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# A First Amendment Theory for Protecting Attorney Speech

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*[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against government intrusion.<sup>1</sup>*

#### INTRODUCTION

In June 2010, the U.S. Supreme Court held that Congress could constitutionally prohibit attorneys from providing legal assistance and legal advice regarding lawful nonviolent conduct to groups that the Secretary of State has designated as Foreign Terrorist Organizations (“FTOs”).<sup>2</sup> In *Holder v. Humanitarian Law Project*, the plaintiffs — Ralph Fertig and the Humanitarian Law Project — wished to assist two such FTOs by advising them on how “to use humanitarian and international law to peacefully resolve disputes,”<sup>3</sup> “to petition various representative bodies,” including the United Nations and the United States Congress,<sup>4</sup> to obtain recognition under the Geneva Conventions,<sup>5</sup> and to assist in other peaceful, lawful activities aimed at securing human rights. At oral argument, counsel for the plaintiffs explained that the Humanitarian Law Project sought to advise these groups regarding “how to pursue their goals in a lawful, rather than a terrorist, way.”<sup>6</sup> The Supreme Court held that the challenged statutory restrictions<sup>7</sup> clearly prohibited plaintiffs’ proposed activities,<sup>8</sup> but did

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<sup>1</sup> NAACP v. Button, 371 U.S. 415, 429 (1963).

<sup>2</sup> *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730-31 (2010).

<sup>3</sup> *Id.* at 2716 (emphasis added).

<sup>4</sup> *Id.* (stating that plaintiffs wished to teach two FTOs “how to petition various representative bodies such as the United Nations”); *see id.* at 2732 (Breyer, J., dissenting) (noting that plaintiffs wanted to petition United States Congress).

<sup>5</sup> *See id.* at 2739 (Breyer, J., dissenting) (noting that declarations below showed that relief sought would not be monetary, but would include seeking “recognition under the Geneva Conventions”).

<sup>6</sup> Transcript of Oral Argument at 40, *Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (No. 08-1498) (Ginsburg, J., clarifying); *see id.* (“They want to engage in advocacy of peaceful means of achieving the goals of these groups.”); *see also* David Cole, *The Roberts Court’s Free Speech Problem*, NYRBLOG, (June 28, 2010, 10:55 AM), <http://www.nybooks.com/blogs/nyrblog/2010/jun/28/roberts-courts-free-speech-problem/>. Cole was counsel to the Humanitarian Law Project, and summarizes the Court’s opinion thus: the Court “ruled that the First Amendment permits Congress to imprison human rights activists for up to fifteen years merely for advising militant organizations on ways to reject violence and pursue their disputes through lawful means.” *See id.*

<sup>7</sup> *See* 18 U.S.C. 2339A & 2339B (2006). The statute prohibits providing “material support” to any group designated by the Secretary of State as an FTO. Congress initially enacted the prohibition on providing “material support” to FTOs in 1996 with the Anti-Terrorism and Effective Death Penalty Act, yet those provisions did not

not violate the Free Speech Clause of the First Amendment because the attorneys could still engage in “independent advocacy” of any political or other message they wished to promote.<sup>9</sup> Allegedly, the plaintiff attorneys’ First Amendment rights were not infringed because the law merely criminalized (with a potential fifteen-year prison sentence<sup>10</sup>) speaking “in coordination with, or at the direction of” their proposed clientele.<sup>11</sup> *Humanitarian Law Project* underscores some of the distinctive problems associated with restrictions on attorney speech. As will be explored below, because attorney speech is essential to the invocation and avoidance of government power and to the protection of life, liberty, and property, restrictions on such speech affect the overall administration of justice.<sup>12</sup> Unfortunately, the Court’s opinion, as well as Justice Breyer’s impassioned dissent, demonstrates that currently, there is no workable First Amendment methodology for analyzing restrictions on attorney speech.

Traditionally, attorneys have been considered a self-regulating profession.<sup>13</sup> Consequently, even though many of the rules of professional conduct, court rules, and other regulations restrict attorney speech, traditional theory held that attorneys agreed to all

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clearly include within their scope legal advice. In 2001, as part of the USA PATRIOT Act, Congress amended the material support statute by additionally prohibiting “expert advice or assistance.” Finally, in the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”), 108 Pub. L. No. 458, 118 Stat. 3638, Congress “added the term ‘service’ to the definition of ‘material support or resources,’ (citation omitted) and defined ‘training’ to mean ‘instruction or teaching designed to impart a specific skill, as opposed to general knowledge,’” and “also defined ‘expert advice or assistance’ to mean ‘advice or assistance derived from scientific, technical or other specialized knowledge.’” *Humanitarian Law Project*, 130 S. Ct. at 2712, 2714-15 (majority opinion); see also 18 U.S.C. § 2339(a)-(b).

<sup>8</sup> See *Humanitarian Law Project*, 130 S. Ct. at 2720 (holding that “the statutory terms are clear in their application to [and thus prohibition of] plaintiffs’ proposed conduct”).

<sup>9</sup> See *id.* at 2722-23 (explaining that “plaintiffs may say anything they wish on any topic” because “[t]he statute does *not* prohibit *independent advocacy or expression* of any kind” (emphasis added) (internal quotations omitted)); see also *id.* at 2728 (explaining why statute is constitutional, concluding that “*most importantly*, Congress has avoided any restriction on independent advocacy, or indeed any activities *not directed to, coordinated with, or controlled by* foreign terrorist groups” (emphasis added)).

<sup>10</sup> See *id.* at 2712 n.1.

<sup>11</sup> *Id.* at 2722; see also *id.* at 2723 (concluding that “the statute is carefully drawn to cover only a narrow category of speech *to, under the direction of, or in coordination with*” FTOs (emphasis added)).

<sup>12</sup> See *infra* Part III.B.

<sup>13</sup> See MODEL RULES OF PROF’L CONDUCT, pmbl. ¶¶ 10-11 (discussing “self-regulation” and stating that “[t]he legal profession is largely self-governing”).

such regulations as a condition of being admitted into the bar.<sup>14</sup> In the words of Justice Benjamin Cardozo, “Membership in the bar is a privilege burdened with conditions.”<sup>15</sup> Thus, attorneys were deemed to have voluntarily waived their free speech rights vis-à-vis judicial and state bar regulators as a condition of becoming an attorney. Although imperfect, this traditional allocation of attorney regulation to judiciaries and the bar arguably worked to preserve the special role that attorneys played in the administration of justice. Theoretically, the regulator, namely the judiciary and/or the bar, understood the role that attorneys played in the United States justice system, and therefore would impose appropriate regulations.<sup>16</sup> Consequently, self-regulation ideally would ensure that attorney speech restrictions would be tailored to the attorney’s function in our system of government.

However, self-regulation has long since been a myth<sup>17</sup> — one that is increasingly disassociated with reality. In the words of Fred Zacharias, “Law has become a heavily regulated industry in modern times” and is subject to regulation from multiple entities external to itself, including state and federal legislatures and administrative agencies.<sup>18</sup> Additionally, Zacharias notes the fallacy of considering regulation by the judiciary to be “self-regulation.”<sup>19</sup> Zacharias posits “that judges overseeing lawyers take their independence from the bar and their regulatory functions seriously,” and thus, “discipline by courts” is “a form of regulation external to the profession.”<sup>20</sup> Moreover, as Thomas Morgan recently reiterated, when the Supreme Court began

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<sup>14</sup> See *infra* Part II.A.1.

<sup>15</sup> See *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917).

<sup>16</sup> See Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation — Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1210 (2003); William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 489 (1995) (explaining theory behind professional self-regulation is that members “alone have the specialized knowledge to understand the unique nature of their profession’s problems and hence, [will alone know how] to apply effective cures”).

<sup>17</sup> See Fred Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1188 (2009) (“Whatever its actual meaning, the term ‘self-regulation’ produces an image of lawyers unilaterally controlling the behavior of their peers. That image is patently false.”); see *id.* at 1157, 1160 (noting that “in the post-revolutionary period of the United States, law truly was a self-regulated profession” and the rise of bar associations in the late nineteenth and early twentieth centuries “represented the modern form of lawyer self-regulation”); see also Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1428-30 (2004).

<sup>18</sup> Zacharias, *supra* note 17, at 1155.

<sup>19</sup> *Id.* at 1153-54.

<sup>20</sup> *Id.* at 1154.

invalidating attorney regulations as unconstitutional, “The idea that, as a profession, lawyers were self-regulating and thus need look only inward, was gone forever.”<sup>21</sup>

Importantly, self-regulation is not a successful argument for staving off attorney regulation from other governmental entities. National and intergovernmental regulation applicable to attorneys exists and will only continue to expand. As explained by Laurel Terry:

Although the ABA recently reaffirmed the traditional view that lawyers should be regulated by the state judicial branch, commentators have noted that lawyers already are subject to multiple sources of regulation. The combination of globalization and the service providers paradigm means that lawyers are likely to face regulation from more and more entities. . . . U.S. lawyers face regulation from many new sources, including global entities.<sup>22</sup>

Indeed, to the extent that regulation of lawyers has been left to state judiciaries, it is done merely as a matter of comity and not because Congress and other governing bodies lack such power. The Supreme Court’s 2010 decision *Milavetz, Gallop & Milavetz, P.A. v. United States* illustrates this point.<sup>23</sup> In *Milavetz*, attorneys challenged the constitutionality of congressional restrictions on attorneys when advising clients in contemplation of bankruptcy.<sup>24</sup> The restrictions directly circumscribed the advice an attorney could give to a client. In its amicus brief, the American Bar Association (“ABA”) argued that “the licensing and regulation of attorneys has been reserved to, and performed by, the State judicial systems.”<sup>25</sup> The Supreme Court flatly rejected “self-regulation” as a defense that shielded attorneys from congressional regulation. The Court noted that “Congress and the bankruptcy courts *have long overseen aspects of attorney conduct* in this area of substantial federal concern” and summarily concluded that an argument that Congress had “impermissibly trench[e]d on an area of

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<sup>21</sup> THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 76 (2010).

<sup>22</sup> Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers,”* 2008 J. PROF. LAW. SYMP. ISSUES 189, 205-06.

<sup>23</sup> *Milavetz, Gallop & Milavetz P.A. v. United States*, 130 S. Ct. 1324, 1332-33 (2010).

<sup>24</sup> *See id.* at 1329-31.

<sup>25</sup> Brief for A.B.A. as Amicus Curiae Supporting Petitioners at \*8, *Milavetz, Gallop & Milavetz P.A. v. United States*, 130 S. Ct. 1324 (2010) (No. 08-1119), 2009 WL 2875367.

traditional state regulation [] *lacks merit*.”<sup>26</sup> Notably, bankruptcy is not the only area of “federal concern” where Congress has been and will be able to regulate attorneys, including attorney speech. In the modern globalized economy, there are and will be areas of legitimate and substantial international concern with consequent regulation.<sup>27</sup> As Morgan summarizes: “By now it is clear that the legal profession no longer exists in a protective bubble, and legal ethics is no longer the business of lawyers alone.”<sup>28</sup>

Yet, even under the self-regulation theory, it was never satisfactory to treat attorneys as having relinquished their First Amendment rights as a condition of membership in the bar.<sup>29</sup> The fact that the judiciary or a bar association imposes a restriction or punishment on speech does not (and should not) render a restriction constitutional. There are scenarios, such as the regulation of attorney speech regarding the judiciary, where the judiciary has demonstrated a failure to protect speech that clearly should enjoy constitutional protection.<sup>30</sup>

The breakdown of self-regulation, the declining viability of the constitutional conditions theory, and the imposition of attorney regulations by entities external to the profession (such as Congress, state legislatures, or intergovernmental entities) create a twofold problem. First, courts lack a workable analytic method for examining the constitutionality of restrictions on attorney speech. Second, outside entities (especially those subject to majoritarian capture) may impose restrictions on attorney speech that compromise the central role of the attorney in providing access to justice and the fair administration of laws. Again, *Humanitarian Law Project* and *Milavetz* illustrate both problems.<sup>31</sup>

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<sup>26</sup> *Milavetz*, 130 S. Ct. at 1332-33 (emphasis added).

<sup>27</sup> See Terry, *supra* note 22, at 205-06.

<sup>28</sup> MORGAN, *supra* note 21, at 79.

<sup>29</sup> This theory is often couched in terms of “constitutional conditions”; specifically, that restrictions on attorney speech are a constitutional condition of receiving a license to practice law. See *infra* Part II.A.1.

<sup>30</sup> See, e.g., Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 365-66 (2010) [hereinafter *Free Speech Right to Impugn*] (examining punishment of attorneys who raise arguments of judicial bias in court proceedings); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1569-72 (2009) [hereinafter *The Truth Be Damned*] (examining punishment of attorneys for impugning judicial reputation).

<sup>31</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2721, 2739-40 (2010); *Milavetz*, 130 S. Ct. at 1333.

In *Milavetz*, the Court employed typical First Amendment methodologies to examine whether the challenged statute, which restricted the advice that an attorney could provide to a client contemplating bankruptcy, was overbroad or vague.<sup>32</sup> During oral argument, Chief Justice Roberts indicated a concern that the regulation achieved its substantive objective — getting debtors to avoid incurring more debt — “indirectly [] by interfering with the attorney-client relationship.”<sup>33</sup> The regulation did not prohibit debtors from incurring debt; rather, it prohibited attorneys from advising clients to incur debt in contemplation of bankruptcy. Yet, normal First Amendment doctrines failed to account for the problematic interference with the attorney-client relationship. Indeed, counsel for the plaintiffs agreed that if the statute were unconstitutional as applied to attorneys, it would be unconstitutional as applied to everyone — again highlighting the lack of a methodology for reaching the distinctive problems of the statute as applied to attorney speech.<sup>34</sup> The Supreme Court ultimately avoided interfering with the attorney-client relationship by interpreting the statute narrowly.<sup>35</sup> Importantly, the protection of the attorney-client relationship came from the Court’s attorney-friendly interpretation of the statute and not from the First Amendment.

In contrast to its protective approach in *Milavetz*, the Supreme Court in *Humanitarian Law Project* failed to recognize the significant implications of the restriction prohibiting “material support” to FTOs as applied to attorney speech. Indeed, the Court purported to “fix” any constitutional problems by allowing attorneys to *independently* advocate whatever messages they like, but prohibiting any and all speech made in coordination with or at the direction of their proposed

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<sup>32</sup> See 11 U.S.C.S. § 526(a)(4) (2011) (forbidding a “debt relief agency,” which Court held included attorneys, “from advis[ing] an assisted person . . . to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title”); *Milavetz*, 130 S. Ct. at 1329-31, 1334, 1335 n.2, 1338.

<sup>33</sup> Transcript of Oral Argument at 41, *Milavetz*, 130 S. Ct. 1324 (Nos. 08-119, 08-1225).

<sup>34</sup> See *id.* at 16. Counsel for appellants agreed with Justice Scalia that if the statute was vague or overbroad for attorneys it would be equally problematic for anyone else to whom the statute applied: “[D]on’t bring in the fact that, well then, moreover, if it’s applied to attorneys, it’s unconstitutional, because if it’s applied to anybody it’s unconstitutional according to your [vagueness] argument.” See *id.*

<sup>35</sup> See *Milavetz*, 130 S. Ct. at 1336-38 & n.6 (the Court interpreted the statute to prohibit only advice to a debtor “to incur more debt *because* the debtor is filing for bankruptcy, rather than for a valid purpose” (emphasis added)).



clients.<sup>36</sup> The majority went so far as to hold that the statute “barred” plaintiffs from even *speaking to* the FTOs if their speech “communicates advice derived from ‘specialized knowledge’— for example, training on the use of international law or advice on petitioning the United Nations.”<sup>37</sup> Justice Breyer’s dissent argued that the First Amendment protects both speech and association and, consequently, protects speech made “in coordination with” others.<sup>38</sup> But Justice Breyer’s dissent failed to identify how acutely problematic a prohibition on coordinated speech is in the context of attorney speech. Specifically, attorneys are denied their core function in the United States legal system if they can be prohibited from speaking to, on behalf of, or in coordination with their clients.<sup>39</sup> While the majority claimed that the attorneys lost nothing because they could still speak independently,<sup>40</sup> this distinction completely denied the role and function of the attorney, as will be explored more fully below.

In this Article, I propose a new access-to-justice theory of the First Amendment to be used in examining the constitutionality of restrictions on attorney speech. The theory applies to all governing entities that restrict or punish attorney speech. As demonstrated by the Court’s appalling decision in *Humanitarian Law Project*, reliance on traditional First Amendment doctrines will not suffice because those doctrines fail to account for the distinctive and important role that attorney speech plays in access to and the fair administration of justice. The access-to-justice theory maintains that where attorney speech is key to providing or ensuring access to justice or the fair administration of the laws, it needs special protection under the Free Speech Clause of the First Amendment. This principle, thus, not only provides a workable theory for evaluating restrictions on attorney speech, but more importantly, it also protects the role of the attorney in our system of justice.

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<sup>36</sup> See *Humanitarian Law Project*, 130 S. Ct. at 2722-24, 2728.

<sup>37</sup> *Id.* at 2723-24.

<sup>38</sup> *Id.* at 2732 (Breyer, J., dissenting) (“[T]he simple fact of ‘coordination’ alone cannot readily remove protection that the First Amendment would otherwise grant. That amendment, after all, also protects the freedom of association.”); see also *id.* at 2732-33 (“‘Coordination’ with a group that engages in unlawful activity also does not deprive the plaintiffs of the First Amendment’s protection under any traditional ‘categorical’ exception to its protection. The plaintiffs do not propose to solicit a crime. They will not engage in fraud or defamation or circulate obscenity.”).

<sup>39</sup> See *infra* Part III.B.

<sup>40</sup> See *Humanitarian Law Project*, 130 S. Ct. at 2710, 2723-24 (concluding that plaintiffs “may say anything they wish on any topic,” indicating that their speech is not abridged because they can engage in “independent advocacy or expression”).

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In Part I, I examine the nature of attorney speech and its relationship to the power of government. Attorneys are engaged in a special type of speech. Specifically, attorney speech is intended to invoke or avoid the power of government in the protection of individual life, liberty, and property.

In Part II, I briefly show the current lack of a workable theory for examining restrictions on attorney speech. Case law either employs normal First Amendment doctrine for regulated industries<sup>41</sup> or declares that the speech restriction is a valid condition on the practice of law without any Free Speech Clause protection or analysis.<sup>42</sup> Moreover, prior scholarly commentary engages in analogies of attorney speech to other areas of limited First Amendment protection. None of these methods for examining the constitutionality of restrictions on attorney speech is satisfactory because each fails to preserve both the role of the attorney in our administration of justice and the underlying rights of clients.

In Part III, I propose an access-to-justice theory of the First Amendment for protecting attorney speech. This theory is modeled on a democratic theory of the First Amendment. Just as citizen free speech is essential to the proper functioning of democracy, attorney free speech is essential to the proper functioning of the United States justice system. Consequently, the access-to-justice theory proposes that where attorney speech is key to providing or ensuring access to justice and the fair administration of the laws, it needs special protection under the First Amendment, akin to political speech. Certainly a large portion of attorney speech does not fall into this narrow category, but some categories of attorney speech are essential to our system of justice and require protection.

In Part IV, I discuss how this new access-to-justice theory protects the role of the attorney in the justice system as attorney self-regulation

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<sup>41</sup> See, e.g., *Milavetz, Gallop & Milavetz P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010) (examining restrictions on attorney speech under traditional First Amendment prohibition on vagueness); *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (employing traditional First Amendment principles to apply strict scrutiny to restrictions on speech of attorneys and judges running for judicial office); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995) (employing First Amendment doctrines for commercial speech to restrictions on attorney advertising and solicitation); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 472 (1988) (same); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 637-44 (1985) (same); *In re R.M.J.*, 455 U.S. 191, 203-06 (1982) (same); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363-83 (1977) (holding that First Amendment protects attorney advertising).

<sup>42</sup> See *infra* note 81 (citing cases).

ceases to be a reality. As entities other than state judiciaries increase their role in regulating attorney speech, it is imperative that there be a method to preserve the role of attorneys in the fair administration of justice.

#### I. LAWYERS ENGAGE IN A SPECIAL KIND OF SPEECH

Attorneys perform nearly all of their work through speech — the written and spoken word. As Frederick Schauer poignantly declared:

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>43</sup>

Because attorneys do their work primarily through oral and written communications, many of the rules of professional conduct and other regulations on attorneys can be couched as restrictions on attorney speech. Indeed, attorney speech is saturated with regulations. One need only reflect on the rules in court proceedings or required disclosures in numerous legal documents to recognize the ubiquitous nature of attorney speech restrictions and regulations. Nevertheless, attorney speech is special and requires special protection because of its relationship to government power and to the protection of individual and collective life, liberty, and property.

