

STATE COURT DIVERSITY AND ATTORNEY DISCIPLINE

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INTRODUCTION

State supreme courts are the ultimate arbiters of attorney behavior for members of the state bar. While state supreme courts generally oversee an office of attorney regulation that handles the intake, investigation, and some adjudication of disciplinary complaints, each state supreme court is potentially the final decision maker regarding possible sanctions for attorney behavior.

In many states, however, the state supreme court bar is substantially less diverse along lines of race and gender than the state bar it regulates.¹ The disparity is even greater in comparison to the overall population of the states.² As of February 2020, twenty-three states have an all-white supreme court,³ including twelve states in which people of color comprise at least 20 percent of the state population.⁴ Similarly, fourteen states have only one woman on their highest courts.⁵

This Essay considers the implications for attorney regulation of the lack of racial and gender equity on many state supreme courts. Drawing on social science data and research about judicial decision-making, it suggests that demographic differences in perception and judgment may affect adjudication of some disciplinary disputes, particularly those involving allegations of racial or gender bias or of racial or sexual harassment. In light of the American Bar Association's addition of Model Rule 8.4(g)—which

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1. See Alicia Bannon & Janna Adelstein, *State Supreme Court Diversity—February 2020 Update*, BRENNAN CTR. FOR JUST. (Feb. 20, 2020), <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-february-2020-update> [<https://perma.cc/66T7-G3R6>].

2. *Id.*

3. These states are: Alabama, Alaska, Arkansas, Idaho, Indiana, Kansas, Kentucky, Maine, Michigan, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. See *id.*

4. *Id.*

5. *Id.*

implicates identity-based discrimination—to the Model Rules of Professional Conduct, such an inquiry is particularly timely.⁶

This Essay proceeds in three parts. In the first part, it introduces demographic data relating to state supreme courts, the bars they regulate, and the populations they serve. It then turns to the literature regarding perceptual disparities among members of different groups and the influence of identity on judicial decision-making. The final part focuses on the attorney complaint process itself. While that process proceeds almost entirely in secrecy in many states, this Essay suggests some reasonable inferences from available information.

This Essay concludes with two proposals, one obvious and one less so. The obvious proposal is that those charged with composing state supreme courts should attend to the demographic composition of the court as one consideration, as evidence indicates that the demographic composition of courts can have substantive consequences.⁷ The less obvious proposal is that attorney disciplinary proceedings should not operate in secrecy. In addition to the many other concerns with secret proceedings,⁸ they serve to obscure potential racial and gender disparities in who is sanctioned and why.

I. DEMOGRAPHIC SURVEY

Many state supreme courts are not diverse along lines of either race or gender, both in an absolute sense and when compared to the membership of the state bar and the population of the state as a whole.⁹ Yet relatively little research has systematically examined courts' demographics or compared those demographics to the demographics of the pools from which state

6. Model Rule 8.4(g) states:

It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

7. The implementation of this proposal may vary quite a bit depending on who is charged with composing the state supreme court: in states where the state supreme court justices are appointed, it may be relatively easy to introduce demographic diversity as a consideration if the relevant decision makers are willing to do so. In states where the justices are elected—particularly in a partisan fashion, as in Alabama, Illinois, Louisiana, North Carolina, Pennsylvania, and Texas—a shift toward greater diversity may be more challenging. Yet, even in those states, a shift may not be impossible. When a vacancy arises in a state with partisan elections, a governor may choose to appoint a justice who increases the diversity of the bench. In Texas, for example, the first Black justice, Wallace Jefferson, was appointed by Governor Rick Perry in 2001. *Wallace Jefferson's Biography*, VOTE SMART, <https://justfacts.votesmart.org/candidate/biography/59079/wallace-jefferson> [<https://perma.cc/R5NZ-Y5GL>] (last visited Jan. 27, 2021).

8. Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 1 (2007) (observing that “remarkably little is known about the effectiveness of lawyer discipline or the fairness of the discipline systems” because in most jurisdictions, nearly all disciplinary information is private).

9. Bannon & Adelstein, *supra* note 1.

supreme court justices are drawn. This part briefly surveys the demographics of state supreme courts and the constituencies they regulate and serve.

