lawyers are dishonest, then there is a perception that the system must also be dishonest. Attorney misconduct perpetuates the public's misperception of the legal profession and breaches the public and professional trust." (citation omitted)); *People v. Ritland*, 327 P.3d 914, 925 (Colo. 2014) ("Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest. Certainly, the reality of such behavior must be abjured so that the perception of it may diminish." (quoting *In re Pautler*, 47 P.3d 1175, 1179 (Colo. 2002))).

388. *See supra* notes 383–87 and accompanying text.

389. Dean Smolla's work explains the importance of the distinction between "palpably functional rationales" and "more ethereal values such as promoting respect for the rule of law, maintaining professionalism and

and to attempt to shore up public confidence in lawyers.<sup>390</sup> Lawyers are “officers of the court”<sup>391</sup> who enjoy exclusive access to the judicial system and monopolistic control over the provision of legal services.<sup>392</sup> The lawyer-client relationship itself is characterized by extraordinary asymmetries of information and expertise, and cannot function without some level of trust between attorneys and clients.<sup>393</sup> There are any number of ways we could explain the intuition that the profession must avidly protect its public image and that a categorical anti-deception rule is essential to doing so. But while it is plausible in the abstract to invoke the profession’s public image as a state interest underlying Rule 8.4(c), the reasoning falters upon closer inspection.

First, it is important to emphasize that preventing lawyers from participating in investigations does not advance the goal of fostering trust between attorneys and their own clients—it instead limits attorneys in the tools they can offer to further their clients’ lawful objectives.<sup>394</sup> One court, refusing to conclude that attorneys who had hired investigators to pose as consumers had violated New York’s ethical rule prohibiting misrepresentation, went so far as to suggest that the rule is really only concerned with misrepresentations that interfere with an attorney-client relationship or victimize an attorney’s own client: “The policy interests behind forbidding misrepresentations by attorneys are to protect parties from being tricked into making statements in the absence of their counsel and to protect clients from misrepresentations by their own attorneys.”<sup>395</sup> This is, to be sure, an unusually narrow understanding of the purposes of the anti-deception rule, but it nonetheless serves to highlight an important point: Rule 8.4(c) as written applies indiscriminately regardless of whether the deception at issue is undertaken as an investigative technique to further the client’s lawful objectives, or whether the lawyer is deceiving her own client and abusing her position of trust.<sup>396</sup> Even if one is unwilling to conclude that *only* the latter should be governed by Rule 8.4(c), it is not difficult to acknowledge that the latter is clearly of

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public confidence in the legal system, and safeguarding the dignity of the profession.” Smolla, *supra* note 30, at 971. The latter, he observes, raises more difficult First Amendment questions because those justifications are so abstract. *Id.*

390. See, e.g., Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE U. L. REV. 123, 132 (2008) (“Many lawyers have bemoaned the profession’s loss of prestige and note the general public views lawyers as less than truthful.”).

391. See, e.g., Aviel, *supra* note 346, at 33 n.6 (collecting sources that describe lawyers as officers of the court); MODEL RULES OF PRO. CONDUCT pmb1. ¶ 1 (AM. BAR ASS’N 2018).

392. “Many local, state, and national bar associations have recently launched initiatives to broaden the definition, raise the penalties, and increase the enforcement of unauthorized practice prohibitions.” Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 406–07 (2004).

393. See, e.g., Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1015–16 (1980–1981).

394. See, e.g., Tory L. Lucas, *To Catch a Criminal, to Cleanse a Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of Public Debate and Creating an Express Investigation Deception Exception to the ABA Model Rules of Professional Conduct*, 89 NEB. L. REV. 219, 226–27 (2010).

395. *Gidatex, S.r.L. v. Campaniello Imports of Florida, Ltd.*, 82 F. Supp. 2d 119, 122 (S.D.N.Y. 1999).

396. See Kathryn A. Thompson, *Legal White Lies*, ABA J. (Mar. 28, 2005, 11:52 AM), [https://www.abajournal.com/magazine/article/legal\\_white\\_lies](https://www.abajournal.com/magazine/article/legal_white_lies) [<https://perma.cc/JLT6-66GG>] (“On its face, Rule 8.4(c) appears to prohibit deceptive activities of any sort.”).

more serious concern, and considerably more germane to a general sense of public confidence in the legal profession.

Second, as explained above, drafting choices made in other provisions belie the supposition that only a categorical rule can promote the profession's interest in having lawyers perceived as absolutely honest. Ostensibly, the profession's public image would also be compromised by the impression that lawyers did not scrupulously obey the law,<sup>397</sup> but Rule 8.4(b) treats as professional misconduct only those criminal acts that reflect "adversely" on the lawyer's fitness to practice.<sup>398</sup> The duty of confidentiality, treated as a cornerstone of professional responsibility and perhaps the paradigmatic lawyerly virtue,<sup>399</sup> allows lawyers to reveal confidences without client consent "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client[.]"<sup>400</sup> Would an investigation exception to the anti-deception rule really impair the profession's public image more than the carve-outs and concessions to self-interest already pervasive throughout the rules? The available evidence does not so suggest. Reflecting on the nineteen jurisdictions that have amended their version of Rule 8.4(c) to provide some level of accommodation for attorney supervision of undercover investigations, the Director of the Center for Ethics and Public Integrity at the National Attorneys General Training and Research Institute indicated that there has been "no degradation in attorney professionalism," or indeed "any negative effect."<sup>401</sup> Surely the attorneys in those jurisdictions are also inclined to guard their public image.