##### A. *Its Binding Nature: Speech Having the Force of Law*

While Schauer is correct that the practice of law “is speech-constituted activity” and, thus, may be termed “our stock in trade,” he goes much too far by arguing that “[s]peech is all we have.”<sup>44</sup> Schauer argues that speech “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>45</sup> Speech may be the lawyer’s tools — our “saws or scalpels”<sup>46</sup> — but speech in the abstract is not the end product of the law or the service that clients

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<sup>43</sup> Frederick Schauer, *The Speech of Law and The Law of Speech*, 49 ARK. L. REV. 687, 688 (1997).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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seek. Attorneys are not hired speech-writers, journalists, academics, or street-corner protestors. Nor is speech, including “argument, persuasion, negotiation, and documentation,”<sup>47</sup> “the only thing that . . . the legal system ha[s].”<sup>48</sup> What the legal system has to offer is the force of law. 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. Even when a client hires an attorney “to speak” on her behalf in litigation or a criminal prosecution, eloquence is not the primary product sought. Rather, clients hire an attorney because the attorney has the training and skills to know: (1) what arguments are legally significant and most likely to invoke the force of law effectively on behalf of that client; and (2) the methods for raising and preserving legal and constitutional rights, including the use of procedural devices, as well as temporary, preliminary, or extraordinary relief having the force of law.

In like manner, the attorney uses language when drafting a document or writing a brief for a client, but it is not just “speech.” Rather, it is the intention of the attorney and client that the speech will invoke the power of the law — meaning that the power of the government will be brought to bear in favor of or against a person or entity because of that speech. Additionally, the client may seek advice about the lawfulness or unlawfulness of proposed conduct. Although the advice itself does not have the force of law, the advice is intended to protect the client from the power of government-imposed punishment or liability.

For purposes of illustration, a subpoena or summons could be termed to solely constitute “speech,” but it is far more than speech. It is a government-backed and government-enforced order for information, documents, or appearance, the violation of which may lead to sanctions or arrest. While the modern subpoena takes the form of speech, it has the same effect as a physical search or seizure of the

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* As a contrasting example, all the academic has is speech — argument, persuasion, and documentation. While academics hope that their arguments and documentation will persuade, they have no power to bind anyone. Even if published in the *HARVARD LAW REVIEW*, the speech still lacks the force of law. *See id.*

ordered materials or person.<sup>49</sup> Indeed, the modern summons for civil service of process is the descendant of the writ of *capias ad respondendum* — a writ that “directed the sheriff to secure the defendant’s appearance by taking him into custody.”<sup>50</sup> In modern practice, rather than physically arresting a person who is sued, “the *capias ad respondendum* has given way to personal service of summons or other form of notice.”<sup>51</sup> While such “notice” in the form of a summons or subpoena could technically be termed “speech,” and often even attorney speech, it serves the same function as did historical government brute force.

The tie of attorney speech to government power is far broader than in the blatant example of compulsory process. Anytime a judgment is rendered or a person is convicted of a crime, individuals are subject to government brute force — defendants held liable will pay the judgment at the risk of wage garnishment or property seizure and sale. On the other hand, losing plaintiffs must bear the cost of harm they suffered and will not be allowed to seek retribution or vengeance on persons allegedly responsible for their harm. In the transactional context, attorneys set up business entities and contractual structures that protect and increase the property of their clients, including through organizing and profiting from the labor of others. Such legal arrangements, if created properly, are backed by government power, which effectively protects individuals from liability and maximizes their wealth.

This very quality of attorney speech — its tie to the power of government and to the force of law — makes attorney speech distinct and requires special protection attuned to its function. Recognizing the need to protect attorney speech, however, does not create a right to attorney “unregulated talkativeness” either in or out of court.<sup>52</sup> Rather, the needed protection correlates to the essential role attorneys play in access to justice and in the fair administration of the laws. Thus, the appropriate protection would cover such attorney speech as

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<sup>49</sup> See, e.g., FED. R. CIV. P. 45(e) (authorizing contempt as sanction for failing to obey subpoena); see e.g., IND. R. TRIAL R. 45(F) (“Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued, or court of the county where the witness was required thereunder to appear or act. The attendance of all witnesses when duly subpoenaed, and to whom fees have been paid or tendered as required by law may be enforced by attachment.”).

<sup>50</sup> *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999).

<sup>51</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (emphasis added).

<sup>52</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948) (“The First Amendment . . . is not the guardian of unregulated talkativeness.”).

the right to raise and argue relevant arguments in official proceedings, to create legally binding entities and agreements for clients, to give advice about lawfulness or unlawfulness of client conduct, or to otherwise preserve people's constitutional and legal rights — in short, to invoke or avoid the power of government.

### B. *Protection of Life, Liberty, and Property*

Lawyers are not paid to provide “speech;” rather, their services are aimed at securing life, liberty, and property. This is as true for the transactional attorney (involved in creating legally recognized business organizations and contracts that have the potential to protect and enhance people's property, avoid liability, and bind themselves and others) as it is for the civil litigator and the criminal lawyer. Of course, rights to life and liberty are among the inalienable rights given to all men and women and recognized in the Declaration of Independence as providing an essential rationale for the creation of our government.<sup>53</sup> Indeed, life, liberty, and property are secured against state or federal deprivation through the Fifth and Fourteenth Amendments.<sup>54</sup>

Scholars have recognized this due-process-centered role of the attorney in addressing the lawyer's professional responsibilities. As Geoffrey Hazard summarizes: “The legal profession's basic narrative is a defense of due process. The lawyer's work consists of resistance to government intervention in the lives, liberty, or property of private parties.”<sup>55</sup> Although Hazard questions the propriety and legitimacy of equating life and liberty with property,<sup>56</sup> he notes that this equivalence

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<sup>53</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); cf. Landon W. Magnusson, *Selling Ourselves into Slavery: An Originalist Defense of Tacit Substantive Limits to the Article V Amendment Process and the Double –Entendre of Unalienable*, 87 U. DET. MERCY L. REV. 415, Part II.A (2010) (explaining that “one of the only reasons that government exists is to ensure [] protection” of “unalienable rights . . . enumerated as ‘Life, Liberty, and the pursuit of Happiness,’” and clarifying that unalienable rights “exist beyond and independent of the guarantees of any government”).

<sup>54</sup> U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”); U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

<sup>55</sup> Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1246 (1991); see also *id.* at 1266 (“[T]he legal profession's traditional ideal viewed the lawyer as the protector of life, liberty, and property through due process.”).

<sup>56</sup> *Id.* at 1266. Notably, Hazard posits that while the “traditional ideal” is that lawyers protect life, liberty and property through due process, yet in actual practice, the work of lawyers “primarily involves the protection of property, specifically business property.” *Id.* Hazard states that “[t]he profession's legitimacy in performing

“was established in the Constitution,” which “expresses the parity of person and property: ‘No person shall . . . be deprived of life, liberty, or property, without due process of law.’”<sup>57</sup> Hazard posits that “protection of property [particularly business property] might be viewed as (1) essential to a stable and prosperous society and (2) continually threatened by majoritarian democratic politics. This would validate the legal profession’s role as *mediator between property and democracy*.”<sup>58</sup> Hazard ultimately concludes:

Since the adoption of the Constitution, the basic function of the legal profession in the United States has been to *reconcile* the constitutional necessities of *an economic system devoted to the production of wealth* through business enterprise with a *political system that is predominantly democratic*. A related function is to *reconcile majoritarian politics* with protection of *the rights of religious and other minorities*. The lawyer’s “practice” of bringing about these accommodations embodies the legal profession’s primary set of skills and expresses *its primary role in the American social system*.<sup>59</sup>

It is this primary, and constitutionally essential, role of attorney speech in protecting life, liberty, and property from governmental intrusion (which, in a self-governing society, includes protection from majoritarian excess and overreaction) that requires special protection. Monroe Freedman and Abbe Smith similarly argue that the rights comprising the adversary system (and that should shape the professional responsibilities of the lawyer) are founded “in the broad and fundamental concept that no person may be deprived of life, liberty, or property without due process of law.”<sup>60</sup> They conclude that “[a]n essential function of the adversary system, therefore, is to maintain a free society in which individual human rights are central.”<sup>61</sup> Freedman and Smith contend that by preserving these rights that comprise due process, attorneys in the adversary system also “preserve the integrity of society itself . . . [by] keeping sound and

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this function [protecting business property] rests on the continual reaffirmation, under the rubric of due process, of the parity between property on the one hand and life and liberty on the other.” *Id.*

<sup>57</sup> *Id.* at 1245.

<sup>58</sup> *Id.* at 1267 (emphasis added).

<sup>59</sup> *Id.* at 1277-78 (emphasis added).

<sup>60</sup> MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 15-16 (4th ed. 2010).

<sup>61</sup> *Id.* at 16.

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wholesome the procedure by which society visits its condemnation on an erring member.’”<sup>62</sup> Such societal condemnation obviously exists in the criminal context, but it also exists whenever the government deprives a person of life, liberty, or property, whether by legislation, judicial decree, or other government action.

While Hazard, Freedman, and Smith discuss the attorney’s central role in protecting due process as a key to understanding professional ethics, I contend that this role should be central to defining the scope of Free Speech Clause protection afforded to attorney speech. Attorneys<sup>63</sup> need special protection for speech that is necessary to fulfill their key function in providing individuals with access to justice — that is, access to the invocation or avoidance of government power in the protection of life, liberty, and property.

### C. Access to Justice

As used in this Article and in the access-to-justice theory of the First Amendment, the idea of access to justice is far broader than the

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<sup>62</sup> *Id.* at 21 (quoting Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 35 (H. Berman ed., 1960)). Freedman and Smith also quote Lawrence H. Tribe making a similar point, specifically in the criminal context:

The presumption of innocence, the rights to counsel and confrontation, the privilege against self-incrimination, and a variety of other trial rights, matter not only as devices for achieving or avoiding certain kinds of trial outcomes, but also as affirmations of respect for the accused as a human being—affirmations that remind him and the public about the sort of society we want to become and, indeed, about the sort of society we are.

*See id.* at 21 (quoting Lawrence H. Tribe, *Trial by Mathematical Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1391-92 (1971)).

<sup>63</sup> This Article examines restrictions on attorneys under current models of attorney licensing and regulation. However, the principles it espouses may apply at some point to others who are allowed to provide legal services after the likely breakdown of certain unauthorized practice of law restrictions. While there are legitimate reaches to unauthorized practice of law rules, restrictions creating the current enforced monopoly of all legal services to lawyers may and probably should be loosened. The breakdown (to a certain extent) of unauthorized practice of law rules appears likely in part because of the globalization of lawyering and the growing existence of and access to standardized forms for legal services. *See* MORGAN, *supra* note 21, at 95; Terry, *supra* note 22, at 205-06. Morgan posits that the regime could be changed to allow certain levels of legal services to be provided by someone with a period of specific training, but less than that required of a full-fledged lawyer. *See* MORGAN, *supra* note 21, at 214-15. Perhaps jurisdictions will begin to allow and schools will begin to offer such training and licensing. Such a system may be a significant improvement over the current regime and perhaps would help solve the long-existing lack of legal services for lower and middle classes. *See infra* note 66.



constitutionally-recognized right to court access<sup>64</sup> or right to counsel for indigent defendants.<sup>65</sup> Additionally, it is significantly broader than “access to justice” in the oft-used sense of providing legal services to those of low or moderate income.<sup>66</sup>

In discussing “access to justice” here, I include access to justice and the fair administration of the laws by anyone, which encompasses 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. The access-to-justice theory recognizes *all* litigants’ constitutional right to counsel. Even where litigants do not have a right to state-appointed counsel,<sup>67</sup> they still have a constitutional right to hire a lawyer to speak on their behalf and act as their advocate and advisor.<sup>68</sup> As Freedman and Smith summarized, “The Supreme Court has reiterated that the right to counsel is ‘the most precious of our rights,’ because it affects one’s ability to assert any other right.”<sup>69</sup> Indeed in recognizing the constitutional right to counsel for indigent criminal defendants, the Supreme Court explained that “the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”<sup>70</sup> The Court also recognized that “assistance of counsel” is “deemed necessary to insure fundamental human rights of life and liberty”

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<sup>64</sup> See, e.g., *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (“Decisions of this Court have grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses.” (citations omitted)); see also Tarkington, *Free Speech Right to Impugn*, *supra* note 30, at 379-85 (reviewing Supreme Court decisions regarding constitutional right to court access in context of raising claims of judicial bias).

<sup>65</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 342-46 (1963).

<sup>66</sup> See, e.g., DEBORAH RHODE, *ACCESS TO JUSTICE* (2004) (discussing the lack of legal services for individuals who are poor or receive moderate incomes and proposing reforms); see also *id.* at 3 (“According to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet.”).

<sup>67</sup> See, e.g., *Gideon*, 372 U.S. at 342-46 (recognizing Sixth Amendment right to counsel for state indigent criminal defendants).

<sup>68</sup> See *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (explaining that it “would be a denial of a hearing, and therefore, of due process” under the Fifth and Fourteenth Amendments to prohibit litigants from employing attorneys to represent them); see also *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980) (discussing the “constitutional right to retain hired counsel”).

<sup>69</sup> FREEDMAN & SMITH, *supra* note 60, at 16.

<sup>70</sup> *Gideon*, 372 U.S. at 344-45.

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without which justice cannot be done.<sup>71</sup> As set forth in the preceding discussion, attorney speech plays a critical role in our constitutional justice system by invoking and avoiding government power on behalf of clients and thus preserving their individual and collective life, liberty, and property.

Although “access to justice,” as used here, encompasses speech broader than the right to court access, it certainly includes and protects attorney speech commensurate with that right.<sup>72</sup> In our justice system, attorneys are the gateway to effective access to the third branch of government. Litigants have constitutional rights to due process and court access, but those rights are of little value if attorneys are restricted from speaking on behalf of clients and securing clients’ underlying rights.<sup>73</sup>

Thus, in examining the attorney’s essential role in our justice system, access to justice includes at least: (1) the ability to invoke the protection of the law; (2) the ability to obtain legal advice about the lawfulness or unlawfulness of proposed or past conduct; (3) the ability to access court and government processes and to raise relevant and colorable arguments therein; and (4) the ability to secure the constitutional rights of others.

## II. METHODS FOR ANALYZING THE CONSTITUTIONALITY OF ATTORNEY SPEECH REGULATION

In existing literature and case law, various theories emerge regarding the appropriate analysis for determining the constitutionality of restrictions on attorney speech. There is no consensus or agreed upon method.<sup>74</sup> Courts and commentators engage in various methods to evaluate the constitutionality of restrictions on attorney speech, including: (1) viewing restrictions on attorney speech as constitutional conditions on the attorney’s privilege to practice law, (2) applying normal First Amendment theories and doctrines, (3) analogizing attorney speech to areas of limited First Amendment protection, and (4) deeming the First Amendment inapplicable to attorney speech.

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<sup>71</sup> *Id.* at 343.

<sup>72</sup> See *infra* notes 247-255, and accompanying text (discussing constitutional right to court access).

<sup>73</sup> See Tarkington, *Free Speech Right to Impugn*, *supra* note 30, at 383, 419-22 (“Due process guarantees to criminal and civil litigants . . . are defeated if the attorney has no right to express and vindicate them in court proceedings.”).

<sup>74</sup> See generally, W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 326-35 (2001) (discussing various approaches to attorney speech).

Nevertheless, an examination of these views demonstrates that each approach fails to adequately protect attorney speech when made *as an attorney*. Indeed, the U.S. Supreme Court appeared to condone this dichotomy by stating in dicta: “It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.”<sup>75</sup> A central idea of the access-to-justice theory is that attorneys — in their capacity as attorneys both in and out of court — perform essential functions in our justice system.<sup>76</sup> Consequently, their speech should not be circumscribed in a way that frustrates those essential functions, especially when that speech is made by a lawyer acting as a lawyer. Because of the representative nature of the lawyer’s work, the most obstructive form of lawyer regulation is that which denies attorneys their essential role to speak to and on behalf of clients.

A. *All Restrictions by the Judiciary or the Bar are Constitutional*

1. Constitutional Conditions of Practicing Law

The traditional view is that attorneys have no Free Speech Clause protection from restrictions on their speech that are imposed by the judiciary or the state bar.<sup>77</sup> The central thesis of this constitutional

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<sup>75</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991).

<sup>76</sup> *See infra* Part III.B.

<sup>77</sup> As noted above, this classic view was expressed by Benjamin Cardozo: “Membership in the bar is a privilege burdened with conditions.” *See In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917). The idea can be seen in earlier cases even as to traditional judiciary-imposed standards for attorneys before the existence of codes of lawyer conduct. In *Bradley v. Fisher*, 80 U.S. 335, 355 (1871), the Supreme Court declared that attorneys agree, upon admission to the bar to be respectful to the judiciary — as a condition of practicing law. *See id.* (explaining that when admitted, attorneys take upon themselves the obligation “to maintain *at all times* the respect due to courts of justice and judicial officers,” which “includes abstaining *out of court* from all insulting language and offensive conduct toward the judges personally for their judicial acts” (emphasis added)).

Fred Zacharias notes that in colonial and post-revolutionary America, “[a]ny regulation of lawyers came from judges exercising their authority to admit lawyers to practice in their courts,” as “judges could forbid lawyers to appear, sanction them for litigation misconduct, or punish them in more indirect ways.” *See Zacharias, supra* note 17, at 1156-57. In the late nineteenth and early twentieth centuries, bar associations were created and “represented the modern form of lawyer self-regulation.” *See id.* at 1158-60. In the 1920s, “a movement began to produce court rules or statutes requiring all practicing lawyers to belong to state bar organizations,” which “allowed the organizations to collect fees, control (and limit) admission to the bar, and participate in the discipline of lawyers.” *See id.* at 1161. *See generally*,

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conditions theory is that, as a condition of receiving licenses to practice law, lawyers voluntarily waive their constitutional rights to free speech and agree to abide by any conditions or restrictions on their speech that the judiciary or the bar may impose. Justice Stewart, in words that are still frequently cited by state courts, explained in his *In re Sawyer* concurrence:

If . . . there runs through the principal opinion an intimation that a lawyer *can invoke the constitutional right of free speech to immunize himself* from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join . . . . Obedience to ethical precepts may require *abstention from what in other circumstances might be constitutionally protected speech*.<sup>78</sup>

For example, in 2003, the Ohio Supreme Court paraphrased Stewart's concurrence in holding that "attorneys may *not* invoke the federal constitutional right of free speech to immunize themselves from even-handed discipline for proven unethical conduct."<sup>79</sup>

Justice Stewart's concurrence is arguably quite dated, but the Supreme Court has not fully rejected the constitutional conditions approach. In *Gentile v. State Bar of Nevada*, Justice Rehnquist, speaking for four justices, articulated the constitutional conditions argument more broadly than Justice Stewart:

When petitioner was admitted to practice law before the Nevada courts, the oath which he took recited that "I will support, abide by and follow the Rules of Professional Conduct as are now or may hereafter be adopted by the Supreme Court . . . ." *The First Amendment does not excuse him from that obligation*, nor should it forbid the discipline imposed upon him by the Supreme Court of Nevada.<sup>80</sup>

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Andrews, *supra* note 17, at 1413-54 (reviewing the history of lawyer regulation).

Freedman and Smith argue that the creation of ethics codes in the early twentieth century were motivated "not [by] a desire to improve the ethical conduct of lawyers," but instead "the established bar adopted educational requirements, standards of admission, 'canons of ethics' designed to maintain a predominantly native-born, white, Anglo-Saxon, Protestant monopoly of the legal profession." See FREEDMAN & SMITH, *supra* note 60, at 3.

<sup>78</sup> *In re Sawyer*, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring) (emphasis added).

<sup>79</sup> *Office of Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 429 (Ohio 2003) (emphasis added) (citing *In re Sawyer*, 360 U.S. at 646-47 (Stewart, J., concurring)).

<sup>80</sup> 501 U.S. 1030, 1081 (1991) (Rehnquist, J., dissenting) (emphasis added)

According to Justice Rehnquist, because lawyer Dominic Gentile had sworn to abide by the Rules of Professional Conduct when he was admitted to the bar, he could not object to any restriction imposed by the state bar on the basis that it abridged his freedom of speech. He had agreed to forfeit his rights to free speech, and, therefore, the state could constitutionally regulate his speech without violating the First Amendment. Courts have cited and continue to cite the constitutional conditions idea as sufficient to defeat First Amendment challenges to judicially-imposed regulation or punishment.<sup>81</sup>

Of course, one of the major problems with the constitutional conditions argument is that it is patently inaccurate. While pronouncing the constitutional conditions theory from time to time, the Supreme Court has repeatedly held attorney regulations unconstitutional as violative of attorneys' First Amendment rights.<sup>82</sup>

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(internal citations omitted).