A brief note on terminology is in order: in discussing primary research, this Essay adopts the demographic identifiers used by those who performed the research. For example, “African American” versus “Black,” “female” versus “woman,” and so forth.

A. State Supreme Courts

State supreme courts are composed of either five, seven, or nine justices, and the justices are selected in a variety of ways, including gubernatorial appointment, legislative appointment, nonpartisan election, and partisan election.¹⁰ In February 2020, the Brennan Center for Justice updated an extensive report about diversity on state supreme courts.¹¹ Its researchers observed that “[a] diverse bench is crucial to achieving a fair system of justice and promoting public trust in our courts.”¹²

Yet the diversity of state supreme courts differs considerably from one state to the next, and in many states the lack of racial and gender representation is stark. As of February 2020, the supreme courts of twenty-three states consisted only of white people,¹³ and twelve of those states have populations consisting of at least 20 percent people of color.¹⁴

A similar pattern appears in relation to gender: fourteen state supreme courts have only one woman.¹⁵ With minor variations, the population of most states is about half men and half women.¹⁶

Combining the data on race and gender diversity is also illuminating. Four state supreme courts in states where the general population is at least 20

10. See Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1645–47 (2010) (collecting information from official sources).

11. Bannon & Adelstein, *supra* note 1.

12. *Id.* All information in this section is drawn from the Brennan Center report. Previous researchers have also done important work and examined more dimensions of identity. See, e.g., Gregory L. Acquaviva & John D. Castiglione, *Judicial Diversity on State Supreme Courts*, 39 SETON HALL L. REV. 1203 (2009). However, this Essay relies on the Brennan Center report as the most recent complete study regarding race and gender on state supreme courts.

13. See Bannon & Adelstein, *supra* note 1.

14. *Id.* These states were: Alabama (35 percent), Alaska (40 percent), Arkansas (28 percent), Indiana (21 percent), Kansas (24 percent), Michigan (25 percent), Nebraska (21 percent), Nevada (51 percent), Pennsylvania (24 percent), Rhode Island (28 percent), Tennessee (26 percent), and Utah (22 percent). *Id.*

15. *Id.* These states were: Alaska, Arizona, Connecticut, Florida, Georgia, Idaho, Indiana, Louisiana, Mississippi, New Hampshire, North Dakota, Rhode Island, South Carolina, and Utah. *Id.* The Brennan Center report actually states that Florida’s seven-member supreme court included *zero* women. *Id.* However, Justice Jamie R. Grosshans was appointed on Sept. 14, 2020. *Justice Jamie R. Grosshans*, FLA. SUP. CT., <https://www.floridasupremecourt.org/Justices/Justice-Jamie-R.-Grosshans> [https://perma.cc/WPF8-VP3W] (last visited Jan. 27, 2021).

16. Hunter Schwarz, *In Most States, Women Outnumber Men*, WASH. POST. (Nov. 14, 2014, 11:02 AM), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/11/10/in-most-states-women-outnumber-men/> [https://perma.cc/WB6V-73ND].

percent nonwhite include only white people *and* only one woman.¹⁷ These states are: Alaska, Indiana, Rhode Island, and Utah.¹⁸ Finally, thirty-three state supreme courts include no women of color.¹⁹

B. *The Populations State Supreme Courts Serve*

Precise data on the demographics of the bar membership of each state are difficult to obtain. Some states keep detailed records, which they make readily available on their websites; others offer only outdated information, present information opaquely, or do not make it available at all.²⁰ To some degree the challenge is logistical: the membership of a bar is inherently fluid, with attorneys seeking admission both through bar examination and reciprocity; moving between active and inactive status for a variety of reasons; and retiring or otherwise leaving practice. And to retreat one step further, the demographics of the population at large also do not explain apparent disparities in the racial and gender makeup of the bar.