A successful defense of Rule 8.4(c), if there is one, will have to be grounded on a particularized assessment of the role of honesty in the practice of law, and its resistance to a tailored rather than categorical rule. Perhaps there is such a close connection between lawyer truthfulness and fitness to practice law that by insisting categorically on the first, the profession is ensuring the second. In the next Subsection, we assess whether a strict insistence on lawyer honesty at all times and in all settings is justified by the particular relationship between honesty and the practice of law.

397. Cf. MODEL RULES OF PRO. CONDUCT pmb1. ¶ 5 (AM. BAR ASS'N 2018).

398. *Id.* r. 8.4(b).

399. See, e.g., David L. Hudson Jr., *Opinion Makes Confidentiality Exception for 'Generally Known' Info*, ABA J. (Mar. 1, 2018, 2:10 AM), [https://www.abajournal.com/magazine/article/ethics\\_opinion\\_makes\\_confidentiality\\_exception\\_for\\_generally\\_known\\_info](https://www.abajournal.com/magazine/article/ethics_opinion_makes_confidentiality_exception_for_generally_known_info) [<https://perma.cc/T2LS-ZFV4>] ("Confidentiality is one of the cornerstone concepts of professional responsibility.").

400. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5).

401. Cynthia H. Coffman, State of Colo. Dep't of L., *Proposed Amendment to Colorado Rule of Professional Conduct 8.4(c)*, in COMBINED COMMENTS TO THE COLORADO SUPREME COURT 7-8 (2017), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf) [<https://perma.cc/PXK4-NPVU>].

### 3. *The Connection Between Attorney Honesty and Fitness to Practice Law*

With a bit more precision about the practice of law and the role of truth within it, can we substantiate the intuition that lawyer honesty is not merely a matter of the profession's public image or an aspiration to a general moral value, but also an essential component of the effective functioning of the legal system? As careful theorists of lawyer speech have taken pains to explain, the practice of law has an entirely unique relationship to speech and speech acts. Professor Schauer posits that:

As lawyers, speech is our stock in trade. Speech is all we have. Our tools are books and not saws or scalpels. Our product is argument, persuasion, negotiation, and documentation, so speaking (by which I include writing) is not only central to what the legal system is all about, and not only the product of law as we know it, but basically the only thing that lawyers and the legal system have.<sup>402</sup>

Professor Tarkington pushes back on the idea that “speech is all we have,” urging that “speech in the abstract is not the end product of the law or the service that clients seek.”<sup>403</sup> Instead, she observes, “What the legal system has to offer is the force of law.”<sup>404</sup> She goes on to explain that:

Clients use attorney speech to invoke or to avoid the power of government. Often what clients pay for when they hire an attorney is not speech at all (even though it is accomplished through speech) but a legally binding result. For example, a client may seek: a plea agreement; the creation of a business association; an estate that will be probated according to the wishes of the testator; the discharge of debts; recognition under the Geneva Conventions; the dissolution of a marriage; payment for personal injuries caused by another; or acquisition of a valid title to property.<sup>405</sup>

Whether we emphasize Schauer's formulation of “the speech-soaked character of law” or Tarkington's observation that lawyers use speech to produce legally conclusive and practically significant effects, we can start to develop a better sense of why the profession would need to vigorously regulate the truthfulness of attorney speech.<sup>406</sup> If, per Schauer, “[s]peech is all we have,”<sup>407</sup> then we must ensure that this precious currency not be devalued through the issuance of counterfeit. As Hannah Arendt observed, “[i]f everybody always lies to you, the consequence is not that you believe the lies, but rather that nobody believes

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402. Schauer, *Speech of Law*, *supra* note 148, at 688.

403. Tarkington, *supra* note 160, at 37–38.

404. *Id.* at 38.

405. *Id.*

406. Not only do our professional services consist entirely of speech acts, and our utterances often have legally conclusive and practically significant effects, but because of the confidentiality duty we also routinely do not speak when others would wish us to do so—we stay silent when doing so presents enormous costs to third parties.

407. Schauer, *Speech of Law*, *supra* note 148, at 688.

anything any longer.”<sup>408</sup> And as for the “legally binding result[s]” that Tarkington describes,<sup>409</sup> whether it be the orderly discharge of debts or the acquisition of valid title according to law, these depend on our ability to rely upon attorney speech with robust and unhesitating confidence. Perhaps honesty is so fundamental to the practice of law that it requires extraordinary vigilance in its regulation—an approach we might call deliberate over-protection.