<sup>81</sup> See, e.g., *In re Pyle*, 156 P.3d 1231, 1241-43 (Kan. 2007) ("A lawyer's right to free speech is tempered by his or her obligations to the courts and the bar, obligations ordinary citizens do not undertake."); *In re Shearin*, 765 A.2d 930, 938 (Del. 2000) (holding that "there are ethical obligations imposed upon a Delaware lawyer, which qualify the lawyer's constitutional right to freedom of speech"); *In re Guy*, 756 A.2d 875, 881 (Del. 2000) (explaining "[r]espondent's right to free speech did not supersede his ethical obligation as a member of the Bar..."); Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 519 (Iowa 1996) (stating that "a lawyer's right of free speech does not include the right to violate the statutes and canons proscribing unethical conduct" (citing Comm. on Prof'l Ethics & Conduct v. Hurd, 360 N.W.2d 96, 105 (Iowa 1984))); *In re Erdmann*, 301 N.E.2d 426, 442-43 (N.Y. 1973) (Burke, J., dissenting) (explaining that statements by attorney for article in Life magazine "violate restrictions placed on attorneys which they impliedly assume when they accept admission to the Bar"); *State v. Nelson*, 504 P.3d 211, 214 (Kan. 1972) ("[T]he right to free speech may not be invoked to protect an attorney against discipline for unethical conduct."); see also *In re Westfall*, 808 S.W.2d 829, 834 (Mo. 1991) (explaining that courts have held that "an attorney's voluntary entrance to the bar acts as a voluntary waiver of the [First Amendment] right to criticize the judiciary").

<sup>82</sup> See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (applying strict scrutiny and invalidating as violative of the First Amendment restriction that prohibited attorneys and judges running for judicial office from speaking their views on legal and political issues); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547-49 (2001) (invalidating as violative of the First Amendment congressional restriction that prohibited Legal Service Corporation attorneys from challenging validity of welfare laws); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 642-43 (1985) (invalidating restrictions on attorney advertising and solicitation as violative of the First Amendment); *In re R.M.J.*, 455 U.S. 191, 206 (1982) (same); *In re Primus*, 436 U.S. 412, 437-40 (1978) (same); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (same); *NAACP v. Button*, 371 U.S. 415, 437 (1963) (holding solicitation ban that prohibited NAACP from advising and assisting potential litigants to bring desegregation suits violates First Amendment).

Thus, the constitutional conditions theory is invoked selectively: sometimes it prevents First Amendment scrutiny, but sometimes it does not. Courts relying on a constitutional conditions approach do not articulate when it is or is not applicable. Attempting to explain this pattern, Kathleen Sullivan argues that the case law can be understood as providing normal First Amendment protection when attorneys are speaking “as participants in ordinary public or commercial discourse on a par with other speakers in those realms,” but that their free speech rights are limited (or even lost) when attorneys are speaking in their role of attorney as officers of the court or “delegates of state power.”<sup>83</sup>

A corollary of the constitutional conditions theory is that the Constitution does not prohibit any restrictions on speech that the attorney could not freely engage in prior to becoming an attorney. As explained by W. Bradley Wendel:

Suppose a lawyer is disciplined for making racist remarks in a closing argument at trial. It is no avail to claim that the disciplinary agency is *requiring the lawyer to surrender a constitutional right* in exchange for the privilege of trying cases before the courts of the state, because *the lawyer had no preexisting right* to address a jury in a courtroom.<sup>84</sup>

That is, because a non-lawyer lacks a constitutional (or any) right to speak on behalf of a client in a court proceeding, the lawyer similarly has no constitutional right to engage in such speech. While the example provided by Wendel is alluring, the ultimate implications of the argument are problematic. Indeed, the *Humanitarian Law Project* decision can be read to espouse a similar view.<sup>85</sup> The Court concluded that attorneys are not denied their free speech rights because they can independently advocate whatever views they want.<sup>86</sup> Attorneys are free to speak and act as lay citizens. What they cannot do is act as attorneys — they cannot engage in any speech or provide advice to or in coordination with their proposed clients.<sup>87</sup> Such a theory completely denies the attorney’s function in our system of justice.

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<sup>83</sup> Kathleen Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 584 (1998).

<sup>84</sup> Wendel, *supra* note 74 at 373-74 (emphasis added).

<sup>85</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722-23 (2010).

<sup>86</sup> *Id.* (“The statute does not prohibit independent advocacy or expression of any kind.”) (citing Initial Brief of Appellee-Respondent at 13, *Humanitarian Law Project*, 130 S. Ct. 2705 (Dec. 22, 2009) (Nos. 08-1498, 09-89)).

<sup>87</sup> See *id.* at 2722-24.

By failing to recognize the need to protect attorneys in performing their essential functions, *Humanitarian Law Project* is in tension with the Supreme Court's prior decisions in *Legal Services Corp. v. Velazquez*<sup>88</sup> and *NAACP v. Button*.<sup>89</sup> In *Velazquez* and *Button*, the Court correctly recognized that attorneys must have free speech rights to perform at least some attorney functions, even though they could not have engaged in such speech prior to becoming an attorney. In *Velazquez*, the Court held that attorneys have a First Amendment right to raise relevant and colorable arguments in legal proceedings on behalf of clients.<sup>90</sup> Certainly this is a right of speech that the attorney did not have prior to being sworn into the bar. Yet the Court correctly found this right constitutionally protected. In order for clients to be able to vindicate their legal and constitutional rights, attorneys cannot be prohibited from undertaking such speech.<sup>91</sup> Indeed, as the *Velazquez* Court noted, if Congress could prohibit attorneys from raising constitutional challenges to congressional legislation, the very function of the judiciary would be frustrated.<sup>92</sup> Similarly, in *Button* the Court held that Virginia could not constitutionally prohibit NAACP lawyers from advising members of the African American community of their rights and offering to instigate litigation on their behalf.<sup>93</sup> The *Button* Court recognized that such "communication" between attorneys and prospective clients, as well as the subsequent litigation, were "a form of political expression" protected by the First Amendment.<sup>94</sup> Notably, in both *Button* and *Velazquez*, the restriction purportedly only prohibited attorney speech and did not directly restrict client speech.<sup>95</sup> Nevertheless, the Court in both cases

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<sup>88</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 537 (2001).

<sup>89</sup> *NAACP v. Button*, 371 U.S. 415, 428-30 (1963).

<sup>90</sup> *Velazquez*, 531 U.S. at 545-47 (holding that statute prohibited "speech and expression" and that "attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case"); *see id.* at 546 (noting that statute attempts "to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider").

<sup>91</sup> *See Tarkington, Free Speech Right to Impugn*, *supra* note 30, at 371-73, 417-22.

<sup>92</sup> *See Velazquez*, 531 U.S. at 545 ("By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits *speech* and *expression* upon which courts must depend for the proper exercise of the judicial power." (emphasis added)).

<sup>93</sup> *See Button*, 371 U.S. at 421-22.

<sup>94</sup> *See id.* at 429.

<sup>95</sup> *See id.* at 423-26 & n.7 (reviewing state restrictions on attorney solicitation that prohibited NAACP activities; the laws imposed no restrictions on client speech or activity); *see also Velazquez*, 531 U.S. at 538-40 (reviewing statutory restrictions that

recognized the lawyer's First Amendment right to speak to and on behalf of clients, even when speaking as lawyers in conjunction with official court processes.

## 2. Protection of Essential Functions through Traditional "Self-Regulation"

As noted above, the flip side of the constitutional conditions argument is its alleged saving grace. Under traditional self-regulation (by which I include regulation by the state judiciary and bar associations), while attorneys purportedly waive their constitutional rights to free speech as to such regulation, the judiciary and the bar understand the legal system and theoretically impose appropriate restrictions on speech.

Indeed, one of the primary justifications for allowing attorneys and other traditional professions to self-regulate is that attorneys "alone have the specialized knowledge to understand the unique nature of their profession's problems and hence, [will alone know how] to apply effective cures."<sup>96</sup> Regulation by the judiciary is generally attuned to this same purpose. The judiciary, generally composed of lawyers,<sup>97</sup> understands the role of attorneys in our justice system and so, in theory, will prescribe appropriate regulations.<sup>98</sup>

Unfortunately, there have been instances where the judiciary has failed to protect speech that should fall within the core protection of attorney functions. For example, the judiciary has failed to protect attorney speech that is critical of the judiciary, even when that speech

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prohibited LSC attorneys from accepting representations designed to change welfare laws — the statutes did not limit client speech or the ability of a client to hire a non-LSC funded attorney or proceed *pro se*).

<sup>96</sup> William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 489 (1995).

<sup>97</sup> See, e.g., MORGAN, *supra* note 21, at 73 (noting that throughout the "1950s and 1960s, lawyers could get away with convincing themselves they were part of a self-regulating profession" in part because "rules of professional conduct has been established by bar associations working through state supreme courts *whose justices had been lawyers only a few years before*" (emphasis added)).

<sup>98</sup> Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation — Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1210 (2003) ("State supreme courts have expertise in the area of legal regulation. First, the regulation of lawyers is at least partially *motivated by a desire to meet the needs of the courts, and supreme courts are in an excellent position to determine those needs*. Second, all of the justices are former lawyers, so they have a good understanding of the legal market, and presumably the effects their regulation will have on the market." (emphasis added)).



raises a relevant argument of judicial bias in a court proceeding.<sup>99</sup> Indeed, the judiciary has harshly punished attorneys for speech impugning judiciary integrity, regardless of the forum in which the speech has been made and regardless of whether the attorney was acting in a representative capacity when the speech was made.<sup>100</sup>

Such examples highlight an additional problem with judicial regulation and punishment of attorneys: the judiciary can punish or restrict challenges to their own actions. Attorneys play a key role in checking government power when it encroaches upon or threatens the life, liberty, or property of individuals. Often the criminal defense attorney or civil rights litigator is upheld as the archetypal example of the attorney who plays this role.<sup>101</sup> Yet, attorneys also challenge judicial power. Every appellate attorney challenges the government and government decrees; but the attorney is challenging judicial action rather than actions of the executive or legislative branch.<sup>102</sup> Further, as Benjamin H. Barton has argued, although regulation by state supreme courts has the advantage of coming from those who understand the needs of courts and attorneys, this advantage is “tempered by the fact that courts rarely use this expertise.”<sup>103</sup> Barton explains that state supreme courts “generally delegate almost all of their authority back to bar associations or regulatory agencies.”<sup>104</sup>

Most importantly, the reality that government entities other than state judiciaries regulate attorneys undermines the underlying constitutional conditions compact. The traditional idea held that attorneys waived their rights to free speech. Yet, regulation came from the state judiciary or state bar, an insular and inside group, that understood the role of the attorney and, in theory, could be trusted to impose appropriate regulation. Although the compact was always

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<sup>99</sup> See generally Tarkington, *Free Speech Right to Impugn*, *supra* note 30 at 364 (examining cases where courts have punished attorneys, and arguing for constitutional protection for attorney speech raising arguments of judicial bias in a court proceeding); Tarkington, *The Truth Be Damned*, *supra* note 30 at 1569-70 (examining the punishment of attorneys for impugning judicial reputation and, in such cases, the widespread rejection by judiciary of the normal constitutional standard protecting speech regarding public officials).

<sup>100</sup> Tarkington, *The Truth Be Damned*, *supra* note 30 at 1569-70.

<sup>101</sup> See, e.g., Sullivan, *supra* note 83, at 587-88 (“It would plainly be untenable for the Court to treat lawyers as entirely the agents of the state, for part of their very job description within the administration of justice is to challenge the state — for example, in the capacities of criminal defense lawyer or civil rights litigator.”).

<sup>102</sup> See Tarkington, *Free Speech Right to Impugn*, *supra* note 30, at 391-92.

<sup>103</sup> Barton, *supra* note 99.

<sup>104</sup> *Id.* at 1210.

imperfect, the basic premise is significantly weakened where attorney regulation comes from outsiders.

### B. Normal First Amendment Theory and Doctrine

The primary alternative to the “constitutional conditions” theory for denying attorneys access to First Amendment protections is to use normal First Amendment case law and doctrines. For example, the Supreme Court has analyzed restrictions on attorney advertising by applying the *Central Hudson* commercial speech test.<sup>105</sup> The Court has not modified the test based on the fact that the regulation restricts attorney speech.<sup>106</sup> Although the state interests and the regulations themselves may involve interests specific to attorneys, the analysis used to test the constitutionality of the restriction, along with the level of scrutiny employed, are the same used for regulation of any other service provider or regulated industry. Further, in *Republican Party of Minnesota v. White*,<sup>107</sup> the Court applied strict scrutiny — the normal level for restrictions on political speech — in analyzing the constitutionality of an announce clause, which prohibited attorneys (and judges) running for judicial office from expressing their views on certain political issues.<sup>108</sup>

The options for analyzing attorney speech have thus taken two completely opposed paths: either the attorney has no constitutional rights, or the attorney has regular constitutional rights. (This may be

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<sup>105</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980). The *Central Hudson* test is the test generally used for examining the constitutionality of restrictions on commercial speech, such as advertisements. Notably, the Supreme Court has used this test in examining restrictions on attorney advertising, just as it would for advertising restrictions imposed on any other regulated industry. As summarized in *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995), under the *Central Hudson* test, the regulator must establish three prongs: “First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be ‘narrowly drawn.’” *See id.*; *see also Cent. Hudson*, 447 U.S. at 564-65.

<sup>106</sup> *See, e.g., Went For It, Inc.*, 515 U.S. at 623-24 (analyzing restriction under *Central Hudson*); *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 472 (1988) (same); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 637-44 (1985) (same); *In re R.M.J.*, 455 U.S. 191, 203-06 (1982) (same); *see also Bates v. State Bar of Ariz.*, 433 U.S. 350, 365-66 (1977) (stating that decision to constitutionally protect attorney advertising “might be said to flow *a fortiori* from” Court’s decision in *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976), which was the predecessor to *Central Hudson*).

<sup>107</sup> 536 U.S. 765, 765 (2002).

<sup>108</sup> *See id.*

contrasted with the special analysis created by the Supreme Court for restrictions on public employee speech.<sup>109</sup>) As noted above, Sullivan has contended that the cases can be understood as depending on whether the attorney is acting in a public or private role. When an attorney acts more as an officer of state power (for example, in courtroom speech), then the constitutional conditions argument applies, and the attorney has no First Amendment rights. Yet, when the attorney acts more as a private citizen, then the attorney has speech rights similar to those of other citizens.<sup>110</sup> The Supreme Court, however, has not expressly adopted such a dichotomy in its treatment of attorney speech.

Even when normal First Amendment doctrines are employed, they are not always sufficient to protect the essential access-to-justice functions performed by attorneys through their speech. As noted above, in *Milavetz* the regulation problematically restricted the ability of attorneys to fully advise a client about the boundaries of lawful and unlawful behavior,<sup>111</sup> yet the argument used to contest the regulation's constitutionality was vagueness.<sup>112</sup> Similarly, in *Humanitarian Law Project*, one of the primary arguments employed by plaintiffs (and relied on by the Ninth Circuit in finding the law unconstitutional) was vagueness, when the true problem with the law was that it denied attorneys the ability to invoke the law on behalf of desired clientele, or even advise them on how to do so.<sup>113</sup> In both cases, the First and Fifth

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<sup>109</sup> See, e.g., *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (“The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”). The *Pickering* test has been significantly undermined by the Supreme Court’s decision in *Garcetti v. Ceballos*, which held that public employees lack Free Speech Clause protection for speech made pursuant to their employment duties. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

<sup>110</sup> Sullivan, *supra* note 83, at 569 (positing that “lawyers are sometimes perceived as classic speakers in public discourse”; however, attorneys in some roles are “thought of as delegates of state power — officers of the court and professional licensees whose special privileges are conditioned upon foregoing some speech rights that others enjoy”); *id.* at 584 (“The lawyer speech cases reflect a dichotomy between the Court’s treatment of lawyers as participants in ordinary public or commercial discourse on a par with other speakers in those realms, and its treatment of lawyers as subject to some additional speech restrictions by virtue of their ties to state power.”).

<sup>111</sup> The challenged statute prohibited an attorney from advising a client to incur debt if that client was contemplating bankruptcy. See *supra* notes 32-34 and accompanying text.

<sup>112</sup> See *Milavetz, Gallop & Milavetz P.A. v. United States*, 130 S. Ct. 1324, 1337 (2010).

<sup>113</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2714 (2010).

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Amendment prohibitions on vague laws were the primary argument used (apparently viewed as the most likely to be successful). Notably, neither the attorneys nor the Court in either case proposed a theory or doctrine of the Free Speech Clause that adequately addressed the core problem with the restrictions: they frustrated the essential role of attorneys in our justice system.

The insufficiency of normal First Amendment doctrines to protect the essential role of attorneys in our system of justice is exacerbated by the private/public distinction noted by Sullivan.<sup>114</sup> To the extent that the private/public distinction is used in determining whether constitutional conditions or First Amendment doctrines apply, attorneys have First Amendment rights when their speech is *not* essential to our system of justice — because in those instances, their speech is seen as private citizen speech. However, attorneys lack free speech protection (even as provided through normal First Amendment doctrines) for speech that is *essential* to fulfilling their role in our justice system — because in those instances they are speaking as attorneys or officers of the court.

### C. Analogy to Other Areas of Limited Protection

While not generally employed by courts, another method for analyzing restrictions on attorney speech is analogizing attorney speech to other more developed areas of limited speech protection.<sup>115</sup> For example, Sullivan and Wendel have analogized attorney speech problems to government-funded speech, public employee speech, and speech made in a nonpublic forum.<sup>116</sup>

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<sup>114</sup> See Sullivan, *supra* note 83, at 569.

<sup>115</sup> Notably, in several specific areas, the Supreme Court has recognized only limited protection for speech based on the nature of the speech, the place where the speech occurs, the identity of the speaker, or the entity funding the speech. Among other areas of limited speech protection, the Court has allowed only limited protection for commercial speech, see *Cent. Hudson Gas & Elec. Corp. v. Public Servs. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980), for speech by public employees, see *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), and for government-funded speech, see *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

<sup>116</sup> See Sullivan, *supra* note 83, at 585-87 (analogizing regulation of attorney speech to public employee speech regulation, government-funded speech, and speech in a nonpublic forum); Wendel, *supra* note 74, at 375-81; see also Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161, 187-90 (2008) (analogizing attorney speech to public employee speech); Caprice L. Roberts, Note, *Standing Committee on Discipline v. Yagman: Missing the Point of Ethical Restrictions on Attorney Criticism of the Judiciary?*, 54 WASH. & LEE L. REV. 817, 846-54 (1997).

Notably, in all of these analogies, attorney speech is treated as deserving little or no protection whenever the attorney is speaking as an attorney. The premise of the government-funded speech theory, for example, is that the government has funded the court systems and made attorneys officers of the court and, thus, can restrict attorney speech made in that capacity.<sup>117</sup> Further, in the analogy to public employee speech, the attorney, as “officer of the court,” is treated in like manner to an employee of the court whose speech rights vis-à-vis the judiciary are extremely circumscribed.<sup>118</sup> Finally, in the nonpublic forum analog, the entire legal system is viewed as a nonpublic forum where the government, which created the forum, can restrict the speech of participant attorneys.<sup>119</sup> Although some of the analogies are less protective of essential attorney speech than others, none are satisfactory, and all fail to protect attorney speech made in the role of attorney, counselor, or representative of others.<sup>120</sup> Consequently, these analogies fail to adequately protect litigants’ rights, including due process and access-to-court rights. Moreover, such analogies do not recognize the constitutionally required nature of our judicial system or the role of attorneys in that system.<sup>121</sup>

Finally, all of the analogies are limited to examining restrictions on attorney speech made in or related to a court proceeding. The analogies fail to even acknowledge other areas of potential restriction on attorney speech, including speech made in advisory contexts to

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<sup>117</sup> See Tarkington, *Free Speech Right to Impugn*, *supra* note 30, at 393-401 (discussing analogy of attorney speech regulation to government funded expression).

<sup>118</sup> See *id.* at 401-09 (discussing analogy of attorney speech to speech of public employees).

<sup>119</sup> See *id.* at 409-13 (discussing treatment of attorney speech as speech made in nonpublic forum).

<sup>120</sup> See *id.* at 392-413 (“Whatever the term ‘officer of the court’ means, it cannot mean something that denies the very function of the court system and the role of attorneys therein, particularly where it results in the loss of rights and protections for litigants. Under each of these analogies, such protections are lost.”).

<sup>121</sup> See *id.* As I show in *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*,

[E]ach of these analogies fails to recognize and account for the following: (1) the nature of the court system as an essential part of our tripartite system of government that performs constitutionally required functions; (2) the constitutional rights of litigants and criminal defendants to access that system and to protections within that system . . . ; and (3) the attorney’s role in representing her client in that court system, particularly in light of its American adversarial form.

See *id.* at 393.

clients or speech made in transactional and other situations where attorneys are invoking the protection of the law on behalf of clients.