With those caveats, neither gender disparities in the membership of the bar nor in the general population appear to explain fully the disparities at the state supreme court level. Nearly every state has roughly the same number of men and women. In many instances, there *are* disparities in the bar membership, which are then magnified at the supreme court level. In Florida, for example, the state bar reports its membership as 61 percent male and 39 percent female.²¹ With one female supreme court justice out of seven, the supreme court is 14 percent female.²² Similarly, in Alaska, the population is 47.7 percent female and 52.3 percent male, but the bar is 37.8 percent female and 62.2 percent male.²³ Following the same trend, just one out of five supreme court justices—20 percent—is female.²⁴

A similar pattern emerges with respect to race. In Michigan, about 25 percent of the population consists of people of color.²⁵ The bar is whiter—people of color are approximately 18 percent of active resident members of

17. See Bannon & Adelstein, *supra* note 1.

18. *Id.*

19. *Id.*

20. See, e.g., MARGOT BOTSFORD ET AL., SUP. JUD. CT. STEERING COMM. ON LAW. WELL-BEING, SUPREME JUDICIAL COURT STEERING COMMITTEE ON LAWYER WELL-BEING REPORT TO THE JUSTICES 24 (2019), <https://www.mass.gov/doc/supreme-judicial-court-steering-committee-on-lawyer-well-being-report-to-the-justices/download> [https://perma.cc/9J9P-QU2A] (recommending that the Massachusetts Supreme Judicial Court begin collecting demographic data regarding the state's attorneys).

21. FLA. BAR, RESULTS OF THE 2018 ECONOMICS AND LAW OFFICE MANAGEMENT SURVEY 63 (2019), <https://www-media.floridabar.org/uploads/2019/03/2018-Economics-Survey-Report-Final.pdf> [https://perma.cc/L7VM-ZECQ].

22. See *Florida Supreme Court Justices*, FLA. SUP. CT., <https://www.floridasupremecourt.org/Justices> [https://perma.cc/NKX2-HZYH] (last visited Jan. 27, 2021).

23. *Member Statistics*, ALASKA BAR ASS'N, <https://alaskabar.org/for-lawyers/member-statistics> [https://perma.cc/3F39-7JL7] (last visited Jan. 27, 2021).

24. *Id.*

25. See *QuickFacts: Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/MI> [https://perma.cc/PYD3-N9LW] (last visited Jan. 27, 2021).

the bar²⁶—and there are no people of color on the Michigan Supreme Court.²⁷

The pattern that emerges in Florida, Alaska, Michigan, and several other states is that the bar is disproportionately white and male compared to the population of the state as a whole. In turn, the state supreme court is disproportionately white and male compared to the bar. This pattern is not universal, but it is consistent among several states. It reveals that the lack of racial and gender diversity on state supreme courts is not simply replicating existing disparities in the broader population.

II. DIVERSITY AND ATTORNEY REGULATION

Demographic diversity can affect both the process and outcome of dispute resolution. The effect of diversity arises in part from the different perspectives of members of different demographic groups.

Russell Robinson powerfully illustrates a concept that he calls “perceptual segregation”—that white and nonwhite people, and especially white people and Black people, often interpret the same events differently and that the same is true of men and women.²⁸ As he explains: “Both insiders and outsiders have perceptual limitations, which may obscure their ability to ascertain discrimination.”²⁹ Robinson argues that these differences in perception can affect interpersonal relationships among romantic partners, friends, and coworkers.³⁰ Although the question has not been directly examined, one might reasonably hypothesize that differences in perception likewise affect interactions among state supreme court justices. More to the point, if there are *no* people of color on a state supreme court—as is the case in twenty-three states³¹—that might affect their decision-making processes, too.

Survey evidence likewise reveals a disparity in perspectives between people of different races and between men and women regarding workplace equality.³² A Pew Research Center poll found that 63 percent of women believed that they experienced gender-based obstacles to progress, while only 41 percent of men believed the same of women.³³ Beyond the

26. STATE BAR OF MICH., 2019–2020 STATEWIDE AND COUNTY DEMOGRAPHICS 2 (2019–2020), <https://www.michbar.org/file/opinions/statewidedemographics2019.pdf> [https://perma.cc/B26E-3XJQ].

27. See *Justices: 2019 Michigan Supreme Court Bench*, MICH. CTS., <https://courts.michigan.gov/courts/michigansupremecourt/justices/pages/default.aspx> [https://perma.cc/C74V-YL94] (last visited Jan. 27, 2021).