The deliberate over-protection rationale might be defended on several distinct grounds. First, we might observe that the bar’s categorical and trans-contextual insistence on absolute honesty has a significant expressive purpose—it reinforces the importance of truthfulness more effectively than a tailored, circumscribed approach with detailed qualifiers and exclusions. As Colorado’s Attorney Regulation Counsel argued, the categorical nature of the rule makes it “clear and unambiguous.”<sup>410</sup> Alternatively, the unqualified nature of the truthfulness obligation might serve a prophylactic function—as is said in the Jewish legal tradition, building a fence around the law.<sup>411</sup> In this vein, one might see Rule 8.4(c) as a catch-all provision that is a necessary failsafe for the rules that more precisely protect against specific harms such as interference with the attorney-client relationship, the integrity of trial processes, and so on. Where the regulatory objective is so essential and the concern so trans-contextual, our hypothetical bar regulator might say, it can’t be trusted only to the piecemeal provisions that reflect our first order assessments of where attorney misrepresentation works concrete harms. Deliberate over-protection might also guarantee against what we could call the risk of leakage—the concern that once the profession allows any exceptions to the truthfulness obligation, it will have to contend with attorneys whose motives are less than pure asserting that their lies, too, are socially useful.<sup>412</sup> Sorting one category from the other, our regulator might plausibly argue, is sure to be tedious and costly.

But the appeal of deliberate over-protection must be weighed against its costs—both as a matter of ordinary policymaking and as a matter of constitutional analysis. As to the former, Professor Sam Buell captures perfectly why the broadest of prohibitions is not necessarily the right approach, even where we are most determined to stamp out harmful behavior and unquestionably seeking to advance worthy objectives:

[L]aw can choose to speak very generally, in the form of broad prohibitions designed to cover all possible forms an undesirable behavior might take. Such prohibitions unfortunately almost always turn out to be overbroad,

408. *Hannah Arendt: From an Interview*, N.Y. REV. (Oct. 26, 1978), <https://www.nybooks.com/articles/1978/10/26/hannah-arendt-from-an-interview/> [<https://perma.cc/9HQN-MY7P>].

409. Tarkington, *supra* note 160, at 38.

410. Coyle, *supra* note 134, at 38.

411. Daniel Joslyn-Siemiatkoski, *Comparative Theology and the Status of Judaism: Hegemony and Reversals*, in *THE NEW COMPARATIVE THEOLOGY: THINKING INTERRELIGIOUSLY IN THE 21ST CENTURY* 104 (Francis X. Clooney S.J. ed., 2010).

412. *See infra* note 413 and accompanying text.

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risking overdeterrence of desirable conduct and punishment of undeserving actors.<sup>413</sup>

Bringing the focus back to undercover investigations, the concern about “overdeterrence of desirable conduct” is well-founded, as explored above. While insistent state bar regulators might wish to press on nonetheless, committed to the deliberate over-protection approach in spite of its costs, their discretion to do so is limited by their constitutional obligations.<sup>414</sup> This, in the end, is why it matters that the direction, supervision, and provision of advice to undercover investigators has a constitutional dimension, one that lends itself to the kind of intermediate scrutiny pervasive in other First Amendment contexts. The fact that these are speech acts covered by the First Amendment demands that the state take a tailored approach, one that reflects a careful assessment of costs and benefits.

## V. CONCLUSION

Lawyers engaged in investigative deception are working at the intersection of several distinct First Amendment doctrines, including professional speech, speech that conveys false statements of fact, the differentiation of commercial speech from political speech, and freedom of association. This Article has undertaken a close analysis of these disparate doctrines, revealing that the First Amendment provides some protection for lawyers who face professional sanction under the anti-deception rule.

Unlike many of the other professional conduct rules, the categorical ban on attorneys engaging in deceptive speech or conduct is in no way limited by requirements of materiality, fitness to practice, or risk of second- or third-party harms. It therefore imposes a substantial, documented chill on lawyers who might otherwise engage in such work in their practices. The professional conduct rules that govern deception by lawyers serve valuable functions, but their impermeability does not adequately account for lies that serve legally and socially valuable purposes. These high value lies do not lose their character simply because attorneys are involved. On the contrary, attorneys who engage in or coordinate with others conducting investigative deceptions serve values that are both critical to their professional roles as zealous representatives of their clients and advance important speech interests that the First Amendment embraces.

These goals could be satisfied by widespread adoption of an exception for work involving lawful undercover investigations, as some states have already enacted, but these changes are occurring at a snail’s pace and there is still significant opposition from the bar. Recognizing a First Amendment right, consistent with the rights of others to engage in investigative deceptions, would provide a uniform rule across jurisdictions and remove the recognized chilling effect that the current, blanket anti-deception rules create.

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413. Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 615 (2011).

414. See *supra* note 30 and accompanying text.

Finally, imposing a First Amendment doctrinal protection for this type of lawyer speech through the application of intermediate scrutiny should be sufficient to protect legitimate investigative activity while minimizing the potential for abuse of the right by unscrupulous practitioners. Such a standard also fits in well with the prior doctrinal structures that typically apply to lawyers' expression. As has been observed again and again, lawyers simply do not enjoy the full panoply of free speech rights that ordinary citizens may invoke. But for all the reasons explored in this Article, they ought to have the right to provide counsel, advice, and supervision to individuals and entities engaged in investigations – even the deceptive kind.