#### D. *The First Amendment Is Inapplicable*

Frederick Schauer offers another possible approach to regulation of attorney speech. Schauer argues that the First Amendment has been, and probably should continue to be, simply inapplicable to the “omnipresence” of regulation imposed on attorney speech.<sup>122</sup> While he notes the “occasional outburst” of First Amendment application to areas of attorney speech, he argues that, in general, the doctrines and discourse of the First Amendment have not been thought to apply to attorney speech.<sup>123</sup> Schauer considers arguments in favor of providing constitutional protection for attorney speech and agrees that the First Amendment likely should apply in certain scenarios, including “to ensure that government, its officials, and its processes are subject to public criticism.”<sup>124</sup> Yet Schauer contends that there are “strong arguments for continuing to treat the question of regulation of much of the speech of law as a policy rather than as a constitutional question.”<sup>125</sup> In other words, lawmakers (those entities regulating attorneys) should be able to consider the policies at issue and determine whether to impose a given restriction on attorney speech,

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<sup>122</sup> See Schauer, *supra* note 43, at 689-92. Although based on a different premise than Schauer’s argument, a similar idea is conveyed in a couple non-majority opinions from the Supreme Court. For example, Justice Harlan’s dissent in *NAACP v. Button* argued that litigation and attorney speech, which are more than speech in that they produce legally binding results, should be regulated as conduct rather than speech. See *NAACP v. Button*, 371 U.S. 415, 455 (1963) (Harlan, J., dissenting). Justice White offered a similar view in his concurrence in *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring). Renee Newman Knake addresses these arguments in her recent article, *Attorney Advice and the First Amendment*, 68 WASH & LEE L. REV. 639, 685-87 (2011). She notes that even in *Humanitarian Law Project*, where the Court found no protection for the speech at issue, the Court determined that the speech should not be treated as conduct. See *id.* at 686. Moreover, Justice Harlan’s theory was rejected by the *Button* majority, which held that advocacy and litigation were protected forms of expression and association, and by the Supreme Court in *Legal Services Co. v. Velazquez*, which held that the First Amendment protected attorney speech and expression even in the litigation context. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545-48 (2001); *NAACP v. Button*, 371 U.S. 415, 429 (1963).

<sup>123</sup> See Schauer, *supra* note 43, at 689-92; see also *id.* at 694-95.

<sup>124</sup> *Id.* at 697-98. Schauer argues that such protection would extend to criticism of the judiciary, a point with which I absolutely agree. *Id.* See generally, Tarkington, *The Truth Be Damned*, *supra* note 30, 1576-83 (arguing that attorneys should be afforded constitutional protection for speech critical of judiciary).

<sup>125</sup> Schauer, *supra* note 43, at 698.

and they should be able to do so free from First Amendment constraints.

Schauer argues that attorney speech should not be afforded constitutional protection in part because speech restrictions are necessary to protect our justice system. Specifically, attorney speech restrictions are necessary to protect such things as courtroom order, the integrity of the jury, and fair trial processes.<sup>126</sup> Schauer indicates that if the normal doctrines and discourse of the First Amendment protected attorney speech, then speech restrictions (such as exclusionary rules or rules prohibiting communication with jurors) aimed at preserving these essential features of our justice system could be unconstitutional.<sup>127</sup> Further, Schauer argues that because certain speech restrictions are essential to our justice system, they are “inevitable,” meaning that courts inevitably would interpret the First Amendment to uphold such restrictions. Consequently, if the Constitution were deemed generally applicable to attorney speech, the normal doctrines and discourse of the First Amendment would have to be diluted to allow these “inevitable” restrictions.<sup>128</sup> Schauer thus fears that “expanding the First Amendment into the process of law-speech entails risks to the First Amendment itself, risks that may come from the dilution of necessarily scarce First Amendment resources.”<sup>129</sup> As will be shown below, the access-to-justice approach to analyzing attorney speech restrictions alleviates Schauer’s concerns about affording constitutional protection to attorney speech. The First Amendment can protect attorney speech without diluting protection in other areas and without frustrating the justice system. Indeed, the access-to-justice theory is intended to provide protection for the proper functioning of the justice system and the attorney’s role therein.

### III. THE ACCESS-TO-JUSTICE THEORY

As periodically recognized by the Supreme Court, the Constitution protects attorney speech. For example, in *NAACP v. Button*, the Court recognized both attorney speech and association rights, declaring: “[A]bstract discussion is not the only species of communication which

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<sup>126</sup> See *id.* at 695; see also *id.* at 689-90, 693.

<sup>127</sup> See *id.* at 693-94.

<sup>128</sup> See *id.* at 698-700 (“[T]here remains the distinct possibility that the diluted tests that make the inevitable constitutional are the same diluted tests that might make other forms of less-inevitable regulation constitutional as well.” (emphasis added)).

<sup>129</sup> See *id.* at 699.

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the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.”<sup>130</sup> Attorneys — through their speech — provide such vigorous advocacy of lawful ends. Indeed, attorneys play a key role in our justice system: they provide to clients speech that has the force of law and that is intended to invoke or avoid the power of government in securing individual and collective life, liberty, and property.

In light of the failure of current approaches to protect the attorney’s role in our justice system, I propose a new access-to-justice theory of the First Amendment to be used in examining the constitutionality of restrictions on attorney speech. This theory proposes that where attorney speech is key to providing or ensuring access to justice or the fair administration of the laws, it needs special protection under the Free Speech Clause. The theory is modeled after a democratic theory of the First Amendment, but is based on the relationship of attorney speech to the proper functioning of our justice system.

A. *Modeled after a Democratic Theory of the First Amendment*

One major interpretation of the First Amendment views the protection of democracy itself as the primary purpose of the Free Speech Clause. As explained by its initial proponent, Alexander Meiklejohn, the purpose of the First Amendment is to protect the ability of U.S. citizens to govern themselves.<sup>131</sup> In his own words: “The First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’”<sup>132</sup> The central idea is that free speech is essential for democracy to function. Under the social contract created by the Constitution, “We the People of the United States” established a democratic form of government. Consequently, free speech must exist so that all citizens can fully participate in the privilege and responsibility of self-government.<sup>133</sup>

Further, Meiklejohn contends that, in a democracy, the people are the ultimate sovereigns: “All constitutional authority to govern the

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<sup>130</sup> See *NAACP v. Button*, 371 U.S. 415, 429 (1963); see also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (holding that attorney advice and representation regarding the validity of welfare laws are “constitutionally protected expression”).

<sup>131</sup> See generally MEIKLEJOHN, *supra* note 52 (arguing that free speech is essential to self-government).

<sup>132</sup> Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961); see also *id.* at 252 (“The freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government.”).

<sup>133</sup> MEIKLEJOHN, *supra* note 52, at 15-16.



people of the United States belongs to the people themselves, acting as members of a corporate body politic.”<sup>134</sup> Through the constitutional compact, the people delegated limited powers to “subordinate agencies, such as the legislature, the executive, [and] the judiciary.”<sup>135</sup> However, “[t]he people do not delegate all their sovereign powers.”<sup>136</sup> Consequently:

Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom *unabridged by our agents*. Though they govern us, *we, in a deeper sense, govern them*. Over our governing, they have no power. *Over their governing we have sovereign power.*<sup>137</sup>

Thus, as Cass Sunstein has reiterated, “[T]he American tradition of free expression” and its “extraordinary protection” for “political speech can well be understood as an elaboration of the distinctive American understanding of sovereignty.”<sup>138</sup> This is so because restrictions on political speech can frustrate channels for political change and, thus, render unavailable democratic correctives to political problems.<sup>139</sup> Where citizens are unable to change and challenge politics through normal democratic processes, the citizen loses its sovereignty over the government. The overall point of view is summarized by Martin Redish and Abby Mollen: “[D]emocracy and free expression are inextricably intertwined in a symbiotic relationship.”<sup>140</sup> Because free speech is essential for democracy and popular sovereignty to function, Meiklejohn argues that speech essential to self-government is absolutely protected by the Free Speech Clause of the First Amendment.<sup>141</sup>

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<sup>134</sup> Meiklejohn, *supra* note 132, at 253.

<sup>135</sup> *Id.* at 254.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 257 (emphasis added).

<sup>138</sup> Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 257 (1992).

<sup>139</sup> *Id.* at 306.

<sup>140</sup> Martin H. Redish & Abby Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1303 (2009).

<sup>141</sup> See MEIKLEJOHN, *supra* note 52, at 46 (explaining that “[s]o long as [a citizen’s] active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged”); MEIKLEJOHN, *supra* note 132, at 257. However, Meiklejohn does not contend that the First Amendment as “an unlimited license to talk,” but instead notes that “there are many forms of communication which, since they are not being used as activities of

Although the Supreme Court has not adopted Meiklejohn's theory in whole, it has been strongly influenced by his thinking.<sup>142</sup> For example, the Court carefully protects political speech, considering it at the "core" of the First Amendment.<sup>143</sup> Furthermore, in *New York Times Co. v. Sullivan* and progeny, the Court adopted the strict "actual malice" standard for the punishment of allegedly defamatory speech regarding public officials.<sup>144</sup> These Supreme Court decisions demonstrate the Court's acceptance of the idea that democracy cannot function properly without free speech.

Meiklejohn's work has also strongly influenced the legal academy. Harry Kalven, commenting on the Supreme Court's adoption of Meiklejohn's theory in *Sullivan*, explained:

This is not the whole meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt why it is

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governing, are wholly outside the scope of the First Amendment." MEIKLEJOHN, *supra* note 133, at 258.

<sup>142</sup> See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 554 (1977) ("The most influential scholarly analysis of the First Amendment to be published since World War II is Professor Alexander Meiklejohn's *Free Speech and Its Relation to Self-Government*.").

<sup>143</sup> See, e.g., *Virginia v. Black*, 538 U.S. 343, 365 (2003) ("[P]olitical speech, [is] . . . at the core of what the First Amendment is designed to protect."); *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002) (citing *Republican Party v. Kelly*, 247 F.3d 854, 861 (8th Cir. 2001) (holding that "speech about the qualifications of candidates for public office" is "'at the core of our First Amendment freedoms'")); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("Indeed, the speech in which Mrs. McIntyre engaged — handing out leaflets in the *advocacy of a politically controversial viewpoint* — is the essence of First Amendment expression." (emphasis added)); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." (internal citations omitted)).

<sup>144</sup> *New York Times Co. v. Sullivan* 376 U.S. 254, 279-80, 283 (1964); see also *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (emphasis added)). In *Sullivan*, the Court held that a public official could not recover for libel unless the defendant acted with actual malice, meaning that the defendant knew that the statement was false or acted with reckless disregard regarding the truth or falsity of the statement. See *Sullivan*, 376 U.S. at 279-80; see also *Garrison*, 379 U.S. at 74-75 ("[O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *Sullivan* may be the subject of either civil or criminal sanctions.").

being protected. *The theory of the freedom of speech clause was put right side up for the first time.*<sup>145</sup>

The Free Speech Clause is “put right side up” because, instead of investigating which exceptions should be recognized as outside the scope of the amendment, Meiklejohn focused on identifying the core protection and moving outward. Rather than examining the First Amendment solely at the fringes, we start with understanding what is at its core — the protection of democracy.

*B. A Free Speech Right Commensurate to Preserve our Justice System*

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. As Freedman and Smith explain, the American adversary system, in which attorneys play an essential and constitutional role, “consists of a core of basic rights that recognize, and protect, the dignity of the individual in a free society.”<sup>146</sup> Freedman and Smith elaborate that core rights, such as “personal autonomy, the effective assistance of counsel, equal protection of the laws, trial by jury,” and others are “included in the broad and fundamental concept that no person may be deprived of life, liberty, or property without due process of law — a concept which itself has been substantially equated with the adversary system” and the lawyer’s role therein.<sup>147</sup>

The access-to-justice theory proposes that where attorney speech is essential to providing access to justice or the fair administration of the laws, it deserves core First Amendment protection. As indicated above, this protection would include the ability of the attorney to assist individuals in invoking or avoiding the power of government in securing individual or collective life, liberty, and property.

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<sup>145</sup> Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 208 (emphasis added).

<sup>146</sup> FREEDMAN & SMITH, *supra* note 60, at 15.

<sup>147</sup> *Id.* at 15-16. Freedman and Smith discuss this constitutional core of rights protected through the American justice system to help attorneys understand their professional duties to their clients. They conclude: “[T]he professional responsibilities of the lawyer, serving as counsel within our constitutionalized adversary system, must be informed by the same civil libertarian values that are expressed in the Constitution.” *See id.*

Just as the Supreme Court in *Garrison v. Louisiana* recognized that political speech “is more than self-expression,” but constitutes “the essence of self-government,”<sup>148</sup> so too attorney speech — particularly speech made as an attorney on behalf of or to clients — is far more than self-expression and instead provides access to the invocation or avoidance of government power. Thus, unlike the analogies to limited speech protection or the constitutional conditions ideas discussed above, the access-to-justice theory primarily protects attorney speech made in the capacity of attorney. Indeed, the protected core of attorney speech should generally not be “self-expression” in a normal sense of the word. Rather, the protected core of attorney speech is representative or communicative by nature. Even attorneys committed to a cause can only bring cases to courts involving real parties in interest who have suffered a legally cognizable harm and hired the attorney to represent them.<sup>149</sup> Attorney speech creates effective access to the third branch of government, advises people regarding their rights so that they can structure their conduct and protect their life, liberty, and property, and provides access to law itself even outside of official court proceedings. It is this speech that constitutes the core and essential role of attorneys in our justice system, and it deserves core protection under the access-to-justice theory of the First Amendment.

In examining the constitutionality under the Free Speech Clause of any regulation or punishment of attorney speech, the central question should be whether the targeted speech is central to the attorney’s role in our justice system of providing access to justice or the fair administration of the laws. While the contours of the theory and its real world application require fuller development and exploration, certain categories of attorney speech should fall within this essential role that attorneys play in the American justice system. These include: (1) the ability to invoke the protection of the law; (2) the ability to provide legal advice about the lawfulness or unlawfulness of proposed or past client conduct; (3) the ability to access courts and raise relevant and colorable legal and constitutional arguments in judicial,

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<sup>148</sup> *Garrison*, 379 U.S. at 74-75.

<sup>149</sup> See RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS AND QUESTIONS 642 (5th ed. 2007) (“Our system does not allow everyone who is irked about something to bring a suit.”). To properly challenge government (or private) action through court processes, a litigant must generally be a real party in interest and satisfy the justiciability requirements, including standing to sue and the existence of a ripe, non-moot controversy. See, e.g., FED. R. CIV. P. 17 (requiring litigant to be a real party in interest); ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 2.1 (5th Ed. 2007) (discussing justiciability requirements).

administrative, and other government-sponsored proceedings that threaten citizen life, liberty, or property; and (4) speech necessary to preserve the constitutional rights of individuals. Such speech should be afforded core protection and subjected to strict scrutiny, similar to political speech.

1. The Power to Invoke the Protection of the Law

A key element to properly understanding the access to justice provided by attorney speech is the lawyer's ability — through legal training and knowledge — to use speech that will invoke the protection or power of the law. While the litigator provides this service as well, it is the transactional attorney's very function to use speech that will have the force of law and will protect her client's interests. The transactional attorney drafts documents that create business organizations and contractual relationships, invoking the law's protection by complying with legal requirements. Again, this attorney "speech" is calculated to have the force of law and to preserve the client's life, liberty, and property or to protect the client from future liability. Examples include estate planning, creating business organizations, issuing securities, real estate contracts, mergers and acquisitions, etc. In each instance, a lawyer is called upon because she has the requisite legal knowledge and training to: (1) understand what is required to make the speech legally binding on the parties; and (2) understand how the speech will likely be interpreted in the event of a dispute.

Lawyers, therefore, serve an essential role in our justice system by providing individuals with the necessary language and process to invoke or avoid government power, including future liability. Indeed, by forbidding such speech — even though allegedly only a restriction on attorney speech — individuals would, in large part, be unable to invoke the law to protect their life, liberty, and property.<sup>150</sup> Consequently, attorney speech that invokes the protections of existing law is essential to accessing justice and to the fair administration of the laws. Therefore, it deserves core Free Speech Clause protection.

*Holder v. Humanitarian Law Project* exemplifies this category of speech that deserves core Free Speech Clause protection. The *Humanitarian Law Project* Court examined the constitutionality of the "material support" provisions of the Intelligence Reform and

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<sup>150</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); see also Tarkington, *Free Speech Right to Impugn*, *supra* note 30, at 419-22.

Terrorism Prevention Act (“IRTPA”),<sup>151</sup> which make it a crime (punishable by up to fifteen years of imprisonment) to “knowingly provide material support or resources”<sup>152</sup> to any group designated by the Secretary of State as a “foreign terrorist organization” (“FTO”).<sup>153</sup> As defined in the statute, providing material support or resources includes “any . . . service . . . training, expert advice or assistance, . . . [and] personnel.”<sup>154</sup> The plaintiffs, all of whom were United States citizens or organizations,<sup>155</sup> instituted a pre-enforcement challenge to the constitutionality of the “material support” law because they had been previously engaged in providing legal assistance to two such FTOs: the Partiya Karkeran Kurdistan (“PKK”) and the Liberation Tigers of Tamil Eelam (“LTTE”). The PKK is devoted to establishing an independent state for Kurds in Turkey, and the LTTE is devoted to establishing an independent state for Tamils in Sri Lanka.<sup>156</sup> The Humanitarian Law Project wished to help the PKK and LTTE by providing legal advice “on how to use humanitarian and international law to peacefully resolve disputes;”<sup>157</sup> teaching organization members “how to petition various representative bodies” for relief, including the United Nations and the United States Congress;<sup>158</sup> advising the groups

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<sup>151</sup> See 18 U.S.C. § 2339A & 2339B (2006). The prohibition on providing “material support” to foreign terrorist organizations was initially enacted in 1996 with the Anti-Terrorism and Effective Death Penalty Act, yet those provisions did not clearly include within their scope attorney speech and advice. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010). In 2001, as part of the USA PATRIOT Act, Pub.L. No. 107-56, 115 Stat. 272, Congress amended the material support statute by additionally prohibiting “expert advice or assistance.” See *id.* at 2714-15. Finally, in the Intelligence Reform and Terroism Prevention Act of 2004 (“IRTPA”), 108 Pub.L. No. 458, 118 Stat. 3638, Congress “added the term ‘service’ to the definition of ‘material support or resources’; defined ‘training’ to mean ‘instruction or teaching designed to impart a specific skill, as opposed to general knowledge’”; and “also defined ‘expert advice or assistance’ to mean ‘advice or assistance derived from scientific, technical or other specialized knowledge.’” See *id.* at 2715; see also 18 U.S.C. § 2339A & 2339B.

<sup>152</sup> 18 U.S.C. § 2339B.

<sup>153</sup> 8 U.S.C. § 1189 (2006); 18 U.S.C. §§ 2339A & 2339B (2006).

<sup>154</sup> 18 U.S.C. § 2339A(b). See 18 U.S.C. § 2339B(g)(4).

<sup>155</sup> See *Humanitarian Law Project*, 130 S. Ct. at 2731.

<sup>156</sup> See *id.* at 2713.

<sup>157</sup> *Id.* at 2716 (citing *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 928 (9th Cir. 2007)).

<sup>158</sup> *Id.* (citing *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 929 (9th Cir. 2007)) (stating that plaintiffs wished to teach FTOs “how to petition various representative bodies such as the United Nations”); see *id.* at 2732 (Breyer, J., dissenting) (noting that plaintiffs wanted to petition the United States Congress).

on how to obtain recognition under the Geneva Conventions;<sup>159</sup> and providing other “political advocacy”<sup>160</sup> — “advocacy of peaceful means of achieving the goals of these groups.”<sup>161</sup> There was no question that “[t]he Humanitarian Law Project ha[d] no interest in furthering terrorism” or the illegal activities of any of the FTOs. Rather, they wanted to protect the human rights of members of such organizations and help and encourage such organizations to “disavow violence and engage in lawful peaceful means of resolving their disputes.”<sup>162</sup>

The Court held that the statute clearly prohibited the plaintiffs’ proposed speech<sup>163</sup> and that such a prohibition did not violate the First Amendment’s guarantees of free speech and association. The determining factor for the Court was that “[t]he statute does not prohibit *independent advocacy or expression* of any kind.”<sup>164</sup> According to the Court, “[Plaintiffs] may say anything they wish on any topic,”<sup>165</sup> and “Congress has not, therefore, sought to suppress ideas or opinions in the form of ‘pure political speech.’”<sup>166</sup> Indeed, the Court concluded that the statute, as construed, prohibits “only a narrow category of speech *to, under the direction of, or in coordination with*” FTOs.<sup>167</sup>

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<sup>159</sup> See *id.* at 2739 (Breyer, J., dissenting) (noting that declarations below showed that the “relief” sought would *not* be monetary, but would include seeking “recognition under the Geneva Conventions”).