28. See generally Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1117–39 (2008).

29. *Id.* at 1139.

30. *Id.*

31. See Bannon & Adelstein, *supra* note 1.

32. *Id.* at 1106–17 (collecting research).

33. Hannah Fingerhut, *In Both Parties, Men and Women Differ Over Whether Women Still Face Obstacles to Progress*, PEW RSCH. CTR. (Aug. 16, 2016), <https://www.pewresearch.org/fact-tank/2016/08/16/in-both-parties-men-and-women-differ-over-whether-women-still-face-obstacles-to-progress> [https://perma.cc/9TAB-UAZW].

workplace, the perceptual gap persists. When asked whether men or women “have it easier” in the United States today, 41 percent of women but only 28 percent of men believed that men have it easier, while 14 percent of men but only 5 percent of women believe that women have it easier.³⁴

This disparity extends to the legal profession. While for the past few decades men and women have graduated from law school in approximately equal numbers,³⁵ the percentage of women grows smaller at each successive professional level: for example, as of 2017, women are only about 19 percent of equity partners and 5 percent of managing partners at the top 200 U.S. law firms.³⁶

The disparity in perspectives extends to sexual harassment. Nationally, approximately 25 percent of women in the legal profession reported sexual harassment when such behavior was defined as “unwanted sexual comments, physical contact, and/or romantic advances,”³⁷ and one in ten women of color and one in eight white women reported that they lost career opportunities “because they rejected sexual advances in the workplace.”³⁸ By contrast, only 7 percent of white men and 11 percent of men of color reported sexual harassment.³⁹

White people have different experiences from people of color, and men have different experiences from women. A lifetime of such differences leads to a difference in the way that the two groups see the world. And when one perspective is disproportionately represented, disputes are likely to be disproportionately resolved consistent with that group’s perception. In particular, group dynamics are likely to influence the decision-making process, sometimes along demographic lines.⁴⁰

Researchers have uncovered concrete differences in the relationship between demographics and dispute resolution. A study of 1666 cases involving claims of sexual harassment or sex discrimination revealed that female judges decided for plaintiffs more often than did male judges.⁴¹

34. Juliana Menasce Horowitz et al., *Wide Partisan Gaps in U.S. over How Far the Country Has Come on Gender Equality*, PEW RSCH. CTR. (Oct. 18, 2017), <https://www.pewsocialtrends.org/2017/10/18/wide-partisan-gaps-in-u-s-over-how-far-the-country-has-come-on-gender-equality> [<https://perma.cc/V7WM-PN9N>].

35. Destiny Peery, *Number of Women Equity Partners in Law Firms Maintains a Slow and Steady Pace*, ANN. SURV. REP. (Nat’l Ass’n of Women Laws., Chi., Ill.), 2017, at 1, 2.

36. *Id.* at 2.

37. JOAN C. WILLIAMS ET AL., AM. BAR. ASS’N, YOU CAN’T CHANGE WHAT YOU CAN’T SEE: EXECUTIVE SUMMARY, INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION 9 (2018); see also Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> [<https://perma.cc/2DPK-4RGW>].

38. WILLIAMS ET AL., *supra* note 37, at 9–10.

39. *Id.* at 9.

40. See generally Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986).

41. See Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1777 (2005) (“[T]he results indicate that both liberal and conservative female judges were more likely than their male counterparts to support plaintiffs.”).

Moreover, male judges on panels with at least one female judge decided in favor of plaintiffs more than twice as often as those on all-male panels.⁴² Importantly, while ideology⁴³ also influenced outcomes, the gender makeup of panels mattered more than ideology.⁴⁴

III. STATE SUPREME COURT DIVERSITY IN ATTORNEY REGULATION

The literature on the influence of demographic diversity on perceptions and dispute resolution suggests that the racial and gender composition of state supreme courts matters to the resolution of disputes in at least three ways. First, the composition of state supreme courts may affect whether and to what extent attorneys who are women or people of color are disciplined for alleged misconduct. Second, state supreme court diversity may influence the adjudication of complaints involving conduct with a racial, sexual, or gendered dimension. And finally, the composition of state supreme courts may influence the interpretation and application of state analogs to Model Rule 8.4(g), a relatively new rule that deals explicitly with racial and gendered bias and harassment and whose interpretation is still evolving.