<sup>160</sup> See *id.* at 2729 (citing *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 921 n.1 (9th Cir. 2007)). The *Humanitarian Law Project* majority held that they could not tell what “political advocacy” included and so they could not address the plaintiff’s pre-enforcement challenge regarding engaging in “political advocacy” on behalf of the PKK and LTTE. See *id.* at 2729. However, as noted by the dissent, the majority should have remanded to the lower court to consider the precise activities “relating to ‘advocating’ for the organizations’ peaceful causes.” See *id.* at 2742-43 (Breyer, J., dissenting). Further, Justice Breyer contends that “the majority is wrong about the lack of specificity. The record contains complaints and affidavits, which describe in detail the forms of advocacy these groups have previously engaged in and in which they would like to continue to engage.” See *id.* at 2743 (Breyer, J., dissenting).

<sup>161</sup> See Transcript of Oral Argument at 46, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (Nos. 08-1498, 09-89) (Ginsburg, J., clarifying).

<sup>162</sup> *Id.* at 22.

<sup>163</sup> Indeed, the *Humanitarian Law Project* Court held that the plaintiffs’ vagueness challenge failed because, while the statute may be vague as applied to the activities of others, “the statutory terms are clear in their application to plaintiffs’ proposed conduct.” See *Humanitarian Law Project*, 130 S. Ct. at 2720.

<sup>164</sup> Initial Brief of Appellee-Respondent at 13, *Humanitarian Law Project*, 130 S. Ct. 2705 (Dec. 22, 2009) (Nos. 08-1498, 09-89) (emphasis added); *Humanitarian Law Project*, 130 S. Ct. at 2723.

<sup>165</sup> *Humanitarian Law Project*, 130 S. Ct. at 2722-23.

<sup>166</sup> *Id.* at 2723.

<sup>167</sup> *Id.* at 2722-23 (emphasis added); see also *id.* at 2728 (listing reasons why Court concludes statute constitutional, namely that number of FTOs are limited, that

Notably, the words “in coordination with” are not found in the statute’s definition of material support.<sup>168</sup> Apparently, the Court

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Congress added clarity to the statute, Congress excluded religious and medical support, and “most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities *not directed to, coordinated with, or controlled by* foreign terrorist groups” (emphasis added).

<sup>168</sup> The prohibition on activities done “in coordination with” an FTO is *not* in the statute. See 18 U.S.C. §§ 2339, 2339(A)-(D)(2006). The statute explains that the prohibition on providing “personnel” to FTOs is limited to prohibiting:

1 or more individuals (who may be or include himself) to work *under that terrorist organization’s direction or control* or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals *who act entirely independently* of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.

See 18 U.S.C. § 2339B(h) (emphasis added). The Court in *Humanitarian Law Project* interpreted this provision to prohibit providing “personnel” who work or “services” made “*in coordination with, or at the direction of*” the FTO. See *Humanitarian Law Project*, 130 S. Ct. at 2721-22 (emphasis added); see also *id.* at 2728 (stating that “Congress has avoided . . . any activities *not directed to, coordinated with, or controlled by* foreign terrorist groups” (emphasis added)). From the language of § 2339B(h) regarding “personnel,” the additional prohibition added by excluding people who work “in coordination with” (rather than solely “under the [FTO’s] direction or control” as stated in the statute) can possibly be inferred from the second sentence of § 2339B(h), which explains that individuals are allowed to “act *entirely independently.*” See 18 U.S.C. § 2339B(h) (emphasis added). But such an interpretation was not inevitable, and the Court’s interpretation may in fact prohibit more speech and conduct than Congress even intended.

Further, the addition of the “in coordination with, or at the direction of” gloss onto “service” has no place in the statute, but is based on the Court’s insistence that “service” implies work done “in coordination” with another. See *Humanitarian Law Project*, 130 S. Ct. at 2721-22. Indeed, the Court cites to *Webster’s Third New International Dictionary* to support its interpretation. See *Humanitarian Law Project*, 130 S. Ct. at 2721.

The Court appears to have adopted the “in coordination with” gloss onto “service” and “personnel” from the Government’s brief. See Brief for the Respondents, *Holder v. Humanitarian Law Project* 2009 WL 4951303, at \*45 (arguing that petitioners violate the statute because they want to “engage in certain activities *in coordination with, or under the direction or control of*, groups that they know have been designated as terrorist organizations or have engaged in terrorist activity” (emphasis added)); *id.* at \*38 (arguing that appellate court properly rejected challenge to the statute “[b]ecause those proposed *coordinated activities* clearly fall within the statutory definition of ‘personnel’ ” (emphasis added)); *id.* at 41 (“they want to render benefit *directly* to those groups by *coordinating their actions* . . . and thus “[p]etitioners’ proposed conduct therefore falls squarely within the term ‘service’ on any interpretation” (second emphasis added)).

Even without such glosses on the prohibitions of “service” and “personnel,” the plaintiffs’ proposed activities (and likely all legal services) would probably come



“fixed” any constitutional problems with the statute by construing it to prohibit speech to or in coordination with an FTO, but allowing independent speech. In his dissent, Justice Breyer argued that “the simple fact of ‘coordination’ alone cannot readily remove protection that the First Amendment would otherwise grant,” particularly because “[t]hat amendment, after all, also protects the freedom of association.”<sup>169</sup>

The most poignant problem with the Court’s distinction, which neither the majority nor the dissent seemed to appreciate, arises from the fact that the constitutionality of the restriction was being challenged as applied to *attorney* speech — specifically, speech that constitutes legal “expert advice or assistance.”<sup>170</sup> However unworkable a prohibition against speech “directed to, coordinated with, or controlled by” certain organizations may be for the public at large, it is distinctively and acutely problematic for attorney speech. The attorney’s essential role requires speaking in coordination with and on behalf of clients. Attorneys, when acting as attorneys, do not speak for themselves or independently. It is nearly absurd to say that an attorney’s speech has not been abridged because the attorney is “only” prohibited from speaking “to, under the direction of, or in coordination with” their desired clientele.<sup>171</sup> The attorney’s very role is to speak and invoke the law on behalf of others, to provide legal advice to someone else on how to act or invoke the law, and to raise arguments and claims in court proceedings for someone else. Indeed, the attorney cannot fulfill any of these functions without speaking to and in coordination with the client. The restriction thus thwarts all the essential aspects of attorney speech identified in this Article. In fact, attorneys generally cannot invoke the protections of the law for or act on behalf of nonclients.<sup>172</sup>

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within the prohibitions on providing “expert advice or assistance.” See 18 U.S.C. § 2339B(h). Indeed, the Court noted that “Plaintiffs’ activities also fall comfortably within the scope of ‘expert advice or assistance.’” See *Humanitarian Law Project*, 130 S. Ct. at 2720.

<sup>169</sup> *Humanitarian Law Project*, 130 S. Ct. at 2732 (Breyer, J., dissenting).

<sup>170</sup> See *id.*, at 2720 (noting that “Plaintiffs’ activities also fall comfortably within the scope of [the statutory prohibition on] ‘expert advice or assistance’” to an FTO); see also *id.* at 2723-24 (stating that the statute “bars” plaintiffs from “speak[ing] to the PKK and LTTE” if their “speech to those groups imparts a ‘specific skill’ or communicates advice derived from ‘specialized knowledge’ — for example, *training on the use of international law or advice on petitioning the United Nations*” (emphasis added)).

<sup>171</sup> *Id.* at 2722-23.

<sup>172</sup> See *supra* note 150 (showing that to properly challenge government (or private) action through court processes, a litigant must be a real party in interest and satisfy the justiciability requirements). Outside of court processes, an attorney obviously

Importantly, the statute prohibits (and aims to prohibit) attorney speech that is politically and legally effective. The *Humanitarian Law Project* Court purports to allow attorneys to “say anything they wish on any topic,”<sup>173</sup> and yet, at the same time, forbids them from speaking *as attorneys* to assist others by providing expert legal advice or access to international human rights law. For example, as noted by the dissent, the Humanitarian Law Project wants to help these organizations resolve disputes peacefully and petition the United Nations for recognition under the Geneva Conventions.<sup>174</sup> The plaintiffs cannot perform either of these functions by speaking “independently.” They must coordinate with the FTOs for their speech to be effective. Thus, the plaintiffs cannot “say anything they wish” because the law deprives them of speaking in the manner and context in which the speech will effectively create desired legal and political results. Speech loses its value if it can be prohibited in the context in which it matters. As the Supreme Court itself has explained: “Urgent, important, and *effective speech* can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed.”<sup>175</sup>

Further, the Court’s claim in *Humanitarian Law Project* that Congress can limit attorney speech made “in coordination with” specific undesirable groups, and somehow avoid “suppress[ing] . . . ‘pure political speech’ ” is entirely fallacious.<sup>176</sup> The elimination of a group’s access to attorney speech, including attorney advice and direction on invoking and avoiding government power, suppresses that group’s ability to play any role in politics, or to even exist. The prohibition also suppresses the attorney’s political speech, including the ability to effectively invoke law on behalf of a group whom the attorney desires to assist politically. For an attorney whose political aims include protecting the human rights of others, such as designated FTOs, or opposing government power through invoking legal protection for disfavored groups, the majority’s limitation forecloses effective political speech.<sup>177</sup> Indeed, as noted by the dissent, the

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cannot advise clients or invoke the law on behalf of clients without coordination or discussion with the proposed client.

<sup>173</sup> *Humanitarian Law Project*, 130 S. Ct. at 2710.

<sup>174</sup> *See id.* at 2738–39 (Breyer, J., dissenting).

<sup>175</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (emphasis added). Indeed, rather than lessening the protection provided, the *McIntyre* Court recognized that the urgency, importance, and effectiveness of speech “*only strengthens the protection* afforded to [the] expression.” *See id.* (emphasis added).

<sup>176</sup> *Humanitarian Law Project*, 130 S. Ct. at 2722–23.

<sup>177</sup> *Cf. In re Primus*, 436 U.S. 412, 431 (1978) (explaining in context of litigation

*Humanitarian Law Project* plaintiffs also wanted to advocate on behalf of FTOs “in *this* country directed to *our* government and its policies.”<sup>178</sup> Attorney speech to and on behalf of FTOs is necessary for these political voices to be effective. Notably, the majority’s own discussion regarding the governmental interests being served by restricting attorney speech underscores the fact that the statute suppresses pure political speech. The Court argues that even peaceful legal assistance for lawful ends of the type offered by the plaintiffs can be criminalized because such assistance “serves to legitimize” the group.<sup>179</sup> Repeatedly, the Court notes that the plaintiffs’ speech “importantly *helps lend legitimacy* to foreign terrorist groups — *legitimacy* that makes it *easier for those groups to persist*.”<sup>180</sup> It is quite clear that the purpose of the statute is to destroy any such organization, which is accomplished in part by denying them access to the law.<sup>181</sup>

The ends of the statute are achieved by prohibiting attorneys from providing designated people with access to the power of the law — even information about international human rights law through international entities such as the United Nations. Notably, the FTOs themselves are not forbidden (and Congress lacks the ability to forbid them) from seeking the protections of international law. Rather, the goal of denying access to the law for these groups, even for peaceful and legitimate purposes, is accomplished by restricting speech of United States citizen attorneys. The threatened punishment for the attorney is severe enough that the scheme works. As stated by the lawyer for Humanitarian Law Project: “The government has spent a decade arguing that our clients cannot advocate for peace, cannot inform [others] about international human rights.”<sup>182</sup> Although

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that for attorneys with political, civil, or human rights aims, attorney’s ability to “advanc[e] the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants”).

<sup>178</sup> *Humanitarian Law Project*, 130 S. Ct. at 2732 (Breyer, J., dissenting) (emphasis in original).

<sup>179</sup> *Id.* at 2725 (explaining that plaintiffs’ assistance “to ‘promot[e] peaceable, lawful conduct’ . . . can further terrorism” because it “importantly helps lend legitimacy to foreign terrorist groups — legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds — all of which facilitate more terrorist attacks”).

<sup>180</sup> *Id.* (emphasis added).

<sup>181</sup> As summarized by Justice Scalia: “The end that Congress seeks to proscribe is the existence of these terrorist organizations.” Transcript of Oral Argument at 17, *Humanitarian Law Project*, 130 S. Ct. 2705 (Nos. 08-1498, 09-89); see also *id.* at 34-35, 39-40 (statements of Solicitor General).

<sup>182</sup> *Id.* at 60.

Humanitarian Law Project lawyers believe it is their right to offer such lawful, peaceful advice and assistance, the threatened fifteen year prison sentence has effectively silenced them.<sup>183</sup>

In fact, *Humanitarian Law Project* is not the only time in United States history that the government has attempted to thwart a group by prohibiting attorneys from informing people about their legal rights and ways to invoke the law's protection. In *NAACP v. Button*, Virginia attempted to obstruct desegregation by redefining prohibited attorney solicitation to include the methods used by NAACP lawyers to inform African Americans about their rights and to urge them to take legal action.<sup>184</sup> The NAACP generally invited African American parents and children to a meeting where a lawyer or member of the NAACP staff would explain "the legal steps necessary to achieve desegregation."<sup>185</sup> The lawyer or staff member would bring forms for parents to sign that authorized the NAACP to instigate a desegregation lawsuit.<sup>186</sup> After the Supreme Court decided *Brown v. Board of Education*,<sup>187</sup> the Virginia legislature (along with the legislatures of Arkansas, Florida, Georgia, Mississippi, South Carolina, and Tennessee<sup>188</sup>) enacted legislation that changed their barratry statutes to include, and thus prohibit, "attorneys paid by an organization such as the [NAACP] and representing litigants without charge."<sup>189</sup> The restrictions aimed at frustrating the NAACP's ability to effectively invoke the power of the law to bring about desegregation.<sup>190</sup> The Virginia Supreme Court of Appeals upheld the constitutionality of the new barratry law, holding that the NAACP's activities were thereby prohibited.<sup>191</sup> The Supreme Court reversed and held that the NAACP's activities constituted "expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to

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<sup>183</sup> *Id.* ("We think it's our right, but we're not going to risk going to jail for 15 years to do it.")

<sup>184</sup> *NAACP v. Button*, 371 U.S. 415, 421-26 (1963).

<sup>185</sup> *Id.* at 421.

<sup>186</sup> *See id.*

<sup>187</sup> 347 U.S. 483, 495 (1954).

<sup>188</sup> *Button*, 371 U.S. at 445 (Douglas, J., concurring) (writing separately to note the "discriminatory nature" of the Virginia law and its "legislative purpose to penalize the N.A.A.C.P. because it promotes desegregation of the races"); *see id.* at 445-46.

<sup>189</sup> *See id.* at 445.

<sup>190</sup> As discussed in Justice Douglas's concurrence, the laws were "enacted as part[] of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees." *See id.* (Douglas, J., concurring) (citing *NAACP v. Patty*, 159 F. Supp. 503, 515 (E.D. Penn. 1958)).

<sup>191</sup> *See id.* at 418.

regulate the legal profession.”<sup>192</sup> The Supreme Court eloquently explained that “abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, *certainly of lawful ends*, against governmental intrusion.”<sup>193</sup> Thus, the Court noted that, for the NAACP, litigation “is a means for achieving the *lawful objectives* of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus *a form of political expression*.”<sup>194</sup> Importantly, the Court recognized that attorney advice and advocacy, as well as litigation itself, are forms of political expression entitled to the fullest constitutional protection.

As in *Humanitarian Law Project*, the legislative enactment in *Button* only purported to restrict attorney speech that would inform others about their rights, tell others how to invoke the law, and offer them legal assistance. In theory, individual nonlawyer African Americans could still pursue these ends on their own. Further, attorneys for the NAACP could still independently “say” anything they wanted. They were only prohibited from speaking to potential clients to inform them about their rights and secure them as clients. As in *Humanitarian Law Project*, the law in *Button* “only” separated attorneys from their desired clientele. Importantly, this separation was aimed at defeating and would, in fact, largely defeat desegregation. The NAACP could not independently bring litigation without clients. The only way for the NAACP to secure the rights of African Americans — to engage in the NAACP’s desired political advocacy — was to act in concert with and on behalf of clients. Thus, the Supreme Court determined that the statute abridged *the attorneys’* right to engage in political expression and association.”<sup>195</sup>

Obviously the NAACP’s proposed clientele was quite different from the FTOs in *Humanitarian Law Project*. The NAACP wanted to represent American citizens and help them obtain constitutionally required equality.<sup>196</sup> In contrast, the *Humanitarian Law Project* wants to represent certain militant organizations accused of violently attacking American citizens or their allies, teaching them how to

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<sup>192</sup> *Id.* at 428-29 (emphasis added).

<sup>193</sup> *Id.* at 429 (emphasis added).

<sup>194</sup> *Id.* (emphasis added).

<sup>195</sup> *See id.* at 431 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)); *see also id.* at 442 (explaining that NAACP attorneys “employ[] *constitutionally privileged means of expression* to secure constitutionally guaranteed civil rights” (emphasis added)).

<sup>196</sup> *See id.* at 442.

invoke international law for peaceful dispute resolutions, their own human rights, and the protections of the Geneva Conventions. Despite the difference in clientele, the underlying theories of the Virginia law and IRTPA are not very different: if attorneys can be prohibited from informing and helping others invoke the law's protections, then, in large part, the law's protections will never be successfully invoked. The legislature attempts to make the law inapplicable to a certain unpopular group, not by changing the underlying legal rights of the group, but by prohibiting attorneys from speaking to the group and telling them how or helping them invoke the law's protections. In both scenarios, the attorneys are only pursuing "lawful objectives" and peaceful conduct on behalf of their proposed clientele. Moreover, in both scenarios, no punishment is imposed against the unpopular group for trying to invoke the law in its favor. However, severe punishments exist for any attorney who helps the group invoke the law. In both *Button* and *Humanitarian Law Project*, helping a group invoke the law could subject the attorney to criminal prosecution: In *Button*, the attorneys faced a fine of \$100 to \$500, plus imprisonment for one to six months;<sup>197</sup> in *Humanitarian Law Project*, the attorneys are threatened with a fine and/or imprisonment for up to fifteen years.<sup>198</sup>

Under the access-to-justice theory, attorney speech invoking the law's protection on behalf of clients is entitled to core speech protection because it falls within the essential role that attorneys play in access to justice and the fair administration of the laws. Indeed, such speech *constitutes* access to justice and the fair administration of the laws. The speech is central to the attorney's special role in invoking and avoiding government power by securing individual or collective life, liberty, and property.<sup>199</sup>

Geoffrey Stone commented that attorneys "play, and have played, a critical role in opposing, and sometimes, moderating" abuses to civil liberties, particularly during times of war or conflict.<sup>200</sup> Stone placed the historical Shakespeare quote — "The first thing we do, let's kill all the lawyers" — in its literary and historical context. Killing lawyers would make it possible for conspirators to "destroy the rights and liberties of the English people."<sup>201</sup> Indeed, in the lines immediately

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<sup>197</sup> See *id.* at 423 n.7.

<sup>198</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 n.1 (2010).

<sup>199</sup> See *supra* Part III.

<sup>200</sup> Geoffrey Stone, *A Lawyer's Responsibility: Protecting Civil Liberties in Wartime*, 22 WASH. U.J.L. & POL'Y 47, 53 (2006).

<sup>201</sup> *Id.* at 47.

following this statement to kill lawyers, the conspirators demonstrate their intent to deprive citizens of life and liberty when they unjustly put to death the Clerk of Chatham for being able to write his name.<sup>202</sup>

An alternative to “killing” lawyers can be accomplished through the abridgment of attorney speech in such a way as to inhibit or block attorneys’ ability to fulfill their function in invoking the law to preserve rights to life, liberty, and property. While initially sounding extreme and unlikely, *Humanitarian Law Project* illustrates that one way to destroy an undesirable group is to restrict lawyers from providing speech that assists the group in pursuing even lawful and peaceful ends. The restriction is intended to eliminate the organization.<sup>203</sup> But this purpose is accomplished not by directly denying the organization access to law, but by prohibiting attorneys from speaking — specifically from assisting the organization in invoking either domestic or international law. The organization is killed by “kill[ing] [] the lawyers.”<sup>204</sup> Attorney speech regulation destroys the organization by keeping the organization from being able to effectively invoke or avoid the power of government.

Does the Constitution prohibit legislatures from pursuing such a course? In *Free Speech and its Relation to Self-Government*, Meiklejohn eloquently poses the problem: “If the legislature has both the right and the duty to prevent certain evils, then apparently it follows that the legislature must be authorized to take whatever action is needed for the preventing of those evils.”<sup>205</sup> Certainly terrorism is an evil threatening the United States. Can Congress then “take whatever action is needed” to prevent that evil?<sup>206</sup> Meiklejohn explains that “our plan of government by limited powers forbids that that inference be drawn.”<sup>207</sup> Rather:

The Bill of Rights . . . lists, one after the other, forms of action which, however useful they might be in the service of the general welfare, the legislature is forbidden to take. And that being true, *the ‘right to prevent evils’ does not give unqualifiedly the right to prevent evils.* In the judgment of the Constitution, *some preventions are more evil than are the evils from which they*

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<sup>202</sup> See WILLIAM SHAKESPEARE, *THE SECOND PART OF HENRY THE SIXTH* act 4, sc. 2, at 80-102.

<sup>203</sup> See *supra* notes 179-181 & accompanying text.

<sup>204</sup> See SHAKESPEARE, *supra* note 202 act 4, sc. 2, at 72-73.

<sup>205</sup> See MEIKLEJOHN, *supra* note 52, at 48.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

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would save us. And the First Amendment is a case in point. If that amendment means anything, it means that certain substantive evils which, in principle, Congress has a right to prevent, must be endured *if the only way of avoiding them is by the abridging of that freedom of speech upon which the entire structure of our free institutions rests.*<sup>208</sup>

While Meiklejohn's words are aimed at citizen free speech and its relationship to democracy, the same could be said of attorney free speech and its relationship to our justice system. The fairness of our entire system of justice depends on freedom of attorney speech — specifically, attorney speech that provides people with access to justice in invoking and avoiding the power of government. Consequently, under the First Amendment access-to-justice theory, attorney speech that invokes the law's protection on behalf of clients is entitled to core protection.

## 2. The Ability to Provide Legal Advice Regarding Client Conduct

One of the traditional and essential roles that attorneys play in the American justice system is providing advice to clients about the lawfulness or unlawfulness of proposed or past conduct. Such advice is protected by perhaps the most enduring and protective evidentiary privilege recognized by law: the attorney-client privilege.

The purpose of the attorney-client privilege is often regarded as the need for “full and frank communication” from the client to the attorney, so that the attorney will know how to best serve the client's needs.<sup>209</sup> This purpose even has constitutional underpinnings of the Fifth Amendment right against self-incrimination — the government should not be able to obtain from an attorney what they constitutionally cannot obtain from the client.<sup>210</sup> However, the purpose of the privilege is not solely to allow the client to provide full and frank information to the lawyer. Rather, it is equally essential in the fair administration of the laws for the attorney to be able to fully and frankly advise the client, particularly regarding the lawfulness or unlawfulness of proposed or past conduct. Thus, as explained by the U.S. Supreme Court, the purpose of the privilege “is to encourage full and frank *communication between attorneys and their clients and thereby*

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<sup>208</sup> *Id.* (emphasis added).

<sup>209</sup> *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

<sup>210</sup> See MORGAN, *supra* note 21, at 57 n.137 (citing MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 186-90 (3d ed. 2004)).



*promote broader public interests in the observance of law and administration of justice.*"<sup>211</sup>

Allowing a person to consult an attorney about proposed conduct — whether in a transactional, criminal, or civil liability context — serves an important legitimizing and fairness function for governmental civil and criminal power that deprives individuals of life, liberty, and property. That is, clients are able to obtain fair notice about government power that might be brought to bear against them prior to acting. Just as the client should be able to fully and frankly explain the facts to the attorney, the attorney likewise should be able to fully and frankly explain the contours of the law, its purpose and function, and the potential for and extent of liability or criminal sanctions. As recognized in Model Rule of Professional Conduct 1.2(d), lawyers should “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>212</sup> An individual’s ability to obtain legal advice and interpretation of law before acting (or even after acting, in order to determine the potential scope of liability or other consequences of violation) improves the fairness of government-imposed liability and sanctions. This, in turn, improves the legitimacy of our entire justice system. Part of “keeping sound and wholesome the procedure by which society visits its condemnation on an erring member”<sup>213</sup> must include fair notice and warning. The “erring member” must be allowed to obtain assistance in understanding the potential “condemnation” they may receive for their actions, which can help

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<sup>211</sup> *Upjohn*, 449 U.S. at 389 (emphasis added). As the New York Court of Appeals explained, the privilege is intended to “foster[] *uninhibited dialogue between lawyers and clients* in their professional engagements, thereby ultimately promoting the administration of justice.” *Rossi v. Blue Cross & Blue Shield*, 540 N.E.2d 703, 705 (N.Y. 1989) (emphasis added). Gregory Sisk has recently argued that by protecting the attorney-client “*dialogue* from outside intrusion,” the privilege allows “*lawyers and clients to engage with difficult problems by considering the full spectrum of legal and moral dimensions,*” and thus, “also promotes the public interest in obedience to the rule of law and advancement of the common good.” Gregory C. Sisk, *The Dynamic Attorney-Client Privilege*, 23 *Geo. J. Legal Ethics* 201, 216 (2010) (emphasis added); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68(c) (2000) (“It is assumed that, in the absence of such frank and full discussion between client and lawyer, adequate legal assistance cannot be realized.”).

<sup>212</sup> MODEL RULE OF PROF'L CONDUCT R. 1.2(d). However, Rule 1.2(d) prohibits a lawyer from engaging or assisting a client in engaging “in conduct that the lawyer knows is criminal or fraudulent.” See *id.*

<sup>213</sup> See FREEDMAN & SMITH, *supra* note 60, at 21 (quoting Lon Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 35 (H. Berman ed., 1960)).

them structure their conduct in such a way to avoid criminal and civil government-backed condemnation.

The complexity of modern law exacerbates the fairness problem because a nonlawyer may not be able to understand the law's requirements. Thus, one of the premises underlying the attorney-client privilege is that "vindicating rights and complying with obligations under the law and under modern legal processes are matters often too complex and uncertain for a person untrained in the law, so that clients need to consult lawyers."<sup>214</sup> If this assumption is true, justice and fairness require that a person be able to consult with an attorney regarding the reach and extent of the law.

Certainly large segments of the population lack access to legal advice. Yet, this problem does not undermine the importance of the availability of legal advice to as many people as possible. The ability of attorneys to provide such advice is an essential part of our justice system in promoting the fair administration of the laws and, thus, should be protected from government restriction and interference.

Despite the established importance of the attorney-client privilege, that privilege only serves to protect communications from compelled disclosure; it does not protect attorney advice from regulation or restriction. Again, *Humanitarian Law Project* and *Milavetz* are illustrative. In *Milavetz*, Congress forbade attorneys (and others falling within the rubric of "debt relief agencies") from advising clients to incur debt in contemplation of bankruptcy.<sup>215</sup> The law seemingly prohibited attorneys from even advising clients regarding lawful conduct, such as selling a home and entering into a lease because that would constitute a new debt obligation.<sup>216</sup> The debtor was not prohibited from undertaking new debt obligations under the law, but the attorney was prohibited from advising the client to incur such a debt. The Supreme Court, in large part, avoided the problem by interpreting the statute so it prohibited the attorney only from providing particular advice that would abuse the bankruptcy system.<sup>217</sup>

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<sup>214</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68(c) (2000).

<sup>215</sup> *Milavetz, Gallop & Milavetz P.A. v. United States*, 130 S. Ct. 1324, 1330, 1339 (2010).

<sup>216</sup> Indeed, this was how the Eighth Circuit had interpreted the statute, as "broadly prohibit[ing] a debt relief agency from advising an assisted person . . . to incur any additional debt when the assisted person is contemplating bankruptcy,' even when that advice constitute[d] prudent [and legal] prebankruptcy planning not intended to abuse the bankruptcy laws." *See id.* at 1331.

<sup>217</sup> The Court specifically held that the statute "prohibits a debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose." *See id.* at 1336-38 & n.6.

The Court acknowledged that without this narrowing interpretation, the statute “would seriously undermine the attorney-client relationship”<sup>218</sup> through its “inhibition of frank discussion.”<sup>219</sup>

Notably, the *Milavetz* Court strove to preserve the attorney-client relationship by narrowly interpreting the statute and not by applying the First Amendment. Indeed, First Amendment doctrine failed to account for the fact that the restriction frustrated the essential role of attorneys in the fair administration of justice. Rather, the best argument available was that the statute was vague — not only vague for attorneys, but vague as applied to anyone.<sup>220</sup> Vagueness was similarly one of the primary challenges used in *Humanitarian Law Project*. Importantly, no one raised or presented a First Amendment doctrine or theory that could effectively recognize and preserve the attorney-client relationship.

Unlike its decision in *Milavetz*, the Court in *Humanitarian Law Project* did not interpret the statute in such a way as to avoid the frustration of the attorney-client relationship. In fact, the Court specifically noted that, under its interpretation, the statute “bars” plaintiffs from “speak[ing] to the PKK and LTTE” if their “speech to those groups imparts a ‘specific skill’ or *communicates advice derived from ‘specialized knowledge’* — for example, training on the use of international law or advice on petitioning the United Nations.”<sup>221</sup> Thus, in *Humanitarian Law Project*, the law not only prohibits attorney invocation of the law on behalf of clients, but also the provision of any legal advice to groups designated as foreign terrorist organizations. As noted, the goal of the statute is to eradicate FTOs, and yet the statute forbids attorneys from providing their legal expertise to these groups on how to change their methods and act lawfully and peacefully, on how to petition *our* government to avoid eradication, or even how to petition the United Nations for human rights relief and recognition under the Geneva Conventions.

The Court in *Humanitarian Law Project* emphasized that it would “legitimize” the FTOs if they received such lawful, peaceful advice — a fact that the Court relied upon in holding that Congress

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<sup>218</sup> *Id.* at 1338 n.5.

<sup>219</sup> *Id.* at 1338.

<sup>220</sup> Transcript of Oral Argument at 20, *Milavetz* 130 S. Ct. 1324 (Nos. 08-119, 08-1225) (Scalia, J., concurring) (“[D]on’t bring in the fact that, well then, moreover, if it’s applied to attorneys, it’s unconstitutional, because if it’s applied to anybody it’s unconstitutional according to your [vagueness] argument.”).

<sup>221</sup> *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723-24 (2010) (emphasis added).

constitutionally could criminalize giving such advice.<sup>222</sup> But what would truly be “legitimized” by allowing attorneys free speech to provide such advice to designated FTOs is our own government’s policies, power, and commitment to justice. The Court allows our government to enact a policy to destroy particular groups and, additionally, to threaten citizen attorneys with imprisonment if they provide the targeted group with any legal advice — even legal advice on how to change their conduct, how to act peacefully and lawfully, or how to obtain human rights relief. While the Court explains that it does “not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations,” the Court’s free speech analysis does not rely on that distinction.<sup>223</sup> Rather, the Court relies on the superficial distinction that the plaintiffs can independently “say anything they wish on any topic”<sup>224</sup>; they just cannot speak to or in coordination with the FTOs.<sup>225</sup>

An important aspect of *Humanitarian Law Project* that deserves serious examination is the Court’s consideration of attorney speech to or on behalf of FTOs as involving a greater association, and thus one that can be criminalized, than membership in the FTO. The Court agrees that membership in an FTO could not constitutionally be forbidden under the First Amendment right to free association.<sup>226</sup> Yet the Court holds that plaintiffs are proposing to do more than become mere members of the FTOs; instead, they seek to “provid[e] material

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<sup>222</sup> *Id.* at 2725.

<sup>223</sup> *Id.* at 2730.

<sup>224</sup> *Id.* at 2710.

<sup>225</sup> *See id.* at 2722-24 (concluding that statute does not abridge “pure political speech” because plaintiffs are only prohibited from coordinated speech with FTOs and so can independently say whatever they wish); *id.* at 2728 (listing reasons why Court concludes statute constitutional, namely that number of FTOs are limited, that Congress added clarity to the statute, Congress excluded religious and medical support, and “most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups” (emphasis added)).

The Court fails to identify the scrutiny that it is applying in analyzing the constitutionality of the statute. The Court says that it need *not* apply strict scrutiny because only coordinated speech is prohibited, but then says that the First Amendment test for analyzing restrictions on conduct found in *United States v. O’Brien*, 391 U.S. 367 (1968), is inapplicable and “a more demanding standard” should be used. *See Humanitarian Law Project*, 130 S. Ct. at 2723-24. Yet, the Court from there just defers to the government’s generalized claims of harm with very little concrete evidence of either harm or tailoring, including specificity on how the plaintiff’s speech could cause that harm. *See id.* at 2724-30; *see also infra* note 235.

<sup>226</sup> *See Humanitarian Law Project* 130 S.Ct. at 2718, 2730.

support”<sup>227</sup> to the FTOs through legal advice, and thus, their actions can constitutionally be criminalized. This holding is particularly troubling in light of the attorney’s role in the administration of justice and the attorney’s duty to take on legal causes and provide access to justice even for unpopular clients.<sup>228</sup>

The “material support” statute in *Humanitarian Law Project* not only *frustrates* the attorney-client relationship (as did the law in *Milavetz*), but in fact *criminalizes* the attorney-client relationship and imputes culpability for the client’s unlawful conduct onto the advising attorney. As with Red Scare statutes aimed at eradicating communism, the “material support” statute, as applied to the plaintiffs in *Humanitarian Law Project*, can be said to “quite literally establish[] guilt by association alone”<sup>229</sup> because it criminalizes association even if the associating attorney “disagree[s] with th[e] unlawful aims”<sup>230</sup> of the FTO. Reliance on the government’s war power does not change this principle: “[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.”<sup>231</sup> If attorneys advise and help clients violate the law or engage in criminal or fraudulent conduct, attorneys have acted in such a culpable manner that it would seem fair to hold them civilly or criminally responsible for such actions. But where an attorney is only advising a client regarding how to pursue peaceful and perfectly lawful conduct, how can that speech be criminalized? Again, as established from our era of convicting communists:

In our jurisprudence *guilt is personal*, and when the imposition of punishment on a status or on conduct can only be justified

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<sup>227</sup> *Id.* at 2718 (“Section 2339B does not criminalize mere membership in a designated foreign terrorist organization. It instead prohibits providing ‘material support’ to such a group.”); *see also id.* at 2730 (explaining that “the statute does not penalize mere association with a foreign terrorist organization,” because “[t]he statute does not prohibit *being a member* of one of the designated groups or *vigorously promoting and supporting* the political goals of the group” but instead “prohibits [] the act of giving material support” which is what “Plaintiffs want to do” and so concluding that “[o]ur decisions scrutinizing penalties on simple association or assembly are therefore inapposite” (emphasis added)).

<sup>228</sup> *See, e.g.,* MODEL RULE OF PROF’L CONDUCT R. 6.2 cmt. 1 (2010) (“All lawyers have a responsibility to assist in providing pro bono publico service. . . . An individual lawyer fulfills this responsibility *by accepting a fair share of unpopular matters or indigent or unpopular clients*. A lawyer may also be subject to appointment by a court to serve *unpopular clients* . . . .” (emphasis added)).

<sup>229</sup> *United States v. Robel*, 389 U.S. 258, 265 (1967).

<sup>230</sup> *Id.* at 266.

<sup>231</sup> *Id.* at 264 (citing *Home Bldg. & Loan Ass’n. v. Blaisdell*, 290 U.S. 398, 426 (1934)).

by reference to the relationship of that status or conduct to other concededly criminal activity . . . *that relationship must be sufficiently substantial to satisfy the concept of personal guilt.*<sup>232</sup>

The Humanitarian Law Project sought to advise FTOs to cease acting unlawfully (using terrorism) and instead pursue their goals peacefully and lawfully.<sup>233</sup> How can such advice be criminal? It cannot. Advising someone on how to cease criminal behavior and act lawfully cannot “satisfy the concept of personal guilt.”<sup>234</sup>

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<sup>232</sup> *Scales v. United States*, 367 U.S. 203, 224-25 (1961) (emphasis added).

<sup>233</sup> Peter Margulies argues that the *Humanitarian Law Project* Court did not directly address or foreclose provision of legal advice or assistance. See Peter Margulies, *Advising Terrorism: Hybrid Scrutiny, Safe Harbors, and Freedom of Speech* 36-37 (Roger Williams Univ. Legal Studies Paper No. 101, 2011), available at <http://ssrn.com/abstract=1777371>. Nevertheless, Margulies explains that “the language of [the opinion] does supply a basis for concern for the future of legal advice to DFTOs” and cites to the portion of the opinion where the Court asserts that that plaintiffs cannot even speak to an FTO if what they say is “advice derived from specialized knowledge—for example, training on the use of international law.” See *id.* at 36. How any legal advice could fail to be “advice derived from specialized knowledge — for example . . . law” is puzzling. Further, the barring of such advice would seem to foreclose representation as well. When Margulies defines what the *Humanitarian Law Project* Court’s opinion allows, it is limited to advice and representation reasonably related to a judicial challenge of an FTO designation. See *id.* at 36-40.

<sup>234</sup> *Scales*, 367 U.S. at 224-25. In *Humanitarian Law Project*, the Court determined that even providing peaceful advice could be criminalized because it could “legitimize” the group and the group could find ways to use such advice to further their unlawful activities. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010). Specifically, the Court said if shown how to petition the United Nations or how to negotiate for peace, an FTO could feign interest in peace negotiations to gain time and position. See *id.* at 2729 (“The PKK could, for example, *pursue peaceful negotiation as a means of buying time* to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks.” (emphasis added)). Justice Breyer’s response is provoking:

What is one to say about these arguments—*arguments that would deny First Amendment protection to the peaceful teaching of international human rights law* on the ground that a little knowledge about ‘the international legal system’ is too dangerous a thing; that an opponent’s subsequent willingness to negotiate might be faked, so let’s not teach him how to try? What might be said of these claims by those who live, as we do, in a Nation committed to the resolution of disputes through ‘deliberative forces’?

*Id.* at 2738 (Breyer, J., dissenting) (emphasis added); see also *id.* at 2738 (asserting that “the risk that those who are taught will put otherwise innocent speech or knowledge to bad use is omnipresent, at least where that risk rests on little more than (even informed) speculation”).

Even if the client has engaged in unlawful activities, as long as the attorney does not provide advice or assistance aimed at furthering those unlawful activities, the attorney should not be seen as sufficiently “associated” with their client’s actions in a way that advising or counseling the client is criminal.<sup>235</sup> The attorney may, in fact, completely disagree with the client’s conduct or views. Instead, the attorney may understand that the adversary system and the criminal justice system in the United States rest on the concept that people threatened with government-imposed loss of life, liberty, or property should be able to obtain advice and assistance from a legal advocate. In its landmark decision *Gideon v. Wainwright*, the Court explained:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals *in which every defendant stands equal before the law*. This noble ideal cannot be realized if the poor [or unpopular] man charged with crime has to face his accusers *without a lawyer to assist him*.<sup>236</sup>

Our conception of due process and liberty, established by the Constitution, includes providing the individual or group threatened with government-imposed loss of life or liberty with effective legal advice and assistance that will challenge the overbearing power of government. Indeed, we respect “the rights even of the guilty individual,” which is “a significant expression of the political philosophy that underlies the American system of justice.”<sup>237</sup>

In the noncriminal context, attorneys have a professional duty to take on legal causes and provide access to justice, even for unpopular clients.<sup>238</sup> The decision to advise and represent the unpopular client

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<sup>235</sup> See, e.g., MODEL RULE OF PROF'L CONDUCT R. 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”).

<sup>236</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (emphasis added).

<sup>237</sup> See FREEDMAN & SMITH, *supra* note 60, at 20; see also *id.* (quoting Bostian M. Zupan i, *Truth and Impartiality in Criminal Process*, 7 J. CONTEMP. L. 39, 133 (1982) (“In societies which believe that the individual is the ultimate repository of existential values, his status vis-à-vis the majority will remain uncontested even when he is accused of crime. He will not be an object of purposes and policies, but *an equal partner in a legal dispute.*” (emphasis added))).

<sup>238</sup> See, e.g., MODEL RULE OF PROF'L CONDUCT R. 6.2 cmt 1 (2010) (“All lawyers have a responsibility to assist in providing pro bono publico service. . . . An individual lawyer fulfills this responsibility *by accepting a fair share of unpopular matters* or

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has been celebrated in the lives of exemplary lawyers since the founding of the United States — beginning with John Adams' decision to represent the British soldiers involved in the Boston Massacre<sup>239</sup> — and demonstrates that American attorneys recognize their role in the justice system as the protectors of due process regardless of the unpopularity of their clients. Again, the attorney may in fact completely disagree with the client's actions or goals and yet be firmly committed to principles of due process, legal representation, equal protection, human rights, and access to justice — principles at the core of our justice system. Consequently, an attorney representing a criminal, or even an alleged terrorist organization, should be recognized as having a lesser associational tie to the conduct of the organization than membership.