A. Diversity and Empathy

The research described in Part II confirms an intuition that many people share: people tend to empathize more with those to whom they relate,⁴⁵ and people—including judges—are more likely to relate to those who share their race and gender characteristics.⁴⁶ Social science research demonstrates such a connection. For example, one study concluded that observers reacted more strongly to pain suffered by people who shared their racial identities.⁴⁷ The research makes intuitive sense. One study found that 75 percent of white Americans report that “the network of people with whom they discuss important matters is entirely white.”⁴⁸ If people are more likely to interact

42. *Id.* at 1778.

43. Ideology was determined, in part, by using the party of the president who appointed the judge as a proxy.

44. Peresic, *supra* note 41, at 1178–79.

45. See, e.g., Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, 722–23 (2014); Robinson, *supra* note 28, at 1120–21, 1133, 1136.

46. See, e.g., Negowetti, *supra* note 45, at 696, 717–19 (“[J]udges, like everyone else, are the product of their race, ethnicity, nationality, socioeconomic status, gender, sexuality, religion, and ideology.”).

47. See, e.g., Alessio Avenanti et al., *Racial Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain*, 20 CURRENT BIOLOGY 1018, 1019–20 (2010); see also Matteo Forgiarini et al., *Racism and the Empathy for Pain on Our Skin*, FRONTIERS IN PSYCH., May 2011, at 1, 4, <https://www.frontiersin.org/articles/10.3389/fpsyg.2011.00108/full> [<https://perma.cc/QE93-8EUZ>] (reporting that “the extent to which Caucasian observers share the pain experience of other people is affected by the race of the person in pain” (citation omitted)).

48. Daniel Cox et al., *Race, Religion, and Political Affiliation of Americans’ Core Social Networks*, PUB. RELIGION RSCH. INST. (Aug. 3, 2016), <https://www.prii.org/research/poll-race-religion-politics-americans-social-networks> [<https://perma.cc/GS3H-FFT3>].

with members of their own racial groups, those shared experiences may breed greater empathy for those within their groups.

Empirical data on the relationship between in-group empathy and attorney regulation is scarce. Yet a substantial body of research supports in-group empathy⁴⁹ as a possible explanation, or as one of several explanations, for potential disparities in the frequency and severity of attorney discipline. Such considerations would be profitably explored in a regime of greater transparency.⁵⁰

Data from both New Mexico and Illinois are suggestive: the attorney regulatory entities in both states have conducted research revealing that in the respective state bars, African American and Hispanic attorneys are disproportionately sanctioned, as compared to their representation in the bar.⁵¹ A number of factors influence this disparity. For example, an important factor in determining whether lawyers receive sanctions is the size of the firm with which they practice. Solo practitioners and attorneys at midsize firms are more likely to receive sanctions than those who practice with large firms, and solo practitioners and attorneys at midsize firms are also more likely to be people of color.⁵²

Nonetheless, the disproportionate likelihood that attorneys of color will receive sanctions bears examination in light of the composition of state supreme courts. And even if the sanction disparity is fully explained by nonracial factors, perceptions also matter, and available evidence indicates that attorneys of color have less confidence in the disciplinary review process. For example, a survey by the Illinois Attorney Registration and Disciplinary Commission found that 38.9 percent of white lawyers believe that attorney discipline is very fair, while only 28 percent of Black lawyers expressed the same belief.⁵³

49. See, e.g., DAVID KAHNEMAN, THINKING, FAST AND SLOW (2011) (describing, generally, the operation of implicit bias); Negowetti, *supra* note 45, at 705–14 (collecting studies).

50. See Jacquelyn M. Desch, *Attorney Discipline Online*, 29 GEO. J. LEGAL ETHICS 921, 921 (2016) (“As legal proceedings move further and further online, why should lawyers remain behind in the relative anonymity and unobtainability of hard copy and confidentiality?”); Levin, *supra* note 8, at 32–49.