The ability of the attorney to provide full and frank legal advice to clients plays an essential role in our justice system. It legitimizes the government's criminal and civil power by providing a means for lay individuals and organizations to structure their conduct to avoid prosecution or liability and to protect their life, liberty, and property — particularly in the face of laws and legal processes that are difficult to understand without legal training. Such advice greatly increases the fairness of the administration of the laws by providing people with notice of the content and reach of the law. Consequently, under the access-to-justice theory, full and frank advice from attorney to client regarding the lawfulness and unlawfulness of proposed or past conduct, the reach and purpose of the law, and liability or punishment under the law would be subject to core protection.<sup>240</sup>

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indigent or *unpopular clients*. A lawyer may also be subject to appointment by a court to serve *unpopular clients* . . ." (emphasis added)).

<sup>239</sup> See JOHN ADAMS, DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 2:79, 3:291-96 (L.H. Butterfield, ed., 1961). Adams explains:

The Part I took in Defence of Captn. Preston and the Soldiers, procured me Anxiety and Obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country. Judgment of Death against those Soldiers would have been as foul a Stain upon this Country as the Executions of the Quakers or Witches, anciently. As the Evidence was, the Verdict of the Jury was exactly right.

See *id.* at 2:79.

<sup>240</sup> Renee Newman Knake has recently published an article in the light of the Supreme Court's decisions in *Milavetz* and *Humanitarian Law Project* where she argues that existing First Amendment theory and doctrine "support[] strong free speech protection for legal advice rendered by an attorney to her client." See Knake, *supra* note 123, at 648. Indeed, the Supreme Court has stated that *NAACP v. Button*



Nevertheless, there are limits to the appropriate scope of protection. Justice Breyer, in his *Humanitarian Law Project* dissent, argued that existing First Amendment doctrine “permit[s] pure advocacy of *even the most unlawful activity* — as long as that advocacy is not ‘directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.’”<sup>241</sup> However, that rule, as initially announced in *Brandenburg v. Ohio*,<sup>242</sup> should not be the standard for attorney speech. The access-to-justice theory provides core speech protection for speech essential to providing access to justice and the fair administration of the laws. It is patently *not* essential to the fair administration of the laws to constitutionalize attorney speech that advises clients to engage in “even the most unlawful activity”<sup>243</sup> — regardless of whether or not it would “incit[e] or produc[e] imminent lawless action.”<sup>244</sup>

The divergence between the majority and the dissent in *Humanitarian Law Project* reflects the typical alternative methods available for examining restrictions on attorney speech: either no protection for attorney speech or the application of traditional First Amendment doctrine (which is not attuned to the attorney function in the administration of justice). This dichotomy demonstrates again the need for a First Amendment theory tailored to the attorney’s function in the system of justice and the attorney’s tie to government power and processes. The majority in *Humanitarian Law Project* did not provide any protection for attorney speech, including lawful advice. But the application of *Brandenburg* to attorney speech, as indicated by the dissent, is also inappropriate in light of the attorney’s tie to government power. Indeed, employing *Brandenburg* as the standard would render important aspects of professional conduct regulation unconstitutional. Because attorneys have access to invoking government power, attorneys are forbidden from using such government power — in the form of law or legal advice — to perpetrate crimes or frauds. Model Rule of Professional Conduct 1.2(d) illustrates this prohibition and forbids an attorney from

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established constitutional protection to lawyers in “advising [individuals] of their constitutional rights.” See *In re Primus*, 436 U.S. 412, 425 n.16 (1978) (citing NAACP v. Button, 371 U.S. 415, 447 (1963) (White, J., concurring in part and dissenting in part)).

<sup>241</sup> *Holder v. Humanitarian Law Project*, 130 S. Ct 2705, 2737 (2010) (Breyer, J., dissenting) (emphasis added) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

<sup>242</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>243</sup> *Humanitarian Law Project*, 130 S. Ct at 2737 (Breyer, J., dissenting).

<sup>244</sup> *Brandenburg*, 395 U.S. at 447.

counseling or assisting a client to engage in criminal or fraudulent activities.<sup>245</sup>

The access-to-justice theory provides protection for attorney advice that is essential to the role of the attorney in our justice system, including advising the client regarding “the legal consequences of any proposed course of conduct” and “the validity, scope, meaning or application of the law.”<sup>246</sup> However, it would not provide Free Speech Clause protection for attorney advice intended to further or assist client crimes or fraud.<sup>247</sup>

### 3. The Ability to Access Courts and Raise Relevant and Colorable Arguments

Although the Supreme Court has been unclear regarding the precise source for the constitutional right to court access,<sup>248</sup> the Court has recognized such a right arising from the Due Process Clauses for criminal defendants,<sup>249</sup> civil rights litigants,<sup>250</sup> and litigants who are denied certain fundamental rights.<sup>251</sup> In *NAACP v. Button*, the Supreme

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<sup>245</sup> See MODEL RULE OF PROF'L CONDUCT R. 1.2(d) (2010). Indeed, even the attorney-client privilege loses its protection in the face of assisting ongoing client crimes and fraud. As Justice Cardozo explained, “A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.” See *Clark v. United States*, 289 U.S. 1, 15 (1933).

<sup>246</sup> MODEL RULE OF PROF'L CONDUCT R. 1.2(d) (2010).

<sup>247</sup> As with all distinctions, there are gray areas between clear-cut assisting client crime and fraud and providing lawful advice. See, e.g., Knake, *supra* note 122, at 699-701 (discussing questionable cases). Yet difficult distinctions in some instances should not lead to the conclusion that lawful advice should be unprotected. Lawful advice to clients is essential to the fair administration of the laws and requires protection.

<sup>248</sup> See *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (“Decisions of this Court have grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection, and Due Process Clauses.” (citations omitted)).

<sup>249</sup> See, e.g., *Bounds v. Smith*, 430 U.S. 817, 821 (1977) (“It is now established beyond doubt that prisoners have a constitutional right of access to the courts.”).

<sup>250</sup> See *NAACP v. Button*, 371 U.S. 415, 429-30 (1963) (holding, in the context of activities of the NAACP, that “litigation” is protected by the First Amendment and “may well be the sole practicable avenue open to a minority to petition for redress of grievances”).

<sup>251</sup> The key distinction is if the state court has a monopoly in controlling that fundamental right, as with marriage and related rights, then there is a right to court access under the Due Process Clauses. See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-20 (1996) (holding that Fourteenth Amendment does not permit states to condition appeal from termination of parental rights on affected parent’s ability to pay record transcription costs); *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971) (holding that

Court recognized that the rights to petition for redress of grievances, free association, and, importantly, freedom of expression secured the attorneys' "First Amendment rights to enforce constitutional rights through litigation."<sup>252</sup> The Supreme Court has also recognized under the First Amendment's Petition Clause a right of civil litigants to bring nonfrivolous claims in court proceedings, including state and federal common law claims.<sup>253</sup> Consequently, litigants cannot be punished or sanctioned for filing a nonfrivolous civil claim.<sup>254</sup> Moreover, the Due Process Clauses prohibit the state and federal governments from depriving individuals of life, liberty, or property without due process of law. The Due Process Clauses, thus, require "a meaningful opportunity to be heard."<sup>255</sup> These rights to due process and court access belong to the client, but if the attorney can be punished or prohibited from bringing claims, the underlying rights of clients to court access are weakened and perhaps lost.<sup>256</sup> Attorneys provide effective access to the court system, and to the extent that individuals have a right to raise a claim or defense in court proceedings, attorneys should have a corresponding speech right to effectuate the client's court access and due process rights.

The argument that attorneys should have protected speech rights to access the courts, bring claims, and raise arguments in court proceedings initially seems problematic. Speech made in conjunction with formal court proceedings is perhaps among the most highly regulated speech.<sup>257</sup> Between the applicable rules of evidence, procedure, and professional conduct, the attorney works in an environment where speech is subject to multiple levels of highly

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Fourteenth Amendment prohibits states from denying court access to individuals seeking judicial dissolution of marriage solely because of inability to pay court costs).

<sup>252</sup> See *Button*, 371 U.S. at 437-40, 452.

<sup>253</sup> See *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-63 (1993) (holding that litigant could not be punished under the antitrust laws for filing a civil claim against competitor unless claim was "objectively baseless"); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743, 746-47 (1983) (holding NLRB cannot enjoin civil litigation unless "plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous"); see also *Harbury*, 536 U.S. 403 at 414-15.

<sup>254</sup> See *Profl Real Estate Investors*, 508 U.S. at 62-63; *Bill Johnson's Rests.*, 461 U.S. at 743; FREEDMAN & SMITH, *supra* note 60, at 25-29.

<sup>255</sup> *Boddie*, 401 U.S. at 377; see also *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (creating three-factored balancing test to determine what process is due and whether there has been a meaningful opportunity to be heard).

<sup>256</sup> See *Tarkington, Free Speech Right to Impugn*, *supra* note 30, at 371-79 (concluding that "[i]f attorneys are punished or deterred from bringing such claims, the underlying rights of the litigants are lost").

<sup>257</sup> See *Schauer*, *supra* note 43, at 688-91.

restrictive regulation. Schauer describes attorney speech in court proceedings as containing an “omnipresence of speech regulation.”<sup>258</sup> Schauer accurately explains that “the speech of the law — in court and out — owes its effectiveness and its very possibility to rules that restrict and prohibit certain forms of speaking and writing.”<sup>259</sup> Schauer argues that “something like a courtroom trial” is both “rule-dependen[t] and enforcement-dependen[t].”<sup>260</sup> A trial (or really any courtroom proceeding) simply cannot proceed without “elaborate rules about who goes when, about who speaks, and about who does not speak,” “rules about how to speak,” and “rules about what not to say.”<sup>261</sup> Schauer further argues that the First Amendment has properly been considered inapplicable to these legal processes. In his view, the “omnipresence of speech regulation,” apparent in a courtroom, is (and should remain) “unencumbered by either the doctrine or the discourse of the First Amendment.”<sup>262</sup> Inherent in Schauer’s conclusion is an assumption that, outside of “extrajudicial utterances,”<sup>263</sup> the application of the First Amendment to attorney speech would necessarily interfere with the role of attorneys and legal processes.<sup>264</sup> Indeed, the Supreme Court in dicta has indicated a similar point of view by stating: “It is unquestionable that in the courtroom itself,

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<sup>258</sup> *Id.* at 691.

<sup>259</sup> *Id.* at 688.

<sup>260</sup> *Id.* at 689.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 691. Notably, Schauer argues that the First Amendment may apply to attorney speech when “the justifications for the First Amendment’s existence, in particular the distrust of the self-protective activities of government itself, apply to that activity.” *See id.* at 702.

<sup>263</sup> *Id.* at 695.

<sup>264</sup> *See id.* at 695. In discussing the inapplicability of the First Amendment, Schauer argues that “[t]he most obvious” argument for not protecting speech

is respect for a criminal defendant’s right to a fair trial, and many of these arguments would spill over into the less-constitutionalized realm of litigants in general. There are also policy arguments about preserving the integrity of the trial process and preserving the integrity, more particularly, of the jury process, arguments of the type that have generated many of the rules of evidence themselves.

*See id.*

Again, it is important to note, that such arguments for not protecting attorney speech assume that any such protection will in fact frustrate “a criminal defendant’s right to a fair trial” and the “integrity of the trial process.” *See id.* However, the whole point of the access-to-justice theory of the First Amendment is that the First Amendment should be invoked to preserve the integrity, not only of the trial and jury processes, but the integrity of the entire system of justice.

during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.”<sup>265</sup>

Schauer’s premises do not necessarily lead to his conclusion. Indeed, this Article proposes a different result altogether. Schauer is certainly right that attorney speech regulation in the court context is ubiquitous, and that such regulation — the restriction of speech — is necessary to preserve the effectiveness of trial, as well as any other court proceeding. Where Schauer errs is in his conclusion that the First Amendment is, therefore, properly inapplicable.

Alexander Meiklejohn, in his seminal work *Free Speech and Its Relation to Self-Government*, takes up this very problem. Using the American town meeting as an illustration, Meiklejohn discusses the tensions inherent in restricting speech to preserve effective political process. Meiklejohn notes that a town meeting is held “not primarily to talk, but primarily by means of talking to get business done.”<sup>266</sup> Meiklejohn also recognizes that “the talking must be regulated and abridged as the doing of the business under actual conditions may require.”<sup>267</sup> He provides examples of having a chairperson who conducts and moderates the meeting, of limiting arguments to an assigned share of the time available,<sup>268</sup> of finding people out of order if a speaker is “abusive or in other ways threatens to defeat the purpose of the meeting” and in extreme circumstances, even denying such abusive speakers continued use of the floor.<sup>269</sup> Indeed, Meiklejohn says “[t]he town meeting, as it seeks for *freedom of public discussion* of public problems, would be wholly *ineffectual unless speech were thus abridged*.”<sup>270</sup> This is precisely Schauer’s point about regulations on attorney speech in judicial proceedings — the speech must be abridged in order to be effectual and to fulfill its purpose.

Yet Meiklejohn does not conclude, as does Schauer, that the First Amendment’s protections should be inapplicable in town meetings. To the contrary, Meiklejohn contends that as to such speech, the First Amendment’s prohibition on abridgement is *absolute*. Meiklejohn explains this paradox: “These speech-abridging activities of the town meeting indicate what the First Amendment to the Constitution does not forbid. When self-governing men demand freedom of speech they are not saying that every individual has an unalienable right to speak

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<sup>265</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991).

<sup>266</sup> MEIKLEJOHN, *supra* note 52, at 23.

<sup>267</sup> *See id.*

<sup>268</sup> *Id.* at 25-26.

<sup>269</sup> *Id.* at 22-23.

<sup>270</sup> *Id.* at 23.

whenever, wherever, however he chooses.”<sup>271</sup> Rather, in town meetings, the First Amendment allows citizens, as “free and equal men” and women, to “cooperat[e] in a common enterprise, and us[e] for that enterprise responsible and regulated discussion. It is not a dialectical free-for-all; it is self-government.”<sup>272</sup> In this system:

Every man [and woman] is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. *The basic principle is that the freedom of speech shall be unbridged.* And yet the meeting cannot even be opened unless, by common consent, speech is abridged.<sup>273</sup>

In like manner, the court systems are created as part of our constitutional government, and all individuals are free to access the courts and seek legal redress.<sup>274</sup> Litigants “meet as political equals,” raise their own arguments, and respond to the arguments of others. But this free speech is only possible because of the agreement to abridge speech so that court business can get done.

Meiklejohn does not end there. Having illustrated permissible regulation of political speech, he then examines the impermissible restriction. According to Meiklejohn:

[T]he vital point . . . is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. And this means that though citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous. . . . And that means unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American.<sup>275</sup>

Meiklejohn contends that “[t]hese conflicting views may be expressed, *must be expressed*, not because they are valid, but *because they are relevant*.”<sup>276</sup> “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”<sup>277</sup>

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<sup>271</sup> *Id.* at 23-24.

<sup>272</sup> *Id.* at 23.

<sup>273</sup> *Id.* at 22 (emphasis added).

<sup>274</sup> This is so at least where litigants have suffered an injury and have a legally cognizable right. *See supra* note 150 and accompanying text.

<sup>275</sup> *Id.* at 26.

<sup>276</sup> *Id.* at 27 (emphasis added).

<sup>277</sup> *Id.* at 25.

Thus, while “[t]he First Amendment [] is not the guardian of unregulated talkativeness” — particularly in political processes like the town meeting or the courtroom — that does not mean that the First Amendment plays no role in those settings.<sup>278</sup> To the contrary, the First Amendment plays its most central role in these settings. Meiklejohn argues that the First Amendment prohibits the mutilation and manipulation of self-government in these structured political processes: “It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.”<sup>279</sup> Consequently, each side (and multiple sides and views) of an issue must be heard.

In the context of courtroom speech, the “vital point . . . is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another”<sup>280</sup> and that “conflicting views . . . [are] expressed . . . because they are relevant.”<sup>281</sup> This idea is particularly compelling in the adversary system where the underlying premise is that truth is more likely to be found if multiple points of view are heard.<sup>282</sup> The adversary system and the attorney’s role therein are frustrated where “mutilation” of the presentation of relevant and conflicting views are allowed.

Thus, the saturation of attorney speech regulation in court proceedings does not compel the conclusion that First Amendment protection is neither needed nor appropriate. Indeed, the Supreme Court has recognized what I would characterize as “core” attorney speech protection for court proceedings in *Legal Services Corp. v. Velazquez*.<sup>283</sup> In that case, the Supreme Court held that certain restrictions on the advice and advocacy of attorneys funded through

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 26; see also *id.* at 8 (“But the manipulation of men is the destruction of self-government.”).

<sup>280</sup> *Id.* at 26.

<sup>281</sup> *Id.* at 27 (emphasis added).

<sup>282</sup> As explained by the Fourth Circuit:

Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system’s process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition.

*United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993).

<sup>283</sup> 531 U.S. 533, 534 (2001).

the Legal Services Corporation violated the First Amendment.<sup>284</sup> The restrictions forbade attorneys from undertaking any representation that sought to amend or challenge existing welfare law.<sup>285</sup> The Court recognized that the restrictions prohibited attorney “speech and expression upon which courts must depend for the proper exercise of the judicial power.”<sup>286</sup> This is so because the judiciary depends upon attorneys to raise challenges to laws and assertions of constitutional rights. Thus, if attorneys can be restricted from raising such arguments, the judiciary cannot fulfill its constitutional function to declare “what the law is.”<sup>287</sup> Further, the *Velazquez* Court relied on a central premise of the access-to-justice theory. The Court held that Congress was prohibited from “distort[ing] the legal system by altering the traditional role of the attorneys.”<sup>288</sup> In so doing, the Court recognized that attorneys play an essential role in the justice system that requires First Amendment protection — even in the highly regulated area of courtroom speech and argument. Without such protection, Congress and other regulators could effect a “serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.”<sup>289</sup> Consequently, the *Velazquez* Court recognized two categories of attorney in-court speech (including written and oral communications to a court) that must be protected: (1) attorneys must be free to “present all the reasonable and well-grounded arguments necessary for proper resolution of the case;”<sup>290</sup> and (2) regulators cannot restrict attorney speech in order to “insulate the Government’s laws” or government action “from judicial inquiry” and scrutiny.<sup>291</sup>

With respect to in-court attorney speech, as recognized both in *Velazquez* and in Meiklejohn’s arguments regarding town meetings, regulators must be forbidden from manipulating the judicial system by manipulating the substantive arguments that may be presented. To the

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<sup>284</sup> *See id.* at 537.

<sup>285</sup> *See id.* at 536-37.

<sup>286</sup> *Id.* at 545.

<sup>287</sup> *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also id.* (“Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy. . . . An informed, independent judiciary presumes an informed, independent bar.”).

<sup>288</sup> *Id.* at 544.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 545.

<sup>291</sup> *Id.* at 546; *see also* Tarkington, *Free Speech Right to Impugn*, *supra* note 30, at 386-87 (arguing that judiciary should not be able to insulate itself from scrutiny by punishing attorneys for raising colorable arguments of judicial bias).



extent that such manipulation of attorney speech is allowed, justice itself is manipulated, and access to justice is thwarted for those on the losing side of the regulation.

#### 4. The Ability to Preserve the Constitutional Rights of Others

Although the attorney's ability to preserve constitutional rights of clients is generally covered by the prior sections, there are additional and significant scenarios where an attorney must speak to preserve constitutional rights of others, including non-clients. As with the entire access-to-justice theory, the contours of this portion need further development and exploration. A notable example of the type of speech at issue here and deserving protection is the prosecutor's constitutional and ethical obligations to provide the defense with exculpatory evidence under *Brady v. Maryland* and rules of professional conduct, such as Model Rule of Professional Conduct 3.8.<sup>292</sup> In *Garcetti v. Ceballos*, the Supreme Court held that government attorneys lack a First Amendment right (vis-à-vis their supervisors/employers) when performing their official duties,<sup>293</sup> apparently including when providing constitutionally required materials to a criminal defendant.<sup>294</sup> Thus, the *Garcetti* Court held that a deputy district attorney, Richard Ceballos, could be punished by his employer for fulfilling what he understood were his obligations under *Brady* to provide exculpatory materials to the defense.<sup>295</sup>

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<sup>292</sup> 373 U.S. 83, 87 (1963); Model Rule of Prof. Conduct R. 3.8(d). Rule 3.8(d) states:

The prosecutor in a criminal case shall . . . (d) make timely disclosure of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.

<sup>293</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

<sup>294</sup> *See id.* at 446 (Breyer, J., dissenting).

<sup>295</sup> *See id.* The *Garcetti* dissent explained that Ceballos argued that the memo "fell within the scope of his obligations under *Brady v. Maryland*" and progeny "to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence." *See id.* Nevertheless, the majority did not even mention the possible characterization of the memo as exculpatory evidence. Indeed, the majority's decision appeared to turn entirely on the fact that Ceballos's speech took place as part of his official duties as a prosecutor and not at all on whether the speech was or was not exculpatory evidence as defined in *Brady* and progeny. *See id.* at 421 (majority opinion) ("[W]hen public employees make statements pursuant to their official duties . . . the Constitution does not insulate their communications from employer discipline.").