51. See ARTHUR J. JARAMILLO & MARY ANN SHAENING, THE STATE BAR OF N.M. TASK FORCE ON MINORITIES IN THE LEGAL PRO. II, REPORT, THE STATUS OF MINORITY ATTORNEYS IN NEW MEXICO—AN UPDATE 11, 43–46 (1990–1999), <https://www.nmbar.org/nmbardocs/pubres/reports/minoritytaskforcereportupdate.pdf> [https://perma.cc/U2S3-A28E] (revealing that between 1988 and 1998, Hispanic attorneys were only 13 to 17 percent of all active attorneys but received 26 percent of serious sanctions); BENEDICT SCHWARZ II ET AL., ATT’Y REGISTRATION AND DISCIPLINARY COMM’N OF THE SUP. CT. OF ILL., 2003 ANNUAL REPORT OF THE ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION (2003), https://www.iardc.org/AnnualReport03/2003main_annreport.html [https://perma.cc/P4S7-DDBR] (revealing that 11 percent of attorneys sanctioned were Black, while bar passage statistics indicate that the percentage of Black attorneys is 4.9 percent).

52. *Id.*

53. Levin, *supra* note 8, at 7 n.38. It is worth noting that the confidence in fairness seems rather low regardless of race—although this is a matter for a different paper.

B. When Identity Is at Issue

The demographic composition of state supreme courts may also influence the courts' decision-making when race or gender is an explicit part of the facts comprising the complaint. Evidence from the sexual harassment context, discussed in Part II, reveals that three-judge appellate panels including women are more likely to rule in favor of plaintiffs on nondispositive motions.⁵⁴ It does not seem implausible that the same would be true in the context of attorney disciplinary measures involving racial or gendered conduct, as well. That is, the demographics of a particular state supreme court may influence the content of its decisions.

All-white and all- or nearly all-male state supreme courts have imposed sanctions on attorneys for racist or sexist behavior in a number of cases.⁵⁵ Yet this does not resolve the question of whether more diverse tribunals might resolve matters of attorney discipline differently. Given currently available information, the question is unanswerable given that most states maintain secrecy for most disciplinary records. Moreover, most of the publicly available instances of conduct relating to race or gender involve conduct that is arguably either criminal or illegal. Many would argue that we should hold lawyers to a standard higher than avoiding the literal commission of crimes.

We gain a limited window into what state supreme courts do *not* consider sanction worthy from the small subset of publicly available decisions. For example, the Indiana Supreme Court—one of the state supreme courts whose justices include only one woman—held that an attorney did not violate Model Rule 8.4(g) when he became romantically interested in a woman who was a summer intern, grew angry when she did not reciprocate his advances, and sent a film clip in which the woman was in a “state of undress,” first to an attorney at her firm and then to a wider audience.⁵⁶ The court’s reasoning was that the attorney’s conduct did not demonstrate bias or prejudice against women *in general*, only anger at the specific woman in question.⁵⁷ The Delaware Supreme Court has not adopted Model Rule 8.4(g). However, in a 2018 case, the court referenced a comment to Model Rule 8 addressing discrimination and held that the rule was not violated when an attorney sent emails stating that female opposing counsel had “no ‘brain wave activity’”⁵⁸ and speculating crudely about opposing counsel’s plans for Valentine’s Day with her husband⁵⁹ and also stated to male opposing counsel: “You are

54. Peresie, *supra* note 41, at 1777.

55. See, e.g., *In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005) (per curiam). In this case, the attorney representing the husband in the divorce matter referred to the wife’s new boyfriend as “the black guy” and insinuated that the reason dead animals had been left on the porch was due to “the black man” in the house. *Id.*

56. *In re Usher*, 987 N.E.2d 1080, 1083–84, 1086 (Ind. 2013).

57. *Id.* at 1089. One might reasonably question whether it is possible to disentangle bias and prejudice against women from sufficiently egregious conduct toward a woman.

58. *In re Member of Bar Hurley*, 183 A.3d 703 (Del. 2018), No. 383, 2018 WL 1319010, at *2 (Del. Mar. 14, 2018) (unpublished table decision).