Importantly, the *Garcetti* Court examined Ceballos's claims under its decisions regarding the First Amendment rights of public employees. The Court did not even consider the special considerations raised by the fact that Ceballos was not just any public employee (like a school teacher), but was a prosecuting attorney armed with state power and constitutional duties. Thus, *Garcetti* provides yet another example of the Supreme Court's failure to employ a First Amendment methodology that accounts for the distinct issues raised by punishment or restriction of attorney speech. The *Garcetti* Court failed to consider such issues as: (1) whether Ceballos was constitutionally required to provide the speech under *Brady v. Maryland*, and if so, whether there should be constitutional protection for constitutionally-required speech;<sup>296</sup> (2) whether criminal defendants would be denied constitutional protection of life, liberty, and property if First Amendment protection were not provided for such attorney speech; and (3) whether the Court's decision would encourage prosecutors to violate their constitutional role to do justice rather than to win cases.<sup>297</sup>

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Despite the dissent's recognition that Ceballos believed his disclosure to be required by his duties under *Brady*, commentators have debated the appropriate characterization of the material. Compare Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 38 (2008) (arguing that Ceballos's speech did not qualify technically as exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963)), with Janet Moore, *Opening the Black Box: Democracy and Criminal Discovery Reform After Connick v. Thompson and Garcetti v. Ceballos*, 77 *BROOK. L. REV.* (forthcoming 2012), available at <http://ssrn.com/author=1707458> (scrutinizing Rosenthal's argument and concluding that Ceballos's speech was likely exculpatory evidence under *Brady*), and Margaret Tarkington, *Government Speech and the Publicly Employed Attorney*, 2010 *B.Y.U. L. REV.* 2175, 2178 n.13, 2199 n. 111 (questioning Rosenthal's conclusion that the material did not fall within Ceballos's *Brady* obligations and noting that Rosenthal agrees that the case can be read to authorize employer punishment for disclosing *Brady* material).

<sup>296</sup> While the dissent discussed the possible characterization of the speech as *Brady* material, see *Garcetti*, 547 U.S. at 446 (Breyer, J., dissenting), the majority neither mentioned Ceballos's argument that his speech was required by *Brady* and progeny nor determined whether Ceballos's speech was *Brady* material, see, e.g., *id.* at 420-24 (majority opinion) (resolving the case entirely on the fact that *Garcetti*'s speech was made as part of his official public employee duties). The Court's decision was wholly divorced from the significant consequences to and violations of constitutional rights of criminal defendants. See *id.*

<sup>297</sup> See *Berger v. United States*, 295 U.S. 78, 88 (1935). The *Berger* Court emphatically expounded the prosecutorial role to do justice:

The United States Attorney [as a prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a

As the representative of the sovereign, prosecutors have “the awesome power to bring criminal charges,” and seek criminal convictions and sentences.<sup>298</sup> Consequently, the Constitution itself requires that certain processes protect the rights of criminal defendants so they are not unjustly deprived of life, liberty or property.<sup>299</sup> Nevertheless, studies show that “*Brady* violations continue to be an on-going problem” and that “the *Brady* disclosure duty has become one of the most unenforced constitutional mandates in the criminal justice system.”<sup>300</sup> A study by the New York State Bar Association Task Force on Wrongful Convictions, for example, “found that *Brady* violations, among other misconduct, potentially caused over 50% of all wrongful convictions in New York State.”<sup>301</sup>

The facts of *Connick v. Thompson*,<sup>302</sup> a recent Supreme Court case, illustrate the disastrous personal consequences that come from violations of *Brady* and Model Rule of Professional Conduct 3.8. Thompson was convicted of two crimes he did not commit, for which he served over eighteen years in prison and was nearly executed.<sup>303</sup> A team of four prosecutors committed egregious *Brady* violations, including hiding blood evidence and a lab report that proved the perpetrator’s blood was type B, yet Thompson’s blood is type O.<sup>304</sup> Prosecutors also hid exculpatory eyewitness descriptions of the assailant and other evidence impeaching prosecutorial witnesses and

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*case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*

*Id.* (emphasis added).

<sup>298</sup> Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice,”* 76 *FORDHAM L. REV.* 1337, 1366 (2007).

<sup>299</sup> See, e.g., U.S. CONST. amends. V & VI (specifying processes required in criminal prosecutions).

<sup>300</sup> Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence,* *J. CRIM. L. & CRIMINOLOGY*, 434-35 (2010) (emphasis added).

<sup>301</sup> Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them,* 31 *CARDOZO L. REV.* 2215, 2222-23 (2010) (emphasis added).

<sup>302</sup> 131 S. Ct. 1350 (2011).

<sup>303</sup> See *id.* at 1371-76 (Ginsburg, J., dissenting) (reviewing history of Thompson’s arrest, convictions, and sentence, and *Brady* violations that infected his trials).

<sup>304</sup> See *id.* at 1372-75.

exonerating Thompson.<sup>305</sup> Indeed, the only reason Thompson was not executed was that, upon learning what was to be his final execution date, he remembered that his son (who had been four years old when Thompson was arrested) would be graduating from High School that week.<sup>306</sup> Thompson asked his lawyers to try anything to move the date.<sup>307</sup> In a last ditch effort, his lawyers hired a private investigator who discovered a microfiche copy of the lab report revealing the perpetrator's blood type and addressed to the prosecutors.<sup>308</sup> By failing to disclose this and other exculpatory evidence, these prosecutors used the attorney's tie to government power not to protect life, liberty, and property — as they are required to do — but to deprive Thompson of these essential liberties and his fundamental rights.

The Supreme Court's failure to constitutionally protect attorney speech in *Garcetti* only exacerbates the *Brady* violation problem exemplified by *Connick* and the studies noted above.<sup>309</sup> Barry Scheck offers reasons why prosecutors may decide to violate *Brady* and proffers fear as a primary motivating factor, including “[f]ear that losing a case would prevent professional advancement or result in demotion.”<sup>310</sup> Prosecutors are often promoted based on their conviction rates,<sup>311</sup> so there is always a fear that losing a case may harm one's career. In fact, in *Garcetti*, it was Ceballos's contention that he was demoted specifically for his attempts to comply with *Brady*, not merely for amassing a lower overall conviction rate. One way to reduce the “fear” held by subordinate prosecutors that they may suffer demotion is to constitutionally protect *Brady* speech from employer discipline. An attorney in Ceballos's position should have a recognized free speech right to provide the defense with exculpatory materials, especially because the Constitution and the rules of professional conduct require attorneys to provide them. Prosecutors have special

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<sup>305</sup> See *id.* at 1373-74.

<sup>306</sup> See John Thompson, Op-Ed., *The Prosecution Rests, But I Can't*, N. Y. TIMES, Apr. 10, 2011, at WK11. When Thompson was arrested, his children were four and six years old — by the time he was released over 18 years later, his children had grown up without their father and he had lost the opportunity to raise them. See *id.*

<sup>307</sup> See *id.*

<sup>308</sup> See *id.*; see also *Connick*, 131 S. Ct. at 1375 (Ginsburg, J., dissenting).

<sup>309</sup> See Moore, *supra* note 295 (manuscript at 1-6, 55) (arguing that *Garcetti* and *Connick* work together to defeat effectiveness of *Brady* obligations and, consequently, that other safeguards are needed to protect criminal defendant's rights, such as open file discovery).

<sup>310</sup> Scheck, *supra* note 302, 2236-37.

<sup>311</sup> See Tarkington, *Government Speech and the Publicly Employed Attorney*, *supra* note 295, at 2187-88.

constitutional obligations to see that justice is done,<sup>312</sup> and need speech protection commensurate to fulfilling that role. Thus, prosecutors should have First Amendment protection for speech necessary to preserve constitutional rights and processes so that they can protect life, liberty, and property without fear of retaliation from an employer or supervisor.

Under the access-to-justice theory, attorney speech that preserves the constitutional rights of others (including, and perhaps especially, the constitutional rights of criminal defendants) would be speech that is essential to providing access to justice and the fair administration of the laws. Thus, such attorney speech would be entitled to core free speech protection. Indeed, when admitted to the bar, attorneys take an oath to uphold the Constitution.<sup>313</sup> Attorneys should have a free speech right sufficient to fulfill that oath where speech is needed to preserve the constitutional rights of one's own clients or others in the justice system.

#### IV. PRESERVING THE ATTORNEY'S ROLE

One of the primary justifications for self-regulation of attorneys is the idea that attorneys (and in our system of self-regulation, state judiciaries) understand their role in the administration of justice and, thus, will impose appropriate regulation. Although certainly prone to failings, self-regulation in theory would safeguard the role of the attorney in providing access to justice and the fair administration of the laws. Regulation from outside entities does not contain this same safeguard, even as an aspiration. For example, the regulations in *Humanitarian Law Project* and *Milavetz* that appear to interfere with the attorney-client relationship and the role of the attorney in our system of justice were enacted by Congress. The Supreme Court in *Milavetz* approved Congressional regulation of attorney speech in areas of "federal concern."<sup>314</sup> However, recognizing Congress's power to regulate attorneys does not ensure that the essential role of the attorney in our system of justice is safeguarded. Further, normal First Amendment doctrines are not keyed to protecting this role and will certainly fail to adequately protect it as happened in *Humanitarian Law*

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<sup>312</sup> See *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>313</sup> See Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 50 (2009) (explaining that oath is required to practice law); see, e.g., *id.* at 35-53 (comparing state lawyer oaths).

<sup>314</sup> *Milavetz, Gallop & Milavetz P.A. v. United States*, 130 S. Ct. 1324, 1332-33 (2010).

*Project*.<sup>315</sup> The lack of safeguards is particularly troubling when a majoritarian entity subject to majoritarian overreactions and pressures — like Congress — can shape the extent to which attorneys are allowed to provide access to justice and the fair administration of the laws.

Justice can only be obtained through speech. I argue above that Schauer inaccurately asserts that “[s]peech is all we have” because attorney speech is tied to government power and is not speech in the abstract.<sup>316</sup> Yet the invocation and avoidance of government power to preserve client life, liberty, and property by an attorney can only happen through speech. Thus, in a sense, Schauer is absolutely correct that “[s]peech is all we have” because speech is the only *means* through which attorneys can fulfill their role in the justice system. Speech is the attorney’s only tool, her sole “saw[] [or] scalpel[],”<sup>317</sup> to accomplish her work, including all four of the areas of attorney speech essential to the administration of justice outlined above. To turn Schauer’s point on its head: it is precisely because “[s]peech is all we have” that the vocation and role of the attorney can be frustrated and even denied through restricting attorney speech that is essential to the attorney’s role in the administration of justice.

It should be disconcerting that such speech is not protected by anything but the good graces of regulators, especially from those who may be subject to majoritarian capture. The greatest concern is for protecting the life, liberty, and property interests of minorities and groups deemed undesirable by the majority.<sup>318</sup> James Madison noted his concern “that measures are too often decided, not according to *the rules of justice and the rights of the minor party*, but by the superior

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<sup>315</sup> The Court has often applied First Amendment doctrines to attorney speech in the advertising arena where attorney speech is arguably more similar to that of other regulated entities. *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995) (applying normal First Amendment commercial speech doctrines, specifically *Central Hudson*, to analyze attorney advertising restrictions); *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 472 (1988) (same); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 637-44 (1985) (same); *In re R.M.J.*, 455 U.S. 191, 203-06 (1982) (same).

<sup>316</sup> Schauer, *supra* note 43, at 688; *see also supra* Part I.A.

<sup>317</sup> Schauer, *supra* note 43, at 688.

<sup>318</sup> It would be difficult to be a more unpopular group than the designated foreign terrorist organizations in *Humanitarian Law Project*. *See generally* 18 U.S.C. §§ 2339A & 2339B (2006) (prohibiting material support, including expert advice and assistance, to organizations designated as an FTO); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724-27 (2010) (providing congressional justifications for prohibiting even lawful, peaceful advice to FTOs, including wanting to ensure that such organizations are not regarded as legitimate).

force of an interested and overbearing majority.”<sup>319</sup> But as *Milavetz* indicates and *Humanitarian Law Project* demonstrates, regulation from “an interested and overbearing majority” can thwart “the rules of justice” themselves through the restriction of attorney speech on behalf of “the minor party.”<sup>320</sup>

John Hart Ely similarly warned against malfunction of political processes, whereby elected representatives can “act[] as accessories to majority tyranny.”<sup>321</sup> According to Ely, “malfunction” occurs when:

(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or vote, representatives beholden to an effective majority *are systematically disadvantaging some minority* out of simple hostility or a *prejudiced refusal to recognize commonalities of interest*, and thereby denying that minority the protection afforded other groups by a representative system.<sup>322</sup>

One way of creating such malfunction is through the regulation of attorney speech that cuts off certain people because of their unpopular status (e.g., alleged terrorists, debtors, the NAACP during the 1960s, and communists in the 1950s) from attorney access and, thus, from the protection of law. For example, in *Humanitarian Law Project*, the plaintiffs wanted to teach certain groups how to use the law to achieve their goals peacefully and lawfully rather than through terrorism. Eradicating terrorism is a common interest of both the Humanitarian Law Project and the Congress that enacted the USA Patriot Act and IRTPA, but there is “a prejudiced refusal to recognize commonalities of interest.”<sup>323</sup> Thus, these minorities are denied “the protection” and the ability to invoke the power of law and obtain attorney advice that is “afforded other groups.”<sup>324</sup>

In the face of the McCarran Act and other Red Scare legislation of the 1950s, including legislation aimed at curtailing attorney activities in relation to alleged communist groups,<sup>325</sup> Zechariah Chaffee wrote:

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<sup>319</sup> THE FEDERALIST, NO. 10 (James Madison) (emphasis added).

<sup>320</sup> *Id.*

<sup>321</sup> JOHN HART ELY, DEMOCRACY AND DISTRUST 103 (1980).

<sup>322</sup> *Id.* (emphasis added).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> ZECHARIAH CHAFFEE, JR., THE BLESSINGS OF LIBERTY 142, 157-61 (1956). Chaffee argued against the creation of a “new political crime” that punished anyone who “contribute[d] to the establishment within the United States of a totalitarian

The only way to preserve ‘the existence of free American institutions’ is *to make free institutions a living force*. To ignore them in the very process of purporting to defend them, as frightened men urge, will leave us little worth defending. We must choose between freedom and fear — we cannot have both.<sup>326</sup>

Of course, this statement is particularly apropos as to *Humanitarian Law Project*. But even if IRTPA were not a current reality, we would still need to make free institutions “a living force,” including our justice system and the essential role that attorneys play therein. The access-to-justice theory calls upon the First Amendment to make essential attorney speech that secures life and liberty “a living force” that cannot be thwarted by legislation or other regulation.

Consequently, the access-to-justice theory is not only aimed at providing a workable First Amendment theory for examining regulations of attorney speech, but more importantly is aimed at preserving the role of the attorney in our justice system — regardless of the regulating entity. The theory is intended to restore what had been an aspirational (yet in some instances unrealized) benefit of self-regulation: the preservation of the role of attorneys in our justice system. By providing core First Amendment protection to attorney speech essential to our justice system, the theory also safeguards the attorney’s role in providing equal access to justice and the fair administration of the laws.

It is also important to understand what the access-to-justice theory does not do. It does not protect attorney speech that would frustrate the American justice system, including the trial process itself, the right to jury trial, the right against compelled self-incrimination, the right to effective assistance of counsel, the right to confront and to call witnesses, and other constitutional and otherwise essential components to our justice system.<sup>327</sup> Schauer attempts to illustrate

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dictatorship” under “the direction and control” of a foreign organization, government, or individual. *See id.* at 142. Chafee also argued against the requirement that attorneys annually sign a loyalty oath and “affidavit stating whether he is or ever has been a member of the Communist Party” or other organization committed to overthrowing the United States government. *See id.* at 158. Chafee maintains that while citizens and lawyers ought to work to prevent a totalitarian dictatorship from “taking over our government and our lives and destroying our freedoms; [] we ought to try to do so by choosing methods which will be effective . . . which will *not impair the very freedoms which we are anxious to maintain.*” *See id.* at 160-61 (emphasis added).

<sup>326</sup> *Id.* at 156.

<sup>327</sup> *See* FREEDMAN & SMITH, *supra* note 60, at 13. Fredman and Smith explain:



how problematic it would be to apply the First Amendment to attorney speech, with a hypothetical situation where a trial court rules that evidence of a drug deal should be excluded.<sup>328</sup> Schauer's hypothetical prosecutor decides in opening argument to describe to the jury the excluded evidence and the fact of its exclusion by the judge.<sup>329</sup> Schauer asserts: "Now we all know what would happen to the trial and the prosecutor at this point were this to happen. And we know as well what would happen if the prosecuting attorney were to claim a denial of his or her First Amendment right to speak to the jury — unmitigated laughter."<sup>330</sup> Schauer's example is meant to illustrate the inapplicability of the First Amendment to the "speech of law."<sup>331</sup> Yet employing the access-to-justice theory does not create his hypothetical problem. The idea of the access-to-justice theory is to create First Amendment protection for attorney speech that is attuned to the United States justice system and the role of the attorney therein. Thus, if a "restriction" (like the exclusionary rule or the rule prohibiting *ex parte* communications to jurors) is aimed at, for example, respecting the criminal defendant's right to a fair trial, right against compelled self-incrimination, or right to a jury trial, then that restriction would clearly be constitutional. There certainly would be no Free Speech Clause protection for attorney speech that frustrates the justice system by interfering with the core rights protected thereby. Admittedly, the access-to-justice theory needs further development and there may be areas where there is room for argument as to whether attorney speech is essential to providing access to justice or the fair administration of the laws. Nevertheless, in situations like Schauer's hypothetical where allowing attorney speech would in fact frustrate the justice system, the prohibition would not receive First Amendment protection under the access-to-justice theory.

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The rights that comprise the adversary system include personal autonomy, the effective assistance of counsel, equal protection of the laws, trial by jury, the rights to call and to confront witnesses, and the right to require the government to prove guilt beyond a reasonable doubt and without the use of compelled self-incrimination. These rights, and others, are also included in the broad and fundamental concept that no person may be deprived of life, liberty, or property without due process of law — a concept which itself has been substantially equated with the adversary system.

*Id.*

<sup>328</sup> See Schauer, *supra* note 43, at 693-94.

<sup>329</sup> See *id.* at 693.

<sup>330</sup> *Id.*

<sup>331</sup> See *id.*; see also *id.* at 698-99.

Schauer's example accurately demonstrates that the normal doctrines and discourse of the First Amendment would not readily show when attorney speech should be *restricted* to preserve our justice system. However, the application of — or even Schauer's view to disregard — the normal doctrines and discourse of the First Amendment also fails to show when attorney speech should be *protected* because the speech is essential to fulfill the attorney's function and role in the justice system. Further, Schauer's concern that if the First Amendment were applied to attorney speech then the general doctrines of the First Amendment would have to be diluted (to allow for restrictions like the exclusionary rule), is also resolved by a theory of the First Amendment that is particularly attuned to attorney speech.<sup>332</sup> Because the access-to-justice theory would only apply to the "speech of law," and not to speech in general, it would not dilute other areas of Free Speech Clause protection.

#### CONCLUSION

When an attorney is admitted to practice law in a United States jurisdiction, the attorney swears to uphold the Constitution of the United States, as well as the constitution of the state in which that attorney is being admitted. Further, the attorney becomes an "officer" of that court.

Traditionally, such "officers of the court" have been viewed as having relinquished their free speech rights, as part of their office.<sup>333</sup> Under the constitutional conditions doctrine, the attorney relinquished her personal liberty interest, guaranteed by the Free Speech Clause, to speak contrary to the regulations imposed by the judiciary and bar.<sup>334</sup> However, the idea was always flawed. Even assuming an attorney can waive her own personal liberty interest of free speech in exchange for a license to practice law, the attorney cannot waive providing speech essential to the fair administration of justice. That is, the attorney cannot waive fulfilling her essential role in our justice system. Indeed, the lawyer is not solely an officer of the specific court to which she is admitted, but is more importantly an officer of the entire United States justice system. Rather than extinguishing her right to free speech, the attorney's office and oath to

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<sup>332</sup> See *id.* at 698-700.

<sup>333</sup> See, e.g., Sullivan, *supra* note 81, at 569, 584 (explaining that attorneys are more likely to be seen as lacking free speech rights when acting in their capacity as officers of the court).

<sup>334</sup> See *supra* Part II.A.

uphold the Constitution require that the attorney assert her constitutional right to free speech on behalf of clients in invoking and avoiding the power of government and securing the rights of her clients to life, liberty, and property. The access-to-justice theory provides the requisite constitutional protection for attorneys to fulfill this essential role in the justice system.