59. *Id.*

outmanned and outgunned. I am Catholic. You're not. You're a young Jewish man, I suspect."⁶⁰ Indeed, sometimes state supreme courts decline to sanction attorneys even for literal crimes.⁶¹

And even when state supreme courts hold an attorney accountable for particular behavior, they sometimes reject other concerning behavior as not worthy of sanction. In *Cincinnati Bar Ass'n v. Young*,⁶² an attorney was not sanctioned for calling one female attorney a "cute girl" and hugging her several times,⁶³ nor was he sanctioned for asking a different employee whether she had a boyfriend; although the court did impose punishment for other conduct it deemed sufficiently severe.⁶⁴

Moreover, the fact that some attorneys are punished for conduct relating to race or gender does not dispense with the question of whether it would happen to the *same extent*, in the aggregate, were the demographic composition of state supreme courts more reflective of the states' bars and constituencies. Many attorney disciplinary proceedings happen in secret,⁶⁵ with the results not made public unless discipline *is* imposed⁶⁶—meaning sometimes we see only the cases in which state supreme courts chose to punish the attorney, not the cases in which the courts declined to do so. Available evidence reveals that far more cases do not result in discipline than those that do—Florida, for instance, reports that each year the state bar opens approximately 4000 discipline files, resulting in punishment of up to 300 people.⁶⁷ While this Essay does not necessarily advocate for more punitive measures, a sanction rate of approximately 7.5 percent in Florida demonstrates that there are many cases that do not rise to the level of punishment: the rate might be different—in either direction—if the decision makers were different.

60. *Id.* The court held that the emails violated Delaware Lawyers' Rule of Professional Conduct 4.4(a) because the emails had "no substantial purpose other than to embarrass, delay or burden' opposing counsel." *Id.* at *3 (quoting DEL. LAWS.' PRO. CONDUCT R. 4.4(a)). The court imposed only a public reprimand and a requirement that the attorney attend training sessions—even after the attorney circulated a twenty-three-page document called "My Struggle, also known as 'Hurleygate'" to many members of the Delaware bar and bench. *Id.* Despite the fairly obvious connotations of the phrasing "my struggle," the Delaware Supreme Court chose not to see the attorney's behavior through the lens of identity. *Id.*

61. *See, e.g., In re* Petition for Disciplinary Action Against Stoneburner, 882 N.W.2d 200, 202 (Minn. 2016) (declining to hold that an attorney's conviction for misdemeanor assault-fear against his wife warranted professional discipline). In *Stoneburner*, the Supreme Court of Minnesota did hold that Stoneburner's related conviction for interference with a 911 call warranted discipline, but the punishment imposed was a public reprimand. *Id.* at 207.

62. 731 N.E.2d 631 (Ohio 2000).

63. *Id.* at 636.

64. *Id.* at 642.

65. Only Florida, New Hampshire, Oregon, and West Virginia treat all or nearly all complaints about lawyers as a matter of public record. Levin, *supra* note 8, at 19.

66. *Id.*

67. *Attorney Discipline*, FLA. BAR, <https://www.floridabar.org/public/acap> [<https://perma.cc/3ZKX-WQXX>] (last visited Jan. 27, 2021).

C. Diversity and Model Rule 8.4(g)

Finally, the interpretation of any and all state versions of Model Rule 8.4(g) will fall to state supreme courts, and therefore the composition of state supreme courts may play a role in how the rule is construed from state to state. Model Rule 8.4(g) was adopted by the American Bar Association's House of Delegates in 2016.⁶⁸ The rule states:

It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.⁶⁹

The adoption of the rule caused considerable controversy, the substance of which is mostly beyond the scope of the discussion here.⁷⁰ Thus far only a few states have adopted Model Rule 8.4(g) without significant changes, while others encode antibias provisions elsewhere in their rules of professional conduct.⁷¹

For present purposes, the important point is that a state supreme court that is diverse along race and gender lines might interpret such a rule—whether Model Rule 8.4(g) itself or some modified equivalent—differently than would a state supreme court that is all white and mostly male.⁷² The distinction is perhaps particularly relevant given that in an interracial complaint or in most gender-based complaints, a given justice will probably identify demographically with either the lawyer named or the complainant but probably not both. Rebecca Aviel has cogently emphasized the importance of reading Model Rule 8.4(g) and its various state implementations in the context of *a particular victim* so as not to run up

68. Kristin A. Kubes et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, AM. BAR ASS'N (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4 [<https://perma.cc/DN8U-FUCW>].

69. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

70. See, e.g., Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31 (2018); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241 (2017); Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195 (2017); Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PRO. 201 (2017) (arguing that the new model rule requires serious First Amendment analysis).

71. See Fifty State Survey (Oct. 8, 2020) (unpublished dataset) (on file with author).

72. There is no corollary to Model Rule 8.4(g) in the American Bar Association's Model Code of Judicial Conduct. Given what we have learned about judicial behavior in the past few years, see, e.g., Chokshi, *supra* note 37, and the inability of many jurists to affirm that foundational cases of racial equality, such as *Brown v. Board of Education*, 347 U.S. 483 (1954), were correctly decided, see Laura Meckler & Robert Barnes, *Trump Judicial Nominees Decline to Endorse Brown v. Board Under Senate Questioning*, WASH. POST (May 16, 2019), https://www.washingtonpost.com/local/education/trump-judicial-nominees-decline-to-endorse-brown-v-board-under-senate-questioning/2019/05/16/d5409d58-7732-11e9-b7ac-390de4259661_story.html [<https://perma.cc/9WL9-HZCF>], the inclusion of such a rule is not just necessary but overdue.

against First Amendment issues.⁷³ This construction offers an even clearer invitation to a justice to see the lawyer and complainant as individuals—with all the benefits and demographic baggage that individuation brings.

Particularly given the strong feelings triggered by the #MeToo movement, sexual harassment is likely to produce a particularly marked divide along lines of gender. Judges—particularly male judges—might themselves worry that they have crossed some line in the past, particularly given the high-profile sanction of jurists such as former judge Alex Kozinski.⁷⁴ Yet as data in the previous section indicate, many attorneys, particularly women, believe that sexual harassment in the legal profession is a serious problem that requires redress.⁷⁵ One vehicle for redress could be a state analog to Model Rule 8.4(g)—which might be more feasible for victims than a Title VII lawsuit—and the overall interpretation of that provision, as well as the results in individual cases could well be influenced by the composition of a court itself.⁷⁶

The various identity categories occupied by state supreme court justices might not matter for their decisions in any individual case of attorney regulation or discipline. In the aggregate, however, in many factual circumstances, across many cases, the composition of state supreme courts may influence attorney regulation. The cases in which discipline is imposed, the scope and nature of such discipline, and the broader interpretation of statutes are all potentially influenced by the membership of the courts construing the relevant provisions. Diversity of state supreme courts is more than mere optics: it is a feature of the attorney regulation system that carries substantive consequences as well.

CONCLUSION

This Essay offers two prescriptions: an easy one and a hard one. The easy conclusion of this Essay is to call for more diversity in state supreme courts. The more challenging conclusion is that pervasive secrecy may impede diversity by preventing examination of the ways in which diversity might make a difference. As Leslie C. Levin has observed, the difficulty in evaluating the effectiveness and fairness of attorney discipline “is compounded by the fact that in many jurisdictions, discipline complaints, discipline files, and even many discipline sanctions are private.”⁷⁷ In addition to the shield from public accountability that these measures provide,

73. Aviel, *supra* note 70, at 55–56. Such First Amendment issues are beyond the scope of this Essay.

74. Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html [<https://perma.cc/PKJ7-VL2C>].

75. *Id.*

76. See generally Leah E. Smith, *Lawyers Too: Addressing Sexual Harassment in the Legal Field Through the Rules of Professional Responsibility*, 41 WOMEN’S RTS. L. REP. 194 (2020).

77. Levin, *supra* note 8, at 1.

they also mask the extent to which disparities in attorney discipline may be traceable to other demographic disparities. Particularly in matters related to discrimination itself, diversity and transparency work in tandem to shape the ways in which attorneys are regulated, including by the supreme courts of the states.